IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM

MISCELLANEOUS CIVIL CAUSE NO. 155 OF 1998
[CONSOLIDATED WITH MISC. CIVIL CAUSES NOS. 146, 147,148, 149, 150, 151, 152, 153, AND 154 BY ORDER OF THE COURT DATED 16TH JULY, 1999]

IN THE MATTER OF THE COMPANIES ORDINANCE
AND
IN THE MATTER OF FAHARI BOTTLERS LIMITED
BETWEEN
FAHARI BOTTLERS LIMITED.....APPLICANT/PETITIONER
AND
THE REGISTRAR OF COMPANIES .....RESPONDENT
AND
NBC (1997) LIMITED AND OTHERS .....OBJECTORS.

RULING

A group of 10 associated Companies has presented itself before this court segmented into ten (10) simultaneous winding up petitions. These sister Companies are Ziggi Bottlers Ltd, Kilima Bottlers Ltd, Mwanza Bottling Company Ltd, Ruaha Bottling Co. Ltd, Shinyanga Bottlers Ltd, Serengeti Beverages Ltd, West Lake Bottlers Ltd, Fahari Fruit Products Ltd, Southern Higland Bottlers Ltd and Fahari Bottlers Ltd. The petitions were assigned Nos. 146/98, 147/98, 148/98, 149/98, 150/98, 151/98, 152/98, 153/98, 154/98, and 155/98 respectively. Prayers sought in all the petitions are similar in terms.

Simultaneous with the winding up petitions the petitioners, by way of chamber summons supported by affidavits of their respective Directors, have applied for appointment of Provisional Liquidators. As is the case with the Petitions for winding up, the prayers in this aspect are the same and on similar terms. In order to appreciate their import I herebelow reproduce them as they appear in one of the petitions:-

> ***"1. That the court exercise its discretion under S.183(1) of the Companies Ordinance, Cap 212 ("Cap 212" or "the Ordinance) and***

Rule 31(1) of the Winding Up Rules, (1929) (Imperial) ("Winding Up Rules") and appoints:

a) Mark Danhi Bomani of Bomani & Co., Peugeot House, 39 Upanga Road, P.O.Box 740, DAR ES SALAAM;

b) Paul Howard Finn, FCA of Finn Associates, temple Chambers, Temple Avenue, London EC4Y ODT., and Peugeot House, 39 Upanga Road, c/o P.O.Box 740, DAR ES SALAAM;

c) Kevin Anthony Murphy, CA of Finn Associates Temple chambers, Temple Avenue, London EC4Y ODT., and Peugeot House, 39 Upanga Road, c/o P.O. Box 740, DAR ES SALAAM.

as Provisional Liquidators of the company with further Order that:

*** they shall take possession of all the fixed and current assets of the company, whether of a tangible or intangible nature;**

*** they shall act with the powers conferred by S.190(1)(a) - (f) and 190(2)(a)-(h) of the said Ordinance;**

*** within four weeks (or such other period as the Court may direct) they prepare a Scheme of Arrangement and make application to the court unders.154(1) of the said Ordinance for the purpose of convening a meeting of the company's Creditors to consider and vote upon the Scheme;**

*** for the purpose of S.187(4) of the said Ordinance they shall act jointly and severally in all matters;**

*** their remuneration be determined by reference to S.187(2) of the said Ordinance at the rate of 12.5% of gross realisations(or at any other rate as the Court shall deem fit) to be divided by agreement between them;**

*** the costs of appointing an advocate under the provisions of S.190(1)(c) or agents under the provisions of S.190(1) (g) of the said Ordinance be defrayed from the assets within the hands of the Provisional Liquidators;**

*** the cost of providing any security as may be determined by the Court**

under the provisions of S.184(c) of the said Ordinance be defrayed from the assets within the hands of the Provisional Liquidators;

* **That, pursuant to s.171 of the Ordinance, the proceedings in any suit, application, case, petition, or matter pending in this court or in any other subordinate court or tribunal be stayed pending the Order for winding up the company or further Order;**
* **That, pursuant to S.170(1), the hearing of the petition be adjourned to a date to be fixed following the meeting of the company's creditors to vote upon the proposed scheme of arrangement.**

2. ***That the costs of this application be defrayed from the assets of the Company.***

3. ***That such other Order be made in the premises as the court shall deem to be just and thinks fit. "***

As the petitions and chamber summons are hinged on similar and same terms, for convenience and avoidance of duplication, with consent of the Court, the Counsel struck a compromise to the effect that the various petitions should be consolidated and argued together in Misc. Civil Cause No. 155 of 1998 hence the presence of proceedings leading to this ruling in the said record.

Arguments were made by way of written submissions. All the petitioners were advocated by Eric Ng'amaryo while the Respondents/objectors had services of various respective Counsel as follows - Capt. Kameja for NBC (1997) Ltd, Dr. Sinare for TRUST BANK, Mwandambo for TIB, Rwebangira (Ms) for KIOO Ltd, Dr. Tenga for CONTINGENT CREDITORS (Girish T. Chande, Ashok T. Chande, Ravi T. Chande, J.V. Textiles & Garments Ltd and M/S Juthalal Vesji Ltd), Mbiro for GROWN CORK COMPANY (EAST AFRICA) LIMITED, Mujulizi for STANBIC BANK (T) LTD and M&M COMMUNICATIONS LTD. One last objector, ABDILLAH MIKIDADI appeared on his own.

In their counter affidavits the objectors except KIOO LTD which also has a preliminary objection specifically directed to Fahari Bottlers Ltd and insists on winding up, do not object to the appointment of Provisional Liquidators. Again, except KIOO Ltd which supports one KEVIN MURPHY all objectors object to the ***trio*** proposed by petitioners for appointment as Provisional Liquidators because of conflict of interests - FINN and MURPHY because they allegedly participated in the proposed restructuring scheme while BOMANI has been acting for the 'Fahari group' including provision of services by his chambers to the petitioners. Not only that but also they all object to the proposed powers and duties of the Provisional Liquidators. All except NBC (1997) Ltd are opposed to the proposed scheme of arrangement - restructuring. They insist that the Provisional Liquidators to be appointed should be for the purposes of maintaining the status quo, fully investigating the affairs of the relevant Companies, compilation of list of creditors, collection, prossession, and preservation of the properties till the winding up order. NBC (1997) Ltd on the other hand agrees on the making of a scheme of Arrangement; agrees on the appointment of the Provisional Liquidators but differs with Petitioners on the proposed trio and the powers to be conferred on whoever is appointed. While insisting on winding up, STANBIC and M & M feel that "reconstruction" or "re-organisation" could be one of the options to be adopted by liquidators with approval of creditors and the Court but that not on terms as proposed. Objectors also, object to the proposed 12 1/2 % of gross realisation as remuneration to Provisional Liquidators suggesting less instead and fair amount ranging from unspecificity to 5%; propose Joseph Warioba as Provisional Liquidator, and call for rejection of the original Provisional Liquidator's Report.

