IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(COMMERCIAL DIVISION)
AT MWANZA
MISC. COMMERCIAL CAUSE. NO.01 OF 2021

CHACHA SILAS MAISA (*Administrator of the Estate of the late Silas Nyamhanga Maisa*).....1st PETITIONER
RAPHAEL IHANDE MAKI..... 2ND PETITIONER
GIDEON MAGAGA.....3RD PETITIONER

Versus

KOMARERA HERITAGE
GOLDMINE CO LTD.....1st RESPONDENT
DR.PONSIANO RAPHAEL MPONZI.....2nd RESPONDENT
GHATI J MPONZI.....3rd RESPONDENT
DAVID MWITA MRONI.....4th RESPONDENT
KIBWABWA NYAMHANGA.....5th RESPONDENT

RULING

Last Order: 27/07/2021.
Date of Ruling: 29/07/2021.

NANGELA, J.:

This is a winding up petition filed under section 281 (1) of the Companies Act, Cap.212 [R.E 2002]. The Petition has been brought by the two petitioners herein, who are also shareholders and members of the 1st Respondent. The 1st Respondent is a limited liability company registered under the laws of Tanzania, and having its registered office at Kerende Village, Kemambo, Nyamongo area of Tarime, Mara Region.

On the 19th July 2021, the Respondents filed a Notice of Objection, raising two pertinent grounds of

objection based on law. The two points of law are to the effect that:

1. That the Petitioners have no cause of action against the 2nd, 3rd, 4th and 5th Respondents
2. That the petition is bad in law for want of advertising the petition in either the Gazette or newspaper less than seven working days after the service of the petition on the 1st Respondent contrary to rule 99 of the Companies (Insolvency) Rules, 2004.

In terms of Rule 64 of the High Court (Commercial Division) Procedure Rules 2019 (the Rules), the learned advocate for the Respondents filed, as well skeleton arguments prior to the oral hearing. On the day fixed for hearing of the preliminary legal issue, the Petitioners were represented by the senior learned counsel Dr. Rugemeleza Nshala, assisted by Mr. Heri Kajinga advocate, while the Respondents enjoyed the legal services of Mr. Silas John, Mr. Sifael Muguli and Mr. Melkizedek Gunda, learned advocates.

Submitting in support of the preliminary points of law, Mr Silas adopted the notice and skeleton arguments which were filed in this court as forming part of his submission. He proceeded to submit on ground one by

arguing that, at the look of things, the Petitioners have no cause of action against 2nd, 3rd, 4th and 5th Respondent.

To support of his argument, Mr Silsa relied on the case of **Msanging'andwa vs chief Jaffery Wanzagi & 8 others (2006) TLR 251**, wherein this case held that, a cause of action is the sum total of those allegations upon which the right to relief is found, as may be ascertained from pleadings, including their annexures.

Advancing his argument further, Mr Silas contended that, as it may be ascertained from the petition filed in this Court, the facts pleaded therein, according to paragraph 5 of the petition, are about the right to wind up the 1st Respondent. He noted, however, that, the 2nd, 3rd, 4th and 5th Respondents are not companies, but rather, individuals, some being directors and others being shareholders of the 1st Respondent.

Mr Silas contended that, as per section 275, 279 (1)(e) and section 281 (1) of the Company Act Cap 212 R.E 2002, a winding up petition can and should only to be brought against a company and not a director or its shareholders. He contended, in reference to this petition, that, since the petitioners have included in it persons who are not the company itself, the petition is rendered incompetent.

To bolster his submission, he referred to this Court the case of **Paumela Essau Shayo vs. Unit schools &**

others (Civil case No. 20 of 2017 [2021] THC 3335, (24th May2021). In that case, this Court was of the view that, the petition was incompetent and lacked cause of action as it ought to have been brought against the company. He thus urged this Court to be persuaded by this decision and uphold the first objection.

