IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISC. COMMERCIAL CAUSE NO. 65 OF 2023

GABRIEL PONSIANI MAKUNDI.....PETITIONER

VERSUS

S.E.C (EAST AFRICAN) CO. LIMITED.....1ST RESPONDENT
XIAO CHUN TIAN.....2ND RESPONDENT
WENX1 SUN.....3RD RESPONDENT
XIAO SHUANG SUN.....4THRESPONDENT
NTULI WILLIAM MWANKUSYE.....5TH RESPONDENT

RULING

Date of Last Order: 16/02/2024
Date of Ruling: 23/02/2024

AGATHO, J.:

This ruling addresses a petition and a cross – petition. The petition was brought under the provisions of Section 233(1) and (3) of the Companies Act, Act No. 12 of 2002. There was also an affidavit verifying the petitioner, deponed by the petitioner himself. The respondents on the other hand raised their cross-petition against the petitioner. The respondent protested the

petition by filing counter affidavit and cross petition. The petitioner filed counter affidavit against the respondents' cross-petition.

The petitioner in his petition was seeking the following reliefs:

a. A declaration that the conduct, actions and omissions of the 2nd, 3rd, 4th and 5th respondents complained of in the petition have been and are unfairly prejudicial to the interests and affairs of the petitioner and the 1st respondent.
b. A declaration that the 4,512 shares held by the petitioner in the 1st respondent are paid up shares, therefore the petitioner owns 30% of the 1st respondent.
c. An order removing the 2nd respondent as the chairman and managing director of the 1st respondent.
d. An order adding the petitioner as a co-signatory of all bank accounts of the 1st respondent for control purposes.
e. An order to reinstate the petitioner as the director of the 1st respondent.
f. An order appointing the petitioner as the chairman and managing director of the 1st respondent with 51% of voting rights both in the

board of directors and shareholders meeting for a period of three years to set up proper system and structure of the 1st respondent.

g. An order to conduct a full and detailed financial audit of the 1st respondent from the time of inception through an international audit firm with presence in the United Republic of Tanzania.

h. An order compelling the 1st Respondent and 2nd Respondent (in his personal capacity) to pay the dividends of the Petitioner as it will be established by the audit in (g) above.

i. An order compelling the 1st Respondent (in his personal capacity) to pay the sales commission of the Petitioner as it will be established by the audit in (g) above.

j. An order to permanently restrain the 2nd, 3rd, 4th and 5th Respondents, their servants, agents or any other person acting under their instruction from interfering or jeopardizing the contract between the 1st Respondent and Shanghai Mitsubishi Elevator Company Limited of the Peoples Republic of China.

k. An order to permanently restrain the 2nd 3rd, 4th and 5th Respondents their servants, agents or any other person acting under their instruction from interfering or jeopardizing the contracts between the

1st Respondent and the existing customers within the United Republic of Tanzania.

l. Costs of this Petition to be born jointly by the Respondents

m. Any other relief (s) that this Court may deem just and proper to grant to the Petitioner:

Upon being served with petition the Respondents under the legal services of Legis Attorneys filed their answer to the petition that was accompanied by, the cross – petition in which they seek:

a) Declaratory orders that the 1st respondent (the petitioner in the petition) is entitled to only 60 shares within the 2nd respondent's company following payment which was done and not 4,512 shares as alleged.

b) An order against the 2nd respondent to undertake all necessary procedures to ensure the 1st respondent is issued with share certificate in respect of 60 shares only.

c) Payment of general damages to be assessed by the court.

d) Any other relief (s) that this court may deem just and proper to grant.

e) Costs of this petition.

In terms representation, whereas Mr. Mutakyamirwa Philemon

represented the petitioner, Mr. Jonathan Mbuga, stood for the respondents. The petition and cross petition were disposed by way of written submissions.

To determine the petition and the cross petition, the court drew some questions that are central to the points that the parties are at issue and also related to the reliefs the parties are seeking. Reference has been made to affidavits of the parties, their submissions, and relevant laws. The critical issues and analysis of the evidence and the law is as depicted below.

