

**IN THE HIGH COURT OF ZANZIBAR
HELD AT VUGA
CIVIL CASE NO. 27 OF 2006**

**EMERSON AND GREEN LIMITED.....PLAINTIFF
VERSUS**

- 1. THE REGISTRAR OF COMPANIES
ZANZIBAR.**
- 2. ABDULBAQ HABIB ALI.....DERENDANT**

JUDGMENT

MWAMPASHI, J.

In this suit the plaintiff Emerson and Green Limited has sued two defendants namely the Registrar of Companies Zanzibar and Mr. Abdulbaq Habibu Ali who are hereinafter to be referred to as the 1st and the 2nd defendant respectively. The plaintiff, a Company incorporated under the Laws of Zanzibar alleges in her plaint that on 17/05/2006 she did hold a Board of Directors' meeting and that on the second day minutes and the resolution were presented to the 1st defendant for filing and registration but the 1st defendant through the 2nd defendant refused to accept and register the same without giving any reason. Several efforts were made by the plaintiff through the Managing Director and her Secretary to have the documents registered but all in vain. It is further alleged in the plaint that after the efforts to make the resolutions registered had proved

futile a notice to sue the defendant was issued and that is when the defendants responded by admitting to have refused registering the resolutions on irrelevant grounds. The plaintiff also alleges that prior to this matter her file under the direct custody of the 2nd defendant had been tampered with and some documents removed therefrom and that the 2nd defendant was receiving unofficial information and acting on them contrary to law and procedure to the detriment of the plaintiff and therefore that in so doing the defendants have failed to fulfill statutory duties and that their acts amounts to misfeasance of public officers.

The plaintiff prays for judgment and decree against the defendants in the following form:

- (a) An order that the Defendants jointly and severally should pay the plaintiff general damages of not more than Tshs. 35,000,000/= for misfeasance of Public officers.
- (b) An order directing the documents to be filed, registered and recorded.
- © An order to compel the Defendants to fulfill their duties according to law; and

(c) Costs of and incidental to suit.

The defendants in their respective written defence have categorically denied the claims against the. They have denied allegations that there was any meeting duly held or convened by the Plaintiff's Company and they have insisted that reasons for the refusal to file the documents were given.

The following were the agreed and recorded issues:-

1. Whether there was a meeting of the plaintiff's Directors on 17/05/2006.
2. Whether the refusal by the defendants to register and file the plaintiff's minutes and Board resolutions were justifiable.
3. Whether the defendants' acts as pleaded in the plaint amount to misfeasance by a public officer.
4. Whether the 2nd defendant can be held personally laible for omissions and commissions of the office of the 1st defendant.
5. Whether the plaintiff is entitled to the damages claimed against the defendants.

6. What are the reliefs.

The first plaintiff's witness has been Mr. Bashiru Wazizi Mohamed who has testified as PW1 telling the court that he is the Assistant General Manager of the plaintiff's Company. He has further testified that the first shareholders of the Company that carries a hotel business in the name of 236 Hurumzi Hotel were Roma Inn limited and Mr. Thomas Robert Green. Later Ms. Faye Linn Richardson became the third shareholder with 2% of shares. PW1 has also told the court that on 17/05/2006 the Company held an extra ordinary meeting of the shareholders. All shareholders attended except Roma Inn Limited. PW1 who was the one who took down the minutes prepared the minutes and resolutions but when he took them to the defendants for registration the 2nd defendant refused to endorse the same. After several follow ups the 2nd defendant told PW1 that the documents cannot be accepted because the meeting and the removal of Mr. Emerson Skins from directorship has not been properly conducted. Because the meeting had been conducted in accordance with the directions of the 2nd defendant through his letter dated 14/02/2006 it was not understandable why the document could not be accepted and for the reason PW1 complained to the 1st defendant who promised to take necessary measures but he did not. Thereafter the plaintiff by a letter, which has been tendered as Exhibit P1,

complained against the defendants to the Chief Secretary who advised that a meeting be convened by the 1st defendant between the plaintiff and Mr. Skins (Exh. P2). The plaintiff responded to the Chief Secretary's letter by the letter dated 30/06/2006 (Exh. P3) telling him that there was no need of convening the meeting as the issue of registering the document is a legal requirement. Then on 04/07/2006 the Secretary sent the plaintiff a reply (Exh. P4) and on 10/07/2006 the 2nd defendant wrote to the plaintiff insisting for the meeting to be convened (Exh. P5) but the plaintiff maintained that the documents were in order and needed to be accepted (Exh. P6). Thereafter a resolution to file this suit was reached on 20/06/2006 (Exh. P7).

