IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MUGASHA, J.A., KITUSI, J.A. And MDEMU, J.A.)

CIVIL APPEAL NO. 515 OF 2021

HASHIM HASSAN MUSSA ..... APPELLANT
VERSUS
DR. CRISPIN SEMAKULA ..... 1ST RESPONDENT
ACCESS MIDICAL & DIALYSIS CENTRE LIMITED ..... 2ND RESPONDENT
REGISTRAR OF COMPANIES ..... 3RD RESPONDENT

[Appeal from the Ruling and Order of the High Court of Tanzania, (Commercial Division) at Dar es Salaam]

(Fikirini, J.)

dated the 15th day of December, 2020
in
Miscellaneous Commercial Cause No. 31 of 2019
.....

JUDGMENT OF THE COURT

18th & 25th August, 2023

KITUSI, J.A.:

Hashim Hassan Mussa, the appellant and Dr. Crispin Semakula, the first respondent are and have been the sole directors of Access Medical & Dialysis Centre Limited, the second respondent, a company incorporated under the relevant laws of this land. Each held 5000 shares. However, the two directors no longer see eye to eye as they disagree on many aspects touching on the management and running of their company. The first respondent lives in the United States of

America, so some of the misunderstandings is evidenced by the content and tone of their written communication.

When the appellant thought he had had enough of it, he petitioned to the High Court under section 279 (1) (e) of the Companies Act and Rules 95 (1) and 100 of the Companies (Insolvency) Rules, 2005 seeking two major orders, namely:-

> *"(c) The Access Medical and Dialysis Centre Limited be wound up.*
>
> *(b) A competent person approved by this Court be appointed as a liquidator of the company."*

The petitioner also prayed for any other orders which would be deemed by the court to be just and fit in the circumstances.

There was no dispute from the pleadings that as a way forward, the appellant had agreed to release his shares upon being paid an agreed price for them. But there was an unresolved dispute as to what was the value of each share. The disagreement on the value of the shares is evident in paragraph 6(h) of the petition in which the appellant alleged that there was an amicable agreement that the first respondent would pay USD 450,000 for the shares in six instalments and that a Board Resolution signed by the directors was proof of that fact. Yet this

fact was denied by the first respondent in paragraph 15 of the reply and further through his advocate by a letter dated 5th February, 2020, alleging that the Board Resolution did not reflect what had transpired at the meeting because it included items which had not been agreed upon.

The basis of the petition therefore was that since the parties have reached a deadlock and as there is no consensus on the value of the shares for the petitioner to release them, then the court should be pleased to wind up the company and appoint a liquidator. On the other hand, the first respondent maintained that he was willing to pay for a fair value of the shares and that the petitioner was being unreasonable insisting on the winding up order. He prayed for dismissal of the petition so that the parties may pursue the available alternative remedy.

There is another dimension to the matter, that is, while the strife between the directors persisted, the company has suffered closure which affects employees as well as those receiving medical services from it. The appellant attributed the closure to the unresolved conflict between the directors, but the first respondent suggests that the closure was totally unrelated to the conflict as it was at the instance of the Ministry of Health aimed at giving the company time to work on some Ministry's recommendations.

The parties addressed the trial court on 19th March, 2020 with Mr. Deogratius Lyimo Kirita, learned advocate representing the petitioner whereas Dr. Edward Hoseah, learned advocate represented the first and second respondents. Mr. Kirita referred to a scenario in **Re a Company** [1983] 2 All E.A. 854 where pursuit of alternative remedy had proved unsuccessful, and parties had to be allowed to go and establish value of the shares leaving the petition pending. He moved the trial court to consider that as an alternative if it is inclined not to order a winding up.

Dr. Hoseah stood his ground and insisted that, the petitioner was being unreasonable because there is an alternative remedy. He cited the case of **Yusufali & Another v. Bardwaj & Another** [2008] 3 EA. 380. He impressed on the court to take into account other interests such as, renal patients who stand to suffer if the facility is wound up. He agreed with the suggestion that a credible person should be appointed to value the shares.

