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

MISCELLANEOUS CIVIL APPLICATION NO. 386 OF 2019
(Arising from Misc Civil Cause No. 41 of 2019)

CHONGQING LIFAN INDUSTRY (GROUP)
IMPO & EXP CO.LTD.....APPLICANT
VERSUS
M/S I & M BANK TANZANIA LIMITED.....1ST RESPONDENT
LOCUS DEBT MANAGEMENT LTD.....2ND RESPONDENT

RULING

MASABO, J.L:-

Before me is an application for temporary injunction made under section 282 (1) of the Companies Act No. 12 of 2002; Order XXXVII Rule (1) (a) and section 68 (e) of the Civil Procedure Code, Cap 33 RE 2002. The Applicant company is praying for the following orders:

> Temporary injunction be issued against the Respondents restraining them, their agents, serants or workmen from evicting the Applicant from the landed property situated at Plot No. 18 Block 'W, L.O No. 1010132 contained under Certificate of Title No. 32767, located at Ilala area in Ilala Municipality in Dar es Salaam city; Plot No. 15 Block 'E' L.O 630501 contained under Certificate of Title No 143965 located at Kariakoo Area in Ilala Municipality in Dar es Salaam and Plot No. 16 Block 'E' L.O 207083 contained under Certificate of Title No 54698 located at Kariakoo Area in Ilala Municipality in Dar es Salaam pending the determination of the main application.

The application is accompanied by an affidavit deponed by one Patrick Toyi Kaheshi, an advocate of the High Court who deposes that the Applicant company claims against Kishen Enterprises Limited a total of USD 2,662,025/- and USD 524,611.83 being principal sum and interest for a credit facility. It is deposed that Kishen Enterprises had defaulted its obligation and it is currently a subject of the winding proceeding instituted by the Applicant herein in its capacity as a creditor of Kishen Enterprises. That alongside the Applicant Company, the 1st Respondent herein has entered appearance in the winding proceedings in Misc Civil Cause No. 41 of 2019 as one of the creditors of Kishen Enterprises. The Applicants major contention as discernible from paragraphs 5, 6, 7 and 8 of the affidavit is that being patrt to the winding up proceeding, the 1st Respondent has instructed the 2nd Respondent to sell the assets of the directors of Kishen Enterprises while knowing that same were used as security and unlimited guarantee to numerous creditors of the company hence forming part and parcel of the the assets to which the petitioner and the creditors in the main application are to exercise their rights. Thus, if left intersected, the impending sale will render nugatory the winding proceeding and occasion an unquantifiable irreparable loss to the Applicant. Countering the application, the 1st Respondent contended that the assets subject to sale will have no effect on the Winding up proceedings as they do not belong to Kishen Enterprises and that the Applicant stands to suffer no loss.

When the application was called for hearing, the Applicant represented by Mr. Shalom Msakyi, learned Counsel, adopted their affidavit and proceed to

submit that KISHEN ENTERPRISES LIMITED owes the Applicant a total of USD 2,062, 025/= owned to the Applicant. He submitted that this court has discretionary powers under section 282(1) of the Companies Act Cap 212 to make interim orders during the hearing of winding up petition. He further argued that the application is further supported by section 283(b) of the same Act which permits a party to a winding up petition to make an application to a competent court restraining any pending act or proceeding from taking effect. Mr. Msakyi reasoned further company which is part of a winding up process is barred from disposing off any of its assets, shares or contribution connected to the company. Any attempt to dispose of the properties is regarded as null and void (section 284). Basing on this provision, Mr. Msakyi argued that the anticipated disposal of the assets of the directors is null and void because the assets has been used as unlimited guarantee hence its disposal would render the winding up proceedings nugatory while also occasioning irreparable loss to the Applicant company whose business is in the verge of collapsing. In support he cited the case of **Fatuma Mbangara v AG** in Civil Appl No. 169/2017 (CA) unreported as cited **John Paschal Sakaya V. Azania Bank Misc.** Commercia case No. 62 of 2018; and **Scandnavia Tours Ltd V. CRDB Bank Ltd Commercial Case No. 115 of 2005.**

For the 1st Respondent Company, Mr. Macarious Tairo, learned counsel a started by attacking the affidavit in that it constitutes a lie in that some of the facts deposed are not in the personal knowledge of the deponent. He specifically referred to Paragraphs 1 and 2, 3 of the affidavit. He argues that,

the deponent Mr Kaheshi deposes in paragraph 1 of the affidavit that he came into contact with the matter since the inception of the winding proceedings which is on or about January 2019 hence he could not have had persona knowledge of the facts that happened back on 27/10/2015 when the Applicant company and Kishen Enterprises entered into a contractual relationship. He further argued that, paragraph 5 is equally defective as it contains facts supported by 'Annexture 03' which was prepared, signed and filed by Shalom Samwel Msakyi.

He further submitted that the application was preferred under a wrong section because, Section 282(1) of Cap 202 vests on this court powers to make interim orders pending the hearing of the winding up submission not otherwise hence the application cannot be sustained. Further, Mr. Tairio reasoned that Order XXXVII Rule (1) (a) of the Civil Procedure Code, Cap 33 RE 2002 can only be invoked where there is a suit over a property and that the suit property is in a danger of being disposed of by way of sale or any other. That, since in the instant case there is no such suit between the Applicant and the Respondents, the Application is misconceived. Mr. Tairo submitted further that winding up petitions are a purview of the Companies Act and its respective Regulations and Rules hence the Applicant ought to have been made under the said laws.

Regarding the applicability of section 283(b) of Cap 212, Mr Tiro submitted that it is only applicable where there is an action or proceedings pending against the same company. As for the status of the disputed assets, Mr Tairo

submitted that according the contested assets belong to individuals who are neither parties to the winding up application or the instant application. He argued further that the guarantee if any are personal guarantees made by individual persons and not assets of the company. He argued that, for any claim against directors of a company personally to be valid, the 1st thing is to lift the veil of incorporation and make the Directors personally liable for company matters, since that was not done, there is no way directors personal properties can form part of the assets to be included in the process of winding up of Kisheni enter parties. This application cannot stand. Distinguishing the case of John Pascal Sakaya he argued that different from the instant case, in Sakaya's case it was the assets of the borrower which were mortgaged while in the instant case the assets are under the ownership of the 3rd parties. He further submitted that the Applicant is an unsecured creditor and can therefore have no priority. He also submitted that the 2nd Respondent is wrongly joined at it is not part to the petition. He concluded that the application entirely failed the test for granting of injunctive orders

In rejoinder Mr. Msack submitted that the affidavit is not defective because the deponent is the member of the firm M&A Attorneys hence bound by the acts of other partners when dealing with third parties. On the applicability of section 284 he rejoined that the disputed property fall under the scope of this section because they were charged as unlimited guarantee to various creditors hence they are not immune to winding up procedures. He rejoined

further that the law allows the personal properties of directors to be realized to secure liability of the company as per section Cap 212.

I have accorded due consideration to all the rival submissions. Starting with the anomalies in the affidavit, it is as held in **Uganda vs Commissioner of Prisons, Ex-parte Matovu** [1966] EA514 at 520, a rue of law and practice that, "an affidavit for use in court, being a substitute for oral evidence, should only contain elements of facts and circumstances to which the witness deposes either of his own personal knowledge or from information which he believes to be true". Where the affidavit is based on information, the source information must be disclosed (**Salima Vuai Foum vs Registrar of Cooperative Societies and Three Others** [1995] TLR 75 CAT. In the instant case, as correctly observed by Mr. Tairo the Affidavit is sworn by an advocate whose contact with the matter at hand as expressly stated in paragraph 1 of the affidavit is traceable on the inception of this matter in court. The affidavit and the appendixes thereto reveal that MA Attorneys to which Mr. Kaheshi, the deponent herein, works as partner came into contact with the matter on or around September 2018. On 13th September 2018 they served a statutory notice on Kishen Enterises (Annex c to the affidavit) and on 15th January 2019 they instituted a winding up petition (the main application). Accordingly, he could not have had personal information that the Applicant advanced a loan facility to the 1st Respondent in 2015 when the loan agreement between Kishen Enterprises and the Applicant company was executed. Accordingly, I entirely agree with Mr. Tairo's contention regarding the content of paragraph 1 of the affidavit.

As for the rest of paragraphs, I agree with Mr. Msakyi's argument that the information came into the knowledge of the deponent in his capacity as Partner of MA Attorney, a law firm instructed to represent the 1st Respondent in this matter. It is my firm opinion that section 201 and 202 of the Law of Contract Act which regulates the conduct of partners when dealing with third parties applies. Accordingly, I refrain from holding in favour of Mr. Tairio's contention save for paragraph 2 of the affidavit and paragraph one to the extent that the deponent is not conversant with facts deponed under paragraph 2. Having found so, the next question is whether or not the defect is fatal in other words, can the affidavit be sustained in the absence of the defective paragraph. It is now a trite law that where the defects in an affidavit are non-fatal/inconsequential, those offensive paragraphs can be expunged or overlooked, leaving the substantive parts of it intact so that the court can proceed to act on it (See: **Phantom Modern Transport (supra) Rustamali Shivji Karim Merani v Kamal Bhushan Joshi**, Civil Application No. 80 of 2009 (CAT) (unreported); **National Insurance Corporation of (T) Limited & Another v. Shengena Limited**, Civil Application No. 20 of 2007 and **Director of Public Prosecution v Wilfred Muganyizi Rwakatare and another**, Criminal Application No. 23 of 2014 (unreported).

Having carefully read the affidavit it does not appear to me that the application cannot be sustained in the absence of paragraph 2 because the content of this paragraph is a restatement of a loan agreement to which

there exist a documentary proof and which neither of the parties disputed. Besides, the fact whether the 1st Respondent was advanced the said loan is not the centre of this application. At the heart of this application is the content of paragraph 5, 6, 7, and 8 which concern the existence of the winding application and the impugned attempt by the 1st and 2nd Respondent to dispose of the disputed assets. On this ground, I am of the settled view that paragraph 2 is inconsequential and I accordingly expunge it from the affidavit.

Having resolved the anomaly in the affidavit, the next point of determination concerns the applicability/ aptness of section 282(1) of Cap 212 as an enabling provision. For clarity the impugned provision states as follows:

> 282.-(I) On hearing a winding-up petition the court may dismiss it, or adjourn the hearing conditionally or unconditionally, or make any interim order, or, any other order that it thinks fit.

As submitted by both parties, this provision vests this court wide discretion to make interim orders pending the hearing of a winding up submission. The provision is conveniently coined to enable the court to dispense justice by restraining the parties from taking actions or from deeds that would otherwise render the winding up petition nugatory. In my settled view such actions and deeds include those listed under section 284 of the Act, namely disposition of company's assets, transfer of shares or alteration in the status of the members of the company made after the commencement of the winding-up, disposition of the company's assets. While the law specifically states that these acts/deeds if commenced after the institution of the

winding up process are null and void (section 284 of Cap 212) it goes without say that the parties are impliedly under obligation to prevent these deeds from happening and this can be achieved by moving the court to grant an interim order under section 282(1). It is, in my considered opinion, imperative for the party in the winding up application to seek court intervention timely so as to prevent the impending disposal of assets or any other deed that would change the status of the company and its assets thereby rendering the winding up proceeding nugatory. In view of this, I am of the considered view that the application for restraining the disposal of assets falls under the scope of this provision. I am however aware of the peculiarity of the application before to which I revert in due course after I have determined the applicability of section 283 of Cap 212.

Mr. Msakyi has impressed this court that the application falls in the scope of section 283 of the Act. However, having carefully read the content of this provision, I am not inclined to buy his idea as the nature of the application appears to be outside the scope of section 283. For convenience, this section states as follows:

> At any time after the presentation of a winding-up petition, and before a winding up order has been made, the company, or any creditor or contributory, may (a) where any action or proceedings against the company is pending in the High Court or Court of Appeal apply to the court in which the action or proceedings is pending for a stay of proceedings therein; and
> (b) where any other action or proceeding is pending against the company, apply to the court having jurisdiction to wind up the company to restrain further steps in the action or proceeding, and the court to

> which application is so made may, as the case may be, stay or restrain the proceedings accordingly on such terms as it thinks fit

As it could be vividly seen from this provision, its scope is squarely on stay of the proceedings pending. That in the instant case it entails in the instant case entails proceedings of winding up petition. In the instant application the Applicant's major prayer is for restraining the disposition of the assets not stay of proceedings hence it cannot be brought under this section.

Having resolved this let me now revert to section 282. As submitted by Mr. Msakyi, the application is somehow peculiar in that it presents two unusual scenarios, the first been on the parties and the second regards the parties. The relief sought is not against the KISHENI Enterprises. It is against the 1st Respondent who is also a creditor to KISHENI Enterprises. In other words, it is an action between creditors. What is even more interesting is that the subject matter, to wit, the assets to which injunction is sought, are not assets of KISHENI enterprises but that of its directors. The Applicant who is the creditor for KISHENI enterprise seeks to restrain the 1st Respondent, a fellow creditor for KISHENI enterprises from selling the suit properties which were created as charges for securing a loan advanced to the KISHEN company. In trying to impress the court hold in favour of the Applicant Mr. Msakyi cited section 284 of the Cap 212 and argued that the impending sale of the assets by the 1st Respondent is not legally tenable because although the assets belong to third parties but the said third parties are directors of the Company and that the assets were used as unlimited guarantees to secure loans from various creditors the 1st Respondent. Having carefully read the content of

section 282(1) and 284 it does at does not appeal to me that the wording of these two sections support the import suggested by Mr. Msakyi. First, section 284 makes specific reference to the properties of the company. Applying the provision to properties other than the properties of the company will be unjustifiably stretching the provision too far.

