IN THE HIGH COURT OF UNITED REPUBLIC OF THE TANZANIA

(COMMERCIAL DIVISION)

AT DAR-ES-SALAAM

MISC. COMMERCIAL CAUSE NO.07 OF 2022

IN THE MATTER OF THE COMPANIES ACT NO.12 OF 2002

AND

IN THE MATTER OF THE PETITION MARKET INSIGHT LTD

BETWEEN

PETROFUEL (T) LIMITED .....PETITIONER

AND

MARKET INSIGHT LTD.....RESPONDENT

Last Order: 17/06/2022
Judgment: 14/07/2022

RULING

NANGELA, J:.

This Petition was brought under Section 279 (1) (d) and 281(1) of the Companies Act, Cap.212 R.E 2002. The Petitioner herein is a limited liability company incorporated under the laws of the United Republic of Tanzania. She has filed this Petition seeking for the following orders:

1. That, the Respondent (Market Insight Ltd) a company incorporated on 14th January 2005 as No.51182, be wound up by this

Honourable Court's Order under section 279(1) (d) of the Companies Act, Cap.212 R.E 2002.

2. That the Court be pleased to appoint an interim liquidator pursuant to section 295(1) of the Companies Act, Cap.212 R.E 2002.
3. The Court be pleased to issue such other orders or reliefs as it deems just, equitable and convenient;
4. Costs of this Petition be provided for.

On the 31st of March 2022, the Respondent filed an affidavit in opposition to the winding up petition. Together with it was a Notice of Preliminary Objection wherein the Respondent raised four grounds of objection and prayed that this Petition be dismissed with costs. The points of objection raised by the Respondent were as follows:

1. That, this Court lacks the requisite jurisdiction to adjudicate on a dispute which the parties have explicitly agreed to refer to Arbitration.
2. That, the Statutory Demand supporting the Petition is defective for want of service as per the requirements of Section 280(a) of the Companies Act, Cap. 212 R.E 2002.

3. That, the Statutory Demand supporting the Petition is defective for contravening the format set forth under Rule 93(1) and (2) of the Company (Insolvency) Rules 2005.
4. That, the Petition is defective for failure to comply with the mandatory advertisement requirement as per Rule 99(2) (b) of the Company (Insolvency) Rules 2005.

On the 27th April 2022, this Court issued an order following a prayer by the Respondent's counsel that, the matter be disposed of by way of written submissions. A schedule of filing was issued and the parties duly filed their submissions, hence, this ruling.

In his submissions in support of the preliminary objections, Mr Rico Adolf, the learned counsel appearing for the Respondent, submitted on the first point arguing that, the parties herein agreed that their disputes should be referred to arbitration. He contended that, any violation of their explicit agreement will be contrary to the doctrine of sanctity of contract.

Mr Rico submitted further that, there is not dispute that this Court can hear and determine matters relating to the winding up of companies in the exercise of its exclusive

mandate provided for under section 275 of the Companies Act, Cap.212 R.E 2002. He submitted, however, that, in the current Petition, the subject matter of it is TZS 465,047,172 claimed by Petitioner, and which is disputed by the Respondent.

He contended that, since the amount is disputed by the Petitioner, then, Clause 10 of their Business Agreement executed by both parties should be triggered and the matter be submitted to an arbitrator for its adjudication and determination instead of bringing it to this Court. Relying on section 7 of the Civil Procedure Code, Cap.33 R.E 2019, he submitted that, this Court can indeed determine all suit except those which it is explicitly barred.

He contended, therefore, that, because of the Arbitration Clause found in the parties' Business Agreement and, the same having signified that the parties have agreed to submit their dispute to Arbitration and not the Court, it follows that, this Court is explicitly barred from determining this matter or any dispute between the parties arising from the executed Business Agreement. To backup his submissions, Mr Rico relied on the case of **Queensway Tanzania EPZ vs. Tanzania Took Garments**, Misc. Commercial Cause No.43 of 2020.

As regards the second ground of objection, Mr Rico submitted that, the Statutory Demand supporting the Petition is defective for want of service as per the

requirements of section 280 (a) of the Companies Act, Cap.212 R.E 2002 as well as Rule 93(1) and (2) of the Companies (Insolvency) Rules 2005. He contended that, the Petitioner herein chose not to comply with that requirement of the law and, for that matter, this Court should proceed to strike out this Petition.

