IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL CASE NO. 95 OF 2021

1. **MAHUMY INVESTMENT COMPANY LTD**
2. **GMD INVESTMENT COMPANY LTD** ..... **PLAINTIFFS**

VERSUS

MIC TANZANIA PUBLIC LTD COMPANY..... **DEFENDANT**

RULING.

Date of order: 16.05.2023

Date of ruling: 16.05.2023

Ebrahim, J:

The plaintiffs lodged this suit against the defendant for prompt payment of Tanzania Shillings Eight Hundred Six Million Four Hundred Thousands only (TZS 806,400,000/-) which accrued from unpaid commission over a period of three years' contract and eight months plus some days. According to the averments in the plaint, on 11.08.2016, the Plaintiffs entered into an agreement with the Defendant for them to distribute, sale and promote the Defendants'

products for a period between August 2016 to April 2020. The consideration for their arrangement was that the Defendant shall pay the Plaintiffs monthly commission amounting to Tshs. 5,600,000/-. The Plaintiffs claimed that Defendant breached their agreement and did not pay the Plaintiffs, hence the instant suit.

The Plaintiffs began where two Plaintiffs' witnesses i.e., PW1 and PW2 adduced evidence in support of their claim against the Defendant. On 15.05.2023 after the Plaintiffs closed their case, counsel for the Defendant before opening their defence raised a concern on the competence of the Plaintiffs' case before this court on the reason that the Plaintiffs being a body corporate has not tendered in court a Board Resolution authorizing institution of the instant suit.

Following such objection, counsels from both parties were invited to address the court on the same.

In this case the Plaintiffs are represented by advocate Ferdinand Makore and the Defendant has representation from advocate John James assisted by advocate Salma Abdallah.

Submitting in support of the raised point of objection, advocate James began by narrating the historical background of the requirement of

having Board Resolutions by the body corporates before institution of a suit. He traced the background of such requirement the Ugandan case of **Bugerere Coffee Growers Limited v. Sebaduka and Another [1970] EA 147** which was then cited with approval by the Court of Appeal of Tanzania in the case of **Ursino Palms Estate Limited Vs Kyela Valley Foods Ltd and 2 Others**, Civil Application No. 28 of 2014. He stated also that the said position was celebrated in various decision of this court in the cases of **Evarist Steven Swai and Another Vs The Registered Trustees of Chama Cha Mapinduzi & 2 Others**, Land Case No. 147 of 2018; and **Exim Bank (T) Ltd Vs Jandu Construction & Plumbers Ltd**, Commercial Case No. 135 of 2020 where in both cases this court struck out the suit for want of board resolutions to institute a case.

Advocate James cemented his argument by telling the court that neither of the Plaintiffs' witnesses said that they have been authorized to institute this case and that PW2 admitted when he was cross examined in court that there is no board resolution. He concluded therefore that in the absence of the same, the instant suit is incompetent before the court and it should be struck out with costs.

On his part, advocate Makore vigorously challenged the Defendant's counsel submission and argued that the law i.e., **The Civil Procedure Code, Cap 33 RE 2019** does not have any rule which sanction a company to have board resolution before commencing a suit. He referred this court to **section 22 read together with Order 28 Rule 1 and 2 of Cap 33, RE 2019** which provides for institution of a suit and suits against corporation and argued that the law is silent on the requirement of a board resolution. He submitted therefore that the Plaintiffs' plaint is competent before the court and urged this court not to be persuaded by the decisions of the cited cases of this court. He said the reasoning of the cited cases rely on **section 147 of the Companies Act** which provides for discretionary powers of the respective company to obtain a resolution for any act done by the company. He fortified his position by citing the provision of **section 23 of the Interpretation of Laws Act, Cap 1 RE 2019** and interpreted the use of the word **"may"** that it imports discretion.

Citing the case of **CRDB Bank PLC Vs Ardhi Plan Limited**, Commercial Case No. 90 of 2020; and the case of **Sharaf Shipping Agency(T) Ltd Vs Barclays Bank Tanzania Limited and Another**, Commercial Case No.

115 of 2014, advocate Makore argued that there are two school of thoughts concerning board resolution of which in the cited cases it was held that there is no law that necessitate the requirement of board resolution and that such requirement is not in our jurisdiction in terms of **section 147 of the Companies Act.** He distinguished the circumstances of the cited case of **Ursino (supra)** that the decision of the Court of Appeal was set on **Rule 30 of the Court of Appeal Rules** which does not apply with the circumstances of this court.

Arguing in the alternative, he prayed for this court to implore the oxygen principle under the provision of **section 3A and 3B of the CPC, CAP 33 RE 2019.** He also urged the court to exercise its inherent powers under **section 95 of Cap 33** for the interest of justice by ordering the Plaintiff witness be recalled under **section 147(4) of the Evidence Act, Cap 6 RE 2019** to tender a board resolution in consideration of the fact that the same was pleaded at para 12 of the plaint and the defendant has not commenced her case. He prayed for the preliminary objection to be dismissed.

In rejoinder, advocate James argued that **sections 22 and 95 of the CPC** do not cover subject matter before the court and that section

147 of the Companies Act was well discussed in **EXIM bank (supra).** He commented that the cited case of EXIM Bank is more recent than the **CRDB case (supra)** which was decided in 2021 while EXIM Bank was decided in 2022. In distinguishing the cited case of **Sharaf Shipping Agency (supra)** he said the same considered the circumstance of the case and found that it was not mandatory while in the circumstance of this case, the board resolution is mandatory. Referring to **Ursino's** case again, he said the same approved the holding of **Bugerere's** case on the requirement of a board resolution.