Just to clarify on the last issue of the "original Provisional Liquidator's Report", I should point out at this point that this was the report compiled by Provisional Liquidators so appointed by this Court when the present Petitions were filed. Following wanting and conflicting orders and decisions by different judges in these petitions and in Civil Case No. 9 of 1998 the Court of Appeal, suo motu, opened revision proceedings vide ***Civil***

Revision No. 1 of 1999 in which, among others, it was ordered "the proceedings for appointment of Provisional Liquidators be and are quashed". By then however the Provisional Liquidators appointed and charged with the duty of restructuring had already commenced their work and the report which had already been compiled is the one being referred to.

With that let us now turn to the submissions.

Mr. Ng'amaryo for Petitioners, painstakingly and in a length submission argued on what can be summarised as follows (for ease of reference I will adopt the paragraphs and entitling he designed):

> ***(A) that PROVISIONAL LIQUIDATION PROCEDURE IS ESSENTIAL TO FACILITATE THE RESTRUCTURING PROCESS OF THE 10 PETITIONING COMPANIES***
>
> ***- that the "winding up order" was not the intention nor the contemplation of the petitioners at this stage but were forced to seek protection of this process because, legally, Provisional Liquidators cannot be appointed under S.183 of the Companies Ordinance unless a winding Petition is filed.***
>
> ***- the three proposed liquidators should be accepted because,***
>
> ***(a) Only seven out of the 10 petitioning Companies have persons objecting***
>
> ***(b) Only 32% (8 persons) out of 26 who filed Notices to appear put up an objection***
>
> ***(c) Creditors who never objected or filed notices to appear are in excess of 100, the vast majority, hence the minority which objects is just less than 10% of the creditors***

there is "overwhelming need to proceed with the restructuring process in order to maximise the realization for the benefit of all the creditors of the ten Companies and therefore facilitating the recapitalisation process of the Pepsi Cola Business in Tanzania, with the consequential benefits also to the workers and the nation"

- Detailing why he is urging for restructuring, Mr. Ng'amaryo insists that

: reasonably, every creditor is concerned with recovery of its debt.

: only restructuring can provide short term and opportunity to creditor to collect all or part of its debt from an insolvent Company

: Pursuing a winding order and full liquidation which results into no realization whatsoever is unreasonable

: Macro-economic benefits would include

" (i) The project revenue generation for the period 1999 to 2003 is Shs.35 Billion.

(ii) Major Tanzania suppliers of goods and services will get business worth over Shs.28 Billion between 1999 - 2003. (The will pay taxes including VAT).

(iii) 25,000 retailers will make a gross profit of Shs.33 Billion during the period 1999 - 2003 from sale of Pepsi-Cola products. (They will pay taxes including VAT to the Government).

(iv) The overall benefit to the economy from the above 3 sources is Shs.96 Billion over the next 5 years.

(v) Direct and indirect employment will be created for 9000 workers.

(vi) Competition - resulting in lower prices, better quality and more advertising and promotion - including sponsorships of sports, leisure and cultural activities in Tanzania.

(vii) The consumers and customers will benefit by competition between two world class brands. The court may be aware from the press of the historically unprecedented drop of the Pepsi Cola prices by 25% followed by other too.

(viii) Inward Investment of over 20 million US Dollars.

(ix) Improved prospects of realisation and dividends by unsecured creditors".

- that under the restructuring process the Provisional Liquidators will within four weeks of their appointment prepare a scheme of Arrangement, make an application to the Court under s. 154 of cap 212 for the purposes of convening a meeting of the Petitioner's/ creditors to consider and vote on that scheme as well as any other matter brought up and\or arising as a result of the enquiries conducted by the Provisional Liquidators, that if approved the scheme would be presented to the Court for approval or variation after which, the role of "the Provisional Liquidators as 'Midwives' of the restructing and recapitalization lapses", that if this fails the petitions for winding up will be activated. Mr. Ng'amaryo vehemently maintains that under this process "there is no possibility .. of any lawful rights of the creditors as a body, and individually (including the objectors) being trampled upon in anyway", and that it is the creditors collectively who know and should finally decide exactly what is best for them and what is a mere sham.

He concluded by stating that the application and proposition is fair, just and equitable to all the creditors as a body".

(B) RESTRUCTURING IS ESSENTIAL AND INDISPENSABLE CONDITION PRECEDENT TO THE RECAPITALIZATION OF THE PEPSI COLA BUSINESS IN TANZANIA

- that the restructuring process leading to recapitalization is to enable a prospective investor "led by a South African based Company called International Pepsi-Cola Bottlers Investment Limited (IPCBIL) with the support of Pepsi-Cola International, who are shareholders in IPCBIL and are also Franchisers of all the Pepsi-Cola Carbonated soft drinks bottled in Tanzania, to recapitalize the Pepsi-Cola business presently run by their Franchisee, namely Fahari Beverages Ltd"

- that the Court should note Finn's report which shows that the Maximum realization to NBC (1997) Ltd is only 2.37 Million U.S dollars at 30th April, 1998.

- that that figure should now be less due to escalating and continuing costs, losses, claims made (i.e. Civil Case No. 98/98 and 42/99) and potential claims including, another factor that is, payments due to preferential creditors i.e. Tanzania Revenue Authority and terminal benefits of the Employees,

- that ".....in liquidation and auctioning the remaining assets, there will be no realisation whatsoever for any unsecured creditors and some objectors will also face the prospects of claims and suits similar" to those facing NBC (1997) Ltd.

(C) THE QUESTION OF THE APPOINTMENT OF PAUL HOWARD FINN AND KEVIN ANTHONY MURPHY AS PROVISIONAL LIQUIDATORS is RES JUDICATA

- that the Court of Appeal decided that the appointment of the two Provisional Liquidators was proper as there was no conflict of interests and that the "Matter therefore ought to and must rest. No one can or should bring it up again unless, and if so, only through further revisional proceedings in the Court of Appeal".

(D) THE PROPOSED APPOINTMENT OF MR. BOMANI AS PROVISIONAL LIQUIDATOR CANNOT BE FAULTED

- that Bomani is eminently qualified and a man whose standing, calibre cannot compromise his integrity and that consenting to the use of his chambers by creditors and interested persons when contacting Petitioners' advocates do not make him partisan or agent of addressees in the sameway the Court whose registries are used to clear various correspondences between opposite parties do not carry that negativity.

