IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM
MISC.COMMERCIAL CAUSE NO. 11 OF 2022
IN THE MATTER OF THE COMPANIES ACT OF 2002
AND
IN THE MATTER OF WINDING UP PETITION OF TRACTORS LIMITED
BETWEEN

TANZALASA LIMITED……..……...PETITIONER

VERSUS

TRACTORS LIMITED…….... RESPONDENT

JUDGEMENT

Last order: 02ND FEBRUARY 2023
RULING : 10RD MARCH 2023

NANGELA, J.,

This is a petition for winding up the affairs of Tractors Limited, the Respondent herein. The Petition was preferred by the Petitioner, **Tanzalasa Ltd**, a company duly incorporated under the Tanzanian laws. The company filed her petition under section 279 (1) (d), section 280 (a) and 294 of the Company Act No.12 of 2002, (Cap.212 R.E 2002) praying for the following:

(i) That, Tractors Limited, be wound up by this Honourable Court under the provisions of section 279(1)(d) of the Companies Act.
(ii) That, this Honourable Court be pleased to appoint Mr. Charles

Rwechungura of CRB Africa Legal, 5th FL, Tanzanite Park, Plot No.38 South Ursino Victoria Street, New Bagamoyo Road, P.o.Box 79958, Dar-es-Salaam as the Liquidator of Tractors Ltd.

(iii) That, this Honourable be pleased to issue an order that the possession of al assets of Tractors Limited, whether tangible or intangible and all its business be taken over by the Liquidator.

(iv) That, all monies realized from the assets and business of Tractors Limited be utilized in satisfaction of the Petitioner's debt as at the debt of final settlement by the appointed liquidator.

(v) That, both direct and incidental costs of this Petition be defrayed from the assets and business of Tractors Ltd within the hands of the appointed liquidator.

(vi) Any other relief that this Honourable Court may deem fit to grant.

Upon filing of this Petition, the Respondent filed an affidavit in opposition to the winding up of her affairs. She was later joined by an interested creditor, in the name of CRDB Bank Plc who, likewise, filed an affidavit in opposition to the winding up of the Respondent.When all pleadings were complete, the

parties appeared for a hearing. However, I directed that, the matter should be disposed of by way of filing written submissions. A filing schedule was issued and the parties duly complied with it. I will consider their submissions,thus,as I proceed to dispose of this matter.

In his submissions, Mr. Lameck Justus Muganyizi, learned Advocate appearing for the Petitioner submitted his position by first requesting this Court to adopt the petition and its supporting affidavit as forming part of his submissions. Tracing the origin of this petition, it was Mr. Muganyizi's submission that, the same originates from a *Convertible Loan Agreement* (CLA) and a Promissory Note dated 20th July 2017 (*ProNote*),and that, the two are imbued with a creditor-debtor relationship upon which the Petitioner is asking this Court for winding up orders.

Mr. Muganyizi submitted that, on 7th February 2022, the Petitioner served the Respondent with a statutory demand under section 280 of the Companies Act, Cap.212 R.E 2002, demanding for a payment of US$ 1,173,566.54. He contended that, the said amount was an outstanding amount due and payableto the Petitioner by the Respondent on the basis of the **CLA** and the **ProNote**.

He contended that; the statutory demand was for 21 days unheeded to by the Respondent hence this petition seeking to wind up the affairs of the Respondent. Mr.Muganyizi submitted that; the Respondent's counter affidavit does contain ex facie

admissions of the debt. He referred to paragraphs 8, 10 and 14 of the Respondent's counter affidavit, arguing that, there under, the Respondent does not dispute the existence of the *CLA*, the *ProNote* and the entire debt.

Relying on section 60 of the *Evidence Act*, Cap.6 R.E 2022, he submittedthat, in law, admissions as thosemade by the Respondent, need not be proved. Reliance was as well placed on the decision of this Court in the case of **MelesianaKagungu vs. Ashery BalelaKihumbi and Another**, Land Appeal No. 5 of 2020 (unreported).

He contended further that, the fact that the Petitioner has been making demands for years without response or payment is yet another reason why the only available and viable recourse to the Petitioner is to have the affairs of the Respondent wound up.He contended that; the Petitioner cannot recover through arbitration under the CLA because there is no arbitrable dispute.

