THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL SUIT No. 1032 OF 2020

TUSHABOMWE JOHN …… PLAINTIFF

VERSUS

WESTERN YOUNG INVESTERS ASSOCIATION LTD …… DEFENDANT

Before: Hon Justice Stephen Mubiru.

JUDGMENT

a) The Plaintiff's claim;

The defendant is a private limited liability company incorporated for purposes of investing members' subscription and savings in diverse economic ventures, with a view to generating returns on investment for the benefit of its members. The plaintiff's claim is for recovery of shs. 43,528,717/= being the outstanding balance on his investment return with the defendant, general and punitive damages, interest and costs. The .plaintiff's claim is that he became a member of the defendant during the year 2016. He thereafter religiously paid to the defendant the annual subscription of shs. 1,000,000/= and monthly savings of shs. 2,500,000/= By December, 2019 he had accumulated an accrued net worth of shs. 141,900,364/= According to the defendant's rules and regulations, the plaintiff was entitled to 100% of his contribution, savings, interest and profits on exit. On 22nd February, 2020 the defendant convened its annual general meeting at which a resolution was passed to the effect that henceforth members exiting the defendant would forfeit 25% of their total contributions as at the date of exit and the net profit earned in the previous twelve months prior to the date of notice based on the defendant's last audited accounts, payable after a period of six months. By a letter dated 22nd February, 2020 the plaintiff gave the defendant notice of his intention to exit the scheme. After the six months wait, the plaintiff was paid only shs. 98,371,647/= hence the claim for an outstanding balance of shs. 43,528,717/= The plaintiff contends that the defendant's resolution depriving him of part of his entitlement is null and void. It was passed irregularly and in bad faith.

b) The defence to the claim;

By its written statement of defence, the defendant denies the plaintiff's claim. The defendant instead contends that the meriting was properly convened and the resolutions passed thereat are valid and binding upon the plaintiff. The defendant was paid in full all that was due to him at the time of exit and therefore is not entitled to any of the reliefs sought.

c) The issues to be decided;

In the parties' joint memorandum of scheduling, the issues raised for trial are as follows:

1. Whether the resolution passed on 22nd February, 2020 on payment to ex-members affected the plaintiff's entitlements which had accrued as of December, 2019.
2. What remedies are available to the parties?

d) The submissions of counsel for the plaintiff;

Counsel for the plaintiff M/s Stanley Omony & Company Advocates submitted that the decision to amend the defendant's rules and regulations was special business which by virtue of item 50 (2) of Table A to *The Companies Act, 2012* required a special notice. It was not an agenda item on the notice that convened the annual general meeting at which the resolution was made. The plaintiff therefore was taken unawares when at the meeting a resolution was introduced for the amendment of the defendant's constitution. The resolution itself cannot be given retrospective effect. Having been paid only shs. 98,371,647/= the plaintiff therefore is entitled to the sum of shs. 43,528,717/= being the unpaid balance due to him upon exit, in accordance with Clause 18 (d) of the defendant's Rules and Regulations. The plaintiff I entitled to general damages, punitive damages, interest and costs.

e) The submissions of counsel for the defendant;

Counsel for the defendant M/s V. Agaba Advocates and Legal Consultants submitted that resolution was taken as a reaction to an agenda item. It was taken as a measure for reducing the negative impact of members' exit on the financial viability of the defendant's savings. Much as

the resolution was made as part of "any other business," none of the members present, including the plaintiff, objected to it. The plaintiff's decision to exit was communicated two days after the resolution, yet the defendant's rules and regulations required a month's notice. The plaintiff did not consider the option of transferring his share to one of the members. The suit should therefore be dismissed.

f) The decision;

The defendant was incorporated on 11th January, 2016 as a private limited liability company, limited by shares. The plaintiff is not one of its four subscribers but a contributor to its investment scheme. In accordance with section 13 (1) of *The Companies Act, 2012* for its Articles of Association, the defendant adopted Table A of the Act with the exception of item 24 (the power of directors to decline to register the transfer of a share to a person of whom they do not approve or of a share on which the company has a lien) and 53 (quorum of members at general meetings). The defendant's main objective being the regular collection of savings from members for investment, i.e. some form of collective investment scheme, it had "Rules and Regulations" dated 9th July, 2016 designed to put in place supervisory, regulatory and risk management measures, beside its Articles of Association. It is regulation 18 thereof that was amended at the AGM of 22nd February, 2020. While the defendant's Articles of Association specify regulations for its general operations, the "Rules and Regulations" guide its operations as a collective investment scheme.

1st issue; whether the resolution passed on 22nd February, 2020 on payment to ex-members affected the plaintiff's entitlements which had accrued as of December, 2019.

