

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DAR ES SALAAM DISTRICT REGISTRY

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 517 OF 2023

IN THE MATTER OF COMPANIES ACT NO.12 OF 2002

AND

**IN THE MATTER OF COMPULSORY WINDING UP OF Z.A.S.
INVESTMENT COMPANY LIMITED**

EQUITY BANK (TANZANIA) LIMITED.....PETITIONER

VERSUS

Z.A.S INVESTMENT COMPANY LIMITED.....RESPONDENT

RULING

Date of last order: 20th December 2023

Date of Ruling: 18th January 2024

MTEMBWA, J.:

The Petitioner herein has petitioned for compulsory winding up of the Respondent company in view of ***section 280 of the Companies Act, No. 12 of 2002***. When the Respondent was duly served, sturdily contested the Application and proceeded further to file a Notice of Preliminary Objections the contents of which are narrated hereinbelow; that;

- 1. The Petition is incompetent for non-citation of enabling law.*
- 2. The petition is not accompanied with Resolution of the Board of directors of the Petitioner.*
- 3. The Petition is misconceived and abuse of the Court process.*
- 4. The Petition is fatally defective.*
- 5. The Verifying affidavit is fatally defective for having two petitioners while the Petition has one Petitioner.*
- 6. The jurat of the verifying affidavit is defective for affirming while the deponent has introduced himself as a Christian.*

Initially, this matter was presided over by Hon. E. Kakolaki, J who has been reportedly to have been transferred to another duty station. As such therefore, it was reassigned to me for final determination. Before reassignment however, parties agreed to argue the preliminary objections by way of Written Submissions. I have gone through the records and noted that the parties correctly filed their Written Submissions as ordered to which I personally subscribe.

In the conduct of the preliminary objections, the Respondent was represented by **Ms. Halima Semanda**, the learned Counsel while the Petitioner enjoyed the good service of **Mr. Shalom Samuel Msakyi**, the learned counsel. As said before, hearing proceeded by way of Written Submissions traceable in the records.

Ms. Halima Semanda, opted to combine and argue all together the fourth, fifth, and sixth preliminary objections. It was her

submissions that upon scrutiny, they noted that the petitioner only cited ***section 280 of the Companies Act*** and considering the import of the said section, the Application may be brought in a different three styles. She added further that, the instant Application in devoid of not indicating the styles under which it has been brought. It was her assertion that such failure to cite the proper section renders the Application incompetent. She cited the cases of ***Ayman M. Alkharaf Vs. Aymanouf Safaris Limited & another, Misc. Civil Application No. 50 of 2021 (Unreported)*** and ***Happiness Ndeki Vs. International Commercial Bank and 3 Others, Misc. Land Application No. 488 of 2023 (unreported)***.

As to the incompetency by reason of failure to attach a Board Resolution of the Company, Ms. Halima submitted that the Applicant has petitioned to this Court without mandatorily attaching the Board Resolution contrary to the dictate ***of section 147 (1) (a) & (b) of the Companies Act***. She added further that, under the cited section, it is mandatory that a Board Resolution from general meeting or meetings of class members of the Company be attached. She cited the case of ***Junior Construction Co Ltd Vs. AMC Tanzania Limited and Another, Civil case No. 72 of 2020***.

As to how the court process was abused, Ms. Halima reminded this Court of the pending case registered as Commercial Case No. 103 of 2022 in the Hight Court of Tanzania (Commercial Division) where the parties herein are the same as in the mentioned commercial case. She said, the facts giving raise to the filing of this Application is the cited commercial case as such, to determine this Application anyhow is the abuse of the Court process. By citing ***Section 8 of the Civil Procedure Code***, Ms. Halima added that, this court is restricted from entertaining the matter which is pending in another Court having competent jurisdiction. She beseeched this court to reject this Application and direct the parties to attend the pending Commercial Case No. 103 of 2022.

As to how the verifying affidavit is fatally defective for having two petitioners while the Petition has one Petitioner and as to how the jurat of the verifying affidavit is defective for affirming while the deponent has introduced himself as a Christian, Ms. Halima submitted that in the petition there appear to be inconsistence regarding the number of the petitioners listed in the verifying affidavit. That in the Petition, the verifying affidavit contains two names of the petitioners while, in the Petition itself, only one name of the petitioner was

mentioned. In such circumstances, the accuracy and truthfulness of the petition is doubtful, she added. To cement, lastly, she cited the case of ***Aliraza Mohamed Rawji Vs. CSS Solutions Limited, Misc. Civil Cause No. 353 of 2021*** (unreported).

