

**IN THE HIGH COURT OF TANZANIA**

**(COMMERCIAL DIVISION)**

**AT DAR ES SALAAM**

**MISCELLANEOUS COMMERCIAL CAUSE NO. 374 OF 2017**

**IN THE MATTER OF COMPANIES ACT, 2002**

**AND**

**IN THE MATTER OF WINDING UP OF ITALFRAME LIMITED**

**BETWEEN**

**IRON AND STEEL LIMITED.....PETITIONER**

**Versus**

**ITALFRAME LIMITED**

**(UNDER LIQUIDATION).....RESPONDENT**

Last Order: 24<sup>th</sup> Feb, 2021

Date of Ruling: 08<sup>th</sup> Apr, 2021

## **RULING**

**FIKIRINI, J.**

On 24<sup>th</sup> February, 2021 when this matter came for orders, Mr. Ayoub Mtafya learned advocate who this Court on 28<sup>th</sup> September, 2020, appointed as a liquidator of the Italframe Limited, moved this Court praying under Rule 115 (2) of the Rules, his appointment be terminated

and he be discharged as per Rule 117 (1) of the Rules, and the Court proceed to give a number of reliefs and orders it deemed appropriate.

He said it was not possible to proceed with the task of liquidating the Italframe Limited as the progress in the liquidation process has been hindered by lack of funds, with exception of Formscaff who has complied with the order as per Rule 115 (1) (1) of the Companies (Insolvency) Rules, 2002 (the Rules) and has deposited Tzs.3,000,000/=, which is not enough for the process, other Creditors have failed to comply to the order and have not deposited the sum of monies assigned to each one of them as per the resolution dated 20<sup>th</sup> August, 2020. The liquidator accounted for the failure of creditors to deposit the monies as what led to automatic failure of the liquidation process, and that this situation could not be salvaged by appointing another liquidator as nothing will happen as there would still be no enough monies deposited in the liquidation account to carry out the duties and tasks, which have been reported in the report dated 26<sup>th</sup> May, 2020. In view of that, he pressed upon the Court that it can invoke R 452 (1) of the Rules and rescind or revoke its order dated 18<sup>th</sup> December, 2019, since this Court has jurisdiction under section 275 of

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the Companies Act, 2002 (the Act). And that although rescinding order under Rule 452 (1) of the Rules was to be made within seven (7) days, he, pursuant to Rule 91 of the Rules prayed for extension of time so that he can apply for the appropriate order.

The effect of the order, he contended was that the company will be released from winding up proceedings. And this was appropriate order as the company cannot trade, and its employees and other matters were stalled. Also he contended that there was no promising outcome from the liquidation process for lack of funds.

In addition to the discharge and termination of his appointment prayer, he prayed for costs. Mr. Mtafya claimed costs reimbursement from the petitioner and those who supported the petition as without them all these would not have occurred. Referring to the report filed on 11<sup>th</sup> December, 2020, the report which revealed tasks completed in the liquidation process and related costs totaling Tzs. 5, 798, 200/= up to 1<sup>st</sup> December, 2020 plus Tzs. 30,000/= incurred in filing the report. Stressing on liquidator's remuneration, it was Mr. Mtafya's assertion that the remuneration aspect

was provided for under Rule 192 (1) of the Rules. And that after all the remuneration amount of Tzs. 150,000,000/= to be paid to him as remuneration for undertaking the liquidation tasks was set by creditors themselves in their resolution dated 20<sup>th</sup> August, 2020, and thus he deserved to be paid.

Mr. Zakaria Daudi for the petitioner Iron and Steel Limited , conceded that on 20<sup>th</sup> August, 2020 it was resolved that an amount of Tzs. 150,000,000/= would be paid to the as remuneration for carrying out the liquidation duties and tasks. The agreed amount was to be deposited within ten (10) days. Out of all the creditors only one complied. He also conceded to the fact that Rule 117 (1) of the Rules allowed termination under the circumstances prescribed under Rule 115 of the Rules and the Court was allowed to make appropriate order.