As regards the second ground of objection, it was Mr Silas's submission that, the petition was not brought in compliance with Rule 99 (2) (b) of the Insolvency Rule, GN No.43/2005. He contended that, the said rule requires a petitioner to advertise her petition either in the *Gazette* or a widely circulating Newspaper, not less than 7 (seven) working days after the service of the petition or, not less than 7 working days of the date, the petition is fixed for hearing.

According to Mr Silas, this petition was filed on 4th March, 2021 and was served on the 1st Respondent on 21st April 2021. Mr Silas contended further that, as the records of the Court will indicate, on 13th April, 2021, 24th May 2021 as well as on 22nd June, 2021, the matter was called on for Mention before the same was fixed for hearing on 26th July 2021.

He submitted that, from the date fixed for hearing of this matter, the petitioner has not advertised the petition. Mr Silas insisted that, failure to comply with the Rule 99 of the GN No. 43 of 2005 renders the petition

incompetent. He placed reliance once again on the **Paumela's case** (supra). To conclude his submission, Mr Silas urged this Court to sustain the preliminary objection and strike out this petition with costs.

For his part, Dr Nshalla, was quite vociferous as he marshalled equally sober arguments against the objections, the submission made by the counsel for the Respondents and the striking out of the petition. To start with, Dr Nshalla premised his submission on Rule 4 of the High Court (Commercial Division) Procedure Rules, 2012 (as amended in 2019). He contended that, the Rule requires the Court, when adjudicating commercial related matters to have due regard to the need to uphold substantive justice.

Dr Nshalla submitted further that, a similar requirement is stipulated in Article 107 A (2)(e) of the Constitution of the United Republic of Tanzania and section 3A and 3B of the Civil Procedure Code, Cap.33 RE 2019, all of which require Courts to uphold substantive justice as their overriding objective.

As regards the first point of preliminary objection, Dr Nshalla submitted that, the petition was filed under section 281 of the Company Act Cap 212 R.E 2019, and, for that matter, it has nothing to do with section 275 of the Company Act. He contended that, under section 281 (1) of the Companies Act, contributors of the Company

are also allowed to file a petition in Court. He argued that, in this petition, the Petitioners have filed the petition against the 1st Respondent to be winding up and, since other contributors to the Company have interest in the 1st Respondent, that is the reasons why they should be impleaded or enjoined to the petition as well.

On a further submission, Dr Nshalla was of the view that, there is even in place a legal a requirement that an interest party to a case should be impleaded. As such, it was his argument that, the 2nd, 3rd, 4th and 5th Respondents have got an interest in the 1st Respondent and, that makes them necessary parties who ought to be impleaded.

Commenting on the **Paumela's case** (supra), the learned counsel was of the view that, the case should not be taken on board because it was held per in curium since it did not take into account the fact that a contributor can also be impleaded as a necessary party. He contended, therefore, that, it should be regarded as a bad law.

Dr Nshalla submitted further that, according to Order 1 rule 9 of the Civil Procedure Code Cap 33 R.E 2019, the law does not require suit to be defeated only because of joinder or non-joinder of a party. In his view, the principle in that rule is applicable since the rules of

this court emphasize that, if there is a lacuna in the Rules, then Civil Procedure Code should come into play.

Dr Nshalla was of a further submission, in the alternative, that, in case it is found that the 2nd, 3rd, 4th and 5th Respondents were wrongly impleaded, that fact should not warrant the striking out of the whole petition. Instead, he argued, the court can still proceed safely with other remaining party or, alternatively, make a finding that the 2nd to 5th Respondents are necessary parties whose presence, in case the petition is allowed, is essential for an effective decree to be issued.

To buttress that submission of his, he referred to this court the case of **Abdullatif Mohamed Hamis vs. Mehboob Yusuf Osman & another,** Civil Revision No.6 of 2017, (unreported), a case which defines who is a proper and a necessary party. He maintained that, in the absence of the necessary party the Court will end up passing a decree which will be of no effect.

