IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR-ES-SALAAM
MISC. COMMERCIAL CAUSE NO.48 OF 2021

IN THE MATTER OF COPY CAT TANZANIA LIMITED
(hereunder "the Company"),
AND
IN THE MATTER OF THE COMPANIES ACT (CAP.212 R.E 2002)
AND
IN THE MATTER OF A PETITION FOR ADMINISTRATION ORDERS BY THE COMPANY
BETWEEN
COPY CAT TANZANIA LIMITED.....PETITIONER
VERSUS
NATIONAL HOUSING CORPORATION .....1ST RESPONDENT
AZANIA BANK LIMITED .....2ND RESPONDENT
Date of the Last order: 25/04/2022
Delivery of the Ruling: 19/05/2022

JUDGEMENT

NANGELA, J.:

This Petition was filed under section 247(1) (a) and (b); (3) (a) and (c) and section 248 of the Companies Act, 12 of 2002, Cap.212 [R.E 2002]. The Petitioner seeks for the following orders:

1. That, this Court be pleased to appoint Advocate Alex Gaithan

Mgongolwa of P.o.Box 72070 as Administrator of the Company.

2. Any Other order or relief that this honourable Court may consider just and fit to grant.

The facts of this matter are as follows. Since 1960s, the Petitioner was incorporated and registered as a Company under the Companies Act, Cap.212 R.E 2002 to deal with a business of importing and distributing office accommodation equipment, security equipment and ICT-related products within Tanzania.

Since 2018 and more so in 2020, the Petitioner started to experience financial constraints which were further exarcebated by the outbreak of the Covid-19 Pandemic. From that time, the total liabilities of the Company rose over and above its assets value by **TZS 11,532,431,000/-.** It is alleged, however, that, although the Company is still a going-concern and continues to comply with the various legal requirements, it has not been able to meet its budget requirements or pay its creditors.

It is alleged that, the Company's financial statements for the three consecutive years i.e., 31st December 2018, 31st December 2019 and 31st December 2020 show that the Company operated under loss.

In December 2018, it is averred that, the Company had a net loss of **TZS 2,385,540,000/-** compared to the loss of **TZS 2,672,990,000** in 2017 and that, in 2019; it registered a loss of **TZS 3,771,833,000/-** as per the financial statements, compared to **TZS 4,385,450,000**.

Further, the financial status of the Company is said reveal that, the assets of the company as at 31st December 2018 amounted to **TZS 25,739,945,000/-** and the losses accumulated as per the Financial Statements dated 31st December 2018 were **TZS 14,774,380,000.00/-.**

Besides, the assets as at 31st December 2019 stood at **TZS 26,920,129,000/** while the liabilities as at 31st December 2019 stood at **TZS 38,452,560,000.00** and, that, the Company accumulated losses for the year 2019 stood at **TZS 18,396,313,000.00**, and, hence, currently

experiencing difficulties in scheduling its debt repayment obligations.

Following the recommendations and observations made by its auditors, the Petitioner appointed Crowe Tanzania, a renowned international audit firm to assess the market value of the Petitioner's shares the aim being to issue new shares as a way of increasing her capital.

The appointed firm had valued the Petitioner at an estimated value of **TZS 26,173,430,850.00** as at 31st July 2018 according to the valuer's report (attached to the Petition as **Annexure "CC-4"**).

It has been submitted that, on 28th December 2018, the Petitioner took a Loan worth TZS 3,500,000,000.00 to boost its working capital, but currently the Petitioner has been unable to service it, despite demands from the lenders (Mauri-Tan Holdings) who has filed a Petition for winging up at the High Court Commercial Division, (i.e., Commercial Cause No.33 of 2020. That case was disposed of on 23rd October 2020 in favour of two interested parties, Azania Bank Ltd and National Housing Corporation.

It has as well been disclosed that, the Company has an overdraft facility with Azania Bank Limited who, as a secured creditor, has since seized and disposed by public auction all the collateral assets of the Company, including its office premises which were disposed by public auction on diverse dates, between 26th July 2020 and 31st July 2020.

According to the Petitioner, the filing of the winding up petition and the publication for it had serious blows on the performance of the Petitioner as its customers took unilateral actions and terminated prior arrangements while other effects being inability to buy new stocks and loss of goodwill. It is the Petitioner's belief that the winding up actions were illegal and same can be challenged by an administrator proposed by the Petitioner, and , that, the same is intending to recover some of the auctioned properties.

It is against that background that the Petitioner has approached this Court having obtained a Board Resolution of its Directors, dated 05th January 2021 to obtain an Order of the Court to appoint, under section 247(1) of the Companies

Act, Cap.212, R.E 2002, an administrator who will administer the affairs of the Company for its survival, pay its debts to its creditors and realise the assets of the Company.

