IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL CAUSE NO. 17 OF 2018

IN THE MATTER OF THE COMPANIES ACT. NO. 12 OF 2002

AND

IN THE MATTER OF PETITION FOR ADMINISTRATION ORDER BY NAKUMATT TANZANIA LIMITED

NAKUMATT TANZANIA LIMITED.....PETITIONER

Versus

KENYA COMMERCIAL BANK.....1st RESPONDENT

JW LADWA (1997) LIMITED.....2nd RESPONDENT

TANZANIA REVENUE AUTHORITY.....3rd RESPONDENT

Last Order: 22nd July, 2019

Date of Ruling: 04th Sept, 2019

RULING

FIKIRINI, J.

The petitioner has petitioned for administration orders from this Court pursuant to sections 247 (1), (2) and (3) (a) (c) and 248 (1) of the Companies Act. No. 12 of 2002 (the Companies Act).

The Kenya Commercial Bank (KBC), JW Ladwa (1997) Ltd and the Tanzania Revenue Authority (TRA) hereinafter referred as 1st and 2nd respondents filed their reply to the petition while the 3rd respondent was ordered to be joined.

On 22nd July, 2019 the matter came up for hearing. Four learned counsels argued the petition for and against their respective parties as follows: Ms. Mukangara featured for the petitioner while Mr. Mwita did so on behalf of the 1st respondent, Mr. Rutaihwa for the 2nd respondent and Mr. Kinabo for the 3rd respondent. Set the ball rolling Ms. Mukangara besides praying for the skeleton arguments filed pursuant to Rule 64 of the High Court (Commercial Division) Procedure Rules, 2012, she as well prayed for an authority in support of the petition namely **in re Atlantic Computer System Plc, Court of Appeal, 1990** be adopted and form part of the petitioner's submission. The case provides steps to be taken for an insolvent company operating under the administration.

Mr. Mwita submitting on behalf of the 2nd respondent opposed the grant of the application on the premises that: **one**, the petitioner has failed to meet criteria or conditions set out under section 247 (3) (a), (b), and (c) of the Company Act, as purposes upon which an administration order should be

granted has to be stated. And that even if the purpose was stated still it was upon Court's discretion to grant the petition or not since the provision has been couched using the term "may" and that the petitioner has to establish to the Court's satisfaction that if the administration order was to be granted there was likelihood the petitioner "Nakumatt (T) Ltd" will endure either the whole or part of its business to a status of being assumed as a going concern.

Two, also the petitioner has to satisfy the Court that granting of the order was more advantageous in realization of company assets than it would be in winding up. Meaning if the Court grants the prayers then this Court is called upon by the law to state or specify the purpose for which the administration order was made from the list. From paragraph 7 of the petition the petitioner has picked the 3rd purpose from the list which it considers was more advantageous for the realization of the company assets than winding up of the company. With that listed choice, the Court was thus called upon to answer as to whether making of an administration order will be more advantageous for realization of the company's assets than winding up, argued Mr. Mwita

The 1st respondent's answer to the question was in negative for the following reasons: one, that the affidavit of Atul Shah in support of the petition dated February, 2019 was too general as there was nowhere a stock list has been provided; its value or location. Two, that there was no management strategy, market or any commitment from shareholders either to inject capital, and further to that the majority shareholder was in liquidation in Kenya. Three, that the petitioner has no place of business as averred in paragraph 7 of the affidavit in support, since the petitioner has been evicted by its landlord for failure to pay rent.

Furthermore, the administrator's report admits the loss of more than Tshs. 14 Billion from 2017. The loss was still accruing and the petitioner has admitted incurring continuous and incremental losses from 2016, 2017 as well as secured creditors including the 1st respondent who has not been paid for 2 (two) years.

According to Mr. Mwita, Black's Law Dictionary defined the term "Going Concern" as "Commercial enterprise actively engaging in business with expectation of indefinite continuous also termed as "Going business"

His more submission was that the proposed administrator did not divulge any information as to how the administrators were going to turn the petitioner to a going concern nor had they given the timeline for doing so. Granting administration order will thus amount to allowing the petitioner to diminish or to continue diminishing the assets currently secured by creditors including the 1st respondent. This was due to the fact that the petitioner has not been trading since 2017 and hence no reason of believing by allowing this petition, it will change its course in any way. The petitioner has no employees right now and in actual fact they have instituted a claim with reference CMA/DSM/INT/20/17 at the Commission for Mediation and Arbitration. The petitioner has therefore no human resources.

