

A in the circumstances, and a befitting lesson to a swindler. In consequence, this second appeal stands dismissed in its entirety. The respondent to have his costs here and in both courts below.

B

**FAHARI BOTTLERS LIMITED v. REGISTRAR OF
COMPANIES AND NBC (1997) LIMITED AND
OTHERS ... OBJECTORS**

C

HIGH COURT OF TANZANIA
AT DAR ES SALAAM

D

(Kalegeya, J.)

MISCELLANEOUS CIVIL CAUSE No. 155 OF 1998

E

[Consolidated with Misc. Civil Causes Nos. 146, 147, 148, 149, 150, 151, 152, 153, and 154 by order of the court dated 16 July 1999]

Civil Practice and Procedure – Preliminary Objection – Contents thereof.

F

Civil Practice and Procedure – Locus standi – Evidence conferring locus standi.

Company law – Provisional liquidator – Appointment of provisional liquidator – What the court should consider in exercising its discretion to appoint a provisional liquidator.

G

Company law – Provisional liquidator – Scope of the powers of a provisional liquidator.

Company law – Provisional liquidator – Stands in the position of a trustee – Need to have no conflict of interests.

H

Company law – Provisional liquidator – Appointment of provisional liquidator – Procedure of appointment – petitioner has filed a chamber application for appointment of provisional liquidator supported by an affidavit – Whether objectors proposing a name of a person to be appointed

I

provisional liquidator after petitioner's application for his appointment require to file a chamber application supported by affidavit.

A

Company law – Provisional liquidator – Remuneration for provisional liquidator – Whether it must be set by the court.

B

The petitioners prayed to the court for appointment of three provisional liquidators, namely Mark Danhi Bomani, Paul Howard Finn and Kevin Anthony Murphy and for issuance of various orders pertaining to the duties of such provisional liquidators, including preparation of a Scheme of Arrangement - restructuring, their powers and remuneration. The objectors filed notices to appear in the petitions and also filed their affidavits. All the objectors, except Kioo Ltd which also had a Preliminary Objection specifically directed to Fahari Bottlers Ltd and insisted on winding up, did not object to the appointment of provisional liquidators. The basis of the Preliminary Objection was that Fahari Bottlers Ltd was fraudulent, acted in bad faith and concealed material facts directly relevant to the agreement between the two parties. Although the objectors did not object to appointment of provisional liquidators, all of them, except Kioo Ltd which supported Kevin A. Murphy, objected to the trio proposed by the petitioners on grounds of conflict of interests. In addition all objectors objected to the proposed Scheme of Arrangement – restructuring, favouring winding up of the petitioner companies. Further more the objectors prayed for limited powers of the provisional liquidators. The proposed remuneration of provisional liquidators of 12.5% was also objected.

C

D

E

F

The learned judge considered the Preliminary Objection and the points raised by the petitioners and objectors.

Held: (i) The Preliminary Objection raised that the petition was presented in bad faith is not known in law and is overruled;

G

(ii) The Objectors' Notices to appear in the petitions and their affidavits stand as sufficient evidence conferring unto them the *locus standi* required in the respective petitions and therefore the objectors are properly and legally before this court;

H

(iii) The court would not usually exercise its power, which is discretionary, to appoint a provisional liquidator unless there was at least a *prima facie* case for a winding-up order or where the company assets were in jeopardy;

I

- A (iv) Since the petitioners have self-confessed of being in deep insolvency and of having "hived down" their assets to another newly formed company and have filed petitions for voluntary winding up and since *prima facie* a winding-up order is likely to be issued and since the petitioners have confessed, this state of affairs sets in
- B uncertainty regarding the stability and safety of the assets let alone the dealings, and loudly threatens the interests of the creditors and shareholders; therefore, in the circumstances, a provisional liquidator is required among other things, to investigate these dealings, collect and protect the assets;
- C (v) The court is vested with unlimited discretion regarding what powers should be bestowed on provisional liquidators;
- D (vi) Provisional liquidators can be bestowed with any powers ranging from investigating petitioners' affairs, collection of assets to selling or disposing of the same or some other duties including designing a Scheme of Arrangement that would be beneficial to all the parties involved and which the latter should agree to before presentation to the court for approval or otherwise;
- E (vii) The provisional liquidator shall exercise the following powers:
- F (a) to carry out full investigation into the affairs of the petitioners in order to identify their (petitioners) assets and property including the hive-down exercise carried out by the petitioners,
- G (b) to take possession of all the property and assets of the petitioners wherever they are and by whomever held and preserve them for the benefit of the creditors until a suitable Scheme of Arrangement is proposed and agreed upon, or if no such arrangement is reached, pending a winding up order and the appointment of a liquidator,
- H (c) to prepare a list of all creditors which should be submitted to the court within 3 weeks,
- I (d) to prepare a statement of the petitioners' affairs within 5 weeks,
- (e) to prepare a proposal for a Scheme of Arrangement, if found feasible, within 6 weeks and apply to the court for an order to convene a creditors' meeting to consider and vote upon the scheme,
- (f) to appoint such persons as he may deem fit to assist him discharge his duties;

- (viii) Since the proposed provisional liquidators have some connection in terms of business dealing with the petitioners, they are disqualified for the appointment;
- (ix) While for an application for a provisional liquidator to be properly before the court, there must be a Chamber application supported by an affidavit, in proposing a name of a person fit to be appointed a provisional liquidator by objectors after the petitioner or any person has filed an application for his appointment does not require the filing of a chamber application supported by affidavit;
- (x) In making an appointment of a provisional liquidator the court relies on various factors including judicial notice of the standing of particular person or upon receipt of proposals;
- (xi) Since a provisional liquidator is expected to protect the interests of the creditors, it is only fair that such creditors be given opportunity to play a part in the proceedings for appointment of liquidator;
- (xii) Mr Joseph Warioba, proposed by the creditors, is a fit person to be appointed a provisional liquidator of the petitioners;
- (xiii) The remuneration to which the provisional liquidator is entitled shall be worked out by the provisional liquidator based on his duties and the task ahead of him as he perceives it, then he will table in court the quotation of his charges in the presence of objectors for comments and observations before the court makes a decision on an appropriate remuneration.

Order accordingly

Cases referred to:

1. *Mukisa Biscuit Manufacturing Company Ltd v. West End Distributors Ltd* [1969] EA 696
2. *Amiral Meghji – the Debtor* [1970] HCD n. 230
3. *Indian Building Contrators Ltd v. RB Purohit* [1965] EA 342
4. *In Re St. Thomas Dock Company* (1876) 2 CLD 116
5. *In Re Uruguay Central and Hygueritas Railway Company of Monte Video* (1879) 11 CLD 372

- A 6. *Re Home Remedies Ltd* [1942] 2 All ER 552
7. *Re Dry Docks Corporation of London* (1888) 29 Ch D 112
8. *Re Hammersmith Town Hall Company* (1877) 6 Ch D 112
- B 9. *Re High-field Commodities Ltd* [1984] 3 All ER 884
10. *In the Matter of Peregrine Investment Holdings Ltd and in the Matter of the Companies Ordinance Chapter 32*, decided by the High Court of Hong Kong Special Administrative Region, Companies Winding Up Number 20 of 1998
- C 11. *Re: Charterland Goldfields* 26 T.L.R. 132
- Statutory provision referred to:
- D (1) Companies Ordinance, sections 183, 171, 184(e), 183(2), 183(1), 187(2), 187(4), 154(1), 190(1)(a) – (f) and 190(2)(a), 190(1)(g) – (h), 190(1)(c), rule 31

RULING

(Delivered 20 September 1999)

- F **Kalegeya, J.:** A group of 10 associated companies has presented itself before this court with ten (10) segmented simultaneous winding up petitions. These sister companies are Ziggi Bottlers Ltd, Kilima Bottlers Ltd, Mwanza Bottling Company Ltd, Ruaha Bottling Company Ltd., Shinyanga Bottlers Ltd., Serengeti Beverages Ltd, West Lake Bottlers Ltd., Fahari Fruit Products Ltd., Southern Highland Bottlers Ltd and Fahari Bottlers Ltd. The petitions were assigned numbers 146 of 1998, 147 of 1998, 148 of 1998, 150 of 1998, 151 of 1998, 152 of 1998, 153 of 1998, 154 of 1998, and 155 of 1998 respectively.
- H Prayers sought in all the petitions are similar in terms.

