IN THE HIGH COURT OF UNITED REPUBLIC OF THE TANZANIA
(COMMERCIAL DIVISION)
AT DAR-ES-SALAAM
MISC.COMMERCIAL CAUSE NO.13 OF 2021

In the Matter of Winding up Petition
(Pursuant to Section 281 of the Companies Act, Cap.212 R.E. 2002)
AND

IN THE MATTER OF TSN LOGISTICS LTD

BETWEEN

SINOTRUK INTERNATIONAL.....PETITIONER
AND
TSN LOGISTICS LIMITED .....RESPONDENT

Date of Last Order: 06/08/2021
Date of Judgement: 24/09/2021

RULING

NANGELA, J.:

This ruling is in respect of a Notice of Preliminary Objections filed by the Respondent. The relevant Notice came about following a Winding up Petition which the Applicant had filed in this Court, under section 281 of the Companies Act, [Cap.212 R.E 2002], claiming that the Respondent Company had failed to pay its debt.

The Respondent's Notice of Objection contains three pertinent grounds which are as follows, that:

1. This Court is not vested with jurisdiction to adjudicate on the

matter which is based on the contract executed in China and to which the applicable laws are the laws of China.

2. The Deponent of the Affidavit verifying the winding up petition has not been authorized by the Petitioner, and instead has been authorized by a third party, one international adviser.
3. The purported Power of Attorney deemed to be authorizing the deponent of the affidavit verifying the Winding up Petition is not attached.

On the strength of the above three grounds constituting the preliminary objections, the Respondent prayed that the matter be struck out with costs. When this Petition was called on for a mention in chambers on 2nd June 2021, the Petitioner enjoyed the services of Ms Madelaine Kimei, learned Advocate and Mr Frank Mwalongo, also a learned Advocate, represented the Respondent. On record at the material date, as well, was Ms Jasbir Mankoo, a learned advocate, who appeared in Court representing the interests of one secured creditors, namely, the Equity Bank (K) Ltd and M/S Equity Bank (T) Ltd.

Although Ms Mankoo did not file any document in respect of the objections raised by the Respondent, she did pray to be allowed to file a 'Notice of Appearance' in line with Rule 104 of the GN.No.43 of 2005. That prayer was not objected to, and, hence, I granted her wish, with an order that, the notice of appearance be filed on or before the 9th day of June, 2021. The matter was thereafter set for mention on 30th June 2021 for further orders of the Court.

On the 30th June 2021, the parties appeared before me. Since the Respondent had filed a Notice of Objection, it was agreed by all parties that, the preliminary legal issues raised by the Respondent be disposed of by way of written submissions. A schedule of filing was given and the parties duly complied with it. On the same day, Ms Mankoo informed this Court that, M/S Equity Bank (T) Ltd was not interested to pursue any of its rights as a creditor and hence, the only interested creditor was Equity Bank (K) Ltd.

Since the parties duly complied with the filing of their written submissions in respect of the preliminary legal issues raised by the Respondent, I will now turn to such written submissions before I render my conclusion and verdict.

Submitting in support of the 1st ground of objection, Mr Mwalongo advanced his argument by first laying down

the jurisdictional foundation of this Court, as established by Article 108 (1) and (2) of the Constitution of the United Republic of Tanzania.

He submitted that, the said Article 108 read together with Article 107A of the Constitution of the United Republic of Tanzania, makes it clear that, the organ vested with power to determine and dispense justice in Tanzania is the Judiciary. Mr Mwalongo made reference as well to Articles 2, 3, and 4 o the Constitution of the United Republic of Tanzania.

Marshalling his energy based on that preliminary understanding, it was Mr Mwalongo's submission that, the Petition before this Court is based on two contracts each bearing a clause reading as follows:

> **"This contract is made and entered into in China as of date ...."**

Mr Mwalongo referred this Court to Clause 14.1 of the contract which states that, the contract shall be governed by the laws of China. It was on that basis Mr Mwalongo contended that, the respective contract to which this Petition is based, were executed in China and the agreed law applicable to dispute between the parties is the law of China.

In view of that fact, Mr Mwalogo concluded that, this Court and the whole of judiciary in Tanzania is not vested with jurisdiction to adjudicate a dispute based on the

contracts executed in China and under the laws of China with applicable laws being the laws of China.

Mr Mwalongo referred this Court to the decision of the Court of Appeal of Tanzania in the case of **SCOVA Engineering S.P.A & Another vs. Mtibwa Sugar Estates Ltd and 3 Ors**, Civil Appeal No.133 of 2017. He contended that, in that decision, the Court of Appeal vacated the order dismissing the suit and substituted therewith an order staying the suit pending adjudication by a foreign Court.

Mr Mwalongo submitted that, the Court of Appeal did what it did because; though the contract which was the basis of the suit was executed in Tanzania, the parties had agreed that the Court seized with jurisdiction was the Italian Court. As regard the facts in this Petition, he contended that, the only difference is that, the contract at hand was executed in China and the parties agreed that the applicable law will be the laws of China.

