

TANZANIA / JUDGMENT

PULA GROUP LLC VS AFRICAN RAINBOW MINERALS LTD COMM CASE NO

COURT
TANZLIIDECIDED
1 January 2023

Source: media.tanzlii.org · Research copy typeset by Esheria. Not court-issued or certified.

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (COMMERCIAL DIVISION) AT DAR ES SALAAM COMMERCIAL CASE NO.149 OF 2023 PULA GROUP LLC..... 1st PLAINTIFF PULA GRAPHITE PARTNERS TANZANIA LIMITED..... 2nd PLAINTIFF VERSUS AFRICAN RAINBOW MINERALS LIMITED..... 1st DEFENDANT PATRICE T. MOTSEPE..... 2nd DEFENDANT AFRICAN RAINBOW CAPTIAL..... 3rd DEFENDANT ARCH SUSTAINABLE RESOURCES GPCO LTD..... 4th DEFENDANT

RULING

Date of last Order: 15/02/2024 Date of Ruling:02/05/2024 GONZI, J. The Plaintiffs instituted this case against the defendants praying for Judgment and Decree against them jointly and severally for: Page 1 of 44

- (a) . A declaration that the Defendants due to their interconnectivity breached the confidentiality Agreement.
- (b) . A declaration that the conduct exhibited by the Defendants after entrance into execution of the Agreement was and is unethical and antithetical to business practices and not in good faith.
- (c) . A declaration that the Defendants' actions, omissions, and conduct complained of caused financial losses and sufferings to the Plaintiffs.
- (d) . A declaration that the plaintiffs are entitled to the remedies agreed under the agreement and further that the defendants are liable to bear and settle those;
- (e) . Payment of compensatory damages in an amount of US Dollars One Hundred Ninety Five Million (USD 195 million) being estimated losses that the Plaintiffs suffered or occasioned as a result of the Defendants' breaches, actions and conducts complained of;

- (f) . Payment of interest on the claimed and /or awarded compensatory damages at a rate that Hon. Court shall determine to run from the date of Judgment till full and final payment;
Page 2 of 44
- (g) . Costs of the suit and in all subsequent ancillary or incidental proceedings arising therefrom and interest thereon at a rate to be determined by the Hon. Court from the day of the suit to the date of the award and to the date of taxation and at the same rate from that date until full and final payment is received; and
- (h) . Any Other reliefs the Hon. Court may deem just, expedient and fit to grant. Only the 3rd defendant filed her Written Statement of Defence. In the Written Statement of defence, the 3rd Defendant raised Preliminary Objections on points of law that:
- (i) . The suit by the 1st Plaintiff is not maintainable in law for want of Board resolution authorizing the 1st Plaintiff to institute the suit. The documents relied upon by the 1st Plaintiff for its purported authority is not a resolution of the board of directors of the 1st Plaintiff and does not purport to be such a resolution. (ii). The Plaintiffs have no cause of action against the 3rd Defendant. (ii i). The Plaintiffs have no locus standi to institute the suit. (iv). The honourable Court does not have jurisdiction over the 3rd Defendant. The 2nd ,3rd and 4th Defendants are not parties to the Confidentiality Agreement (Annexure Page 3 of 44 PULA-2 to the Plaintiff) (the agreement). The 3rd Defendant is registered in Republic of South Africa and does not conduct business, have a place of business or own property within the jurisdiction of the Honourable Court. None of the Defendants are registered in Tanzania. The 1st, 2nd and 3rd Defendants are resident and/or registered in the Republic of South Africa. The Agreement was concluded in and is subject to the laws of the Republic of South Africa. The courts of South Africa are therefore the most suitable, convenient, and legally competent to determine the Plaintiff's claims." The 3rd Defendant therefore prayed that the suit as against the 3rd Defendant be struck out with costs. On 15th February 2024, the Court granted the prayer by the learned counsel for the Plaintiff and the 3rd defendant to argue the preliminary objections by way of written submissions. In preparing and filing the final submissions, the Plaintiff was represented by Michael Ngalo and Nzaro Kachenje, learned advocates while the 3rd defendant was represented by Gasper Nyika and Samah Salah, learned advocates. In their submissions in support of the Preliminary Objections, the learned advocates for the 3rd Defendant began with the 1st point of objection on lack of proper board resolution. They submitted that as a legal entity, a company must be authorized by its board of directors through a board resolution, to file a case in court. They argued that the rationale for requiring a board resolution before a company can institute a suit is to Page 4 of 44 protect the interests of shareholders and other directors of the company. In the case at hand, it was submitted that the 1st Plaintiff attached annexure Pula 14 which a letter by ambassador Dr. Mary Mildred Stith who is indicated therein as Chairman of the 1st Plaintiff providing limited mandate to initiate legal proceedings against the 1st defendant and its affiliates without identifying the envisaged affiliates. The 3rd Defendant's learned counsel argued that it is that letter which the Plaintiffs

