

TANZANIA / JUDGMENT

douglass elie rugina vs mwasiti ally mpoto another 2023 tzhccomd 106 6 april 2023

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TZHCCOMDDECIDED
6 April 2023

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (COMMERCIAL DIVISION) AT
DAR ES SALAAM MISC. COMMERCIAL CAUSE NO. 35 OF 2022 IN THE MATTER OF THE
COMPANIES ACT NO. 12 OF 2002 AND IN THE MATTER OF MWIZA K LIMITED AND IN THE
MATTER OF PETITION FOR UNFAIR PREJUDICE BY DOUGLASS ELIE
RUGINA.....PETITIONER VERSUS MWASITI ALLY
MPOTO.....1ST RESPONDENT MWIZA K
LIMITED.....2ND RESPONDENT

RULING

Date of last order: 03/04/2023 Date of ruling:06/04/2023 AGATHO, J.: By way of the petition, the petitioner moved the court under the provisions of Section 233 (1) and (3) of the Companies Act, Act No. 12 of 2002 seeking:

- (a) Declaratory order that the affairs of the 2nd Respondent have been run in a manner which is unfairly prejudicial to the interests of the Petitioner and the 2nd respondent in general. 1
- (b) Declaratory order that, the 1st respondent has been terminated as director of the 2nd respondent to handover the office of Director as well as 2nd respondent's motor vehicle.
- (c) Declaratory order that the 1st respondent immediately return all the properties of the 2nd respondent in the same conditions they were on the last day she ceased being the director.
- (d) An order restraining the 1st respondent from interfering and threatening the 2nd respondent's employees.
- (e) Any other relief which this honourable court may find fit and just to grant. Having been served upon with the petition the 1st and 2nd respondents filed their answers to the petition. The parties to the proceedings were represented by advocates. Whereas the petitioner was represented by Nazario Michael Buxay, advocate, the 1st respondent was under representation of Mr. Alex Mashamba Balomi, and the 2nd respondent enjoyed the services of advocate, Sabas Shayo. The petition was heard by way of written submissions. The key

issues are:

- (i) Whether there is unfair prejudice in the management of affairs of the 2nd Respondent? (ii) Whether the petitioner has been unfairly prejudiced by the way the 1st respondent manages the affair of the 2nd respondent company? (iii) Whether the 1st respondent has been terminated as director of the 2nd respondent and hence should handover the office of Director as well as 2nd respondent's motor vehicle? 2 (iv) Whether the 1st respondent should immediately return all the properties of the 2nd respondent in the same conditions they were on the last day she ceased being the director?
- (v) Whether the 1st respondent should be restrained from interfering and threatening the 2nd respondent's employees? Unfair prejudice is provided for under Section 233 of the Companies Act. Under that provision the law allows the director, shareholder or a member of a company to petition to the court whenever they see or feel that the affairs of the company are unfairly conducted to the detriment of that member, shareholder, director or the company itself. What amount to unfair prejudice depends on the circumstances of a particular case. However, the cases of *Shirin Moosajee v Juzer Zakiuddin Mohamedali & 2 Others*, Misc. Commercial Application No. 2 of 2021, HCCD. Another case is *Velisas Elizabeth Deflose* (petitioning as legal representative under power of Attorney of Gordon McClymont) v Joseph Ignatius Noronha, Misc. Commercial Cause No. 20 of 2021, HCCD at pages 23-26 the elements unfair prejudice were stated (1) the conduct of the company's affair, (2) has prejudiced; (3) the petitioner's interest as a member of the company. It was emphasized in that case that the test of unfair prejudice be an objective one. In *Elder v Elder & Watson* [1952] SC. 49 it was held by Lord Cooper that: "unfairly prejudicial conduct could exist where there was a visible departure from the standard of fair dealing and a violation of the conditions of fair play on which every 3 shareholder who entrusts his money to a company is entitled to rely." In the case at hand, what acts constituting mismanagement of the 2nd respondent by the 1st respondent were prejudicial to the petitioner's interests? One of the alleged acts is misuse of the motor vehicle make Toyota Spacio belonging to the 2nd respondent. This is stated in paragraph 8 of the petition. But it strongly disputed by the 1st respondent para 7 of the 1st respondent's answer to the petition. She stated that she is equally entitled to use it in day-to-day operation of the 2nd respondent company. There is no evidence adduced by the petitioner to prove that the 1st respondent is misusing the said motor vehicle. There is also allegation that the 1st respondent took and withheld TZS 2,379,186. The 1st respondent narrated what she did from registration to operationalization of the 2nd respondent. However, she did not respond to the allegation of withholding the money to the tune of TZS 2,379,186. The petitioner on his side attached a copy of agreement form (annexture MK-3) to the petition to prove that the 1st respondent withheld the said amount of money. Looking at annexture MK-3 the 1st respondent's signature is strikingly different from that appended in the 1st respondent's answer to the petitioner. It is also confusing in MK-3 shows that the director (1st respondent) is purporting to take fully responsibility for the loss caused by Aisha Hollo, sale representative of the 2nd respondent company. I am thus not convinced that the said agreement is genuine. Moreover, the

