

TANZANIA / JUDGMENT

COSTA CHHRISTOPHER LEMA COSTANTINO LEMA VS WILSON CHRISTOPHER TARIMO COMM CASE NO

COURT
TANZLIIDECIDED
1 January 2024

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (COMMERCIAL COURT
DIVISION) AT MWANZA COMMERCIAL CASE NO. 9880 OF 2024 COSTA CHRISTOPHER LEMA
©CONSTANTINO LEMA.....1ST PETITIONER LEONARD
SWAI..... 2ndPETITIONER VERSUS WILSON
CHRISTOPHER TARIMO..... 1stRESPONDENT LEWICO COMPANY
LIMITED..... 2ndRESPONDENT

RULING

Date of last order:23/07/2024 Date of ruling: 30/08/2024 AGATHO, J.: This is a ruling in respect of the petition filed by the 1st and 2nd petitioners against the 1st and 2nd respondents regarding the conduct of affairs of the 1st respondent company which they allege is unfairly prejudicial to them and the company itself. The petition was brought under the provisions of Section 233(1) and (3) of the Companies Act, [CAP 212 R.E. 2002]. Along with the petition there was an affidavit verifying it deponed by the petitioners themselves. The petitioners in the petition were seeking the following reliefs: i

- (a) A declaration that the first and the second respondents fraudulent acts, omission and the conducts contrary to and the prejudicial to the interests of the petitioners.
- (b) A declaration that all acts and omissions of the 1st and 2nd respondents from the date of incorporation of the second respondent on the 29th July 2005 to the date hereof are acts and omissions of the first and the second respondent and the note of the petitioners.
- (c) An order notifying all acts, deeds and the decisions made by the 1st respondent in the second respondent.
- (d) An order of transfer of shares of the petitioners to the designated persons.
- (e) Costs of the petition Be provided.

- (f) Any other reliefs) the court may in the circumstances deem fit and adjusted to grant. As per paragraphs 7 and 8 of the petition and in terms of share structure: the first petitioner holds 30 shares; the second petitioner holds 30 shares and the first respondent holds 30 shares in the second respondent company. The petitioners alleged that since its incorporation on 29th July 2005 the second respondent company has never had a single meeting of directors and the shareholders. They argued that that is contrary to article 33 of the MEMART of the 2nd respondent and Section 112 of Companies Act 212.² However, the court has noted that Section 112 of the Companies Act deal with company's name and seal. It does not deal with meetings. The correct provision is Sections 136 of the Companies Act dealing with meetings. Article 33 requires that meeting shall be conducted at least once in every calendar year. It is further observation of the court no notice has been issued for AGM which is contrary to article 41 of the MEMART of the 2nd respondent. The acts or business of the secondary respondent has never been approved by the board of directors as the petitioners have never received any notice of meeting to pass a resolution to sanction the activities of the second respondent. Paragraph 8 of the petition states that the petitioners have never signed any documents on its behalf. It is the first and 2nd respondents on their own doing that have done all the acts. These have been done contrary to the 2nd Respondent's MEMART, annexure CLL-01 to the petition. Annexure CLLS -02, is the extract from BRELA dated 25th September 2023 showing the second respondent's share structure. According to paragraph 11 of the petition and annexure CLLS-02, The second respondent has failed to file the annual returns party BRELA from 2006-2023. The respondents dispute this averment in paragraph 8 of their reply to the petition. However, reading their averments between the line, one notes that the respondents are making excuses for not filing the returns. They are not presenting any evidence to show that they ever managed to file the returns at BRELA. It is clear that from 2006 to 2023 the 2nd respondent never filed any returns. ³ Paragraph 11 of the petition states that the second respondent executed debentures with the KCB to secure TZS 300 Million loan Without knowledge and approval of the petitioners. In the same paragraph of the petition avers further that the debentures were subject of land application case No. 214 of 2022 District Land Housing Tribunal (DLHT) Nyamagana, Mwanza Between Wilson and Christopher Tarimo V KCB Bank Tanzania Limited and Tai Five Hotels Ltd. The debentures are annexure CLLS-03 to the petition. According to Article 33 of the second respondent's MEMART, the power to issue debentures among other things has to be exercised through the directors. The respondents reacted to the petitioners' allegation that the first petitioner never signed the debentures. In the reply to the petition paragraph 10, the respondent states that that the debenture issued to KCB Bank Tanzania Ltd was legally signed by the 1st petitioner. The averred further that the debenture was issued and drawn by KCB Bank Tanzania Ltd was presented to the 1st respondent and 1st petitioner separately the Bank was satisfied by the signatories and disburse the sum of Tshs 300,000,000/= to the borrower Tai five Hotels Ltd whereas the disbursed amount was used to finance the 2nd respondent because she could not borrow on her name due to unavailability of the sufficient securities. The respondents went on stating that the amount has already been paid in fully as seen in annexure WCT-05 to the reply to the petition. The court has noted here is that the

