

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

**MISCELLANEOUS COMMERCIAL CAUSE NO.62 OF 2013**

**AFRISCAN GROUP (T) LIMITED.....APPLICANT**

**VERSUS**

**DAVID JOSEPH MAHENDE.....1<sup>ST</sup> RESPONDENT**

**THE REGISTRAR OF COMPANIES.....2<sup>ND</sup> RESPONDENT**

*Oral Hearing: 22/10/2014*

*Last Order: 10/12/2014*

*Ruling: 19/12/2014*

*Appearances:*

*For the Applicant, **Mr. Rutabingwa**, Advocate*

*For the 1<sup>st</sup> Respondent, **Mr. Mbamba**, Advocate*

*The 2<sup>nd</sup> Respondent did not enter appearance*

**RULING**

**MAKARAMBA, J.:**

This is a ruling on application to show cause why a caveat **DAVID JOSEPH MAHENDE**, the 1<sup>st</sup> Respondent (the caveator), lodged at the Companies Registry in the Office of the Registrar of Companies, on the 7<sup>th</sup> June 2013 in respect of ***AFRISCAN CONSTRUCTION COMPANY LTD*** should not be removed.

The application has been brought under section 2(1) (3) (5) of the *Judicature and Applications of Laws Act* [Cap.358 R.E 2002] and section 95 of the Civil Procedure Code [Cap.33 R.E 2002]. It is supported by the affidavit of one **ULF NILSSON**, a Shareholder and Managing Director of the Applicant's Company. In the application, the Applicant is seeking from this Court for the following orders:-

- 1. That the 1<sup>st</sup> Respondent, David Joseph Mahende, the caveator, show cause why the caveat lodged at the Companies Registry on 7<sup>th</sup> June 2013 in respect of AFRISCAN CONSTRUCTION COMPANY LTD should not be removed.*
- 2. That the said caveat be removed and the order be served upon the 2<sup>nd</sup> Respondent Registrar of Companies for necessary action.*
- 3. That the 1<sup>st</sup> Respondent be ordered to pay the costs of the application*

According to the sworn affidavit of **ULF NILSON** in support of the application, the resolution to challenge the caveat lodged at the Companies Registry in the Office of the Registrar of Companies at BRELA by Mr. **DAVID JOSEPH MAHENDE**, the 1<sup>st</sup> Respondent (the caveator), concerning the affairs of **AFRISCAN CONSTRUCTION COMPANY LTD** in which **AFRISCAN GROUP (T) LIMITED**, the Applicant herein, holds 40 shares and therefore interested therein, was reached at an extra-

ordinary meeting of the Board of Directors of the Applicant's Company, **AFRISCAN GROUP (T) LIMITED** on the **19<sup>th</sup> of July, 2013**.

**Mr. DAVID JOSEPH MAHENDE**, the 1<sup>st</sup> Respondent (the caveator), is among the shareholders of **AFRISCAN CONSTRUCTION CO.LTD**. On the 7<sup>th</sup> June, 2013, **Mr. DAVID JOSEPH MAHENDE** filed a caveat at the Companies Registry (BRELA), to the effect that, nothing should be done to the records of the **Afriscan Construction Company Ltd, the Company**, pending what the caveator referred to as "Company Dispute" allegedly pending in court.

**Afriscan Construction Company Ltd**, the Company, was incorporated on **30<sup>th</sup> October, 1990** under a Certificate of Incorporation No. 18673 with three founding members; **David Joseph Mahende** (the 1<sup>st</sup> Respondent herein), **Saidi Msangi** and **Afriscan Group (T) Ltd** (the Applicant herein). It is deponed further in the affidavit of **ULF NILSON** that, from the time of incorporation, there has been various changes in the shareholding and directorship and most of the filed documents at BRELA are yet to be verified at the said Companies Registry. The documents show some anomalies which are to be addressed upon urgently for proper record. It is deponed further that, currently, the actual shareholding in **Afriscan Construction Company Ltd** is comprised of the 1<sup>st</sup> Respondent, **David Joseph Mahende**, **Farida Nilson** and the Applicant Company, **Afriscan Group (T) Ltd** and that, this is one of the matters requiring regularization at BRELA.

