

TANZANIA / JUDGMENT

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IN THE HIGH COURT OF TANZANIA (COMMERCIAL DIVISION) AT DAR ES SALAAM MISC. COMM.CASE NO. 34 OF 2002 IN THE MATTER OF DIESEL & AUTO ELECTRIC SERVICES (DAS) LIMITED AND IN THE MATTER OF THE COMPANIES ORDINANCE CAP.212 OF THE LAWS [Made under section 167 and 169 of the companies Ordinance CAP.212]

RULING

KIMARO, J. ' This is a petition in which Mr. Paul Juma Is praying for the following orders: II (a) That DIESEL& AUTO ELECTRIC SERVICES (DAS) LIMITED be wound up. IN THE ALTERNATIVE but without prejudice to the foregoing. (b) That the Petitioner be paid the value of his 50% equity of the said company. rcJ Any other and further relief(s) that this Honourable court may deem just. 11 The petition is made under sections 167 and 169 of the companies ordinance, cap.212. The petitioner is represented by Mr. Ringia, II -11 • 2f, I 11 I • Learned Advocate" from Mr. Nyange and co. Advocates. Mr. I 'Werner • Alfred• Werner appears and he is objecting to the r• Kesaria, Learned Advocate. . petition. He• Is represented by Mr. i• Mr. Paul .Juma ls.. a contributory to DIESEL & AUTO ELECTRIC SERVICES (DAS) LIMITED. He is seeking for an order for the winding up of the -company. •The company was registered on 8th August, 1984 under the companies Ordinance, cap.212. The company was I . I jointly established by the petitioner and the objector. The I I grounds upon which the petitioner is seeking for the winding up i are contained in paragraph . 7<c> of the petition. Among them is fraud and carrying on the affairs of the company unlawfully. some 1 I, of the grounds are reproduced hereunder:- , I, I " iJ The company's affairs have been conducted without the I petitioner's knowledge and/or consent, i.e in secrecy I between the co-director Werner Alfred Wolf formerly known I 1, as Abdulaziz Wolf and his single handed appointed II lieutenants. t ii I, riiJ That the said Werner Alfred wolf formerly known as I I Abdulaziz Wolf did forge and/or falsify company I. resolution on the appointment of his child, WOLF ANNE I ALEXA a shareholder and Director of the said company I I with malicious intention of reducing the petitioner's ' voting powers and to ultimately kick the Petitioner out of the said company. I I, !, <iiiJ The .said Werner Alfred Wolf (i formerly . known as Abdulaziz ...:•,• .. : ; .Wolf did unilaterally appoint his said child, who had not 3 attained the age of majority as a Director and maliciously conspired to expel the petitioner from the company. That subsequent to the said unlawful appointments the said Werner Alfred Wolf formerly known as Abdulaziz . Wolf and his child purporting to constitute a coram of the said company appointed further directors e.g one -Linus \ Dismas Nyoni. Subsequent , meetings of the said

Werner Alfred Wolf formerly known as Abdulaziz Wolf and the unlawful appointed directors removed the petitioner on the , (' company Board of directors 1n furtherance to their acts of isolating the Petitioner from the affairs of the company. , ; iiiJ That the said Werner Alfred Wolf formerly known as Abdulaziz Wolf has purportedly and unilaterally reduced the shares of PAUL JUMA and Increased his share to 5000. n The objector who will also be referred to as the respondent, denied. all the allegations and prayed for the dismissal of the petition. ' Four issues were framed for determination by the court, iJ whether , or not there has been any fraud committed ' by the objector in relation to the petitioner's share . . . holding in the company. 1 iiJ What is the percentage of shareholding of the Petitioner and objector in the company. I . 4 , 1i0 . . whether or not the affairs of the company were conducted in accordance with the law; JvJ Whether Diesel & Auto Electric services (DASJ should be wound up. In his, final submissions Mr. Kesaria submitted that as much as fraud was pleaded, no evidence was led to prove fraud. Mr. Ringla on the other hand submitted that the fraud which is complained of is not exclusively documentary but it is based to a great extent in the whole process and or the conduct of the objector since the 1st Incorporation of the company. He started with the objector's use of the name of . Abdul Aziz argu'n. Ig that . It was used at inception as a fictitious name so as to defraud the government as his residence permit then, did not allow him to engage in any business other than what he came here for to seek an employment with Tanzania . development Finance I . . . (TDFU. L1m1 With respect to Mr. Ringla, there is neither pleadings, nor ' evidence led by the petitioner in relation to the use of the name of Abdul Aziz with his residence permit or employment. Neither was it framed as an issue in this proceedings. Final submissions must always relate to the pleading's and the evidence which was tendered- in court. Matters which were neither pleaded nor litigated upon by the court can not be brought into the proceedings at final submissions stage. I refer to the case of

