REPORTABLE (82)

(1) HAYLMA TRUST (2) KENIAS SIBANDA (3) ANTONY CHIHIYA (4) JANITA RAMA (5) RASHI D ALMEIDA
v
(1) KASOMA TRUST (2) MARS ZIM TRUST (3) LEADERSHIP INVESTMENTS (PRIVATE) LIMITED (4) BILTRANS SERVICES (PRIVATE) LIMITED (5) AUTO SEAL TRUST (6) AUTO SEAL ZIMBABWE (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
BHUNU JA, CHIWESHE JA & MUSAKWA JA
HARARE, 31 OCTOBER 2023 & 31 JULY 2024

L. Uriri, for the appellants

T. Magwaliba, for the first, second, third and fifth respondents

No appearance for the fourth and sixth respondents

CHIWESHE JA: This is an appeal against the whole judgement of the High Court (the court *a quo*) sitting at Harare handed down on 15 March 2023.

In a composite judgment involving two consolidated opposed applications, the court *a quo* issued two orders to the following effect:

In respect of HC 1351/21, that:

1. The resolution for the appointment of third appellant as the fourth respondent`s company secretary be and is hereby declared null and void and accordingly set aside.

2. The resolution for the appointment of the second appellant as Executive Director is hereby declared null and void and accordingly set aside.

3. The resolution for the dissolution of the Board of the fourth respondent dated February 2021 is declared null and void and it is hereby set aside.

4. The resolution for the reconstitution of the management team and the Executive Committee be and is hereby declared null and void and accordingly set aside.

5. All documents field pursuant to the resolutions passed on the 8 February 2021 be and are hereby set aside and the documents relating to the status of the company and its Directors in existence prior to the 8 February 2021 be and are hereby revived.

6. Each party shall bear its own costs of suit.

In respect of HC 1270/21, that:

1. The resolution for the appointment of the third appellant as the sixth respondent`s company secretary be and is hereby declared to be null and void and accordingly set aside.

2. The resolution for the removal of David Edward Tanner and Richard Eric Stenton as Directors of the sixth respondent is declared as null and void and it is hereby set aside.

3. The resolution for the appointment of the third and fourth appellants not having been done in accordance with the law and the company`s constitutive documents is declared to be null and void and it is hereby set aside.

4. All documents filed pursuant to the resolutions passed on 8 February 2021 are hereby set aside and the documents relating to the company Directors in existence prior to the 8 February 2021 be and are hereby revived.

5. Each party shall bear its own costs of suit.

Aggrieved by the decisions of the court *a quo*, the appellants noted the present appeal for relief.

THE FACTS

The facts in this matter are well captured by the court *a quo*. They may be summarised as follows: - Two opposed applications under case numbers HC 1351/21 and HC 1270/21 were consolidated and heard as one in the court *a quo*. At the centre of the dispute in both cases was an Extra Ordinary General Meeting (the meeting) which dealt with the business of the fourth respondent, Biltrans Services (Pvt) Ltd in HC 1351/21 (case 1) and the sixth respondent, Auto Seal Zimbabwe, in HC 1270/21 (case 2). The respondents in both cases contended that the meeting did not comply with certain provisions of the Companies and Other Business Entities Act [*Chapter 24:31*] (the Act), the shareholders agreements and the Articles of Association of the fourth respondent (case 1) and the sixth respondent (case 2). Consequently, the respondents contended that any resolutions passed at the meeting were null and void. Additionally or alternatively, the respondents further contended that the manner in which the meeting was held constituted an oppression of the minorities.

In both cases, the respondents sought a declaration that the notice convening the meeting did not comply with the provisions of s 168 of the Act and that it be set aside and that the meeting itself be declared null and void and that all its resolutions be set aside. The respondents also sought various consequential reliefs as reflected in the orders of the court *a quo* in both cases. In addition, alternative relief was sought declaring certain resolutions appointing various company officials, directors, the board, the status of each company and its directors null and void and thus liable to be set aside. It was also prayed that all documents filed pursuant to the resolutions of the meeting be set aside and that prior documents relating to the status of the companies and their directors be revived. Finally, an order was sought in

each case that the first appellant be directed to acquire the minority interests in each company within ninety (90) days at a value to be agreed by the parties or at a fair market value.

The background facts specific to case (1) are outlined in the pleadings as follows:- Biltrans Services (the fourth respondent) is in the business of transportation of goods within Zimbabwe and in the Southern African region. It operates from premises owned by Auto Seal Zimbabwe (Pvt) Ltd (the sixth respondent). The shareholders of the sixth respondent are the same as those of the fourth respondent. The first and second respondents are shareholders in the fourth respondent with each holding 10% of the issued share capital. The third appellant holds 15% of the issued share capital while the first appellant holds the remaining 65%.

There is a shareholders' agreement concerning the management of the fourth respondent. As at 8 February 2021 the fourth respondent's board of directors consisted of P.S. Gumede, D.E Tanner, AH. Bhika and T. Mpofu. The day to day management of the business of the fourth respondent was reposed in Tanner as the Managing Director, Bhika as the Finance Director, Archer as the Technical Director and Gumede as the Operations Director. Around 23 November 2020 the first appellant made a requisition for an extra ordinary general meeting of the fourth respondent. No meeting was convened pursuant to that request. Relying on the provisions of s 168(3) of the Act, the first appellant proceeded to convene the meeting of members of the fourth respondent. The agenda for that meeting was set out as follows:

> "- To consider a resolution on the removal of the company secretary, Virgin Management Services.
>
> - The appointment of a new company secretary with immediate effect.
>
> - the appointment of Kenias Sibanda as an Executive Director of the company with immediate effect
>
> - Accountability by Directors of the company`s business.

