

## DISPUTE RESOLUTION

## ARE ALL MATTERS REQUIRED TO BE PARTICULARISED IN A NOTICE/ AGENDA OF A BOARD OF DIRECTOR'S MEETING?

In a recent case handled by Ms. Idza Hajar Ahmad Idzam from Messrs Zul Rafique & Partners, several questions of law were posed and answered by Justice Ong Chee Kwan sitting in the High Court of Kuala Lumpur. The full grounds of decision may now be found at *Rozilawati Binti Haji Basir v Nationwide Express Holdings Berhad v 4 Others [2020] MLJU 1198*. Ms. Idza was appearing for all the defendants in this case namely the public listed company i.e. Nationwide Express Holdings Berhad and the directors thereof at the material time (“the Defendants”) to defend against the claim commenced by one Rozilawati Binti Haji Basir (“the Plaintiff”) who was once a Managing Director and a Director of the 1<sup>st</sup> Defendant.

**BRIEF FACTS** By way of a notice dated 27.04.2018 (“Notice”), the Plaintiff and the directors of the 1<sup>st</sup> Defendant i.e. 2<sup>nd</sup> to 5<sup>th</sup> Defendants were informed of a board of directors’ meeting scheduled to be held on 30.05.2018 (“Board Meeting”) in accordance to the 1<sup>st</sup> Defendant’s Articles of Association dated 27.04.2016 (“Constitution”). The Board Meeting’s agenda dated 21.05.2018 (“Agenda”) was circulated to the Plaintiff and listed a number of matters to be discussed and resolved during the Board Meeting which included *inter alia* “to receive matters arising and to transact on any other matters” of the 1<sup>st</sup> Defendant.

During the Board Meeting, the board of the 1<sup>st</sup> Director has unanimously resolved to *inter alia* terminate the Plaintiff’s contract of service as the Managing Director of the 1<sup>st</sup> Defendant with immediate effect (“Termination”).

The Plaintiff then commenced a suit against the Defendants in relation to the board of directors’ decision to terminate her said contract of service.

The Plaintiff has alleged *inter alia* that the 1<sup>st</sup> Defendant’s failure to state and/or particularise the intended Termination in the Notice and/or Agenda of the Board Meeting had rendered the said Board Meeting and/or resolutions passed therein being wrongful, ineffective, invalid, null and/or void. In the course of the proceeding, the Defendants had filed an application pursuant to Order 14A Rules of Court 2012 (“Order 14A Application”) where several questions of law were posed and answered which ultimately led to the Plaintiff’s entire action being struck out by the High Court with costs.

**QUESTIONS OF LAW** The questions of law posed in the Order 14A Application included *inter alia* the following:-

1. *Whether the Defendants were correct in that at the material time, there was no mandatory requirement under the 1st Defendant’s Constitution and/or applicable laws to have all matters / particulars to be discussed (including but not limited to the Plaintiff’s proposed termination as 1st Defendant’s Managing Director) to be set out in the notice of meeting dated 27.04.2018 and/or meeting agenda dated 21.05.2018? (“1<sup>st</sup> Question”)*
2. *Whether the 1<sup>st</sup> Defendant’s Board Meeting was valid and properly convened in accordance with the 1st Defendant’s Constitution? (“2<sup>nd</sup> Question”)*
3. *Whether the resolutions passed in the Board Meeting which form the subject matter of this suit are valid? (“3<sup>rd</sup> Question”)*

## FINDINGS OF THE HIGH COURT

The learned High Court Judge’s findings on the questions of law posed are as follows:-

### 1<sup>st</sup> Question and 2<sup>nd</sup> Question

The learned High Court Judge answered both questions simultaneously in the affirmative. In arriving at His Lordship’s said decisions, the presiding Judge agreed with the solicitors for the Defendants in that there is no requirement of law to mandate the particularisation of a particular agenda for a Board Meeting. The Court further agreed with the solicitors for the Defendants that the service of

the Notice is in line with the Constitution and that the Constitution is silent on the need for the matters of particulars to be discussed at the meeting.

