

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 60 OF 2009

COOL CARE SERVICES LTD PLAINTIFF

VERSUS

1. ELECTRICS INTERNATIONAL COMPANY LTD.....DEFENDANT

2. CONSOLATA NGIMBWADEFENDANT

Date of last order: 17/11/2009

Date of final submissions: 10/12/2009

Date of ruling: 06/05/2010

RULING

MAKARAMBA, J.:

The Defendant in this matter has raised a three-point preliminary objection that the Plaintiff has no *locus standi* due to want of a valid Board Resolution of the company to institute this action against the Defendants; secondly, that the suit as filed is bad in law as it contravenes the mandatory requirements of provision of O.VI Rule 14 and 15(2) of the Civil Procedure Code [Cap 33 R.E. 2002]; and lastly, that the suit is bad at law and cannot be maintained to the extent that the Plaint is predicated upon a void agreement, for lack of proper attestation.

The preliminary objection by consensus was disposed of by way of written submissions, M/s Ukongwa appearing for the Defendants and Law Associates (Advocates) for the Plaintiff.

The gist of the first point of preliminary objection raised by the Defendants is that the Plaintiff has not attached a Board Resolution to the Plaint, which was filed in this Court, and that the action of the Plaintiff to attach such resolution in the Reply to the Written Statement of Defence is intended to pre-empt the valid objection raised by the Defendants.

The case for the Defendants on the first point of preliminary objection is that it is a condition precedent that before a case is instituted against a company, a Board resolution sanctioning the commencement of any legal proceedings should be in place, and to be attached to the Plaint otherwise any suit instituted without such resolution as is the case presently, is void and should therefore be dismissed with costs. Further, that "***Annexure CSSL 1***" to the Reply to the Written Statement of Defence should be expunged from the pleadings and the suit be dismissed accordingly for want of a Board's Resolution to sue.

In support of his submissions on the first point of preliminary objection, the learned Counsel for the Defendants cited to this Court the case of **ST. BERNARD'S HOSPITAL CO. LTD VS. DR. LINUS CHUWA** Commercial Case No.57 of 2004 of the High Court of Tanzania (Commercial Division) (unreported) a copy of which was availed to this Court, to the effect that a plaint should reflect that there is a resolution authorizing the filing of an action. The learned Counsel for the Defendants has also cited

the case of **PAN CONSTRUCTION CO. LTD AND CHAWE TRANSPORT IMPORT AND EXPORT CO. LTD.** Land Case No.25 of 2008 of the Land Division of the High Court of Tanzania (unreported) to the effect that an attempt to do an act to circumvent a validly raised objection amounts to pre-emption and it is therefore incompetent and liable to be dismissed.

In reply the learned Counsel for the Plaintiff submitted that there is a necessary implication in a preliminary objection on a point of law that it has to relate to a certain law which has been flouted by the opposing party, which the learned Counsel for the Defendants has failed to show. It was the further submission of the learned Counsel for the Plaintiff that there is no law which states clearly that a limited liability company when instituting a suit must attach to the plaint a copy of the Company's board Director's resolution authorizing the Company to file the said suit. Perhaps I should point out here that the rule that when companies authorize commencement of legal proceedings, a resolution or resolutions have to be passed either at a Company or Board of Directors' meeting and recorded in minutes is what we may venture to call a judge-made rule which was coined for the first time in the case of **BUGERERE COFFEE GROWERS LTD VS SEBADDUKA & ANOTHER [1970] E.A 147** (the *Coffee Growers Ltd* case). Much as there is as yet no statutory rendering of the rule, this nevertheless does make it of an inferior status since case law has the same weight as any other provision of the law until overriden by statute. It is true as submitted by the learned Counsel for the Plaintiff that section 28 of the Civil Procedure Code which is the specific provision in

respect of filing of suits against corporate bodies in the High Court does not make it mandatory for a Company to annex to the Plaint a copy of the Company's board resolution authorizing it to sue another person.

Distinguishing the two cases of the High Court, the Commercial and Land Divisions respectively relied upon by the learned Counsel for the Defendants in support of his preliminary objection on lack of Company Board's resolution, the learned Counsel for the Plaintiff submitted that both **ST. BERNARD'S HOSPITAL CO. LTD VS. DR. LINUS CHUWA Commercial Case No.57 of 2004** and the case of **BUGERERE COFFEE GROWERS LTD VS SEBADDUKA & ANOTHER [1970] E.A 147** (the *Coffee Growers Ltd* case) cited therein, were cases evolving out of an internal conflict within the Companies over ownership and control of the companies, which is not the case presently as the case at hand relates to payment of a debt due to the Plaintiff which contract the Plaintiff claims that was dully performed. The learned Counsel for the Plaintiff argued further that in any case the **ST. BERNARD'S HOSPITAL CO. LTD VS. DR. LINUS CHUWA Commercial Case No.57 of 2004** and that of **PAN CONSTRUCTION CO. LTD AND CHAWE TRANSPORT IMPORT AND EXPORT CO. LTD.** Land Case No.25 of 2008 of the Land Division of the High Court of Tanzania (unreported) relied on by the learned Counsel for the Defendants being of this Court, and this Court being not bound by its own decisions, it is at liberty to depart from them.

