

IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM

MISC. CIV. APP.NO. 21 OF 2003

RENE VOGT t/a TOFCO SA.....1ST PETITIONER
FRANK L. MAREALLE.....2ND PETITIONER
VERSUS

TANADE.....1ST RESPONDENT
PARASTATAL SECTOR
REFORM COMMISSION.....2ND RESPONDENT

R U L I N G

KIMARO, J.

Three Points of preliminary objection have been raised in response to a winding up petition filed by Mr. Maira, Advocate.

The preliminary points raised are as follows:

" 1. That the petition is incurably defective because the applicant has not filed an affidavit as required by the Companies Winding Up Rules, 1929.

2. That the petition is improperly before the court as the 1st Respondent is already in the process of being wound up and is already under the official receivership of the 2nd Respondent.

3. That the 1st Applicant lacks locus standi and the applicants have no cause of action against the respondent."

The preliminary objection was raised by Mr. Maige, Advocate (from SABAS KIWANGO & COMPANY ADVOCATES) for the respondents.

The petition has been filed under Section 167 (e) and 168 of the Companies Ordinance, Cap.212 and the Winding Up Rules, 1929.

It is pleaded in the petition that the petitioners are creditors of the 1st Respondent. The role taken by each petitioner is pleaded as follows:

" That the petitioners are creditors of the Respondent in that the 1st Petitioner has invested in the construction of the company and the 2nd Petitioner has given the company a loan."

The hearing of the preliminary objection was pursued by written submissions.

Mr. Maira acknowledged the first point that the petition is not verified as required by Rule 29 of the

Winding Up Rules 1929. The provision of the said rule requires a petition to be verified within four days from the date of the filing of the petition. The preliminary objection was raised on 21/07/2003. The petition was filed on 24/06/2003. At the time the preliminary objection was raised, twenty eight days had lapsed.

However, Mr. Maira is of the opinion that the defect is curable. Mr. Maira cited Rule 223 (1) of the Companies (Winding Up) rules, arguing that no formal defect can invalidate proceedings and so the court has power to order rectification of the defect. The cases of **Re African Marble Company Ltd Misc Civil Application No.128 of 1968** (High Court) (Unreported) (A decision of Hon. Judge Mapigano as he then was) and **East African Development Bank V Godes Ltd** (1989) TLR 122 (Bahati J as he then was) were cited by Mr. Maira to support his submission that the defect of not verifying the petition is curable and the court can order rectification of the defect. I agree with Mr. Maira that the defect is one which can be cured by rectification of the mistake.

On the second point of preliminary objection, the submission by Mr. Maige is that the 1st respondent is under statutory receivership of the 2nd Respondent because of being declared a Specified Public Corporation

under Section 43 of the Public Corporations 1992, as amended by Act No.16 of 1993. Having been declared specified, it became under statutory receivership of the second respondent, pursuant to the provisions of Section 43(1)(a) of the Public Corporation Act, 1992 as amended.

The case of **Mukubangi Vs Tanzania Railways Corporation** Civil Case No.300 of 1995 (High Court) (unreported) was cited to show the effect of specification of a Public Corporation. The specification is equivalent to a receiving order under the Bankruptcy Ordinance and so the 2nd Respondent automatically became the Official Receiver of the 1st Respondent.

Mr. Maige submitted further that as a Statutory Receiver, the PSRC has powers under section 43 (2) (a) (i) of the Public Corporation Act, 1992 as amended, to determine whether an insolvent public corporation should be liquidated or not. Mr. Maige said since the 1st Respondent was proved to be insolvent, a decision was made by the 2nd Respondent to invite members of the public to bid for the purchase of the assets of the 1st Respondent in the process of liquidation a fact which the petitioners are well aware of.

Mr. Maige said that what the petitioners ought to have done after the specification of the 1st Respondent was to list their names with the 2nd Respondent for realization of their debt. Instead of complying with the above requirement, the petitioners filed these proceedings. Mr. Maige observed that this is not only an abuse of the court process but is also likely to create confusion and inconvenience other creditors of the 1st Respondent and to the 2nd Respondent as a Liquidator cum Official Receiver.

