IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CAUSE NO. 31 OF 2019

IN THE MATTER OF COMPANIES ACT, 2002 (NO. 12 OF 2002)

IN THE MATTER OF THE PETITION OF THE PETITION FOR WINDING UP OF

ACCESS MEDICAL AND DIALYSIS CENTRE LIMITED

HASHIM HASSAN MUSA.....PETITIONER

Versus

DR.CRISPIN SEMAKULA.....1st RESPONDENT

ACCESS MEDICAL & DIALYSIS

CENTRE LIMITED.....2nd RESPONDENT

REGISTRAR OF COMPANIES.....3rd RESPONDENT

Last Order: 16th Dec, 2019

Date of Ruling: 21st Jan, 2020

RULING

FIKIRINI, J.

Dr. Crispin Semakula and Access Medical & Dialysis Centre Limited, hereinafter referred as 1st and 2nd respondents, raised four points of preliminary objection namely:

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(a) That, the Petition is bad in law as it is prepared contrary to the Companies Act, Cap. 12 of 2002 and the Companies (Insolvency) Rules, 2005;

(b) That, the application is premature;

(c) That, there is non and/or wrong citation of the specific provision of the law in respect of the Petition and its accompanied affidavit; and

(d) That, the Petition is bad in law as it does not indicate the name of the Court properly as required by the High Court Rules.

Counsels filed skeleton arguments and on 16th December, 2019 argued the objection orally. Mr. Gabriel Massinga assisted by Mr. Ahmed El Maamry appeared for the 1st and 2nd respondents and Mr. Deogratius Lyimo Kiritta appeared for the petitioner. Counsels for the parties adopted their filed skeleton arguments filed on 13th December, 2019 prior to embarking on submitting to the Court on their respective positions. From the oral submission as well as filed skeleton arguments, it was Mr. Massinga's submission that the petition was filed in contravention to the Companies Act, No. 12 of 2002 (the Companies Act) and the Companies (Insolvency) Rules, 2002 (Insolvency Rules), for failure to indicate the circumstances leading to opting to the winding up; court's jurisdiction, none observance of requirement under Rule 99 (2) (a) – (g) of the Insolvency Rules and

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insufficiency for only citing the provision of Rule 100, which has 7 sub rules. Citing of a specific sub rule was essential; he stressed and urged the Court to dismiss the petition pursuant to Rule 99 (4) on the Insolvency Rules.

Submitting on the 2nd point of objection, he contended that the petition was prematurely instituted, since the company was a private one with its memorandum of association which was equal to its constitution. In addition to the company's memorandum of association the company was guided by the provisions of the Companies Act. Therefore if the company's state of affairs were as alleged the same was to be resolved according to the articles of association of the company which was adequate and comprehensive on dispute resolution among shareholders and directors. Adding to that he referred to section 133 (1) (a) – (f) of the Companies Act, which provided for how company registered or carries out its business in Tanzania should operate. Which includes the requirement of informing the Registrar of Companies, also referred as the 3rd respondent, under section 133 (5) of the Companies Act, if parties failed or had no opportunity of resolving their dispute. Fortifying, his submission he submitted that the petition was not accompanied by any notice calling annual or extra ordinary meeting, which he said showed the petitioner's ill motive which was detrimental to the 1st and 2nd respondents. Against that he prayed for the dismissal of the petition.

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The 3rd point on wrong citation and/or non citation of a specific provision of the law in respect of the petition and its accompanied affidavit, was explained as to have been lacking for not citing the relevant and specific provision of the law meriting this Court to determine the petition. That the provision of Rule 100 of the Insolvency Rules cited has7 (seven) sub rules which the petitioner has left the Court to fish out the proper sub rule, the exercise which was not acceptable. In support he referred this Court to the cases of **Citibank Tanzania Limited v Tanzania Telecommunications Co. Limited, Tanzania Revenue Authority, Tanzania Communications Commissions, VIP Engineering and Marketing Ltd & TRI Telecommunication Tanzania Ltd, Civil Application No. 64 of 2003, CAT, Dimon Tanzania Limited v The Commissioner General Tanzania Revenue Authority, The Commissioner for Income Tax & The Attorney General, Civil Application No. 89 of 2005, CAT, Unreported, p. 10** (no copy was attached), whereby the Court of Appeal stressed on both wrong citation and none citation rendered the application incompetent.