Relying on the case of **Swissport Tanzania Plc vs. Fastjet Air Lines Limited**, Misc. Civil Cause No.10 of 2018, (unreported), he submitted that,in the absence of any other remedy, the order of the Court winding up the Company in the interest of justice after the Company has become insolvent and unable to pay its debt, is most appropriate, it being an extra-ordinary remedy coming to the service after the ordinary one ceases to be of service.

Mr. Muganyizi submitted that, under section 280 (a) of the Companies Act, Cap.212, if a Company is served with a written demand and neglects within 21 days of service thereof to settle the claims, such a Company will be *deemed to be unableto pay* its debts. In his view, the Respondent is by virtue of that provision unable to pay its debts as she failed to heed to the demand notices dated 07th February 2022. He contended that, the deeming effects of section 280 (a)of the Companies Act, Cap.212, is palpable on the face of section 279(1)(d) under which this Court is vested with powers to make an order for the winding up of such a Company.

Mr. Muganyizi submitted that, section 280(a) of the Companies Act, Cap.212 is *in parimateria* with section 434(1) of the *Indian Companies Act*, 1956 (now repealed and replaced *mutatis mutandis* by section 271(2) (a) of the *Indian Companies Act*, 2013). To further support his submission, he relied on the Indian case of **GulamhusseinAhmedalli and Co. vs. Canhag Private Ltd** [1972] 42 ITR 136 Bom where it was stated, as regards section 434 (1) (a) of the 1956 Indian Companies Act, that:

> "…the company has failed and neglected to pay the said amount or to secure or to compound for it to the reasonable satisfaction of the creditor in spite of service of a statutory notice as required by section 434(1) (a) of the Act. It is therefore clearly

> established that, the company, under circumstances, shall be deemed to be unable to pay its debts… as the above ground is sufficient to dispose of this petition, it is unnecessary to consider the further contention of substituted petitioners that the company is commercially insolvent and is unable to pay its debts."

On the basis of the above, Mr. Muganyizi has urged this Court to dispose of this petition in favour of the Petitioner since under the deeming effect of section 280(a) of the Companies Act, Cap.212, the Company can be legally wound up without proving further that the Respondent is commercially insolvent. As regards the meaning of the phraseology "**shall be deemed**", as used in that that section, it was Mr. Muganyizi's submission that, itself is not a virgin territory as it has been considered within out jurisprudence.

To that effect, he referred to this Court the case of **National Microfinance Bank Bukoba PLC vs. Julieth Zacharia & Another,** Land Case Appeal No.40 of 2020 where, at page 12 thereto, the Court referring to the case of **S vs. Rosenthal** (1980) (1) SA 65 stated as follows, that:

> "The expression has no technical connotation. Its precise meaning, and especially its effect must be ascertained from its context and the ordinary canons of construction… I

> should add that, in absence of any indication in the statute to the contrary, a deeming that is exhaustive is usually conclusive and one which is merely prima facie is likely to be supplementary and not exhaustive."

As regards the Respondent's commercial viability as a going concern, it was Mr. Muganyizi's submission that, Annexure 2 attached to the Petition, which is the Respondent's audited financial Reports for the year ended 2018, does show that, the Respondent's liabilities in the year 2018 exceeded its assets. He submitted, though without proof, that, the fact that the winding up petition was filed in 2022, means that the Respondent's financial woes worsened. He urged this Court to issue an order winding up the Respondent Company as prayed.

On the 10th day of January 2023, the Respondent, through the services of Mr. Bonaventure Masesa, learned Advocate, filed a reply to the submissions by the Petitioner. In his submission, Mr. Masesa adopted the Respondent's counter affidavit filed in this Court on the 27th day of April 2022. The Respondent does admit that on 31st May 2017 the CLA was executed and that a total of US$ 350,000 was borrowed, warranted by an individual warrantor, one Jonathan Aubrey Lane, a shareholder of the Respondent company.

The Respondent's counsel submitted further that on 20th July 2017 an additional sum of US$ 100,000 was advanced to

her and, a *ProNote* was signed. He contended that the Respondent has been working tirelessly to ensure that the business is revived to enable the Respondent fulfil its obligations under the CLA but the Petitioner has been frustrating her efforts.

He submitted that;an admission of the debt does not mean that the Respondent has failed to repay. He contended that, the loan was issued under the CLA and it was later intended to be converted into equity. He submitted that, when the Respondent was under the management of Mr.Ryan Joseph Gregory as the CEO and also the owner of the Petitioner, the Respondent went through various business challenges beyond control, taking into account that Mr. Ryan left in the year 2020 without notice, hand over or solid business plan and Mr. Benjamin Lane took over as the CEO of the Respondent to put in place a solid business plan with investors. He contended, therefore, that, the Respondent is working towards repayment of the loan and has not failed to pay.