Mr Rico submitted that, there has as well been a violation of Rule 99(2) (b) of the Companies (Insolvency) Rules 2005 since it is mandatory for an advertisement to be made not less than 7 working days. He contended that, looking at the Certificate of Compliance filed by the Petitioner, it is clearly indicated that the Petition was scheduled for hearing on the 29th March 2022 but the service was done to the Respondent on the 21st March 2022. He contended, therefore, that, the rules having been clear and mandatory in nature, the Petition should be dismissed.

In reply to the submission in opposition to the objections raised by Mr Rico, it was Mr Stanslausi Ishengoma's submission that, before this Court takes steps to consider the preliminary objections, it should first question the propriety of the approach taken by the Respondent in challenging the winding up petition before this Court.

He submitted, on the basis of section 13 (1) and (3) of the Arbitration Act, Cap.15 R.E 2020, that, the Respondent ought to have acknowledged the legal proceedings and file a

petition for stay. He submitted that, since the Respondent has not complied with the requirement of section 13 (1) and (3) of the Arbitration Act, then, this Court should dismiss the objection on jurisdiction.

Aside that submission, Mr Ishengoma contended that, one of cardinal legal principles is that, parties cannot contract to oust the jurisdiction of the Court. To support his contention, Mr Ishengoma has relied on Article 108(2) of the Constitution of the United Republic of Tanzania, 1977 (as amended) and Section 2(1) of the Judicature and Application of Laws Act, Cap.358 R.E 2019.

He also relied on the case of **Nashua River Paper Company vs. Hammermill Paper Company**, 223 Mass.8, where a Massachusetts Court held that a provision in an ordinary commercial contract in writing between two parties that one of them shall not sue the other except in Courts of Common Pleas in the State of Pennsylvania was void and could not be enforced to deprive the Court of Massachusetts its jurisdiction.

Mr Ishengoma submitted that, this Court is vested with jurisdiction to determine matters pertaining to winding up petitions upon failures to repay debts s provided for under section 275 and 279 (1) (d) of the Companies Act, Cap. 212.

He submitted that, as per section 283 of the Companies Act, it is clearly stated that, whenever there is filed in Court a winding up petition all other proceedings will

have to be stayed pending the determination of the winding up petition. He contended that, on November 4th 2021, the Petitioner sent a Demand Note to the Respondent which went un-responded to, meaning that, the Respondent had conceded it.

He also relied by way of analogy, on the case of **International Commercial Bank Limited vs. Jacadem Estate Limited**, Civil Appeal No.446 of 2020, [2021] TZCA 673 (15 November 2021) where the Court of Appeal made an observation that, the Appellant's silence after the Respondent had rescinded the offer amounted to a concession. Mr Ishengoma relied further on the **Indian case of Goetze India Ltd vs. Pure Drinks (New Delhi) Ltd (1994) 80 CompCas 340 P H, (1993) 104 PLR 745,** Punjab-Haryna High Court.

He contended that, in that case, the Court discouraged dismissal of a winding up petition under the pretext of an arbitration clause. In that case the Court stated as follows:

> "The Company Court is clothed with jurisdiction. A Court can go behind the decree. Mere counter claims or arbitration clauses does not by itself lead to mechanical or automatic dismissal of the petition... the arbitration clause in itself is not a litmus test for bringing up the winding up proceedings to a halt...It would be reasonable to

> infer from the observation made ...that, mere existence of an arbitration clause in an agreement by itself wound not debar or oust the jurisdiction of the Company Court in proceedings for winding up nor would it make it incumbent upon the Company Court to stay the proceedings till the decision of the arbitrator."

Mr Ishengoma invited this Court to be inspired by the above quoted words. Arguing in the alternative, he submitted, relying on the case of **Telnic Limited vs. Knipp Mediaen Und Kommuikation GmbH** [2020] EWHC 20759(Ch). He submitted that, the Court approved a decision to stay the winding proceedings instead of dismissing them. He submitted, therefore, that, should this Court make a finding that the objections have merit; the proceedings should be stayed instead of having them dismissed.

