IN THE SUPREME COURT FOR ZAMBIA **APPEAL NO. 122/2006**

HOLDEN AT KABWE

(Civil Jurisdiction)

IN THE MATTER OF: SUN COUNTRY LIMITED

AND

IN THE MATTER OF: THE COMPANIES ACT, CAP 388 OF THE LAWS OF ZAMBIA, SECTIONS 271(1)c, 272(F) AND 239 (2) (3)

BETWEEN:

SUN COUNTRY LIMITED	1ST APPELLANT
CHARLES KEARNEY	2ND APPELLANT
JACK THADDEUS MICHELSON	3RD RESPONDENT

AND

RODGER REDIN SAVORY	1ST RESPONDENT
SHIRLEY MARGARET FAWCETT SAVORY	2ND RESPONDENT

CORAM: **Mwanamwambwa D.C.J., Wood and Malila SC, JJS,**
On 14th April, 2015 and 9th August 2017

For the Appellants: *Mr. Mutemwa, of Messrs. Mutemwa Chambers*
For the Respondents: *No appearance*

JUDGMENT

Mwanamwambwa D.C.J., delivered the Judgment of the Court.

Legislation Referred to:

(1) **Sections 271(1) (c), 272(1) (f) and 239 (2)(3) of the Companies Act, Chapter 388 of the Laws of Zambia**

Cases Referred to:

1. **Re Yenidje Tobacco Company Limited (1924) 2 Ch 426**
2. **Loch v John Blackwood Limited (1924) AC 783**
3. **Townap Textiles & Chhagnlal Distributors Limited v Tata Zambia Ltd (1988/1989) ZR 93**
4. **The Minister of Home Affairs, Attorney General v Lee Habasonda (2007) ZR 207**

5. **Kenmuir v Hattingh (1974) ZR 162**
6. **Zambia Telecommunications Company Limited v Mulwanda and Paul Ngandwe (2012) 1 ZR 405**

Work Referred to:

1. **Halsbury's Laws of England, Vol. 16, 4th Edition**
2. **Paragraph 2209 of Halsbury's Laws of England, Vol. 7(3), 4th Edition re-issue**

This appeal is against the High Court's decision to wind up a company known as Sun Country Limited, the 1st appellant in this appeal, which we shall refer to as *"the Company"*.

The said Company was engaged in the business of ranching and farming. Its registered office was at Lion Kop Ranch in Kalomo in the Southern Province of Zambia. However, there was animosity between shareholders. The 2nd appellant was the majority shareholder and the respondents, who are mother and son, were minority shareholders. The respondents came to Court accusing the 2nd appellant as majority shareholder, of conducting the affairs of the company in a manner which was oppressive to the respondents. They filed a petition to wind up the Company pursuant to sections 271(1) (c), 272(1) (f) and 239 (2)(3) of the **Companies Act**. The ground, on which the petition was made, was that it was just and equitable that the Company should be wound up, because the relationship between the 2nd appellant and the respondents had broken down irretrievably and this had resulted in a deadlock.

The respondents cited numerous acts of oppression that they had allegedly suffered at the hands of the 2nd appellant. Some of the allegations they made were that the 2nd appellant, as majority shareholder, had filled the board of directors with his family members. In this regard, the 2nd appellant had allegedly written to the respondents informing them of a director's meeting at which the removal of the respondents as directors were to be discussed. They further alleged that after the 2nd appellant became the majority shareholder, he had been demanding that all the title deeds and documents of the Company should be removed from the Company's registered office and be given to him, purely on account of him being the majority shareholder. The Company Secretary wrote to the 1st respondent threatening to remove him as director if he did not comply with the demands to release the title deeds and documents of the company. On several occasions, the 2nd appellant had allegedly secured police officers, some of whom were armed, to harass and intimidate the 2nd respondent. It was further alleged that the 2nd appellant had tried to secure the deportation of the 1st respondent from Zambia, such that four days before the 1st respondent received a notice of deportation, the 2nd appellant had already informed him that he was being deported from Zambia.

The 1st respondent claimed that he had greatly suffered brutal oppression, which the 2nd appellant was allegedly using to intimidate him. He testified that security guards hired by the 2nd appellant had shot at him with a rifle, and the 2nd appellant

himself had also shot at him. He also testified that the 2nd appellant instructed a farm worker to loosen the wheel nuts on his privately owned motor vehicle, an act which the 1st respondent believed could possibly have caused his death had he been traveling at high speed when the wheels came off the vehicle.

