

TANZANIA / JUDGMENT

ephraim solomon swila vs inets co ltd

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TZHCCOMDDECIDED
8 September 2023

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (COMMERCIAL DIVISION) AT
PAR ES SALAAM MISC. COMMERCIAL CAUSE NO. 48 OF 2022 IN THE MATTER OF THE
COMPANIES ACT NO. 12 OF 2002 IN THE MATTER OF AN APPLICATION MADE UNDER SECTION
281 (1) OF THE COMPANIES ACT AND IN THE MATTER OF COMPULSORY WINDING UP OF
INETS COMPANY LIMITED BETWEEN EPHRAIM SOLOMON SWILA.....
PETITIONER AND INETS COMPANY LIMITED RESPONDENT

RULING

A.A. MBAGWA, J. This is a petition for winding up of a company. The petitioner, Ephraim Solomon Swila is the contributor and director of the respondent while the respondent is a company incorporated and registered under the Companies Act. Mr. Ephraim Solomon Swila has petitioned for winding up order against Inets Company Limited under the provision of section 281

- (1) of the Companies Act (Cap 212 of 2002). The petition is supported by i a verifying affidavit of Ephraim Solomon Swila, the contributor and director of the respondent. On the contrary, the petition was gravely contested by the respondent through an affidavit in opposition sworn by Yohana Ibrahimu Nasson. The petitioner has advanced one main ground for winding up namely, that there is communication breakdown between the directors to the extent that they cannot manage to run the business of the respondent. In the circumstances, the petitioner is praying for the following orders; -
 - a. That the respondent be wound up by the Court under the provisions of the Companies Act [Cap. 212 R: E 2002]
 - b. That the official liquidator be appointed to take possession of the assets, properties, books of accounts and records of the company forthwith.
 - c. Costs of the petition be provided for

- d. Further orders be made and directions given by this Honourable Court as may deem fit and proper. Upon service, the respondent filed an amended affidavit in opposition to the petition for winding up on the 17th March 2023 disputing the petitioner's contentions and prayers. The respondent stated that the petitioner is not a shareholder of the respondent in that he surrendered 2 all his shares and rights in the respondent through his letter dated 29th July, 2022 (annexure R-1). Before hearing of the petition, the petitioner filed in Court a certificate of compliance under rule 102(1) and (2) of the GN No. 43 of 2005 (The Companies (Insolvency) Rules) indicating that the petition was advertised in Mwananchi Newspaper dated 28th December, 2022. However, no copy of the said newspaper was produced in Court nor does the certificate indicate whether the petition was advertised in the government gazette. This, nevertheless, will be discussed at a later stage. Briefly, the background leading to this petition may be told as follows; It is on record that the respondent company was registered on 22nd June, 2012, under the Companies Act, in the name of Innovation Software and Network Company with Reg. No. 92016 before it changed to INETS Company in 2015. Initially, the respondent was incorporated as private company limited by shares with the petitioner and one Yohana Ibrahim Nasson as its registered directors and contributors. Later on, one Aman Mwakilasa joined in the company. It is contended that in 2019 the misunderstanding between the petitioner and one Yahana Ibrahimu arose. It is further alleged that as the conflict between the directors intensified, on 28th July 2022 Amani Mwakilasa resigned and on 31st July, 2022 the petitioner resigned from the office as Chief Executive Officer and board 3 2 member of the respondent. It was averred that since July 2022 respondent has only one director as such, the management of respondent has become deadlock which hinders smooth and efficient running of the company as a commercial concern. For the stated reasons, the petitioner prays for orders as contained in the petition. When the parties appeared before this Court on 20th March, 2023 the petitioner was in the legal services of Ms. Faraja Msuya, learned advocate while Mr. Gerald Noah learned advocate appeared for the respondent. Upon consensus by the parties, the Court ordered the petition to be disposed of by way of written submissions. Both parties filed their respective submissions within the scheduled time. In a nutshell, the substance of their submissions may be summarised as follows; It was the petitioner's submission that, there is a serious misunderstanding between Yohana Ibrahim Nasson, Ephraim Solomon and Aman Mwakilasa, the directors of the respondent company. The learned counsel for petitioner expounded that, it is undisputed fact that there is misunderstanding between the directors as such, the only dispute is on resignation of the petitioner and resumption of Aman Mwakilasa as director. Mr. Faraja Msuya further submitted that, the respondent has failed to prove that Aman Mwakilasa is currently the director of respondent nor did she establish that the petitioner has ceased to be a director. The 4 petitioner admitted that he filed the notice of resignation and surrendered his shares but he was quick to pointed out that since the respondent has failed to file form No. 210 as required by section 210 and section 479 (f) of the Companies Act, 2002 to the registrar of companies, then the petitioner is still the director and shareholder of the respondent. He placed his reliance to regulation (38) part II of the 1st schedule to the Companies Act. Furthermore, the petitioner's counsel submitted

