

UGANDA / JUDGMENT

Technology Associates Ltd & 2 Ors v Girisch Nair (Civil Suit No. 72 of 2012) [2013] UGCommC 153 (3 September 2013)

[2013] UGCommC 153

COURT

Commercial Court of Uganda

CASE / FILE NUMBER

Civil Suit No. 72 of 2012

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT NAKAWA COMMERCIAL COURT DIVISION CIVIL SUIT
NO. 72 OF 2012

1. TECHNOLOGY ASSOCIATES LTD
2. SUNEET SAHAI
3. BHAVNA SAHAI

>

PLAINTIFFS

VERSUS

GIRISCH NAIR:..... DEFENDANT Before: HON. MR.
JUSTICE WILSON MASALU MUSENE

JUDGMENT

The first plaintiff Technology Associates Limited, is a limited liability Company incorporated in Uganda under the companies Act, whose objects are among others, to carry out the business of Computer dealership, installations, repairs, exchange, serving, settling, programming, adjustment and all other business connected directly or indirectly with Computer and data processing machines, selling and dealing in Computer Accessories, software and hardware. The 2nd and 3rd plaintiffs, Suneet Sahai and Bhavna Sahai are adults who are husband and wife. They are shareholders in the 1st plaintiffs (Technology Associates Limited), holding 30% and 19% respectively of the issued and paid up share capital amounting to a joint shareholding of 49%.

The defendant, Girish Nair on the other hand is an adult and a shareholder in Technology Associates Limited, holding 51% of the issued and paid up share capital. The 2nd and 3rd plaintiffs, allegedly

i

on behalf of Technology Associates Limited, filed this suit against the defendant, Girish Nair, seeking:-

1. A declaration that the board resolution dated 11th day of April, 2013 confirming the disqualification of the Defendant as a Director of the Technology Associates was valid and lawful.
2. A Declaration that the resolution dated 11th day of April, 2013 removing the defendant as joint signatory to the Bank Accounts of Technology Associates Limited and replacing him with Mr. Vishal Manduker was valid and lawful.
3. An injunction restraining the Defendant from interfering in the management of Technology Associates other than through lawfully convened general meeting held in accordance with the Articles of Association.
4. Costs of the suit. The circumstances leading to the conflict among the parties are that Technology associates Limited was incorporated on 17th day of June, 2002.

And by resolution dated 26th day of July, 2002, Suneet Sahai was allotted 30% shares, Bhavna Sahai was allotted 195 shares and Girish Nair was allotted 51% shares. On 17th day of December, 2007, the Particulars of Directors of Technology Associates Limited and Secretaries were filed, namely 2nd, 3rd plaintiffs and Defendant, and the law firm of Verma Jivram & Associates as the Company Secretary. By an e-mail dated 6th day of April, 2013, the Defendant called an extraordinary General meeting of Technology Associates Limited to be held on 8th day of April, 2013 at 9:00am.

At the said meeting, resolutions were passed removing the Company Secretary and appointing another in their place, and also removing the 2nd plaintiff as the Managing Directors of Technology

Associates Limited. Subsequently, on 11th day of April, 2003, a board meeting convened by the 2nd plaintiffs and board Secretary disqualified the Defendant as Director and removing him from the management of Technology Associates and as a co-signatory to the Account. That is how the conflict between the Shareholders and Directors of Technology Associates escalated and ended up in this Court. The plaintiffs were represented by Mr. Adriko of [MMAKS] Advocates, while the defendant was represented by M/S. Katende, Sempebwa & Co. Advocates. It is also important to note that one of the points or issues which led to the misunderstanding was the alleged discovery that the defendant had undisclosed shareholding in a competitor company called Computer Point Limited. The defendant, on the other hand averred that he had been a shareholder of Computer point Limited since the early 1990s and that it was known to Suneet Sahai who used to work

under him for several years. According to the Joint scheduling memorandum, issues for determination are;-

1. Whether the resolution dated 11th day of April, 2013 noting the disqualification of the defendant as Directors of the 1st plaintiff was valid and lawful.
2. Whether the various resolutions dated 11th day of April, 2013 removing the defendant as a Joint signatory to the Bank Accounts of the 1st plaintiff and Vishal Manduker were lawful and valid.
3. Whether the plaintiffs are entitled to the remedies sought in the plaint.
4. What other remedies if any are the parties entitled to.

