THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

COMPANY CAUSE NO. 08 OF 2020

IN THE MATTER OF AFRILAND FIRST BANK UGANDA

CLIFF MASAGAZI::PETITIONER

VERSUS

AFRILAND FIRST BANK UGANDA LTD:::RESPONDENT

<u>BEFORE HON. JUSTICE SSEKAANA MUSA</u>

<u>JUDGMENT</u>

The respondent is a duly incorporated company limited by shares in which the petitioner holds 15% ordinary shares. The petitioner brought this petition against the respondent seeking for declarations and orders among others that; the affairs of the company were being run in a manner that is oppressive, prejudicial and unfair to him; an order be made for the purchase of his shares by the company at the current market value and in the alternative, that he be allowed to sell his shares to a third party.

The respondent was granted a license to transact financial institutions businesses in Uganda. At the time of its legal commencement of business as a financial institution, the respondent had a total share capital of UGX 34,430,979,327 that was divided into ordinary shares with each ordinary share valued at UGX 1 with the petitioner holding 15%.

The petitioner alleged that his shares were paid for by way of non-cash consideration. It was the petitioner's case that he was very resourceful and active in ensuring the general set up and licensing of the respondent as a commercial bank but after a short while, the respondent's managing director started excluding him from involvement in the affairs of the company without any legal justification.

On the other hand, it was the respondent's case that the petitioner was a shareholder who never paid up for the shares allotted to him who falsely alleges that he paid for his

shares by way of non-cash consideration. The respondent prayed that the petition be dismissed with costs.

The petitioner was represented by *Kagoro Friday Roberts* while the respondent was represented by *Idoot Augustine*, *Raymond Mwebesa* and *Martha Mutamba*

The parties filed a joint scheduling memorandum agreed on the following facts and issues be determined by this court.

Agreed Facts

1. On the 12th day of September, 2019 the respondent was granted a licence to transact financial institutions business in Uganda.
2. At the time of its legal commencement of business as a financial institution, the Respondent had its total share as UGX 34,340,979,327/=
3. The respondent shareholding was divided into 34, 430,979,327 ordinary shares.
4. Each Ordinary share of the respondent was valued at UGX 1/=
5. The Petitioner was allotted a total of 5,164,646,899 ordinary shares equating to a 15% shareholding in the respondent company.

Agreed Issues

1. **Whether the petition discloses a cause of action.**
2. **Whether the Petitioner's 15% shares in the Respondent Company are paid up.**
3. **Whether the affairs of the Company are being run in a manner that is oppressive, prejudicial and unfair to the Petitioner.**
4. **Whether the Petitioner can sell off his shares to the Company or alternatively to a third party.**
5. **What remedies are available to the parties?**

Both parties filed written final submissions that were considered by this court.

DETERMINATION

Issue 1: Whether the petition discloses a cause of action.

The petitioner alleges that despite evidence showing that the petitioner's shares were paid up the respondent made a call on the shares and even threatened the petitioner

that if he did not pay up, his shares would be forfeited back to the company without any compensation to him.

The petitioner contended that that was contrary to Article 19 of the respondent's amended Articles of Association which provides that a call is supposed to only be made in respect of unpaid shares. Counsel submitted that this was unfair prejudice to the petitioner's interests in the respondent company.

Counsel for the respondent submitted that the only particulars that would merit the court's consideration are the allegation of calling on his shares to determine whether a call on a member's unpaid shares constitutes unfair prejudice to him under Section 248.

Analysis

As held in **Auto Garage vs Motokov [1971] EA 514** the three essential elements to support a cause of action are where the plaintiff enjoyed a right, that the right has been violated, and finally that the defendant is liable.

The petitioner's claim was rightly brought before this court as provided for under section 248 of the Companies Act hence this court has the jurisdiction to hear the matter. According to section 248 Companies Act 2012, *a member of a company may apply to the court by petition for an order under this Part 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 herself 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.*

There is no contention that the petition discloses a cause of action but rather whether the action complained of were prejudicial to the petitioner.

This issue is answered in the affirmative.

Whether the Petitioner's 15% shares in the Respondent Company are paid up.