The plaintiff contends that the defendant's 22nd February, 2020 resolution to the effect that henceforth members exiting the defendant would forfeit 25% of their total contributions as at the date of exit and the net profit earned in the previous twelve months prior to the date of notice based on the defendant's last audited accounts, payable after a period of six months is void on account of the fact that; (i) it was not preceded by the mandatory 21 days' prior notice; (ii) it was passed in violation of the defendant's regulations; and (iii) it was erroneously given a retrospective effect. The first two grounds of contention will be considered concurrently.

i. It was not preceded by the mandatory 21 days' prior notice.

ii. It was passed in violation of the defendant's regulations.

A general meeting can be called either by the company directors or requested by the company shareholders. According to section 140 (1) of *The Companies Act, 2012* any provision of a company's articles which provides for the calling of a meeting of the company, other than an adjourned meeting, by a shorter notice than twenty-one days is void. The exceptions are a meeting called as the annual general meeting, by all the members entitled to attend and vote at the meeting and in the case of any other meeting, by a majority in number of the members having a right to attend and vote at the meeting. The notice period is for clear days, meaning that the period does not include the day on which the notice is given or the day of the meeting.

In the instant case, item 66 (1) of the defendant's Articles of Association stipulates that "every general meeting shall be called by at least twenty one (21) days' notice. Therefore Regulation 27 (a) of the defendant's "Rules and Regulations" which provides that an annual general meeting is to be preceded by at least fifteen (15) days' notice is void in light of section 140 (1) of *The Companies Act, 2012*. Nevertheless it was the testimony of the defendant's Secretary General D.W.1 Mr. Joseph Jabs Mubiru that he issued the notice of the impugned annual general meeting on 30th January, 2020 indicating that the meeting was to be convened on 22nd February, 2020. The statutory requirement of the minimum period of notice was thus complied with.

However, by virtue of section 149 (1) of *The Companies Act, 2012,* where by any provision of the Act special notice is required of a resolution, the resolution is not effective unless notice of the intention to move it was given to the company not less than twenty eight (28) days before the meeting at which it is moved. Special notice of an AGM is required where at that meeting there is to be proposed a resolution to remove a director by ordinary resolution or to appoint somebody in place of a director so removed at the same meeting, remove an auditor from office, or appoint auditors where there has been a failure to re-appoint the existing auditors (see sections 168 and 195 of the Act). Considering that this was not part of the business to be conducted at the AGM of 22nd February, 2020 there was no need for a special notice.

Apart from compliance with the minimum twenty one (21) days' period of notice, the notice should mention the place, the date and day of the meeting, the hour at which the meeting is scheduled. The matters to be dealt with at the meeting must be clearly mentioned so that the shareholders will understand which matters will be under consideration. The notice should also mention the business to be conducted at the AGM and of any resolution which may properly be moved and is intended to be moved at that meeting (see section 147 (1) (a) of the Act).

The business conducted at an AGM usually includes the declaration of a dividend, the consideration of the company's accounts and reports, the election of directors in place of those retiring and the appointment of the company's auditors and the fixing of their remuneration. According to section 16 of *The Companies Act, 2012,* subject to the provisions of the Act and to the conditions contained in its memorandum, a company may by special resolution alter its articles. If an amendment of the articles of association is to be dealt with at the general meeting, the main contents of the amendment must be set out in the notice. In the instant case, what was amended at the AGM was not the defendant's articles of association but rather aspects of its "Rules and Regulations" which guide its operations as a collective investment scheme. The question then is whether or not the requirements of notice applicable to amendments to the defendant's articles of association applies to its "Rules and Regulations" in the same measure.

The defendant operates a collective investment scheme. A collective investment scheme is any arrangement which; (a) is made for the purpose, or having the effect, of providing facilities for persons to participate in or receive profits or income arising from the acquisition, holding, management or disposal of securities, derivatives or any other assets (referred to as fund's assets) or sums paid out of such profits or income; (b) the persons who participate in the arrangements do not have day-to-day control over the management of the fund's assets; (c) the contributions from the persons who participate in the arrangements and the profits or income from which payments are made, are pooled; and (d) the fund's assets are managed by an entity who is responsible for the management of the fund's assets following approved regulations guiding management activities of the fund (see section 3 of *The Collective Investment Schemes Act, 2003; Financial Services Authority v. Asset Land Inc [2013] EWHC 178 at [160]; [2014] EWCA Civ 435; Brown v. Innovator One PLC [2012] EWHC 1321 at [1167-1168]; The Financial Conduct Authority v.*

Capital Alternatives Limited [2014] EWHC 144; [2015] EWCA Civ 284 and *The Russell-Cooke Trust Company v. Elliott (No 2)[2001] All ER (D) 300*). As an investment company, the defendant raises money from its members to buy assets that it manages on behalf of them all. It enables members taking part in the arrangement to participate in or receive profits or income arising from the acquisition, holding, management or disposal of the property or sums paid out of such profits or income.