The respondents categorically indicated in their joint affidavit that they had come to believe that the 2nd appellant was no more than *"a common con artist"* who never had honourable intentions towards the respondents as well as the 1st and 3rd appellants. They claimed that it was just and equitable that the Company should be wound up with a view to bringing an end to this deadlock. They were seeking the following reliefs:-

(1) That Sun Country Limited may be wound-up by the Court under the provisions of the Companies Act, Chapter 388 of the Laws of Zambia;

(2) That Bernard Leigh Gadsden of Permanent House, Cairo Road, Lusaka, be appointed Liquidator without security;

(3) Alternatively, that such other order should be made under section 239 (3) of the Companies Act, Chapter 388 of the Laws of Zambia, especially for:-

(a) an order that the 2nd respondent or the Company purchase the shares of the Petitioners at current market value after a re-evaluation of the Company and its assets and Director's investments by a reputable accounting firm and such other terms as the court should think fit; or

(b) an order regulating the conduct of the Company's affairs in future including the reconstitution of the Board of Directors; or

(c) an order prohibiting the appellants from removing the respondents from the Board of the Company: or

(d) such other order, whether directing investigation into the Company's affairs or otherwise, might be made in the premises as might be just.

Although we did not see the answer to the winding up petition on record, it is clear from the Judgment of the Court below that the appellants had opposed the petition. In the Judgment appealed against, the Court below indicated that the 2nd appellant had equally highlighted the misdeeds of the 1st respondent in relation to the property of the Company. The 2nd appellant's position was that the 1st respondent was not a fit person to be a Rancher and that the 2nd appellant could only work with him if he obeyed 2nd appellant's instructions. The 2nd appellant described the 1st respondent as "*a thief, a crook and a disgrace to the white community*". It was his further evidence that the 1st respondent was a problem and they needed to part-company.

On the evidence that was before him, the learned trial Judge found that there was real animosity between the petitioners and the 2nd respondent and this was evidenced by the accusations and counter-accusations of misdeeds that the parties were making against each other. According to the trial Judge, the relationship between the parties had broken irretrievably because they had lost trust and confidence in each other and could not work together. He pointed out that under section 272 (1) (f) of the **Companies Act**, the Court may order the winding up of a Company if in the opinion of the Court it is just and equitable that a Company should be wound up.

The trial Judge went on to cite the case of **Re Yenidje Tobacco Company Limited**[1] where a company was formed by two tobacco manufacturers, Rothman and Weinberg, in order to amalgamate their business. They were the only shareholders with equal voting rights and the only directors. The two had been in a state of continuous quarrel and had only been communicating with each other through the Secretary of the Company. Although the company was making larger profits than ever before, the Court granted a winding up order on Weinberg's petition. The ground on which the Company was wound up was that it was just and equitable to wind up a company, if it is an incorporated partnership, or the same ground as would justify the Court in decreeing the dissolution of a partnership when for example, there is a deadlock between the members.

He also referred to the case of **Loch v John Blackwood Limited**[2], where it was held that it was just and equitable to wind up a Company where there is justifiable lack of confidence in the management of the Company's affairs.

According to the trial Judge, the relationship that existed between the shareholders in this case, was almost the same as that which existed in the case of **Re Yenidje Tobacco Company Limited**[1] and the case of **Loch v John Blackwood Limited**[2].

He dismissed the 2nd appellant's contention that there was no need to make a winding up order since the Company was doing fine. He took the view that the consideration in granting or

refusing to grant a winding up order is not the viability or the profit making of a Company but whether it is just and equitable to grant the winding up order. The trial Judge found our sentiments in the case of **Townap Textiles v Tata Zambia Limited**[3] applicable to this case, that where there is a going concern which might suffer by the making of a winding up order, Courts will be reluctant to make such an order; but when circumstances are such that there is no other alternative, the order must be made.

The trial Judge was satisfied that the respondents proved their case on a balance of probability that it was just and equitable to wind up the Company. Accordingly, he granted the order to wind up the Company and appointed Mr. Bernard Leigh Gadsden as liquidator without security.

