IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 115 OF 2014

BETWEEN

SHARAF SHIPPING AGENCY (T) LIMITED.....PLAINTIFF

VERSUS

BARCLAYS BANK TANZANIA LIMITED.....1ST DEFENDANT

HABIB AFRICAN BANK LIMITED.....2ND DEFENDANT

RULING

Date of last order: 06/12/2022
Date of Ruling: 24/02/2023

AGATHO, J.:

This ruling was triggered by a Preliminary Objection (PO) raised by the learned counsel for the Defendants that:

> *The suit is incompetent for failure to plead and annex board resolution sanctioning the institution of the suit.*

Before venturing into the PO raised, I should point out that this case is a backlog. It was instituted in 2014. Sometimes in 2018 the Court pronounced judgment. Both parties were aggrieved and appealed to the Court of Appeal. And on 14/06/2022 the Court of Appeal allowed the appeal, quashed, and set aside the judgment of the High Court and ordered retrial.

But before commencement of the retrial in 2022 the Defendants filed a notice of PO that the suit is incompetent for failure to plead and annex board resolution sanctioning the institution of the suit.

In prosecuting the PO, the Plaintiff was represented by Mr. Abdon Rwegasira, and the Defendants are represented by Mr. Tazan Mwaiteleke, advocates. It was by consensus that the PO be heard by way of written submissions. The schedule was fixed, and the parties complied with it.

What I have gathered from the PO raised is that the same is not only an afterthought but also misconceived. Despite numerous authorities cited by the Defendants, they are mostly distinguished. The reasons for taking that stance are bound one, the issue of a company suing with or without board resolution depends on the circumstance of the case. The case of **ISA Limited and Another v Bulyanhulu Gold Mine Limited and Two Others, Consolidated Commercial Cases No. 114 and 115 of 2016, HCCD at Dar es salaam** (unreported) underscore the point that lack of board resolution renders the suit to be incompetent for want of board resolution. I am aware that, some cases from Ugandan such as **Bugere Coffee Growers Limited v Sebaduka and Another [1970] 1 EA** was cited with approval by the CAT in the case of **Pita Kempap**

LTD v Mohamed I.A Abdul Hussein, Civil Application No. 128 of 2004 c/f No. 69 of 2005, CAT, at Dar es salaam and in **Ursino Palm Estate Ltd v Kyela Valley Foods Limited, Civil Application No. 28 of 2014.**Withdue respect to learned counsel for defendants these cases are distinguishable because the Court of Appealing **Pita Kempap (supra)**was concerned with incompetency of the suit due to contravention with Rule 30 of the Court of Appeal Rules which require an advocate appearing at the Court of Appeal on behalf of a company to be approved by board resolution the raised preliminary objection in the case at hand is not on application of Rule 30 of the Court of Appeal Rules. Moreover, no provision of the Companies Act, Act No.12 of 2002 that conspicuously and mandatorily require board resolution to sanction institution of a case by a company. In my view doing so is to question company's legal personality as propounded in **Salomon v Salomon & Co. Ltd. (1897) A.C.22**. Moreso, Section 147 (1) of the Companies Act [Cap 212 R.E. 2002] cited by the Defendants does not strictly bar filing of a case by a company in its own name without board resolution. It simply provides for written resolutions that where meetings cannot be done resolution may be reached in writing. That is, the company members or directors may reach resolution in writing to sanction anything to be done by the company. In lieu of the foregoing, the ruling

in **Kati General Enterprises v Equity Bank Tanzania Limited and Another, Civil Case No. 22 of 2018 HCT Dar es salaam District Registry** (unreported) and other plethora of decisions are distinguishable because they were based on their own set of facts. However, I subscribe to the Court's view in **BETAM Communications Tanzania Limited v China International Telecommunication Limited and Others, Civil Case No. 220 of 2012 HCT at Dar salaam** (unreported) in which the court held that, *board resolution is not mandatory for a company to institute a suit. It is internal affairs of the company in which Defendants as third parties, it is none of their business.*

I am of the settled view that a board resolution may be dispensed with, where minority initiates an action in the name of the company to protect interests of that company against mismanagement by the majority shareholder(s) or directors or against third parties. Also I am aware that there could be instances where board resolution may be required but this suit is among the situation which may require leave because, it is intriguing that the objection raised by the Defendants who never asked for board resolution when they initiated their business relation with the company. More alarming is the raising of the PO after several years the

case has been in the Court since 2014 but defendant did not bother to raise the preliminary objection on that point even in appeal, he could have been raised it but for reasons known best to them they did not raise it at first place. That without meandering is an afterthought.

In addition, it is a trite law that a Preliminary Objection on pure point of law can be entertained at any stage even on appeal. But it must be the Preliminary Objection based on pure point of law. Taking consideration of the decision on **BETAM's case** and in my own consideration that, the board resolution is internal affairs of the company regulated by the MEMARTS then the outsiders such as the Defendants may not know it. On that circumstance, evidence may be required to substantiate that indeed there was a board meeting that passed the resolution as the said resolution ought to be annexed to the petition, hence not a pure point of law as a purported Preliminary Objection contrary to the principles in **Mukisa Biscuits Manufacturing Ltd v West End Distributors Ltd [1969] E.A. 696**.

Given what I have held above, I find this limb of PO falls short of the principle enunciated in **Mukisa Biscuits case** and is hereby overruled as it intersects law and factual issues.

