

TANZANIA / JUDGMENT

shirin moosajee vs juzer zakiuddin mohamedali 2 others 2022 tzhccomd 155 2 june 2022

COURT
TZHCCOMDDECIDED
2 June 2022

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IN THE HIGH COURT OF TANZANIA (COMMERCIAL DIVISION) AT ARUSHA MISC.
COMMERCIAL APPLICATION NO. 2 OF 2021 IN THE MATTER OF COMPANIES ACT NO.212 OF
2002 AND IN THE MATTER OF APPLICATION BY SHIRIN
MOOSAJEE..... PETITIONER VERSUS JUZER ZAKIUDDIN
MOHAMEDALI..... 1stRESPOND FATEMA JUZER
MOHAMEDDALI.....2nd RESPONDENT AFRICAN LIGHTENING CENTRE
LIMITED..... 3rd RESPONDENT Date of Last Order: 30/05/2022 Date of Ruling: 02/06/2022

RULING

MAGOIGA, J. The petitioner, SHIRIN MOOSAJEE by way of petition filed under section 233 (1), (2), (3) (a), (b), (c), and (d); section 121 (1) (a), (b), 121(2) (3) and (4) of the Companies Act, No. 12 of 2002 against the above named respondents is moving this court to grant the following orders, namely:

- i. A declaration that the 3rd respondent's affairs have been, and still are, conducted in a manner which is unfairly prejudicial to the interest of the petitioner and that the forfeiture of the petitioner's 10 ordinary shares in the 3rd respondent is so prejudicial to the petitioner; ii. A declaration that the forfeiture of the petitioner's shares in the 3rd respondent and their subsequent re-allotment to the 2nd respondent is null and void ab initio, iii. A declaration that the appointment of the 2nd respondent as a director of the 3rd respondent is null and void ab initio; iv. An order directing the 3rd respondent to rectify its register of member by restoring of the petitioner's name as a shareholder holding 10 ordinary shares and cancellation of the 2nd respondent's name;
- v. General damages as shall be assessed by the court; vi. Costs of the petition be borne by the respondents vii. Any other relief or order this honourable court will deem just and equitable to grant to enable smooth and proper running of the 3rd respondent's business affairs in protection of the petitioner's interests. The petitioner stated in the petition grounds why this petition should be granted as prayed and filed as well an affidavit verifying the petition. 2

Upon being served with the petition, the 1st and 3rd respondent did not file any reply to the petition. The 2nd respondent filed a reply to the petition disputing the petitioner's prayers and stated that the transfer of shares was legally done on 30th September, 2014 and all legal requirements for transfer of shares were complied off, hence, officially terminating the shareholding of the petitioner to the 3rd respondent. The facts pertaining to this petition are simple and straight forward. The petitioner is one of the founding members of the 3rd respondent incorporated in the year 1992 with 10 ordinary shares which constituted 50% shares issued and allotted. Facts went on that, the 1st respondent and the petitioner served as first directors of the 3rd respondent until when she was purportedly succeeded by the 2nd respondent, which succession, it is alleged was fraudulently and illegally done for a number of reasons subject of this petitioner and prayers as contained therein. On the part of the 2nd respondent it was stated that the transfer of shares was legally done and followed all requirements and as such prayed that this petitioner be dismissed with costs. a 3 When this petition was called for hearing, the petitioner was enjoying the legal services of Mr. Richard Masawe, learned advocate. The 1st and 3rd respondents were enjoying the legal services of Messrs. Nelson Merinyo and Lengai Nelson Merinyo, learned advocate. The 2nd respondent was enjoying the legal services of Mr. Ephraim Koisange learned advocate. Mr. Masawe when called up to arguer the petition told the court that they filed written skeleton arguments and prayed to adopt them. In the written skeleton arguments, Mr. Masawe argued that, the respondents unfairly and with prejudice to both the petitioner and 3rd respondent have been running the 3rd respondents company in a manner which is unfairly prejudicial to the petitioner's interest and interest of the company itself by removing the petitioner's membership and directorship without due process of the law and without his consent. Mr. Masawe cited the case of JANETH KIMARO AND 2 OTHERS vs. PELAGIA AUYE MREMA AND 2 OTHERS, MISC. COMMERCIAL APPLICATION NO.2 OF 2020 (HC) ARUSHA) (UNREPORTED) which defined unfair prejudice to mean detriment of some kind, but because it must qualify as 'unfair' it must be form of detriment which would strike a man of business as unjust and inequitable. 4 According to Mr. Masawe, deprivation of the shareholder's shares (which are paid up) without his/her knowledge nor consideration is nothing but unfair prejudice. The learned advocate cited Palmer's Company Law at pgae 8202 in which the learned author cited the of IN RE BOVEY HOTEL VENTIRE LIMITED, in which Slade, J. said:- "the test for unfairness must, I think be an objective, not subjective one. In other words, it is not necessary for the petitioner to show that persons who have de facto control of the company have acted as they did in conscious knowledge that this was unfair to the petitioner or they were acting in bad faith; the test, I think is whether a reasonable bystander observing the consequences of their conduct, would regard it as having unfairly prejudiced the petitioner. On forfeiture which is said to be done, Mr. Masawe sought the guidance in the case of MOROGORO HUNTING SAFARIS LTD vs. HALIMA MOHAMED MAMUYA [2017] TLR 384 in which it was held that where forfeiture is invalid, it follows therefore, the removed director remains a bonafide shareholder and director of the company. 5 Mr. Masawe went on to argue that shareholder ceases to be upon payment to him or her consideration for his/her interests in the company as held in the case of NILE