(E) THERE IS NO APPLICATION BEFORE THE COURT FOR THE APPOINTMENT OF MR. JOSEPH SINDE WARIOBA AS PROVISIONAL LIQUIDATOR OR EVIDENCE AS TO HIS QUALIFICATIONS AND PROFESSIONAL EXPERTISE

- that Warioba cannot be appointed a Provisional Liquidator as there is no chamber application supported by an affidavit to that effect in terms of Rule 8 (2) of THE WINDING UP RULES, (1929) (IMPERIAL) (WINDING UP RULES) and as elucidated by the Court of Appeal in Civil Revision No. 1/99; that in any case objectors have not provided his qualifications and expertise let alone a defect apparent in the purported consent which reveals an irrelevant company "JV Group of Companies Ltd"

(F) THE REMUNERATION OF THE PROPOSED PROVISIONAL LIQUIDATORS IS FAIR AND REASONABLE

- that the 12 1/2% of the gross realization in reference to s. 187 (2) of CAP 212 is neither unreasonable nor unfair considering, the "enormity and complexity of the task of the provisional liquidators as exemplified by the volume of the interim report submitted by the previously appointed liquidators, and activities to be covered which are far-flung and over the whole country and specifically considering "the added difficulty in transport and electronic communication between the Companies, the rudimentary and manual record keeping and the relatively short time required to complete their ...task"

(G) THE COURT SHOULD SEE ULTERIOR MOTIVE IN THE EFFORT BY A HANDFUL OF CREDITORS TO OPPOSE AND FRUSTRATE THE RESTRUCTURING PROCESS AND RECAPITALIZATION OF THE PEPSI-COLA BUSINESS IN TANZANIA. THE SAID HANDFUL OF CREDITORS SEEM TO BE ALL MAKING A JOINT EFFORT TO DO SO.

- that the various affidavits of creditors and guarantors seem to compliment each other, that some creditors appear prepared to write off their debt albeit jeopardizing other creditors' chances of recovery as well as kill the Pepsi-Cola business in Tanzania

- that the self-injurious and unreasonable efforts by the objectors in blocking genuine and fruitful efforts by Petitioners seeking Courts assistance in restructuring should be seen as aiming at boosting Coca-Cola Business in Tanzania

(H) FOR CREDITORS TO ADDRESS THIS COURT IN OPPOSITION OF THIS APPLICATION, PROOF OF DEBT MUST HAVE BEEN SUBMITTED

- that the 9 Creditors should have proved their debts; "They must have proved that .....Applicants/Petitioners owe them the sums they have indicated in the Counter affidavits. The onus and responsibility falls on them to do so, someone cannot simply appear and say I am a creditor, produce no evidence and expect to be heard by the Court."
- Regarding the contingent "creditors they should have adduced evidence of the existence of the loans and guarantees.
- that none of these has a locus standi

I. THE REPORT OF THE INITIAL PROVISIONAL LIQUIDATORS AND THEIR WORK SO FAR DONE SHOULD NOT BE WASTED
- that the interim report relates to a task almost half way through and the same should be adopted in order to allow completion of the task within the contemplated time frame and save effort and expenses so far injected therein.
- that this will have sense if Finn and Murphy in conjunction with Bomani will be allowed to complete the task from where they left off because otherwise it will be to "reinvent the wheel" if new Provisional Liquidators are appointed.

J. POWERS OF THE PROVISIONAL LIQUIDATORS SHOULD NOT BE LIMITED (this was not so framed by Mr. Ng'amaryo as he put it under item (a) above, but considering its importance in the dispute I have deemed it proper to give it a separate title)
- that though powers of Provisional Liquidators are not specifically spelt out under the cap 212 the said CAP juxtaposes provisions relating to Liquidators with those relating to Provisional Liquidators in several sections including ss. 176, 180 (1), 184, 186 (5) proviso, 186 (6), 188 thus leading one to reasonably conclude that the same powers required

by a Liquidator are needed by a Provisional Liquidator albeit for a specific period

- that less powers than those asked for will delay the process as the Provisional Liquidators will have to constantly seek specific Court orders to enable them carry out their duties and obligations responsibly

- that as much as the Court may limit and restruct the Provisional Liquidator's powers under s. 182 (2) CAP 212 or Liquidators powers under s. 190 so also it is a natural inference that the Court has power to give other or additional specific powers to Provisional Liquidators as circumstances of the case may require.

- that it is unimaginable that Provisional Liquidators cannot have powers to "spearhead" restructuring process but at the sametime have powers to investigate, collect, preserve assets, prepare statement of affairs and related.

- that "powers and order less than those prayed for, particularly powers as meagre as those proposed by objectors will delay the efforts, the process, hamstring the Provisional Liquidators and frustrate the restructuring process".

The above is a summary of a very lengthy submission by Mr. Ng'amaryo. This attracted a formidable joint counter by the objectors. As they are all launched on the same vein, and being almost similar in substance, I will summarise them jointly and together save for limited areas where they part, in which case, I will deal with those elements separately. I will start with Ms Rwebangira's submission on preliminary objection.

Ms Rwebangira has raised a preliminary objection to the effect that the Petition in respect of Fahari Bottlers Ltd was presented in bad faith and should be stayed pending hearing and determination of legal issues as follows -

(i) " Whether a company which is under compulsory winding up proceedings by a Creditor, enters into a settlement agreement under which it promises to pay a compromise amount and thereby persuades the Creditor and the Court to mark the matter as settled and, as a result of which issue a decree but soon thereafter and, without paying the said compromise amount thereto, fraudulently, and/or in an attempt to avoid liability under the decree is entitled to proceed, to a "voluntary" Winding Up on grounds of alleged insolvency or restructuring or has to show "clean hands" before it can be heard.

(ii) In what circumstances would a Petitioner be allowed to defeat the rights of a decree holder, when such judgement had been entered with the consent of the Petitioner, fully aware of its alleged insolvency but not disclosed to the decree holder?

(iii) Whether a company which goes into liquidation immediately after it has agreed to settle part of a debt in a compromise and has not paid that compromise amount did so fraudulently or not .

(iv) Whether a company which transfers its assets (and business) to another company without transferring its liabilities with the said assets and immediately petitions for Voluntary Winding Up, that company to which the assets were transferred should not be wound up or at least the assets so transferred be brought into the liquidation process.

Facts leading to this objection include the following - In Misc. Civil Cause No. 133/98 filed on 5/8/98 Kioo Ltd petitioned for the winding up of Fahari Bottlers Ltd. Before the petition could be heard, precisely on 15/8/98, parties entered into an agreement which was recorded by the Court on 19/8/98. The terms were as follows:

1. Fahari Bottlers Ltd to pay a sum of Tsh.225/- Million to Kioo Ltd towards settlement of its claim
within 55 days from the date of this agreement provided the investment was in place by then.

2. If as a result of investment into Fahari or reconstruction it was able to pay Kioo Ltd a further sum towards full settlement of the claim, it would do so. If not the sum paid .....shall be the full agreed settlement.

3. Kioo agreed to withdraw the petition (also consent to lifting of the injuction) and defer further steps in the action for a period of 60 days from the date hereof. If during this period, as a result of investment into Fahari or reconstruction, Fahari took any steps such as transfer of assets or formed a joint venture, Fahari undertook not to prejudice Kioo's rights under their claim. Fahari further undertook to inform Kioo in writing within one week of any such step which may have been taken which could prejudice Kioo's rights.

This persuaded Kioo Ltd to apply to the Court to mark the matter as settled which prayer was granted accordingly. According to Mrs Rwebangira, the Fahari Bottlers Ltd had a hidden agenda, for,

" Surprisingly on the same day of 19th August, 1998 the Petitioner entered its own resolution for Voluntary Winding up and filed petition for Voluntary Winding up on the next day", and the assets were "hived-down" to a newly formed Company - Fahari Beverages Ltd.