On 3rd December 2021, the 2nd Respondent filed a Notice of appearance pursuant to Rule 104 (1) and (2) (a), (b) and (c) of the Companies (Insolvency) Rules, 2005 and, on the 28th December 2021 and 13th December 2021 the two Respondents herein filed affidavits in opposition to the Petition.

When the learned counsel for the parties showed up in Court on the 24th of February 2022, this Court ordered them to dispose of the matter by way of written submissions. The parties complied with the schedule of filing given by this Court, and, consequently, I will summarise their arguments before I proceed to deliver my verdict on this matter.

Submitting in support of the Petition, Mr Kagirwa, the learned advocate appearing for the Petitioner, adopted the contents of the Petition and the verifying affidavit of Vitash Patel as forming part of his submissions.

Mr Kagirwa, contended that, the grant of Orders sought herein by the Petitioner is conditional upon fulfilment of what the law provides under section 247 (1) of the Companies Act, i.e., that, the Petitioner is unable to pay its debt within the meaning of section 280 of the same Act, and, that, the Order of administration would achieve one or more purposes of the Company's administration.

Referring to section 247 (3) of the Act, Mr Kagirwa noted that, the Petitioner has pegged her petition on the issue of ensuring her survivability and the whole or part of her undertaking as a going concern, and, that, with administration Order in place, there is a high chance of more advantageous realization of the Company's assets that would be affected on a winding up.

He further contended that, the law does not require the Petitioner to fulfil all conditions under Section 247(3) of the Act but any of them, and, that, it is because of that, the Petitioner has sought for the Orders. To support his contention, he relied on the case of **Mattheus De Klerk vs. Cassava Starch of Tanzania Corporation Ltd**, Misc.

Commercial Cause No.17 of 2020. He contended that, at this stage the Court is only supposed to look at the documents presented before it to see as to whether they fulfil the requisite conditions for the granting of the respective Orders sought by the Petitioner.

Responding to the opposition by the Respondents, Mr Kagirwa submitted that, looking at the affidavit filed by the 1st Respondent to oppose the Petition, the same does not oppose but rather states existing grievances between the two parties, a fact which he claimed to be far from the purposes of the orders sought in the Petition. He contended, in the first place, that, the opinion of the independent auditor is based on the fact that the total liabilities of the Company exceed the total assets and, hence, the Company is unable to pay its debts. He argued, therefore, that, such a fact alone is in line with what section 247(1)(a), read together with section 280, of the Companies Act, Cap.212 R.E 2002 demands.

Secondly, it was the submission of Mr Kagirwa that, there has been no confirmation of the shareholders that they

were ready to inject additional capital to the Company. However, currently the members of the Petitioner are willing to do so subject to the proposals to be submitted to them by the appointed administrator if this Petition succeeds. He submitted that, whether the Petition is to be granted or not, the basis for that is the law, in particular section 247 of the Companies Act.

It was his contention that, all in all, if the administration order is granted, still the Petitioner will be bound by its obligations and, will not be relieved from any current or future liabilities. Besides, he added that, section 253 (1) (e) of the Companies Act empowers the Administrator to bring or defend any action or legal proceeding against the Company.

As regards, the 2nd Respondent' opposition, Mr Kagirwa submitted that, the position is just slightly similar. Referring to paragraph 11 of the affidavit filed by Mr Charles Mugila on behalf of the 2nd Respondent, it was Mr Kagirwa's submission that, all grounds relied on by the 2nd Respondent are an indication that the Petitioner is a going concern. He

contended that, there is anticipation of money to be injected or be received and the reasons stated by the 2nd Respondent do not support the legal requirement under section 247 of the Companies Act.

In response to Mr Kagirwa's submission, Ms Endael Mziray, learned advocate for the 2nd Respondent stated that, the 2nd Respondent is opposed to the granting of the orders of administration due to the fact that, the Petitioner has not been able to establish that the Petitioner is a going concern. She submitted that, the shareholders have not shown any intention to inject capital to the Company. It was also her contention that, the supporting documents in the Petitioner's affidavit (specifically the audit reports) show that, though the liabilities of the Company have exceeded the assets, the Company can pay its liabilities in the normal course of business.

According to Ms Mziray, the granting of the Orders sought will jeopardize the secured creditors who will not be able to recover the debts due to the loan agreement (Annexure ABL to the 2nd Respondent's counter affidavit).

She contended that, there has been no evidence to show that the Petitioner is unable to pay her debts as Annexure CC-7 mentioned in paragraph 18 of the Petition is not there.

