**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(COMMERCIAL DIVISION)**

**AT DAR ES SALAAM**

**MISC.COMMERCIAL CAUSE NO.192 OF 2023**

**MARY DEOGRATIAS MAGUBO** (formerly known as
**MARY BONIFACE FUNGO..... 1st APPLICANT**
**MOMENTOUS INTERNATIONAL & GENERAL**
**SUPPLY COMPANY LIMITED.....2nd APPLICANT**
**ELIA BONIFACE FUNGO.....3rd APPLICANT**

**VERSUS**

**THE REGISTRAR OF COMPANIES.....RESPONDENT**

**RULING**

***Date of last Order: 18/01/2024***

***Date of Ruling:25 /01/ 2024***

**GONZI, J.;**

The Applicantfiled the present applicationunder certificate of urgencyon 8th December 2023 by way of chamber summons supported withan affidavit. In the Chamber summons the Applicant prayed for the following orders:

*(1) That this honourable Court be pleased to give an order that the meetings of shareholders of the 2nd Applicant company be called, held and conducted and the 1st Applicant be deemed to constitute*

*a meeting and pass a resolution appointing Elia Boniface Fungo of Plot No.79, Msichoke Street, Tegeta Ward, Kinondoni District in Dar es Salaam Region, P.O.Box 75649 Dar es Salaam.*

*(2) Any other ancillary or consequential directions as the court thinks fit and just to grant.*

The application is supported with an affidavit of the 1st Applicant Mary Deogratias Magubo, a director and shareholder of the 2nd Applicant Company. Through annexture M-1-, a duly registered deed poll, the Applicant changed her name in January 2020 from Mary Boniface Fungo to Mary Deogratias Magubo. It is stated in the affidavit of Mary Deogratias Magubo that one Deogratias Alphonce Magubo and the 1st Applicant,as husband and wife respectively, incorporatedthe 2nd Applicant Companyon 22nd July 2016 and became the first subscribers to the memorandum of association whereby the said Deogratias Alphonce Magubo held 800 shares while the 1st Applicant held 200 shares in the company that hada total of 1000 shares of Tshs. 1000 each.Throughout, the two persons were the only shareholders, membersand directors of the 2nd Applicant Company.

It is stated further that on 21st June 2023, Deogratias Alphonce Magubo died. According to annexture M-3 which is collectivelymade up of a death certificate and Letters of Administration of Estate, the 1st Applicant was appointed by the Primary Court of Temeke as the administratix ofthe estate of her late husband Deogratias Alphonce Maguboon 31st July 2023 vide Probate and Administration Cause No.996/2023. The 1st Applicant deposed further that due to the death of her husband, the 2nd Applicant Company consequently remained with only 1 shareholder and 1 Director, that is herself, and that as such it has become impracticable to conduct meetings of shareholders and directors of the 2nd Applicant Company in the manner prescribed by the company's memorandum and articles of association. The Memorandum and Articles of Association of the 2nd Applicant Company were annexed to the affidavit as annexture M-2.

The 1st Applicant stated further in her affidavit that since the death of the other shareholder, the 2nd Applicant company has been unable to carry on its operations and business venturesdue to lack of the requisite quorum hence putting the company's affairs in jeopardy. The first applicant concluded, in her affidavit in support of the application that

the Respondent,Registrar of Companies, has been joined in this case as a necessary party responsible for registration of Companies and maintaining the records of the companies in Tanzania.

On 18th January 2024, the matter was called for hearing whereupon Mr.Hassan Gyunda, learned Advocate appeared for all Applicants while the Respondent did not file a counter affidavit nor appear for hearing despite being duly served with the Application and summons to appear and acknowledging the receipt thereof. The hearing of the application was therefore ordered to proceed exparte against the Respondent.

Mr.Gyunda adopted the affidavit of the 1st applicant and submitted briefly that the application is brought under section 137(1) and (2) of the Companies Act, Cap 212 of the Laws of Tanzania. He submitted that upon the death of the other shareholder and director, the business of the 2nd Applicant Company is not practicable and that all operations of the company are not in good condition because meetings of Directors and of shareholders are impossible to conduct with only one remaining director and shareholder in it. Hefurther submitted that the 2nd Applicant Company's activities which are impracticable due to lack of quorum

include operating the company's bank account, signing of tender documents and contracts.

