



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**COMMERCIAL AND TAX DIVISION**

**CORAM: D. S. MAJANJA J.**

**WINDING UP CAUSE NO. 6 OF 2016**

**IN THE MATTER OF**

**CONCORD INSURANCE COMPANY LIMITED**

**AND IN THE MATTER OF THE**

**INSOLVENCY ACT, 2015**

**AND**

**IN THE MATTER OF THE**

**INSURANCE ACT (CHAPTER 487 OF THE LAWS OF KENYA)**

**JUDGMENT**

1. This winding up cause concerns Concord Insurance Company Limited (“the Company”) which was incorporated under the *Companies Act (now repealed)* in 1997. At all material times it was licenced to conduct the business of insurance under the *Insurance Act (Chapter 487 of the Laws of Kenya)*. The petition dated 29<sup>th</sup> January 2016 has been brought by Sammy Makove, the Commissioner of Insurance and Chief Executive Officer of the Insurance Regulatory Authority at the material time.

2. The nominal share capital of the Company is Kshs. 300,000,000/- divided into 15,000,000 shares of Kshs. 20/- each. As the time of filing the petition, the paid up share capital of the Company was Kshs. 121.6 billion which is Kshs. 478.4 million short of the required minimum capital of Kshs. 600 million.

3. On the 6<sup>th</sup> of February 2013, the Company was placed under statutory management under **section 67C(2)(1)** of the *Insurance Act* so that, *inter alia*, all assets and properties of the Company could be traced, preserved and secured, all debts and other sums of money due to and owing to the Company be recovered, its financial liquidity and solvency evaluated and established and the adequacy of its capital and reserve necessary towards maintaining its solvency be determined, all with the objective of reviving the Company. The Company was also placed under statutory management in order to establish any governance issues which prevented it from maintaining the solvency margin and the fulfilling reasonable expectations of its policyholders.

4. The Statutory Manager declared and gazetted a moratorium on any payments by the Company to its policyholders and all other creditors for an initial period of 12 months with effect from the date the declaration. The moratorium was extended several times and was is still in force at the time of hearing this petition.

5. Following assessment of the financial, administrative and technical capacity of the Company, the Statutory Manager recommended that the Company be sold, revived or liquidated. After meeting with the petitioner, the shareholders agreed that the Company should be revived based on conditions determined by the Statutory Manager in his final statutory report as at 30<sup>th</sup> September 2014, *inter alia*, as follows:

a. Shareholders agreed to work together and resolve disputes in an amicable manner;

b. Shareholders inject admitted assets worth Kshs. 239,712,323 to meet the margin of solvency as prescribed under **section 41(2)** of

the **Insurance Act**;

c. Shareholders settle outside liabilities amounting to Kshs. 544,847,550;

d. Shareholders inject fresh capital of Kshs. 17,352,038 being shortfall of funds required to meet the capital threshold of Kshs. 300,000,000 as then required under the **Insurance Act**;

e. Shareholders inject a further Kshs. 456,629,386 as working capital to meet day to day operations; and

f. Shareholders negotiate with the Kenya Revenue Authority on the bonds liability of Kshs. 776,000,000.

6. The petitioner thereafter requested the shareholders of the Company to produce a comprehensive and realistic business plan for the revival of the Company which plan was to include the following;

a. A new shareholding structure;

b. Capitalization levels for general insurance business as well as long term business by 2018;

c. A report on compliance with various sections of the **Insurance Act**;

d. A business model through which the required minimum capital and settlement of liabilities totalling Kshs. 1.73 billion would be raised;

e. 3 year financial projections of revenue accounts, balance sheets and statements of comprehensive income under both optimistic and pessimistic scenarios;

f. Estimates of working capital requirements;

g. Payment of outstanding claims and other liabilities; and

h. The governance structure envisaged for the revival of the Company and its operations.

7. Despite the petitioner setting out conditions for revival of the Company, the shareholders failed to give an indication of the time frame required to revive the Company and identify a substantive investor. They made very little progress towards reviving the Company and upto the time of filing and hearing of this petition, the shareholders had not submitted substantive proposals on how to revive the Company. The petitioner stated that the shareholders' failure to implement the proposals for revival of the Company continues to prejudice creditors and policyholders.

