IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: RUTAKANGWA, J.A., BWANA, J.A., And OTHMAN, J.A.)

CIVIL REVISION NO. 1 OF 2009

IN THE MATTER OF INDEPENDENT POWER TANZANIA LIMITED
AND
IN THE MATTER OF THE COMPANIES ACT, 2002 [R.E.]
AND
IN THE MATTER OF A PETITION BY A CREDITOR FOR AN ADMINISTRATION ORDER BY STANDARD CHARTERED BANK (HONG KONG) LIMITED (PETITIONER)

(Application for Revision of the Proceedings, Ruling and Orders of the High Court of Tanzania at Dar es Salaam)

(Mihayo, J.)

Dated 27th day of January, 2009
in
Miscellaneous Civil Cause No. 5 of 2009

RULING OF THE COURT

19th March, 2009 & 9th April, 2009
RUTAKANGWA, J.A.

The Companies Act, Cap. 212 R.E.2002 of the Laws of Tanzania, henceforth the Act, came into force on **1st March, 2006**. It repealed and replaced the Companies Ordinance (the Ordinance). The Act also introduced a totally new legal concept in corporate management and/or governance, previously unknown in our jurisprudence. This was the concept of ADMINISTRATION, which is embodied in Part VII of the Act.

Administration, as a legal concept, is a procedure under the insolvency laws of a number of common law jurisdictions, including the U.S. It functions as a rescue mechanism for insolvent companies and allows them to carry on with their business instead of being liquidated. The process is usually referred to as **going into administration** and the entire concept is better known as the RESCUE CULTURE. In the U.S. the process is known as going into Chapter 11.

Independent Power Tanzania Limited (I.P.T.L. as popularly known by this acronym), henceforth the Company, is a body corporate operating in Tanzania. It was incorporated on 1st November, 1994 under the provisions of the repealed Ordinance. It has two shareholders, which are also corporate entities. These are Mechmar Corporation (Malaysia) Berhard or Mechmar hereafter, holding 70% of the shares and VIP Engineering and Marketing Limited, or VIP hereinafter, holding 30% of the shares.

The object of the Company is to build and operate "a 100 MW independent, oil fired, power plant, with designation for the provision of additional capacity and supply to the national grid." The preparatory stages, which included the entering into a Power Purchasing Agreement with TANESCO and the installation of the operating plant at Tegeta, Dar es Salaam, were successfully concluded by the year 2001.

However, as it happens by one of those unusual coincidences which sometimes occur in real life, the brilliant idea began to backfire

thereafter. The initial trust and confidence that animated the business relationship between the two shareholders became sour and turned to bitterness. There emerged mutual mistrust. This led VIP, on **25th February, 2002,** to petition for the winding up of the Company and simultaneously applying for the appointment of a Provisional Liquidator of the Company __ **vide**, Miscellaneous Civil Cause No. 49 of 2002 of the High Court of Tanzania at Dar es Salaam, henceforth the winding up petition.

In the said petition, based on the provisions of the Ordinance, VIP was accusing Mechmar of oppression, corporate waste, fraud and alleging a total breakdown of trust and communication. While the winding up petition was still pending, Mechmar won an **ex parte** award against VIP in the London Court of International Arbitration, directing VIP to discontinue the winding up petition. This award was lodged in the High Court, **vide,** Miscellaneous Civil Cause No. 254 of 2003. In the course of time these two separate proceedings were consolidated. On **16th December, 2008**, the High Court (**Oriyo, J.**) appointed the "Administrator General/Assistant Official Receiver" as the Company's Provisional Liquidator under Section 183 (1) of the Ordinance.

Following that appointment, Mechmar formally applied to this Court for a stay order. Before this application was heard and disposed of, Standard Chartered Bank (Hong Kong) Limited, henceforth the Bank, a limited liability company incorporated in Hong Kong, entered the saga, by way of the administration process, under

Part VII of the Act. Claiming to be a creditor of the Company owed "approximately US $46,265, 468,42," which the Company had failed to pay, the Bank petitioned the High Court, under s.247 of the Act, to make an administration order and "appoint Charles Rutayuga Burchard Rwechungura as administrator of the Company". This was Miscellaneous Civil Cause No. 5 of 2009 in the High court at Dar es Salaam, hereinafter the petition.

