THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

(CORAM: KISAAKYE, ARACH-AMOKO, NSHIMYE, OPIO-AWERI, TIBATEMWA-EKIRIKUBINZA JJSC.)

CIVIL APPEAL NO.03 OF 2015

BETWEEN

MATTHEW RUKIKAIRE::::::::::::::::::::::::::::APPELLANT

AND

INCAFEX LIMITED::::::::::::::::::::::::::::::::::RESPONDENT

(*An appeal from the judgment of the Court of Appeal at Kampala before Hon. Justices:Kasule, Mwangusya and Mwondha, JJA, in Civil Appeal No. 67 of 2010 dated the 22nd day of December 2014)*

Representation

At the hearing of this appeal, Mr. Joseph Byamugisha together with Mr. Didas Nkuruziza represented the appellant while Mr. Peter Walubiri represented the respondent (Company).

JUDGMENT OF PROF. TIBATEMWA-EKIRIKUBINZA.

This is a second appeal from the Court of Appeal. The brief background of the appeal is that the present appellant, Mr. Matthew Rukikaire filed a petition in the High Court against the company, Incafex Ltdunder Section 211 (1) (2) of the repealed

Companies Act Cap 110. The petition was on the ground that the affairs of the company were being run in a manner that was oppressive to him. He particularly complained that he had been closed out of company meetingsand that there was no transparency in the financial affairs of the company.

The company through its Managing Director – Mr. James Musinguzi Garuga - opposed the petition on the ground that the appellant was never a shareholder or member in the Company because he had never paid for the 450 shares he was allotted and that he held the said shares in trust for M/S Hauliers – a foreign company. The respondent further contended that there was no evidence to show that the petitioner is a shareholder of the Company. That, Section 27 of the Companies Act defined a person as a member of the company if their name was entered on the register of members.

The High Court held that the petitioner was a shareholder and a member of the company.

The company being dissatisfied with the High Court decision filed an appeal in the Court of Appeal on the following grounds:

1. The learned trial Judge erred in law and fact in holding that the petitioner was a shareholder in Incafex Ltd.

2. The learned trial judge erred in law and fact in allowing the petition when there was no evidence to prove that:

(a) There has been oppression of some members of the company including the petitioner.

(b) The facts justify a winding up on grounds that it is just and equitable to do so.

(c) The winding up will prejudice the oppressed members or the petitioner.

3. The learned trial judge erred in law and fact to make orders for the benefit of foreign shareholders who were not party to the petition and in absence of any prayer to that effect.

The Court of Appeal came to the conclusion that there was inadequate evidence as to whether or not the allotted shares had been paid for by the petitioner (current appellant) or the foreign shareholders. Therefore, the petitioner could not be said to be a shareholder.

Dissatisfied with the decision and finding of the Court of Appeal, the appellant appealed to this Court on the following grounds:

1. **The learned Justices of Appeal misdirected themselves and erred both in law and in fact when they held that the appellant failed to prove that he had subscribed to the 450 ordinary shares that had been allotted to him in the respondent Company.**

2. **The learned Justices of Appeal misdirected themselves and erred both in law and in fact when they held that the Appellant did not hold shares in the respondent Company.**

3. **The learned Justices of Appeal erred in law and in fact when they held that:**
   (a) The foreigners were fully compensated;
   (b) The question of the consideration was never resolved;
   (c) The letter by Mr. Agaba Maguru could not have been a substitute for the evidence to determine that the allotted shares were subscribed to by the Appellant.

4. **The learned Justices of Appeal erred in law when they held that the Appellant could not claim to have been oppressed by the respondent Company.**

5. **The learned Justices of Appeal erred in law and fact when they held that there was no evidence adduced to justify winding up of the Respondent Company.**

Both counsel adopted their written submissions which this court has considered in resolving the grounds of appeal raised.

The appellant argued grounds 1 and 2 together and the rest of the grounds were argued separately.

However, I shall address grounds 1 and 2 together, grounds 4 and 5 together and ground 3 separately.

