IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[ARUSHA SUB-REGISTRY]

AT ARUSHA

MISC. CIVIL CAUSE NO. 4 OF 2023

IN THE MATTER OF COMPANIES ACT (CAP 212 R.E 2002)

AND

IN THE MATTER OF THE PETITION FOR THE WINDING UP OF

AFRICA ARTEMISIA LIMITED

(COMPANY NO. 30950)

BETWEEN

JOHN BEATUS KASEGENYA _____ **PETITIONER**

VERSUS

AFRICAN ARTEMISIA LTD _____ **RESPONDENT**

RULING

28/02/2024 **&** *08/03/2024*

BADE, J.

The instant petition has been filed by the Petitioner herein for judgment and decree against the Respondent as follows:

a) That African Artemisia Limited be wound up by the Court under the provisions of the Companies Act;

b) That SINDATO ALPHEY SHAO (Advocate) be appointed by this Court as a

Liquidator for purposes of winding up African Artemisia Limited, the Respondent herein;

c) That this Court be pleased to issue an order that the possession of all assets of the Company whether tangible or intangible be realized to pay off its debts.

d) Costs of Petition be provided for.

e) Any other reliefs that would be decreed by the court as it deems fit and just to grant.

The said Petition is brought before the Court under the provisions of section 279(1) (d) and Section 294 of the Companies Act [Cap 212 R.E. 2002 by the Petitioner against the Respondent on the ground that the Company is unable to pay its debt as the Company is indebted to the Petitioner the total sum of TZS Ten Million (TZS 10,000,000) as an outstanding debt for service rendered by the Petitioner to the Respondent.

The Petition for Winding Up was supported by an Affidavit sworn by the Petitioner in compliance with section 281 of the Companies Act. Also through a list of Additional Documents, the Petitioner brought to the court's attention a Demand Notice dated 2nd October 2022 and an Invoice No. 110 dated 14th July 2022, documents which were not previously annexed to the filed

Petition.

In his written submission, the counsel for the Petitioner adopted these two documents and the affidavit accompanying the petition. He then proceeded to state that the Respondent is a company registered in Tanzania on the 7th November 1966 (sic) with Certificate of Incorporation No. 30950 with a share capital of Tanzanian Shillings 10,000,000 divided into 1000 shares of TZS 10,000 each, and attached a copy of the Certificate of Incorporation which was marked as Annexure 'PA1' the Respondent was registered on November 7th, 1996 (contradicting the petitioner's factual account provided in the petition that the company was registered in 1966)

The counsel maintained that having filed this Petition, the Petitioner served the summons to the Respondent but the Respondent did not appear, where the Petitioner prayed for a fresh set of summons served by a substitute method, which was advertised through the Guardian News Paper No. ISSN 0856-5434 ISSUE No. 8938 on the 25th of August 2023, and Mwananchi Newspaper No. ISSN 0856-7573 NA. 8413 on the 26th of August 2023.

Further, the Petitioner's counsel was candid enough to admit that they had intimated over the court to dispense with the requirement of advertisement

as per Rule 99(1) of the Companies (Insolvency) Rules and have the petition proceed to be heard ex parte under Order VIII Rule 14(1) of the Civil Procedure Code, Cap 33 R.E 2019 since there was no objection filed after the advertisement of the summons. He also intimated that the Petitioner took the liberty to file a Certificate of Compliance purportedly complying with Rule 102(1) of the Companies (Insolvency) Rules.

To put context into the matter, the Petition resulted from a claim that sometime in 2022, the Petitioner and the Respondent entered into an oral agreement for the Petitioner to provide legal services to the Respondent with a promise to pay for the said services after two weeks. In essence, the Petitioner claimed to have been instructed to search and update the company details through the Business Registrations and Licensing Agency (BRELA) online system, prepare land sale agreements, facilitation and computation of capital gain tax, which service had a value of **TZS10,000,000** (inclusive of tax); which the Petitioner invoiced as per invoice No. 110 dated July 14, 2022 but the same remains outstanding to date.

In furthering their argument, the counsel for the Petitioner contends that the said debt remained outstanding despite the lapse of the initial two weeks that the Respondent had undertaken to make payment to the Petitioner and that the Petitioner kept visiting the Respondent in demand of the payment for the debt and conducted several meetings to discuss how the Respondent would make good of the debt without any fruition.

The counsel further explains that his client conducted an official search through the Business Registration and Licensing Agency (BRELA) where the Registrar of Companies responded with a search result REF NO. MIIT/ BRELA/30950 dated 16/02/2023; through which the counsel maintains, they became aware that since the Respondent's registered share capital is **TZS 10,000,000** the Respondent would no longer be able to pay its debts.