Next point for determination now is, whether the board resolution established *locus standi* of the petitioner company. *Locus standi* is referred to as a person's power to sue or to initiate legal proceedings to protect or claim his right(s). (Samatta, JK as he then was) in the case of **Lujuna Shubi Balonzi (senior) V Registered Trustees of Chama cha Mapinduzi [1996] TLR203** defined *locus standi* as a Common Law doctrine according to which a person bringing a matter to Court should be able to show that his right or interest has been breached or interfered with.

With that in mind and back to this suit, the provision of Section 15 (2) of the Companies Act No. 12 of 2002, is loud and clear that once a company is incorporated it becomes a body corporate and it acquires legal personality through which her *locus standi* is established. If that is the position then *locus* of *standi* of the company cannot be established or be taken away by board resolution required under Section 147 of the Companies Act No. 12 of 2002 because the said Section does not deal with *locus standi* of a company as a such to demand board resolution whenever a company institutes a case is to erode foundation of legal personality of the company as pioneered in **Salomon v Salomon & Co.**

Ltd. (1897) A.C.22. In addition to that, the applicability of Section 147 of the Companies depends on the circumstance of a particular case.

For clarity, I will reproduce Section 147 of the Companies Act, Act No. 12 of 2002 to leave no stone unturned. Section *147 (1)*

Anything in the case of a company may be done (a) *by resolution of company in general meeting, or* (b) *by resolution of any class of members of the company, may be done, without a meeting and without any previous notice being required, by resolution in writing signed by or on behalf of all the members of the company who at the date of the resolution would be entitled to attend and vote at such meeting:*

Provided that, nothing in this section shall apply to a resolution under section 193(1) removing a director before the expiry of his period of office or a resolution under section 170(7) removing an auditor before the expiry of his term of office.

(2) The signature need not be a single document provided each is on a document which accurately states the terms of the resolution.

(3) The date of the resolution means when the resolution is signed by or on behalf of the last member to sign.

(4) A resolution agreed to in accordance with this section has effect if passed –

(a) by the company in a general meeting, or

(b) by a meeting of the relevant class of members of the company as the case may be; and ay reference in any enactment to a meeting at which a resolution is passed or to members voting favour of a resolution shall be construed accordingly.

(5) A resolution may be agreed to in accordance with this section which would otherwise be required to be passed as a special resolution; and any reference in any enactment to a special resolution includes such a resolution.

This provision is permissive to support any activity done by company requiring board resolution (often done through meetings) can be done through written resolution. The provision does not categorically state that the company cannot sue without board resolution. Therefore, lack of such resolution should not be used to deprive the company's right to sue on its own name to protect her interests. More so, the provision of Section 147 of Companies Act is about written resolutions. It is more on internal affairs of a company. If the legislature intended that in every

situation the company must have board resolution before instituting a suit the legislative provision would have clearly stated so. Section 147 of the Act in my opinion contemplates situations where resolution can be done without a meeting or without any previous notice and it does not say for a company to sue there must a board resolution. Truly, the requirement of board resolution depends on the circumstance of the case. The legislature was aware of circumstances where board resolution via meetings may not be forthcoming for a company to do certain things. For example, an advocate cannot file a case on behalf of a company without being duly authorised by the said Company however, there is no one size fits all rule that bars a company from suing unless it has board resolution.

Context matters. Looking at the circumstance of this case, the absence of board resolution cannot make the suit incompetent. Further, it is not against the law for the company to institute a suit to protect her interests unless the shareholders or directors appear to resist such move in which case it is internal affairs of the company.

That said, I have taken note of the Defendants citation of case law and detailed clarification on raising of Preliminary Objection. But with due respect, the provision of the law, cases cited, and lengthy submission

made have little to add on the substance of the Preliminary Objections raised.

As for the Plaintiff's faulting of how the PO was raised, in my view, it was without merit. I am saying so because the notice of the PO was served upon them. It does not matter whether the PO was pleaded in the Written Statement of Defence (WSD) or not. The PO as such ought to be purely a point of law that can be raised at any time and any stage of the proceedings even on appeal. To strictly demand it be raised in the WSD will be unreasonable.

In the end the POs raised is overruled for lacking substance. For that reason, the Plaintiff shall have her costs.

It is so ordered.

DATED at **DAR ES SALAAM** this 24th day of February 2023.

U. J. AGATHO
JUDGE
24/02/2023

Date: 24/02/2023

Coram: Hon. U. J. Agatho, J.

For Plaintiff: Shaban Abdallah Kaberwa, Advocate h/b Abdon Rwegasira, advocate

For 1st Defendants: Deves Aloyce Kwembe, Advocate h/b Jackline Kapinga, Advocate

For 1st Defendants: Tazan Mwaiteleke, Advocate

C/Clerk: Beatrice

Court: Ruling delivered today this 24th February 2023 in the presence of Shaban Abdallah Kaberwa, Advocate h/b Abdon Rwegasira, counsel for the Plaintiff, Deves Aloyce Kwembe, Advocate h/b Jackline Kapinga, Advocate for the 1st Defendant and Tazan Mwaiteleke, learned counsel for the 2nd Defendant.

THE HIGH COURT OF TANZANIA
COMMERCIAL DIVISION

U. J. AGATHO
JUDGE
24/02/2023