

TANZANIA / JUDGMENT

RULING ELITE CHOICE VS NSSF AND ATTORNEY GENERAL

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21 May 2024

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IN THE HIGH COURT OF TANZANIA (DAR ES SALAAM SUB-REGISTRY) AT DAR ES SALAAM
MISC CIVIL APPLICATION CAUSE NO. 622 OF 2023 IN THE MATTER OF THE COMPANIES ACT,
2002(NO. 12OF 2022) AND IN THE MATTER OF THE PETITION FOR THE WINDING UP OF THE
ELITE CAREER CHOICES (T) LIMITED BY ELITE CAREER CHOICES (T) LIMITED
.....THE PETITIONER

RULING

17th & 21st May 2024 MWANGA, J. This court is urgently requested to order the winding up of the Petitioner, ELITE CAREER CHOICES (T) LIMITED (herein referred to as the company) under section 279(1) (a) of the Companies Act, Cap. 212 R.E 2022 and Rules 95(1) and 100 of the Companies (Insolvency) Rules 2005, 1 as the company is gravely unable to pay its debts to the NSSF and other creditors who are not in court. The petitioner brings the petition, ELITE CAREER CHOICES(T) LIMITED, accompanied by the affidavit sworn by Ms. Roselyn Kakande Paul. The facts leading to this application reveal that the petitioner company was incorporated on 23rd January 2017 by the company's Registrar and given a certificate of corporation No. 733726. Subsequently, the petitioner applied and was granted Tax identification No. 133188886. The petitioner was registered to conduct a recruitment agency in Tanzania as licensed, as seen in attachment-ELITE2. The certificate of incorporation, tax identification number, memorandum, and articles of association were collectively attached to form part of these proceedings. During the hearing, Mr. Johnson Kachenje, learned Advocate, represented the petitioner, whereas Ms. Zainab Juma represented the NSSF learned State Attorney. The hearing was proceeded by the publication of the advertisement in the Sunday Newspaper and Mwananchi Newspaper on 12th May 2024 as required by law. Mr. Johnson Kachenje told the court that all other creditors were diligently served, but only NSSF opted to enter an 2 appearance. Hence, it is a clear sign that they do not object for the company to be wound up. The counsel asserted that in 2019, the Petitioner was faced with the unprecedented and devastating impact of the pandemic (COVID-19), which affected many businesses and caused some to close. The counsel produced the petitioner's Audited financial statement for 2022, attached to the petition as Elite 3. In other words, the severe and unforeseen loss of business caused by COVID-19 led the petitioner to fail to run her daily business and hence failed to pay her debts. The counsel pointed out that the financial statement

shows that the petitioner had several debts, including WCF-Tshs. 23,000,000/=; worker's salaries-Tshs 169, 987,942/=; Ahava Security-16,933,000/=; Jackson mama-Tshs 3,800,000/=; Salutory Mosha-Tshs 36,000,000/=; NHIF-Tshs. 6,300,000/=; TRA-Tshs. 1,152 980161.66/=; and NSSF has a debt of Tshs. 746,000,000/= before penalty. According to the counsel, the petitioner cannot pay those debts. Therefore, section 279(1) (d) of the Company Act allows companies to be wound up by court where the company cannot pay its debts. He contended that the company has failed to run its activities and has incurred significant 3 losses. The counsel referred the court to Section 280 of the Companies Act, which provides the circumstances where a company can be described as unable to pay the debt and that the petitioner has met the threshold because the debt is above fifty thousand shillings. The notice was served, but the defendant neglected to pay and failed to do so within 21 days. The counsel supported his contention with the case of China Chung Group Co. Limited 113 of 2017, where Sehel J. held on page 4 that when the company's assets are less than liability, the company should be wound up. Also cited is the case of Miniso Tanzania Company Limited, Cause No. 4/2021, where the case of China Chung was noted on page 4, and the wind-up order was issued for failure to pay the debts. For the preceding, the counsel prayed to the court to wind up this company because it has failed to pay its debts as enlisted. He prayed further that, under the companies. Act 2002, the court shall also appoint Joyce Cyril Mwacha to be the official liquidator of the company. Ms. Zainab Juma, the learned State Attorney who represented the creditor, NSSF, submitted that, as stated in the notice of their appearance, they do not object to the petitioner company's winding up. However, she prayed for the court to prioritize them during the liquidation process in line 4 with Section 75 (a) and (b) of the NSSF Act. According to her, the court should record their debts to Tshs: 1,218 634 538/= (penalties and principal amount) as claimed in the WSD. In rejoinder, Mr. Kachenje acknowledged NSSF's existing debt to the extent of the amount stated in the WSD and not otherwise. I have heard the submissions of the learned counsels. The questions raised by the impleading petitioner for consideration before this Court are whether the Company Petition in the present form is maintainable and whether the court can proceed further for the winding up of the Company on the grounds of inability or inability to pay its debt. As rightly observed by Mr. Kachenje, section 279 (1) (a) of the Companies Act, Cap. 212 [R. E 2022] contemplates the circumstances in which the Court may wind up a company. It reads; "279.-(I) A company may be wound up by the court if - Circumstances in

