

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(COMMERCIAL DIVISION)**

AT DAR ES SALAAM

MISC. COMMERCIAL CAUSE NO. 18 OF 2023

IN THE MATTER OF THE COMPANIES ACT NO. 12 OF 2002

AND

IN THE MATTER OF ZIMTAC VENTURES (EAST AFRICA) LIMITED

AND

IN THE MATTER OF PETITION FOR UNFAIR PREJUDICE BY

ELLY MWAIJANDE.....PETITIONER

VERSUS

PETROS MAJINYORI.....1ST RESPONDENT

JOSEPH ASA RUGUMYAMHETO.....2ND RESPONDENT

ZIMTAC GROUP OF COMPANIES INC.....3RD RESPONDENT

RAMADHANI SWALEHE SHIJA.....4TH RESPONDENT

ZIMTAC VENTURES (EAST AFRICA)

LIMITED.....5TH RESPONDENT

RULING

Date of last order: 20.10.2023

Date of ruling: 10.11.2023

AGATHO, J.:

The petitioner, ELLY JOEL MWAIJAGE by way of petition filed the instant petition under Section 233 (1), (2), (3) of the Companies Act, No.

12 of 2002 against the above-named respondents on the following orders, namely:

- i. A declaration that the petitioner is a lawful shareholder of the 5th Respondent.
- ii. Declaration that the 1st to 4th respondents' actions is wanton contravention of the law, 5th respondent articles of association and therefore, unfairly prejudice to the petitioner's rights.
- iii. An order appointing an independent Auditor/audit firm to investigate the financial affairs and conduct valuation of the assets of the 5th respondent for fair and equitable compensation of the petitioner financial interests.
- iv. An order that, the petitioner be paid off proportional of shares held by him on the basis of the fair value of the said shares, considering the gross worth of the assets of the 5th respondent at the current market value.
- v. An order that, board of directors of the 5th respondent to convene a meeting and resolve to initiate the procedure for changing the petitioner as the technical Director and shareholder of the 5th respondent from the records of the contractor's registration Board (CRB)
- vi. An order that the respondents to permanently restrain from using or continuing to use the petitioner's name, academic and professional certificates at the Contractors Registration Board (CRB) for regulatory compliance any other regulatory authority.

- vii. An order that this honourable court authorize the petitioner to commence civil proceedings in his name and his company inter alia Nextan Engineering Limited as against the respondent and any other persons as shall deem necessary in order to protect the interest of petitioner.
- viii. An order for payment of USD 1,000 being compensation against the respondent from 31st December,2020 to the date of exit as the shareholder of the 5th Respondent.
- ix. The Court be pleased to order those costs of the petition be borne by the respondent and;
- x. The court be pleased to grant such other reliefs or orders that it may, in the circumstances consider to be just, proper, fair and fit to grant to the petitioner.

Upon being served with the petition, the Respondents filed joint reply to the petition disputing the petitioner's prayers and stated the reasons why this petition should not be granted. In order to have a better understanding the gist of the present ruling, I find it apt to narrate, albeit briefly, the background material facts leading to this ruling. It is on record that the 5th respondent is limited liability company doing business among others construction. Being a construction firm, the presence of registered engineer is mandatory as such on 1st September,2019 the 5th respondent hired the petitioner as electrical engineer and technical director for the term of 12 Months. Ill-advisedly, some of shareholders failed to pay for their subscribed shares and in the circumstance the petitioner on 20th

October, 2019 was allotted with 5 shares, so he become a shareholder and employee of the 5th respondent. However, on 31st December, 2020 the petitioner employment was terminated and remained as shareholder.

Further facts were that, after that termination, the 5th respondent continued to use the petitioner names and professional credential without the petitioner's consent. Despite of numerous reminders the 1st 2nd 4th Respondents have turned deaf and neglected or refused to initiate the process of removing the petitioner's name in the 5th respondent's register and regulators records in this case Contractors Registration Board (CRB). It is against this background that the petitioner is praying for orders as contained in the petition hence this ruling.

It was agreed that the matter shall be disposed by way of written submissions. A schedule of filing was issued, and I am glad that the parties complied with the directive of the court and duly filed their submissions. When the matter was called on for hearing the petitioner was under legal representation of Mr. Nafikile Mwamboma and Felix Mutaki learned Advocates, and the respondents had legal services of Mr. Ahmed El-Maamry, learned counsel.

