IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: KILEO, J.A., KIMARO, J.A., And MASSATI,J.A.)

CIVIL APPLICATION NO. 75 OF 2013

1. MARY BUNDALA
2. FIRST SEAL COMPANY LIMITED.....APPLICANTS

VERSUS

1. RIPE (T) LIMITED
2. PETER CHITAMU
3. CHARLES BURCHARD RWECHUNGURA.....RESPONDENTS

(Application for revision of the Ruling of the High Court of Tanzania at Dar Es Salaam (Commercial Division)

(Bukuku, J.)

dated 11th April, 2013

in

Miscellaneous Commercial Cause No.38 of 2012

RULING OF THE COURT

28th June & 16th August, 2016

KIMARO, J.A.:-

DOVETEL (T) LIMITED trading as SASATEL TANZANIA is a limited liability company incorporated under the Laws of Tanzania. It was formed for conducting businesses of Information and Communication Technologies (ICT) in Tanzania. It started with share capital of 1,000,000 ordinary shares of 1,000 Tanzania shillings each with a total of four shareholders. RIPE (T) LIMITED is a minority shareholder in the company. PETER CHITAMU, a

natural person, was a founder, chairman and one of the directors in the company. MARY BUNDALA, a natural person, is one of the members and Director of the company. KATHRYN NGENDA KIGARABA, a natural person, is a consultant of the company and a Director. FIRST SEAL COMPANY LIMITED is a limited liability company and one of the members and majority shareholder after purchasing the shares of PME Tanco (Mauritius) ('PME").

On 14th December 2011, a petition was filed in the High Court of Tanzania, Commercial Division, (Miscellaneous Civil Case No.33 of 2011) seeking for administrative orders under sections 247 and 248 of the Companies Act, (Act No. 12 of 2002). It was the company itself which by a Special Resolution dated 13th September 2011 resolved to have the appointment of an Administrator. At that time PME Tanco (Mauritius) ("PME") was the majority shareholder in the company and was financing the company. It decided to stop financing the company because of the Company's inability to pay for an amount of United States Dollar 37.7 million advanced to it. Together with the accrued interest on the amount advanced to the company, the total amount it was claiming from the company was United States Dollars

fourty one thousand and point seven (41,000.7). ZTE Corporation ("ZTE") was also claiming from the company an amount of United States Dollars six million point seven (6.7) being an amount that remained unpaid, for equipment supplied and other services rendered to the company. On 20th December, 2011 the trial court appointed Mr. Charles Rutayumba Rwechungura as an Administrator of the company. He was directed by the court to comply with the provisions of section 259 of Act No. 12 of 2002 in administering the company. Specifically, he was directed to ensure:

i) that share purchase agreement to replace PME was signed by all parties;

ii) the then members of the Board were discharged of their duties and new members of the Board were appointed to represent the new Shareholder (the one purchasing the shares of PME);

iii) the management of business and assets of the company were vested in the new shareholder /Directors;

iv) The administrator had to complete those duties in a period of three months.

v) The administrator had to report to the court on completion of those duties on 21st September2012.

On 3rd September 2012 before the date the trial court set for the Administrator to report on the progress of the duties he had been directed to do, the court made an order to discharge Mr. Rwechungura from the duties of administration of the company. The court was satisfied that he had rescued the company as a going concern through a sale of shares of the company.

However, not much time elapsed before RIPE LIMITED AND PETER CHITAMU filed another petition in the same division of the High Court claiming that FIRST SEAL COMPANY, the company which became a majority shareholder by virtue of purchasing the shares owned by PME was not running the company profitably. The petitioners complained that the company was leading to a worse situation.

Parties to the petition filed (Miscellaneous Civil Application No. 29 of 2012) were RIPE (T) LIMITED and PETER CHITAMU the first and second applicants respectively and MARY BUNDALA, KATHRYN NGENDA KIGARABA and FIRST SEAL COMPANY LIMITED, the first to third respondents respectively.