PW1 has maintained that the meeting and the removal of Mr. Skins from directorship was properly done not only in accordance with the directions of the 2nd defendant but also in accordance to the Company Decree, Cap 153. He has told the well as to the 1st defendant and that the agendas were the removal of Mr. Skins from directorship and any other business. Mr. Skins who was asked to show cause why he should not be removed from the directorship did not turn up on 10/05/2006 and even when the meeting was adjourned to 17/05/2006 he again failed to attend.

It has further been testified by PW1 that at one time they decided to make a search of the Company file but the file could not be found. The matter was

reported to the 1st defendant but for three months the file could not be found and when it was later found it had some document missing. PW1 has also testified that the 2nd defendant for his personal interests was unofficially communicating with Roma Inn Ltd, was biased, was acting for Roma Inn and was unjustifiably blocking the plaintiff to fulfill its legal obligations. PW1 has lastly asked the court to hold the 2nd defendant personally liable for failing to perform his duties for his personal interests. He has also prayed for the defendant to be held liable for inconveniences and damages the Company has suffered due to the defendants' refusal to register the documents in question.

When asked in cross examination PW1 has stated that Mr. Emerson Skins was one of the directors of the plaintiff's Company through his Company known as Roma Inn that has shares in the plaintiff's Company. He has also stated that it was resolved that Mr. Skins be removed from the directorship because Roma Inn was in shamble with no required number of directors and also because Mr. Skins had attempted to improperly sell the plaintiff's Company and had caused part of the hotel building belonging to the plaintiff's Company to be attached in execution of his personal debt. PW1 has further stated that they preferred removing Mr. Skins from the directorship to winding up the Company because they could efficiently continue to run the Company.

It has also been stated by PW1 that the resolution to remove Mr. Skins from the directorship was firstly passed at the first meeting attended by three directors, i.e Mr. Thomas Robert Green, Dr. Hickman and him. He has insisted that the 2nd defendant refused to accept the documents for his personal interests.

In further cross examination PW1 has told the court that the removal of Mr. Skins from the directorship was in accordance with the law. He has also stated that that Mr. Skins was given a 28 days notice as directed by the 2nd defendant but he failed to appear and even when the matter was adjourned for a week to afford him more time he did not turn up to show cause why he should not be removed from the directorship. PW1 has admitted that resolutions are filed to the Registrar of Companies and that the 2nd defendant was the deputy registrar of Companies. He has however stated that he was informed that his documents were being dealt with the 2nd defendant.

Mr. Thomas Robert Green the Managing Director of the plaintiff's Company has testified as PW2 telling the court that the shareholders of the plaintiff's Company are Roma Inn Ltd (50%), his wife Ms. Faye Lynn Richardson (02%) and himself (48%), he has also testified that other directors are Ms. Jenifa Kay Goodman, Mr. Bashiru Mohamed and Dr. Hickman. PW2 has further told the court that the main agenda for the shareholder meeting held on 17/05/2006 was to remove Mr. Emerson Skins from the plaintiff's Company directorship and that the required

notice under S. 181 of the Companies Decree Cap 153 was properly served to Mr. Skins, the Registrar of Companies and to all other members. He has also testified that because Mr. Skins refused to attend, the meeting proceeded in his absence and it was resolved that he be removed from the directorship and that Roma Inn Ltd should appoint a new director. At point PW2 has produced a copy of the resolutions which has been admitted as Exhibit D1.

PW2 has went on telling the court that when Mr. Bashiru (PW1) who did also act a the secretary at the meeting of 17/05/2006 went to file the resolution the defendants refused to accept the resolution with no explanations till on 10/07/2006 when the 2nd defendant wrote to the plaintiff's Company (Exh.P5) saying that the documents cannot be accepted because no proper quorum had been formed and also that the chairperson was not a member and director of the plaintiff's Company. The 2nd defendant in his letter did also state that the refusal to accept the document was due to contravention of Article 9(b) of Articles of Association in regard to the transfer of 02% shares by PW2 to Ms. Faye Richardson.