Mrs. Rwebangira argues,

" the Petitioner deliberately misled the creditor and the court into settlement simply to get the Creditor's petition off the court record so that it could present its own and seek winding up or its so called "reconstruction"/

"restructuring" under its own terms. We submit that this was fraud. The Petitioner concealed the fact that its current investment and assets could not meet the initial sum of Shs.225,000,000. It also concealed the fact that it was about to make it impossible for Kioo Ltd as decree holder to execute the decree" or "take further steps" to recover the decretal amount by reason of its new Petition.

This concealment of material facts directly relevant to the agreement, settlement and consent to the lifting of the injuction amounted to fraud and we pray that its petition should not be allowed to stand".

In response to this, Mr. Ng'amaryo, citing Mukisa Biscuit manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696 argued that the above cannot be a preliminary objection known in law as it contains facts which have to be proved (and not points of law); that even if it is one it has been raised prematurely as what is before the Court now is an application to appoint Provisional Liquidators and not the hearing of the Petition.

With respect to Mrs.Rwebangira I am on all fours with Mr. Ng'amaryo that this is not a preliminary objection known in law. Authorities on what is a preliminary objection abound and the authority cited above summarises what the legal stand is. As was observed by, Law, J.A, at page 700 of the cited Report,

".....So far as I am aware a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration...."

While I dont agree wih Mr. Ng'amaryo in his arguments that the debt of Shs.225,000,000 due to Fahari Bottlers was not proved and that the "settlement agreement alleged must be

proved", for, the decree on record speaks for itself and he would surprise the world if he pretends ignorance of the same when he was a participant thereto, I cannot associate myself with an argument by Mrs Rwebangira that the existence of that liability is a point of law which should bar the filing of a Petition for winding up as was the case here.

I am pursuaded, without prejudice to subsequent decisions on the matter, that on the facts at hand, Fahari Bottlers Ltd's acts are very very suspicious - offering debt settlement terms today only to file a Petition for winding up tomorrow, and even then without notifying the party you struck the agreement with, when the terms of the said agreement so provide, and not only that but also going further to transfer the assets excluding liabilities to another newly formed Company cannot be compatible with honesty, genuiness or faithfulness. There is something very wanting if not fishy. But that is the maximum we can comment at this point. Mrs Rwebangira's arguments are relevant when it comes to the hearing of the Petition. Those are strong and relevant points that can be fronted to convince the Court that the petition for winding up should not be granted. Even then they cannot even be raised as preliminary objection for they don't legally qualify. There is no unlawfulness or illegality in the filing of the Petition. Mrs Rwebangira cannot be heard to say "this petition was unlawfully filed" or "this petition is illegally before the Court." What she can be rightly heard to front is, "though filed, this Court should not grant this petition as petitioners are before this Court shrouded with dirt". This is defferent from fronting a preliminary objection. In the premises the preliminary objection is over-ruled.

Going back to the main substance I should outrightly state that the objectors ably submitted, and at length for that matter.

For consistency I will summarise the objectors' response along the paragraphs and titles as numbered in respect of Mr. Ng'amaryo's submissions.

All objectors cancede that in law provisional liquidators can be appointed but insist (save NBC (1997) Ltd) that these would be for the purpose of maintaining the status quo, in that they would only collect, preserve and protect the Petitioners property. Except NBC (1997) Ltd, they don't agree that their duties should cross over to restructuring or working on a scheme of Arrangement. Stanbic Bank and M & M concede to some extent that that could possibly be one of the duties of the Provisional Liquidators.

Regarding the indispensability of restructuring as a condition precedent to recapitalization objectors who are against it insist that the restructuring is for the benefit of the Petitioners and more so because they entered in a scheme of Arrangement without involving interested parties, i.e. Creditors; that they "hived-down" their assets into a new Company "without carrying the liabilities as well and leaving themselves being empty shells and without Considering Creditor's interests." The gist of the charges is well reflected in one of the objectors submissions as follows - ".....the Petitioners directors ....grossly mismanaged the debtor companies, have dispated their properties and assets including illegal transferring thereof to a third party, namely Fahari Beverages Ltd whose directorship composes of the Petitioners' advocate".

They strongly oppose the proposed ***trio*** as Provisional Liquidators - Finn, Murphy and Bomani as they are interested parties. They insist that the latter was not only used in clearance of Petitioner's correspondences but was actively involved in various negotiations while the former were involved in the restructuring scheme and advises to petitioners - hence none can service and command the confidence of objectors. They stand surprised over the alleged res judicata regarding the appointment of Finn and Murphy as it is not supported by the Court of Appeal decision in Misc. Civil Revision No. 9/99.

They all (except the contigent objectors who have no particular preference) urge for the appoint of Joseph Sinde Warioba as a Provisional Liquidator for they have trust and confidence in him. They argue that once there is a chamber application for

appointment of a Provisional Liquidator, proposals that follow don't require a chamber application; that the consent made by Warioba is proper and the wrong name of the Company (JV Group) was by slip of the pen which can be rectified if need be.

On the remuneration, while they all object to the 12 1/2% of the gross realization they stand divided on what should be given. The majority propose 5% while NBC (1997) Ltd maintains that the person appointed should make a proposal for determination by the Court.

They dispute existence of any ulterior motive in their objections arguing that rather it is the Petitioners who harbour the same by engaging in actions which touch their interests but without involving them.

Regarding their locus standi objectors are surprised by this argument because Petitioners conceded of being insolvent, that they (objectors) have clearly stated the extent of indebtness in affidavits; and that in any case this is not the occassion to prove debts.

Lastly, they argue that the initial Report by the Provisional Liquidators should be disregarded as it was Composed by people whose appointment was declared null and void, and that powers of the Provisional liquidators to be appointed should be limited to protect objectors' rights.

Mr. Ng'amaryo did not have much in rejoinder. He reiterated what he stated in the main submission. He insisted that the proposal of Mr. Warioba is against Rule 31(1) of the rules; that decision of majority creditors is of pursuasive force (cited Amiral Meghji - the Debtor (1970) HCD 230) and Indian Building Constrators Ltd. v R B Purohit (1965) E.A 342, In Re st. Thomas'Dock Company (1876) 2 CLD 116, In re Uruguay Central and Hygueritas Railway Company of Monte Video (1879) 11 CLD 372, Re Home Remedies, Ltd (1942) 2 ALLER 552), and that Chandes (Contigent creditors) by the end of June, 1998, were totally controlling and managing the affairs of the Petitioner

Companies, thus "they and their associated companies are .....accountable for the affairs and financial position of the companies" and that their acts would be scrutinised and decided upon by creditors' meeting if prayers are granted. He insisted,

> **"Fahari Beverages Ltd is a Company floated by the Chandes for the purpose of restructuring and hive down. This is mentioned in the letters .....signed by Chandes".**

I have detailed the submissions and arguments purposely. Although the application seems to be a simple one a decision thereon affects a substantial group of companies let alone other interested parties including objectors. Arguments and submissions regarding their fate therefore should clearly be put to the fore.

I should start by stating that I stand indebted to the Counsel's (of both sides) able submissions. Not only that but also for availing me copies of authorities cited - I think, in a responsible recognition of the wanting nature of our Library facilities.