- Accountability by the directors of the company`s losses.
- The termination of the management team, Excom and reconstitution thereof with immediate effect."

The first, second and third respondents' representatives attended the meeting. The meeting was chaired by the second appellant, a trustee of the first appellant. Prior to the commencement of the meeting, a document prepared by Hurricane Trust objecting to the holding of the meeting and setting out several objections had been presented to the chairperson. The chairperson however proceeded with the meeting without considering those objections. The chairperson was advised that the minority shareholders were not going to sanitise the meeting. They were there not as participants but as observers of the proceedings. The third appellant was appointed by the first appellant`s representatives as the minutes taker and, subsequently, as the company secretary.

Before the court *a quo* the respondents made several objections. Firstly, they contended that the notice convening the meeting did not comply with s 168 of the Act as read with Article 52 of the fourth respondent's Articles of Association in that the notice did not incorporate the statement required that a member is required to appoint a proxy and that it did not incorporate the form of proxy as required by s 171(3) of the Act and the Articles of Association. The respondents also pointed out that contrary to the provisions of the Act which required that resolutions to be adopted by the meeting be clearly set out, the notice contained discussion points and not resolutions. Further, it was contended that the notice had not been served on all the shareholders and in particular that the third respondent was not served with the notice at its chosen address, becoming aware of the meeting only through the first and second respondents. For these reasons, the respondents moved the court *a quo* to declare the notice null and void. In the event the court *a quo* upheld the validity of the notice, the

respondents sought, in the alternative, that some of the resolutions adopted at the meeting be set aside as they were improperly passed. In that regard the following resolutions were cited as having been improperly adopted:

(a) The appointment of the third appellant as company secretary.
(b) The appointment of directors
(c) Reconstitution of the Executive Committee and the Management Committee, and,
(d) The dissolution of the Board.

The respondents also complained, by letter addressed to the third appellant that the minutes taken at the meeting were not reflective of the business transacted at the meeting. They received no response to their complaint.

The respondents contended that the cumulative effect of the conduct of the first appellant and its representatives constituted an oppression of the minority. It was contended that the manipulation of the majority shareholders controlling stake to elbow out the minorities by removing their representatives from the board and the day to day management of the business was contrary to the expectations of the minority as set out in the Shareholders Agreement.

On the other hand, the first and second appellants opposed the application *a quo* alleging that the application was replete with material disputes of fact which could not be resolved on the papers without hearing evidence *viva voce*. They cited the fact that the respondents were of the view that the minutes of the meeting did not correctly reflect what transpired thereat whereas the appellants` position was that the minutes accurately portrayed the proceedings of the meeting. They contended that two positions could not be reconciled without hearing evidence *viva voce*. For that reason, it was contended that the application be either dismissed or referred to trial.

On the merits, the second appellant denied that T. Mpofu was a director of the fourth respondent as he had declined to take the appointment before an audit of the company had been done. The results of the audit were still to be presented hence he had not yet been so appointed.

The second appellant averred that the document containing the objections was handed to him by one Madya who had a proxy, from an entity called Hurricane Trust. He had not been aware of the existence of that entity nor was such entity affiliated with the fourth respondent. It was neither a member nor a shareholder of the fourth respondent. For that reason, there was no basis for him to consider the said document. He also averred that the third appellant was duly appointed secretary in terms of the agenda. He argued that the notice convening the meeting complied with s 168 of the Act and that any alleged omissions or defects in it were not fatal. He admitted that the notice did not incorporate a statement to the effect that a member was entitled to a proxy but argued that such omission did not invalidate the proceedings, more so as all the shareholders attended the meeting, hence none of the respondents were prejudiced. He denied that the resolutions were not set out clearly and insisted that any alleged non-compliance was immaterial and had not prejudiced the respondents. He also denied that the appointment of the secretary was irregular, insisting that it was necessary that one be appointed as the company secretary was not in attendance at the meeting nor did he receive any cooperation from the director of the fourth respondent. Contrary to the assertions by the respondents, he insisted that shareholders had authority to appoint an executive director. He said that the directors that had been removed had run the business to the ground as they had failed to execute their mandates with diligence. Their incompetence seriously prejudiced the first appellant as a majority shareholder.

The second appellant also denied the alleged oppression of the minorities stating that it was instead the respondents who had attempted to thwart the first appellant`s rights in the affairs of the fourth respondent from the time that the first appellant became a majority shareholder.

In their answering affidavit, the respondents denied the existence of any disputed facts of a material nature. Having been informed by letter that the minutes were not reflective of the proceedings at the meeting, the appellants had not given any response. No response had been proffered in the opposing papers either. The appellants merely denied the allegations and insisted that the minutes were a true representation of what transpired at the meeting. For these reasons, the respondents averred that the alleged dispute of fact was not *bona fide.* The respondents specified the matters which they said had not been captured in the minutes. They did so in annexure J to their founding affidavit. The appellants had not made specific reference to the issues raised in annexure J. For that reason, the respondents averred that the preliminary point raised was without merit. As to the merits, the respondents contended that the opposing papers only contained bare denials which were not sufficient to defeat the averments made in the founding affidavit.

Under case 2, the respondents` founding affidavit was to the following effect:- The first appellant had proceeded to convene a meeting of the sixth respondent in terms of s 168 of the Act. The agenda of the meeting included the appointment of the person to take the minutes, the removal of the current company secretary, the appointment of a new company secretary with immediate effect, the appointment of J. Rama and R. D Almeida as directors and the removal of the current directors with immediate effect. Also, on the agenda was accountability by the directors of the company`s business and accountability of the directors

for the company`s loss. The meeting was chaired by second appellant and third appellant was appointed as the minute taker and subsequently, as the company secretary.