ENERGY LIMITED vs. PHOENIX PETROLEUM LTD at page 8 while quoting with approval HENRY KAWALYA vs. DAN SAMAKADDE [1992] KALR 104. According to Mr. Masawe, this is not the case in this case. The learned advocate for the petitioner argues that looking at the reply this petitioner is unopposed and urged this court to determine only two issues, namely: one, whether the alleged forfeiture that removed the petitioner from third respondent company and added the 2nd respondent was legal and followed due procedure and the second is, whether the forfeiture took place at all and if not, the legality of any other action or procedure that took place. Mr. Masawe pointed out that the two issues are to be answered in favour of the petitioner for reasons that; one, the whole procedure, if any, is fraught with the law, two, the 2nd respondent contradicts herself of what took place while she was not in the company and contains untruth statements and should not be believed. Three, the confusion between transfer and allotment which cannot go at once. Four, forfeiture can only take place where the shares are unpaid for, which is not the case here. Five no meetings and resolution authorizing the forfeiture or allotment and no notice 6 was given to the petitioner as per article 15 of the Table to the Companies Act and sections 147 and 148 of the Companies Act. Six, the provisions of article 4(a) (b) of the Articles of Association were not complied with by giving reasons and notice of forfeiture or transfer. On the strength of the above reasons, Mr. Masawe urged this court to grant the petition as prayed in the petition. Mr. Merinyo, learned advocate for the 1st and 3rd respondent told the court that they did not file reply to petition because they don't oppose this application. In reply Mr. Koisange, learned advocate for the 2nd respondent told this court that they seriously oppose the grant of the application based on facts as stated in the reply to petition. According to Mr. Koisange, the 2nd respondent was invited and legally joined the company by acquiring shares as earlier as September, 2014 and since then she became the director and shareholder of the 3rd respondent together with the 1st respondent. Mr. Koisange insisted that since then all documents were duly filed with BRELA and the petitioner ceased to be part of the company. The learned advocate for the 2nd respondent argued that the status of BRELA shows that the 2nd respondent is the owner of ten shares. Mr. Koisange further argued that given the nature and relationship of the parties, this petition is triggered by family feuds or family affairs between the petitioner, the 1st respondent and the 2nd respondent/ which dispute has nothing to do with the affairs of the company. On that note, Mr. Koisange urged this court to find no merits in this petition and proceed to dismiss it with costs. In rejoinder, Mr. Masawe joins issues with Mr. Koisange that family feuds have nothing to do with company affairs. According to Mr. Masawe, nothing was tendered to back up their story and urged this court to disregard it in its face value. The learned advocate for the petitioner reiterated his earlier prayers. This marked the end of hearing of this hotly contested petition for its grant or not. Having carefully considered the pleadings, written skeleton and oral arguments by learned advocates for parties, the law and the cases cited altogether, I found that the kernel of this dispute is on the fate of the 10 8 shares originally owned by the petitioner but later on according to annexure SM4, now those shares are owned by the 2nd respondent. And as such, in the circumstances, the first issue for determination is whether the transfer/allotment/forfeiture, if any, was lawfully done. The