Collective investment is all about spreading risk by pooling resources through a fund manager. New opportunities are opened that otherwise would not be available for an individual investor. It is one of the most common ways in which individuals invest in stock markets and other types of assets with the aim of gaining income and / or capital appreciation. Determining an investment's time horizon, also called its term, is usually based on the intention or goal behind the investment. Though the term does not necessarily denote a specific length of time, many consider anything below two years to be short-term; from two to ten years as medium term; and anything beyond 10 years to be long term. Medium term can be contrasted with both short term (often regarded as less than a year or two) and long term (longer than 10 years).

The nature of short-term financial goals is the collection of money to meet personal needs such as saving for purchase of a car, so the short-term investment portfolio is in the range of 1-3 years and is usually in low-medium risk, highly liquid assets. The focus is on the ability to get one's cash without either delay or loss. On the other hand, medium-term financial goals often add convenience to life or to improve the lives of better living, such as buying a house. Investment is usually in assets with medium to high risk highly liquid assets where the collection goal is approximately 3 - 7 years. The investor is expected to receive the return on investment and the initial capital within that period. Lastly, a long-term financial plan is a financial planning for retirement. Therefore, the investment period depends on the demand for retirement, for example, a person now 30 years old, who plans to retire at 60 years, will have 30 years of investment time. Since it is a long-term financial plan, it can be invested in high-risk assets. Low returns are the flip side of the low-risk coin. The longer the investment period the higher the risk but also the higher the return on investment. An investor in the short-term investment portfolio cannot earn much of

a profit; hence stability comes at a cost. The defendant's investment scheme in the instant case is generally medium to long-term investments.

Regulations 33 – 36 of the defendant's "Rules and Regulations" provide an oversight mechanism over the operation and management of the collective investment scheme. Regulations 35 (h) – (j) and (n) of those regulations empower the Executive Committee as the governing body of the scheme to direct its affairs, including; authorising investment, conveyance of property and borrowing from its funds. It is against that backdrop that the AGM of 22nd February, 2020 was convened. The minutes of the meeting, (exhibit D. Ex.6) and the agenda (exhibit P. Ex.3), indicate that the agenda and programme for that meeting was as follows;

1. 10.00 Welcome tea and snack.
2. 10.05 Opening prayer.
3. 11.30 Presentation from Exco.
4. 12.00 Presentation of the Audit Report.
5. 13.00 Reactions to Exco presentation and audit report.
6. 14.00 Lunch Break
7. 14.30 Presentation from Credit Committee.
8. 14.45 Reactions to Credit Committee presentation.
9. 15.15 Presentation by Investment Committee.
10. 15.45 Reactions to Investment Committee presentation
11. 16.00 Tea Break.
12. 16.45 Any other business
13. 16.55 Closing Remarks from the Chairman.
14. 17.00 Closing prayer.
15. Till late Cocktail.

Following the consideration of the third agenda item, the members present agreed to constitute a special sub-committee to come up with recommendations to the general meeting. It is that committee which recommended the amendment of Regulation 18 of the defendant's "Rules and Regulations" relating to payments to be made to members exiting the scheme. Before that amendment, Regulation 18 (as per the 9th July, 2016 version, exhibit P. Ex.1) provided as follows;

18. PAYMENT TO EX-MEBERS.

A member who withdraws or is expelled shall be repaid the following amounts after deductions of any debts owed by him to the Association as borrower, endorser, guarantor or otherwise;

a) 80% of contributions (but no interest or profit share) if member exits within 1 year of joining.
b) 90% of contributions (but no interest or profit share) if member exits within 2 years of joining.
c) 100% of contributions (but no interest or profit share) if member exits within 3 years of joining.
d) 100% of contributions and interest or profit share if member exits after 3 year of joining. The profits will be computed up to the end of the preceding financial year, i.e. not in the year of exit.

The special sub-committee constituted in the course of consideration of the fifth agenda item of the AGM came up with recommendations to the general meeting for the amendment of that regulation which, according to D.W.2 Mr. David Bigirwa, was unanimously adopted. The regulation, as amended (exhibit D. Ex.1), provides as follows;

18. PAYMENT TO EX-MEBERS.

A member who withdraws or is expelled shall be repaid the following amounts after deductions of any debts owed by him to the Association as borrower, endorser, guarantor or otherwise;

a) Voluntary exit; any member exiting voluntarily will either sell their shares to an individual to be approved by Exco or forfeit 25% of their total contribution to the date of exit, as well as the net profit earned in the last 12 months (from the date of notice) based on the last audited financial statement.
b) Forced exit; any member who is expelled from the Association shall forfeit 25% of their total contribution up to the date of exit, as well as the net profit earned from inception of the Association.
c) Exit by incapacitation (certifiable insanity, death or terminal illness); any exiting member to be paid their full contributions and net profits earned from inception based on the last audited financial statements.