To begin with we ask whether the petitioner own 4, 512 shares in the 1st respondent which was allotted to him as paid-up shares. The issue of paid shares that the petitioner claims to own and supported by annexture PM4 (resolution made by the board in its meeting held on 12th July 2006 in which it was agreed that the petitioners' to treated as paid up in kind as per annexture PM4 – minutes of the meeting of the board of directors of S.E.C company held on 12th July 2006) has been disputed by the respondents. And they added that the 2nd respondent's signature has been forged (but no evidence of forgery has been given). They also testified in the affidavit that the decision to call on shares was made in a meeting held on 31st March 2020 in which the petitioner and the respondents participated. The minutes of the 1st respondent's meeting was attached as annexture SEC-1.

Looking at PM3 and PM4 annexed to the petition they show that the petitioner was allotted 3000 shares and not 4, 512 shares. But PM5 shows that there is another meeting held on 20th December 2019 in which among other things transacted, the petitioner was allotted 1,512 shares. The SEC-1 also supports the fact that the petitioner had 4,512 shares in the 1st respondent. The parties are divided on whether these are paid up shares.

Another controversy is centred on allegation that the signature of 2nd respondent was forged. Amidst that allegation and to the contrary the petitioner alleged that the 2nd respondent's signature kept changing. That is fortified with annexture PM4 where the 2nd respondent's signature therein is different from PM5. The petitioner has attempted to prove that the 2nd respondent has been using different signatures. And this has not been rebutted by the respondents. The 2nd respondent merely claims that his signature was forged, and no evidence has been laid by the respondents to prove that the signature was indeed forged. However, paragraph x of the respondents' answer to the petition claims that the signature found in PM-9, declaration on forfeiture of shares does not belong to the 2nd respondent as it is forged. Further paragraph 16 of the respondents' counter affidavit assert that the respondent denied even at the police station to have signed the

statutory declaration. Hence the signature was forged and there was a fraudulent scheme set up by the petitioner. Nevertheless, the respondents have not brought any evidence from the police showing that the signature of the 2nd respondent was forged. The case of **Anna Babu t/a E&L Catering Services v AKIBA Commercial Bank, Commercial Division Manual Reports [2011] CDMR 1** shows that allegation of forgery of a signature requires evidence such as expert testimony. In the present petition, the allegation of forgery of the 2nd respondent's signature has been rebutted by the petitioner in his reply to the counter affidavit as per annexture EA-1, that is various documents signed by the 2nd respondent with different signatures. This shows that the 2nd respondent was using different signatures. I should remark that the petitioner ought to raise this evidence in his evidence in chief. But the respondents were not barred from filing sur rejoinder responding to the petitioner's reply to counter affidavit. Their silence means admission of the facts and documents annexed to the reply to counter affidavit.

The issue as to why the 5th respondents was not involved in the decision to allot 4,512 shares to the petitioner, this does not seem to hold water as rightly submitted by the petitioner's counsel, the decision in the

board of directors can be done with a minimum of two directors as per article 83 of the MEMART, annexture PM1.

Another question is whether the petitioner has share certificate for 4,512 shares in the 1st respondent company. The petitioner has annexed his share certificate. Its possession though does not mean that the petitioner holds paid up shares. Moreover, annexture SEC – 1 to the counter affidavit is the evidence of the call made on the shares as required by the law and the MEMARTS (article 15 of PM1). The 2nd respondent has also denied having signed the petitioner's share certificate. The petitioner as per the minutes of the 1st respondent company's meeting held on 30th June 2020, SEC - 2 was asked to produce the original share certificate, but he failed to do so. However, the respondents made no attempt to require the petitioner produce the same before the court.

Moreover, the respondents annexed SEC – 3 as proof that the petitioner paid for only 60 shares each valued TZS 250,000/= as per resolution done on 30th June 2020, SEC-2. The petitioner has disputed it and produced evidence from BRELA that he owns 4,152 paid shared.