- I Vidyarthi V Ram Rakha (1957) 1 E.J. 527. He also challenged the manner ' . . 1 in which the I . proportion of 1 . , share:- , . . . ; 8,01,000 shares were valued , ' dqne sayi 'g that the valuation which was . ' . ' I I ~ . . 5 ' carried out was for purposes of Insurance. He further challenged 1- the transfer of shares from the respondent to his daughter as well as the appointment of Mr. Linus Nyoni as a Director. Finally Mr. Ringla questioned the rationality of raising the value of the additional 3900 shares allotted later, to T.shs 10,000 = each, while the company was operating profitably, saying that it was an arbitrary decision. After evaluating the evidence, I entirely agree
- ,I with Mr. Kesaria that everything which has been complained off against the objector was done in accordance with the Memorandum and Articles of Association of the company. It was tendered and admitted in court as Exhibit P1. Exhibit P1 shows that at the time of incorporation; the authorized share capital was T.shs 100,000 = divided into 100 shares of shs 1000 = each. The ' petitioner and the objector were the subscribing shareholders of one share each. This evidence is corroborated by the company's first annual return filed with the Registrar of companies. This is 1, the objector's exhibit D1 at pp , 65 - 67. The first annual return 1 ' states that the petitioner and the objector were the only shareholders and Directors in the company when it was ,r' 1 ' incorporated. Only 2 shares of the 100

shares had been allotted, one to the petitioner and one to the respondent. I. . The position continued until 1987 when a decision was taken to make a valuation of the assets of the company and allot more shares, depending on each shareholder's contribution. The evidence on record shows that this was done with full knowledge of the petitioner. He signed the minutes of the Director's Meeting convened for that purpose. The meeting was convened on 7th March, 1987; The objectors exhibit D1 - Minute 9/87 on pg 361 and

- • I 12/87 at pg 366 ' show. that the petitioner was present in those ' 6 meetings and he indeed signed a Resolution which retained
- 1. Martin Heyman to do the valuation. The allegations made by petitioner on this point are not true. Subsequent to the valuation exercise a Directors Meeting was convened on 25th July, 1987 <Exh.D1 pg 367 - 369) where a Resolution was made authorizing the share capital of the company to be increased from shs 100,000/= to shs 10,000,000/= . 9,900 additional shares of T.shs 1,000/= each were created. The proposal to increase the company's authorized capital to T.shs 10,000,000/= was made by the respondent and seconded by the petitioner. Minute (6/87 refers). The petitioner's contribution to the company rose to T.shs 1,000,000/= while that of the objector rose to T.shs 5,050,000/ =. Shares which were allotted to the petitioner then rose to 1050 and to the respondent 5050. Again, the increase of the share capital and the allotment of 1050 and 5050 shares to the petitioner and the respondent was done in the presence of and with full knowledge of the petitioner. The evidence to support this is his signature to the , minutes of the meeting (Minute 34/87 at pg 368 exhibit D1). Form No.16 which is the Notice of increase in the Nominal capital filed with the Registrar of companies on 17th September, 1987 and supported by the companies Resolution signed by both the petitioner and the objector, reflect the same shareholding proportion. Even the Annual returns filed with the Registrar of Companies <Pg 86 - 91 of Exhibit D1) reflect the same proportion of share holding - 1050 (petitioner) and 5050 (objector). 7 I What flows from the proportion of shares above, is that the initial subscribing shareholding of one share each changed to 1050 shares of the petitioner and 5050 shares of the objector. This change shows that as far back as 19th, the petitioner was already a minority shareholder and he was fully aware and participated in the process which changed the positions. /, Ii I; . As regards the allegation of the appointment of the objector's daughter Alexa as Director, there was no evidence to prove this. What the evidence shows is that the objector gave his daughter Alexa 50 shares in 1996. No fraud was committed. Article 33(9) of the company's Articles of Association permitted the objector to exercise such a right. The article permits a member to . ' transfer shares to members of the family like a child, son in law, daughter in law, father, mother, brother, or sister. There are no
- If conditions which are attached to the, transfer. The person who was appointed Director was Mr. Linus Nwoni '1 and the appointment was done in 1988. By then, the objector was the majority shareholder. He is entitled to make the appointment by . Article 82 (3) of the company's Articles of Association. This appointment is also reflected in all annual returns of the company filed with the Registrar of companies since 1988. I , , r •,; Article 82 (3) allows