PW1 testified that when he accepted to join the respondent, he was allotted 15% shares and a resolution was passed to that effect. His personal data was requested by BOU to see whether he was a fit and proper person to be a shareholder and director of the respondent which he passed. That his position, goodwill and credentials were used and considered by BOU to grant the respondent the desired licence to transact financial institutions business which had been put on hold for over one year.

The respondent parent company then sent the required working capital which it had indicated in its business proposal to commence business as a financial institution. That the other shareholders were foreigners and he was the only Ugandan national, so most of the work was left to me to handle as a director/shareholder.

The petitioner testified that he put in a lot of effort in ensuring the general setup of the company as a financial institution and running of the day to day business as local (Ugandan) director/shareholder.

That it was the effort he put in to run the company to ensure the respondent gets a licence, his sweat equity, good will and all the expenses he incurred that were considered as payment for the 15% shares earlier allotted. A return of allotment was filed to effect the changes showing that his shares were paid up.

However there is no communication between the petitioner and respondent alluding to the fact that shares were paid for through non-cash consideration.

The respondent's counsel submitted that during cross examination the petitioner did not have any communication from the respondent nor was there a resolution passed by either the petitioner's shareholders or Board of Directors for him to carry on the activities he claimed to have carried on.

The applicant's counsel submitted that the evidence of the petitioner was not controverted because the only witness of the respondent, RW in cross examination testified that she joined the respondent company in February 2020 and that she was not present at the time all what was stated in the petitioner's witness statement happened.

Section 61(1) of the companies Act provides that;

"whenever a private company limited by shares … makes any allotment of its shares, the company shall, within sixty days thereafter, deliver to the registrar for registration-

a) *a return of allotments, stating the number and nominal amount of the shares comprised in the allotment, the names, addresses and descriptions of the allottees and the amount if any, paid or due and payable on each share."*

That an annual return of allotment was filed in compliance with the above provision which indicated amount of shares of 15% being equivalent to Ugx 5,164,646,899.2 paid for as well as all the other shareholders. There was no evidence adduced to show that the said return of allotment was a forgery. PW1 in re-examination confirmed that the

said document was not a forgery and that he was not the one who filed it at the company registry. RW confirmed that the signature which appears on the return of allotment was of the then company secretary.

The respondent did not dispute the annual return of allotment except for the error stated in reference to the petitioner's shares as preference shares instead of ordinary shares was in error. Counsel cited **Matthew Rukikaire versus Incafex Limited SCCA No. 03 of 2015**, evidence of the annual return of allotment was relied on for court to conclude that the appellant was a member of the company. Similarly, in the present case, the return of allotment shows that all the shares in the company are paid up.

The respondent submitted that the activities carried out by the petitioner as a paid consultant. Counsel submitted that had the shares been paid for through non cash consideration there would be evidence of compliance with section 61(1) (b) of the Companies Act which provides;

"in the case of shares allotted as fully or partly paid up otherwise than in cash, a contract in writing constituting the title of the allottee to the allotment together any contract of sale or for service or other consideration in respect of which that allotment was made such contract being duly stamped and a return stating the number and nominal amount of shares so allotted, the extent to which they are to be treated as paid up and the consideration for which they have been allotted."

The petitioner acknowledged during cross examination that when he stated that he did not have any contract for payment of his shares on a non-cash consideration and that there was no resolution by which the respondent had made such a decision or promise.

The form of return of allotment of shares shows that no shareholder of the respondent paid for his shares by way of non-cash consideration. Item numbers 4,5,6 and 7 clearly shows that.

It also further was not conclusive on whether the shares were paid for nor not. The figures for all shareholders were written in both columns making it impossible to tell whether the figure represent shares paid for or not.

Counsel concluded that there is no evidence as required by law to prove that the petitioner paid up his 15% shares in form of non-cash consideration or meets the statutory requirements for such a non-cash consideration.

The applicant's counsel submitted in rejoinder the fact that there was no resolution passed or written contract regarding the petitioner's non cash consideration for his shares is not the petitioner's fault. A contract can always be made after allotment.