For an organised flow of findings I will not follow the sequence of titles and paragraphs as designed by Mr. Ng'amaryo and paraphrased at the beginning of this ruling. Where necessary I will interchange them or argue them together.

I will start with the question of the objectors' Locus standi. As rightly submitted by the objectors I have been at pains to understand what Mr. Ng'amaryo meant by insisting that in order for the objectors to have a locus standi they should have proved the existence of debts! The objectors duly filed notices upon the Petitioners' advertisements regarding their petitions for winding up. They duly appeared before the Court represented by Counsel. Their respective Directors swore affidavits showing the extent of indebtness by Petitioners - Crown cork, U$ 186,288; Kioo Ltd, Tshs.1,139,814,293 F out which Tshs.225,000,000/= form a Court decree; Stanbic Bank, U$.1,193,199.99; M/S M & M Communications Ltd, Tshs.68,333,909/20 and U$.773.39, subject of (HC) Civil Case No. 268/98; Abdillah Mikidadi, 10 Million Tshs for wrongful termination, subject of Civil Case

No. 283/96 at Kinondoni District Court; NBC (1997) Ltd, a total of Tshs.7,300,378,428 [broken up as follows:- Ruaha Bottlers - Tshs.298,541,705, Southern Highlands Bottling Coy - Tshs.137,679,230/=; Fahari Fruits Products Ltd - Tshs.184,409,767/=; West Lake Bottlers Ltd - Tshs.130,787,172/=; Fahari Bottlers Ltd - Tshs.6,399,463,939/=], Shinyanga Bottling Company Ltd - Shs.149,496,615/=; Trust Bank (Tz) Ltd, Tshs.688,000,000/=; TIB, Tshs.269,036,877/92. The Directors of the contingent Creditors (Girish T. Chande, Ashock T. Chande, Ravi T. Chande, J.V. Textiles & Garments Ltd, M/S Juthalal Verji Limited) swore affidavits to show that they guaranteed various loans extended to Petitioners. What else does Mr. Ng'amaryo wish to be proved in order for these parties, who stand to lose in case the Petitioners die miserably insolvent, to be able to stand in Court to defend their interests?

The objectors' notices to appear in the Petitions and their affidavits stand as sufficient evidence conferring unto them the locus standi required in the respective Petitions. As rightly submitted by them, in any case, this is not the right moment for proving the exact debts/liabilities. Coupled with this, the petitioners who self-confessed of being deeply indebted to various parties did not challenge the objectors' affidavits regarding the debts nor regarding the contingent Creditors that they guaranteed various loans. Mr. Ng'amaryo who knows it well, being a seasoned lawyer, is aware that an affidavit is evidence and cannot be assailed by mere submissions as he is trying to do. Suffice to conclude that the objectors are properly and legally before this Court.

Next to consider is whether it is proper to appoint a Provisional Liquidator. This should not detain us at all. All Counsel concede that this is purely legal and the law so provides. S. 183 (1) of Cap 212 (COMPANIES ORDINANCE) provides,

> ***"Subject to the provisions of this section the Court may appoint a liquidator or provisionally at any time after the presentation of a winding up petition and before the making of a winding - up order, and either the official receiver or any other fit person may be appointed".***

Rule 31 of the Companies (Winding up rules, 1929) provide further,

> ***"After the presentation of a petition, upon the application of a creditor, or of a contributory, or of the Company, and upon proof by affidavit of sufficient ground for the appointment of a Provisional Liquidator, the Court, if it thinks fit and upon such terms as in the opinion of the Court shall be just and necessary, may make the appointment".***

Do facts and circumstances of the controversy before this Court warrant appointment of Provisional Liquidators? On this point the Counsel have made reference to various pursuasive foreign decisions on what the Court should consider in exercising its discretion towards that end - (Re Dry Docks Corporation of London (1888) 29 Ch. D 112, Re Hammersmith Town Hall Company (1877) 6 Ch. D 112, Re High-field Commodities Ltd (1984) 3 All. ER. 884). The enunciated principles boil to what is contained in the headnote to the report of the judgement in Re High-field's case

> **" The Court would not usually exercise its powers.....to appoint a Provisional Liquidator unless there was at least a good prima facie case for a winding up order. However, the Courts' Power to appoint a provisional liquidator (is) general in scope and (is) not restricted to cases where the Company was obviously insolvent or where it was otherwise clear that it was bound to be wound up, or where the Company's assets were in jeopardy. Furthermore, the power (is) discretionary, and in addition to be being required to be exercised judicially the need for the exercise of the discreation should outweigh the consequences to the Company.....In particular where the grounds for winding up Petition....was expedient in the public interest, the public interest should be given full, though not conclusive, weight".**

The above quoted being a common law stand and not in derogation of the law as already quoted has full blessing of this Court, for, it portlays what the law is in this country as well.

The Petitioners have self-confessed of being in deep insolvency. They have filed petitions for voluntary winding up.

Prima facie therefore a winding up order is likely to issue. The Petitioners have categorically stated

" all the ten Companies are interlinked in their businesses, finances, directors and shareholders",

and have confessed of having "hived-down" their assets to another newly formed Company. Naturally, this state of affairs sets in uncertainity regarding the stability and safety of the assets let alone the dealings, and loudly threatens the interests of the Creditors and Shareholders. In the circumstances, a Provisional Liquidator is required, among others to investigate these dealings, collect and protect the assets. For that reason I answer the question I had posed at the beginning, positively.

Following on heels to the above is - what powers should this Provisional Liquidator have.

The objectors save NBC (1997) Ltd urge for very limited powers and not as insisted upon by Petitioners. They insist instead that the Provisional Liquidators are only appointed for preservation of the petitioner's assets - maintain status quo, and that legally a Provisional Liquidator cannot engage in restructuring or composition of any Scheme of Arrangement (cited the Re Dry Docks and Hammersmith cases whose citation has already been provided above). On whether restructuring is essential and indispensable to recapitalisation of Pepsi-Cola business in Tanzania they argue that Petitioners being insolvent and out of business no meaningful restructuring can be made; that it is superflous to the petitions and that Creditors should not be compelled on a course whose extent of the alleged benefit has not been disclosed and more so in relation to creditors.

I should start by stating the obvious that neither the Companies Ordinance nor the "Rules" made thereunder specifically provide powers which have to be conferred upon Provisional Liquidators. S. 183(2) of the Ordinance and Rule 31 of the Winding up Rules, refer to powers of a Provisional Liquidator in an assumptive manner. They provide,

" 183(2) Where a Liquidator is provisionally appointed by the Court, the Court may limit and restrict his powers by the order appointing him".

Under Rule 31 the Court, (regarding a Provisional Liquidator),

" (i) ....if it thinks fit and upon such terms as in the opinion of the Court shall be just and necessary, may make the appointment

(ii) The order appointing the Provisional Liquidator .....shall state .....the duties to be performed by the Provisional Liquidator"

On the basis of the quoted law it is clear that the Court is vested with unlimited discretion regarding what powers should be bestowed on Provisional Liquidators. For that matter I am in full agreement with Mr. Ng'amaryo that the Court is empowered to give powers including those provided to the Liquidator under s. 190 through 193 of the Ordinance. What powers should be given are left to the wisdom of the Court. I cannot therefore buy the objectors' contention that Provisional Liquidator's powers is limited to only investigating the affairs of the Petitoners, collection and preservation of the Petitioner's assets. Depending on the facts of a particular case Provisional Liquidator's powers can loom into restructuring action and making of a scheme of arrangement or any other activity deemed proper by the Court to be in the interests of the creditors/shareholders.

