THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL COURT)

COMPANIES CAUSE NO. 18 OF 2002

TOBACCO AND COMMODITY TRADERS
INTERNATIONAL INCORPORATED …….PETITIONER

VERSUS

MASTERMIND TOBACCO (U) LIMITED …….RESPONDENT

BEFORE: THE HONOURABLE MR. JUSTICE JAMES OGOOLA

RULING

In the course of a scheduling conference, the Petitioner produced three documents for the Respondent to agree as exhibits in the forthcoming hearing of the matter. The three documents were:

(i) the Certificate of Incorporation of Tobacco Commodity and Traders International Inc. (TCT), a Panamanian company;
(ii) a Deed/Power of Attorney; and
(iii) a Verifying Affidavit in support of the petition to wind-up the company.

The Respondents objected to the admission in evidence of the three documents. Subsequently, the Petitioner abandoned the first document — the Company's Panamanian Certificate of Incorporation — stating that it had been intended merely to provide background information to the case. That left only the other two documents: the Power of Attorney, and the Verifying Affidavit. The Power of Attorney purported to appoint a Mr. NICK WATSON as a General Attorney/Agent of TCT, to carry out any and all administrative acts on behalf of TCT. The Verifying Affidavit is required to support a petition, such as the instant one, for the winding up of a company. The Respondent's objections to these two documents were as follows:

Power of Attorney: This Power sought to confer on Mr. WATSON, a non- member of TCT, certain administrative powers to be exercised on behalf of TCT. The Respondent challenged this document on the grounds that it bore no evidence of payment of stamp duty; was executed in a foreign language (Spanish) without a certified translation into this Court's working language (English); it was not properly executed (i.e. showed no signatures of those who executed it); and it did not give the donee (Mr. WATSON) authority to act as a Director or Secretary or other principal officer of the company, contrary to Rule 25 of the Companies (Winding Up) Rules.

Verifying Affidavit: Under Ugandan law, a verifying affidavit is required to support a petition for the winding up of a company — see Rule 25 of the Companies (Winding Up) Rules. The Respondent's major challenge to the Petitioner's affidavit in the instant petition is that the affidavit contains hearsay (i.e. information and beliefs), rather than being confined — as mandated by 0.17, r.3 of the Civil Procedure Rules (CPR) — only to such facts as the deponent is able of his own knowledge to prove. The Respondent contended further that as virtually all the paragraphs of this particular affidavit contain mere hearsay, the offending parts of that affidavit can neither be severed nor rectified. The errors are so fundamental as to render the entire affidavit incompetent and, therefore, inadmissible in evidence. It must be struck out. In that event, the petition would then be unsupported by the requisite verifying (affidavit — contrary to Rule 25 of the Companies (Winding Up) Rules — and must itself be struck out as well.

I have given the matter considerable attention and circumspection. In my view, the challenges now marshalled against these two documents bring into sharp focus the makings of a battle royale between obeisance to procedural technicalities and formalism, on the one hand, versus dispensation of substantive justice, on the other hand. In this connection, it is crucial to emphasise the background and context in which this ferocious battle has arisen — namely in the midst not of a full-fledged hearing, but merely during a scheduling conference of the underlying petition.

The hallmark of a scheduling conference is its informality and flexibility, as contrasted to the more adversarial strictures of a full-blown trial. True, the scheduling conference is the commencement of the laying out of the general strategy of each counsel for prosecuting their respective cases. Nonetheless, the conference is only the planning stage; the occasion, so to

speak for weighing each other out, and for sounding each other out. As its very name suggests, it is a conference — not a *hearing*, much less a *trial* of the issues in dispute; and therefore not the occasion for seeking (as the Respondent in the instant case seeks to do) to strike out the entire petition/suit. Not at all. For the Court to concede to that stratagem would be to misconceive the real value and intent of a scheduling conference. The conference is the occasion when the parties and the Court (working in tandem) seek to narrow the dispute to its lowest common denominator, by agreeing (and disagreeing) the essential facts, issues and documents that will be relied on at the trial. If agreement is reached at this early stage, fine, if it is not, that also is fine. Failure to agree a particular document at this stage is not the end of the matter. Such a document could be reintroduced at the trial through the normal, orthodox channel of calling a witness to tender the document in evidence, subject to objection and opposition thereto by the opposite party, based on the normal rules for admissibility of documents. Be that as it may, I will now turn to a consideration of the substantive arguments of both parties concerning the two impugned documents in the instant case.

As regards the **Power of Attorney,** this Court finds that the Respondent's objections constitute nothing but a long list of mere technical arguments only — all of which can and should, in the interests of substantive justice, be remedied appropriately. In particular, the Court agrees with the learned lead counsel for the Petitioner (Mr. Karamagi) that matters of executing a document, and matters of a company's internal regulation and internal dealings are matters to be governed by the law of the country of the company's incorporation (i.e. Panama, in the instant case) — see the rule in **Royal British Bank v Turquand (1856) 6 E&B 327; see also United Assurance Co. Ltd v Attorney General, Supreme Ct. Civil Appeal No. 1186** (reported in **[1995] VI KALR 109).** Indeed on this point, even the learned lead counsel for the Respondent (Mr. Makubuya) conceded that the applicable law is Panamanian law. Accordingly, whether WATSON was properly or improperly appointed to act for the Petitioner Company, is a matter to be determined not by Ugandan law, but by Panamanian law. Proof of any such foreign law in Ugandan courts is a question of fact to be proved (through an expert) by the party asserting those facts. The more reason then why substantive challenges, of the nature that is now canvassed by the Respondent, are particularly inappropriate at this initial stage of a mere scheduling conference. They are more appropriate for the trial stage when witnesses, including experts, are called to testify.

In any event, even by Ugandan law, the position seems to be that whether or not WATSON was properly appointed to act for the Petitioner company, the company is bound by his acts *vis a vis* third parties, such as the Respondents. In other words, the Power of Attorney which purports to donate such powers to WATSON cannot be questioned — see **Mahay v East Holyford Mining Co. (1875) LR HL 869,** in which the House of Lords held a company to be bound by cheques which a bank had honoured in accordance with instructions contained in a letter signed by the "Company Secretary", notwithstanding that the so called Company Secretary had not been properly or formally appointed, but had himself assumed that position merely as a founder member of the company. In the instant case, far from WATSON merely "assuming" the position of General Agent of the company, he was categorically and positively appointed to that position by the company itself, by virtue of the now challenged Power of Attorney. What is more, attached to the Power of Attorney, are 'Minutes" of an extraordinary meeting of the Company which authorised the President of the company (one, JULIO ANTONIO QUIJANO) to execute a Power of Attorney by which to appoint WATSON as a General Agent of the company.

The Respondent contends that there should have been a Company resolution authorising the above appointment. However, it is trite law in Uganda that in cases such as the present one, the important thing is that authority was given to the donee and not that a company resolution was passed — see United **Assurance** case *(supra).* In that case, the issue was whether the Plaintiff Company gave instructions to its counsel to file a suit on its behalf. The learned trial judge in that case had held that a company resolution in that behalf was necessary and that the company's Managing Director was incapable of giving instructions to commence legal proceedings. On appeal, the Supreme Court rejected the trial judge's argument. Instead, WAMBUZI C.J. held that:

> *"The important thing is whether authority is given for doing an act — not whether a resolution has been passed. If authority is given, in my view it is irrelevant as to how it was given."* [Emphasis added]

In holding as he did above, the learned Chief Justice based himself, *inter alia*, on the case of **EMCO Plastica International Ltd v Freeberne [1971] EA** 432. In that case, the Company's Managing Director signed a contract of employment for engaging the Company Secretary, but

without any authority from the Company's Board of Directors or from the Company's Articles of Association. On appeal to the East African Court of Appeal, LUTTA, JA held that the Managing Director, Mr. Dhamani:

> "*had implied or ostensible authority to enter into the contract on behalf of the Appellant Company. The basis of this would appear to be that the Appellant Company held out Mr. Dhamani as the person who was managing its day to day business and, therefore, had authority to enter, on its behalf, into contracts."* [Emphasis added]

In light of the above jurisprudence, it is evident that as long as the President of the Petitioner Company (Mr. QUIJANO) had even as much as implied or ostensible authority, he was capable of effectively and validly appointing Mr. WATSON to be the Petitioner Company's General Agent, to carry out the acts specified in the Power of Attorney that was executed by Mr. QUIJANO. It is of no consequence to third parties whether or not that Power of Attorney was properly executed, or was authorised or not authorised by a resolution of the Company's Board of Directors or General Meeting — let alone whether or not the Company's Articles of Association authorize such appointment. By the company President's authority, Mr. WATSON was clothed with ostensible authority to do what the Power of Attorney purported to clothe him with.

As regards the actual execution of the Power of Attorney, the Court is satisfied that the primary document itself was duly signed by the Company's President (QUIJANO), other Directors, and the Company Secretary — because that is what the secondary document, now before Court, specifically states, namely that:

> *"Quijano, the holder of personal identity No.8-97-441, President of TCT with offices at Salduba Building Top Floor in the city of Panama — personally appeared before the Notary, executed the Power of Attorney, and signed it for the record before the attesting Notary, witnessed by Mariela Diaz, and Salvador So/is who also signed the Power of Attorney."* [Emphasis added]

True, the signatures of the document of the executors are not shown on the secondary document itself, but that is because the document now before Court is the Notary's own deposition (i.e.

Public Deed executed by the Notary: CARLOS GARCIA MARTIN) testifying as to what the executors did in the primary document. For purposes of the scheduling conference, Court is prepared to give the benefit of the doubt to the contents of the Notary's Public Deed which in effect recites each and every detail contained in the primary Power of Attorney itself. If need be, both the Notary and the executors of the actual Power of Attorney could be called to produce the primary document itself and to give evidence thereon during the substantive trial of the matter. That approach would be analogous to the well known and much practiced procedure in our courts — by which a rather doubtful document is initially marked for identification only, pending its final admission at the trial stage.

The arguments that the Power of Attorney has not been formally translated from Spanish into English, etc do not go to the root of the matter. It is an omission — if omission it is — that can be remedied easily in due time and without any prejudice whatsoever to the Respondents. But in any event, as matters stand, the document has indeed been subjected not to one but two consecutive translations so far — the latest one having been done by translators based at the Institute of Languages at Makerere University, this country's premier institution of higher learning — a most prestigious institution indeed, if one was ever required for such a task. All in all, the Court finds the Power of Attorney to be proper and competent in all respects. If, however, any particular element is proved wanting, it would not be fundamental or fatal. It could be remedied in due course, without any prejudice to the Respondent. Such a remedy could be effected either by amendment of the existing affidavit, or by permitting deposition of supplementary affidavit(s).

As regards the Respondent's challenge that the Power of Attorney did not give WATSON authority to act as the Company's Director or Secretary or other principal officer in order to qualify him to depone to the verifying affidavit as required by Rule 25 of the Companies (Winding Up) Rules, the simple and short answer to that is to be found in **Halsbury's Laws of England (4th Edn., 1974) Vol.7, paragraph 1022,** to the effect that:

> *"Every petition must be verified by an affidavit ... which may in a proper case be made by the Petitioner's solicitor or agent if he knows the facts. An affidavit verifying a petition*

> *presented by a corporation must be made by some person who has been concerned in the matter on behalf of the corporation."* [Emphasis added]

I turn now to the Respondent's objections to the Petitioner's **Verifying Affidavit.** The gravemen of Respondent's challenge was that the affidavit contains only hearsay — i.e. information given to WATSON and his own beliefs regarding that information, rather than facts that he is able to prove of his own knowledge. However, in the instant case, it is beyond any dispute that WATSON is the one person who knows everything about the suit transaction. It was he to whom all payment requests were made; and it was he who authorised all disbursements of moneys — both which are matters that are at the very core of the present dispute. Therefore, as a General Agent of the Company (combined with his intimate knowledge of the facts), he is the one person in the company who is peculiarly qualified to depone to the verifying affidavit in question. He fits perfectly into the above quoted test of **Halsbury's** Laws. Indeed, one must be alive to the intricacies of modern commercial intercourse. For as HEWETT J forcefully and eloquently stated in the very recent Kenyan case of Masefield Trading (K) Ltd v Kibui [2001] 2EA 431:

> *"Clearly in heavy commercial cases it is very unlikely there is any one person in the Plaintiff Corporation who personally knows all the facts on which the plaint is founded. It is going to be necessary for the leave of the court to be granted in nearly every long commercial case for statements to be permitted on information and belief in the verifying affidavit."*

More importantly, hearsay is admissible in certain circumstances. In this regard, **Halsbury's Laws *(supra),* paragraph 1023** specifically and categorically states that:

> *"In relation to winding up petitions there are special categories of material to which the court must give due consideration, even though they may amount to hearsay"* [emphasis added]

There is a string of case authorities that bear out the above legal position. First, in **Re Koscot Interplanetary (UK) Ltd, Re Koskot AG [1972] All ER 829 at** 831, two documents were attached to a verifying affidavit in a winding up action. There was nothing to indicate who prepared the second document, nor was there anything to authenticate the document.

MEGARRY, J held that while there was no open licence to admit hearsay evidence generally in a petition for winding up a company, nonetheless there were two special categories of evidence or material which are admissible, even though hearsay — namely, affidavits verifying a petition under rule 30 of the Companies (Winding Up) Rules 1949. **Second,** in ABC [1962] All ER 68, the only evidence in an opposed petition was the requisite statutory affidavit verifying the petition. The affidavit exhibited the signed copies of the Inspector's reports and stated the affiant's belief in the truth of the facts set out in the reports. The affiant being a Board of Trade official who had not himself made the investigations in the company's affairs set out in the reports. BUCKLEY, J did not accept this evidence as being sufficient proof of the charges to support the making of a winding up order. Nonetheless, he accepted that the effect of rule 30 of the Companies (Winding Up) Rules was that a petition might be sufficiently verified by what was hearsay evidence or worse, but verifying the petition was one thing and establishing a sufficient case to justify making a winding up order was another.

Third, in Re **Allied Produce Co. Ltd [1967] 3 All ER** 400, again BUCKLEY, J having explained his decision in the earlier ABC **case** (supra), nonetheless held that by virtue of rule 30 of the Companies (Winding Up) Rules, the affidavit by a Petitioner verifying the petition is admissible for the purpose of providing evidence of the truth of the statements in the petition, even though such evidence may be hearsay.

Given the above flexibility permitted courts to consider even information that may amount to hearsay, I must at once hold the Respondent's objections to the present affidavit to be seriously misplaced. In this connection, I am totally convinced by the force and logic of the holding by HEWETT, J in the **Masefield case** (supra). In that case (as in the instant one), the Defendant sought to strike out a plaint for want of a verifying affidavit, in as much as the affidavit presented before the Court attached a wrong power of attorney (compare MARTIN's secondary Deed of Attorney), instead of the right one (comparable to QUIJANO's primary Power of Attorney). Plaintiff applied for leave to file a further affidavit supplementary to the "defective" one. HEWETT, J dismissed the application to strike out the plaint, and allowed the application for rectification. In so doing, his Lordship opined that:

> *"In exercise of its discretion when faced with an application to strike out a suit due to a failure by the Plaintiff to file a proper affidavit, the permutations of the circumstances under which the court might exercise its discretion in favour of the Plaintiff are never closed. Undue delay in seeking to rectify the defect will tend to disentitle the Applicant. Errors on the part of a litigant's advocate will be more readily overlooked than errors on the part of the litigant. A court will consider the extent to which the innocent party can be compensated in costs and court will exercise its discretion in light of the totality of circumstances before it. A court will proceed on the basis that the defect is an irregularity which can be cured or waived, and not a nullity."* [Emphasis added]

The rationale for his Lordship's above holding was founded on his earlier statement (quoted elsewhere in this Ruling) to the effect that in hearing commercial cases, it is very unlikely that there is any one person in a company who personally knows all the facts on which the company's plaint is founded. In the instant petition the Respondent Company's directors/managers were as far-flung as Uganda, South Africa, Tanzania, Kenya, and Rwanda. The one and only person who comes closest to personally knowing all the facts of the disputed transactions is WATSON. He is the best suited to swear the verifying affidavit.

Having disposed of the Respondent's most fundamental objection as I have done above, it is not at all necessary to delve into Respondent's subsidiary challenges. Nonetheless, for the sake of completeness, I will address two of them briefly. The challenge concerning non-payment of **stamp duty** in respect of both documents, has since been effectively remedied by the Petitioner taking the documents to the revenue authorities, paying the outstanding duty, and having the documents duly stamped. I am satisfied that this course of action is permitted under our law — see section 38 of the Stamps Act. See also Yekoyada Kaggwa v Mary Kiwanuka (1979) HCB, in which ODOKI, Ag. J (as the Hon. the Chief Justice then was) held that:

> *"Generally, under s. 38 of the Stamps Act, any instrument on which a duty is chargeable is inadmissible in evidence unless that instrument is duly stamped ... However, such unstamped instruments can be rendered admissible in evidence on payment of the duty with which the instrument is chargeable in addition to any penalty that may be prescribed"* [emphasis added]

The objection that the documents were not authorised by the Company's resolution can be answered on two levels. First, the Company did indeed pass a resolution to that effect. Attached to the Power of Attorney are the "Minutes" of an extraordinary meeting of the Company's Board of Directors (held at 3.30p.m on 10/12/92 in Panama City). The Minutes were unanimously approved to empower the President of the Company (Mr. QUIJANO) to grant a general Power of Attorney to WATSON to permit him to carry out all "regular or special administrative acts" on behalf of the Company 'including acts of strict domain". **Second, even** if the Company had not adopted such a resolution, that would not have been fatal — for as stated by WAMBUZI C.J in the United **Assurance case** *(supra)* **p.117:**

> **"***the important thing is whether authority is given for doing an act — not whether a resolution is given ... it is irrelevant as to how [the authority] was given."*

Moreover, the learned Chief Justice added that:

> *"every case must be decided on its own facts. Looking at the authorities and the law, I would say that one way of proving a decision of the Board of Directors [giving authority to the Managing Director] is by a resolution of the Board in that behalf. <u>But I would not go so far as to say that this is the only means of proof,</u> unless of course the law specifically requires a resolutions"* [emphasis added]

In the instant petition, WATSON was amply clothed with implied or ostensible authority. Both the Company and its President (QUIJANO) held him out as the person who was managing the disputed transaction — see LUTTA JA in the **EMCO Plastics case** quoted elsewhere in this Ruling. Respondents never dealt with anybody else but WATSON. It is he that they requested the disbursements of money from. It is he, and only he, who disbursed the money to them on behalf of the Company.

I will conclude this Ruling in the same way as I started it — with expressions of my deep sentiments about the veritable battle between procedural technicalities and substantive justice. All in all, the challenges marshaled by the Respondent in the present petition in respect of the two disputed documents, amount to nothing more than technical objections. In as much as these technicalities are aimed at a quick technical knock-out in this legal battle royale, they are

understandable. However, in as much as the technicalities are intended to muzzle the course of justice by ousting the substantive merits of the petition from being aired by the Petitioner and heard by the Court, they are simply intolerable.

Apposite in this connection, are the well considered and well-measured sentiments of HEWETT, J in **Masefield's case** *(supra)* to the effect that:

"This case highlights the conflict between strict compliance with procedural requirements, which can sometimes work so as to deprive one party, and the Court, of the opportunity to delve into and decide the real issues in controversy."

The Applicant is merely standing on bare technicalities. Nobody has a vested right in procedure and a Court must, at least at the present day, strive to do substantive justice to the parties, undeterred by technical procedure rules. As is often said, rules of procedure are good servants, but bad masters... Lord Denning, the celebrated English Judge has said, ad nauseum, that technicalities are a blot in the administration of justice. English courts have on numerous occasions refused to set aside process for technical irregularities — see **Macfoy v United Africa Company Ltd [1962] AC 152."**

Writing in the 19th Century, PEARCE, L.J in Pontin **v Wood [1962] IQB 594** recalled the boast of BOWEN, L.J that:

> "*It may be asserted without fear of any contradiction that it is not possible in the year 1887 for an honest litigant in Her Majesty's Supreme Court to be defeated by a mere technicality, any slip, any mistaken step in his litigation."*

That was England of 116 years ago. Today, in the Uganda of 2003, the rule has been elevated to constitutional status — see Article 126(2) (e) of the Constitution of 1995. As MUKASA-KIKONYOGO, DCJ emphsised in K**assam v Habre International Ltd [2000] 1 EA 98:**

> *"Courts of law are enjoined by the Constitution to administer justice without undue regard to technicalities."*

In light of all the above, the Respondent's objections to the Petitioner's two documents are hereby dismissed. The relevant documents are admitted in evidence. Needless to say, their evidential value will be assessed and weighed in the context of the substantive hearing of the petition.

Ordered accordingly.

James Ogoola

JUDGE

09/05/03

DELIVERED IN OPEN COURT, BEFORE:

Kabito Karamagi, Esq (with Mrs. Ruth Sebatindira) — for the Petitioner

Apollo Makubuya, Esq (with Richard Obonyo, Esq) — for the Respondent

J.M. Egetu — Court Clerk

James Ogoola

JUDGE

09/05/03