respondents have not tendered evidence to prove that the 1st petitioner's signature in the debenture is not a forgery. 4 In paragraph 12 of the petition, the petitioners allege that the first respondents caused documents to be signed on behalf of the first petitioner without his permission, knowledge and notice. No evidence was given on the purported documents except the minutes of the board of directors. The law under section 110 of the Evidence Act [Cap 6 R.E. 2019] requires that he who alleges must prove. The petitioners further claim in paragraph 12 of the petition that the first respondent alone appointed directors and the secretary of the second respondent, executed the debentures and the security for the second respondent, acts which are unlawful and unfairly prejudicial to the interests of the petitioners. The evidence here is paragraph 15 of the petition referring to annexure B to DLHT Land Application case Where the second respondent Our next border resolution Dated the 17th April 2023 in which the second respondent resolved to institute the suit against the first petitioner. The respondents admitted on paragraph 13 of reply to the petition that the board resolution was signed by the 1st respondent and the and Wensley W. Tarimo, and Whitney W. Tarimo as director and member respectively; and Glory W. Tarimo as secretary. The respondents added that Mr. Wensely W. Tarimo is a director of Tai Five Hotels which is also the financier of the 2nd respondent. In the petitioners' view these acts are unlawful and the prejudicial to them. The petitioners in paragraph 16 of the petition claim have alleged misrepresentation. According to them particulars of misrepresentation are:

- (a) The respondents' willful misrepresentation of facts By instituting land application No. 50 at the DLHT for Mwanza at Nyamagana 5 against the first petitioner without any knowledge or approval of the petitioners as the members of the board of directors of the second respondent.
- (b) The respondents willfully misrepresented that Wensely W. Tarimo is a director of the 2nd respondent, Whitney W. Tarimo is a member of the 2nd respondent company and Glory W. Tarimo is a company secretary of the 2nd respondent. Further in paragraph 16 the petition, the petitioners allege that the respondents committed fraud. The listed the particulars of fraud to be:
 - (a) Changing shareholding structure of the second respondent without the meetings, board resolutions or approval of board of directors. It should be noted that the company operates through the board of directors whose business is done through resolutions which are legally passed by a well constituted board.
 - (b) That the 2nd respondent executed debentures in favour of KCB bank Tanzania limited without meeting of company members or approval by the board of directors. The debentures were purported to have been signed by among others the first petitioner. However, if the 1st petitioner claims that his signature was forged, why there is no evidence of forensic investigator, handwriting expert or police investigation report of forgery of the said signature. See Gabriel Ponsiani Makundi v S.E.C (East African) Co. Ltd & 4 Others. Misc. Commercial Cause No. 65 of 2023 HCCD at DSM. See also The case of Anna Babu t/a E&L