Mr. Gyunda submitted that under section 137(1)of the Companies Act, Cap 212 of the Laws of Tanzania, the court may grant an order to allow the 1st Applicant,acting alone,to hold a meeting and constitute the quorumunder circumstances like the ones obtaining in the present case where it is impracticable to hold the company's meetings pursuant to the memorandum and articles of association of the company. The learned counsel for the applicantsconcluded his submissions by praying that the court be pleased to grant the orders sought in the chamber summons or alternatively the court can grant any consequential or ancillary orders it deems fit in the circumstances.

After hearing the submissions by the learned advocate for the Applicants, the court was curious to know whether the application is necessary despite there being in place a duly appointedAdministratix of estate of the late Deogratias Alphonce Magubo. Hence the Court called upon the learned advocate, to address the court on that issue. Mr.Gyunda responded and submitted that, in his view, the application is still necessary because the Administratix of estate upon being appointed

by the Probate Court, only looks after the affairs of her late husband. She cannot ipso facto become a shareholder in the 2nd Applicant Company until the shares of her late husband are transmitted by operation of the law to the lawful heirs of the deceased person.

After hearing the submissions by the learned counsel for the Applicants and carefully going through the application together with the supporting affidavit and all annextures thereto, I will now proceed to determine the application at hand in relation to the applicable laws. The application is brought under section 137(1) and (2) of the Companies Act, Cap 212 of the Laws of Tanzania. The section is reproduced hereunder for ease of reference:

***137.-(1) If for any reason it is impracticable to call a meeting of a company in any manner in which meetings of that company may be called, or to conduct the meeting of the company in the manner prescribed by the articles or this Act, the court may, either of its own motion or on the application of any director of the company or of any member of the company who would be entitled to vote at the meeting, order a meeting of the company***

***to be called, held and conducted in such manner as the court thinks fit.***

***(2) Where any such order is made, the court may give such ancillary or consequential directions as it thinks expedient; and these may includea direction that one member of the company present in person or by proxy shall be deemed to constitute a meeting.***

***(3) Any meeting called, held and conducted in accordance with an order under this section shall for all purposes be deemed to be a meeting of the company duly called, held and conducted.***

It is clear that an application of this kind can either be initiated by the court suomottu or be made by a member or a director of the company. In order for a member or director of the company to successfully move the court under section 137(1) of the Companies Act or for the court to invoke its powers on its own motion as such,either of the following alternative circumstances must be satisfied. The first set of circumstances is that it must be established that for any reason it is impracticable to call a meeting of the company in any manner in which

meetings of the company may be called.The second set of circumstancesis where it is impracticable to conduct the meeting of the company in the manner prescribed by the company's articles of association or bythe Companies Act.

The scope and utility of section 137 of the Companies Act was well elaborated by the Court in the persuasive case of**Wheeler v Ross** (2011) EWHC 2527which interpreted section 306 of the Companies Act of the United Kingdom, a statutein*parimateria* to the Companies Act of Tanzania. The wording of section 306 of the UK Companies Act is identical to the wording of section 137 of the Companies Act of Tanzania, hence a useful external aid as aninterpretational tool of the relevantTanzanian legalprovision since similar language in statutes with common purpose is interpreted in the same way. In the case of Wheeler vs Ross (supra) the Court in interpreting the above provision observed that:

> *"The purpose of the s306 order was to allow the applicant to enforce his rights as majority shareholder by overcoming the deficiency in him holding an inquorate extraordinary general meeting; the order was merely one of the steps necessary to put the governance of the*

*company into a viable state.....it must be remembered though, that the court's power is discretionary and fact sensitive.The courts will take a broad approach to the provisions under s.306 where they feel the provisions under the articles are being exploited. This will enable the company to overcome practical difficulties created by either the articles, shareholder agreements or the Act."*

Deduced from the above quotation, it is plain that section 137 of the Companies Act, Cap 212 of the Laws of Tanzania is intended to enable a member or director of a company to overcome the deficiency in him to call or conduct a meeting of the company in which he is eligible to vote by overcoming the difficulty of lacking the requisite quorum as prescribed in the articles of association of the company or as laid down in the Companies Act. The provision is intended to put the governance of the company into a viable state by overcoming practical difficulties created by the articles of association, shareholder agreements or the Companies Act. In short, the provision is intended to be used for a cause that is beneficial to the practical and viable governance of the company and not otherwise.In determining whether the court's discretion ought to be exercised, the court proceeds on a holistic

assessment, which "entails an assessment of whether there is indeed impracticability and whether such impracticability is of a sufficient degree as to call for the intervention of the court.

