GERARDUS ADRIANUS VAN BOXTEL v ROSALYN MARY KEARNEY (a minor by Charles Kearney her father and next friend) (1987) Z.R. 63 (S.C.)

SUPREME COURT
NGULUBE, D.C.J., GARDNER AND SAKALA, JJ.S.
18TH AUGUST, AND 21ST DECEMBER, 1987.
(S.C.Z. JUDGMENT NO. 29 OF 1987)

Flynote

Company - Ratification by share holders of particular act of directors in excess of authority - Issue of shares - Powers to waive technicalities - Validity.

Headnote

The respondent, through her father, entered into an agreement with the appellant to the effect that once the latter had purchased Falcon Air Ltd., the parties would hold shares in the company in the ratio of 60% for the respondent and 40% for the appellant. The respondent paid a sum of K110,000 to the appellant in consideration of receiving shares amounting to 60% of the equity. The High Court upheld the respondent's claims for a declaration that the sum of K110,000 was for the purchase of shares in Falcon Air Ltd., and a declaration that the plaintiff was a shareholder; and for an account of all the property and money of the company. In his appeal the appellant argued that since the litigation had been between individuals, the court had no jurisdiction to bind the company to implement any decision passed as to the entitlement of the respondent. Further, that the proper formalities had not been complied with and that properly constituted Board of Directors (comprising the appellant and another) had never passed any resolutions on the question of the plaintiff's shareholding.

Held:

(i) The court has undoubted jurisdiction in litigation to which the company is not a party but which is between a shareholder and an alleged shareholder, to make an order for rectification under s.60 of the Companies Act, which will be binding upon the company

(ii) Shareholders enjoy, as a matter of right, overriding authority over the company's affairs. Where all the shareholders happen to be present at a meeting where an *intra vires* decision is passed with the unanimous concurrence of all of them, then even if the meeting was defective a director's meeting, the business transacted is valid as a member's decision (*In Re Express Engineering Works, Ltd.* followed).

Cases cited:

(1) Ex parte A.R. Shaw [1877] 2 Q.B.D. 463
(2) In Re Express Engineering Works Ltd [1920] 1 CH. 466
(3) Grant v United Kingdom Switchback Railways Company [1889] 40 CHD 135
(4) Nkhata and Four Others v The Attorney-General (1966) Z.R. 124

Legislation referred to:

Companies Act, Cap. 686, s. 60

For the appellant: S.S.Zulu and Company, assisted by E.B. Mwansa of Jaques and Partners.
For the respondent: M.Lwatula, Ellis and Company

Judgment

NGULUBE,D.C.J.: delivered the judgment of the court.

For convenience, we shall refer to the respondent as the plaintiff and the appellant as the defendant, which is what they were in the action.

This was an appeal from a decision of the High Court before the Honourable Mr Commissioner Chisengalumbwe in which he upheld the plaintiff's claims for a declaration that the sum of K110,000.00 paid to the defendant in March, 1983, was for the purchase of 12,000 shares in Falconair Limited and declaration that the plaintiff was a shareholder; for an account to be taken relating to the use of an aircraft which was the property of Falconair Limited and of all moneys received by the defendant in respect of the aircraft which was operated under Falconair Limited and Airvania Limited; payment of the money found due on the said account; return of books and records and an interlocutory induction to restrain the defendant from operating the aircraft in question until after the trial. The learned trial commissioner granted all the prayers after accepting the plaintiff's evidence to the effect that the parties had entered into an agreement for the acquisition of the shares and after rejecting the defendant's evidence to the contrary.

The brief facts, so far as it is necessary to state them separately, were that three individuals by the name of Mack registered the company Falconair Limited and three of them each took one share out of 20,000 with which the Company was registered. The articles of association named the three Macks as well as the defendant and a Mr Patel as the directors. At the beginning of 1983, around March, the Macks sold their shares to the defendant and resigned from the board of directors. Meanwhile, the plaintiff, through her father, claimed that an agreement was entered into with the defendant to the effect that, once the latter had purchased the undertaking, the parties would hold shares in the company in the ratio of 60% for the plaintiff and 40% for the defendant; that a sum of K110,000.00 was paid to the defendant to assist him in his purchase from the Macks and in consideration of the acquisition, by the Plaintiff, of a 60% shareholding; and that, in furtherance of such agreement, various documents and transactions were brought about. We propose to go into other details later in the judgment.

