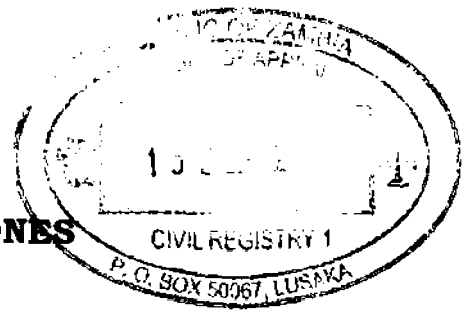
IN THE COURT OF APPEAL FOR ZAMBIA **APPEAL NO. 30/2017**

HOLDEN AT LUSAKA

(Civil Jurisdiction)



BETWEEN:

MICHAEL ROBERT JONES **APPELLANT**

AND

SONS OF THUNDER LIMITED **RESPONDENT**

CORAM: Mchenga, DJP, Chashi and Mulongoti, JJA
on 6th and 13th June, and 14th September, 2017

For the Appellant: *I.E. Suba (Ms), Messrs Suba, Tafeni & Associates*

For the Respondent: *Messrs Mak Partners (N/A)*

J U D G M E N T

CHASHI, JA delivered the Judgment of the Court.

Cases referred to:

1. ***Glossop v Glossop (1907) 2 Ch, 370***
2. ***Ndungo v Moses Mulyango and Rostic Banda (2011) ZR, Volume 1, 187***
3. ***Philip Mhango v Dorothy Ngulube and Others (1983) ZR, 81***

Legislation referred to:

4. ***The Companies Act, Chapter 88 of the Laws of Zambia***

Other Works referred to:

5. ***Mayson, French and Ryan on Company Law – 22nd edition, 2005 – 2006, Oxford University Press.***

This appeal is against the Judgment of the High Court, which was delivered in favour of the Respondent, which was the plaintiff in the court below.

We shall in this Judgment refer to the Respondent as the plaintiff and the Appellant as the defendant, for that is what they were in the court below. The background to this matter is that, the plaintiff commenced an action on 11th October 2016, by way of writ of summons, accompanied by a statement of claim, seeking the following reliefs:

1. *An order extending the time within which to file the changes on the companies register at the company's registry.*

2. *An order directing the defendant to file in the companies registry in order to effect changes on the register of the company or in the alternative an order directing the Registrar of companies to effect the changes without the signature of the defendant.*

At the trial, the plaintiff's witness Reini Marini testified that the defendant was a founder member and a guarantor of the plaintiff company, a company limited by guarantee. He resigned in 2006 and the plaintiff's parent company accepted his resignation.

According to Marini, she was then together with her husband appointed as directors of the company. She was further appointed as company secretary and together they took charge of the company.

Marini's further testimony was that after resigning, the defendant had no dealings with the company and his whereabouts were unknown. The defendant only showed up at the company farm in 2014 and demanded company records and books of accounts, which she resisted to hand over. It was asserted that at the time of resigning, the defendant did not sign any documents to enable the company effect the necessary changes and file returns. This is what gave rise to the proceedings in the court below.

In turn, the defendant filed a defence that he had not resigned from the company, but had only asked to be released from his liabilities and responsibilities as regards day to day administration of the company, whilst remaining a member, guarantor and director of the company.

The defendant counter claimed the following against the plaintiff:

1. *A declaration that the defendant was a bonafide member and director in the company.*
2. *Damages for loss of and deprivation from participating in all activities of the company.*

3. *Damages for stress, embarrassment and anguish.*
4. *An interim Order prohibiting the plaintiff from disposing off any land currently owned by the company in particular farm number 1944 Livingstone and any other assets pending determination of the cause.*

It was the defendant's evidence that he was excluded from the company and despite having left his physical and postal addresses, as well as his mobile contact, he was never contacted for any meeting. When he became aware that the plaintiff wanted to illegally sell off part of the farm, he lodged a caveat and demanded to enforce his rights as a member, shareholder, director and guarantor of the company by having access to the books and records. According to the defendant, the plaintiff's actions have caused him a lot of stress, embarrassment and anguish.

After considering the evidence and submissions by the parties, the learned trial Judge found that the plaintiff company was limited by guarantee and at the time of incorporation in 1996, the defendant was one of the guarantors. He further found that on 10th April 2006, the defendant authored a document in which he requested to be released of all responsibilities and liabilities in the company. Thereafter the defendant neither participated in the running of the company nor attended any meeting. The document was viewed and

treated as a resignation from the company by all those who worked with the defendant and as a result, the parent company accepted it as a resignation and sent Marini and the husband from United States of America to Zambia, to administer the company.