The powers of the court in dealing with a winding up petition are governed by section 282 of the Act which provides:

> *"282 (1) On hearing a winding up petition, the Court may dismiss it, or adjourn the hearing conditionally or unconditionally or make any*

interim order or any other order that it thinks fit.

(2) Where the petition is presented by members of the company as contributories on grounds that it is just and equitable that the company should be wound up, the court if it is of the opinion;

(a) That the petitioners are entitled to relief either by winding up the company or by some other means and

(b) That in the absence of any other remedy it would be just and equitable that the company should be wound up

Shall make a winding up order, unless it is also of the opinion both that some other remedy is available to the petitioners and that they are acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy".

In this case in terms of section 282 of the Act, the learned judge was of the opinion that, the directors had reached a deadlock but she was also of the opinion that there existed an alternative remedy which the parties were unreasonably not pursuing. She therefore declined to make an order of winding up. On that basis, having heard the advocates

for the parties the learned judge rendered her ruling on 24th March, 2020 part of which reads:

> *"To allow the company to be wound up while there is alternative remedy is, in my view, not only disheartening but inconsiderable under the circumstance. Having said so, it does not mean the petitioner's rights do not deserve protection. What I am saying is once everything has been placed under consideration and there is an alternative remedy, the Court should opt for the alternative remedy and not winding up of the company. For the avoidance of doubt and/or one party taking advantage of the other the following orders are given.*
>
> 1. *Parties are directed for each to find an arbitrator or certified public accountant firm who would be ready to work with the third appointed arbitrator or a certified public accountant firm for the purposes of valuing the company assets including petitioner's shares.*
>
> 2. *Failure to agree on the availed share price, parties can come back to Court where it will be decided as to whether the established value was reasonable.*

3. *Once the Court has considered the value of the shares established as reasonable but refused by the petitioner then it will proceed to dismiss the petition.*

4. *If the 1st respondent makes an unreasonable offer, the Court will then proceed to grant the winding up order.*

5. *The exercise to be completed within 30 (thirty) days as from the date of this ruling, to wit on 23rd April, 2020.*

6. *The petition is in the meantime stayed pending the outcome of the directed what to do."*

After several adjournments principally caused by delays in preparing and submitting the envisaged reports, the matter was called on for "orders" on 17/11/2020. The reports had been submitted, but instead of the court giving orders, it allowed the parties to address it. This is because there was no consensus but, if anything, the parties had drifted further apart. Each party disagreed with the report prepared by the other's auditor. The petitioner refused the first respondent's offer of USD 140,000.00 even after the first respondent had offered to top up with an additional USD 30,000.00, which was over and above what had been estimated by the neutral company appointed by the directors.

Given the nature of the orders we intend to make in the end, we are deliberately avoiding some of the details of the reports at this point.

The learned judge composed another ruling in which she reiterated the observations she had earlier made in her ruling dated 24.3.2020 in relation to the company's role in providing health services to patients she declined the petition for winding up but ordered the shares to be sold at USD 170,000 payable to the appellant by the first respondent.

That decision has attracted this appeal which has raised seven grounds of appeal. Although what transpired at the hearing left us in no doubt that the parties seek answers to only two issues, we reproduce all grounds below for ease of reference whenever the need may arise : -

1. *The learned High Court Judge erred in law and fact by refusing to grant an order for winding up of the 2nd Respondent's company, while the circumstances were that the winding up order ought to have been issued.*
2. *The learned High Court Judge erred in law and fact by adopting the procedure for determination of value of shares and thus forcing the alternative remedy over the parties without jurisdiction to do so.*
3. *The learned High Court Judge erred in law and fact in applying the provision of Section 282 (2) of the*

Companies Act Cap 212, thus causing injustice to Appellant.

