IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM

CIVIL CASE NO. 360 OF 1998

POLY-MED (TANZANIA) LIMITED.....PLAINTIFF
VERSUS
BAGCO LIMITED .....DEFENDANT

RULING

KALEGEYA, J.:

The Defendant represented by Mr. Rweyongeza & Co. Advocates, raised a preliminary objection that the

> *"suit is defective for non-joinder of the PRESIDENTIAL PARASTATAL SECTOR REFORM COMMISSION" (generally known as PSRC)*

The plaintiff is represented by Mr. Jadeja, Advocate. Arguments were presented by way of written submissions.

The defendant, in brief, argued that as it bought the "business formerly carried on by POLYSACKS COMPANY from the PSRC", which is an official Receiver under the Public Corporations Act No. 2 of 1992 as amended by act No. 16 of 1993, its liability is limited as per section 2 and 7 of the TRANSFER OF BUSINESS (PROTECTION OF CREDITORS) ORD. CAP 398; that on those premises the plaintiff has no cause of action against the Defendant as the latter is not liable for any debts that accrued before the business was acquired. The Defendant's Counsel, on another front, insisted that though O.1, Rule 9 of the Civil Procedure Code provides that no suit should be defeated by reason of non-joinder, that rule does not apply because the substantive laws show that their (parties) rights interests cannot be determined in this situation without inclusion of PSRC. He relied on a commentary appearing on page 526 of SARKAR'S LAW OF CIVIL PROCEDURE, 8th Ed. 1995. He added that, as plaintiff has not bothered to join

PSRC despite raising the objection the suit should be dismissed. and. again called to his aid SARKAR'S commentary on page 526 where it is stated.

> *"If in such a suit the plaintiff. in spite of the objection raised insists on proceeding with the suit without joining all the necessary parties. who are absent. the suit be dismissed".*

In response, Mr. Jadeja for the plaintiff argued that as preliminary objections "must assume the facts pleaded in the plaint to be correct" there is nothing in the plaint which suggests that PSRC is relevant hence the preliminary objection raised is not supported: that defendant acts on an erroneous belief that **Bagco Ltd** bought assets from Polysacks Coy Ltd and that these are two different companies when the truth is that it is the same company which upon change of shares ownership assumed just a new name and that it is not possible for a coy to transfer its own property to itself and therefore Cap. 398 is inapplicable. Clarifying, Mr. Jadeja stressed that PSRC was simply acting for the Government and would have been made a party if the Company was under liquidation or in the process of restructuring. He maintained that the process was perfected under the latter but that by the time the suit was filed the exercise had already been exhausted: that in any case PSRC may be a proper party but not a necessary party such that the Court can easily pass an effective decree (referred to a number of Indian decisions), and, more particulary in this case because the defendant's liability remained alive under S. 20 (5) of the Companies Ord. after change of name.

In order to appreciate the gist of the arguments we should equip ourselves, albeit briefly, with facts behind the controversy. According to the materials before me (pleadings and submissions) the following facts are not disputed.

The plaintiff (Poly-Med (T) Ltd) and Polysacks Co. Ltd, both limited liabilities Companies and incorporated in Tanzania, in the past, used to have trading transactions between them. The Government of the United Republic of Tanzania owned shares in Polysacks Co. Ltd. In quest for privatisation policy the Government of Tanzania formed

the PRESIDENTIAL PARASTATAL SECTOR REFORM COMMISSION (PSRC). This is a body corporate established by S. 21 of the Public Corporation Act. No. 2 of 1992 as amended by Act 16 of 1993. Among others, Act 16 '93 bestowed powers of an "official Receiver" unto PRSC. Also, among other duties PSRC could liquidate or restructure any corporation designated a "specified public Corporation" by the Minister upon PSRC's recommendations. Polysacks Co. Ltd was designated as such and in the privatisation exercise that followed, a foreign Company, PURE BOND LIMITED, acquired some shares therein. Polysacks Co. Ltd changed name and acquired a new name of BAGCO Ltd, the Defendant in this matter. The plaintiff's claim is for shs.29,535,000/= being unsettled account for goods allegedly supplied to Polysacks Co. Ltd during their trading transactions before PSRC came unto the scene.

It is on those facts that Defendant argues that having bought the property from the official Receiver, PSRC, under Cap. 398, S. 7, it is not liable for any debts, and in the alternative that PSRC should have been joined as a party, while the plaintiff counters by maintaining that mere change of name did not amount to "selling property" and at the same time, that it could not sell property to itself.

Under S. 2 of the Transfer of Businesses (Protection of Creditors) Cap. 398, a law designed to protect creditors on the transfer of Businesses, any person who acquires, among others,

> *"the whole or substantially the whole of the property of any trading or manufacturing businesses or any business of a like nature, shall, notwithstanding any agreement to the contrary be liable for all the debts and obligations for which the transferor thereof is liable in respect of that business"* (some provisos are then

indicated but which for our purpose are not relevant). The above however is subject to S. 7, upon which Defendant hinges its argument. The said section provides,

"7. Nothing in this Ordinance shall affect any person acquiring the goodwill or the whole or substantially the whole of the property of any business -

(a) from the Official Receiver or any trustee in bankruptcy;

(b) from the liquidator of any company;

(c) from an executor or administrator;

(d) by operation of law."

As to the Commission's (PSRC) capacity as an "official Receiver" S. 43 (1) of the Public Corporation Act, No. 2 92 as amended by Act No. 16 of 1993 provides:

"43 (1) Notwithstanding any other law to the contrary with effect from the date of publication of an Order declaring a public corporation to be a specified public corporation the Commission shall

(a) without further assurance on appointment have the power to act as the official receiver of the specified public corporation, and

(b) have the power and all the rights of a receiver appointed in accordance with or pursuant to the Bankrupt Ordinance."

Having carefully analysed the law, the pleadings and submissions I have reached a conclusion that the preliminary objection has no basis to hold it and should consequently be thrown out. I have so concluded because of the following.

With respect to the Counsel for the Defendant, S. 7 of Cap 398, as rightly submitted by the Counsel for the Plaintiff, is totally out of place on the facts of this case. The section protects a "person acquiring ... whole or substantially the whole property of any business from the "official Receiver". Assuming that in supervising the transaction PSRC was acting as an official Receiver (and for our purpose and on facts of this case it is not necessary to consider whether S. 43 of Act 16 of 1993 appointed PSRC an automatic "official Receiver" of any corporation designated a specified public

"... if the words of an Act are clear you must follow them even though they lead to a manifest absurdity. The court has nothing to do with the question whether the legislature has committed an absurdity."

He sought further support of his view from **Vacher and Sons Ltd vs. London society** of Compositors (1913) AC 107, 121, where it was observed,

" ... a court of law has nothing to do with the reasonableness or unreasonableness of a provision of a statute, except so far as it may hold it in interpreting what the Legislature must be taken to have meant and intended what it has plainly expressed, and whatever it has in clear terms enacted must be enforced though it should lead to absurdity and mischievous results."

Regarding attaching copies of notices to the reply to the 3rd party's written statement of defence he insisted also that it was an after thought regard being had to the dates when he (plaintiff) approached the Tanganyika Law Society, the assignment of the matter on legal Aid basis to Mr. Marandu by the former and the dates indicated on the said notices. He concludes by maintaining that they should have been attached to the plaint.

Finally, while supporting the rest of the 3rd Party's submissions, the 1st Defendants deplores its submissions which tend to dispute the existence of any Insurance contract between them on allegations of non-production of relevant documents and brands this as bordering fraud because he believes that the 3rd party is supposed to keep the records of its customers.

Enough for the synopsis of the arguments presented. I should however, at this point, commend the counsel, for the preparation and presentations of their respective submissions. Now, for the merits and the law pertaining thereto.

I will deal first with the preliminary objection regarding the defective verification clause. Parties have conceded that the verification clause is defective. Indeed it is. This, and which leaves a lot to be desired, runs as under,

"what is stated herein above is true to the best of my knowledge, information and belief."

This goes counter to what O.VI, Rule 15(2) provides. The same provides,

> *"The person verifying shall specify, by reference to the numbered paragraphs of the pleading what he verifies of his own knowledge and what he verifies upon information received and believed to be true."*

The defect notwithstanding however I am not persuaded that the consequences are to have the plaint dismissed. While I appreciate that theVIP Engineering case and " Majumder on Plaints' insist that procedural requirements are not meant to be mere decorations in legislations, I am also aware that the same authorities clearly state that a procedural defect which does not go to the core of the matter is a curable irregularity. Further to the above authorities there are many others to the same effect. Examples of these are: Fortunatus Lwanyantika Masha vs Dr.William Shija & another (CA) Civil Application No.6 of 1997 (Mwanza Registry); Hamed Rashid Hamed v Mwanasheria Mkuu na Wenzake watatu, (CA) Civil Application No.9 of 1996 (Zanzibar, Registry) and not forgetting various treatise by learned authors including Mogha's Law of Pleadings and Mulla on code of Civil Procedure. For clarity, let the latter, also cited by Plaintiff in support of the proposition of curability and which makes persuasive guidance as it relates to provisions in the India Code of Civil Procedure which are similar to those in our CPC, take the floor:

> *" a pleading which is not properly verified in the manner required by the rule may be verified at a later stage of the suit, even after the expiry of the limitation period. The omission to verify a pleading is a mere irregularity and where a verification of a plaint or petition is defective, that should not normally be rejected but an order should be made for its amendment" - (Mulla on Code of Civil Procedure, vol. II, 15th Ed., page 1175-6)*

I am also aware that there are conflicting views of this court regarding the effect of a defective verification clause. As examples, we have **Massawe and Coy vs. Jachibhai Patel and 18 others, civil case No.39/95 (HC) DSM Registry**, where it was held that such defect is incurable hence the pleading should be dismissed. In **Hilal Hamed Rashid & 4 others v The Permanent Secretary (Establishment) and Attorney General, (HC), DSM civil case No.129 of 1998** the holding was the opposite. There could be in existence many more others but lack of judgments rulings of other

judges inhibit my otherwise thirst and hunger to digest and compare the same. However, as I had an occasion to hold in many others, including, **Msetti auction Mart (T) Ltd vs SIDO, Commercial case No.1 of 1999,** and as I am now holding in this case, such defects are curable by ordering just an amendment. The **Georgia** case cited by Mr. Msemwa for the third Party did not decide on the defective verification clause but rather on a written statement of defence signed by unauthorised person. The two cases are clearly distinguishable.

The above disposed and regard being had to the nature of the remaining preliminary objections which are clearly interwined, I will deal with them together. I should start by associating myself with plaintiff's proper directions quoted above regarding what preliminary objections should contain. I need not reiterate the same, for, that is a clear legal stand known to every legally trained mind.

Now, starting with a complaint regarding the purported failure to comply with S.10 (2) of Cap 169 I should say outrightly that it has no base on which to stick. The answer was provided by **Byombalirwa's case** cited by both parties. Again, I am in agreement with plaintiff that although in that case the court was dealing with a different provision of the law, s.6 of the Sale of Goods Ordinance, the analogy attached there-to fits the one which should be accorded s.10 (2) of cap.169. The Court of Appeal (KISANGA, J.A) negatively reacting to the finding of the High court on the matter (the High Court had upheld the preliminary objection that the plaintiff had disclosed no cause of action by not disclosing that he had complied with section 6 of the Sales of Goods – Ordinance) had the following to say,

> *" We have given much thought to Mr Uzanda's argument, but we have not been persuaded by it We do no think that the requirements under section 6 amount to facts constituting cause of action. We think, as argued by Mr. Raithatha, that section 6 only provides a special defence which a defendant may rely on if he so wishes. It should be pointed out however that where a defendant wishes to avail himself of that defence, he has to raise it on the pleadings. The reason for this is clear It is to avoid taking the other party by surprise at the trial It is designed to give the opposite party sufficient notice of the case which he is to meet at the trial Once we hold that the requirements under section 6 only*

create a special defence open to a defendant, it logically follows that a plaintiff is under no obligation to aver in the plaint compliance with any such requirement. Nor does he have to anticipate it. His obligation in relation to it arises only if and when the defendant has raised it. So that should the defendant choose not to raise it at all, for instance, the trial is to proceed; the plaintiff has no duty to refer to it and even the court is not bound to take judicial notice. It is a special defence designed for the benefit of a defendant, but if the defendant does not with to avail himself of it, the matter is to rest at that."

S.10(2) of Cap.169, whose alleged non-compliance embitters the 3rd Party, provides,

> *" No sum shall be payable by an insurer under the foregoing provisions of this section:*
>
> *(a) in respect of any judgement, unless before or within fourteen days after the commencement of the proceedings in which the judgement was given, the insurer had notice of the bringing of the proceedings"*

The wording above reproduced clearly shows that this is a special defence accorded to the insurer. The Court of Appeal observations in Byombalirwa's case cannot have a better bearing.

Again, the hulla baloo raised by 3rd party regarding the third party Notice and replies thereto cannot get support from any legal circle. The Third Party attacks the notice from two fronts – first, that it does not "state the date, place and time when the accident happened" and also "cannot constitute a cause of action without establishing contractual relationship with the third party."

