

- A Let me say that my thoughts are correctly stated. At that time all the parties were of the view that a settlement was very much a possibility and were openly exploring possible reasons. On further scrutiny of the pleadings and the correspondence between the parties, it is apparent
- B that any legal decision one way or the other, its effects will not be limited to the interests of the parties only. It will have more far reaching effects. Tourism industry and investment in the country as a whole is likely to be affected; other sectors of the national economy are likely to be affected. If that be the case, there is certainly need
- C for careful and exhaustive consultations with interested parties as to what should be the policy with regard to re-assignment of leases in the National Parks. I say so, because there has been a previous re-assignment. To reach such a decision it requires time but there
- D is not much time regarding the matter at hand.

E **IN THE MATTER OF COMPANIES ORDINANCE AND**
IN THE MATTER OF FAHARI BOTTLERS LIMITED
BETWEEN FAHARI BOTTLERS LIMITED AND THE
 F **REGISTRAR OF COMPANIES AND NBC (1997)**
LIMITED AND OTHERS (OBJECTOR)

G HIGH COURT OF TANZANIA
 AT DAR ES SALAAM
 (Kalegeya, J.)

H MISCELLANEOUS CIVIL CAUSE No. 155 OF 1998

(Consolidated with Miscellaneous Civil Causes Nos.
 146, 147, 148, 149, 150, 151, 152, 153 and 154 by order of the Court dated 16 July 1999)

I *Company law – Scheme of arrangement – Approval of scheme of arrangement*
– Principles to be taken on board before sanctioning such approval –
Section 154 of the Companies Ordinance Chapter 212.

The “Fahari Group of Companies”, subject of ten petitions, had either to go into total liquidation or survive under an approved scheme of arrangement. A provisional liquidator appointed by the court was of the view that a scheme of arrangement would be beneficial to all parties. The court put into motion procedures for the preparation of the scheme. After its formulation the scheme was filed in court for approval. The court surveyed the law relating to formulation and approval of a scheme of arrangement.

Held: (i) Before sanctioning the scheme of arrangement the court should satisfy itself on the following elements:

- (a) that the meeting of creditors or class of creditors or of the members of the company or class of members, as the case may be, was properly called and held;
 - (b) that the resolution at that meeting which approved the scheme should have been made by the majority in number of those who attended and voted (whether in person or proxy);
 - (c) that the majority should be holding three-quarters in value of the interest of all such persons;
 - (d) that the number and value of the interests of those who did not attend and not represented and those who attend but refrain from voting are immaterial in the latter’s calculation;
 - (e) that votes are computed according to the value of the interest of the persons who cast them;
 - (f) that the scheme does not violate the law; it is reasonable; is made in good faith and is fair.
- (ii) Exercising scrutiny on the instant scheme, there is no missing element or any factor that stands on the way between the application and its sanction by the court;
- (iii) Since the scheme of arrangement complies with the law and is in the interests of beneficiaries, it is accordingly approved with the following directions:
- (a) provisional liquidator to carry out investigations relating to property sold to third parties before the hive down and furnish a report to the court for record purposes or otherwise;

- A (b) provisional liquidator to furnish to the court records of costs payable to himself and the experts or related in this matter; such records should be available and would be subject of challenge by any creditor or interested party.

B *Scheme of arrangement is approved with directions accordingly*

Statutory provision referred to:

1. Companies Ordinance Chapter 212, section 154

C JS Warioba, Provisional Liquidator

RULING

(Delivered 21 November 2000)

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F **Kalengeya, J.:** On 26 October 2000, this Court directed the Provisional Liquidator, JS Warioba, to present to the Petitioners and Creditors a Scheme of Arrangement he had prepared in compliance with a court's order dated 20 September 1999. Over 75% of the petitioners and creditors having voted in favour thereof, the said Scheme of Arrangement has now been presented to the court for sanctioning in terms of section 154 of the Companies Ordinance (Chapter 212).