The petition was lodged on **22nd January, 2009**. It was expressly stated in para 2 of the petition thus:-

> *"It is not intended to serve this Petition upon any party,* ***save as directed*** *by this Honourable Court."* [Emphasis is ours].

On 23rd January, 2009, only Mr. Charles Morrison, learned advocate, appeared before Mihayo, J. and made a brief submission in support of the petition. The ruling was reserved. It was eventually delivered on 27th January, 2009. The petition was granted. IPTL was placed into administration. Mr. Charles R.B. Rwechungura was appointed Administrator of the Company.

When the Provisional Liquidator became aware of the said administration order, he was aggrieved. As he was not a party in the petition, he chose to lodge a complaint, by way of a letter, to the Chief Justice. He was complaining, among other reasons, about the manner the petition proceedings were hastily conducted behind his back thereby occasioning gross injustice to him. He urged the Chief

Justice to cause the Court to act **suo motu** under section 4(3) of the Appellate Jurisdiction Act, Cap.141 R.E. 2002 and revise the proceedings before Mihayo, J. "to redress the injustices" that had been committed. This is the brief background to these **suo motu** revision proceedings.

The Provisional Liquidator had three main grievances. **One,** the High Court erroneously entertained the proceedings in respect of the Company under the provisions of the Act, when the same are specifically misapplied by section 486 of the Act. **Two,** section 176 of the Ordinance as well as section 288 of the Act, which are **in pari materia**. bar commencement and/or continuation of proceedings, actions, etc, against a company once a Provisional Liquidator had been appointed. **Three,** he was condemned unheard.

In the interests of justice, before a decision on these grounds of complaint was made, the Court deemed it helpful to hear representations from the following persons:-

(a) the Provisional Liquidator,

(b) the Attorney General,

(c) VIP,

(d) Mechmar, and

(e) the Bank.

On the day the matter first came up for hearing, representation of the interested parties was as follows: Dr. Fredrick S. Ringo and Mr. C. Morrison, learned advocates, for the Bank; Mr. Michael Ngalo, Mr. Cuthbert Tenga and Mr. Respecius Didace, learned advocates, for

VIP; Mr. Dilip Kesaria, learned advocate, for Mechmar; Mr. Theophil Rugonzibwa and Miss Anuciata Ngairo, learned State Attorneys for the Provisional Liquidator; and Mr. Gabriel Malata, learned Senior State Attorney, for the Attorney General. Furthermore, Ms. Fatma Karume, learned advocate, sought to be given audience on the basis that she had instructions from one Ms. Martha K. Renju, who is said to be the Receiver of all IPTL shares, to represent her. As there was no opposition from either Mechmar or VIP and/or the Provisional Liquidator, she was given audience in the matter.

In these revision proceedings counsel had to grapple with a number of issues drawn from both the complaint letter and the record of proceedings before the High Court. These were:-

(a) Whether it was proper for the learned High Court judge to proceed **ex-parte** without issuing notices to any interested party;

(b) Whether the Bank needed leave of the High Court before petitioning for an administration order;

(c) What was the applicable law in the peculiar circumstances of the case and whether the High Court had been properly moved;

(d) Whether there was any legal requirement to support the petition with an affidavit and if the answer is in the affirmative if there was such an affidavit in this case;

(e) Whether the petition by the Bank had to be accompanied by a copy of a resolution by its Board authorizing institution of the proceedings;

(f) Whether the petition was signed by an authorized officer of the Bank, and

(g) Whether the petition for an administration order ought to have been filed in the consolidated winding up petition in terms of Rule 11(2) of the U.K. Companies Winding Up Rules, 1929.

Admittedly, some of these issues were intricate. That notwithstanding, each counsel presented his or her case to us at length, and in an absorbing manner to which we pay sincere tribute. However, we might not attempt to provide an answer to each issue raised and submitted on in these proceedings and therefore, we cannot hope to do full justice to counsel. But we are much indebted to them. We are saying so advisedly because we believe that the answer to the first issue might prove to be crucial and conclusive, and there is no gainsaying that some of the issues raised by counsel need to be established by calling of evidence.