It was the argument of the learned counsel for the Respondent that, the Petitioner's last resort should not have been to dissolve the Company since the CLA has conditions agreed upon by the parties. Reference was made to clause 8 whereby the said loan could be converted to fully paid-up shares at the conversion price, which shares were to rank *pari passu* with all other shares of the borrower then in issue.

It was contended further that, since the Respondent is still in business, the Petitioner as a shareholder, had the sole

discretion and option to convert his shares in accordance with the CLA rather than file for a winding up petition. References were also made to Clauses 23.1 and 23.2 of the CLA as regards the remedies available if any party to the CLA is in breach thereof. He argued that, those remedies ought to have been exhausted before locking on to a winding up option.

As regards the provisions under which the Petition is premised, Mr. Masesa submitted that, the phrase "unable to pay" should not be applied in an absolutist manner. He contended that, the powers vested on the Court are to be exercised in a discretionary mode since the word used in section 279(1) of the Companies Act, Cap.212 is "may".

Relying on the case of **Tanganyika Plywood Limited vs. Amboni Paints Company Limited**, Misc. Commercial Cause No.19 of 2021, (unreported), Mr.Masesa contended that, a Court granting an order of winding up a company must be satisfied that, indeed, all factors considered, the Company is unable to pay its debts. He contended as well that, it must be shown that the Company is commercially insolvent in the sense that it is unable to meet its day-to-day liabilities in the ordinary course of business. He contended, therefore, that, nothing was submitted to show that section 280(b) (c) and (d) of the Act, Cap.212, were in existence as well so as to convince this Court.

Mr.Masesa contended that, the Respondent cannot be pronounced as having been unable to pay its debts and that, the

value of its assets is not lesser than its liabilities as other creditors have also issued credit facilities to the Respondent on the basis that she can meet her liabilities still. He contended that, reliance on the Respondent's audited financial statements for the year 2018, some four years back, gives a mere presumption that the Respondent is unable to pay its debt. He urged this Court to dismiss this petition with costs.

As I stated herein earlier, the CRDB Bank Plc, did apply, through a notice of appearance issued under Rule 104 of the Companies (Insolvency) Rules, 2005, to be joined in this Petition as an interested creditor. Having been allowed as an interested creditor, she has filed an affidavit and later her submission, all which were set to oppose the winding up of the Respondent. The interested creditor enjoyed the legal services of Mr. NzaroKachenje, learned Advocate. In his submission, Mr. Kachenje submitted that, the CRDB is the main known creditor of the Respondent.

Mr. Kachenje challenged the legality of the Petition itself arguing that, as a proceeding instituted in Court by a limited liability company, there was a need for a Board Resolution to authorize the commencement of the Petition. He advanced his argument further that, apart from there being no evidence to that effect, there is no statement indicating that the Petition was sanctioned by the Board members.

He referred to this Court the decision of the Court of Appeal in the case of **Ursino Palms Estate Ltd vs.Kyela Valley Foods Ltd & 2 Others**, Civil Application No.28 of 2014 (unreported). Further references were made to the cases decided by this Court, including the case of **Exim Bank (T) Ltd vs. Jandu Construction & Plumbers Ltd and 5 Others**, Commercial Case No.135 of 2020. On that account alone, he charged that, the Petition should be dismissed.

On a further submission, Mr. Kachenje contended that, the loan agreement is itself illegal for containing provisions of lending at an interest while the Petitioner (Lender) is not licensed to undertake the banking business. He referred to this Court, Clause 10 of the *CLA* and all amendments (*attached thereto as Annex.4 to the Petition*), as well as Clause 2 of *the Company Form No. 280(attached as Annexure 8 to the Petition)*, which, together, pointed out to a payment of interest over the loaned amount.

On the other hand, Mr. Kachenje pointed out as well the provisions of sections 3 and section 6 (1) of the *Banking and Financial Institution Act*, 2006, Cap.342 R.E 2019 regarding the business of banking and the prohibitions attached to it. He contended that, since the contract of lending at an interest has been defined as among the business of banking, pursuing such an action without a requisite license is entertaining an illegality which cannot be consecrated by this Court.

