

**IN THE HIGH COURT OF TANZANIA**

**MOSHI DISTRICT REGISTRY**

**AT MOSHI**

**MISCELLANEOUS CIVIL CAUSE NO. 2 OF 2020**

**IN THE MATTER OF THE COMPANIES ACT**

**AND**

**IN THE MATTER OF AN APPLICATION MADE UNDER SECTION  
281(1) OF THE COMPANIES ACT, (Cap 212 R.E 2002)**

**AND**

**IN THE MATTER OF COMPULSORY WINDING UP OF MOSHI  
MAASAI EXPERIENCE COMPANY LIMITED**

**AND**

**IN THE MATTER OF**

**INIGO MAMRTINEZ WAZOVEZ .....PETITIONER**

**VERSUS**

**MAASAI EXPERIENCE COMPANY LIMITED .....RESPONDENT**

**JUDGMENT**

10/11/2022 & 8/12/2022

**L.M. Mlacha,J**

The petitioner, Inigo Martinez Wazovez filed a petition under section 281(1) of the Companies Act, Cap 212 R.E 2002 against the respondent, Maasai Experience company Limited seeking an order for winding up of the respondent company, the appointment of an official liquidator to take

acquire various properties such as **Land cruiser registered as T 578 CBB,** **Land Rover registered as T 101 ACS,** tour Equipments and two computers. Things went well up to 2019 when Isaac started to act strangely and evasive towards the company's best interests. He was paid USD 10,000 to settle company debts which included TRA tax and other company expenses for services rendered but failed to account for. He also withdrew USD 6,000/= from the company account and refused to account for. He took all bank cheque books and reported Inigo Martinez Wazovez to Immigration and TRA authorities maliciously leading to his interrogation for a couple of days and hours. He was later discharged freely but Mr. Isaac refused to attend Board meetings nor talk to his fellow director to enable a smooth operation of the company. He refused to cooperate with the company accountant to finalize the 2019 accounts to ascertain TRA liability which until 2020 was USD 23,000/=.

It was submitted further that the petitioner sought to settle the matter through negotiations and arbitration with a proposal that the petitioner be given one car only while leaving the rest of the company assets and the company to Isaac but Mr. Isaac refused. In the circumstance, it was submitted that the directors have failed to work together and make decisions

possession of the assets, properties, books, accounts and records of the company, costs and further orders as the court can deem fit to grant. It was stated in the petition that the respondent company was incorporated on 25/3/2015 as a private company limited by shares with the petitioner and one Isaac Simon Kitindi as its registered directors and shareholders. The company was involved in tour operations, hoteliers, safari promoters, agents and subagents for local and international airlines. Its registered office was in Moshi, Kilimanjaro region.

That, post incorporation, the company witnessed the acquisition of various properties including motor vehicles Land cruiser with registration No. T. 578 CBB, Land Rover T. 101 ACS, Tour Equipments and two computers. That on divers' dates in 2019 Mr. Isaac Simon Kitindi started to act strangely. He was paid USD 10,000 to settle company debts including taxes to TRA and other company expenses but to date he has not submitted any receipts for accounting purposes. He has also withdrawn USD 6,000 from the company account but has refused to account for. He has taken all the bank books.

It was stated further that Mr. Issac Simon Kitindi with malicious intent made false and malicious reports to the Immigration and Tax officials against the petitioner who is a foreign national. On account of these false reports, the

petitioner was subjected to interrogations by the authorities for a number of days and for several hours. Further the said Isaac Simon Kitindi has refused to co-operate with the company accountant to finalize the 2019 accounts so as to ascertain the TRA liability for to date the company has accumulated a debt amounting to USD 23,000. He does not wish to talk or attend Board meetings so as to create movement of company affairs. That in consequence of the behavior of the said Isaac Simon Kitindi, the two parties cannot work together thereby rendering company operations impossible.

The respondent filed a reply to the petition and denied the claims. It was stated in the reply that the petitioner has failed to include another vehicle, Toyota Land cruiser Hard Top with registration No. T424 ADK. The second director, Mr. Isaac Simon Kitindi put the petitioner to strict proof and prayed the court to dismiss the petition with costs. Side with the Reply was a preliminary objection which reads thus: -

1. That this petition lacks missing citation as provided for under section 281 of the Companies Act.
2. That the petitioner fails to follow the rules that accompanies the main Act.
3. The respondent has no locus standi and does not exist.

