

TANZANIA / JUDGMENT

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IN THE HIGH COURT OF TANZANIA (COMMERCIAL DIVISION) AT DAR ES SALAAM MISC.
COMMERCIAL APPLICATION NO. 217 OF 2016 IN THE MAHER OF THE COMPANIES ACT, CAP
212 [R.E 2002] AND IN THE MAHER OF DOVETEL (T) LIMITED t/a SASATEL TANZANIA (IN
ADMINISTRATION) (hereinafter “the company”) AND DR. PETER JONAS CHITAMU
APPLICANT AND MARY BUNDALA 1st RESPONDENT FIRST SBAL
COMPANY LIMITED 2nd RESPONDENT

RULING

Date of the Last Order: 19/06/2018. Date of the Ruling 17/07/2018 SEHEL, J. This is a ruling on preliminary objections raised by the counsel for the respondents, Mr. Martin Matunda against the applicant's application for two orders. The first order is for the court to extend the period for administration for another period of six months. The second order is for the court to appoint Mr. Thomas Mtarima Kohi to fill the vacancy of the office of the Administrator of DOVETEL (T) LIMITED, t/a SASATEL TANZANIA, The application is made under Sections 252(2); (3) (c) of the Companies Act (hereinafter referred to as “the Act”); Rule 88 of the Company (insolvency); Rules GN 43 of 2005 (hereinafter referred to as “the Rules”) and Section 95 of the Civil Procedure Act, Cap.33 (hereinafter referred to as “CPC”). The respondents, after being served with the application, filed their joint counter affidavit and notice of the preliminary objection that contained one point of law that the applicant had no locus standi to bring the application. The hearing of the preliminary objection was ordered to be by way of written submissions whereby both parties complied with the filing schedule. The respondent in their written submissions added one more point of law to the effect that the applicant has failed to cite proper 2 provision of the law for extending the period of administration order. It was argued that Section 252 (1); 3(c) of the Act and Rule 88 of the Rules do not provide for extension of the administration order. He said these provisions provide for filling the vacancy in the office of the administrator. In reply, the learned advocate, Samson Mbamba, who represent the applicant, contended that the counsel for the respondents failed to point out the proper provision of the law to be cited by the applicant. He argued neither in the Act nor in the Rules there is a provision that caters for the orders sought in the chamber summons. Therefore, to counsel Mbamba's view, the court has powers under Section 95 of CPC which can be invoked where there is no specific provision of the law. In support of his submission, the counsel referred the court to the case of Shaku Haji Osman Juma Vs Attorney General and Two Others [2000] TLR 49 where Mchome, J (as he then was) said:-

“The inherent powers of the court provided under Section 95 of the Civil Procedure Code are invoked in situations where 3 'M the court has authority or jurisdiction to deal with the matter and there is no specific law in place". He therefore prayed for the objection to be dismissed. For the second objection, it was argued that Section 252(3) of the Act does not give powers to a single director or shareholder to make an application for filling the vacancy in the office of the administrator. It was submitted that the powers are vested to the company acting unanimously or any creditor or creditors of the company. There is no room for a single director to apply for an administration order unlike the position of creditors where even a single creditor can make such an application. It was the respondent's submission that Section 252(3) of the Act is derived from Section 248 (1) of the Companies Act, Cap. 12 and that Section 248 (1) of the Companies Act, Cap. 12 of 2002 is in pair materia with Section 9 of the United Kingdom Insolvency Act of 1986 where in the case of *Re Equiticorp International Pic* (1989) IWLIR 1010 the English Court stated:- 4 “If there is disagreement between the directors, a board resolution duly passed, will bind the dissenting minority, and they are, thereafter, under a duty to implement the resolution”. From the above position, the counsel for the respondent argued that the application by the directors must be either pursuant to a Resolution of the Board of Directors or by all Directors acting unanimously. He said since the present application was filed by a single director acting alone, without a Resolution of the Board then the applicant lacks locus Standi to bring the application and the same should be dismissed with costs. The main complaint in the first objection is whether the applicant has properly moved the court to grant the orders sought in the chamber summons. I have shown herein that the applicant used Sections 252(2); 3(c) of the Act; Rule 88 of the Rules and Section 95 of CPC for the court to grant for orders for extension of the period for administration s * order and for appointment of Mr. Thomas Mtarima Kohi to fill the vacancy of the office of the Administrator of DOVETEL (T) LIMITED t/a SASATEL TANZANIA. It be recalled that on 11th April, 2013 this court issued an administration order that the affairs of the company shall be managed by Mr. Charles Burchard Rwechungura for a period of not more than six months from the date the order was issued. It is acknowledged by both parties that the period expired on 10th October, 2013 and there had been no extension of time. It is on records that the appointed administrator on 10th June, 2013 decided to resign from his position as administrator of the company. In a normal circumstances an order for his release pursuant to Section 258 (1) of the Act was supposed to be issued by the court for the administrator to be discharged. However, to date no such release order is made. I thus take that the administration order is still in force though the administrator has resigned. This means that the vacancy of the administrator is open. Since the vacancy is open then in terms of Section 252(2) of the Act the Court may by order fill the vacancy. Therefore Section 252(2) of the Act was properly cited. 6 This takes me now to the second preliminary objection that the applicant has no locus to bring the present application in person without the Resolution of the Board. It is argued by the counsel for the respondents that Section 252

- (3) (c) of the Act does permit an individual director to make an application and he has cited the case of *Re Equicorp* (Supra) to support his submission. Section 252 (3) (c) of the Act reads:
“(3) An application for an order under subsection (2) may be made:

- a) Not relevant
- b) Not relevant
- c) where there is no such administration and no such committee, by the company or the directors or by any creditor or creditors of the company”. I do agree with the counsel for the respondents that the wording of the above provision of the law requires for a petition by the directors to be presented by all of them acting unanimously when there has been no formal board resolution. If the board of directors resolves to present a petition for an administration order, any director has authority to present the petition on behalf of all of the directors. (See the case of *Re Instrument Electrical Services Ltd* 7 [1988] BCLC 550) and all the company’s directors, including those who voted against the resolution, are bound to take such steps as may be necessary to give effect to the board resolution as stated in *Re Equitcorp (Supra)*. Thus a duly passed board resolution is treated as a decision of all of the directors notwithstanding that it is passed by majority vote. From the above position of the law it is clear that a single director, acting on behalf of all other directors pursuant to a passed board resolution, may petition for administration order. In other words, the applicant has locus Standi to bring the present application. I am alive that the counsel for respondent argued that since there is no board resolution then the applicant has no locus. The issue whether there is in place a board resolution or not is a matter of fact which requires evidence to establish it as such it cannot be resolved at the stage of preliminary objection. Therefore, I see no merit in the second preliminary objection. In the end, the preliminary objections are dismissed with costs. It is so ordered.
8 Dated at Dar es Salaam this 17th day of July, 2018. JUDGE 17th day of July, 2018 9

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