



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

PETITION NO. 18 OF 2018

IN THE MATTER OF: TRANSMARA SUGAR COMPANY LIMITED [C.I/2015]

AND

IN THE MATTER OF COMPANIES ACT 2015

**AND IN THE MATTER OF AN APPLICATION UNDER SECTIONS 780,782,786 AND 789 OF THE COMPANIES ACT,
2015**

JATIN SHANTILAL MALDE 1ST PETITIONER
MUKUNTIKUMAR SHANTILAL MALDE 2ND PETITIONER
MAYUR SHANTILAL MALDE 3RD PETITIONER
MAHUL J. SHAH 4TH PETITIONER
SHASHIKANT S. SHAH 5TH PETITIONER
BHUPENDRA S. SHAH 6TH PETITIONER
YOGESHCHANDRA K. SHAH 7TH PETITIONER
JAYESH J. SHAH 8TH PETITIONER
PALKESH J. SHAH 9TH PETITIONER
ASHISH B. SHAH 10TH PETITIONER

VERSUS

TRANSMARA INVESTMENT LIMITED RESPONDENT

AND

TRANSMARA SUGAR COMPANY LIMITED 1ST INTERESTED PARTY

SUCRIERE DES MASCAREIGNES LIMITED 2ND INTERESTED PARTY

RULING

1. This Court must decide whether or not to allow the Board Meeting of Transmara Sugar Company Limited (the Company) scheduled for 14th June, 2018 to proceed as planned and on the agenda set.

2. That Agenda is to discuss the following:-

1. Welcome by Chairman

2. Confirmation of Quorum and Adoption of the Agenda

3. To consider and approve the valuation report of the Company.

4. To call a shareholders' meeting in order to;

(i) Authorise the increase in the minimal share capital of the company.

(ii) Authorize the Board of Directors to issue and allot new shares in the Company.

3. The Petitioners, who together, own 41% of the Shares in the Company have presented this Petition under the provisions of Sections 780, 782, 786 and 789 of The Companies Act 2015 in which they complain of oppression and unfair prejudice as minority shareholders of the Company. Together with the filing of the Petition, the 10 Shareholders filed a Notice of Motion dated 29th May 2018. Whether or not to allow the Meeting of 14th June, 2018 is considered in the context of prayers 2,3 and 4 thereof which seek:-

2. THAT the 1st, 2nd, 4th and 5th Petitioners are in addition Directors of the Board of Directors of Transmara Sugar Company Limited.

3. THAT the Respondent is the majority shareholder of Transmara Sugar Company Limited, by virtue of a transfer of shares effected by the 2nd Interested party in favour of the Respondent after the completion of the share purchase agreement between the 2nd Interested party and the Petitioners. In addition, the Respondent has control of the Board of Directors of Transmara Sugar Company Limited by virtue of appointing five (5) Directors to the Board, including the Chairman of the Board.

4. THAT the Respondent is a wholly owned subsidiary of the 2nd interested party.

It is common cause that Transmara Investment Limited (the Respondent) is the Majority Shareholder with 51% Shares which were transferred to it by Sucriere Des Mascareignes Limited (the 2nd interested party).

4. Counsel representing the disputing Shareholders made some short arguments on the matter now before Court. Mr. Nyaribo for the Petitioner asked this Court to consider that the proposed Agenda will lead to a Rights issue which will have the consequence of the Shareholding of the Petitioners suffering a dilution which will or may lead to an automatic loss of Directorship. The Court was asked to remember that the Petitioners are the Minority and it will be a futile effort for them to ventilate their Rights in the Board Meeting as they will obviously be outvoted.

5. Mr. Karungo for the Respondent and 2nd interested party and Mr. Gachuhi for the Company took a joint position. The Court was told that the Company is currently run with the financial support of the Majority Shareholder or would otherwise go bust and the need for some Capital injection by way of a Rights issue was even acknowledged by the 5th Petitioner. On the part of the Company,

it is argued that it is not the position of the Petitioners that the calling of Meeting is illegal or does not comply with the Memorandum and Articles of Association or that the Agenda is illegal.

6. The Meeting of 14th June 2018 seeks to discuss two issues. The first is to consider and approve the Valuation Report of the Company. The other is to call a Shareholders Meeting to authorize the increase in the nominal Share Capital and to authorize the Board of Directors to issue and allot new Shares in the Company. This second Agenda is a recognition, I would think, that it is a Shareholders Meeting and not a Board Meeting that can authorize the increase in the nominal Share Capital and the issuance and allotment of new Shares. For that reason the true occasion for a discussion of the increase in Share Capital and Rights issue has not been reached, at least technically.

7. There however does not seem to be a contest that the Valuation Report to be discussed is partly to be used to assess the value of the Shares of the Company for purposes of an intended Rights issue. This is reflected in Minute 9/12/2017 of The Board Meeting of 6th February 2018 which reads,

“The Ag. Chairman clarified to the Board that the Rights issue had not yet been approved. The price of Rights issue and the amount to be raised had not been determined. The initial stage was to engage a Valuer to carry out a Valuation of the Business and determine the current price of one Share in the Company”. (my emphasis)

This was as a follow-up to a resolution of the Board of 10th October 2017 in which it was resolved that,

“..EY and PWC being some of the big four audit firms be approached and asked to submit proposals for valuation of the Company”

In that Meeting it was stated that “the first step in preparation for the Rights issue was the valuation of the Company”.

