

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**CIVIL DIVISION**  
**COMPANY CAUSE NO. 07 OF 2022**  
**IN THE MATTER OF BUGOYE HYDRO LIMITED**  
**IN THE MATTER OF A PETITION FOR AN ORDER OF**  
**CONFIRMATION FOR REDUCTION OF SHARE CAPITAL BY**  
**BUGOYE HYDRO LIMITED**

*BEFORE: HON. JUSTICE SSEKAANA MUSA*

**RULING**

The petitioner filed a petition under section 76, 77 & 78 of the companies Act 2012 for orders namely that this honourable court approves the following resolutions of the company;

- a) That the share capital of the company be reduced from USD\$ 8,608,200 to USD\$ 6,158,200 by reducing the nominal value of each share from USD\$ 600 to USD\$ 429.2326.
- b) That on completion of the reduction, the share capital of the company shall be USD\$ 6,158,200 divided into 14,347 shares of USD\$ 429.2326 per share.
- c) That without extinguishing or reducing liability on any of the shares, to pay off USD\$ 2,450,000 which is in excess of the required share capital to the shareholders in proportion to their share capital contribution.
- d) That the memorandum and articles of association of the company be amended to reflect the share capital reduction.

The grounds are well laid down in the petition and supporting affidavit but generally and briefly state that;

1. The company was incorporated on 31<sup>st</sup> May 2006 as Tronder Power Limited and later changed its name to Bugoye Hydro Limited under registration numbers 80764/80010002908362.
2. The shareholders stated in the Amended Memorandum and Articles of Association of the Petitioner are Uganda Hydro Holdco Limited with 14,346 shares and Africa Renewable Energy Holdings Limited with 1 share.
3. The objects for which the company was established are to carry on the business of electricity generation and the business of producing, selling and supply of electricity.
4. That the petitioner is desirous of reducing its share capital without extinguishing or reducing liability on any of the shares to pay off USD\$ 2,450,000 in excess of the required share capital to the shareholders in proportion to the share capital contribution and amend the Memorandum and Articles of Association of the petitioner to reflect the share capital reduction.
5. That on the 9<sup>th</sup> December, 2021, the shareholders of the petitioner held a meeting for purposes of passing a special resolution for reducing the share capital of the company. The said meeting was held pursuant to Article 67 of the Articles of Association of the company having been notified by the Board of Directors that the company was over capitalized and a recommendation to reduce the share capital was made.

6. That Article 48 of the company's Articles of Association permits the Petitioner to reduce her share capital by Special Resolution in any manner and with, and subject to any incidental authorization and consents required by law.
7. That the proposed reduction of share capital is in respect to paid up share capital and the petitioner intends to cause the excess of the required share capital to be paid off to the shareholders in proportion to their share capital contribution.
8. That the petitioner intends to cause the publication of the said Special resolution for reducing share capital in the Gazette and in a newspaper having national wide circulation as this Honourable court may direct.

The petitioner was represented by *M/s Kaggwa & Kaggwa Advocates*

The only issue for determination is;

*Whether the petitioner is entitled to an order of confirmation of reduction of share capital?*

The petitioner's counsel submitted that Article 48 of the Company's Article of Association permits the petitioner to *"reduce her share capital by Special resolution in any manner and with, and subject to incidental authorization and consents required by law"*

*Sections 77(1) and 78 of the Companies Act* allow this court to grant an Order for confirmation of the reduction share capital on such terms and conditions as deems fit. Counsel further cited section 76 of the Companies Act which provides for court's confirmation of such resolution if the articles of association permit.

## **ANALYSIS**

A company cannot reduce its issued share capital except as authorized by its Article of Association. This is construed to include the share premium account and any capital redemption reserve account of the company.

When the company reduces its share capital, the interest of members and the creditors of the company may be more adversely affected than by any other alteration of capital.

The company's Articles of Association paragraph 49 provides;

*The company may by special resolution reduce its share capital and any capital redemption reserve fund in any manner and with and subject to any incident authorized and consent required by law and the directors may also, subject to the provisions of the companies Act, accept surrenders of shares.*

In addition he referred to Section 76(1) of the Companies Act 2012 which provides that;

***Subject to the confirmation by the court, a company limited by shares may if authorized by its articles by special resolution reduce its share capital.***

If, the articles do not authorize reduction of share capital, then a special resolution must be passed altering the articles and thereafter a second resolution must be passed for the reduction. In effect the two resolutions cannot be passed at the same meeting. Such power to reduce the share capital should be in the Articles and Memorandum of Association since this is a matter within the exclusive preserve of the articles to be contained therein. See *Re Patent Investment Sugar Co. (1885) 51 Ch.D 166: Re Dextine Patent Packing & Rubber Co. [1903] 86 L.T 791*

The role of court in an application to reduce share capital is to provide some protection mechanism for the shareholders and creditors of the company. Rights of creditors are affected if there is a diminution of liability for unpaid share capital and repayment to shareholders of paid up share capital. In that case, the court must provide a mechanism for the satisfaction of the claim of creditors in opposition to the reduction. In the

case of *Poole v National Bank of China Ltd [1907] AC 229* court held and noted that where the creditors are not concerned, the questions to be considered by court would thus be;

- (a) Should the court refuse its sanction to the reduction out of regard to the interest of those members of the public who may be induced to take shares in the company?
- (b) Whether it is fair and equitable as between the shareholders as it must provide uniform treatment of shareholders with similar rights.
- (c) Is the reduction fair and equitable between the different classes of shareholders?