With the foregoing understanding in mind,I now proceed to examine the application before me. The Applicants have advanced the ground of death of one shareholder who was also one of the two directors of the company,as making it impracticable for the remaining shareholder and Director namely Mary Deogratias Magubo, to run the affairs of the company. I asked myself whether or not the demise of the late Deogratias Alphonce Magubo, really resulted into the practical difficulties leading to lack of the requisite quorum to call or conduct companies meetings under the articles of association of the 2nd Applicant Company and the requirements of the Companies Act? In his submissions in support of the application, Mr.Gundya, learned Advocate for the Applicants, referring to the affidavit of the 1st Applicant, submitted that the existing shareholder and director finds it impracticable to conduct affairs of the company due to lack of the requisite quorum wherebyall operations of the company are not in good condition because meetings of Directors and of shareholders are impossible to conduct with only one

remaining director and shareholder. He further submitted that the 2nd Applicant Company's activities including operating the company's bank account, signing of tender documents and contracts are impracticable due to lack of quorum. I am duty bound to look at the requirements of the articles of association of the 2nd Applicant Company and the provisions of the Companies Act so as to ascertain if at all the arguments by the learned counsel for the applicants hold any water? This ascertainment is pertinent so as to determine whether or not the prevailing circumstances in the present case constitute asufficient cause to trigger the operation of section 137 (1) and (2) of the Companies Act.

The Articles of Association of the 2nd Applicant Company were annexed to the affidavit in support of the application as annexture M-2. I will consider the pertinent provisions thereof as follows:

Under Article 3 it is prescribed that the number of shareholders with which the company is registered is two but that directors may from time to time increase the number of shareholders.Article 11 provides that no business shall be transacted at any general meeting unless a quorum of

members is present at the time when the meeting proceeds to business; and that two persons entitled to vote on the business to be transacted, each being a member or a proxy for a member or a duly authorized representative of a corporation, shall be a quorum. The same requirement is put in respect of directors' meetings under Article 46 which provides that the quorum necessary for the transaction of the business of the directors may be fixed by the directors, and unless so fixed shall be two.Therefore, Articles 3 and 11 of the Articles of association of the 2nd Applicant Company make it a requirement that the 2nd Applicant Company must always have at least 2 shareholders. And more importantly, the quorum for the purpose of company meetings is at least two members of the company who are entitled to vote. The quorum for directors' meetings is also fixed at 2. I have taken notice of the fact that the requirements of the 2 member's quorum for company's meetings and 2 directors for directors' meetings is not only prescribed in the articles of association of the 2nd Applicant Company, but also it is a statutory requirement under the Companies Act Cap 212 of the Laws of Tanzania. Section 136 (c) provides that two members personally present

shall be a quorum while section 186 requires that every company shall have at least two directors.

I would have concluded at this point by applying the facts to the law and thereby deriving the necessary conclusions. Both, the articles of association of the 2nd Applicant company and the Companies Act, have put a quorum for meetings of the company and of the directors at two members or directors respectively, whereas in the present case there is only one shareholder and hence only one director due to the death of the other shareholder and director. This would inevitably mean that it is impracticable to run the affairs of the 2nd applicant company and hence the court's intervention under section 137(1) of the Companies Act would be perfectly justified. However, for the sake of certainty and repose, I have to address the issue I raised suomottu during the hearing of the application. After hearing the counsel's submissions, I was curious to know his opinion as to whether the application was necessary despite there being in place an Administratix of estate of the late Deogratias Alphonce Magubo, the deceased Director and shareholder. I asked this question so as to satisfy myself whether or not the appointment of the 1st Applicant as an Administratix of the estate of the deceased

shareholder and director, effectively supplied the requisite quorum for the 2nd applicant company to run its affairs in compliance with the requirements of the articles of association and the Companies Act. I raised this question while alive to the fact that under section 99 of the Probate and Administration of Estates Act, Cap 352 of the Laws of Tanzania, the executor or administrator, as the case may be, of a deceased person is his legal representative for all purposes, and all the property of the deceased person vests in him as such. I was therefore curious to know whether upon the death of Deogratias Alphonce Magubo, and upon appointment by the probate court of Mary Deogratias Magubo as the Administratix of estate of the late Deogratias Alphonce Magubo, the deficiency in shareholding and membership of the 2nd Applicant Company was thereby effectively cured by transmission of the deceased'sshares to his administratix of estate hence filling up any gap in the practical operations and management of the 2nd Applicant company? Hence I called upon Mr.Gyunda, learned advocate for the Applicants to address me on this issue before I could properly exercise my discretion under section 137(1) of the Companies Act. Mr.Gyunda addressed me that in his view the application at hand is still necessary