Grounds 1 and 2

Appellant's submissions

The appellant submitted that there was evidence to prove that he is a member and shareholder of the company. The appellant relied on the evidence of a return of allotment form marked 'annexure D'. The return of allotment form indicated that the appellant was allotted 450 shares. Another piece of evidence relied upon was 'annexture E'- a Memorandum of Understanding between Incafex Ltd Shareholders, Mr. James Musinguzi and Mr. Matthew Rukikaire. The memorandum indicated that all expected payments from government in respect of compensation for the ranches was to be deposited on a bank account to which the appellant was a signatory.

The Appellant's counsel contended that payment for the shares is not what constitutes membership or settlementof the consideration for shares. He cited **Section 27** of the **Companies Act**. Basing on this provision, the appellant argued that the consequences of registration of an allottee of shares accorded him the right to be a member of the company.

Counsel for the appellant also faulted the Court of Appeal finding that the appellant was not a shareholder without the register of

members having been adduced in evidence to prove that the appellant was not on the register of members.

Respondent's submissions

On the other hand, the respondent submitted that the appellant failed to adduce any evidence by way of a receipt, a share certificate or memorandum for the payment of the 450 shares. That the appellant in essence failed to discharge the evidential burden that lay on him.

It was further submitted that the evidence of the return of allotment and memorandum of understanding relied upon by the appellant do not constitute evidence of him taking up the allotted shares or settlement of the consideration for the said shares.

That an allottee of shares is not a shareholder unless there is proof of agreement to take up the shares through payment and the name entered on the register of members.

In support of the argument, the respondent relied on an excerpt in **Gower's Principles of Modern Company Law, fourth edition, page 428** where it is statedthat**:**

> **... every person, other than a subscriber, who agrees to become a member and whose name is entered in its register of members, shall be a member. Here two things are necessary (a) agreement and (b) entry on the register; both must**

be present before the person concerned becomes a member and shareholder.

The respondent prayed that ground 1 and 2 of the appeal be dismissed.

Ground 3

Appellant's submission

The appellant mainly faulted the learned Justices of Appeal finding that the foreign shareholders had been compensated and yet at the same time found that he had never paid for the shares. That this was a contradiction since the foreign shareholders could not be compensated for that which was not paid for. The appellant further faulted the Court of Appeal for coming to such a finding basing on the mere assertion in the letter written by the company secretary without further evidence by way of receipts to prove payment of the compensation.

Respondent's submission

For the respondent, it was submitted that the court of Appeal was right to dismiss the issue of the compensation. Since the compensation was in respect to the investment into the company by the foreigners - who were not parties to the petition in the first place. Further that Amrik Singh –representative of the foreign shareholders – did not raise any dispute concerning the compensation in the lower courts.

Ground 4

Appellant's submission

In regard to this ground, it was submitted that there was evidence on record to prove that the appellant was an oppressed member of the company. That, the directors refused to convene company meetings which was mandatory under the Companies Act. In support of this contention, counsel for appellant relied on **Re: NakivuboChemists (U)Ltd (1977) HCB 312** where it was held that not being allowed to attend company meetings was evidence of oppression. Further, that the compensation of investment in respect of the shares was paid to foreign shareholders who were not members of the company.

Respondent's submission

On the other hand, the respondent contended that the court of Appeal's holding that there was no evidence of oppression was based on the fact that the appellant did not have shares in the company.

That the authorities of **Re Nakivubo Chemists (U) Ltd (supra)** and **Lock vs. John Blackward Ltd [1924] A.C 782** relied upon by the appellant were distinguishable from the present facts. While in the foregoing cases the court found that the petitioners were shareholders, the appellant in the instant case was not shareholder.

Ground 5

Appellant's submission

The appellant contended that the facts of the present case justified an order to wind up the company. While relying on the authority of **Re: Nakivubo Chemists (U)Ltd (Supra) and Section 211(2) (b) of the Companies Act Cap 110,**the appellant submitted that the test to apply is whether the business of the company cannot go on due to the deadlock among the shareholders.The deadlock among the shareholders was failure to be transparent with the compensation money due from government for the ranches of the company.

In conclusion, the appellant prayed that the appeal is allowed with costs both in his Court and in the courts below.

