IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 145/2014**

HOLDEN AT LUSAKA

(CIVIL JURISDICTION)

BETWEEN:

SYLVESTER NTHENGE **APPELLANT**

AND

FRIDAY MWAMBA **RESPONDENT**

CORAM: Hamaundu, Wood and Malila JJS.

On 23rd May, 2017 and 1st March, 2018.

For the Appellant: *Mr. Nchima Nchito SC – Messrs Nchito and Nchito*

For the Respondent: *Mr. Milner Katolo – Messrs Milner & Paul Legal Practitioners*

JUDGMENT

WOOD, JS, delivered the Judgment of the Court.

Legislation referred to:

(1) Sections 164,170 and 171 of the Companies Act Cap 388 of the Laws of Zambia.

This is an appeal against a decision of the High Court which held that the appellant was obliged to sign the accounts of two

companies pursuant to section 164 and 170 of the Companies Act 388 of the Laws of Zambia.

The parties to this appeal are major shareholders in a company called Necor Zambia Limited. The respondent is the Managing Director of Necor Zambia Limited. The parties are shareholders and Directors of a Company called Applications Solutions Limited.

In February, 2013 the respondent sent the appellant accounts for the year ended 31st December, 2011 for his signature as required by Part VIII of the Companies Act Cap 388 of the Laws of Zambia. The appellant refused to sign the accounts on the grounds that he was not availed information he had requested for and that his outstanding dividend had not been paid or recorded in the accounts in question as a debt owed by the companies to him.

As a result of the statement on the signing of the accounts, the respondent commenced an action by way of originating

summons under section 164 and 170 of the Companies Act seeking the following relief:

1. *That the respondent (now appellant) does within a period not exceeding 14 days from the date of the order to be made herein make good his default in failing or refusing to sign the financial statement or accounts of the companies for the accounting reference period ending 31st December, 2011.*

2. *The court do make all consequential directions as it may deem or consider just and expedient in the circumstance; and*

3. *The respondent does personally bear the costs of and incidental to the application.*

In her judgment, the learned judge held that even though there was a query by the appellant relating to the appointment of the auditors and their remuneration, auditors are appointed for each year. She further held that where the members of a company have not held an annual general meeting or they do not do so for a particular year, then the auditors remain in office until the members pass a resolution to re-appoint, or remove them as auditors. She held that the auditors were appointed by the shareholders with the approval of the board. She further held that the auditor who prepared the 2011 accounts remained in

office and would continue doing so until an annual general meeting was held where the members would either choose to re-appoint or remove them. This was so because the failure to re-appoint auditors is treated largely as a matter for internal concern to a company rather than a matter for external regulators. She therefore did not find that the issue of a letter of re-appointment or approval of auditors was a factor to the claim and that it had no bearing on the prepared financial statements.

The learned judge then determined whether the queries raised in respect of the audited accounts would entitle the respondent to refuse to sign the accounts. She accepted that a director is not obliged to sign accounts that do not reflect a true and fair position of the company but concluded that from the evidence before her, no queries were made to the auditors by the respondent to warrant his refusal to execute the financial statements. Since there were no queries in connection with the accounts, she took the view that the accounts reflected a true and fair position of the companies and dismissed the argument that

they were not signed by the appellant on the ground that they did not reflect a true and fair position of the companies.

The learned judge also dismissed the argument raised by the appellant that the accounts were not circulated for approval because there was an email dated 7th March, 2013 from the appellant in which he stated that he would not be able to look at the 2011 audited accounts until his dividend for 2009 was settled in full.

The last issue the learned judge dealt with in her judgment was whether the appellant was justified in his refusal to sign the 2011 audited accounts. She came to the conclusion that from the emails exhibited, the appellant was not justified or being reasonable in refusing to sign the accounts. She found that it was obvious that the reasons for the appellant's refusal to sign the accounts was solely because of the non-settlement of the dividend for 2009. The issues raised in connection with the dividend, non-payment of directors' fees and reimbursement of expenses incurred in attending board meetings were separate issues and could not be used as a defence or bar to the

appellant's performance of statutory obligations imposed by the Companies Act. She therefore allowed the respondent's application and ordered the appellant to sign the statement of accounts for the companies within 14 days from the date of her judgment.

The appellant has now appealed to this court on four grounds. The first ground of appeal is that the court below erred in law when it failed to consider the effect of section 164 (6) of the Companies Act requiring the appellant to satisfy himself as a director that the accounts reflected a true and fair view of the company's financial position before signing the accounts.