because the Administratix of estate upon being appointed by the Probate Court, simply looks after the affairs of her late husband only. She cannot ipso facto become a shareholder in the 2nd Applicant Company until the shares of her late husband are transmitted by operation of the law to the lawful heirs of the deceased person. With respect, I think the learned counsel has missed the point here. Transferability of shares of the deceased person by operation of the law to his legal personal representative does not have to await transfer processes of the deceased's shares to the lawful heirs of the deceased person. The position in law is that upon death of the deceased shareholder, ipso facto, automatically and without much ado, the Administratix of estate became a shareholder in the company upon her appointment by the probate court, effectively replacing the deceased person. I am of the fortified position that under the doctrine of share transmission, upon death of the deceased shareholder, the Administratix of estate of the deceased shareholder immediatelyas of the date when the death occurred, became a shareholder in the company in the place of the deceased shareholder by operation of the law.Succession is not kept in abeyance and the property of the deceased member vests in the

legal personal representative on the death of the deceased member.Transmission isan automatic process; when a shareholder dies, his shares immediately pass to the personal representatives or, if a member is declared bankrupt, their shares will vest in the trustee in bankruptcy. The word 'transmission' means devolution of title to shares otherwise than by transfer, for example, devolution by death, succession, inheritance, bankruptcy etc. While transfer of shares is brought about by delivery of a proper instrument of transfer (viz, transfer deed) duly stamped and executed, transmission of shares is done by forwarding the necessary documents (such as a notarized copy of death certificate) to the company. On registration of the transmission of shares, the person entitled to transmission of shares becomes the shareholder of the company and is entitled to all rights and subject to all liabilities as a shareholder.

Back to the case at hand, I therefore find that the 2nd Applicant Company in the present case, has always had 2 shareholders despite the death of one shareholder Mr.Deogratias Alphonce Magubo on 21st June 2023. The first shareholder is the 1st Applicant Mary Deogratias Magubo owning 200 shares in the company in her own capacity. The

second shareholder is Mary Deogratias Magubo (as Administratix of estate of the late Deogratias Alphonce Magubo) who is holding 800 shares in the 2nd Applicant Company in trust for the benefit of the heirs of the late Deogratias Alphonce Magubo. In law, these are two different persons who are capable of transacting business validly. Mary Deogratias Magubo (as Administratix of estate of the late Deogratias Alphonce Magubo) is holding the 800 shares in the 2nd Applicant Company in the same way like she is holding in a resulting trust the other properties forming part of the estate of the late Deogratias Alphonce Magubo to be distributed to the lawful heirs of the deceased person pursuant to the law of succession applicable to him and subject to the supervision of the probate court under the relevant probate and administration proceedings. Shares are property like other properties. In **Borland's Trustee v Steel Bros & Co Ltd [1901] 1 Ch 279**the court defined a share that:

> *"A share is the interest of the shareholder in the company measured by a sum of money, for the purpose of liability in the first place, and of interest in the second, but also consisting of a series of mutual covenants entered into by all the shareholders."*

Therefore, as Mary Deogratias Magubo, in her position as the Administratix of estate, is holding the other properties of the deceased Deogratias Alphonce Magubo, in the like manner she is also holding the 800 shares of the deceased in the 2nd Applicant Company. By holding shares in the company, it follows therefore that Mary Deogratias Magubo, in her position as the Administratix of estateof the late Deogratias Alphonce Magubo, is, in law, a shareholder of the 2nd Applicant companywith 800 shares. I have noted sadly that the Articles of Association of the 2nd Applicant Company do not contain any provision on share transmission at all and the issue of share transfer is narrowly touched therein. Article 2(a) prescribes that: "the company is a private company and accordingly the right to transfer shares is restricted in the manner herein after prescribed". Surprisingly, after that statement there is only a prohibition for members of the public to subscribe for shares or debentures. Throughout the entire 61 Articles of Association of the 2nd Applicant Company, no manner of share transfer or share transmission is ever stipulated anyhow or anywhere. Nevertheless, where the articles of association are silent, the Companies Act and the general principles of company law can properly be applied to fill the gap.

The doctrine of share transmission therefore is still applicable to the 2nd Applicant Company.