He rejoined further that the Plaintiffs have already closed their case and it cannot be revived by the oxygen principle. As for a prayer to - recall a witness under **section 147** he argued that the prayer is not applicable because it came after the defendant's side has raised an objection. Therefore, if the court invokes the above cited provision at this stage it would amount into allowing the Plaintiff to build their case. He prayed for the court to sustain the objection and struck out the suit with costs.

I have carefully followed the rival submissions of the parties' counsels.

Indeed, a Company as a legal entity/juristic person **(subject to the Companies Act and to such limitations inherent to its corporate nature);** has capacity to sue or be sued. However, unlike natural person, much as they enjoy the same privileges, all those privileges have to be acted through another body which is a Board of Directors or through a majority voted decision in shareholder's meeting via a vocal termed as a **"board resolution"** (see the cited case of **Evarist Steven Swai and Other (supra)**).

Therefore, a body corporate like the Plaintiffs are managed through its board of directors which acts through a board resolution and in exercising particular powers or activities of the company, those powers are derived by the company general meeting or Board of Directors vested in them by the memorandum and articles of association. Thus, anything done by the company must be authorized and sanctioned by the Board through a resolution. My stance is amplified by the provisions of **section 147(1) of the Companies Act, 2002, Cap 212 (R.E 2002)** which provides as follows;

"147(1) anything which in case of a company may be done-

(a) By resolution of the company in general meeting, or

(b) By resolution of a meeting of any class of members of the company"

My take of the purpose of the word "may" in the above provision is that the word **"may"** is disjunctive to subsection (a) and (b) in a sense that it only explains the discretion of the company in the activity it wishes to do and the mode in which a company can make its decision i.e., by either invoking **section 147(1)(a) or (b)** but a Company is not at liberty to either or not invoke the provisions of **section 147(1)(a) and (b)**; rather it has to use one of the above options in making any such decision. Therefore, I do not agree with the counsel for the Plaintiffs that the invoking of **section 147(1)(a) and (b) of the Companies Act** in making the decision of the activity of the company like in our instant case to decide to file a suit is discretionary. The discretion is on what they wish to do thereafter the same act is mandated to be done by either through a resolution of the company in a general meeting or resolution of a meeting of any class of members of the company. All in all, a resolution has to be passed for a company to perform its activity or act.

I am abreast to two positions propounded by this Court as to whether the authority of the Board of Directors of the company is mandatory or not. That notwithstanding, while the **CRDB case (supra)and the Sharaf case(supra)** where decided to serve purpose of their own facts and circumstance of each case; it is my holding that a company has to authorize the commencement of legal proceedings by passing a resolution either at a company or Board of Directors meeting, hence the requirement of a board resolution.

I am persuaded by the holding of this court in the case of **Kati General Enterprises versus Equity Bank Tanzania Limited and Another, Civil Case No. 22 of 2018,** High Court of Tanzania, Dar es Salaam District Registry at Dar es Salaam (unreported); and the case of **Ukod International Company Limited Vs Equity Bank Tanzania**, Civil Case No. 216 of 2021

whereby the position that failure to have a board resolution authorizing filing of a suit offends the provisions of **Section 147 (1) of the Companies Act, 2002** renders the suit incompetent was affirmed. I am further inspired by the wisdom of this court in the case of **Tanzania American**

International Development Cooperation 2000 Limited (TANZAM) (Supra) where it was observed that;

> *"I fully subscribe to the spirit and position of the High Court which are to the effect that the plaintiff being a corporate entity must have a board resolution of an entity before instituting a civil suit. I take the above position basing on the fact that, a company is formed by more than one person and those persons have interest in the company. Thus, since the suit touches that interest, it is prudent to have a board resolution prior to the filing of a suit, the board resolution will show that people whose interest will be affected have consented to the institution of a suit..."*

The above same position was also held by the Court of Appeal of Tanzania in the case of **Pita Kempap Ltd. v. Mohamed L A. Abdulhussein, Civil Appeal No. 128 of 2004 & 69 of 2005** (unreported).

Borrowing a leaf from other jurisdictions, I am again inspired by a persuasive decision in the case of **La Campagnie de Mayville v. Whitely (1896) 1 Ch 788** where it was held that:-

> *"if authority is wanted to use the name of the company, must be authority from the proper quarter either from the Directors or from the shareholders meeting convened for the purpose".*

I am taking this route in cognizance of the policy of the company, financial implications, costs associated with the legal proceedings in the event the matter is decided against the company and protection of corporate bodies from its own overzealous directors and shareholders. Again, the assurance that the board has authorized institution of proceedings is paramount to the defendant to know the legitimacy of the proceedings instituted against him/her and whether or not he will be able to recover his/her costs should the matter end in his/her favour instead of endless objection proceedings and litigations. As for the alternative prayers made by the counsel for the Plaintiffs, the same should nct detain me as this court cannot invoke the oxygen principle to revive an incompetent case before the court at first place. Also, the court cannot also allow the recalling of the witness as this argument arose after the Defendant's counsel has raised an objection concerning the incompetence of this suit after the Plaintiff has closed its case. Allowing the same would indeed amount to allow the Plaintiffs to build their case which in them the prayer came as an afterthought. Much as they pleaded and promised to file the same before the hearing of the case, they did not find it important to ensure that the

board resolution gets into the court records. The mere pleading of the same in the plaint shows that it is a necessary document but does not mean that it should be taken that there is a board resolution.

Having said that, I sustain the objection and struck out this case with costs for being incompetently filed before the court without a board resolution.

Accordingly ordered.

HIGH COURT TANZANIA

R.A. Ebrahim
Judge

Dar Es Salaam

16.05.2023.