Furthermore, we are mindful of the fact that the Court acted **suo motu** under section 4(3) of the Appellate Jurisdiction Act, Cap.141 to call for the record of proceedings before Mihayo, J. It did so only for the purpose of satisfying "itself as to the

correctness, legality or propriety" of the said proceedings and the ruling and/ or orders made therein. This does not cover legal and factual issues not canvassed by the learned judge. If issue (a) is answered in the negative, then the parties will have ample time to raise these other issues at the opportune moment and in the appropriate forum. What did counsel have to say on this issue?

It was the contention of the Provisional Liquidator in these proceedings that the entire proceedings before Mihayo, J. and the appointment of the administrator were a nullity. They were a nullity because they were conducted in violation of one of the cardinal principles of natural justice, in that he and other interested parties were condemned unheard. On this, he was supported by VIP and the Attorney General. This contention was vehemently opposed by the Bank, which received unflinching support from Mechmar and Ms. Martha Renju.

In support of his contention, Mr. Rugonzibwa began by asserting that the Provisional Liquidator, on being appointed, took charge of all properties of the Company. He relied on section 188 of the Ordinance, which reads as follows:-

> *"Where a winding order has been made or where a provisional liquidator has been appointed the liquidator, or the provisional liquidator as the case may be, shall take into his custody, or under his control, all the*

property and things in action to which the company is or appears to be entitled."

It is worth noting here that this section 188 reappears in the Act as section 299.

Placing much reliance on section 188 of the Ordinance, Mr. Rugonzibwa submitted that as section 248 of the Act does not provide for **ex-parte** proceedings, the Provisional Liquidator, who was the Company by then, had to be heard before an administration order was made. As this was not done, he pressed, his constitutional right was violated. Relying on the decisions of this Court in **ECO-TEC (ZANZIBAR) LTD v. GOVERNMENT OF ZANZIBAR,** Civil Application No. 1 of 2007 (unreported) and **VIP ENGINEERING AND MARKETING LIMITED AND 2 OTHERS v. CITIBANK TANZANIA LIMITED,** Consolidated Civil References No. 6, 7 and 8 (unreported), he urged us to nullify the entire proceedings before Mihayo, J. and order a re-trial in which they will be afforded a hearing.

Mr. Ngalo questioned the propriety of the manner the petition was hurriedly entertained by the learned judge without even the petitioner itself being served with a notice of hearing.

Mr. Tenga was emphatic that the right to be heard is very fundamental and was not ousted by section 248(2)(a) of the Act. He was of the firm view that the Petitioner in the winding-up petition

was one of the prescribed persons in the Act and was, therefore, entitled to a hearing.

For Mr. Morrison, his long address on the virtues of the administration procedures and the incisiveness of Mihayo, J.'s decision apart, it was his strong contention that he could read nothing in the Act which gave a right of hearing to either VIP or the Provisional Liquidator. According to him, the powers of the Provisional Liquidator were spelt out in the order of Oriyo, J. which appointed him. From that premise, he boldly submitted that his powers being "limited to carrying out investigations" and reporting back to the Court, he had no right to be heard in a petition for an administration order. He buttressed this argument by insisting that as section 248(2) of the Act gives no discretion to the Court in choosing on whom the notice of the petition should be served and in the absence of the Rules detailing those other "prescribed persons," this was not a fit case to afford a hearing to the Provisional Liquidator. Significantly, he said nothing on the fate of the petitioner in the then pending winding up petition (i.e VIP).

On his part, Mr. Kesaria boldly asserted that as this was not a petition for favouring one and discarding another, but one which was in the interests of all parties, the Provisional Liquidator and VIP had no cause for complaining. It was his undisguised contention that none of them was adversely affected. More specifically, he pressed us to find that the Provisional Liquidator had no role to play in those proceedings, as "he has no interests in the survival of the company."

Ms. Karume prefaced her brief submission with a castigation of those who were driven by "sheer emotions" to attack the learned High Court judge. To her, the learned judge ought to be highly commended for "working with speed" to administer justice. Otherwise, she was in full concurrence with the submissions of Mr. Morrison and Mr. Kesaria on the issue as the learned judge had to work within the confines of section 248 (2)(a) of the Act.

We shall begin our discussion of this issue by first stating the law governing it as we understand it and which we believe counsel in these proceedings are familiar with.