As in case (1) above, the respondents had prepared a document outlining its objections to the holding of the meeting. The objections that found the cause of action in, case 1 were more or less similar to the objections in this case. Indeed, they all emanated from the same meeting. Similarly, appellants` responses to the respondents` founding affidavit in case1 are not materially different from their responses in case 2, although there are certain objections which are peculiar either to the fourth respondent in case 1 or to the sixth respondent in case 2.

SUBMISSIONS BEFORE THE COURT *A QUO* AND THE DECISIONS OF THE COURT *A QUO*

Dispute of Fact

The dispute of fact alleged, by the appellants pertained to the objection made by the respondents that the minutes of the meeting of 8 February 2021 were not a correct record of what transpired at the meeting. Counsel for the appellants submitted that the respondents had taken a calculated risk in proceeding on motion in the face of apparent disputes of fact regarding the contents of the minutes. The minutes would have been tabled at the next meeting for adoption with or without correction. Counsel argued that the minutes had been produced by a person acting officially, and, for that reason, should be presumed to be regular until they were set aside. He submitted that the court could not make a decision on the accuracy of those minutes in motion proceedings, without hearing the contested versions.

In response, counsel for the respondents argued that the point *in limine* was so narrow and could thus not impede upon the resolution of the dispute on the papers. The point only related to the minutes but did not affect the relief sought by the respondents. In reply,

counsel for the appellants submitted that the respondents` complaints were centred on events that transpired at the meeting. The record of those proceedings were the minutes that the respondents impugned. As the entire proceedings were grounded on those minutes, the matter could not be dealt with on the papers.

Relying on the well know case of *Supa Plant Investments (Pvt) Ltd* v *Chidavaenzi* 2009 (2) ZLR 132 (H) the court *a quo* noted that the mere allegation of a possible dispute of fact is not conclusive of its existence. The papers must expose the existence of a *bona fide* dispute of fact which is incapable of resolution on the papers without recourse to oral evidence. The dispute of fact must be central to the issue before the court. In other words, it must be demonstrated that the issues pending for resolution by the court cannot be resolved without hearing *viva voce* evidence. It noted that the reliefs sought in both case 1 and case 2 are not entirely reliant on the impugned minutes. Rather, the respondents sought to impugn the notice convening the meeting and the resolutions passed thereat. They also prayed that the first respondent in each case be ordered to acquire the minority interests in the fourth respondent in case 1 and in the sixth respondent in case 2. The court *a quo* also noted that none of the draft orders in the two cases seek any specific relief on the minutes. It observed that in both cases the respondents' prayer was that in the event that the court upholds the meeting, then the minutes must be declared not a correct record of the business of the meeting. Thus the fate of the minutes was dependent on the findings the court makes in the main case.

It concluded that the issues for determination were legal in nature and could be resolved independently of the minutes of the meeting. Accordingly, it dismissed the point *in limine* raised by the appellants.

Whether the meeting was properly convened.

The respondents submitted that the notice requisitioning the meeting was invalid because it was directed to the offices of the company secretary at No 7 Normandy Road, Alexandra Park, Harare. This was not the registered address of the company (fourth respondent in case 1 and sixth respondent in case 2). For that reason, the directors were not obliged to convene the meeting as required by s 168(2) of the Act. Counsel for the appellants argued that it was a basic principle of corporate law jurisprudence that the court must be slow to interfere with the internal arrangements of the company since the company must regulate itself in terms of its constitutive document. Breaches of a technical nature were not fatal for as long as the majority could sit and arrive at the same conclusion that would have been arrived at had there been no breach. In any event, argued the appellants, both companies in case 1 and case 2 did not convene the meetings as requested. The respondents' founding affidavit makes that admission. Further, there was no averment in the founding affidavit in case 1 that the directors of the fourth respondent were not aware of the meeting.

As regards the sixth respondent in case 2, it was averred in the founding affidavit that the directors had attempted to engage the second appellant as they felt there was no need for the meeting. That averment, argued the appellants, was an admission that the directors in case 2 were aware of the meeting. In fact, the deponent of the founding affidavit stated that he had received the notices but did not advise the other directors. The appellants submitted that s 168 (3) of the Act provides a remedy to a member where a company sought to deny the member the right to have a meeting convened.

The court *a quo* determined that in terms of s 168 of the Act, the directors of a company must, on the requisition of members, issue a notice to members convening the meeting. It noted the assertion by the appellants that their directors were not obliged to issue the notice because the requisition by members was not deposited at their registered office.

However, the court *a quo* found that the assertion was irrelevant to the case made out in the respondent's founding affidavits. In both cases, the respondents did not make the non-service of the requisition on the companies an issue. The written objection submitted at the beginning of the meeting did not raise the issue either. Rather, what the respondents took issue with was the notice issued by the members consequent upon the failure by the directors to issue a notice upon request by the members. It ruled that as such, the respondents were estopped from challenging the validity of the requisition of the meeting by a shareholder when in their founding affidavit they never made it an issue. It accordingly found no merit in the objection.

Validity of the notice convening the meeting

The first appellant convened the meeting in terms of s 168 (3) of the Act, consequent upon the failure by the directors of the fourth respondent in case 1, and, the directors of the sixth respondent in case 2, to convene it. The respondents contended that the notice was defective for want of compliance with the provisions of s 171 (3) of the Act. The appellants did not deny that the notice was defective but argued instead that the alleged irregularity was not fatal. Counsel for the appellants submitted that there was nothing irregular with the meeting having been convened, as nearly as possible, to a meeting that would have been convened by the directors. He submitted that the duty to strictly comply with s 171 (3) of the Act rested with the officers of the company and not shareholders and that the definition of officer in the Act does not include shareholders. In any event, all shareholders of the two companies duly attended the meeting either in person or by proxy, hence no prejudice arose from the omission of the proxy forms.