I Simultaneous with the winding up petitions the petitioners, by way of chamber summons supported by affidavits of their respective directors, have applied for appointment of provisional liquidators.

As is the case with the petitions for winding up, the prayers in this aspect are the same and on similar terms. In order to appreciate their import I here below reproduce them as they appear in one of the petitions:

- I. That the court exercise its discretion under section 183(1) of the Companies Ordinance Chapter 212 ("Chapter 212" or "the Ordinance") and rule 31(1) of the Winding Up Rules (1929) (Imperial) ("Winding Up Rules") and appoints:
- (a) Mark Danhi Bomani of Bomani and Company, Peugeot House, 39 Upanga Road, P.O. Box 740, Dar es Salaam;
- (b) Paul Howard Finn, FCA of Finn Associates, Temple Chambers, Temple Avenue, London EC4Y 0DT., and Peugeot House, 39 Upanga Road, c/o P.O. Box 740, Dar es Salaam;
- (c) Kevin Anthony Murphy, CA of Finn Associates Temple Chambers, Temple Avenue, London EC4Y 0DT., and Peugeot House, 39 Upanga Road, c/o P.O. Box 740, Dar es Salaam.

As provisional liquidators of the company we further Order that:

- (a) They shall take possession of all the fixed and current assets of the company, whether in tangible or intangible nature;
- (b) They shall act with the powers conferred by section 190(1)(a) – (f) and 190(2)(a) – (h) of the said Ordinance;
- (c) Within four weeks (or such other period as the court may direct) they prepare a Scheme of Arrangement and make application to the court under section 154(1) of the said Ordinance for the purpose of convening a meeting of the company's creditors to consider and vote upon the Scheme;
- (d) For the purpose of section 187(4) of the said Ordinance, they shall act jointly and severally in all matters;
- (e) Their remuneration be determined by reference to section 187(2) of the said Ordinance at the rate of 12.5% of gross realizations (or

- A at any other rate as the court shall deem fit) to be divided by agreement between them;
- (f) The costs of appointing an advocate under the provisions of section 190(1)(c) or agents under the provisions of section 190(1)(g) of the
- B said Ordinance, be defrayed from the assets within the hands of the provisional liquidators;
- (g) The cost of providing any security as may be determined by the
- C court under the provisions of section 184(e) of the said Ordinance be defrayed from the assets within the hands of the provisional liquidators;
- (h) That pursuant to section 171 of the Ordinance, the proceedings in
- D any suit, application, case, petition, or matter pending in this court or in any other Subordinate Court or tribunal be stayed pending the Order for winding up the company or further Order;
- (i) That pursuant to section 170(1), the hearing of the petition be adjourned
- E to a date to be fixed following the meeting of the company's creditors to vote upon the proposed Scheme of Arrangement.
2. That the costs of this application be defrayed from the assets of
- F the Company.
3. That such other Order be made in the premises as the court shall

As the petitions and chamber summons are hinged on similar and

G same terms, for convenience and avoidance of duplication, with consent of the court, the counsel struck a compromise to the effect that the various petitions should be consolidated and argued together in Miscellaneous Civil Cause Number 155 of 1998 hence the presence

H of proceedings leading to this ruling in the said record.

Arguments were made by way of written submissions. All the

I petitioners were advocated by Eric Ng'maryo while the respondents/objectors had services of various respective counsel as follows – Capt. Kameja for NBC (1997) Ltd., Dr Sinare for Trust Bank, Mr.

Mwandambo for TIB, Rwebangira (Ms) for Kioo Ltd., Dr Tenga for

A contingent creditors (Girish T Chande, Ashok T Chande, Ravi T Chande, JV Textiles and Garments Ltd and M/S Juthalal Vesji Ltd), Mr. Mbiro for Grown Cork Company (East Africa) Limited, Mr. Mujulizi for

B Stanbick Bank (T) Ltd and M and M Communications Ltd. One last objector, Abdillah Mikidadi appeared on his own.

In their counter affidavits the objectors except Kioo Ltd which

C also has a Preliminary Objection specifically directed to Fahari Bottlers Ltd and insists on winding up, do not object to the appointment of provisional liquidators. Again, except Kioo Ltd which supports one

D Kevin Murphy all objectors object to the trio proposed by petitioners for appointment as provisional liquidators because of conflict of interests – Finn and Murphy because they allegedly participated in the proposed restructuring scheme while Bomani has been acting

E for the 'Fahari group' including provision of services by his chambers to the petitioners. Not only that but also they all object to the opposed powers and duties of the provisional liquidators. All except NBC (1997) Ltd, are opposed to the proposed Scheme of Arrangement –

F restructuring. They insist that the provisional liquidators to be appointed should be for the purposes of maintaining the *status quo*, fully investigating the affairs of the relevant Companies, compilation of list of creditors, collection, possession, and preservation of the properties fill the

G winding up order. NBC (1997) Ltd on the other agrees on the making of a Scheme of Arrangement; agrees on the appointment of the provisional liquidators but differs with petitioners on the proposed trio and the

H powers to be conferred on whoever is appointed. While insisting on winding up, Stanbic and M and M feel that "reconstruction" or "reorganization" could be one of the options to be adopted by liquidators with approval of creditors and the court but that not on terms as

I proposed. Objectors also, object to the opposed 12 – 0.5% of gross realization as remuneration to provisional liquidators suggesting less instead and fair amount ranging from unspecificity to 5%, proposed Joseph Warioba as provisional liquidator, and call for rejection of the original provisional liquidator's Report.

A Just to clarify on the last issue of the "original provisional liquidator's Report", I should point out at this point, that this was the report compiled by provisional liquidators so appointed by this court when the present petitions were filed. Following wanting and conflicting orders and decisions by different judges in these petitions and in Civil Case Number 9 of 1998 the Court of Appeal, *suo motu*, opened revision proceedings vide Civil Revision Number 1 of 1999 in which, among others, it was ordered "the proceedings for appointment of provisional liquidators be and are quashed". By then, however the provisional liquidators appointed and charged with the duty of restructuring had already commenced their work and the report which had already been compiled is the one being referred to.

D With that let us now turn to the submissions.