Replying to the first preliminary objection, on his part, Mr. Shalom Samuel Msakyi submitted that the Petition may be brought under the general citation of section 280 of the Companies Act. To him, there was no problem at all. He was not in agreement the Respondent's counsel that such anomaly, if any, may render the Application incompetent warranting an order to strike it out. He said, what has been omitted is a clear citation of ***section 280(a), (b), or (c) of the Companies Act***. He cited the case of ***Abdallah Hassan Vs. Juma Hamis Seiboko, Civil Appeal No. 22 of 2007*** which was later on blessed in the case of ***Bitan International Enterprises Ltd Vs. Mished Kotak, Civil Appeal no. 60 of 2012***.

Mr. Msakyi faulted the cited case of ***Ayman M. Alkharaf Vs. Aymanouf Safaris Limited & another, Misc. Civil Application No. 50 of 2021*** on the ground that the same is not binding on this Court. He added that, the cases cited by him are binding to this Court. He invited this Court to consider section 3A of Cap 33 and invoke the

principle of overriding objective. On the other hands, Mr. Msakyi implored this court to consider the pleadings and annexures in the determination of the preliminary objections. To fortify, he cited the case of ***John Byombalirwa Vs. Agency Maritime International (Tanzania) 183 Ltd TLR 1.***

On the failure to accompany the Board Resolution Mr. Msakyi submitted that nowhere under the ***Companies Insolvency Rules of 2005*** particularly Chapter 3 indicates that a board resolution is a mandatory document to accompany the Petition. He however acknowledged awareness of the current development or trend on the requirement to attach a board resolution. To him, such requirement does not apply in the circumstances. He added that such requirement applies when there is internal conflict within the Company. He submitted further that what is needed is a general resolution. He cited the case of ***Simba Papers Converters Limited Vs. Packing and Stationaries Manufacturing Limited & 2 others, Civil Appeal No. 280 of 2017.***

On how the instant Petition is misconceived and an abuse of the Court processes, Mr. Msakyi submitted that the facts leading to the preliminary objection have not been ascertained to stand as a pure

point of law. He added that the fundamental requirement is that any alleged irregular defect must be apparent on the face of the pleading so that the objector does not consider other documents accompanying the Petition. He cited the case of ***Mukisa Biscuit Manufacturing Company Ltd Vs. West End Distributors Ltd (1969) EA 296.***

Mr. Msakyi submitted further that the Petition herein is a winding up proceedings dealing with the issue of insolvency deriving its root from Companies Act. On the other hand, Commercial Case No. 103 of 2022 is a normal commercial dispute as a result of the breach of contract and as such, since the facts of the cases can not be ascertained on the pleadings before this Court, the same cannot be determined as a preliminary objection. He was of the view that the Companies Act allows the filing of the windup proceedings even if there is a pending matter in Court.

On how the verifying affidavit is fatally defective for having two petitioners while the Petition has one Petitioner and as to how the jurat of the verifying affidavit is defective for affirming while the deponent has introduced himself as a Christian, Mr. Msakyi submitted that the Respondent does not in any way fault the verifying affidavit

in terms of ***Order IX Rule 3 of the Civil Procedure Code (Supra)*** nor has she cited any law to which the Petitioner has violated. He added further that the mixing up of the names in the verifying Affidavit did not prevent the Respondent from responding to the Petition. He was of the views that the mixing up of the names was a mere typographical error which did not occasion any injustice to the Respondent. To fortify, he cited the case of ***Truckline Limited Vs. Nasibu Juma, Labour Revision No. 112 of 2018.***

On whether the verifying Affidavit was defective for being affirmed by a Christian, Mr. Msakyi was of the views that the Respondent is misleading the Court as the same was sworn by one Shalom Samweli Msakyi in the jurat. He implored this Court to examine its records. By citing the case of ***Mekefason Mandali & Others Vs. the Registered Trustees of the Archdiocese of Dar es Salaam, Civil application No. 397/17 of 2019***, Mr. Msakyi submitted that the affidavit is not defective simply because the Christian affirmed. He, in addition, cited the case of ***Hassan Bacho Nassoro Vs. Republic, Criminal appeal No. 264 of 2020.*** He lastly beseeched this Court to overrule the objections.