One of the issues raised by the defendant was that, even assuming that the parties had entered into the alleged agreement, no relief could be granted which would be binding upon the company. It was Mr Zulu's argument that, since the company was not a party to the litigation and since the litigation has been between individuals, the court had no jurisdiction at law to bind the company to implement any decision passed as to the entitlement of the plaintiff. Mr Zulu relied on the articles of association and the Companies Act Cap. 686 with regard to the correct steps and procedures for a person to acquire shares. We have anxiously considered this argument and find that, although not referred in terms, the litigation took a form which necessarily invoked the court jurisdiction, through the declaration obtained, to enforce the same by rectification under Section 60 of the Companies Act, Cap. 686, which reads:

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"60. If the name of any person is, without sufficient cause, entered in or omitted from the register of members of any company, or if default is made or 'unnecessary delay takes place in entering in the register the fact of any person having ceased to be a member of the company, the person or member aggrieved or any member of the company, or the company itself, may, by application to the court, apply for an order of the court that the register may be rectified, and the court may either refuse such application, with or without costs, to be paid by the applicant, or it may, if satisfied of the justice of the case, make an order for the rectification of the register, and may direct the company to pay all the costs of such application, and any damages the party aggrieved may have sustained. The court may, in any proceedings under this section decide on any question relating to the title of any person who is a party to such proceedings to have his name entered in or omitted from the register, whether such question arises between two or more members or alleged members, or between any members and the company, and generally the court may in any such proceedings decide any question that it may be necessary or expedient to decide for the rectification of the register; and the court may direct an issue to be tried, in which any question of law may be raised."

That this section applies to this case will become apparent when we address the issue, which was the hub of the case, whether (assuming the findings of the learned trial commissioner to have been correct that there was an agreement between the plaintiff and the defendant for the acquisition of shares to be held in the ratio of 60% to 40%), the company which is not a party to the proceedings could be bound by the decision and have orders made against it for rectification. As already stated, Mr Zulu's submission is that this could not be done.

In *Ex parte A.R.Shaw* (1), counsel for a shareholder resisting an effort by an alleged shareholder to be registered advanced an argument very similar to that of Mr Zulu and the court was construing section 35 of the Companies Act, l862, which is virtually identical to our section 60, Cap. 686. Both the Common Pleas Division and the Court of Appeal had no difficulty in rejecting the argument that the court had no jurisdiction, under the section, to grant the remedy of rectification so as to bind the company in litigation essentially between a shareholder and an alleged shareholder. To borrow from the reasoning of Lord Coleridge, C.J., (from page 476 to 477) with which we respectfully concur, and applying the facts found by the learned trial commissioner to section 60 (putting aside for the moment the arguments and grounds attacking the findings of fact), we have a plaintiff who became, by virtue of the agreement made between the defendant and her father on her behalf, a person whose name, without sufficient cause, has been omitted from the register She applied to the court for relief and the justice of the case required that an order should be made to

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put matters right. Thus, section 60 of our Act is a complete answer to Mr Zulu's submission:

The court has undoubted jurisdiction in litigation to which the company is not a party but which is between a shareholder and an alleged shareholder, to make an order for rectification which will be binding upon the company. The section gives jurisdiction to the court to decide in such litigation any question of title, which there is here, which arises between a member and an alleged member,

namely the defendant - who was at one stage a sole shareholder - and the plaintiff - on whose behalf a substantial sum of money was paid in consideration of receiving shares amounting to 60% of the equity. It is thus clear that, on the authority of section 60 of Cap. 686 and the case of *Shaw* (1), the company can be bound by a decision of the court which orders rectification in litigation to which the company is not a party. This is not only the law but also a logical position since the court would have had regard to all he circumstances of the case bearing in mind that, in matters of membership, the company as such - being a non-natural creature - must necessarily yield to the will of the shareholders against whom it can have no independent locus standi.

In response to Mr Zulu's further arguments, that the proper formalities had not been complied with and that the properly constituted board of directors (comprising the defendant and Mr Patel) had never passed any resolutions in the question of the plaintiffs shareholding end her father's directorship, Mr Lwatula relied on a number of authorities to the effect that third parties should not be bound by absence of formalities in the internal management of the company. Mr Lwatula also relied on the equitable maxim that the court should regard that as done which ought to have been done. He pointed out that, at the time of the agreement, the defendant was to be sole shareholder and did in fact become the sole shareholder; and that, as director and sole shareholder, the defendant had power and ostensible authority and is estopped from denying this position.