Mr Ng'maryo for petitioners, painstakingly and in a lengthy submission argued on what can be summarized as follows (for ease of reference I will adopt the paragraphs and entitling he designed):

- E (a) that provisional liquidation procedure is essential to facilitate the restructuring process of the 10 petitioning companies
- F (i) that the "winding-up order" was not the intention nor the contemplation of the petitioners at this stage but were forced to seek protection of this process because, legally, provisional liquidators cannot be appointed under section 183 of the Companies Ordinance unless a winding petition is filed.
- G (ii) the three proposed liquidators should be accepted because;
- (a) Only seven out of the 10 petitioning Companies have persons objecting
- (b) Only 32% (8 persons) out of 26 who filed Notices to Appear, put up an objection
- H (c) Creditors who never objected or filed Notices to Appear are in excess of 100, the vast majority, hence the minority which objects is just less than 10% of the creditors. There is "overwhelming need to proceed with the restructuring process in order to maximize the
- I

realization for the benefit of all the creditors of the ten Companies and therefore, facilitating the recapitalization process of the Pepsi Cola Business in Tanzania, with the consequential benefits also to the workers and the nation"

- (1) Detailing why he is urging for restructuring, Mr Ng'amaryo insists that
- (2) reasonably, every creditor is concerned with recovery of its debt.
- (3) only restructuring can provide short term and opportunity to creditor to collect all or part of its debt from an insolvent company
- (4) Pursuing a winding-up order and full liquidation which results into no realization whatsoever is unreasonable
- (5) Macro-economic benefits would include:
- (i) The project revenue generation for the period 1999 to 2003 is TZS. 35 billion.
- (ii) Major Tanzania suppliers of goods and services will get business worth over TZS. 28 billion between 1999 – 2003. (They will pay taxes including VAT).
- (iii) 25,000 retailers will make a gross profit of TZS. 33 billion during the period 1999 – 2003 from sale of Pepsi-Cola products. (They will pay taxes including VAT to the Government).
- (iv) The overall benefit to the economy from the above 3 sources is TZS. 96 billion over the next 5 years.
- (v) Direct and indirect employment will be created for 9000 workers.
- (vi) Competition – resulting in lower prices, better quality and more advertising and promotion – including sponsorships of sports, leisure and cultural activities in Tanzania.
- (vii) The consumers and customers will benefit by competition between two world class brands. The court may be aware from the press of the historically unprecedented drop of the Pepsi Cola prices by 25% followed by other too.

- A (viii) Inward Investment of over USD 20 million.
- (ix) Improved prospects of realization and dividends by unsecured creditors.
- B (6) that under the restructuring process the provisional liquidators will within four weeks of their appointment, prepare a Scheme of Arrangement, make an application to the court under section 154 of Chapter 212 for the purposes of convening a meeting of the petitioner's/creditors to consider and vote on that scheme as well as any other matter brought up and/or arising as a result of the enquiries conducted by the provisional liquidators. If approved, the scheme would be presented to the court for approval or variation after which, the role of "the provisional liquidators as 'Midwives' of the restructuring and recapitalization lapses", that if this fails, the petitions for winding up will be activated. Mr Ng'amaryo vehemently maintains that under this process "there is no possibility – of any lawful rights of the creditors as a body; and individually (including the objectors) being trampled upon in anyway", and that it is the creditors collectively who know and should finally decide exactly what is best for them and what is a mere sham. He concluded by stating that the application and proposition is fair, just and equitable to all the creditors as a body".
- E
- F (b) Restructuring is an essential and indispensable condition precedent to the recapitalization of the Pepsi Cola business in Tanzania
- G (i) that the restructuring process leading to recapitalization is to enable a prospective investor "led by a South African based Company called International Pepsi-Cola Bottlers Investment Limited (IPCBIL) with the support of Pepsi-Cola International, who are shareholders in IPCBIL and are also Franchisers of all the Pepsi-Cola Carbonated soft drinks bottled in Tanzania, to recapitalize the Pepsi-Cola business presently run by their Franchisee, namely Fahari Beverages Ltd."
- H
- I (ii) that the court should note Finn's report which shows that the maximum realization to NBC (1997) Ltd is only USD 2.37 Million at 30 April 1998

- (iii) that that figure should now be less due to escalating and continuing costs, losses, claims made (i.e. Civil Case Number 98 of 1998 and 42 of 1999) and potential claims including, another factor that is, payments due to preferential creditors i.e. Tanzania Revenue Authority and terminal benefits of the employees, A B
- (iv) that "..... in liquidation and auctioning the remaining assets, there will be no realization whatsoever for any unsecured creditors and some objectors will also face the prospects of claims and suits similar" to those facing NBC (1997) Ltd. C
- (c) The question of the appointment of Paul Howard Finn and Kevin Anthony Murphy as provisional liquidators is *res judicata*
- (i) That the Court of Appeal decided that the appointment of the two provisional liquidators was proper as there was no conflict of interests and that the "Matter therefore ought to and must rest. No one can or should bring it up again unless, and if so, only through further revisional proceedings in the Court of Appeal". D E
- (d) The proposed appointment of Mr Bomani as provisional liquidator cannot be faulted
- (i) that Bomani is eminently qualified and a man whose standing, caliber cannot compromise this integrity and that consenting to the use of his chambers by creditors and interested persons when contracting petitioners' advocates do not make him partisan or agent of addresses in the same way the court whose registries are used to clear various correspondences between opposite parties do not carry that negativity. F G
- (e) There is no application before the court for the appointment of Mr Joseph Sinde Warioba as provisional liquidator or evidence as to his qualifications and professional expertise H
- (i) that Warioba cannot be appointed a provisional liquidator as there is no chamber application supported by an affidavit to that effecting terms of rule 8(2) of the Winding-up Rules (1929) (Imperial) (Winding-up Rules) and as elucidated by the Court I

- A of Appeal in Civil Revision Number 1 of 1999; that in any case
objectors have not provided his qualifications and expertise let
alone a defect apparent in the purported consent which reveals
an irrelevant company "JV Group of Companies Ltd".
- B (f) The remuneration of the proposed provisional liquidators is fair and
reasonable
- C (i) that the 12.5% of the gross realization in reference to section
187(2) of Chapter 212 is neither unreasonable nor unfair considering,
the "enormity and complexity of the task of the provisional
liquidators as exemplified by the volume of the interim report
submitted by the previously appointed liquidators, and activities
to be covered which are far-flung and over the whole country
and specifically considering "the added difficulty in transport
and electronic communication between the companies, the
rudimentary and manual record keeping and the relatively short
time required to complete their ... task".
- D (g) The court should see ulterior motive in the effort by a handful of
creditors to oppose and frustrate the restructuring process and
recapitalization of the Pepsi-Cola business in Tanzania. The said
handful of creditors seem to be all making a joint effort to do so.
- E (i) that the various affidavits of creditors and guarantors seem to
compliment each other, that some creditors appear prepared
to write off their debt albeit jeopardizing other creditors chances
of recovery as well as kill the Pepsi-Cola business in Tanzania.
- F (ii) that the self-injurious and unreasonable efforts by the objectors
in blocking genuine and fruitful efforts by petitioners seeking
courts assistance in restructuring should be seen as aiming at
boosting Coca-Cola Business in Tanzania.
- G (h) For creditors to address this court in opposition of this application,
proof of debt must have been submitted
- H (i) that the 9 creditors should have proved their debts; "They must
have proved that ... applicants/ petitioners owe them the sums
- I