Submitting in support of the petition the learned counsel for petitioner started his submission by giving out the historical background, citing the provision under which the petition was pegged. Essentially, the learned counsel for the petitioner told the court that the kernel to the allegation is that the affairs of the 5th respondent are being conducted in a manner that is prejudicial to the interest of petitioner and the 5th respondent. It was Mr. Mwamboma and Mutaki's acknowledgement that the unfair prejudice doctrine has its own elements as echoed in **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. Extending his submission, the learned counsel for the petitioner mentioned four elements constituting unfair prejudice to wit; - (a) conduct of a company's affairs, (b) has prejudiced the petitioner (c) unfairly conducted (d) to the interests of petitioner as a member of the company.

Expounding his submission on the conduct of a company's affairs, Mwamboma and Mutaki contended that the petitioner was participating in running the company's affairs as such after his termination on 31st December, 2020 the relationship ended. He contended further that despite the termination the 5th respondent has retained the petitioner's name and professional credentials in the records at BRELA and the regulator CRB without consent or formal arrangement. According to Mwamboma and Mutaki the refusal to remove the petitioner from the company's register and the contractors Registration Board records while the respondents have capacity to initiate the process is unfair prejudice to the petitioner's interest and it amounts to conduct of 5th respondent company's affairs.

Regarding the second and third element, the learned counsel for the petitioner submitted that refusal to sanction or initiate the process of removing the petitioner as a shareholder after termination of his employment and after receiving demand note is nothing other than unfair prejudice and operates as an encumbrance to petitioner as minority shareholder. Mwamboma and Mutaki insisted that the 5th respondent's refusal to remove the petitioner as shareholder immediately after termination of his employment amounts to violation of Articles 23 and 24 of the 5th respondent's Articles of association. He placed his reliance in the

case of **Velisa Elizabeth Deflose** (supra) in which the court held that, the interest of a member is not limited to his strict legal rights under the constitution of the company but can take into account wider equitable consideration such as underlying understanding between the parties. He added that the petitioner's rights and interest have been unfairly dealt. He elaborated that the petitioner sought to incorporate his independent construction firm, but he could not do so because the 5th respondent retained his name as its technical director. And consequently, the petitioner could not register his company. This act according to Mr. Mwamboma and Mutaki has been affecting the petitioner. It was further submission of the learned counsel for the petitioner that the use of the petitioner's name and credentials without his consent or any formal arrangement may subject the petitioner to disciplinary and criminal penalties. In addition to that the learned counsel contended that failure to appoint a technical director are acts detrimental to the 5th respondent because Section 23 of the Contractors Registration Act No 17 of 1997 requires firms conducting contractors' business to have at least one director or partner.

Submitting on the petitioner's rights and interest as the member of the 5th respondent, the learned counsel for the petitioner had it that the actions stated above violated the petitioner's rights and interests in the 5th respondent in the following folds: first, termination and business hindrance. He elaborated that the petitioner sought to establish his company called Nextan Engineering Limited. When he went for registration the CRB rejected to register it because he is still listed on the 5th respondent as the technical director. It was Mwamboma and Mutaki's submission that the petitioner has requested to be removed as

shareholder, but the respondents have refused. In the view of the learned counsel for the petitioner the refusal has caused financial ramifications, leaving the petitioner incapable of securing registration with CRB, and obtaining a construction business license. He added that the 5th respondent has retained the petitioner in her registry without taking into account that being a shareholder is voluntary and not obligatory. To cement his argument, he referred this court to the case of **Mohammed Said Kiluwa vs Kiluwa Steel Group Company Limited, Wang Sengju and Wang Wengqian Misc Commercial Cause No 30 of 2020 HCCD at DSM.**

The second fold was the unauthorized use of the petitioner's name and credentials without his consent and formal agreement. Submitting on this point, the learned counsel for petitioner contended that according to the regulator's records it is the petitioner who is responsible for all construction activities conducted by the company. To Mwamboma and Mutaki the use of the petitioner's name amounts to fraudulent representation because he is no longer a technical director. That act is a violation of the law and exposes the 5th respondent to legal sanctions. On the last fold, which is neglect of directorial duties, the learned counsel for petitioner opined that the 1st, 2nd and 4th respondents have neglected the obligation to manage, direct, and supervise the 5th respondent operation in accordance with the Companies Act and MEMARTS.

