IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISC. COMMERCIAL CAUSE NO. 33 OF 2020

IN THE MATTER OF THE COMPANIES ACT NO. 12 OF 2002

AND

IN THE MATTER OF PETITION FOR WINDING UP OF COPY CAT TANZANIA LIMITED

AND

IN THE MATTER OF A PETITION FOR WINDING UP

BETWEEN

MAURI-TAN HOLDINGS LIMITED ..... PETITIONER

AND

THE COPY CAT TANZANIA LIMITED ..... RESPONDENT

AND

AZANIA BANK TANZANIA LIMITED ..... 1ST OBJECTOR

NATIONAL HOUSING CORPORATION ..... 2ND OBJECTOR

NOBLE RENT A CAR LIMITED ..... 3RD SUPPORTER

Date of Last order:25/09/2020

Date of Judgement:23/10/2020

JUDGEMENT

MAGOIGA, J.

Under the provisions of section 281 of the Companies Act, 2002, the petitioner, MAURI-TAN HOLDINGS LIMITED petitioned for winding up order

against COPY CAT TANZANIA LIMITED on one account that, the company is unable to pay its debts and prayed that this court be pleased to grant the following orders, namely:

1. The COPY CAT TANZANIA LIMITED be wound up by the court under the provisions of the Companies Act.
2. The court be pleased to appoint Advocate Alex Mgongolwa (Esq) or Advocate Seni Malimi or any other qualified person the court may deem fit to liquidate the COPY CAT TANZANIA LIMITED for the benefit of the petitioner and other creditors in the order provided under the law.
3. That the assets of the COPY CAT TANZANIA LIMITED be realized to pay off its liabilities to the petitioner and other creditors.
4. Such other orders may be made as the court thinks fit.

Upon this petition being advertised in the Government Gazzete No. 1050 dated 7th August 2020 and Daily News- a widely circulated newspaper in Tanzania dated 3rd August, 2020 respectively, three entities filed notices of appearance as required under Rule 104 of the Companies (Insolvency) Rules, 2005 (to be referred in this judgement as the '**Rules**'). These are; AZANIA BANK TANZANIA LIMITED, NATIONAL HOUSING CORPORATION AND NOBLE RENT A CAR LIMITED. I ordered and directed parties to file their respective

affidavits to pave way for hearing of this petition which was filed under certificate of urgency. The first two companies strongly opposing the winding up proceedings filed their respective affidavits as required under Rule 106 of the Rules. The third company in support of the winding up petition equally filed an affidavit. The petitioner equally filed counter affidavits in reply to the affidavits filed by the parties opposing winding up order. The first two companies, simultaneously filed a preliminary objection on points of law to the effect that the instant petition is not maintainable on two points, namely that;

i. The petition is an abuse of the court process and

ii. The petition is incompetent for want of verification clause.

As such, they prayed that this petition be dismissed with costs.

The background to this petition albeit in brief is imperative to know. It is alleged that on 28th November, 2018, one, BHARAT RUPARELIA and AMIN MOHAMED VALJI extended a term loan to the respondent of Tshs.3,500,000,000/= repayable at an interest rate of 15.5%. Facts go that on 18th December, 2018 the parties executed an addendum to the loan agreement and Deed of Assignment from BHARAT RUPARELIA and AMIN MOHAMED VALJI to MAURI-TAN HOLDINGS LIMITED, which, among others,

amended the repayment terms to monthly installments and assigned the loan to the petitioner. Under the terms of the loan, the respondent was to repay the loan in equal monthly installments for a period of one year at an interest rate of 15.5% per annum to elapse on 17th December, 2019.

Further facts were that the respondent failed to repay the loan but managed to pay portion of the principal amount and the interest to the loan, leaving substantial amount of principal sum and interest unpaid. As a result of such default as to the date of institution of this petition, the company was indebted to the tune of Tshs.3,152,872,649.44. The efforts by the petitioner by way of telephone calls, meetings, demand notices and reminders to make the company pay the money have been in vain. The company has unequivocally admitted the liability and stated its inability to pay its debts through letters and notices in reply to the petitioner's demand notices.

Lastly, the facts are that on 20th April 2020, the petitioner served the company with statutory demand notice in accordance with the law demanding payment of Tshs.3,152,872,649.44, which money has not been paid and in the circumstances justifying the instant petition for winding up order, hence, this judgement.

