IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: OTHMAN,C.J., MSOFFE, J.A., And RUTAKANGWA ,J.A.)

CIVIL REVISION NO. 1 OF 2012

STANDARD CHARTERED BANK
(HONG KONG) LTD.....APPLICANT

VERSUS

1. **MECHMAR CORPORATION (MALAYSIA) BERHAD**
2. **VIP ENGINEERING AND MARKETING COMPANY LTD**
3. **INDEPENDENT POWER TANZANIA COMPANY LTD**
4. **THE LIQUIDATOR OF IPTL/OFFICIAL RECEIVER**
5. **THE ATTORNEY GENERAL**
6. **THE BANK OF TANZANIA**
7. **TANZANIA ELECTRIC SUPPLY COMPANY LTD**
8. **TANZANIA REVENUE AUTHORITY**

.....RESPONDENTS

(Revision from the Proceedings, Rulings and Orders of the High Court of Tanzania at Dar es Salaam)

(Kaijage, J.)

dated the 16th day of March, 2012
in
Misc Civil Cause No 49 of 2002, Misc. Civil Cause No. 254 of 2003, Misc. Civil Cause No. 5 of 2009 and Misc Civil Cause No. 112 of 2009

RULING OF THE COURT

19th November, & 17th December, 2012

OTHMAN, C.J.

This revision by the Court, *suo motu*, proceeds under section 4(3) of the Appellate Jurisdiction Act, Cap 141 R.E. 2002 and Rule 65 of the Court of Appeal Rules, 2009. It concerns Misc. Civil Cause No. 5 of 2009 (the first

Administration Petition), Misc. Civil Cause No. 112 of 2009 (the Second Administration Petition), Misc. Civil Cause No. 49 of 2002 (the Winding up or Unfair Prejudice Petition) and Misc. Civil Cause No. 254 of 2003 (the Arbitration Award Petition), the last two of which were consolidated by the High Court (Oriyo, J. as she then was) on 31/07/2007.

At the hearing of the revision on 19/11/2012, the parties were represented by the following learned Counsel: Standard Charted Bank (Hong Kong) Ltd (S.C.B.), (the Applicant) by Mr. Charles Morrison; Mechmar Corporation (Malaysia) Berhad (1st Respondent) by Mr. Melchisedeck Lutema; VIP Engineering and Marketing Company Ltd (2nd Respondent) by Mr. Cuthbert Tenga, Mr. Michael Ngalo and Mr. Respicius Didace; Independent Power Tanzania Company Ltd, (I.P.T.L.) (3rd Respondent) and The Liquidator of IPTL/Official Receiver of I.P.T.L. by Mr. Joseph Makandege; The Hon. Attorney General (5th Respondent) by Mr. Obadia Kameya, Principal State Attorney; the Bank of Tanzania (6th Respondent) by Mr. Ismail Mustapha; Tanzania Electric Supply Company Ltd (7th Respondent) by Mr. Godwin Simba Ngwilimi, Mr. Howa Hiro Msefya and Mr. Stephen Urassa; and Tanzania Revenue Authority (8th Respondent) by Mr. Juma Beleko.

We are highly indebted to learned counsel for their in-depth written submissions.

Taking the matter from its recent past, on 9/04/2009, in Civil Revision No 1 of 2008, the Court ruled and directed:

> *"We declare the proceedings before Mihayo, J. (i.e. Misc. Civil Cause No. 5 of 2009) from 23rd January, 2009 to 27th January, 2009, a nullity. Together with the rulings, orders and directions made therein, they are hereby revised, quashed and set aside. We accordingly order a fresh hearing before another judge. The Provisional Liquidator, the Company, VIP and/or any other creditor(s) should be afforded opportunity to make their own representations in the petition".*

Given the import of the order made, it follows that the starting point to be attended to in this revision is whether or not Misc. Civil Cause No 5 of 2009 was properly withdrawn on 14/09/2009 and correctly substituted by Misc. Civil Cause No 112 of 2009, which was filed by the Applicant at the High Court on 17/09/2009.