Moreover, he submitted that, the 1st respondent has not given any substantive answers to the petition as his answers are general denials putting the petitioner under strict proof of his allegations without giving clear or specific response opposing the petitioner's allegations by statement made under oath. To cement his arguments, he referred this

Court to the case of **Janeth William Kimaro and two others Vs Pelagia Auye Mrema and two others, Misc. Commercial Application No. 2 of 2020, HCCD at DSM** (unreported). In view of the above, Mwambona and Mutaki contended that based on the decisions provided and acts of the respondents this court should be pleased to grant the prayers sought in the petition.

In reply Mr. El Maamry, learned advocate had nothing useful to submit save only for admission that there is no dispute that the petitioner's employment was terminated and that he (the petitioner) has failed to prove unfair prejudice because nothing was tendered to back up the allegation contrary to Section 110 of the Evidence Act [Cap 6 R.E. 2019]. On that note, Mr. El Maamry urged this court to find no merits in the petition and proceed to dismiss it with costs.

In brief rejoinder, the learned counsel for petitioner reiterated what he submitted in chief and added that the acknowledgement that the 5th respondent was in a process of making rectification at BRELA is admission of prejudice suffered by the petitioner.

Having carefully considered the rival argument, the law and cases cited altogether I found that the nitty-gritty of this dispute is refusal to remove the petitioner's name and his credentials from 5th respondent register and CRB's records after the termination of his employment. The doctrine of unfair prejudice is wide enough to cover such shenanigans. The law under Section 233 (1), (2), (3) of the Companies Act, No. 12 of 2002 provides for unfair prejudice. For easy reference I will reproduce hereunder

- i. Any member of a company may make an application to the court by petition for an order on the ground that the company's affairs are being or have been conducted in a manner which is unfairly prejudicial to the interests of its members generally or of some part of its members (including at least himself) or that any actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial. If the court is satisfied that the petition is well founded, it may make such interim or final order as it sees fit for giving relief in respect of the matters complained of.” (3) Without prejudice to the generality of subsection (1), the court's order may:

- a) Regulate the conduct of the company's affairs in the future,
- b) Require the company to refrain from doing or continuing an act complained of by the petitioner or to do an act which the petitioner has complained it has omitted to do,
- c) Authorize civil proceedings to be brought in the name and on behalf of the company by such person or persons and on such terms as the court may direct,
- d) Provide for the purchase of the shares of any members of the company by other members of the company or by the company and, in the case of a purchase by the company, for the reduction accordingly of the company's capital, or otherwise.”

In my literal interpretation and in the light of what was stated in the case of **Velisa Elizabeth Deflose (supra)** the purpose of section

233 (1), (2), (3) of the Companies Act, No. 12 of 2002, 'unfair prejudice' is for the protection of the minority shareholders who may lack sufficient power or influence over decisions touching the affairs of the Company or critical matters affecting the business of the Company or exclusion of a shareholder from the management or decision making over the affairs in instances where there is a legitimate expectation of being involved in the management of the companies.

With the above understanding, it should be noted that a petition for unfair prejudice may be brought on the grounds that the affairs of the Company are being carried out or have been conducted in a manner that is unfairly prejudicial to the interests of the minority shareholders. It should further be emphasized that a phrase **company's affairs** imply multitude of things and need to be understood within the context in which it is considered. It may include decision reached by directors, removal or exclusion of a member from participation in the management of the affairs of a company and any actions taken by directors contrary to articles of association of a company may amount to unfair prejudice. Also, it should be noted that the interests of a member are not limited to his strict legal rights under the constitution of the company but can take into account wider equitable consideration such as the underlying understanding between the parties.

Now the question for determination is whether refusal to remove the petitioner's name in 5th respondent's register and on the regulator's records amount to unfair prejudice. My answer to this is yes. I am taking this stance on the following reasons: one, it is not disputed that petitioner is still a shareholder of the 5th respondent even after his termination as technical director as such he is entitled to petition for unfair prejudice.

Two, the decision to remove the petitioner from the 5th respondent's register is among directors' function. Articles 28 and 29 of the 5th respondent's articles of association provides that, every member who intends to transfer shares shall give notice in writing to the board of his or her intention and the board shall invite the member of the company to state in writing within 21 days from the date of the said notice his or her willingness to purchase the shares.