Having found as a fact that, in law, the 2nd Applicant company has never had deficiency in shareholding despite the death of the other shareholder and director the late Deogratias Alphonce Magubo, because his Administratix of estate under the doctrine of share transmission effectively and immediately stepped in as the second shareholder in the company, one would expect the matter to end there. But yet from another angle the case seems to take a dramatic turn in my view. This dramatic turn occurs when the court reverts back to the basic legal issue pertaining to the applicability of section 137(1) of the Companies Act as elaborated earlier herein above. I found that section 137(1) of the Companies Act comes into play principally so as to enable the company to overcome practical difficulties created by the articles, shareholder agreements or the Act. Are there practical difficulties created by the articles, shareholder agreements or the Act in relation to the running of the affairs of the 2nd Applicant Company in the circumstances of the present case? My answer is definitely in the affirmative. There is quorum deficiency in the 1st Applicant in that she cannot hold an inquorate

extraordinary general meeting of the company to elect a new director or a meeting of the directors to register new members in the company.

Article 11 of the 2nd Applicant's Articles of Association provides that no business shall be transacted at any general meeting unless a quorum of **members** is present at the time when the meeting proceeds to business; and that two persons entitled to vote on the business to be transacted, each being a **member** or a proxy for a member or a duly authorized representative of a corporation, shall be a quorum. Section 136 (c) of the Companies Act also provides that two **members** personally present shall be a quorum.It should be carefully noted that Article 11 of the Articles of Association of the 2nd Applicant Company as well as section 136(c) of the Companies Act recognize "two members" of the company as constituting the quorum. The pertinent question is whether or not in the circumstances of the present case the 2nd Applicant Company has in its register of members at least two members who can constitute a quorum? My answer is in the negative. The 2nd Applicant Company after the death of the other member and shareholder, has two shareholders but only one member.The first shareholder is the 1st Applicant Mary Deogratias Magubo owning 200

shares in the company in her own capacity. The second shareholder is Mary Deogratias Magubo (as Administratix of estate of the late Deogratias Alphonce Magubo) who is holding 800 shares in the 2nd Applicant Company in trust for the benefit of the heirs of the late Deogratias Alphonce Magubo. But the 2nd Applicant Company has only one member namely Mary Deogratias Magubo whose name is in the register of companies. Mary Deogratias Magubo (as Administratix of estate of the late Deogratias Alphonce Magubo) who is holding 800 shares in the 2nd Applicant Company in trust for the benefit of the heirs is not yet a member of the 2nd Applicant Company as her name as such is yet to be entered into the register of members of the company. I am making a finding here that not every shareholder is a member of the company. Members of the company are only those persons whose names are in the register of members of the company. Whereas a shareholder has an investment interest in the company, a member has a legal interest in the company's management and operation. Members have contribution to the management of the company by,for example,appointing and removing directors. They have voting rights on changing memorandum and articles of association of the company and

other corporate decisions. Nearly all members are also shareholders but not all shareholders are members of the company.I am fortified in my finding by the scholarly work of the learned author Ben Pettet, who in his book titled "**COMPANY LAW"**, LONGMAN LAW SERIES, 2nd Edition, © Pearson Education Limited, 2005, at page 267 writes:

> *"When the company is first formed the subscribers to the memorandum are deemed to have agreed to become members, and are accordingly entered in the register of members. In every other case, membership is acquired in accordance with s. 22(2), (of the UK Companies Act) whichrequires, first, an agreement to become a member and, secondly, entry of name on the share register. The share register is required to be kept by the company and made available for inspection. It should be noted that in two situations it is possible as a matter of technicality, for a person to be a shareholder and not a member: (1) where renounceable letters of allotment are used during the course of an offer for sale, the holder of the allotment letter will be a shareholder and yet not a member, since he is not yet entered on the share register; (2) where share warrants are issued, the warrant holder is a shareholder but since his name will not be on the share register he is*

*not a member (although sometimes the articles will deem him to be a member).*

The distinction between a member and a shareholder of the company is not something foreign to our jurisdiction. The very Companies Act Cap 212 of the Laws of Tanzania has several provisions which make a distinction between the two. Sometimes the best interpretational tool of a legal provision in the statute is another provision of the same statute. With a bid to underscore the difference between a member and a shareholder and to nail down the argument that a shareholder is not necessarily a member, I will make reference to their differential treatment under other provisions of the Companies Act. I will pick section 78 and 233(2) of the Companies Act in this regard.