Mr. Morrison submitted that S.C.B. was, *ex debito justitiae* (as of right) entitled to present Misc. Civil Cause No 112 of 2009 as it did.

Mr. Lutema submitted that unless at some point in time S.C.B. had properly withdrawn Misc. Civil. Cause No. 5 of 2009, the filing of Misc. Civil Cause No 112 of 2009 would have been an abuse of the process of the court.

Forcefully opposed, Mr. Ngalo, Mr. Tenga and Mr. Didace contended that S.C.B. had violated the order of the Court in Civil Revision No 1 of 2009. Relying on **Heykel Berete V. Dero Investment**, Civil Revision No. 1 of 2010 (C.A.T.) (unreported) they too urged that this amounted to an abuse of process of the court.

Echoing the same line of argument, Mr. Kameya submitted that in Civil Revision No. 1 of 2009, the Court had ordered a rehearing of Misc. Civil Cause No 5 of 2009. S.C.B. was not at liberty to withdraw and refile.

On their part, Mr. Ngwilimi, Mr. Msefya and Mr. Urassa submitted that as S.C.B. filed Misc. Civil Cause No. 112 of 2009 on 17/09/2009 well after the appointment of the Provisional Liquidator of I.P.T.L. on 06/12/2008, this went contrary to section 288 of the Companies Act, No 12 of 2002, which is in *pari materia* to section 176 of the Companies Ordinance, Cap 212 R.E. 2002, which provided that no action or proceeding shall be proceeded with or commenced against the company except with leave of the court, once a Provisional Liquidator has been

appointed. That as no such leave was sought and obtained by S.C.B., Misc. Civil Cause No 112 of 2009 cannot legally subsist. This rendered it incompetent.

Now, Section 248(2)(b) of the Companies Act provides:

"248(2) **Where a petition is presented to the court**

(a).....

(b) **the petition shall not be withdrawn except with leave of the court.**" (Emphasis added).

Having closely examined the record, it is plain therein that on 14/09/2009 the High Court (Kaijage, J.) on oral application by S.C.B. granted it leave to withdraw Misc. Civil Cause No. 5 of 2009, with liberty to file a fresh petition. On 17/09/2009 S.C.B. filed Misc. Civil Cause No. 112 of 2009 under sections 247(1) and 248(1) of the Companies Act. With respect, we think that section 248(2)(b) was complied with. The petition had been properly lodged in Court.

An examination of the record reveals that, Misc. Civil Cause No 5 of 2009 could not have proceeded with its contents intact as originally filed on 22/01/2009. I.P.T.L. (3rd Respondent), V.I.P Engineering and Marketing company Ltd. (2nd Respondent) and The Liquidator/Official Receiver of I.P.T.L. (4th Respondent) then the Provisional Liquidator, were not

impleaded therein. Moreover, paragraph 2 of that petition for an Administration order had categorically stated that it was not intended that it be served upon any party, save as directed by the High Court. Paragraph 2 of the second Administration Petition, Misc. Civil Cause No. 112 of 2009 now reads:

> *"It is intended to serve this Petition upon the Provisional Liquidator of the Company (i.e. I.P.T.L.), the Company and any creditors of the Company who require to be heard."*

It is worth recalling that the principal issue in Civil Revision No 1 of 2009 was whether or not it was proper for the High Court (Mihayo, J.) to grant S.C.B. an administration order *ex parte*, without notice having been issued to any of the interested parties. The Court held that this ran contrary to the right to a fair trial, including the fundamental right to be heard before adverse action or decision is taken against a party. It vitiated the proceedings in Misc. Civil Cause No 5 of 2009.

When all the above is reconsidered, no impropriety can be said to have occurred in the procedure employed by the applicant and the order given by the learned Judge.

