IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MAIN REGISTRY)

AT DAR-ES-SALAAM

MISCELLANEOUS CAUSE NO. 46 OF 2023

BETWEEN

CHALINZE CEMENT COMPANY LIMITED ..... 1ST APPLICANT

MOHAMED HUSSEIN BAHADELA ..... 2ND APPLICANT

VERSUS

REGISTRAR OF COMPANIES ..... 1ST RESPONDENT

THE HONOURABLE ATTORNEY GENERAL ..... 2ND RESPONDENT

RULING

Date of last Order: *01/11/2023*
Date of Ruling: *20/11/2023*

MLYAMBINA, J.

The Applicants are seeking for an order of Certiorari against the Respondent to quash the decision of the 1st Respondent to deregister the 1st Applicant and for an order of Mandamus compelling the 1st Respondent to restore the Applicant's Company and maintain the *status quo ante* that obtained before the deregistration order dated 03/03/2023. The application was made under *section 17(2) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act [Cap 310 Revised Edition 2019]; Rule 8 (1) (a) and (b), 2, 3, 4 and 5 of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, 2014; and Section 2*

(3) of the Judicature and Application of Laws Act [Cap 358 Revised Edition 2019].

The moving provisions indicates that this Court has been asked to exercise its judicial review powers. For that reason, it must be appreciated that the instant judicial review proceedings is all about review, the decision-making process and not the merits of the decision of the first Respondent of which the application for judicial review has been brought. This is the position in the case of **Rahel Mbuya v. Minister for Labour and Youth Development and The Attorney General,** Civil Appeal No. 121 of 2005, Court of Appeal of Tanzania at Dar es Salaam (unreported).

The purpose of the remedies availed to a party under the judicial review regime is to ensure that the Applicants were given fair treatment by the first Respondent to which the Applicants have been subjected. The rationale behind is not to substitute the opinion of the Court with that of the first Respondent in which is vested statutory authority to determine the matter in question.

At the centre of the controverse, it emerged one intriguing legal issue surrounding the interpretation of *Section 400 (6) of the Companies Act as amended by Act No. 3 of 2019,* which though not taken as a separate

preliminary legal issue, I find it convenient to consider at the outset. *Section 400 (6) (supra)* provides:

> If a Company or any member or creditor thereof feels aggrieved by the Company having been struck off the Register, *the Court on an application made by the Company or member or creditor before the expiration of ten (10) years from the Publication in the Gazette of the notice above,* may if satisfied that the Company was at the time of striking off carrying on business or in operation or otherwise that it is just the Company be restored to Register order the name of the Company and upon satisfying a copy of the order being delivered to the Registrar for registration, the Company shall be deemed to have continued in existence as if its name has not been struck off and the Court may by the order give such directions and make such provision as seem just for placing the Company and all other persons in the same position as nearly as may be as if the name of the Company has not been struck off. [Emphasis added]

Counsel Subira Omary was of firm view that *section 400 (6) (supra)* requires a person aggrieved to make application for the Court to give direction of restoring the Company. Thus, the proper remedy for the Applicants were to file this application praying for mandamus order for the

Respondent to be compelled to restore the Company and the Respondent could not be compelled if the order dated 03/03/2023 is not quashed. She cited *section 17(1) & (2) of the Law Reform Fatal Accidents and Miscellaneous Provisions Act [Cap 310 Revised Edition 2019]* which provides:

> The High Court shall not whether in the exercise of its Civil or Criminal jurisdiction issue any of the prerogative writs or Mandamus, Prohibition or Certiorari.
>
> (2) In any case where the High Court would but for subsection (1) have had jurisdiction to order to the issue a writ of mandamus requiring any act to be done or a writ of prohibition prohibiting any proceeding or matter or a writ of Certiorari removing any proceeding or matter in the High Court for any purpose, the Court may make an order requiring the act to be done or prohibiting or removing the proceedings or matter as the case may be.

According to Counsel Subira, there is nowhere in *Section 400 (6) of the Companies Act (supra)* providing that application should be by way of application for restoration. There is no such procedure as to which format should be preferred. There is no such local remedy apart from this petition.