The issue is whether the defendant, as sole shareholder and managing director, could bind the company to transactions when decisions were made without reference to the other director, a non-shareholder. In our considered opinion, there can be no doubt whatsoever that shareholders enjoy, as a matter of right, overriding authority over the company's affairs. In this regard, the articles of association of Falconair Limited are instructive: The members can, in general meeting informally, pass a resolution (article 9); they can determine the number of directors end either increase or reduce the same (articles 10 and 11), even when the directors fill a casual vacancy on the board, this is subject to ratification or otherwise by the members (article 18). But in fact, In *Re Express Engineering Works, Limited* (2) is authority for a finding that, where all the shareholders happen to be present at a meeting where an intra vires decision is passed with the unanimous concurrence of all of them, then even if the meeting was defective as a director's meeting, the business transacted is valid as a members' decision. Again, if the defendant entered into the contract alleged in his capacity as director and if such contract would have been invalid for lack of a quorum for a directors' meeting, then nonetheless such contract would be capable of ratification by the members and would become a valid contract of the company: See *Grant v United Kingdom Switch Back Railways Company* (3). It follows from the preceding discussion that the technical rejections based on the absence of any board

resolutions cannot avail the defendant when, in his unassailable position as a sole shareholder, he had undoubted capacity and power to enter into an arrangement binding on the company. Thus, as sole shareholder (a situation which is permissible for a limited time - See sections 4, 5 and 106 of Cap. 686) the defendant could validly appoint other directors and he could allot shares.

It was argued on behalf of the defendant that, since he had only purchased three shares from the previous shareholders, and since only the three shares had ever been issued, the plaintiff could at

most only be entitled to 60% of these three shares. This argument is, we consider, specious and wholly untenable having regard to the nature of the agreement which was contended for and accepted by the learned trial commissioner and which was that the plaintiff would have a 60% interest in the company. We can see no impediment in law for the allotment of all the shares in the company in such proportions as would achieve that result. There was a further argument that the plaintiff was, in any case, not party to the agreement between the defendant and her father. This we regard to have been expletive since, on the facts accepted by the trial court, the father was contracting on behalf of the daughter with the full knowledge and concurrence of the defendant.

That brings us to the factual issues upon which the validity of the decision below and all the foregoing discussion depends. It is obvious that, unless the findings of fact can be supported to the effect that the parties did enter into the alleged agreement, there would be no basis for the judgment entered in favour of the plaintiff. The parties had each set up a case which was diametrically opposed to that of the opponent. Whereas the plaintiff claimed that a substantial sum of K110,000.00 was paid to the defendant for the purpose of the utilisation of K84,000 thereof to acquire shares, the defendant's case was that the whole of this amount was a personal loan. It was the plaintiff's case that the defendant actively pretended to be performing the contract by filing a hand written return (prepared by the plaintiff's father but signed by him) in which the plaintiff's shareholding was reflected; by making the plaintiff's father and the latter's accountant signatories to the company's bank accounts, a supported by the bank documents; by attending a meeting where various appointments and allotments were agreed, and by signing the document recording such transaction. The plaintiff's position was that this action became necessary when it was discovered that there were conflicting returns at the companies' registry and that the defendant was attempting to dispose of the company's aircraft and to exclude any mention of the plaintiff's interest in the company or the fact that the defendant had approved the appointment of a chairman and a company secretary, both from the Plaintiff s side. The defendant's case, on the other hand, was that the handwritten return was a forgery; that the plaintiff's father and the accountant became signatories only for convenience and on the basis of friendship because the other signatory - his wife - was receiving medical treatment outside the country; that the bank documents must have been falsified after he had signed them to the extent that they showed the plaintiff's father to be chairman and the accountant to be company secretary; that he never attended the alleged meeting where allotments and appointments were made and that his signature on the minutes of the meeting was procured fraudulently by the accountant who made him sign some blank sheets of paper in connection with some accounts the accountant was doing for

him, gratis, courtesy of the plaintiff's father as a good friend and neighbour; and that his set of returns, contradictory to that of the plaintiff, reflected the true position, which was that, he and Mr Patel continued as directors until the latter resigned and was replaced by Mrs Van Boxtel, and that, only he was a shareholder of three shares until a new allotment was made to himself and his wife.