- they have indicated in the Counter affidavits. The *onus* and
responsibility falls on them to do so, someone cannot simply
appear and say I am a creditor, produce no evidence and expect
to be heard by the court".
- A (ii) regarding the contingent "creditors, they should have adduced
evidence of the existence of the loans and guarantees.
- B (iii) that none of these has a *locus standi*.
- C (i) The report of the initial provisional liquidators and their work so far
done should not be wasted
- D (i) that the interim report relates to a task almost half way through
and the same should be adopted in order to allow completion
of the task within the contemplated time frame and save effort
and expenses so far injected therein.
- E (ii) that this will have sense if Finn and Murphy in conjunction
with Bomani will be allowed to complete the task from where
they left off because otherwise, it will be to "reinvent wheel"
if new provisional liquidators are appointed.
- F (j) Powers of the provisional liquidators should not be limited (this was
not so framed by Mr Ng'maryo as he put it under item (a) above,
but considering its importance in the dispute I have deemed it proper
to give it a separate title).
- G (i) that though powers of provisional liquidators are not specifically
spelt out under the Chapter 212, the said Chapter juxtaposes
provisions relating to liquidators with those relating to provisional
liquidators in several sections including sections 176, 180(1),
184, 186(5) proviso, 186(6), 188 thus leading one to reasonably
conclude that the same powers required by a liquidator are
needed by a provisional liquidator albeit for a specific period.
- H (ii) that less powers than those asked for will delay the process as
the provisional liquidators will have to constantly seek specific
court orders to enable them carry out their duties and obligations
responsibly.
- I

- A (iii) that as much as the court may limit and restrict the provisional liquidator's powers under section 182(2) Chapter 212 or liquidators powers under section 190, so also it is a natural inference that the court has power to give other or additional specific powers to provisional liquidators as circumstances of the case may require.
- B
- C (iv) that it is unimaginable that provisional liquidators cannot have powers to "spearhead" restructuring process but at the same time have powers to investigate, collect, preserve assets, prepare statement of affairs and related ...
- D (v) that "powers and order less than those prayed for, particularly powers as merger as those proposed by objectors will delay the efforts, the process, hamstringing the provisional liquidators and frustrate the restructuring process".

E The above is a summary of a very lengthy submission by Mr Ng'maryo. This attracted a formidable joint-counter by the objectors. As they are all launched on the same vein, and being almost similar in substance, I will summarise them jointly and together save for limited areas where they part, in which case, I will deal with those elements separately. I will start with Ms Rwebangira's submission on Preliminary Objection.

F Ms Rwebangira has raised a Preliminary Objection to the effect that the petition in respect of Fahari Bottlers Ltd was presented in bad faith and should be stayed pending hearing and determination of legal issues as follows:

- G (i) Whether a company which is under compulsory winding up proceedings by a creditor, enters into a settlement agreement under which it promises to pay a compromise amount and thereby persuades the creditor and the court to mark the matter as settled and, as a result of which issue a decree but soon thereafter and, without paying the said compromise amount thereto, fraudulently, and/or in an attempt to avoid liability under the decree is entitled to proceed, to a "voluntary" Winding-Up on grounds of alleged insolvency or restructuring or has to show "clean hands" before it can be heard.
- H
- I

- A (ii) In what circumstances would a petitioner be allowed to defeat the rights of a decree holder, when such judgement had been entered with the consent of the petitioner, fully aware of its alleged insolvency but not disclosed to the decree holder?
- B (iii) Whether a company which goes into liquidation immediately after it has agreed to settle part of a debt in a compromise and has not paid that compromise amount did so fraudulently or not.
- C (iv) Whether a company which transfers its assets (and business) to another company without transferring its liabilities with the said assets and immediately petitions for Voluntary Winding Up, that company to which the assets were transferred should not be wound up or at least the assets so transferred be brought into the liquidation process.
- D

E Facts leading to this objection include the following – In Misc. Civil Case Number 133 of 1998 filed on 5 August 1998, Kioo Ltd petitioned for the winding-up of Fahari Bottlers Ltd. Before the petition could be heard, precisely on 15 August 1998, parties entered into an agreement which was recorded by the court on 19 August 1998. The terms were as follows:

1. Fahari Bottlers Ltd to pay a sum of TZS. 225 million to Kioo Ltd towards settlement of its claim, within 55 days from the date of this agreement provided the investment was in place by then.
 2. If as a result of investment into Fahari or reconstruction it was able to pay Kioo Ltd a further sum towards full settlement of the claim, it would do so. If not the sum paid ... shall be the full agreed settlement.
 3. Kioo agreed to withdraw the petition (also consent to lifting of the injunction) and defer further steps in the action for a period of 60 days from the date hereof. If during this period, as a result of investment into Fahari or reconstruction, Fahari took any steps such as transfer of assets or formed a joint venture, Fahari undertook not to prejudice Kioo's rights under their claim. Fahari further undertook to inform Kioo in writing within one week of any such step which may have been taken which could prejudice Kioo's rights.
- F
- G
- H
- I

A This persuaded Kioo Ltd to apply to the court to mark the matter as settled which prayer was granted accordingly. According to Mrs Rwebangira, the Fahari Bottlers Ltd had a hidden agenda, for:

B "Surprisingly on the same day of 19 August 1998 the petitioner entered its own resolution for Voluntary Winding-up and filed petition for Voluntary Winding-up on the next day", and the assets were "hived-down" to a newly formed Company – Fahari Beverages Ltd.

C Mrs Rwebangira argues:

The petitioner deliberately misled the creditor and the court into settlement simply to get the creditor's petition off the court record so that it could present its own and seek winding up or its so called "reconstruction"/ "restructuring" under its own terms. We submit that this was fraud. The petitioner concealed the fact that its current investment and assets could not meet the initial sum of TZS. 225 000 000. It also concealed the fact that it was about to make it impossible for Kioo Ltd as decree holder to execute the decree" or "take further steps" to recover the decretal amount by reason of its new petition.

F This concealment of material facts directly relevant to the agreement, settlement and consent to the lifting of the injunction amounted to fraud and we pray that its petition should not be allowed to stand.

G In response to this, Mr Ng'maryo, citing *Mukisa Biscuit Manufacturing Company Ltd v. West End Distributors Ltd* (1) argued that the above cannot be a Preliminary Objection known in law as it contains facts which have to be proved (and not points of law); that even if it is one it has been raised prematurely as what is before the court now is an application to appoint provisional liquidators and not the hearing of the petition.

H With respect to Mrs Rwebangira I am on all fours with Mr Ng'maryo that this is not a Preliminary Objection known in law. Authorities on what is a Preliminary Objection abound and the authority cited above summarises what the legal stand is. As was observed by Law,

I J.A. at page 700 of the cited Report,

... So far as I am aware a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration ...

While I don't agree with Mr Ng'maryo in his arguments that the debt of TZS. 225 000 000 due to Fahari Bottlers was not proved and that the "settlement agreement alleged must be proved, for, the decree on record speaks for itself and he would surprise the world if he pretends ignorant of the same when he was a participant thereto, I cannot associate myself with an argument by Mrs. Rwebangira that the existence of that liability is a point of law which should bar the filing of a petition for winding up as was the case here.

I am persuaded, without prejudice to subsequent decisions on the matter, that on the facts at hand, Fahari Bottlers Ltd's acts are very suspicious – offering debt settlements terms today, only to file a petition for winding-up tomorrow, and even then, without notifying the party you struck the agreement with, when the terms of the said agreement so provide, and not only that, but also going further to transfer the assets excluding liabilities to another newly formed Company cannot be compatible with honesty, genuineness or faithfulness. There is something very wanting if not fishy. But that is the maximum we can comment at this point. Mrs Rwebangira's arguments are relevant when it comes to the hearing of the petition. Those are strong and relevant points that can be fronted to convince the court that the petition for winding-up should not be granted. Even then they cannot even be raised as Preliminary Objection for they don't legally qualify. There is no unlawfulness or illegality in the filing of the petition. Mrs Rwebangira cannot be heard to say this petition was unlawfully filed" or "this petition is illegally before the court". What she can be rightly heard to front is, "though filed this court should not grant this petition as petitioners are before this court shrouded with dirt".

