



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Winding Up Cause 38, 39 & 40 of 1991

In the Matter of Avitech Ltd, Aircraft Engineering Services Ltd, Rent-A-Plane Ltd and

In the Matter of The Companies Act

Ruling.

The three chief protagonists in this dispute were all once close business associates and two of them are even brothers. The three personally ran as directors, three middle sized, almost one could say, family business, in the highly technical and interdependent fields of the repair, maintenance and hire of small aeroplanes. Fields of activity, the prosperity of which, could be severely affected by any public hint of trouble affecting the business or disagreement among the proprietors of the business. Things seem to have gone on as well as could be expected until sometime last year when the relationship between the three directors finally broke down and from reading between the lines of the affidavits which have been filed in support of and against the present application and in deed, on the face of them, I would say, irrevocably. And as so often happens in such cases, the two brothers found themselves on opposing sides. The third director being on the side of the older of the two brothers. Then the younger brother, Derek Seton, who stood alone, petitioned for the winding up of the three companies which go by the revealing names of: Avitech Ltd, Aircraft Engineering Services Ltd, and Rent-A-Plane Ltd. The petitioner duly caused a notice of the winding up petitions to be published in the Standard, the more serious mass circulation newspaper in town. This notice stated that the winding up petitions had been presented to the High Court by Derek Seton, and to those who had dealing with the companies, this spoke volumes, and further called upon all creditors desirous of supporting or opposing the petitions to appear at the hearing of the petitions.

Subsequent to that, and in an effort to settle matters, a consent order was made by the High Court Winding Up Cause No 40/91 in respect of Aircraft Engineering Services Ltd in the following terms.

- “1. That the Petitioner be bought by the remaining shareholders
2. That for this purpose a valuation report be prepared on or before the 30th day of January 1992 on the assets and business of the company.
3. That the valuation report be prepared by Mr Levitan of Mutar and Oswald and Mr Levitan be at liberty to employ specialised assessors.
4. That an account be taken after preparation of the report.
5. That in the meantime the petitioner do continue as a director of the company and status quo to be maintained.
6. That the present proceedings be and are hereby stayed.
7. That this order do apply to the winding up proceedings in Numbers 38 and 39 of 1991.

8. That this cause be mentioned on the 30th day of January 1992.”

The preparation of the valuation report and accounts being matters requiring specialised skills, were in the consent order, left to the undertaken by persons other than the court. The report and accounts and it could not be otherwise, would relate to the state of affairs of the companies as at the time of the presentation of the petitions for winding up and it was desirable that the Petitioner should not only be in a position to object to the valuer and the auditor, but should also be allowed to be present when these persons carry out their work. Hence the provision of the consent order to the effect that until 30.1.92, when the report should have been completed, the Petitioner should continue to be a director of the companies on the status quo to be maintained. The thirtieth of January 1992 was also the date on which the matter was to be mentioned in court, with a view to report progress and submit the valuation report and accounts. Proceedings were to be stayed, but not disposed of.

It was, however, not till 11-2-1992 that the valuation report was presented to me. On 17-2-92 counsel for the Petitioner sought time to study the accounts before their representation to me, which on 20.2.92, was finally begun by Mr Avinash Shah, the Chartered Accountant who the parties had agreed should prepare the accounts. A word about Mr Shah. He was well known to all the parties and had for several years before the winding up petitions were presented, been the auditor of the three companies. It also appears that he had some honorary position in the companies. It, however, soon became clear after he had submitted his accounts and during his cross-examination by counsel for the Petitioner, that the accuracy of his accounts particularly in respect of Rent-A-Plane, was being challenged by the Petitioner. The Petitioner's view was that the revenue of Rent-A-Plane had been so deliberately and considerably understated by Mr Shah as to reduce drastically the Petitioner's share of the correct earning of Rent-A-Plane. This in brief, according to the Petitioner had been achieved by not attributing to Rent-A-Plane all the commissions that it was entitled to when aeroplanes individually owned by the other directors had been hired out on charter through Rent-A-Plane which of all the three companies, was the only one licensed to conduct such business. It also emerged from the evidence of Mr Shah that Rent-A-Plane which significantly, does not itself own any aeroplanes, was treated by the directors who owned their own aeroplanes, as a mere convenience for the renting out of their aeroplanes as well as Rent-A-Plane itself, did not deal with at arms length. There were no laid down requirements on how much if at all, the directors would pay to Rent-A-Plane for the hire of their aeroplanes through Rent-A-Plane, and commissions were not paid regularly to Rent-A-Plane. In such a situation there are bound to be transactions that would only be known to the directors and not be apparent on the face of the documents of accounts of Rent-A-Plane. Hints of these also emerged in the course of Mr Shah's evidence and that of Mr Salim, the present accountant of Rent-A-Plane.

Recriminations also surfaced, especially those made on behalf of the Petitioner. A lot more of this was to surface in the part heard evidence of Mr Power who was called by the Petitioner to give evidence to show not only that Mr Shah's accounts in relation to Rent-A-Plane was ludicrous, but also that they were false. Mr Power described himself as a merchant banker who among other things, evaluates companies for shareholders or prospective investors. He had been asked by the Petitioner to reconstruct the balance sheet of Rent-A-Plane which he had done by examining the balance sheet prepared by Mr Shah, the miles flown by the aeroplanes owned by the directors and hired out through Rent-A-Plane, the fuel consumed by them, their average speed and the Civil Aviation Board charter rates of hire. The result showed that the income earned by the aeroplanes and consequently Rent-A-Plane, was much higher than Mr Shah had shown.