The last point of objection was on appropriateness of the title on the chamber summons as required by the High Court Rules and High Court (Commercial Division) Procedure Rules, 2012 as amended in 2019 (the Rules). The Counsel submitted that Rules regulate all applications filed before the Commercial Court,

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one of the requirement was to name the proper registry of the Court, but in the present petition there was no name of the proper registry of the Court, as the petitioner has failed to cite the word "AT DAR ES SALAAM" since the Commercial Court has registries in Tanzania and in filing pleadings the place or registry must be cited as provided by Rule 19 (2) of the Rules. In support the cases of **Badugu Ginner Company Limited v Siliwani Galati Mwantebe & 3 Others, Miscellaneous Commercial Application No. 146 of 2017** (no copy was annexed) and **KG Corporation Group Ltd v Said Salum Bakhresa & Co. Ltd, Miscellaneous Commercial Application No. 287 of 2016**, unreported (copy annexed) were cited.

On the strength of his submission and authorities cited and supplied, Mr. Massinga urged the Court to dismiss the petition with costs as provided for under section 282 (1) of the Companies Act.

Reacting to the preliminary points of objection raised, Mr. Kiritta prefaced his position as reflected in the skeleton argument stating that the petition before the Court was properly instituted under section 279 (1) (e) of the Companies Act and Rules 95 (1) and 100 of the Insolvency Rules.

Dealing with the 1st point of objection that the petition was bad for contravening the Companies Act and Insolvency Rules, he controverted the objection for failing

to specify the provisions of the law and rules contravened. In its place submitted that the provisions of the section 281 (1) (a) (i) and (ii) of the Companies Act and Rule 100 of the Insolvency Rules cited in the petition were correct enabling provisions for the purpose of the petition. Likewise the affidavit deponed in support spoke of the sub rules which all express the same thing.

Specifically countering Mr. Massinga's submission, he submitted that apart from citing section 267 (1) of the Companies Act, as mandatory provisions, the 1st and 2nd respondents have not given a legal position for this Court to be moved. Also citing of section 279 (1) (a) of the Companies Act was not a requirement that it should be cited. As for Rule 99 of the Insolvency Rules cited, he stated that the rule had been complied with by notice of advertisement made in Mwananchi Newspaper dated 18th November, 2019 which was within 7 (seven) days as required, the copy which was alleged to be still with the counsel. And to indicate that such advertisement was carried out, notices of appearance were filed by other parties other than the respondents in this matter. Since the compliance on Rule 99 was couched in discretionary terms, it cannot therefore be raised as point of objection going by the Mukisa Biscuits Manufacturer's Ltd v West End Distributors (1969) EA, 696 which was cited with approval by CAT decision in Gasper Peter v Mtwara Urban Water Supply, p. 10, that once the preliminary point

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of objection needs ascertainment or based on Court's discretion then it cannot feature as point of objection. The Counsel submitted that this submission covered the 3rd point of objection as well.

On the 2nd point of objection that the petition was premature, it was his submission, that no further and better particulars were furnished as to why the petition was stated to be premature. Besides what was stated in the skeleton argument for the petitioner, Mr. Kiritta submitted that the submission was based on facts and must be established and therefore cannot be raised as a preliminary point of objection, referring the Court to the CAT decision, p. 10 (supra).

Extending his submission on the 4th point of objection raised, Mr. Kiritta acknowledged the omission but gave the reason that it was typo error. Moreover, the petition was filed in Court without rejecting it, and the respondents have not been prejudiced in any way, and that was why the respondents were able to file their counter affidavit and raise the preliminary points of objection. Since the omission was minor he invited the Court to take cognizance of the overriding principle under the Written Laws (Miscellaneous Amendment) (Act) No. 8 of 2018 which underscored attending to substantive justice rather than minor errors.