For completeness, it should be mentioned that the two then resolved on 29th November, 1984, to increase the nominal capital. A month later, on 27th December, 1984, they resolved to transfer the aircraft to a new company - Airvania Limited - in which they were the sole shareholders at the time. They also resolved, on the same occasion, to put Falconair Limited into voluntary liquidation. The

learned trial commissioner must have considered what was the need for these manoeuvres at the time when the defendant contended that there were no other persons interested in the company when he found that the transfer of the aircraft was a wrongful conversion. Meanwhile, the plaintiff's side also attempted to make further appointments to the Board and to remove the defendant from the Board.

It is common ground that such conflicting positions fell to be resolved on an issue of credibility based not only on the performance of the principal participants in the witness box but also dependent upon the totality of the evidence, both oral and documentary, as to which of these irreconcilable stories was to be believed. The learned trial commissioner found that the plaintiff's account had received confirmation and support from the documents and from the conduct of the parties generally. On the other hand, he found, in effect, that the defendant's account was fantastic and incredible and that the defendant himself was an untruthful witness.

Messrs Zulu and Mwansa, for the defendant, attack the findings of fact and contend that the learned trial commissioner had wrongly relied on certain documents and had failed to attach due weight to certain aspects, including the weaknesses in the plaintiffs case. The upshot of their argument, which we shall now discuss in greater detail, was that the defendant, and not the plaintiff, should have been believed. One line of argument relied on the fact that the company's records made no reference to the plaintiff. But that was the precise matter in issue and the whole point of the litigation: The plaintiff was complaining that the defendant had ignored her interests in the company.

Another line of argument was that the learned trial commissioner fell into error when he accepted and relied upon a number of documents. Although a variety of reasons were advanced at the appeal for impeaching the documents, the probative value of most of them lay in the fact that they were found to have been signed by the defendant and in the fact that they tended to confirm the existence of a state of affairs contended for by the plaintiff. Thus, the evidential value of the initial agreement for the acquisition of 60% of the shares could not have depended on questions such as who valued the assets at K140,000; or how many shares were involved and so on, as argued by Mr Zulu. Once it was accepted that the defendant signed on the document, that was evidence in support of the plaintiffs case. Again, once it was accepted that the defendant had signed on the petty cash voucher which purported to explain the payment of K110,000.00 to him as being in respect of shares, the corroborative significance of that document did not lie in the fact, as argued by Mr Zulu, that the

cheque was from Kearney & Company or that no hard cash passed to the defendant, nor in the fact that the voucher did not break down the figure to reflect that some of it was a loan of K26,000.00 to the defendant, as stated in the initial agreement. Again, the objections to the handwritten return of allotments, based on the absence of a valid board resolution and a challenge that the parties could not have held the number of shares reflected, overlooks the evidential value afforded by the finding that the defendant signed the document and lodged it together with other undisputed documents for which a lodgement fee was paid, as stated by the Registrar of Companies. Though such returns were patently not in conformity with the articles of association and of doubtful legal effect - as conceded by Mr Lwatula in relation to all documents and minutes created in the absence of Mr

Patel - their evidential value lay in providing general corroboration for the agreement alleged as conduct tending to support the plaintiff's version in this dispute. The same observations can be made for the criticisms levelled against the minutes of the meeting which purported to appoint the plaintiff's father and his accountant and to allot shares. Furthermore, the same applies to the significance to be attached to the fact that the plaintiff's father and the accountant were indisputably made signatories to the company's bank accounts. The learned trial commissioner was fully alive to the conflicting allegations; he discounted the forgery claim and other claims of fraudulent conduct on behalf of the plaintiff and, on a matter of credibility, resolved in favour of the plaintiff. He found instead that it was the defendant who was fraudulently transferring the company's aircraft to his other company. In these circumstances, we can only interfere with the findings of fact based on an issue of credibility on settled principles. We need only refer to *Nkhata and Four Others v The Attorney-General* (4) where this was said, at page 125

"A trial judge sitting alone without a jury can only be reversed on fact when it is positively demonstrated to the appellate court that:

(a) by reason of some non-direction or otherwise the judge erred in accepting the evidence which he did accept; or

(b) in assessing and evaluating the evidence the judge has taken into account some matter which he ought not to have taken into account, or failed to take account of some matter which he ought to have taken into account; or

(c) it unmistakably appears from the evidence itself, or from the unsatisfactory reasons given by the judge for accepting it, that he cannot have taken proper advantage of his having seen and heard the witnesses; or

(d) in so far as the judge has relied on manner and demeanour, there are other circumstances which indicate that the evidence of the witnesses which he accepted it is not credible, as for instance, where those witnesses have on some collateral matter deliberately given an untrue answer."