The 7th respondent had vehemently challenged the legal subsistence of Misc. Civil Cause No 112 of 2009 under section 288 of the Companies Act, which is in *pari materia* to section 176 of the Companies Ordinance, as it was an action or proceeding against the Company (I.P.T.L.) that had only commenced on 17/09/2009 when Misc. Civil Cause No. 112 of 2009 was filed, a time well after the Provisional Liquidator of I.P.T.L. had been appointed by the High Court (Oriyo, J.) on 16/12/2008.

Section 288 of the Companies Act provides:

> *"288. When a winding up order has been made or an interim liquidator has been appointed under section 295, no action or proceeding shall be proceeded with or commenced against the company except by leave of the court and subject to such terms as the Court may impose."*

It should be noticed at once that the objection here mirrors the very ground of challenge mounted by the 2nd and 5th Respondents in firmly resisting the propriety and legality of Misc. Civil Cause No 112 of 2009 under section 249(1)(c) of the Companies Act. For convenience, we shall consider the issue together.

Mr. Morrison lucidly submitted that the concept involved in Administration orders, known in other jurisdictions as the "corporate rescue culture" which was introduced into Part VII, Chapter II of the Companies Act has among its purposes under section 247(3) thereof, the survival of the company and the whole or any part of its undertakings as a going concern or a more advantageous realisation of the company's assets that would be effected by a winding up. He argued that Misc. Civil Cause No 112 of 2009, is in specie neither an action nor a proceeding against I.P.T.L. It was also not a plaint claiming damages. Relying on **Re MTI Trading Systems Ltd & Others** (1998) B.C.C. 400 and **In re Atlantic Computer Systems PLC** (C.A.) (1992) Ch.505 he submitted that such proceedings were intended for the rescue of the company. They were meant to save it from its certain death by a winding up order.

We are alive, one side to the caution drawn by Mr. Lutema for the Court not to usurp the powers of the High Court in addressing issues reserved at first instance to it, and on the other hand, the invitation by Mr. Kameya for us to guide that Court by determining the applicable law. Given the protracted nature of the litigation; the issues raised in this revision; the strength of the parties submissions and the need for an expedited resolution of the matters in court, we think that, exceptionally, it is best

that we attend to the legal points raised. We are not unmindful of Mr. Tenga's proposition, which we entirely agree with, that issues such as whether or not the Applicant has *locus standi* or is a creditor of I.P.T.L. or not, must first and foremost be taken up and resolved by the High Court.

We are not a shed persuaded that Misc. Civil Cause No 112 of 2009, is a suit, as strenuously argued by the 5th respondent. The law and procedures on Company Administration, encapsuled in Part VII, Chapter II, Administration Orders, sections 247 -274 of the Companies Act are a significant replica of Part II, Administration Orders, sections 8-27 of the Insolvency Act, 1986 of England, introduced following the adoption of the *Report of the Review Committee on Insolvency Law and Practice* (Comm 8558, 1982) (The Cork Report). Since, the Enterprise Act, 2002 has largely enhanced the administration procedure.

On our part, and for the reasons we shall endeavour to give in due course, section 288 of the Companies Act, contained in Part VIII, Chapter 2, *Winding up by the Court*, does not apply to Misc. Civil Cause No. 49 of 2002. However, section 176 of the Companies Ordinance couched in identical terms as section 288 does.

That said, whether or not an administrative petition is a proceeding against the company, requires an appreciation of the distinction, between

an administrative order and a winding up order and the purposes for which the law, under section 249(1)(c) of the Companies Act prohibits the commencement or continuation of proceedings against the company, save with leave of the court.

To the extent that the revision turns around corporate insolvency law, we think that it is of assistance to draw attention to the point made by the learned author, **Goode R.,** in **Principles of Corporate Insolvency Law** (4th Ed., 2011, p.29) that administration and winding up (liquidation) are distinctive legal regimes for handling the insolvency of a company, each having its own distinctive purposes and principles.