second issue will be, if issue number is answered in the negative, what is the effect of such transfer/allotment/forfeiture. Mr. Koisange adopted the contents of the reply in which it was categorically stated that there was lawful transfer of the share and allotment of the shares done on 21st November, 2014 and that the 1st respondent officially terminated the petitioner on 30th September, 2014. To buttress his arguments on the alleged transfer and allotment, the 2nd respondent attached annexure FJM-1 to her reply. On the other hand, Mr. Masawe for the petitioner argues to the contrary that the whole process of the alleged transfer/allotment/forfeiture is fraught with a lot of legal procedures, among others, for want of Meetings, Company resolution, consent of the petitioner and considerations. I have with a very serious legal eye considered and perused the contents of FJM-1 in which the 2nd respondent claims to have been made director and 9 shareholder of the 3rd respondent but with due respect to both the 2nd respondent and Mr. Koisange, I find annexure FJM-1 legally devoid of legal back up of taking the petitioner's shares. The reasons I am taking the above stance are abound. One, Form No.210b which terminated the directorship of the petitioner was against clauses 2, 3 and 4 Articles of Association of the company which in mandatory terms restricts the transfer of shares unless all the conditions set out there are complied with. These conditions are; prohibition of any invitation to public to subscribe for shares, veto to refuse transfer of any share, any new member must be selected by directors, notice in writing to sale or transfer shares and agreed prices. All these legal requirements were missing, hence, making Form No. 210b of no effect. Two, Much as Form No. 210b is of no legal effect as stated above, then, other Forms No. 55b and 210c which their basis emanates from Form No.210b are nullity for want of basis upon which to stand. Three, the decision to terminate a member/director is a serious action that at any rate requires the person to be terminated to be notified and consent to such termination and this being a company, in my view, cannot be done by a single director and without any lawful resolution. The arguments that this is a family company and that their affairs were handled by the family has no legal basis, and in 10 this is fit case for this court to intervene in the manner the affairs of the 3rd respondent are conducted for interest of justice. On the foregoing reasons, I find issue number one couched that whether the allotment/transfer/sale/ forfeiture, if any, of the shares was lawfully done in the negative that the whole exercise was fraught with serious legal deficiencies to be legally considered so. Therefore, in their totality the whole exercise of any was not lawfully done. Having found issue number one in the negative, issue number two, that what is the effect of such allotment/transfer/forfeiture/sale is obvious that tis issue will not detain much of this court's time. Without much ado the whole transaction, I unreservedly declare was void ab initio for want of following laid down procedures. Making decision that affect interest of a person must be done having regards to all laid down mechanism including and not limited to right to be heard. In this application this was not done at all. On that note, therefore, the instant petition is hereby granted as prayed in the following orders:

- i. Declaration that the 3rd respondent's affairs have been, and still are, conducted in manner which is prejudicial to the interests of the 12 petitioner and that the forfeiture of the petitioner's 10 ordinary shares in the 3rd respondent is so prejudicial to the petitioner; ii. Declaration that the forfeiture/sale/allotment/transfer, if any, of the petitioner's shares in the 3rd respondent and their subsequent re- allotment to the 2nd respondent was null and void abi initio-, iii. Declaration that the appointment of the 2nd respondent as director of the 3rd respondent was null and void abi initio; iv. I further order and direct the 3rd respondent to rectify its register of members by restoration of the petitioner's name as shareholding 10 shares and cancellation of the 2nd respondent's name with immediate effect;
- v. Given the nature of the relationship between parties I decline to order for general damages and costs of this application. It is so ordered and directed. 13

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