At all material time the petitioner has been enjoying the legal services of Ms. Grace P. Joachim, learned advocate. The respondent, when the petition was called on for hearing had the legal services of Mr. Jovinson Kagirwa, learned advocate. The 1st and 2nd objectors had a team of legal trained Attorneys, led by Messrs. Deodatus Nyoni and Aloyce Sekule, Principal State Attorneys, Mr. Charles Mgella, learned State Attorney and Ms. Upendo Mmbaga, learned State Attorney. The 3rd appearance was represented by Mr. Erick Mkandala, learned Advocate.

In the circumstances, I directed that I will hear both the preliminary objection on points of law and the substantive petition at the same time. Further, I directed the learned advocate for the petitioner to start, then, in reply the learned Attorneys start with the preliminary objection first, then, reply to the substantive petition. The order of rejoinder was as well taken care of to make sure each party was adequately afforded an opportunity to be heard. However, in my considered judgment, I will for obvious reasons start with the determination of the preliminary objection on point of law first. Nevertheless, if the preliminary objections are sustained, then, the whole matter will be put to rest. But if they fail, then, will go on to determine the merits or demerits of the petition as amply argued by the parties.

Therefore, Mr. Nyoni arguing the first limb of objection submitted that, after going through the pleadings and annexure pertaining to this petition they noted that there are an ascertained facts that, the instant petition is an abuse of the court process. According to Mr. Nyoni, the ascertained facts are gathered from paragraph 7(b) of the petition which is to the effect that Bharat Ruperalia and Amin Mohamed Valji extended a term loan to the respondent and it is clear the term loan was given at an interest rate of 15.5% per annum. Other ascertained facts were that at paragraph 6 of the petition the petitioner stated that the principal objects of the company was importation and sale of office automation equipments and real estate acquisition, development and leasing, hence, not lending money entity. This arrangement, which involve charging interest to a loan, according to Mr. Nyoni, is limited to banking and financial institutions registered and licensed to do such business. Mr. Nyoni went on to argue that, looking at the transaction, the genesis of this petition, is clearly against the provisions of section 6(1) of the Banking and Financial Institution Act, 2006. The whole transaction, pointed out Mr. Nyoni, was illegal for want of licence and registration of the borrower to lend money on interest contrary to section 3 of the Business Licensing Act, [Cap

208 R.E.2019]. Section 65 of the Banking and Financial Institution Act triggers penalties for anyone who does business without licence.

On the above reasons, Mr. Nyoni submitted that the instant petition is an abuse of the court process because was intended to bless something which was illegal from its inception. In support of the their respective stance, the learned Principal State Attorney cited the case of DAVID CHARLES v. SENI MANUMBU, (HC) CIVIL APPEAL NO.31 of 2006 (HC) (MWANZA) (unreported) in which this court held that money lending by individuals on interest not licensed to carry on business of lending is illegal and not enforceable because it contravened the mandatory provisions of section 7 of the Banking and Financial Institution Act, 2006 and section 3(1) of the Business Licensing Act, [Cap 208 R.E.2002].

On the totality of the above submissions, the learned Principal State Attorney in strong but humble terms implored this court to dismiss this petition with costs.

In response, Ms. Joachim argued that the 1st limb of objection is misconceived and do not qualify to be a preliminary objection on point of law. According to Ms. Joachim, it requires production of evidence. The learned advocate for the

petitioner cited the case of MUKISA BISCUITS v. WEST END DISTRIBUTORS LIMITED [1969]1EA 696 to buttress her point.

In the alternative, the learned advocate for the petitioner argued that, even if it can be found that the money was borrowed with interest but the transaction did not qualify to be a business deal under the Banking and Financial Institution Act, 2006 because the banking business is defined to mean receiving deposits from general public funds . In support of the point the learned advocate cited the case of SHIVABHAI G. PATEL v. CHATURBHAI M. PATEL [1961] 1 EA 361 (HCU) in which it was held that the word "business" in the context of money-lending transactions imports the notion of system, repetition and continuity; and the number of the money-lending transactions as well as their nature must be considered and that the evidence had not proved that the plaintiff was a money- lender within the meaning of the Money-Lenders Ordinance, 1951.

According to Ms. Joachim since no repetition on this transaction in dispute, then, it is wrong to argue that the petitioner was doing lending business. In support of this stance, the learned advocate for the petitioner cited the case of ULF NILSON v. DR. TITO MZIRAY ANDREW, Land case no. 66 of 2007(HC)

DSM (Unreported) in which it was held that the law does not prohibit an individual to give loan to another individual.

Ms. Joachim went on to argue that the agreement did not fall under the Banking and Financial Institution Act for the loan was intended to turn around the business of the company. As to the case of DAVID CHARLES v. SENI MANUMBU (supra), the learned advocate for the petitioner argued that, it is distinguishable because it involved security showing it was banking transaction as opposed to the instant transaction subject of this petition. Therefore, the learned advocate for the petitioner prayed that this limb of objection be overruled with costs.