Catering Services v AKIBA Commercial Bank, Commercial Division Manual Reports [2011] 6 CDMR holding that allegation of forgery of a signature requires evidence such as expert testimony. Apart from the above observations, and position of the law, the respondents stated in their reply to the petition that the 1st petitioner has more than two names which are unofficial, and he has been using them to avoid liabilities for different reasons. The names are "COSTA C, LEMA which is the proper name registered by the Government, "COSTER CHRISTOPHER LEMA" the name which he has used in the NHC Agreement, "CONSTATINE LEMA" the name which has been used in the Memorandum of association and BRELA, and "NICKSON COSTA CHRISTOPHER" the name which was used in the contract to rent the 2nd respondent property of which COSTA C LEMA signed knowingly he was not NICKSON COSTA CHRISPOHER and later on he did not deposit the agreed amount for rent. A copy of the rent contract between the 1st petitioner and 2nd respondent is annexure WCT-07 to the reply to the petition. The 1st petitioner did not file any rejoinder petition against the averments of the respondents in the reply to the petition. Silence in such situation may constitute admission of the facts alleged. However, the issue using different names to avoid liability was not substantiated, and besides that such allegation was beyond the scope of this ruling. That aside, the respondents vide paragraph 14 of their reply to the petition have rejected the contents of paragraph 14 of the petition on executing a contract with Pamba Secondary Schools in contravention to the law and without the petitioners are members of board of directors sanctioning it. The respondents stated that the government schools in early years could enter in the contract with non -government entities, moreover 7 Pamba Secondary School had already obtained a building permit in its name which encouraged the 2nd respondent to conclude a contract with the school. It is further stated that later in 2018 the 2nd respondent entered in the new contract for managing and renting the constructed shops in Pamba Secondary school with Mwanza City council, the contract which replaced the former contract between the 2nd respondent and the school. Copies of Pamba Secondary School building permit and a contract between the 2nd respondent and the city council are annexure WCT-06 to the reply to petition. However, what has not been answered here is whether the board of directors of the 2nd respondent sanctioned such contracts. It is elementary that a company operates through its board of directors. The petitioners have also alleged that the respondents have colluded to manage the affairs of the second respondent in a manner which is prejudicial to the petitioners. That allegation has been sternly denied by the respondents in their reply to the petition. Despite the above exchange of averments, a key point for determination is whether there was unfair prejudice in the 1st respondent's conduct of affairs of the 2nd respondent. That is a subject of a section below. But before progressing, we ask what are the elements of unfair prejudice? The said elements were restated in Yasmin Haji vs Kenyatta Drive Properties Limited & Anthony Amin Haji, Misc Commercial cause No 14 Of 2022 at DSM where this Court while referring to the case of Velisas Elizabeth Deflose (petitioning as legal representative under the Power of Attorney of Gordon McClymont) v Joseph Ignatius Noronha, Misc. Commercial Cause No. 20 of 2021, HCCD at pages 23-26 8 outlined the elements as (1) the conduct of company affairs (2) has prejudice

- (3) unfairly (4) the petitioner's interests as a member of the company. According the above decisions, for the petition of unfair prejudice to be sustained the questions to be answered are, (i) was there a conduct of company's affair in question?, (2) were the said conduct of affairs prejudicial? (3) Were they unfair? After proving the above three (4) then where the interests of the petitioners as members unfairly prejudiced. We examine the conducts of the respondents using the above lens. Thereafter, the findings will be drawn as to whether the respondents' acts were indeed unfairly prejudicial to the petitioners. Another crucial point is whether the petitioners do not hold full paid-up shares in the 2nd respondent company? On this point the court examines whether there was a transfer of shares from the petitioners to other person. Along with that the court scrutinizes whether the petitioners' shares were forfeited. These issues will provide an answer to a question as to how Wensely W. Tarimo and Whitney W. Tarimo became director and member respectively in the second respondent company. In paragraph 4 of reply to the petition, the respondents aver that, the 1st respondent is the only director in the 2nd respondent who has fully paid-up shares. It is not clear how Wensley W. Tarimo became a director, w If the transfer of shares to these individuals were in breach of the MEMARTS of the 2nd respondent company, the said share transfer will be deemed unlawful and prejudicial to the petitioners. It should be remembered that transfer of shares in the second respondent company is regulated by Articles 12-17 of its MEMART. The 9 respondents have not told the court how these individuals acquired the shares in the second respondent company. This mystery which shocked the petitioners learning that the said individuals purporting to be the member and the director respectively. Moreover, if we assume that the petitioners' shares were forfeited by the company itself, the said forfeiture ought to have complied with Article 22 of the second respondent's MEMART. Forfeiture of shares may be done through operation of law, court order or by company itself. Along with that we ask whether there was a call on shares to support the respondents claim that the petitioners hold unpaid up shares and hence they have lost their membership in the company. Article 11 of the 2nd respondent's MEMART requires the board of directors to make call on shares that remain unpaid. It provides that: "The Directors may subject to the provisions of these Articles and to any conditions of allotment from time to time make such calls upon shareholders in respect of all monies unpaid on their shares, as they think fit." Article 11 of the MEMART reproduced herein above requires the company to issue call on shares that are unpaid to be paid for. And if a member fails to pay for the said shares, they may be forfeited in accordance with Article 22 of the MEMART. In this case, there is no evidence in the petition or reply thereto that there was a call on shares to members requiring them to pay for their unpaid shares. The evidence as adduced in the reply to the petition does show that there was any call on shares issued by the board of directors of the 2nd io respondent company. It is common practice that, and as seen in the MEMART of 2nd respondent and the Companies Act, subscribers to shares are required to pay for shares when the call is made. There is no evidence that the board of directors of the 2nd respondent passed a resolution to call on shares. There is no evidence that such call was made to shareholders to pay for their unpaid shares. Therefore, if there was not a call on shares issued then the petitioners cannot be accused of not holding