As regards the alleged defects of the statutory demand supporting the petition for want of service as per section 280 (a) of Cap.212, Mr Ishengoma submitted that, in line with Rule 17(1) and (3) and Rule 18 of the High Court (Commercial Division) Procedural Rules, 2012 (as amended), the law allows service electronically and, that, the demand note was served on the Respondent by way of email address, micoalsongea@gmail.com and was received on 30th

November 2021 at 7:48pm in the official email of adv.ishengoma@gmail.com. He relied on a response by Tan Africa Law dated 6th December 2021 arguing that, it was a sufficient proof that the statutory demand notice was received.

As regards the third and the fourth objections, it was Mr Ishengoma's submission that, the third objection was based on a misconception of Rule 93 (1) of the Company (Insolvency) Rules of 2005. He contended that, the trail of emails and demand notice are evident that the figure stated in the statutory demand was already communicated. He contended, as well, that, the requirement to separate the principal and accrued interest will only come into play when there is no previous knowledge of the debt with accrued interests.

Mr Ishengoma submitted that, as regards the issue of advertisement, the summons for orders in respect of this matter was issued on 18th March 2022 and the Petitioner served a copy of the winding up petition with the summons to the Respondent via email address micoalsongea@gmail.comon Monday of 21st March, 2022 at 5:04 pm and advertised in the Guardian News Paper on 23rd March 2022. He contended, therefore, that, there is nothing done outside the ambit of the law.

He maintained, instead, that, the Respondent's silence upon being served with the demand notice which notified

the intention to invoke Court legal processes amountied to concession to the forum and a waiver to the arbitration. He surmised, in the alternative, that, if the Court will uphold the objection regarding jurisdiction, the matter should be stayed and should not be dismissed.

In rejoinder submissions, the Respondent reiterated the submissions made in chief and rejoined further that, as regards section 13 (1) and (2) of the Arbitration Act, Cap.15 R.E 2020, the same has been misconstrued since the word used is "may", which means it is not mandatory for a stay to be ordered but rather optional and the Respondent did not opt for its because the Petition is tainted with defects.

Mr Rico contended that, the Respondent has not been able to address the position of the law as pronounced in the case of **Queensway Tanzania EPZ** (supra) where the Petition was struck out in favour of an arbitration clause. He contended that, since it has not been controverted, it means that the Respondent recognises it as the current position of the law in Tanzania and, there is no need for a persuasive decision.

As regards the applicability of Rule 17 and 18 of the High Court (Commercial Division) Procedural Rules, 2012 (as amended), Mr Rico submitted that, the same does not apply to statutory demand since, by the time the demand was served the matter was not in Court and secondly, winding up petitions are governed by the Companies Act, 2002. He also

contended that, the Petitioner contravened Rule 99(2) (b) of the Company (Insolvency) Rules of 2005. He relied on Rule 99(4) of the Company (Insolvency) Rules of 2005 and urged me to dismiss the Petition.

The issue which I am called upon to respond to is whether the preliminary objections raised by the Respondent have any merit in them.

It is worth noting, as this Court pointed out in the **Chongquing Lifan Industries (Group) Impo and Exp. Co. Ltd vs. Kishen Enterprises Ltd**, Misc. Cause No.41 of 2019 (unreported), 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.

It is as well worth noting, as it was stated in the **Chongquing's case** (supra) and in the case of **TANESCO vs. IPTL** [2000] T.L.R 324, that, a Court's jurisdiction is a creature of statute and not of the parties. That settled legal position was as well maintained by the Court of Appeal in the case of **SCOVA Engineering S.P.A & Another vs. Mtibwa Sugar Estates Ltd and 3 Ors**, Civil Appeal No.133 of 2017. It will mean, 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 appropriate question to tackle should have been whether this Court can exercise such jurisdiction or rather whether it is the appropriate forum to exercise jurisdiction over the matter taking into account the circumstances under which the Petition arises and the laws governing the parties' relationship.

