FTCC.23/2020 2020 M. NO. 5

IN THE HIGH COURT OF SIERRA LEONE

COMMERICAL AND ADMIRAL DIVISION

FAST TRACK COMMERICAL COURT

BETWEEN:

PREM CHAND MEKLA - PLAINTIFF

AND

RAINBOW DRILLING (SL) LIMITED & OTHERS - DEFENDANT

JUDGMENT OF THE HONORABLE JUSTICE LORNARD TAYLOR DELIVERED ON THE 4TH JUNE 2020.

The Petitioner Prem Chand Mekla has come before this court by petition dated 29th January 2020 praying that this court winds up the 1st Respondent Rainbow Drilling (SL) Limited pursuant to section 343 (1)(a) of the Companies Act No. 5 of 2009 which gives this court the authority to wind up the 1st defendant and section 350 (f) of the Companies Act No. 5 of 2009 which states the specific circumstance pursuant to which the Petitioner wishes this court to exercise its authority to wind up.

The 1st defendant company was incorporated on the 15thDecember 2017 in Sierra Leone and pursuant to our Laws. It was registered to inter alia, engage the in drilling of boreholes, exploration operations and equipment services. At incorporation, the shares were taken up by AlugubellyPurushotham Reddy GaddamMahidhar who held 75% and 25% of the said shares respectively. The share capital was Le 50,000,000 (Fifty Million Leones) divided into 100,000 (One hundred thousand) shares of Le 500 (Five hundred leones) each. The 3rd defendant was by then appointed Company Secretary.

The Petitioner claims that sometime in July 2017 prior to the incorporation of the 1st Respondent, he was approached by the 2nd Respondent and cajoled to invest the sum of US$ 64,615(Sixty-four thousand, six hundred and fifteen

United States Dollars) for the incorporation and operations of the 1st Respondent for which he was to receive as consideration 25% of the shares in the 1st Respondent. He said that the said amount was paid to the 2nd Respondent and that the said sum was used for the purchase of a drill lorry, a support vehicle as well as other miscellaneous supplies associated with borehole drilling generally. According to him, after he had paid this sum, the 2nd and 3rd Defendants came to Sierra Leone, registered the business and brought in the said equipment without due consideration to the agreement that the Petitioner was to get 25% of the business. He maintained that on the invitation of the 2nd and 3rd Respondents, he came to sierra Leone and he was offered a job with the 1st Respondent for which he was to receive inter alia a monthly salary of US$ 1,500 (One thousand five hundred United States Dollars). When he came to realise that shares were not allotted to him, he made several requests as a result of which he was given a document captioned Special Resolution dated 22nd March 2018 and signed by the 2nd and 3rd Respondents on the letterhead of the 1st Respondent Company. **(This document was not exhibited)**Several requests were made subsequently for the transfer and registration of his shares to be regularised but same was not done as at the date of commencement of this action.

According the Petitioner, the management and operations of the 1st defendant company was also left entirely with him. Knowing that his life savings had been invested in the 1st Respondent, he put in the extra hours of work to make it a successful business and during that period, sent updates on the status of the 1st defendant company to the 2nd and 3rd defendant via email. When the Petitioner received information regarding another company in Sierra Leone and in their line of business, that worried him and he tried to reach the 2nd Respondent who according to him was evasive. In the process, the Petitioner came to realise that the 2nd and 3rd Respondents had deliberately overvalued the 1st Respondent and their cash investment in the 1st Respondent was also overstated. There were also assets which were supposed to be company property that were also non-existent. All of the Petitioner's efforts to reach the 2nd and 3rd Respondents failed. The Petitioner said his fears were heightened when he received a suicide note **(not exhibited)** from the 2nd Respondent. Meanwhile he kept receiving demands from relatives of the 2nd Respondent for his share of dividend in the 1st Respondent but according to him, he consistently resisted this shakedown.