He also prayed that the judgment of the Court of Appeal be set aside and that of the High Court be reinstated.

Respondent's submission

The respondent argued that since the appellant was not a shareholder, he could not say that he was an oppressed member. That there would be no ground to wind up the company at the instance of a non-member. Since winding up was not justified, then there would be no alternative relief to winding up under **Section 211** of the **Companies Act.**

It was further submitted that the relief of winding up was not prayed for by the petitioner in the first place.

The respondent prayed that the appeal be dismissed with costs to the respondent in this Court and in the courts below.

Rejoinder

In rejoinder, the appellant emphasized that he was a member of the company by virtue of **section 27 (2)** of the **Companies Act Cap 110.** That the provision defined a member as every other person who agrees to become a member of the company.

The appellant further submitted that the respondent's assertion that he had never paid for the allotted shares was irrelevant for the purpose of determining membership ofa company.

The appellant reiterated his earlier submissions that he owned 45% of the shares in the Company. That the respondent could only dispute this fact by producing the members register of which it failed to do.

Consideration of court

Grounds 1 and 2

The central question for determination in grounds 1 and 2 rotates around the definition of who a shareholder or memberof a Company is.

The process of incorporating a company limited by shares involves registration of the company's memorandum and articles of association which are signed by subscribers. A 'subscriber' is the term applied to the first members of a private limited company who

add their names to the memorandum of association during the company formation process. By so doing, they agree to form a company and become members/share- holders in the company.

However, other persons can become members of the company when shares in the company are allotted. When a person either individual or corporate is allotted shares subsequent to the formation of the company, that person becomesa 'shareholder', 'member' or 'owner' and stands in the same position as the subscriber. Such personsagree to become part of a company by taking a particular number of shares through a process known as allotment.

Indeed **David J. Bakibinga** in his book**, Company Law in Uganda**, **2001 at page 66** states that, agreement to become a member can be through allotment of shares. This position was also reflected in Section 27(2) of the Companies Act Cap 110.

Section 27 of the then **Companies Act Cap 110**defined a member as follows:

Definition of member.

1. **The subscribers to the memorandum of a company shall be deemed to have agreed to become members of the company, and on its registration shall be entered as members in its register of members.**
2. **Every other person who agrees to become a member of a company, and whose name is entered in its**

register of members, shall be a member of the company.

What can be deduced from the section is that a person may become a member of a company in two ways;

(a) by subscribing to the memorandum of association; and

(b) by agreement to be a member subsequent to the formation of a company.

The law on Allotment of company shares and membership

The word allotment was not defined in the Companies Act Cap 110.However,**Section 54** of the said **Companies Act** required a company to file a return of the allotment of its shares with the company Registrar within 60 days of the making of the allotment.

Chitty Jin **Re FlorenceLand and Public works Company** (**1885) L.R.29 Ch. D 421**stated:

> What is termed allotment is generally neither more nor less than the acceptance by the company of the offer to take shares.... The offer is to take a certain number of shares, or such a less number of shares as may be allotted.

The above definition was adopted by the Supreme Court of Indiain **Sri Gopal Jalan and Company vs.Calcutta stock 1964 Air 250/1964 SCR (3) 698.**

Gower and Davies,in **Principles of Modern Company Law, 8th edition at page 845** define the term'allotment' as the process by which the Company finds someone who is willing to become a shareholder of the company.Gower and Davies further explain that the process of becoming a shareholder is a two-step one, involving first a contract of allotment and then registration of the member.

Lord Templeman in **National Westminster or Bank Plc vs. IRC (1995) A.C111 at 126** held that*"allotment does not make a person a member of the company.Entry in the register of members is also needed to give the allottee legal title to the shares.Allotment confers a right to be registered as a member."*

Lord Templeman further stated that *an applicant (for shares) is neither a member nor a shareholder while his rights rest in contract until the issue of the shares has been completed by registration.*

The term "allotment of shares" is sometimes confused with that of "issue of shares"; the two terms are not the same. They are quite distinct and afford distinct rights to a person in law. Distinguished from allotment, the term "issue of shares" is a subsequent act whereby the title of the allottee becomes complete. In **Ambrose Lake Tin and Copper Co (1878)8Ch. D 635 at 638** it was held:

> **in as much as the term 'issue' is used, it must be taken as meaning something distinct from allotment, as importing that some subsequent act has been done whereby the title of the allottee becomes complete,**

either by the holders of the shares receiving some certificate or being placed on the register of shareholders, or by some other step by which the title derived from the allotment may be made entire or complete.(Emphasis of court)

From the foregoing, it could be safely be concluded that a person becomes a shareholder or member of a company if allotment is followed by registration. However one question which must be answered is: who is duty bound to complete the process, who has the duty to register the allotments? The answer lies in **Section 112** of the **Companies Act**which provided that:

(1) Every company shall keep a register of its membersand enter in that register the following particulars—

(a) the names and postal addresses of the members, and in the case of a company having a share capital, a statement of the shares held by each member, distinguishing each share by its number so long as the share has a number, and of the amount paid or agreed to be considered as paid on the shares of each member;

(b) the date at which each person was entered in the register as a member;

(c) **the date at which any person ceased to be a member, except that where the company has converted any of its shares into stock, the register shall show the amount of stock held by each member instead of the amount of shares and the particulars relating to shares specified in paragraph (a) of this subsection.**(Emphasis added)

My conclusion is that it is"the company"which has the obligation to enter each member on the members register. In this context the company's duty lies with the company secretary, whose duty it is to ensure that the company complies with relevant legislation and regulations.

I take note of the fact that there was no members register adduced to prove whether or not the appellant was a registered member of the Company.

Could it then be said that appellant was not a member of the Company?

The appellant argued that the respondent did not adduce the evidence of the members register as required by Section 112 and that therefore, his assertion that he was a member was not rebutted. On the other hand, the respondent argued that the mere registration of an allotment is not evidence that the allottee has accepted the shares and paid for them. There has to be an

agreement to become a shareholder and registration on the members register.

Having already stated that it is the duty of the company to enter the name of each shareholder into the company register and to indicate the amount paid on the shares, I cannot visit the failure of the company onto the shareholder.

Furthermore, I note that the issue of whether membership is exclusively proved by the presence of an individual's name on the register was addressed in the case of **Mawogola Farmers & Growers Ltd vs. Kayanja [1971] E.A 272.** In that case, the promoters of the appellant company called upon the respondent and others to purchase shares in the company. The respondents agreed and paidfor the shares. However, no shares were allotted to them. The respondents sued the appellant company for orders that their shares be allotted to them and that the company's register of members be rectified but the appellant company did not keep a register. Mustafa JA held:

> **if a person has paid for his shares and has been issued with a share certificate but his name is not in the share register, such a person should be allowed to prove he is a member despite ... the absence of a register.**

Lutta JA concurring with Mustafa JA also held:

> **... in such cases, the register cannot be said to be conclusive of membership of the company. That Section 28 of the Companies Act does not make the register of members final and conclusive of the membership. A person may agree to be a shareholder and is made a shareholder by paying for his shares and actually being issued with share certificates, or being given receipts in respect of the payment although his name may not, de facto, be in the register.**

Although the facts of the **Mawogola** case can be distinguished from the matter before us, in that in the Mawogola case there was no dispute as to whether the respondents had paid for the shares allotted to them, the East African Court of Appeal set a principle that: presence of an individual's name on the register is not the only way in which shareholding can be proved.

In **Lutaaya vs. Gandesha [1986] HCB 46** the Court held *inter alia* that:

> **Although the Company's Act makes provision for membership of a Company under Section 28, for maintenance of members register in Section 112, for the inspection of the register by even a non-member in Section 115 and for the fact that the register is a prima facie evidence for membership in Section 120, <u>there was not one exclusive or</u>**

> **exhaustive mode of proving membership of a Company. Even the occurrence of ones name on the register of members was only prima facie evidence and other evidence could be adduced to rebut that. Therefore, other modes could be used to prove membership of the company. Some of the ways of proving membership was possession of a share certificate and to some extent the appearance of one's name on the annual return. But none of these was exclusive or conclusive.** (My emphasis)