The second ground of appeal is that the court below erred in law and in fact when it found that the appellant's refusal to sign the 2011 audited accounts of the companies in question was not justified when his reasons for doing so were clearly set out in his evidence and supported by the law.

The third ground of appeal is that the court below erred in law and in fact when it found that the non-payment of the

appellant's dividend was of no importance to the matter at hand when dividends are a material debt owed by the company to its shareholders and affect whether the accounts in question give a true and fair view of the companies' financial position.

The fourth and last ground of appeal is that the court below erred in law and in fact when it found that the appointment of the auditors for the year 2011 had no bearing whatsoever on the 2011 financial statements when the appointment of the auditors directly affected the validity of the accounts in question.

When this appeal came up for hearing on 23rd May, 2017, Mr. Katolo applied for leave to file the respondent's heads of arguments. We allowed him to file the heads of arguments on or before 31st May, 2017. He has not done so to date. State Counsel Nchito on the other hand, relied on his heads of argument which he augmented with a brief submission.

He submitted, with regard to the first ground of appeal, that the learned trial judge had not referred to section 164 of the Companies Act in full as she had only quoted subsection 6 of

section 164. When section 164 is read in full it does not give a director a mandatory obligation to sign the accounts but only to do so if they reflect a true and fair position of the company which is also an important obligation on the part of a director. With regard to the second ground, he submitted that in addition to the email correspondence between the parties, the appellant gave evidence and was cross-examined. The court below did not take a view on his credibility but rather decided to ignore his evidence. On the question of the dividend, he submitted that the evidence supported the position taken by the appellant. He referred the Court to a series of emails in the record of appeal and drew the attention of the Court to the email dated 7th March, 2013 which shows that the accounts prepared by the auditors did not take into account the resolution on the payment of dividends to enable the appellant to sign the accounts. According to State Counsel Nchito, the payment of the dividend was, contrary to the view taken by the court below, not a condition precedent for signing the accounts but was in addition to the necessity of the resolution on the dividend being reflected in the accounts.

On the appointment of auditors, State Counsel Nchito submitted that the question was whether the appointment had been done and not whether they should simply continue. The evidence in the record of appeal showed that there was no proof of the auditors having been appointed. The question was not whether they should have continued but whether there was a specific appointment for 2011.

With respect to the first ground, the appellant has argued that the obligation of a director under section 164 (5) of the Companies Act to sign the accounts of a company is not unqualified as it clearly provides that the directors must take reasonable steps to ensure that certain information appears in the accounts and that it appears correctly. Section 164 (6) of the Companies Act further provides that the directors must be of the opinion that the profit and loss accounts as well as the balance sheet drawn up give a true and fair view of the profit and loss of the company for that financial year. The appellant argued that as one of the only two directors of the companies in question he had been excluded and blocked by the respondent from accessing

company records and as such he was not in a position to affirm the integrity of the financial statements made in the accounts. This evidence, the appellant argued, was unchallenged in the court below and it showed that the appellant was not in a position to affirm the integrity of the accounts as he had no access to the relevant information.

The appellant further argued that section 164 (6) of the Companies Act resolves the question as to the accuracy of the accounts. The director must be of the opinion that the accounts reflect a true and fair view of the financial state of the company. In order to form this opinion, the director must have full access to the necessary source documents and all his queries and questions must be answered and answered in full, to his satisfaction. The appellant argued that the court below should have taken into account the effect of section 164 (6) of the Companies Act because section 164 (1) of the Act is not in isolation. A director's duty to sign accounts is qualified by section 164 (6) and the appellant should have been satisfied that the accounts were accurate before he signed them.

We have considered this ground of appeal. The issue as we see it relates to the interpretation of section 164 of the Companies Act and to the type of evidence adduced in support of the argument that the accounts are not a true and fair reflection of the financial position of the companies. Section 164 of the Companies Act in so far as is relevant to this appeal states as follows:

> *"164. (1) Subject to this Division the directors of a company shall, after the end of each financial year of the company but not later than twenty-one days before the annual general meeting of the company for that financial year, or, if no annual general meeting of the company is held within three months after the end of the financial year of the company, not later than twenty-one days before the end of that period of three months, caused to be made out----*
>
> *(a) a profit and loss account for the financial year just ended, being a profit and loss account that gives a true and fair view of the profit or loss of the company for that financial year;*
>
> *(b) a balance sheet as at the end of the financial year just ended, being a balance sheet that gives a true and fair view of the state of affairs of the company as at the end of that financial year.*
>
> *c) ____*
>
> *2) ____*
>
> *3) ____*
>
> *4) ____*