The complaint by the petitioners as averred in the petition was that following the pull out of PME, the resolution that was made by all the shareholders of DEVOTEL (T) LIMITED that the shares of PME be sold to the third respondent, was made out of information and assurance made by first and second respondents that the third respondent was reliable and suitable to buy the shares of PME. But that did not turn up to be the real situation. The share purchase process was completed on 2nd July, 2012 and the third respondent became the potential buyer of the 65% shares held by PME and paid USD 1.00 in consideration of taking over all the company liabilities. But prior to the third respondent taking over, she was made aware in January 2012 of the urgent need to pay the creditors an outstanding amount of US$ 250,000. The third respondent failed to pay despite several reminders to her, and the many promises she made to do so.

The situation worsened because the first and second respondents became the main signatories of the third respondent and Directors of the Company and demanded full control of the company. The decision was made despite having full knowledge that no funds were ejected into the company business. The other shareholders were excluded when the decision was made. That put the company business and other members of the

company into high risk as some of the company creditors withdrew their services. The petitioners also alleged that the 1st and 2nd respondents using their position as majority shareholder and directors acted and pushed the affairs of the company in a manner prejudicial to the company business and interests of the other shareholders, including the firing of competent employees and replacing them with new incompetent employees.

Furthermore, the second respondent assumed the position of Chief Finance Officer while she had no experience in telecommunication business and her appointment was not even confirmed by other members. In addition, there was mismanagement of funds of the company. The first and second respondents paid themselves consultants fees while the company had difficulties in paying staff salary on time and not in full, because the company's Bank Account was almost empty and there was poor management of the business sites. At the time the administrator was discharged from his duties, no funds had been ejected into the business and the financial position of the company was going worse. It was also averred in the petition that the first and second respondents failed to disclose the financial capability and identity of the third respondent, refused to meet, and or, turned down new investors brought by the second petitioner, who was

the chairman, founder and director of the company. The petitioners say that all the averred complaints against the first and second respondents caused serious constraints to the business of the company and had increased the company liabilities to over Tanzanian shillings 9,000,000,000/=. (Tanzanian shillings nine billion) and immediate cash required to pay creditors and service suppliers was over 1,000,000,000 (Tanzanian Shillings one billion).

From the complaints made, by the petitioners they applied for following orders: -

(1) A declaration that the 1st and 2nd Respondents have been conducting the Company's affairs in a manner unfairly prejudicial to the interest of the shareholders' interest and to the company itself.

(i) An order to relieve from duties the 1st and 2nd respondents as Directors of the Company and appoint Mr. Thomas Mtarima Kohi as Administrator to regulate the conduct of the company's affairs in the future.

(ii) An order for the 1st Petitioner to purchase shares held by the 3rd Respondent in the company pending the soliciting of new potential buyer investor or alternatively order the 3rd

respondent's shares be relinquished to the company and remain unpaid but unallocated.

The status of the petitioners when they filed the petition was that RIPE (T) LIMITED was the minority shareholder and PETER CHITAMU was a member, Director, and founder of the company.

The respondents disputed the aspect of mismanagement of the company and putting it on administration. They also disputed the "locus standi" of the petitioners in filing the application. Although the respondents accepted that there were problems in the company, they said it was normal drawbacks, and given time, the company business would stabilize.

The learned trial judge (Bukuku, J.) after hearing the parties and analysis of their grievances observed that a minority shareholder is not totally impotent. Both under the general law and under the Companies Act there is some protection which gives leverage to the minority shareholders to curb excesses of the majority shareholders. The learned trial judge observed further that in some circumstances, a minority shareholder may be affected by a wrong done by the majority shareholder

not personally but to the company. In such a situation the minority shareholder has a right to petition to the court under sections 233 (1), (3), (a), (c) (d) 247 and 248 of the Companies Act, No. 12 of 2002 for a remedy. The learned judge said the section is founded on a presumption that, the affairs of the company are being conducted by the majority shareholders in a manner unfairly prejudicial to the interests of minority shareholder or some of the members generally. In such a situation the court is empowered to intervene by granting an order providing for a clean break. Orders for the adjustment of the unfair prejudices to the minority as proved, may be given. This would include ordering the company to be valued, or shares to be sold or regulating the conduct of the affairs in future or make interim or final orders in respect of the matter complained of and orders prayed for as deems fit.