In rejoinder to the first limb of objection Mr. Nyoni reiterated his earlier submissions and added that once a loan triggers interest it cannot be other than doing business. The learned Principal State Attorney submitted in reply that the case of PATEL (supra) is distinguishable because in that case the definition was limited to the word "business" while in our case at hand the Banking and Financial Institution Act defined "banking business". The learned Principal State Attorney insisted that the illegality of the loan was vitiated by the interest claimed, and, hence, unenforceable with all intents.

Stood by his guns, therefore, the learned Principal State Attorney prayed that the instant preliminary objection on point of law be upheld and consequently this court continue to dismiss this petition with costs.

This marked the end of hearing of the first limb of objection. I find it apposite to determine this point first before going into the second limb, and, then, if need be to the merits of the petition.

Having carefully considered the rival arguments of the learned trained minds of the parties on this point and having gone through the impugned documents in support of the petition, and the case laws cited, I have noted that the genesis of this petition, is the provision of a term loan of Tshs. 3,500,000,000/= with interest of 15.5% extended and enjoyed by the respondent from Messrs. BHARAT KARSANDAS RUPERALIA and AMIN MOHAMED VALJI.

The main contention in the first limb of preliminary objection, therefore, is whether, the said lenders as exhibited in the term loan dated 28/11/2018 and in the addendum dated 18/12/2018 had license to borrow the money by interest of 15.5%. Having dispassionately considered all arguments submitted for and against this preliminary objection on point of law, I am constrained to

find merits in this point. I will explain. **One,** as rightly held in the case of DAVID CHALRES v. SENI MANUMBU (supra) and rightly so in my opinion that, the law is very clear that money-lending on interest is only limited to banking business after complying with the elaborate procedure provided for under sections 6-15 of Part III of the Banking and Financial Institution Act, 2006 read together with section 3 of the Business Licensing Act, [Cap 208 R.E 2002] which prohibits doing business without holding a valid business license. For easy of reference, the said provisions provides as follows:

Part III

LICENSING, OWNERSHIP AND STRUCTURE OF BANKS AND FINANCIAL INSTITUTIONS (ss 6-15)

Section 6. (1) A person may not engage in the banking business or otherwise accepts deposits from general public unless that person has a license issued by the Bank in accordance with the provisions of this part.

(2) Any person who contravenes the provisions of this section shall be guilty of an offence and on conviction shall be liable to a fine of not exceeding twenty million shillings or to imprisonment for a term not exceeding five years or to both such fine and imprisonment.

(3) Any body corporate which contravenes the provisions of this section and every director and every officer who is in default thereof shall be guilty an

offence and on conviction shall be liable to a fine not exceeding twenty million shillings.

(4) NA.

Section 7. (1) The Bank may, upon application made in pursuance of the provisions of this Act, grant a licence to undertake the banking business to any entity formally established in accordance with the Companies Act, Companies Decree, Cooperative Societies Act, 1986 or the Cooperative Societies Act, 2003.

(2) The license shall permit a bank or financial institution to conduct banking business in the United Republic, subject to such terms and conditions as the Bank may require.

(3) NA.

Section 8. NA

Section 9. NA

Section 10. NA

Section 11. NA

Section 12 NA

Section 13 NA

Section 14 NA

Section 15 NA

And section 3(1) of the Business Licensing Act, [Cap 208 R.E. 2002, provides as follows:

Section 3(1) No person shall carry on Tanzania whether he as a principal or an agent, business unless-

(a) Is the holder of valid business license issued to him in relation to such business.

The words ***"banking Business are defined in the Banking and Financial Institution Act to mean the business of receiving funds from general public through acceptance of deposits payable upon demand or at a fixed period or after notice, or any similar operation through frequent sale or placement of bonds, certificates, notes or other securities, and use such funds, whole or in part for loans or investment for the account of and at risk of the person doing such business." (emphasis mine)***

From the above provisions of the laws, it is obvious that a contract for lending money on interest is no other than banking business /deal that needs one to have a license. Therefore, since this petition traces its origin from the loan agreement between BHARAT KARSANDAS RUPERALIA and AMIN MOHAMED VALJI and the respondent herein with interest, then, it is my firm considered

opinion that, money-lending with interest without valid license is illegal and unenforceable as rightly held in the case of DAVID CHARLES v. SENI MANUMBU (supra) that money lending by individuals not licensed to carry business is illegal and not enforceable. Truly, I find no reasons to differ with the above holding of this court.