A This is different from fronting a Preliminary Objection. In the premises the Preliminary Objection is over-ruled.

Going back to the main substance I should out rightly state that the objectors ably submitted, and at length for that matter.

B For consistency I will summarise the objectors' response along the paragraphs and titles as numbered in respect of Mr Ng'maryo's submissions.

C All objectors concede that in law provisional liquidators can be appointed but insist (save NBC (1997) Ltd) that these would be for the purpose of maintaining the *status quo*, in that they would only collect, preserve and protect the petitioners property. Except NBC
D (1997) Ltd, they don't agree that their duties should cross over to restructuring or working on a Scheme of Arrangement. Stanbic Bank and M and M concede to some extent that, that could possibly be one of the duties of the provisional liquidators.

E Regarding the indispensability of restructuring as a condition precedent to recapitalization, objectors who are against it, insist that the restructuring is for the benefit of the petitioners and more so because they entered in a Scheme of Arrangement without involving
F interested parties, ie creditors; that they "hived-down" their assets into a new company "without carrying the liabilities as well and leaving themselves being empty shells and without considering the creditor's interests". The gist of the charges is well reflected in one of the
G objectors submissions as follows – "...the petitioners directors...grossly mismanaged the debtor companies, have disparted their properties and assets including illegal transferring thereof to a third party, namely Fahari Beverages Ltd whose directorship composes of the petitioners' advocate".

H They strongly oppose the proposed trio as provisional liquidators – Finn, Murphy and Bomani as they are interested parties. They insist that the latter was not only used in clearance of petitioner's
I correspondences but was actively involved in various negotiations

while the former were involved in the restructuring scheme and advises to petitioners – hence none can service and command the confidence of objectors. They stand surprised over the alleged *res judicata* regarding the appointment of Finn and Murphy as it is not supported by the Court of Appeal decision in Miscellaneous Civil Revision Number 9 of 1999. B

They all (except the contingent objectors who have no particular preference) urge for the appointment of Joseph Sinde Warioba as a provisional liquidator for they have trust and confidence in him. They
C argue that once there is a chamber application for appointment of a provisional liquidator, proposals that follow do not require a chamber application; that the consent made by Warioba is proper and the wrong name of the Company (JV Group) was by slip of the pen which can
D be rectified if need be.

On the remuneration, while they all object to the 12.5% of the gross realization they stand divided on what should be given. The majority propose 5% while NBC (1997) Ltd maintains that the person
E appointed should make a proposal for determination by the provisional liquidator.

They dispute existence of any ulterior motive in their objections arguing that rather it is the petitioners who harbour the same by engaging
F in actions which touch their interests but without involving them.

Regarding their *locus standi* objectors are surprised by this argument because petitioners conceded of being insolvent; that they (objectors) have clearly stated the extent of indebtness in affidavits; and that in
G any case this is not the occasion to prove debts.

Lastly, they argue that the initial report by the provisional liquidators should be disregarded as it was composed by people whose appointment was declared null and void, and that powers of the Provisional liquidators to be appointed should be limited to protect objectors' rights. H

Mr Ng'maryo did not have much in rejoinder. He reiterated what he stated in the main submission. He insisted that the proposal of I

A Mr Warioba is against rule 31(1) of the rules; that decision of majority
creditors is of persuasive force (cited: *Amiral Meghji – the Debtor*
(2) and *Indian Building Constructors Ltd v. R B Purohit* (3). In *Re:*
B *St. Thomas' Dock Company* (4), In *Re: Uruguay Central and Hygueritas*
Railway Company of Monte Video (5), *Re: Home Remedies, Ltd*
(6), and that Chandes (contingent creditors) by the end of June, 1998,
were totally controlling and managing the affairs of the petitioner
Companies, thus "they and their associated companies are ... accountable
C for the affairs and financial position of the companies" and that their
acts would be scrutinized and decided upon by creditors' meeting if
prayers are granted. He insisted,

D Fahari Beverages Ltd is a company floated by the Chandes for the purpose
of restructuring and hive down. This is mentioned in the letters ... signed
by Chande.

E I have detailed the submissions and arguments purposely. Although
the application seems to be a simple one, a decision thereon affects
a substantial group of companies let alone other interested parties
including objectors. Arguments and submissions regarding their fate
therefore should clearly be put to the fore.

F I should start by stating that I stand indebted to the counsel's (of
both sides) able submissions. Not only that but also for availing me
copies of authorities cited – I think, in a responsible recognition of
the wanting nature of our Library facilities.

G For an organized flow of findings, I will not follow the sequence
of titles and paragraphs as designed by Mr Ng'maryo and paraphrased
at the beginning of this ruling. Where necessary I will interchange
them or argue them together.

H I will start with the question of the objectors' *locus standi*. As
rightly submitted by the objectors, I have been at pains to understand
what Mr Ng'maryo meant by insisting that in order for the objectors
to have *locus standi* they should have proved the existence of debts!
I The objectors duly filed notices upon the petitioners' advertisements

regarding their petitions for winding up. They duly appeared before
the provisional liquidator represented by counsel. Their respective
directors swore affidavits showing the extent of indebtedness by petitioners
– Crown Cork, USD 186,288, Kioo Ltd TZS. 1 139 814 292; out
which TZS. 225 000 000 forms a provisional liquidator decree; Stanbic
B Bank, USD 1 193 199 99; M/S M and M Communications Ltd TZS.
68 333 9090-20 and USD 773-39, subject of (HC) Civil Case Number
268 of 1998; Abdillah Mikidadi, TZS. 10 000 000, for wrongful
termination, subject of Civil Case Number 283 of 1996 at Kinondoni
District Court; NBC (1997) Ltd a total of TZS. 7 300 378 428 [broken
up as follows:- Ruaha Bottlers – TZS. 298 541 705 Southern Highlands
Bottling Co. – TZS. 137 679 230; Fahari Fruits Products Ltd – TZS.
184 409 767, West Lake Bottlers Ltd – TZS. 130 787 172; Fahari
D Bottlers Ltd – TZS. 6 399 463 939], Shinyanga Bottling Company
Ltd – TZS. 149 496 615, Trust Bank (Tz) Ltd, TZS. 688 000 000;
TIB, TZS. 269 036 877-92. The directors of the contingent creditors
(Girish T Chande, Ashock T Chande, Ravi T Chande, JV Textiles and
E Garments Ltd M/s Juthalal Verji Limited) swore affidavits to show
that they guaranteed various loans extended to petitioners. What else
does Mr Ng'maryo wish to be proved in order for these parties,
who stand to lose in case the petitioners die miserably insolvent, to
be able to stand in provisional liquidator to defend their interests? F

The objectors' Notices to Appear in the petitions and their affidavits
stand as sufficient evidence conferring unto them the *locus standi*
required in the respective petitions. As rightly submitted by them,
in any case, this is not the right moment for proving the exact debts/
liabilities. Coupled with this, the petitioners who self-confessed
G of being deeply indebted to various parties did not challenge the
objectors' affidavits regarding the debts nor regarding the contingent
creditors that they guaranteed various loans. Mr Ng'maryo who knows
H it well, being a seasoned lawyer; is aware that an affidavit is evidence
and cannot be assailed by mere submissions as he is trying to do.
Suffice to conclude that the objectors are properly and legally before
I this court..