There are two principles of natural justice. These are that, no person should be a judge in his or her own cause and that no one should be condemned unheard. In these proceedings we are concerned with the latter. All the same, it is fair to stress here that these two principles have been given constitutional recognition. They are encapsulated in Article 13(6)(a) of the Constitution of the United Republic of Tanzania 1977, which we shall hereinafter refer to as the Constitution.

Article 13(6)(a), of the Constitution provides as follows:-

> *"To ensure equality before the law, the State Authority shall make procedures which are appropriate or which take into account the following principles; namely:-*

(a) *when the rights and duties of any person are being determined by the Court or any other agency,* ***that person shall be entitled to a fair hearing*** *and the right of appeal or other legal remedy against the decision of the Court or of the other agency concerned, ...*" [Emphasis is ours].

Expounding on the basic attributes of "a fair hearing," the Supreme Court of India, in the case of **UNION OF INDIA V. TULSI RAM**, AIR 1985 S.C.1416 at page 1456, said:-

> *"The principles of natural justice constitute the basic elements of a fair hearing, having their roots in the innate sense of man for fair play and justice which is not the preserve of any particular race or country but is shared in common by all men."*

Addressing our minds to the right to be heard, which is the focus of the issue under scrutiny, we can put it as a proposition of law of universal application, that no decision must be made by any court of justice, body or authority, entrusted with the power to determine rights and duties, so as to adversely affect the interests of

any person without first giving him a hearing according to the principles of natural justice.

In similar vein, the Supreme Court of Zimbabwe **in HOLLAND v. MINISTER OF PUBLIC SERVICE, LABOUR AND SOCIAL WELFARE** [1998] ILRC 78, did not disguise its distaste for violations of the rules of natural justice. It said, at page 83, as follows:-

> *"It is settled law that where a statute empowers a public official or body to give a* ***decision which will prejudicially affect an individual in his liberty, property or existing rights,*** *the right to a fair hearing is to be given effect to unless the statute expressly or by implication indicates the contrary."*

Similar sentiments were echoed by the Supreme Court of South Africa (Appellate Division) in the case of **DU PREEZ AND ANOTHER v. TRUTH AND RECONCILIATION COMMISSION** [1998] I LRC 86. Providing an answer to the question: what does the duty to act fairly demand?, the said Court sought useful guidance from the English case of **DOODY v. SECRETARY OF STATE FOR THE HOME DEPARTMENT** [1993] 3 LRC 428, wherein Lord Mustill, for the House of Lords said, at page 443:-

> *".....Fairness will very often require that a person* ***who may be adversely affected by***

the decision will have an opportunity to make representations *on his own behalf either before the decision is taken, with a view to producing a favourable result, or after it is taken, with a view to procuring its modification or both...."*

The prevailing view, however, is that a hearing before a decision is taken is a **sine qua non** of any judicial proceeding. We subscribe wholly to this view. The "hang him first and try him later" syndrome mockingly spoken about by Mark Twain, is an affront to the rule of law and our fair senses for justice. It is a relic of the past which is relished no more.

In view of the above, we have found ourselves in full agreement with Justice Brandies, of the U.S. Supreme Court, who once aptly observed that:-

"A judge rarely performs his functions adequately unless the case before him is adequately presented," see: B. Donovan James's "Stranger's on a Bridge", (1964).

To us, this cannot be accomplished unless and until all would be adversely affected parties in the proceedings have been given a reasonable opportunity to make their representations to the judge before he decides. **Ex post facto** hearings, therefore, should be avoided unless necessitated by exceptional circumstances, as they

are at times riddled with prejudices apart from being a negation of timely and inexpensive justice, which we all strive for. What then, are the consequences of failure to afford a hearing?