The learned trial Judge was of the view that the defendant resigned from all responsibilities and liabilities in the company. That the explanation that he was resigning only from day to day administration was extrinsic of the document and could not be accepted to alter or vary the meaning therein.

Further that, that was compounded by his conduct after the document, by staying away from the company until 2014, without any correspondence or evidence that he had wished to manage or participate in the administration of the company in order to justify his counter claim.

According to the learned trial Judge, the document authored by the defendant was in tandem with Section 19(3) (b) and 210 (1) of the ***Companies Act***[4] (the Act), which respectively provides for resignation of a member and director by giving notice. Thereafter, the plaintiff company and or the defendant in accordance with Section 19 (4) of the Act should have within seven (7) days, have brought the

resignation to the attention of the Registrar by filing the necessary documentation to effect changes to the membership and directorship of the company. That having not done so, there was default on the part of the plaintiff and the defendant, which could only be remedied by an order to extend time within which to file the necessary changes at the company's registry, pursuant to Section 371 of the Act.

The learned trial Judge accordingly granted the application to extend time and further ordered that the company's registry fills in the necessary documentation.

The learned trial Judge did not find any merit in the counter claim and he declined the reliefs which were being sought by the defendant.

Disenchanted with the Judgment, the Defendant launched an appeal to this court advancing seven grounds of appeal as follows:

1. *The honorable court erred in law and fact when it held that the defendant did not after the alleged resignation participate in the running of the company and that he thereafter attended no company meeting.*

2. *The honourable court erred in law and fact when it held that both the plaintiff and the defendant were in agreement that following the resignation of the defendant, the defendant did not participate in the administration of the company.*

3. *The honourable court erred in law and fact when it held that the defendant admitted that the letter handing over his day to day duties was in fact admitted by him in his testimony as having been accepted by the company as his resignation letter from the company when in fact not.*
4. *The honourable court erred in law and fact when it held that other directors were appointed, necessary documents were filed with the Registrar of companies and the directors were recognised as they were included on the record of directors of the company by the Registrar when in fact there is evidence on record to the contrary*
5. *The honourable court erred in law and fact when it directed the Registrar of companies to remove the defendant's name from the names of directors and guarantors of the company without having to sign the resignation form as provided for under the Act.*
6. *The honourable court erred in law and fact when it held that it found no merit in the defendant's counter claim and dismissed it in total.*
7. *The honourable court erred in law and fact when it condemned the defendant in costs.*

At the hearing of the appeal, learned Counsel for the defendant, Ms Suba, relied on the appellant's heads of argument. Although Counsel for the plaintiff was not in attendance, he did file the respondent's heads of argument, which we shall take into consideration in determining this appeal.

Counsel for the defendant argued grounds 1 and 2 together. Grounds 3, 4, 5 and 6 were also argued simultaneously.

In arguing the 1st and 2nd grounds, it was contended that, the record will show that right up to the time of the Judgment in the court below, the defendant as shown at page 296 of the record of appeal was still a director, shareholder and guarantor of the company.

Counsel submitted that there is a distinction between membership of a company and management by directors. The court's attention in that respect was drawn to sections 206 (2), 45 (3) and 19 (2) of the Act and submitted that the defendant was entitled to directorship of the company by virtue of being named as a director at the time of incorporation. That the document, alleged to be a letter of resignation, referred to being released from all responsibilities and liabilities of the company and not resigning as a member or guarantor. Reference in that respect was made to Section 210 (1) of the Act, which provides for resignation of directors.

According to Counsel, the company in 2009 filed returns, which showed the defendant as one of the four directors. That this was an indication that the defendant had continued retaining his directorship as well as being a guarantor. That it was for that reason that he did not sign the requisite statutory form signifying his resignation from the company.

In response to grounds 1 and 2 it was submitted on behalf of the plaintiff that, instead of arguing in support of the contention in the two grounds, that the defendant has been participating in the running and administration of the company, the defendant had opted to show how his name appears on the documents at company's registry. That, the fact that his name appears on documents at the registry is not in dispute and that's the reason why the matter was commenced. Further, the fact that his names still appear at the registry, does not confirm that he was participating in the running and or administration of the company.

It was further submitted that, as rightly held by the learned trial Judge, the defendant did not produce any document or communication to show that he was active in the affairs of the company.

On the document at page 129 of the record, it was submitted that the question as to whether the contents can be construed as a resignation depends on the interpretation of the following:

(a) The correspondence before and after the documents relating to the departure of the defendant and

(b) The literal interpretation of the words used in the documents.

The Court's attention was drawn to pages 223 – 227 of the record and submitted that the defendant resigned from the company both as director and guarantor and his resignation was accepted by the company. On the literal interpretation of the words *"release of responsibility and liability"* it was submitted that according to the ***English Oxford Advanced Learners Dictionary, 8th edition***, it means *"to set somebody or someone free"*, which has the effect of resignation.