Entitlements to exiting members shall be paid in a period of six (6) months to avoid disruption of committed investments.

The plaintiff faults this amendment on grounds that it was not one of the items on the agenda and members were thus not given notice of the intention to introduce the amendment prior to the meeting. It is trite that the articles of association of a company are its by-laws or rules and regulations which govern the management of its internal affairs and the conduct of its business. They are framed with the object of carrying out the aims and objects as set out in the Memorandum of Association. A company can alter its Articles by way of addition, deletion, modification, substitution, or in any other way as it deems fit. If an amendment of the Articles of Association is to be dealt with at the general meeting, the main contents of the amendment must be set out in the notice.

According to section 16 of *The Companies Act, 2012,* subject to the provisions of the Act and to the conditions contained in its memorandum, a company may by special resolution alter its articles. If an amendment of the articles of association is to be dealt with at the general meeting, the main contents of the amendment must be set out in the notice. In the present context an agenda is a statement of the business to be transacted at the meeting. It also sets out the order in which the business is to be dealt with. Though *The Companies Act* does not make it obligatory on the secretary to send an agenda or to incorporate the same in the notice of the Annual General Meeting, yet by convention it necessarily accompanies the notice calling the meeting. When the agenda is enclosed with the notice each member gives due consideration to the proposed business and comes with necessary preparations for discussion in the meeting.

In the instant case, what was amended at the AGM was not the defendant's articles of association but rather aspects of its "Rules and Regulations" which guide its operations as a collective investment scheme. The question then is whether or not the requirements of notice applicable to amendments to the defendant's articles of association applies to its "Rules and Regulations" in the same measure. Part IV of *The Collective Investment Schemes Act, 2003* prescribes the content of Scheme Regulations, but does not provide for the procedures of amendment. *The Collective Investment Schemes (Conduct of Business and Miscellaneous Provisions) Regulations, 2007* too are silent on this aspect. It turns out in the instant case that the reason why amendment of the defendant's "Rules and Regulations" was not an item on the agenda is because it came to hand during the consideration of item 5; "Reactions to Exco presentation and audit report." Apparently

the reason why discussion of this item could not be delayed until a subsequent annual general meeting is because a resolution on the matter was required before the next scheduled annual general meeting to enable a timely decision to be made.

It is trite that an operator of a collective investment scheme (CIS) will often be responsible for ensuring that all the day to day activities of operating the CIS are carried out competently. This may involve a wide range of activities which include managing the investments in accordance with the objectives of the CIS, valuation, administration, accounting, promotion and distribution. With so much responsibility resting with one entity, the level of supervision of each activity will probably vary. It is likely however that all activities will be supervised on an ongoing basis, to be determined in each case. This will depend, in part, upon the nature of any risks which may previously have been identified. Therefore, not all significant changes which may materially affect the risks and returns of a collective investment scheme can be determined by the directors at least one month in advance.

Collective Investment Schemes generally entail a high degree of investment risk. Unexpected changes are bound to occur in the general market conditions, the industry, sector or country or specific aspects of the financial instruments which the scheme invests in. Therefore a change in the investment objective or focus of the scheme or in the investment approach of the directors as stated in the constituent document of the scheme, where "investment approach" refers to how the directors select investments for the portfolio of the scheme, or an amendment to the "Rules and Regulations" of the scheme to allow a new form of remuneration or expense payable by the scheme, cannot be subjected to the same procedural requirements as those that apply to the constituent documents of the company. Decisions may have to be taken as soon as reasonably practicable in the circumstances.

The general principle though is that alterations to the constituent documents of a company should be to the benefit of the company as a whole. The context of the power being exercised must be taken into account. The power of amendment of the constituent documents of a company is a power to alter a contractual relationship between members *inter se*, and between them and the company and as such should be governed by considerations of what is in the best interests of the

members as a whole, and their collective interests are reflected in the commercial interests of the entity (see *Greenhalgh v. Arderne Cinemas Ltd [1951] Ch 286; Shuttleworth v. Cox Bros Ltd [1927] 2 KB 9* and *Redwood Master Fund, Ltd and Others v. TD Bank. Europe Limited and Others, [2002] EWHC 2703; [2002] All ER (D) 141*). Consequently an amendment that is wider than could necessary in the interests of the company, will be void (see *Dafen Tinplate Co Ltd v. Llanelly Steel Co (1907) Ltd [1920] 2 Ch 124*).