She submitted further that, according to the financial statements of the Petitioner for the year 2020, 2019, 2018 and 2017, pages 45, 43, 39 and 35 respectively state that,

> *"the fact the total liabilities exceed total current assets has not hindered the company's ability to pay its debts as they become due in the normal course of business."*

Ms Mziray contended, on the basis of the above, that, the fact that the Company is not hindered to pay its debts as they become due has disqualified the Petitioner from being considered ripe for an Order of administration. She relied further on paragraphs 11.1 and 11.2 of the 2nd Respondent's affidavit in opposition to support her assertion that, the Petitioner is still doing business and can earn money that can pay its debts in its normal course of business.

Ms Mziray submitted further that, although the Petitioner has strived to state in paragraphs 10, 11, 12, 13 and 14 of the Petition that she cannot survive in whole or part of the undertaking, that averment is not substantiated by evidence and, the Financial statements referred to in Paragraph 12 speaks the contrary. She contended that, there is an indication under paragraph 23 of the Petition that, the Directors of the Petitioner may inject capital for proper administration of the Company depending on the proposal submitted by the proposed administrator.

To that end, she argued that, since the injection of capital is not mandatory, it means that, even if this Court is to grant the prayers sought, should the directors refuse proposals to be submitted before them, then, this Court's judgment would be one made in vain. It was a further submission that, although the Petitioner has mentioned one Mr. Alex Gaithan Mgongolwa as the proposed Administrator, the Company Resolution does not so speak of him and no document whatsoever shows that, he should be the one proposed by the Board.

According to Ms Mziray, the case of **Mattheus De Klerk** (supra) is distinguishable from the case at hand. She contended that, in that case, the Petitioner was appointed by the shareholders to petition for administration Orders of the Court and the Company had a layout plan on the way the Company will be operated under administration. Further the administrator was mentioned in the Board Resolution and the order was for a specific period of time.

Ms Mziray further sought and relied on the case of **Nakumatt Tanzania Limited vs. Kenya Commercial Bank and 2 Others**, Misc. Commercial Cause No.17 of 2018 (unreported) regarding the purpose of an order of administration.

Concerning the alleged issues of service of statutory notices and failure on the part of the Petitioner to honour demands, as well as the issue regarding sale of the assets of the Company amid winding up proceedings, Ms Mziray submitted that, the person who served the statutory demand had no legal mandate to carry out lending business and the

Petitioner has failed to attach other demands which she was unable to honour.

Besides, it was Ms Mziray's submission that, the 2nd Respondent is a secured creditor and followed all procedures to recover her debts after appointing a broker to do recovery of the assets on her behalf. She contended that, to date, the Petitioner never challenged the auction or the sale at the High Court (Land Division) and she is very aware that she has defaulted in fulfilling her obligation under the Offer Letter and the Mortgage Deed.

In view of the above, Ms Mziray contended that, the granting of the Orders sought will jeopardise the interests of the secured creditors for not being able to initiate any recovery measures or negotiations on settlement of debts. She urged this Court to reject the Petition.

As regards the opposing submission by the 1st Respondent, Mr Erigh Rumisha filed a brief one. He contended that, in line with the legal requirements under section 110 of the Evidence Act, Cap.6 R.E 2019 and the case of **Abdul-Karim Haji vs. Raymond Nchimbi and**

Joseph Sita Joseph [2006] TLR 419, it is the fundamental duty of the person who alleges as to existence of any fact to prove its existence. He submitted that, the Petitioner herein has not been able to prove, with evidence, that, there are compelling reasons suggesting that the Company is suffering from low cash flows, or that, it has more liabilities comparing to its assets.

According to Mr Rumisha, all facts stated under paragraphs 7, 8, 9, 10, 11, and 12 of the Petition are not backed with any documentary evidence. In particular, Mr Rumisha was of the view that, there ought to have been brought to the attention of the Court, the Petitioner's monthly VAT Returns from the Tanzania Revenues Authority (TRA) as proof that the income declared in the Financial Statements is matching the income reported to the revenue authority.

He contended that, although such a fact was stated in the 1st Respondent's opposing affidavit, it has never been countered by the Petitioner but only responded to by way of submissions, a fact he considered to be erroneous as per the

case of **East Africa Cable (T) Limited vs. Sencon Service Limited**, Misc. Appl. No.61 of 2016 (unreported) and **Morandi Rutakyamirwa vs. Petro Joseph** [1990] TLR 49. He contended that, the Report of Independent Auditors of the Petitioner did admit that there is insufficient information to reach a finding related to the financial position of the Company and so, the Court cannot grant the orders sought.

In a brief rejoinder the Petitioner has rejoined by reiterating her submission in chief. It was Mr Kagirwa's rejoinder that, the provision of the law under which the Petition is premised should not be read in isolation. He submitted that, the Petitioner has met the criteria stated in the **Nakumatt's case** (supra) as well. He urged this Court to grant the prayers sought.