In conclusion, it is the counsel's contention that the facts and documents presented in court prove that the Petitioner provided legal services to the Respondent who had completely failed to pay for such services within the time agreed or at all, and thus qualifies to be wound up as per section 280 of the Companies Act, 2002 since the Respondent failed to heed the demand

notices served to him. The Petitioner's counsel relied on the authority of this Court sitting in Tanga in the case of ***The Board of Trustees of National Social Security Fund as Creditor of M/S Katani Limited,*** Winding up Cause No. 5 of 2021 (unreported), where the Court faced a case like the one at hand and held:

> *"And since the liabilities of the respondent company exceed its assets, and because there were unheeded demand notices, and it is evident that the Court gave orders for the Petitioner (Creditor) to take other courses to realize its debts against the respondent Company which proved that the latter is incapable of meeting its liabilities, it is just and equitable to grant winding up order"*

I have dispassionately read the submission by the counsel for the Petitioner and have availed myself of the law regarding a petition of this nature. Section 279 (1) of the Companies Act, among other things provides for the circumstances under which a company may be wound up. Paragraph (d) is particularly relevant as it provides for a circumstance where the company fails to pay its debts, with section 280 outlining the circumstances in which

a company may be deemed to be unable to pay its debts.

The circumstances are when a notice is served upon the company making a demand of a debt exceeding fifty thousand Tanzanian shillings then due and requiring the company to pay the same and the company has for a period of 3 weeks or twenty-one days neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor, and that the value of the company's assets is less than the amount of its liabilities.

On this account, the issue for determination I consider to be whether a winding-up order against the Respondent should issue based on its insolvency and inability to pay its debts, particularly a debt of TZS 10,000,000 arising out of an advocate client professional fees which the Respondent failed to honor.

Subservient to the issue posed above, one is inclined to determine whether the conditions for a debtor to be rendered insolvent and unable to meet its debt have been established by the Petitioner. It is settled law that a winding-up order is not automatic. There must be proof of insolvency and /or inability on the part of the Company to pay its debts. This necessarily means that the

Petitioner must show that the company is insolvent, it is unable to pay its debts before any order to wind up the company is made.

A question that comes to mind at this point is how is it determined whether a company is unable to pay its debts. According to section 280 of the Companies Act, a company shall be deemed to be unable to pay its debt if a demand is made to the company to pay the sum due within 21 days; and the company fails to do so, or offers an unsatisfactory explanation of its failure so to do.

In my view, the requirement is for the Petitioner to establish that the company is unable to pay a debt that is legitimately due from it, and it is undisputed. So in other words one has to ask is the debt due legitimate and undisputed? According to the record on the file and as submitted by the counsel for the Petitioner, the Petitioner has demanded from the Respondent the repayment of the debt by issuing them with a Demand Notice on the 2nd of October 2022 having previously issued them with an invoice dated July 14, 2022 both of which received no response. They have also intimated that the said demand notice was received by the Respondent's authorized officer on the 3rd of October 2022 who signed its receipt, but the Respondent has

failed to pay the debt or come to a settlement with the Petitioner in the manner described in the said statutory demand notice. Meanwhile, I have not found any evidence to substantiate the claim such as an instructions letter, documents that have resulted from the said instructions from a client to the firm and vice versa, or any acknowledgment of the debt so to speak. Looking at the annexures and the affidavit verifying service, I wondered if the said authorized officer is an authorized officer by design or default since either one is a fact unsubstantiated, and does not help in satisfying if the debt is undisputed and or legitimate. This makes it valiant because the counsel intimated that the engagement to undertake the legal work was also orally instructed. So it is logical to ask if the person from the Respondent issuing the instructions was the same authorized officer who was served and received the invoice and the demand notice. It is unfortunate that the whole of the evidence presented before the court is one-sided. Assuming the facts as presented by the Petitioner are correct, can it be said that they are creditors in the eyes of the law presenting a legitimate and undisputed debt? In this, I am hesitant to view it affirmatively. In **Mann vs Goldstein** (1968) 2 ALL ER 769 the learned Judge stated:

"…..I would prefer to rest my jurisdiction directly on the comparatively simple propositions that a creditor's petition can only be presented by a creditor, that the winding-up jurisdiction is not for the purpose of deciding a disputed debt ….. since, until a creditor is established as a creditor he is not entitled to present the petition and has no locus standi in the companies court; and that, therefore, to invoke the winding-up jurisdiction when the debt is disputed (that is, on substantial grounds) or after it has become clear that it might be so disputed is an abuse of the process of the court.

I am increasingly of the view that the position of "creditorship" and "indebtedness" must be categorically self-evident, and the indebtedness should not be contentious or call for proof as in other trials undertaken by the Court.

In any case, while the threat or actual issuing of a Winding-up Petition may put pressure on a company to pay an outstanding debt, the court has frowned on parties who prefer winding-up proceedings as a debt collection process for individual creditors. That is because a winding-up procedure is a mechanism for putting an insolvent debtor into a collective form of insolvency proceedings for the benefit of all creditors. Now this being the case, I have scrutinized the process that the Petitioner has employed in

achieving this end and found it is falling short.