It is on record that two return forms were adduced in evidence. The first form was the annual return for the period of 30th June 1987, signed by the company secretary of the respondent. This form was filed and registered at the Companies registry on 3rd September 1987. The form indicated that the share capital of the company is1000 shares. The company made a call for payment on 300 shares out of the 1000 shares. The holders of the 300 shares were: Twinomukunzi Charles- 100 ordinary shares, James Musinguzi- 100 ordinary shares and Henry Nganwa- 100 ordinary shares. Further, the form indicated the following persons as the directors of the company: Charles Twinomunzi, James Musinguzi, Ernest Kakwano, Matthew Rukikaire, Henry Nganwa, Amrik Singh, Mohan Singh and Tumusiime Mutebile.

The second form was a return of allotment filed for the period between 30th July 1987 and 30th July 1995.The form indicated that 1000 shares were allotted. The allotees of the said shares were described as: Twinomukunzi Charles- 100 shares, Musinguzi James- 100 shares, Nganwa Henry- 100 shares, Rukikaire Matthew- 450 shares and Garuga Properties Ltd – 250 shares. This form was filed and registered with the companies' registry on 7th February 1995 by the respondent's company secretary.

I must however make mention of the affidavit of the respondent's managing director- Mr. James Musinguzi - which confirms the fact of allotment of 450 shares to the appellant. He stated in paragraphs 6 and 7 of the affidavit as follows:

6. That since Incafex Ltd intended to acquire land in Uganda for ranching and Mr. Amrik Singh and Mohan Singh were non-Africans within the meaning of the Land Acquisition Act, it was agreed that they would not be allotted shares in the company and that their interests would be taken care of by Mr. Matthew Rukikaire who was accordingly allotted 450 ordinary shares in the company.

7. That ever since Mr. Matthew Rukikaire was allotted the said 450 shares he has never paid for them in cash as per the allotment or otherwise.

It is clear that the Respondent does not dispute the fact that the appellant was an allottee of shares. What is in contention is whether the shares had been paid for.

From the above analysis, and in line with the decision of **Lutaaya vs. Gandesha (supra),** I find that the appellant was a member of the company to whom 450 shares were allotted, since *the appearance of one's name on the Company's Annual Return may be evidence of membership.*

The only contention that remains to be resolved is whether the appellant actually paid for the 450 shares he was allotted. The trial judge found that there was no evidence adduced as to payment for the 450 shares by the appellant even though he promised to adduce the evidence of payment. I note also that the return of allotment form filed in 1995 does not also indicate that the appellant paid for the said shares whether in cash or kind.

In view of such circumstances, I am not in position to make a finding that the appellant had paid up for his shares.

However, the obligation of a member of a company limited by shares, to pay for the shares arises either when the company calls upon the shareholder to make payment for the unpaid shares during its operation or when the company is being wound up. And on a company being wound up, the liability of the shareholder is limited to the extent of the unpaid shares that he or she holds.

Therefore, the lack of evidence that the appellant had paid for the 450 shares does not affect his membership in the company.

It was also the evidence of the appellant that he invested in the company a vehicle (land rover) and land. This was not disputed by

the Managing Director of the Company who instead said the land was subject to a bank loan and that the company had contributed to clearing off the mortgage together with the appellant. I consider this as further evidence that the appellant was indeed a member of the company.

Based on the fact that the appellant adduced evidence that his name was on the annual return of allotment formand also adduced evidence that he had invested in the company, I come to the conclusion that he was a shareholder in the company.

Arising from the above, I come to the conclusion that grounds 1 and 2 succeed.

Ground 3

The appellant submitted that the learned Justices of the Court of Appeal contradicted themselves when on the one hand they held that the foreign shareholders were compensated, and yet on the other hand, they held that the appellant's shares had not been fully paid for. It would leave a question as to why anybody would be compensated for something they had not paid for.

Furthermore, the appellant argued that apart from the letter of the company secretary (Mr.Agaba Maguru) asserting compensation to the foreign shareholders, no other evidence was adduced to prove compensation.