When the Petitioner went to India, a meeting was held to resolve the impasse between the parties. The 2nd and 3rd Respondents were represented by their families. According to the Petitioner, the negotiators inter alia concluded that the relatives of the 2nd and 3rd Respondents buy out the Petitioner in the sum of

US$933,333. However they offered the sum of US$ 26,000 which was rejected by the Petitioner thus creating a stalemate on the issue. In the middle of this stalemate, the 2nd Respondent came to Sierra Leone and removed all the personal effects of the Petitioner from the office premises of the 1st Respondent as well as those in the living quarters. The personal vehicle of the Petitioner with Registration Number API 444 was also taken from him by the Criminal Investigations department on account of allegations made to them by the 2nd Respondent. The Petitioner considers himself to have been expelled from the 1st Respondent Company in which he has invested so much.

The Respondents in their answer to the Petition denied that that they ever approached the Petitioner and it was in fact the Petitioner who approached them in 2018 and offered to buy shares in the 1st Respondent. The 2nd Respondent offered to sell him 5% while the 3rd Respondent offered to sell him 20% of their respective shares in the 1st Respondent. Payment was to be effected in India. According to the Respondents, the process for the transfer was commenced but they refused to see it to the end because the Petitioner had contrary to his promise to pay for the shares, issued the Respondents with a cheque that the Respondents could not encash due to the unavailability of funds. **(This cheque was not exhibited)**Despite repeated demands for payment, the Petitioner has since refused to make payment for the said shares and as a result the shares have not been transferred to him. The Respondents admit employing the Petitioner as General Manager on a monthly salary of US$ 1,500 monthly. During this process, the 2nd Respondent came to realise that the Petitioner had been involve in what he termed "a massive fraud and forgery against the 1st Respondent company and the 2nd and 3rd Respondents". The Petitioner had prepared a resolution in the name of the 1st Respondent Company to transfer all the shares in the 1st Respondent to himself. This document is marked Exhibit B in the affidavit in support of answer. The Petitioner also forged documents and opened two accounts in the name of the 1st Respondent at the FBN bank in Freetown. He was the sole signatories to both accounts and caused payments meant for the operations of the 1st Respondent to be paid therein. In fact, an internal audit was conducted on the business of the 1st Respondent Company between the 17th May 2018 and 2019 and this showed that the Petitioner received US$ 368,576 of the sum of US$ 415,933 billed on customers of the 1st Respondent. **(This audit report is also not before this court)**. Accordingly, this also formed the basis of the cross-petition of the Respondents.

This court must therefore examine the following;

1. Is there an enforceable between the parties by which the Petitioner was to receive shares in the 1st Respondent?

2. Does this court have before it sufficient evidence to order and account to be given by the Petitioner?

1. **Is there an enforceable contract between the parties by which the Petitioner was to receive shares in the 1st Respondent?**

The Petitioner has come before this court praying that the 1st Respondent be wound up. There is no arguing that this court has the authority to grant or refuse that which the Petitioner seeks. There is also not question that in exercise of its authority, this court must in these circumstances apply the principles of equity. This court also notes that the Petitioner brought this action on his own behalf as a shareholder in the 1st Respondent. Based on the facts and arguments as highlighted above, it is but prudent that this issue be deal with before proceeding any further as it has the potential of being the primary determining factor with respect to any judgment that may emanate from this court in this matter. The simple summary of the facts as stated above is that the Petitioner alleges that he invested is money in the 1st defendant for which he was to receive shares which he has not received. The defendants contend that the Plaintiff never paid for the shares he is claiming and is therefore not entitled to same. In this jurisdiction, it still trite law that for a contract to be enforceable, consideration must have been provided by the person seeking to enforce same. In the present case, the Petitioner is claiming that he paid the sum of US$ 64,615(Sixty-four thousand six hundred and fifteen United States Dollars) for which he was to receive 25% of the shares in the 1st Respondent. The Respondents deny this. At this point, the Petitioner was not yet a shareholder in the 1st Respondent company. This court must before it can reach a decision see beyond the claim and denial of the parties and decide whom it must believe. For if the court is satisfied that the respondent indeed provide the consideration for the shares, this court can then examine what the most appropriate action should be in the event a party provides consideration in fulfilment of the terms of a contract but is yet deprived of his entitlement. This can only be done by a rigid application of the rules of evidence. The primary question therefore becomes, who bears the burden of proving this fact? The fact of whether the Petitioner has provided consideration for the shares he claims.