It is deponed further that since the 1<sup>st</sup> Respondent lodged the caveat at BRELA, the 1<sup>st</sup> Respondent has not taken any steps to justify the caveat as

per the directions of the Registrar of Companies. It is deponed further that, there is no pending case in Court in respect of disputes (if any) among the shareholders and directors of **AFRISCAN CONSTRUCTION CO. LTD.** Rather, what is in Court is execution proceedings of an award granted by this Court in favour of **AFRISCAN CONSTRUCTION CO. LTD** against the Government. It is also deponed that, the proceeds of the award sought to be executed when determined may not be released unless the status and records of **AFRISCAN COSTRUCTION CO. LTD** at BRELA are in order.

The 2<sup>nd</sup> Respondent has been impleaded in these proceedings as necessary party, because of its role as the custodian of all matters relating to companies and as such the orders sought in the application are to be directed at the 2<sup>nd</sup> Respondent. It is in the interest of the Applicant that, the caveat be removed so as to allow the necessary steps to be taken to formalize the records of the Company at BRELA.

Submitting in support of the application Mr. Rutabingwa learned Counsel for the Applicant argued that, it was the intention of the caveator that, nothing should be done to the company records pending determination of the company disputes by courts of law. According to Mr. Rutabingwa, the caveat was a mere administrative notification to the Registrar of Companies without any force of law since under the Company laws there is no provision recognizing a caveat. The caveat does not show which disputes are pending in Court, Mr. Rutabingwa added.

Mr. Rutabingwa submitted further that, the grounds that defeat the existence of the caveat are such that, a company cannot place a caveat on

its business operations and that there were no pending disputes in Court at the time of lodging the caveat.

Mr. Rutabingwa submitted further that, the annual returns of the Company for the years 2005, 2008, 2009, 2011 and 2012 have not been registered due to irregularities in the submitted annual returns. The current status of the Company cannot be confirmed until when the irregularities are rectified by filing amended annual returns. With a caveat all of the above stated irregularities will not be rectified, Mr. Rutabingwa further submitted.

In buttressing his arguments, Mr. Rutabingwa took inspiration from the land laws on caveat recognized under section 78(6) of the Land Registration Act, [Cap. 334 R.E. 2002], where a notice is given to a caveator upon a presentation of a deed for registration and on expiration of one month that caveat lapses unless there is an order of the High Court directing otherwise. According to Mr. Rutabingwa, a caveator therefore was expected to take steps in Court to protect the caveat. Since the caveator has not done anything to maintain the caveat, it should be considered to have been expired.

In reply Mr. Mbamba referred this Court to **Black's Law Dictionary 8<sup>th</sup> Ed** at page 236 where a caveat is defined as "*a formal notice or warning given by a part to a Court or Court Officer requesting a suspension of proceedings.*" Mr. Mbamba submitted further that the term traces its origins from Latin which means a "*warning or proviso.*" Mr. Mbamba surmised that, a caveat is a notification of interest of a person and therefore nothing should be on the company's record.

Mr. Mbamba submitted further that, changes should not be done in the affairs of **Afriscan Construction Company Ltd** because there is a dispute and disagreement between members of the Company. According to Mr. Mbamba, **Commercial Case No.86 of 2013 and Commercial Case No. 87 of 2013** are pending disputes on the shareholding status of the Applicant and the 1<sup>st</sup> Respondent. Buttressing his argument that so long as there are pending disputes and disagreement between members of the Company nothing should be done until such matters are determined, Mr. Mbamba sought assistance by way of analogy by citing to this Court the decision in the case of **AMINA AMRI V. AHMED MABROUK, PC. Civil Appeal No. 85 of 1990** (unreported) in which it was held that;

*"Since the issue whether or not the suit house is part of the estate of Tiba Salum or that of Amri Hussein was subject to determination in the pending appeal, it was logical and reasonable to assume that apart from the appellant, nobody else could have attempted to dispose of the house. So long as the suit house was a subject of the pending appeal, the objector is a stranger in the suit...At the time of the alleged sale the vendors were aware that the demised house was a subject matter of pending court litigation. Hence the purported sale agreement cannot be said to be bona fide as it has the effect of frustrating the court process. The controversy over the ownership of the suit house is still to be determined by the Court. Any act which interferes with due process of law is illegal."*

