

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

MISC. CIVIL CAUSE NO. 292 OF 2017

**IN THE MATTER OF COMPANIES ACT, CAP 212 R.E 2002
AND
IN THE MATTER OF PETITION FOR AN ADMINISTRATION ORDER
BETWEEN**

BCS (2000) LTD.....PETITIONER

AND

SALIM LADAK1ST RESPONDENT

NAFISHA LADAK.....2ND RESPONDENT

JAMANI LIMITED.....3RD RESPONDENT

JUDGMENT

Last Order 15/11/2021
Ruling: 19/11/2021

MASABO, J.:-

BCS (2000) LTD, which shall hereafter be referred to as the company, is a company incorporated and operating in Tanzania since 1999. It has filed this petition praying for an administration order. It is subsequently prayed that the court be pleased to hold that the whereabouts of the directors of this company is currently unknown and to order the company to proceed with its activities in the absence of its directors.

The abbreviated factual background as discernible from the petition are that, the company has its genesis in the privatization of government entities. It was formed by former employees of the defunct Biashara Consumer Services Company Limited (a government entity). The main purpose behind its establishment was to take over the operations of Biashara Consumer Services Company Limited which was being privatized. Through terminal benefits and bank loans these employees managed to form the company and to pay a partial price of the assets and liabilities of the defunct Biashara Consumer Services Company Limited. The assets included two duty free shops at Julius Nyerere International Airport and at Ubungu Plaza. After taking over the operations, the company started to run the shops until 2011.

In paragraph 9 of the petition, it is pleaded that around March 2011, the 3rd respondent entered into a management agreement with Jamani Limited (the 3rd Respondent herein) a body cooperate owned and operated by the 1st and 2nd Respondent who happens to husband and wife. Under the agreement, the management of the duty free at Ubungu Plaza was into the 3rd Respondent for a duration 5 years at a consideration of USD 36,000 payable in the 1st Year of the agreement, USD 38,000 payable in the 2nd year, USD

40,000 payable in the 3rd year, USD 42,000 payable in the 4th year and a similar amount payable in the fifth year. This price was allegedly unpaid as of today.

Meanwhile, in June 2013, the petitioner and the respondents entered into yet another agreement vide which the directorship of the petitioner company changed. Under this new framework, the company had only three directors who are Samwel Emmanuel Dyelu, Salim Ladack and Nafisha Ladack. From 2019, the 2 Salim Ladack and Nafisha Ladack who are both Canadian mysteriously vanished. Their whereabouts remain unknown. They are suspected to have returned to their mother land, Canada. Following the mysterious disappearance of these two directors the company remained with Samwel Emmanuel Dyelu as its sole director and company secretary.

He continued to run the company until his death on 18/4/2020. The demise of Samwel Emmanuel Dyelu created a huge void and substantially affected the smooth operation of the company as it was robbed of its secretary and the only functional director. Its operations depended solely on 5 employees. Further, it was averred that in the absence of the directors, the

company has been unable to operate and has failed to file the necessary returns at the Business Registration and Licensing Authority (BRELA) and Tanzania Revenue Authority (TRA) hence the instant petition. It is subsequently prayed that, should the court be pleased to grant the administration order, one CPA Fredrick Benard Msumali be appointed as administrator.

Hearing of the petition proceed ex parte the respondents after all the efforts for physically and substituted service to the respondent ended futile. been affected. The petitioner who was represented by Mr. Kelvin Lwambano, learned counsel, called one Damian Anthony, as the sole witness (PW1). In the course of his testimony, this witness produced several documents the most relevant of which being:

1. **Exhibit P3 collectively:** comprising of the certificate of incorporation of the petitioner, the memorandum and articles of association of the company showing that it has a total of 120 shares owned by 6 subscribers who are Mrs. Salome Joseph Mbatia, Mr. Efraim Emily Urassa; Mr. Samwel Emmanuel Dyelu, Mr. David Mtimbwi

Mwaka, Mr. Damian Anthony Mdee and Ms. Nuru Mhaville each with 20 shares;

2. **Exhibit P5:** An agreement between the petitioner and Jamani Investment Limited. Page 3 of this agreement shows that BCS (2000) had the following shareholders: Muyenga Mohamed with 2,545 paid up shares; Damian Mdee with 5,394 paid up shares; Fabila Nyangali with 4,177 paid up shares; Margreth Shao with 2,686 paid up shares; Efrem Urassa with 6,047 paid up shares; Joyce Kazimoto with 3, 757 paid up shares; Samwel Dyelu with 6,942 paid up shares, David Mwaka with 5,484 shares, Joyce Mbelwa with 1,520 shares and Zuhura Kyissima with 3,954 shares. These unanimously approved the allotment of 975, 000 shares to JIL (Jamani Investment Limited). And, as per this document, Efrem Urassa, Damian Mdee (PW1) and David Mwaka, were among the directors of the company but resigned and Sadrudin Virji and Salim Ladack, took their place with the said Salim Ladack also appointed as secretary of the company (the agreement was concluded in 2013).