Section 78 provides:

***A transfer of the share or other interest of a deceased member of a company made by his personal representative shall, although the personal representative is not himself a member of the company, be as valid as if he had been such a member at the time of the execution of the instrument of transfer.***

This provision shows that a legal personal representative of the deceased member of the company can transfer the shares of the deceased member even though the legal personal representative himself is not a member. The emphasis here is on the phrase "***although the personal representative is not himself a member of the company***". This provision underscores the fact that a legal personal representative of a deceased member may hold shares in a company as a shareholder in the company and have all the benefits of a shareholder in the company even without himself becoming a member therein. He will have the rights of a shareholder including the right of transferring the shares of the deceased person to another person or to heirs of the deceased person subject to the pre-emption rights enshrined in the articles of association. The legal personal representative may on the other hand opt to apply to the directors of the company to register him as a member as such in order to enjoy and exercise the rights and powers of a member of the company. The pre-emption clause will dictate the response by directors.Section 2 of the Companies Act defines a"personal representative"as his executor or administrator-a definition that covers Mary Deogratias Magubo as an administratix of the estate of

the late Deogratias Alphonce Magubo. Therefore, Mary Deogratias Magubo as an administratix of the estate of the late Deogratias Alphonce Magubo,effectively became a shareholder with powers of transferring the shares of the deceased person held in her Administratix capacity, without being a member of the 2nd Applicant Company. This therefore underscores the point that a shareholder is not automatically a member of the company.So the 2nd applicant company is yet to have the second member so as to meet the quorum requirements in law.

The other provision I would like to make reference to is section 233(2)of the Companies Act on protection of minority member's rights in the company. Section 233(1) protects minority members against unfair prejudicial conduct. But then the law is cognizant of the fact that there can be another category of persons who can be shareholders in the company "by operation of the law" without necessarily being members thereof. The law therefore also protects a person who becomes a shareholder in a company by operation of the law and who is not thereby a member of the company. Thus section 233(2) of the Companies Act provides:

***(2) This section shall apply to a person who is not a member of a company but to whom shares in the company have been transferred by operation of law, as those provisions apply to a member of a company; and references to a member or members are to be construed accordingly.***

The subsection above reproduced recognizes that essentially, protection under section 233(1) is given to a minority who is a member of the company meaning that a shareholder whose name is in the share register of the company. However, the above provision on the other hand goes further and recognizes the fact that where a shareholder is not a member,still he can also be protected under section 233(1) where shares have been transferred to him by operation of the law. So here we have a person to whom shares have been transferred by operation of the law but who, in law, is not a member of the company. He is just a shareholder. Transfer by operation of the law is what is known otherwise as transmission which essentially is the devolution of title to shares otherwise than by transfer, for example, devolution by death, succession, inheritanceor bankruptcy.

The legal personal representative of a deceased member is only a shareholder but not a member. To acquire membership, the legal

personal representative of the deceased member should apply to the company and get his or her name registered in the register of members of the company. This point was well captured by the High Court of India in the case of **Kedar Nath Agarwal v.Jay Engineering Works Limited**(1963)33 Com Case 102 Cal., where Gowans,J., observed that:

> *in some situations and contingencies, the "member" may be different from a "holder". A membermay be a holder of shares but a holder may not be a member..."member" has a distinct connotation in the Companies Act. He is either a subscriber of a memorandum of a company or a person who agrees to become a member of a company and whose name is entered in the register of members.*

The question as to whether or not an administratix of the estate of the deceased person before her registration in the company becomes merely a shareholder or both a shareholder and a member, has been earlier on answered by this Court. In the case of **Ashura Saidi Ndundu versus Buyuni Company Limited**, Misc Civil Cause No. 508 of 2020, High Court of Tanzania, Dar es Salaam District Registry, his Lordship Mlyambina,J., at page 7 quoted with approval the holding in the English case of **Gursharan Randhawa and Another v. Andrew Turpin and Another** (2017) EWCA, Civil 1201, whereby the Court of Appeal Civil Division stated:

> *The administrator of the deceased shareholders of the Company will only become members after being appointed*

*so and not by merely being granted letters of administration.*

In the present case, therefore, I have no iota of doubt that the shares of the late Deogratias Alphonce Magubo,upon his death, were automatically transmitted by operation of the law, to Mary Deogratias Magubo as an Administratix of the estate of the deceased person. That transmission by operation of the law made Mary Deogratias Magubo in her capacity as an Administratix of the estate of the deceased person, a shareholder in the 2nd Applicant company but did not thereby, ipso facto,make her a member in the company. The company, therefore, since the death of the other shareholder, had and still has, only one member namely Mary Deogratias Magubo in her own capacity as subscriber to the memorandum of association of the company.