The counsel for both camps cited authorities in support of their respective stands- some of the objectors cited Re Dry Dockm Re Hammersmith and Highfield's cases while Ng'amaryo for Petitioners cited, among others, Re Amirali Meghji (1970) HCD 230; Indian Building contractors Ltd v R.B. Purohit (1965) EA 342. The latter cases show that a Provisional Liquidator has powers even to make restructuring or arranging a Scheme of

Agreement, which stand, I fully support in view of the blank cheque given by the law (above quoted) to the Court. There is yet another support from a recent commonwealth decision, decided just last year (1998) (Mujulizi, learned Counsel, stands commended for unearthing it) which shows that Provisional Liquidators not only can they be given powers to preserve but also to dispose off the Petitioner's property (In the Matter of Peregrine Investment Holdings Ltd AND In the Matter of the Companies Ordinance Cap. 32, decided by the High Court of Hongkong Special Administrative Region, Companies Winding Up No. 20 of 1998). An excerpt from the judgement runs as under -

> **" Provisional Liquidators were appointed**
>
> .....
>
> .....
>
> **The order appointing the Provisional Liquidators provided that the Liquidators could sell or dispose of any assets by way of private treaty tender or auction upon such terms as the provisional Liquidators may deem appropriate subject only in the case of sales of subsidiaries or entire business divisions to the Liquidators obtaining leave to do so from the Court".**

I am satisfied that as the law stands now Provisional Liquidators can be bestowed with any powers ranging from investigating Petitioners affairs, collection of assets to selling or disposing of the same or some other duties including designing a Scheme of Arrangement that would be beneficial to all the parties involved and which the latter should agree to before presentation to the Court for approval or otherwise.

Now, back to the specific question, on the facts of this particular case what specific powers should be conferred on the Provisional Liquidator?

My first reaction is that they should not be limited as proposed by the majority objectors but rather should be wide enough to cover a formulation of a scheme of Arrangement. I have reached this conclusion because of the following, first, it would

seem that there is a confusion regarding the centre of controversy. The arguments presented by the objectors seem to suggest that there is already in place a scheme of arrangement which they are being called upon to agree to. One of the objectors charges thus:

> **" It is therefore manifestly clear that there has already been a transfer or attempt to transfer the assets. What then are the Provisional Liquidators to take charge of? Aren't they being appointed simply to inherit and adopt the already prepared scheme, and thrust it at the creditors, call for a vote from a number of already approving creditors who are in the majority any way? Isn't the Court being called on to rubber-stamp an already made scheme, with the secured creditors being sidelined as mere by-standers?"**

And yet another lauched a similar serious attack in the following words,

> **" It is ridiculous therefore my Lord for a debtor to compel a creditor to agree to a course of action of whatever description which does not appear to be beneficial to him considering the fact that there is no real guarantee that the recapitalisation process will deliver any positive results. My Lord, it is our further submission and we pray that this honourable court of law should not be used as conduit pipe for debtors finding their lee way of technically avoiding debts on sheer mechanism such as restructuring and recapitalisation which were at their disposal long way ago to the detriment of the creditors".**

To clear the air, I should say that I am surprised by these submissions. I know from the record that ***Finn and Murphy*** had already embarked on a formulation of a scheme of Arrangement. I also get a feeling that whatever was proposed arose serious misgivings among the objectors. ***Well, that may be correct but for the purposes of this application there is no scheme whatsover in existence***. The Petitioners and objectors alike may feel that in case Provisional Liquidators are empowered to formulate a scheme

of Arrangement the already compiled proposal may find its way into the new scheme. That should not be our concern now. A decision to utilise which material and from which source will lie with the person appointed - ***thats why a neutral, unbiased person is required.***

At the sametime, it is not correct to say that a scheme of Arrangement would be brought to the Court for simply rubber stamping. The scheme will have secured the blessings of the creditors/shareholders. The Court's duty is not to rubber-stamp but rather to scutinise the scheme of Arrangement formulated, satisfy itself on the response of creditors/shareholders and whether the scheme itself is fair and equitable and for the benefit of all parties concerned. Only after being satisfied with the above perfection would the Court approve the scheme. It is not mandatory that the Court should approve such scheme. It may reject the same or order for amendments.

While still on that it should be noted that it is not mandatory that such a Provisional Liquidator must formulate a scheme of Arrangement. He would be empowered to formulate one but during his investigations he may get convinced that a scheme of Arrangement is unworkable in the circumstances or not beneficial to the creditors. In such situation he is not bound to formulate any. He would then inform the Court accordingly for winding up process to proceed. What is the gauge of his duties? Whatever he does should be in the best interest of the creditors/shareholders. Thats why I have not and will not bother to make a finding on the weight to be attached to percentages of creditors as regards their support on the scheme orchestrated by Mr. Ng'amaryo and elaboratively responded to by the objectors' Counsel. It is premature to argue on the percentage of creditors that support a scheme or not, for, at this point there is none.

Insisting on merely winding-up without giving a lee-way to the Provisional Liquidator to survey for another beneficial option may not lie in the interests of creditors. 10 Companies are invlolved. They have effected a hive-down on the assets to a newly created Company. They are miserably indebted to both secured and unsecured creditors

(just one creditor claims over Tshs 7 billion). Even if a winding-up order is made there may not be enough money to pay creditors. Let a Provisional Liquidator investigate, scan and come out with what is good for the parties.

Arguments have been presented that only limited powers should be given and that the Provisional Liquidator would be at liberty to apply to Court for specific additional powers to embark on restructuring or a scheme of Arrangement if he soon discovers its necessity. Well, this is one mode of approach but compared to what I am suggesting the latter saves time, expedites matters and removes unnecessary delays. Let him leave the Court clothed with all the authority and powers. Let him join the battle armed with all armaments available. It defeats common sense for a fighter to join the battle with a scheme that he has to check on the strength of the enemy first then rush back to the armoury to equip himself well!

That said, what should these wide powers encompass? We have two versions. The Petitioners' as they appear at the begining of this ruling, and NBC (1997) Ltd's.

Having carefully considered the arguments, the law, the state in which the 10 Petitioners are, the way the "hive-down" has been effected, I settle, with minor variations on NBC (1997) Ltd's proposals regarding powers which should be exercised by a Provisional Liquidator as follows:-

1. *To carry out full investigation into the affairs of the Petitioners in order to identify their (Petitioners) assests and property including the hive-down exercise carried out by the Petitioners*

2. *To take possession of all the property and assets of the Petitioners wherever they are and by whomever held and preserve them for the benefit of the creditors until a suitable scheme of Arrangement is proposed and agreed upon, or*

if no such Arrangement is reached, pending a Winding Up Order and the appointment of a Liquidator.