As regards the second ground of objection, it was Dr Nshalla's submission that, the case of **Paumela Shayo (supra)** should be disregarded. He maintained that stance contending that, Rule 2 (6) of the GN No.43 of 2005 was not referred in that decision, while it is a pertinent rule that makes the reference to venue, as to the time, dates and place of proceeding attendance or meeting.

Although he does concede that Rule 99 of the said GN 43 of 2005, which the Respondents allege was not complied with, requires an advert to be caused to appear in either the Government Gazette or a Newspaper and requirement of what should be stated therein, Dr Nshalla has asked, however, how one could fix all those requirements and publish an advert in a newspaper while the venue is not certain to him? Is it not until one appears before the court and after obtaining an order of the Court concerning the publishing of such advert?

To cement the above submission, Dr Nshalla referred to this Court its own decision in the case of **China Chang Group Limited,** Misc. Cause No. 113 of 2017 (unreported). He argued that, as it may be observed from page 2 paragraph 2 of that case, it is this Court which made an order for advertisement. He contended, therefore, that, Rule 99 (2) of the Company (Insolvency) Rules, GN No. 43 of 2005, should be read harmoniously with rule 2(6) of the same, GN No. 43 of 2005, and should not be read disjointedly.

To further consolidate his argument, Dr Nshalla submitted that, this Court is enjoined to ensure that substantive justice is achieved. It was his views that, the 1st, 2nd, 3rd, 4th, and 5th Respondents were duly served and have entered appearance before the Court without anyone complaining about the service of the petition on

them. According to Dr Nshalla, the publication envisaged under Rule 99 (2) of the Company (Insolvency) Rules, GN No. 43 of 2005, is not meant for the Respondents but for the interested parties after a hearing date of the case has been fixed.

As regards the issue raised by the Respondents' counsel that the matter had already been fixed for hearing, Dr Nshalla was strongly opposed to that submission, noting that, all the summons or notices received were notices for mention and not hearing of the case. Nevertheless, Dr Nshalla was of the view that, in case this Court will find that the petition was indeed fixed for hearing and the petition was no advertised, then the Court is invited to take into account and be guided by the oxygen principle as enshrined under Article 107A (2) (e) of the Constitution of the United Republic of Tanzania and rule 4 of the Commercial Court Rules and, order that an advert regarding this winding up petition be made by the petitioners.

To strengthen his point, he referred to this Court the Court of Appeal decision in the case of **Yakobo Magoiga Gichere vs. Penina Yusuph,** Civil Appeal No. 55 of 2013, CAT, Mwanza, (unreported) stressing on the need to adjudge matters justly, taking into account the overriding principle.

In the alternative, Dr Nshalla contended that, if the 2nd 3rd, 4th, and 5th Respondents are wrongly impleaded, they will still be entitled to whatever costs which are to be paid. He contended that, costs heal wounds of a litigant. To support his submission, he relied on the case of **Shabani Fundi vs. Leornad Clement** Civil Appeal No. 38 of 2011. He, therefore, urged this Court to overrule the preliminary objection with costs as the objection does not promote the principle of fair and substantive justice.

In a brief rejoinder, Mr Silas, the Respondents' counsel, rejoined, submitting on the issue of joining the 2nd, 3rd, 4th, and 5th Respondents as the necessary party, that, such a submission was erroneous because, the same argument was rejected by this Court in the **Paumela'case**. He contended that, since this is a petition for the winding up of a company, it should have only impleaded the Company.

As regards the need to harmoniously read Rule 2 (6) of the insolvency Rules with the rest of the rules, he submitted that, the reasoning adopted by Dr Nshalla was erroneous because the law makes publication of the winding up petition mandatory as per Rule 99 (4) of the GN 43 of 2005. He contended that, if one reads Rule 99 (4) and Rule 102 (1) of the GN 43 of 2005, the order of the court is not required.