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I In my ruling of 26 October 2000, a full background leading to this state of affairs was given hence I find no cause for repetition. For continuity of running of events however I should state that the final report by the Provisional Liquidator which included the proposed Scheme of Arrangement was filed on 5 September 2000, generating arguments and which entailed the filing of affidavit/counter affidavits, the process of which ended on 11 October 2000. On 26 October 2000 the court ordered that the scheme be placed before the meeting of petitioners and creditors. A first report thereon was filed on two different dates: the first Report was filed on 14 November 2000 while the final Report (supplementary) was filed on 20 November 2000. It suffices to point out further that the "Fahari Group of Companies", subject of the 10 petitions, has, *either to go into total liquidation,*

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B *or survive under an approved scheme of arrangement.* That the "Group" is in deplorable financial distress, indeed seemingly insurmountable crisis, has aptly been portrayed by the Provisional Liquidator's Report. The issue is whether the scheme is the best way out for the beneficiaries deserving this Court's approval.

The scheme as proposed, and presented to the Petitioners and creditors' meeting is as follows:

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- a. The assets of the eight companies for example Fahari Bottlers, Fahari Fruit, Kilima Bottlers, Southern Highlands Bottlers, Ruaka Bottling Company, Mwanza bottling Company, Shinyanga Bottlers and West lake Bottlers will be acquired by IPBCIL and its associates which include Pepsi Company International.
 - b. The assets will be acquired liabilities.
 - c. Non-beverages assets will be excluded.
 - d. The consideration will be TZS. 4 billion (USD 5 million) payable before 31 December 2000.
 - e. IPCBIL will create a Tanzania Company in which the assets will be transferred.
 - f. Pepsi Cola International will grant the franchise to IPCBIL to bottle and distribute Pepsi Cola products in Tanzania.
 - h. The assets shall operate under the control of the Provisional Liquidator until they are legally transferred to IPCBL.
 - i. Employees who were in place on 17 May 2000 will be taken over in the new Company.
 - j. Pepsi Cola International will write off its debt of USD. 12 048 000.

Regarding the distribution formula agreed upon, the Provisional Liquidator's report subsequent to the meeting has the following:

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- (a) TZS. 500 million to be set aside to meet cost of the provisional liquidation. This amounting includes TZS. 200 million as costs of the previous provisional liquidation as directed by the Court of Appeal.

- A (b) TZS. 100 million for the benefits of employees.
- (c) TZS. 2 250 million for the Government claim (NBC and TRA), which is 17% of the total claim.
- B (d) TZS. 360 million to secured creditors (27% of the claim)
- (e) TZS. 1003.6 to unsecured creditors (17% of the claim)

As to attendance, 95 creditors attended and 94 voted 93 were for the scheme while one abstained.

- C Let us now turn to the law. Recognising that business is a risky activity, and that it is never static hence susceptible to changes depending on prevailing circumstances, whether to counter elements of deterioration or create/advance booming climate the law recognizes the Companies can enter the agreements by which their claims or rights can be compromised or modified and so also are claims or rights held by other persons against them. A scheme of Arrangement is one of such agreements.

- E The law relating to formulation, and approval of a Scheme of Arrangement is found in section 154 of the Companies Ordinance which provides:

- F 154(1) Where a compromise or arrangement is proposed between a company and its creditors or any class of them, or between the company and its members or any class of them, the court may, on the application in a summary way of the company or of any creditor or member of the company, or, in the case of a company being wound up, of the liquidator order a meeting of the creditors or class of creditors, or of the members of the company or class of members as the case maybe, to be summoned in such manner as the court directs.
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- H (2) If a majority in number representing three-fourths in value of the creditors or class of creditors, or members of class of members, as the case may be present and voting either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the court, be binding on all
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the creditors or the class of creditors, or on the members of class of members, as the case may be, and also on the company or, in the case of a company in the course of being wound up, on the liquidator, and contributors of the company.