To bolster his submission, he relied on the cases of **David Charles vs. Seni Manumbu**, Civil Appeal No.31 of 2006 and that of **Mauri-Tan Holding vs. Copy Cat (T) Limited and 2 Objectors and 1 supporter**, Misc. Commercial Cause No.33 of 2020.

In a further assault based on the CLA executed by the parties, Mr. Kachenje submitted that, under Clause 23.1 of the CLA, the relationship between the Petitioner and the Respondent required to be governed and be resolved in accordance with the laws of England and Wales. He contended that, the Petition has been brought under the laws of Tanzania and thus, violates the express interest of the parties.

Mr. Kachenje has also contended that; the Petitioner has failed to establish that the Respondent is unable to pay her debts. He submitted that, in dealing with winding up cases, Courts have taken a more holistic approach of the Company involved, mainly its commercial solvency and ability to meet its daily liabilities. To that effect, he cited the decision of this Court in the case of **Tanganyika Plywood Limited** (supra).

He contended further that, although the financial statements relied on are those of 2018 while the Petition was brought four years later in 2022, yet the Petitioner has not been able to establish the insolvency or otherwise of the Respondent. According to Mr. Kachenje, the moment the Respondent received the statutory notice, she replied to it advising that the

parties should adhere to the CLA provisions and did high-lighted on there being an on-going disagreement between the parties.

Mr. Kachenje submitted that, if this Court is to entertain the Petitioner, that will be tantamount to using winding up processes to resolve contractual disputes, a fact which is not measuring up to the intentions for which the insolvency laws were enacted. He urged this Court to dismiss the Petition.

In a consolidated rejoinder submission, Mr.Muganyizi rejoined that, the issue of equity conversion canvassed by the Respondent based on what Clause 8 of the CLA provides is based on exercise of discretion on the part of the Petitioner which discretion could only be exercised if the Respondent is a going concern. He argued, based on the submissions that the Respondent is trying to '*revive its business'*, that, it would be impossible for the Petitioner to convert its repayment rights under the CLA into shares of a company which is struggling to revive itself to life.

As regards to the mentioning of *Mr. Ryan Joseph Gregory* in the submissions, Mr. Muganyizi rejoined that, that was a misapprehension of the law since the Petitioner is a distinct person from Mr. Ryan (a shareholder and director) by virtue of the case of **Solomon vs. Solomon**[1897]AC 22.He, as well, rejoined that, the said Ryan is not privy to this matter before the Court. As regards the remedies under the CLA, Mr. Muganyizi

contended that, the point was already decided in the ruling rendered by this Court earlier and need not be revisited.

Concerning section 280 of the Companies Act, Mr. Muganyizi held his position that the Respondent has failed to pay her debts. He tried distinguished the case of **Tanganyika Plywood Limited** (supra) noting that, in that case, here was no indication that, the Respondent was served with a statutory notice under section 280(a) of the Companies Act, Cap.212. He contended that; the Petitioner has well addressed the issue of commercial solvency as well.

Concerning reliance on the 2018 Financials, Mr.Muganyizi rejoined that, the Petitioner was never served with the recent copies of the financial statements despite the fact that she is a shareholder of the Respondent, and that she had so requested several times. He contended that, failure to comply with section 164(1) of the Companies Act, is another ground sufficient to warrant the winding up of the Respondent. He called to his aid, the case of **Amir Ramadhani Mpungwe vs. Michael John Lancaster Warren & 9 Others**, Misc. Appl. No.14 of 2021(unreported).

Rejoining on the issues raised by the interested creditor, MrMuganyizi submitted that, the case of **Ursino Palms Estate Ltd** (supra) is distinguishable to the matters at hand. He contended that, the Petition at hand is specifically about a winding up governed by the insolvency laws. It was his further

contention that, where a specific law exists, the general law is excluded. He cited to his aid, the case of **MlengaKarundeMirobo vs. The Trustees of the Tanzania National Parks & Another**, Labour Revision No.6 of 2021 (unreported) and submitted that, the Company law laid down which procedures to follow in insolvency proceedings.

As regards the illegality of the Petition as contended by Mr.Kachenje, it was Mr. Muganyizi's rejoinder submission that, the citing and reliance on section 3 and 6 of the Banking and Financial Institutions Act, Cap.342 R.E.2019 is a misdirection. He argued that, the Petitioner has neither received funds from general public nor loaned funds to the general public. As such, he distinguished the Mauri-Tan Case (supra) as inapplicable to the matters at hand. He contended that; the loan extended to the Respondent was a "shareholder loan" as per Clause 1 of the CLA.

