

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISC. COMMERCIAL CAUSE NO. 20 OF 2019

IN THE MATTER OF COMPANIES ACT, 2002

AND

IN THE MATTER OF APPLICATION FOR ORDERS

BETWEEN

MS. DEVOTA KIWORY.....1ST PETITIONER

MR. NYEMO MALUNDO.....2ND PETITIONER

AND

CETAWICO LIMITEDRESPONDENT

RULING

B.K. PHILLIP, J

This ruling is in respect of a petition lodged by the petitioners herein under the provisions of section 233 (1) and (3) (a) & (b) of the Companies Act, 2002(Hereinafter to be referred to as "Cap 212").

It is stated in the petition that the petitioners are members and ordinary Directors of the respondent and one Dr. Fiorenzo Chesini, is the Managing Director of the respondent (Hereinafter to be referred to as " the Company"). The petitioners have enumerated a number of complaints

against the Managing Director, Dr. Fiorenzo Chesini which can be classified in the following broad areas of complaint.

- i) Failure/refusing to convene mandatory statutory meetings.
- ii) Misuse of the respondent's funds in different ways such as paying personal expenses for his girl friend, one Katrine Mwimbe, payment of service fees for FINICO and buying Aircraft using the respondent's money.
- iii) Opening of Bank accounts and taking loans without involving the petitioners.
- iv) Shifting the registered office of the respondent from Hombolo, Dodoma to another place without involving the petitioners.
- v) Failure to lay out the Annual Accounts and Auditors' report of the respondent.
- vi) Failure to declare Dividends.

The petitioners attached to the petition a number of documents including bank statements and various correspondences between the petitioners and Dr. Chesini to substantiate their claims.

The petitioners pray for the following reliefs;

- i. This honourable court be pleased to order the Managing Director Dr. Florenzo Chesini to stop his involvement in the Management affairs of the Respondent pending the final order of this honourable court.
- ii. This honourable court be pleased to make an order in regulating the respondent company's affairs in the future.

- iii. This honourable court be pleased to make an order restraining, the Managing Director Dr. Florenzo Chesini from doing or continuing with acts complained of by the Petitioners or to do acts which the petitioners have complained they have been omitted.
- iv. In exercise of its powers in item (iii) above this honourable court be pleased to make an order restraining the Managing Director Dr. Florenzo Chesini from misusing the respondent company's funds and properties.
- v. In exercise of its powers in item (iii) above this honourable court be pleased to order the Managing Director Dr. Florenzo Chesini to call for the meetings of the member of the respondent.
- vi. In exercise of its powers in item (iii) above this honourable court be pleased to order the Managing Director Dr. Florenzo Chesini to declare Dividends of the respondent to its members.
- vii. In exercise of its powers in item (iii) above this honourable court be pleased to order the Managing Director Dr. Florenzo Chesini to disclose all information relating to all affairs of the respondent.
- viii. Any other orders be issued whether interim or final, as this court may deem just.
- ix. The costs be paid by the respondent.

In his reply to the petition , the Managing Director, Dr. Fiorenzo Chesini refuted all the complaints leveled against him and attached to his reply to the petition a number of documents showing that he is the majority share holder owning 4000 shares out of 5000 shares in the respondent.

He averred that he has not shifted the registered office of the Company. He also stated that the complaints on failure to hold statutory meetings are premature and that the respondent has been convening various board meetings. Moreover, Dr. Chesini contended that the duty to call statutory meetings is not the duty of the managing director solely but the responsibility of all directors.

As regards the complaint on misuse of funds, he stated that he has never misused any of the respondent's fund. He contended that there has been a lot of liabilities accrued since 2012 to date which he has been struggling to clear them on his personal efforts, for instance, he has stated that in 2014 the respondent's assets stood at Tshs 2,437,647,252/= while the liabilities stood at 4,933,578,716/= and in 2017 the respondent's assets stood at Tshs 2,699,202,000 compared to liabilities which stood at Tshs 2,841,376,000/=. He proceeded to state that it was impossible to pay dividends as there was no any profit.