5) The directors shall, before the profit and loss account and balance sheet referred to in subsection (1) are made out, take reasonable steps—

(a) to ascertain what action has been taken in relation to the writing off of bad debts and the making of provisions for doubtful debts;

b) to cause all known bad debts to be written off and adequate provision to be made for doubtful debts;

c) to ascertain whether any current assets, other than current assets to which paragraph (a) or (b) applies, are unlikely to realize in the ordinary course of business their value as shown in the accounting records of the company and, if so, to cause—

(6) *The directors shall cause to be attached to the annual accounts, before the auditor reports on the accounts under this part, a statement made in accordance with a resolution of the directors, and signed by at least two directors stating whether in the opinion of the directors----*

a) the profit and loss account is drawn up so as to give a true and fair view of the profit or loss of the company for the financial year;

b) the balance sheet is drawn up so as to give a true and fair view of the state of affairs of the company as at the end of the financial year;

c) there are reasonable grounds to believe that the company will be able to pay its debts as and when they fall due; and..."

We do not agree with the appellant that a director of a company must be of the opinion that the accounts reflect a true

and fair view of the state of the company before he appends his signature to the financial statements. The argument that a director's duty to sign accounts under section 164 (1) is qualified by section 164 (6) which requires a director to satisfy himself that the profit and loss accounts gives a true and fair view of the profit or loss of the company for the financial year and that the balance sheet gives a true and fair view of the state of affairs of the company as at the end of the financial year does not mean that a director has the right to refuse to sign the accounts. We say so because in a case such as this one where the directors have not agreed that the accounts give a true and fair view of the profit or loss of the company or that the balance sheet does not give a true and fair view of the state of affairs of the company a director who does not agree is obliged to sign the accounts but must indicate as to why he believes they are not a true and fair view of the state of the company. Section 164(6) uses the word 'whether' which implies that a director can sign either in agreement with the state of the company as reflected in those accounts or in disagreement. This would then put third parties on notice as to state of affairs of the company.

Although the learned judge seems to have reached the conclusion that the main reason why the appellant had refused to sign the accounts was because the balance of his dividend for 2009 had not been paid, a reading of the emails shows that this was not the only reason. The other reasons were that the accounts did not take into account the board of directors' resolution on the payment of dividends and the dispute over whether or not the auditors for 2011 had been properly appointed. The appellant's email of 27th February, 2013 reads as follows:

> *"AM*
>
> *I basically advised FM that unless my 2009 balance of dividend is paid I will not sign the NECOR Accounts.*
>
> *Thankx*
>
> *Sylvester Nthenge"*

In his email of 7th March, 2013 he stated:

"AM.

Above received but be advised as follows:

1. *I need to see the signed accounts for 2010 (NECOR & ASL)*
2. *There exists a standing BOD resolution on payments of dividends (check your records). I note these accounts do not take that resolution into account and they should for me to sign them off 3.*

After addressing the above two issues kindly be advised that until the balance of my 2009 dividend is settled in full. I will not be able to look at these accounts leave alone approving/ signing them off.

Regards

Sylvester Nthenge"

Even though these reasons appear to be valid, the appellant was obliged to sign the accounts with the caveat that in his view, the accounts were not a true and fair view of the state of the companies.

The appellant has also argued that his unchallenged evidence in the court below showed that he was not in a position to affirm the integrity of the accounts as he had no access to the relevant information. While we accept the argument that as a

director and shareholder appellant is entitled to have access to relevant information to the companies in which he had an interest, this entitlement does not override the statutory obligation to sign the accounts. We find no merit in first ground of appeal.

The argument in support of the second ground of appeal is that the finding of the court made on the review of the evidence was not supported by the law. The appellant had made it clear that his reasons for refusing to sign the accounts was that he was not satisfied that the accounts presented a true and fair view of the financial affairs of the company. The e-mails that were referred to by the learned trial judge explained that he needed to see the signed accounts for 2009 and 2010 before he could sign the 2011 accounts. He had explained in the emails that the accounts did not take into account the company's resolution on the payment of dividends. The appellant argued that the reasons advanced went to the accuracy of the accounts that had been presented to him for signature. The second ground is related to the first ground. We are of the view that the arguments in the

second ground of appeal are an extension of the arguments in the first ground of appeal. We therefore find no merit in the second ground of appeal for the reasons given in the first ground of appeal.