That in the case of **Matthew Rukikaire versus Incafex** Limited at page 15 that, *"… the Company's duty lies with the Company secretary, whose duty is to ensure that the company complies with relevant legislation and regulations." It was further held at page 16 that such failure cannot be visited on the shareholder.*

Counsel submitted that although the annual return of allotment in the column for details of non- cash consideration it is indicated as N/A, it does not necessarily mean that the shares were not paid for and all the details indicated against each shareholder shows that all their shares are paid up.

Counsel submitted that if the details on the return of allotment were done in error as stated by the respondent that would have been rectified long time ago as it is now four (4) years since this return was filed in July 2017. At the trial, the respondent did not even show that there is any attempt to do.

Counsel cited **Olive Kigongo** versus **Mosa Courts Apartments Ltd** at page 5, where the issue relating to whether the petitioner paid for her shares, it was held that; "I find that issue not relevant under the circumstances because neither the petitioner nor the majority shareholder presented any proof that they paid for their shares. It appears from the pleadings that the company never obtained its working capital from shareholders but rather from debt financing …." The court further ordered that the petitioner's 15% shares be purchased by the company.

Counsel cited that there is no evidence from other shareholders that they paid up for their shares in cash or otherwise but all their shares are indicated as paid up and there is no reason why the petitioner's shares should be singled out as unpaid.

Analysis

There are a lot of discrepancies in the evidence on record. The annual return of allotment filed by the respondent company leaves a lot wanting. There are so many errors on the document for it to be reliably relied upon as conclusive evidence that the shares were paid for.

First both parties conceded that there were no preference shares issued by the company.

Secondly it cannot be conclusively determined whether the shares were paid for or not. On the table showing the particulars of allotment, the amount filled both columns of paid and unpaid leaving the person interpreting the table confused as to whether the amount was paid up or not.

Lastly the column for non-cash consideration was filled as not applicable.

Further more as submitted by counsel for the respondent, had the shares been paid for by non-cash consideration, the respondent company ought to have complied with **Section 61(1)(b) of the Companies Act 2012**.

It provides that; *whenever a private company limited by shares or a company limited by guarantee and having a share capital makes any allotment of its shares, the company shall, within sixty days thereafter, deliver to the registrar for registration (b) in the case of shares allotted as fully or partly paid up otherwise than in cash, a contract in writing constituting the title of the allottee to the allotment together with any contract of sale or for services or other consideration in respect of which that allotment was made such contract being duly stamped and a return stating the number and nominal shares so allotted, the extent to which they are to be treated as paid up and the consideration for which they have been allotted.*

There is no evidence that the same was complied with.

There is also no evidence of a resolution showing that the applicant's shares were to be paid up by way of non-cash consideration.

It also suffices to note that even though the respondent contended that the petitioner did all the work as a paid consultant, there is no proof on record that the petitioner was ever paid for the same. The respondent did not lead any evidence to prove that any payment was ever made to the petitioner as a consultant. What should be noted also is the fact that the respondent hired services of Plinth Consultancy Services Limited to do a consultancy business which included getting a commercial banking licence. The Managing director of Plinth Consultancy Services-Joseph Mbazzi Misagga is a brother of the petitioner which may explain how he came on board after the rejection of the earlier proposed Ugandan-Hon Muyanja Mbabali who had accepted to take up 25% shares but lacked desired qualifications.

However, it is the duty of the petitioner to prove his case on the balance of probabilities. The balance of probability standard means that a court is satisfied an event occurred if

the court considers that, on the evidence, the occurrence of the event was more likely than not.

The burden of proof is at all times on the party who alleges a claim on the balance of probabilities as per **Sections 101, 102, 103 and 104 of the Evidence Act cap 6**. As noted by the persuasive reasoning of ***Hon Justice Stephen Mubiru*** in **Olanya James v Ociti Tom & 3 others Civil Appeal No.0064 of 2017** who stated that,

"The question as to whether the plaintiff has discharged the burden of proof on a balance of probabilities depends not on a mechanical quantitative balancing out of the pans of the scale of probabilities but, firstly, on a qualitative assessment of the truth and/or inherent probabilities of evidence of the witnesses and, secondly an ascertainment of which of the two versions is more probable. The enquiry is two fold; there has to be a finding on the credibility of the witnesses and there has to be balancing of the probabilities. Application of Judicial experience requires the court to reject factual allegations if the hypothesis put forward to account for the proved facts is in itself extremely improbable. The Court may reject any hypothesis in absence of evidence supporting it. When the law requires proof of any fact, the Court must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of mere mechanical comparisons of probabilities independent of any belief in its reality….