In addressing the issue of compensation, the Court of Appeal found as follows: *During the trial, both the respondent (current appellant)*

and Amrik Singh (foreign shareholder) were crossed-examined on the consideration for the allotted shares and although they promised to produce documents and an adjournment was granted for the purpose, none of them did.

Just like the Court of Appeal noted, this Court finds that the issue of whether the alleged compensation related to investment made in the Company by the foreign shareholders or for the shares allotted to them needs to be clarified through production of evidence of payment.

In such circumstances, it is my view that the complaints raised in ground 3 would be resolved through an audit of the respondent's books of account as directed by the trial judge.

Grounds 4 and 5

The main argument in these grounds relates to whether there is sufficient evidence on record to sustain a claim of oppression and subsequent winding up of the company.

A claim of oppression is brought by a shareholder. The Companies Act did not define what amounts to oppressive conduct and this court shall not lay down a definitive description of the term oppression. To determine whether a shareholder is oppressed requires a case by case analysis of the matter before court.

The appellant claims that following his resignation from government employment, he made efforts to get involved in

the company in a more active way but such involvement was denied.

On record is a letter written by the appellant on 3rd December 2003 in which he indicated that for years the company through its managing director- Mr. James Musinguzi had never convened shareholders' meetings. In a bid to protect his interest and find an amicable settlement concerning the compensation the company had received from the government, the appellant proposed a meeting between himself and the managing director, before 5th December 2003.

In its reply dated 4th December 2004, the company simply denied the appellant's concerns. No response was made as to the proposal to have a meeting.

In his petition the appellant contends that on two occasions he was not notified of Extraordinary Meetings called by the respondent. The first occasion was a meeting held on 1st December 2003. At this meeting, a resolution was passed to remove the appellant's name as one of the signatories to the Company's bank account where the compensation money from government was to be deposited. The appellant avers that he first discovered this development in January 2004. The second occasion was an extraordinary meeting held on 3rd December 2003 at which a resolution was passed to sell one of the company's properties situated in Kololo, Kampala.

Following the above discoveries, on 15th January, 2004, and pursuant to Section 132 of the Companies Act, the appellant requisitioned for the holding of an Extraordinary General Meeting. This requisition was received and duly signed by the company secretary. The company only made response to the appellant through a letter dated 16th January 2004 informing him that he had no capacity to call a company meeting. As such his requisition was of no consequence and was to be disregarded.

The above response is what culminated into the appellant filing a suit in the High Court against the respondent on ground that the company's affairs were being conducted in a manner oppressive and prejudicial to his interests and contrary to law and procedure.

This Court notes that calling of company meetings is a statutory mandate. The Companies Act categorized company meetings into three. The Annual General meeting, Extraordinary General Meeting and statutory meeting.

It is to be noted that the right to requisition for an extraordinary meeting accrued to a person who fulfilled the requirements of **Section 132 (1)**of the (then) Companies Act below:

132. Convening of an extraordinary general meeting on requisition.

1. **The directors of a company, notwithstanding anything in its articles, shall, on the requisition of members of the company holding at the date of the deposit of the requisition not less than <u>one-tenth of such of the paid-up capital</u> of the company as at the date of the deposit carries the right of voting at general meetings of the company, or, in the case of a company not having a share capital, members of the company representing not less than one-tenth of the total voting rights of all the members having at that date a right to vote at general meetings of the company, forthwith proceed duly to convene an extraordinary general meeting of the company.**

I note that the above provision of law gave a right to a member of the company to requisition for an extra-ordinary general meeting only if such member had paid up one-tenth of the shares held. As already noted in this judgment, since the return of allotment form filed in 1995 does not indicate that the appellant had paid for the 450 shares allotted to him, I am unable to find that the appellant was qualified to requisition for an Extra-ordinary General meeting under Section 132 (1) (supra). I cannot therefore fault the company for not convening the Extra-ordinary General meeting.

Nevertheless, Extra-ordinary General Meetings are just but one type of meetings convened by a company. The appellant

also contends that for several years the respondent did not convene an Annual General Meeting.