Next quest was whether 4,512 shares were forfeited? The forfeiture of shares is governed by article 28-34 of the MEMART (PM1) See annexture

PM10 (a letter from BRELA dated 4th September, 2023 communicating the decision of the Registrar of BRELA declaring that the procedures followed in forfeiting of the Petitioner's 4, 452 (sic) shares were not lawful as the shares held were all fully paid up and they cannot be forfeited. That is corroborated with the annexture EA-3 official search from BRELA dated 31st May 2023 indicting that the petitioner still holds 4,512 shares in the 1st respondent's company.

Whether 60 shares belong to the petitioner as claimed by the respondents was yet another issue for determination. The petitioner has opposed the allegation that he owns only 60 fully paid-up shares. And has adduced evidence that he owns 4,512 paid up shares. But the receipts presented by the respondents show that the petitioner has 60 shares that are fully paid up which contradicts the petitioner's evidence and PM10 – the BRELA letter showing that the petitioner own 4,512 fully paid up shares.

Regarding a call on the shares which the respondents are claiming the petitioner has not paid up for, there is evidence that the said call was made. According to SEC-1 the call was made. The petitioner and other shareholders never headed to it. The petitioner claimed he has fully paid-up shares, which is supported by PM10, BRELA letter dated 4th September 2023. If this point

to have merit.

Another intriguing point was whether the petitioner should be reinstated as a director in the 1st respondent company? As per annexture PM7 to the petition, the meeting held on 21st December 2021 in which the petitioner was removed as a director. He participated in that meeting. But the petitioner has questioned the procedure of his removal from director position as it contravened the MEMART (PM1) article 70 requiring such action to be taken in extra ordinary meeting not emergency meeting as done in this case. The criticism he has put forward is on the issue wording, emergency as opposed to extra ordinary meeting. This in my view is *de minimis non curat lex*. The law cannot cure minor things. It is terminology disparity that is seen. However, the message is clear. Besides the petitioner participated in that meeting and he has not disputed that. Whether it termed emergency or extra ordinary meeting, in the context of this case it does not really matter. I am convinced that the meeting took place. And it is a valid meeting. Nevertheless, a question lingering is whether there was a resolution for removal of the petitioner as director of the 1st respondent's company? SEC-5, the minutes of the meeting which the respondents have cited as the one that removed him from directorship position does not say so. The discussion

as per the minutes was about an offence which constitute serious misconduct that may lead to the removal of the director. SEC- 5 has this to say:

> *"Discussed and directed that Mr. Garbiel P. Makundi's failure to sign the company documents for submission to BRELA office is illegal and commits an offence which constitutes a serious misconduct that may lead to his position as director of the board being revoked."*

That extract does not say the board resolved that his position as the director has been revoked. The procedure for removal of a director is provided for under Section 193 of the Companies Act. It is elementary that company's decisions are made through board resolutions reached in the meetings (as per section 88, 93 and 94 of the Companies Act [Cap 212 R.E. 2002], and there is no meeting that removed the petitioner from his position as the director of the 1st respondent. A purported removal communicated via letter dated 19th July 2023 was contrary to lawful procedures of board decisions as there was neither a meeting nor resolution sanctioning revocation of the petitioner's board directorship position. The petitioner is thus still a lawful director of the 1st respondent's company unless and until when the lawful

procedure of his removal is properly followed.

Whether the petitioner should be appointed a chairman and Managing Director of the 1st respondent company because he has 51% of voting rights both in the Board of directors and shareholders meeting? This is rejected because the procedure to make a person a chairman and managing director of the 1st respondent is a business of the company itself through the board. See Section 91 of the Companies Act providing for procedure for appointment of board chairman. It states that the board may appoint the chairman. However, for public corporations the chairman is appointed by the President of United Republic of Tanzania as per Public Corporation Act. Again, the petitioner in this very same petition has asked the court to give an order to reinstate him in his directorship position. And before that is decided the petitioner is seeking to be appointed a chairman and managing director of the 1st respondent's company.