Submitting on the 2nd and 3rd grounds of objection, Mr Mwalongo contended, in the first place, that, the deponent of the Affidavit verifying the Petition was not authorised by the Petitioner. He contended that, the purported authorization is not that of the Petitioner but of a third party, an International Advisor.

Secondly, as regards the 3rd ground, Mr Mwalongo submitted that, the purported Power of Attorney deemed

to be authorizing the deponent of the Affidavit verifying the Winding up Petition is not attached to the Petition.

Besides, Mr Mwalongo submitted that, the deponent of the verifying affidavit, one Ms Madelaine Kimei, has described the nature of her 'agency-ship' by stating that, she draws power from the Power of Attorney where the Petitioner is the donor of the power of attorney to International Advisors. According to Mr Mwalongo, what the deponent seems to mean is that, she has no power of attorney from the Petitioner as the power of attorney is between the Petitioner and International Advisors. However, and, to add salt to the injury, it was submitted that, that power of attorney under reference, was not itself attached to the Petition.

Relying on Order III Rule 2 of the Civil Procedure Code, Cap.33 R.E 2019, Mr Mwalongo contended further that, a recognised agent can be a person holding the power of attorney or a person trading in the name of the party. Citing Rule 6 (1) of the said Order III of the C.P.C, Cap.33 R.E 2019, Mr Mwalongo reiterated what the particular provision states, noting that, the appointment of the holder of the power:

> "may be special or general and shall be made by an instrument in writing, signed by the principal, and such instrument, or if the appointment is

general, a certified copy thereof, shall be filed in the Court."

From that observation, it was Mr Mwalongo's contention that, the power of attorney must have been filed in Court in its original form, save where the same is of general nature, of which its certified copy may be filed.

To back up his submission, Mr Mwalongo referred to this Court the case of **Elifaraja Leonardo Tummino (Suing through the attorney of Leonardo Tummino) vs. Asile Sleyum Masoud and 4Others** (2017) TLSLR 31. In that case, the Court struck out the suit because, although the power of attorney was attached, it was not certified. Mr Mwalongo submitted, in respect of the current Petition before me, therefore, that, since the power of attorney was unattached, that defect suffices to have the Petition struck out.

To further reinforce his preferred line of thinking, Mr Mwalongo placed reliance on two more decisions of the Court. The first one is the decision of this Court in Land Case No.401, (between **Cyprian Z.J Funuguru and James Musoha & 3 Ors)** (unreported)) in which this Court rejected a power of attorney for lacking the names and signature of its *donee*. The Court declared that the Plaintiff had no *locus standi* to conduct the matter.

The second decision relied upon by the Respondent's counsel was a Court of Appeal decision in

the case of **Rayah Salum Mohamed vs The Registered Trustees of Masjdi Sheikh Albani,** Civil Appl. No.340/18 of 2019 (unreported). In that case, the Court examined the contents of the disputed power of attorney and established that, it was not giving power to its holder to lodge the application in the Court, and, for that reason, the Court struck out the application. On the strength of those submissions, Mr Mwalongo urged this Court to make a finding, that, a power of attorney ought to have been filed in Court, if a court is to examine it, failure of which this Petition should be struck out with costs.

Ms Kimei, the learned counsel for the Petitioner has equally put up a spirited contestation to the objections raised by the Respondent.

As regards the first objection, she submitted that, it is an undisputed fact that the Petition at hand is based on two contracts executed in China and are governed by the laws of China as reflected in their Clauses 14.1. She submitted, however, that, the Petitioner will have no recourse to a winding up of a company under the laws of China, especially for a company that has been incorporated and has its business operations solely in Tanzania.

According to Ms Kimei, a law governing the contractual claim cannot be applicable to the winding up

of a company incorporated elsewhere. She maintained that, any conclusion to the contrary would lead to unpredictability or rather bizarre results.

Stretching her submission a farther step, she contended that, winding up proceedings are **sui generis** and differ from debt recovery proceedings. It was her submission that, while the intention of instituting a winding up proceeding is to terminate the existence of a company, on the contrary, a simple debt recovery proceeding is merely based on a contractual right to recover debts owed under an agreement and does not terminate the existence of the company.

In view of such dissimilarity, she maintained an argument that, irrespective of the agreement of the parties, a Tanzanian company can only be wound up in Tanzania, whereas debt recovery proceedings or any other proceedings arising out of the contract may be determined in accordance with the parties' agreed choice of jurisdiction.

Ms Kimei submitted that, the present Petition was brought before this Court on the premise that, the Respondent Company is a limited liability company duly registered under the laws of the United Republic of Tanzania, hence, falling within the jurisdiction of this Court in accordance with Article 108 of the Constitution of the United Republic of Tanzania. That being said, and

referring this Court to sections 275 and 279 (2) of the Companies Act, Cap.212 R.E 2002, she maintained that, the law is clear regarding which Court in Tanzania has jurisdiction over a winding up petition.