It was his contention that the petition was instituted to curtail the effort by the secured creditors and in particular the 1st respondent to appoint a receiver under its security documents. In view of the submission made he prayed for the petition be dismissed with costs.

Picking from where Mr. Mwita has left, Mr. Rutaihwa for the 2nd respondent apart from adopting the reply to the petition and skeleton arguments filed to form part and parcel of his submission in opposing the petition, he as

well subscribed to his colleague's submission. Submitting on the 2nd respondent's position, Mr. Rutaihwa stated that the relationship between the petitioner and the 2nd respondent was that of the landlord and tenant, the petition being a tenant in arrears of rent in the premises occupied for doing their business. At the time of filing the petition, the petitioner was in arrears of rent to the tune of Usd 345, 046. Despite the huge amount, yet the 2nd respondent was not recognized as a creditor as there was nowhere he has been mentioned in the petition. Several demands were made but to date the petitioner has not been in the position to pay. Under paragraph 6 (b) of the petition, the petitioner admitted vacating other premises but still failed to state what measures were in place to pay the existing huge amount in order to continue occupying the premises and do business.

The 2nd respondent feels that the petition was intended to defeat the interest of justice as far as the 2nd respondent was concerned. Picking up on Mr. Mwita's submission, it was Mr. Rutaihwa that in order for the administration order to be granted, there must be criteria met, including showing efforts to be taken by the administrator upon appointment. Under paragraph 6 (b) the petitioner has indicated efforts had been taken but had not yielded immediate fruits. These efforts were nonetheless not disclosed

in the affidavit of Atul Shah, be it those taken or those intended to be taken while knowing the purpose of the administration order was for placing temporarily the company under the care of another person in order to make it prosperous again. At this juncture he referred this Court to the book **Company Law by Geofrey & Mores, p. 700.**

It was thus Mr. Rutaihwa's contention that administration order was not appropriate remedy because even if granted no efforts have been shown that the company will turn around and thriving. A decision from Kenya in relation to the petitioner's sister company (a copy which was attached) p.12-15 dismissing the petition on the ground that no efforts or measures were shown by the petitioner which will benefit the petitioner or its creditors was relied by Mr. Rutaihwa to cement his position. In that decision the Court examined the petitioner's conduct from inception of the petition to its determination.

The petitioner has been a tenant at the 2nd respondent's premises and was requested to vacate to avoid further accumulation of rent but did not give vacant possession. This conduct was in Mr. Rutaihwa's view from the business perspective was not advantageous to the petitioner, but intended

to totally deny the 2nd respondent from use of the premises, profit and chances of prospective tenants.

Examining the petition filed under section 248 (1) of the Company Act, it was his submission that there was no compliance. It was Mr. Rutaihwa's submission that the provision allows the institution of a petition by either the company or directors or creditors, together or separately. In the present petition that was not observed as the petition was not backed by the Board Resolution. In support of his assertion he cited the case of **St. Bernard Hospital Co. Ltd v Dr. Linus Chuwa,** (a copy of which was to be supplied).

On the stated reasons he prayed for the petition to be dismissed with costs. He as well in the alternative prayed for the Court to order the petitioner to pay all the rent in arrears and create vacant possession of the premises before the appointment of an administrator.

Mr. Kinabo submitting on behalf of the 3rd respondent, he started by supporting the submissions made by the counsels for the 1st and 2nd respondents. Submitting specifically for the 3rd respondent, it was Mr. Kinabo's contention that the administration sought was not likely to be

effective taking into account the company's current business status. The company has bank loans, overdrafts and other amounts which were payable to other creditors while it has no business to conduct. Giving the example of the petitioner being indebted to the 3rd respondent to the tune of Tshs. 2 Billion. Also that the petitioner has no immovable properties in the United Republic of Tanzania, therefore the appointed administrator will have no assets to administer.