The Annual General meeting was provided for under **Section 131 of the Companies Act Cap 110** as follows:

> **Annual general meeting.**
>
> 1. **Every company shall in each year hold a general meeting as its annual general meeting in addition to any other meetings in that year, and shall specify the meeting as such in the notices calling it; and not more than fifteen months shall elapse between the date of one annual general meeting of a company and that of the next; except that so long as a company holds its first annual general meeting within eighteen months of its incorporation, it need not hold it in the year of its incorporation or in the following year.**

Company meetings are called through written notices which must be served on each member of the company according to**Section 134** of the **Companies Act.** The Section **provided** that:

> **Notice of the meeting of a company shall be served on every member of the company in the manner in which notices are required to be served by Table A, and for the purpose of this paragraph, the**

expression "Table A" means that Table as for the time being in force.

The appellant alleged that he was never notified of any meeting the Company held.

The Court of Appeal while addressing the ground relating to oppression of the appellant held as follows:

There was no credible evidence of any other member of the said company being offended. There was also no evidence adduced to justify winding up of the appellant company.

A company meeting is an avenue through which members of the company exercise their rights and protect their interest in the company. It will therefore ordinarily be an act of oppression on the member if he is deprived of this privilege and right.

I am persuaded by the authority of **Re Nakivubo Chemists (U) Ltd [1977] HCB 311(HC)**. Although it is a decision of the High Court, it ably laid down the law regarding the principle underlying minority oppression. The facts of the case were that, on 30/5/73 the Company- Nakivubo Chemists (U) Limited was incorporated under the Companies Act Cap 85. The petitioner- Dominiko Rumanyika and two other respondents- James Rwanyarare and Joseph Kakuhikire subscribed for shares in the company. The petitioner had borrowed the money he used to buy his shares from James

Rwanyarare which money he had not repaid. James Rwanyarare purported to take away the shares from the petitioner for failure to refund his money. Rwanyarare himself had never paid for his shares. This degenerated into quarrels between the two and the petitioner claimed that the affairs of the company had been carried out in an oppressive manner.

The issues raised for determination *inter alia* were:

(1) Whether the company's affairs had been carried out in an oppressive manner and whether the petitioner had been oppressed by the majority.
(2) Whether it would be appropriate to make a winding up order.

The court held inter alia that:

> **For the petitioner to succeed under Section 211 of the Companies Act, he must show not only that there has been oppression of the minority shareholders of a company but also that it has been the affairs of the company which have been conducted in an oppressive manner. The oppression must be to a person in his capacity as a shareholder and not in any other capacity.**
>
> **Rwanyarare's illegal act of purportedly taking away some of the petitioner's shares in the company clearly amounted to oppression to the petitioner as**

a shareholder. The petitioner had also been oppressed by the majority in that he had not been allowed to attend any company meeting as a shareholder since 1974 and this was contrary to the Memorandum and Articles of Association of the company. The petitioner was wrongfully excluded from all participation in the management of the company as a result of bitter unresolved quarrelling between himself and the respondents ...

Also, **Gower and Davies** in **Principles of Modern Company law, 4th edition at page 528** state:

The Annual General Meeting is an important protection to members, for it is the one occasion when they can be sure of having an opportunity of meeting the directors and of questioning them on the accounts ... The Annual general meeting is valuable to them because the directors must hold it whether they want to or not.

The respondent alleged that the appellant was not a member – which allegation I have found legally incorrect – and therefore not entitled to requisition for a meeting. The evidence reproduced above shows that the appellant was never notified of company meetings. He was therefore denied a platform to participate in the affairs and management of the company as a member.

I therefore find that ground 4 succeeds.

Ground 5

Following the above, I now turn to the issue - whether the evidence adduced was sufficient to justify the winding up of the company.

The relevant section that provided for winding up a company on ground of oppression was Section 211 of the Companies Act. It provided as follows:

1. **Any member of a company who complains that the affairs of the company are being conducted in a manner oppressive to some part of the members (including himself or herself) or, in a case falling within section 170(2), the Attorney General may make an application to the court by petition for an order under this section.**
2. **If on any such petition the court is of opinion—**
    1. **that the company's affairs are being conducted as aforesaid; and**
    2. **that to wind up the company would unfairly prejudice that part of the members, but otherwise the facts would justify the making of a winding up order on the ground that it was**

just and equitable that the company should be wound up,

the court may, with a view to bringing to an end the matters complained of, make such order as it thinks fit, whether for regulating the conduct of the company's affairs in future, or 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.