annexture MK-3 is a scanned and or photocopy and the petitioner gave no explanation even in his written submission as to whereabouts of the original. 4 The petitioner further claimed that the 1st respondent took and collected the 2nd respondent's money to the tune of TZS 4,701,000 out of the 2nd respondent's business transactions from various vendors and partners and hold it for personal use without notice or consent of the 2nd respondent. On this, the petitioner annexed annexture MK-4 (a copy of the printout from transaction of sole proprietor (Maneno)). It is unclear who is Maneno, and how is he connected to the 2nd respondent company. Moreover, the MK-4 being a electronically generated data there is no affidavit/certificate or any evidence of authentication of the said data message as required by Section 18 of Electronic Transactions Act. That being a legal requirement or a point of law it is a matter of judicial notice. The MK-4 is thus a document whose authenticity is doubtful. The petitioner further avers that the 1st respondent (as director of the 2nd respondent) following her continuous misconduct she was terminated on 04/02/2022. Intriguingly, the petitioner annexed a copy of official search from BRELA (MK-5) showing that the 1st respondent is merely a shareholder and no longer the director of the 2nd respondent. What is missing in the petition though is the minutes of the board resolution or shareholder meeting to remove the 1st respondent from her position as a director. Further, it is not clear if at all the 1st respondent was given the right to be heard when her directorship was being terminated. In *Jasmin Haji v Kenyatta Drive Properties and Antony Amin Haji*, Misc. Commercial Cause No. 14 of 2022, HCCD (unreported), it was held that a shareholder should be afforded a right to be heard whenever the decision is done affecting her interest. In my view, the procedure of her termination was irregular. It will remain to be so as 5 there is no evidence to show that the termination of her directorship was in accordance with the law. The 1st respondent's refusal to vacate the 2nd respondent's office is another claim levelled by the petitioner against the 1st respondent. That her refusal to vacate the office after being terminated as a director has hampered operations of the 2nd respondent company. They have been forced to hire a car for the new director to run daily activities of the 2nd respondent. While the law under Section 182 – 185 of the Companies Act [Cap 212 R.E. 2002] impose duties on the directors of companies inter alia duty of directors to act in good faith and in best interest of a company, directors to have regard in interest of the employees, directors' powers to be exercised for proper purpose, and directors' duty of care. The petitioner has mounted allegations of breach of these duties by the 1st respondent. However, evidence has been wanting to prove the same. I have further held herein above that so long the termination of the 1st respondent's directorship was irregular then the installation of a new director was equally irregular. The 1st respondent cannot therefore vacate the office of the 2nd respondent without her termination following the law. The petitioner has also alleged that the 1st respondent has been threatening the new director and the employees of the 2nd respondent. The details of the threats have not been given. No evidence of threats has been brought before this court. I am thus not convinced if there were any threats given by the 1st respondent towards the employees and the new director of the 2nd respondent. It is the law under Section 110 of the Evidence Act [Cap 6 R.E. 2019] that he who alleges must prove. 6 The allegation that the 1st respondent has refused to hand over

the 2nd respondent's properties because the company owes her seven month's salaries has been fiercely disputed by the 1st respondent. It is also disturbing that the petitioner has not brought any evidence to substantiate his allegation. They thus remain to be unproven allegations. As to the removal of the 1st respondent from her directorship, Section 193(1) of the Companies Act [Cap 212 R.E. 2002] provides that directors may be removed from office before expiration of their tenure in office by ordinary resolution. Section 193 (2) of the Act requires special notice to be issued to remove the director. And Section 193(3) of the same Act provides that if the special notice (notice for special resolution) is given the director to be removed should make representation. That is, s/he ought to be afforded the right to be heard. The possibility of removing a director from office is provided for not only under the Companies Act but also in the 2nd Defendant's Memorandum and Articles of Association (MEMART), annexure MK – 1. The latter in articles 43-68 provides for appointment, powers, and disqualification of directors. Article 64 of MK-1 provides: "...without prejudice to the provisions of the Act, the company may, by Special Resolution remove any director from office and may, by Ordinary Resolution, appoint another director in his stead. Without prejudice to the powers of the directors under article 31, the company, in General Meeting, may also, at any time appoint any person to be director either to fill a casual vacancy or as an additional director." 7 In the case at hand there is neither a copy of special resolution supplied to the court which removed the 1st respondent from her directorship position nor a copy of minutes of general meeting appointing one, Neema Arnold Matemba as a director. Therefore, what one gathers from the petition is that the affairs of the company have been derailed by both parties, the petitioner and respondents. The petitioner and the 2nd respondent have irregularly removed the 1st respondent from her position as the director of the 2nd respondent. And she has also been defiant as she has interest in the 2nd respondent company. In my view both parties are to be blamed for putting the affairs of the 2nd respondent in shambles. For the foregoing reasons, I have not been impressed by the petition as it lacks evidence and falls short of proof of unfair prejudice. I thus proceed to dismiss the petition with costs. It is so ordered. DATED at DAR ES SALAAM this 6th day of April, 2023. U. J. AGATHO JUDGE 06/04/2023 8 Date: 06/04/2023 Coram: Hon. U.J. Agatho J. For Petitioner: Absent For 1st Respondent: Walter Massawe, Advocate holding brief Alex Balomi, Advocate. For 2nd Respondent: Absent. C/Clerk: Beatrice Court: Ruling delivered today, this 6th April 2023 in the presence of Walter Massawe, Advocate holding of Alex Balomi, the learned counsel for the 1st Respondent and in the absence of the petitioner, and the 2nd respondent. U. J. AGATHO JUDGE 06/04/2022 9

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