It's the law of evidence that the party who bears the burden must produce evidence to satisfy it, or his or her case is lost. The probabilities must be high enough to warrant a definite inference that the allegations are true. In a civil suit, when the evidence establishes conflicting versions of equal degrees of probability, where the probabilities are equal so that the choice between them is mere matter of conjecture, the burden of proof is not discharged… The facts proved must form a reasonable basis for a definite conclusion affirmatively drawn of the truth of which the trier of fact may reasonably be satisfied… The law does not authorize Court to choose between guesses, where the possibilities are not unlimited, on the ground that one guess seems more likely than another or others." (P.6,7).

It is unlikely that the respondent company awarded the petitioner 15% shareholding with no documentation whatsoever on record to prove the same. It is also unlikely that the petitioner did all the work to ensure the general set up of the company with no payment except for the undocumented award of paid up shares. The record and

evidence shows that the consultant hired to execute the work was Plinth Consultancy Services Limited which belongs to the Petitioner's brother.

The petitioner's evidence has left a lot to be desired by this court. The petitioner has never paid up for the 15% shares allotted to him.

This issue fails.

Whether the affairs of the company are being run in a manner that is oppressive, prejudicial and unfair to the petitioner.

According to the petitioner, the particulars of oppression include calling meetings without his notice, making a call on his shares which are fully paid up, being excluded from the involvement of the affairs of the company, ignoring his calls to have meetings with the management to address his grievances but to no avail.

The petitioner testified that, he put in a lot of effort which included sweat equity and goodwill in ensuring the general setup of the company as a financial institution and running of the day to day business and also to ensure that the respondent gets a licence to conduct financial institutions business but after the respondent company was up and running, the managing director started excluding him.

Counsel for the applicant submitted that **Olive Kigongo versus Mosa Courts Apartments, High Court Company Cause No. 01 of 2015,** it was held that," *to constitute unfair prejudice, the value of the quality of the shareholder's interests, that is his/her shares in the company limited by shares must be adversely affected."* It was further held that, "*the objective test of unfairness is what amounts to unfair prejudice. It is not necessary for the petitioning shareholder to show that anybody acted in bad faith or with intention to cause prejudice …. Fairness is judged in the context of a commercial relationship, the contractual terms which are paramount and as are set out the Articles of association and in any binding shareholders agreement.*

Counsel further submitted that the case went on to outline what may constitute unfairly prejudicial conduct and among them are; exclusion from management in circumstances where there is (legitimate) expectations of participation; abuses of power and depriving the member of their right to know the state of the company's affairs.

Counsel submitted that the respondent's actions of excluding the petitioner from the affairs of the company, conducting meetings without his notice which denied him

platform to participate in the affairs and management of the company, making a call on his shares and/ or requiring him to forfeit them back to the company without any compensation, is unfair to his interest as a member and shareholder of the company.

That the petitioner is a director as well as a shareholder with a right to be involved in the affairs of the company and since he was left out in the participation and management of the company and also the fact that call was made on his paid-up shares and the threat to forfeit the same, all this was oppressive, prejudicial and unfair to him.

Counsel for the respondent submitted that the petitioner did not have evidence to support all the particulars he stated in the petition as constituting oppressive behavior.

Counsel submitted that the petitioner failed to show how the failure to call him for the director's meetings amounted to unfair and prejudicial conduct towards him. That an allegation of unfair and prejudicial conduct should not only be alleged but must be proved with cogent evidence and prejudice proved.

On the call of unpaid shares, counsel submitted that the petitioner's shares were unpaid for and the directors were entitled to make a call which is the procedure applicable in the memorandum and articles of association. That a call was only supposed to be in respect of unpaid up shares.