a member holding at least 40% shares to appoint at least two Directors. At the time of the appointment, the respondent had more than 40% shares. The petitioner also complains that the objector appointed his child Wolf Anne Alexa as a shareholder and Director with the malicious intention of reducing the petitioner's voting powers and that at the time of the appointment, Alexa had not attained

- the age of the majority. As said earlier, this complaint was not supported by evidence. The evidence shows that Alexa was not appointed a director. She was only given shares. At the time she was given shares, she had attained age of majority. The birth certificate of Alexa which was part of exhibit D1 shows that Alexa was born in 1972. In 1996, when she was given the shares, she was
- 24. She was an adult. As shown earlier, article 33 (9) of the Articles of Association of the company permitted the objector to give her 100 shares. Mr. Ringia relied on the identity of the objector, that is the use of the names "Abdul Aziz" and Werner Alfred interchangeably to imply fraud. As stated before, there was no sufficient evidence to prove fraud in the content in which Mr. Ringia wants this court to believe. No evidence was led to show how the objector came into this country to work with the IDFL and nor was evidence on the restrictions which were tied to his employment brought before the court. Even evidence connected to the type of residence permit issued to the objector and conditions applicable was not brought to court. The objector did explain the circumstances under which he came to use the name of Abdul Aziz. According to the objector, it was his marriage to a Muslim woman which led him to use the name. Both names however, are recorded in the company's Annual Returns filed with the Registrar of companies - (Exhibit D1 pages 1-5 - 136, 139 - 140, 143 - 144, 147 - 148, 151 - 157, 155 - 156, 159 - 160 and 163 - 164). Mr. Ringia did raise questions in relation to the valuation of the company's assets of the company which changed the proportion of shareholding saying that the valuation was done for purpose of insurance only and nothing else. The evidence which is on record is clear. There are minutes of the Meeting of Directors and a resolution made to change the shareholding to which the petitioner was not only fully aware of but was also fully involved. On the basis of the evidence which is on record, I find that there has been no fraud committed by the objector in relation to the petitioner's shareholding in the company. The next issue is the percentage of shareholding of the petitioner and the respondent in the company. The analysis of the first issue simplifies the work involved in answering the second one. The evidence on record shows that as far back as 1987, the petitioner had 1050 shares while the objector had 5050 shares. This status of shareholding continued until June 2002 when a Board of Directors Meeting was convened and a decision taken to allot 3900 unallotted ordinary shares to the existing shareholders. The decision was taken in order to raise additional capital for the company's working capital requirements instead of seeking for bank loans. A Resolution was passed (Minute 3/2002) that the members of the company be offered first priority according to each one's shareholding percentage to subscribe to the said 3900 shares, at a value of 10,000 = per

share. This exercise would have boosted the company's working requirement by T.shs 39,000,000/=. ii I According to. Mr. Joseph Rutabingwa (DW3) all company shareholders were written a letter of Invitation to subscribe to the additional 3900 shares as aforeaid. It was further evidence of how that the petitioner was served and he acknowledged receipt ' ' ' ' ' t .. (Exh.06 -or p 33 - of exh.01). There was no response from the ' ' ' i