It was contended that, there is ample evidence of the defendant's resignation as director and member of the company and he cannot therefore without consent of the company unilaterally decide to assume the responsibilities and liabilities he had sought to be released from and was released. Reliance in that respect was placed on the case of the **Glossop v Glossop**[1] at page 310 where Neville, J held that:

> *"A director is entitled to relinquish his office at anytime he pleases by proper notice to the company and that his resignation depends upon his notice and is not dependent upon any acceptance by the company, because I do not think they are in a position to refuse acceptance. Consequently, it appears to me that a director once having given in a proper quarter notice of his resignation of his office, is not entitled to*

withdraw that notice, but if it is withdrawn, it must be by the consent of the company properly exercised by the managers who are the directors of the company"

On the strength of the aforestated, it was submitted that the defendant resigned and the court properly found that he did not thereafter participate in the running or administration of the company.

In responding to the third ground of appeal, Counsel for the plaintiff contended that there is no such finding by the court at page 23 of the record as is being advanced by the defendant and as such they have failed to find any connection between the ground of appeal and the holding from which it is said to emanate.

In arguing the 4th, 5th, 6th and 7th grounds of appeal, Counsel for the defendant submitted that, she was at pains to find a provision under the Act, that gives power to the court to compel or force a member, secretary, director or guarantor to resign his position or ejected.

According to Counsel, guarantorship cannot be transferred. In order to dispense with guarantorship, a company has to wind up and seize to operate. That this brings to the fore a lot of irregularities which point to the fact that the two additional directors were not appointed in accordance with sections 206 of the Act.

It was further submitted that, it was wrong for the court below to have dismissed the defendant's counter claim in view of the evidence on page 298 and 299 of the record, to the effect that he was prevented from having access to the company's premises which conduct culminated into an injunction being obtained by the plaintiff.

On the issue of costs, it was contended that the court erred in condemning the defendant as the proceedings in the court below were only commenced seven to eight years later, whilst in the meantime the plaintiff continued filing returns in which the defendant was being indicated as a director. Counsel in concluding, urged us to have the lower court's Judgment set aside.

In response to grounds 4, 5, 6 and 7, Counsel for the plaintiff submitted that there is evidence on record at pages 295 and 296 that two more directors were added to the list of directors at the company's registry and therefore, Marini and her husband were also directors. That it is therefore not true that there is no evidence of appointment of more directors on the record.

It was further submitted that the defendant does not seem to appreciate the context in which the action in the court below was

commenced. The court was not being called upon to force the defendant to resign but to direct the completion of the resignation process which was started by the defendant, by having the changes agreed upon by the parties effected.

That as regards the guarantorship, there was no prayer by the plaintiff to have the same transferred. What was in issue was the resignation by a member or guarantorship and the law under Section 19 (3) (b) of the Act.

On the counter claim, it was submitted that the court below was on firm ground, to dismiss the same because its validity was dependant on the success of the defendant's argument that he never resigned from the company. Having failed, the court below was entitled to dismiss the counter claim.

On the issue of costs, it was argued that they are granted in the discretion of the court and the normal practice is to award costs to the successful party.

In conclusion, it was argued that this appeal is mainly against findings of fact and the evidence, in support of the said facts. The defendant having failed to show that the findings of the court below were perverse or made in the absence of relevant evidence, the

appellate court cannot upset findings of the trial court. Reliance was placed on the case of **Ndungo v Moses Mulyango and Rostic Banda**[2] where the Supreme Court held that an appellate court will not reverse findings of fact made by a trial Judge unless it is satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of fact or that they were findings which on a proper view of the record, no trial court acting correctly can reasonably make.

We were urged to dismiss the appeal with costs.

We have carefully perused the record and considered the arguments by both parties.

It is evident and we agree with the plaintiff's argument that all the grounds of appeal are premised on attacking the learned trial judge's findings of fact. There is a plethora of authorities on this issue as far back as the case of **Philip Mhango v Dorothy Ngulube**[3] to the **Ndungo case**[2], which has been cited by counsel for the defendant. The Supreme Court has on numerous occasions held that an appellate court will not reverse findings of fact made by a trial Judge unless it is satisfied that the findings in question were either perverse, or made in the absence of any relevant evidence or upon a

misrepresentation of facts, or that they were findings which on a proper view of the evidence, no trial court acting correctly can reasonably make. We shall revert to this point in due course.

In determining this appeal, we shall deal with grounds 1 and 2 together, ground 3 on its own and ground 4, 5 and 6 simultaneously.