In his further rejoinder, Mr Silas refuted any need to rely on the overriding principle. He submitted that, it was a duty of every counsel to assist the court to arrive at the overriding objective and section 3 B of the Civil Procedure Code is of that effect. He contended that, he who fails to observe the law cannot call for the mercy of the Court as that will not be allowed.

In view of the above, it was Mr Silas views, therefore, that, the case of **Magoiga Gichere** (supra) is inapplicable to this petition. Besides, he was of the view that, the Insolvency Rules do not harbour a lacuna that calls for a need to resort to the provisions of the Civil Procedure Code. Consequently, the Respondents' learned counsel insisted that, the Case of **Paumela Shayo (supra)** was still a good case, as it has never been challenged anywhere. For those reasons, Mr Silas urged this Court to uphold the objection and struck out the petition with costs.

I have carefully considered the above rival submissions. The key issue I am called upon to determine in this ruling is, in my view: **whether the objections raised by the Respondents are meritorious or not.** I will start with the first ground of objection, regarding the issue of the cause of action.

As it might be seen, the Respondents are trying to convince this Court to believe that the petitioners have no

legal capacity of filing a winding up petition against the 2nd, 3rd, 4th, and 5th Respondents, who are not body corporate. They have argued orally and, by way of their skeleton written arguments, that, sections 275, 279 (1) (e) and section 281 (1), apply to the winding up of a company and cannot be used against a companies' members in their individual capacity.

On the other hand, the learned counsel for the Petitioner has maintained that, impleading the 2nd to 5th Respondents was essential as necessary parties and only for the purpose of ensuring that any decree of the Court issued will be effective. It was argued that, the Respondents are also contributors to the Company and they can legally be joined. The two rival submissions have indeed exercised my mind, taking into account the decision of this Court in the case of **Paumela's case** (supra). The case considered a somewhat similar issue as this one.

In that case, it was conceded, and the Court made a finding, that, the petitioners therein had no cause of action against the 2nd to 14th Respondents. His Lordship Robert, J., held that:

> "in a winding up petition such as this one, the application for winding up order is sought against the company and prompted by grounds related to the company intended to

> be wound up. The Procedure requires that, after advertisement of the petition in the Gazzete or newspaper, any person intending to appear at the hearing whether to support or oppose the petition, is required to give notice of such intention as directed in Rule 99(3) (g) of the Companies (Insolvency) Rules, 2005. Thus the petitioner is not expected to join any person he considers to have interest in the petition without following the laid down procedures."

In the end, the learned judge found merit in the second preliminary objection which was similar to the first point of objection raised in this present petition.

As it might be noted, Dr Nshalla has urged me to find that, the **Paumela's case** (supra) was held *per incurium* and, hence, a bad law. He reasoned that, the present petition was premised on section 281 of the Companies Act, Cap.212 [R.E 2002]. He observed that the 2nd to 5th Respondents as contributors to the Company have interest in the 1st Respondent, and, for that matter, they ought to be impleaded as necessary parties.

As such he has placed reliance on the Court of Appeal decision in the case of **Abdullatif Mohamed**

(supra) regarding who is a necessary party and contended that, in the absence of 2nd to 5th Respondents as necessary parties, the Court will end up passing a decree which will be of no effect. Besides, he has invited this Court to take into account Order 1 rule 9 of the Civil Procedure Code, Cap.33 R.E 2019 which provides that a suit need not be defeated by reason of misjoinder of parties.

I have carefully considered those submissions by Dr Nshalla. First, and with due respect, I find it inappropriate for me to make a holding that the decision of my brother Judge Hon. Robert, J., in **Paumela's case** (supra), was a decision held *per incurium*.

To me, that will be going too far a mile, far beyond the *Biblical two mile*, in my view, simply because, stating whether Hon. Robert J., was right or wrong is not within my purview. If I do, I will be vesting on myself a mantle which is not mine. Perhaps the only and appropriate way he should have put it was to say that the decision is distinguishable. Even so, he would not have won the day because that is not even the case here as I find it properly befitting and within the factual matrix of the present case.