Mr. Daudi's point of departure was under the provided provisions the appropriate order by the Court was not only that of terminating and discharging the liquidator. Instead the Court after terminating and discharging the liquidator, pursuant to section 318 (1) of the Act can

appoint a manager. He thus prompted the Court not to invoke the provision of Rule 452 (1) of the Rules and in its place apply section 318 (1) of the Act.

On the costs that the expenses so far incurred and remuneration be borne by the three (3) creditors only, Mr. Daudi considered the submission and prayers unfounded. His reasons for disputing the argument were that the Court order dated 28<sup>th</sup> September, 2020 was against ten (10) huge creditors, thus was unfair to zero it down to only three (3) creditors. Also, the amount to be realized was presupposed would have covered the whole liquidation process from start to the end, the process which has not been accomplished. And that under section 322 of the Act, the costs and remuneration of the liquidator has to be paid out of the assets of the company under liquidation unless it has been proved that the assets were insufficient to cover that.

Mr. Daudi concluded his reply submission praying that all costs and remuneration be paid out of the assets of the company and not by its creditors.

Mr. Charles Mugila for Azania bank admitted that the Azania bank did not make any deposit. The reason being upon receiving the liquidator's report indicating that the claim by statutory creditors was over and above the value of the company's assets, the bank concluded that there was no chance they will ever recover anything, giving example of the Tanzania Revenue Authority (TRA) claiming almost Tzs. 1.5 Billion. By depositing money into the liquidation account would have been adding loss to bank in addition to the one already experienced.

Touching on costs, it was Mr. Mugila's submission that the amount of Tzs. 150,000,000/= was to cover the whole process which had not been accomplished yet. And on the costs incurred he contended most were not supported by electronic fiscal receipt (EFD) to justify the claim. Closing his submission, he urged the Court if it finds the liquidator deserved to be paid, then it has to be by all creditors and not only three (3) creditors as pointed out by Mr. Mtafya.

Rejoining, Mr. Mtafya rebutted the submission by Mr. Daudi on appointment of a manager to replace the liquidator, arguing that such

order would not be appropriate as still money will be required and creditors have declined to pay as ordered, which can be easily interpreted as the creditors not being interested in seeing the liquidation process being accomplished. Moreover, the appointment of a manager will continue to place the company in an unfair situation as nothing productive will take place for lack of funds.

On pointing out the three (3) creditors as the ones who ought to pay the costs incurred as well as the liquidator's remuneration, it was his argument that these three (3) were the ones who initiated and supported the process with full knowledge and consequences that might come with such action. Therefore, any reason advanced at this stage ought to have been known before embarking on the journey. Otherwise the Court's and the liquidator's time have been wasted and the company placed in an awkward situation and its blemished image blemished.

In addition, he reminded that the creditors were bound by their resolution for the payment of Tzs. 150,000,000/= and the Court ruled as such due to the fact the resolution has not been rescinded. He thus stressed on the



payment of the whole amount, which was the appropriate fee under the circumstances. This, he argued, was so since the creditors were the ones who frustrated the process of winding up, connoting that the presupposed completion would not be reached. It was thus fair for the liquidator to be compensated for actual costs incurred and the rest which was abandoned, maintained Mr. Mtafya.

Canvassing on the losses and that the company assets that will not fetch anything, as put forward by Mr. Mugila, Mr. Mtafya maintained his earlier position that the possibility ought to have been known even before taking the initial step. On the claim that some payments were without proof of EFD receipts, he faulted Mr. Mugila for not having gone through the receipts properly, and also pointed out that the big chunk of the payment went on advertisements and receipts in that regard had been attached.

Finally he put Mr. Daudi and Mr. Mugila to challenge for not coming up with an alternative amount and hence urging the Court to grant his application and give the appropriate orders.