Grounds 1 and 2 though similar, comprises of two limbs. The first limb raises the issue of whether, after the alleged resignation, the defendant did participate in the administration of the company. The second limb raises the issue of whether the document on pages 40 and 129 can be considered as a resignation. This is the same issue, which has been raised under the third ground of appeal. We shall therefore appropriately consider the second limb under ground 3.

As regard the first limb, it is not in dispute and it is in fact common cause, that at the time of incorporation, the defendant was one of the directors and he remained as such on paper after the resignation as evidenced by the returns in the defendants' bundle of documents.

There is however no iota of evidence, either documentary or through some other activity, that after the resignation, the defendant continued participating in the administration or affairs of the company as a director or member or otherwise.

In the absence of such evidence, coupled with the defendant's conduct of having stayed away from the company from 2006 to 2014, the learned trial Judge cannot be faulted in his finding that there was no evidence after the resignation that the defendant had wished to manage or participate in the administration of the company.

We now turn to the third ground of appeal. Here again, it is common cause that the plaintiff company was incorporated under Section 13 (b) (ii) of the Act as a company limited by guarantee, as a non-profit or non-commercial undertaking.

It is also not in dispute that at the time of incorporation, the defendant was one of the guarantors of the company. The liability of a member of a company limited by guarantee was made very clear by the learned authors of ***Mayson***, ***French*** and ***Ryan on Company Law***[5] at page 23 where they stated that:

> *"The liability of a member of a company limited by guarantee is based on the undertaking to contribute on the winding up of the company, an amount not exceeding a sum specified in the memorandum for the payment of debts and liabilities of the company and of the costs, charges and expenses of winding up and for the adjustment of the rights of the contributories amongst them"*

The defendant's declaration and undertaking as to his liability to the company appears on page 198 of the record.

As earlier alluded to the issue under this ground is whether the letter at page 40 of the record can be construed as a letter of resignation as a member and director of the company.

For ease of reference and understanding, it is inevitable to reproduce the relevant portion of the said letter by the defendant to the plaintiff:

> *"Subject: Release of Responsibility and Liability.*
>
> *I, Michael R. Jones, request written and signed release of all responsibilities and liabilities of and to Sons of Thunder LTD, Zambia as of the 10th day of April, 2006..."*

We agree that the wording of the aforestated is clear and does not need any extrinsic evidence to be read into it. The defendant was asking the company to release him from the responsibilities, which he bore as a director and the liabilities as a member and that they should sign off such release in writing which they did vide e-mail appearing on page 223 of the record, in which they indicated that they were accepting the defendant's resignation. The defendant never took any issue with the use of the word, resignation by the plaintiff.

The defendant instead went on and negotiated his separation package and was accordingly paid what was due to him. Although the letter in issue does not use the word, resign, it is in consonant

with resignation and in line with Article 39 (6) of the Company's articles of association and Section 210 (1) of the Act which deal with resignation of a director. It also conforms with Section 19 (3) (b) of the Act which stipulates, how one ceases to be a member, by giving written notice. Furthermore, the defendant's conduct of absenting himself from 2006 to 2014 without any communication clearly shows that he had left the company.

Here again the learned trial Judge cannot be faulted by making a finding of fact that the defendant had resigned and dismissing his counter claim which was premised on determination of resignation. This ground of appeal is accordingly dismissed.

As regards grounds 4, 5 and 6, it is evident from the reliefs, which were being sought in the court below, that the plaintiff was seeking the completion of the process of the resignation by the defendant in order to effect changes to the company's register as opposed to compelling or forcing the defendant to resign. We are at pains ourselves to understand how this ground arose as this issue never arose in the court below.

Furthermore, the issue of appointment of other directors was not an issue in the court below and is being raised in this Court for the first

time. An issue not raised in the court below cannot be raised on appeal. We also find the contention by the defendant, that a guarantorship, which is the same as a member of the company limited by guarantee cannot be transferred. That argument is highly misleading and not tenable as the Act provides for cessation of membership as well as issuance and transfer of shares pursuant to part IV of the Act.

As regards the dismissal of the counter claim, we have already addressed the issue in our determination of ground 3 of the appeal.

As earlier alluded to, the learned trial judge made findings of fact, which in our view were correct. They were not perverse or made in the absence of any relevant evidence or upon a misrepresentation of facts. As such, we are not in a position to tamper with or reverse the same.

The sum total of this appeal, is that it lacks merit and is accordingly dismissed.

On the issue of costs, we note that the default in registering the changes which gave rise to this action was occasioned by both

parties. This therefore is an appropriate case for ordering that each party bears its own costs both in this Court and in the court below.

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C. F. R. MCHENGA
DEPUTY JUDGE PRESIDENT

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J. CHASHI
COURT OF APPEAL JUDGE

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J. Z. MULONGOTI
COURT OF APPEAL JUDGE