Moreover, as it was once stated in the case of **Bank of Africa Tanzania Ltd v Nakumatt Tanzania Ltd & 3 Others,** Commercial Case No.151 of 2019

(HCCoDv), (unreported), it is not advisable, as a matter of practice, comity and rationality, to easily depart from a decision of a brother or sister Judge unless one finds truly cogent reasons to do so.

I think there is yet another reason while I respectfully decline to take on board the line of reasoning taken by Dr. Nshalla, the learned counsel for the petitioners, concerning the impleading of the 2nd to the 5th Respondents as contributories and, hence, necessary parties. As it may be noted from his submissions, from the beginning, he seems to have argued that way and brought into his submission the provisions of the C.P.C, because he feels that the 2nd and 5th Respondents are not strangers to the Company.

In essence, as it was stated by the Privy Council in the case of **Price waterhouse Coopers (Appellant) v Saad Investments Company Limited (Respondent)** [2014] UKPC 35, on paragraph 31:

> "[a]s a general proposition, it is no doubt correct that a court will not normally be prepared to entertain submissions from strangers to a winding up on the issue whether a winding up order should, or should not have been, made." (Emphasis added).

From the English Company law perspective, the law on the question as to who can be heard as of right in a

winding-up proceeding is set out in paragraph 1028 in Volume 7 of **Halsbury's Laws of England (4th Edition)** thus:

> "....Only the petitioner, the company, and creditors and contributories are entitled to appear on the petition; other parties have no right to be heard, and, even if court of first instance elects to hear them as *amici curiae*, they have no right of appeal."

That position under the English law was also captured in paragraph 30 of the **Price waterhouse Coopers'** case (supra) where the Privy Council had the following to say, that:

> "So far as the first reason is concerned, it is perfectly true that PwC can be described as strangers to the winding up, as they are not the company itself, nor the Official Receiver, the liquidators, contributories or creditors. It is also true that there is a fair amount of authority to support the propositions that (i) a person who is not within those classes, and therefore is a stranger to the winding up, cannot be heard on a winding up petition, and (ii) a person who could not be heard on the winding up petition does not have locus

subsequently to challenge the making or continuation of the winding up order...."

That general English legal position, emanated from an old Company law decision of the English Court **In re. Bradford Navigation Company** (1870) LR 5 Ch App 600, where Sir W.M. James, L J. observed at page 601 thus:

> "I am of opinion that this preliminary objection must prevail. It appears to me that the Appellants' argument is based upon a misconception of what a winding-up order and what a winding-up petition is. It is a substitute for a suit for winding-up a partnership. It is a power applicable by the Act of Parliament to corporations as well as to unincorporated societies. Partners have a right to file a bill one against the other, and to have the usual decree for the administration of the partnership property, and for the settling of the partnership accounts and liabilities. In the case of large companies, winding-up was thought to be a more convenient course than a common partnership suit, but in every other respect it is the same. In a common partnership suit nobody can be made a party, or can be heard, except the partners themselves, and, originally, a winding-up was the same

thing. Contributories were the only persons who could be heard; but as creditors were interfered with by the operation of the winding-up, the Act of Parliament has made a winding-up a matter both for creditors and contributories. A creditor may present a petition for winding-up, and both creditors and contributories are heard upon that; but it is new to me to say that any person who has an interest in, or a right to or in respect of, some of the property of the company, large or small, has right to appear as a litigant here, because that company chooses to apply for an order with respect to itself. In this case the company was desirous of being wound up. I am of opinion that the winding-up order does not in the slightest degree derogate from any right whatever which any member of the public has with respect to this canal The winding- up will deal with such rights as the partners in the partnership can deal with themselves. The Court will deal with it just as the partners themselves could have dealt with it"...In the Court below the Court might very well say to a person so situated, "I should be glad to hear you as amicus curiae, if you have an interest, that I may know what public

> grounds there are." There the Court might use its discretion, and think it right to hear such an objection; but when it comes before me on a Petition of Appeal from the Order, then the Appellant must show that he fills some character in which he has a right to litigate with the company. I am of opinion that he does not fill any such character, and that the Petition of Appeal must be refused with costs."