The learned Counsel for the Plaintiff submitted further that a Reply to the written statement of defence is a pleading just like a plaint and

therefore there is nothing unprocedural about attaching the Board's resolution to it. In any event, the learned Counsel for the Plaintiff further submitted, since the preliminary objection was about absence of a company board's resolution, not non attachment to it, it is obvious that the Defendant's Counsel is prevaricating as he attempts to assist the Defendants not to pay to the Plaintiff what is lawfully due to it.

I have carefully followed the arguments and counter arguments by learned Counsel on the first limb of the preliminary objection that a suit instituted against a body corporate without a Board's Resolution authorizing the institution of such legal proceedings is void and ought to be dismissed. I should point out here however, and with due respect to the learned Counsel for the Plaintiff, that much as there is no express legal provision mandating a Company to annex to the Plaint a copy of a Company's Board Resolution authorizing it to sue another person, this does not rule out the authority of case law on the point as is the case within our adversarial system of litigation based on the common law doctrine of precedent. I have in mind here the evolution of the legal principle on absence of company board's resolution from the Ugandan case of **BUGERERE COFFEE GROWERS LTD VS SEBADDUKA & ANOTHER** [1970] E.A 147 (the *Coffee Growers Ltd* case) which I have already alluded to albeit briefly above. In my view however, the argument would, I suppose, rather be whether the preliminary objection on lack of Company's Board Resolution before instituting a suit against a body corporate passes the test of a pure point of law.

In order to establish whether there is a Board's Resolution it would in my view, require evidence to be adduced, thus defeating the whole object of a preliminary objection which is to raise a pure point of law, if argued disposes of the suit. The authority on this legal position is the classic case of **MUKISA BISCUIT CO.LTD V. WEST END DISTRIBUTORS (1969) E.A** where the test of a pure point of law was succinctly set out by his Lordship, Law, J.A. at page 700 that:

"a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued may dispose of a suit."

It seems to me that the learned Counsel for the Plaintiff perhaps anticipating the possibility of contest on the pure point of law test for a preliminary objection to stand decided to resort into annexing to the Reply to the written statement of defence a Board's Resolution. His main argument is that a Reply is equally a pleading like the plaint or the written statement of defence. It is true as argued by the learned Counsel for the Plaintiff that a Reply is also a pleading just as is a plaint or a written statement of defence. However, this misses the point. The issue before this Court is predicated on the failure by the Plaintiff to attach such Board's resolution to the Plaint at the time of instituting the suit. Attaching it after a preliminary objection has been raised in my view, and as correctly submitted by the learned Counsel for the Defendants, amounts to pre-empting the preliminary objection raised by the Defendants, which is unacceptable. The persuasive authorities cited in the case of **PAN CONSTRUCTION CO. LTD AND CHAWA TRANSPORT IMPORT AND**

EXPORT CO. LTD. Land Case No.25 of 2008 of the Land Division of the High Court of Tanzania (unreported) amply allude to this settled position of the law and I have no good reason not to be persuaded by it in the circumstances of this case. It is true as argued by the learned Counsel for the Plaintiff that this Court is not bound by its own decision, unless of course there are strong reasons warranting a departure. One such reason in my view would be, if the material facts of the decision sought to be relied on are clearly distinguishable from those of the case at hand. The learned Counsel for the Plaintiff submitted that the two cases relied on by the learned Counsel for the Defendants, namely **ST.BERNARD'S HOSPITAL CO. LTD VS. DR. LINUS CHUWA** High Court of Tanzania (Commercial Division) Commercial Case No.57 of 2004 and that of **PAN CONSTRUCTION CO. LTD AND CHAWE TRANSPORT IMPORT AND EXPORT CO. LTD.** Land Case No.25 of 2008 (unreported) are distinguishable from the present case. The present case does not deal with matters evolving out of an internal conflict within the Companies over ownership and control of the companies. The case at hand relates to payment of a debt due to the Plaintiff which contract the Plaintiff claims that was dully performed. This is the peculiar circumstances in this case warranting a departure. I hereby dismiss the first preliminary objection, for the reasons explained above.

