IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM SUB REGISTRY)

AT DAR ES SALAAM

MISC.CIVIL CAUSE NO. 618 OF 2023

IN THE MATTER OF THE COMPANIES ACT [CAP 212 0F 2002]

IN THE MATTER OF PETITION FOR WINDING UP OF WOVEN INDUSTRIES (T) LTD

BETWEEN

NEW RAINBOW AFRICA LIMITED .... PETITIONER

VERSUS

HALAIS PRO-CHEME INDUSTRIES (T) LTD............................RESPONDENT

RULING

13th May & 25th June 2024

MWANGA, J.

The Petitioner, **New Rainbow Africa Limited,** is a limited liability company incorporated under Tanzanian law, with its registered office located on Mahindi Street in the Arusha Region. The petition was filed to winding up of the Respondent, **Halais Pro-Cheme Industries (T) Ltd** under Sections 279(1)(a)(d), 280(a), and 281(1) of the Companies Act [CAP 212 R.E 2002] (hereafter referred to as "the Companies Act").

The petition is accompanied by a sworn affidavit by Mr. Prateek Yadav, the Principal Officer of the petitioner, verifying the statements in the petition in compliance with Rule 100 of the Companies (Insolvency)

Rules GN No. 43 of 2005. In accordance with Rule 99(1) and (2) of the Companies (Insolvency) Rules GN No. 43 of 2005, an advertisement was published, as evidenced by the Mwananchi Newspaper dated 25th November 2023, on page 25.

After the publication, no objections were raised against the petition. Consequently, the parties presented their arguments viva voce. The petitioner was represented by learned Advocate Merrs. Elphas Rweshabura, while the respondent was represented by learned Advocate Merrs. Yuda Dominic.

The learned Counsel Mr. Rweshabura, kicked off his submission in chief by adopting the petition and the affidavit verifying the petition of the of the petitioner, Mr. Prateek Yadav. He further submitted that, the petition has been made in order to intervene for the interest of justice winding up order being insolvency of being unable to pay the debts. He said, in 2021, the respondent received a consignment from the petitioner under an agreed contract for the supply of raw materials worth TZS 37,000,000, which is the outstanding amount from arrears in payment and unpaid supply of the materials, as well as TZS 4,000,000, representing 12% interest of the claimed amount. He further stated that the petitioner attempted to settle the matter amicably by serving a statutory notice dated June 3, 2023, which was received on July 24, 2023.

However, the respondent refused to honor the notice. He also mentioned that after the notice, the petitioner and respondent agreed to settle the debt through cheques issued by the respondent. Despite providing these cheques, the transactions failed due to insufficient funds.

Learned Advocate Mr. Rweshabura further stated that before bringing the matter to this Honourable Court, the petitioner had complied with the procedures outlined in the Company Insolvency Rules 35 of 2024, which require advertisement in the Gazette, as evidenced by the newspaper submitted to the Court. He emphasized that, according to Section 279(d) of Cap. 212, a company may be wound up by the court if it is unable to pay its debts. Mr. Rweshabura cited the case of **China Chang Group Ltd** (Winding Up Cause 113 of 2017) [2018] TZHCComD 24 (13 February 2018), where this court held at page 3 that, *"a company may be wound up if its assets are less than its liabilities."* Therefore, since the debts exceed TZS 50,000, the Court is empowered to wind up the company. He concluded by requesting the appointment of a liquidator and costs be awarded to the petitioner.

In his rebuttal, learned advocate Mr. Dominic, representing the respondent, requested the court to adopt the counter-affidavit of the respondent's principal officer, Rafik K. Halai. He referred to Section 279(d) of the Companies Act, which pertains to the winding up of a company that

cannot pay its debts. Mr. Dominic argued that a company is deemed unable to pay its debts when its liabilities exceed its assets, which can only be established by producing an audited bank account. He cited the case of China Chang Group Ltd (Supra), where it was noted on page 4 that *"the petitioner could not demonstrate that the respondent's assets were less than its liabilities, hence the application could not be considered."* He contended that this application is premature.

Mr. Dominic further argued that, the core issue between the parties is a misunderstanding regarding payments rather than an inability to pay. He highlighted that, according to the counter-affidavit, the respondent issued postdated cheques from May 31, 2023, to December 31, 2023. The first cheque was honored, but the cheques for May, June, and July were not presented to the bank at the agreed-upon times. Instead, all three cheques were deposited simultaneously in September, resulting in their dishonor. He asserted that this was due to the petitioner's negligence in handling the postdated cheques, making the petition premature.

Mr. Dominic concluded that the dispute could be resolved through a civil suit, as it revolves around a payment misunderstanding rather than an inability to pay. He distinguished the case cited by the petitioner’s counsel, noting that it was brought under Section 297(1)(a) of the

Companies Act due to trading losses, as evidenced on page 2 of the judgment. He prayed for the application to be dismissed with costs.