It was just before Mr Power began his evidence that the remaining directors brought the present application that upon the remaining shareholders of the companies depositing into court or paying to the Petitioner the sum found by Mr Shah in his accounts to be the price of the Petitioner's shares in the three companies and upon their giving an acceptable guarantee to pay to the Petitioner any sum that the court may find to be due to the Petitioner over and above that determined by Mr Shah, the Petitioner should be restrained from holding himself out as a shareholder or director of the companies and from meddling in the affairs and management of the companies and from trespassing on their premises. In other words, upon buying out the Petitioner by paying him what has now been found by Mr Shah as owing to him and upon guaranteeing to pay to the Petitioner what may in addition be found by the court to be due to him as the

price of his share in the companies, the Petitioner should cease to be a shareholder and director of the companies or have anything to do with them and the remaining shareholders be at liberty to re-organise the companies within the framework of their articles of association. The reasons for the present application which is supported and opposed by affidavits that illustrate again, the existing acrimonious relationship between the Petitioner on the one hand and the other directors on the other hand, are not difficult to understand. Some of the letters annexed to the affidavits in support of the application indicate and this is not surprising, that the business of the companies whose well being can be so easily affected by bad publicity, will suffer so long as the dispute between the Petitioner and his business associates exist or are seen to exist which means, to put it bluntly, so long as the Petitioner is seen to be associated with the companies. If, the Petitioner's objective in these proceedings it to see that he gets his fair share of the value of the companies and not in addition, to bring the companies to their knees, then he should have no real objection to the application in which the other shareholders have agreed to guarantee this. Moreover, all the documents which are needed by Mr Power or any other person to reconstruct the true earnings of the companies as at the time the winding up petitions were presented, are available and have been seen and studied by M Power and can be preserved. In an application such as the present, I am not required to come to any conclusions that should be left for determination at the trial of the issues. It is the rule that in an application like the present one, an injunction will only be granted if the applicant is able to show that he has a prima facie case with a probability of success. If, however, he is unable to do so but the court is satisfied that on the balance of convenience the application ought to be granted, then it can be granted. I do not think in the present application that the applicants have shown a prima case with a probability of success, since the Petitioner's criticism of Mr Shah's balance sheet of Rent-A-Plane may be right even though the Petitioner must have himself like the other directors, adopted deliberately an unbusiness like attitude in the chartering of his own aeroplanes through Rent-A-Plane and must have been aware himself like the other, and as guilty as them, of the manner in which revenue generated *stricto sensu* by the charter of the aeroplanes belonging to the directors under the aegis of Rent-A-Plane, were dealt with. But the other directors have shown that on a balance of convenience, they are deserving of the orders they are seeking.

As I have already adverted to, the consent order did not dispose of the dispute between the directors. The matter was to be mentioned on 30.1.92 to see what had been achieved towards buying out the Petitioner and if he or the other directors are aggrieved with the valuation report or the accounts of the companies, they cannot be said to be estopped from raising the matter. By doing this as the Petitioner has done, he is not thereby seeking the variation of the substratum of the consent order which is that he be bought out, but for orders if this is found to be desirable or required, to ensure that he is bought out on the basis of a proper and fair valuation and accounts of the companies. But should the continued presence and role of the Petitioner in the affairs of the companies be allowed to lead to their detriment? I am led by the general situation disclosed by the affidavits filed both in support of and in opposition to the present application, that the profitability of the companies have been adversely affected not only by the winding up petitions having been presented by the Petitioner, but more importantly, by him being continued to be seen as being closely associated with the companies implying that the problems facing the companies and raised by him had not yet been solved, and the general bad effect that this has had and is bound to have, at the work places of the companies. And even if all this were not actually so, common sense dictates that they will be so if nothing is done about the Petitioner especially where his continued connection with and meddling in the affairs of the companies will be of no particular benefit to him in his search for a true valuation and statement of accounts of the companies, which is the real matter now in issue, but which will only lead to the unnecessary and gratuitous embarrassment of the other directors and adversely affect the well being and profitability of the companies in which, the Petitioner has obviously as from the time of the presentation of the winding up petitions, ceased to have any interest in their existence and future, except for his being bought out at a fair price.

If the Petitioner is paid this or guaranteed the payment of this, then his continued association with the companies would no longer be necessary. But as I have observed earlier, this can be done without the Petitioner continuing to be a shareholder or director of the companies. The necessary documents can be identified and preserved and the Petitioner continued association with the companies whilst a fair assessment of his shares is being arrived at, would in all the circumstance surrounding this matter, have no more than a nuisance value.

All in all, and taking into consideration all the matters deponed to in this application and the authorities cited to me, the order that commends itself to me is to grant the prayers sought in the application of the other directors filed on 7.4.92 and which are hereby granted on condition that the sum of Shs 2,786,946/- shall be deposited into court within 7 days of this order, that within this period the remaining shareholders shall submit for my approval guarantees to pay to the Petitioner such monies that may be found due to the Petitioner in respect of his shares in the three companies over and above that determined by Mr Shah in the balance sheets prepared by him, and an agreed list of documents which should be preserved for the purpose of carrying out an assessment of the shares of the directors in the companies and that for these purposes, this matter shall be listed before me on 3.6.92, and that the prayers granted herein shall take effect upon my approval of the guarantees mentioned hereinbefore. The costs of the present application shall be reserved. It is so ordered.

I have already mentioned in the cause of my ruling in the present application that the financial assessment of the value of the shares of the directors in the companies is a matter that is best left to persons with special related skills. It also seems to me that the balance sheets prepared by Mr Shah to say the least, over simplify matters and that there may well be a more realistic approach to the assessment of the revenues of the instance, Rent-A-Plane. I think that this is implicit in the other directors preparedness to give guarantees for the payment of such additional sums as may be found to be due to the Petitioner.

If the directors are not able by 3.6.92 to decide on someone who can carry out such a realistic assessment, I will have to consider appointing one myself.

May 27, 1992

Akiwumi, J