The appellants were not happy with the decision of the Court below. They appealed to this Court advancing two grounds of appeal as contained in their amended memorandum of appeal. The grounds read as follows:-

1. **That the honourable Judge of the High Court erred in law and fact when he failed to make findings of fact and categorically state the basis of the order to wind up the company;**
2. **That the honourable Judge of the High Court erred in law and fact in not considering the alternative prayer to winding up as requested for by both the petitioners and the respondents;**

In support of these grounds of appeal, some very lengthy heads of arguments were filed by Messrs. Mutemwa Chambers.

Counsel's arguments were largely an exposition of the law on winding up, writing of Judgments and a summary of the proceedings in the Court below. Only a small part of the arguments directly addressed the issues raised in the grounds of appeal. The appellants' advocates filed a notice of non-appearance and as such they did not appear at the hearing of this appeal in Kabwe.

The respondents on the other hand, did not file heads of arguments and they did not also appear at the hearing of this appeal. We reserved Judgment after being satisfied that their advocates were aware of the hearing of this appeal.

In support of the first ground, State Counsel Mutemwa submitted that, what was stated in the Judgment of the Court below were not findings of fact. Reasons being that: (a) they were a mere recitation of the testimonies of the parties; (b) no deductions were made from the evidence; and (c) the findings of fact were not declared. He stated that without demonstrating the reasoning and evaluating the relevant evidence, the learned trial Judge went on to conclude that both parties had lost trust and confidence in each other and could not work together. He argued that the purported findings of fact fell short of the required standard because they were a mere recital of the evidence presented by the parties, without analyzing and interpreting it in relation to the case pleaded. On the authority of **Minister of Home Affairs, Attorney General v Lee Habasonda**[4], State

Counsel Mutemwa contended that the Judgment appealed against was no judgment at all.

State Counsel referred us to the case of **Kenmuir v Hattingh**[5], in which we held that an appeal from a Judge sitting alone is by way of re-hearing on the record and the appellate court can make the necessary findings of fact if the findings were conclusions based on facts which were common cause or items of real evidence, then the appellate Court is in as good a position as a trial Court. We further held, in that same case, that an appellate Court will normally be reluctant to order a new trial where it appears from the record that there was sufficient evidence before the trial Court to make the necessary findings of fact. State Counsel Mutemwa argued that in this case, it was common cause that the Company was a going concern and the parties desired a buy out as a way of resolving the dispute. His contention was that there was no need to subject the parties to the trouble and expense of a new trial.

We have considered the issues raised by the appellant in ground one. This ground is impugning the Judgment of the Court below. Mr. Mutemwa SC, on behalf of the appellant, argued that it was no Judgment at all because the Court below did not make findings of fact but merely recited the testimonies of the parties without making any deductions from the evidence. Therefore, the issue to be decided on this ground is whether the Judgment of the Court below met the minimum standards of a Judgment worth its name.

In our previous decisions, we have given general guidelines on what should be contained in a judgment. We held, in the case of **Minister of Home Affairs, Attorney General v Lee Habasonda**[4] that:

> **"... every judgment must reveal a review of the evidence, where applicable, a summary of the arguments and submissions, if made, findings of fact, the reasoning of the court on the facts and the application of the law and authorities, if any, to the facts. Finally, a judgment must show the conclusion. A judgment which only contains verbatim reproduction and recitals is no judgment. In addition, a court should not feel compelled or obliged and moved by any decided cases without giving reasons for accepting those authorities. In other words, a court must reveal its mind to the evidence before it and no just simply accept any decided case."**

In our later decision in **Zambia Telecommunications Company Limited v Aaron Mulwanda and Paul Ngandwe**[6], we held that a Judgment should be thorough, exhaustive, and clear on issues. We further outlined the seven essential elements of a Judgment, namely:

1. **An introductory structure, setting forth the nature of the case and identifying the parties;**
2. **The facts;**
3. **The law relevant to the issues;**
4. **The application of the law to the facts;**
5. **The remedy; and**
6. **The order.**

In the present case, we take the view that the decision of Court below met the required standard as set out in the two cases. Contrary to State Counsel Mutemwa's argument that there were no findings of fact made by the Court below, the trial Judge found as a fact that there was real animosity between the petitioners and the 2nd respondent and this was evidenced by the accusations and counter-accusations of misdeeds that they were

making against each other. In our considered view, the learned trial Judge revealed his reasoning when he found from the evidence that was before him, that the relationship between the parties had broken irretrievably because they had lost trust and confidence in each other and could not work together. It was from this evidence that the trial Judge deduced that it was just and equitable to wind up the Company.