As far as the resolution of the above issues is concerned, both sides filed written submission. They were all lengthy but they will be summarized for purposes of this Judgment. The main contention

by the plaintiff's Counsel was that the defendant contravened Articles 24 of the Company's Articles of Association when he held a meeting of 8th day of April, 2013, whereby he purported to remove the 2nd Plaintiff as the Managing Director of Technology Associates, and Also removing the Company Secretary. It was also submitted that when the Company Secretary, PW3, M/S. Deepa Verma conducted a search at the Registry of Companies, it was discovered that Defendant was a shareholder in a competing Company of M/S. Computer Point Ltd, and therefore breached Article 37(c) of the Company's Articles of Association. Article 37(d) of 1st Plaintiffs Articles of Association:-

"37(d) the office of a Director shall ipsofacto be vacated; if he becomes an employee or shareholder of another Company doing the same business without the written consent of the Board of Directors.

In reply, Counsel for the Defendant's submissions were that the defendant ceased to be a Directors and part of the Management of Computer point Limited. And remained a minority shareholder. It was further submitted that the defendant's minority shareholding in Computer Point was a fact well known to the 2nd plaintiff, Suneet Sahai because he was an employee of Computer Point directly under the Defendant's supervision from the year 1997. At this Point, it is important to note that the 2nd plaintiff did not deny having been an employee of Computer Point under the supervision of the Defendant. So it is therefore the finding and holding of this Court that for some time before the formation of Technology Associates Limited, both Suneet Sahai and Girish Nair were in Computer Point as an employee and shareholder respectively. But more significant was the submission by Counsel for the Defendant that Article 37 (d) does not and was never meant to apply retrospectively.

That the same applies to Directors and employees of Technology Associates who became shareholders of another Company after the

date of Incorporation. And that was after June, 2002. That was an agreed fact from the records that Technology Associates Limited was incorporated on 17th day of June, 2002. So whereas Counsel for the 2nd and 3rd plaintiffs insisted that Articles 37 (d) of the Articles of Association is both prescriptive and mandatory, under the Golden rule of interpretation, Ordinary words have to be given their Ordinary meanings and technical words their technical meanings.

That was stressed by Lord Diplock in Dupont Steel Vs. Sirs [1980]

1 All E. R 529, quoted by Counsel for the Defendant, where it was held thus:-

“Where the meaning of the Statutory words is plain and unambiguous it is not then for the Judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they consider the consequences for so going would be expedient

And so while I agree with the submissions by Counsel for the plaintiffs that under Halsbury's Laws of England (4th) Edition 1996, volume 7 (1) paragraphs 142 states:-

“142 the Articles constitute a contract between the Company and a members in respect of his rights and liabilities as a shareholder; and a company may sue a member and a member may sue a Company to enforce and restrain breaches of the regulations contained in the Articles dealing with such matters”.

However, in my humble view, the above position of the law as stated in Halsbury's laws of England does not apply retrospectively. The provisions of Article 37(c), that;

“if he becomes an employee or a shareholder of another Company doing the same business without the written consent of the Board of Directors”.

“Becomes” is for the future and not the past. Infact is this Court was to hold that the above provision was meant to act retrospectively, then it involved affect Suneet Sahai as well because it is not disputed from the Testimony of the Defendant that Suneet Sahai was also an Employee of Computer Point Limited from 1997 to 2001.

In their reply to the defendant's submissions, Counsel for the plaintiffs on page 3 there of urged that the 2nd plaintiff being a former employee of M/S. Computer Point Ltd from 1997 to 2001 and therefore knew about the shareholding of Defendant was immaterial. I respectively disagree because this Court cannot hold that it is immaterial to Suneet Sahai who was an employee in Computer point Ltd, but material to the Defendant Girish Nair when both Suneet Sahai and Girish Nair were in Computer Point Ltd as an employee and shareholder respectively before the incorporation of Technology Associates Limited in June, 2002.

And since both Suneet Sahai and Girish Nair were in Computer Point before incorporation of Technology associates, in 2002, then Suneet Sahai cannot now make a U turn that he was not aware of Girish Nair being in Computer Point when they were both there before 2002. For this Court to uphold the submissions that 2nd plaintiff being an employee of Computer Point between 1997-2001 was immaterial and then condemn the defendant who was also there with him, would be applying double standards and would be applying the law retrospectively. I decline to do so.

