

INTERNATIONAL TRADES CRYSTALS SOCIETE ANONYME v NORTHERN
MINERALS (ZAMBIA) LIMITED (1985) Z.R. 27 (S.C.)

SUPREME
NGULUBE, D.C.J., GARDNER AND MUWO, JJ.S.
27TH FEBRUARY,
(S.C.Z. JUDGMENT NO 5 OF 1985)

COURT
1985

Flynote

Civil Procedure - Writ - Authority for issue - Resolution by Company in absence of one director - Waiver of right to require second meeting - Validity of resolution.
Company - Meeting - Irregularity - Waiver - Failure by person affected to require another meeting.

Headnote

The plaintiff sued the defendant for certain sums of money. The defendant applied to have the writ set aside on the ground that the resolution passed by three out of five directors of the plaintiff company authorising the institution of the proceedings was not valid because one of the directors had not been notified of the meeting at which the resolution was passed. The director to whom notice should have been given became aware of the decision taken in his absence and took no steps to require a second meeting to be held so that he could vote on the resolution.

Held:

As the director affected had not called for another meeting within a reasonable time or at all, he could be regarded as having waived the irregularity which would otherwise have attached to the meeting at which the resolution was passed.

Cases referred to:

- (1) Bellamano v Ligure Lombarda Ltd. (1976) Z.R. 267
(2) Browne v La Trinidad [1888] 37 Ch. 1

For the applicant: S.Sikota, of Solly Patel, Hamir and Lawrence.
For the respondent: J.H. Jearey, of D.H. Kemp and Company.

Judgment

NGULUBE, D.C.J.: delivered the judgment of the court.
For convenience, we propose to refer to the applicant as the defendant and to the respondent as the plaintiff.

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This is an application by the defendant for leave to appeal against the decision of the High Court in its appellate jurisdiction, in the following circumstances:

The plaintiff sued the defendant for certain sums of money representing the proceeds of sale of certain minerals sold by the defendant on behalf of the plaintiff. The relationship between the parties was governed by a contract which had an arbitration clause. Both here and below, the defendant has raised objection to the suit on two grounds contained in two applications which were made to the Deputy Registrar: The first being an application to stay the proceedings so as to enable an arbitration to take place; and the second being an application to set aside the writ on the ground that the same had been issued without authority.

In relation to the application for a stay of proceedings on the ground that the contract between the parties provided for arbitration, we are satisfied, on the evidence on record, that there was in fact no dispute relevant to the contract. The argument which Mr Sikota has advanced shows clearly that the defendant was proposing to raise a counter-claim in its capacity as a shareholder in the plaintiff company against the other shareholders. Such being the case, it is clear that there is in fact no dispute alleged between the plaintiff and the defendant as such arising out of the contract between them and for that reason, there can be no dispute which can be referred to arbitration under the said contract. There were other considerations which the learned appellate Commissioner of the High Court had taken into account, but in the view that we take, it is unnecessary to deal therewith. The argument in support of the contention that the proceedings be stayed for the purpose of arbitration cannot possibly succeed having regard to the point to which we have referred.

We now turn to the argument that the writ was issued without authority. The defendant applied to have the writ set aside on the ground that the resolution passed by three out of five directors of the plaintiff Company, authorising the institution of proceedings was not validly passed. The submissions in this regard were that since one of the directors had not been notified of the meeting at which the resolution was passed, the proceedings at such meeting were invalid, and that, therefore, the resolution passed was of no effect and so, the proceedings were issued without authority. During the course of the hearing, the issue was raised as to whether or not it is necessary for a company to pass a resolution before proceedings can be instituted. We observe that the record before this court does not exhibit the Company's Memorandum and Articles of Association, but since a resolution was passed (which is the subject of discussion), we assume that a resolution was required in this matter in terms of the Company's Articles of Association. If we understood both counsels correctly, it is not in dispute that all the directors of a company are entitled to receive notice of meetings save in the circumstances to which any appropriate articles may make exception. We agree also with the general proposition of the law regarding meetings of directors, that as a general rule, a decision passed by directors at a meeting to which some of their number are not invited will generally be considered to be invalid.

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The consequences of what we have said, however, are not necessarily that the writ must be set aside. Where there is an irregularity in the passing of a resolution by a company through its directors, then, depending on the circumstances of each particular case, the action commenced, allegedly without proper authority, may either be dismissed or it may be stayed, at the discretion of the Court, to permit any irregularity which can be cured to be cured. This is what happened for example, in the case of *Bellamano v Ligure Lombarda Ltd.* (1) where proceedings were stayed on condition that the action be thereafter properly constituted by ratification or otherwise on the part

of the plaintiff.

On the facts of this case, however, we note that the director to whom notice was not given became aware of the decision taken in his absence. As the irregularity in this case was curable, we find that it can in fact, and it may well be cured by the calling of another meeting to which the director concerned could be summoned. However, we do not propose to make the sort of conditional order which this Court made in the *Bellamano* case to which we have referred. The reason for this is that we agree with the submission made by Mr J. Jearey, that since the absent director was aware of the decision made, he could have demanded that a meeting be called to re-discuss the issue. Mr Jearey relied on the following passage appearing on page 526 of the 4th edition of Pennington's Company Law:

"It has been held that unless proper notice of a board meeting is given to each director, the meeting and all resolutions passed thereafter are void, but in two other cases, it was held that failure to give proper notice to a director merely entitled him to require a second meeting to be held if he does not attend the first; if he does not require a second meeting to be held within a reasonable time after learning of the first meeting, he waives his right to require it, and resolutions at the first meeting then become unassailable. From the practical point of view, the second of these two decisions is obviously preferable."

We agree with the last proposition therein made and find that, as the director affected had not called for another meeting within a reasonable time or at all, he can be regarded as having waived the irregularity which would otherwise have attached to the meeting at which the resolution was passed. The attitude that we have adopted in this case is supported by the case of *Browne v La Trinidad* (2) which supports the view that if a board meeting were found to be irregular, the person affected could raise objection and require another meeting to be summoned, and that failure to call for such other meeting may result in the proceedings of the first meeting being upheld.

For the reasons which we have given, we find that the arguments on this application by the defendant do not commend themselves to us. The application is accordingly refused, with costs to the plaintiff to be taxed in default of agreement.

Application refused