Therefore, a company may quite legitimately wish to reduce stated capital for accounting reasons, or return surplus capital to shareholders for legitimate business reasons. However, given the overriding concern in corporate law theory with share capital as a creditors' fund, it becomes necessary to balance legitimate business needs to reduce stated capital against the need to protect corporate creditor's interest in the maintenance of the company's capital. See *Unisource Canada Inc v Hongkong Bank of Canada (1998) 43 BLR (2d) 226 Ont Gen Div; varied (2000) 131 OAC 24 Ont CA*

The companies Act section 76(1) (a) allows reduction of share capital for the purpose of extinguishing or reducing the liability in respect of share capital not paid up. Therefore, reduction in share capital in such circumstances should not be applicable once the shares are fully paid up. The petitioner in this petition states that the shares were never fully paid up.

Secondly, the Companies Act 76(1) (b) also allows reduction of share capital where any paid up share capital is lost or unrepresented by available assets. This is intended to reduce share capital by returning an amount in respect of consideration that the company received for an issued share, whether or not the company purchases, redeems or otherwise acquires any share or fraction thereof that it issued. Reductions in respect

of consideration which the company received for an issued share and to reflect an amount not represented by realizable assets are essentially an exercise in restoring reality to the company's accounts.

Thirdly, the Companies Act 76(1) (c) allows reduction in order to pay off any paid share capital which is in excess of the requirement of the company. The share capital may be reduced to reflect an amount that is not represented by realizable assets. The share capital is thus reduced to return to its shareholders any of its assets which are in excess of the wants of the company. Reduction for this purpose caters for occasions where there are legitimate business reasons to return capital to shareholders.

It bears emphasis that what is stated in section 76 of the Companies Act is not exhaustive and the company may reduce its share capital in other ways. See *Caruth v I.C.I Ltd [1937] 2 All ER 422*

The petitioner is desirous of reducing its share capital without extinguishing or reducing liability on any of the shares to pay off USD\$ 2,450,000 in excess of the required share capital to the shareholders in proportion to the share capital contribution.

In a reduction of capital on the ground that it is in excess of the company's wants, it is competent for a company to pay up share capital assets for which it is reduced and court should sanction the reduction provided it is satisfied as to safeguarding the interest of creditors, shareholders and the public who may have dealings with the company or invested in it.

If capital is being returned on ground that it is in excess of the company's wants like in this case, it should be returned first to the class with priority as to return of capital in a winding up. The prima facie rule is that, if money is to be repaid or losses are to be borne, it should be in the order in which the different classes of shares would rank as regards repayment or loss of capital respectively, in a winding.

In the case of *Re Chatterley-Whitfield Collieries Ltd [1948] 2 All.ER 593* Lord Greene stated as follows;

*“It is a clearly recognized principle that the court, in confirming a reduction by the payment off of capital surplus to the company’s needs, will allow, or rather require, that the reduction shall be effected in the first instance by payment off of capital which is entitled to priority in a winding up. Apart from special cases where by agreement between classes the incidence of reduction is arranged in different manner, this is and has for years been the recognized practice of the courts, accepted by the courts and by businessmen as the fair and equitable method of carrying out a reduction by payment off of surplus capital. I know of no case where this method has, apart from agreement been departed from,,”*

It is the duty of the court to see that the rights of the shareholders and if the reduction involves variation of the rights of a class, the court will not sanction it, if modification of rights clauses in the articles is not complied with. The payment which affects or would have the effect of extinguishing the special rights preserved for the preference shareholders whose sanction is not obtained will be rejected. See *Re Old Silkstone Collieries Ltd [1954] Ch 169*

*In Re OCL India Ltd, AIR 1998 on 153*, the company wanted to reduce the company based on a special resolution passed. The court held that in order to permit the reduction it is the duty of court to see if the procedure through which the resolutions is to be passed is formally sound and correct. It is also the responsibility of court to see if the scheme is fair or not.

In this case the said reduction of share capital will not affect any special rights conferred on preference shareholders and there is no evidence that indeed the company had preference shares. In addition no special rights exist in this company which would have been considered before allowing any reduction.

This court therefore approves the special resolution of the shareholders of the company to reduce its share capital of the company in accordance with

the memorandum and articles of association of the company with orders that;

- a) That this Honourable Court makes an Order confirming the reduction of the Petitioner's Share Capital from USD\$ 8,608,200 to USD\$ 6,158,200 by reducing the nominal value of each share from USD\$ 600 to USD\$ 429.2326.
- b) The Petitioner be allowed to pay off USD\$ 2,450,000 which is in excess of the required share capital to the shareholders in proportion to their share capital contribution.
- c) An Order confirming the amendment of the Memorandum and Articles of Association of the company to reflect the share capital reduction.
- d) That the Orders of the Court and the resolution be published in the Uganda Gazette and any newspaper with national wide circulation

The petition accordingly succeeds.

I so Order

*Ssekaana Musa*

*Judge*

*2<sup>nd</sup> September 2022*