3. To prepare a list of all creditors which should be submitted to the Court within 3 weeks.

4. To prepare a statement of the Petitioners' affairs within 5 weeks

5. To prepare a proposal for a Scheme of Arrangement, if found feasible, within 6 weeks and apply to the Court for an order to convene a creditors' meeting to consider and vote upon the scheme.

6. To appoint such persons as he may deem fit to assist him discharge his duties.

The schedule within which to take the steps, for one reason or another, may prove insufficient. In that case, he will be allowed to apply for extension of time.

The question of restructuring and its indispensability being a condition precedent to the recapitalization should not take much of our breath. We have provided wide powers to the Provisional Liquidator. Armed with that he will investigate full activities of the Petitioners and will come up with whether restructuring is necessary and in what form and thats why he is empowered to formulate a Scheme of Arrangement, which has to be accepted by the creditors and approved by the Court. The benefits enumerated by the Petitioners should not carry the show of the day for the Provisional Liquidator has to go into them thoroughly and satisfy himself that they are real and workable and a not a "sham" (to borrow the language of one of objectors' Counsel).

While still on this I should touch the argument that the initial Report of Provisional Liquidators and their work so far done should not be wasted. I am afraid this Court cannot issue an order for its utility. The Provisional Liquidator should be left free to

decide on how to collect the required information. However, common sense would dictate that the Provisional Liquidator will go for all relevant materials and contacts, and that report is one of them. It is not of insignificance that the initial Provisional Liquidators will be paid for whatever they did before being barred. In effect therefore the initial report is the property of the Petitioners.

That said, who should be appointed a Provisional Liquidator? I should in very certain terms declare that neither Finn, Murphy nor Bomani is fit to be appointed as Provisional Liquidator - they are disqualified because of their association with the Petitioners. Conflict of interest is very glaring.

I was surprised if not sturned to hear a seasoned lawyer of Ng'amaryo's calibre gathering guts and audacity to say that the Court of Appeal in Civil Revision No, 1/99 dicided on the appointment of Finn and Murphy. He asserts that the matter is res judicata. He declared,

> **" the matter therefore ought to and must rest. No one can or should bring it up again unless, and if so, only though further revisional proceedings in the Court of Appeal".**

With respect, I am sure that Mr. Ng'amaryo is aware that that submission is fallacious. The Court of Appeal observed,

> **" There is not much to say about the appointment of the two other provisional liquidators (i.e. Messrs Finn and Murphy). At first we had the impression that both resided outside the jurisdiction of the High Court, that is, in London, but on closer examination of the record, it appears that they have an address within the jurisdiction of the court and is [sic] qualified for appointment as a liquidator".**

The Court of Appeal did not appoint (and could not in the circumstances) Provisional Liquidators. If so, as rightly fronted by the objectors, why bring the same matter before this Court which is subordinate to the Court of Appeal?

Although Mr. Ng'amaryo capitalises on those observations he forgets or deliberately, fails to make reference to the final order of the Court, which among others states,

> **"The proceedings for appointment of Provisional Liquidators be and are quashed".**

Clearly, and as rightly submitted by the objectors, the observation of the Court relied upon was obita dicta. In any case, having quashed the proceedings which appointed them, on which ground then can the purported appointment stand?

The suitability or otherwise of ***Murph, Finn*** as is the case with ***Bomani*** is now what is before this Court for determination. And I have already indicated that the ***trio*** do not qualify because of conflict of interests. As was stated in ***Peregrine case*** already referred to above,

> **" It is the task of the Provisional Liquidators to get in the assets on behalf of the creditors and shareholders. They stand in the position of trustees.....**
>
> **.....**
>
> **Trustees are never permitted to be or remain in a situation where they have a conflict of interest. That rule is crucial to the proper administration of the relevant trust. The dual role of the Liquidator's firm should have been disclosed to the Court at the earliest opportunity".**

In that case the Provisional Liquidators had been performing auditing duties to the other party and this was concluded upon to be client relationship hence existence of a position of having conflict of interests.

Again, in **Re: Charterland Goldfields 26 T.L.R 132** a liquidator was disqualified for similar reasons-it was stressed,

> **'the liquidator of the company must be a person who will act independently, aspecially of those against whom there may be pending claims, and will discharge his duties without favour to either side.**
> **Where it appeared that the liquidator in the voluntary Winding Up of a company had an intimate business connexion with several of the directors of company, who were also directors of other companies between which and the company in question there had dealings requiring investigation, the court being of the opinion that he was not in a position to take independent course in making the necessary investigations, made an order removing him from the office of liquidator, and appointed another liquidator in his place".**

The objectors in here have sufficiently proved that there is client relationship between Finn, Murphy and Petitioners. The two personalities have been engaged in the negotiations with some of the creditors on behalf of Petitioner, let alone formulation on the restructuring proposal long before the petitions were filed. They have been negotiating with NBC on behalf of Petitioners regarding their indebtness proposing in the process debt - compression. The objectors' fears that they may put into effect whatever plans and recommendations they have had in their capacity as Professional advisors to the Fahari Group are not far fetched. On the other hand it has amply been proved that Mr. Bomani's Chambers were being used by the Petitioners for clearance of their Correspondences. Mr. Ng'amaryo's urge that the relationship ended at that has been contradicted by evidence that fees were paid for services. Also it has not been explained why, if the services ended at Mail delivery arrangement, didn't they use Eric N. Mahayo Partnership Chambers just within reach.

In any case, there are very telling correspondences whose copies were sent to Mr. Bomani and which clearly show that he was engaged in some negotiations between the

newly formed Company, Fahari Beverages Co Ltd and NBC. The former is the Company to which the Petitioners transfered their assets. Even an angel would not trust that Mr. Bomani would not take sides in a conflict, as the one in existence, between objectors and Petitioners.

As Provisional Liquidators are expected to protect the interests of the creditors any person who has any connection in terms of business dealing between him and Petitioners is outrightly disqualified from appointment to that position, for, conflict of interest is the very obvious. Here it is not a question of qualification and experience. The ***trio*** no doubt excel in this. And it is not a question of acting in the interest of the creditors. It must actually be seen that it is done. Provisional Liquidators must not have tainted let alone suspicious trust in the eyes of the creditors. The ***trio*** is obviously netted in the latter and is accordingly disqualified.

Who should be appointed? The objectors propose Mr. Joseph Warioba. The Petitioners object to the proposal arguing that there is no application as such as Rule 8 (1) of the "Rules" has not been complied with; that he has not given his consent as the one he submitted is in respect of a different company and that his qualifications and expertise have not been proved.

Indeed, for an application for a Provisional Liquidator to be properly before the Court there must be a chamber summons supported by an affidavit - the Court of Appeal in Civil Revision No. 1 of 1999 is clear on this as is Rule 8 (1) of the "Rules". However, with respect to Mr. Ng'amaryo, what the objectors are proposing is not an application for appointment of a Provisional Liquidator as much but who should fill in that position once an application to appoint is allowed. The Petitioners were the ones who applied for appointment of Provisional Liquidator and that is the application which is before us.