Dr. Chesini admitted that he opened Bank account at NMB for the respondent. However, he explained that the Bank account was opened for a good intention and best interest of the respondent as it was for the purpose of availing loans to the farmers who are the major suppliers of grapes to the respondent.

Moreover, Dr. Chesini explained that the operation of the day to day activities of the respondent are dependent on him as the petitioners stopped participating in the daily operational activities of the respondent since 2015 to date. He contended that the petitioners also allowed him to

give loan to the respondent so as to rescue it from the financial crisis. Also, he attached to his reply to the petition a previous statement of financial position of the respondent signed by the petitioners to show that the petitioners are involved in the affairs of the respondent including financial matters.

I ordered this petition to be disposed of by way of written submission. The learned advocates Hudson B. Mchau and Francis Steven prepared the Written Submissions for the petitioners and respondent respectively.

In his submissions Mr. Mchau submitted that the petitioners are minority share holder and their complaints are against the managing Director Dr. Chesini because he is conducting the affairs of the respondent ("Company") unfairly. He proceeded to submit that Dr Chesini who is the managing director and majority share holder of the company has neglected to hold the statutory meetings of the company for many years, in total contravention of the provisions of section 133(1) of the Cap 212. Thus the petitioners have been denied of their right to know what is going on in the Company including the financial affairs of the Company. Mr. Mchau reiterated the complaints against Dr. Chesini as they are stipulated in the petition. He submitted further that failure to lay out annual account and Auditors report of the company before the members contravenes the provisions of section 159 (1) and 161 (1) of Cap 212. Mr. Mchau contended further that Dr. Chesini's Act of opening a Bank account for the Company at NMB Bank without involving the petitioners contravenes the provisions of sections 151 (1) (a) and (b) and 152 of Cap 212.

Moreover, Mr. Mchau contended that the alleged misuse of fund done by Dr. Chesini contravenes the provisions of section 181 and 182 of Cap 212, and the failure to declare dividends contravenes the provision of section 180 (1) and (2) of Cap 212.

In response Mr. Francis Steven submitted as follows; That from 2012 to 2015, the petitioners were involved in the daily operational activities of the Company and in those years the company's financial situation was not good. The respondent intervened and labored to rescue the Company. His efforts were not supported at all as the petitioners refused to cooperate with him and decided to withdraw from the management and daily operation of the Company to date, leaving the Company with a liability to a tune of Tshs 4,933,578,716. The aforesaid act of the petitioners have been causing great hardship to Dr. Chesini in running the Company. Citing the provisions of sections 133 (1) (4) of Cap 212, Mr Steven submitted that the complaint on failure to hold meetings are not true, baseless and premature since the petitioners were supposed to take appropriate steps by making the relevant application to the minister. Mr. Steven contended that there is no any proof that the respondent neglected or refused to hold those meetings. Moreover, he submitted that Article 29 and 30 of the company's Articles of Association do not vest the duty to call meetings to the managing Director alone, but the same is vested to all Directors and the Board of Directors. Since the incorporation of the Company several meetings had been held and attended by the petitioners contended, Mr. Steven.

Referring to the official search results from BRELA that is attached to the reply to the petition, which shows that the registered office of the Company is Hombolo Village, Dodoma, Mr. Steven Contended that Dr. Chesini has never shifted the registered office of the Company.

In addition to the above, Mr. Steven submitted that all complaints on failure to lay out audited accounts for the company and opening bank account illegally are baseless. He reiterated what is stated in the reply to the petition and proceeded to submit that the Annual Financial statement for the year ended 31st December 2014, which is annexed to the reply to the petition shows that it was signed by the 2nd petitioner. Furthermore, Mr Steven contended that it is not the duty of the managing Director to lay out books of accounts for the Company, his duty is to keep them and make them available for inspection by the Directors.

In conclusion of his submission Mr. Steven insisted that Dr. Chesini has not committed any wrong or misused the Company's fund. He neither purchased the company called DOWICO nor released the Company's properties to any company, contended Mr. Stephen.