Furthermore on the point, in the counter affidavit of Mr. Amin Mohamed Valji when read together with the **annexure I,** it is without doubt that this operation was an arrangement to take money from the bank of **I & M Bank** and '**use it for loans with interest'**, hence, falling squarely within the meaning of banking business and worse without a valid license. Further, the use of securities as shown in annexure I, shows that getting public funds from the bank and lending at a higher interest rate is other than banking business and by virtue of section 6(1) of the Banking and Financial Institution Act, requires one to have license and further reading of section as quoted above Messrs. Amin Mohamed Valji and Bharat K. Ruparelia in law do not qualify to be an entity capable of being granted a license.

Two, the argument by Ms. Joachim that the issue of license is matter that need evidence, hence, do not meet the test of being a point of law as decided in the celebrated case of MUKISA BISCUITS MANUFACTURING CO. LIMITED

v. WEST END DISTRIBUOTORS LIMITED [1969] EA 696 on preliminary objection are not true. To the contrary, Mr. Nyoni argued that, there are ascertained facts which negate the arguments that there is a requirement of evidence. In this, he pointed out paragraphs 6 and 7 of the petition to support his stance. I have read the entire petition and the counter affidavit of Mr. AMIN MOHAMED VALJI who introduces himself as principal officer of the petitioner and at paragraph 4 of his counter affidavit had this to say:

> "... the rest of the contents are denied and wish to state that **the petitioner is not a bank or financial institution and is not in the business of lending money and it has in no way communicated express or tactically that they are engaged in lending business**. The money lent to the respondent was a private mutual business transaction intended to assist the respondent in financial difficulty with the intention of petitioner becoming a shareholder ....." (emphasis mine).

From the above express admission in the counter affidavit of Amin Mohamed Valji that the petitioner is neither a bank nor financial institution, in the light of the case of MUKISA BISICUITS (supra), a point of law, can successfully be raised from such ascertained facts. By ascertained facts, in my considered opinion, it means facts which need no proof and are correct as pleaded by the

petitioner. As in this petition, the facts stated above need no proof that the petitioner is neither bank nor financial institution capable of lending money on interest. Hence, a successful point of law can be raised on such facts unless the contrary is shown, and is not the case here.

Three, equally the arguments by Ms. Joachim in the alternative that even if it can be found that the transaction was tainted with interest, but still it did not qualify to be a banking business as defined in the Banking and Financial Institution Act, 2006 [Cap 342 R.E.2002] by not taking deposits from public cannot, with due respect to the learned advocate for the petitioner, this is not true and cannot save this petition. I will explain. Firstly, In my opinion, borrowing money from the bank at lower rate of interest and re-loan with intent to get profit by way of higher interest rate amounts to doing banking business as defined in the Act. This is not an exception. I have read carefully, the case of ULF NILSON v. DR. TITO MZIRAY ANDREW (supra) cited to support this point but I am without doubt that my learned sister Ngwala, judge (as she then was) in some respect is distinguishable from the facts of this petition and was very clear on business of lending money on interest without license that is illegal. And the learned Judge in her reasoned judgement concluded on the point at page 27 by saying that:

" the Court cannot consecrate this illegal lending business."

On the same parity, I have no reason to differ with her on this point and proceed to find that the impugned loan in support of this petition was tainted and in law illegal and unenforceable with all intents. No court of law can bless an illegal transaction. Secondly, Much as the whole transaction was tainted by unlawful act in its inception it does not matter whether it was receiving funds from public or not. The cited cases of PATEL v. PATEL (supra) is distinguishable from the petition we have here because want of license goes to the root of the agreement when done with interest. Not only that but it should be noted that the money used in this transaction is public money taken from the **I and M Bank**, so the argument that same did not meet the test of public fund is misconceived and I hereby reject such an argument. The first borrowers were neither bank nor a financial institution. However under the definition of the phrase **'banking business'** same is not limited to receiving funds from public but it goes further to cover **'any similar operation through securities and the use of such funds in whole for loans is what is prohibited unless registered and licensed'** hence, this arrangement was one of the prohibited transaction under the Act.

From the totality of the above reasons, I hereby find and hold that the first limb of objection is merited and I hereby do sustain the first limb of objection. To do otherwise will amount to use this court to bless an illegality, which this court cannot take. Since this point of law suffices to dispose of this petition, I find no reason to go on with second ground of preliminary objection for it would not serve any purpose in the circumstances but be an academic exercise.

In the fine, the first objection is hereby sustained and the instant petition is hereby dismissed with costs for being an abuse of the court process.

It is ordered.

Dated at Dar es Salaam this 23rd October 2020.

S. M. MAGOIGA

JUDGE

23/10/2020