The consequences of breach of a right to a fair hearing can be traced in a plethora of decisions by this Court and foreign jurisdictions. The principle of law to be distilled from decided cases, is that violation of this right, unless expressly or impliedly authorized by legislation, renders the proceedings and the decisions and/or orders made therein a nullity. In view of the now clear constitutional provisions, where a statute excludes natural justice, as was lucidly observed by the Supreme Court of India in the case of **UTTAR PRADESH V. VIJAY KUMAR TRIPATH**, AIR 1995 sc 1130, its "validity .... may fall for consideration". This is all because the principles of natural justice are the embodiment of justice itself. You cannot talk of doing justice without observing the rules of natural justice. So this rule of fair play:-

> *".... must not be jettisoned save in very exceptional circumstances where compulsive necessity so demands. The court must make every effort to salvage this cardinal rule to the maximum extent possible, with situational modifications", in* ***SWADESH COTTON MILLS v. UNION OF INDIA,*** *AIR 1981 SC 818, 832.*

This Court re-affirmed this position in the case of **ABBAS SHERALLY & ANOTHER v ABDUL SULTAN HAJI MOHAMED FAZALBOY**, Civil Application No. 33 of 2002 (unreported). The Court said:-

> *"The right of a party to be heard before adverse action or decision is taken against such a party has been stated and emphasized by the Courts in numerous decisions.* ***That right is so basic that a decision which is arrived at in violation of it will be nuillfied, even if the same decision would have been reached had the party been heard,*** *because the violation is considered to be a breach of natural justice."* [Emphasis is ours].

A similar stance was taken by the Court in the cases of the **BANK OF TANZANIA v. SAID A. MARINDA AND OTHERS**, Civil Application No. 74 of 1994 (unreported) and **ECO-TEC (ZANZIBAR) v. GOZ** (supra), wherein Ms. Karume acted for the respondents. In **VIP v. CITIBANK TANZANIA LTD** (supra) in which Mr. Kesaria advocated for CITIBANK, this Court followed the Privy Council in **A.G. v. RYAN** [1980] A.C. 718, to re-affirm the long established principle of law to the effect that "a decision which offends against the principles of natural justice is outside the jurisdiction of the decision-making authority." All these cases, in our settled view, constitute a

line of recent decisions of convincing authority, to the effect that failure to afford a party a fair hearing, which is a constitutional requirement, vitiates the proceedings and renders the decision arrived at a nullity regardless of its merits. That being the clear position of the law, how does it apply to the contrasting positions taken by the parties in these revision proceedings?

From the above discussion, it is clear that failure to afford a hearing to a person whose rights, duties, etc, are to be adversely affected by the decision, unless such violation is mandated by legislation, shall vitiate the proceedings. It is common ground in these proceedings that neither the Company, the Provisional Liquidator nor VIP were notified of the filing of the Petition. Furthermore, none of them was heard before the administration order was made. Nonetheless, the Company is not complaining. Equally undisputed is the fact that the Act does not mandate violation of the fairness principle in respect of administration proceedings. The bone of contention here, is whether or not under the scheme of Part VII of the Act the Provisional Liquidator and/or VIP had a right to be heard.

We have already shown above that the parties opposed to these proceedings have adamantly argued that the complainants have no such right. This is because, as strenuously contended, they are not mentioned in section 248(2)(a) of the Act and no rules have been made to regulate such proceedings, which is an admitted fact.

section 248(2)(a) of the Act provides as follows:-

> *"248-(2) Where a petition is presented to the Court __*
>
> (a) notice of the petition shall be given immediately to any person who has appointed, or is or may be entitled to appoint an administrative receiver of the company, **and such other persons as may be prescribed.**
>
> (b) .... Not relevant. [Emphasis is ours].

It will be appropriate to point out at this juncture that this provision is identical with section 9(2)(a) of the Insolvency Act. With this caveat in mind, let us examine the true intendment of this provision.

This provision is a clear vindication of our earlier stated position that the Act did not intend to dispense with the right to hearing in administration proceedings, at least in so far as those persons who have appointed, or are, or may be entitled to appoint an administrative receiver are concerned. It has not been pressed before us that either the Provisional Liquidator or VIP fall into this category. So a literal and restrictive construction of section 248(2)(a)

would naturally vindicate Mr. Morrison, Mr. Kesaria and Ms. Karume. However, it is our considered view that such a construction will lead to an absurdity. It will be at odds with the constitutionally enshrined fairness principle. We would like to emphasize here that we are saying so advisedly, in the peculiar circumstances of this case. This is because there is a second category of persons which section 248(2) recognizes as having a right to notification . These are the **"such other persons as may be prescribed."**

Now, who are these "such other persons as may be prescribed?" Unfortunately, the Act, unlike the Insolvency Act, does not provide an answer to this germane question. The Insolvency Act in section 251, defines the word "prescribed" as "prescribed by the Rules". In England, unlike in Tanzania, the Rules are in existence. These are the Insolvency Rules, 1986, henceforth the Rules.