Counsel Subira maintained that; even if there could be other remedies, the Applicants are not barred from bringing this application. To buttress the position, Counsel Subira cited the case of **Bi Johari General Trading LLC**

v. The Commissioner General TRA and 2 Others, Misc. Commercial Case No. 24 of 2006 (unreported) in which the Court observed *inter alia* that in obvious cases, the Court may also examine whether the Applicants have exhausted particular alternative statutory remedies, but it has frequently been held by this Court that the availability of alternative remedy perse would not bar access for the prerogative orders. Under page 8, the Court quoted the case of **John Byombarirwa J. Regioner Commissioner and Police Commander Bukoba** [1986] TLR 73 and held that:

> The existence of a alternative remedy is not necessarily a bar to the grant for leave to apply for judicial review.

Counsel Subira went on to argue that the availability of an alternative remedy is neither a necessary requisite nor a bar to access judicial review in appropriate cases, like the one under considerations.

In reply, learned State Attorney Ayub Sanga contended that the key words under *Section 17(2) (supra)* is that the Court can issue the orders sought if it has jurisdiction.

It was Mr. Ayub's submission that despite the fact that the High Court has unlimited jurisdiction under *Article 107 of the Constitution of the United Republic of Tanzania of 1977,* that jurisdiction has been limited by statutes.

To back up the proposition, Mr. Ayub cited the case of **Commissioner General TRA v. AG & Milambo Ltd,** Civil Appeal No. 62 of 2022, Court of Appeal of Tanzania at Dar es Salaam (unreported), pp. 16, 17 and 20 which emphasized that the High Court is clothed with jurisdiction of judicial review. However, when there is special forum to deal with the matter, that special forum must be exhausted first.

Mr. Ayub went on to draw attention at page 17 where the Court of Appeal borrowed leaf from **the Halsbury's Laws of England,** Vol. 10 where jurisdiction is defined in paragraph 314 as follows:

> ...The limits of this authority are imposed by statute...Under which the Court is constituted and may be extended or restrained by similar means. A limitation may be either as to the kind and nature of the claim, or as to the area which jurisdiction extended or it may partake of both these characteristics.

He was of strong view that the writs of certiorari and mandamus prayed by the Applicants sets preconditions. One of it is exhaustion of available remedies. He cited the case of **CS1 Energy Group (Tanzania) Ltd v. Public Procurement Appeals Authority & 3 Others**, Misc. Civil Cause No. 104 of 2021 (unreported), pp. 22-23 and 32-33 in which the Court quoted the case **of Sanai Mwambe and Another v. Muhere Chacha**

(1990) TLR 54. In the latter case, it was held that; one of the condition for an order of certiorari is that there should not be a right of appeal (other remedies). At page 32-33 the Court while citing the case of **John Byombaliwa** *(supra),* gave five conditions for issuing a writ of mandamus, the exhaustion of alternative remedies is a preliquisite condition before grant of writ of certiorari or mandamus.

Mr. Ayub went on to cite the case of **Paris Jaffer and Another v. Abdulrasul Ahmed Jaffaer and 2 Others** 1996 TLR P. 116 as cited in the case of **Transworld Aviation Ltd v. The Board of Directors of Tanzania Civil Aviation Ltd and the AG**. Misc. Cause No. 63 of 2022 in which it was held that:

> Where there is alternative remedy, that alternative remedy has to be exhausted first before coming to judicial review.

Other authority cited by Mr. Ayubu was the case of **M/S Aqua Power Tanzania Ltd (T/S Turbine Tech) v. The Public Procurement Appeals Authority and 3 Others,** Misc. Civil Cause No. 32 of 2021, High Court of Tanzania Main Registry at Dar es Salaam, pp. 19, 20 and 21. At page 19, the Court cited the case of **Freeman Aikael Mbowe v. The DPP & 2 Others,** Misc. Civil Cause No. 21 of 2021 where it was held:

> This Court assumes jurisdiction to hear application of this nature only after all available remedies under any other written laws have been exhausted.

At page 20, the Court cited the case of **Abadiah Salehe v. Dodoma Wine Co. Ltd** 1990 TLR 113 where the Court held:

> ...As a general rule the Court will refuse to issue the order if there is another convenient and feasible remedy within the reach of the Applicants.

Mr. Ayub was of solid view that the Applicants were required to exhaust the remedies available under *Section 400 A (6) of the Companies Act(supra).* It is the remedy for restoration. Such application must be by way of restoration before the High Court under *Section 400A (6) (supra).* The application has to be filed before the Dar es Salaam Zone and not before the Main Registry.

According to Mr. Ayub, the Applicants were/are aware that they were supposed to apply restoration. That is why they lodged application for restoration *Misc. Civil Application No. 213/2023* with the same parties but with non joinder of Attorney General. It was lodged on 15/05/2023. Parties appeared before Hon. Bwegoge on 1/6/2023. They withdrew the application with the purpose of issuing 90 days notice to the Attorney General and join

him. They issued the 90 days notice as per annexture OSG1 to the counter affidavit.

Mr. Ayub invited us to read paragraph 13 of the reply to Counter affidavit and the submission from the Applicant's Counsel. The Applicants admitted that there is remedy but the Act does not provide for a mode to apply.

It was the view of Mr. Ayub that the mode is by way of application for restoration. He cited the case of **Bonifasia Aidan Mapunda v. The Registrar of Companies,** Misc. Commercial Cause No. 45 of 2022, High Court of Tanzania Commercial Division at Dar es Salaam. He also cited the case of **Bahari Schools Ltd v. The Registrar of Companies,** Misc. Commercial Cause No. 12 of 2022 High Court of Tanzania Commercial Division and the case of **Nyanza Mines (Tanganyika) Ltd v. The Registrar of Companies and Another,** Misc. Civil Application No. 684 of 2019 High Court of Tanzania at Dar es Salaam (unreported), p.16.

Mr. Ayub took us to the jurisprudence of other jurisdictions. *The Companies Act of India* which is *impari materia* to the Tanzania *Companies Act. Section 400 A (1) of the Companies Act (supra)* is *impari materia* with *Section 248 (c) of the Indians Companies Act* which provides for the power

of Registrar to remove name of company from register of Companies. The remedy in India is as provided under *Section 252 (supra)* is to appeal to the Tribunal with the purpose to get restoration order which is the same with *Section 400(6) of the Tanzania Companies Act (supra)*. The difference in India one goes by way of appeal but here is by way of application but with the same result of restoration order.

Mr. Ayub went further to invite the Court to the writings of different jurists on the powers of the Registrar to struck off the Company from the register and the remedy. Avtar Singh: **Business Law** 11th Edition, Eastern Book Company Ltd 2018, Luck London page 678, 679 & 680 points that the available remedy is restoration. It is not by way of judicial review. The same position is maintained by A Ramaiya: **Guide to the Companies Act** 18th Edition Lexis Nexis Faridabade India 2021 p. 4341.

Mr. Ayub maintained confidently that the Applicants ought to have filed application for restoration. Such remedy is convenient and feasible. That is why they even applied for the same before and in their application they have not stated whether such remedy is inconvenient or not feasible.

Mr. Ayub winded up his reply submission by contending that; it is a trite law and principle of this Land that the Judicial process must be

predictable. To avoid unpredictability even though the High Court has unlimited jurisdiction, the Applicants should avoid forum shopping and follow proper procedure.

In the light of the foregoing application, supporting affidavit and opposing affidavit and submissions of both Counsel, it is noteworthy, as correctly submitted by Mr. Ayub, *Section 400 (6) of the Companies Act (supra)* is circumscribed by well-defined condition that the Applicants, if aggrieved with the decision of the first Respondent, may make an application before the expiration of ten (10) years from the publication in the gazette of the notice, the company be restored to register.

I am sceptical about the merits of the submission of Counsel Subira that there is nothing that limits the Applicants from filing this application. It is my firm view that the provision of *section 400 (6) (supra)* is inevitably fact-sensitive, and it appears to me that it would be properly arguable if the Applicants had preferred an application for deregistration before the first Respondent and became rejected. In absence of such procedure, I find the Applicants have not exhausted the local remedies available under such section.

Indeed, I do agree with Mr. Ayub on the preconditions of applying for writs of mandamus and certiorari. For instance, the test for mandamus as set out in various cases is satisfaction of ten factors for the writ to issue: *One*, there must be a public legal duty to act. *Two*, the duty must be owed to the Applicants. *Three*, there must be a clear right to the performance of that duty, meaning that: (i) the Applicants have satisfied all conditions precedent; and (ii) there must have been: *Fourth*, a prior demand for performance. *Fifth*, a reasonable time to comply with the demand, unless there was outright refusal. *Sixth*, an express refusal, or an implied refusal through unreasonable delay, *Seventh*, *no other adequate remedy is available to the Applicants. Eighth*, the order sought must be of some practical value or effect. *Ninth*, there is no equitable bar to the relief sought. *Tenth*, on a balance of convenience, mandamus should lie.

The efficacy of an order of mandamus as per the cited **Halsbury's Law of England** is to be issued in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual.

The expression less convenient, beneficial and effectual may, attract a wealth of judicial analysis. However, the redress which is "convenient means

close or useful, beneficial means convenient and effectual means effective or efficient." It is more useful, convenient and efficient to apply for restoration before the same Body that deregistered the Company's name because the whole record is with that Body. Importantly, the writs preferred cannot interfere with the decision. The remedy is limited to the process. If the application for restoration will be granted, the remedy is to restore the name of the Company. But entertaining the writs petition means reviewing the process only. Therefore, it is more efficient to exhaust the available remedy for restoration of the name than writs petition.

This Court in the case of **Joshua Nassary v. Speaker of the National Assembly of the United Republic of Tanzania and Another**, Miscellaneous Civil Cause No. 22 of 2019, High Court of Tanzania at Dodoma as cited in the case of **Joram Meagie Lukumay v. Minister of Constitutional and Legal Affairs and Honourable Attorney General**, Miscellaneous Civil Cause No. 24 of 2021, High Court of Tanzania Main Registry at Dar es Salaam (unreported) and the cited case of **CS1 Energy Group (Tanzania) Ltd** *(supra);* **Sanai Mwambe and Another** *(supra);* **Paris Jaffer and Another** *(supra);* **Transworld Aviation Ltd** *(supra);* **M/S Aqua Power Tanzania Ltd (T/S Turbine Tech)** *(supra)* **and**

Freeman Aikael Mbowe *(supra);* held that; it is not proper for the Applicants to file application without first exhausting the remedies available.

I do agree with Ms. Subira's cited cases of **Bi Johari General Trading LLC** *(supra)* **and the case of John Byombarirwa** *(supra)* that the availability of alternative remedy perse would not bar access for the prerogative orders. However, in order to succeed, the supporting affidavit and Ms. Subira's elaboration ought to have demonstrated to the Court's satisfaction how convenient, beneficial and effectual is this petition than preferring application for restoration of the Applicant's company.

In absence of demonstration by the Applicants on how less convenience, not beneficial and ineffectual on the application for restoration of the Applicant's company name, I find it to be an evasion of a positive duty or a virtual refusal to perform a duty prescribed under the provision of *section 400 (6) of the Companies Act (supra).* I am therefore entitled to regard myself as not bound by the cited decisions of **Bi. Johari** *(supra)* **and John Byombalirwa** *(supra)* because the available local remedy in the instant case appears to the Court to be convenient, beneficial and effectual to the Petitioners/Applicants. It is an adequate remedy which signifies that it is efficacious, reachable, easily accessible, less expensive,

simple, advantageous and expeditious remedy with no cumbersome procedures as that of applying writs orders before this Court of law.

Equally, as noted at the introductory part of this ruling, one of the precondition for the writ of certiorari is that the Court issuing a writ of certiorari acts in the exercise of a supervisory and not appellate jurisdiction. One consequence of this is that the Court will not review findings of fact reached by the inferior Court or Tribunal or Administrative Body, even if are erroneous. The Body which has jurisdiction over a subject matter has jurisdiction to decide wrong as well as right, and when the legislature does choose to confer the right of reconsidering the matter for restoration of the deregistered company's name to the same Body, it would be defeating its purpose and policy, if this Court is to rehear the case on the evidence, and substitute its own findings in certiorari prior exhausting such available local remedy. [See the case of **Rahel Mbuya** *(supra)*].

On the same vein of reasoning, I find no escape to the conclusion that can reasonably be drawn. There are no cogent reasons to differ with the proposition of the cited distinguished jurists and the established jurisprudence of India and England. *First*, Counsel Subira has not offered the Court with other jurists who have contrary proposition. *Second,* both **Avtar**

Singh and **A Ramaiya** (supra) share same position prescribed under the provision of *Section 400 (6) of the Companies Act (supra)* that the available internal remedy is to prefer application for restoration of the deregistered Company name.

In the premises, I accordingly find not important to consider the substance of the application at this stage. It is impermissible to prefer writs application prior exhausting available local remedies unless the writs application is convenient, beneficial and effective.

In the end result, therefore, the application is striked out with no order as to costs for being incompetent before the Court.

Y.J. MLYAMBINA
JUDGE
20/11/2023

Ruling delivered and dated 20th November, 2023 in the presence of learned Counsel Subira Omary for the Applicants and Grace Umoti learned State Attorney for the Respondents.

Y.J. MLYAMBINA
JUDGE
20/11/2023