Referring to the application that was made earlier, on 20th December, 2011, the learned judge said the court had made an order appointing Mr. Charles Burchard Rwechungura to be an administrator of the company for purposes of overseeing that the company was made a going concern. One of his duties was to ensure that the parties signed a purchase agreement. That duty was done. However, what was apparent from the

petition was that the new investor who bought the shares of PME, that is First Seal Company, had not been able to make the company reach the envisaged goal. It failed to inject capital into the company for purposes of making it run its business. She noted that the parties are in agreement that the company is not in good financial standing. Capital needs to be injected in the company to make it a going concern and expand its business operation. The learned judge opted in her decision to appoint Mr. Charles Rwechungura who was conversant with the problems facing the company because he was earlier on appointed to do the same job, instead of Mr. Thomas Mtarima who was proposed by the petitioners. The period of appointment was six months to run from 11th of April 2013. His duties were to act in consultation with the shareholders to:-

(a) cause an Extra Ordinary General Meeting of the shareholders be convened for addressing the issue of capital of the company.

(b) cause the third respondent to pay for the 65% shares or in the alternative, to solicit for new investors to purchase the said shares and come up with a business strategy.

(c) cause to be prepared a report of the affairs of the company, including financial position, business trend and human resource.

(d) perform such other duties as may be for the betterment of the company.

The respondents were aggrieved by the decision of the High Court. Since the decision of the High Court is not appealable as it was an administration order issued under section 233 of the Companies Act, the respondents filed this application for revision under section 4(3) of the Appellate Jurisdiction Act, [CAP 141 R.E.2002]. The Court is requested to call for the record of Commercial Case No. 29 of 2012 for purposes of satisfying itself as to the correctness, legality, regularity and propriety of the ruling and the orders that followed. The grounds given are many. They are:-

(a) The aspect of the majority shareholders conducting the business of the company in a manner prejudicial to the interests of the company and the first and second respondents.

(b) The administration order was premature because of being instituted only after 45 days of the previous administration order while the second applicant had already come up with a five year business Recovery Plan.

(c) The orders contradicted the previous orders given in the earlier application for administration.

(d) The finding of the learned judge that the applicant bought 65% shares in DEVOTEL (T) Limited on condition of applicant paying the creditors of DEVOTEL (T) LIMITED and on condition of injecting capital in the company.

(e) The order that the third respondent should cause the second applicant to pay the 65% shares in DEVOTEL (T) LIMITED is discriminatory and unfairly selective as against the second applicant in as much as it does not require other shareholders to pay the unpaid up shares and it does not take into account that the said shares are fully paid up.

(f) The order requiring the third respondent to cause the second applicant to sell its 65% shares in DEVOTEL (T) LIMITED is unfair and illegal as long as it expropriates the second applicant financial assets and interests without any justifiable cause.

(g) The order requiring the third respondent to cause the second applicant to sell its 65% shares in DEVOTEL (T) LIMITED with a view of raising the company's capital is unconscionable, illogical,

and self-defeating because the purchase price will not be paid to the second applicant but to the DEVOTEL (T) LIMITED.

(h) The learned judge is faulted for having entertained the petition while it was filed in bad faith by the first and second respondents because they were the ones managing the company until when the order of administration was made on 20th December 2011.

(i) The administration order in respect of DEVOTEL (T) LIMITED was issued erroneously because the petition was not well founded.

The application is supported by the affidavit of Mary Bundala. For the first and second respondents an affidavit in reply to oppose the application has been filed by Dr. Peter Jonas Chitamu. Before us for the hearing of the application, the applicants were represented by Mr. Martin Matunda learned advocate, while Dr. Chitamu appeared in person and also on behalf of the first respondent.

