

[2011] CCJ 8 (AJ)

**IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction**

**ON APPEAL FROM THE COURT OF APPEAL OF THE
CO-OPERATIVE REPUBLIC OF GUYANA**

**CCJ Appeal No CV 3 of 2010
GY Civil Appeal No 62 of 2005**

BETWEEN

**ASLIM SHEERMOHAMED, deceased
(through Kathleen Sheermohamed,
the executrix of his estate)**

APPELLANT

AND

**1) AZEEZ SHEERMOHAMMED, deceased
(through Shir A. Nabi, the Administrator
of his estate)**

2) Shir Affron Nabi

RESPONDENTS

**Before the Right Honourable
And the Honourables**

**Mr Justice de la Bastide, President
Mr Justice Nelson
Mr Justice Bernard
Mr Justice Hayton
Mr Justice Anderson**

Appearances

Mr Christopher Roy Parker, QC for the Appellants

Sir Fenton Ramsahoye, SC and Mr. Sanjeev Datadin for the Respondents

JUDGMENT

of

**The Right Honourable Mr Justice de la Bastide, President
and the Honourable Justices Nelson, Bernard, Hayton and Anderson**

Delivered by

**The Right Honourable Mr Justice de la Bastide
on the 23rd day of May, 2011**

- [1] This appeal was by consent of counsel on both sides heard together with a related appeal, GY Civil Appeal No. 61 of 2005 judgment in which has just been given¹. In hearing the appeals together we were following a pattern that had been established in the High Court and the Court of Appeal. The principal actors in this case are for the most part the same as in the related appeal. This case, like the other, was part of a struggle between members of the same family for control of the family company, S.A. Nabi & Sons Limited ('the Company'). In this case the proceedings were launched on the 1st November, 2004, by the appellant (whom I shall refer to as "Aslim") by way of a notice of motion under section 137 of the Companies Act, 1991 ('the Act') against three respondents. The first-named respondent (whom I shall refer to as "Azeez") was the brother of Aslim and also of Shir Amin Nabi ("Amin"). The second-named respondent (whom I shall refer to as "Affron") is the son of Amin. The third respondent, who was the Registrar of Joint Stock Companies, did not appear and was not represented in these proceedings.
- [2] The purpose of the action was to strike down as unlawful and invalid a meeting of the Company's shareholders which was convened by Amin and held on the 11th October, 2004, and resolutions passed at that meeting appointing Affron a director of the Company and "confirming" Azeez as a director as well. The facts concerning the convening of this meeting of the 11th October, 2004, are set out below.
- [3] On the 6th September, 2004, Amin served on the directors of the Company a requisition pursuant to section 135 of the Act requiring them to call a meeting of shareholders for the purpose of nominating and electing directors and fixing their remuneration. Amin owned many more than the 10 per cent of the issued shares of the Company which qualified a shareholder to requisition a meeting pursuant to section 135 (1).
- [4] The directors were required by section 135 (4) to call a meeting of the shareholders to transact the business stated in the requisition as none of the exemptions from that obligation mentioned in that sub-section was applicable.

¹ [2011] CCJ 7 (AJ)

[5] The crucial provision for the purpose of deciding this appeal is section 135 (5), the relevant part of which reads as follows:

“If, after receiving a requisition referred to in sub-section (1) ... the directors ... do not ... within twenty-one days after receiving the deposit of the requisition proceed duly to convene a meeting to be held not later than twenty-eight days after the meeting is convened, any requisitionist who signed the requisition may convene the meeting to transact the business specified in the requisition.”

[6] Four days after the requisition was deposited, that is, on the 10th September, 2004, a directors’ meeting convened by Aslim, was held. Amin and Aslim were the only directors to attend that meeting. The purpose of the meeting was to appoint a third director. Amin proposed Azeez for appointment while Aslim proposed his son, Ashmid. Aslim claimed as chairman a second or casting vote and by exercise of that vote he resolved the deadlock in Ashmid’s favour. It was the validity of this meeting and the appointment made at it of Ashmid as a director, that was challenged in the related action which was brought by Amin in the name of the Company. It was the appeal in that action which was heard together with this appeal and judgment in which was given in favour of Ashmid and Aslim immediately prior to the handing down of this judgment².