8. The petitioner further states that at the time of filing the petition, the liquidity levels for the Company were insufficient to meet its statutory, financial and legal obligations required under the **Insurance Act**. At the time of filing the petition, Kshs. 2,495,541,297 was required to meet the Company's capital requirements and liabilities made up as follows:

a. Kshs. 2,195,541,297 as determined by the Statutory Manager made up of:

i. Injection of admitted assets worth Kshs. 239,712,323 to meet the margin of solvency as prescribed under **section 41(2)** of the **Insurance Act**;

ii. Settlement of outstanding liabilities amounting to Kshs. 544,847,550.

iii. Injection of Kshs. 178,352,038 fresh capital being shortfall of funds required to meet the capital threshold of Kshs. 300,000,000 as required under the **Insurance Act**;

iv. Injection of a further Kshs. 456,629,386 as working capital to meet day to day operations; and

v. Negotiation with the Kenya Revenue Authority on the bonds liability of Kshs. 776,000,000.

b. Kshs. 300,000,000 being the additional capital required to comply with **section 23 (1)** of the **Insurance Act**.

9. The petitioner avers that he has afforded the Company and its shareholders a reasonable opportunity of making representations but the Company has not met the solvency margins required by law hence the Company should be wound up for the following reasons:

a. It is unable to pay its debts and the value of its assets is less than the amount of its liabilities.

b. It's inability to pay its debts is due to circumstances directly and/or indirectly attributable to the lack of capital required to be injected towards its revival.

c. It is unable to commence business.

d. The shareholders have been unable to comply with the recommendations of the Statutory Manager towards the revival of the Company causing prejudice to its creditors and policyholders.

e. That it is just and equitable that the Company be wound up.

10. The petition was advertised in the Daily Nation on 19<sup>th</sup> December 2019 and in the Kenya Gazette of 27<sup>th</sup> December 2019. At the time of hearing, no creditor or any other person opposed the petition. All the facts set out in the petition and the supporting affidavit of the petitioner are uncontroverted. Mr Ochieng, counsel for the petitioner, reiterated the grounds I have set out above and submitted that the petitioner had established grounds for winding up the Company.

11. In addition to the provisions of the **Insolvency Act, 2015**, the liquidation of an insurance Company is specifically regulated under **PART XII** of the **Insurance Act**. The court is empowered to order liquidation of the Company under **section 123** thereof which provides as follows:

*123(3) The court may, after considering the application made by the Commissioner, order the liquidation of the insurer if it is satisfied that —*

*(a) there are sufficient grounds for making the order; and*

*(b) it is just and equitable for the insurer to be liquidated*

*(c) on the ground that the insurer —*

*(i) having failed to comply with a requirement of this Act, has continued that-failure; or*

*(ii) having contravened a provision of this Act, has continued that contravention.*

12. Having considered the facts set out in the petition and the supporting affidavit, I am satisfied that the petitioner has established all the grounds necessary for liquidation of the Company under **section 123** of the **Insurance Act**. The Company is no longer a going concern, it cannot carry on insurance business in compliance with the provisions of the **Insurance Act** and its existence is not in the interests of the Company's creditors or policy holders. Further, the shareholders do not appear to be interested in reviving the Company which has been under statutory management for a period of 7 years. In the circumstances and pursuant to **section 427** of **Insolvency Act, 2015**, I now make an interim liquidation order and appoint the Official Receiver as the Provisional Liquidator.

13. The Official Receiver may in consultation with the Commissioner of Insurance, as the case may be, appoint the Policy Holders Compensation Fund established with functions, inter alia, to, "*liquidate an insurer as may be ordered by the court,*" under **section 179** of the **Insurance Act** as the Provisional Liquidator pursuant to **section 439** of the **Insolvency Act, 2015** if necessary.

14. In conclusions, I now make the following orders:

(a) An Interim Liquidation Order be and is hereby issued in respect of the Company, Concord Insurance Company Limited;

(b) That the Official Receiver be and is hereby appointed as the Provisional Liquidator of Concord Insurance Company Limited;

(c) Cost of the petition shall be borne out of the Company assets.

**DATED and DELIVERED at NAIROBI this 27<sup>th</sup> day of FEBRUARY 2020**

**D.S. MAJANJA**

**JUDGE**

Mr Ochieng instructed by Rachier and Amollo Advocates for the petitioner.