

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**CIVIL DIVISION**  
**COMPANY CAUSE NO. 09 OF 2022**  
**IN THE MATTER OF CONSUMER DISTRIBUTORS (AFRICA) LIMITED**  
**IN THE MATTER OF A PETITION FOR AN ORDER OF CONFIRMATION FOR**  
**REDUCTION OF SHARE CAPITAL BY CONSUMER DISTRIBUTORS (AFRICA) LIMITED**  
***BEFORE: HON. JUSTICE SSEKAANA MUSA***

**RULING**

The petitioner filed a petition under section 76 and 77 of the companies Act 2012 for orders namely that;

- a) The Honorable court approves the special resolution of the shareholders of the company to reduce the share capital of the company in accordance with the Memorandum and Articles of Association by the sum UGX 498,000,000/= representing the 498,000 ordinary shares issued and allotted to Fairmont Investments Ltd which have not been paid up.

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

1. The company was incorporated on 4<sup>th</sup> October 1991 under registration numbers 2379B/80010000239314 with a share capital of 2,000,000 comprised of 2000 shares worth 1,000/=.
2. The said shares were taken up completely by three individual shareholders who subscribed to the Memorandum and Articles of Association, that is to say, Shiraz Meghani with 750 shares, Sikander Meghani with 750 shares and Amin Meghani with 500 shares.
3. That on the 5<sup>th</sup> day of June 2014, the company increased its share capital from UGX 2,000,000 to UGX 500,000,000 by creating 498,000 ordinary shares worth UGX 1,000 each, all of which were allotted to Fairmont Investments Limited (marked annexure c)

4. Upon the issuance of shares to Fairmont Investments, it was expected to pay for the same by paying the purchase price of the shares of the company.

That as of April 2019 the various share transfers stood as follows;

NO.	NAMES	SHARES HELD
1	<b><i>Shiraz Meghani</i></b>	<b>1000</b>
2	<b><i>Sikander Meghani</i></b>	<b>1000</b>
3	<b><i>Fairmont Investment</i></b>	<b>498,000</b>
4	<b><i>TOTAL</i></b>	<b>500,000</b>

6. That however its now apparent that Fairmont Investments has not paid for the 498,000 shares were allotted.

7. That the sum 498,000,000/= is NOT reflected as part of the company's capital.

8. That Fairmont Investments forfeited its shares upon failure to pay for them.

9. That the petitioner has NO creditors.

The petitioner was represented by ***Counsel Mugalula Patrick*** and the company Legal Officer-***Anita Natukunda***

The only issue for determination was;

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

#### ***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 Dexine 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***

As seen in Annexure "F; indeed, Fairmont Investments communicated its intention to forfeit shares to the company. A scheme of reduction that regards silence as equivalent to consent should not be allowed and a positive agreement

of shareholders should be taken into account. The forfeiture of Fairmont Investment should be constructed as positive consent.

In order NOT to impair the 'capital' of the company according to respectable accounting standards, it was prudent that in the audited financial statements for the years 2018, 2019 and 2020, the active share capital was kept at UGX 2,000,000.

The general overview for reduction of share capital is that the company should be solvent and the company should not confirm reduction if there are reasonable grounds for believing that the company is either unable to pay its liabilities when they become due or would not be able to do so after the reduction or that the realizable value of the company's assets would be rendered less than the aggregate of its liabilities by the reduction. This would require that the company presents audited books of accounts to satisfy the court that the company is indeed financially sound and not a going concern or that the intended reduction is not made *malafide*. The petition indeed confirms that the company has no creditors who would have been seriously prejudiced by the reduction of the share capital.

It is the duty of the court to see that the interests of the minority shareholders and or creditors are adequately protected and that there is no unfairness even though this is an internal matter of the company.

*In Re OCL India Ltd, AIR 1998 on 153*, the company wanted to reduce the company based on a special resolution past. 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 shareholder-Fairmont Investments Ltd who would have been seriously affected has unequivocally forfeited the shares to the company in a communication dated 31<sup>st</sup> January 2022 upon failure to pay for the said shares allotted to them.

Therefore, seeking leave to reduce the share capital due to a shareholder that have not paid up makes sense. This is the standard practice in corporate financing arrangements world over. This doesn't in any way prejudice the rights of anyone.

The said reduction in share capital in this case is an exercise in restoring reality to the company's accounts.

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 by the sum of UGX 498,000,000/= representing 498,000 ordinary shares allotted to Fairmont Investments Ltd which have not been paid up.

The petition accordingly succeeds.

I so Order

***Ssekaana Musa***

***Judge***

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