We therefore hold the view that that the Judgment appealed against was a proper Judgment which met the benchmarks we set in the above authorities. There is no merit in ground one. We hereby dismiss it.

We shall now address ground two.

In support of ground two, Mr. Mutemwa SC attacked the decision of the Court below to rely on the case of **Townap Textiles and Chhagnlal Distributors Ltd v Tata Zambia Ltd**[3]. He argued that the learned trial Judge, without carefully considering and weighing the options encapsulated by the **Townap Textiles case**[3], rushed to the conclusion that the sentiments which were made in that case were very much applicable to the present case. That yet, the respondents in their petition indicated that they had offered to sell their shares to the 2nd appellant and proposed for an amicable resolution of the deadlock but the 2nd appellant had not responded to the proposals. State Counsel drew our attention to the 1st respondent's testimony where he maintained the reliefs he was

seeking in the petition and the alternative reliefs. He further referred us to the 2nd appellant's evidence that the Ranch was doing very well and there was no reason to liquidate the Company.

He argued that section 272 (1) (f) of the **Companies Act** vests broad discretionary power in the Court, to make a winding up order if it is of the opinion that it is just and equitable that the Company should be wound up. He submitted that this discretion, like all discretionary powers, must be exercised judiciously. He argued that in particular, it must be founded on sound reasoning and must be justified. He submitted that it is settled law that it is unreasonable to wind up Companies that are solvent or where the shareholders are able to dispose of their shares for a fair price. He argued that on the facts of this case, the Court below failed to consider and to evaluate the repeated pleas from the respondents and the 2nd appellant to consider the alternative remedy that the 2nd appellant should buy off the respondents' shares. That as a result, the power or discretion to wind up the Company was not exercised judiciously by Court below. He persuaded us to make an order that the 2nd appellant should buy out the shares of the respondents and the value of the shares should be determined by an independent and reputable firm of accountants to be agreed by the parties.

We have considered the issues raised in ground two. In this ground, Counsel for the appellant argued that since the Company was still a going concern, the Court below ought to have granted

the respondents' alternative prayer in the petition that the 2nd respondent should purchase the respondents' shares. We note that the main relief which the respondents were seeking in their petition was that the Company should be wound up. In the alternative, the respondents were seeking such other order under section 239 (3) of the **Companies Act**. Under this claim, the respondents outlined four alternative reliefs, among them was a claim for an order that the 2nd respondent or the Company should purchase the respondents' shares.

We wish to indicate that in cases such as this one where parties are seeking a main relief and some alternative reliefs, the Court is not bound to consider alternative reliefs. This is especially in cases where the Court has granted the main relief. In such cases, it ought to look no further. The rationale behind alternative reliefs is that if the main relief fails, the Court can consider granting the alternative reliefs. This does not however mean that if the main relief fails, then the alternative reliefs should automatically succeed. There is still need for a party seeking an alternative relief to prove that he is entitled to it.

In this case, the Court below held that the respondents proved their case on a balance of probability that it was just and equitable to wind up the Company. It was, therefore, not bound to consider alternative reliefs. We cannot fault the learned trial Judge for granting the order to wind up the Company in this case, because it was the main relief the respondents were seeking and strong grounds existed upon which the Court made its

decision. It is trite law that a Company may be wound up on the ground that winding up is just and equitable, where it is impossible to carry on its business, owing to internal disputes which have produced a state of deadlock; or where improprieties in management have led to the loss of mutual confidence between shareholders and directors. For this principle, **see:**

1. **Halsbury's Laws of England, 4th Edition re-issue, Vol. 7(3), in paragraph 2209**

In this case, there were internal disputes among the shareholders, which produced a state of deadlock. We, therefore, support the decision of the Court below to wind up the Company. Ground two of this appeal equally lacks merit. It is hereby dismissed.

We hereby dismiss this appeal for lack of merit. We order the appellants to pay costs to the respondents. These are to be taxed, in default of any agreement.

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M.S MWANAMWAMBWA
DEPUTY CHIEF JUSTICE

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A.M WOOD
SUPREME COURT JUDGE

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M. MALILA, SC.
SUPREME COURT JUDGE