As regards the governing law and jurisdictional issue raised by the interested creditor, it was Mr. Muganyizi's submission that, that point was determined *in limine*. He rejoined that, the jurisdiction of the High Court to wind up companies such as the Respondent falls within the spectrum of what was termed by the Court of Appeal in the case of **Scova Engineering vs. Mtibwa Sugar & Others,** Civil Appeal No.133 of 2017 (unreported), as "non-derogable" and cannot be ousted by the parties' agreement. As regards the alleged on-going grievances

between the parties, Mr.Muganyizi stated that, this was an un-pleaded fact. At the end of it all, he urged this Court to grant the prayers of the Petitioner and wound up the Respondent.

I have considered the rival submissions carefully. The issue which I will address generally is whether the Petitioner's prayers should be granted or not. However, I find it apposite to start by addressing the issues raised by the Interested Creditor (CRDB Bank PLC) since, in my view, they constitute matters of law.

The first one was about the absence of a Board resolution allowing the Petitioner to bring this matter. Before I proceed any further, let me state categorically that, while I take note of the authorities cited by the Interested Creditor, including the case of **Ursino Palms Estate** (supra), it is my considered opinion that, the requirement for evidence in form of a Board Resolution allowing a Company to institute legal proceedings in a Court of law is not a hard and fast rule, and, I do believe that, the Court of Appeal did not mean that it should be a requirement in each and every legal proceedings instituted in Court by corporate bodies.

In my humble view, such a requirement will vary from one case to another, given that, each case, as a matter of common sense, is to be decided on the merits of its own facts.From that understanding, it follows, therefore, that, a requirement of evidence of a Board Resolution authorizing the filing of legal proceedings by a Company will depend on the facts of each

case. That means, it is on a case-by-case basis that the rule applies.

Having state so, what then is the situation in regard to this instant petition?Do the facts at hand support a view that there must have been a board resolution in order to avoid matters being taken at the whims of individuals at the detriment of other members as this Court stated in the case of **New Life Hardware Co. Ltd and Another vs. ShandongLocheng Export Co. Ltd and 2 Others**, Commercial Case No.86 of 2022(unreported)?

In my view, this being a petition by one of the shareholdersseeking to wind up of the Respondent company, it is my considered opinion that the requirement for Board resolution will hold before the matter comes to the Court. The reasons for that are simply pegged on the dire effects which flows from a winding up order of the Court once issued. Such an order has grave implications of burying the company affected by the Order. This is to say, it has the ultimate effects of exposing the company to its complete dissolution.

Besides, and from an economic and market competition perspective as well, once the order is issued, it takes out a player from the relevant market thereby tilting the competition balances and, a monopoly situation may easily crop out, being one abated by the Court order. For that matter, a thorough scrutiny of winding up petitions is always required since such petitions are not to be lightly taken on board.

In the present Petition, the learned counsel for the interested creditor (CRDB Bank PLC) has urged this Court to make a finding that there was a requirement for a board resolution evincing that the Board of the Petitioner authorized the bringing of this Petition to wind up the affairs of the Respondent and, that, lack of such a board resolution gives a fatal blow to the Petition. The Petitioner has denounced such a proposition, arguing that, winding up is a specialized process governed by specialized procedure.

While I do agree that the process of winding up is governed by specific provisions of the Companies Act and has its special procedures under the *Company (Insolvency) Rules*, 2005, that does not take it outside the applicable principles/rules such as the one under consideration provided that the facts so require.

As I stated herein above, the Petitioner is one of the shareholders also in the Respondent Company. In my view, given that a petition is a proceeding in Court and, taking into account the facts as they stand herein, requirement of a board resolution being there to show that the institution of the petition was sanctioned by the Board or the members is a matter of necessity which would bring into play the holding in the case of **Ursino Palms Estate Ltd vs. Kyela Valley Foods Ltd &2Others** (supra).

While I could have just ended this discussion by laying this Petition to rest on the basis of the above point raised by the learned counsel for the CRDB Bank Plc (the interested creditor), I find it apposite as well to address the other equally important point regarding the lending by the Petitioner and charging of interest of 12% as per the CLA.