The Rules expressly provide in Part II, Chapter 1, Rule 2(6)(2) who shall be served with the petition for an administration order. It says:-

> *"(2) The petition shall be served __*
>
> *(a) On any person who has appointed, or is or may be entitled to appoint an administrative receiver of the company;*

(b) *if an administrative receiver has been appointed, on him;*

(c) ***if there is a pending petition for the winding up of the company, on the petitioner (and also on the Provisional Liquidator if any; and***

(d) ***on the proposed administrator.***

(3) If the petition for the making of an administration order is presented by the creditors of the company the petition shall be served on the company." [Emphasis is ours].

The Rules, consistent with the mandatory requirements of a fair hearing, require service of the petition to be effected not less than five days before the day of hearing. However, case law is to the effect that time of service may be abridged, but not dispensed with, where the affairs of the company are extremely parlous (see **Re A COMPANY [1987]** B.C.L.C 467) or where it is considered essential that the directors should be prevented from disposing of assets otherwise than in the ordinary cause of the company's business (**Re GALLIADORO T RAWLERS LTD [1991] B.C.L.C 411.**

In our considered view, the English Insolvency laws afford a right to be heard to these "other prescribed persons" because they are the ones who most likely would be adversely affected by the making of the administration order. This is obvious from the identical provisions of the Act and the Insolvency Act dealing with the effects of such an order. For example, section 250(1)(a) of the Act provides thus:

> *"(1) On the making of an administration order__*
>
> *(a) any petition for the winding up of the company* ***shall be dismissed."*** [Emphasis is ours].

So by operation of the law, the winding up petition filed by VIP in 2002 which was still pending on 27th January, 2009 should be dismissed, if it is yet to be dismissed. The High Court has no discretion on this in view of the clear provisions of section 53(2) of the Interpretation of Laws Act, Cap. 1 R.E 2002.

Furthermore, even in the absence of sections 253 and 254 of the Act which grant the administrator extensive general and specific powers, including those of a provisional liquidator, once the winding up proceedings are dismissed, the provisional liquidator remains with no legal leg to stand on. He relinquishes the office or he will be forced out of it. Hence the overriding and indeed mandatory need

for the Court to hear the provisional liquidator and/or the petitioner in a winding up petition before an administration order is made.

It has occurred to us that the administration order is not granted as a matter of right. It is trite law, where the rescue culture has taken root, that the Court's jurisdiction to make the order applied for hinges upon its own assessment of whether, in terms of the requirements of the law, for example section 247(1) (b) of the Act, "the making of the order would be likely to achieve one or more of the purposes specified" in sub-section (3). Therefore, the court:-

> "... may take into account any *factors which are capable of off-setting the advantages expected to accrue if the administration succeeds in achieving the purposes which would serve as a basis for making it. Here, it is suggested that the parties whose interests are likely to receive the closest consideration are those who would still receive something under a distribution of the company's assets if a liquidation were immediately to take place. In most cases such persons might well derive some advantage from which achievement of the purposes instanced in the administration order, but it is equally possible that they may consider that such advantage would be marginal at best, and may not outweigh the*

disadvantage of being kept out of their money for a further period while the administration order is carried through," see, ***PALMER's COMPANY LAW****, Vol.2, page 14014, para. 14.008.*

Hence, the need for the Court to take into account, "as a relevant factor the extent to which creditors ... have indicated support or opposition to the use of the administration procedure," (ibid).

From the foregoing, it is increasingly obvious that the phrase "**such other persons as may be prescribed**", is meant to cover a petitioner in a winding up petition, a provisional liquidator, if already appointed, a creditor or creditors of the company, and the company itself. After all, since administration proceedings are for the benefit of a company, they must be characterized by total openness.

We have already demonstrated that the law strictly enjoins the courts to give a fair hearing to any person likely to be adversely affected by their decisions before such decisions are made. We have now shown the category of persons who under the scheme of Part VII of the Act would likely be so affected in administration orders proceedings. It is the courts which have the mandate of administering this Part of the Act. In the absence of any express law to the contrary, in order to meet the justice of the cases in administration orders proceedings, we find it to be within our

jurisdiction, to give meaning and effect to the phrase "**such other persons as may be prescribed"** as including the persons mentioned immediately above. These persons must, always, be served with the petition and be heard in such proceedings.