[7] Resuming the narrative of events, on the day after the directors’ meeting i.e. on the 11th September, 2004, Amin issued to the shareholders of the Company notice of a general meeting of the Company to be held on the 11th October, 2004, for the purpose of conducting substantially the same business as that specified in his requisition. It will be noted, however, that the twenty-one day grace period allowed to the directors for convening a general meeting in response to the requisition, did not expire until the 27th September, 2004, but up to the time the meeting convened by Amin on the 11th September was held on the 11th October, no meeting had been convened by the directors.

[8] The meeting convened by Amin was held on the 11th October, 2004. While Aslim was initially present at the venue at which the meeting took place, he did not attend the meeting in circumstances, and for reasons, which are in dispute. It is not

² See footnote 1

necessary, however, for the purposes of this appeal to resolve that dispute. A resolution was passed at the meeting appointing Affron a director and it was also “confirmed” that Azeez was, and Ashmid was not, a director of the Company. In these proceedings Aslim has challenged the validity of the meeting convened by Amin and held on the 11th October, 2004 and all that ‘flowed’ from that meeting.

- [9] Persaud J. in the High Court gave judgment in Aslim’s favour. He held that the meeting of 11th October, 2004 was unlawful and invalid because it had been convened prematurely by Amin. He also held that “on examination of the proxies the necessary statutory requirements were not complied with”. He did not however, identify either what these statutory requirements were or in what way they had not been complied with. Persaud J. granted only declaratory relief. He declared that:
- (a) the meeting of the 11th October, 2004 was “wholly invalid”;
 - (b) the appointment of Affron was “in breach of the statutory provisions”; and
 - (c) the confirmation of Azeez as a director was invalid.
- He made no order as to costs.

- [10] On appeal the Court of Appeal allowing the appeal, held that the premature convening of the meeting of the 11th October, 2004, by Amin did not have the effect of rendering that meeting invalid given the failure of the directors to convene any meeting of their own. With regard to the objection taken to the proxies, the Court of Appeal held that there was no evidence of non-compliance with article 76 of the Company’s articles of association as the result of a failure to deposit the proxies at the Company’s registered office more than 48 hours before the meeting. With regard to the form of the proxy instrument issued by Azeez, which purported to appoint both Amin and Hermes Munian or either of them as his proxy, the Court of Appeal held that while the appointment of both persons contravened article 75 of the Company’s articles (which limited the number of proxies to one), the appointment of either Amin or Munian was valid.

- [11] We have come to the clear conclusion that the Court of Appeal was wrong in holding that the meeting of the 11th October was valid notwithstanding that it was called before the expiration of 21 days from deposit of the requisition. Key to the proper interpretation and application of section 135(5) is an appreciation of what is meant by

the “convening” of a meeting in the context of this provision. “Convene” is defined in Collins English Dictionary as “to gather, call together or summon especially for a formal meeting”. The difference in meaning between the convening of a meeting and the holding of a meeting is high-lighted in section 135(5) itself. In that sub-section the directors are given the opportunity to “convene a meeting to be held not later than 28 days after the meeting is convened” (emphasis added). There is a striking contrast made between the convening and the holding of a meeting. One notes also that in section 135 (7) there is separate mention made of expenses incurred by a requisitionist in convening a meeting and those incurred in holding the meeting. This sub-section gives the requisitionist the right to be reimbursed “the expenses reasonably incurred by them in requisitioning, convening and holding the meeting”. In section 135 the expression “to call a meeting” is used as synonymous with “to convene a meeting”. The former term (‘call’) is used in sub-sections (1), (4) and (6) of section 135 while the latter expression (‘convene’) is used in sub-sections (2), (5) and (7). The clear intent, when either term is used, is to refer to the giving of notices to shareholders of a meeting which is to be ‘held’ on some future date.

[12] Section 135(5) therefore confers on a requisitionist the power to call a meeting of shareholders, but only in circumstances in which the directors have failed to give to shareholders within 21 days of the deposit of the requisition, notice of a general meeting to be held within 28 days of the date of such notice. The power which is given to the requisitionist is thus from the outset subject to that limitation. A shareholder has no power to call a general meeting except he does so under and by virtue of some provision in the Act. The directors cannot exempt the requisitionist from his obligation to wait for 21 days before convening a meeting. Even if the directors told the requisitionist that they did not intend to convene a meeting and that the requisitionist was free to go ahead and convene one himself, this would not empower the requisitionist to convene a meeting before the 21 days had run. Equally, the ultimate failure of the directors to call a meeting does not operate retrospectively to absolve the requisitionist from the obligation to wait for 21 days or to validate a meeting prematurely convened.