In rejoinder, learned counsel Mr. Rweshabura asserted that, the application was brought by creditors, thereby negating the need for a financial statement. He maintained that the issuance of cheques does not alter the fundamental issue at hand.

At this juncture, the focal point of discussion by this court is whether the petitioner qualifies as a creditor, and under the present circumstances, the criteria determining when a company is considered unable to pay its debts, thereby justifying the court to order the winding up of the respondent.

In deliberating on this matter, it coherent to examine the conditions delineated for winding up under the Company Act as enshrined in Sections 279(1)(a)(d), 280(a), and 281(1) of the Companies Act [CAP 212 R.E 2002]. The relevant **Section 279(1) (a-d) of the Companies Act**, stipulates: -

> *279(1).* ***A company may be wound up by the court if;***
>
> *a) The Company has special resolution resolved that the company be wound up by the court;*

b) The Company does not Commence his business within a year from its incorporation or suspends its business for a whole year;

c) The number of members falls below two;

d) ***The company is unable to pay its debts****; and*

e) The court is of the opinion that is just and equitable that the company should by wound up.

In so far as it is concerned, Section 280 and 281(1) of the Companies Act [CAP 212 R.E 2002], provides that;

280. A company shall be deemed to be unable to pay its debts -

(a) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding fifty thousand shillings or such other amount as may from time to time be prescribed in regulations made by the Minister, then due has served on the company, by leaving at the registered office of the company, a written demand requiring the company to pay the sum so due and the company has for

twenty-one days thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor*; or*

(b) if execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part; or

(c) if it is proved to the satisfaction of the court that the company is unable to pay its debts as they fall due; or

(d) if it is proved to the satisfaction of the court that the value of the company's assets is less than the amount of its liabilities, taking into account the contingent and prospective liabilities of the company.

281.-(I) An application to the court for the winding up of a company shall be by petition presented, subject to the provisions of this section, either by the company or by any creditor or creditors (including any contingent or prospective creditor or creditors), contributory or contributories, or by an

administrator, or by all or any of those parties, together or separately":

It is a well-established legal principle that to initiate winding up proceedings under the aforementioned provisions, the petitioner must first establish their status as a creditor. The indebtedness should be clear and unambiguous, without necessitating additional substantiation or proof typically required in other legal proceedings. Failure to satisfy this criterion may lead to the dismissal of the petition by the Court on the grounds of the petitioner's lack of standing. In the case of **Petrofuel (T) Limited vs Bahdela Co. Limited (Misc. Commercial Cause 42 of 2021) [2022] TZHCComD 85 (22 April 2022)**, laid the foregoing legal stance, my learned brother **Hon. Nangela, J** being faced with an akin situation, held the following;

> *"The court stated, relying on the cases of* ***Re Tanganyika Produce (supra) and Re Lympne Investments (supra), and Mann and Another vs.Goldstein and Another [1968]2AII ER 769 at 778****, that:* ***"since the petition is based solely on a disputed debt, the Petitioner has no locus standi in this matter since he***

is not a creditor within the meaning of section 169 of the Companies Ordinance".

In our case at hand, the submissions made by Mr. Mbamba and the cases he/has relied on to support them are, in my view, valid, and have captured my attention. It is clear that, the Petitioner not a debtor as such for the time being since whatever claims he might have against the Respondent are disputed claims upon which no sound Petition for winding up can be mounted for the obvious Reason of-lack of locus standi which in the ordinary sense, only a creditor would possess it. Thus, and taking into account what Bahati, J (as he then was) stated in the case of **The East Africa Development Bank (supra**), "since the petition is based solely on a disputed debt, the Petitioner has no locus standi in this matter since he is not a creditor within the meaning of the Companies Act. As such, the Petitioner can seek remedy through a normal suit and not by way of a petition as she has done herein".

In the current petition, the petitioner asserts that, being a creditor, they fulfill the conditions outlined in Sections 279(1)(a)(d), 280(a), and 281(1) of the Companies Act [CAP 212 R.E 2002]. Consequently, the petitioner contends that the court

should order the winding up of the respondent company. Upon diligent review of the submissions tendered by both parties and in accordance with established legal principles, it becomes evident that the assertions put forth by the petitioner may not meet the requisite standard to establish their standing as a creditor under the Companies Act. The petitioner contends that the respondent is indebted to them in the sum of TZS 37,000,000 for outstanding payments and unpaid supply of materials, accompanied by an additional TZS 4,000,000 in interest. However, the respondent vigorously disputes these claims, asserting that the alleged debts are contentious and lack the requisite clarity to unequivocally establish creditor status under the Companies Act.

This contention aligns with the precedent articulated in the case of **Petrofuel (T) Limited vs Bahdela Co. Limited (Supra)** wherein the court underscored that disputed debts do not per se confer creditor status within the purview of the Companies Act. Moreover, it is evident that the focal point of contention between the parties lies not in the demonstrable inability of the respondent to fulfill its obligations, but rather in the disputed outstanding amount and the purported accrued interest. This renders the matter contentious in nature. Counsel for the respondent, Mr.

Dominic, aptly highlights instances wherein the petitioner's mishandling of postdated cheques resulted in their subsequent dishonor. This underscores the notion that the veracity of the alleged debts remains subject to dispute and further validation, thereby casting doubt on the petitioner's asserted creditor status.

To add, Counsel for the respondent, Mr. Dominic cogently contended that the dispute could feasibly be ameliorated through resort to a civil suit, intimating that the invocation of winding up proceedings may not be the most judicious recourse at present, he termed it as premature. It is my considered view that, winding up ought to be reserved for cases wherein the indebtedness is manifestly clear and does not necessitate ancillary corroboration.

In light of the foregoing legal analysis and the principles delineated therein, I hold that the petitioner’s petition and submissions fall short of establishing their entitlement to creditor status under the Companies Act. Accordingly, the petitioner's locus standi to pursue winding up proceedings against the respondent is called into question. This reason alone suffices to dismiss the petition. However, to substantiate the court's reasoning, I shall also address the pending issue of whether, under the present circumstances, the criteria for determining when a company is

considered unable to pay its debts, thereby justifying the court to order the winding up of the respondent, have been met.

To determine whether the company is unable to pay its debts, the test is whether the company can meet its day-to-day liabilities in the ordinary course of business. Reference is made to the case of **Tanganyika Plywood Ltd v. Amboni Paints Co. Ltd** (Misc. Application 19 of 2021) [2022] TZHCComD 112 (6 May 2022), where my learned brother Hon. Magoiga, J. clarified this standard that:

> *"As a general rule, in my considered opinion, going by the provisions of the law as stated above,* ***it is not automatic that the phrase "unable to pay its debts" is applied in absolutism. Much as the word used in the section is 'may', then, by virtue of section 53 (1) of the Interpretation of Laws Act, [Cap 1 R.E. 2019] the court is enjoined to be satisfied by the petitioner to its satisfaction that, indeed, all considered, the company is unable to pay its debts.*** *The test, therefore, in my opinion, to be applied,* ***is whether it is commercially insolvent in the sense that it is unable to meet its day to day liabilities in the ordinary***

course of business. *Or in other words it can be said that* ***whether or not it has liquid assets or readily releasable assets available to meet its liabilities as they fall due to be met in the ordinary course of business and thereafter to be able in a position to carry on normal trading.*** *Or if it is proved that the* ***company assets having been valued, far exceeds its liabilities considering the contingent and prospective liabilities…"***

In the said case, the court made further reference in the case of **Dangote Cement Ltd vs Nsk Oil and Gas Ltd (Misc. Commercial Application 8 of 2020) [2020] TZHCComD 2052 (5 October 2020)** where it was stated that,

"The winding up of a company amounts to legally killing and burying of the company…"

In the present case, the petitioner has alleged that the respondent owes them TZS 37,000,000 for outstanding payments and unpaid supplies, as well as TZS 4,000,000 representing accrued interest. The petitioner further submitted that despite efforts to settle the matter amicably through statutory notice and the issuance of postdated

cheques, the respondent failed to honor these obligations due to insufficient funds. Conversely, the respondent’s counsel, Mr. Dominic, argued that the core issue between the parties is a misunderstanding regarding payments rather than an inability to pay. He pointed out that the dishonored cheques resulted from the petitioner’s negligence in handling the postdated cheques, not from the respondent’s inability to pay its debts.

The court must apply the test of commercial insolvency to determine whether the respondent is truly unable to pay its debts. This entails examining if the respondent can meet its day-to-day liabilities and has sufficient liquid or readily releasable assets to cover its liabilities as they fall due. In reviewing the evidence presented, it is clear that the petitioner has not provided sufficient proof that the respondent is commercially insolvent. The alleged debts are disputed, and the respondent has demonstrated that the dishonor of cheques was due to procedural issues rather than a lack of funds. Moreover, the petitioner has not convincingly shown that the respondent's assets are insufficient to cover its liabilities, considering both contingent and prospective liabilities.

As stated in **Tanganyika Plywood Ltd v. Amboni Paints Co. Ltd (Supra),** the petitioner must show and prove that the company

has declined to pay without reasonable excuse and that conditions of insolvency in the commercial context exist. This burden of proof has not been met by the petitioner.

Based on the foregoing analysis, the petitioner has failed to substantiate their claims that the respondent is unable to pay its debts as required under Section 280 of the Companies Act. The petitioner has not demonstrated that the respondent's financial situation meets the criteria for winding up under the Act.

In view of all considerations and discussions made above, the petition is hereby dismissed without cost due to the petitioner's lack of locus standi and failure to prove commercial insolvency. The petitioner may seek alternative remedy through a normal civil suit if they wish to pursue the disputed claims further because winding up the company is a remedy of the resort and should be exercised with great circumspection.

It is so ordered accordingly.

H. R. MWANGA

JUDGE

25/06/2024