She was of the view, according to section 275 of the Companies Act, in which the word "**shall**" has been used, that, the jurisdiction of this Court cannot be ousted in matters of winding up. Expounding her submission further in relation to the use of the word "shall", Ms Kimei urged this Court to find inspiration from the Indian decision in the case of **Dinesh Chandra Pandey vs. High Court of Madhya Pradesh**, (2010) 11 SCC 50.

In that India case, the Supreme Court of India was of the view that:

> "where the expression "shall" has been used it would not necessarily mean that it is mandatory. It will always depend upon the facts of a given case, the conjunctive reading of the relevant provisions along with other provisions of the Rules, the purpose sought to be achieved and the object behind implementation of such a provision.... In other words, it is not merely the use of a particular expression that would render a provision directory or mandatory. It would have to be interpreted in the light of the settled

> principles, and while ensuring that intent of the Rule is not frustrated."

Furthering her submission, Ms Kimei was of the view that, in the circumstance of this Petition, the "*lexi fori*" should march forward as the "*lex concursus*". In a further support of her submission, she laid hands on the decision of MacPherson, J (as he then was) in the case on **Ogilvie Grant vs. East** [1893] 7ACLR 669. In the decision, the Court was of the view, on paragraph 7-071 of the decision, that:

> "[as] a matter of history, a winding up by the court was, and remains today, an administration conducted by the Court."

Aside from that sibmission, Ms Kimei did argue as well a point that, the nature of the winding up petition does not surmount to adjudication of the dispute based on the contract between the parties. Placing reliance on yet another decision of the Indian Supreme Court in the case of **Haryana Telecom Ltd vs. Sterlite Industries (India) Ltd** 1999 (3) SCR 861, she contended that, the key object of winding up proceedings is the protection of the interest of creditors and, that, such object is not premised, like arbitration, on a private contractual arrangement for the resolution of disputes.

In other words, what Ms Kimei tries to insinuate is a view that, insolvency matters are non-arbitrable and,

hence, remain a mandate for the jurisdiction of local courts.

To support that view, reliance has been placed on the decision of this Court in the case of **Group Six International Ltd vs. Central Paris Complex Company Ltd**, Misc. Civil Cause No.5 of 2020 (unreported), (which was based on **Rufiji Basin Development Authority vs. Kilombero Holding Ltd**, Misc. Comm. Case No.34 of 2006 (unreported) (to be referred to hereafter as **"the RUBADA Case"**).

She was quick, however, to observe what this Court stated in the case of **Queensway Tanzania (EPZ) Ltd vs. Tanzania Tooku Garments Co. Ltd**, Misc. Commercial Cause No.43 of 2020 (unreported) as a departure from the **RUBADA Case**. In the **Queensway's case**, this Court chose to preserve the party autonomy and upheld the arbitration agreement since the parties' case was found to be "arbitrable".

Ms Kimei has also relied on several other case law from within and outside our jurisdiction to support her viewpoint. One of the cases relied on is the English decision in the case of **Salford Estates Ltd vs. Altonmart Ltd,** [2014] EWCA 1575 of which the Court was of the view that, a winding up petition was in a nature of a class action in the public interest and not a claim of payment. That case was also referred to and

relied upon by this Court in the **Queensway's case (supra).**

Submitting in respect of Clause 14.2 of the contracts signed by the parties here in, Ms Kimei contended that, the phrase "*in the event of a dispute arises*" found in Clause 14.2 of the agreement signed by the parties herein, is not always clear, and, that, there is no merit-based threshold for a "dispute" to be a qualifying dispute for the purpose of an arbitration agreement. Reliance was placed on an Australian High Court decision in the case of **Spencer Constructions Pty Ltd vs. G & M Aldrige Pty Ltd**, [1997] FCA.

Besides, she also anchored her strength on the Hong Kong High Court decision in the case of **Sit Kwong Lam vs. Petrolimex Singapore Pte Ltd** [2019] HKCA, 1220 where the Court held a view that:

> "it would make no sense to dismiss or stay an insolvency petition on the mere existence of an arbitration agreement when the debtor has no genuine intention to arbitrate."

Ms Kimei has argued, agreeing with what this Court held in the **Queensway case** (supra), that, where a debt is disputed or not admitted, a winding up petition will not stand. She maintained, however, that, in the present Petition, there is no *prima facie* arbitrable dispute between the parties. In that regard, she urged this Court to adopt a

variant position away from the **Salford Estates' case** (supra) which was considered by this Court in the **Queensway case (supra).**

That variant position was expressed in the Hong Kong case of **Dayang (HK) Marine Shipping Co. Ltd vs. Asia Master Logistics** Ltd [2020] HKFCI 311, where it was found that the debtor did not dispute the debt but raised a counter claim.

Traversing through the Indian jurisprudence, Ms Kimei has also brought to the discussion, the Indian position as expressed in the Indian Supreme Court decision in the case of **Mobilix Innovations (P) Ltd vs. Kirusa Software (P) Ltd.,** (2018) 1SCC 353 concerning "genuine existing dispute" to refer to adjudication, and also, the case of **Karpara Project Engineering Private Ltd vs. BGR Energy Systems Ltd., 2019 SCC Online NCLAT 239**, where it was held that, on there being *prima facie* evidence in support of the allegation that the debt is disputed, then insolvency petition cannot hold.

Summing up the above discussion, it was Ms Kimei's submission that, if the Respondent is to succeed having this matter referred to adjudication in accordance with the governing laws of the contract, then, the Respondent must sufficiently demonstrate that the debt is disputed and not admitted.

She placed reliance on the persuasive decision of the Court of Appeal of Hong Kong in the case of **But Ka Cho vs. Interactive Brokers LLC [2019] HKCA 873** and the Indian Supreme Court Decision in the case of **K. Kishan vs. M/s Vijay Nirman Company Pvt. Ltd** Civil Appeal No. 21824 of 2017 (issued on 14 August, 2018).

Ms Kimei has also argued in the alternative. She submitted that, should this Court make a finding that the Petition should be struck out because the proceedings fall within the meaning of "legal proceedings", then, the Court shall instead order a stay of the proceedings pending reference to arbitration. She relied on section 15 of the Arbitration Act, Cap.15 R.E 2020 and the decision of the Court of Appeal in **SCOVA's Case (supra).**

Ms Kimei noted, however, that, in **Chongquing Lifan Industries (Group) Impo and Exp. Co. Ltd vs. Kishen Enterprises Ltd**, Misc. Cause No.41 of 2019 (unreported), this Court, Masabo, J., was of the view that the presence of an arbitration clause does not automatically oust the jurisdiction of the Court in a winding up cause (citing the Kenyan case of **Rift Valley Railways (K) Ltd vs. Kenya Shell Ltd, Nairobi (Mlimani)** HCWC, No.2 of 2009).

Further still, Ms Kimei submitted, that, since there is an acknowledgement of the debt as outlined in paragraph 5 (1) of the Petition and affirmed by the Respondent in

paragraph 7 of the Affidavit in opposition, this Petition has been lodged appropriately. She relied further on the case of **Hayter vs. Nelson** (1991) 1 Re LR 119; **Halki Shipping Corporation vs. Sopex Oils Ltd** [1997] EWCA Civ. 3062, **AnAn Group (Singapore) Pte Ltd vs. VTB Bank (Public joint Stock Co.)** [2020] SGCA 33.

The latter Singaporean decision put emphasis on the need for the debtor-company to only raise "triable issues" if it is to obtain a stay or dismissal of a winding up application. That approach was also emphasized by the Singaporean Court in **BDG vs. BDH** [2016] 5SLR 977, and this Court has been invited to consider adopting that standard.

As regards the 2nd and 3rd points raised in objection to this Petition, Ms Kimei addressed them in tandem. She submitted that, as per Rule 100 (6) of the Company (Insolvency) Rules, 2005, G.N. 43 of 2005, an affidavit is regarded therein as "*prima facie evidence of the statements in the petition to which it relates*". For that matter, it was her contention that, any person acquainted with the facts of the case may give affidavit, and, since the deponent has such knowledge she was fit to depone.

To support her position, she brought to the attention of the Court two persuasive decisions, the first being the South African case of **Eskom vs. Soweto City Council** 1992 (2) SA 703 (W) and the second being a decision of

the Supreme Court of Zimbabwe, in the case of **Chiadzwa vs. Paulkner** 1991 (2) ZLR 33 SC at page 36-G-H.

On the authority of the above two cases, Ms Kimei submitted that, no authority was required to affirm to the affidavit verifying the Petition. She relied on Rule 100 (4) and (5) of the Company (Insolvency) Rules, 2005, G.N. 43 of 2005 regarding the persons who could swear an affidavit. She maintained that, the Respondents are misguided because International advisors have been duly authorized to act for and on behalf of the Petitioner under a Power of Attorney referred in the affidavit in support of the Petition and they engaged the advocate.

She, therefore, distinguished the cases relied upon by the Respondent, arguing that, those were applicable in a situation where there was a mandatory requirement of there being evidence of a power of attorney as opposed to this insolvency petition.

Besides, she argued that, the agent has not been added as a party; hence, the case of **Leonard Tummino (supra)** is distinguishable. She maintained, likewise, that, the **Funuguru's case (supra)** involved a statutory requirement under section 96 (1) of the Land Administration Act, Cap.334 R.E 2002; hence, distinguishable.