For example in *Allen v. Gold Reefs of West Africa Ltd [1900] 1 Ch 656,* Allen was member of a company, he held both fully and partly paid up share. Despite repeated demand by the company, Allen failed to pay up on its partly paid up share. The company altered its constitution to provide that if a member failed to pay on his partly paid up share, the company would have a lien on that member fully paid up share. Allen contended that he was prejudiced by the alteration. The court held that even though the alteration was prejudicial to one shareholder, it was a bona fide alteration to the benefit of company as a whole. The alteration was valid. It targeted all those shareholders who had unpaid shares. It was for the benefit of the company as a whole and therefore was a valid alteration.

Similarly in *Sidebottom v. Kershaw, Leese & Co Ltd [1920] 1 Ch 154*, the company altered its articles of association by adding a provision allowing its directors the power to buy out, at a fair price, any shareholder who competed with the business of the company. A minority shareholder, who carried out a competing business, challenged alteration. It was held that the alteration was entirely for the benefit of the company that members who compete with company be bought out i.e. being members, it was more likely that they would get benefit of information which would help them compete with the company. Thus the alteration was found to be valid.

Regulation 14 of *The Collective Investment Schemes (Conduct of Business and Miscellaneous Provisions) Regulations, 2007* requires an operator to deal with a CIS customer, a CIS and own account transactions fairly and in due turn. Consequently, the directors should seek to ensure that the assets of a CIS are managed in the best interests of its investors and in accordance with the objectives of a CIS. It was the testimony of D.W.1 Mr. Joseph Jabs Mubiru, that the amendment was prompted by the fact that some members were construing the defendant as a saving rather than

an investment entity. The minutes of the meeting (exhibit P. Ex.5 and D. Ex.6 respectively) indicate that after unanimous decisions to permanently halt members' loans disbursements, not to pay out any dividends to members and re-invest all profits generated in the next five (5) years, among other resolutions, it was decided that "a committee of SIB (Sheila Birungi), HAP (Hans Paulsen), BAM (Beimukye Apollo Musimenta), & CNM (Celia Namuddu Muhwezi) meet and propose procedures for exiting members in light of the long-term investments already undertaken and planned." The question then is whether the resultant amendments were bona fide.

The plaintiff testified that he just went to the AGM with the exit letter and during deliberations when he got to know there would be no more lending, he handed in his exit letter. The plaintiff is highly convinced that this angered the Chairman since he kind of took them by surprise and he is convinced the resolutions they made was prompted by that. It is trite that Annual General Meetings provide members with an opportunity to collectively discuss the affairs of the company and to exercise their ultimate control over the management of the company. The general principle is that shareholders are free to exercise their votes in their own interests (see *Citco Banking Corporation NV v. Pusser's Ltd [2007] UKPC 13*). An amendment to the constituent documents of a company will be considered *mala fide* where; (i) it is intended to oppress the minority shareholders; (ii) where it has the effect to discriminate the minority shareholders; or (iii) where it seeks to take away the rights of shareholders. Good faith is the starting point, and the overall amendment should be in the long term interests of the company (see *Rights & Issues Investment Trust Ltd v. Stylo Shoes Ltd [1965] Ch 250*).

In the instant case, although it was not one of the items on the agenda and members were thus not given notice of the intention to introduce the amendment prior to the meeting, the circumstances justified that it is considered as a special matter arising from one of the agenda items. I have not found any persuasive evidence of oppressive conduct against the plaintiff when the meeting adopted that procedure. When adopted, there was no discrimination between the majority and the minority in the application of the amendment; it applied to all existing members in equal measure and since it was for the long term benefit of the company as a whole, therefore it was a valid amendment.

iii. It was erroneously given a retrospective effect.

A fundamental right of an investor in a CIS is the right to withdraw funds from the CIS within a reasonable period. The constituent documents of the scheme should preserve the rights of investors to be able to withdraw their funds with relative ease. There are four ways an investor may be able to withdraw his or her investment from a collective investment scheme: (i) redeeming his or her interests from the scheme; (ii) requiring the scheme operator to buy his or her interests in the scheme (buy back); (iii) selling his or her interests on a recognised exchange or by private arrangement; and (iv) terminating the scheme and liquidating its assets. Terminating a scheme is an option available to investors in all schemes but it would only be used in extraordinary circumstances to facilitate the exit of all investors from the scheme. Not all options are available to investors in all schemes. In the instant case, the 9th July, 2016 version, (exhibit P. Ex.1) provided for two modes of exit; voluntary exit and expulsion. Upon amendment at the AGM of 22nd February, 2020, a third option was added; exit by incapacitation (exhibit D. Ex.1).

Upon voluntary exit, a collective investment scheme will ideally pay out investors either directly (redemptions) or indirectly (buy backs by the scheme manager with a subsequent redemption of acquired interests) when its assets are liquid. Whereas in the 9th July, 2016 version, (exhibit P. Ex.1) upon voluntary exit after a period of membership exceeding three (3) years, an exiting member would be entitled to 100% of his or her contributions and interest or profit share computed up to the end of the preceding financial year, upon amendment at the AGM of 22nd February, 2020 such a member was given the option of either selling his or her shares to an individual approved by Exco or forfeit 25% of his or her total contribution to the date of exit, as well as the net profit earned in the last 12 months (from the date of notice) based on the last audited financial statement. The latter amendment therefore was materially prejudicial to participants who would opt for a redemption or buy back.