In support of the application Mr. Matunda submitted that the applicants are shareholders in DEVOTEL (T) LIMITED). Dr. Getrude Rwakatare and PME Mauritius Limited who were the majority shareholders withdrew from the company. , Mr. Matunda repeated what the parties averred in the

pleadings which we have reproduced above. Starting with ground (i), he said the respondents had no *"locus standi"* to file the application. While sections 247 and 248 vest in the High Court power to grant administration orders, said the learned advocate, Rule 36(1) of the Companies (Insolvency) Rules requires the petition to be filed unanimously by the Directors or a creditor or creditors. One Director can file the petition but he has to indicate in the pleadings that the petition is filed on behalf of the other directors and has to be signed on behalf of the other directors. He admitted that the second respondent is a Director in the first respondent but in signing the petition he did not indicate that he was signing it on behalf of the first respondent. That rendered the petition to be unfounded, said the learned advocate. So the petition was not well founded.

Another deficiency pointed out by the learned advocate is failure by the petitioners to include in the petition a report by an Independent Person that given the situation in which the company was, it was necessary to apply for an administration order. That requirement is founded on Rule 34. He said the respondents did not comply with Rule 35(2) of the petition. The provisions of Rule 35 require the petitioner(s) to attach to the petition a Financial Report giving the position of the company. He said since the

petitioners omitted to include into the petition an Independent Report by an Independent Person on why it was necessary for the petitioners to petition for administrative orders and a financial report giving the position of the company, the petition which was filed by a shareholder and a Director was not well founded. The learned advocate admitted that section 233 of the Companies Act protects the minority in the company. However, he said it was wrong for the learned judge to issue administration orders because the purpose of administration orders is to make the company going.

Arguments by the learned advocate in support of ground (g) of the application is that after the sale of shares of PME to the second applicant it was wrong for the learned judge to make an order for the sale of those shares to the second respondent. In support of ground (e) it was contended by the learned advocate that the order which was made by the trial court requiring the second applicant to pay for the 65% shares of the DEVOTEL is discriminatory and unfairly selective to the second applicant because the other shareholders were not ordered to pay up for the unpaid up shares. Regarding grounds (b) and (c), the learned advocate said the orders were given prematurely because the petition was filed after 45 days of the previous administration order which was given on December 2011. The

petitioner did not produce evidence of failure of the Recovery Plan which was for five years. Under the circumstances, said the learned advocate, it was too early to condemn the second applicant that it failed to implement the Business Recovery Plan. The learned advocate was of the opinion that the petition was not brought in good faith and the orders given prior to the filing of the petition should be restored. He prayed that the application be granted and the respondents be condemned to pay costs.

Dr. Chitamu in reply to the submission made by the learned advocate for the applicants adopted the affidavit he filed in reply to the application. He said he is the founder of the company and he developed the business concept and he did all that was necessary to make the company operative. However, when PME pulled out and the company was put under administration, and the second applicant came in as an investor and purchased the share of the PME, she has not paid any money and because of maladministration, the company was closed since January 2016. He said there is no other way of reviving the company and he being a creditor and representing a minority shareholder, he had the capacity to file the petition. He prayed that the application be dismissed.

In a brief rejoinder the learned advocate for the applicants insisted that the second respondent did not disclose the capacity in which he was filing the petition. It was not pleaded in the petition that he was suing as a creditor. On the other hand, said Mr. Matunda, the applicants are Directors and Managers of the Company and the second applicant has the means and capacity to develop the company. He said the Share Purchase Agreement has all the qualities of a purchase agreement and the one dollar which the second applicant paid was received as sufficient consideration. He said the agreement was fully negotiated and the Business Plan of the Second applicant was the one that was approved. To the learned advocate, the history of the formation of the Company has no bearing to the proceedings. He prayed that the application be allowed with costs.

After going through the record of the revision, namely the pleadings by the parties, the ruling of the trial court and the grounds of revision and the submission by the respective parties involved in the revision we will determine the revision as given hereunder. The revision is brought under section 4(3) of the Appellate Jurisdiction Act which reads:-

> *"Without prejudice to subsection (2) the Court of Appeal shall have power, authority and jurisdiction to*

call for and examine the record of any proceedings before the High Court for the purpose of satisfying itself as to the correctness, legality, or propriety of any finding, order or any other decision made therein as to the regularity of any proceedings of the High Court." (Emphasis added).