Discussing Rule 19 (2) of the Rules cited, he submitted that the provision did not support the objection as the Rule dealt with format of pleadings and other legal

documents and had nothing to do with omission of the word "Dar Es Salaam". He went on submitting that even if the preliminary point of objection was to be upheld, the position which the petitioner do not subscribe to, still the remedy available was to struck out the petition.

Concluding his submission he prayed for the Court to find the preliminary of points of objection devoid of merits and prayed for its dismissal with costs.

Rejoining the submission, Mr. Massinga basically reiterated his earlier position, putting emphasis that Rule 99 of the Insolvency Rule was not fully complied with and the Court's discretion pointed out, should be exercised judiciously. Touching on the Gaspers' case (supra) he submitted that the case was distinguishable as it emanated from the Labour Court which was a Court of equity and not technicality. The present petition was filed in the Court governed by the Commercial Court Rules (the Rules and the Companies Act, which the petitioner was bound to abide by as illustrated under section 133 of the Companies Act.

Capturing on the submission in respect of the 4th point of objection, he stressed that the omission was fatal and cannot be cured by overriding principle. Pitching to the rejoinder, Mr. El Maamry submitted that the reasons of having rules and procedures in place was to assist the Court to reach a fair decision, also referring to the cases cited in support of their submissions.

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Finally, Mr. Massinga prayed for the preliminary points of objection to be sustained and the petition struck out.

All preliminary points of objection such as this one are basically governed by one principle that they should be on pure point of law. There are many decisions in that regard but so far the case of **Mukisa Biscuits** (supra) is the one taken as to have given the legal definition of what is a preliminary point of objection. At page 701, the Court when dealing with that issue had this to say:

> "*……a preliminary objection consists of point of law which have been pleaded or which arise by clear implication out of the pleadings and which if argued as a preliminary objection may dispose of the suit ……A preliminary objection is in the nature of what used to be a demurer. It raises a pure point of law which is argued on assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.*"

From the definition, it is without a doubt that for a preliminary point of objection to sustain, the raised point ought to be on pure point of law. Anything calling for

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ascertainment by adducing evidence is short of being a preliminary point of objection as envisioned by the **Mukisa** case (supra).

With that position in place my next assignment is to examine as to whether the 4 (four) preliminary points of objection fits the above definition.

The petition has been filed under section 279 (1) (e) of the Companies Act and Rules 95 (1) and 100 of the Insolvency Rules. Section 279 (1) (e) of the Companies Act, illustrate circumstances in which company may be wound up by the Court, whereas Rule 95 (1) elucidate on presentation and manner of filing petition. Rule 100 which has 7 (seven) sub-rules explains on the verification of the petition, though in the present petition no specific sub-rule was referred to.

The petitioner as correctly pointed out by Mr. Massinga did not cite the provision of sections 275, 267 (1) (a), 279 (1) (a) of the Companies Act. The not cited provisions are, section 275 which gives the High Court jurisdiction to wind up companies registered in Tanzania; Section 267 (1)

(a) pointing out modes of winding up, which in the present case was by the court, and section 279 (1) (a) that the company had by special resolution resolved that the company be wound up.

Citing of sections 275, 267 (1) (a), 279 (1) (a) of the Companies Act, though important but non-citing them did not in my view had an effect on the petition. This is stated based on the fact that the petition was filed in the High Court which

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has been conferred with jurisdiction to entertain the matter. And the modes of winding up as provided under section 267 (1) (a) are either by the court or voluntary, the petition has clearly indicated the winding up was by the court when it cited section 279 (1) (e) of the Companies Act.

As to the compliance to section 279 (1) (a) of the Companies Act, besides annexture HHM-5 annexed to the affidavit in support of the petition, this as submitted by Mr. Kiritta is not a pure point of law as it will require evidence to ascertain it.