that the respondent has contravened the mandatory provision of section 133(1) of the Companies Act. He added that the management of the respondent has become deadlock to the extent of failing to call statutory meetings as required under Section 133 of the Companies Act. He contended that, failure to convene statutory annual general meetings of the company constitutes one of the reasons for winding up a company. According to Mr. Msuya, misunderstanding of the directors is one of the reasons for winding up of the company. To buttress his contention, the learned counsel relied on the cases of Ernest Andrew vs Francis Philip Temba [1996] TLR 287, Joelle Dahan and Albero Italian Restaurant & Hotel Limited & Another, Misc. Civil Cause No.3 of 2017, HC Arusha (unreported) and Ingo Marmrtinez Wazovez vs Masai experience Company Limited (unreported) in which the Court held that, the Court is empowered to wind up company where the court is of the opinion that it was just and equitable to do so. The learned counsel opined that in a situation like the one in the case at hand where the former directors are not in speaking terms and each is accusing the other of fraud, it is just and equitable that the respondent company be wound up. The petitioner's counsel lamented that Mr. Yohana Ibrahim Nasson, the managing director of the respondent and other persons namely, Donata Nicodemus Rwegalulila, Amani Mwakilasa, Elihuruma Lomayani Kivuyo, Gerald Noah Mwakyonde, Mwangata Hamid Makawa Kelvin Kulwa and Laurent Wilfred Shuka have registered a new company in the name of Runshule whose objectives are similar to those of the respondent, the act which is contrary to Companies Act. Based on the grounds advanced in the petition and submissions, Mr. Msuya beseeched the Court to find it just and equitable that, the respondent company be wound up under the provisions of section 281(1) of the Companies Act. He also prayed for costs of this petition. In rebuttal, the respondents strongly argued against the petition. At the outset, it was the respondent's submission that, this petition has been pegged under section 280 (1) of the Companies Act which enjoins creditors and contributors only to petition for winding up. It was the submission of respondent's counsel that the petitioner is not among the persons authorised to bring petition. Expounding on the capacity of the petitioner, the learned counsel for respondent told the Court that on 29th July, 2022, the petitioner surrendered his shares to respondent as per annexure 1, the fact which is not disputed by the petitioner. However, the counsel was quick to remark that the process to remove the petitioner's name as shareholder and director is still underway as the necessary documents have been submitted already to the Business and Licensing Agency (BRELA). The respondent's counsel added that, the petitioner has no sufficient reasons for winding up rather he has ill intention to steal the respondent's business through his company Shulesoft Limited. Further, Mr. Gerald Noah submitted that, the shareholding structure was changed in 2016. He further submitted that upon resignation and surrender of shares by the petitioner, the respondent filed a notice through track No. G221111-9429 to BRELA with the view of effecting changes in shareholding structure but BRELA stayed the process pending determination of this petition. Besides, the respondent's counsel had it that, the petitioner's reasons for winding up are centred on number of directors and misunderstanding. In that regard, the learned counsel submitted that the respondent company currently has two directors namely, Yohana Ibrahim Solomoni and Amani