4. That the petitioner lacks certificate of compliance as per order 102 of the Companies (Insolvency) rules.

It was heard, found to be baseless and dismissed. Somewhere in the course, the court received a report from TRA signed by Mr. Aziz Rajab for Regional Manager - Kilimanjaro which showed that the respondent company has a tax liability of **Tshs 168,374,307/=** which included the principle tax and penalties for the period from 2019 up to 2022. The court received the tax from Mr. Azizi in writing. Attempts to engage the parties to sit and settle the tax liability and proceed to work together failed. It was then decided that the petition should proceed for hearing by written submissions and everything to be resolved by the court.

Advocate Elizabeth Minde appeared for the petitioner while the respondent had the services of Advocate Diana Solomoni. It was submitted for the petitioner that the company started with a capital of Tshs 10,000,000/= divided into 1,000 shares, each Tshs 10,000/= as shown in para 5 of the Memorandum of Association. Each director held shares. Inigo held 60 shares while Isaac held 40 shares as stipulated in para 7 of the Memorandum of Association. Counsel submitted that the company operated very well since its incorporation under the direction of the two directors. It was able to

in the best interest of the company thereby calling up on the court to issue orders of winding up by the court under section 279(1) of the Companies Act, cap 212.

Referring section 279(1) (e) of the Act, counsel submitted that a company may be wound up by the court if the court is of the opinion that it is just and equitable that the company should be wound up. Counsel for the petitioner went on to submit that it is just and equitable to wind up the company because the directors of the company are not in personal good terms and have defaulted in holding statutory meetings and filling annual returns since 2019. Counsel referred the court to **Mbembetu Ndikwege v. Frambe company Ltd**, High Court (Commercial Division), Commercial Case No. 56/2009 where it was said that the phrase '*just and equitable*' appearing in section 279(1)(e) of the Companies Act involve situations like this where the two sole shareholders and directors of the company are not in talking terms and have even failed to comply with statutory requirements. In such a situation, counsel submitted, the court is empowered to make winding up orders.

Reference was made to the case of **Ernest Andrew Chitalika v. Francis Philip Temba** [1996] TLR 287 where the court made winding up orders

the company's business in the future such that the company's operations in the future will not be able to be conducted in any commercially viable and sensible way.

(iii) There is serious and operative stage of mistrust and disharmony between incorporators.

(iv) Where the relationship between incorporators has completely broken down such that the company could not continue to function meaningfully.

(v) Where the foundation of the whole agreement that was made, that the incorporators would act as reasonable men with reasonable courtesy and reasonable conduct in every way towards each other and there has been a breakdown in communication.

(vi) There is justifiable lack of confidence in the conduct and management of the company's affairs.

Counsel submitted that in this case the company has not been properly managed as directors are not in good terms, they have failed to reconcile, they have lost trust in each other and one of the directors (Isaac) have went further to report the other director (Inigo) maliciously to Immigration and TRA. Further, they have failed to hold statutory meetings. Based on what

'Winding up of a company is a serious matter which should be treated with the serious it deserves. Before a court makes a winding up order therefore, it must be satisfied that all the pre requisite procedural steps have been taken. She argued the court to dismiss the petition.

I will start with what has been brought by the respondent counsel in her submission that the petition was filed contrary rule 105 and 102 of the Insolvency Rules. Reading through the ruling of my brother Mwenempazi, J I have seen that this aspect was dealt in that ruling and there is already a decision. That being the case, I cannot examine the matter again. I will leave that to the Court of Appeal in case an appeal is preferred on the points. I will only add that after the decision of this court, it was not proper to raise it again at a later stage.

Next is on the merit of the petition. It is not disputed that the company has two shareholders who are also the directors. It is not disputed that they are now in bad terms each accusing the other of stealing company money. They have developed a bad blood and have been that way since 2019 to date. The operations of the company are now at a standstill with missing cheque books. Each is accusing the other of stealing the cheque books. The company is now having a huge tax liability amounting to Tshs 168,374,309. The



had the view that the petition be dismissed. On the other hand, I cannot issue a winding up order and end up there. I have consulted the Deputy Registrar who has given me a list of people who have experience in the field in Moshi. One of them is advocate Hellen Mahuna. This is a small company which we are told have 2 cars, some tour equipments and two computers. It is having a bank account and missing cheque books. I think that it can be liquidated within a short period for it will involve only the taking into possession of the two cars; **Land cruiser T 578 CBB and Land Rover T 101 ACS** and any other company assets which can be found and selling them to raise money pay the TRA **Tshs 168,374,309/=**. In the event I make the following orders:

1. The company by the name of MAASAI EXPERIENCE COMPANY LIMITED is wound up by an order of this court made under section 291(1) (e) of the Companies Act.
2. In the exercise of powers vested on me under section 294 of the Companies Act, I appoint advocate **Hellen Mahuna** to be the liquidator of the company for a period of 3 months within which she shall, subject to the control of the court, exercise all the powers

because the directors were not in talking terms and each accused the other.