4. *The learned High Court Judge erred in law and fact by ordering that the Appellant was entitled to USD 170,000.00 (United States Dollars One Hundred Seventy Thousand only) as a value of the shares without taking into account the available assets of the company in terms of cash and equipment as per valuation.*

5. *The learned High Court Judge erred in law and fact by imposing the alternative remedy to the parties, regard being that the parties have disagreed on the consideration for the shares belonging to the Appellant.*

6. *The learned High Court Judge erred in law and fact by determining the value of shares of the 2nd Respondent's company without having jurisdiction to do so.*

7. *The learned High Court Judge erred in law and fact by issuing orders that were inexecutable and not implementable*

During the hearing, Messrs. Gabriel Mnyele and Deogratius Lyimo Kirita, learned advocates represented the appellants, and they suggested, as we have alluded to above, that the appeal turns on two issues. These are; whether it was proper for the trial judge to refuse the winding up order and; whether the order for alternative remedy was proper in the circumstances and capable of being executed. The first

and second respondents were represented by Mr. Audax Kahendaguza Vedasto, learned advocate. The third respondent, the Registrar of Companies did not enter appearance despite being served. Therefore, hearing proceeded in the absence of the third respondent who had been served but we note that it had exhibited no interest in the petition right from the trial.

Mr. Vedasto agreed that the appeal seeks answers to the two issues proposed by Mr. Mnyele. However before addressing the appeal through those two issues, Mr. Vedasto informally addressed us on the competence of the appeal submitting that, it was time barred and should be struck out. We understood Mr. Vedasto as interrogating the certificate of delay issued to the appellant for excluding days needed for preparation and delivery of copy of proceedings covering days beyond the date when such copies were ready for collection. The learned advocate submitted that, the Deputy Registrar purported to exclude even the days spent by the appellant in seeking and obtaining leave to appeal, which was not envisaged by the provisions of rule 90, particularly rule 90 (5) of the Tanzania Court of Appeal Rules, 2009 (the Rules).

In response, Mr. Mnyele submitted that when the appellant obtained leave to appeal, he noted that the earlier certificate of delay that had been issued to him did not include the days spent in obtaining leave to appeal. Thus, he returned the earlier certificate of delay for the Deputy Registrar to issue a fresh one covering the whole period of the delay. The learned counsel did not see anything wrong with the procedure adopted.

Responding to our probing, Mr. Vedasto argued that if the appellant wanted his appeal to be within time, he should have sought extension of time under rule 10 of the Rules to cover the days spent in obtaining leave. The learned counsel insisted that view even when we drew his attention to prospects of jamming the Court registry with applications of that nature.

With respect, we are not going along with Mr. Vedasto as we are aware that, such a restrictive approach will result in absurdity and multiplicity of applications. In our view, the appellant correctly raised the matter with the Registrar and returned the initial certificate of delay as he requested a fresh certificate of delay to be issued. The Registrar's fresh certificate of delay was the only certificate in the record and it did not give the appellant an unfair advantage nor prejudice the

respondents. To walk Mr. Vedasto route will be turning the clock of justice back to the days when substantive justice was denied or delayed on technical grounds. We dismiss the point of objection and proceed to determine the merits of the appeal.

The parties had filed written submissions and made some clarifications during their oral submissions. Counsel are hardly at issue on the fact that the two shareholders have reached a deadlock. The appellant's Counsel submitted that to determine that fact, the measure should be whether such strained relationship would lead to an order of dissolution of a partnership, and he cited the case of **Re Modern Retreading Co. Ltd** (1962) EA 57 and also the case of **Ernest Andrew Chitalika v. Francis Philip Temba** (1996) TLR 287 in which the directors were not in talking terms. The respondent's counsel does not contest that fact. With respect, we agree with the common position taken by the advocates for the parties.

What the parties part ways on is the order that should have been made by the learned trial judge. Interestingly, the written submissions by the parties have cited same case law to support opposing views maintained by each. These are **Yusufuali & Another v. Bhardwaj and Another** and **Re A Company** (supra). The two cases involved

purchase of the other's shares as an alternative remedy, the same as in the instant case.