The third ground of appeal attacks the holding by the learned trial judge that the non-payment of dividends was of no importance to the matter at hand to be a basis for refusing to perform his statutory obligations. The argument advanced by the appellant was that the, non - payment of the appellant's dividend is important and goes to the accuracy of the accounts presented. In cross-examination, the appellant had testified that the issue of the outstanding dividend should have been reflected in the accounts of 2011 because dividends are company expenses which are payable. He further testified that if the outstanding dividend was not reflected then the accounts did not show a true and fair reflection of the company's financial position. According to the appellant, the court below misapprehended the facts when it found that the non-payment of dividends was a separate issue that could be pursued separately and was not a defence to the

action. The appellant wondered how many other material debts would have been concealed if the accounts in question did not reflect a material debt such as a dividend. The appellant could not therefore, in the circumstances be compelled to sign the accounts.

We note in dealing with the third ground of appeal that the learned trial judge in a ruling delivered in respect of a counter claim on 3rd April, 2014 separated the dividend counter claim of K694, 038.27 and ordered that it be tried separately together with the other issues in the counter claim. We have not seen any appeal against that ruling. The appellant is taken to have accepted that ruling and cannot now raise it as it had been effectively dealt with. In any event, we do not see how the non-payment of dividend can be used as a basis for refusing to sign the accounts particularly in view of the fact that he was obliged to do so and that the appellant had refused to look at the accounts or contact the auditors for any clarification where he felt that the accounts did not reflect a true and fair position of the company. Quite clearly there is no merit in this ground of appeal as well.

In the fourth ground of appeal, the appellant argued that the appointment *(or lack of it)* of auditors to prepare the accounts was also crucial in this matter. This was because the accounts were purporting to be audited accounts and the auditors preparing the accounts should have been duly appointed by the company. The appellant argued that there was a resolution appointing the auditor to prepare the 2010 accounts. The auditors were supposed to hold office for one year only, until the next annual general meeting. There was no evidence to show that an annual general meeting had taken place or that a resolution was passed to extend the auditors appointment and mandate to 2011. The absence of a resolution appointing auditors for 2011 was a serious flaw to the entire process as it meant that the accounts that the appellant was being asked to sign were prepared without the requisite authority. As such there were no accounts to be signed.

The view taken by the learned judge that no queries were made by the appellant to the auditors overlooks the dispute the appellant had with regard to the appointment of the auditors. His

position was that while the directors had earlier on appointed Grant Thornton as auditors, there was no agreement showing that HLB Reliance had been appointed as auditors for 2011.

Section 171(3) of the Companies Act provides that:

> *"(3) A company shall at each annual general meeting appoint an auditor or auditors of the company, who shall hold office until the close of the next annual general meeting held by the company."*

Subsection (8) of section 171 allows a company by ordinary resolution to fill any casual vacancy in the office of auditor. It goes on to state that an auditor so appointed shall hold office until the close of the next annual general meeting held by the company. It is, therefore, a requirement to have a resolution first providing for the filling of any casual vacancy in the office of auditor, before the auditor is appointed. The appellant's grievance was that there was no resolution appointing the auditors for 2011. The respondent in cross-examination stated that there was a resolution to that effect but that it had not been produced in evidence. Quite clearly, apart from his testimony, there was nothing in writing to show that indeed a resolution had been passed appointing HLB Reliance to fill any casual vacancy in

the office of auditor. This was a valid ground for signing the accounts with a further caveat to the effect that the auditors were not properly appointed. In addition, the appellant was entitled, pursuant to cause 8.16 of the shareholders agreement to have access to the financial books and records of the company. Clause 8.16 reads as follows:

> *"8.16 The shareholders shall have access co-equivalent to that of the directors to the financial books and records of the company and each shareholder shall have the right to an independent audit of the financial books and records of (the) company carried out at the requesting shareholder's expense by an auditor nominated by it."*

The appellant's affidavit in opposition states in some considerable detail the difficulties he encountered in trying to gain access to company information and records. No affidavit in reply was filed in response to his assertions although the respondent in cross-examination stated that there was confirmation by the Head of Finance that documents were availed to the appellant. It is quite clear from what we have said in connection with the fourth ground of appeal, that this was a valid reason for signing the accounts with an explanation that the

appointment of the auditors was not done in accordance with the Companies Act. We find no merit in the last ground of appeal.

The net result is that the appeal is dismissed with costs to the respondent to be agreed or taxed in default of agreement.

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E.M. HAMAUNDU
SUPREME COURT JUDGE

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A.M.WOOD
SUPREME COURT JUDGE

.....
M. MALILA, SC
SUPREME COURT JUDGE