The court *a quo* agreed with these submissions by counsel for the appellants. It noted that s 168 (4)(a) of the Act deals with meetings convened by requisitionists as opposed to meetings convened by directors or officers of the company. It provides that meetings

convened by requisitionists "shall be convened in the same manner, as nearly as possible, as that in which meetings are to be convened by directors." The court *a quo* interpreted these words to mean that the standards by which a meeting convened by directors and one convened by members should be measured are different because some latitude should be given in respect of meetings convened by members. For that reason, the court *a quo* concluded that the failure to comply with s 171 (3) of the Act did not make the notice irregular, more so as the persons who were required to attend the meeting were present. No one was prejudiced by the non-compliance. The objection was accordingly dismissed.

Non-compliance with section 168 (2) of the Act

The respondents submitted that the notice was defective because it fell foul of s 168 (2) of the Act in that it did not state the objects of the meetings, an object being a statement of what is intended to be achieved by the meeting. It was argued that an object was not a statement of issues to be discussed but the resolution to be adopted by the meeting. *In casu*, the notice lacked clarity and specificity regarding the details of the person to be appointed company secretary, the appointment of directors, termination of the management committee and reconstitution of the executive team. In short, the agenda items were too broad and vague.

In reply, the appellants contended that a reading of the notice showed that the first appellant was clear in both cases as to the goals or purposes of the meeting. At any rate, a contravention of that section would not invalidate the proceedings. The meeting could have been postponed to allow the parties to exchange further information. It was further submitted that the appellants were not expected to know and comply with every single requirement of the Act when convening a meeting where the directors of the company had failed to do so.

The court *a quo* ruled in favour of the appellants. It reasoned that the infractions alluded to by the respondents in respect of non-compliance with s 168 (2) were not so grievous as to diminish the significance of the notice. In any event, in view of the import of s 168 (4)(a) of the Act, a meeting convened at the instance of requisitionists cannot be expected to meet the standards of a meeting convened by directors. For those reasons the court *a quo* dismissed the objection.

Failure to serve the third respondent

The respondents averred that the notice was not served on all the shareholders. They stated that the third respondent in case 1 had not been served while the first and second respondents received vague and unhelpful information. In case 2 the respondents stated that they were not supplied with sufficient detail and clarity of the meeting. The appellants` response was that there was a full quorum to allow for the conduct of the business of the meeting.

The court *a quo* agreed with these submissions by counsel for the appellants. It ruled that in as much as it was irregular not to serve the notice on all the parties, that irregularity was not so serious as to invalidate the proceedings, more so as all the parties attended the meeting. Accordingly, no prejudice was suffered by any of the parties by the irregular service or non- service of the notice. The objection was for that reason dismissed.

RESOLUTIONS OF THE MEETING

The appointment of the third appellant Antony Chihiya as company secretary

The respondents raised a three pronged attack against the appointment of the third respondent as company secretary. Firstly, it was submitted that there had been no proper notice in terms of s 168 of the Act in that while the letter of 23 November 2020 proposed the appointment of a new company secretary, it did not propose the termination of Virgin

Management's term as company secretary. The issue had not been raised in the requisition and should not therefore have been discussed at the meeting. In any event, a new secretary could not have been appointed where there was no vacancy. Secondly, it was submitted that a company secretary could not be appointed by shareholders at a meeting. In terms of s 198 (2) of the Act as read with article 76 of the company articles, it was the domain of the directors to appoint a company secretary. Thirdly, it was submitted that the third appellant was conflicted as he was the lawyer for the first and second appellants. As such, his appointment offended s 198 (4) (d) as read with s 198(7) (c) of the Act.

In response, the appellants submitted that s 198 (2) imposed the obligation to appoint a company secretary in respect of a public company and not a private company. It did not apply *in casu* and as such, shareholders acted within their rights to appoint one. As regards the absence of a vacancy, the appellants contended that the previous company secretary had abdicated its role in that Virgin Management, as secretary, had failed to convene a meeting and had not attended the meeting under review. That conduct created a vacancy. On the question of conflict of interest the appellants submitted that the previous secretary, one Littleford, was equally conflicted as he was a director in Virgin Management as well as a trustee of the first and second respondents in case 1 and the first respondent in case 2.

The court *a quo* held that there was substantial compliance with the law as required by s 168 (4) of the Act. In any event, the notice of the meeting clearly stated that the meeting was going to consider a resolution for the removal of the company secretary and the appointment of a new secretary. The respondents were therefore aware of the import of the notice in that regard. In any event, the court *a quo* came to the conclusion that s 198 (2) of the Act applies only to public companies. *In casu,* the two companies in case 1 and case 2 are private companies, rendering inapplicable the provisions of s 198 (2). The court *a quo*

accordingly held that the appointment of a company secretary of a private company must be done in terms of the constitutive document of the particular company. It observed that in the case of the fourth respondent in case 1, the appointment of the third appellant ought to have been made by the fourth respondent's board in terms of article 76 of its articles. That requirement was not met rendering the appointment of the third respondent invalid. As regards the sixth respondent in case 2, the court *a quo* held that the appointment of the third appellant was irregular because its article provided that such appointment was the preserve of the directors and not shareholders.

The court *a quo* also held that the question of conflict of interest had been raised in the context of s 198 (4) (d) of that Act as read with s 198 (7) (c) of that Act. These provisions refer to the qualification required for appointment as company secretary to a public company. *In casu* both companies in cases 1 and 2 are private companies, to which those provisions do not apply. The court *a quo* further noted that the constitutive documents of both companies do not define the required qualification nor do they state that one is disqualified on the basis that one has some relationship with a shareholder. That being the case, the court *a quo* was of the view that it could not prescribe who should qualify to be the company secretary of either entity.

The appointment of the second appellant as director of the fourth appellant in case 1

The respondents argued that second appellant had not, as required by the articles of the company, deposited with the company a notice confirming his acceptance of the appointment at least three days before the meeting. He should have been disqualified. The court *a quo* noted that the respondents had not, in their heads of argument or oral submissions, referred to the article that required one to signify one's prior acceptance in that manner. For that reason, the court *a quo* ruled that the respondents could not be heard to raise the objection at that late stage.

The respondents also submitted that executive directors were appointed by directors and not shareholders at a meeting. At any rate, the fourth respondent had a full complement of executive directors and as such there was no vacancy. It was also submitted that there was non-disclosure of the material terms of the appointment to enable the respondents to decide whether or not to vote for or against the appointment. The respondents further contended that clause14.1.5 of the Shareholders Agreement entitled the first appellant to only one director. The first appellant had already appointed Mr Mpofu as director and had thus exhausted its quota.

The respondents also averred that the shareholders agreement provided that the management of the company shall be under the Board of Directors, the Management Team and the Executive Committee. For that reason, it was not open for the meeting to reconstitute the management organs of the company. It was submitted that in the event of a conflict between the articles of the company and the shareholders agreement, the latter would prevail.

In response, the first appellant argued that it was entitled to appoint directors to represent its interests in terms of clause 14 of the shareholders agreement. It submitted that the appointment of T. Mpofu was never put into effect as it was conditional upon the presentation of the audited statement, which had not yet materialized.

After a detailed analysis of the company's shareholders agreement, the court *a quo* determined that the appointment of the second appellant as director could only be made by the Board of Directors and not shareholders. For that reason, it held that the appointment was irregular. It also held that the evidence before it was not sufficient for it to confirm whether T. Mpofu was indeed appointed as director.

The dissolution of the board and its substitution with a new board of two persons

The respondents in case 1 contended that the resolution to dissolve the Board was irregular as there was no notice of the intended resolution in the letter of 11 January 2021. They further alleged that the resolution was made after the meeting had been concluded. In response, the appellants argued that agenda number 8 of the notice dealt with this matter. The item referred to "the termination of the Management Team, EXCO and reconstitution with immediate effect." The appellants read this to include the dissolution and reconstitution of the Board and argued that sufficient notice was given for that purpose.

The court *a quo* noted that there was a difference between the board and the management team and that the notice did not refer to the dissolution of the board and its reconstitution. For that reason, it held that the resolution to dissolve and reconstitute the Board was irregular.

The appointment of Janita Rama and Rashi D'Almeida as directors to the sixth respondent in case 2 (fourth and fifth appellants, respectively)

The first respondent averred that a resolution had been taken at the meeting to appoint new directors for the sixth respondent and that the existing directors were removed from their positions. It was averred that the procedure adopted was irregular in that no requisite notice was given in terms of the articles of association, the appointees had not given notice accepting their appointment and that an objection raised by first appellant at the meeting was not adequately responded to. It was also averred that the second appellant communicated the dismissal of the sitting directors and the appointment of the fourth and fifth appellants but these developments were not recorded in the minutes. By omitting this from the minutes, the third appellant was alleged to have shown bias to the fourth and fifth appellants. It was further averred that the notice convening the meeting was defective because it had not adequately

informed the first respondent and the directors of the reasons of their removal. The respondents further averred that they had lodged their objections at the meeting but these were ignored and not attended to.

On their part, the appellants maintained that the notice of the meeting clearly referred to the removal of the current directors and the appointment of the fourth and fifth appellants. They denied that one Tanner and Stenton were removed as directors. The only resolution passed pertained to the appointment of the fourth and fifth respondents as directors. In any event the first appellant had the right to appoint directors in terms of the shareholders agreement.

The court *a quo* held that the objections raised by the respondents at the meeting were not attended to. The failure by the second appellant to address the objections made by the respondents at the outset of the meeting rendered the purported appointments irregular.

Oppression of minorities

The respondents` contention in both case 1 and case 2 was that the conduct of the appellants was oppressive of their minority rights. The court *a quo* noted that the respondents` complaint emanated from the events of the meeting. It was for that reason that the respondents sought the intervention of the court in terms of clause 22 of the shareholders agreement as read with ss 233 and 225 of the Act. However, the court *a quo* was not satisfied that the respondents' complaints about how the meeting was convened and conducted, were sufficient cause for it to be approached under s 223 of the Act. It reasoned that the section required an applicant to show that the company's affairs "are being or have been conducted" in a manner that the applicant finds to be oppressive to the interests of the minority. Thus, the improper conduct complained of must have been consistently and persistently repeated, for the

court to intervene as prayed. In any event, the court *a quo* noted that some of the conduct complained of may be corrected by the court without recourse to the drastic measures provided in s 225 (2) (d) of the Act. Accordingly, the court *a quo* dismissed the relief sought by the respondents in that regard.

The fate of the minutes

The court *a quo* was of the view that any shortcomings in the minutes should, as the norm, be corrected at the next meeting. It noted that such corrections were an internal matter to be resolved by the parties. The court could not be drawn into that internal process.