As its guidance, before sanctioning the Scheme, the court should satisfy itself on the following. The meeting should have properly been called and held; the resolution at that meeting which approved the scheme should have been made by the majority in number of those who attended and voted (whether in person or by proxy); that majority should be holding three-quarters in value of the interests of all such persons. The number and value of the interests of those who did not attend and not represented and those who attend but refrain from voting are immaterial in the latter's calculation. Votes are computed according to the value of the interests of the person who cast them. The court should also be satisfied that the Scheme does not violate the law; it is reasonable; made in good faith and is fair. On reasonableness however, the court having at its disposal limited information has generally to tread on commonsense. As observed by one learned author.

The courts judgment is invariable a broad commonsense one, paying particular regard to suspect motives and substantial disproportions between the treatment of different interests, and is not based on minute analysis of the details of the scheme or a comparison of alternative ways of dealing with the problems which the scheme seeks to solve - *Pennington's Company Law* (5 ed), Page 394.

As to fairness, the court has to look at the face value of the scheme. On existence of good faith or otherwise which is interconnected to the former, the court has to scan and satisfy itself that the group of voters which passed it did not do so in order to obtain unfair advantage against others, or that the positive voting was not induced by a group bent at advancing an improper advantage against another.

Generally, when holding meetings, in order to avail a particular group sufficient opportunity to deliberate fully and decide on how

- A a the proposed scheme affects its interests, separate meetings for different classes of interested parties for example separate classes of creditors or members, are held. However, in my view this may not apply in all schemes and in all situations. In a situation like the
- B present one, where the Companies merely floated the idea of formulation of a scheme but the Scheme itself was formulated by a court appointee (a Provisional Liquidator), the court has power to order a common meeting as it did here. And this will depend on the conditions in
- C which the Companies are and the nature of the scheme of Arrangement proposed. The court's duty then remains to be carefully exercised during analysis before sanctioning or otherwise of the scheme. I read no other limitation in the wording of section 154 of the Companies Ordinance.
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- Now exercising our scrutiny on the scheme is there any missing element or existing factor which stands on the way between the application and its sanction by this Court? My considered response is that there
- E is none. I should however point out that whereas in the proposal the sum agreed upon was to be paid by 31 December 2000, the meeting pushed the deadline to a period of four months after sanctioning. The Provisional Liquidator's Report explains, and I think reasonably,
- F the disparity on the grounds that earlier on, the sanction was expected to have been obtained in September.

- The Petitioners came to Court petitioning for winding up. At the same time they implored the court to avail them first an opportunity
- G of trying to put in a place a Scheme of Arrangement. The court conceded and appointed a Provisional Liquidator charged among others, with a duty of formulating such a scheme of Arrangement. The same was formulated and placed before the court which directed to have it
- H tabled before a meeting of creditors and petitioners. A meeting was held and the required approval secured. The Provisional Liquidator's report shows that if an alternative course of total liquidation is taken through, both the petitioners and Creditors stand to lose than if the scheme is put in place. The basis given for the viability of the Scheme
- I of Arrangement proposed and which, I believe greatly influenced

the petitioners and Creditors while casting their votes (and indeed not without justification) can best be painted by quoting in full paragraphs 20 and 23 of the Provisional Liquidator's Report.

20. After compiling the list of creditors and after I had received the preliminary valuation report it became clear to me that the companies were completely insolvent. The value of the physical assets was so low that there was no hope of the creditors realizing enough from liquidation. The value of the physical assets was about TZS. 5.5 billion and the registered claims of creditors was around TZS. 21.6 billion (later with the adjustment of the Pepsi Cola claim it rose to about TZS. 30 billion). The value had estimated liquidation realization at 2.7 55 billion. The picture that emerged was an average creditor realization of about 10% through liquidation.