Now back to instant petition the petitioner has attached a copy of demand notice (annexture EJM-6) to the petition to prove that he informed respondents his intention to be removed in the register. Looking at annexture EJM-6 the heading of the demand notice indicates that the petitioner requested the 5th respondent to expunge his name in her register and in BRELA. However, for the reasons known best to respondents there was neither responses nor action taken by the 5th respondent's directors. Therefore, considering what has been narrated in paragraph 13,14,15 and 16 of the petition, and reply of the respondent in paragraph 3, I find that such matters constitute conduct of unfairly nature and prejudicial to the interest of the petitioner as the shareholder. And the argument that after the termination of the petitioner the respondent had always wished to comply with BRELA, and contractors' registration board is far from convincing me otherwise. The demand notice was issued on 14th June, 2022 but to date no action was taken by the directors. Therefore, that action or omissions is in contravention of the articles 29 of the Articles of the Association which require the process to be completed within 21 days. As I stated earlier that act constitutes an unfair prejudice on the part of the petitioner in his capacity as a member just as a disregard of the rights of a member may, even without any financial

consequences to him/her, amount to prejudice falling within the section. See the case of **Elder v Elder & Watson [1952] SC. 49** in which Lord Cooper had this to say:

"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 shareholder who entrusts his money to a company is entitled to rely."

Guided by the above authority it is my considered view that refusal to remove the petitioner in 5th respondent register is an act of the company because directors are duty bound to initiate the process. Therefore, that actions or omission in compliance or refusal to act on the petitioner request amount to unfair prejudice. In the case at hand, the petitioner has alleged that the 5th respondent has refused to remove his name from the register in my view the request to be remove from the register connotes transfer of shares as such it is a matter touching on the conduct of the affairs of the company. See the case of **Arbuthnott v Bonymann & Others [2015] EWCA Civ 536 (20 May 2015) at 630** the court held that, prejudice may extend to other financial damages.

Guided by the above authority and taking the status of the petitioner on the company, the affairs of 5th respondent are being run to his detriment because to date he cannot register his own company as his professional certificate are with the 5th respondent. On that note, therefore, the instant petition is granted as prayed in the following orders.

- i. It is declared that the petitioner is a lawful shareholder of the 5th respondent.

- ii. It is declared that the 1st to 4th respondents' actions have contravened the law, and 5th respondent articles of association, and hence, unfairly prejudiced the petitioner's rights.
- iii. The court orders the appointment of an independent Auditor/audit firm to investigate the financial affairs and conduct valuation of the assets of the 5th respondent for fair and equitable repayment of the petitioner financial interests.
- iv. It is further ordered that after the valuation being done the petitioner be paid off proportional of shares held by him on the basis of the fair value of the said shares, considering the gross worth of the assets of the 5th respondent at the current market value. That is so ordered because the petitioner was holding paid up shares in the 5th respondent.
- v. It also ordered that, the board of directors of the 5th respondent convene a meeting and resolve the procedure for changing the petitioner as the technical Director and shareholder of the 5th respondent from the records of the contractor's registration Board (CRB).
- vi. The respondents are permanently restrained from using or continuing to use the petitioner's name, academic and professional certificates at the Contractors Registration


Board (CRB) for regulatory compliance or any other regulatory authority.

- vii. the court declines to order that the petitioner commence civil proceedings in his name and his company inter alia Nextan Engineering Limited against the respondents.
- viii. The prayer for payment of USD 1,000 being compensation against the respondent from 31st December, 2020 to the date of exit as the shareholder of the 5th Respondent is rejected because the relief sought in (iv) above has been granted.
- ix. The respondents shall remove the name of the petitioner in the 5th respondent's register and proceed with rectifications at BRELA.
- x. That the costs of this petition shall be borne by the respondents.

It is so ordered.

DATED at DAR ES SALAAM this 10th Day of November 2023.




U. J. AGATHO
JUDGE
10/11/2023

Date: 10/11/2023

Coram: Hon. U.J. Agatho J.

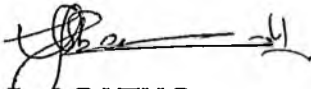
For Petitioner: Felix Mutaki, Advocate

For Respondents: Absent

C/Clerk: Beatrice

Court: Ruling delivered today, this 10th November 2023 in the presence of Felix Mutaki, counsel for the Petitioner, but in the absence of the Respondents.




U. J. AGATHO
JUDGE
10/11/2023