

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(IN THE DISTRICT REGISTRY OF ARUSHA)**

**AT ARUSHA**

**MISC. CIVIL CAUSE NO.3 OF 2017**

**IN THE MATTER OF THE COMPANIES ACT, 2002, CAP. 212**

**And**

**IN THE MATTER OF PETITION FOR WINDING UP OF ALBERO ITALIAN  
RESTAURANT & HOTEL COMPANY LIMITED**

**JOELLE DAHAN .....PETITIONER**

**VERSUS**

**ALBERO ITALIAN RESTAURANT & HOTEL**

**COMPANY LIMITED .....RESPONDENT**

**MYLENE DIMITRI.....CREDITOR**

**JUDGMENT**

**28/7/2020 & 19/03/2021**

**GWAE, J**

Petitioner, Joelle Dahan filed this petition against Albero Italian Restaurant & Hotel ("the respondent") and on the 1<sup>st</sup> August 2019 one Mylene Dimitri as the respondent's money lender ("Creditor") issued a notice of appearance pursuant to Rule 104 of the Companies (Insolvency) Rule, 2004 G.N. No.43 of 2005 contending that he advanced a loan to the respondent in the tune of US\$

189,956.48. After filing of the notice of appearance by the creditor, on the 14<sup>th</sup> August 2019 the parties' pleadings were ordered to include the creditor as a party to this matter.

The petitioner's complaints are to the effect that; the respondent's operations started excluding her from its affairs in the mid of the year 2015 as no company's general meetings that were being held and neither submission of accounts nor recommendation of dividend to the members and that the company is facing serious financial problems leading to inability to pay its employees. Further to that, there are new directors appointed without the knowledge of the petitioner. Relying on the above complaints, petitioner is now praying for the following reliefs;

1. This Court intervenes for the interest of justice to issue a winding up order of the Company on a just and equitable ground
2. A liquidator be appointed forthwith
3. Costs of the petition be provided for
4. Any other and further relief the court may deem just and equitable to grant

According to the petitioner's petition, the 1<sup>st</sup> respondent was incorporated as a private company on the 13<sup>th</sup> day of February 2008 under the Companies Act, Cap 212 Revised Edition, 2002 with Certificate of Incorporation Number

64227 and her office is in Arusha. The principal objects of the respondent being to carry on hotel business, restaurant, café tarven, inn, roadhouse, out court, motel holiday camp and apartment and other objects stated in the Memorandum and Article of Association of the Company. That, the respondent has its two members and directors namely; the petitioner and one Aslam Ramadhani Topiwala who are holding 50% @ of the shares. According to the petitioner, the respondent's shareholders / directors are in serious differences or misunderstandings which hinder smooth and efficient running of the company as a commercial concern.

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Through an affirmed affidavit of Aslam Ramadhani Topiwala, respondent's co-director, the respondent has disputed this petition averring that both directors have not yet been registered with the Business Registration and Licensing Authority (BRELA) due to anomalies in the office of the Registrar of Companies and that it is not equitable for the Company to be wound up simply because it is still in operation and has employed about 20 employees and due debts are ordinarily payable.

Mr. Aslam also stated that the petitioner has not presented any reforms of the Company that were rejected. He added that the petitioner is not only contributor to the respondent's working capital but also the creditor and that the

petitioner has been away from Tanzania and that there is no deadlock between the directors of the Company.

After long various court's adjournments intended to enable the parties to mutually settle the matter, finally the parties' advocates sought to dispose this petition for winding up by way of written submissions.

In her submission, the petitioner's advocate argued inter alia that, initially the company's former directors and shareholders were Antonio Gianni (holder of 75 % shares), Raphael Nacarlo (15 %) and Simion E. Mndeme (10 %). As to the ~~reasons which necessitated this petition, the petitioner's advocate submitted that~~ the company has been unable to pay the petitioner USD 2000 monthly as repayment of her money that is USD 279,000 advanced to the company since February 2016 despite her several reminders.

However, the petitioner argued that, the respondent does not reach insolvency margin except that, the appointed Board Members are incompetent and ineffective as required by the Memorandum and Article of Association of the Company and that the company's objects aforestated cannot be met. He went on arguing that the shareholders and directors are unable to speak terms to each other. To embrace his submission the petitioner's advocate cited the decision of this court in **Ernest Andrew v. Francis Philip Temba** (1996) TLR 287 where at page 291, it was held that;

"In my considered view, I think it would be just if this company is wound up because as remarked earlier on in my ruling the former directors are not in talking terms so to speak, each director is accusing the other director of one of the other.....in the final event this court in exercise of its discretion under s. 167 (f) has find fit to wind this company and appoints the Registrar of companies to act as official receiver"

The Counsel for the petitioner also urged this court to make a reference to section 282 (2) (a) & (b) of the Act and in **Re Morden Retreading Co. Ltd** (1962) EA 57.

On the other hand, the respondent in her submission opposing the sought winding up argued that, section 281 (1) (a) (ii) of the Act cited by petitioner and paragraphs 1 and 15 of the petition envisaging that the petitioner has preferred this petition as a contributory and not as a creditor whereas her shares are yet to be registered due to anomalies and even if as creditor yet he she has not provided security as required under section 181(a) (i) and (ii) of Cap 212 nor has the petitioner addressed the registration issue of the shareholders at BRELA as raised in the respondent's affidavit in opposition.

The respondent's went on attacking the winding up petition by stating that the petitioner has been participating fully in the management of the company vide representation by advocate **George Mwaria** as per Resolution dated 11<sup>th</sup>

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Nov. 2015 and Advocate **William Mwisijo** pursuant to Resolution dated 24<sup>th</sup> June 2016. He further argued that if this petition is granted the interest of the creditor (s) will be into jeopardy. therefore, according to him, it is not just and equitable for the court to issue an order of Winding Up of the company

In his part, the creditor seriously resisted this petition by submitting that it is not just and equitable to wind up the respondent for the following reasons, firstly, that, she has not issued a demand notice of payment and secondly, negative implication for the sought winding up of the company on the part of the creditors and personnel involving.

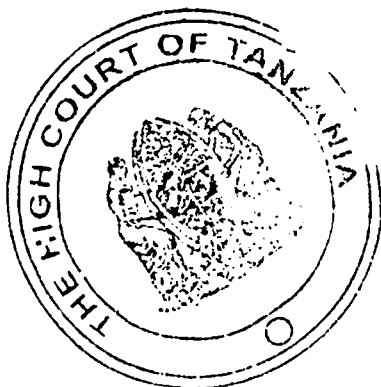
This ruling was to be delivered earlier however after the court observation suo motto that, names of respondent's current shareholders are not clear and contentious issue as to whether shares of the petitioner and one Aslam Ramadhani were duly registered and subsequent to such observations, I issued the order requesting the Registrar of Companies to give us detailed information nevertheless to date, I have received none.


Considering the petitioner's complaints that, there are serious differences or misunderstandings between them (shareholders/directors) which hinder smooth and efficient running of the company as a commercial concern and undisputed fact that since institution of this petition in the year 2017 to date, no

amicable resolution of the matter, in those circumstances, therefore, this petition is legally grantable.

I consequently declare the respondent, Albero Otalian Restaurant and Hotel Company Limited effectively wound up and by virtue of section 308 (1) and (2) of the Companies Act (supra). I further order that the respondent's creditors and contributories arrange for meeting in order to decide as whether to file to an application for an appointment of committee of inspection and appropriate liquidator. In the circumstances of this petition, I make no order as to costs

~~Each party shall bear its costs~~



  
**M. R. GWAE, J**  
**JUDGE**  
**19/03/2021**