Proposing a name is just ancillary to the main application. The Petitioner could even have simply filed the application without naming a person leaving it to the Court to

scan around and pick a fit person. The objectors are simply proposing whom they think, once the application is granted, can fill up the position. I cannot imagine the legislature passing such unreasonable a law which sets up a procedure as proposed by Mr. Ng'amaryo. I am of the settled view that in proposing a name of a person fit to be appointed a Provisional Liquidator by objectors after the Petitioner or any person has filed an application for his appointment does not require the filing of a chamber application supported by affidavit. That requirement stands only for the initial application, in this case, the one filed by Mr. Ng'amaryo for the Petitioners.

Concerning the argument that Warioba did not give consent, while conceding that he made an error when he consented to be being appointed a Provisional Liquidator to "JV Group of Companies" because there is no Petitioner going by that title, I am inclined to agree with the objectors that that was a slip of a pen. In any case, the law does not state that such consent should be secured before appointment. It may be desirable in order to avoid inconvinience because a person may refuse to take up the task if arbitrarily picked but the law as it stands puts up no such condition to the Court before so appointing. The same is the case with qualifications and expertise. The Court simply picks on a "fit" person. In doing that the Court will rely on various factors including judicial notice of the standing of particular person or upon receipt of proposals. The objectors have come up with a proposal. As was observed by the Court of Appeal Civil Revision No. 1 of 1999,

> **".....After all the provisional Liquidators were expected to protect the interest ot the creditors, and it is only fair that such creditors be given opportunity to play a part in the proceedings for appointment of Liquidators...."**

The objectors, all of whom except one are represented by advocates, and able ones for that matter, have proposed Mr. Warioba. Is it possible that this formidable group can come up with a personality who is incapable of protecting its interests? I am not pursuaded by Mr. Ng'amaryo in this respect. I thus hold that Mr. Joseph Warioba is a fit person to be appointed a Provisional Liquidator of the Petitioners. In any case, he is just a

Provisional Liquidator. The task will surely involve engaging various professionals and thats why it has specifically been provided that he can appoint any fit person to assist him. For that matter, he is not precluded from seeking assistance from Finn, Murphy or Bomani. What is important is not who does what but who controls what is being done, who decides on direction to be taken, who makes a decision before matters are presented to creditors and to Court.

We come to the remuneration to which the Provisional Liquidator is entitled. Here we have three scenarios proposed 12 1/2 % by Petitioners, 5% by the rest of the objectors except NBC which proposes that the Liquidator be called upon to chart his duties and activities and quote his charges. The contingent creditors leave it to the wisdom of the Court.

It is unfortunate that neither the Ordinance nor the Rules provide a definite answer. The counsel are agreed on this. Those who propose 5% argue that this is the commonly applied practice in Tanzania in respect of receivership and Liquidation and this is in consonance with the requirements of English Property Conveyancing Act, 1881 as applied to tanzania by Cap. 114 of the laws. While I have not been able to understand the basis of Mr. Ng'amaryo's urge to have his clients pay a higher charge of 1 2 1/2 % (he argues that the enormity and complexity of the task call for that percentage) I have been pursuaded by the Counsel for NBC that using a "percentage" criteria ***on the gross realisation*** in awarding the Provisional Liquidator's remuneration is wanting.

What is that "gross realisation"? This would have no problems in winding up proceedings for there would be sales and disposals. Now, in our case, regard being had to the powers and duties we have placed on the Provisional Liquidator which realisations will he make? If he manages to formulate an acceptable Scheme of Arrangement no sales will have been made and even if that fails and winding-up proceedings activated he will only have collected assets. We have given him no powers to sell. How then will we calculate the 5% of the gross realisation? Again, on this, I am pursuaded that the only logical step

to take is to call upon Mr. Warioba to chart out his duties, and the task ahead of him as he perceives it and quote his charges which would then be tabled in Court in the presence of objectors for comments and observations before the Court makes a decision on an appropriate remuneration.

Finally, I will make a brief observation on what the petitioners call ***ulterior motives*** by objectors. This charge is too unfortunate, for, there is no scintilla of evidence suggesting what is alleged and I am glad that though while thus charging the Petitioners concede in the same submission,

> **"there is no direct evidence that the objectors are actually making a proxy effort to kill the Pepsi-Cola business".**

The Petitioners' conduct, including unclear "hive-down" of some of the assets into another newly formed Company would naturally generate suspicions, resistance and mistrust on the part of objectors/creditors. Their reactions cannot therefore be faulted.

In conclusion therefore:

(a) The preliminary objection by Mrs. Rwebangira for Kioo Ltd that the Petition by Fahari Bottlers should be thrown out for having been filed in bad faith is dismissed.

(b) The prayer by Petitioners that Objectors be declared to have no Locus standi is dismissed

(c) The Application for appointment of Provisional Liquidator in respect of the Petitioners (the 10 Companies) is granted

(d) The prayer that Mark Danhi Bomani, Paul Howard Finn and Kevin Anthony Murphy should be appointed Provisional Liquidators is dismissed on basis of

Conflict of interest and instead Joseph S. Warioba is appointed.

(e) The prayer that the Provisional Liquidator's Powers should encompass all powers of a Liquidator under s. 190 (1) (a) to (f) and 190 (2) (a) to (h) of the Ordinance Cap 212 is dismissed except as embodied in this ruling, and which powers are wider than mere collection and preservation of Petitioner's assets, for they include formulation of a Scheme of Arrangement

(f) The prayer that the Provisional Liquidator's remuneration be 12 1/2% of Gross realization is dismissed and instead the person appointed Provisional Liquidator should sketch his duties and submit his quotations which shall be tabled in Court in the presence of parties for decision within 7 days of the delivery of this ruling

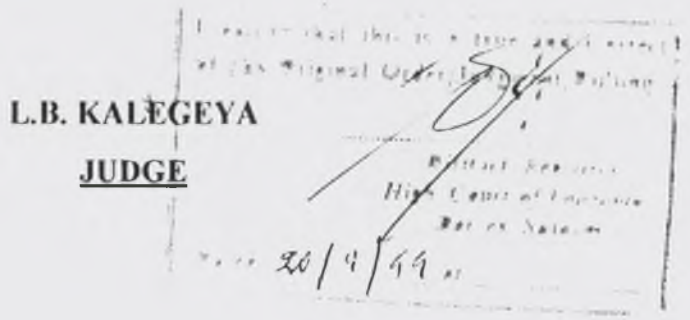
(g) Other prayers, that Costs of appointing an advocate and providing security; that all other proceedings in this Court, subordinate Court or Tribunal be stayed pending the winding up order or further, order; that hearing of the petition be adjourned to a date after the creditor's meeting to vote on the Scheme of Arrangement, if any, and that costs of the application be defrayed from the assets of the petitioners, stand allowed.

(h) The Provisional Liquidator will be at liberty at any time, to apply to the Court for directions and guidance on anything he deems proper and which has a bearing to Petitions.

L.B. KALEGEYA

JUDGE

Order: To be dilivered by the SDR-HC on 20/9/99



L.B. KALEGEYA

JUDGE

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