In the case of **Sinotruk International** (supra), this Court noted that, the parties' dichotomous positions raised interesting questions regarding the interaction between insolvency proceedings and the general regime on arbitration and the applicable law to contractual obligations. The similar situation arose in the **Queensway Tanzania EPZ's case** (supra) as what has been raised in this Petition if one is to take into account the circumstances under which the Petition arose and the laws governing the parties' relationship.

In this petition, the Parties herein concluded, on the 4th day of December 2019, a business supply agreement wherein the Respondent was to be supplied by the Petitioner, fuel in her coal mining site in Kitai-Songea Tanzania. There agreement was to last for three years time. Under clause 10 the Parties were categorical that:

> "Should any dispute or difference of any kind whatsoever arise between the parties herein, the matter in question shall be resolved amicably by mutual discussion as a principle. Where such settlement cannot be reached, the matter shall be referred for settlement by an arbitrator to be mutually agreed upon by the Parties."

It is from the above clause that the Respondent has premised her first objection arguing that, this Court should refrain from exercising her jurisdiction over this matter as the parties chose a path to resolve their disputes. I am indeed alive to the decision of this Court in the case of **Chongquing Lifan Industries** (supra) where 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).

However, the applicability of that position depends on the nature of the facts and circumstances of the particular case at hand. In both the **Queensway's case** (supra), and **Sinotruk International** (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."

To me, that is still a sound view in the modern day business environment, where the doctrine of party autonomy which unveils the freedom of the parties to construct their contractual relationship in the way they see fit, is finding a full-fledged support. In the **Queensway's case** (supra), and **Sinotruk International** (supra), this Court did emphasise that, where a particular debt is disputed, what comes to the front is a question of fair balancing of the scales of commercial justice.

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."

Two of the reasons offered in support of the above approach were that,

(a) 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,

(b) 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.

In this Petition, therefore, one needs to ask if the debt is acknowledged or disputed and if it is disputed, then the recourse should be to allow the parties to resolve their dispute via arbitration and not otherwise since that will be in line with the doctrine of party autonomy. In doing so, however, one has to be careful not to slide too far to the merits of the case but only to confine oneself to the ambits of the jurisdictional arguments which, in my view, will be material depending on whether the debt is disputed or not.

In his submissions, the Petitioner's counsel referred to a letter from **Tanafrica Law** dated 06th December 2021 which indicates that the Respondent disputed the claims. Without going further to the details, since the same seems

to be disputed, the rightful approach as stated in the **Queensway's case** (supra) (citing the case of **Bahadurali E Shamji & Another vs. The Treasury Registrar Ministry of Finance- Tanzania & 4 Others, Misc. Commercial Case No.1 of 2001 (unreported)** is that:

> "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."

In view of the above, I do not see the reasons why I should devote energy and deal with the rest of objections. It suffices to state that the first objection has merits since the debt is disputed and the parties chose to have their dispute resolved first by an arbitrator.

In any case, if an arbitrator rules in favour of the Petitioner and the Respondent fails to honour the award, that act will constitute a rightful ticket for filing a petition as this one. In the mean time, the Petitioner seems to have jumped the gun.

In the upshot of all those considerations, therefore, this Court settles for the following orders:

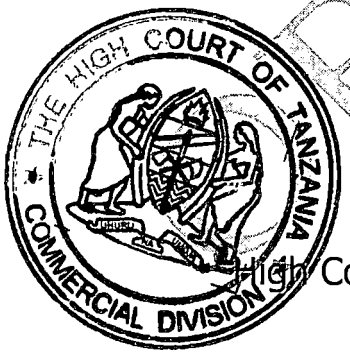
1. **THAT**, the first preliminary objections raised by the Respondent is upheld,

though on a different reasoning other than as argued by the Respondent.

2. **THAT,** the Parties are hereby directed to embark on the arbitration route as per Clause 10 of their Business Agreement.
3. **THAT**, the Petition is hereby **struck out** as the underlying dispute between the parties from which this Petition was anchored is an '*arbitrable dispute*' under the Parties' Arbitration Agreement.
4. **THAT**, in the circumstance of this case, each party is to bear its own costs.

It is so ordered.

DATED AT DAR-ES-SALAAM ON THIS 14TH DAY OF JULY 2022



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HON. DEO JOHN NANGELA
JUDGE.
High Court of the United Republic of Tanzania
(Commercial Division)