THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

[CORAM: KISAAKYE; ARACH-AMOKO; NSHIMYE; OPIO-AWERI; & TIBATEMWA-EKIRIKUBINZA, JJ.S.C.]

CIVIL APPEAL NO 03 OF 2015

BETWEEN

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

AND

INCAFEX LTD. ::::::::::::::::::::::::::::::::] RESPONDENT

[Appeal from the Judgment of the Court of Appeal (Kasule, Mwangusya & Mwondha, JJA) dated 22nd December 2014 in Civil Appeal No. 67 of 2010]

JUDGMENT OF DR. KISAAKYE, JSC

This is a second appeal from the Judgment of the Court of Appeal rendered in Civil Appeal No. 67 of 2010.

The background to this appeal and the parties' submissions have been well set out in the lead Judgment of my sister Tibatemwa-Ekirikubinza, JSC. I will therefore only give a brief summary.

The appellant petitioned the High Court in Company Cause No. 03 of 2004 under section 211of the repealed Companies Act, Cap 110.

In his petition, he contended that the affairs of the respondent company were being conducted in a manner that was oppressive to some part of its members, including himself.

The appellant made the following prayers in his Petition:

(i) An order to bring to an end the matters complained of;

(ii) Such further or other order as the Court shall think fit;

(iii) An order for the audit of the company's accounts;

(iv) An order, in the alternative, that the company be wound up; and lastly;

(v) An order that the costs of this Petition be provided for

The respondent company opposed the Petition on grounds that the appellant had no locus to petition the High Court for any of the above orders because he was not a shareholder therein.

Kiryabwire, J. (as he then was) heard the Petition and held among others, that the appellant was a shareholder and a member of the respondent company and that there was evidence of oppression on the appellant.

The trial Judge however, declined to order for the winding up of the company. He instead ordered that books of accounts of the respondent company be audited the audit report be filed in the Court. Lastly, the Judge ruled that thereafter, the parties should move Court to make consequential orders to the Judgment.

Dissatisfied with the decision of the trial Court, the respondent company appealed to the Court of Appeal. The company faulted the trial Court's finding that: (i) the appellant was a shareholder and member of the respondent company, and (ii) there was evidence that as a member of the respondent company, the appellant was being oppressed by the manner in which the respondent company's affairs were being conducted.

The Court of Appeal, held, among others, that there was no basis for the trial Judge to hold that the appellant was a shareholder when the same Court had earlier found that the appellant had failed to prove

that he had subscribed to the shares that had been allotted to him in the respondent company.

The Court of Appeal further held that since the appellant did not hold shares in the respondent company, he was therefore not a member of the respondent company and could not claim to have been oppressed by the respondent company.

The appellant was dissatisfied with the decision of the Court of Appeal and appealed to this Court on five grounds. The focus of my Judgment is on ground 4 which was framed as follows:

"That 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."

The appellant prayed this Court sets aside the Judgment of the Court of Appeal and reinstate the Judgment of the High Court. He also prayed that the respondent company pays him costs in this Court and in the Courts below.

I have had the benefit of reading in draft the Judgment of my sister, Tibatemwa-Ekirikubinza, JSC. I agree with her analysis and conclusion that the appellant is a member of the respondent company. I also agree with her finding that there was evidence of oppression of the appellant by other members and managers of the respondent company. I further agree with her that, with the exception of ground 3 of appeal, this appeal ought to succeed on all the other grounds.

The learned Justice, in the lead Judgment has found that the appellant was oppressed. While I agree with her that neither the repealed Companies Act, Cap 110 Laws of Uganda nor the new Act did not define what amounts to oppression or oppressive conduct, it is in my

view important for this Court to define oppression and to also discuss and consider the relevant evidence on record that supports our finding that the appellant was indeed oppressed.

The appellant contended that he was oppressed as member of the respondent company because: (i) the majority shareholders kept denying that he was a member of the respondent company, (ii) the majority refused to call meetings whenever he requested for them, (iii) the majority shareholders kept him out of company meetings, by among others, ensuring that he did not get notices of such meetings.

Black's Law Dictionary 9th Ed., at page 1203 defines oppression as follows:

> ***"Unfair treatment of minority shareholders (esp. in a close corporation) by the directors or those in control of the corporation."***

On the other hand, oppressive conduct was defined by **Haslam, J.** in ***Re Empire Building Ltd [1973] 1 NZLR 214, 220*** cited in ***'Words & Phrases Legally defined Vol 3 K-Q*** at page 281 as follows:

> ***"Oppressive conduct seems to me to begin when directors, or officers, or a group of shareholders, use powers expressly or impliedly given to them by [Act of Parliament] or by the constitution of the company, as to the use of which they have a discretion, in a way which is unjust to other shareholders.'***

Furthermore, in ***Re Bright Pine Mills [1969] V.R. 1002*** cited in ***Stroud's Judicial Dictionary 4th Ed. 3 I-O*** at pages1859, the Court held:

> ***"Conduct is 'oppressive' to members of a company within the meaning of s. 186 of the Companies Act 1961 (Vic.) if those holding a controlling power pursue a course designed to advance their own interests"***

Lastly, in ***Re Five Minute Car Wash Service [1966] 1 W.L.R. 745, 751, Buckley, J.*** held as follows:

> ***"To succeed in obtaining relief under the section, a member of a company must have established that at the time when his petition was presented, the affairs of the company were being conducted in a manner oppressive of himself, or of a part of the members including himself..."***

The learned Judge then set the following test a petitioner must satisfy in order to succeed in proving oppression.