A careful perusal of the provisions of the Articles of association of the 2nd applicant company and the relevant provisions of the Companies Act shows that the two sources are in tandem with respect to how persons can become members in the company.Article 4 for example provides that:

*"The subscribers to the memorandum of association and such other persons as the directors shall admit to membership shall be the members of the company".*

Likewise, section 24(1) and (2) of the Companies Act, Cap 212 provides:

*24(1) "The subscribers to the memorandum of a company shall be deemed to have agreed to become members of the company, and on its registration shall be entered as members in its register of members.*

*24 (2) Every other person who agrees to become a member of a company, and whose name is entered in its register of members, shall be a member of the company."*

It is crystal clear therefore that the articles of association of the 2nd Applicant Company as well as the Companies Act prescribe in no uncertain terms that membership in the Company can be earned in two ways only. The first one is by subscribing to the memorandum of association. The second way is by being admitted to membership by directors of the company. That is all.Unlike in shareholding, there is no membership in the company by operation of the law. One does not become a member of the company merely by being a shareholder or being entitled to shares therein. In the case at hand, Mary Deogratias Magubo subscribed to the memorandum of association and her name is in the company's register as

owning 200 shares in the company in her own capacity. She is therefore a member of the 2nd applicant company. But on the other hand, Mary Deogratias Magubo (as an Administratix of estate of the late Deogratias Alphonce Magubo), who is a shareholder and holding in trust 800 shares in the company, is not a member in the 2nd Applicant companybecause she did not subscribe to the memorandum of association of the company as such when the company was formed. Her name as an Administratix of estate has not been admitted to membership by directors of the company, and infact, as the company now is left with only one director, there will be no adequate quorum for the directors of the 2nd Applicant company to hold a valid meeting of directors in order to deliberate upon the matter and admit her as a member and shareholder of the company in that capacity with a view to increasing membership of the company to two so that the members in turn can appoint another or other director(s). As if that is not an enough impracticability, the existing member holds only 20% of the voting power in the company;hence ordinarily and practically the 1stApplicant would be unable to make decisions in the company meetings without the support of other members, even if the quorum was there. Theseare indeed practical difficulties in the viable management of the

company. Section 137 of the Companies Act is intended to cure such practical defects in the management of the companies' affairs.

Now, bringing the point home to the present case, when it comes to quorum in the company meetings, what really matters is one being a member in the company who is entitled to voterather than merely being a shareholder therein. That is why the 1st Applicant, despite having another shareholder in the 2nd Applicant Company, still cannot garner the requisite quorum to call for and conduct company meetings in the absence of another member of the company. The Applicants' prayers therefore are relevant not because the 2nd Applicant Company lacks the second shareholder upon death of the late Deogratias Alphonce Magubo as represented in the application before me, but rather because the 2nd Applicant Company actually lacks the second member to constitute the quorum for its meetings. Actually, there is a sanction for a company operating with less than two members: Section 26 of the Companies Act, Cap 212 provides that:

***If at any time the number of members of a company is reduced below two, and it carries on business for more than six months while the number is so reduced, every person who is a member of***

***the company during the time that it so carries on business after those six months and knows that it is carrying on business with fewer than two members, shall be liable (jointly and severally with the company) for the payment of the whole debts of the company contracted during that time.***

In this regard, to ensure conformity to the legal requirements, there is a need for this court to exercise its discretion and grant the present application. The absence of the second member and director in my view impedes the smooth and practical operations of the 2nd Applicant Company. As I have observed elsewhere in this Ruling, under section 137 of the Companies Act, the court's power is discretionary and fact sensitive. The present case is one whose facts fit under the ambit of section 137 of the Companies Act, Cap 212 of the Laws of Tanzania. Death of the other shareholder who was a member and director of the 2nd applicant company has left the company with only one member and one director. Company meetings cannot be called and conducted validly under the articles of association of the company itself and under the relevant provisions of the law. Actually, the first Applicant is a minority shareholder with only 20% of the voting powers by holding 200 shares out of the 1000 shares of the company. Without the court's intervention, no company's meetings can be

called and conducted. Also, no valid resolutions can be passed. I recall what I have already stated herein that section 137 of the Companies Act, Cap 212 of the Laws of Tanzania is intended to enable a member or director of a company with deficiency in him to call or conduct a meeting of the company in which he is eligible to vote, to overcome the difficulty of lacking the requisite quorum as prescribed in the articles of association of the company or as laid down in the Companies Act. The provision is intended to put the governance of the company into a viable state by overcoming practical difficulties created by the articles of association, shareholder agreements or the Companies Act. I find the present application merited as the company, upon the death of its second member, has found itself entangled by the provisions of its own articles of association and provisions of the Companies Act in such a way that it cannot practically operate unless the Court intervenes to rescue the situation by virtue of section 137 of the Companies Act.Therefore,I allow the application.