In her brief rejoinder, Ms. Halima insisted that the Overriding objective introduced by ***the Written Laws Miscellaneous Amendment Act No. 8 of 2018*** can not save the day as the omission goes to the root of the matter. She cited the case of ***Jacob Bushiri Vs. Mwanza City Council and 2 others, Civil Appeal No. 36 of 2019, CA at Mwanza***. She insisted that the Petition should be struck out with costs.

I have painstakingly gone through the submissions by the learned counsels and, perhaps a bit, I should congratulate them for their well-researched arguments. In my considered opinion, among the six raised preliminary objections, I will start with the second one. On this, the Respondent alleged that the Petition is incompetent for failure to accompany a Resolution of the Board of directors of the Petitioner. Ms. Halima submitted that the Applicant has petitioned to this Court in blatant contravention ***section 147 (1) (a) & (b) of the Companies Act***. She cited the case of ***Junior Construction Co Ltd Vs. AMC Tanzania Limited and Another (supra)***.

Mr. Msakyi did not find it impressive as it has never been a requirement under the ***Companies Insolvency Rules of 2005*** particularly Chapter 3. Although he acknowledged to have been aware

of the current trend on the requirement to attach a board resolution, to him, such requirement applies when there is an internal conflict within the Company.

With respect to Mr. Msakyi, in my conviction, a company's resolution to commence proceedings is mandatory. The presence of or availability of the Board resolution ensures that the company is aware of the commencement of the proceedings and ready to face the consequences arising therefrom. It is thus a written document created by the board of directors of a company detailing a binding corporate action. A Board of Directors may use corporate resolutions to address challenges, establish initiatives, commence proceedings or resolve conflicts between a corporation, its shareholders and or other outsiders. It is therefore a vital document in every company's action.

The need to ensure that there must be a company resolution before commencement of the proceedings was strengthened in the case of ***GSM Tanzania Limited Vs. Umoja wa Vijana Karagwe Savings and Credit Co-operative LTD, Civil Case No. 5 of 2019, HC at Bukoba*** where the court noted that;

Now taking into consideration the policy of the company, financial implications and costs associated with the legal proceedings when the

matter is decided against the company, it appears imperative for the Directors/Board of Directors of the Company vested with powers to manage, direct and supervise the business and affairs of the company to pass a resolution authorizing the institution of an action to avoid the company being taken by surprise and fall into legal crisis which could have been avoided or lessened.

As it has been held in a number of cases, pleading should expressly reflect that there is a resolution authorizing the filing of an action. A company which does not do so in its pleadings risk itself to the dangers of being faced by an unsurmountable preliminary objection as the one at hand (see also ***St. Bernard's Hospital Company Ltd. Vs. Dr. Linus Maemba Muia Chuwa, High Court and Commercial Division No. 57 of 2004 Dar es salaam Registry***). In the case of ***Luwita Amcos Limited Vs. Tanzania Coffee Board & Another, Civil case No. 11 of 2019, HC at Moshi***, the Court, I the course, observed that;

I have read the plaint and the attached documents. In them I could not find any kind of sanctioning resolution with the aim of filing the present suit. That said, I subscribe to the submission made by the learned advocate for the 1st defendant and hold that the plaintiff has no locus standi to file this suit.

Equally, the instant Petition was filed without attaching a Board Resolution authorizing such a dangerous move. It follows therefore that it is not established surely whether the Board of directors of the Petitioner authorized such proceedings to be commenced or not. It is therefore unknown whether the petitioner company is ready to face the consequences arising therefrom. This Court cannot venture into unknown by believing that the Petitioner so authorized the commencement of these proceedings.

Mr. Msakyi convinced this Court to believe that there has been no such requirement under the ***Companies Insolvency Rules of 2005*** particularly Chapter 3. With respect it does not matter under which law the proceedings are commenced. What matters is whether there was a corporate resolution authorizing such commencement. In the premises I hold the views that the Petition is incompetent for failure to attach or implead the Board Resolution. Having so observed, I see no reason to discuss other preliminary objections.

In the result, the second preliminary objection is sustained with costs. The Petition is struck out for being incompetent by reason of failure to attach a Board Resolution of the Petitioner.

I order accordingly.

Right of appeal explained.

DATED at **DAR ES SALAAM** this 18th January 2024.



A stylized signature of H.S. Mtembwa, consisting of a series of loops and a long horizontal stroke.

H.S. MTEMBWA

JUDGE