It is also on record in the testimony of Mr. Vincent Katutsi, the legal and compliance Manager of Uganda Registration Services Bureau (UBSB) that if the information that defendant had been a shareholder in Computer Point prior to incorporation of Technology Associates Limited had been brought to the attention of URSB, the resolution filed on 11th day of April, 2013 would have been rejected. And that was precisely because since Technology Associates was

formed in 2002, the prohibition about being employees or shareholder before that which applies to both 2nd plaintiff and defendant, could not operate retrospectively. On that basis alone, since the law could not operate retrospectively, then the resolution removing the defendant as a director of Technology Associates because he was a shareholder of Computer Point before 2002 when 1st plaintiff was incorporated, (dated 11th day of April, 2013, was not valid and was not lawful.

Secondly and it is no record that the 2nd and 3rd plaintiffs were acting in retaliation to the defendant's extraordinary meeting of 1st plaintiff held on 8th day of April 2013. In that meeting, the resolutions were removal of the Company Secretary and removal of the 2nd plaintiff as managing Director of Technology Associates Ltd. So whereas those resolutions were not proper, and that was why this Court issued a temporary injunction to maintain the status quo so that the operations of the Company (Temporary Associates Ltd) were not halted.

However, the retaliation meeting and resolution of 11th day of April, 2012 removing the Defendant as a Director was equally wrong and done in a haste and in the middle of a conflict or misunderstanding. This is because two wrongs do not add up to a right.

Thirdly, was the contention by Counsel for defendant that the resolution removing the Defendant as a Director was made without the required Quorum as provided for in Article 33 (c) of the 1st plaintiff's Articles of Association. Article 33 (c) of the Articles provides that as long as the number of directors is four or less, to transact business as Directors, the Quorum of Directors must be three.

It therefore follows that two Directors could not pass valid resolutions removing the Defendant as a Director of the 1st plaintiff Company. Whereas Counsel for the plaintiff brought in article 27 of the Articles of Association, I am obliged to agree with the

submissions by Counsel for the Defendant that Article 27 is under the sub heading "General Meeting" as opposed to Article 33 which specifically deals with DIRECTORS. This is in addition to Article 100 of Table A of the Companies Act, Cap. 110, laws of Uganda which governed the operations of Technology Associates Limited at the time of this misunderstanding and whose provisions were adopted by the 1st Plaintiff under Article 100 of Table A afore mentioned, the only business which the 2nd and 3rd plaintiff could conduct sitting as two Directors was to call for an extra-ordinary general meeting and not to remove the Defendant as a Director of the Company or as a signatory to the 1st plaintiff's Bank Accounts.

In my view, Table A of the Companies Act is relevant and applicable in the circumstances of this case. I also wish to emphasize the holding of Jesse M. R. in *Re Alma spinning Company* (1880) 16 Ch. 681 (Bottomley's case) that, "where the Articles of Association provide that the business of the Company shall be conducted by not less than the specified number of Directors, the words are imperative and not merely directory".

It therefore follows that any resolution passed without the required Quorum was invalid. In the premises, and in view of what is outlined herein above, I find and hold that the resolution dated 11th day of April, 2013 noting the disqualification of the defendant as a Director of the 1st plaintiff Company and chairman of the Board of the 1st plaintiff was not lawful. The 2nd issue is answered in the negative. ON the second issue about the resolution removing the defendant as a joint signatory to the Bank Accounts of the 1st plaintiff Company and replacing him with Vishal Mandiker, Counsel for the plaintiffs to section-191 of the Companies Act.

It provides:-

"The acts of a Director and Manager shall be valid notwithstanding any defect that may afterwards be discovered in his or her appointment or qualification".

Counsel for the plaintiff therefore emphasized that where there is a statutory presumption then the resolution removing the defendant as a signatory to the Bank accounts of the 1st Plaintiff Company and replacing him with Vishal Mandiker were valid and lawful.

On the other hand Counsel for the Defendant referred to the testimony of the 2nd Plaintiff, Suneet Sahai under Cross Examination. He stated that he did not hold any board meeting and that all resolution passed on 11th day of April, 2013 were only passed by circular resolution. The defendant's Counsel added that since the meeting never took place as conceded to by Suneet Sahai under Oath, then the alleged resolution removing the 1st defendant as a signatory was illegal.