Furthering his submission Mr. Kinabo argued that although liquidation would have been the proper measures, but the petitioner has not opted for that. Similarly, the respondents have not petitioned for an order of liquidation this Court cannot on its own grant one. It was his argument further that section 247 (1) of the Company Act has not been satisfied, as there was no evidence showing how the petitioner found itself at the insolvency state given the amount of money obtained from the 1st respondent. No detailed explanation were given as to how the losses were made, therefore even if this Court will grant an order for administration, the administrator will have nothing to do as there will be no enough money, stock and consequently there will be nothing to sell, the granting of the order will thus be theoretical assumption. This was stated based on the

fact that the petitioner did not exist in the market as at the time of the petition, submitted Mr. Kinabo, and even the consignment in stock would by now have expired. Likewise, the movable properties even if the petitioner had, still would not be sufficient to offset all the debts owned by creditors.

Cautioning, the Court, he urged it to treat the petition with maximum attention. Discussing the cited English case, it was his contention that Court's in this jurisdiction were not bound by the decisions by the Court's in England. The cited case of **Atlantic** (supra) should therefore not bind this Court in accordance with the doctrine of precedent.

Winding up his submission he urged the Court to order the petitioner to pay all the outstanding taxes on one hand while on the other he considered the petition lacking in merits and therefore should be dismissed.

Rejoining the submission, Ms. Mukangara prayed for the reply made to the 1st and 2nd respondents replies which she now included the 3rd respondent which she had filed on 29th October, 2018 and 27th July, 2018 be adopted as the petitioner's rejoining submission. She as well reiterated all the

prayers contained in the petition and prayed for the administration order be granted with no order as to costs.

As taken from the accounting profession readings, a going concern is a concept or a principle that "assumes that a company will continue to exist long enough to carry out its objectives and commitments and will not liquidate in the foreseeable future". In other words the company or business is considered to be a "going concern", when it is assumed, during and beyond the next year period, that company or that business will complete its current plans, use its existing assets and continue to meet its financial obligations, with the expected ability to stay afloat and avoid liquidation or insolvency.

This explanation taken from the accounting readings is not different from the definition provided by Mr. Mwita's definition derived from the Black's Law Dictionary.

The company can file for petition as provided under section 248 (1) of the Company Act which provides as follows:

> *"An application to the court for an administration order shall be by petition presented either by the company or*

the directors, or by a creditor or creditors (including any contingent or prospective creditor or creditors), or by all or any of those parties, together or separately"

From the petition filed the Court is approached to consider and upon satisfying itself to make an order placing the company or business under administration. The Court can do so under section 247 (1) (a) of the Company Act. For ease of reference the provision of section 247 (1) (a) of the Company Act is reproduced below:

"....is satisfied that a company is or is likely to become unable to pay its debts"

Pursuant to section 247 (2) of the Company Act, the company or business once placed under administration, it forces the affairs, business and property of the company to be managed by an administrator appointed for the purpose by the Court.

In so doing the Court should consider that making of the order would likely to achieve one or more purposes mentioned under section 247 (3) (a), (b) and (c) of the Company Act. That the purposes for whose achievement an administration order may be granted are -

(a) The survival of the company, and the whole or any part of its undertaking, as going concern;

(b) The sanctioning under section 299 of a compromise or arrangement between the company and any such persons as are mentioned in that section; and

(c) A more advantageous realization of the company's assets than would be effected on a winding up;

and the order shall specify the purpose or purposes for which it is made"

This petition has been brought under section 247 (1), (2) and (3) (a), (c) and 248 (1) of the Company Act. According to Mr. Mwita, the petitioner has failed to meet the conditions as provided under section 247 (3) (a), (b) and (c) of the Company Act, on which the petition is premised. Amongst the condition was for the petitioner to show that the order by the Court would be more advantageous in realization of company's assets than it would be on winding up. Also that there is likelihood of the company's either as a whole or part of it to be considered as "going concern". The affidavit deponed by Atul Shah in support of the petition should therefore be able to

avail the Court with the information the Court can rely on in making its decision.

What the Court is therefore tasked with is to determine whether the petitioner has satisfied the Court warranting granting of an administration order sought. The affidavit in support of the petition deponed by Atul Shah is lacking as it has not disclosed vital information besides general averment. Paragraph 8 of the affidavit discloses existence of stocks but without explaining what the list contained and the whereabouts of the alleged stocks in terms of location or its value.

This being a company with shareholders, it was expected that there would be market and management strategy or commitment from shareholders by way of injecting capital to support the petition for the Court's consideration. This could however, not be possible as the majority shareholder is in liquidation in Kenya. Besides, the petitioner has been evicted by its landlord in some of its business premises and hence no place of business as averred in paragraph 7 of the affidavit in support of the petition, for failure to pay rent. The 2nd respondent in particular owes the petitioner rent which has accumulated to Usd. 345, 046. Despite the accumulated rent in arrears the petitioner is not ready to create vacant

possession of the premises, the act which deprives the 2nd respondent from the use of the premises for profit including procuring tenants as it was with the petitioner.