The departure of investors from a collective investment scheme invested only in liquid assets rarely causes cash flow challenges. The scheme is able to pay out investors either directly (redemptions) or indirectly (buy backs by the scheme manager with a subsequent redemption of acquired interests) because its assets are liquid. The departure of investors from wholly or partly illiquid

collective investment schemes, on the other hand, can cause serious cash flow challenges. This is because the scheme operator and the scheme itself may not have enough liquid funds readily available to pay out these persons. If more investors are entitled to leave the scheme than can be paid out from available liquid assets, the operator will need to sell assets of the scheme quickly. This can cause disruption in the operations of the scheme.

Redemption from scheme assets is only viable if enough assets are liquid. A Collective Investment Scheme that owns one or two commercial properties, for example, will not be able to meet redemption requests unless the scheme's assets include sufficient cash or other liquid assets in addition to the real property. Without adequate liquid assets in the scheme the operator will have to sell an asset of much greater value than would be necessary to meet the redemption request. Even if a scheme that is invested mainly in illiquid assets holds some liquid assets, as soon as more redemption requests are received than can be met from those liquid assets, the scheme will have difficulty meeting the requests. It is not always possible to liquidate part of a scheme's assets to meet redemption requests, certainly not without disadvantaging continuing investors or even possibly jeopardising the future of the scheme, hence the proviso to the amendment that "entitlements to exiting members shall be paid in a period of six (6) months to avoid disruption of committed investments," effectively creating a six months' redemption period. Units of any CIS must be repurchased or redeemed at the request of any unit holder, in a manner which does not give an unfair advantage to one investor in the CIS over any other investor.

In light of the fact that the contributions of the participants are pooled, the profits or income out of which payments are to be made are pooled and the property to which the different participants are entitled are not bought and sold separately but dealt with as such only when a person ceases to be a participant, I do not find the six months' redemption period to be unreasonable.

This amendment resulted in the modification of the rights of the participants to the scheme. For any modification of the "Rules and Regulations" the company should obtain a special resolution of participants unless the company certifies that: (i) the modification does not materially prejudice the interests of participants to the scheme and does not release to any material extent the company from any responsibility to the participants; or (ii) the change to the scheme or rights or obligations

of participants, which requires a modification to the "Rules and Regulations," is necessary in order to comply with applicable fiscal, statutory or official requirements (whether or not having the force of law); or (iii) the modification is made to remove obsolete provisions or to correct manifest errors. According to D.W.2 Mr. David Bigirwa, was unanimously adopted. The minutes of the meeting (exhibit P. Ex.5 and D. Ex.6 respectively) indicate that it was a unanimous decision. It therefore was validly passed as a special resolution.

Investors should be fully aware of their rights at the time they invest. The general principle is that changes to a company's constituent documents take effect from the date of amendment; it is not possible to back date them so that they take effect from any earlier date (see *Whinney (Liquidator of W. & A. M'arthur, Limited) v. The Gulf Line, Limited [1909] SLR 497*). This presumption applies to all amendments which affect vested rights, whether the amendment affects them retroactively or only prospectively. A variation in the rights or obligations of participants as set out in the constituent document of the scheme, where the variation is materially prejudicial to participants, cannot be given retrospective effect. An amendment is retrospective in the weak sense if it prospectively effects, or changes the consequences for the future of pre-existing transactions and matters. An amendment is retrospective in the strong sense if it is deemed to have been in force from an earlier date than that on which it was in fact enacted. In this case the court has to consider retrospectivity in the former instance, where the amendment prospectively effects, or changes the consequences for the future of pre-existing transactions and matters.

If at the date of the amendment the event has not happened, then the operation of the amendment in forbidding the subsequent coming into existence of a claim based on that event is not a retrospective operation. An amendment has a retrospective effect when it attaches benevolent consequences to a prior event; attaches prejudicial consequences to a prior event; or imposes a penalty on a person who is described by reference to a prior event, where the penalty is not a consequence of the event. It includes and amendment that takes away or impairs any vested right acquired under existing provisions, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect to transactions or considerations already passed. From this perspective, almost every amendment of a company's constituent documents affects rights which would have

been in existence but for the amendment. A prospective amendment may be bad if it affects vested rights.

