

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

COMMERCIAL DIVISION

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL APPLICATION NO. 10 OF 2022

(Arising from Commercial Case No. 118 of 2018

BETWEEN

NITRO EXPLOSIVES (T) LIMITED..... APPLICANT

VERSUS

TANZANIA ONE MINING LTD.....2NDRESPONDENT/J. BEBTOR

HUSSEIN OMARHAJJI GONG'A.....2ND RESPONDENT

R U L I N G

DATE OF LAST ORDER: 26/09/2022

DATE OF RULING: 23/11/2022

MKEHA, J

The applicant is moving the court for an order lifting the veil of incorporation of the judgment debtor company, TANZANITE ONE MINING LIMITED. Upon grant of the prayer hereinabove, the applicant is further

asking the court to order Mr. Hussen Omarhajji Gong'a, the Director of the Judgment Debtor Company, to satisfy a decree of TZS 124,543,781.68 issued against the Judgement Debtor, failure of which, the said Director be arrested and committed as a Civil prisoner. The application is made under sections 38 (1), 42 (c), (e), 95 and Order XXI Rule 9, 10 (2) (i) (iii) 28, 35 (1), (2), 36 and 39 (2), (b) and (d) of the Civil Procedure Code. The chamber summons is supported by an affidavit sworn by Ms. Agness Dominick, advocate for the Applicant/Decree Holder in Commercial Case No. 118 of 2018. The application is resisted through a counter affidavit affirmed by Mr. Hussein Omarhajji Gong'a, the 2nd respondent.

Whereas Ms. Agnes Dominick learned advocate represent the applicant, Mr. Alex Samwel Yunga represented the respondents. Before the application was causelisted for hearing, the learned advocate for the 2nd respondent raised points of law aimed at challenging competence of the applicant's application. One of such points was to the following effect:

"That, in view of the legal position the 1st respondent having been placed under liquidation, the application for execution is grossly incompetent".

It was submitted for the 2nd respondent that, the 1st respondent having been put under liquidation, lost the legal capacity to stand under her own capacity in the execution proceedings and that, it was the liquidator who assumed the liability and responsibility of the first respondent. According to the learned advocate for the 2nd respondent, the 1st respondent was put under liquidation on 23/12/2021 by the High Court whereupon Mr. Mpaya

asking the court to order Mr. Hussen Omarhajji Gong'a, the Director of the Judgment Debtor Company, to satisfy a decree of TZS 124,543,781.68 issued against the Judgement Debtor, failure of which, the said Director be arrested and committed as a Civil prisoner. The application is made under sections 38 (1), 42 (c), (e), 95 and Order XXI Rule 9, 10 (2) (i) (iii) 28, 35 (1), (2), 36 and 39 (2), (b) and (d) of the Civil Procedure Code. The chamber summons is supported by an affidavit sworn by Ms. Agness Dominick, advocate for the Applicant/Decree Holder in Commercial Case No. 118 of 2018. The application is resisted through a counter affidavit affirmed by Mr. Hussein Omarhajji Gong'a, the 2nd respondent.

Whereas Ms. Agnes Dominick learned advocate represent the applicant, Mr. Alex Samwel Yunga represented the respondents. Before the application was causelisted for hearing, the learned advocate for the 2nd respondent raised points of law aimed at challenging competence of the applicant's application. One of such points was to the following effect:

"That, in view of the legal position the 1st respondent having been placed under liquidation, the application for execution is grossly incompetent".

It was submitted for the 2nd respondent that, the 1st respondent having been put under liquidation, lost the legal capacity to stand under her own capacity in the execution proceedings and that, it was the liquidator who assumed the liability and responsibility of the first respondent. According to the learned advocate for the 2nd respondent, the 1st respondent was put under liquidation on 23/12/2021 by the High Court whereupon Mr. Mpaya

Kamala was appointed the liquidator. The learned advocate went on to submit that, the wound up petition for the 1st respondent was advertised as per the statutory requirements requiring all the creditors who owed the 1st respondent to join the petition for winding up of the 1st respondent. According to the learned advocate for the applicant, by making the present application against the 1st respondent who is under liquidation after being wound up by the competent court, the applicant was pursuing an incompetent application which deserved being dismissed with costs.

As for the applicant, there was no contest regarding the fact that, the 1st respondent was indeed wound up on 23/12/2021. According to the learned advocate for the applicant, it was until the 25th February, 2022 when the applicant got knowledge that the applicant had been wound up. Despite having such knowledge, the learned advocate for the applicant still believes that the execution proceedings can proceed in the manner preferred by the applicant.

The only issue for determination is **whether a corporate veil can be lifted even when the winding up process of a company is over.** The settled legal position is that, when a winding up order is made all power is taken away from the Directors of the company. The financial affairs of the company are taken and placed into the hands of the official receiver/liquidator. On the making of a winding up order it would seem that, there are situations in which an automatic stay is imposed prohibiting any suit, action or other proceedings from being proceeded with or commenced against the company without the leave of the court. **See:** section 288 of the Companies Act. When a winding up order has been made any attachment,

distress or execution put in force against the estate or effects of the company after commencement of the winding up is void and if the liquidator makes a decision to continue proceedings commenced prior to the winding up or has obtained the leave of the court to bring or defend proceedings, in accordance with his general obligations and duties, he must act in the interests of the creditors and shareholders generally. **See:** section 289 of the Companies Act.

It is relevant to quote what section 288 of the Companies Act provides, so as to appreciate the consequences of a winding up order. The said provision provides as here under:

"When a winding up order has been made or an interim liquidator has been appointed under section 295, no action or proceeding shall be proceeded with or commenced against the company except by leave of the court and subject to such terms as the court may impose."

An application for leave to continue proceedings such as these execution proceedings may be made by the liquidator or creditor. Ordinarily, leave is to be sought by making an application to the High Court Registry having the conduct of the winding up proceedings. Annexure TML4 to the 2nd respondent's counter affidavit indicates that on 26th October, 2021 notice was issued to the general public inviting any person who would be interested to join or oppose the petition for winding up of the 1st respondent. The applicant took no step. Without having obtained leave of the court, the applicant seeks to continue execution proceedings against a person he names to be Director of the wound-up company. As demonstrated

hereinabove, the law does not allow such a course. I hereby uphold the preliminary point of objection raised by the learned advocate for the 2nd respondent.

For the foregoing reasons, the application is struck out for being incompetent. No order is made as to costs.

Date at DAR ES SALAAM this 23rd day of November, 2022.





C.P. MKEHA

JUDGE

23/11/2022

Delivered this 23rd day of November, 2022 in the presence of Ms. Agnes Dominick the learned counsel for the Applicant and also hold brief of Advocate Alex Yenga for the Respondent.




J. M. MINDE

DEPUTY REGISTRAR

23/11/2022