The High Court handled the issue of winding up as follows:

To my mind, the deadlock among the shareholders of this case is all about disclosure and transparency with regard to the compensation due from the Government for the ranches of the Respondent Company which is its core business. Such a deadlock if it persists unresolved would justify the making of a winding up order on the grounds that it was just and equitable that the Company be wound up. However, would the winding up of the company unfairly prejudice that part of the members within the meaning of Section 211 (2) (b) of the Act? I think it would. Such a hurdle regarding disclosure and transparency is not unsurmountable. In such a situation the court under Section 211 of the Act may make such order as it thinks fit to bring to an end the matters complained of.

The High Court judge then made orders relating to auditing the books of accounts of the company. No winding up order was made.

The Court of Appeal held: *There was also no evidence adduced to justify winding up of the appellant company.*

However, I find that there was evidence adduced to justify winding up of the company. I have reproduced this evidence in ground 4. That notwithstanding, I am inclined to agree with the trial judge that although there was evidence to justify winding up, the contentious issue of compensation needed to be resolved. This would be possible through an audit of the company books of accounts.

I therefore find it just and equitable that the winding up order is not granted at this stage since the issues as to compensation, the value of investment (if any) into the company by the appellant and the worth of each shareholder can only be resolved after an audit of the company's accounts. Furthermore, the contentious issue of whether or not the appellant had paid for the shares allotted to him would also be resolved through the same audit.

Ground 5 therefore succeeds in part.

Orders of Court

1. The appellant having succeeded on 4 out of the 5 grounds, I would allow the appeal with costs here and in the courts below.
2. Consequently, I would set aside the judgment and orders of the Court of Appeal and reinstate the orders of the trial judgeas follows:

(a) The auditor be agreed upon by all the parties to the petition.

(b) The auditor be given specific terms of reference including;

(i) The duty to receive evidence on whether the petitioner paid for his shares.

(ii) The auditor should not consider evidence already availed in court and addressed in the judgment.

(iii) The auditor's draft report be availed to the parties for their comments.

(iv) The parties be at liberty to challenge the auditor's findings in case their comments on the draft are not taken into account.

(b) The final orders be made by court after the process in (a) and (b) are concluded.

In addition to the above orders, the terms of reference for the special audit were as follows:

1. That the special audit shall be carried out by any of the following reputable audit firms: price water house coopers, Ernest and Young, Deloitte and Touche, KPMG or PKF Uganda to be jointly appointed by the petitioner within 30 days of the judgment.

2. That the petitioner and the respondent company shall share the cost of the audit in the proportions of 1/3 for the petitioner and 2/3 for the respondent company.

3. That the preliminary findings of the special audit shall be made available to the parties within 45 days of the appointment for comments which comments shall be made within another 14 days of receipt by them of the preliminary report.

4. A final report shall be made to court and the parties within another 14 days.

5. The final report shall be binding upon the parties.

6. The special audit shall address the following issues:-

   (i) Based on the letter of M/S Agaba & Co. Advocates to Mr. James Musinguzi dated 15th December 2003 whether the 45% foreign shareholders represented by the petitioner of M/S Incafex Ltd withdrew and were compensated for their shares. Precise details as to minutes, dates

and payment amounts are to be provided by the parties.

(ii) If the said foreign shareholders were not compensated for their shares what would be the fair value for their compensation. This is to pave way for the purchase of the said shares by other members of the company or by the company.

(iii) To establish whether the respondent has been preparing and maintaining annual audited accounts and if not, to make appropriate recommendations to court.

(iv) To establish whether the respondent company has been holding regular meetings of the company and if not to make appropriate recommendations to court.

(v) To make such other recommendations to court to ensure good corporate governance within the respondent company.

Dated at Kampala this ..... day of ..... 2017.

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PROFESSOR DR. LILLIAN TIBATEMWA-EKIRIKUBINZA
JUSTICE OF THE SUPREME COURT.

Final 10th Oct 2017.