There is no general presumption that amendments should not alter the existing legal situation or existing rights: the very purpose of amendments is to alter the existing legal situation and this will often involve altering existing rights for the future. So, as Dickson J went on to point out in *Gustavson Drilling (1964) Ltd. v. Minister of National Revenue [1977] 1 SCR 271, at 282 - 283*, with special reference to tax legislation: "No one has a vested right to continuance of the law as it stood in the past; in tax law it is imperative that legislation conform to changing social needs and governmental policy. A taxpayer may plan his financial affairs in reliance on the tax laws remaining the same; he takes the risk that the legislation may be changed."

By analogy and paraphrasing, no member has a vested right to continuance of the regulations of the company as they stood in the past; it is imperative that the regulations of a company conform to changing market needs and governmental policy. A member may plan his or her financial affairs in reliance on the regulations remaining the same; he or she takes the risk that the regulations may be changed at the company's Annual General Meeting or other general meeting of members. As the sparks fly upward, individuals and businesses run the risk that the general meeting may change the rules governing their affairs. In order to attract the protection of the presumption against retrospective amendment, the claimant must therefore go on to prove that the substantive right affected is also an acquired or vested right. a retrospective operation is not to be given to an amendment so as to impair an existing acquired or vested right or obligation, otherwise than as regards matter of procedure, unless that effect cannot be avoided without doing violence to the language of the amendment.

To qualify as an acquired or vested right, the right in question needs to be particular to an individual and it needs to be sufficiently exercised. The only way in which a right can be considered an accrued right is if an individual is actually capable of exercising the right at the moment when it is repealed by amendment. The right-holder must be able to claim the right, without any barrier preventing him or her from doing so, in order for it be considered an accrued right. If anyone in the general membership of the company can claim a certain right, an individual cannot be said to

have thus gained an "acquired" or "vested" right, since they have not placed themselves in a distinct position from anyone else. A right accrues when all events have occurred necessary to fix the liabilities of the parties concerned therewith and to determine the amount of such liabilities; i.e. when it becomes capable of being enforced.

In essence, the right must be acquired by a specific individual, and not the membership in general in order for it to be particular and concrete. Some step must have been taken or some event must have occurred toward the realisation of the right before the amendment of the relevant document. The particular beneficiary of the right must have done something to avail himself or herself of it before the amendment. This is the line that distinguishes vested rights from simple expectations. Until vesting occurs, an interest is a mere expectancy.

To support his claim of the right to recovery of 100% of his contributions and interest or profit share upon exiting after 4 years of joining the defendant's investment scheme, the plaintiff partly relies on the audit report for the year ending 31st December, 2019 (exhibit P. Ex.2) showing his net worth was shs. 141,900,364/= Net worth is the sum of all assets owned by a person, minus any obligations or liabilities. The plaintiff's contention is that the amendment of 22nd February, 2020 could not be applied retrospectively to deprive him of that entitlement upon exit in order to subject him to forfeiture of 25% of his total contribution to the date of exit, as well as the net profit earned in the last 12 months. This argument would be valid only if by 22nd February, 2020 some event had occurred or the plaintiff had taken some step toward the realisation of the right to be paid that amount. He had the onus of leading evidence to show that he had done something to avail himself or herself of it before the amendment.

As regards the occurrence of an event creating a vested interest, this could only have been based on a declared return of capital before 22nd February, 2020 or evidence that the company used the profit it generated during the preceding year to declare a dividend payable to members as a reward for their investment. According to section 69 (2) of *The Companies Act, 2012* a company may not pay a dividend or make any other distribution to its members except out of profits available for that purpose. Dividends are not to be paid out of capital (see *Lubbock v. British Bank of South America [1892] 2 Ch 198* and *Verner v. General and Commercial Investment Trust [1894] 2 Ch*

239). Any distribution of income can only be made from realised gains or realised income, after taking into consideration the following: (a) total returns for the period; (b) income for the period; (c) cash flow for distribution; (d) stability and sustainability of distribution of income; and (e) the investment objective and distribution policy of the fund. No payment should be made from the scheme if it is unfair to, or materially prejudices the interests of, any participant or prospective participant.

A company is under no legal obligation to pay dividends. Its directors may recommend a final dividend (i.e. one to be paid after the financial year to which the profits being distributed relate), which is then declared by the approval of the shareholders, usually by ordinary resolution, the amount declared not exceeding the amount recommended by the directors. It is trite that members of a company cannot claim any right to its profits unless a dividend has been declared. A dividend must be declared before it is paid (see *Foster v. New Trinidad Lake Asphalt Co. Ltd [1901] 1 Ch 208*). Since there had not been any declaration of a return of capital or dividend by the defendant before 22nd February, 2020 no event had occurred by which the plaintiff acquired a vested right to redemption or pay-back of his net worth in the defendant company.