23. From this preliminary analysis I came to the conclusion that a scheme to continue the business would be more advantageous to the creditors. In selling the business under a scheme of arrangement, in addition to value of land and buildings and plant and machinery, non-physical asset such as goodwill intellectual property, know-how etc. would be considered in determining the consideration. In addition the continuation of the business would preserve jobs and create more and also contribute to the growth of the economy though injection for further capital. With this in mind I put into motion procedures for the preparation of the scheme.

On job specification the scheme shows that recapitalization will inject in new life to the business saving about 450 jobs while creating others. On the whole this Court is satisfied that the Scheme of Arrangements complies with the law and is in the beneficiaries' interests and it is accordingly approved with the following two directions. In my ruling of 26 October 2000, at page 6, I had observed as follows:

At the same time I should also point out that there are areas which, in accordance with the Provisional Liquidator's Report, need observations by this Court. For example, the report shows that there are claims that "some of the financial resources of the Fahari Group of Companies had

A been diverted to buy shares in another company, Tasco". For such elements which the provisional liquidator conceded not to have properly investigated and which do not affect the proposed scheme, directions thereon will be made during the final decision by this Court when deciding whether to approve the scheme or otherwise.

B I so observe because, among others the provisional liquidator's report in paragraph 10 has the following:

C 10 Serengeti (Dodoma) and Ziggi (Tanga) were a different story. I was presented with documentary evidence showing that both had been sold to third parties before the hire down and the management at both plants had no relationship with the petitioners. On the other hand the petitioners maintained that the assets were hired down when the companies were under the petitioners. It required investigation but I did not have financial resources to undertake this. I put it aside to be undertaken owing the process of full liquidation and proceeded to prepare the valuation statement of affairs and a scheme for the remaining eight companies. There were also claims that some of the financial resources of the Fahari Group of Companies had been diverted to buy share in another company, Tasco. This also needed investigation and for the same reasons I set it aside for later action.

F An investigation into the alleged state of affairs is necessary because any sum or property illegally transferred, if recovered, would go to the percentage which the creditors would be entitled to. The Provisional liquidator should carry out that investigation and recover whatever is recoverable with liberty to seek assistance of the court. While taking all the necessary steps in that regard the provisional liquidator should furnish a report to the court for record purposes or otherwise.

H Secondly, for record purpose, the provisional liquidator should furnish to the court, records of costs payable to himself and the experts or related in this matter. This is necessary for transparency. These records should be available and would be subject of challenge by any creditor or interested party.

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BUSHANGILA NG'OGA v. MANYANDA MAIGE

HIGH COURT OF TANZANIA
ATTABORA

(Mwita, J.)

(PC) CIVIL APPEAL No. 18 OF 2000

(From the District Court of Kahama at Kahama in Civil Appeal No. 62 of 1999 originating from Urban Primary Court of Kahama in Civil Case No. 62 of 1999)

Family Law – Enticement of another's wife – Medicineman retaining respondent's wife for six months to treat her – Wife subsequently refuses to return to the respondent – Enticement established – Sections 73 and 74 of the Law of Marriage Act 1971.

Civil Practice and Procedure – Appeals – Powers of appellate Court – Whether a court on second appeal may interfere with Lower Courts' findings of fact.

Family Law – Damages – Assessment of damages – Duty of second appellate Court.

The respondent took his wife, Mirembe Sato, to a local medicine-man, the appellant, for treatment. Having performed his rituals, the appellant told the respondent that the respondent had an omen and that he should leave his wife alone at the appellant's home undergoing treatment and should not return there as the presence of his omen would cause the death of his wife. The respondent complied and left his wife at the appellant's home. Thereafter the respondent used to request his elder brother to take maintenance to his wife at the appellant's home. After six months the respondent, now suspicious, went to the appellant's home; he found his wife taking part in a local dance conducted by the appellant. Married women, it was stated, do not take part in the said dance. When requested to go back to her husband, Mirembe Sato refused, preferring to stay at the appellant's home. The respondent then successfully sued the appellant for damages for enticing the respondent's wife. The Trial Court awarded TZS. 200 000 in damages. The appellant unsuccessfully appealed to the District Court.