On the issue posed above, nothing could be more explicit than the observations by the Court of Appeal of England and Wales, **In re Atlantic Computer Systems PLC** (*supra*, pp. 527 -528):

> " *The reason for this difference is that the objectives of winding up orders and administration orders are different and, hence, the approach that should be adopted by the court when exercising its discretion under the two regimes is different. In the case of winding up, the company has reached the end of its life. The basic objective of the winding up process, in the*

case of an insolvent company, is to achieve an equal distribution of the company's assets among the unsecured creditors. A secured creditor will not, as such, participate in the ensuing distribution.....

.....

In contrast, an administration is intended to be only an interim and temporary regime. There is to be a breathing space while the company under new management in the person of the administrator, seeks to achieve one or more of the purposes set out in section 8(3) [which in the instant case are set out in section 247(3)(a)-(c) of our Companies Act]. There is a moratorium on the enforcement of debts and rights, proprietary and otherwise, against the company, so as to give the administrator time to formulate proposals and lay them before the creditors, and then implement any proposals approved by the creditors. In some cases winding up will follow, in others it will not . "

In **Re MTI Trading Systems Ltd & Others** (*supra,* p. 403) the Court of Appeal also stated:

" there is a sharp distinction to be made between winding up and administration orders. The former brings the life of the company to an end; the latter are designed to revive, and to seek to ensure the continued life of the company if at all possible. "

In yet another case, in **Re Polly Peck International (PLC) (In Administration) (No.2)** ***Marangos Hotel Co. Ltd and Others*** **V.** ***Store and Others,*** (1998) 3 All ER 812, the Court succintly emphasized that:

"The making of an administration order as with the case of winding up order, triggers a prohibition on proceedings being commenced or continued against the company. While the administrators seek to achieve the statutory purpose for which they are appointed, a moratorium is imposed on the enforcement of proprietary and other rights against the company."

In view of the above, it is apparent that the moratorium on commencing or continuing actions or proceedings is placed on those proceedings, which are against or in opposition to the company, that is those opposed to the interests, rescue or survival of the company.

On a close conderation of the statutory scheme of the administration process in the Companies Act and the distinction between an administration order and a winding up order in the above cited cases that we adopt as guidance, we are also of the settled opinion that the administration regime is specifically designed to benefit an insolvent company by providing a "breathing space" for the Administrator to implement one or more of the statutory purposes set out in section 247(3) (a)-(c) of the Companies Act. From this perspective, therefore, it would appear to us, odd, to say the least, to label proceedings instituted for the purposes of rescuing or resuscitating the survival of the company, and the whole or any part of its undertaking, as a going concern or a more advantageous realization of its assets, as an action or proceedings against it. For these reasons, with respect, we see no merit in the reliance placed on sections 176 of the Companies Ordinace and section 249 (1)(c) of the Companies Act by the 2nd, 5th and 7th Respondents to impugn Misc. Civil Cause No. 112 of 2009.

We deal next with the bone of contention concerning the applicable law. The question is this: in relation to Misc. Civil Cause No 112 of 2009 what is the relevant law that governs Misc. Civil Cause No 49 of 2002?

It was common ground that Misc. Civil Cause No 112 of 2009 lodged on 17/09/2009 is governed by the Companies Act, which came into effect on 1/03/2006. The thorny issue centers on its legal effect on Misc. Civil Cause No 49 of 2002, filed on 25/2/2002 and in view of section 486 of the Companies Act. It provides:

> " ***486. The provisions of the Act with respect to windlng up shall not apply to any company of which the winding up has commenced before the coming into operation of this Act, but every such company shaii be wound up in the manner and with the same incidents as if the Act has not been passed, and for the purposes of the winding up, the repeated Companies Act shall be deemed to remain in force."*** *(Emphasis added)*

Mr. Morrison submitted that the process of winding up of I.P.T.L. is subject to the Companies Ordinance, while that of the Administration order in Misc. Civil Cause No. 112 of 2009 in respect of that Company is governed by Part VII, Chapter II of the Companies Act. That the effect of section 486 is only to ensure that I.P.T.L. is wound up in accordance with the Companies Ordinance, otherwise in relation to Misc. Civil Cause No 112

of 2009, the Companies Act applies to Misc. Civil Cause No 49 of 2002 regardless of when the winding up process commenced under the Companies Ordinance. Thus, section 249 of the Companies Act applies to both Misc. Civil Cause No 112 of 2009 and Misc. Civil Cause No 49 of 2002.