- (a) the company has by special resolution resolved that the court wind the company up; 5
- (b) the company does not commence its business within a year from its incorporation or suspends its business for a whole year;
- (c) the number of members falls below two;
- (d) the company is unable to pay its debts;

- (e) the court thinks that it is just and equitable that the the company should be wound up;” Again, section 280 of the Act, Cap. 212 envisages when a company shall be deemed to be unable to pay its debts. It states; “280. A company shall be deemed to be unable to pay its debts -
- (a) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding fifty thousand shillings or such other amount as may from time to time be prescribed in regulations made by the Minister, then due has served on the company, by leaving at the registered office of the company, a written demand requiring the company to pay the sum so due and the company has for twenty-one days thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor; or 6
- (b) if execution or other process issued on a judgment, decree, or order of any court in favor of a creditor of the company is returned unsatisfied in whole or in part; or
- (c) if it is proved to the satisfaction of the court that the company is unable to pay its debts as they fall due; or
- (d) if it is proved to the satisfaction of the court that the value of the company's assets is less than the amount of its liabilities, taking into account the contingent and prospective liabilities of the company.” After reading the two provisions of the law above and in light of the present application, the petitioner is mainly required to establish to the satisfaction of the court two things: proof of the debt and the petitioner's inability to pay the debt. This may call for a winding-up order by the court on the grounds of inability to pay. The petitioner has established various debts from government institutions and individuals in the present petition. See the debt recorded from TRA, NSSF, NHIF, WCF, and others as pleaded in the affidavit and submitted during the hearing. These debts are over two billion Tanzanian 7 shillings and are reflected as well in the audited financial bank statement of the petitioner as of 2022. The petitioner has also said that her business activities have stopped due to the effects caused by pandemic diseases- COVID-19, the facts checked, which are known globally. Moreover, in the cited case of China Chang Group Limited(supra), Sehel, J held on page 4 that when the company's assets are less than liabilities, the company should be wound up, likewise, in the case of Miniso Tanzania Company Limited (Supra), Mteule, J. on page 4 accepted to wound up the company for its inability to pay debts. After considering all of the above, I have concluded that the company’s inability to repay its current liabilities and demands is sufficient to support the conclusion that it is unable to pay its debts. For the preceding, this court gives the following orders;
1. The petitioner company ELITE CAREER CHOICES (T) LIMITED with Certificate of Incorporation No. 133726 is at this moment wound up by this court under section 279(1) (a) and (d) of the Companies Act, Cap 212 R.E 2022.

2. That Ms. Joyce Cyril Mwacha is appointed as an official liquidator of the company Elite Career Choices (T) Limited within three 8 months within which shall, subject to the control of the court, exercise all the powers enumerated from sections 299 to 234, and 306 of the Companies Act, Cap. 212 R, E 2022.
3. That the official liquidator, upon realizing all the property of the company or, in her opinion, there is no need of protracting liquidation, and has distributed, shall cause and file in court a report on her accounts for his release according to the provision of section 307 of the Companies Act, Cap 212 R.E 2022.
4. The liquidator shall ensure that the NSSF, amongst all creditors of the petitioner, be given priority during the liquidation process for the payment of her debt amounting to Tshs.1, 218,634,538/= (principal and interest amount) under section 75(a) and (b) of the NSSF Act.
5. No order to costs. Order accordingly. 9 H. R. MWANGA JUDGE 21/05/2024 10

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Prepared on 13 October 2026 · Esheria