I have carefully, considered the submission on both sides as far as the 2nd issue is concerned. I wish to reiterate that in view of this court's finding and holding on issue NO.1, and to the extent that Article 33 (c) provides for a Quorum of the board of Directors to be three when transacting business as Directors, then the second resolution cannot stand. Two Directors could not pass valid resolutions removing the Defendant as a signatory to the Bank accounts of the 1st Plaintiff Company. The second issue is therefore answered in the negative.

I now come to the third issue as to whether the Plaintiffs are entitled to the remedies sought in the plaint. I wish to reiterate that as far as the law of Companies is concerned, and to the best of my understanding, there are three levels in the operations of Companies.

These are;-

1. Shareholders level
2. Board of Directors

3. Management of the Company.

The Management of the Company is under the Managing Director. And as provided under Article 42 of the Articles of association, the Managing Director shall be answerable to the Board of Directors for the general Management of the business of the Company. The detailed duties of the managing Director are spelt out under Articles 42 and 43. The Board of directors is the second organ of the Company, below whom are the Managing Director and the workers. Then the Supreme organ of the Company to which the Board of Directors are answerable or accountable is the shareholders meeting.

The shareholders, as owners of the Company are supreme and constitute the final authority of the Company in a General meeting. While in some Companies the Board of Directors are not necessarily shareholders, in the case at hand, shareholders are wearing two hats. One hat as shareholders and the second hat as Board of Directors. And whereas the Defendant was dismissed as a Director, which dismissal has now been rejected by this Court, there was no way he could be dismissed as a shareholder. In the premises, and in view of what has been outlined, the Plaintiffs are not entitled to the remedies sought in the plaint. _

The last and fourth Issue is what other remedies if any are the parties entitled to?

Counsel for the Plaintiffs submitted that this Court Directs the Defendant to sell his shareholding in the Company to the 2nd and 3rd Plaintiff, on the basis that the relationship between the shareholders have been irretrievably ruptured. He made reference to the Companies Act and Section 33 of Judicature Act. In reply, Counsel for the Defendant's submissions were that the prayer to order the Defendant to sell his shares to the 2nd & 3rd plaintiffs is illegal and malafides attempt at expropriation of the Defendant's property and would be an abuse of Court Process. They cited Article 26 of the

Constitution which provides for non compulsory deprivation of property except where it is necessary for public use or in the interest of defence, Public safety, Public order, Public morality or Public Health. And that any Order compelling the Defendant to sell his shares to 2nd & 3rd Plaintiffs would be a violation of the Defendant's guaranteed Constitutional right to property. I have carefully considered the submissions on both sides as far as Alternate or other remedies available. I must point out from the outset that Courts of Law, as arbiters and settlers of disputes or misunderstandings among people in society such as the parties now is of paramount importance. The Courts will never abandon their role of promoting reconciliation between the parties which is within the contexts of Article 126 (2) (d) of the Constitution.

It provides;-

"126 (2) (d) in Adjudicating cases of both a Civil and Criminal Nature, the Courts shall subject to the law, apply the following Principles reconciliation between the parties shall be promoted,

And it is for that reason that I respectively disagree with the submissions by Counsel for the Plaintiffs that the relationships between the 2nd Plaintiffs, the Third Plaintiffs and the Defendant has been irretrievably ruptured. And as a Commercial Court, we are to ensure that business Enterprises such as that of the 1st Plaintiff, Technology Associates Limited are not disrupted, but instead misunderstandings between the parties are resolved. That makes good Commercial Sense. And the Advocates, on both sides, being Officers of Court by law and practice should play an active role in such reconciliatory process.

Furthermore, since this Court has not found any wrong doing on the part of the Defendant in terms of the Complaints raised against him, then this Court cannot compel him to sell his shares to the 2nd and 3rd Plaintiff. And the Operations of the Company must

Continue in the interests of all shareholders, the employees, the contractors and members of the General Public. Since the ultimate powers of any Company lie with shareholders in a General meeting, I do hereby direct that a General meeting of Technology Associates be held with Reconciliation being on top of the agenda. And in this regard, Advocates on both sides have to be in attendance. The said meeting should be held within three days from the date of the delivery of this Judgment.

Secondly, I order that an Audit of the Accounts and Financial Affairs of the Company, Technology Associates Limited be done by an international Firm of Auditors, chosen from either Ernest and young, Coopers Waterhouse or Deloitte and Touche or any other International firm as will be chosen by both sides with the assistance of Advocated,' on both sides.

Lastly, since reconciliation of the parties is to be promoted, I make no order as to Costs.

Each party is to meet their own costs.

JUDGE

3/9/2013

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