A Next to consider is whether it is proper to appoint a provisional liquidator. This should not detain us at all. All counsel concede that this is purely legal and the law so provides. section 183(1) of Chapter 212 (Companies Ordinance) provides:

B Subject to the provisions of this section, the court may appoint a liquidator or provisionally at any time after the presentation of a winding-up petition and before the making of a winding-up order, and either the official receiver or any other fit person may be appointed.

C Rule 31 of the Companies (Winding-Up Rules, 1929) provide further:

D After the presentation of a petition, upon the application of a creditor, or of a contributory, or of the Company, and upon proof by affidavit of sufficient ground for the appointment of a provisional liquidator, the court, if it thinks fit and upon such terms as in the opinion of the court shall be just and necessary, may make the appointment.

E Do facts and circumstances of the controversy before this court warrant appointment of provisional liquidators? On this point, the counsel have made reference to various persuasive foreign decisions on what the court should consider in exercising its discretion towards that end – *Re: Dry Docks Corporation of London* (7), *Re: Hammersmith Town Hall Company* (8), *Re: High-field Commodities Ltd* (9). The enunciated principles boil to what is contained in the headnote to the report of the judgement in *Re High-field's* case:

G The court would not usually exercise its powers ... to appoint a provisional liquidator unless there was at least a good *prima facie* case for a winding-up order. However, the courts' Power to appoint provisional liquidator (is) general in scope and (is) not restricted to cases where the company was obviously insolvent or where it was otherwise clear that it was bound to be wound-up, or where the company's assets were in jeopardy. Furthermore the power (is) discretionary, and in addition to being required to be exercised judicially, the need for the exercise of the discretion should outweigh the consequences to the Company ... In particular where the grounds for winding up petition ... was expedient in the public interest, the public interest should be given full, though not conclusive, weight.

A The above quoted being a common law stand and not in derogation of the law as already quoted has full blessing of this court, for it portrays what the law is in this country as well.

B The petitioners have self-confessed of being in deep insolvency. They have filed petitions for voluntary winding-up. *Prima facie* therefore, a winding-up order is likely to be issued. The petitioners have categorically stated:

C All the ten companies are interlinked in their businesses, finances, directors and shareholders and have confessed of having "hived-down" their assets to another newly formed company. Naturally, this state of affairs sets in uncertainty regarding the stability and safety of the assets let alone the dealings, and loudly threatens the interest of the creditors and shareholders. D In the circumstances, a provisional liquidator is required, among others to investigate these dealings, collect and protect the assets. For that reason, I answer the question I had posed at the beginning, positively.

E Following on heels to the above is – what powers should this provisional liquidator have.

F The objectors save NBC (1997) Ltd urge for very limited powers and not as insisted upon by petitioners. They insist instead that the provisional liquidators are only appointed for preservation of the petitioner's assets – maintain *status quo*, and that legally a provisional liquidator cannot engage in restructuring or composition of any Scheme of Arrangement (cited the *Re: Dry Docks (7) and Hammersmith (8)* cases whose citation has already been provided above). On whether restructuring is essential and indispensable to recapitalization of Pepsi-Cola business in Tanzania, they argue that petitioners being insolvent and out of business no meaningful restructuring can be made; that it is superfluous to the petitions and that creditors should not be compelled on a course whose extent of the alleged benefit has not been disclosed and more so in relation to creditors.

I I should start by stating the obvious that neither the Companies Ordinance nor the "Rules" made thereunder specifically provide powers

A which have to be conferred upon provisional liquidators. section 183(2) of the Ordinance and rule 31 of the Winding up Rules, refer to powers of a provisional liquidator in an assumptive manner. They provide:

B 183(2) Where a liquidator is provisionally appointed by the court, the court may limit and restrict his powers by the order appointing him.

C Under rule 31 the court, (regarding a provisional liquidator), "(i) ... if it thinks fit and upon such terms as in the opinion of the court shall be just and necessary, may make the appointment (ii) The order appointing the provisional liquidator ... shall state ...the duties to be performed by the provisional liquidator."

D On the basis of the quoted law, it is clear that the court is vested with unlimited discretion regarding what powers should be bestowed on provisional liquidators. For that matter I am in full agreement with Mr Ng'maryo that the court is empowered to give powers including those provided to the liquidator under section 190 through 193 of the Ordinance. What powers should be given are left to the wisdom of the court. I cannot therefore buy the objectors' contention that provisional liquidator's powers is limited to only investigating the affairs of the petitioners, collection and preservation of the petitioner's assets. Depending on the facts of a particular case, provisional liquidator's powers can loom into restructuring action and making of a Scheme of Arrangement or any other activity deemed proper by the court to be in the interests of the creditors/shareholders.

G The counsel for both camps cited authorities in support of their respective stands – some of the objectors cited *Re: Dry Docks* (7), *Re: Hammersmith* (8) and *High-field's* (9) cases while Ng'maryo for petitioners cited, among others, *Re: Amirali Meghji* (2); *Indian Building Contractors Ltd v. RB Purohit* (3). The latter cases show that a provisional liquidator has powers ever to make restructuring or arranging a Scheme of Agreement, which stand, I fully support in view of the blank cheque given by the law (above quoted) to the court. There is yet another support from a recent Commonwealth

A decision, decided just last year (1998) (Mujulizi, learned counsel, stands commended for unearthing it) which shows that provisional liquidators not only can they be given powers to preserve but also to dispose off the petitioner's property (In the Matter of *Peregrine Investment Holdings Ltd* (10) and *In the Matter of the Companies Ordinance Chapter 32, decided by the High Court of Hong Kong Special Administrative Region, Companies Winding-Up* (10). An excerpt from the judgement runs as under –

C provisional liquidators were appointed ...

D The Order appointing the provisional liquidators provided that the liquidators could sell or dispose off any assets by way of private treaty tender or auction upon such terms as the provisional liquidators may deem appropriate subject only in the case of sales of subsidiaries or entire business divisions to the liquidators obtaining leave to do so from the court.

E I am satisfied that as the law stands now, provisional liquidators can be bestowed with any powers ranging from investigating petitioners affairs, collection of assets to selling or disposing of the same or some other duties including designing a Scheme of Arrangement that would be beneficial to all the parties involved and which the latter should agree to before presentation to the court for approval or otherwise.

G Now, back to the specific question, on the facts of this particular case what specific powers should be conferred on the provisional liquidator?

H My first reaction is that they should not be limited as proposed by the majority objectors but rather should be wide enough to cover a formulation of a Scheme of Arrangement. I have reached this conclusion because of the following, first, it would seem that there is a confusion regarding the centre of controversy. The arguments presented by the objectors seem to suggest that there is already in place a Scheme of Arrangement which they are being called upon to agree to. One of the objectors charges thus:

I

A It is therefore manifestly clear that there has already been a transfer or attempt to transfer the assets. What then are the provisional liquidators to take charge of? Aren't they being appointed simply to inherit and adopt the already prepared Scheme, thrust it at the creditors and call for a vote from a number of already approving creditors who are in the majority anyway? Isn't the court being called on to rubber-stamp an already made Scheme, with the secured creditors being sidelined as mere by-standers?

C And yet another objector launched a similar serious attack in the following words:

D It is ridiculous therefore my Lord for a debtor to compel a creditor to agree to a course of action of whatever description which does not appear to be beneficial to him considering the fact that there is no real guarantee that recapitalization process will deliver any positive results. My Lord, it is our further submission and we pray that this honourable court of law should not be used as conduit pipe for debtors finding the leeway of technically avoiding debts on sheer mechanism such as restructuring and recapitalization which were at their disposal long way ago to the detriment of the creditors.