By so doing we are not extending the category of parties to be notified. Rather, it is only to give meaning to the phrase so as to give effect and due import to the purpose of that provision. Such reading, in our respectful view, would not be contrary to Parliamentary intention as a expressed in section 248(2). It would advance the purpose for which the administration process under Part VII of the Act was enacted. Suffice to reiterate, Article 13(6)(a) of the Constitution enshrines as a basic right and duty, entitlement to a fair hearing when the rights and duties of any person are being determined by the court.

In this particular case, having regard to sections 247 and 248 of the Act, paragraphs 2 and 7 of the petition and the affidavit in support of it, the learned High Court judge, in our considered opinion, ought to have realised that it was incumbent upon him not only to serve the petition on the Company, VIP and the Provisional Liquidator, but also to afford them a fair hearing. Had that been done, these revision proceedings would have been avoided. That the judge did not do so, he violated the right to a fair hearing principle.

After all is said and done, we fail to bring ourselves to the conclusion that what transpired in the High Court was done in the

spirit of promoting timely justice. It was not a parody of justice as such. It was, however, a denial of justice to VIP and the Provisional Liquidator. These persons had a right to a fair hearing, which right subsists to this day.

It was suggested to us by Mr. Kesaria that if we were disposed to hold that the complainants were adversely affected by the administration order, then we should not disturb the ruling of the High Court. Instead, he said, we should remit the record back to Mihayo, J., with directions to him to hear the parties and vary his orders if he deemed it fit. This invitation has perturbed us much. All we can say here, in deference to Mr. Kesaria, is that we have found it beyond our jurisdiction to accede to it. It would defy logic and common sense to find the proceedings and the ruling to be a nullity and at the same time sustain them. We are not prepared to do that as the suggestion is destitute of all authority. It appears to us it would be introducing an extremely dangerous rule of law if we accede to it. We, respectfully, reject it. We also reject his other invitation to us, to re-visit some of the orders made by **Oriyo, J.** in the winding up petition. This is because, the invitation was made belatedly and the other parties could not respond to it either effectively or at all. But more importantly, in view of the mandatory provisions of section 250 of the Act and the unequivocal direction by Mihayo, J. that his order be "brought to the attention of my sister Judge presiding over the winding up petition", we are not sure if those orders are still existing.

In view of all this, we find ourselves constrained to hold that this Court will not countenance the fast-tracking of justice delivery, if this is done or achieved through trampling over peoples' rights to a fair hearing. This is not even the spirit behind Article 107A – (2)(b) of the Constitution. We are enjoined therein to deliver timely justice but within the confines of the laws of the land. This provision was never intended to derogate from the provisions of Article 13(6)(a), referred to earlier on in this ruling. It is important always to remember that speed in itself, as courageously commended by Ms. Karume, is not of the essence in the delivery of justice if it does not lead to justice itself. Our conviction is that in the administration of justice, speed is good, but JUSTICE IS BEST. For as Potter Stewart once aptly observed in the **Time** of October, 20th, 1958:

> *"Swift justice demands more than just swiftness."*

We take it to be an immutable truth that there can be no equal justice when one, for no compulsive reason, is condemned unheard.

In fine, we declare the proceedings before Mihayo, J. from 23rd January, 2009 to 27th January, 2009, a nullity. Together with the ruling, orders and directions made therein, they are hereby revised, quashed and set aside. We accordingly order a fresh hearing before another judge. The Provisional Liquidator, the Company, VIP and/or any other creditor (s) should be afforded opportunity to make their own representations in the petition.

In the light of the position we have taken on this issue, we find no compelling reasons to discuss the remaining issues. If the parties will still find them worth pursuing, they will be raised and, canvassed in the High Court first.

We so order.

DATED at DAR ES SALAAM this 3rd day of April, 2009.

E.M.K. RUTAKANGWA

JUSTICE OF APPEAL

S.J. BWANA

JUSTICE OF APPEAL

M.C. OTHMAN

JUSTICE OF APPEAL

I certify that this is a true copy of the original.

J. S. MGETTA

DEPUTY REGISTRAR