

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

MISCELLANEOUS CIVIL APPLICATION NO. 684 OF 2019

BETWEEN

NYANZA MINES (TANGANYIKA) LIMITED.....APPLICANT

AND

THE REGISTRAR OF COMPANIES.....1ST RESPONDENT

BRIDGE OF BALGIE LIMITED.....2ND RESPONDENT

RULING

Date of last Order: 21/12/2020

Date of Ruling: 24/12/2020

MLYAMBINA, J.

This is another grey challenging area in respect of a case involving untraceable shareholders of paid up shares. It is similar to Misc. Civil Application No. 685 of 2019. The Application addresses the following questions: One, what is the position of the law in respect of untraceable shareholders with paid up shares? Two, are their shares amenable to auction by an order of the Court through the doctrine of "*compulsory share sale by the Court*"? Three, what is the fate of the Company in the current circumstances where the Business Registration and Licensing Authority (BRELA) has

introduced a new registration system requiring all past and new Companies to be uploaded and registered on an Electronic Online System documents such as passport or NIDA Cards for individual shareholders and Certificate of Incorporation for corporate entities holding shares in a Company?

The answers to the above questions, are the test of the two divergent interests; *one*, interests of the Company and; *two*, interests of the untraceable shareholders.

In my observation, the case will wake up a desire to file similar applications by many Companies who are stranded on what to do following the BRELA's policy directives. Though there are serious challenges in bringing into application of the doctrine of compulsory share sale by the Court, it is the general opinion of this Court that Court of law in today's World has to act flexible and pragmatically to give effect to fair and genuine commercial arrangement if it considers just and equitable to do so.

The application is brought by way of chamber summons made under *Section 95* and *Order XLIII Rule 2 of the Civil Procedure Code Cap 33 (R. E. 2002)*. The Applicant sought for two orders:

- i) That, this Honourable Court be pleased to grant an order allowing the Board of Directors of the Applicant's

Company to dispose of the shares held in the Company by the 2nd Respondent and cause the named Respondents' names removed from the Company's register to cease existing as a member of the Applicant's Company.

- ii) That, this Honourable Court be pleased to grant an order allowing and compelling the 1st Respondent herein to record and recognize all changes in the Applicant's Company shareholding structure as shall be made pursuant to the orders of the Court sought in (i) herein above.

This Application has been taken out at the instance of Lexmicus Attorney and it is supported with the Affidavit of Mukesh Tulsidas Mamlani. Paragraph 1- 21 of the supporting affidavits states:

1. That, I currently serve as a Director in the Applicant's Company Board of Director, thus conversant with the facts I am about to depose hereunder.
2. That, I have served as a Director in the Board of Directors of the Applicant's Company since June, 2009. I have, since joining the Board of Directors of the Applicant's Company, been attending all meetings called by the Boards of Directors off the Company.
3. Further to the above, in the course of discharging my duties as the Director of the Applicant's Company, I have happened

to learn and fully understand the history of the Applicant's Company since its incorporation to date.

4. That, that the Applicant's Company was incorporated herein Tanzania then Tanganyika on 13th day of July in the year 1927 A.D whereas the initial founders of the said Company were, John Milsom Rees and Charles Milsom Rees. *Copies of the certificate of incorporation and the memorandum and articles of association marked AS exhibit NSM-1, are now shown to me, I seek the leave of this Honourable Court to form part of this affidavit.*
5. Further to the above, the initial share capital of the Applicant's Company was then at \$ 28,000 or TZs 560,000 for 28,000 shares of TZs 560,000 for 28,000 shares of TZs 20/= each.
6. That, the date the current authorized share capital of the Company ranges at Tanzania Shillings Eight Billion (TZs 8,000,000,000/=) divided into 1,600,000 ordinary shares of Tanzania Shillings Five Thousand (TZs 5,000/=) each.
7. It follows that, since incorporation, the Applicant's Company shareholding structure has been changing from time to time whereas new members, including the 2nd Respondent, joined the Company by either purchasing shares from the Company or from the existing shareholders.

8. That, all shareholders have fully paid up for the share they subscribe in the Company.
9. That, for a long time since I joined the Company, inspite of timely circulation of general meetings notices, I have never seen the 2nd Respondent or person holding proxy thereof attending any meeting of the Company. Further that, neither have I ever received nor seen any communication from the said Respondent with regard to any matter pertaining the Applicant's Company.
10. That the Board of Directors, on several occasions, have taken initiative to find the said 2nd Respondent but we failed to trace her whereabouts.
11. The effort to look for the 2nd Respondent escalated in 2019 following the new requirement by the Business Registration and Licensing Agency (BRELA) for all registered Companies to update their information with the Register to cause such Companies uploaded on to the Online Registration System (ORS).
12. That, the means of communication shared by the 2nd Respondent for the purposes of services of Company's communications have since lost its identity.

13. That, all efforts engaged by the Applicant has yield no fruits at all and it is now stuck on the matters related to compliance of the Business Registration and Licensing Agency's requirements.
14. That, the current law (available statutes) administration and guiding matters related to Companies' affairs do not provide means to deal with the paid up share in the event the whereabouts of the owners of such shares is known or impossible to locate.
15. That, it is the requirement by Business Registration and Licensing Agency that all registered under it, to be updated and duly uploaded onto ORS system before 31st day of December in the year 2019 A.D
16. Sequel to the above, it is set by Business Registration and Licensing Agency that all Companies which shall fail to comply with the above requirement, shall be struck out of the register with an immediate effect.
17. That, for the purposes of foregoing and since the whereabouts of the 2nd Respondent is untraceable, she must be removed from the register of the Company's members.

18. That, if the 2nd Respondent is removed as a shareholder from the Company, it will remain only with one shareholder which render it statutory defunct.
19. That, our laws are silent on the measures and to resolve the prevailing circumstance. Only Court's scrutiny will provide way forward on the above instance.
20. That, the Applicant's Company is still operational and would still wish to continue its operations in Tanzania.
21. That, I have taken this oath in support of the application by the Applicant herein.

The application was further supported with the supplementary affidavit of Denice Tumaini. Paragraph 2 –5 of the supplementary affidavits states:

2. That, on 23rd December, 2019 the Applicant herein filed Application No. 685/2019 moving the Court to grant orders as sought in the presented chamber summons.
3. That this affidavit is made in view of presenting such documents in support of the Applicants Application.
4. That copies of the certificate of incorporation and the memorandum and Article of Association of the Applicant's Company marked as Exhibit NAH - 1, is now shown to me, I

seek the leave of this Honourable Court the same to form part of in support of the Applicant.

5. Further that, copies of bouncing notices sent through the shareholders registered mails marked as exhibit NAH 2 are now shown to me. I pray the same be admitted to form part of this affidavit. The facts that have necessitated the Applicant to file this application.

It remains undisputed, the facts that have necessitated the Applicant to file this application are that early in 2018 the Business Registration and Licensing Authority (BRELA) introduced a new registration system. This system required all past and new Companies to be uploaded and registered on an Electronic Online System.

In compliance to the BRELA new policy, all Companies incorporated prior to coming into force of this policy, were required to update their information and cause of the Companies uploaded forthwith. An update of the information would mean setting a proper and clear record of the Company tracking from the inception date.

At the time of doing updates, a Company is further required to submit documents such as passport or NIDA Cards for individual shareholders and Certificate of Incorporation for corporate entities

holding shares in a Company. It is due to that requirement; the Applicant's Company encountered a challenge that requires this Court's attention and intervention as the law in place is silent on situation such as one.

One important fact to be noted from the very beginning is that the Applicants' Company like a thousands of other Companies in Tanzania, unlike in UK and Australia, do not have a potential clause of unilaterally selling of the shares of the Company held by shareholders, who for a period of time, and despite of reasonable efforts on the part of the Company to ascertain their whereabouts. The following facts are not in dispute: *One*, the 2nd to 70th Respondents are the lawfully registered owners of 135, 245 ordinary shares in the Applicant's Company. According to the available records, for over twenty (20) years, despite Applicant's Company efforts in finding ways to reach, the said Respondents have not been attending the Company's meeting. *Two*, when the need to update and upload the Company on the BRELA ORS system came into place, the Applicant's Company engaged more efforts into location the Respondents whereabouts but with no success. *Three*, being a shareholder with full paid up ordinary shares, their rights to property remain intact. *Four*, as it stands, Company has no power over a shareholder holding paid up shares.

Tanzanian law, as it stands now and till when the Company Act is amended, does not provide for a way forward in the event such shareholder (s) is untraceable. Due to that, it has been difficult to meet requirements of the BRELA's introduced new policy as it has been impossible to locate this shareholder.

The instant application was resisted by the 1st Respondent. Through the Counter Affidavit of Seka Kasera, the 1st Respondent stated that the Applicant failed to prove that he performed adequately his duties to communicate to the 2nd to 70th shareholders by statutory notices.

In his submission in chief, the Applicant conceded that being a shareholder with shares, full paid up ordinary shares, the 2nd – 70th Respondents right to property remain intact. As it stands, the Company has no power over a shareholder holding paid up shares. The law does not provide for a way forward in the event such shareholder is untraceable.

The 1st Respondent on its part has submitted that allowing the Applicant's Company to sale the paid up share of all the Respondents on the ground that the other shareholders are not found, will set an unjust precedent as the same will be used as a tool to deprive the right of a person over their property in the name of untraceable shareholder. It will be used as a shield to

cover illegal transaction. Neither the Company nor the Board of Director has the right over the paid-up shares. In view of the 1st Respondent, formation of a Trust by an order of the Court is a necessity so as to strike a balance between the right of the 2nd to 70th Respondents on the shares and the proper functioning of the Company.

It was averred by the Respondent that *the Trustee Incorporation Act Cap 318 as amended by Act No. 3 of 2019*, defines the term Trust to mean:

a legal relationship created by personal act, by an order of the Court of operation of the law, when specified property or interests are placed under the control and management of a trustee or trustees for the benefit of another party or parties, called a beneficiary or beneficiaries or for purposes specified.

In view of the 1st Respondent, Trust by an order of the Court will be for the best interest of both the 2nd to the 70th Respondents and the Applicant's Company in the sense that it will protect the legal right of all Respondents (untraceable shareholders) and at the same time the Company will be able to perform its function including meetings in which the 2nd to 70th Respondents (untraceable shareholders) will be represented by the Trustee.

According to the Applicant, Trust is a triangle arrangement in which case there must a settler, trustee and beneficiary. In this case the Court will act as settler, the Administrator General will be the trustee and the 2nd Respondent will be a beneficiary. The name of the Administrator General will be entered in the register of members of the Applicant's Company as a trustee of the 2nd Respondent. Further, the costs born out of running a trust, will be covered with the dividends entitled to the 2nd Respondents to the 70th Respondent and any other monetary benefits entitled to the said Respondents. In case any sum left will be reserved for their benefit in the instance he is found.

It was the 1st Respondent's contention that, in the event the 2nd Respondent to 70th do not appear for the period of twelve years and no other person files a claim over the shares held in trust by the Administrator General. *Section 48 (2) of the Administrator Generals (Power and Function) Act Cap 27* provides that:

where any assets in the charge of the administrator-general which have been in the custody of the Administrator General for a period of less than twelve years are claimed and proved by the government to the satisfaction of the Court that the assets are bona vacantia, such assets shall become the absolute property of the government and shall be subject to

the power of disposal conferred upon the minister by Section 49.

The Applicant concurred with the idea of forming a trust that will safeguard the interests of the purported untraceable shareholders but the Applicant was of view that it should be in a manner that does not force members who consented to a private Company to have a new form of Company which does not exist under the law.

The Applicant was of further view that it should be a trust that will work without collateral damage to the Company's formation. It should be a trust which receives and keep proceeds or report as to the proceeds obtained from a compulsory sale of shares of untraceable share holder (s). Under this circumstance, the trust will be responsible for storage of the gains resulting from the sale of untraceable shareholder until he is found and if he does not show up for unbroken period of 12 years the same shall be transferred to the government treasury.

I have considered the submissions of both parties. The Court is of equal view with the Applicant that the Administrator General cannot be made a shareholder in a private Company. Otherwise there will be no meaning of having private Companies.

It is correct that a trust is a triangle arrangement in which the Court will act as a settler, the Administrator General can act as a trustee and the untraced shareholders as beneficiaries. However, once such arrangement is allowed, the Administrator General will be entered into the register of the Applicants' Company as a trustee of the untraced beneficiaries. It will erode the essence of having a private arrangement. The Administrator General cannot even be a Director in the Applicant's Company.

Another valid reason of not adding the Administrator General as a public protector in a private Company is that it will remove flexibility meant for a private Company having a public protector in a private Company will make the Company a quasi-public Company. There will arise challenges in terms of arrangement of meetings, voting powers and management as a whole.

I further agree with the Respondent that there is a danger for misuse of the Court's order for selling shares of untraceable shareholders. Order can be used to cover illegal transactions and deprive rights of the so called "untraceable shareholders".

The above observation does not mean, however, that Companies activities should cease because of failure of other shareholders who absentees in participation of all affairs of the Company for a period

of more than six years consecutively. Silence of the law on the remedy to cure inconveniences created by absence of untraceable shareholders is not an immunity of their inaction. The Courts of law as fountain of justice have to step in and give a proper solution while protecting interests of all shareholders and wellbeing of the Company itself. A compulsory share sale by the Court is necessary by all purposes. Through that compulsory sale, the Court may in the alternative order the Applicants to set up a bank account containing the purchase proceeds due to untraceable shareholders and to keep that account open for twelve (12) years.

As stated earlier, though Tanzania laws are silent on the way forward in case of untraceable shareholders. However, it provides for remedies such as liquidation of the Company. The question at this point therefore is; can liquidation be a remedy to cure challenges caused by failure to produce presence of a member of the Company whose shares have been paid up?

Winding up of a Company occurs under circumstances that, members of the Company want to seize operations under the name of that particular Company or the Company's liabilities are exceeding its assets (financial difficulties) or by order of the Court where; the Company, by special resolution resolves to be wound up by Court, the Company defaults holding a statutory meeting, or

filling a statutory return, the number of shareholders falls below the number prescribed as minimum in the Company law (two and seven for private and public Company respectively), the Company is unable to pay its debts in any of the following circumstances: *One*, where a creditor for more than TZs. 1,000/= serves on the Company a demand to pay and the Company fails, within three weeks thereof, to pay, or to secure or to compound the sum. *Two*, where an execution or other legal process of a Court is returned unsatisfied. *Three*, it is proved to the satisfaction of the Court that the Company is unable to pay its debts, taking into account for this purpose any contingent and prospective liabilities. *Four*, the Company fails to commence business within a year of its incorporation or suspends its business for a whole year. *Five*, for any other reason the Court considers it just and equitable that the Company should be wound up (e.g. where there is a deadlock in management, where the business carried on by the Company was illegal, personal antagonism between two Directors who were the only Directors etc.

This remedy is only actionable only when members or creditors or the registrar of Companies approach the Court to seek it is sought by way of petition and once the Court has passed an order to that effect and the process of winding up is completed as per the

Companies Act in line with the order of the Court the Company will no longer exist.

Where a shareholder(s) is untraceable and the remaining members find out that they are no longer interested in continuing trading with the Company, winding up is the best solution. Any other reason such as being out of operations in a period exceeding twelve months would form a good and reasonable ground for winding up a Company. However, where a Company is of concern and members still wish to continue with the business, winding up would not be a good option due to the consequences that come with winding up process.

Upon commencement of Winding Up, which is deemed to commence at the time of presenting the petition for winding up order, or on the date of passing the resolution for voluntary winding up, the following are void; *one*, any disposition of property by the Company; *two*, any transfer of shares or alteration in status of members is avoided; *three*, any attachment, distress or executions put into force against the Company are void. This means that all activities of the Company cease, the Board of Directors, which is the moving engine of the Company, will cease to act and operate nothing will take place in the Company.

Further, winding up order will compel the official receiver appointed to commence liquidation process which is by consolidation of Company's assets and liabilities. Once consolidation is done, he shall be bound to settle the outstanding debts and other liabilities. The reason is that all the shareholders Companies run on credit and other financial facilities from bank and other financial institution. Winding up process compels the Company to repay back all outstanding credits also not to take fresh credits for a Company that is trading a winding up process will kill its business.

For going concern problem therefore will not be the ability of the Company to settle its liabilities or inaction by failure to comply with statutory requirements but traceability of one more of its members which solution would be to take him/them out through a recognized, transparent and just process of selling their shares to an interested person. Where this process fails and it leaves Company with no other choice than winding up then wind up shall have to take place. As it stands, Tanzania law does not offer a remedy to the existing shareholders where they are of the view that a certain member is untraceable neither does it prohibit the Company or existing shareholder from seeking remedy for the best interests of the Company where there is a good will to protect.

In the event the Company is of going concern and able to meet its ability, winding up may only happen by resolution or by order of the Court where it is evident that the number of shareholders in the Company falls below the number prescribed as minimum.

I therefore agree with the Applicant that compulsory sale of the shares of untraceable shareholders can be done under stringent condition, and supervision by the Court to remove all likelihood of misuse. Among other conditions; *First*, the Petitioner shall plead the Registrar of Companies as the first Respondent follows by the shareholders whose shares are subject of sale on the untraceability ground. *Second*, no petition should be preferred if the shareholder is not traceable for a period of not less than six years. On this ground, there must be satisfactory proof thereof. *Third*, the Petitioners should furnish to the Court proof of:

- a) Notice of shareholders meeting being served to the last address of untraceable shareholders.
- b) Publication on the intention to remove untraceable shareholders was done in the Government Gazette twice in a period of 42 days.
- c) Publication was done through widely circulated Newspaper one in English, another in Swahili which are also online in a period of not less than 42 days.

- d) The publication referred herein under paragraph (c) should not be less than 1/8 of the page.
- e) Upon filing of the Petitioner must summons through the Government Gazette three times for the period of not less 63 days.
- f) The Petitioner must publish summons through widely circulated Newspaper one in English and another in Swahili language for the period of not less than 63 days. The advertisement should not be less than 1/8 of the page.
- g) The Court issue an order of sale.
- h) The order of sale be published for the period of not less than 21 days in both Government Gazette and two circulated Newspaper one in English and another in Swahili for not less than 1/8 page.
- i) Before sale, there must be valuation of shares conducted by certified auditor or accountant.
- j) Sale of shares be conducted by public auction.
- k) The Petitioner to clear capital gain tax and stamp duty.
- l) The Petitioners to settle all the debts to the Government and other institutions.
- m) The Petitioners to pay all other debts.

- n) Proceeds remains be transferred to the Administrator General who will keep for the period of not less than 12 years.
- o) Upon expiry of 12 years, the assets shall be transferred to the account and credit of the Government in terms of *Section 48 of the Administrator General (Powers and function) Act Cap 27 (R.E. 2019)*.
- p) The Petitioner shall prepare and furnish a report accounting of the sale of shares whose copy thereof shall be tripartite to be served to the Administrator General to the Registrar of Companies and one remain in the custody of the Petitioner himself/ itself/herself.

In unison, I grant this application subject to conditions stated herein above under paragraph (g) to (p). Costs be shared.

Y. J. MLYAMBINA

JUDGE

24/12/2020



Ruling delivered and dated 24th December, 2020 in the presence of Counsel Denice Tumaini for the Applicant and Gift Raphael, Registration Officer of the Respondent. Right of Appeal explained.



Y. J. MLYAMBINA

JUDGE

24/12/2020