3. **Exhibit P6:** A search report downloaded from the BRELA's website on 28/1/2021 showing that the company has a total of 1017506 ordinary

shares worth Tshs 1000 per share (Tshs 1017506000/= in total) and two subscribers who are Samwel Emmanuel Dyelu with 6942 ordinary shares and Jamani Investment Limited with 1010564 ordinary shares. The report also shows that, the company has 3 directors: Samwel Emmanuel Dyelu (Tanzanian) who is also a Company secretary; Salim Ladack (Canadian) and Nafisha Ladack (Canadian)

4. **Exhibit P1:** A letter bearing a letter head of Biashara Consumer Services Co. Ltd dated 25/7/2007 showing that PW1 was employed by Biashara Consumer Services Co. Ltd with effect from May 2006 (post undisclosed)
5. **Exhibit P2:** An internal memo by S.E.Dyelu assigning PW1 to act as director of the company from 12th- 14January 2015 when the said S.E. Dyelu travelled to India for a business summit and Minutes of the meeting of employees of the BSC(2000) Ltd attended by: Mr. Damian A. Mdee, Mrs. Zuhura Kyissima, Mrs. Margreth Shao, Mrs. Joyce Mbelwa, Ms. Fabiola Nyangali, Ms. Muyenga Mohamed and Mr. Athuman Gumbo who unanimously agreed that, PW1 continue to act in the position of "AG. GENERAL MANAGER."

6. **Exhibit P7:** An email by PW1 requesting the surviving directors of the companies to pass a "SPECIAL RESOLUTION to appoint Director and Company Secretary Mr. Damian A. Mdee and Zugura B. Kyisima from among the remaining workers of the company...."

From these documents and the evidence of PW1, it became apparent that, following the demise of Samwel Dyelu, the company remained with only one shareholder who is Jamani Investment Limited and Salim Ladack and Nafisha Ladack, as surviving directors. PW1, who apparently instituted this petition in the name of BSC (2000) Ltd is neither its shareholder or director but an employee a revelation which made it imperative for this court to address itself to the competence of the petition.

When invited to address the court on the competence of the application, Mr. Lwambano stated that as per the provision of section 248(1) of the Companies Act, a petition for an administration order can be made by the company, its directors, creditors separately or jointly. He however pleaded that this court find it just to hold that PW1 is eligible to institute the petition as he has been acting director for the company. He implored upon the court to consider the special circumstances of the company, as narrated above

and grant the prayers for the survival of the company which is now of great concern.

I respectfully decline the invitation as it is not only with no limbs to stand on but contradicts the precise position of the law applicable in administration orders. As conceded by Mr. Lwambano, as per section 248 (1) of the Companies Act, a petition for an administration order can only be instituted by the company itself, its directors, or creditors. It states that:

248.-4 1) An application to the court for an administration order shall be by petition, presented either by the company or the directors or by a creditor or creditors (including any contingent or prospective creditor or creditors), or by all or any of those parties, together or separately.

From this precise provision, I am unable to comprehend how PW1 could competently institute a petition for administration on behalf of the company to which he is neither a shareholder nor director. Much as he tried to tried to explain that he and his co- founding members/subscribers passed their shares to the late Samwel Dyelu so that he can hold them on their behalf, the assertion was not supported by any document. It also contradicts the

documentary evidence he produced in court, notably, Exhibit P6 which shows that the company has only one surviving shareholder and Exhibit P1, P2 and P7 which show that PW1 is a mere employee of the company working in the capacity of Acting General Manager.

For these reasons, I have come to the conclusion that, the petition is untenable, devoid of merit and proceed to dismiss it. Order, accordingly.

DATED at DAR ES SALAAM this 19th day of November 2021.

X



Signed by: J.L.MASABO

J.L. MASABO
JUDGE