- petitioner; consequently, the 671 shares which were set for the petitioner, Were offered to the other shareholders <pg 36 of Exh.D1L Minute of the company Meeting held on 28 th Nov, 2002 . confirms the allotment of the 3900 additional shares to the objector and his daughter. These shares Certificates for the additional 3900 shares were tendered and admitted in court as exhibit D7 -(pg 435 & 436 of Exh.D1~. The Minutes of the company meeting convened on 25th November 2002 <page 35 of exhibit 01J reflects the allotment. The allotment is also reflected in Form No.6 filed with the Registrar Of Companies (page 171 - 172 Of Exh.01). ~ After the allotment of the 3900 shares, the share proportion of the members; is that, the petitioner has 1050 or 10.5% and the objector and his daughter 8950 or 89.5%. From the analysis given above, the answer to the second issue is that the petitioner holds 10.5% and the respondent 89.5%. The third issue is whether the affairs of the company were conducted in accordance with the law. Mr. Ringla had no comments at all on this submission much as he had complained bitterly on the objector's conduct. The objector and his witnesses produced in court the company's returns filed with the Registrar of companies, the minutes of meetings of the Directors and shareholders, the original certificates for the shares, the original Memorandum and 11 Articles of Association of the company and the company's audited Accounts. i Mr. Linus Dismas Nyoni testified that he is the Managing Director and an Accountant of the company. He was lawfully appointed a Director under Article 82 (3) of the company's Articles of Association. The transfer of shares from the objector to his daughter Alexa was in conformity with article 33 (9) of the company's Articles of Association i Mr. Ringla associated the allotment of the additional 3900 shares in the year 2002 with fraud on the ground that the company did not need any funds from members nor did it need a bank facility because it was generating " great profits and growing steadily) I do not know the basis for such argument but I would think that the sustainability and growth of the company are issues of management. Persons in the management are the best source for an assessment of the best methods which can be used to run the company .. For this reason, I am not in an agreement with the submission made by Mr. Ringla. In as far as the evidence is concerned, the allotment of the additional 3900 shares was lawful. The petitioner was not discriminated. He was invited to buy the shares but he did not respond. Everything was done in accordance with what the law required except for the transfer of the shares from Alexa to Kaoli. I because the transfer was done the time when Kaoli had not attained the age of majority. If she was born in 1986, this year she is 17 which is not yet the age of majority. However, this is a matter which does not affect the proportion of shareholding between the petitioner and the objector. i 12 Much as the petitioner complained of having been kicked out of Directorship, there was no evidence to prove that he was kicked out. The petitioner

