IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: LUBUVA, J.A., MROSO, J.A., And NSEKELA, J.A.)

CIVIL APPEAL NO. 106 OF 2002

BETWEEN

GAUTAM JAYRAM CHAVDA.....APPELLANT
AND
COVELL MATTHEWS PARTNERSHIP LTD.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Chipeta, J.)

dated the 18th day of October, 2001
in
Misc. Civil Cause No. 62 of 2000

J U D G M E N T

LUBUVA, J.A.:

This is an appeal against the ruling of the High Court (Chipeta, J.). The facts giving rise to this appeal are simple and short, they may be stated as follows: The appellant, Gautama Jayram Chavda petitioned for the winding up of the respondent company.

When the petition was called on for hearing, counsel for the respondent raised a preliminary objection that the petitioner, the appellant, had no locus standi to file the petition. Sustaining the

preliminary objection, the learned judge struck out the petition on the ground that the appellant was neither a shareholder nor a creditor in terms of the provisions of section 167 of the Company's Ordinance, Cap.212 of the Laws. As already observed, the appellant, aggrieved by the decision, has appealed to this Court.

The three grounds of appeal complained that:

1. The learned Judge erred in dismissing the appeal

2. The learned Judge erred in considering and relying on annexure/documents attached to the Answer which was filed out of time.

3. The learned Judge erred in making findings of facts without evidence having been given.

Mr. Marando, learned counsel for the appellant, faulted the learned trial judge for finding that the appellant was neither a share holder nor a creditor. He argued as his first ground that the trial judge did not set out fully the provisions of section 167 of the Companies

Ordinance which relate to the circumstances in which a company may be wound up by the court. Paragraph (e) of section 167 which is relevant to the case was not reproduced.

Had the learned trial judge considered the provisions of this paragraph together with the fact that the petition revealed among other things, that the appellant had a claim against the respondent and that the respondent was unable to pay its debts, he would have found that one of the circumstances for winding up of the respondent company under section 167 had been established. In support of this submission, Mr. Marando called the attention of the Court to the book by the learned author, D.J. Bakibinga Company Law in Uganda pages 263 - 264. Once it is accepted and found that the circumstance under paragraph (e) of section 167 had been established in this case, it followed that grounds for winding up by the appellant had been established.

Responding to this submission, Miss Sheikh, learned counsel for the respondent, was firmly of the view that the provisions of

paragraph (e) of section 167 of the Companies Ordinance was not in issue in this case. This is so, she said, because the appellant had not established his status as a creditor or as share holder. Not being a creditor, the appellant had no legal basis upon which to file the petition for winding up under the provisions of section 169 of the Companies Ordinance. Furthermore, she said that even if the trial judge had considered the provisions of paragraph (e) of section 167 of the Companies Ordinance as contended by the appellant, still it would not make any difference in the case. She contended that the learned trial judge would have come to the same decision because the respondent company was not unable to pay its debts. After all, she further stated, the appellant was claiming only 25% of the respondent's credit worth.

The issue is straightforward; namely whether the circumstance set out under paragraph (e) of section 167 of the Ordinance were considered. On this we think we need not be detained. From the ruling of the learned trial judge, it is clear that he did not consider the fact that the respondent was unable to pay its debts as alleged by the appellant. It was perhaps for this reason that in reproducing

the provisions of section 167, paragraphs (e) was omitted. Paragraph (e) of section 167 provides:

(e) the company is unable to pay its debts.

So, the pertinent question is whether it had been established that the respondent was unable to pay its debts in terms of the provisions of paragraph (e).

It is common knowledge that where it is shown that the respondent company was unable to pay its debts, then one of the circumstances warranting the winding up of the company would be available. We are reinforced in this view by the learned author D.J. Bakibinga in his views expressed in the book Company Law in Uganda at page 264. In part, it is stated that: "once the court is satisfied that the company is insolvent, it would grant a winding up to a petitioner who is owed money by the company". In this case, from the petition, it is apparent that repeated demands were made to the respondent to pay the appellant 240.5 Million shillings to no avail. The appellant alleges that the respondent was insolvent. It is

important and relevant at this juncture to examine how the respondent addressed the allegation raised in the petition. To this, we will shortly advert to.

In that regard, Mr. Marando took up the second limb of his ground of appeal. It was his contention that from the pleadings and the annexures thereto, the respondent did not have lawful pleadings in the court record. In elaboration, he said in terms of rule 29 of the Companies (Winding-up) Rules, 1929, the appellant as petitioner filed a verifying affidavit of the petition on 29.3.2000 together with the petition. This, Mr. Marando urged, in terms of rule 29, was sufficient prima facie evidence of the statements in the petition. He went on to submit that under rule 35 (1), the respondent did not file an affidavit in opposition to the petition within seven (7) days from 29.3.2000, when the petition and the verifying affidavit were filed.

Furthermore, Mr. Marando submitted that according to this rule (35 (1)), a notice of the filing of the affidavit in opposition shall be served on the petitioner. In this case he maintained that neither the affidavit in opposition to the petition nor the notice were filed and

served on the appellant. In the circumstances, because of failure on the part of the respondent to comply with the mandatory requirement of rule 35 (1) to file the affidavit in opposition and serve the notice of the filing on the appellant, the respondent did not have proper pleadings in the court record.