Having analyzed the submissions made by learned advocates herein, let me start by point out that the respondent's concern on the non-joinder of Dr. Chesini in this petition, is a pure afterthought raised belatedly. As correctly submitted by the petitioner's advocate, the same was supposed to be raised at the earliest stage before the hearing. The position of the law is very clear that points of preliminary objections have to be raised at the earliest time, except preliminary objections on jurisdiction which can be

raised at any time even at appellate stage (see the case of **Tanzania – china Friendship Textile Co. Ltd. Vs Our Lady of the Usambara Sisters (2006) TLR 70**). Therefore I cannot entertain that concern at this stage, bearing in mind that the same has just being raised in submissions as an afterthought.

Now, let me proceed with the determination of the merits of the petition. I have perused the pleadings and subjected the submissions made by the learned advocate to strict scrutiny. What I have noted is that some of petitioners' complaints need more evidence to be proved. For instance the allegation on selling of the company's properties without any mandate from the Company or any approval by other directors (the Petitioners) and the allegedly use of the Company's money for buying a personal Aircraft. Other complaints, attract opening of a civil case against Dr. Chesini, for instance a complaints on misuse of the company's funds by buying a Company called DOWICO and using the company's machines for DOWICO's works for his personal profits/benefits. In my considered view I think , in this petition I am not in a position to make any determination on those kind of issues since the same need formal hearing in a civil or criminal case. Also, what have been brought before me in terms of the alleged facts and attached annextures are not enough for the determination of the complaints raised.

In addition to the above, I have also noted that , the prayer for ordering Dr. Chesini to step aside and leave the office is misconceived and not practical because from the pleadings it is evident that the petitioners have not been active on participating on the day to activities of the Company ,

so they are not well versed with what has been going on in the Company. Thus, removing Dr. Chesini from the Company abruptly as prayed by the petitioners will lead to total paralysis of the Company and in my view it will have far reaching negative impacts to many people and institutions. For instance the pleadings reveal that the company has been working with farmers of grapes and the National Bank of Commerce which has been involved in giving loans to the farmers.

Moreover, the complaints raised by the petitioner are entirely results of failure to hold the statutory meetings for the Company. I am saying this because the pleadings show that there is breakage of communication among the parties herein. Therefore, the Directors need to meet for exchanging information and deliberate on the issues involving the running of the day to day activities of the company and ultimately they will decide on the way forward whether to proceed with the business or otherwise.

From the foregoing, I hereby order as follows;

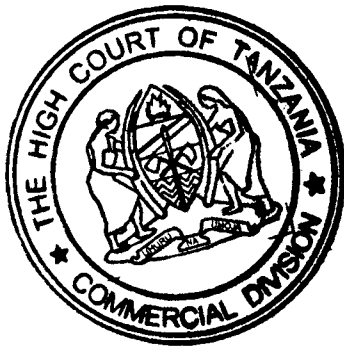
- i) That Dr. Fiorenzo, the managing director of the company should convene an extra ordinary meeting of all directors of the company within one month from the date of this order.
- ii) The agenda of the meetings should include all matters raised by the petitioners in this petition as complaints.

Further order, pursuant to the provisions of section 233 (3) (c) of the Company Act, 2002 at the end of the meeting, any party herein who will still have complaints in respect of the issues raised in this petition shall be at liberty to institute civil proceedings in the name of the Company.

Also, I wish to point out that the directors of a Company are expected to exhibit cooperation in running the affairs of the Company. A company is run by its directors who can be equated to an engine in a motor vehicle, so if the engine is not in order, definitely the motor vehicle cannot move. It will not be useful and cannot serve the purpose intended for. Therefore, the Directors' meeting ordered herein above need to ascertain whether or not the company is serving the intended purposes, and if not, it has to make appropriate resolutions in line with the laws.

In the upshot, this petition is partly granted to the extent explained herein above. Each party will bear its own costs.

Dated at Dar es Salaam this 13th day of May 2020.



A handwritten signature in black ink, appearing to read "B.K. PHILLIP".

B.K. PHILLIP

JUDGE