at paragraph 63 of their plaint allege to be a Board Resolution while it is just a notification letter whose originator and recipient share the same name, informing the recipient of the passing of a board resolution authorizing the institution of cases against the 1st Defendants and its affiliates in Tanzania or South Africa. They argued further that the plaint does not contain sufficient information on the existence of the board resolution. They submitted that the absence of a board resolution violates the legal requirement as restated in various cases decided by the authoritative courts in Tanzania such as the case of Pita Kepamp Ltd vs Mohamed I.A Abdulhussein, Civil Application No. 128/2004 decided by the Court of Appeal which cited with approval the case of Bugerere Coffee Growers Limited versus Sebaduka and another (1970) 1 EA 147. Also, the learned counsel for the 3rd Defendant submitted that the same position was followed by the High Court in the case of CRDB Bank PLC versus Delta Africa Limited and another, Civil Appeal No.55 of 2022 decided by the High Court of Tanzania at Dar es Salaam. The 3rd defendant also relied upon the case of Kati General Enterprises Limited versus Equity Bank Tanzania Limited and another, Civil Case No.22 of 2018 where the court insisted on the need for existence of a board resolution to signify consent of Page 5 of 44 directors as well as the minutes of the meeting which should have been annexed to the plaint. The 3rd Defendant's learned counsel prayed that the suit be struck out for the defect of lacking the accompanying board resolution by the 1st Plaintiff. They argued that this remedy is in accordance with the rule in Wellworth Hotel and lodges Limited versus East Africa Canvas Company Limited and others, Commercial Case No. 107 of 2020 and in Simba Paper Converters Limited versus Packaging and Stationery Manufacturers Limited and another, Civil Appeal No.280 of 2017. The 3rd Defendant's counsel in their written submissions went beyond the scope of their preliminary objection which was directed to the 1st Plaintiff company only and challenged the 2nd Plaintiff's authority to institute the suit in view of annexure PULA 15. They submitted that although the board resolution of the 2nd Plaintiff was not challenged in the notice of preliminary objections, based on section 95 of the Civil Procedure Code they were entitled to bring that point to the attention of the court. The learned counsel submitted that the annexure PULA 15 is made up of minutes of meeting of directors of the 2nd Plaintiff which took place on unspecified date in July 2023 and the resolution thereof is dated 28th April 2023 which is signed by persons whose names are not disclosed but are indicated as directors. They argued that the second plaintiff's resolution appears to have been passed even before the respective directors met. They submitted that the board resolution seems to have authorized the institution and prosecution of a case before the High court of Tanzania, in respect of previous proceedings instituted by the Plaintiffs and which case was struck out upon a successful preliminary objection on want of board resolution. Page 6 of 44 On the second preliminary objection, the 3rd Defendant's learned Counsel submitted that the Plaintiffs have no cause of action against the 3rd Defendant. They submitted that under Order VII Rule 1(e) of the Civil Procedure Code, Cap 33 of the Laws of Tanzania, a Plaint must disclose a cause of action and that the term, "cause of action" was defined in the case of John Mwombeki Byombalirwa versus Agency Maritime Internationale (Tanzania) Limited (1983) TLR 1 to constitute of the facts necessary for the plaintiff to prove before succeeding in a

