IN THE HIGH COURT OF MALAWI, BLANTYRE

PRINCIPAL REGISTRY

CIVIL CAUSE NO.109 OF 1988

IN THE MATTER OF MAPANGA ESTATES LIMITED

AND

IN THE MATTER OF THE COMPANIES ACT 1984

CORAM: MTEGHA, J.

Msaka of Counsel for the Petitioner
Chatsika of Counsel for the Defendant
Namvenya, Official Interpreter
Manda, Court Reporter

JUDGMENT

This petition is brought by Rosemary Argente, hereinafter referred to as the petitioner, under the provisions of S.213(f) of the Companies Act 1984 to have an order of this Court that Mapanga Estates Limited be wound up if the Court is of the opinion "that it is just and equitable that the company be wound up."

The petition discloses that Mapanga Estates Limited, formerly known as Kalulu Weaving Factory, was incorporated on 4th May, 1959 and its registered office is at Plot No. BC 255 with a nominal capital of K200,000 divided into 100,000 shares of K2.00 each, and the whole capital is fully subscribed.

There are only two shareholders - namely the petitioner, who holds 49,000 shares and one James Allan Sauze, who holds 51,000 shares.

It was the petitioner's allegation that to the detriment of the petitioner, Mr. Sauze had taken out K77,000.00 from the company's bank account for his own use and serious differences have arisen between the shareholders so that it has become impossible to conduct and carry on the business of the Company, and therefore it is just and equitable that the company be wound up by the order of the Court.

The affidavit of the other shareholder, Mr. Sauze, denies any impropriety in the running of the Company. He denies to have used K77,000.00 for his own personal benefit. He admits, however, that deep differences have arisen between them. These differences, according to the affidavit, stem from the fact that the petitioner wants to live in England, while he wants to live here in Malawi. He has enumerated a number of instances of their differences which clearly indicate that the two shareholders are not on speaking terms.

The affidavit of Mr. Sauze's legal practitioner is to the effect that the petitioner offered her shares to be sold and that she offered the first option to the respondent company, but for unknown reasons this has not materialised.

It appears that the petitioner and Mr. Sauze were originally very good and intimate friends and cohabited together. For some reason this relationship has soured and grave differences have arisen that they are no longer on speaking terms.

Mr. Msaka has taken up a few preliminary points. In the first place he submits that the law applicable in the present case is that of the United Kingdom and therefore rules made under the 1948 Companies Act in the U.K. are applicable in this country by virtue of S.212 of our Act and Government Notice No.29 of 1986 published on 7th February, 1986 which empowers this Court to use the U.K. rules on winding up companies. This I concur with the learned counsel.

It has further been submitted by Mr. Msaka that under Rule 34 of the Companies (Winding Up) Rules, 1949 any person who intends to appear at the hearing of the petition must send or serve on the petitioner notice in writing of his intention to do so. But Mr. Msaka submits that the only notice he has received is that of Mapanga Estates Limited and since there were only two directors, the petitioner and Mr. Sauze, and the affidavit of Mr. Sauze does not disclose the capacity in which he has sworn the affidavit, the company has no locus standi either to support or oppose the petition because in a compulsory winding up a company cannot give notice to oppose or support a petition except a creditor or a shareholder.

It has also been submitted that the objection should have been made by Mr. Sauze in his personal capacity as a shareholder. As such he should have given the prescribed notice to that effect, and therefore the petition should be treated as unopposed.

On the other hand it has been submitted by Mr. Chatsika that Mr. Sauze owns 51% of the shares of the company and he is Managing Director; he has a right and duty to commit the company, therefore his affidavit should be accepted since he is opposing the petition as a director as well as a shareholder.

Now, there is no doubt at all that Mr. Sauze holds 51% of the shares; there is no doubt that Mr. Sauze was Managing Director and has been conducting the affairs of the Company even in the absence of the petitioner. Indeed, as a shareholder, he can oppose or support the petition; the question is: has he done so? The answer is in the negative. No notice has been filed. In his personal capacity as a major shareholder, he cannot be heard in this petition because he has not conformed with Rules 33 and 34 of the Companies (Winding Up Rules) 1949.

Can the company itself be heard having given notice? It appears it cannot be heard. Nowhere does the affidavit of Mr. Sauze indicate that he was acting on behalf of the company and even so, it appears to me the rules require only creditors and shareholders to oppose or support the petition. I, therefore, concur that the company has no locus standi and that Mr. Sauze cannot be heard.

Where does this leave us? It means that the petition is unopposed. Does this entitle the petitioner to get the order which she has asked for? This depends entirely on the circumstances of this case.

It has been submitted that it is just and equitable that this Company be wound up because there is a deadlock. In Re Yenidge Tobacco Company Ltd. (1916) 2 Ch.426 a dispute arose between the only two directors who held equal voting shares. They were not in talking terms; their business was being conducted by the secretary. It was held by Lord Cozens-Hardy that the company should be wound up, especially where voting powers were equal or almost equal.

In the present case both counsel have admitted that indeed the relationship between the two shareholders is sour; the company has assets, mostly real property, the value of which is rising. It has been submitted by Mr. Chatsika that it does not necessarily mean that if there is a deadlock, as there is in the present case, there should automatically be a winding up order. In Re H.R. Harmer Ltd. (1959) 1 WL 62, the two petitioners were the sons of the respondent. The respondent held controlling shares and despite board decisions, the father used his powers in disregard of the board's decisions. The petitioners sought for the compulsory order that the company should be wound up on the ground that it was just and equitable that the company should be wound up. It was held that the proper order would not be to wind up the company, but to order that the father should not interfere with the Board's decisions. It follows then that the courts can make any other order which is just and equitable. This power is equitable and it is discretionary. The courts will endeavour to reach a decision which is fair to all shareholders.

There is some evidence that the petitioner offered to sell her shares to Mr. Sauze, but the result of the offer is not clear. The company is viable and indeed prosperous. Would it be in the interest of both shareholders that it should be wound up? In my considered opinion this is not so. There is a fair chance that the company can go on satisfactorily. I, therefore, decline to make an order for a compulsory winding up. Instead I order that the petitioner should sell her shares; the first option to buy should be offered to Mr. Sauze, the other shareholder.

Each party will pay his or her own costs.

PRONOUNCED in open Court this 15th day of April, 1988 at Blantyre.

H.M. Mtegha
JUDGE