It is principle of law that a company is legal entity separate from its directors. The principle, as stated by Lord Macnaghten in **Salmon Versus Salmon & CO** [1897] AC 22 which laid down a legally principle that, a company is a separate legal entity from its directors inter alia held:

> "The company is at law a different person altogether from the subscribers ....., and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee of them. Nor are subscribers, as members liable, in any shape or form, except to the extent and in the manner provided by the Act".

This principle is incorporate under section 15 of the companies act and has been cited with approval in numerous cases including in **Yusuf Manji Versus Edward Masanja and Abdallah Juma** [2006] TLR 127 CAT; **Mussa Shaibu Msangi Vs Sumry High Class Limited & Sumry Bus Service Ltd** Misc Commercial Cause No 20 of 2012 (HC Commercial Division) and in **Zebedayo Mkodya v Best Microfinance Solutions Limited** Commercial Case No. 95 of 2016 (HC Commercial Division). The consensus emerging in this case is that the above principle is binding save where there

exist special and exceptional circumstances requiring the lifting of veil. That for example, where after the completion of the liquidation process there is nothing left to cover unsecured creditors (Manji's case) or where there is a judgment debtor as in the case of **Mussa Shaibu Msangi Vs Sumry** (supra).

The question would then be, does the instant case present special and exceptional circumstances warranting the lifting of the veil. In my settled, the answer to this question is strictly in the negative. Considering that the pending hearing is for winding up it would premature for this court to lift the veil as time when the assets of the company are yet to be ascertained nor is ability or otherwise of the its assets to satisfy the claims of secured and non-secured creditors known.

Mr. Msakyi has impressed this court to invoke section 382 of Cap 212 in lifting the veil of incorporation. However, this too is inapplicable and premature at this stage. With respect to Mr. Msakyi, Section 382 does not automatically lift the veil. The veil is lifted by the court upon satisfaction that indeed the director misapplied the money or assets of the company or that he/she has been guilty of misfeasance, breach a fiduciary or other duty in relation to the company. Considering that I have not been moved to determine the conduct of the directors with respect to the money or assets of the company, I find the prayer to invoke section 382 to devoid of merit and a severe misconception on the part of the applicant.

I wish to reiterate further that the scope of section 284 is limited to the assets of the company and not that of its directors. Therefore, as rightly argued by Mr. Tairo the case of **John Pascal Sakaya v Azania Bank Limited** Misc Commercial Case No. 40 of 2018 cited by the Mr. Msakyi is distinguishable from this case as the properties belonged to the parties not the third parties.

As regards the parties, I am of the the injunctive order under section 282(1) whether made *suo motto* by court or at the instant of a parties, is contingent to the pendency of a winding up proceeding. By virtue of being contingent to a winding up petition, it goes without say that the injunctive order under section 282(1) only applies or binds the parties to the winding up proceedings. In the instant case, the pendency of winding up proceedings is not in dispute. It is equally not in dispute that the Applicant and the 1st Respondent are all parties to the suit. Conversely, the 2nd respondent herein is not a party to the said proceedings. Under the circumstances, I find the argument by Mr. Tairo that the 2nd Respondent has been wrongly dragged to this application as a tenable and a correct interpretation of the law.

Having stated that, I will now proceed to state albeit briefly the criteria for granting injunctive orders under Order XXXVII as set by Georges, C.J in the landmark case of **Atilio vs Mbowe [1969] HCD 284.** The criteria which have now become part of law requires that before granting the order of injunction the court must be satisfied that:

i. There is a serious question to be tried on the facts alleged, and the probability that the plaintiff will be entitled to the relief prayed.

ii. the Applicant stands to suffer irreparable loss requiring the courts intervention before the Applicants legal right is established;

iii. that on the balance, there will be greater hardship and mischief suffered by the plaintiff from withholding of the injunction than will be suffered by the defendant from granting of it.

In the light of what I have already held with regard to the ownership of the assets and the misjoinder of the 2nd Respondent, I will not labour much on these criteria as the answer to the 1st criteria is obviously in the negative and so is the answers to the rest of the criteria. Accordingly, I dismiss the application with costs.

DATED at DAR ES SALAAM this 29th day of October 2019.

J.L. MASABO

JUDGE

Judgment delivered this 29th day of October 2019 in the presence of Mr. Dennis Maringo, counsel for the Respondent and in the absence of the Applicant.

J.L. MASABO

JUDGE