In the present petition, therefore, it is basically and, indeed correct to say that the 2nd to 5th Respondents are not totally strangers to the Company (the 1st Respondent). As correctly stated by Dr Nshalla, these Respondents are interested parties to the Company not only as contributories but also shareholders of the Company. However, while Dr Nshalla's reasoning and submission could be applied in a different scenario, (in that, indeed the 2nd to 5th Respondents can and have a right to be heard in a petition affecting their interests), I find, on the other hand, that, such reasoning cannot be tenable in light of the stage at which these Respondents were impleaded in this petition.

I hold that view because; the concept of necessary party in the context of this petition, would have been appropriately applied if the 2nd to 5th Respondents were brought into the scene **after** the state of filing and

advertisement of the petition and in compliance with the applicable procedural requirements laid down by the Companies (Insolvency) Rules, 2005.

In my view, therefore, the 2nd to 5th Respondents cannot be impleaded prior to the stage of advertisement envisaged under Rule 99(1) of the Companies (Insolvency) Rules, 2005. Impleading the 2nd to 5th Respondents in the petition right away from its conception is tantamount to jumping the gun in total disregard of the laid down rule.

From the foregoing discussion, it means, therefore, and as my learned brother Judge, His Lordship Robert, J., correctly stated in **Paumela's case** (supra), that, *"the petitioner(s) [are] not expected to join any person [they] [consider] to have interest in the petition without following the laid down procedures."* To that effect, the first ground of objection has merit and, the decision of this Court in **Paumela's case** (supra) needs to be followed even in this case.

I could have ended my discussion here. However, in his submission, Dr Nshalla has relied (as an alternative view) on the provision of Order 1 rule 9 of the Civil Procedure Code, Cap.33 R.E contending that, in case a finding is made that the 2nd to 5th Respondents were wrongly impleaded, then the petition should be spared. In the **Abdullatif Mohamed's case** (supra), the Court of

Appeal had the chance of discussing Order 1 rule 9 of the Civil Procedure Code, Cap.33 R.E 2019. The Court stated that, Order 1 rule 9 of the Code, "*only holds good with respect to misjoinder or non-joinder of non-necessary parties.*"

As I stated herein above, the 2nd to 5th Respondents are indeed necessary parties entitled to take part in the proceedings, but their involvement in it is regulated by the law in the sense that, there is a prescribed modality of their involvement or impleading as explained herein earlier. As such, since they are not totally strangers to the petition, the finding that they were wrongly impleaded cannot have the dispositive potent in itself but gives the Court the opportunity to make necessary orders should that be found to be appropriate.

That being said, what about the rest of preliminary objections raised by the Respondents? The second ground of objection is to the effect that, the Petition is bad in law for want of advertisement in the Gazzette or newspaper as required by Rule 99(1) of the (Insolvency) Rules, 2005. In their submission, the Respondents have urged this Court to uphold the objection, reliance being had on the decision of this Court in **Paumela's case** (supra). The Petitioner's learned counsels have vehemently objected to the submission. If I understood the Petitioners submission, they consider it that, the

advertisement was not warranted without there being an order of the Court.

To begin with, the requirement to publish or rather advertise a petition filed in Court is a requirement under Rule 99 (1) of the (Insolvency) Rules, 2005. However, I find it pertinent to state that, the right premises upon which this Court may approach the second objection in a manner that brings sense to its subject is by way of considering or asking one simple question, that is to say: **looking at the entire provision of Rule 99 of the Companies (Insolvency) Rules, 2005, is that provision mandatory or directory?**

To respond to the above, one has to interpret or get the real import and intent of that respective provision. Essentially, it is the duty of courts of justice to try to get at the real intention of the Legislature's enactment of a particular piece of legislation. That intention is usually discovered by carefully attending to the whole scope of the statute to be considered. It is also settled that, a statute, or one or more of its provisions, may be either mandatory or directory.