The presiding Judge further stated that while **it may be a matter of best practice in general for the meeting agenda to contain specifics of what will be discussed, it is not a necessity and/or requirement under the law, unless expressly required in the company's constitution.** (*emphasis added*)<sup>1</sup>

The Court further stated that due to the occasional urgency of meetings, “it may not always be possible for an agenda to be prepared and circulated before such meetings.”<sup>2</sup> and that meeting agenda with incomplete particulars or notice will not invalidate the resolutions passed. The Court is of the view that if any of the directors of a company is taken off guard of the “surprise” during the meeting then he/she may adjourn the matters for further deliberation and any directors who is absent or ill-prepared to discuss the matters raised at a meeting would unfortunately have to accept the outcome of the discussions made by the majority of the directors at the meeting.<sup>3</sup>

In this regard, it is important to emphasise that the 1<sup>st</sup> Defendant's constitution is silent on the need to furnish all the particulars in a meeting agenda and the board meeting was held in accordance to the constitution of the 1<sup>st</sup> Defendant.

### 3<sup>rd</sup> Question

The learned High Court Judge answered this question in the affirmative. In arriving at His Lordship's said decision, His Lordship held *inter alia* that **it is not necessary that there must be deliberation of a subject matter by the Board of Directors of the 1<sup>st</sup> Defendant before a resolution relating to the matter can be validly carried through** (*emphasis added*).

During the hearing of this matter, the Plaintiff's solicitors had also raised the contention that there was no deliberation by the directors before the purported resolution to terminate the Plaintiff as the Managing Director of the 1<sup>st</sup> Defendant and that all that had happened was an announcement by the Chairman of the Board of Directors to terminate the Plaintiff's Contract of Service.

Apart from holding that it is not necessary that there must be a deliberation of the subject matter by the board of directors before a resolution, the presiding further held that **there is also no necessity for a formal voting process to take place relating to the matter before a resolution is validly carried through** (*emphasis added*).<sup>4</sup> In the instant case, the presiding further stated that the fact that none of the directors at the meeting had raised any objection to the Chairman of the Board of Directors' announcement is a natural inference that the board of directors was in unanimity in the decision.<sup>5</sup> In addition, when the minutes of the board of directors' meeting was drawn up and resolution was recorded, there was no objection taken by any of the directors.<sup>6</sup>

**COMMENTARY** This case will serve as a precedent where a company's constitution is silent on the particularisation of matters to be discussed in a board of directors' meeting and where paragraph 4 of the Third Schedule of the Companies Act 2016 is not adopted by a company. In deciding on whether a notice and/or agenda ought to specify the full and complete matters to be discussed in a board of directors' meeting, the presiding Judge had also quoted paragraph 4 of the Third Schedule of the Companies Act 2016 (“**Third Schedule**”) which provides that a notice of a board meeting shall, amongst others, include the matters to be discussed. The presiding Judge went on to state that while a company is at liberty to not adopt the said Third Schedule, it nevertheless reflects the intent of the legislation that such practice should be the default

<sup>1</sup> Paragraph 34 of Rozilawati Binti Haji Basir v Nationwide Express Holdings Berhad v 4 Others [2020] MLJU 1198 (“MLJU”)

<sup>2</sup> Paragraph 40 of MLJU.

<sup>3</sup> Paragraph 43 of MLJU.

<sup>4</sup> Paragraph 50 of MLJU.

<sup>5</sup> Paragraph 50 of MLJU.

<sup>6</sup> Ibid.

provision in the event the Third Schedule is adopted.<sup>7</sup>

In this regard, a different outcome or approach may have been reached in the event that the said Third Schedule of the Companies Act 2016 was adopted by the 1<sup>st</sup> Defendant. Having said so, the term “*all matters*” used in the Third Schedule would still be subject to Court’s interpretation i.e. whether it includes all matters to be discussed in a board of directors’ meeting, be it major or minor. This remains untested in Court.

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<sup>7</sup> Paragraph 44 of MLJU.