GROUNDS OF APPEAL

The appellant's grounds of appeal are as follows:

"1. The court *a quo*, having found that the notice convening the meeting was valid and that the extra ordinary meetings of the fourth and sixth respondents of the 8 February 2021 were validly convened and lawful, erred and grossly misdirected itself at law in finding that the resolutions passed thereat, were unlawful and thus null and void.

2. The court *a quo* erred and grossly misdirected itself on the facts and evidence, a misdirection amounting to an error and misdirection in law, in finding that the first appellant resolved to remove the minority directors in sixth respondent in the face of the minutes of the meeting in issue and the resolution itself to the contrary.

3. The court *a quo*, having found that the first appellant had not appointed any director to the boards of directors to the fourth and sixth respondents respectively as required by shareholders agreements of the fourth and sixth respondents, erred and misdirected itself in finding that the appointment of second appellant and of the fourth and fifth appellant as directors of the fourth and sixth respondents

respectively, was not done in accordance with the law and the company's constitutive documents.

4. "*A fortiori*", the court *a quo* erred and misdirected itself in setting aside documents filed pursuant to the resolutions of the meeting held on 8 February 2021 in respect of the fourth and sixth respondents and in reviving documents relating to the fourth and sixth respondents' status prior to the 8 of February 2021
5. For the stronger reason the court *a quo* erred and grossly misdirected itself in failing to find that the further appointment of second appellant on 8 of February 2021 as executive director of the fourth respondent was in accordance with fourth respondent`s constitutive documents and lawful.
6. Having found that the board of directors in fourth and sixth respondents and the company directors thereof have failed to conduct their duties, amounting to an abdication of their duties in respect of the affairs of fourth and sixth respondents, the court *a quo* erred and grossly misdirected itself at law in finding that first appellant's appointment of third appellant as company secretary for the fourth and sixth respondents for the smooth running of business of these two was unlawful and null and void."

RELIEF SOUGHT

The appellants seek the following relief:

"1. That the appeal succeeds with costs.

2. The judgment of the court *a quo* is set aside and substituted with the following:

(a) The court application under case number HC 1351/21 be and is hereby dismissed with costs at the legal practitioner and client scale.

(b) The court application under case number HC 1270/21 be and is hereby dismissed with costs at the legal practitioner and client scale"

ISSUES FOR DETERMINATION

The grounds of appeal raise the following issues for determination by this Court.

1. Whether the resolutions passed at the meeting were unlawful and thus null and void.
2. Whether the court *a quo* grossly misdirected itself on the facts in finding that the first appellant had resolved to remove the minority directors in sixth respondent.
3. Whether the appointment of the second, fourth, and fifth appellants as directors of the fourth and sixth respondents was done in accordance with the law and the companies' constitutive documents.
4. Whether the court *a quo* erred in setting aside documents filed pursuant to the resolutions of the meeting and reviving documents relating to fourth and sixth respondents prior to the meeting.
5. Whether the court *a quo* erred in failing to find that the further appointment of second appellant as executive director of the fourth respondents was in accordance with fourth respondent`s constitutive documents.
6. Whether the appointment of third appellant by the first appellant as company secretary for fourth and sixth respondents was unlawful.

SUBBMISSIONS BEFORE THIS COURT

In the main, Advocate *Uriri*, for the appellants, submitted that once the court *a quo* had found, as it did, that the meetings of the fourth and sixth respondents were validly convened in terms of the Act and the companies` constitutive documents, it could not have proceeded to find that the resolutions passed thereat were invalid and therefore null and void. Relying on the English case of *Rights Issues Investments Trust Ltd* v *Stylo Shoes Ltd & Others* 1964 (3) All ER 628, Mr *Uriri* submitted that it was trite that valid meetings of the company cannot birth an illegal outcome. To that end he submitted that where the meeting has been validly convened and the people who passed resolutions there constituted the majority, no

question of invalidity under those circumstances could arise. It could only arise if it is shown that there were vitiating factors, such as lack of quorum or lack of controlling shareholding. Further, it was submitted that the setting aside of the resolutions passed by the majority shareholder of the fourth and sixth respondents (in the first appellant) was irregular in that such resolutions can, notwithstanding that they had been declared null and void, even be passed again if the meetings were reconvened at the instance of the first appellant, the major shareholder in both companies. In this regard Advocate *Uriri* submitted that the correct position is that where a resolution is one that could be ratified by the company even when it has not followed the proper procedure, the court must not interfere. In support of that submission, reliance was placed on the case of *James North (Zimbabwe) Pvt Ltd & Others* v *Mattinson* 1989 (1) ZLR 377 (H) at 331H-332B. In that case the court quoted with approval the sentiments expressed by PLOWMAN J in *Bentley Stevens* v *Jones & Others* 1974 (2) ALL ER 653; 1974 (1) WLR 639 (CH) when he held that:

> "In my judgment, even assuming that the plaintiff's complaint of irregularities is correct, this is not a case in which an interlocutory injunction ought to be granted. I say that for the reason that the irregularities can all be cured by going through the proper processes and the ultimate result would inevitably be the same. In *Browne* v *La Trinidad* (1887) 37 CHD 1 at 17, LINDLEY LJ said:
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> > 'I think it is most important that the court should hold fast to the rule upon which it has always acted not to interfere for the purpose of forcing companies to conduct their business according to the strictest rules, where the irregularities complained of can be set right at any moment.'

In the *James North* case the court had noted that:

> "All the shareholders were present, in person or by proxy, at the extra ordinary general meeting, were fully aware of the business that was to be conducted and were able to state their views on the resolutions that were on the agenda… had a meeting of the directors of James North been held to consider the requisition by Siebe to convene the extra ordinary general meeting, the views of the directors of Siebe would have prevailed because they held the majority of the shares in James North. If the requisition for an extraordinary general meeting had been made by a minority of the shareholders the position might have been different.'"