I fully appreciate that a third party notice stands in the same position as a plaint and that it has therefore to disclose a cause of action. O.1, Rule 15 CPC prescribes what should be contained in a third party notice as follows: -

> *15. Every third party notice shall state –*
>
> *a) the nature of the plaintiff's case against the defendants;*
>
> *b) the nature of the defendant's claim against the third party;*

c) *the reliefs claimed by the defendant against the third party;*

d) *the period within which the third party may present his defence;*

and

e) *the consequences of the failure by the third party to present his defence within such a period.*

I agree that the notice did not itemise what is prescribed under O.I, Rule 15 CPC. Nevertheless, I am convinced that it complied with what was required of the 1st Defendant. Again, putting aside the plaintiff's argument that the 3rd party does not dispute that it was not served with a copy of the 1st Defendant's written statement of defence, the contents of the notice and what was attached thereto satisfies me that it complied with the law. In part, the notice reads,

> *" TAKE NOTICE that this action has been brought by the plaintiff against the 1st Defendant. In it the Plaintiff claims against the 1st Defendant special and general damages arising out of injuries suffered by the Plaintiff in a road accident involving the First Defendant's motor vehicle TZF 9381 that was being driven by the second Defendant as appears by the endorsement on the statement of claim a copy whereof is delivered herewith."* Not only that. The notice goes on,
>
> *" The first Defendant claims against you to be indemnified against the Plaintiff's claim and the costs of this action to the extent of the plaintiff's claim on the grounds that at the time and date of the said accident the First Defendant's said motor vehicle was comprehensively insured with you against the risks and remedies claimed by the plaintiff which you undertook to pay pursuant to the terms of the Insurance policy given and issued by you in respect thereof"*

Now, can the 3rd party genuinely and honestly come up with an argument that the notice disclosed no cause of action? The notice is categorical that a copy of the claim is attached. I take a copy of the claim to be a copy of the plaint. It cannot mean any other claim for, we are not told that any other claim had so far been lodged by any party let alone 1st Defendant. The plaint shows the date of accident, the place, the parties involved and their relationship in relation to the controversy. With respect to Mr. Msemwa, who

no doubt has dutifully prepared and gallantly fought for his client, to uphold an argument that the notice does not disclose sufficient particulars port-laying a cause of action would tantamount to defeating common sense and this court is not prepared to be debased for blindness.

The other arguments regarding, copies of notices being a hatchment of 2nd thoughts, and 1st Defendant not being the owner of the accidented vehicle, as rightly argued by plaintiff, are matters of evidence prematurely featured at the stage of preliminary objections. Indeed, in determining whether or not a cause of action does exist in a particular action we only have to look at the four corners of the plaint. This was squarely put in JORAJ SHARIFF & SONSDS VS CHOTAI FANCY STORES (1960) E.A at 375 where a principle which has been approved by our courts was declared and which runs as under,

> *" The question whether a plaint discloses a cause of action must be determined upon a perusal of the plaint alone, together with anything attached so as to form part of it and upon the assumption that any express or implied allegations of fact in it are true."*

In our case therefore, looking at the plaint as presented by plaintiff, and the third party notice as presented by the 1st Defendant, what we unobtruetively see is an impeachable cause of action by both plaintiff as against Defendants and by 1st Defendant as against, the third Party. The 3rd Party's Counsel is aware that only material facts constituting a party's case and not evidence in support thereof, are given in pleadings.

On the last preliminary objection concerning the alleged incapacity of plaintiff to institute a case on his own, again, with respect, this observation is far fetched. The Doctor's report which is an annexture to the plaint, runs in part;

> *"... he gained consciousness with severe headaches, poor speech, poor memory, and poor personality. This means the dominant brain was affected more than the rest*
>
> *He is dependant person. Before accident he was sales boy with private enterprise..... Because of these permanent disabilities he has to get 85%(eighty five per cent) as compensation."*

A casual glance at the wording may indeed lead one to conclude that plaintiff is a useless being now but deep analysis leads to a contrary finding because merely being "dependant," and being entitled to 85% "compensation" does not brand one as being of "unsound mind." In any case, O.XXXI, Rule 15 CPC requires that in order for persons to fall in that category they should have been "adjudged to be of unsound mind" or though not so adjudged they should have been "found by the court on inquiry by reason of unsoundness of mind or mental infirmity, to be incapable of protecting their interests when suing or being sued." Clearly therefore the Defendant is duty bound to prove the existence of this condition and this is after he has made a specific application under O.XXI, Rule 2 CPC. Mere assertions or preliminary objections as is the case here is not enough. In any case, if the third party has evidence in support of the contention it can still present an application and adduce evidence in support thereof.

For reasons discussed above the preliminary objections save the one of defective verification clause stand dismissed. The one upheld is qualified that the defective verification clause be amended so as to comply with the law.

L.B.Kalegeya,

JUDGE,

Order: Meanwhile, as I am now attached to another division of the High Court, Commercial Division, after delivery of the ruling, the record to be placed before the Judge-In charge for re-assignment and fixing of a mediation date.

L.B.Kalegeya,

JUDGE

L.B. KALEGEYA

JUDGE