ADESEMI TANZANIA LIMITED *v.* THE REGISTRAR OF COMPANIES

HIGH COURT OF TANZANIA AT DAR ES SALAAM

(Kalegeya, J.)

MISCELLANEOUS CIVIL CAUSE No. 5 OF 2000

Company Law – Winding up – Petition for compulsory winding up – Petitioner unable to meet demands of creditors and debts exceeding value of assets – Circumstances in which the court may issue a winding up order – Section 167 of the Companies Ordinance Chapter 212.

The petitioner is a locally registered company. Its parent company and main share holder is Adesemi Communications International based in the United States. The petitioner heavily depended on the parent company for loan facilities to sustain its public payphone facilities. It ceased its operations after failing to secure funds from the parent company for its sustenance and to run its six hundred public pay booths. The company was unable to procure an independent telecommunications license because of lack of funds. As a result it failed to meet its commitments on the loan facilities given and failed to honour the demands of its creditors. So by a special resolution of 5 June 2000 it was decided to file the petition. The Provisional Liquidator appointed after the filing of the petition charged with the duty of finding ways to salvage the situation reported that the liabilities of the petitioner by far exceeded its assets with no hope of its operations being capable of bridging the gap. No objection to the petition was registered after due advertisement

Held: (i) The court has power to wind up a company where, by special resolution, the company resolves that it should be wound up.

(ii) As the company is unable to meet its debts to the creditors it is just and equitable that it be wound up.

Order for winding up granted

Statutory provisions referred to:

1. Section 167 of the Companies Ordinance Chapter 212
2. Section 167(d of the Companies Ordinance Chapter 212
3. Section 167(a)] of the Companies Ordinance Chapter 212

RULING

(Delivered 12 October 2000)

Kalegeya, J.: Adesemi Tanzania Limited petitions for compulsory winding up by this Court. On the basis of the evidence adduced in this Petition the following matters stand out uncontroverted.

The petitioner is a limited liability company which was incorporated under the laws of Tanzania in 1994 in the name of ACG Telesystems Limited. It changed into the present name in 1998. One Adesemi Communications Internatinal, an American Incorporated Company, is the petitioner's Parent Company and a majority shareholder. Apart from other loan facilities, the petitioner heavily depends on funds from the Parent Company. However, in 1999 the said Parent Company, for undisclosed reasons, failed to secure the necessary funds for the Petitioner and its own sustenance. It ceased operations although there is no evidence of legal liquidation. Then this company the Petitioner which provides public payphone services within Dar es Salaam with over 6000 telephone booths, operating using wireless telecommunication technology went into financial doldrums for lack of necessary funds hence failing to meet its commitments on the loan facilities given. It thus failed to honour the creditors' demands. This led to the making of a special resolution dated 5 June 2000 to the effect that the present petition should be made.

Upon filing of the Petition, a Provisional Liquidator was appointed, charged among others, with a duty of looking into the possibility of coming up with a scheme of arrangement which could salvage the situation. The Provisional liquidator with the required and due diligence, carried out the task bestowed on him but failed to come out with any scheme. He concluded that the Company is grossly insolvent because:

> ... the company's difficulties (are) not merely of a cash flow nature but that its liabilities seriously (exceed) its assets with no hope of its operations being capable of bridging the gap

Further facts show that the extent of indebtness is not small – just 5 creditors claim a total of TZS. 4 169 683. ; that even if it had funds the Petitioner has failed to secure its own independent operating telecommunication licence from Tanzania Communications Commission (TCC), which licence could only guarantee the necessary profit; that on incorporation of the Company it was thought that licence would inevibly be procured. After due advertisements no one registered as an objector to this petition. That said, the next question is whether the winding-up order prayed for should issue.

Under section 167 of the Companies Ordinance Chapter 212, a company may be wound up by Court due to various reasons. Among those reasons is where the company has by special resolution resolved that it should so be wound up [section 167(*a*)].

The court may also issue a winding up order where the company is unable to pay its debts (section 167(e). Not only that, but also the court may so decide where it is of the opinion that it is just and equitable that the company should be wound up [section 167(*d*)]. The different reasons are inter-pendent of each other.

Subjecting the facts at hand to the law, I find no hesitation to say that a case has sufficiently been made out for the winding up order to be made. I stated above that the three grounds upon which the order can be made are inter-pendent of each other. In here, however, there is a cumulative effect of the trio.

There is a special resolution. Legally, in an application by the company itself, armed with this resolution, no reason for winding up need be given. In the case at hand, however, liquidity problems

have fully been painted. I have not been able to detect any fraudulent scheme elements leading to the passing of the resolution, or elements of intention to oppress minor shareholders. Neither have I noted that the same was not made in the interest of the company as a whole. On this leg alone, the petition would be allowed. That apart, even if the special resolution did not exist there is also a clear ground of indebtness. The company has deplorably failed to honour demand notices for payment of debts: demand notice from creditors such as the Standard Chartered Bank and TCCL, just to mention a few, is a telling factor. Again, the Company having failed to secure an independent operating licence from Tanzania Communications Commission (TCC) which was expected to be a cornerstone for the Petitioner's business on inception (it is on record and uncontested that there is no way TCC could grant such licence) is also a sufficient ground upon which the court can conveniently base its decision to give the order.

On the whole, therefore, I am satisfied that a winding up order is for the benefit of creditors and the petitioner. The Petition for winding up of the Petitioner Company is accordingly granted.

In line with the above order, one Leonard C. Mususa, who was the Provisional Liquidator in this matter, is hereby appointed the Petitioner's Official Receiver.