

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

MISCELLANEOUS CIVIL CAUSE NO. 5 OF 2020

WINDING UP PETITION

Pursuant to section 281(1) of the Companies Act [CAP 212 R.E. 2002]

IN THE MATTER OF THE COMPANIES ACT [CAP 212 R.E. 2002]

GROUP SIX INTERNATIONAL COMPANY

LIMITED.....PETITIONER

VERSUS

CENTRAL PARIS COMPLEX COMPANY

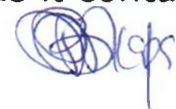
LIMITED.....RESPONDENT

15TH september, 2020 & 23^d SEPTEMBER, 2020

RULING

MKAPA, J:

This Ruling relates to preliminary point of objections raised by the Respondent **in Miscellaneous Civil Cause No. 5 of 2020** in which the petitioner is seeking for an order for winding up the Company (the Respondent) for failure to pay its debts. The preliminary point of objections raised are to the effect that **first**, the application is frivolous, vexatious and bad in law for being filed prematurely **secondly**, the petition is incompetent as it contained



defective verification clause and **lastly**, the petition has been filed under the non-existence law. The petition is brought under section 281(1) of the Companies Act Cap 212 [R.E 2002] and Rule 106 of the Companies (Insolvency) Rules, GN No. 43 of 2005 and is supported by a sworn affidavit of Mr. Steven. D. Mushi legal counsel of the petitioner. The Respondent disputed the petition and raised the following preliminary points of objection;-

1. That, the application is frivolous, vexatious and bad in law for being filed prematurely.
2. That, the petition is incompetent as it contains a defective verification clause.
3. That, the petition has been filed under the non-existing law.

On the date when this petition was set for hearing the petitioner was represented by Mr. Stephen Mushi learned advocate, while the respondent had the representation of Mr. Engelberth Boniface also learned Advocate. Parties consented the preliminary objection be disposed of by filing written submission and the court so ordered.

In the course of arguing the points of objection, Mr. Engelberth abandoned the third point of preliminary objection and proceeded to argue the first and second objections respectively.



Submitting in support of the first preliminary objection Mr. Boniface submitted that the petition is frivolous, vexatious and bad in law as the same has been filed prematurely before this court. Mr. Engelberth went on explaining the fact that the said objection is based on the provisions of clause 40.1 of the agreement and schedule of conditions of building contract between parties herein which provides for arbitration as a means of resolving disputes thus it was Mr. Engelberth's argument that as the said agreement contained an arbitration clause, the agreement should have been governed by Arbitration Act. No. 2 of 2020 and more so, the dispute should have been first referred to the arbitrator. On the second objection Mr. Engelberth contended that the petition is incompetent for containing defective verification clause. Furthering his contention he submitted that it is mandatory under section 281 of the Companies Act, [Cap 212 R.E 2002] that, the petition for winding up a company should be supported by an affidavit verifying a winding up petition. However, the affidavit which was sworn by the petitioner's legal counsel did not disclose which facts were to his knowledge, information or belief thus rendered the affidavit incompetent. To support his argument Mr. Engelberth cited the case of **Salimu Vuai Fom Versus Registrar of Cooperative Societies And Three Others (1995) T.L.R 75** where the Court



of Appeal observed that, where an affidavit is made on information, it should not be acted upon by the court unless the source of information is specified.

Finally, Mr. Boniface submitted that as the affidavit's verification clause for verifying the winding up is defective it renders the petition incompetent. He thus prayed for the petition to be dismissed with costs.

Submitting against the preliminary objections raised, Mr. Mushi submitted that the first preliminary objection has been misconceived and it has been improperly raised because the same ought to have been brought by way of application to stay the proceedings pending reference to the arbitration. The learned counsel supported his submission with the decision in the case of **Tanzania Union of Industrial Workers Association V. Mbeya Cement and another, Civil case No. 315 of 2020 TLR 2005** where **Hon. Judge Massati** held that;-

"..... The point that the suit/application was prematurely instituted because it was not referred to arbitration is a matter sought in the exercise of judicial discretion and cannot properly be taken and decided as a preliminary objection. So a party has



to move a court by an application to stay the proceedings and not to raise a preliminary objection on the trial”

Following the above legal position, it was Mr Mushi’s argument that it would be contrary to the law to refer the petition for winding up of a company for arbitration, for lack of forum as an arbitrator does not have powers to order for winding up of a company. Furthering his submission Mr. Mushi referred to the decision in the case of **Rufiji Basin Development Authority Vs. Kilombero Holding Limited Misc. Commercial Case No. 34 Of 2006, Commercial Division of The High Court, (Unreported)** where it was held that, once a winding up proceeding is commenced an arbitrator has no jurisdiction to arbitrate the parties to a submission even if there exist a reference in the agreement.

Furthering his contention the learned counsel contended that the first preliminary objection to the effect that the application for winding up is prematurely filed before this court is not based on purely point of law but rather on evidence and this court would require evidence in establishing the existence of the arbitration clause which is contrary to the settled principle that **a point of preliminary objection cannot be raised if any fact has to be ascertained or proved through evidence in the course of deciding it.** Mr Mushi cited the decision in the celebrated case of

Mukisa Biscuit Manufacturing Co. Ltd. Versus West End Distributors Ltd [1969] E.A 696 at page 100.

Next Mr. Mushi faulted the second preliminary point of objection to the effect that, all paragraphs in the petition were based on the knowledge, belief and information possessed by the advocate of the petitioner because he had been involved all alone in the matter giving rise to the winding up thus he had requisite knowledge of the matters referred in the petition as clearly stated in the affidavit vide Form 281b. Mr. Mushi supported his submission with the decision in the case of **Victoria Rweikiza Versus Benedicto R. Ijumba, Misc. Land Application No. 93 of 2013 (Unreported)** Hon. Judge D Mango had this to say;-

".....where it shows that the deponents have been actively involved in the issue of matter giving rise to the application presupposed that he had the first knowledge in his mind hence no need of disclosing the source of information."

It was Mr. Mushi's view that applying the principle in **Victoria Rweikiza** (Supra) in the instant application, the advocate for the petitioner was authorized to depone on behalf of the petitioner or third party the petitioner therefore cannot be compelled to disclose



the source of fact or information which were all known to the legal counsel who had been authorized to depone.

Mr. Mushi went on explaining that it is a legal requirement that all affidavits pertaining to the winding up of a company to conform to the prescribed format namely Form 281b under the companies (Forms) Rules 2003 the fact that the advocate for petitioner on behalf of the petitioner did comply. It was Mr.Mushi's further argument that following the advent of the principle of Overriding Objective brought by the Written Laws (Misc. Amendments) (No.3) Act, 2018, in which courts are required to deal with cases justly and to have regard to substantive justice, courts have granted and should in this case, grant the petitioner leave to cure the defect. The learned counsel supported his submission with the decision in the case **Yakobo Magoiga Gichere Versus Penninah Yusuph Civil Appeal No. 55 Of 2017** and another decision in the case of **Sanyuo Service Station Limited Versus BP Tanzania Limited Civil Application No. 186/17 Of 2018** where Hon. Justice Kitusi held that;-

".....it can safely be concluded that the courts powers to grant leave to a deponent to amend a defective affidavit, are discretionary and wide enough to cover a situation where a point of preliminary objection has been raised and even where the affidavit has no



verification clause. Undoubtedly, as the rule goes, the discretion has to be exercised judiciously. On the advent of the overriding objective rule introduced by the written Laws(Miscellaneous Amendments) (No.3), Act, 2018 the need of exercising the discretion is all the more relevant.”

On basis of the above principle, it was Mr. Mushi’s views that the defect in verification clause did not occasion any miscarriage of justice to the respondent.

Finally, he prayed for the preliminary objection to be dismissed with costs.

In rejoinder, the learned counsel for the respondent reiterated his submission in chief and maintained his stance to the effect that the application is incompetent hence has to be dismissed with cost.

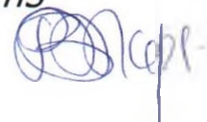
Having considered both parties’ arguments for and against the points of objections raised the question for determination is whether the objections raised qualify the test for preliminary objection? On the first point of objection to the effect that the application for winding up is premature due to the availability of an alternative remedy by way arbitration as stipulated in the agreement, this argument should not detain me as I am in agreement with the petitioner the fact that it is a settled principle

as illustrated in the landmark case of **Mukisa Biscuit Manufacturing Co. Ltd V. West End Distributors Ltd** (1969) E.A. 696 that, a point of preliminary objection cannot be raised if any of the fact has to be ascertained or proved through evidence in the course of deciding it. I am satisfied that this point of preliminary would require long arguments with evidence in the course of deciding it. Thus the first point of objection is meritless and I proceed to reject it. As to the second point of objection the counsel for the petitioner has argued the fact that it a legal requirement that all affidavits pertaining to the winding up of companies to conform to the prescribed format /standard Form 281b under the Companies (Forms) Rules 2003. My perusal of the said form has revealed the fact that Form 281b requires the petitioner while making oath to delete some information relating to the knowledge of the statement in the petition if the affidavit is not made by the petitioner. It is plain clear that the affidavit was sworn by Mr. Stephen D. Mushi, advocate and legal counsel to the petitioner who was not a petitioner yet he proceeded to swear to the effect that the statement in the petition is true to the **best of his knowledge**, information and belief. [Emphasis mine] while in the first paragraph of the oath Mr. Stephen conceded the fact that he was not a petitioner by deleting the



statement on knowledge on the statement of the petition. It is opportune for me to point out the fact that it is trite principle that affidavit being a substitute to oral evidence in court, should contain statement of facts and circumstances to which the witness (petitioner in this case) deposes either of his own personal knowledge or from information to which he believes to be true. The counsel for the petitioner considered such defect as minor and curable by invoking the principle of overriding objective which requires courts to deal with cases justly and to have regard to substantive justice. It is pertinent to out that despite the law being settled on the principle of overriding objective the Court of Appeal has had the occasion to pronounce itself on the extent to which it can invoke the overriding objective in the decision of **Mondorosi Village Council & Two Others V. Tanzania Breweries Limited and 4 Others** Civil Appeal No 66 of 2017 and in another decision of **Njake Enterprise Limited and Another Civil Appeal No. 69 of 2017** (both Unreported) where the Court held that;-

"Whilst taking cognizance of the overriding objective principle, the said principle cannot be invoked blindly in disregard the rules of procedure couched in in mandatory terms"



Coming to the facts of this matter, it is mandatory under section 281 of the Companies Act Cap 212 [R.E 2002] that the petition for winding up a company must be supported by an affidavit verifying a winding up petition. I am satisfied the fact that the omission mentioned above is fatally incurable and the same cannot be cured by the principle of overriding objective thus making the whole petition incompetent. In the event, I found the second point of objection meritorious and proceed to struck out the petition for being incompetent for non-compliance with the Companies Act Cap 212.

It is so ordered.

Dated and delivered at Moshi this 23rd day of October, 2020




S.B. MKAPA
JUDGE
23/10/2020