The learned counsel for the interested creditor has contended that, the CLA is tainted with an illegality based on the fact that the Petitioner had lent monies on interest as a bank would do while she is not licensed to do so. I think there is a need to consider that aspect in detail. In his submissions, Mr. Muganyizi stated that, the Petitioner was or did lend such monies to the Respondent as "s*hareholder loan*".

In essence, a '*shareholder loan'* is a loan that a shareholder advances to the Company. In some jurisdictions,like Canada, for instance, ashareholderwho advances a loan to the Company may charge some interest on the loan advanced to the Company but that charging *must be reasonable* and may result into additional personal taxes for the shareholder.The prescribed interest rate for shareholder loans in Canada, for instance, was 1% from July 1, 2020 to June 30, 2022, and was steadily raised since then, to 4% January 1, 2023, and expected to be 5% starting April 1, 2023.

Apart from reasonability of the interest charged, the loan so advanced must also appear on the Company books of accounts as a liability of the Company.

From the foregoing discussion, one will note that, while a shareholder may advance credit facility to the company as a means of financing the company, there are two aspects worth noting here: **first**, was the loan advanced as a "*shareholder loan*" and if there was any payment of interest, was it a "*reasonable payment*"? **Second**, did the loan appear in the books of the company?

As regards the second quest, I havelooked at the attached financial statements of the Respondent for the year ending 31st December year 2018 and, indeed the monies advanced to the Respondent are indicated to be an unsecured loan.

The first aspect of reasonability of the charged however, seems to be a matter to consider.In my view, much as a shareholder may lend monies to the Company on interest, the issue of how reasonable is the interest charged on such a credit facility advanced to the Company by the shareholder may turn down the tables given that, ordinarily, the business of lending monies to other people on interest is a regulated business and, it is regulated for good economic and fiscal reasons.

For instance, at times shareholders' loans can be abused as avenues for tax evasion/avoidance and, at times interest rates may be manipulated to allow tax-free repayments instead of

declaring dividends.The questions which often arise given such possibilities, therefore, is what should be the maximum interest rate which may be charged and how this is taxed. While I am not prepared to go down to all such lengths and depths, I find that, the reasonableness approach which is used to assess the kind of interest charged by a shareholder's loan agreement would count on whether the agreement is lawful or not.

In my view, a highinterest rate which equals what a bank would charge, would be unreasonable and the agreement will be illegal because such may be a deemed dividend or that the loan has funded payment of a dividend, a fact which will have implications for the deductibility of interest as an expense to the company. That is why I stated that, in other jurisdictions the requirement is that, the charging of interest be "*reasonable*" which, in my view, represent an objective test.

In this instant petition, the CLA had, in Clause 10.1 thereof, required the Respondent as a borrower to pay a compounded interest of 12% per annum on the principal amount of the Loan outstanding from time to time, which interest was to be paid on a quarterly basis. Now, the question is: was the 12% interest per annum a "*reasonable*" one which could be tolerated in the sense that the Shareholder advanced the facility for the purpose of enabling the Company to generate income.

In my humble view, the 12% rate which roughly equals what the regulated entities like bank would charge, cannot be

said to be reasonable but one that goes overboard. In that regard, the applicability of the cases relied upon by the learned counsels for the Respondent and the interested creditor would come into discussion as to the legality to charge such an amount of interest upon lending while the Petitioner is not a regulate (registered) lending entity perse.

In the case of **Grofin Africa Fund Limitedvs.H. Furniture and Electronics Ltd & 3 Others**, Commercial Case No. 81 of 2017 (unreported) ([2020] TZHCComD 3),this Court, (Fikirini, J (as she then was)) held that:

> "A loan advanced with the condition of paying interest thereon implies that the transaction was a business deal, which could only be done by institution such as banks and other recognized financial institutions or any authorized organization. The only institution from which people borrow money to be repaid with interest are banks andfinancial institutions which meet conditions imposed by the Banking and Financial Institutions Act, Cap 342 (the Banking and Financial Act). Based on the evidence adduced, there is no doubt that when the plaintiff was advancing the loan to the 1st defendant did not do so as a bank or asa financial institution and

> therefore that is illegal and the contract is void."