The liquidator's application came almost a year or so after the Court has issued a winding up order on 18<sup>th</sup> December, 2019. The reason behind such delay, the liquidator has indicated was because of the following, that after being appointed he did the initial duties and tasks as required under the law and upon completion filed a Liquidator's Report dated 26<sup>th</sup> May, 2020 as required by the law. This was then followed by creditors' meeting convened on 20<sup>th</sup> August, 2020. Out of 57 (fifty - seven) creditors 7 (seven) were in attendance. The liquidator's remuneration and expenses which are costs of liquidation and that have priority over other liabilities were discussed. Among resolutions made in the meeting was one, a total of Tzs. 60,000,000/= be raised upfront by the following 10 creditors with huge credit, namely, Azania Bank Limited, The French School Society, Formscaff Tanzania Limited, Banca Monte Dei Paschi Di Siena, Iccrea Banca Impresa S.P.A, Doshi Hardware (T) Limited, Camel Concrete (T) Limited, Iron and Steel Limited, Sata Company Limited and LeaJoy Real Estate Ltd, by each depositing 0.53% of their claims which would have been used by the Liquidator to carry out the duties and tasks coming with the appointment. and two, the meeting also resolved Tzs. 150,000,000/=

be the remuneration for the Liquidator. None of the creditors deposited the upfront money, the act which compelled the liquidator to approach the Court. All creditors were summoned through a substituted service by way of publication in the Mwananchi newspaper dated 14<sup>th</sup> September, 2020. The matter was scheduled for hearing on 22<sup>nd</sup> September, 2020. Almost 9 (nine) creditors entered appearance through their advocates and representatives. The Court in its ruling dated 28<sup>th</sup> September, 2020, ordered reiterating the creditors resolution passed on 20<sup>th</sup> August, 2020, that the 10 (ten) huge creditors, each to pay the required amount as agreed within 10 (ten) days. That did not happen save for 1 (one) creditor namely Formscaff Tanzania Limited who paid Tzs. 3, 000,000/=.

The liquidator approached the Court as illustrated above in this ruling. Under Rule 115 (2) of the Rules, this application for discharge of the liquidator ought to be filed within 2 (two) days after the creditors have failed to deposit the amount ordered or the deposited amount is insufficient. For ease of reference the provision is reproduced below:

*"Where the sum deposited or secured subsequently proves to be insufficient, the court may, on application by the official receiver, order that an additional sum be deposited or secured. If the order is not complied with within 2 days after service of it on the person to whom it is directed, the court may discharge the order appointing the interim liquidator."*

This application was filed I would say completely out of the prescribed time stated in the above cited provision. The liquidator has thus moved this Court seeking for an extension of time to make this application citing Rule 452 (1) of the Rules which empowers this Court to review its own orders. The following is the wording of the provision of Rule 452 (1) of the Rules:

*"Every court having jurisdiction under the Act to wind up companies may review, rescind or vary any order made by it in the exercise of that jurisdiction."*

This Court which is conferred with jurisdiction to deal with matters of this nature under section 275 of the Act, it is therefore as well vested with powers to review, rescind or vary its orders.

The application for rescission of a winding up order has, however, been prescribed to be made within 7 (seven) days from the date the order was made pursuant to Rule 452 (2) of the Rules. This point was emphasized in the case of **Metrolab Ltd and Another [2010] EWHC 1317 (Ch)**, when the Court had this to say:

*The interests of the administration of justice require any application for rescission of a winding-up order to be made promptly. ... a winding-up order affects all creditors of the company and gives the Official Receiver authority to act immediately. Without the requirement for a prompt application a considerable degree of uncertainty would arise for creditors and the Official Receiver and any liquidator thereafter appointed.*

Appreciating the efforts made by the liquidator and in anticipation that the money to carry out duties and tasks would be realized as per the resolution dated 20<sup>th</sup> August, 2020 and later Court order dated 28<sup>th</sup> September, 2020, that the 10 (ten) huge creditors would deposit the Tzs. 60,000,000/= to

enable the liquidation to occur; unfortunately, that did not materialize as out of 10 (ten) only one creditor fulfilled the obligation while the rest did not. Azania bank, specifically informed the Court through Mr. Mugila that the amount required was not deposited, as after assessing the situation, it has found that complying to the order, this creditor would be adding more loss to the bank from the one already experienced by failure to be paid. Considering the facts availed to this Court and which are not disputed, it is fact that aside from Tzs, 3,000,000/= no any other money has been deposited up to the time this application was made, this Court finds even though the 7 (seven) days rule has not been complied with but there are valid reasons as put forward by the liquidator, as narrated above, warranting granting the extension of time. And pursuant to Rule 91 of the Rules, this Court proceeds to grant the application for extension of time and consider his prayers. The provision of Rule 91 empowering this Court to extend time if and when need be reads as follows:

*"Where by any provision of the Act or these Rules about winding up, the time for doing anything is limited, the court*

*may extend the time, either before or after it has expired, on such terms, if any, as it thinks fit."*

After grant of the application for extension of time, I will now examine if the liquidator's prayer for discharge deserves granting or not. And if it deserves granting then what should follow and if not what happens.