As to whether the court should order the petitioner to be a co-signatory of all the bank accounts of the 1st respondent for control purpose, this cannot be upheld. In fact, the issue of appointment of signatories of company's bank account is an internal affair of the company that has to be decided by the company itself in the meetings. The court declines to grant such order. There

is no evidence given to show that the attempts in the company's meeting to install the petitioner as co-signatory of bank accounts have failed.

Whether the court should order full and detailed audit of the 1st respondent from the time of inception? The petitioner's prayer that the court should order full and detailed audit of the 1st respondent from the time of inception is also rejected because such matter can be done by board of directors of the 1st respondent. There is no evidence put forward that the proposal was put in the board meeting about the conduct of audit of the company and it was refused. The court thus cannot grant such relief without having concrete evidence that the board is refusing to approve conducting of audit in the 1st respondent's company without any justifiable cause.

Whether an order should be given to compel the 1st respondent and 2nd respondent (in his personal capacity) to pay dividends to the petitioner as it will be established by the audit. It is understood that payment dividend is a matter of solvency of the company. The law under Section 103 of the Companies Act states that dividends may be declared by a company via its ordinary resolution. There is no evidence that the 1st Respondent's declared dividends in any of its ordinary resolution. This relief is thus declined because the respondents (as per SEC-3, Audited Financial Statements for the years

ended 31st December 2021) have clearly pointed out that there was no profit that has been made. They tendered financial statement to that effect. That is SEC-3. But this is only for the year ended on 31st December 2021, what about other years?

The 1st respondent company was incorporated on 23rd December 2005. It has been doing business since then. Strange as it may seem the respondents have brought only a financial statement for the year 2021. This raises doubt as there is no explanation as to the whereabout of financial statements for other years. For that matter the court may make adverse inference for not producing the financial statements for the rest of years. But then again, the petitioner (Mr. Makundi) after having sat in the board of directors for some years ought to have produced evidence of some sort indicating that the 1st respondent was for all those years making profit and hence liable to pay dividends. Since the petitioner was the one alleging that the 1st respondent made profit and was obliged to pay dividends to its shareholders, he had a burden of proof. It is the law under Section 110 of the Evidence Act [Cap 6 R.E. 2019] that he who alleges must prove. See also **Hemedi Said v Mohamed Mbilu [1984] TLR 113.** I am not convinced that there is evidence that the 1st respondent was making profit and ought

to pay dividends. Besides the year 2021 financial statements (annexture SEC-3) shows that the 1st respondent has not made any profit for that year. However, it is unclear whether the 1st respondent has ever made any profit from the time it commenced operation.

Regarding the issue of compelling the 2nd respondent in individual capacity to pay dividends is alien to Company Law because the 1st respondent has a separate legal personality. Moreover, even if the directors have misappropriated the company's assets that can only be determined after lifting the corporate veil. We have not dealt with lifting the corporate veil in this petition. Moreover, the petitioner never asked the court to lift the corporate of the 1st respondent company. The court cannot grant what was not asked by a party.

Whether the order compelling the 1st respondent and 2nd respondent (in his personal capacity) to pay the sales commission of the petitioner as it will be established by the audit. This too sounds premature. Even if we assume that the court orders an audit to be conducted the audit report will have to be tabled before the court for deliberation and directions. Therefore, the order to pay sales commission to the petitioner is declined for being premature.

Whether the court should grant permanent injunction against the 2nd. 3rd, 4th and 5th respondents, their servants, agents or any other person acting under their instruction from interfering or jeopardizing the contract between the 1st respondent and Shanghai Mitsubishi Elevator Company Limited of the People's Republic of China. This relief cannot be granted because the petition at hand is not about injunction. No law has been cited about injunction. Moreover, the petitioner is inviting the court to engage into the realm of speculation. There is scant (PM4) or no information about the contract between the 1st respondent and the Shanghai Mitsubishi Elevator Company Limited of the People's Republic of China. The court cannot render a decision based on speculation or suspicion however strong it may be.