Mr. Lutema eloquently submitted that the clear language of section 486 is not that the provisions of the Companies Act shall not apply to any Company of which the winding up has commenced before the coming into operation of that Act. The prohibition in section 486, he urged, relates to the provisions of the Companies Act with respect to winding up only.

Mr. Tenga and Mr. Ngalo forcefully submitted that section 486 of the Companies Act was not intended to allow S.C.B., a stranger with no bona fide credentials or *locus standi*, which had filed Misc. Civil Cause No 112 of 2009 on 17/09/2009, to invoke sections 247 -250 of the Companies Act to set aside Misc. Civil Cause No 49 of 2002 instituted on 25/2/2002 and under sections 163,167 (b) and (f) and 169 of the Companies Ordinance. That as an Administration order under section 248 of the Companies Act is only available to a creditor where a winding up petition has been commenced under section 281(1) thereof, section 486 saved the Companies Ordinance in respect of I.P.T.L. They were emphatic that by

section 486, proceedings in Misc. Civil Cause No 49 of 2002 were only governed by the Companies Ordinance.

In a slight twist of the arguments raised, Mr. Kameya briefly submitted that since Misc. Civil Cause No 49 of 2002 was lodged on 25/2/2002, the law applicable to it was the Companies Ordinance because the Companies Act came into effect on 01/03/2006, four years later.

On his part, Mr. Ngwilimi submitted that the plain meaning of section 486 of the Companies Act was that for all those companies whose winding up had commenced before the coming into operation of the Companies Act, those companies should be wound up as if the repealed Companies Ordinance is still in force, with all its provisions. This meant that for the winding up of I.P.T.L. that commenced on 25/2/2002, before the Companies Act came into force (i.e. 1/03/2006), the Companies Ordinance applied, and not the Companies Act.

He went on to submit that the legal effect of Section 486 was that no petition for an administration order is maintenable as the Companies Ordinance does not provide for the powers of the High Court to make an administration order. Misc. Civil Cause No 112 of 2009 filed after the institution, on 25/2/2002, of Misc. Civil Cause No 49 of 2002, was therefore incompetent.

The crucial issue posed raises in stark form the question of the true construction and application of section 486 of the Companies Act.

In **R.v. Multiform Manufacturing Co.** (1990)2 S.C.R. 624 the Supreme Court of Canada stated:

> *" When the Courts are called upon to interpret a statute, their task is to discover the intention of Parliament. When the words used in a statute are clear and unambiguous, no further step is needed to identify the intention of Parliament. There is no need for further construction when Parliament has clearly expressed its intention in the words used in the statute. "*

The learned author, **Maxwel on the Interpretation of Statutes** (12th Ed; 1969, pp. 28-29) has this to say:

> *"If there is nothing to modify, alter or qualify the language which the statute contains, it must be construed in the ordinary and natural meaning of the words and sentences. The safer and more correct course of dealing with a question of construction is to take the words themselves and arrive if possible at their meaning without, in the first instance, reference to cases.*

The rule of construction is to intend the Legislature to have meant which they have actually expressed. The object of all interpretation is to discover the language of Parliament, but the intention of Parliament must be deduced from the language used.

.....

Where the language is plain and admits of but one meaning, the task of interpretation can hardly be said to arise."

In the same line of authority, **E.A. Driedger,** in **Construction of Statutes**, 2nd Ed, 1983. pp. 8-7 states:

"In the construction of statutes, their words be interpreted in their ordinary grammatical sense, unless there be something in the context , or in the object of the statute in which they occur, or in the circumstances with reference to which they have used a sense different from other ordinary grammatical sense". (See also, ***Nasiruddin V. State Transport Appeal Tribunal,*** *(1976) I SCR 505;* ***Verdun V. Toronto Dominon Bank*** *[1996] 3 S. C. R. 550 at p.22)*

Also relevant to the issues before us, **N.S. Bindra's Interpretation of Statutes**, M. N. Rao and A. Dhanda, 10th Ed., 2010, p.436 observes:

> *"when the language of the law admits of no ambiguity and is very clear, it is not open to the Courts to put their own gloss in order to squeeze out some meaning which is not borne out by the language of the law".*

Section 486 of the Companies Act contains a savings clause. "A saving clause is ordinarily a restriction in a repealing Act and saves rights, pending proceedings, etc from the annihilation which would result from unrestricted repeal": **P. Ramanatha Ayer, The Law Lexicon. The Encyclopaedic Law Dictionary**, (2nd Ed., 2010). "A savings clause is generally used in a repealing Act to preserve rights and claims which would otherwise be lost": **Black's Law Dictionary**, (7th Ed.).

Explaining the purpose of a saving clause, the Supreme Court of India in **Hassan Nirani Malak V. Asst Charity Commissioner** A.I.R. 1967 SC 1742 observed:

> " *The object of a saving clause is to save what has been previously done under the statute repealed. The result of such a saving clause is that the pre-existing law continues to govern the thing done before a particular*

date from which the repeal of such pre-existing law takes effect. "

Applying the above principles and giving best attention to the plain wording of section 486, in our respectful view, it is only the provisions of the Companies Act with respect to winding up which shall not apply to any company of which winding up had commenced before the coming into operation of that Act. Thereunder, those companies are to be wound up under the relevant provisions of the repealed Companies Ordinance. We fully agree with Mr. Morrison and Mr. Lutema that section 486 was not intended by Parliament to save or protect companies whose winding up commenced before the coming into operation of the Companies Act, from the application of the relevant provisions of that Act related to administration orders. On the contrary and translated into the instant case, the provisions on Administration orders, Part VII, Chapter II, sections 247-332 of the Companies Act do apply to the process of winding up of I.P.T.L, notwithstanding that it had commenced well before the coming into force of that Act on 1/3/2006. In our judgment, the plain language employed in section 486 does not call for a contrary construction.

The inevitable question that follows next is this: bearing in mind section 249(1)(a) and (c) of the Companies Act, was the conduct of

proceedings by the High Court proper in Misc. Civil Cause No. 49 of 2002 after the institution of Misc. Civil Cause. No. 112 of 2009, on 17/09/2009?

Section 249 provides:

> *"249 (1)* ***During the period beginning with the presentation of a petition for an administration order and ending with the making of such an order or the dismissal of the petition-***
>
> ***(a) no resolution may be passed or order made for the winding up of the company***
>
> *(b) .....*
>
> ***(c) no other proceedings and no execution or other legal process may be commenced or continued, and no distress may be levied, against the company or its property except with the leave of the court and subject to such terms as aforesaid*** *". (Emphasis added)*

Mr. Morrison submitted that as a matter of law, the clear effect of section 249 (1) (c) was that the mere existence of Misc. Civil Cause No. 112 of 2009, properly presented to the High Court on 17/09/2009 meant

that no order for winding up could validly have been made in Misc. Civil Cause No. 49 of 2002.

Mr. Lutema submitted that due process and fairness required Misc. Civil Cause No. 112 of 2009 to have been determined by the High Court before Misc. Civil Cause No. 49 of 2002 and Misc. Civil Cause No. 254 of 2003. By determining the latter first, the High Court chose one case by rendering the other moot. It had violated S.C.B's right to a fair trial and acted in flagrant breach of the principle of natural justice. Moreover, the existence of Misc. Civil Cause No. 112 of 2009, he maintained, had the effect of staying the hearing and determination of Misc. Civil Cause No. 49 of 2002 and Misc Cause Case No. 254 of 2003. By analogy, it was like a preliminary objection. Misc. Civil Cause No. 112 of 2009 was impliedly meant to object to Misc. Civil Cause No. 49 of 2002. The result was that the winding up order issued on 15/07/2011 was *void ab initio*.

Mr. Tenga was adamant that as Misc. Civil Cause No. 112 of 2009 was a nullity, with no legal force, it could neither affect the proceedings in Misc. Civil Cause No. 49 of 2002 and Misc. Civil Cause No. 254 of 2003 nor the winding up order. S.C.B. he reiterated, is barred under section 486 of the Companies Act from commencing proceedings in I.P.T.L. That as it was not a creditor of I.P.T.L, it does not have a competent petition in Misc.

Civil Cause No. 112 of 2009 capable of affecting the continuation of proceedings in Misc. Civil Cause No. 49 of 2002 and Misc. Civil Cause No. 254 of 2003 or even the winding up order.

On his part, Mr. Ngwilimi also relying on section 486 of the Companies Act maintained that the proceedings in Misc. Civil Cause No. 49 of 2002 and Misc. Civil Cause No. 254 of 2003 could not have been affected by Misc. Civil Cause No. 112 of 2009, which was null and void.

On the above debated issue, **Goode, R., Principles of Corporate Insolvency Law,** (*supra*, 3rd Ed, 2005, p.22) offers guidance:

> *"**administration has the unique effect in imposing a total freeze on the** enforcement of security and rights of repossession, the levy of distress, **the** institution or **continuation of proceedings** and even the winding up of the company, during the currency of the administration, **except with the permission of the court** or the consent of the administration "*
> *[Emphasis added).*

Having given the matter careful consideration, in our respectful view, the clear effect of section 249 (1) (a) and (c) meant that the proceedings in consolidated Misc. Civil Cause No. 49 of 2002 and Misc. Civil Cause No.

254 of 2003 could not have continued the way it erroneously did, after 17/09/2009, the date Misc. Civil Cause No. 112 of 2009 was correctly presented in court. As of the date, the latter no doubt, imposed a "total freeze" on the proceedings in Misc. Civil Cause No. 49 of 2002 and Misc. Civil Cause No. 254 of 2003. No leave was sought or obtained under section 249 (1) (c) for their continuation. Worst still, no winding up order could have been validly issued on 15/07/2011, as categorically spelled out in section 249 (1) (a) of the Companies Act. With respect, the High Court completely failed to notice the requirements of the law as pointed out earlier.

For completeness, and before parting, we are constrained to briefly distil one point. In faulting the High Court, Mr. Morrison submitted that Misc. Civil Cause No 112 of 2009 had remained unattended since September, 2009. No steps were taken to have it heard. It was simply ignored. Instead, Misc. Civil Cause No 49 of 2002 and Misc Civil Case No 254 of 2003 were heard in haste by the court.

Exonerating the High Court, Mr. Ngalo submitted that it was not to be blamed. Misc. Civil Cause No 112 of 2009 was stayed by the court on the parties consent, with liberty to be reactivated on application. That path was not pursued by S.C.B until 29/7/2011, a long period after.

With respect, on a bare persual of the record, and in fairness, the blame in not properly attending to Misc. Civil Cause No 112 of 2009 as required by the law ought not to be fully saddled on the High Court. On 6/11/2009, with S.C.B. and the other interested parties present in court, Misc. Civil Cause No 112 of 2009 was stayed by the court, "with liberty to be restored upon application". On 28/7/2011, S.C.B. applied to the Court for the stay order to be lifted. This was done on 29/07/2011, a period of over 18 months from the date it was issued and after the winding up order had been granted on 15/07/2011.

It is trite that the scheduling of the proceedings subject to this revision is squarely the responsibility of the High Court.

In the instant case, however, with the parties ably represented, we do not see why they voluntarily and repeatedly chose to pursue proceedings in Misc. Civil Cause No 49 of 2002 and Misc. Civil Cause No 254 of 2003, which were before the same Judge (Kaijage, J.) and the correct position of the law being as we have expounded it to be.