Requirement to deposit money has been clearly stipulated under Rule 115 (1) of the Rules, the fact which is not contested by Mr. Daudi or Mr. Mugila. Rule 115 (1) of the Rule, instructed deposit of money to cover the liquidator's remuneration and expenses. Since there is insufficient deposit, it means the liquidator cannot accomplish the duties and tasks he was expected to complete. Creditors aside from what was resolved in the creditors meeting convened on 20<sup>th</sup> August, 2020, they even failed to comply to the Court order dated 28<sup>th</sup> September, 2020. Besides Tzs. 3, 000,000/= deposited by Formscaff Tanzania Limited, no any other creditors deposited money. The amount of Tzs. 3, 000,000/= is not sufficient to carry out the duties and tasks to be accomplished. Against that background I find it more sensible to grant the application and discharge the liquidator



rather than not. This is due to the fact that there is nothing promising that the required money would be realized. In light of that I thus proceed to discharge the liquidator's as per Rule 115 (2) of the Rules. Consequently, this will terminate his appointment as liquidator under Rule 117 (1) of the Rules.

The biggest hurdle after the termination of the appointment is the way forward. The Court has been urged to make appropriate orders it deems fit the powers which has been conferred under Rule 117 (2) of the Rules. While Mr. Mtafya considered releasing the company from liquidation as an appropriate order this Court should make, Mr. Daudi opposed the suggestion and in its place proposed appointment of a manager under section 318 (1) of the Act.

The impression one gets when reading of section 318 (1) of the Act, it connotes that appointment of a special manager is first and foremost at the behest of the liquidator who is required to apply to the Court for appointment of a special manager depending on the nature of the business of the company under liquidation. This appointment presupposes the



creditors have deposited money to cover remuneration and expenses. Second, the appointed special manager would be carrying out the duties and tasks under the liquidator's instruction. Under the circumstances of the application under scrutiny, that is not possible, *one*, the liquidator has not preferred such application and *two*, if there was no money to carry out the liquidation exercise from start to the end; the same would still be the situation. Since both, the special manager and the liquidator, need to be remunerated as per the law, although with the special manager, the Court is the one tasked to determine the amount as provided under section 318 (3) of the Act, however, source of funding to accomplish the exercise must be clear. Mr. Daudi has not enlightened the Court from which source the special manager would be paid from and hence making the submission not backed up.

Under the circumstances the only viable option is for this Court to of rescind its order dated 18<sup>th</sup> December, 2019 pursuant to Rule 452 (1) and release the company from winding up order initially issued. For ease of reference the Rule is supplied below:

*"Every court having jurisdiction under the Act to wind up companies **may review, rescind or vary any order made by it in the exercise of that jurisdiction.**"* [Emphasis mine]

The effect of this rescinding order will be the company will be revived. This is so because by having the winding up order in place it does not mean the company has ceased to exist. The company ceases to exist after it has been dissolved and deregistered from Business Registration and Licensing Agency (BRELA). And this Court rescinds its order and allow the respondent's company business which was halted to resume its business and of course deal with the affairs of its employees who were left uncertain. This order is nonetheless granted despite the fact there are seem to be no light at the end of the tunnel for the company to continue operating normally.

The last part in this application as raised by the liquidator is order for costs for the expenses incurred and liquidator's remuneration as resolved by the creditors in their meeting held on the 20<sup>th</sup> of August, 2020. I have

examined the receipts filed in support of the expenses incurred. Mr. Mugila has challenged the claim as not supported by EFD receipts. I am content that the related costs totaling Tzs. 5, 798, 200/= up to 1<sup>st</sup> December, 2020 plus Tzs. 30,000/= incurred in filing the report as supported by the statement of account on all expenses, which correspondingly have been supported, by taxi receipts for the payment for the taxi charges, by tax invoices for the payment on advertising expenses, and by other listed expenses as annexed to the report were sufficient proof on the claim put forward. Even though not all were EFD ones as preferred by Mr. Mugila, but those annexed in my view were credible and sufficed.