suit. They argued that in *Autogarage and others versus Motokov* (1971) E.A 514 it was held that three elements are necessary to disclose a cause of action namely that the Plaintiff enjoyed a right, that the right was violated and that the defendant is liable. They argued that in determining existence of the cause of action, the plaint and its annexures should be looked at. They relied on the rule established in the case of *Tansimo Quarries versus Grand Tech (T) Limited and Atu Patrick Mwakitwange*, Commercial Case No.54 of 2012 for this holding. The 3rd Defendant's learned counsel further argued that in the present case the Plaintiffs' basis for suing the Defendants is breach of agreement which is annexure PULA-2 to the plaint and to which the 3rd Defendant is not a party. They submitted that the parties to that agreement are the 1st Plaintiff and the 1st defendant only. They argued that the doctrine of privity to contract leaves the 3rd Defendant out of that contract and that strangers to the contract cannot sue or be sued thereon unless given a statutory right on it. The 3rd Defendant's counsel relied on the cases of *Kayanja versus New India Assurance Company Limited* (1968) E.A 295 and *Tarlok Singh Nayar and another versus Sterling General Insurance Company Page 7 of 44 Limited* (1966) E.A 144. The 3rd Defendant's learned counsel submitted that the agreement between the Plaintiff and the 1st Defendant under Clause 4(i) expressly provides that any action by any affiliate will be treated as the action of the recipient (1st Defendant) which therefore means that the 1st Plaintiff and the 1st Defendant intended to make their affiliates not liable in terms of the confidentiality agreement. They argued that the 3rd Defendant is an affiliate as defined in the confidentiality agreement for the reasons pleaded, inter alia, under paragraph 8 of the Written Statement of Defence. The 3rd Defendant therefore prayed for striking out of the Plaint for not disclosing the cause of action. The third preliminary point of objection was to the effect that the Plaintiffs have no locus standi to institute the suit. The learned counsel for the 3rd Defendant argued that in *Peter Mpalanzi versus Christina Mbaruka*, (Civil Appeal No.153 of 2019), it was held that locus standi is a point of law rooted in the court's jurisdiction and that the court has a duty to determine it at the earliest when it is raised. The Learned counsel for the 3rd Defendant submitted that to have a locus standi, the Plaintiff has to show that his right or interest has been breached or interfered with. They argued that as the 3rd Defendant and 2nd Defendant are not party to the agreement between the Plaintiff and the 1st Defendant, the Plaintiff has no rights under the agreement which entitle them to bring a claim against the 3rd defendant. The 3rd Defendant relied on the case of *Benson Elikana Mafuwe versus CRDB Bank PLC, Comrade Auction and another*, Land Case No.66/2018 to argue that the remedy where the plaintiff files a suit without having locus standi, is to strike out the suit. They also cited the case of Page 8 of 44 *Lujuna Shubi Ballonzi, Senior versus Registered Trustees of Chama cha Mapinduzi*, (1996) TLR 203 and relied on Section 2(3) of JALA to the effect that the rules on locus standi are governed by common law, On the fourth preliminary point of objection, the 3rd Defendant alleged that this Court has no jurisdiction over the 3rd Defendant. They argued that the requirements of section 18(a), (b) and (c) of the Civil Procedure Code, Cap 33 of the Laws of Tanzania have not been fulfilled as to warrant this Court to exercise jurisdiction over the 3rd Defendant. They argued that in *Well worths Hotels and Lodges Limited versus East Africa Canvas Co. Ltd and Others*,