In rejoinder, counsel for the petitioner submitted that the respondent making a call on the petitioner's shares which are paid up constitutes unfair prejudice to the petitioner's interest in the said shares and it is obviously unfair to him.

Analysis

The statutory juxtaposition of the words oppressive and unfairly prejudicial seems to introduce in the descending order, the stringency of the proof required to invoke in case of oppression remedy. In other words, the wording of the legislation seems to suggest that oppressive conduct requires stricter proof than unfairly prejudicial conduct which, in turn, requires stricter proof than unfair disregard.

The courts have given different interpretation to the two words. In ***Such v RW-LB Holdings Ltd (1993) 11 BLR (2d) Alta QB*** it was held that the burden of proof required for unfair prejudice or unfair disregard is less rigorous than the burden of proof required for oppression because what is at issue is the unfair result of the conduct, not the state of mind of the wrongdoer. Similarly, in ***Re Mason and Intercity Properties Ltd***

(1987) 59 OR (2d) 631Ont CA Blair JA opined that 'oppressive' conduct involves a more rigorous standard than that of 'unfairly prejudicial' or conduct which 'unfairly disregards'. Again, in ***Dancey v 229281 Alta Ltd (1988) 40 BLR Alta QB*** it was held that the words 'unfairly prejudicial' had an effect different from and going beyond that ascribed to 'oppressive'

That the petitioner doubled as a shareholder and director of the respondent and he believes there was no reason why he was always left out on the important aspects of the respondent which were to affect him as well.

In **Olive Kigongo vs Mosa Courts Apartments, High Court Company Cause No. 01 of 2015;** To constitute unfair prejudice the value or the quality of the shareholder's interest, that is his/her shares in the company limited by shares must be adversely affected.

Justice Stephen Musota further held that;

The objective test of unfairness is what amounts to unfair prejudice. It is not necessary for the petitioning shareholder to show that anybody acted in bad faith or with intention to cause prejudice. The courts will regard the prejudice as unfair if a hypothetical reasonable standard would regard it to be unfair. Fairness is judged in the context of a commercial relationship, the contractual terms which are paramount and as are set out in the Articles of association and in any binding shareholders agreement. This court believes that the protection for a shareholder is found in the Articles themselves. Therefore, is the conduct of which the shareholder complains in accordance with the Articles and the powers which the shareholder have entrusted the board? If the conduct is in accordance with the articles to which the shareholder has agreed it will be difficult to succeed in a cause based on unfair prejudice. This does not mean that anything done outside the articles amount to unfair prejudice. Far from it. Even if the conduct is not in accordance with the articles, it does not necessarily render the conduct unfair since trivial and technical infringements of the articles may not give rise to a remedy under Section 248 of the Companies Act.

Therefore unfair prejudice is a flexible concept incapable of exhaustive definition. This means that the categories of conduct which may amount to unfair prejudicial conduct are not closed. Examples that may constitute unfairly prejudicial conduct are:

1. *Exclusion from management in circumstances where there is (legitimate) expectations of participation.*

2. *The diversion of business to another company in which the majority shareholder holds interest.*
3. *The awarding of the majority shareholder to himself of excessive financial benefits.*
4. *Abuses of power and breaches of Articles of Association for example the passing of a special resolution to alter the Company's Articles maybe unfairly prejudicial conduct if such alterations would affect the petitioner's legitimate expectation that he would participate in the management of the company.*
5. *Repeated failures to hold Annual General Meetings.*
6. *Delaying accounts and depriving the members of their right to know the state of the Companies affairs.*

This therefore begs the question as to whether the particulars of unfair conduct complained of by the petitioner fit within what amounts to unfair prejudice.

The petitioner stated that the calling and holding the company's Board of Directors meeting on the 12/12/2018 and 24/1/2019 to authorize the opening of various bank accounts without notice of the meeting to your petitioner. The petitioner did not show how this was prejudicial to his interests in the company. As held in **Kigongo vs Mosa Courts (supra);** the value of the petitioner's interest in the company ought to be adversely affected. There is no evidence that the petitioner's interest was in adversely affected as a result of being excluded from the two board meetings.