To wind up her lengthy submissions, Ms Kimei contended that, in case this Court makes a finding that the Respondent's arguments are valid, then, the Court should invoke the Oxygen Principle and cure the defects by ordering an amendment of the Petition under Order VII Rule 14 (2) of the CPC, Cap. 33 R.E 2019.

Alternatively, Ms Kimei argued, the Court should order that the original power of attorney be filed in Court to cure the defects. She relied on the Court of Appeal decision in the case of **Gasper Peter vs. Mtwara Urban Water Supply Authority**, Civil Appeal No.35 of 2017 (unreported). All said, she urged this Court to dismiss the Respondent's objections with costs.

On 29th day of July 2021, the Respondent's counsel filed a rejoinder submission and reiterated what he had stated in his submission in chief. In additional response to the submissions made in respect of the 1st preliminary objection, Mr Mwalongo rejoined that, the Petitioner filed the Petition as a modality of recovery from the Respondent a claim arising from the two contracts executed in China and to which the applicable laws are China laws.

Mr Mwalongo maintained that, the transaction took place in China and thus it is materially incorrect to argue that the parties chose foreign law as if the transaction took place in Tanzania.

Mr Mwalongo argued that, the matter before this Court is a "dispute" as the Petitioner is seeking to recover from the Respondent **USD 2,000,000** and the contract had provided which laws shall apply. He argued that, the law governing recovery of that sum is not Tanzania law but the Chinese law as per the contract. He submitted that, since the Petitioner in China was trading with a non-resident in China, he had to require the security to secure itself in China in case of default in payment.

In view of the above, it was Mr Mwalongo's submission that, Ms Kimei's contention to the effect that the Respondent is registered in Tanzania hence winding up cannot be brought in China is made out of context.

Mr Mwalongo drew the attention of this Court to the case of **Stanbic Bank Ltd vs. Nam Enterprises and Four Others**, Commercial Case No.99 of 2015 (unreported). In that case this Court, Songoro, J., (as he then was) stated that:

> "where there is written agreement like credit facility's letter signed by both parties, the sole duty of the Court is that which was stated in the cases of Osman vs. Mulanawa [1995-1998] 2 E.A 275 (SCU) and Jiwaji vs. Jiwaji [1968] EA 547 being to give effect to the clear intention of the parties as stipulated in the terms of their agreements. It is trite law stipulated in the case of National

> Bank of Kenya Ltd vs. Pipe Plastic Samkolit (K) Ltd & Another [2002]2 EA 503, that, parties are bound by their terms of the contract, unless coercion, fraud or undue influence are pleaded and proved."

According to Mr Mwalongo, the Petitioner wasted much energy in trying to argue the extent of applicability of contract laws in arbitration and pursuance of winding up in disregard of arbitration. He thinks that it was uncalled for and did not rejoin on such submissions. He only maintained that this Court does not have jurisdiction to adjudicate the matter as it is a matter based on the laws of China in respect of contracts executed in China.

As regard the 2nd and 3rd objections, he rejoined briefly with a submission that, the Petitioner seems to admit that the deponent affidavit verifying the Winding up Petition has not been authorized by the Petitioner, instead by the International advisors. He rejoined, likewise, in respect of the third objection, that, the Petitioner seems to agree the power of attorney has not been submitted and seeks the indulgence of the court to cure the defect. On such observations, he urged this Court to strike out the Petition with costs.

Much as the parties have made lengthy submissions, I do commend them for their industriousness and the respective authorities extensively referred to in support of

their rival submissions which I have carefully considered. The issues which I am called upon to determine are:

(i) whether this Court is clothed with jurisdiction to entertain this Petition

(ii) Whether the deponent of the affidavit verifying the Petition has a proper authority to depone to it, and if so,

(iii) Whether failure to attach the power of attorney has any effect to the petition at hand.

It is worth noting, as this Court pointed out in the **Chongquing's case** (supra), that, whenever the issue pertaining to a court's jurisdiction is raised, the same should be given priority lest one embarks on a journey of adjudicating over a matter for which there was no jurisdiction to handle it. I will therefore start by addressing the first issue in the same order as that followed by the parties in the course of their submissions.

As regard the first issue, it is common knowledge that jurisdiction of a court is not derived from the parties but rather from the law. Thus, to assert that this Court lacks jurisdiction, is rather an incorrect proposition because, as it was stated in the **Chongquing's case** and **TANESCO vs. IPTL** [2000] T.L.R 324, a court's jurisdiction is a creature of statute and not of parties. That

settled legal position was as well maintained by the Court of Appeal in **SCOVA Engineering's case** (supra).

It follows, therefore, that, this Court does have jurisdiction to hear this Petition. However, what should have been the appropriate question to tackle is whether it is the competent forum to exercise jurisdiction over the matter taking into account the circumstances under which the Petition arises and the laws governing the parties' relationship.

As noted in the submissions, the Respondent herein, if one is to put it rightly, has contested the appropriateness of this Court to adjudicate a dispute based on contracts executed in China and for which the chosen law governing it is the law of China. The Petitioner, however, has contested the Respondent's objection stating that, the parties' chosen law being a law governing contractual claims, cannot be applied to the winding up proceeding, and, that, winding up proceedings are **sui generis** and differ from debt recovery proceedings.

Admittedly, the parties' dichotomous positions, raises interesting questions regarding the interaction between insolvency proceedings and the general regime on arbitration and the applicable law to contractual obligations. This, however, is not the first case to deal with such a situation. In the **Queensway's case** (supra),

for instance, this Court did examine in detail a situation somewhat similar to the one at hand.

In that case, this Court accepted a view that, a winding up petition cannot stand in a situation where the Respondent disputes the claims and the parties are governed by an arbitration agreement requiring them to submit their dispute to arbitration. This Court further subscribed to the view that:

> "Courts should not encourage parties to use *the draconian threat of liquidation*" as a method for bypassing an arbitration agreement."

I still hold that view because, in essence, when a Court is faced with a winding up petition arising from a situation where the parties' relations are also governed by a contract which requires them to submit any of their disputes to arbitration, if the debt is disputed, what comes to the front is a question of fair balancing of the scales of commercial justice.

It is a fact well settled that, arbitration and insolvency can present a significant conflict of policy interests. From such a scenario, therefore, a fair and appropriate balance, in my view, would be that which gives more weight to the parties' preferred choice before allowing the Court to step in.

The above noted approach is justified by three reasons, namely that:

(a) it upholds the party autonomy principle and the pro-arbitration policy approach which, together, seem to be well embraced within section 5 (a) (i),(ii), (b) and (c) of our Arbitration Act, [Cap.15 R.E 2020];

(b) if arbitration is given room and where an award is issued, any failure to satisfy the award will out rightly entitle the winner to seek recourse in the Court, which may as well include petitioning for a winding up; and,

(c) it helps to subdue the possible dangers of abusing the winding up procedures, by discouraging those who would like to use that avenue as a means to force their debtors to pay its bona fide disputed debts. As it was observed in the English case of **Parmalat Capital Finance Ltd vs. Food Holdings Ltd (in liq) [2009] 1 BCLC 274**, such a possibility should not be condoned.

In this present petition, however, the question which needs to be addressed is whether the Respondent has disputed the debt, so as to provide a room for the parties to arbitrate such a dispute in the manner agreed under Clause 14.2 of their contract. In other words, is there a prima facie arbitrable dispute?

I am alert to the fact that, in the course of responding to that question, I have to be careful lest I find myself sliding too far to the merits of the Petition while I am still held up on its preliminaries.

As it might be noted, paragraph 14.2 of the parties' contracts does provide that,

> "in the event of a dispute arises in relation to the interpretation or implementation of the contract, the parties shall engage amicably and if they fail to resolve it, then, they shall submit it to the China International Economic and Trade Arbitration Commission."

In her submission, however, Ms Kimei contended that, the phrase "**in the event of a dispute arises**" is unclear and there is no merit-based threshold for a "**dispute**" to be a qualifying dispute for the purposes of arbitration. In fact, she contends that, the Respondent has not disputed the debt.

Ms Kimei submitted that, since the debt is acknowledged by the Respondent, this Court should take a position it expressed in the **Queensway case** (supra), the basis of which is the decision in the Hong Kong case of ***Dayang (HK) Marine Shipping Co Ltd v Asia Master Logistics Ltd*** **[2020] HKCFI 311**.

In the **Dayang's case**, the Court departed from the position held in the **Salford Estates' case** (supra) (which this Court followed in the **Queensway's case** (supra)); as it was found that, the debtor did not dispute the unpaid debt but only raised a counter-claim.

It is indeed correct, therefore, that, in **Queensway's case (supra)**, a finding was made to the effect that where the debt is not disputed, the existence of an arbitration agreement should be regarded as irrelevant to the exercise of the court's discretion to make a winding-up order.

In this Petition, Ms Kimei has contended that, according to paragraph 7 of the Respondent's affidavit in opposition, the Respondent has averred that, it has not been unable to pay the viable debts to the Petitioner. I will not address the implication of such a statement here, since, that submission seems to draw this Court to the merits of the Petition itself.

To me, it suffices to say that, the Respondent is not disputing the debt but only raises and relies on the argument that, the parties have chosen a different path and law to be relied upon in resolving their dispute. That fact, notwithstanding, will not aid the Respondent once there is no a genuine arbitrable dispute regarding the debt, a dispute which would have justified a reference to adjudication.

That being said, it is clear that, the position expressed in the persuasive case of **Dayang** (supra), will apply. The arbitration clause, therefore, will be disregarded, and, since I have ruled that this Court has jurisdiction to competently hear and determine the winding up petition, the petition will have to proceed unless it is rejected on some other grounds.

For the reasons as aforesaid, I find, therefore, that, the first objection cannot be allowed to stand in the absence of a genuine arbitrable dispute.

From that same viewpoint, if the winding up petition is to proceed, I do, as well, agree with Ms Kimei that, the ***lex fori*** should march forward as the ***lex concursus*** (i.e., the law of the country in which the main bankruptcy proceeding is initiated, usually the jurisdiction in which the debtor has been incorporated and has its head office and/or main place of business).

Essentially, that proposition flows from the general understanding that, once insolvency proceedings are initiated, unless they are set aside for some other reasons, it is the ***lex concursus*** that determine all the effects of such proceedings, both procedural and substantive.

Consequently, it does not matter that the parties' relations were governed by a choice of law clause since, unless argued differently, as demonstrated earlier here above, that particular clause will fall outside the ambit of

the insolvency proceedings. The ***lex cuncurcus***, therefore, will govern all the conditions for the opening, conduct and closure of the insolvency proceedings.

To borrow a leaf from what HO Look Chan, argues in ***Conflict of Laws in Insolvency*** (2008)20SAcLJ, at para 55:

> "the choice of law rules should generally be in the service of the theory of universalism – that, all bankruptcy assets and claims should generally be administered in the debtor's **"home country" under the laws of that country**.. " (Emphasis added).

From the above reasoning and understanding, I do agree with Ms Kimei that, since this Winding Up Petition was brought on the basis that the Respondent is a limited Company duly registered in Tanzania, under the laws of this country, this Court is the right Court to deal with it as provided for under Section 275 of the Companies' Act, [Cap.212 R.E 2002] and the applicable laws are the laws of this country. Its success or otherwise is not a matter for consideration at that stage.

I am also in agreement with Ms Kimei, that, in the circumstances of this Petition, the **Scova's case** (supra), cited by the Respondent does not bear relevance as it is distinguishable, particularly because, this case is a Winding up Petition based on an undisputed debt.

Likewise, the **Stanbic Bank Ltd Case (supra)** is also distinguishable on similar grounds.

Having dealt with the first ground let me look at the last two grounds which the parties have argued in tandem. The two remaining objections fall in line with the issues:

> (ii) "whether the deponent of the affidavit verifying the Petition has a proper authority to depone to it", and if so,
> (iii) "whether failure to attach the power of attorney has any effect to the petition at hand".

As regards the two issues above, and to start with the last one, there is no doubt that the learned counsel for the Petitioner concedes to the fact that, there is no attached copy of the power of attorney. Does that omission create a fatal blow to the Petition?

While Mr Mwalongo contends that it does, and urges this Court to strike out the petition, Ms Kimei has urged this Court to invoke the overriding objectives principle and order that the same be filed in Court to cure the defect or else order an amendment of the Petition under Order VII Rule 14 (2) of the CPC, Cap. 33 R. E 2019.

I have looked at the submissions and the cases relied upon by the Respondent's counsel. Ms Kimei has, therefore, distinguished them on some material grounds

arguing that, unlike what was the situation in the case of **Leonard Tummino (supra),** in this Petition the agent was not added as a party; hence, the case is distinguishable. As regards the **Funuguru's case (supra)** she argued that it involved a statutory requirement under section 96 (1) of the Land Administration Act, Cap.334 R.E 2002; hence, distinguishable as well.

While it is true that in all such cases the respective Judges of the Court ended up striking out the matters that were before them on the basis of defects and/or lack of authorization, no case considered a situation where the power of attorney was unattached to form part of the pleadings filed in Court. That fact makes this petition distinguishable from such other cases.

But the question that follows is whether the act of not attaching the power of attorney is fatal. As correctly argued by Mr Mwalongo, Order III Rule 2 (a) of the Civil Procedure Code, Cap.33 R.E 2019, does provide that, a recognised agent can be a person holding the power of attorney or a person trading in the name of the party.

Furthermore, Rule 6 (1) of the said Order III of the C.P.C, Cap.33 R.E 2019, states, noting that, the appointment of the holder of the power:

> "may be special or general and shall be made by an instrument in writing, signed by the principal, **and such instrument**, or if the appointment is

general, a certified copy thereof, **shall be filed in the Court.**" (Emphasis added).

Looking at the above provision, I do find that, as a matter of legal requirement, the law has made it clear and mandatory for a power of attorney to be filed in court, in its original form, save where the same is of general nature, of which a certified copy of it may be filed. That requirement is mandatory since the Court will need to be satisfied that the person asserting to be donee was duly authorized to act for and on behalf of the donor. However, unless the said power of attorney was filed it could not be inferred that the purported donee had any authority on behalf of the Petitioner as its substituted attorney.

I am aware that under section 94 of the Evidence Act, Cap.6 R.E 2019 the law is to the effect that this court shall presume that every document purporting to be a power of attorney and to have been executed before and authenticated by a notary public, or commissioner for oaths, any court, judge, magistrate, registrar, foreign service officer or diplomatic representative of a Commonwealth country, was so executed and authenticated. But that provision cannot be of aid to the Petitioner unless there is in Court filed a document purporting to be a power of attorney.

Ms Kimei has urged this Court to invoke the overriding objective principle and make an order that the

power of attorney be filed in Court or cure the defects by ordering an amendment of the Petition under Order VII Rule 14 (2) of the CPC, Cap. 33 R. E 2019. She has relied on the Court of Appeal decision in the case of **Gasper Peter vs. Mtwara Urban Water Supply Authority**, Civil Appeal No.35 of 2017 (unreported).

It is true that by invention of the overriding objective principle, the courts need to have due regard to substantive justice than technicalities However, it is also equally true and clear from the decision of the Court of Appeal in the case of **Mondorosi Village Council & 2 Others vs. Tanzania Breweries Ltd & 4 Ors**, Civil Appeal No.66 of 2017, (CAT) at Arusha (Unreported), that, the overriding objective principle cannot be applied blindly against the mandatory provisions of the procedural law which go to the very foundation of the case. For such reasons, I find that the 3rd objection has merit and its corresponding 3rd issue regarding *whether failure to attach the power of attorney has any effect to the petition at hand*, is responded to in the affirmative.

As regard the 2nd ground of objection and its corresponding issue regarding *whether the deponent of the affidavit verifying the Petition has a proper authority to depone to it,* I will make a brief consideration of it.

First, I do agree with Ms Kimei that, as per Rule 100 (6) of the Company (Insolvency) Rules, 2005, G.N. 43 of

2005, an affidavit required under the Rule is regarded therein as "*prima facie evidence of the statements in the petition to which it relates*". It is also correct that, any person acquainted with the facts of the case may give affidavit, provided that, that person has knowledge of the matter, and, that may include an advocate or some responsible person duly authorised to make affidavit and has requisite knowledge of the matters giving rise to the presentation of the petition. (See Rule 100 (1), (4) (b) and (c) of the Company (Insolvency) Rules, 2005, G.N. 43 of 2005).

My concern, however, is with the requirements of Rule 100(5) of the of the Company (Insolvency) Rules, 2005, G.N. 43 of 2005 which is to the effect that,

> "where the deponent is not the petitioner himself, ...he shall in the affidavit identify himself and state-:
>
> (a) the **capacity** in which, and the **authority** by which, he makes it; and
>
> (b) the means of his knowledge of the matters sworn in the affidavit."

As to the first requirement (in regards to **capacity**) Ms Kimei has expressed in the affidavit to be the legal counsel for the Petitioner. As to the aspect of **"authority"**, she has relied on the "Power of Attorney

extended to International Adviser BV dated 24th November 2020".

In her submission she relied on the South African case of **Eskom vs. Soweto City Council** 1992 (2) SA 703 (W), where the Court was of the view that:

> "there is no need that any other person, whether he/she be witness or someone who becomes involved especially in the context of the authority, should additionally be authorized. It is therefore sufficient to know whether the attorney acts with authority."

As it was observed in my consideration of the 3rd ground of objection, the authority of power of attorney extended to her by the so-called "International Advisors BV" ought to have been brought to the attention of the Court. I need not repeat what I said.

However, I hasten to add that, as stated in South African case of **Eskom vs. Soweto City Council (supra)**, one has to be satisfied regarding "whether the attorney acts with authority." That aspect is what I endeavoured to deal with under the 3rd ground. It follows, therefore, that, the case does not support Ms Kimei's position but strengthens the Respondent's submission.

The second decision of the Supreme Court of Zimbabwe in **Chiadzwa's case (supra)** is, as well, not in her favour. In that case the Court was of the view that:

> "where the affidavit is **not of the Plaintiff** himself, the **deponent while <u>not requiring any special authority</u>** from the plaintiff to make the affidavit, must belong to a particular class of persons, namely, those who can swear positively to the facts. (Emphasis added).

I hold that the above decision does not work in favour of Ms Kimei because, looking at it and what Rule 100 (5)(a) of the Company (Insolvency) Rules, 2005, G.N. 43 of 2005, it will be clear that the two provides opposing positions.

In particular, the Rule is clear that, if the deponent is not the Petitioner himself, there must be a demonstration of the capacity and authority to act. Consequently, the case law cited by Ms Kimei runs contrary to the rule and cannot be in her favour.

For the reasons stated here above, I will also uphold the 2nd objection. In the upshot, this Court settles for the following orders:

(i) That, the 1st preliminary objection is without merit and, is hereby overruled.

(ii) That, for reasons stated herein, the 2nd and 3rd preliminary objections are hereby upheld.

(iii) The Petition is hereby struck out on the basis of the 2nd and 3rd preliminary objections.

(iv) Costs to follow event.

It is so ordered.

DATED AT DAR-ES-SALAAM ON 24TH SEPTEMBER 2021

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DEO JOHN NANGELA

JUDGE