According to **Crawford, Statutory Construction, 3rd Edn, Vol.III, page 104**:

> "While usually in order to ascertain whether a statute is mandatory or directory, one must apply the rules relating to the construction of statutes;

> yet it may be stated, as general rule, that those whose provisions relate to the essence of the thing to be performed or to matters of substance, are mandatory, and those which do not relate to the essence and whose compliance is merely a matter of convenience rather than of substance, are directory."

In the Indian case of **DA Koregaonkar v State of Bombay** AIR 1958 Bom 167, the Court held that, one of the important tests that must always be employed in order to determine whether a provision is mandatory or directory in character is to consider whether the non-compliance of a particular provision causes inconvenience or injustice and, if it does, then the court would say that, the provision must be complied with and that it is obligatory in its character.

In this present Petition, the wordings used in Rule 99 (1) to (4) of the Companies (Insolvency) Rules, 2005 are: "shall" (in 99 (1) and (2), "must" (in 99 (3) and "may" (in 99 (4)). As it may be observed, from sub-rule (1) to (3) of the Rule, the provisions are of mandatory nature and not merely directory. Their mandatory nature is better understood from the consequences that may follow if they are disregarded. As it may be observed under Rule 99 (4) of the Companies (Insolvency) Rules,

failure to advertise the Petition invites either a dismissal or if not a dismissal, then its being struck out.

In this petition, Mr Silas, the learned counsel for the Respondents, has submitted that, the petition was not advertised. In essence, the Petitioners have not denied that fact, only that, they contend the timing when the advertisement ought to have been made. According to Dr Nshalla, and relying on the decision of this Court (Sehel, J (as she then was), in the case of **China Chang Group Limited,** Misc. Cause No. 113 of 2017 (unreported), an advertisement must be made by an order of the Court. He has contended further that, Rule 99 (2) of the Company (Insolvency) Rules, GN No. 43 of 2005, should be read harmoniously with rule 2(6) of the same, GN No. 43 of 2005, and should not be read disjointedly.

Indeed, it is a general rule of interpreting statutes that, a statute must be read as a whole. As such, the language of one provision may affect the construction of another. However, before one goes to that holistic approach proposed by Dr Nshalla, it is imperative to note that, the starting point with regard to advertisement of a Petition is not Rule 2 (6) and 99 (2) of the Company (Insolvency) Rules, GN No. 43 of 2005 but rather Rule 99 (1) of the said GN No. 43 of 2005. That provision states as follows:

> "99(1) Unless the Court otherwise directs, the petition shall be advertised

> once in the Gazzette and once in a daily newspaper widely circulating in Tanzania."

As stated earlier herein, Rule 99(1) of GN No. 43 of 2005 cited above is mandatory in nature, requiring that a Petition be advertised unless the Court directs otherwise. Rule 99(2) (b) of GN No. 43 of 2005 (which is relevant to the discussion) provides as follows:

> "(2) The advertisement shall be made in Gazzette or newspaper-
> (b) otherwise, not less than 7 working day after service of the petition on the company, or less than 7 working days before the day so appointed".

The above provisions have no ambiguity in them. They are very clear regarding the timing within which an advertisement should be published. It was the submission by Mr Silas for the Respondents that, the Petition was filed on 4th March 2021 and served on the Respondents on 21st April 2021. As the record indicates, it was set for mention on 13th April 2021; 24th May 2021; 22nd June 2021 a date when it was finally set for hearing on 26th July 2021.

From the above facts and taking onto account the position of the law in Rule 99(1) and (2) (b) of the of GN No. 43 of 2005, one would have expected it to have been published either on 28th April 2021 (which is 7 days after

it was served on the Company) or 19th July 2021 (which is 7 days before the appointed day of its hearing).