We agree with the learned counsel for the appellant that in dealing with a winding up petition the Court has the following options at its disposal. (a) Dismiss the petition (b) Adjourn hearing conditionally or unconditionally (c) Make an interim order (d) Make any other order it thinks fit.

We have found ourselves wondering what should the learned judge have done in the circumstances of this case? It appears to us that she went out of her way in a bid to avoid winding up of the company for the reasons she considered fit. After all, is it not a fact that the parties had earlier intimated that they wanted to pursue an alternative remedy which prompted the learned judge to make the interim order dated 24th March 2020? The disturbing question is what should have been done by the learned judge on receipt of the valuation reports which were not in harmony?

In the written submissions, the respondent has argued that:

> *"...the trial court acted within jurisdiction in entertaining further proceedings after the ruling of 24th March, 2020. Section 282 (1) of the Companies Act, Cap 212, the court on hearing a*

winding up petition to adjourn hearing conditionally or unconditionally or make any interim order or any other order that it may think fit. The 24th March 2020 ruling was an interim order made on hearing..."

On the other hand, it has been submitted that the proposed value of the shares at USD 140,000 was too low that it surprised even the respondent such that he decided to top up by adding USD 30,000 to it. The appellant's advocate has, therefore, submitted that: " *In such a situation, what was open to the court was to order the winding up of the company so that the company assets could be sold by the liquidator..."*

We are increasingly of the opinion that despite her good intentioned attempts to spare the company from the peril of winding up, there is a point when her powers under the relevant laws did not permit the learned judge to go further. By proceeding with the determination of the value of shares when there was no consensus by the parties, the learned judge was risking her decision being attacked on grounds such as the ones featuring as grounds two, five and six in this case which fault her for forcing the alternative remedy onto the parties without jurisdiction. In **Chu v. Lau** Supreme Court of British Virgin Islands [2020] UK PC 24 the Board sitting on appeal from the Court of Appeal,

held that winding up is both a statutory and equitable remedy which required the parties to have clean hands. Bearing that in mind, in a situation where the value of the shares had not been set by a consensus, the learned judge should not have been overly determined to see an end to the strife by setting the value. Such orders would not be equitable in our view.

In the seventh ground of appeal, the appellant is challenging the trial court for making orders which are not capable of being executed. The respondent has submitted that: *"Since the court has already ordered payment of USD 170,000 as purchase price of the petitioner's shares the said order has to be complied with by the 1st respondent."* We can hardly see the rationale to that reasoning because in a winding up petition there can be no such thing as compliance with an alternative remedy as ordered by the court when there is no consensus.

From the above discussion, we find merit in the second, fifth, sixth and seventh grounds of appeal. As earlier intimated, we do not wish to go further than it is necessary in this matter. Since the learned judge exceeded her jurisdiction, and in line with the suggestion made by Mr. Mnyele, we quash the ruling dated 24th March, 2020 as well as that dated 15th December, 2020, and set aside the orders that arose from

them. We replace those orders with an order remanding the record to the High Court for it to appoint and approve a competent liquidator of the second respondent according to law.

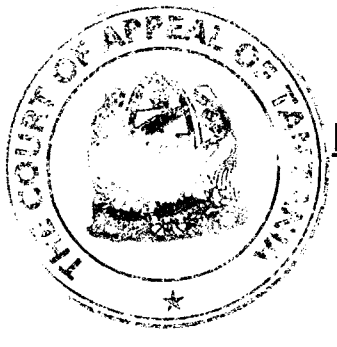
DATED at **DAR ES SALAAM** this 25th day of August, 2023.

S.E.A. MUGASHA
JUSTICE OF APPEAL

I.P. KITUSI
JUSTICE OF APPEAL

G. J. MDEMU
JUSTICE OF APPEAL

The Judgment delivered this 25th day of August, 2023 in the presence of Mr. Gabriel Simon Mnyele, learned Counsel for the Appellant also holding brief for Mr. Audax Vedasto Kahendaguza, learned Counsel for the 1st and 2nd Respondents and in absence of the 3rd Respondent, is hereby certified as a true copy of the original.



R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL