

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(TANGA DISTRICT REGISTRY)

AT TANGA

MISC. CIVIL CAUSE NO. 2 OF 2021

IN THE MATTER OF COMPANIES ACT NO. 12 OF 2002

AND

IN THE MATTER OF APPLICATION BY

GRYAYSON JOEL KIRUMBA (As the Lawful Attorney

of RITA ANNE BALFOUR PETITIONER

-VERSUS-

**ASHA HAMISI MGEMBE (As Liquidator of JIMBO MANAGEMENT
LIMITED.....1ST RESPONDENT**

JIMBO MANAGEMENT LIMITED.....2ND RESPONDENT

SBLHF & CO. S.a.r.l.....3RD RESPONDENT

JAMES HENRY BALFOUR.....4TH RESPONDENT

R U L I N G

Date of last order: 08/02/2022

Date of judgment: 24/02/2022

AGATHO, J.:

The Petitioner brought this Petition under provisions of Rule 293(1)(2)(3)(4) and (5) of the Companies (Insolvency) Rules G.N. No. 34 of 2014 and Section 233(1) of the Companies Act, [Cap 212 R.E. 2019].

The gist of the Petition is that the Petitioner claims that she on diverse dates advanced a loan executed in two instalments to the 2nd Respondent Company (Jimbo Company). That in the period between 2003 and 2013, the Petitioner gave a loan amounting to Euro 50,000 to assist the 2nd Respondent with its investment in purchase of land, assets and pay off some creditors. The loan was disbursed in two instalments: Euro 20,000 in year 2003 and Euro 30,000 in 2013. The claim goes on that the Euro 20,000 was loaned to the company via Mr. James Balfour (4th Respondent) in December 2005. The Euro 30,000 was loaned to the 2nd Respondent by one Mr. Neil Cranston. That the latter loan was due to be paid back to Mr. Cranston by 31st December 2009. The Petitioner further alleges that the said sum of money was paid back to the creditor (Mr. Cranston) by Mrs. Rita Arthur Balfour (the Petitioner). And a copy of extract from the Petitioner Bank statement was annexed to the petition as annexure "JML 6."

In 2014, the 4th Respondent sold his shares (70% controlling interest of the company) to the 3rd Respondent. There was disclosure of 2nd Respondent's accounts for 2013 and 2014. The Petitioner claims that these accounts showed that there was a loan that was approximately Euro 50,000. These are found in annexure "JML 7." The loan is also found in the financial

statement of the 2nd Respondent company as shown in annexure "JML 8." The whole loan was secured by the landed property with Certificate of Title No. 13495 plot No. 10, Ushongo Pangani.

The Petitioner made attempts to recover her money loaned to the 2nd Respondent. She engaged Hakika Law Partner to follow up on loan repayment. A copy of a demand letter is annexed as "JML 9." But effort for loan recovery proved futile. Seen that the efforts are not materializing she opted to register a caveat on the security landed property with Certificate of Title No. 13495 plot No. 10, Ushongo Pangani. A copy of the Caveat is annexed as "JML 10."

The Petitioner claimed further that in 2019 the 2nd Respondent through its lawyer Blandy and Blandy LLP wrote to the Petitioner and acknowledged that the 2nd Respondent is aware of the liability. This allegation is disputed by the 1st Respondent who argued that the Blandy and Blandy LLP demanded more clarifications from the Petitioner on the loan for verification purposes. And that was not done by the Petitioner. Unfortunately, on this point the Petitioner did not attach any annexure. Moreover, the 1st Respondent submitted that shareholders of the 2nd Respondent company have also questioned the loan claimed and seem to be unaware of its existence. Further, there is contradiction as to who is the

creditor is it Rita Balfour or Arthur Balfour. The loan agreement shows that it was Rita Balfour who signed as the lender. But there are other instances where the 4th Respondent claimed the money is owed to Arthur Balfour. This also made the 1st Respondent to doubt the credibility of the loan.

The Petitioner was also shocked when the 2nd Respondent company in liquidation following creditors' voluntary winding up the Petitioner's loan was categorised as junior loan in the statement of affairs presented to the liquidator during creditors meeting. The statement is annexed as annexure "JML 11."

The Petitioner aggrieved by the ranking as junior creditor (junior loan) in the creditors' list she through her lawyer submitted to the liquidator the proofs so that the liquidator (1st Respondent) could accord the Petitioner appropriate ranking. This received unfavourable response from the 1st Respondent. It was her response that the loan was not genuine and the same shall not be included in the creditors' list. A copy of the 1st Respondent on the non-inclusion of the Petitioner in the creditors' list is annexed as annexure "JML 12."

These series of events left the Petitioner with no option than seeking Court redress. The Petitioner prays for:

- i. An order varying and or reversing the 1st Respondent's decision dated 23rd April 2021
- ii. An order directing the 1st Respondent to include the Petitioner in the list of the 2nd Respondent's creditors.
- iii. An order directing the 1st Respondent to correctly rank the Petitioner as preferred (preferential) creditor in the list of creditors and ensure the loan takes precedence over other subsequent loan in the 2nd Respondent company.
- iv. General damages as shall be assessed by the Court.
- v. Costs of this Petition be borne by the Respondents.
- vi. Any other directives as may be ordered by the Court.

When the matter came for hearing on 21/10/2021, the Court ordered the same be conducted by way of written submissions. The schedule for filing was set and the parties complied with.

Having gone through the Petition and the parties submission thereto, several issues may be drawn to determine this Petition. But the key issue is whether there was a loan advanced by the Petitioner to the 2nd Respondent Company? I am in agreement with the 1st Respondent's proposed issues:

- a. Whether the 2nd Respondent entered into a loan agreement with the Petitioner?

If the first issue is answered in the affirmative, then whether there is a proof of the said loan on the 2nd Respondent's account. This may not always be the case. What is needed is any proof that the loan was received by the 2nd Respondent. Whether the legal requirement set by the law were complied with. The Petitioner claims that these accounts showed that there was a loan that was approximately Euro 50,000. These are found in annexure "JML 7." The loan is also found in the financial statement of the 2nd Respondent company as shown in annexure "JML 8." The whole loan was secured by the landed property with Certificate of Title No. 13495 plot No. 10, Ushongo Pangani. But on this point, the financial statements of the 2nd Respondent company show the amount as TSHS. 139,000,000 as money owed to creditors. And this figure has been increasing at times. The Petitioner claims that that amount is the loan of Euro 50,000 the Petitioner advanced to the 2nd Respondent. It is not possible in absence of notes annexed to the financial statements or any other company document acknowledging and revealing the name of the creditor to conclude that the Petitioner is the one who advanced TSH 139,000,000 to the 2nd Respondent company.

- b. Whether there is a board resolution proving that the 4th Respondent was mandated to enter and execute the loan agreement on behalf of the 2nd Respondent.
- c. To what reliefs are parties entitled to.

Let us now turn to the issues and see if the Petition has any merits. Regarding (a) Whether the 2nd Respondent entered into a loan agreement with the Petitioner, to answer this issue we look at what the Petitioner alleges and then we proceed to examine the companies MEMARTS and consider whether the 4th Respondent's signing of the said loan agreements was authorized by the 2nd Respondent company's board of directors through a resolution. It is a basic principle of company law that a company has an independent existence. It has its own separate legal personality. The company operates through its board of directors. The board can mandate by resolution any person including the directors to do anything on behalf of the board. Looking at the loan agreements annexed as annexure "JML 4" in the petition and even perusing the submissions by the Petitioner's counsel nowhere we find a piece of evidence showing that the 4th Respondent was authorised by the board resolution to enter into the loan agreement on behalf of the 2nd Respondent company. What the 4th Respondent did goes contrary to the 2nd Respondent company's Articles of

Association. In her submission the 1st Respondent submitted that Article 26.2 of the 2nd Respondent Articles of Association provides that borrowing powers requires a board resolution. Moreover, Rule 286(10)(2) and (93) of the Companies (Insolvency) Rules GN, 43 of 2004 empowers the Liquidator to examine every proof of the debts lodged with him/her, and the grounds of the said debt, and in writing admit or reject that debt in whole in part, and if rejects then state to the creditors reasons for doing so. From that provision of the law the 1st Respondent was and yet is duty bound to protect the interest of the 2nd Respondent company. She was justifiable to scrutinize the claims of the Petitioner with regards to the loan. And since it has become apparent that there was no evidence that the 4th Respondent was authorised by the board through resolution then the 1st Respondent was right in declining to include the Petitioner in the list of creditors.

As for the second issue whether there is proof that the Money as loan was transferred into the 2nd Respondent's account, this can briefly be disposed by considering the route the money transfer took to its destination. The evidence (James Henry Balfour bank statement) shows that the money the Petitioner claims to be the loan was transferred to one Leonie Schelming. Can this be considered to be a proof that the money was received into the 2nd Respondent's bank account? Even if that money could have been

received into the 2nd Respondent's account still the legal requirement of sanctioning company's borrowing would have been flawed.

A third issue (c) whether there is a board resolution proving that the 4th Respondent was mandated to enter and execute the loan agreement on behalf of the 2nd Respondent. This issue has already been answered. Briefly the 4th Respondent was not authorised by any board resolution to enter into any loan agreements on behalf of the 2nd Respondent company. To cement that position I would reiterate the principle that a company has a separate legal personality (see **Salomon v Salomon & Co. Ltd. (1897) A.C.22; Mike W. Kitwaka (As Lawful Attorney of Floyd Vernon Hammer) v Shallom Farming and Plantations Ltd, & 2 Others, Civil Case No. 6 of 2019, High Court, at Tanga** (unreported)). The organic principle of the company is that a company is like a human body it is composed of organs and systems. It operates through the head and arms and other organs. The head is constituted of directors of the company. It directs what the body (company) should do. The company conduct its affairs through meetings, including the board of director's resolutions. Therefore, for a company activity to be lawful it must be sanctioned by the board resolution. The director cannot operate on its own on behalf of the company unless authorised through board resolution to do so.

I have noted that the 4th Respondent in his submission just supported the Petition. However, I am of the view that the principles of company law were not observed by the 4th Respondent. Although Section 39(2) of the Companies Act [Cap 212 R.E 2019] provides an exception that a company document including contracts may be signed by a director and company secretary, in the petition at hand there is no evidence that the company secretary signed the loan agreements. Moreover, the 2nd Respondent company has put restriction in its Articles of Association on borrowing. Under Article 26.2 of the Articles of Association of the 2nd Respondent company such power can be exercised where there is authorisation by board resolution. The 1st Respondent submitted that the 4th Respondent did not have board authorisation to enter into loan agreement. He failed to comply with the Article 26.2 of the New Articles of Association of the 2nd Respondent company. Thus, the 4th Respondent support to the Petitioner's petition is without substance. The old AA and New AA both limits on power to borrow. There must be board resolution. The Petitioner did attach in the petition copy of the 2nd Respondent company's MEMART. The said MEMART its articles end with clause/article 21. This left the Court with questions as where was article 26.2 extracted from? The one attached by 1st Respondent has 55 article. On this the court summoned the parties to

address the Court. The 1st Respondent stated that the article 26 is there in the MEMART of the 2nd Respondent company titled as New Articles of Association (NAA) per shareholders resolution of 19 August 2016. On perusal of record/pleading I found the said New Articles of Association annexed to the 1st Respondent's reply to the Petition. The New Articles of Association has 55 articles. It is not clear why the Petition brought an old AA of the 2nd Respondent company. But in both Articles of Association the power to borrow is rested upon the directors not a single director. Directors means the board resolution. Because directors exercise their powers through board meetings and their resolutions.

But before concluding, I should say something regarding the annextures in the written submissions. There is case law **Tanzania Union of Industrial and Commercial Workers v Mbeya Cement Company and National Insurance Corporation (T) Limited [2005] TLR 41** where it was held that:

"...submission is a summary of arguments. It is not evidence and cannot be used to introduce evidence. In principle all annextures, excerpts extract of judicial decisions or textbooks have been regarded as evidence of the facts and where there

are such annextures to written submission, they should be expunged from the submission and totally be disregarded.”

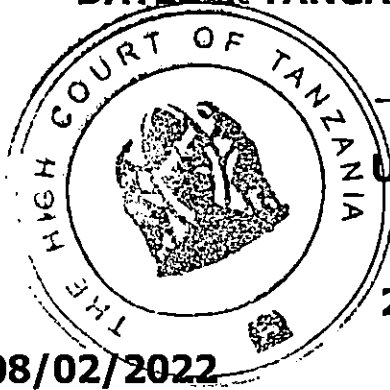
The 1st Respondent submitted that the Petitioner’s counsel has annexed annextures to his written submissions. She thus prayed that the same should be expunged, disregarded, or not be given weight at all.

While I subscribe to view in **Tanzania Union of Industries and Commercial Workers v Mbeya Cement and National Insurance Corporation (T) Limited case**, I am equally of the view that such position does not apply in all situations. In the present petition, the petition was annexed with the annextures as required by Rules 293(3) of Companies (Insolvency) Rules G.N. No. 43 of 2004. I should add here that according to Rule 293(4) of Companies (Insolvency) Rules G.N. No. 43 of 2004 the liquidator (1st Respondent) is required upon receiving the Petition/Notice to file in Court the relevant proof, together if appropriate with a copy of the written statement of his reasons for rejecting the creditor’s proof of debt. Thus, since the counsel for the Petitioner’s written submissions did not introduce any new evidence and because the Petition/Application of this nature is not supported by any Affidavit which could have contained evidence, the annextures suffice. It is the law that evidence may be adduced orally or by way of Affidavit. In the present

application, the Petition was heard by way of written submissions, and hence the evidence could only be given via the annextures to the Petition. However, it is also trite law that the documents annexed to the plaint are not evidence. But by virtue of Rule 293(3) of Companies (Insolvency) Rules G.N. No. 43 of 2004 proofs are allowed to be given. That by implication may mean that documents annexed to the Petition are intended to be relied upon as evidence. And that is why under Rule 293 (4) of Companies (Insolvency) Rules G.N. No. 43 of 2004 the Liquidator is obliged to file in Court the relevant proof and a copy of the written statement of reasons for rejection. Therefore, I am of the settled view that the moment the Court ruled that the hearing shall be by way of written submissions in the Petition then evidence may be given during that time or when the Petition is filed and annexed with the evidence. That is not new evidence because it was annexed to the Petition.

Aside from the holding on the annextures, and for the reasons started herein above the Petition deserve to be dismissed for lacking merits. I thus dismiss it with costs.

DATED at TANGA this 24th Day of February 2022.




U. J. AGATHO

JUDGE

24/02/2022

Date: 08/02/2022

Coram: Hon. Agatho, J

Appellant: Present

Respondent: Present

B/C: Zayumba

Court: Ruling delivered on this 24th day of February, 2022 in the presence of the Abubakary Omary Adv holding brief or Qamara Valerian Adv for the petitioner, Selevasia Kimario representative of the 4th respondent, and the Elisia Paul Adv holding brief of Ernestilla Bahati Adv for 1st Respondent

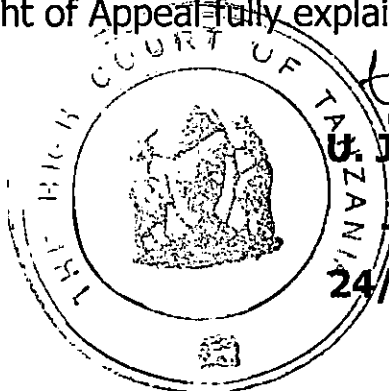



U. J. AGATHO

JUDGE

24/02/2022

Court: Right of Appeal fully explained.




U. J. AGATHO

JUDGE

24/02/2022