

TANZANIA / JUDGMENT

dr peter jonas chitamu vs mary bundala 2 others 2022 tzhccomd 213 12 july 2022

COURT
TZHCCOMDDECIDED
12 July 2022

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (COMMERCIAL DIVISION) AT DAR-ES-SALAAM MISC, COMMERCIAL APPL. NO.195 OF 2021 (Arising from Misc. Commercial Application No.45 of 2019) IN THE MATTER OF THE COMPANIES ACT (CAP.212 R.E 2002) AND IN THE MATTER OF DOVETEL (T) LTD t/a SASATELx TANZANIA z (IN ADMINISTRATION) \ AND c DR. PETER JONAS CHITAMU..... APPLICANT VERSUS MARY BUNDALA..... 1st RESPONDENT FIRST SEAL COMPANY LTD.:.....:.....;..... 2nd RESPONDENT ADMINISTRATOR GENERAL.....:.....3rd RESPONDENT Last order: 14/06/2022 - Ruling: 12/07/2022 '

RULING

NANGEL& J.,: This application was brought under section 252 (2) and (3)

- (c) of the Companies Act, Cap.212 R.E 2002, Rule 88 of the Companies (Insolvency) Rules GN. No. 43 of 2005 and section 95 of the Civil Procedure Code, Cap.33 R.E 2019. It was through a chamber summons supported by an affidavit of Dr. Peter Jonas Chitamu. The Applicant seeks for the following:
1. This Honorable Court be pleased to extend the period of administration pursuant to an order issued by this Page 1 of 9 r Honorable Court on the 11th day o April 2013 in Misc. Commercial Cause No.29 of 2012 and that of 25th July 2019 in Misc. Commercial Application No.45 of 2019 for another Period of six months.
 2. That, this Honourable Court be pleased to issue an order Appointing administrator General to fill the office vacancy of Administrator of Dovetel (T) Limited t/a SASATEL Tanzania ("the Company") pursuant to an Order of this Hounorable Court issued on the 11th day of April 2013 in Misc. Commercial Cause .No. 29 of 2012 and 25th July 2019 in Misc.? Commercial Appl. No.45 of 2019. \ ?/
 3. That, costs of this application be provided for.

4. Any other reliefs) that this Honourable Court may deem just, fit and equitable to grant. The 1st Respondent filed; her counter affidavit and a reply to the counter affidavit*was filed in Court as well. On 16th May 2022 this Court ordered that the matter be argued by way of written

submissions.

In her submission, Ms Eliaichi Ndowo who represents the Applicant submitted that, the application is for an extension of the period of administration for another six (6) months and appoint the Administrator General, the 3rd Respondent to fill the office vacancy of Administrator of Dovetel (T) Limited t/a SASATEL Tanzania ('the company'). She told this Court that, although the former administrator was discharged from his duties on the 3rd of September 2012 having sold shares to the 2nd Respondent as part of making the Company a going concern, the investor (2nd Page 2 of 9 Respondent) failed to inject capital into the Company to improve its operations and run the business. She submitted that, since there was no real turnaround of the Company, the Order of this Court in Misc. Commercial Cause No.29 of 2012 was sought and granted and the Company was placed under administration. According to Ms Ndowo, although the Order of this Court was challenged by way of an appeal in Misc. Application No.75 of 2013, the Court of Appeal confirmed the orders of this Court. , However, she contended that, to date the administrator has not implemented the directives of this Court dated 11th April 2013 and that; it is desirable that the orders of this Court be implemented. In her submission, Ms Ndowo submitted further that, the 1st administrator resigned without accomplishing his duty and, that, the 2nd administrator appointed on 5th October 2018 by order of this Court in Misc. Commercial Application No.217 of 2016, could not as well fulfill the directives of the Court dated 11th April 2013 until his resignation on 4th March 2019 on the account that the 1st Respondent failed to hand over business, office and management of the Company. She submitted further that, Misc. Commercial Application No.45 of 2019 was filed to rescue the situation wherein, Judge Fikirini, J., (as she then was) appointed Mr. Gratian B. Mali a third administrator of the Company for a period of six months. However, she submitted that, similarly, the third administrator failed to discharge his duties, including failure to implement the Page 3 of 9 directives of this Court dated 11th April 2013 on similar grounds and his tenure expired on 24th January 2020. She contended further that, the purpose of the administration which including putting the company under a temporary care of another person (administrator) in order to enable it turnaround to the successful path as a going concern has not been achieved. As regards whether the vacancy of the administrator is vacant, she submitted that to be a *facias* the third administrator's tenure was only for six months from the 25th July 2019 and, thus it expired on the 24th January 2020, his application for possible extension of that tenure having been dismissed and no appeal is so far pending. She submitted, therefore, that, this Court has the powers under section 252 (2) of the Companies Act, Cap. 212 [R.E 2002], to fill the vacancy (Besides, and, as regards the competence of the 3rd Respondent to take up such a mantle of administration, Ms Ndowo relied on section 4(5) of the Administrator General (Powers and Functions) Act, Cap.27 R.E 2002. In a reply submission filed in this Court by Mr Mpaya Kamara, learned Advocate for the 1st and 2nd Respondents, started his submissions by

adopting the contents of the counter affidavit of the 1st Respondent. He contended that, the application has not been properly preferred before this Court because according to section 252 (2) and (3) (c) of the Companies Act, Cap.212 R.E 2002, the filing should have been brought by the Company, the directors or any creditor or creditors of the Page 4 of 9 Company. He contended that, the law does not provide a room for an application by a single director of the Company as the situation seems to be in this case. Secondly, it was Mr Kamara's submission that, section 95 of the CPC, Cap. 33 R.E 2019, which was cited in support of the Chamber summons, applies only where there is no specific provision of the law, and ought not to have been invoked as it 'Z' y was done in this application to extend a period of administration or for appointment of the 3rd Respondent. To support his ' / ' submission regarding applicability of section 95 of the CPC, Mr v\ Kamara relied on the case of Aero Helicopter (T) Ltd vs. F.N Jansen [1995] TLR 142. - In his further submission, MrKamara contended that, since the attempt to extend the tenure of the third administrator was unsuccessful following\the dismissal of the Misc. Commercial Application No.40 of 2020, unless the dismissal order is vacated this Court is. precluded, from entertaining another application. He submitted<that,'the matter is further complicated since the Notice of Appeal filed by Mr Gratian B Mali to challenge this Court's decision in^Misc. Commercial Appl.No.40 of 2020 is still pending since there to become effective, there must be an order of the Court of Appeal to that effect. In her rejoinder submissions, Ms Ndowo has rejoined that, some of the issues raised by Mr Kamara are basically preliminary objections which ought to have been raised at the earliest time possible and cannot be raised at this time. In my view, I find that Page 5 of 9 r to be a correct position. In essence, what the 1st Respondents stated in paragraph 2 of her submission, are matters which she ought to have raised them at the earliest possible time, these being matters of law. As to the issue of locus standi of the Applicant, she contended that, that mater was canvassed by the Court of Appeal in the Civil Appl.No.75 of 2013. She contended, therefore that, this present application cannot be taken/qut of its ■: - - X proper context. In my view, that is a correct position, ^T)ie current application has its basis in the previsions ones and cannot be taken in isolation. ----- " In her rejoinder submission, however, what I do not find z \ there in is a response to the alleged fact that the Notice of Appeal preferred by Mr Gratian B Mali is still pending in the Court of Appeal and no ordjer has ever been issued by the Court to indicate that the matter before it was withdrawn. Even so, the point was canvassed in/her submission in chief and reference was made to the case of the Board of Trustees of National Social Security Fund Versus Mbowe Hotels Ltd, Civil Appl.No.197 of 2016, regarding Notices filed in the Court, which outlives their life span without there being an Appeal. In my view, and taking into account the above decision of the Court of Appeal and the fact that, the said Notice of Appeal has out-lived its life span of 60 days, I tend to agree with Ms Ndowo that, there can be no pending Notice any more, even if there is no Order of the Court of Appeal to that effect. In his Page 6 of 9 supplementary affidavit, Mr. Mali did as well state under oath that on the 14th April 2022 he filed a Notice of Withdrawal of the Notice of Appeal earlier filed in the Court of Appeal. Technically, therefore, there cannot be a notice pending in the Court of Appeal, otherwise, that would have as well been raised well in advance as a preliminary legal issue. What then should be the position of this Court taking intp account the historical account and circumstances pertaining to/ this application? In my view, there is a need to ensure thatthis

matter is laid to rest and the orders of this Court dated 11th April 2013 are fully implemented. It is vividly clear that, there have been three appointed administrators so far and, these have altogether failed to implement the orders of this Court dated 11th April 2013. The matter cannot be left in an indeterminate state. The argument that this Court is functus officio cannot hold since what is before this Court is an application to have a new administrator appointed since the earlier one had not been able to discharge his duties as expected. It follows that, this Court, in exercise of its powers under section 252 (2) of the Companies Act, Cap.212 [R.E 2002], can entertain the prayers and appoint the Administrator General to act, in terms of section 4(5) of the Administrator General (Powers and Functions) Act, Cap.27 R.E 2002. That being said, this Court settles for the following orders: Page 7 of 9

1. That, the period of administration pursuant to the orders of this Court dated on 11th April 2013, in Misc. Commercial Appl. No.29 of 2012 and that of 25th July 2019 in Misc. Commercial Appl. No.45 of 2019, is extended for six (6) months from the date of this ruling. '
2. That, by virtue of section 252(2) of Companies Act, Cap.212, R.E ' / ' 2002, this Court do hereby , appoint the Administrator General to fill the vacancy left. by Mr Gratin B. Mali as administrator of the affairs of DOVETEL (T) LTD t/a . SASATEL TANZANIA ("the Company");/pursuant to the ' Orders of this Court dated on 11th April 2013, in Misc. Commercial
- ' ' Appl. No.29 of 2012 and that of / \ \ ->:"25th July 2019 in Misc. / Commercial Appl. No.45 of 2019. -. 3. That, in the circumstances of this matter, each party shall bear its own costs.
4. All parties are hereby directed to fully cooperate with the administrator to ensure that the Page 8 of 9 orders of this Court are implemented. It is so ordered DATED at DAR-ES-SALAAM ON THIS 12th DAY OF JULY, 2022 Page 9 of 9

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