[13] We wish to record our disagreement with the views expressed by the Court of Appeal on the following points:

- (a) What stands in the way of the requisitionist convening a meeting before 21 days have expired, is not any act or omission on the part of the directors but the restriction contained in the Act itself.
- (b) Amin did not convene the meeting after the expiry of the 21 days from the directors' receipt of the requisition. He convened the meeting before the 21 days had expired although the meeting was held after the 21 days had expired.
- (c) The "precipitate notice of the 11th September 2004" was not "quite irrelevant to the validity of the meeting ... which was held on the 11th October". The effect of the notice being premature was that the meeting was convened without authority and was, therefore, invalid.
- (d) The effect of so holding is neither to impose a restriction on nor fetter the statutory right of the requisitioning shareholder to convene the meeting, nor tantamount to putting a premium on fault by the directorate to the prejudice of the requisitionist. The invalidity of the meeting resulting from the premature convening of it is simply the result of giving effect to the policy of the Act as expressed in section 135(5).

[14] This policy has some practical advantages. If a requisitionist was able to anticipate possible default by the directors by convening a meeting before the 21 day period had expired and thereafter the directors gave notice of a different meeting on a different date, the shareholders might be confused and embarrassed by having to decide which notice was valid and which meeting to attend. Furthermore, it may be doubted whether a requisitionist could by convening a meeting before the 21 day period had expired, hold the meeting earlier than if he had waited 21 days before convening it. The notice given by the requisitionist has to be adequate and it is at least doubtful whether in determining the adequacy of notice, account can be taken of a period during which the shareholder who has received the notice, does not know whether it is valid or whether the meeting which it announces, will actually be held. This uncertainty will of necessity exist until the expiry of the 21 day period.

[15] It is interesting to compare the policy of section 135 (5) with that of its predecessor provision i.e. section 71(3) of the former Companies Act, Cap 89:01, an enactment which was repealed and replaced by the Act. Section 71(3) read as follows:

“If the directors do not proceed to cause a meeting to be held within 21 days from the date of the requisition being so deposited, the requisitionists ... may themselves convene the meeting, but any meeting so convened shall not be held after 3 months from the date of the deposit.”

- [16] In this earlier provision the only time constraints imposed on the directors and the requisitionist apply to the time when meetings are held. Nothing is prescribed with regard to the time when they are convened. The directors had 21 days after the deposit of the requisition to hold a general meeting. If they failed to do so, the requisitionist had to make sure that any meeting which he convened was held within 3 months from the date of the deposit. The introduction in section 135(5) of time constraints on the convening of a meeting both by the directors in response to the requisition and by the requisitionist in case of the directors defaulting, represents a deliberate change of policy. The courts have no option but to give effect to the new policy by striking down as invalid any meeting convened by a requisitionist at a time when he was not empowered by the Act to do so.
- [17] Our conclusion on this issue is sufficient to dispose of this appeal which must in our view be allowed. It is unnecessary, therefore, to make any ruling on the objections taken with regard to the proxies. We would confine ourselves to saying that it is at best doubtful whether a proxy instrument which appoints as proxies “A and B or A or B” can be treated as effective or valid. The questions which arise with regard to an appointment in this form, are (a) is the part which purports to appoint both persons as proxies severable from the rest, and (b) is the appointment of one of two persons in the alternative without any indication of priority, void for uncertainty, given the possibility that both persons may turn up at the meeting. These problems are of course avoided if the standard formula is adopted whereby the appointment is made of “A or failing him B”.
- [18] For these reasons we allow this appeal, quash the decision and orders made by the Court of Appeal and reinstate the declarations and the order made by Persaud J. We order that the respondents pay to the appellant the costs of this appeal to be taxed in default of agreement. We make no order with regard to the costs in the High Court but order that the appellants in the Court of Appeal (who are the

Respondents before us) pay the costs of the appeal to the Court of Appeal in the sum fixed by the Court of Appeal of \$150,000.00.

/s/ M. de la Bastide
The Rt. Hon. Mr Justice Michael de la Bastide (President)

/s/ R. F Nelson
The Hon. Mr Justice R. Nelson

/s/ D. P. Bernard
The Hon. Mr Justice D. Bernard

/s/ D. Hayton
The Hon. Mr Justice D. Hayton

/s/ Winston Anderson
The Hon. Mr Justice W. Anderson