8. A critical resolution was reached in the Board Meeting of 6th February 2018 and this reads,

“Although in the previous Board Meeting it had been resolved that EY and PWC be asked to present proposals for the value of the Company, it was now agreed that the two groups of Board Members (those representing the Kenya parties and those representing SML) should each appoint a valuer or consultant of their choice. The two valuers/consultants will work together and come up with a joint valuation.

It was agreed that a sub-committee comprising of Fabien Enouf, Stephane Isautier, a person representing the Malde Group and another one representing the Spin Knit Group be appointed to spearhead discussions on the appointment of two valuers and valuation of the Company. The sub-committee will present its proposals to the Board for consideration and approval”.

9. The next Meeting was that of 16th March, 2018. In respect to the appointment of a Valuer and request by the minority Shareholders for an Independent Business Review, the Majority Shareholders took the following position:-

“It could be envisaged that the Company enlarges the terms of reference of the original planned Company Valuation exercise in order to include an independent Financial Review of the Company. Then PWC and PKF could be jointly appointed to do so. However as time was of the essence, it would have to be agreed that within a month, the sub-committee of the Board already nominated, should have obtained and validated a proposal from the joint valuers to undertake this assignment. Short of this, PWC would be commissioned to carry out in solo an evaluation of the company on terms already agreed”.

10. The minority asked for a couple of weeks to deliberate. This was rejected by the Chairman. There was then a stalemate and then the minutes show the following,

“The Directors representing the majority shareholders proposed that a joint valuation be carried out with a focus on the valuation of the company and that the scope of the valuation be increased to include an independent financial review.

The following motion was put to vote;

That as discussed and agreed at the Company's previous Board meeting, and in the absence of confirmation from the directors representing the minority shareholders within one week of their wish to assign a second company to act jointly with Price Waterhouse Coopers (PWC), the Board will commission PWC to carry out, in solo, an evaluation of TSCL on the terms already submitted at the Board meetings dated November 24th 2017 and March 16th 2018. The conclusions of PWC's assignment will be presented to the Board as soon as they will be available".

11. The observation of the Court is that although the Directors representing the Majority Shareholders were not averse to a joint Valuation, the eventual Motion put to vote appointed PWC as the sole Valuer. The minutes show that the Chairman had proposed that the Minority Shareholders confirm, within one week, if they assign PKF as joint Valuers. There appears to have been an impasse when the Minority did not give an indication as to whether they will be making this confirmation.

12. From the Resolution set out above, it seems that there was indeed a Board Resolution appointing PWC as Consultants and they were to carry out an evaluation of The Company on the terms already submitted at the Board Meetings dated November 24th 2017 and March 10th 2018. Unlike what the Petitioners allege the appointment of PWC had the sanction of a Board Resolution and their terms of Reference set out the scope of the Valuation Report was to include an Independent Financial Review which had always been a major demand of the Minority Shareholders.

13. There is no doubt that a Share issue has the potential of diluting the strength of Shares of all the current Shareholders, including those of the Minority. Yet the issue and allotment of new Shares is permitted and contemplated by the Memorandum and Articles of The Company. That said, a concern would be if the manner and procedure of issue and allotment of Shares is flawed and motivated by some a *malafides* like a stage-manned dilution of Shares as alleged by the Petitioners. However, there is a common position that the Company is in dire need of new Capital. The Majority take a view that this should come from a Share issue. Indeed, on this, there is support from an unlikely quarter. There is an email from one Shashikant Shah (the 5th Petitioner) in which he says to this problem,

"Only solution is to inject additional Share capital by way of Rights issue and NOT Shareholder loan to be converted into Share capital in few months' time".

The Minority on the other hand, advocate an alternative funding arrangement which would not upset the current Shareholding structure of the Company. So as to explore the alternative, an Independent Financial Review is necessary.

14. This short backdrop shows that the discussion of Capital injection into the Company has been on the cards for sometime now. Whether or not it will be by way of increase in the Nominal Share Capital of the Company, will be a call to be made by a Shareholders Meeting which is yet to be called. For discussion in the meeting of 14th June 2018 is the proposal to call for the said Shareholders meeting, and to consider and approve the Valuation Report of The Company. But as I understand it, the scope of the Valuation Report includes The Independent Financial Review as mandated by the Board Resolution of 10th March 2018. Perhaps as a signal that alternative funding to a share issue has not been outruled or at least not been exhaustively debated. The Petitioners have been aware for some time now, and at least by 16th March 2018 that the Board had resolved to proceed with a Valuation of the Company as a step towards the Shareholders considering the Rights issue. It would therefore be unequitable for the Petitioners to wait until barely 16 days before the Meeting of 14th June 2018 to seek to injunct the consideration of a Report which has been contemplated for some time. This Court will not stop the intended meeting from taking place.

Dated, Signed and Delivered in Court at Nairobi this 12th day of June, 2018.

F. TUIYOTT

JUDGE

PRESENT:

Nyaribo for Petitioners

Karungo for Respondent and 2nd Interested party

Gachuhi for 1st interested party

Nixon - Court Assistant



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