Mr. Mbamba submitted further that, there are forms submitted to the Registrars of Companies requesting changes of shareholding status of the Directors. However, in his response the Registrar of Companies vide its letter dated **9<sup>th</sup> July, 2013** pointed out some anomalies which were to be rectified by the company including; (1) the filing date appearing on the annual return was incorrect; (2) there was no form submitted in respect of appointment of the Company Secretary "Matena Associates" appearing in the forms; (3) the annual return forms were incomplete as they do not bear the residential addresses, date of birth, class shares; (4) the annual returns have different physical address for the office to the one which is on record; and (5) some returns have different position of directors and shareholding status. Mr. Mbamba submitted further that there is a caveat which Mr. David Mahende lodged at the Companies Registry on the 7<sup>th</sup> June, 2013 in respect of the directors and shareholders of the Company which needs to be addressed between themselves or by the court (if need be) before any rectifications are made in the Company records. Therefore, Mr. Mbamba surmised, the law was not complied which is why the Registrar of Companies rejected to effect the requested changes.

In rejoinder Mr. Rutabingwa submitted that, the application does not ask the Court to make an order against the Registrar of Companies to effect some changes in the shareholding structure of the Company, rather to remove the caveat from the Register of Companies. According to Mr. Rutabingwa changes on the records of the Company are to be effected subject to some issues to be resolved.

Mr. Rutabingwa submitted further the removal of the caveat is vital because there are some matters which need to be recognized by the Registrar, for instance, the Office of the Company, which the 1<sup>st</sup> Respondent unilaterally changed and transferred records at the Office of Marando and Mnyele Advocates. Secondly, as per the direction of the Registrar, there some documents which need to be regularized. Thirdly, the certification of some of the Company's documents cannot be done in the presence of the caveat. Fourthly, there are some records missing in the Company's record, which the Applicant was intending to submit them to the Registrar of the companies.

Replying to new issues raised by Mr. Rutabingwa in his rejoinder submissions, Mr. Mbamba submitted that, matters relating to the regularization of documents are not stated in the affidavit in support of the application.

In the present application, the Applicant seeks for orders that the 1<sup>st</sup> Respondent show cause why the caveat the 1<sup>st</sup> Respondent lodged at the Companies Registry on the 07<sup>th</sup> June 2013 in respect of AFRISCAN CONSTRUCTION COMPANY LTD should not be removed.

The record shows that on the **7<sup>th</sup> May, 2013**, the 1<sup>st</sup> Respondent lodged a "caveat" in the form of official letter. However, on the 7<sup>th</sup> June, 2013, the 1<sup>st</sup> Respondent lodged another letter (the so called caveat) to rectify some errors in its earlier caveat dated 7<sup>th</sup> May, 2013. The purpose of the caveat according to the 1<sup>st</sup> Respondent was to notify the Registrar of Companies that nothing should be done to the Applicant Company's records pending determination of disputes pending in this Court. The



pertinent question for determination is whether in the eyes of the law the so called caveat has any force of law. Mr. Mbamba cited to this Court **Black's Law Dictionary 8<sup>th</sup> Ed** in which at page 236 defines the term caveat as "*a formal notice or warning given by a part to a Court or Court Officer requesting a suspension of proceedings.*" A caveat must therefore be a formal notice, which means that it must be based on law. As Mr. Mbamba rightly submitted and as Mr. Rutabingwa would agree, the Companies Act, Cap.212 of the laws of Tanzania, does not make provision for caveat. In the event therefore, the so called caveat which was made by way of a letter was made informally. It does not have any force of law.

Furthermore, the so called caveat was lodged at the Registry of Companies on the 7<sup>th</sup> June, 2013 and not in this Court. If we are to go by the definition in **Black's Law Dictionary 8<sup>th</sup> Ed** at page 236 that a caveat is *a formal notice or warning given by a part to a Court or Court Officer requesting a suspension of proceedings*, the argument by Mr. Mbamba that the caveat was lodged pending determination of the proceedings in **Commercial Cases No. 86 and 87 of 2013** which were both filed in this Court on the 25<sup>th</sup> July, 2013 is incorrect.