It has also been testified by PW2 that the refusal to accept the documents was not justified because the law and procedure had been followed in removing Mr. Skins from the directorships per directions earlier given by the 2nd defendant. He has added that it was for misfeasance of a public officer that the 2nd defendant

refused to accept the documents because there was even no complaint lodged before the Registrar of Companies against the documents. PW2 has asked the court to hold the 2nd defendant personally liable because he was the one who handled the matter and who was improperly acting for Mr. Skins. He has lastly prayed for the court to award the damages claimed because the refusal to accept the documents has affected the plaintiff's Company business as the Company cannot obtain loans and the Company business is no longer smoothly operated.

When asked in cross examination PW2 has stated that he transferred the 02% shares to Ms. Faye on 22/11/2005 and that the meeting of 17/05/2006 was attended by two shareholders i.e himself and Ms. Faye. He has also stated that PW1 was appointed the Company secretary on 17/04/2006. He has also admitted that though he has no proof that the 2nd defendant was contacting Mr. Skins there were clear circumstances showing that there were such contacts.

PW2 has also stated in cross examination that Mr. Skin is not a member of the plaintiff's Company but Roma Inn Ltd and that the meeting of 17/05/2006 was not attended by Mr. Skin or any representative from Roma Inn Ltd. He has further stated that directors are appointed and removed by shareholders. It has also been by PW2 that the documents were addressed to the Registrar of Companies but were being attended by the 2nd defendant personally. He has

admitted that it is the Registrar of Companies who is directly responsible for registering documents and that the 2nd defendant was not the Registrar General and also that there was no resolution to sue the 2nd defendant personally.

The defence has called Mr. Abdul baq Habib Ali the 2nd defendant who has testified as DW1 for the 1st defendant and for his own defence. In his defence DW1 while being lead by Mustafa Abdul Hamid (Legal Officer) for the 1st defendant and his advocate Mr. Abdalla Juma has stated that he works at the office of the Registrar General as an Assistant Registrar of Companies and that the plaintiff's Company was registered in 1995. the shareholders were Mr. Thomas Green and Roma Inn Company Ltd with equal number of shares while the first directors were Mr. Thomas Green and Mr. Emerson Skins.

DW1 has further told the court that according to his recollection, as the relevant file is misplaced, at one time the Plaintiff's Company presented to the office of the Registrar of Document a resolution for filing but the resolution was rejected because one of the founding directors Mr. Emerson who had earlier complained that he was being sidelined in the Company business had not participated in passing the resolution. It was therefore directed the Registrar of Companies that the problem be settled first but nothing was done by the plaintiff's Company.

In his further testimony DW1 has denied to have received any information and to have acted on such information against the Plaintiff's Company. He has insisted that he works under the Registrar of Companies who is also the Registrar General and that it was him who directed the plaintiff's Company resolution not to be filed until when the problem between the directors is settled. DW1 has admitted that he wrote to the plaintiff's Company on behalf of the Registrar General explaining the reasons why the resolution could not be filed and what needed to be done. He has denied to either know Mr. Emerson or to have met him at any time insisting that he never acted as his advocate. DW1 has again insisted that he properly performed his duty as directed by the Registrar General who is the final authority.

When asked by Mr. Mnkongje learned advocate for the plaintiff's Company DW1 has admitted that he was the principal assistant of the Registrar General in all matters concerning Companies. He has also stated that he does not remember that before the resolution to remove Mr. Emerson from the directorship had been passed he had directed the plaintiff's Company to convene a meeting for such purpose. DW1 has however changed the stand after being shown a letter dated 14/02/1996 written by him to the plaintiff's Company directing on how a director can be removed from directorship. DW1 has further admitted that on the face of it the resolution (exh.D1) which was refused to be filed had no any problem and that neither Mr. Emerson nor Roma Inn Ltd had complained about the removal of

Mr. Emerson from the directorship. He has stated that the resolution was rejected not because it had any problem but because by that time it was not clear who were the owners of the plaintiff's Company. He has added that the plaintiff's Company was served with a letter to that effect i.e that it was not known who were the owners, but that he does not know its whereabouts. DW1 has admitted that if the letter was not sent to the plaintiff's Company then it is a misfeasance in public office. When further pressed DW1 has stated that according to paragraph 2 of exh. P5 the resolution was rejected because the procedures in writing and preparing it had not been followed.