We understand Advocate *Uriri`s* submission on this point to boil down to this, that where a decision has been taken by the majority shareholders on a particular issue, though under irregular circumstances, the court must not interfere. This is so because the company can self-correct by subsequently following the proper procedures and still arrive at the same conclusion as the one taken irregularly because the will of the majority would inevitably prevail.

In motivating the second ground of appeal, Advocate *Uriri* submitted that the facts before the court *a quo* did not support the court`s finding that the first appellant had removed the minority directors in the sixth respondent. In this regard it was submitted that the court *a quo* committed a gross misdirection of facts which amounts to a misdirection of law as stated in *Hama* v *National Railways of Zimbabwe* 1996 (1) ZLR 250 (SC).

With regards the third ground of appeal, Advocate *Uriri* submitted that the court *a quo* had contradicted itself in finding on the one hand that the appointment of second, fourth and fifth appellants to the board of directors of the fourth and sixth respondents was contrary to the Act and the constitutive documents, whilst on the other hand, holding that the first appellant, as the majority shareholder, had not exercised its right to appoint any director to the fourth and sixth respondents as provided for in the shareholders agreement of the fourth and sixth respondents. It was submitted that the record showed that T. Mpofu was not appointed director of fourth respondent by first appellant and that there was no allegation that the first appellant had appointed anyone as director of the sixth respondent. In any event, the shareholders agreement of the fourth respondent provides that the first appellant shall have the right to appoint a director and the right to remove and replace such director from the board of directors of the fourth respondent. Similarly, with regards the sixth respondent, the first

appellant has the right to nominate two directors. It nominated fourth and fifth appellants. It did so at a properly convened meeting.

As to the fourth ground of appeal, Mr *Uriri`s* submissions were to the following effect. The appointments of second, fourth and sixth appellants having been properly made, the setting aside of the fourth and sixth respondents` document filed as a result of the resolutions of the meeting was a misdirection on the part of the court *a quo*. Equally untenable was the revival of the fourth and sixth respondents` status prior to the meeting. That decision by the court *a quo* indicated a failure to take relevant considerations into account, namely, that the appointment of directors to fourth and sixth respondents constituted due and lawful exercise of first appellant`s rights in terms of the constitutive documents of both companies. Similarly, it was submitted that the appointment of second appellant as executive director of the fourth respondent was above board. The fact that there was no three days' notice given of the second appellant`s appointment did not invalidate the appointment. The case of *James North (Zimbabwe) supra* was cited as authority for that proposition.

In support of the sixth ground of appeal, Advocate *Uriri* submitted that the appointment of the third appellant as company secretary of the fourth and sixth respondents was properly made and that the finding to the contrary by the court *a quo* was a misdirection in the sense that such appointment had become necessary as the then secretary, Virgin Management Services, had abdicated its responsibility. Section 198(1) of the Act provides that a company must not conduct its business without a secretary. It was necessary that the third appellant be appointed in order to comply with the law. The argument that for validity, the appointment of the secretary ought to have been done in terms of the fourth and sixth respondents` articles of association, could only hold water if the boards of both companies

were willing to perform their duties. The evidence on record shows that these boards were not willing to perform their duties to further the interests of the two companies.

Advocate *Uriri* made no submissions in motivation of the fifth ground of appeal.

The appeal was vehemently opposed by the respondents. Advocate *Magwaliba,* for the respondents, submitted that the appeal was premised on a wrong basis, namely, the assertion by the appellants that a valid meeting of the company cannot birth an illegal outcome. It was submitted that the correct position was that an irregularity with regards the convening of the meeting or proceedings at the meeting will render invalid resolutions passed at the meeting. It did not follow, however, that where the notice convening the meeting is valid, decisions or resolutions made thereat are also valid.

In casu, the resolutions of the meeting were set aside not because the meeting had not been properly convened, but because they were made contrary to the constitutive documents of the two companies. It was submitted that any appointments made outside the constitutive documents would be irregular, notwithstanding the fact that the meeting in which they were made was itself properly convened. It was also submitted that the English cases cited by the appellants do not support the appellant's position and are in any case, distinguishable from the facts of this matter. As the resolutions in question were declared null and void, they could not, as suggested by the appellants, be ratified by the two companies. The case of *James North (Zimbabwe) supra* dealt with irregularities in convening the meeting and not the shareholders` power to appoint a director or a company secretary. That case is clearly distinguishable from the present matter. It was submitted that the court *a quo* correctly found that in terms of the constitutive documents of the two companies, the appointment of the executive directors was the preserve of the board of directors and not the shareholders. The

shareholders could only appoint non-executive directors to represent their interests on the board. It also correctly determined that in terms of the constitutive documents, the appointment of the company secretary was similarly the preserve of the board and not the shareholders. The resolutions passed by the shareholders, purporting to make these appointments, were accordingly properly declared null and void.

Advocate *Magwaliba* attacked the second ground of appeal on the basis that it was premised on the wrong facts. The record clearly shows that the court *a quo* could not make a pronouncement on whether or not the first appellant had resolved to remove the minority directors in sixth respondent because the facts and the minutes did not shed light as to what exactly had transpired. It could not establish whether in fact the minority directors had been removed. The court *a quo* merely opined that if such had happened, it would have been null and void for non- compliance with the constitutive documents. It made no factual finding on the matter nor did it make any ruling of the nature alleged by the respondents. It was submitted that any indication to the contrary in the operative part of the order of the court *a quo* is a patent error which can be corrected in terms of r 29 (1)(b) of the High Court Rules, 2021.