What the High Court was called upon to do, was to issue appropriate administration orders which would enable the company to revive from the maladministration and mismanagement of funds by the majority shareholders that resulted into the company failing to do its business profitably. The learned trial judge observed in her ruling at page 11 of the ruling that:-

"In this particular matter, both parties are agreed that, currently, the company is not performing to their satisfaction and thus, there is a need to have an urgent recovery program, including sourcing for finances. Both parties agree that there is, at this juncture a need to have an administrator, who will,

as neutral person, administer the company during the interim period until a solution is found."

What prompted the minority shareholders to petition for the administration order is the financial crisis and mismanagement the company was suffering from. Mr. Matunda challenged the "*locus standi* " of the respondents to file the petition. The learned trial judge in addressing the issue said at page 7 of the ruling:

> "*In many circumstances, a minority shareholder may be affected by a wrong done, not to them personally but to the company by the majority shareholder. The most important protection that a minority shareholder has, is the right to petition to the court for an order under section 233(1),(3) (a), (c), (d), 247 and 248 of the Companies Act , Act No. 12 of 2002."*

After bringing into light why the petition was filed let us now proceed to determine on the complaint of the respondents lacking *"locus standi"* to file the petition. In the first paragraph of the petition, it is pleaded that the first respondent is one of the minority shareholders of the company. Paragraph two shows the status of the second respondent. He is a natural

person, founder and chairman and one of the Directors of the company. The capacity of the respondent to file the petition is specifically pleaded at paragraph 18 of the petition thus:

> *"That, this state of affairs makes it inevitable for the Petitioners in their capacity one being a minority shareholder and a member of the company and the other being a Director and founder of the company."*

From what is averred in the petition, RIPE (T) LIMITED who was the first petitioner, is a minority shareholder and member of the company of (DEVOTEL T.LIMITED). Section 233 (1) of the Companies Act allows a member of the company or shareholder to petition for administration orders. The section reads:-

> *"Any member of the company may make an application to the court by petition for an order on the ground that the companies affairs are being conducted or have been conducted in a manner prejudicial to the interests of its members generally or some part of its members..."*

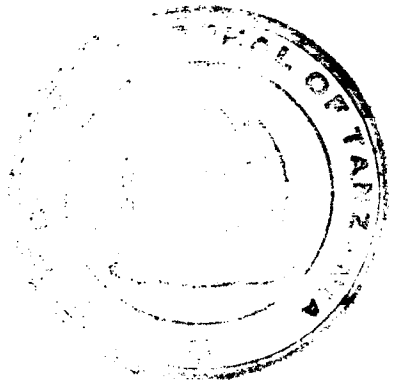
Reading from what is averred in the petition on the status of the respondents when they filed their petition for administration orders, the

provision of section 233(1) of the Companies Act and the finding of the learned trial judge on the capacity of the respondents to file the petition, there is definitely no irregularity either in form or in substance. The ground of complaint that the petition was incompetent for being filed by persons not allowed by the law has no merit.

For the rest of the complaints, we will deal with them generally. The grounds for filing the petition are well averred in the petition. The company had had problems which led to the filing of a previous petition seeking for administrative orders. An Administrator was appointed and was given specific tasks. That he did and was discharged. After a period of 45 days the respondents filed the petition which forms the subject matter of the revision. The complaint by the applicants that the petition was filed in bad faith, there was no compliance with the procedure in filing the petition in that there was no independent report to support the petition, no financial report, challenges on the order compelling the second applicant to pay for the shares, the order to have the shares sold to the first respondent or be surrendered to the company are all without merit. As earlier on said, the parties are in agreement that the company is in critical financial problems. The parties concede that the company is in high debts and has failed to pay

its creditors. There is also a problem of mismanagement or maladministration and inefficiency because of incompetency of some of the staff. In such a situation there was need to give orders that would benefit all members of the company. That was done by the learned trial judge who heard the application. Reading from the provisions of section 4(3) under which the application was filed, we see no fault or irregularity in the orders made by the learned trial judge. There is nothing for the Court to revise. We accordingly dismiss the application with costs.

DATED at DAR ES SALAAM this 15th day of August 2016.



E.A.KILEO
JUSTICE OF APPEAL

N.P.KIMARO
JUSTICE OF APPEAL

S.S.MASSATI
JUSTICE OF APPEAL

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

P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL