THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL DIVISION

IN THE MATTER OF THE WINDING UP OF CHEMICAL DISTRIBUTORS (U) LTD

AND

IN THE MATTER OF THE COMPANIES ACT 2012

HCT-00-CV-CI-0027-2015

BYARUHANGA SILVER ::::::::::::::::::::::::::::::::::::PETITIONERS

- VERSUS –

1. **CHEMICAL DISTRIBUTORS (U) LTD**
2. **TUMWINE MARGARET :::::::::: RESPONDENTS**

BEFORE: HON. JUSTICE STEPHEN MUSOTA

RULING:

This is a ruling on a preliminary point of law and an oral application to amend the petition in this cause or appoint a provisional liquidation. The petition has been brought under no specific provisions of the law but it seeks for orders that:

1. The 1st respondent Company be wound up under the provisions of the Companies Act 2012;
2. The Petitioner be paid equity equal to his 35% share holding;
3. Such other orders be made in the circumstances as this court may deem fit;
4. Costs of the Petition be provided for.

At the hearing of the petition the Petitioner was represented by Mr. Arthur Murangira and Stanley Omwony while the respondents were represented by Mr. Lawrence Twesigye.

The brief background to this ruling is that on 6th November 2015, the Petitioner filed this petition and court set down the same for hearing on 22nd February 2016. On that day one of the lawyers for the Petitioner applied for an adjournment on the grounds that he had just been freshly instructed and that he needed to conference with his colleague lawyer. The court adjourned the matter to the 21st March 2016 on which date learned counsel for the petitioner told court the after perusal and review of the petition he realized that certain aspects had been left out especially on the relief sought and therefore prayed to add other reliefs. He further prayed that the Official Receiver be appointed provisional Liquidator in accordance with Ss 92, 93 (2), 94 (1) & (2) of the Insolvency Act 2011 since only a liquidator has power to manage the assets of the company including sale. That with such prayer being granted the fears of the orders left out would be remedied. He also asked this court that in case the circumstances do not warrant the grant of an order appointing a liquidator then the reliefs sought in the petition be amended by including an order against the 2nd respondent to provide an updated profit and loss account and a balance sheet of assets and liabilities of the company and current evaluation of the assets of the company.

Learned counsel finally submitted that since the 2nd respondent has been in exclusive management of the company with effect from 2012, they are in a better position to explain the affairs of the company.

Learned counsel for the respondents opposed the submissions by learned counsel for the applicant on the ground that the applicant is not clear whether they seek for the appointment of a liquidator or the amendment of the petition.

Learned counsel also raised a preliminary point of law which in his opinion would dispose of the matter. He submitted that this is a winding up petition under the Companies Act 2012 and not the Insolvency Act. That under the Companies Act 2012, a winding up petition can only be presented by the Company itself under Part IX of the Act and specifically Ss 268 and 269

thereof, or by a creditor bringing a winding up petition in court. That an aggrieved or oppressed shareholder has remedy of petitioning the registrar of Companies and it would be the registrar of Companies to bring the petition to court if he cannot provide a remedy.

It is for that reason that learned counsel submitted that this petition is not properly before court and it should be struck out with costs. That although learned counsel for the petitioner applied for amendment of the reliefs this is not possible because the petition discloses no cause of action and this court has no jurisdiction to entertain it.

Learned counsel relied on the case of **Charles Forte Investments Ltd Vs Amanda 1963 2 ALLER 940** where it was held that if winding up is not a perfect remedy court has the authority to strike it out for it would be an abuse of court process and would have an effect of inflicting irreparable damage on the company and the other share holders who are innocent.

Further, learned counsel for the respondent submitted on the prayer to appoint a liquidator that even if the petition was properly before court, appointment of a liquidator would come after the petitioner has proved the grounds. For those reasons learned counsel prayed that the petition be struck out with costs.

In rejoinder learned counsel for the petitioner submitted that his submissions was twofold, and that is for either appointing an interim liquidator or allowing an amendment of the petition and so there is no contradiction at all. That this is not a petition for voluntary winding up so **Para IX and Ss 268 – 269 of Companies Act** do not apply to this petition. Further that this court has jurisdiction because the practice is that if a matter is brought under a wrong law or under no law at all but jurisdiction to grant orders sought exists the court will grant them as per the case of ***Saggu Vs Roadmaster Cycles (U) Ltd [2002] 1 EA 258*.** Learned counsel further submitted in rejoinder that S. 91 of the Insolvency Act gives High Court jurisdiction in this matter and S. 139

of the Constitution gives the High Court unlimited jurisdiction which cannot be fettered by the existence of a separate remedy. That therefore this court has jurisdiction to entertain this matter.

On appointing a liquidator prematurely, learned counsel submitted that it is intended to avoid mischief to defeat the petition. That the best time for appointment of a liquidator is at the hearing or at the time of filing the petition and such application is timely. It should not abide the full hearing of the petition.

Learned counsel referred to S. 92 (3) of the Insolvency Act and submitted that court may dismiss the petition or adjourn or make interim orders or any other order court thinks fit to grant. He prayed that this court considers if the order for appointment of an interim liquidator is appropriate. That the preliminary point of law be dismissed and court goes ahead to appoint the Official Receiver as interim liquidator and gives directions on whether to proceed or give other directions from the submissions of respective counsel. From the submissions of respective counsel certain issues between the parties emerge:

These are:

1. Whether the petition is properly before this court, and if not whether it should be struck out with costs;

2. Whether an interim liquidator can be appointed under the circumstances of this case;

3. Whether the petitioner should be allowed to amend the petition under the circumstances.

After carefully considering the submissions by respective counsel and the law applicable, I will go ahead and resolve the issues as I have identified them.

1. <u>Whether the petition is properly before court, and if not should it be struck out with costs?</u>

This issue arose in form of a point of law. The respondents' counsel submitted that the petitioner brought the petition under the Companies Act 2012 which bars a petitioner from presenting a petition for winding up of a company.

Secondly that when a shareholder is oppressed, the Companies Act 2012 gives a remedy of presenting a petition before the Registrar of Companies and it is only after the Registrar of Companies has failed to find a remedy for the parties that he may refer the petition to the High Court.

Thirdly that this court has no jurisdiction to entertain the petition because it is wrongly brought under the Companies Act 2012.

In reply learned counsel for the petitioner submitted that this petition is not for voluntary winding up so the petition is properly before this court since it is not under the Companies Act 2012. He went on to cite several provisions in the Insolvency Act to support his submission that this court has jurisdiction to entertain the petition.

From the way learned counsel for the petitioner was submitting, he appeared confused as to what remedies they should seek from court and how such remedies should be sought. Even the freshly instructed counsel could not cure the dilemma and defects in the petition after the generous adjournment that this court gave him to review and analyze the case. This observation is evident in the pleadings and the submissions made by learned counsel for the petitioner. First of all, they brought the petition under no specific provision or section of the Law, then learned counsel submitted that the petition is not under Ss 268 – 269 of the Companies Act 2012. Yet in the heading of the petition he says it is only in the matter of the Companies Act 2012 and the 1st prayer in the petition is squarely under the Companies Act. The complaint in the petition

appears to be that the Company must be wound up on the ground that it is just, fair and equitable. (See paragraph 22 of the petition).

Although such grounds for winding up used to be in the repealed Companies Act Cap. 110 under S. 222 (f), it is not existent in the Companies Act 2012. This could be the reason why learned counsel for the petitioner was unable to cite a specific provision of the law under which he brings this petition.

My observation is further demonstrated by the prayers and applications for appointment of a liquidator under S. 92 of the Insolvency Act 14 of 2011 yet this is not a petition for liquidation and there has been no proof of inability to pay debts by the Company as required under S. 92(2) of the Insolvency Act 14 of 2011.

I agree with the submissions by learned counsel for the respondents that under the Companies Act 2012, a winding up petition can only be presented by the Company itself under Part IX of the Act and specifically Ss 268 and 269 thereof. It must be voluntary winding up.

The Act bars any person, shareholder, or creditor to bring a winding up petition to court.

An aggrieved or oppressed shareholder has a remedy of petitioning the Registrar of Companies and it would be the Registrar of Companies to bring the petition to court if he cannot provide a remedy. It appears the rationale for this was to promote reconciliation in business and protect the economy from collapsing. If every quarrel and misunderstanding in the company resulted in winding up, the Ugandan economy would never grow. It is therefore important that the law is strictly followed when seeking to end the life of a company.

It is trite and important to note that companies are a creature of statute. They are legal persons by virtue of the Companies Act 2012. It is for that reason that I hold the opinion that everything done in relation to companies must be strictly provided for or implied or premised on a specific provision of the Companies Act. Companies are inanimate beings.

I am in agreement with the holding in the case of ***Saggu Vs Roadmaster Cycles (U) Ltd [2002] 1 EA 258*** cited by learned counsel for the petitioner that where an applicant omits to cite any law at all or cites the wrong law but the jurisdiction to grant the order exists, the irregularity or omission can be ignored and the correct law inserted. However in the instant case, even if this magnanimity was extended to the petitioner, it would not cure the defect in the petition.

This petition has no cause of action in as far as learned counsel relied on a repealed ground for winding up. This court also has no jurisdiction to entertain the petition because matters of equitable grounds and oppression must first go to the Registrar of Companies under S. 247 of the Companies Act 2012.

I will consequently find merit in the point of law raised by the respondents and find that the petition is not properly before court and it should be struck out with costs.

It follows that this court cannot consider appointment of an interim liquidator in the circumstances and/or allow amendment of the petition which is illegally on record.

I so order.

Stephen Musota
J U D G E

30.05.2016.

30.05.2016:-

Mr. Gerald Ayero holding brief for Mr. Arthur Murangira for Petitioner.

Petitioner not in court.

Respondent is represented by Mr. Tumwesigire who is the Manager of the 1st & 2nd respondents not in court.

Ruling read and delivered.

Ajiji Alex Mackay
DEPUTY REGISTRAR

30.05.2016.