F To clear the air, I should say that I am surprised by these submissions. I know from the record that Finn and Murphy had already embarked on a formulation of a Scheme of Arrangement. I also get a feeling that whatever was proposed arose serious misgivings among the objectors. Well, that may be correct but for the purposes of this application there is no scheme whatsoever in existence. The petitioners and objectors alike may feel that in case provisional liquidators are empowered to formulate a Scheme of Arrangement, the already compiled proposal may find its way into the new scheme. That should not be our concern now. A decision to utilize which material and from which source will lie with the person appointed – that's why a neutral, unbiased person is required.

I At the same time, it is not correct to say that a Scheme of Arrangement would be brought to the court for simply rubber stamping. The scheme will have secured the blessings of the creditors/shareholders. The

A court's duty is not to rubber-stamp but rather to scrutinize the Scheme of Arrangement formulated, satisfy itself on the response of creditors/shareholders and whether the Scheme itself is fair and equitable and for the benefit of all parties concerned. Only after being satisfied with the above perfection would the court approve the Scheme. It is not mandatory that the court should approve such Scheme. It may reject the same or order for amendments.

C While still on that, it should be noted that it is not mandatory that such a provisional liquidator must formulate a Scheme of Arrangement. He would be empowered to formulate one but during his investigations he may get convinced that a Scheme of Arrangement is unworkable in the circumstances or not beneficial to the creditors. In such situation he is not bound to formulate any. He would then inform the court accordingly for winding up process to proceed. What is the gauge of his duties? Whatever he does should be in the best interest of the creditors/shareholders. That's why I have not and will not bother to make a finding on the weight to be attached to percentages of creditors as regards their support on the scheme orchestrated by Mr Ng'maryo and elaboratively responded to by the objectors, counsel. It is premature to argue on the percentage of creditors that support a scheme or not, for, at this point there is none.

G Insisting on merely winding-up without giving leeway to the provisional liquidator to survey for another beneficial option may not lie in the interests of creditors. 10 companies are involved. They have effected a hive-down on the assets to a newly created company. They are miserably indebted to both secured and unsecured creditors (just one creditor claims over TZS. 7 billion). Even if a winding-up order is made there may be not be enough money to pay creditors. Let a provisional liquidator investigate, scan and come out with what is good for the parties.

I Arguments have been presented that only limited powers should be given and that the provisional liquidator would be at liberty to apply to court for specific additional powers to embark on restructuring

A or a Scheme of Arrangement if he soon discovers its necessity. Well, this is one mode of approach but compared to what I am suggesting the latter saves time, expedites matters and removes unnecessary delays. Let him leave the court clothed with all the authority and powers. Let him join the battle armed with all armaments available. B It defeats common sense for a fighter to join the battle with a Scheme that he has to check on the strength of the enemy first then rush back to the armoury to equip himself well!

C That said, what should these wide powers encompass? We have two versions. The petitioners', as they appear at the beginning of this ruling, and NBC (1997) Ltd.

D Having carefully considered the arguments, the law, the state in which the 10 petitioners are, the way the "hive-down" has been effected, I settle, with minor variations on NBC (1997) Ltd's proposals regarding powers which should be exercised by a provisional liquidator as follows:

- E 1. To carry out full investigation into the affairs of the petitioners in order to identify their (petitioners) assets and property including the hive-down exercise carried out by the petitioners.
- F 2. To take possession of all the property and assets of the petitioners wherever they are and by whom ever held and preserve them for the benefit of the creditors until a suitable Scheme of Arrangement is proposed and agreed upon, or if no such arrangement is reached, pending a Winding-Up Order and the appointment of a liquidator.
- G 3. To prepare a list of all creditors which should be submitted to the court within 3 weeks.
4. To prepare a statement of the petitioners' affairs within 5 weeks.
- H 5. To prepare a proposal for a Scheme of Arrangement, if found feasible, within 6 weeks and apply to the court for an order to convene a creditors' meeting to consider and vote upon the scheme.
- I 6. To appoint such persons as he may deem fit to assist him discharge his duties.

A The schedule within which to take the steps, for one reason or another, may prove insufficient. In that case, he will be allowed to apply for extension of time.

B The question of restructuring and its indispensability being a condition precedent to the recapitalization should not take much of our breath. We have provided wide powers to the provisional liquidator. Armed with that he will investigate full activities of the petitioners and will come up with whether restructuring is necessary and in what form and that's why he is empowered to formulate a Scheme of C Arrangement, which has to be accepted by the creditors and approved by the court. The benefits enumerated by the petitioners should not carry the show of the day for the provisional liquidator has to go into them thoroughly and satisfy himself that they are real and workable D and a not a "sham" (to borrow the language of one of objectors' counsel).

E While still on this I should touch the argument that the initial report of provisional liquidators and their words so far done should not be wasted. I am afraid this court cannot issue an order for his utility. The provisional liquidator should be left free to decide on how to collect the required information. However, common sense F would dictate that the provisional liquidator will go for all relevant materials and contracts, and that report is one of them. It is not of insignificance that the initial provisional liquidators will be paid for whatever they did before being barred. In effect, therefore the initial report is the property of the petitioners. G

H That said, who should be appointed a provisional liquidator? I should in very certain terms declare that neither Finn, Murphy nor Bomani is fit to be appointed as provisional liquidator – they are disqualified because of their association with the petitioners. Conflict of interest is very glaring. H

I I was surprised not stunned to hear a seasoned lawyer of Ng'maryo's caliber gathering guts and audacity to say that the Court of Appeal in I

A Civil Revision Number 1 of 1999 decided on the appointment of Finn and Murphy. He asserts that the matter is *res judicata*.

B He declared, the matter therefore ought to and must rest. No one can or should bring it up again unless, and if so, only through further revisional proceedings in the Court of Appeal.

With respect, I am sure that Mr Ng'maryo is aware that that submission is fallacious. The Court of Appeal observed:

C There is not much to say about the appointment of the two other provisional liquidators (i.e. Messrs Finn and Murphy). At first we had the impression that both resided outside the jurisdiction of the High Court, that is, in London, but on closer examination of the record, it appears that they
D have an address within the jurisdiction of the court and is [*sic*] qualified for appointment as a liquidator.

E The Court of Appeal did not appoint (and could not in the circumstances) provisional liquidators. If so, as rightly fronted by the objectors, why bring the same matter before this court which is subordinate to the Court of Appeal?

F Although Mr Ng'maryo capitalizes on those observations he forgets or deliberately, fails to make reference to the final order of the court, which among others states.

The proceedings for appointment of provisional liquidators be and are quashed.

G Clearly, and as rightly submitted by the objectors, the observation of the court relied upon was *obiter dicta*. In any case, having quashed the proceedings which appointed them, on which ground then can the purported appointment stand?

H The suitability or otherwise of Murphy, Finn as is the case with Bomani is now what is before this court for determination. And I have already indicated that the trio do not qualify because of conflict of interests. As was stated in *Peregrine case* already referred to above:

I

A It is the task of the provisional liquidators to get in the assets on behalf of the creditors and shareholders. They stand in the position of trustees ...

B Trustees are never permitted to be or remain in a situation where they have a conflict of interest. That rule is crucial to the proper administration of the relevant trust. The dual role of the liquidator's firm should have been disclosed to the court at the earliest opportunity.

C In that case the provisional liquidators had been performing auditing duties to the other party and this was concluded upon to be client relationship hence, existence of a position of having conflict of interests.