The first issue as recorded was whether there was a meeting of directors on 17/05/2006. This issue was framed basing not only on the plaintiff's allegations in paragraph 4 of the plaint but also mainly on the fact that still it has to be determined whether the meeting was properly convened or not. Now, from the evidence given and produced it has been revealed that the meeting of 17/05/2006 was not of directors. The meeting convened on that date was of shareholders or members of the plaintiff's Company. The allegations in paragraph 4 of the plaint that the meeting was of directors is in contravention to what has been given in evidence. The evidence from PW1, PW2 and from Exh. D1 clearly show that what was held on that date was the shareholders' extraordinary meeting which was attended by two shareholders namely Mr. Thomas

Robert Green (PW2) and Ms. Faye Linn Richardson. Pw1 did also attend the meeting not as a shareholder but as an Acting Company Secretary.

The fact that the first issue is resolved in the above explained manner i.e that the meeting of 17/05/2006 was not of directors but of shareholders does not settle the issue. Having found that the meeting was of shareholders and taking in account the fact that the issue in dispute between the plaintiff's Company and the defendants is the resolution to remove Mr. Emerson from the directorship of the plaintiff's Company which was passed at that meeting it becomes a matter of prudence to see whether the meeting was properly convened or not.

Generally a Company director is appointed by members of the Company at a general meeting of members. This is what is provided under S. 180(1) of the Companies Decree, Cap 153. Likewise members of a Company have power to remove a director before the expiration of his period of office (see S. 181(1) of the Companies Decree). According to S. 181(2) of the Companies Decree what is required to remove a director is that a special notice has to be given to the director to be removed. The purpose of the notice is to afford an opportunity to be heard to the director before he is removed. This is also in accordance with principles of natural justice that no one should be condemned unheard. Another requirement is that the quorum must be formed. According to Article 12© of the

Articles of Association of the plaintiff's Company a quorum is properly formed when two members are either personally or by proxy present.

As to the question whether the required quorum was formed on the relevant meeting the evidence given by PW1 and PW2 that two members among the three members of the plaintiff's Company i.e Mr. Thomas Green and Ms. Faye Richardson did attend the meeting personally is accepted because there is no any other evidence to the contrary. The quorum was therefore formed as it is required by Article 12 © of the Articles of the plaintiff's Company.

There is also sufficient evidence showing that the notice to pass the resolution to remove Mr. Emerson was given to him as required by the law but he opted not to attend and he therefore lost his right to be heard. The 28 day's notice was given and although the resolution was not passed on 10/05/2006 but at an adjourned meeting on 17/05/2006 the resolution was properly passed because according to S. 126(8) of the Companies Decree no new notice was required as the original notice was still in effect and was sufficient. Even Article 12(b) of the plaintiff's Company Articles of Association clearly provides that an adjourned meeting does not require a new notice. It is therefore a finding of this court that the plaintiff's Company shareholders' meeting held on 17/05/2006 was properly convened and for that case any resolution passed at the meeting is valid in as far as the required procedure is concerned.

Issue No. 2 is in regard to whether the refusal by the defendants to accept for filing and registering the Plaintiff's Company minutes and resolution was justifiable. According to the evidence on record it cannot be said that the defendants had any good reason for not accepting the minutes and resolutions. Apart from the fact that DW1 in his testimony has given contradicting statements on what were the reasons for their refusal to accept the document, the defendants, conduct in dealing with the matter especially their unexplained delay to explain to the plaintiff as to why the documents could not be accepted leaves a lot to be desired.

The defendants did not give the plaintiff Company any good reason as to why the documents could not be accepted for filing and registration. Even before this court the defendants have completely failed to give a straight reason for refusal. In his defence evidence DW1 at first had told the court that the documents were refused because Mr. Emerson who is one of the founding directors had not participated in passing the resolutions and also because he had earlier complained that he was being sidelined from the business of the Company. The question here is how could Mr. Emerson participate when the evidence show that he was dully served with the notice to appear but he declined to do so. On the allegation that Mr. Emerson was being sidelined there is no evidence to substantiate the allegation and even if the allegation was true this court does not

think that would have been a reason to refuse accepting the documents passed at the properly convened meeting. Mr. Emerson had other legal ways for his complaints to be attended for.