The general rule is that he who asserts must prove. Basically, the burden of proving the claim rests on the party raising the issue. This cannot be better put than is currently in **paragraph 490 at page 268 in volume 15 of the 3rd edition of Halsbury's laws of England**. It is stated therein that "in considering upon whom the burden of proof of an issue, that is, the legal

burden falls, a convenient test is to inquire whether the allegation involved, be it affirmative or negative, is or is not essential to the particular party's case, that is, whether he would fail if it were struck out of the record. If it is essential that he would fail, then the burden of proving it is upon him". See also the case of **Abrath v North Eastern Rail. Co. (1883) 11 QBD pg. 440.**In applying this principle of law, I can confidently hold that the burden of proving whether consideration was provided for the shares rests on the Petitioner.

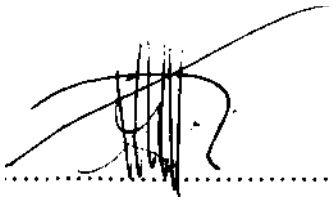
This begs the next question; have the Petitioner discharged this burden placed on him by the law? In paragraph 10 of the affidavit in support of the Petition, the Petitioner deposed to the following facts; ***"That I was encouraged and or cajoled by the 2nd Respondent to part with 4,200,000 Indian Rupees the equivalent of US$ 64,615 (Sixty-four thousand six hundred and fifteen United States Dollars) as at that time for which I will be given 25% shares in the company and appointed director"***.This deposition was denied by the Respondents in paragraphs 7 and 8 of answer to the Petition. In paragraph 7 they stated ***"The Respondents aver that the petitioner has since not paid a cent for the said shares transmitted to him by the 2nd and 3rd Respondents respectively"***. Paragraph 8 states; ***"The Respondents accordingly deny paragraphs 7 to 10 of the Petitioner's petition and aver that the petitioner has never contributed a cent towards the procurement of any of the assets of the 1st Respondent Company, including its drill vehicle and drill rig equipment"***. This is the evidence before the court on this issue and no more in any material particular. The Respondents having denied, the claim of the Petitioner on this issue, I anticipated an affidavit in reply showing proof of the said payment whether by receipt or some form of formal communication between the parties but same was not provided. On a balance of probabilities, which is the standard set by trite law, I cannot hold that the burden of proving the provision of consideration as stated above has been discharged. In the absence of proof of payment of the said consideration, there is no enforceable contract between the parties by which the Petitioner was to receive shares in the 1st Respondent. The Petitioner has not provided consideration for the shares he is laying claim to and can therefore not hold himself out to be a shareholder of the 1st Respondent Company.

The next challenge facing this court is whether the Petitioner not being a shareholder can apply for the court to wind up the company. I must state at the outset that the Petition for winding up of a company need not be presented only by a member of the company for the court to hear a petition for winding up on the grounds that it is just and equitable to do so. A wide range of

individuals have in the development of the law been held as relevant parties to winding up proceedings. The petition may be presented by a creditor on the grounds that the company is unable to pay its debts as per Section 350 € of the Companies Act No. 5 of 2009. It may be presented by a contributory or contributories as in the case of **Re. Commercial Bank of London (1888) WN 199.** It may also in certain cases be presented by the board official receiver. Under what category can the Petitioner be placed for the purposes of this matter? There must also be circumstances sufficient to precipitate this action of the court to wind up a company on the grounds that it is just and equitable to do so. In **Re. Haven Gold Mining company (1882) 20 Ch. D 151** the court wound up a company where its substratum was gone and the concession had lapsed. **In Re. Crown Bank (1890) 44ChD. 634**, where the company's only business is ultra vires the objects of the company. I understand that the Petitioner's grip with the 1st Respondent is that it was used as a basis to obtain money from him. He felt defrauded having been asked to invest in a business for and yet received nothing for his investment. But this court thrives on evidence. It is its life line. The Petitioner could not show that indeed he parted with the alleged sum for the alleged purpose. I therefore cannot hold that the 1st Respondent was used as a vehicle to defraud him as he failed in his attempt to prove that he was defrauded in the first place.

In the circumstances, I make the following orders;

1. The Petitioner dated 29th January 2020 herein is accordingly dismissed.
2. The costs of this action is assessed at Le 100,000,000 (One hundred million Leones) to be paid by the Petitioner to solicitors for the Respondents.



JUSTICE LORNARD TAYLOR