paid up shares. And consequently, their membership in the 2nd respondent company cannot be stripped off. Again, if the shares were forfeited which is not true, the court wonders whether there was any notice given to the petitioners that their shares have been forfeited as required by Article 26 of the 2nd respondent's MEMART? There is no evidence that such notice of forfeiture of shares was issued. Reading further the MEMART of the second respondent particularly Article 24, it provides for alternative way or forfeiting members shares well compliance with the notice or call for shares was not match. That is for feature by a resolution of directors. These two can hardly apply to the case at hand because there is no evidence of such resolution being passed by the directors of the second respondent company. Regarding appointment of directors, Article 43 of the 2nd respondent's MEMART provides that election of directors is to be done during annual general meeting. No evidence has been given that annual general meeting was conducted and the one of which business was election of new directors. li Furthermore, to conduct a meeting as per Article 44 of the second respondent's MEMART required a quorum of at least two members to be present. If the two petitioners seized or were terminated from membership in the second respondent company which is not the case here then the meeting could not be done. That is because only the first respondent would have been a valid or lawful member, and a single member does not make a quorum as body article cited. Apart from that, the petitioners' allegation that there were no meetings conducted in the second respondent's company has not been rebutted by the respondents. And from this the court can safely concluded that the appointment of a new director as shown hereinabove was done in contravention of the 2nd respondent's MEMART. Without pondering further other points raised by the petitioners the above disposition on the non-compliance with the MEMART, which includes and lawful appointment of director and a new member as well as failure to conduct the meetings, transfer or forfeiture of shares not sanctioned by board resolutions to say the least these are matters that are prejudicial to the petitioners. The court therefore concludes that the respondents conduct of affairs in the second respondent company he's unfairly prejudicial to the petitioners. Hence there was indeed unfair prejudice. The petition is thus found to have merit. The court by virtue of Section 233(1) and (3) of the Companies Act [Cap 212] declares and orders as follows: 12

- (a) The first and the second respondent's fraudulent acts, omission and the conducts contrary to and prejudicial to the interests of the petitioners. Hence there was unfair prejudice
- (b) That all acts and omissions of the 1st and 2nd respondents from the date of incorporation of the second respondent on the 29th July 2005 to the date hereof are acts and omissions of the first and the second respondents with exception of debenture issued in favour of KCB Bank Tanzania Limited that bears the signature of 1st petitioner which lacked evidence of forgery.
- (c) Moreover, the 1st and 2nd respondents are ordered to rectify all acts, deeds and the decisions they have done which are prejudicial to the petitioners.

- (d) The court declines to order transfer of shares of the petitioners to the designated persons. Instead, if the petitioners wish their shares to be transferred to other persons they have to comply with the 2nd respondent's MEMART as well as the provisions of the Companies Act [Cap 212].
- (e) The petitioners shall have their costs. Order accordingly. DATED at DAR ES SALAAM this 6th Day of September 2024. U. J AGATHO JUDGE 06/09/2024 13 Date: 06/09/2024 Coram: Hon. U. J. Agatho J. For the Petitioners: Absent For the 1st Respondent: Absent For the 2nd Respondent: Absent C/Clerk: E. Mkwizu Court: Ruling delivered today this 6th September 2024 in absence of the parties. JUDGE 06/09/2024 14

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