Worst still when answering questions from the plaintiff's Company advocate in cross examination, DW1 has given other different reason. He has stated that the reasons for the refusal were the plaintiff's failure to properly the resolutions i.e that there were not in the required form, and also the fact that it was not clear who were the owners of the Company. That the refusal was due to the fact that the resolutions were not in the required form is surprising because it has been admitted by DW1 himself when shown a copy of the resolutions (Exh. D1) that the resolutions have no any problem. Even the reasons given by the defendants in their letter to the plaintiff dated 10/07/2006 (Exh. P5) are irrelevant and misconceived as they are all not related to the matters pertaining to the meeting of 17/05/2006 but the meeting held on 12/10/2005 the meeting which had been declared by the defendants to be not properly conducted and from which the plaintiff was directed to conduct another meeting hence the meeting of 17/05/2006.

For the above given reasons the second issue is found in negative. The refusal by the defendants to accept the plaintiff's Company minutes and resolutions

passed at its meeting of 17/05/2006. for filling and registration were not justifiable.

The third issue is whether the defendant's acts as pleaded in the plaint amount to misfeasance by a public officer. Misfeasance in a public office includes malicious abuse of power or deliberate maladministration and other wrongful acts done by a public officer causing injury to another person. It is a deliberate abuse of power. According to H.W.R Wade in his book titled Administrative Law, 6th Edition, Oxford University, 1988 at page 780, the tort of misfeasance in public office goes at least to the length of imposing liability on a public officer who does an act which to his knowledge amounts to an abuse of his office and which causes damage. The gist of the action for damages is malice or bad faith or conscious abuse and for such an action to succeed malice and of course injuries suffered need to be established.

According to the evidence on record and in consideration of the finding of this court on the second issue there is no doubt that the defendants did not perform their statutory duties. The defendants were required to accept the plaintiff's Company documents for filing and registration but they refused to do so for no good reasons. The failure to perform their duties as explained above does however, by itself, not amount to a successful tort of misfeasance in public

office. This court finds that an important element of malice on the part of the defendants has not been established. The allegations by the plaintiff that the refusal was done in bad faith and deliberately in order to favour Mr. Emerson have not been proved to the satisfaction of this court. There is no concrete evidence to prove the allegations that the defendants were acting for Mr. Emerson. The mere fact that DW1 has told the court that it had been complained by Mr. Emerson that he was being sidelined from the plaintiff's Company business is not enough to prove that the defendants' refusal to accept the documents was deliberately done in order to injure the plaintiff's interests. The third issue is therefore found in negative.

As to the fourth issue whether the 2nd defendant can be held personally liable for omissions and commissions of the office of the 1st defendant it is a considered view of this court that since the 2nd defendant's evidence that he refused to accept the documents after being so directed by the 1st defendant has not been contravened by any other evidence then the 2nd defendant cannot be held personally liable. The 1st defendant has not disassociated himself from the 2nd defendant's acts and there is ample evidence showing that what was being done by the 2nd defendant was well known by the 1st defendant. The 2nd defendant cannot therefore be held personally liable.

Because as it has been found above in the third issue the tort of misfeasance by a public office has not been established then the plaintiff's Company cannot be held to be entitled to the claimed general damages amounting to Tshs. 35,000,000/= . The damages can also not be awarded because the plaintiff's Company has totally failed to show how the refusal by the defendants to accept the documents has affected her business. We have not been told that the refusal caused the business to stop running but instead there is evidence that the business is progressing. PW2's allegations that the Company cannot successfully apply for loan facilities due to the refusal has not been supported by any concrete evidence. General damages are damages which the law presumes to flow from the wrong complained of and though it is not necessary to allege general damages in detail in a plaint the damages must be proved.

From the above findings the plaintiff's case partly succeeds in the manner above explained. It is hereby ordered that the defendants should fulfill their duties in accordance with the law and that the plaintiff's documents relating to the extraordinary shareholders' meeting of 17/05/2006 i.e the minutes and resolutions be accepted by the 1st defendant for filing and registration. The costs of the suit to be borne by the 1st defendant.

Sdg: Abraham Mwampashi, J.

25/06/2012.

Delivered in court this 25th day of June, 2012 in the presence the presence of Mr. Thomas Robert Green who is the Managing Director of the Plaintiff's Company, Mr. Suleiman Fadhil Shaaban (adv) holding brief for Mr. Mnkonje (adv) for the Plaintiff's Company and in the presence of Mr. Abdalla Juma (adv) for the 2nd defendant.

Sdg: Abraham Mwampashi, J.

25/06/2012.

Mbs/.