As the court record would reveal, **Commercial Case No. 87 of 2013** and **Commercial Cases No. 86 of 2013** are disputes on the shareholding status between **Afriscan Group (T) Limited, David Joseph Mahende and Said Msangi** in **Afriscan Construction Company Ltd. Commercial Case No. 87 of 2013** is between **Afriscan Group (T) Limited and Said Msangi**. In that case, Afriscan Group (T) Limited, the Plaintiff, claims against Mr. Said Msangi, the Defendant, is for

a declaration that, Mr. Said Msangi had on 15<sup>th</sup> September, 2000 sold and transferred twenty 20 shares in the Company known as **Afriscan Construction Co. Ltd.** Mr. Said Msangi therefore ceased to be a member in **Afriscan Construction Co. Ltd.** and could no longer serve as a director of **Afriscan Group (T) Ltd.** However, in his Written Statement of Defence, Mr. Said Msangi vehemently disputed to have sold or transferred the alleged 20 shares or any share to any person. Mr. Msangi maintained that he is still holding 20 shares in **Afriscan Group (T) Ltd.** It is without any doubt that, on the above facts, there is a dispute in the shareholding status between the shareholders and/or directors of **Afriscan Construction Company Ltd.**

The court record in **Commercial Case No. 86 of 2013** which is between **Afriscan Group (Tanzania) Limited and David Joseph Mahende**, *Afriscan Group (Tanzania) Limited* is claiming for a declaration against **Mr. David Joseph Mahende** that, the Defendant had on 15<sup>th</sup> September, 2000 sold and transferred ten (10) shares in the Company known as **Afriscan Construction Co. Ltd** as result of which the Defendant remained with only thirty (30) shares out of his original forty (40) shares. However, in the Written Statement of Defence, Mr. David Joseph Mahende vehemently denied to have sold the alleged 10 shares or any shares to **Afriscan Construction Co. Ltd.** Mr. Mahende maintains that he still holds 40 shares in **Afriscan Group (T) Ltd.**

As it could be gathered from the above facts, and as Mr. Mbamba rightly submitted, there are pending matters in this Court regarding the shareholding status of the members in the two companies namely; the

**Afriscan Group (T) Limited** and **Afriscan Construction Company Ltd** respectively. Thus, even though the so called caveat has no force of law, it is illogical for the Registrar of Companies to proceed with confirmation of the position of the shareholding status or directors as requested by the Applicant's company given the pending matters in this Court regarding the shareholding status of the two companies, **Afriscan Group (T) Limited** and **Afriscan Construction Company Ltd** respectively.

I have noticed however that, the caveat by the 1<sup>st</sup> Respondent was lodged against the affairs of **Afriscan Construction Company Ltd**. The extra-ordinary meeting of the Board of Directors of the Applicant's Company, **Afriscan Group (T) Limited** which was held on the **19<sup>th</sup> July, 2013** resolved to challenge the affairs of **Afriscan Construction Company Ltd**. In the present application, the Applicant, **Afriscan Group (T) Limited** is seeking for orders that, the caveat be removed against the affairs of **Afriscan Construction Company Ltd**. Rather curiously though, **Afriscan Construction Company Ltd** is neither a party to this application nor to **Commercial Cases No. 86 and 87 of 2013**. It seems to me that the parties are busy discussing the affairs of **Afriscan Construction Company Ltd**, a Company which is not present in Court. Both the Applicant, **Afriscan Group (T) Limited** and the 1<sup>st</sup> Respondent, **Mr. David Joseph Mahende** are shareholders and directors of **Afriscan Construction Company Ltd**, which in the eyes of the law has separate corporate existence from its shareholders. The present suit is not an interpleader one, where the affairs of a stranger could be discussed and determined by this Court. It is only a matter of being on the cautious side

that a court of law should not be making order(s) against the affairs of a person not present in Court and this case, **Afriscan Construction Company Ltd**, lest such orders run the risk of not capable of being enforced thus becoming a mockery of justice thus putting this Court into disrepute. It is rather difficult also for this Court to make orders against the 2<sup>nd</sup> Respondent, the Registrar of Companies, to take action against a Company, **Afriscan Construction Company Ltd**, not in Court and neither a party to the present application.

In the whole and for the above reasons, the application fails. It is hereby struck out with costs.

A handwritten signature in black ink, appearing to read 'R.V. Makaramba', is written over a horizontal dotted line.

**R.V. MAKARAMBA**

**JUDGE**

**19/12/2014**

Ruling delivered this 19<sup>th</sup> day of December, 2014 in the presence of Mr. Rutabingwa, Advocate for the Applicant and M/s Aziza Msangi, Advocate for the 1<sup>st</sup> Respondent and in the absence of the 2<sup>nd</sup> Respondent.

A handwritten signature in black ink, appearing to read 'R.V. Makaramba', is written over a horizontal dotted line.

**R.V. MAKARAMBA**

**JUDGE**

**19/12/2014**

**Word count: 2957**