Much as S.C.B. promptly sent a letter, Reference No. FSR/0362-002 on 11/11/2009 to the High Court, which the 2nd and 7th respondents were duly copied, protesting that neither did it through its Advocate consent to the staying of Misc. Civil Cause No 112 of 2009 nor was the Advocate

instructed to consent thereto on 6/11/2009, unquestionably that order could not have been set aside, administratively by correspondence. On that communication, the Court record could also not have been disowned. If S.C.B. was most desirous for Misc. Civil Cause No 112 of 2009 to be heard with dispatch, it should have moved the court in a proper way, in the manner it perfectly did, on 28/07/2011, when it sought the order to be set aside. It is not insignificant that this course was only taken by S.C.B. after the issuance of the winding up order on 15/07/2011 and after it, like the other respondents had vividly participated in the proceedings in Misc. Civil Cause No 49 of 2002 and Misc. Civil Cause No 254 of 2003 and before the very learned Judge. As we have stated earlier, Misc. Civil Cause No 112 of 2009 was legally connected to Misc. Civil Cause No 49 of 2002 in the application of administration orders in the Companies Act. In these circumstances, the parties too must be apportioned a share of the blame or delay.

That said, on our part and having considered the whole matter, the reason why we are constrained to quash and set aside the stay order of 06/11/2009 is that, with respect, the High Court had erroneously based its decision on an earlier consent order issued on 18/09/2009 in Misc. Civil Cause No. 49 of 2009 and Misc. Civil Cause No 254 of 2003 in order to

allow the parties to work out a mutual negotiated settlement. As we had observed earlier, from the beginning of the presentation of Misc. Civil Cause No. 112 of 2009 in court on 17/09/2009, those other proceedings ought not to have commanded and dictated it. An "automatic moratorium" was levied against them. Those proceedings were to have been frozen, subject to leave of the court.

For the foregoing reasons, the conclusion we have reached, with respect, is that the High Court committed fatal irregularities in the conduct of the impugned proceedings. The revision inevitably dictates that all the proceedings in Misc. Civil Cause No 49 of 2002 and Misc. Civil Cause No 254 of 2003 as of 17/9/2009 are a nullity. The rulings and orders made therein, including the winding up order of 15/07/2011 are accordingly revised, quashed and set aside.

That apart, given the order of the Court in Civil Revision No 1 of 2009 for a fresh hearing of Misc Civil Cause No 5 of 2009, in whose place Misc. Civil Cause No 112 of 2009 was correctly filed on 17/9/2009, we are inclined as we hereby do, also to decree a nullity, quash and set aside all the proceedings and orders therein that intervened after 17/09/2009.

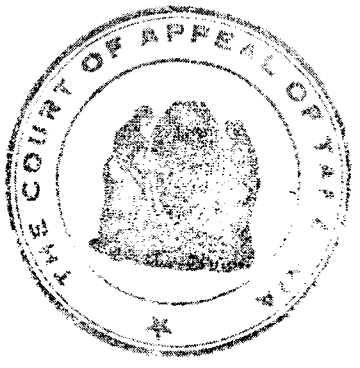
Accordingly, we order the hearing of the matter, expeditiously before another Judge of the High Court. This includes challenges, if any, to the

competency of Misc. Civil Cause No. 112 of 2009, as well as the 2nd Respondent's undetermined application filed on 30/10/2009 for leave to join the Provisional Liquidator of I.P.T.L. as a necessary party and for security for costs and any other relevant matters.

In these circumstances, each party is to bear its own costs in this revision.

It is so ordered.

DATED at **DAR ES SALAAM** this 17th day of December, 2012.



M. C. OTHMAN
CHIEF JUSTICE

J. H. MSOFFE
JUSTICE OF APPEAL

E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

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

E. Y. MKWIZU
DEPUTY REGISTRAR