The amount of Tzs, 60,000,000/= was to be covered by 10 (ten) huge creditors, each according to what was claimed proportionally at 0.53%. The failure of these 9 creditors to fulfill their obligation after the resolution makes me find them still responsible to cover for the costs incurred. Since there were supposed to deposit 0.53% of their claims and in total the deposit would have summed up to Tzs. 60,000,000/=:, and also since at this juncture the already paid expenses by Liquidator amounts to Tzs. 5,798,200/=:, which is almost 10% of the Tzs. 60,000,000/=:, I thus order

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each of the selected 10 huge creditors to pay only 10% of what they would have paid upfront as 0.53% of their claims (amount) in order to reimburse the Tzs. 5, 798,200/= already incurred by the Liquidator in course of his duties and tasks. However, with regard to Formscaff who had already deposited Tzs. 3, 000, 000/=, only a 10% of the 0.53% of the credit amount owed to her should be deducted as share of the costs and what remains, if any, be used to pay her share of the remuneration charges.

Mr. Mugila's account that the Azania bank opted not to pay as they learnt that by paying the amount they will be incurring additional loss to what they had already experienced, though plausible but at this juncture the assertion reads to me as an afterthought. The bank ought to have known that even before joining the petition. All the difficulties the bank encountered in recovering the monies loaned to Italframe, was in my view sufficient indicator that this client of theirs was in a sorry state and there was no way Italframe would honour her debts. Azania bank was therefore better informed than others. Mr. Mugila's submission in this regard is thus ignored and treated as mere attempt to escape liability *first*, imposed on itself by joining or supporting the petition and *second*, by being part of the

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resolution that 10 huge creditors including Azania Bank should each as per what they claim deposit money in the liquidation account, which would have enabled the liquidator to carry out his duties and tasks.

Coming to remuneration, it is obvious the liquidator deserves to be remunerated. Whilst, the liquidation process has not been accomplished fully, but the fact that the liquidator has fulfilled part of the duties and tasks, which according to the estimated amount for the expected expenses to be incurred by the Liquidator to the completion of the exercise, exclusive of the remuneration of Tzs. 150,000,000/=, was pegged at Tzs. 60,000,000/=, and only Tzs. 5, 798, 200/= had been incurred, which is almost 10% of the expected expenses which should have been incurred to the completion of the exercise, so logically and fairly the Liquidator also ought to be remunerated to the extent of 10% of the agreed remuneration of Tzs.150,000,000/= which would have been paid at the completion of the exercise.

I have opted to rely on the correlation of the work that has been done by liquidator and related costs he has incurred to accomplish the work, based

on the fact that it is hard to peg value in terms of what has been done and how should the liquidator be remunerated. Therefore out of the agreed Tzs. 150,000,000/= as liquidator's remuneration, based on the correlation ratio established above, a fair remuneration to the liquidator should be 10% of the agreed remuneration amount which comes to Tzs. 15,000,000/=. This amount has to be paid equally by the 10 (ten) selected huge creditors, as resolved by the creditors in their meeting of 20<sup>th</sup> August, 2020, as they are the ones who hindered complete liquidation process for failure to deposit Tzs. 60,000,000/= which would have covered liquidation process expenses.

From the above, the following is thus ordered; the 10 selected huge creditors, each should pay 10% of 0.53% of its claim to reimburse the Liquidator the Tzs. 5, 798,200/= which he has so far incurred. Also each creditor amongst the ten huge creditors, should pay the liquidator 10% of the 10% of the agreed remuneration amount of Tzs. 150,000,000/= as remuneration for the work done.

However since Formscaff deposited Tzs.3,000,000/=, is only obligated to pay her remaining share of the incurred liquidation costs and that of the remuneration to the Liquidator.

I also order costs of this application. It is so ordered.



A handwritten signature in blue ink, appearing to read "P. S. Fikirini", written over a horizontal line.

**P. S. FIKIRINI**

**JUDGE**

**08<sup>th</sup> APRIL, 2021**