has been a Director from the time the company was incorporated until 2002 when no one proposed him for nomination, not even his own proxy who represented him in that meeting. There is therefore no justification for complaining. The petitioner has also complained that he has not received any dividend since when the company was Incorporated. The objector and his witnesses admitted that the company has not declared dividend, nor distributed the same. The profit which the company got was reinvested In the company. The operation of the company depends on equity ,and not external loans. Even then, the petitioner admitted that he receives from the company T.shs 125,000/= every week. My assessment of the evidence is that except for the transfer of the shares from Wolf Anne Alexa to Kaoli which was unlawful because it was done at a time when Kaoli had not yet attained the age of the majority, the affairs of the company were conducted in accordance with the laws. Lastly, is the Issue whether or not Diesel and Auto Electric services (DAS) Ltd should be wound up. The petitioner prays that the company be wound up because it is just and equitable to do so. At least this was the issue which Mr. Ringia addressed directly. Mr. Ringia .submitted that It Is just and equitable to have the company be wound up rather than letting one smart shareholder to swindle all profits that were . 13 - I made and reinvest in a company through the petitioner's labour and skills. He relied on the cases of Daniels vs Daniels and Ernest ' I Andrew Chitalika v Francis Phillip Temba (1996) TLR 287. Mr. Ringia submitted that from the very beginning, the conduct of the objector cannot be termed as anything else other than grossly unfair to the petitioner. Mr. Kesaria for the objector submitted that there is nothing in the conduct of the affairs of the company which should be construed as unjust or inequitable. To the contrary, it would be unjust and inequitable to wind up the company because It Is successful) profitable and .solvent. The petitioner is only a disgruntled shareholder. He relied on the cases of Re a company Butterworths company Law case 1985 PP 151 - 163 and Mitha V Mitha 1967 EA 575. Mr. Kesaria submitted further that the petitioner is a minority shareholder with only 10.5% while the majority shareholder has 89.5%. The company is hugely successful and It operates branches in Dar-es-Salaam Mwanza and Arusha. It has a work force of about 70 workers. It is a tax payer and contributes to the National economy by paying taxes of approximately T. 250,000,000 = per annum. All the ,se successes are without any bank loans or borrowing. Mr. Kesaria is of a view that winding up such a company because of the petitioner's grievances which are not justified, would be detrimental to the economy of our nation. After having gone through the evidence and the submissions by the Advocates, I reluctantly agree with Mr. Kesaria 1. that an order for a winding up of the company would be unjust and inequitable under the circumstances of the case. In deed, para 14 . " . wondering why Mr.,-Ringia is insisting that the company should be . . , . ~ I wind up while the petitioner himself has not done so. Since . ' 1987, he is a minority ' . . . shareholder. He has never remained an equal share -with. the objector. It is a fact well known to him. He has shown an intention to pull out of the company several times , . ' , , but he has not been able to make up his mind. Even the company was ready to buy him out but he persisted and came to file this petition. He raised quite a number of accusations against the majority shareholder - and almost all, except the one of the transfer of shares from Alexa to Kaoli (which

however was not even pleaded) were unfounded. 11 Even the authorities cited by Mr. Ringia cannot assist the petitioner in this prayer. In both the cases of *Re venidje i. "Tobacco co. Ltd"* 1916, *L.J. Warrington and Daniel v Daniel* 1978 *Templemen. J.* It was held that an order for a winding up by a minority shareholder will only be issued by the court where there is no other remedy. Likewise in *Ernest Andrew Chitalika vs Francis Phillip Tesha* It was held that an order for a winding up will only issue where the court is of an opinion that it will be just and equitable. In the present case, issuing an order for the winding up of the company will not be just and equitable. It is a company which is going on well. Winding up the company is not the only remedy which the petitioner has. Even the petitioner himself does not support an order for the winding up of the company. As he gave evidence in his testimony in cross examination, he said - "I, I, I... 15... "The company is healthy and profitable. There are 130 employees. The company has branches in Arusha and Mwanza. The company contributes to the economy of the country. If an assessment is made on how the shareholders can buy off my shares, there is no need for winding up the company. What I need is a fair share." Under the circumstances, I would entirely agree with Mr. Kesaria that it is not just and equitable to order the company to be wound up. It is not the only remedy which is available to the petitioner. He can sell his shares. Moreover, he has not proved the grounds upon which this petition is founded. In the case of *Mitha v Mitha* [1967] EA 575 the court held that the petitioner failed to prove that it would be just and equitable to make a winding up order. The petition was dismissed. Likewise, I will order the dismissal of this petition with costs because the petitioner failed to prove that it is just and equitable to give such an order. Mr. Kesaria asked this court not to consider an alternative remedy. I do not consider this to be the best way of handling this case. I mentioned before that the winding up is not the only remedy which is available. I feel duty bound to explain which other remedy is available to the petitioner. In his own testimony the petitioner said he would be satisfied if the shareholders can buy him off. What both parties should do under the circumstances is to consider the best way in which the petitioner's shares should be sold. The parties themselves know their interest. With the assistance of their Advocates, they can work out the best methods in which the problem can be solved. Where any need arises, they can always seek the help of the court. Having said all, the petition is dismissed with costs. I N.P. KIMARO, JUDGE 14, 532 - words. I, I,

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