Then there is the Court of Appeal for Eastern Africa in the case of **Cruisair Limited vs CMC Aviation Limited** (No. 2) (1976-80) KLR 874 which quoted the following statement from the learned author **Buckley on the Companies Acts** (11th Ed) pages 356, 357 that:

> "A winding up petition is not a legitimate means of seeking to enforce payment of a debt which is bona fide disputed by the Company. A petition presented ostensibly for a winding up order but really to exercise pressure will be dismissed and under circumstances may be stigmatized as a scandalous abuse of the process of the court."

The Court will not be used as a means to achieve this end while the procedure is flouted. It is certainly not going to be positioned as a debt-collecting agency.

According to the record, the Petitioner served the documents on the Respondents, and the same were received by an 'authorized officer' of the company on 15th July 2023. The documents on the Petition were stamped as received. When the matter came back in court on 22nd August 2023, the Petitioner prayed to re-serve the Respondents, this time through substituted service, and the court had ordered summons to re-issue for this purpose. In

my reserved opinion, it is suspicious and devious to want to do a reservice on a party that you had successfully served the first time. Upon my perusal of the documents on the file including the summons issued for substitution of service, I realized that the summons served which is also appearing on the Guardian of 25th August 2023 and Mwananchi of 26th August 2023 are both summons to file a defense which among other things, inform the filing of a matter in court by the 'Plaintiff' and that the case is now fixed for mention/hearing on 20 Sept 2023. With due respect to the counsel for the Petitioner, this is grossly misleading and quite contrary to the requirement of the insolvency rules. Fast forward to the next mention date, the Petitioner asked the court to dispense with the requirements of Rule 99 of the insolvency rules, as well as make obsolete Rule 104 pressing that no one has shown intention to come forth and contest the pending Petition. In a further flout of the procedures, the counsel misdirected the court to resort to Rule 14 of Order VIII of the Civil Procedure Code to order to proceed ex parte with the hearing of the matter. As I have said previously, this is a gross contravention of the procedural laws in proceedings of this nature, and The Insolvency Rules are expressive that a matter not treated this way is only liable to be dismissed. There is no application of the Civil Procedure Code in

the place of Insolvency Rules, and the said rules have to be followed to the letter.

I have already said that the goal of winding up a business compulsorily or even voluntarily is, first and foremost, to ensure that its assets are fairly distributed among its creditors and members, and that is the position of the law. (See Re **Tanganyika Produce Agency Ltd** [1957] E.A 241, **East African Development Bank vs Godes Limited,** [1989] TLR 129.

Now if the other (and there is no gainsaying and assume that there are no other) creditors of the company are not made aware of the pendency of the winding-up proceedings, how will they bring forth their debts for consideration and repayment or come forth to object or support the petition? I say so because the notice that was published by the Petitioner did not at all allude to the pendency of the winding-up proceedings, only a suit between the parties calling for the filing of a Written Statement of Defence. It can not be said by any threshold of reason that the public has been notified of the petition to wind up the debtor so that other creditors can also present their claims including statutory debts as well as the Government which might be owing taxes.

The Supreme Court of India in **Re Raghunath Prasad Jhunjhunwala, Hind Overseas Pvt.** [1971]41 COMPCAS 308 (CAL) ruled that the winding up of a corporation is a harsh measure that should only be used to defend the interests of the creditors or the firm itself holding that a company's inability to pay its debts alone is an insufficient cause for winding up, and that the court must weigh all the relevant factors before issuing a winding-up order.

Whichever way one looks at it, if Winding up proceedings are presented for less than legitimate purposes they can not be justified, and the court is duty-bound to ensure it. In **East African Development Bank vs Godes Limited,** (supra) in which Ungoed-Thomas, J. (as he then was) had been approvingly quoted by this court as saying:

> "....it is well established that this court has jurisdiction to restrain the presentation or advertising of a winding up petition and restrain all further proceedings on it. That jurisdiction is a facet of the court's inherent jurisdiction to prevent an abuse of the process of the court. It will be exercised where a winding-up application is presented or prosecuted otherwise than in accordance with the legitimate purpose of such process.... The court held that a company's inability to pay its

debts alone is insufficient cause for winding up, and that a disputed debt cannot be used in winding-up proceedings."

My view is that when the court is faced with such applications, it must fashion an appropriate remedy; one that does not give one party any undue advantage. In my due deliberation, this winding-up petition has to be dismissed, as in consideration of the evidence presented, it is a plain and obvious case for dismissal as the petition was bound to fail.

I so order.

DATED at **ARUSHA** this **08th** day of **March 2024**

A. Z. Bade
Judge
08/03/2024

Ruling delivered in the presence of the Parties and or their representatives in chambers on the **08th** day of **March 2024**

A. Z. BADE
JUDGE
08/03/2024