The response by Mr. Maira on this point was brief. While he does not dispute the fact of the specification of the 1st Respondent, he is of a view that the statutory receivership of the 2nd Respondent does not confer power on the 2nd Respondent to automatically wind up the 1st Respondent and that the 1st respondent is not under liquidation. According to Mr. Maira, the invitation to bid for the assets of the 1st Respondent is not evidence of winding up.

Section 39 (2) of the Public Corporation Act 1992 was cited to show the powers vested on PSRC in relation to Specified Public Corporation. The conclusion made by Mr. Maira is that the statutory receivership of the 2nd Respondent does not automatically place a specified

public corporation to winding up. Mr. Maira said further that even if the 1st Respondent fell under voluntary winding up, it is not a bar to the petitioners as creditors to have it wound up as provided by Section 251 of the Companies Ordinance.

While Mr. Maige agrees that the PSRC can initiate winding up proceedings in respect of a specified public corporation, his opinion is that, such a step need not necessarily be taken. He is of a view that the PSRC has a wide range of powers including liquidation of specified public corporation without necessarily petitioning to the court for the winding up.

Admittedly, Section 39 (2) of the Public corporation Act, 1992 as amended allows the PSRC to petition for the winding of a Specified Corporation. However, the wording of the said provisions show that it is not a mandatory requirement. The word used is may. This means that filing of proceeding for the winding up is optional on the part of the PSRC.

Mr. Maige submitted correctly that the powers given in Section 39(2) are additional powers to those given by section 43 (2).

Reading the provisions between lines, I entirely agree with Mr. Maige that the said provision confers an automatic right on the PSRC to liquidate an insolvent specified public corporation without necessarily petitioning in court for the winding up. Section 43 (1) (a) and (b) is very clear. Once a public corporation is declared specified, PSRC automatically becomes a receiver with all powers and rights just like a Receiver who is appointed under the Bankruptcy Ordinance. Given the position of the law as displayed in section 43 (1) (a) and (b), no petition for winding up of a specified public corporation can be filed by any person in a court of law. The second preliminary objection is upheld.

As for the third and fourth preliminary objection, the documents which are before this court speak by themselves. The Joint venture Agreement which gave birth to Tanzania Naturals Development Company Ltd (TANADE) was made between Tanganyika Pyrethrum Board ("TPB") and TOFCO S.A ("TOFCO"). The name of Rene VOGT t/a TOFCO S.A does not appear in the said agreement. The explanation given by Mr. Maira that the 1st petitioner was a shareholder and a director in TOFCO S.A and that he placed TOFCO S.A under Bankruptcy proceedings in Switzerland to recover payment due to him after majority shareholder had decided to buy the

1st Petitioner but failed to pay him, will not assist him. The agreement under which the first respondent was formed is very clear. The other explanation given to support his recognition cannot in law be accepted. The formalities required have not been complied with.

Although Mr. Maige combined the third and fourth preliminary objection he said nothing at all in respect of the fourth point. I assume that he abandoned it.

Having exposed the position in law in respect of specified public corporations that no one can petition for the winding up, of such corporations the preliminary objection is upheld and the petition is dismissed with costs.

N.P. KIMARO,

JUDGE

19/09/2003

19.09.2003

Coram: Hon. N.P.Kimaro, J.

For the 1st Petitioner } Absent
For the 2nd Petitioner }

For the 1st Respondent } Mr. Maige
For the 2nd Respondent }

CC: Ngonyani.

Court: Ruling delivered today.

Order: The 2nd preliminary objection is upheld and the petition is dismissed with costs.

N.P.KIMARO,

JUDGE

19/09/2003

I Certify that this is a true and correct copy of the original signed by
.....
.....

Commercial Court

Dar es Salaam

Dated

19/9/03

1,859 – words.