As to the final orders, I have the following to say. The Applicants in their chamber summons prayed that:

*(1) That this honourable Court be pleased to give an order that the meetings of shareholders of the 2nd Applicant company be called, held and conducted and the 1st Applicant be deemed to constitute a meeting and pass a resolution appointing Elia Boniface Fungo of Plot No.79, Msichoke Street, Tegeta Ward, Kinondoni District in Dar es Salaam Region, P.O.Box 75649 Dar es Salaam.*

*(2) Any other ancillary or consequential directions as the court thinks fit and just to grant.*

Obviously, the first prayer cannot be granted verbatim as it is phrased because it purportsto seek the court's intervention to convene a meeting of shareholders. As I have said the company has already got two shareholders but has only one member and the meeting quorum is determined with reference to membership and not shareholding. Further the first prayer is seeking the court's endorsement of oneElia Boniface Fungo of Plot No.79, Msichoke Street, Tegeta Ward, Kinondoni District in Dar es Salaam into anundisposed position in the 2nd Applicant company. The Court cannot decide for members what they wish to do with the said Elia Boniface Fungo in their company. That is an internal matter which should be handled in a properly convened and conducted meeting

of the company after taking into consideration the rights and interests of the members of the company as well as the dictates of the memorandum and articles of association of the company, the requirements of the Companies Act and other relevant laws (in this case the succession laws regulating the estate of the late Deogratias Alphonce Magubo should also be taken into account in line with the ongoing Probate and Administration Cause No.996/2023 at Temeke Primary Court). It should be noted thatsection 137 of the Companies Act is a "procedural section", which is only intended to enable company business which needs to be conducted at a general meeting of the company to be so conducted. Being a procedural section, it cannot be used to override the substantive rights of shareholders.A meeting is a mechanism to allow decisions to be made. Proposals are meant to be put, debated and voted upon. The quorum is to ensure only that there is at least a minimal opportunity to debate and convince. It is part of the structure of a proper meeting. The questions as to who should be elected a director or be made a member in the company are substantive issues and are in the domain of the members of the company to decide pursuant to their articles of association and the relevant laws. Under

section 137 of the Companies Act, Cap 212 of the Laws of Tanzania, this Court can only intervene in circumstances like the ones prevailing in the case at hand, so as to cure the quorum deficiency or other procedural practical impracticability so as to enable the members conducta meeting. I find backing for this position from the case of **Harman v BML Group Ltd** [1994] 1 WLR 893.

In the final analysis, I decline to grant the prayerNo.1 as made in the chamber summons; but as the application succeeds, and as the Court has discretion in makingorders and consequential directionsas it deems fit in the circumstances, I do hereby order that:

(a) ***A meeting of the 2nd applicant company,that is the member's extraordinary general meeting,be called, held and conducted by the 1stApplicant as the only member of the companyand that the 1st applicant as one member of the company present in person shall be deemed to constitute quorum for a valid meeting of the company.***

***(b)That the 2nd Applicant Company is empowered to rectify the register of members of the 2nd Applicant Company by effecting***

***changes in the shareholding and membership of the Company to the extent that is a necessary pre-requisite and or consequentialto the exercise of the powers under order (a)above.***

***(c)Except for dispensation of members' quorum requirements and decision making powers with respect to orders (a) and (b) above, the other procedural and legal requirements prior to and after the calling and conducting of a valid members' extraordinary general meeting of the 2nd Applicant Company be complied with and adhered to by the 1st Applicant, to the extent that they are not incompatible with or affected by the orders in (a) and (b) above.***

***(d) I make no order as to costs.***

It is so ordered.


**A. H. GONZI**
**JUDGE**
**25/01/2024**

Ruling is delivered in Court this **25th day of January 2024** in the presence of the 1st Applicant who is also a Director of the 2nd Applicant and a representative of the 3rd Applicant and in the absence of the Respondent who was duly notified of the date of Ruling.


**A. H. GONZI**
**JUDGE**
**25/01/2024**