Further reference was made to **Joelle Dalian v. Albero Italian Restaurant & Hotel Company Limited**, Mylere Dimitri [2021] Tanzilii page 6 where a winding up order was made due to serious differences or misunderstanding between shareholders/directors which hindered smooth and efficient running of the company as a commercial concern.

Counsel for the petitioner took the court to other Commonwealth jurisdictions in the case **Tomanovle v. Argyle Pty Ltd** [2010] NSWSC where Austin J had the opinion that the element that must generally be satisfied is that, the "*break down*" must be of the nature and degree that materially frustrates the commercially viable and sensible operations of the company in accordance with the incorporator's expectations and any loss of confidence must be justified. Therefore, for the company to be wound upon ground of just and equitable, the following elements must be observed: -

- (i) Where a working relationship predicated on mutual cooperation, trust and confidence has broken down such that the continuation of such an association could be a futility.
- (ii) Where there is no real prospect that the parties can work together sensibly to reach necessary agreement to be able to conduct

she had submitted, she prayed the court to issue a winding up order in respect of the respondent company. She prayed for costs.

It was submitted for the respondent company that; indeed, the two directors are in difficulties which have affected the operations of the company. But counsel for the respondent proceeded to deny that Mr. Isaac took USD 16,000. She said that Mr. Inigo is the one who had been withdrawing company funds freely and moved to start another company in Arusha by the name of **MHUSIKA AFRICA TRAVEL LIMITED**. He has also confiscated the cheque books. The company which registered profits in 2018 to the tune of Tshs 182,775,158/- is now in huge debts, she said.

Apart from admitting the difficulties caused by misunderstanding of directors who accused each other for misuse of company funds and are not in talking terms, counsel submitted that his client did not support the petition. She said that the petitioner has failed to file and serve a list of appearances as mandatorily required by rule 105 of the Companies Insolvency Rules. He has also failed to comply with rule 102 (1), (2) and (3) which has a requirement to file a certificate of compliance five days before the hearing. Further reference was made to the case of **In the matter of African Safari Club Ltd, Winding up clause No.1 of 2005 EKLK** where it was observed that,

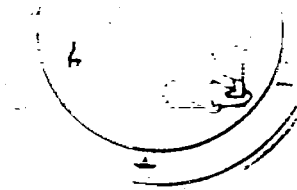
cheque books are nowhere to be seen and none of the two directors is ready to disclose what is in the bank accounts. It appears that there is little or no funds. All efforts to cause them sit and settle their differences have failed. No body is interested in the company due to its tax liability. None of them have plans on how to pay the debt and revive the company. In the light of the decision of the case of **Tomanovle** (supra), I am satisfied that, the working relationship based on mutual cooperation, trust and confidence between the two directors has broken down such that they can no longer sit and work together. I see no prospect that the parties can work together sensibly to reach an agreement to do anything. There is serious mistrust and disharmony between them. The foundation of the whole agreement that was made, which had held them together has breakdown irreparably. This calls for a winding up order.

In the exercise of the powers of this court contained under section 279 (1)(e), I have the opinion that it is just and equitable that the company by the name of MAASAI EXPERIENCE COMPANY LIMITED, herein the respondent, be wound up by an order of this court, as I hereby do.

The petitioner pleaded that a liquidator be appointed but did not come out with a proposal. The respondent did not have any suggestion because they

enumerated under sections 299, 300, 301, 302, 303, 304, and 306 of the Companies Act.

3. The liquidator upon realizing all the properties of the company and paid the TRA debt, Tshs 168,374,309/= and has distributed the final dividends, if any, to the contributories and made a final return, shall cause and file in court a report of his accounts for his release as per section 307 of the companies Act.
4. It is ordered so. No order for costs.



**L.M. Mlacha**

**Judge**

**8/11/2022**

**Court:** Judgment delivered. Right of Appeal Explained.



**L.M. Mlacha**

**Judge**

**8/11/2022**