A similar approach was taken in the case of **David Charles vs. SeniManumbu,** Civil Appeal No 31 of 2006 where the Court held that:

> "charging interest on a loan by any description, a business transaction must comply with the provision of section 3 ofBusiness Licensing Act Cap 208 R.E 2002, which provides that, no person shall carry on in Tanzania whether he as a principal or an agent, business unless (a) is a holder of a valid business license issued to him in relation to such business "

From the foregoing discussion, one may safely conclude that, where a shareholder advances a loan to the Company at an unreasonably interest charges as a licensed banking institution would do, the agreement upon which the transaction is pegged would be tainted with an illegality and, hence void *ab initio*. But even if one was to ignore the two legal issues considered hereabove, still the Petition would not, as well, sail through easily.

Essentially, this instant Petition was filed under section 279(1)(d) and section 280 (a) of the Companies Act of 2002 which provides that a company may be wound up by the court if the company is unable to pay its debts. Generally, section 280 of

the Companies Act of 2002 outlines the circumstances in which a company may be deemed to be unable to pay its debts.

However, as I stated earlier hereabove, still this Petition will fail because, one of the pertinent questions which would need to be addressed, aside from what I discussed earlier hereabove, is when is a company deemed to be unable to pay its debt? This is an important consideration since a company deemed unable to pay its debts may be wound up at the instance of a creditor.

In essence, the applicable test in determining whether a company is unable to pay its debts, however, is whether it is commercially insolvent in the sense that it is unable to meet its day-to-day liabilities in the ordinary course of business. In the case of **Tanganyika Plywood Limited vs. Amboni Paints Co. Limited**, (supra), this Court (Magoiga, J.) made it clear that:

> "As a general rule, …going by the provisions of the law as stated above, it is not automatic that the phrase "unable to pay its debt" is [to]be applied in absolutism…the Court is enjoined to be satisfied by the Petitioner to its satisfaction that, indeed, all considered, the company is unable to pay its debt. The test, therefore, …is whether it is commercially insolvent in the sense that it is unable to meet its day-to-

day liabilities in the ordinary course of business."

In the above noted decision by this Court, reference was made to yet another decision of its own, in the case of **Dangote Cement Limited vs. NSK Oil and Gas Limited**, Misc. Commercial Application No.8 of 2020 (unreported) where this Court stated that, the winding up of a company amounts to legally "*killing*" and "*burying*" of the Company and, for that matter, for a Court to grant a winding up order, there must exist genuine grounds relating to the complete affairs of the Company. I do,as well,fully subscribe to that proposition.

In this instant Petition, the Petitioner has relied on the financial statements of the Respondent for the year ending 31st December 2018 as part of the evidence to show that the Respondent is facing financial difficulties, hence, unable to pay its debts. However, the Petition was filed in the year 2022, some four years and, no recent financial statements were availed to this Court to show the financial state of affairs of the Respondent.

In his submission, the learned counsel for the Petitioner submitted that, such financial statements were requested by the Petitioner several time but the Respondent did not want to avail them to the Petitioner. However, no evidence was availed to the Court to prove such assertions. Since it was not a fact within the pleadings as well, but one advanced from the submissions made by the learned counsel for the Petitioner, I cannot take it to be

the basis of evidence or proof that the Petitioner did request for such financial statements and was denied by the Respondent.

As this Court stated in the case of **Tanganyika Plywood Limited vs. Amboni Paints Co. Limited**, (supra), when a party raises an issue of a company's inability to pay its debts:

> "it is not enough to merely show that the Company has omitted or declined to pay its debts despite service of a statutory notice, but the petitioner must show and prove that the Company has declined to pay without reasonable excuse and conditions of insolvency in the commercial context …exist. This is not the case...here. With due respect to the counsel for the Petitioner, he took thing for granted and failed to meet the test of section 280(c) of the Companies Act,2002 for the Court to exercise its powers …"

In essence, the above quoted assessment of things as they were in that case, do squarely apply as well to the Petition at hand. In this Petition, I am not convinced that the Petitioner has put forth sound and convincing reasons demonstrating that the conditions set out under section 280 of the Companies Act have been satisfied as nothing was tabled in proof that the Respondent is unable to operate its daily business.

In view of all considerations made herein, this Court finds that this Petition is wanting. In the upshot of all that, this Courtsettles for the following, that:

1. based on the reasoning advanced herein, this Petition is found to be wanting and I, thus, hereby dismissed it.
2. The dismissal is with costs to the Respondent.

It is so ordered.

DATED AT DAR-ES-SALAAM ON THIS 10TH DAY OF MARCH 2023

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
COMMERCIAL DIVISION

.....
DEO JOHN NANGELA