According to Mr. Marando, from the record, the respondent instead of filing an affidavit in opposition, filed an answer to the petition on 30.5.2000. This, he maintained, is not an affidavit in opposition in terms of rule 35 (1), it should not therefore have been looked at or considered. On the other hand, he argued that even if it is taken that the answer to the petition was a substitute to the affidavit in opposition, it was not filled within seven days of the date when the affidavit verifying the petition was filed, namely 29.3.2000. This is so, Mr. Marando emphasized, because the answer to the petition was filed on 30.5.2000, a period long after the statutory period of seven days.

In summary, Mr. Marando submitted that in the absence of an affidavit in opposition to the petition, there was no credible evidence

to controvert the appellant's statements in the affidavit in support of the petition. He added that in that situation there was sufficient material evidence on record to show that the appellant was a creditor of the respondent company which was unable to pay its debts. Had the learned judge addressed the matter in this light, he would have come to the conclusion that circumstance under section 167 of the Companies Ordinance had been established, Mr. Marando contended. Consequently, Mr. Marando concluded, the learned judge would have found that the appellant had locus standi in this matter.

With regard to the filing of affidavit in opposition to the petition, Miss Sheikh conceded that no such affidavit was filed. She said the circumstances of the case were such that there was no chance for filing the affidavit. However, even though the respondent did not have the chance of filing a proper affidavit in opposition, an answer to the petition was filed by the respondent on 30.5.2000. In spite of that however, Miss Sheikh claimed that there was sufficient material based on the pleadings upon which the learned trial judge correctly came to the conclusion that the appellant was neither a

share holder nor a creditor and thus had no locus standi in the matter.

Earlier in this judgment, we had indicated that we shall advert to the response of the respondent to the petition filed by the appellant. There is no gainsaying that once a petition for winding up of a company is filed, under the provisions of rule 35 (1) of the Companies (Winding-up) Rules, it is mandatory for the respondent to file an affidavit in opposition within seven days of filing the petition and the verifying affidavit. In this case, the petition was filed on 29.3.2000 and the record shows that no affidavit in opposition was filed.

On this, Miss Sheikh, learned counsel for the respondent concedes that in the circumstances of the case, the respondent had no chance of filing the affidavit. So, it is accepted that the mandatory requirement of rule 35 (1) was not satisfied, for whatever reasons aforementioned by Miss Sheikh. What is the effect of failing to file the affidavit in opposition to the petition for winding up in the matter before us. In an attempt to respond to this question Miss

Sheikh was quick to point out that an answer to the petition was filed on 30.5.2000. With respect, Miss Sheikh, is not correct on this point. Where the law clearly provides for an affidavit in opposition to be filed, a reply to the petition cannot in anyway be a substitute for the affidavit. In any case, even if the reply to the petition were accepted as a substitute to the affidavit in opposition, it was filed long after the expiry of seven days from 30.3.2000, when it was filed. It should not be looked at and considered at all, as urged by Mr. Marando. We are therefore in agreement with Mr. Marando that no proper legal reply was furnished to the petition by the appellant. The averment in the pleadings by the appellant remained, as it were, uncontroverted.

As observed earlier, circumstance (e) of section 167 of the Ordinance had not been addressed by the learned trial judge. In this paragraph, the circumstance is that the respondent was indebted and unable to pay the appellant. Whether this was so or not, it was an aspect which could be explained or controverted by the respondent in the pleadings. As happened in this case, the issue raised in the petition for winding up has not been controverted in the pleadings as no affidavit in opposition was filed in terms of rule 35 (1). The

answer in reply to the petition filed on 30.5.2000 does not satisfy the requirement of the law either. In the circumstances, the appellant's assertion in the petition that the respondent was indebted to him and that the respondent company was unable to pay the debt stands uncontroverted. In that case, the debt claimed by the appellant at least until the time the matter was before the trial judge, was not disputed in the pleadings. It is our view that in that situation, unlike the case of in Mann And Another V Goldstein And Another (1968) All E.R. 769, where the winding up petition was based on a disputed debt, the existence of the debt has not legally been disputed. It follows therefore, that the appellant had locus standi to present the petition. If the debt had been disputed, the position would be different because it is trite principle that a disputed debt cannot be used in a winding up proceedings – see for instance, Re Tanganyika Produce Agency Limited (1957) E.A. 241 and Re Lympare Investments Ltd. (1972) 2 All E.R. 385.

In recapitulation, having regard to the circumstances of the case, we are satisfied that the learned trial judge erred in not addressing and finding that the circumstance under paragraph (e) of

section 167 of the Ordinance had been shown. Had the learned trial judge done so, we think he would have found that the appellant was a creditor. Furthermore, we are also of the settled view that had the trial judge properly directed himself to the facts and circumstances of the case as well as the applicable law, he would have found that the appellant's petition had not been replied by way of an affidavit in opposition. For these reasons, the learned trial judge should have come to the conclusion that the appellant had locus standi to present the petition for winding up of the respondent company. It was an error to hold otherwise.

In the upshot, we allow the appeal and set aside the order of the High Court of 18.10.2002 sustaining the preliminary objection. It is further ordered that the case is to be remitted to the High Court with direction to proceed with the hearing on merit before another judge from the stage reached before the preliminary objection was raised. Costs to the appellant.

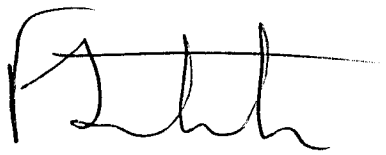
DATED at DAR ES SALAAM this 7th day of October, 2003.

D. Z. LUBUVA
JUSTICE OF APPEAL

J. A. MROSO
JUSTICE OF APPEAL

H. R. NSEKELA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.



(F. L. K. WAMBALI)
DEPUTY REGISTRAR