> ***"First, the matter complained of must affect the person or persons alleged to have been oppressed in his or their character as a member or members of the company. Harsh or unfair treatment of the petitioner in some other capacity, as, for instance, ... in relation to his personal affairs apart from the company cannot entitle him to relief under section 210.***
>
> ***Secondly, the matters complained of must relate to the conduct of the affairs of the company.***
>
> ***Thirdly, they must be such as not only to make the winding up of the company just and equitable, but also lead to the conclusion that the affairs of the company are being conducted in a manner which can properly be described as 'oppressive' of the petitioner, and, it may be, other members.***
>
> ***The mere fact that a member of the company has lost confidence in the manner in which the company's affairs are conducted does not lead to the conclusion that he is oppressed; nor can resentment at being outvoted; nor mere dissatisfaction with or disapproval of the conduct of the company's affairs. Those who are alleged to have acted oppressively must be shown to have acted at least unfairly towards those who claim to have been oppressed."***

While all the above are persuasive authorities from other jurisdictions, they do provide useful guidelines for our Courts to use in adjudicating Petitions on oppression of members of a company.

Furthermore, I note that our own High Court adopted similar standards on what conduct can amount to oppression on a shareholder. In ***Re Nakivubo Chemists (U) Ltd [1977] HCB 312,*** Manyindo, J. (as he then was) also held as follows with respect to the Petitioner's claims that he had been oppressed.

> ***"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.***
>
> ***In the instant case the removal of the petitioner from his post of Executive Director did not amount to oppression within the meaning of section 211 of the Companies Act.***
>
> ***Dr. 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 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...By the respondents declaring and taking dividends twice without the knowledge and consent of the petitioner was also oppressive to him as a shareholder...That not being allowed to attend company meetings or purporting to take away shares of a petitioner amounted to oppression."***

Re Nakivubo (supra) is a High Court decision, which is by no means exhaustive. I however find that, it correctly reflects the law on what can amount to oppressive conduct in Uganda. I only wish to add that that since the new Companies Act of Uganda does not define oppression, it remains open to a petitioner to adduce other evidence

that can support a finding of oppression of a shareholder by our Courts.

Turning to the present appeal, the appellant claimed in his petition, at pages 13 to 14 of the Record of Appeal that he had been oppressed as follows:

> *"8. … your Petitioner made efforts to get involved in the company in a more active way but all overtures to the company, and in particular the Managing Director Mr. James Musinguzi, for such involvement or in the alternative for the holding of a formal Annual General Meeting, were ignored.*
>
> *9. Sometime in 2003 your Petitioner learnt that the company, through the Managing Director, was negotiating with the Government of Uganda for the payment of compensation to the company in respect of the companies [sic] ranches that had been taken over or acquired by the said Government.*
>
> *10. Since no annual General meeting was called nor appeared forthcoming, your Petitioner demanded to know the details from the said Managing Director who reluctantly confirmed that the said compensation was due and that a down payment in excess of one billion shillings was imminent.*
>
> *11. Upon expressing your Petitioner's disquiet at the manner the affairs of the company were being conducted, and upon your Petitioner's insistence, a Memorandum of the Company's shareholders dated 19th June 2003 was drawn up and executed by the said James Musinguzi and myself whereby it was agreed that we would be the only two signatories of the company account at DFCU Bank Ltd. and that this would not be changed without our joint signatures.*
>
> *12. …*
>
> *13. …*
>
> *14. In January 2004 your Petitioner discovered that an Extraordinary Meeting of the Directors of the company, of which your Petitioner, as a Director, was not aware and had not been*

given notice, had been held on 1st December 2003 and a Resolution passed changing the mandate to operate the above said account at DFCU Bank Limited.

15. *Your Petitioner further discovered that another Extra ordinary Meeting of the Directors of the company was held on the 3rd December 2003, again without my knowledge or any notice to me, at which a Resolution was passed to sell one of the company's properties at Kololo, Kampala.*

16. *Your Petitioner immediately wrote through my lawyers to DFCU Bank and the Registrar of Companies protesting the manner in which the companies affairs, and in particular its bank account, were being handled but received no response.*

I note that James Musinguzi, one of the Directors of the respondent company, who deponed one of the two affidavits in opposition to the petition, at pages 86 to 108 of the Record of Appeal did not reply to all the above allegations.

The same can be said of the second affidavit in opposition to the Petition, which was deponed by Henry Nganwa, also a Director in the respondent company. This Affidavit appears at pages 109 to 112 of the Record of Appeal.

I further note that the appellant alleged in his Petition that the Directors in the respondent company: (i) did not call an annual general meeting of the company; (ii) held extra ordinary meetings without his involvement, yet as a Director and shareholder, he had the right to participate; (iii) did not notify him of the convention of these extra ordinary meetings; (iv) generally did not allow him to participate in the affairs of the country.