The petitioner is seeking from this Court so that it can be placed on administration. The proposed administrators have filed a report annexed as NTL-4. The report has not furnished any information as to how it will be able to turn around the company/business to achieve status of a "going concern" or even timeline involved in bringing about the anticipated outcome. Under paragraph 6 (b) of the petition it has been averred that the company has made efforts to recover from the losses, but the efforts have not bore immediate results and as such the company has continued to incur more losses and liabilities. This account has not been supported by any demonstration of what efforts have been made or intended to be made in the event the company is placed under administration. The purpose of an administration order is to temporarily place the company under care of another person in this case the administrator in order to make it turn around. Without pointing out the strategies or efforts already taken or to be employed which will, restore the company to its past glory. Failure to demonstrate any measures for sure places this Court in a difficult position

to reason along the same line with the petitioner. In the matter of **Insolvency Cause No. 10 and 13 of 2017 (consolidated) The High Court of Kenya**, the Court had this to say:

> *".....A speculative suggestion is not enough neither is a statement simpliciter that the company or proposed administrator believes that an objective of administration will be achieved. It is the applicant who seeks to and must satisfy the court the prospect. He must this by way of affidavit in support of the motion establish the reasonable grounds, including indication of how long the turnaround is expected to take place"*

I fully concur with the decision that the Court must be availed with sufficient information be it from the petitioner through the affidavit in support or report filed by the would be or appointed administrator. In the present petition both the affidavit and the report were lacking in vital information.

The petitioner's financial report as furnished has admitted loss of more than 14 billion from 2017 and the loss is still accruing this is certainly due

to existing bank loans, overdrafts and other amounts payable to creditors including failing to pay secured creditors such as the 1st respondent who has not been paid for almost 2 (two) years. The 2nd respondent is claiming for almost Usd. 2,867, 233.89 and Tshs. 3,584,191.073.39 plus accrued interests thereon. The 3rd respondent though not a secured creditor but have priority over all other debt to be paid. And the amount of taxes to be paid is almost 2 billion. This vividly shows that the petitioner has no funds not only to pay its debts but even to run business which could generate income, which could lead to a belief or assumption that if Nakumatt Tanzania Limited under administration could continue to exist long enough to carry out its objectives and commitments and will not liquidate in the foreseeable future. Without serious financial bailout, which I contemplate would be hard to come by, the petitioner cannot be able to buy new stocks, and without new stocks there will be nothing to sell. This is concluded based on the fact that the alleged available stock which has been ruled out after the affidavit deponed has failed to disclose its where bouts and what it entails, which by now possibly would be on verge of expiration due to passage of time. The petitioner, under the situation will definitely need a new stock which entail additional capital or financing, and

of course new market strategy to bring itself to the business platform after going underground, the undertaking which would not necessarily work in his favour.

Considering that the petitioner has no immovable properties in Tanzania and the fact the majority shareholder is under liquidation, it is obvious the chances of the petitioner getting boosted is farfetched. And in view of that even the appointed administrator will have no assets to administer or business to turn around. But even if the petitioner had immovable properties, it was not definite that it would have sufficed to sort out the debts it owes its secured and unsecured creditors.

Under the circumstances the best optioncould, have been granting liquidation but since neither the petitioner nor the respondents have sought for that this Court cannot on its own proceed to order so. Neverthelesssince the requirement under section 247 (1) of the Company Act has not been fulfilled this Court can in no way grant the petition. The petitioner apart from all that has been pointed out above has equally failed to show how they arrived at such sorry state given the amount of money advanced or obtained from the 1st respondent. No detail account of how losses were made was given nor description of the nature of the business

which caused the subsequent losses, and the measures that would be curtail recurrence of the same.

Examining the petition in its totality including the cited case of **Atlantic** (supra) cited in support of the petition, I find the petition is without merit as the petitioner has failed to satisfy the conditions as stipulated under section 247 (3) (a) and (c) of the Company Act. The petition is thus dismissed with costs. It is so ordered.

P.S.FIKIRINI

JUDGE

04th SEPTEMBER, 2019