It was the further submission of the learned Counsel for the Defendants that the suit is bad in law as it contravenes the mandatory requirements of the provision of Order VI Rules 14 and 15(2) of the Civil

Procedure Code [Cap.33 R.E. 2002] for lack of due authority. It was also the further submission of the learned Counsel for the Defendants that the plaint filed in Court was signed by the Advocate for the Plaintiff whose status is being complained of in the first ground of preliminary objection since he did not have the company's mandate to institute the suit and therefore what he did was done without the authority of the Plaintiff who did not issue a valid Board Resolution not only to commence the suit but also to authorize him sign on behalf of the company. It was the further submission of the learned Counsel for the Defendants that the learned Advocate jumped into signing the said plaint without pointing out the authority and capacity under which he was doing that or that he was duly authorized by the Plaintiff's company which in any case is operated by its directors who could sign the said plaint, thus violating the provision of Rule 15(2) of the Civil Procedure Code requiring him to verify that what is stated is based on information received and believed to be true. It was the further submission of the learned Counsel for the Defendants that the omission of the declaration **"the information is believed to be true"**, is fatal and should not be handled lightly because the main purpose of that declaration is to verify both the correctness and the trustworthy of the information contained in the pleadings and that the verifier is conversant with facts or information therein and not otherwise.

It would appear that the learned Counsel for the Plaintiff having submitted at length on the first preliminary point of objection relating to lack of authority to institute the suit, submitted only briefly on the point of

omission of the words “***the information is believed to be true***”, in the verification clause in the Plaint. The learned Counsel for the Plaintiff conceded however, that the words “***the information is believed to be true***” escaped his scrutiny and that they were inadvertently omitted and was quick to submit that he humbly believed that they can be rectified by invoking the provision of Order VI Rule 15 of the Civil Procedure Code.

Order VI Rule 15 of the Civil Procedure Code which deals with verification of pleadings stipulates as follows:

*“(1) Save as otherwise provided by any law for the time being in force, every pleading shall be **verified at the foot by the party or by one of the parties pleading or by some other person proved to the satisfaction of the court to be acquainted with the facts of the case.***

*“(2) The person verifying shall specify, by reference to the numbered paragraphs of the pleading, **what he verifies of his own knowledge and what he verified upon information received and believed to be true.***

*“(3) The verification shall be **signed by the person making it and shall state the date on which and the place at which it was signed.**”*

The provisions of Order VI Rule 15 of the Civil Procedure Code comprise a set of three subrules all of which are mandatorily rendered namely: that the pleadings must be verified at the foot by the party pleading or by some other person proved to the satisfaction of the court to be acquainted with the facts of the case. Secondly, that the person pleading must specify what he verifies of his own knowledge and what he verified upon information received and believed to be true. Thirdly, the

person making the verification must sign it stating the date on which and the place at which it was signed. All but one of these rules have been complied with by the Plaintiff.

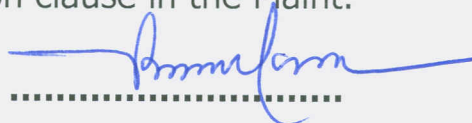
The point of controversy is that the verification in issue was signed by the Advocate for the Plaintiff without stating "*what he verifies of his own knowledge and what he verified upon information received and believed to be true.*" In the nine-paragraph Plaintiff, the learned advocate who signed stated it generally stated that "*What is stated in paragraph 1-9 is based from information received from the Plaintiff.*" The learned Counsel for the Defendants has taken issue with the omission by the learned signing advocate of the phrase "***the information is believed to be true***" which he claims to be fatal.

The Plaintiff in this case is a company limited by liability, Cool Case Services Ltd. It is not however, not disclosed who is or are the Plaintiff's Company Director(s) and from whom the learned advocate who signed the Plaintiff got the information. These are matters for evidence at the trial. At this stage our interest is whether the omission of the phrase "***the information is believed to be true***" is that fatal as to render the suit unmaintainable. In my view the omission is not that fatal and can easily be cured by simple amendment of the Plaintiff. I would therefore dismiss the second point of preliminary objection.

On the third point of preliminary objection the learned Counsel for the Defendants submitted that the suit is bad at law and cannot be maintained to the extent that the Plaintiff is predicated upon a void

agreement for lack of proper attestation. This particular point should not detain us any longer than is necessary. Suffice to point out here and as correctly submitted by the learned Counsel for the Plaintiff that it is an issue which requires evidence to be tendered in court to prove since it relates to the agreement which is the very basis of the present suit. In any event the preliminary objection does not pass the MUKISA case pure point of law test. In any event issues relating to the signing or not signing of the contract by the 2nd Defendant are matters of evidence going to the merits of the case itself thus making it premature to delve into them at this stage. I shall therefore dismiss the third ground of objection that the suit is bad in law for being predicated upon a void agreement due to lack of attestation. I should point out here that in order for a preliminary objection on lack of attestation to hold sway it has to relate to the pleadings and not to annexures to the pleadings, which are matters to be tested in evidence at the trial.

In the upshot and for the foregoing reasons all of the three preliminary points of objection are hereby dismissed with costs, which costs shall be in the cause. The Plaintiff is at liberty subject to limitation period to rectify the verification clause in the Plaint.



R.V. MAKARAMBA

JUDGE

06/05/2010

Ruling delivered in Chambers this 6th day of May, 2010 in the presence of Mr. Massawe, Advocate for Mkongwa, Advocate and in the absence of Defendants.



R.V. MAKARAMBA

JUDGE

06/05/2010

Words count: 3,009