In his judgment, the learned trial commissioner gave detailed reasons and reviewed all the evidence which was before him and decided to disbelieve the defendant. For our part, we are satisfied that none of the conditions referred to in *Nkhata* (4) has been demonstrated to us to enable this court to reverse findings which were amply supported by the evidence on record. The additional arguments by Mr Mwansa were that the learned trial commissioner failed to take into account a letter

from an Assistant Registrar of Companies to the effect that the records did not refer to the plaintiff who should, therefore, satisfy his office as to when end how she became a member. We regard this as expletive since there was direct evidence of conflicting returns from the Registrar himself. Other arguments concerned the returns and other documents emanating from the plaintiffs side as well as the absence of board resolutions. Those arguments overlooked the fact that the decision in the case could not depend on the state of the Company records or the returns but that the decision had to rest on the evidence in support of the alleged agreement reached between the parties. As already observed, we are unable to see that the learned trial commissioner had misdirected himself in any way when he believed the plaintiff's version.

There was a ground of appeal concerned with the transfer of the aircraft to another company end the finding that it was the property of Falconair Limited. With the failure of the legal grounds concerning the jurisdiction to order rectification and the failure of the grounds regarding the findings of fact, it follows that the learned trial commissioner was not wrong when he held that the aircraft belonged to the company in which the plaintiff has an interest and was not validly transferred to another company by the sale which be found to have been fraudulent.

There were also various orders made against the defendant which were expressed to be for the purpose of teaching him a lesson. Mr Lwatula quite properly concedes and we agree that there was no occasion for the making of any punitive orders and that the trial court should only deal with the matters in issue. We quash all the orders that were made concerning individuals' passports and the freezing of bank accounts; closing of ports of entry; fines for prospective contempt and the alleged contempt sum of K110,000.00, and the rest of the orders that were made as punishment. We also quash the award of half a million Kwacha (K500,000.00) as the plaintiffs share of the profits from the use of the aircraft but confirm that the necessary account be taken on the plaintiff's prayer as noted above. It follows also that all injunctions granted pending trial are no longer necessary and are discharged with the coming into force of the declaration in favour of the plaintiff and all necessary rectifications.

To summarise, we have rejected the grounds of appeal - and affirmed the judgment appealed against - on the question of (a) the plaintiffs entitlement to shares; (b) the finding that the aircraft in issue belongs to Falconair Limited; and (c) the taking of an account. In regard to the taking of an account, we must make it clear that the account is to be taken in relation to the use of the Cessna aircraft 402 B - Registration No. BJ - ADS in the name of Falconair Ltd as well as in the name of Airvania Ltd as a result of the defendant's wrongful transfer of the aircraft to the latter company. The money found to be due is to be paid by the defendant into the coffers of Falconair Ltd. as indeed it is Falconair Ltd. and not the plaintiff as an individual, which is entitled to such money and it would be improper for the court to pre-empty any decision which the board of directors may wish to take in relation to the divisible profits, if any, which result from the taking of the account. Since the declaration made by the learned trial commissioner entails performance of the agreement found to have been made, with all consequential rectifications of the company records and the returns at the companies Registry and at the Ministry responsible for aircraft registrations, the interlocutory injunction restraining the defendant from having access to the aircraft,

pending trial, necessarily falls away. We have, on the other hand, allowed the grounds of appeal in respect of the orders and fines made in the nature of punishment.

For the avoidance of doubt, we should indicate what the effect of this, and the lower court's judgment is: It has been adjudged, and it is ordered:

(1) That the company's records (including the register of members) and the returns at the Companies Registry must be rectified to reflect, in accordance with the agreement found, that the plaintiff was allotted 12,000 shares and the defendant 8,000 shares Out of the 20,000 shares; that the plaintiffs father is a director and chairman; that the accountant is company secretary; and that

the defendant is Managing Director.
(2) That there be cancellation of all entries in the company's records and in the records of the Registrar of Companies, and cancellation of all resolutions and returns by either side, which are inconsistent with the order at (1) above.
(3) That there be cancellation of the transfer of the aircraft to Airvania Limited and its re-registration under the ownership of Falconair Limited.
(4) That an account be taken.
(5) That there be liberty to apply to the Registry of the High Court for directions and as necessary for the due enforcement of the judgment.

Save to the extent hitherto indicated, the appeal is dismissed, with costs.

Appeal dismissed