The petitioner also contended that the calling and holding the company's board of directors meeting on the 23/4/2019 to authorize a call on shares without notice of the meeting to your petitioner. Further that the company CEO writing a letter to your petitioner on the 10/4/2019 demanding that he pays up for the 15% allotted shares he validly holds in the company. It was well within the mandate of the respondent's board of directors to make a call on unpaid shares. The petitioner's contention that his shares were paid up did not bar the respondent who contended that the shares were unpaid for from making a call on the unpaid shares. As a shareholder, the petitioner was not entitled to attending a meeting for making a call on shares. There is no evidence from the petitioner showing that the call on shares was oppressive and prejudicial to him as this was conduct in accordance with the Articles of Association.

Oppressive conduct is a concept that involves the most stringent requirements and it connotes to burdensome, harsh and wrongful conduct to some part of the members of the company. It therefore necessitates a course of conduct, not mere isolated acts, continuing up to the time of petition involving an invasion of legal rights, displaying lack of probity on the part of those conducting the company's affairs, and affecting the petitioner in his capacity as a member. See ***Scottish Cooperative Wholesale Society Ltd v Meyer [1959] AC 324; Cohen v Jonco Holdings Ltd (2005) 4 BLR (4th) 232 Man CA***

The petitioner states that he has not been invited for meetings but he does not state how many of such meetings and which type of meetings he has not been invited to attend. However, he acknowledges being invited for a board meeting dated 25th January 2020. The notice Invitation for the said meeting clearly indicated as follows; *NOTICE OF THE FIRST ORDINARY MEETING OF THE BOARD OF DIRECTORS OF AFRILAND FIRST BANK.* It would appear this was the first meeting unless the petitioner mentions any other meeting he alleges or knows to have been conduct.

The petitioner has been appointed to two proposed Board committees to wit; Board Risk/Credit Committee and Board ALCO Committee. This clearly means the petitioner has been involved in the proposed management of the company

The petitioner contended that reporting in the 25th January 2020 meeting that the company bought treasury bills and allegedly made profits of US $ 2000,000 without the knowledge and involvement of your petitioner. There was no evidence of this allegation put forward by the petitioner and cannot be termed as prejudicial conduct towards the petitioner.

That the respondent mismanaged funds by spending 700 million on a Land Cruiser Prado and a Toyota Wish without his knowledge. This allegation was never proved by the petitioner and was rebutted by the respondent. There was no proof by the petitioner showing how the respondent procuring property was prejudicial to the interests of the petitioner.

The petitioner has a duty to show how prejudicial acts are to his interest in the company. The courts have held that the conduct complained of must be prejudicial in the sense of causing prejudice or harm to the relevant interests of a shareholder (or, presumably, other complainant) and that as such both unfairness and prejudice must be

proved. See ***Re Saul D Harrison and Sons plc [1995] 1 BCLC 14 Eng CA: Re RA Noble & Sons (Clothing) Ltd BCLC 273***

Having found that all the actions complained of by the petitioner did not amount to unfair or prejudicial conduct, this issue is resolved in the negative.

Whether the Petitioner can sell off his shares to the Company or alternatively to a third party.

Having found that the petitioner's shares were unpaid for, the respondent has a lien on the allotted shares preventing him from selling them.

Article 15 of the respondent's Amended Articles of Association provides that *the company shall have a first and paramount lien on every share (not being a fully paid share) for all moneys (whether presently payable or not) or payable at a fixed time in respect of that share, and the company shall also have a first and paramount lien on all shares (including fully paid shares) standing registered in the name of any person for all moneys presently payable by him or his estate to the company; but the directors may at any time declare any share to wholly or in part exempt from the provisions of this Article.*

See ***Alfred Byaruhanga Muhumuza & Another v UNI OIL (U) Ltd High Court Company Cause No. 14 of 2016***

The petitioner therefore cannot sell off his shares to a third party.

What remedies are available to the parties?

The petitioner has failed to discharge their burden to prove the allegations put forward.

This petition fails on all the issues raised by the petitioner. The same stands dismissed with no order as to costs.

I so order.

SSEKAANA MUSA
JUDGE
24th June 2021