According to the respondents, the appellants misconstrued the issues in their third ground of appeal. That ground speaks to the right of the first appellant to appoint directors as it did in appointing the second, fourth and the fifth appellants. The issue before the court *a quo* was whether the appointment of executive directors was the prerogative of the board and not the shareholders. The court a *quo* considered the provisions of clauses 14 and 15 of the Shareholders Agreement and Articles 56 and 60 of the fourth respondent`s Articles of Association and came to the inevitable conclusion that executive directors could only be appointed by the board of directors and not by a meeting of shareholders. The respondents submitted that the decision of the court *a quo* in this regard cannot be impugned. It was for

that reason that the court *a quo* set aside the appointment of the second appellant as an executive director. Similarly, it was submitted that the first appellant failed to comply with the provisions of the constitutive documents regarding the appointment of fourth and fifth appellants as directors of the sixth respondent. Such non-compliance was fatal to the resolution made appointing the fourth and fifth appellants.

The respondents submitted that the appellants' fourth ground of appeal has no merit in that it assumes that the appointments of the second, fourth and fifth appellants to the boards of both fourth and sixth respondents were done lawfully. For that reason, the appellants assert that the order of the court *a quo* setting aside documents generated as a result of those appointments should not have been made. The fact of the matter however, argue the respondents, is that the court *a quo's* finding was that the appointments were illegal for lack of compliance with the constitutive documents. Once it had made such a finding, it stood to reason that documents generated in pursuit of such illegal appointments be set aside as they emanated from acts found to be null and void. No misdirection could arise under those circumstances.

The fifth ground of appeal was not motivated in the heads of argument. The respondents submitted that the ground must, for that reason, be deemed to have been abandoned. In any event, the averments in that ground are essentially the same as those in the third ground.

Advocate *Magwaliba* attacked the sixth ground of appeal on the grounds that the appellants seem to be of the view that they were entitled to self-help by appointing the third appellant as company secretary on the grounds that the substantive secretary, Virgin Management Services, had abandoned its responsibilities. He submitted that the principle that

one cannot take the law into one`s hands in asserting one`s rights is fundamental in our law. The appellants should have followed due process. The appointment of third appellant as company secretary was thus unlawful. The court *a quo* was obliged to intervene in the manner it did. In any event, the facts do not show that the incumbent secretary had abandoned its duties as averred. The court *a quo* observed that on that occasion the secretary had failed to convene the meeting as requisitioned. The secretary had given an explanation which the court *a quo* viewed as unconvincing. The allegation of abandonment is based on just that one instance. He submitted that the conduct of the secretary cannot in the circumstances be regarded as abdication. That is the reason why the court *a quo* did not make a finding of abdication of duty. For the same reason, it cannot be said that the Board itself had also abdicated its responsibility. In any event, the Act provides shareholders with remedies where such abdication will have taken place. The appellants should have pursued those remedies. These remedies are outlined in s 62 and 202 of the Act.

ANALYSIS

The record shows that the appellants pinned their appeal on the assumption that resolutions made at a meeting duly convened in terms of the law are unimpeachable. That foundation is clearly misplaced. Resolutions made at such a meeting are required to comply with the constitutive documents of the company and the shareholders agreement, the governing instruments. Non-compliance with these instruments is fatal.

The appellants submitted that any irregularities perceived in such resolution can be cured by subsequent meetings of the company. That is true where the irregularities are purely procedural. Where the irregularities relate to the powers and responsibilities of the organs of the company, no remedial action by the company is possible. For example, the

constitutive documents of the two companies vest the powers to appoint executive directors and company secretary in the board of directors. The shareholders have no role in the appointments of these officers. Any purported appointment of such officers by the shareholders is clearly outside the powers vested in the shareholders. Such appointments are illegal and thus null and void. A company cannot ratify an illegality.

We are satisfied that the court *a quo's* decision was arrived at after a thorough examination of the facts, the law, the constitutive documents and the shareholders agreements for both companies. We discern no misdirection in the manner in which it determined the facts and applied the law to those facts. Indeed the appellants have not indicated even a single provision in the governing instruments which is at variance with the findings of the court *a quo*. The case law cited by the appellants is distinguishable from the facts of this matter. The basic but fallacious argument put across by the appellants was that because the first appellant had a right to appoint directors to the two companies, such right could be exercised without due regard to the companies` constitutive documents. That argument is clearly wrong.

We conclude, therefore, that the appeal in both cases has no merit. It ought to be dismissed. We agree with the respondents that the order of the court *a quo* to do with the removal of minority directors in the sixth respondent is at variance with the clear reasoning of the court *a quo* in the body of its judgment. We also agree with the respondents that this patent error may be corrected by the court *a quo* in terms of r 29 of the High Court Rules, 2021.

DISPOSITION

The appeal has no merit. It must be dismissed.

Both the appellants and the respondents sought, in the event that they succeeded in the appeal, costs on the legal practitioner and client scale. We find no justification for an order of costs on that scale. Accordingly, costs on the ordinary scale shall follow the cause.

In the result it is ordered as follows:

1. The appeal against the judgment of the court *a quo* given under case HC 1351/21 be and is hereby dismissed
2. The appeal against the judgment of the court *a quo* given under case HC 1270/21 be and is hereby dismissed.
3. The appellants shall pay the costs of suit jointly and severally, the one paying the others to be absolved.

BHUNU JA : I agree

MUSAKWA JA : I agree

Chambati Mataka & Makonese Attorneys, 1st to 5th appellants' legal practitioners

Wintertons, 1st to 6th respondents' legal practitioners