Whether the court should grant permanent injunction against the 2nd. 3rd, 4th and 5th respondents, their servants, agents or any other person acting under their instruction from interfering or jeopardizing the contracts between the 1st respondent and the existing customers within the United Republic of Tanzania. This relief is rejected too because the petition at hand is not about injunction. Again, no law has been cited about injunction. As held hereinabove, the petitioner either is speculative or suspicious of the respondents. But there is neither evidence nor any information about the

contract between the 1st respondent and other customers in Tanzania.

As for the reliefs sought in the cross petition the court is of the view that they lack merits. From the evidence produced in this petition, the court cannot declare that the 1st respondent is entitled to only 60 shares within the 1st respondent's company. That is because the record from BRELA is clear that the petitioner owns 4,512 shares in the 1st respondent company. No effort was done by the petitioners in cross petition to bring the registrar or any officer of BRELA to testify about the purported 60 shares which are said to be paid up. There the allegations are not backed with any evidence from BRELA. There is no evidence that 4,512 shares are not in the BRELA records. There is no evidence to contradict that. The issue of whether these are paid up or not it is the internal matter of company. The respondents could have sought court intervention and issued notice to produce to the petitioner (in the petition) and compel him to produce the original receipts and share certificate to prove or disprove that he owns 4, 512 shares which are full paid. But that was the duty of the respondents and not the court.

The court further refuses to order the 1st respondent in the petition, and 2nd respondent (cross petition) to undertake all necessary procedures to ensure the petitioner (1st respondent in the cross petition) is issued with

share certificate in respect of 60 shares only. This stance is taken due to the fact that the evidence produced has confirmed that the petitioner owns 4, 512 shares in the 1st respondent company.

As for the payment of general damages to the respondents, that is equally rejected. The court has observed that the respondents did not follow lawful procedure in removing the petitioner from the board of directors. In addition to that they have not given him any dividends for all years since the time the company started operating. Moreover, they have not proved the allegation of forgery of 2nd respondent's signature. Further, it has come to the attention of the court that the respondents were attempting to forfeit the petitioner's shares unlawfully and unreasonably.

For the foregoing reasons the court declares, and orders as follows:

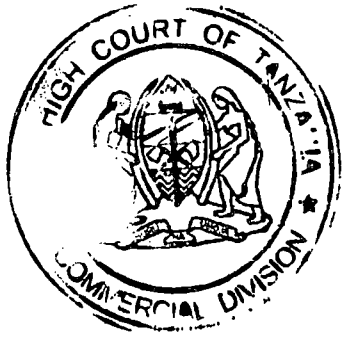
1. That the conduct, actions and omissions of the 2nd, 3rd, 4th and 5th respondents are unfairly prejudicial to the interests and affairs of the petitioner and the 1st respondent.
2. That the petitioner is a lawful owner of 4,512 fully paid-up shares in the 1st respondent company.
3. That the petitioner shall be reinstated as one of the directors of the 1st

respondent company.

4. That the respondents (in the petition) bear the costs of this petition.

Order accordingly.

DATED at **DAR ES SALAAM** this 23rd Day of February 2024.



U. J. AGATHO

JUDGE

23/02/2024

Date: 23/02/2024

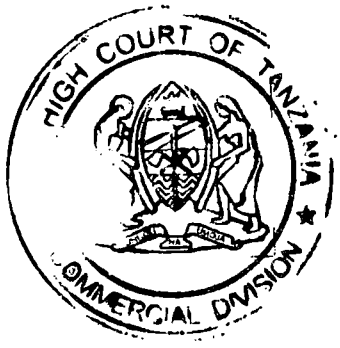
Coram: Hon. U.J. Agatho J.

For Petitioner: Mutakyamirwa Philemon, Advocate

For **Respondents**: Jonathan Mbuga, Advocate

B/Clerk: Mustafa

Court: Ruling delivered today, this 23rd February 2024 in the presence of Mutakyamirwa Philemon, counsel for the Petitioner, and Jonathan Mbuga, advocate for the Respondent.



U. J. AGATHO

JUDGE

23/02/2024