As regards the plaintiff having taken some step toward the realisation of the right to be paid his net worth in the defendant company through redemption or buy-back, this could only have ben triggered by voluntary exit. The procedure for voluntary exit is prescribed by Regulation 15 providing; "WITHDRAWAL BY MEMEBRS: a member may at any time withdraw from the Association by giving at least one month's written notice." It was the testimony of the plaintiff that this regulation required him to give notice of one month and that he notified the company on 22nd February, 2020. Although it was stamped as received on 24th February, 2020, he submitted it on 22nd February, 2020 at the Annual General Meeting of the company. The notice took effect when the 30 days elapsed. The implication therefore is that as at 22nd February, 2020 he was still a member of the company, and he admitted that much in his testimony.

Members of a company can exercise their powers and can bind the company when they act as a body at a validly convened and held Meeting. They should act collectively and not individually. A member or shareholder, irrespective of his or her shareholding, cannot bind a company by his

individual act. A resolution passed at a meeting of unit holders in an investment scheme binds all unit holders, whether or not they were present at the meeting. No objection may be made as to any vote cast unless such objection is made at the meeting. Except where a special resolution is specifically required or permitted, any resolution is passed by a simple majority. While an ordinary resolution means a resolution passed by a simple majority of votes validly cast at a meeting of unit holders, a special resolution means a resolution passed by a majority of not less than ¾ of unit holders voting at a meeting of unit holders. In the instant case, the minutes indicate that amendment of Regulation 18 was adopted unanimously. Since he was still a member of the defendant by 22nd February, 2020 the plaintiff was bound by the amendment.

At the time when the plaintiff presented the letter of resignation from membership of the defendant on 22nd January, 2020 (exhibit P. Ex.3 and D. Ex.4 respectively) he was, according to Regulation 18 of the amended "Rules and Regulations" of the company, entitled to either sell his shares to an individual approved by Exco or forfeit 25% of his total contribution to the date of exit, as well as the net profit earned in the last 12 months (from the date of notice) based on the last audited financial statement. He opted for the latter. Since his notice took effect 30 days after 22nd February, 2020, the implication is that by the date of the amendment he had not taken any step toward the realisation of the right to be paid his net worth in the defendant company through redemption or buy-back. I doubt whether the letter of resignation delivered after the amendment had been passed can fairly be construed as having crystallised a vested right or interest. The plaintiff therefore had not acquired a vested right of redemption or buy-back in accordance with the pre-amendment provision. The amendment, although prospective, was to be operative with respect to transactions occurring prior to its adoption. The plaintiff was thus subject to the post-amendment position.

The amendment in the present case, although undoubtedly affecting past transactions of the plaintiff, does not operate retrospectively in the sense that it alters rights as of a past time. The regulation as amended by the repeal does not purport to deal with prior voluntary exit to the date of the amendment; it does not reach into the past and declare that rights of members as of an earlier date shall be taken to be something other than they were as of that earlier date. The effect, so far as the plaintiff is concerned, is to deny for the future a right to be exempted from any deduction enjoyed in the past but the right is not affected as of a time prior to the amendment. Since provisions

which affect existing rights prospectively are not retroactive, the presumption against retroactivity does not apply in the instant case.

Both the presumption against retrospective application and the presumption against interference with vested rights as presumptions of variable strength. The strength of both presumptions varies according to the unfair or arbitrary effect their rebuttal would create. One of the main principles underpinning good corporate governance is that the internal regulations apply equally to all; when these regulations change, uniform application of that change should generally be the preferred outcome. In any event, if an amendment is passed for the long term benefit of the company as a whole, it will be allowed to operate retrospectively, although by such operation it will deprive some person or persons of a vested right. In conclusion, I find that the resolution passed on 22nd February, 2020 on payment to ex-members affected the plaintiff's entitlements which had accrued as of December, 2019.

2nd issue; what remedies are available to the parties.

In accordance with Regulation 18 as amended, the plaintiff upon voluntary exit had the option either sell his shares to an individual approved by Exco or forfeit 25% of his total contribution to the date of exit, as well as the net profit earned in the last 12 months (from the date of notice) based on the last audited financial statement. The plaintiff opted for the latter whereupon the defendant had the obligation to pay him his entitlements, as an exiting member, within a period of six (6) months. Exhibit P. Ex.7 dated 10th August, 2020 shows that the plaintiff's bank account was credited with shs. 98,371,647/= on 7th August, 2020. This was six months after his letter of resignation took effect. Defence exhibit D. Ex.2 presents the computation on basis of which the defendant effected that payment. The computation is consistent with the plaintiff's net worth as per the audit report (exhibit P. Ex.2) and the formula embedded in regulation 18 as amended. The plaintiff having been paid his entitlement in full, he is not entitled to any other payment. The suit is entirely misconceived and is accordingly dismissed with costs to the defendant.

Delivered electronically this 7th day of January, 2022 ……Stephen Mubiru……..

Stephen Mubiru
Judge,
7th January, 2022.