IN THE HIGH COURT OF THE UNITED REPUBLIC OF THE TANZANIA
(COMMERCIAL DIVISION)
AT DAR-ES-SALAAM
MISC. COMMERCIAL CAUSE NO. 11 OF 2022

IN THE MATTER OF COMPANIES ACT OF 2002

AND

IN THE MATTER OF PETITION FOR WINDING UP OF

TRACTORS LIMITED

BETWEEN

TANZALASA .....PETITIONER

AND

TRACTORS LIMITED.....RESPONDENT

Last Order: 22/08/2022.
Date of Ruling: 30/09/2022.

RULING

NANGELA, J.:

The present petition for the winding up of TRACTORS LIMITED (the Respondent) was preferred by the Petitioner (TANZALASA) under section 279 (1) (d), section 280 (a) and section 294 of the Companies Act, Cap.212 R.E 2002.

The filing of this petition attracted opposition from not only the Respondent but also an interested creditor in

the name of CRDB Bank PLC. A notice of appearance by the CRDB Bank PLC was, thus, filed in Court, together with an affidavit in opposition.

Likewise, the Respondent filed an affidavit in opposition and a Notice of preliminary objection. The Notice of preliminary objection raised two points of law, to wit, that:

1. This matter is prematurely preferred by the Petitioner in this Honourable Court.
2. The matter has been instituted in contravention of section 7(1) of the Civil Procedure Code, Cap.33 R.E 2019 as the matter is instituted in a Court with no jurisdiction to try it.

On the 11th day of July 2022, it was agreed that the preliminary legal issues should be disposed of by way of written submissions. Aschedule of filing was issued and the

parties duly complied with it. I have gone through their written submissions and I will only make a summary of what each submitted before I render my own verdict.

To begin with, the learned counsel for the Respondent, Mr Bonaventura Masesa, submitted that, this matter is prematurely before this Court because the Petitioner ought to have exhausted the available remedies under the Convertible Loan Agreement**("CLA")** which was executed by the parties on the 31st May 2017. He contended that, under that agreement, the parties had envisaged how their differences or misunderstanding/dispute should be resolved, and, that, arbitration was the parties' preference over the courts.

According to Mr Masesa, the parties had agreed to refer their matters to an arbitrator and the applicable rules should be the rules of the London Court of International Arbitration- Mauritius International Arbitration Centre (LCIA-MIAC) - Secretariat. Reference was made to the 11th Clause of the **"CLA".**

Mr Masesa submitted that, as a matter of principle, since the parties' dispute arose from the **"CLA"**; then, it is imperative for the parties to refer their dispute to the arbitral tribunal as per the agreement of the parties. He contended that, the lodging of this petition is a circumvention of what was agreed earlier, a fact which should not be tolerated by this Court.

To back up his position, Mr Masesa relied on the decision of this Court in the case of **Bahadurali E. Shamji & Another vs.The Treasury Registrar, Ministry of Finance –Tanzania & 4 Others**, Misc. Commercial Case No. 14 of 2001 (unreported) where the Court, (Nsekela J (as he then was))had the following to say:

> "As a matter of general principle.... where a dispute between the parties has by agreement to be referred to the decision of a tribunal of their choice, the Court would direct that the parties should

go before the specified tribunal and

should not resort to Courts."

On the basis of the above authority, it was Mr Masesa's prayer that, this Court should proceed to strike out the Petition and order costs in favour of the Respondent.

As regards the second limb of the objection raised by Mr Masesa, he submitted that, there has been a contravention of section 7 (1) of the Civil Procedure Code, Cap.33 R.E 2019. In his view, if parties have expressly stated in their own agreement that their dispute shall be tried by a specific forum, then, it is not open for either party to again choose a different forum.

Mr Masesa relied on **Mulla, the Code of Civil Procedure, 18thEdition**, to support that contention.Besides, Mr Masesa placed reliance on the decision of this Court in the case of **Queensway Tanzania (EPZ) Ltd vs. Tanzania Tooku Garments**

Co.Ltd, Misc. Commercial Cause No.43/2020 (unreported) where this Court (Nangela, J) held a view that:

> "since the dispute arose from breach of an agreement, a dispute which was 'an arbitrable dispute', it was not fair for the Petitioner to opt for the insolvency proceedings. If an arbitral tribunal was to be formed, it would have specifically dealt with the issue of breach of the agreement and not whether the Respondent was solvent or otherwise."

On the basis of the holding which this Court made in the **Queensway case** (supra), the Respondent urged this Court to strike out the petition with costs.

Through the services of Mr Lameck Justus Muganyizi, learned Advocate, the Petitioner filed a written reply submission. Mr Muganyizi submitted that, the Respondent is indebted to the Petitioner to a tune of USD 1,173,566.54 as of the 7th day of February 2022. He contended that,

according to paragraph 14 of the Respondent's counter affidavit, 'at all times the shareholders of the Respondent Company have neither denied nor disputed the existence of the loan'.

He contended, however, that, the Respondent failed to satisfy within 21 days the Statutory Demand issued by the Petitioner under section 280 of the Companies Act for the payment of the admitted debt. In his further submissions, Mr Muganyizi contended that, the first objection must fail because there is no arbitrable dispute arising from or in connection with the agreement containing the arbitration clause.

Mr Muganyizi contended that, under the authority if this Court's decision in the **Queensway's case,** (supra), there must be a demonstrable proof of existence ofan arbitrable dispute before a winding up is said to be struck out. He contended that, the Respondent readily admits her indebtedness and, for that reason, there is no arbitrable dispute.

In further submissions, this Court was invited to make a finding that, aside the "**CLA**"the Respondent will still be liable under the Promissory Note which falls outside the arbitration clause and, that, the Petitioner will still have a recourse to this Court under it.

He invited this Court to take into account its decision in **Queensway case** (supra) at page 19 where this Court took note of the dictum of Massati J (as he then was) in the case of **Rufiji Basin Development Authority vs. Kilombero Holdings Ltd, Misc. Commercial Case No.34 of 2006, HC CommDv, (DSM) (unreported)**andrule that, this petition isa fit case for its application.

Mr Muganyizi did also urge this Court to taken into consideration the Court of Appeal decision in the case of **NorthMara Gold Mine Limited vs. Diamond Motors Limited**, Civil Appeal No. 29 of 2017 (unreported), where the Court of Appeal, at pages 22 -23 affirmed the decision of Massati, J., in **Rufiji Basin's case** (supra).

Mr Muganyizi submitted that; the cases cited by the Respondent were totally distinguishable. He contended that, the only dispute that emerges in the matters before the Court is whether or not the Respondent ought to be wound up.

He contended that, even that dispute is ethereal due to the deeming effects of sections 279(d) and 280 of the Companies Act. I think I need not consider this portion of Mr Muganyizi's submission as he seems to have jumped the gun. This should have been a matter for discussion if I were to deal with the merits of the Petition.

Mr Muganyizi contended that, this Court is the correct forum for winding up proceedings. He argued that, the Respondent's submission that the Petitioner has approached a wrong forum is utterly misplaced because the Companies Act and the Companies (Insolvency) Rules 2004, GN.43 of 2005, has designated this Court as the appropriate forum.

Mr Muganyizi submitted that, although the Respondent has relied on section 7(1) of the CPC and also on **Mulla, the Code of Civil Procedure**, the fact is that, Mulla recognizes that, civil courts have inherent jurisdiction, unless a part of that jurisdiction is carved out, expressly or by necessary implication, by statutory provision and conferred on any other tribunal.

To complement Mulla's interpretation of section 9 of the Indian CPC, which is in parimateria to section 7 (1) of the CPC, Cap.33 R.E 2019, reliance was placed on the Indian Supreme Court decision in the case of **Sankaranarayanan Potti (Dead) vs.K. Sreedevi & Others** (1998) 3SCC 751.

Mr Muganyizi surmised, therefore, that, the bar to a court's jurisdiction can only be place by express provision of a statute and not by agreement of the parties as the Respondent seems to suggest. He placed reliance on the Court of Appeal decision in the case of **Scova Engineering vs. Mtibwa Sugar 7 Others,** Civil Appeal

No.133 of 2017 (unreported). In that case, the Court of Appeal held that:

> "... the jurisdiction of the High Court or any court for that matter, having been conferred by statute, is not capable of being ousted by agreement of the parties except by statute in explicit terms."

He submitted that, far from ousting this Court's jurisdiction in insolvency proceedings, statute (the Companies Act) expressly endorses it through section 275. For the reasons above, Mr Muganyizi urged this Court to dismiss the Respondent's preliminary objections and exercise the Court's non-derogable jurisdiction to wind up companies.

Mr Masesa filed a brief rejoinder submission. In his rejoinder, he rejoined that, it is incorrect to hold that there is no dispute between the parties arising from the "**CLA**". He contended that, as per paragraphs 7 and 8 of the Petition, reference has been made to the CLA which is also

attached as Annexure 3 and 4 to the Petition. He contended that, the grounds of the Petition are based on the debt under the "**CLA**" for which the parties had agreed to arbitration.

Mr Masesa rejoined further that, the Promissory Note referred to by the Petitioner uses the same terms and conditions as set forth in the **"CLA"**. He contended that, what the Respondent is seeking is for the parties to refer their disputes to the arbitral tribunal as agreed upon in clause 23.1 and 23.2 of the "**CLA**". As such, he urged this Court to strike out the Petition.

I have gone through the rival submissions and read the various cases which the parties have urged this Court to be guided with. I am indeed conversant with what this Court stated in the **Queensway's case** (supra). One of the factors considered which will make this Court to refrain from exercising its jurisdiction to entertain a winding up petition in favour of arbitration is where the debt is disputed by the Respondent.

The decision of this Court in **Queensway's case** (supra) was to that effect and thePetition was struck out in favour of an arbitration clause. But before I even delve on that aspect, I find it pertinent that I should consider the issue of jurisdiction of this Court since the second limb of the objection was anchored on that point.

As this Court stated in the case of **Chongquing Lifan Industries (Group) Impo and Exp. Co. Ltd vs. Kishen Enterprises Ltd**, Misc. Cause No.41 of 2019 (unreported), 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.

In the **Chongquing's case** (supra)and, in the case of **TANESCO vs. IPTL** [2000] T.L.R 324, it was made clear that, a Court's jurisdiction is a creature of statute and not of the parties. That settled legal position was fully endorsed by the Court of Appeal as well, inthe caseof **SCOVA Engineering S.P.A**(supra).

Since, in line with what the Companies Act and its regulations provide that this Court is the one to deal with insolvency matters, it means, in principle, therefore, that, this Court does have jurisdiction to hear this Petition.

However, as this Court stated in the case of **Sinotruk International vs. TSN Logistics Limited** Misc.Commercial Cause No.13 of 2021 (unreported), the only apt question to ask and respond to is whether, this Court is the appropriate forum to exercise jurisdiction over such matters, taking into account the circumstances under which the Petition arises and the laws governing the parties' relationship.

An attempt to respond to the above question requires that I revert to the first issue and the decision of this Court in the **Queensway case (supra)**, and other decisions to which this Court was referred to by the parties. Essentially, in both the **Queensway's case** (supra), and **Sinotruk case** (supra), 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.

In those two cases, this Court subscribed to a view, which I still stand for it even now, that:

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

In the **Sinotruk International** (supra) this Court had the following to say, and I quote:

> "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."

However, as emphasised by this Court in the **Queensway's case** (supra) and also in**Sinotruk** (supra), for this Court to take up the above stated legal position, the debt should have been a bonafide disputed debt by the Respondent. From the foregoing discussion, the question that calls my attention in light of the first preliminary objection is whether the debt in question has been disputed.

In his submission, Mr Muganyizi has contended that, the debt has not been disputed at all. He has relied on paragraph 14 of the counter affidavit filed by the Respondent in opposition to the winding up proceedings initiated by the Petitioner, in particular the averments starting in the 4th line of that paragraphs, which states as follows, that:

> "The Respondent states further that, at all times the shareholders of the Respondent Company **have neither disputed nor**

denied the existence of the loan." (Emphasis is added).

Correctly interpreted, the Respondent is not denying the fact of being indebted to the Petitioner. I would tend to agree, therefore, that, there being such a clear view, there can be no room on the part of the Respondent to seek refuge in the arbitration clause contained in the **"CLA"**.

That avenue, however, will not avail much for the Respondent and, as contended by Mr Muganyizi, this becomes a fit case for which the **Rufiji Basin's case** (supra) and, even **Chongquing Lifan Industries** (supra), will apply, meaning that, the presence of an arbitration clause does in the circumstance of this case oust the jurisdiction of this Court in this winding up petition.

From the foregoing discussion, I find that the preliminary objections filed by the Respondent are devoid of merit and should not be allowed to stand in the path of the Petitioner. In the upshot of that, this Court settles for the following orders, that:

1. The two preliminary objections filed by the Respondent are hereby dismissed with costs; and
2. The parties are to proceed with the hearing of the merits of the petition.

It is so ordered.

DATED AT DAR ES SALAAM ON THIS 30thDAY OF SEPTEMBER, 2022

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DEO JOHN NANGELA
JUDGE