Mwakilasa after the latter resumed the office as director. 7 In respect of misunderstanding between the directors, the counsel denied existence of any misunderstanding between the directors as alleged by the petitioner on the ground that, the petitioner is no long in the office as director. Mr. Gerald Noah contended that, the petitioner has failed to prove the allegation of existence of the new company allegedly formed by the directors of the respondent by the name of Runshule Company Limited. In the end, the respondent's counsel urged the Court to dismiss the petition with costs. I have carefully gone through the pleadings and depositions for and against the petition. I have further accorded the deserving attention to the rivaling submissions by the parties. The germane issue for determination is whether the petitioner has sufficiently established the grounds for this Court to wind up the respondent company. As alluded to, this petition was pegged on section 281(1) of the Companies Act. The petitioner contends that there is a misunderstanding between the directors in a such a way that the company cannot efficiently carry out its objectives. On the contrary, the respondent, through an affidavit in opposition sworn by Yohana Ibrahim, one of the company's directors refuted the contentions. Mr. Yahana Ibrahim deponed that the petitioner is intending to steal the company's business. He elaborated that in a bid to manifest his ill intention, the petitioner registered a sham 8 7 company in the name of the respondent's product namely, "Shulesoft School Management System" but upon receiving the complaints from the respondent, the registrar of companies through a letter dated 19th September, 2022 ordered the petitioner to change the company name (Shulesoft School Management System). Respondent attached the said letter to the affidavit in opposition (annexure R-4). The respondent further alleged that the petitioner has been fraudulently transferring the company's funds into his personal accounts with the view to fail the respondent company. The respondent attached the company account bank statement (annexure R-4) to exhibit the alleged fund transfers into the petitioner's personal account. Moreso, the respondent vehemently stated that despite the petitioner malicious acts, the respondent company is still excelling financially. To fathom her assertion, the respondent attached the financial statements for the years 2019, 2020 and 2021 (annexure R-3). The respondent added that after resignation of the petitioner, the respondent has remained with two directors namely, Yohana Ibrahim and Amani Mwakilasa. It is the settled position that the Court can issue a winding up order if it is satisfied that it is just and equitable to do so. In the case of Dr. Hashim Hassan Mussa vs Dr. Crispin Msemakula and 2 Others, Civil Appeal No. 515 of 2021, CAT at Dar es Salaam, the Court of Appeal held that 9 1 winding up is both statutory and equitable remedy as such, a petitioner should go to Court with clean hands. The question for consideration at this juncture is whether the petitioner, under the circumstances of the case, has clean hands to move this Court to grant a winding up order. My quick answer to this question is 'no'. This is because the respondent has proved that the petitioner has all along been trying to steal the respondent's business and consequently impoverish it. The respondent adduced evidence i.e., respondent account bank statement showing transactions which the petitioner as chief executive officer fraudulently transferred to his account. Further, the petitioner has gone further to establish the company in the name of the respondent's product i.e., 'Shulesoft Limited' which the registrar of companies

through a letter Ref. MIIT/BRELA/RC/MISC/2022 has ordered the petitioner to change the said company name. All these acts, in my considered view, prove the petitioner's malicious intention against the respondent company. On top of the above, the respondent has stated that the company is exceling commercially. The respondent produced financial statements for the three consecutive years showing that the company has been making profit. This confirms that the respondent company is still stable to run its day-to-day business. This Court has held, on different occasions, that winding up a company is tantamount to killing or burying the company 10 hence there should be genuine reasons. See the cases of Dangote Cement Limited vs NSK Oil and Gas Limited, Misc. Commercial Application No.8 of 2020, HC (Commercial Division) Arusha and Tanzalasa Limited vs Tractors Limited, Misc. Commercial Cause No. 11 of 2022, HC (Commercial Division) at Dar es Salaam. With the above position in mind, are there genuine reasons to kill the respondent company which is trading at profit and manned by two directors? Again, my answer is absolutely no. Indeed, the petition is devoid of compelling reasons for the Court to wind up the company. As I am closing to an end, I find it also pertinent to remark that the petitioner did not publish the petition in the government gazette contrary to rule 99 of the Companies (Insolvency) Rules which is couched in mandatory terms. All said and done, it is my considered findings that, the petitioner has failed satisfy this Court that it is equitable and just to wind up the respondent company. Consequently, in terms of section 282 of the Companies Act, I hereby dismiss the petition with an order to costs. It is so ordered.

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