From my perusal of the record of appeal, I have also found that the appellant also alleged that the Managing Director had failed to account for money he received on behalf of the respondent company. In

particular, the appellant alleged that the said monies were compensation made by the Government in respect of the ranches belonging to the respondent company-one of which was contributed to by the appellant.

Again, the Managing Director of the respondent company did not refute these allegations in his Affidavit in Reply.

The question that arises is whether or not there was oppression of the appellant by the managers and other shareholders in the respondent company? I note that the Court of Appeal did not consider this issue because of its finding that the appellant was not a member of the respondent company.

Section 131(1) of the now repealed Companies Act obligated a company to hold an annual general meeting. Thus, the failure by a company (usually through its Directors) to convene one is a breach of a statutory directive. Indeed under section 131(5) of the now repealed Companies Act, and under section 138(8) of the current Companies Act, 2012 failure to convene one attracts a penalty in form of a default fine of twenty five currency points.

In the present case, the respondent company was expecting a large sum of money (over 13 billion shillings according to the appellant) due to it from the Government of Uganda. The appellant, in my view, had the right, as a shareholder and director in the respondent company, to have a say on how the respondent company was going to disburse or otherwise use the money it was going to receive. It is during an annual general meeting of the company that major decisions affecting the assets and dealings of a company are tabled and discussed and voted on. Therefore, by failing to convene an Annual General Meeting, the directors of the respondent company were denying the appellant the

avenue of expressing his views. This, in my view, amounted to oppression on the appellant by the respondent company.

Similarly, by holding extra ordinary meetings without the knowledge of the appellant, thereby excluding his input in the 'extra ordinary business of the company that could not wait for an annual general meeting', the respondent company clearly oppressed the appellant. In the circumstances, I find the holding of Manyindo, J. (as he then was) in ***Re Nakivubo Chemists (U) Ltd*** (supra) that not allowing a shareholder to attend company meetings was evidence of oppression persuasive.

A clear appreciation of this oppression on the appellant is further evident in one of the resolutions passed in one of these extraordinary meetings of the directors of the company. This resolution appears at page 65 of the Record of Appeal. It was provided therein that *'with immediate effect'*, a one Henry Hapa Nganwa, a Director in the respondent company was to be added as a signatory to the respondent company's current account at DFCU Bank.

In the same special resolution, it was also stated that ANY TWO of the signatories could sign. It suffices to note that the other two signatories to the said account were James Musinguzi and the appellant.

The significance of this special resolution is not hard to decipher. It meant that James Musinguzi could sign with Henry Hapa Nganwa to access the company's funds. The effect of this resolution was that the respondent company could lock out the appellant from having any say in how the respondent company's funds are spent thereby excluding him from any financial control in the respondent company

From all the above actions of the respondent company, I find that the actions of the Managing Director and other shareholders amounted to

oppression of the appellant by the respondent company. It therefore follows that by denying the appellant the right and/or opportunity to participate in the respondent company's affairs (either through failing to convene an annual general meeting or holding extra ordinary meetings behind the appellant's back; and by-passing his signature on the respondent company's account in DFCU Bank), the majority shareholders and managers were clearly oppressing the appellant.

Having found that the appellant was oppressed by the majority shareholders, the question arises as to what reliefs is he entitled to?

I note that the appellant preferred the option of petitioning the High Court for various orders I listed earlier in my Judgment including, in the alternative, an order that the company be wound up.

I further note that that the Court of Appeal held that there was no evidence adduced to justify winding up the respondent company, since the appellant was not a shareholder therein.

I agree with the decision of the trial Judge not to wind up the company in the circumstances since it would, among others, unfairly prejudice the other members of the respondent company. I also agree with the trial Judge's finding that *'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.'* This hurdle, like the trial Judge held *'is not un surmountable.'*

Basing on the above finding, the trial Judge invoked his powers under the then section 211(2) of the Companies Act to '*make such orders it thinks fit to bring to an end the matters complained of*'.

I agree with the orders on the auditing of the respondent company's books, which have been well laid out in the lead judgment of my learned sister, Tibatemwa-Ekirikubinza, JSC. I further agree that once this audit is completed, the parties should move the High Court, as directed by the trial Judge for further consequential orders.

Conclusion

I would allow grounds 1, 2, 4 and 5 of this appeal and make the following orders:

(i) The appellant is a member and shareholder of the respondent company;
(ii) The appellant was oppressed by other Directors/shareholders in the respondent company;
(iii) That an audit of the books of the company be done as ordered by Kiryabwire, J. (as he then was) and thereafter the parties report back to the High Court for consequential orders;
(iv) The appellant is awarded costs in this Court and in the Courts below.

Order of the Court

As the rest of the members agree with the decision of Tibatemwa-Ekirikubinza, JSC, this appeal is allowed in part on the terms proposed by the learned Justice in her lead Judgment.

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

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JUSTICE DR. ESTHER KISAAKYE
JUSTICE OF THE SUPREME COURT.