In my view, this Court cannot buy the submission made by Dr Nshalla to the effect that there should have been an order of the Court before the advertisement is made and that he did not know when the hearing was to take place and the venue. Indeed, it is on record that on the 22nd June 2021 when the parties appeared before Hon. B.M Lema, Ag.DRCC (RM), the Petitioners were represented by Advocate Nyaronyo Kicheere while the Respondents were represented by Mr Silas John, learned Advocate.

The Court made the following orders:

*"**ORDER**: Hearing on 26/7/2021*
at 11:00am.
Parties to appear.
SGD.
22nd JUNE 2021.

From the foregoing, I do not see how the submission made by Dr Nshalla that it was impossible to know the venue and time of the hearing so as comply with Rule 99 (2) of GN No. 43 of 2005 can be accepted even if one is to read it together with Rule 2(6) of the same of GN No. 43 of 2005. Nothing is obscure concerning what it provides and what was demanded in compliance. Being a procedural provision of mandatory nature goes to the root of the petition itself and that is the reason why non-compliance with it attracts the

sanctions provided for under Rule 99(4) of GN No. 43 of 2005.

In his submission, however, Dr Nshalla has sought refuge in the overriding principle citing Article 107A (2)(e) of the Constitution of the United Republic of Tanzania and section 3A and 3B of the Civil Procedure Act, Cap.33 RE 2019. He argued that, should the Court find that the objection is merited, then it should rely on those provisions to uphold substantive justice of the parties. He referred to this Court as support for his submission, the decision of the Court of Appeal in the case of **Magoiga Gichere** (supra).

For his part Mr. Silas was opposed to that view and stated that, the case of **Magoiga Gichere** (supra) is inapplicable to this petition. He contended further that, the Insolvency Rules do not harbour a lacuna that calls for a need to resort to the provisions of the Civil Procedure Code. However, on my part, and without being bothered as to whether Insolvency Rules harbour or do not harbour a lacuna that calls for a need to resort to the provisions of the Civil Procedure Code, I find it difficult to toe the line of argument taken by Dr Nshalla. I hold that view because, as I stated herein above, Rule 99 (1) and (2) (b) of GN No. 43 of 2005, is a procedural rule of mandatory nature.

In the case of **Mondorosi Village Council & 2 Others vs. Tanzania Breweries ltd & 4 Others** (Civil Appeal No.66 of 2017) [2018] TZCA 303; (13 December 2018) the Court of Appeal of Tanzania had the following to say regarding the applicability of the Overriding Objective Principle. In particular the Court stated as follows:

> "Regarding the overriding objective principle, we are of the considered view that, **the same cannot be applied blindly against the mandatory provisions of the procedural law which go to the very foundation of the case.** This can be gleaned from the objects and reasons of introducing the principle under section 3 of the Appellate Jurisdiction Act [CAP 141 R.E. 2002] as amended by the Written Laws (Miscellaneous Amendments) (No. 3) Act No. 8 of 2018, which enjoins the courts to do away with technicalities and instead, should determine cases justly. According to the Bill to the amending Act, it was said thus:
>
> > "The proposed amendments are not designed to blindly disregard the rules of procedure that are couched in mandatory terms...."

It is on the basis of the above law, and with due respect, that, I find it difficult to pursue the trajectory line of thinking taken by Dr. Nshalla. I thus agree with Mr. Silas' submission that, the case of **Magoiga Gichere** (supra) is inapplicable to this petition as the Petitioners cannot rely on the overriding objective principle to rescue their own inaction or non-compliance with the mandatory provision of the GN.No.43 of 2005.

In the upshot, I do find merit in the two objections filed in this Court against the Petition and, on the basis of the lengthy discussion which I held herein, I proceed to uphold the two objections. That being said, I strike out this Petition with costs.

It is so ordered

DATED at **MWANZA**, this **29TH** Day of **JULY 2021**

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HON. DEO JOHN NANGELA
JUDGE,

HIGH COURT OF TANZANIA
COMMERCIAL DIVISION