Again, in *Re: Charterland Goldfields* (11) a liquidator was disqualified for similar reasons-it was stressed:

D The liquidator of the company must be a person who will act independently, especially of those against whom there may be pending claims, and will discharge his duties without favour to either side.

E Where it appeared that the liquidator in the Voluntary Winding-Up of a company had an intimate business connection with several of the directors of company, who were also directors of other companies between which and the company in question there had dealings requiring investigation, the court being of the opinion that he was not in a position to take independent
F course in making the necessary investigations, made an order removing him from the office of liquidator, and appointed another liquidator in his place.

G The objectors in here have sufficiently proved that there is client relationship between Finn, Murphy and petitioners. The two personalities have been engaged in the negotiations with some of the creditors on behalf of petitioner, let alone formulation on the restructuring proposal long before the petitions were filed. They have been negotiating with NBC on behalf of petitioners regarding their indebtedness proposing
H in the process debt – compression. The objectors' fear that they may put into effect whatever plans and recommendations they have had in their capacity as professional advisors to the Fahari Group are not far fetched. On the other hand it has amply been proved that
I

- A Mr Bomani's Chambers were being used by the petitioners for clearance of their correspondences. Mr Ng'maryo's urge that the relationship ended but as that has been contradicted by evidence that fees were paid for services. Also it has not been explained why, if the services ended at mail delivery arrangement, didn't they use Eric N. Mahayo partnership chambers just within reach.

- In any case, there are very telling correspondences whose copies were sent to Mr Bomani and which clearly show that he was engaged in some negotiations between the newly formed company, Fahari Beverages Company Ltd and NBC. The former is the company to which the petitioners transferred their assets. Even an angel would not trust that Mr Bomani would not take sides in a conflict, as the one in existence, between objectors and petitioners.

- As provisional liquidators are expected to protect the interests of the creditors, any person who has any connection in terms of business dealing between him and petitioners is outrightly disqualified from appointment to that position, for, conflict of interest is the very obvious. Here it is not a question of qualification and experience. The trio no doubt excel in this. And it is not a question of acting in the interest of the creditors. It must actually be seen that it is done. provisional liquidators must not have tainted let alone suspicious trust in the eyes of the creditors. The trio is obviously netted in the latter and is accordingly disqualified.

- Who should be appointed? The objectors propose Mr Joseph Warioba. The petitioners object to the proposal arguing that there is no application as such as rule 8(1) of the "Rules" has not been complied with; that he has not given his consent as the one he submitted is in respect of a different company and that his qualifications and expertise have not been proved.

- Indeed, for an application for a provisional liquidator to be properly before the court there must be a chamber summons supported by an affidavit – the *Court of Appeal in Civil Revision Number 1 of 1999* is clear on this as is rule 8(1) of the "rules". However, with respect

to Mr Ng'maryo, what the objectors are proposing is not an application for appointment of a provisional liquidator as much, but who should fill in that position once an application to appoint is allowed. The petitioners were the ones who applied for appointment of provisional liquidator and that is the application which is before us.

Proposing a name is just ancillary to the main application. The petitioner could even have simply filed the application without naming a person leaving it to the court to scan around and pick a fit person. The objectors are simply proposing whom they think, once the application is granted, can fill up the position. I cannot imagine the legislature passing such unreasonable a law which sets up a procedure as proposed by Mr Ng'maryo. I am of the settled view that in proposing a name of a person fit to be appointed a provisional liquidator by objectors after the petitioner or any person has filed an application for his appointment does not require the filing of a chamber application supported by affidavit. That requirement stands only for the initial application, in this case, the one filed by Mr Ng'maryo for the petitioners.

Concerning the argument that Warioba did not give consent, while conceding that he made an error when he consented to be being appointed a provisional liquidator to "JV Group of Companies" because there is no petitioner going by that title, I am inclined to agree with the objectors that that was a slip of a pen. In any case, the law does not state that such consent should be secured before appointment. It may be desirable in order to avoid inconvenience because a person may refuse to take up the task if arbitrarily picked but the law as it stands puts up no such condition to the court before so appointing. The same is the case with qualifications and expertise. The court simply picks on a "fit" person. In doing that, the court will rely on various factors including judicial notice of the standing of particular person or upon receipt of proposals. The objectors have come up with a proposal. As was observed by the Court of Appeal Civil Revision Number 1 of 1999:

A ...After all the provisions liquidators were expected to protect the interest of the creditors, and it is only fair that such creditors be given opportunity to play part in the proceedings for appointment of liquidators ...

B The objectors, all of whom except one are represented by advocates, and able ones for that matter, have proposed Mr Warioba. Is it possible that this formidable group can come up with a personality who is incapable of protecting its interests? I am not persuaded by Mr Ng'maryo in this respect. I thus hold that Mr Joseph Warioba is a fit person to be appointed a provisional liquidator of the petitioners. In any case, he is just a provisional liquidator. The task will surely involve engaging various professionals and that's why it has specifically been provided that he can appoint any fit person to assist him. For that matter, he is not precluded from seeking assistance from Finn, Murphy or Bomani. What is important is not who does what but who controls what is being done, who decides on direction to be taken, who makes a decision before matters are presented to creditors and to court.

E We come to the remuneration to which the provisional liquidator is entitled. Here we have three scenarios proposed 12.5% by petitioners, 5% by the rest of the objectors except NBC which proposes that the liquidator be called upon to chart his duties and activities and quote his charges. The contingent creditors leave it to the wisdom of the court.

G It is unfortunate that neither the Ordinance nor the rules provide a definite answer. The counsel are agreed on this. Those who propose 5% argue that this is the commonly applied practice in Tanzania in respect of receivership and Liquidation and this is in consonance with the requirements of English Property Conveyancing Act 1881 as applied to Tanzania by Chapter 114 of the Laws. While I have not been able to understand the basis of Mr Ng'maryo's urge to have his clients pay a higher charge of 12.5% (he argues that the enormity and complexity of the task call for that percentage) I have been persuaded by the counsel for NBC that using a "percentage" criteria on the gross realization in awarding the provisional liquidator's remuneration is wanting.

A What is that "gross realization"? This would have no problems in winding up proceedings for there would be sales and disposals. Now, in our case, regard being had to the powers and duties we have placed on the provisional liquidator which realizations will he make? If he manages to formulate an acceptable Scheme of Arrangement no sales will have been made and even if that fails and winding-up proceedings activated, he will only have collected assets. We have given him no powers to sell. How then will we calculate the 5% of the gross realization? Again, on this I am persuaded that the only logical step to take is to call upon Mr Warioba to chart out his duties, and the task ahead of him as he perceives it and quote his charges which would then be tabled in court in the presence of objectors for comments and observations before the court makes a decision on an appropriate remuneration.

E Finally, I will make a brief observation on what the petitioners call ulterior motives by objectors. This charge is too unfortunate, for, there is no scintilla of evidence suggesting what is alleged and I am glad that though while thus charging the petitioners concede in the same submission:

F There is no direct evidence that the objectors are actually making a proxy effort to kill the Pepsi-Cola business.

G The petitioners' conduct, including unclear "hive-down" of some of the assets into another newly formed company would naturally generate suspicions, resistance and mistrust on the part of objectors/creditors. Their reactions cannot therefore be faulted.

In conclusion therefore:

- (a) The Preliminary Objection by Mrs Rwebangira for Kioo Ltd that the petition by Fahari Bottlers should be thrown out for having been filed in bad faith is dismissed.
- (b) The prayer by petitioners that objectors be declared to have no *Locus standi* is dismissed.