The issue which I am called upon to consider is whether this Court should grant the prayers sought. Essentially, an Order of administration issued by the Court is intended to be a temporary process where in an insolvent company is availed with a 'breathing space' in order to

maximise realisations and/or save all or parts of its business undertaking.

In the case of the **Nakumatt's case** (supra), this Court reiterated such a purpose for an order of administration noting that, the Order places the company under a temporary:

> "…. care of another person, in this case the administrator, in order to make it turn around."

From the above understanding, the purpose of administration should be viewed, therefore, as a mechanism aimed at rescuing an ailing corporate entity. That being said, the question that follows is whether the Petitioner herein deserves to be granted such an order. Essentially, the Court will only make an administration order if two requirements are fulfilled, namely:

> (a) That, the company is insolvent or likely to become insolvent. In this regard, one has to consider the issue of its solvency on the basis of the application of the 'solvency

test' under section 247(1) (a) and (b) of the Companies Act.

(b) That one or both of the purposes of administration may be achieved by the making of the administration order.

The purposes for which an administration order may be made are listed under section 247(3) of the Companies Act, Cap.212 [R.E 2002]. Such purposes are as follows:

(a) the survival of the company, and the whole or any part of its undertaking, as a going concern;

(b) the sanctioning under section 229 of a compromise or arrangement between the company and any such persons as are mentioned in that section; and

(c) a more advantageous realization of the company's assets than would be effected on a winding up; and the order shall specify the purpose or purposes for which it is made.

In all those circumstances, the Court expects to be availed with reasons, supported by evidence, as to why an applicant believes an administration order will promote either one or all of the purposes, and, further, the Court shall specify which of them (or all) is (are) found to be justifying the administration order.

In this case, the Respondents have contended that, the Petitioner has not adduced sufficient evidence to justify the insolvency test. However, one of the pieces of evidence relied upon by the Petitioner to justify the granting of the orders sought is the financial statements of the Petitioner which indicates that its current liabilities has far exceeded its assets.

Furthermore, the Petitioner has banked on the prospects, as well, that the administrator if appointed will engage in Court with some of the creditors whom she believes disposed of her assets illegally and, that the Company shareholders are expected after considering a proposal to be tabled before them by the prospective administrator, to inject capital to raise funds for proper

administration of the Company as it is expected that the administrator will come up with other sources of financing the company with more capital.

Well, much as those are the prospective plans, it is clear, as stated in the **Nakumatt's case** (supra), that, without pointing out the strategies or efforts already taken or to be employed which will, restore the company to its past glory, the orders sought may be refused. In that case, this Court stated that:

> "**Failure to demonstrate any measures** for sure places this Court in a difficult position to reason along the same line with the petitioner.

The above position was reiterated as well in the case of **Mattheus De Klerk (supra)**. In that case, this Court noted that, for the orders to be granted, the Court must be fed with sufficient information regarding how the company/business is intended to be turned around to achieve its status of a "going concern".

This Court went ahead and borrowed a leaf from a Kenyan case; **in matter of Insolvency Cause No. 10 and 13 of 2017 (consolidated) The High Court of Kenya,** where the Kenyan Court was of the view that:

> **"A speculative suggestion is not enough neither is a statement simpliciter that the company or proposed administrator believes that an objective of administration will be achieved.** It is the applicant who seeks to and must satisfy the court the prospect. He must do this by way of affidavit in support of the motion establish[ing] the reasonable grounds, including indication of how long the turnaround is expected to take place." [**Emphasis added**].

In **Mattheus De Klerk' case,** this Court made it clear that, the information upon which it is invited to make considerations should not give the Court a speculative picture but rather there must be concrete information which

will enable the Court to make appropriate decisions regarding whether to grant the orders or not.

In my view, if one considers the above considerations in the context of this Petition, s/he will agree with me that, the Petitioner has not fully discharged that obligation in demonstrating to the Court how the Company will be turned around and, to the best, what has been brought to my attention is a speculative endeavour that is anchored on a proposal to be tabled by the would be administrator (if this Court grants the prayers) and, on the basis of it the Shareholders will then see if they can inject capital to the Company or not.

To me, that is a purely speculative scheme which as the cases I cited here above, i.e., **Mattheus De Klerk's** case and the Kenyan case; (**in matter of Insolvency Cause No. 10 and 13 of 2017 (consolidated) The High Court of Kenya)**, made it clear, cannot be taken on board.

From the foregoing, I find this Petition to be without merit as the Petitioner has not fully satisfied the requirements of section 247 (3) (a) to (c) of the Companies

Act. In view of that, this Court settled for the following orders, that:

1. This Petition is here dismissed.
2. In the circumstance of this Petition, this Court makes no orders as to costs.

It is so ordered.

DATED AT DAR-ES-SALAAM ON THIS 19TH DAY OF MAY 2022

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HON. DEO JOHN NANGELA

JUDGE