Compliance to Rule 99 of the Insolvency Rules has also been submitted as to have been contravened. The requirement to advertise the petition as provided under Rule 99 (1) is once in the Gazette and once in a daily newspaper widely circulating in the country. Since the Court has not directed otherwise, then compliance as dictated in the above cited provision is expected. However, Rule 99 (2) has given an option when it used the word "either" which means choice can be made. Mr. Kiritta submitted that the advertisement was made in the Mwananchi Newspaper dated 18th November, 2019 which was within 7 (seven) days provided in law, the submission which I do not have any reason to dispute. The reason behind my stance is that my perusal of the record revealed that notice of appearance filed by Mr. Tom Njau of P. O. Box 3095 Dar es Salaam annexed a copy of the Mwananchi newspaper dated 18th November, 2019 carrying the advertisement in respect of the

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petition for winding up presented by Mr. Hashim Hassan Mussa on 31st October, 2019, which was in compliance to Rule 99 (2) (b) of the Insolvency Rules as well as Rules 99 (3) (a), (b), (c), (d) (e) and (g).

Compliance to section 281 (1) (a) (i) and (ii) of the companies Act, has been complied with since the petitioner is one of the shareholder and director. Further evaluation of that point will require evidence which will make that not to be a pure point of law.

The 1st point of objection raised has in actual fact having no basis and thence overruled.

The 2nd point that the petition has been brought prematurely, besides the facts deponed in the affidavit in support, there is can only be determined properly after adducing of evidence. Since there are must evidence in support of the claim, the point does not fit squarely as pure point of law.

The 2nd preliminary point of objection is overruled.

The 3rd point of objection, although the petitioner has not specifically pointed out the sub-rules but reading through the whole Rule 100 and its 7 (seven) sub-rules one will find they all carter for the verification of the petition which is by way of an affidavit. Non-citation of the specific sub-rule hasno any adverse effect on the affidavit in support of the petition. The cited cases of **Citibank** and **Dimon Tanzania Ltd** (supra), as well as the submissions that rules and procedures in

place are there to assist the Court to reach a fair decision, have been considered in the light of Rule 4 of the High Court (Commercial Division) Procedure Rules, 2012 as amended by section 4 of the High Court (Commercial Division) Procedure (Amendment) Rules, 2019, where much emphasis has been placed on substantive justice.

The 4th point on lack to indicate the proper name of the Court as required by the High Court Rules, this point will not detain me long. It is clear from the documents filed that fact that the petitioner had omitted citing the word "AT DAR ES SALAAM", I agree with the Counsel that this is an important thing to be shown as the High Court of Tanzania Commercial Division has 2 (two) other registries whereby filing of pleadings can as well take place. The omission, has however, in my opinion not prejudiced the 1st and 2nd respondents. Furthermore, and in actual fact, I am in agreement with Mr. Kiritta that the omission was typing error which can be cured under the slip of a pen rule, considering that the omission did not go to the root of the matter. And even if, the remedy would have been to struck out the petition but the petitioner would still have a room to file a fresh petition upon correcting the errors pointed out.

I highly value adherence to the rules and procedures in place and soundly agree to Mr. El Maamry's stance, on one hand but recognize the importance of giving

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substantive justice a room rather than technicalities and especially at the Commercial Court where time is of essence, on the other.

Adding to that, the provision relied on by Mr. Massinga, that of, Rule 19 (2) of the Commercial Court Rules, 2012, did not support his position, as the provision relates to the format of pleadings and other legal documents, and not what he claims. For ease of reference the provision is provided herein below:

> "*The format of pleadings presented for filing to the Court shall be in paragraphs, "Times New Roman" font type, twelve font size, 1.5 line spacing and shall not be in more than ten pages*"

The submissions and the two cited cases of **Badugu** and **KG Corporation Group Ltd** (supra), in my opinion are not relevant to the situation at hand.

In the upshot, I find the 3 (three) that is the 1st, 2nd and 3rd preliminary points of objection devoid of merits and overrule them. The 4th point of objection is sustained but instead of striking out the pleadings, I order amendment within 7 (seven) days as from the date of this ruling. This is to be followed by a hearing date of the petition after compliance to all filing prerequisites as per section 282 (1) of the Companies Act, Cap 12 of 2002. Costs to follow events. It is so ordered.

THE HIGH COURT OF TANZANIA COMMERCIAL DIVISION

P.S.FIKIRINI

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JUDGE

21st JANUARY, 2020