Commercial Case No.5 of 2020, the court held that jurisdiction of the court over a foreign individual arises when the foreigner crosses our territorial frontiers and that the connecting factors are residency or submission to jurisdiction or place where a cause of action arises. They argued that the 3rd Defendant is an entity registered in the Republic of South Africa as per paragraphs 7,8, 12 and 13 of the Complaint and hence the 3rd Defendant is outside the local limits of Tanzania and that she does not carry out business in Tanzania, nor is she a resident of Tanzania. The learned counsel submitted that the 3rd Defendant, being a foreign company, cannot do business in Tanzania without obtaining a certificate of compliance under section 435 of the Companies Act, Cap 212. They argued that the complaint has no details as to whether or not any of the Defendants in this case submitted themselves to the jurisdiction of this Court. In a further argument, the 3rd Defendant submitted that Clause 13 of the Confidentiality Agreement annexed as PULA-2 shows that the agreement was executed in Sandton Page 9 of 44 South Africa and is governed by the laws of South Africa. They submitted that the alleged breach of confidentiality was done by e-mails whose domain is outside Tanzania, from officials of the Plaintiff to officials of the 1st defendant both being entities registered outside Tanzania, the 3rd Defendant's counsel argued that the cause of action arose in South Africa, The 3rd defendant's learned counsel submitted that under paragraph 59(e), (f) and (h) of the complaint, the Plaintiff has attempted to connect the defendants with the jurisdiction of this court due to the alleged defendants' investment in the Chilalo Project in Ruangwa, Lindi, Tanzania and their inter relationship with the alleged affiliates. They argued that, however, the same complaint under paragraph 31 shows that the Chilalo Project in Ruangwa District, Lindi Region, Tanzania is owned by another entity called Ngwena Tanzania Limited which is not a party to the suit at hand. They argued further that under paragraph 13 of the Complaint the said Ngwena Tanzania Limited is, on the other hand, shown as being indirectly owned by the 4th Defendant through an Australian entity which also is not a party to the suit. They argued that at any rate the arguments connecting the Defendants with the Chilalo Project cannot be used to show that the Defendants reside or conduct business in Tanzania. The learned counsel for the 3rd Defendant concluded by arguing that although the preliminary objection on lack of jurisdiction is argued for and on behalf of the 3rd defendant only, the court should be justified to extend it to cover all the Defendants in this case because the issue of jurisdiction can be raised even by the court suo mottu. Page 10 of 44 For this they relied on the case of Salim Kibora versus Tanesco and others. Civil Appeal No.55 of 2014 decided by the Court of Appeal of Tanzania. The 3rd Defendant's learned counsel prayed for the preliminary objections to be sustained and that the suit be struck out with costs. They added that even if the court persists to entertain the suit, and eventually delivers a judgment, the resulting Judgment will not be capable of being enforced as all the defendants are residents of South Africa and none of the Defendants has been shown by the Plaintiffs to possess any property in Tanzania. The Plaintiff's Counsel Michael Ngalo and Nzaro Kachenje, filed their reply submissions in respect of the Preliminary Objections. They started by submitting that all the preliminary objections advanced in this case do not qualify as proper preliminary objections in the eyes of the law. They relied on a number of decisions to support their argument.

These included the case of Mukisa Biscuits Manufacturing Company LTD v West End Distributors LTD (1969) EA 696 which is the leading authority for the rule that a preliminary objection should be based on a pure point of law. With regard to the preliminary point of objection on lack of Board Resolution, the learned counsel for the Plaintiffs submitted that Order VI Rules 1(a) to (i) lists what a Plaint should contain and should not contain. They reasoned that there is no requirement of a Board of directors' resolution. They submitted that neither a board resolution nor authority of any other sort is prescribed as one of the requirements to be pleaded in, and or attached to, the Plaint or any pleading filed by litigants, be they individual or corporate bodies. They argued that suits against corporations are dealt Page 11 of 44 with under Order XXVIII Rule 1 of the Civil Procedure Code and it is provided therein that pleadings by corporations may be signed and verified by a director, company secretary or Principal Officer able to depose to the facts of the case. They cited the cases of Basons Enterprises Limited and Mire Artan, Civil Appeal No.26 of 2020 decided by the Court of Appeal of Tanzania for the principle that a plaint by a company should be signed and verified by persons listed under Order XXVIII Rule 1 of the Civil Procedure Code. Also they cited the case by the High Court of Uganda in Bugerere Coffee Growers Limited versus Sebaduka and another (1970) EA 170 which has been relied upon by subsequent decisions as the authority to require a board resolution before institution of a suit by a company. The Plaintiffs' learned counsel are of the view that the principle in Bugerere's case (supra) has been applied out of its context as the requirement for board resolution in that case was dealt with not as a preliminary matter but rather on the merit of the case and that requirement was intended only to apply in suits involving companies with internal disputes. The learned counsel for the Plaintiffs expounded the three schools of opinions prevailing in the High Court regarding the requirement to have a Board resolution. The Plaintiff's counsel submitted that in one school there are decisions which consider the need to have a board resolution as mandatory and it is reflected by decisions relied upon by the 3rd Defendant's learned counsel in their submissions in chief. They submitted that the second school is the one that advocates that a board resolution is not a mandatory requirement before a company can file a suit in court. They substantiated this school with a number of decisions including Makoa Farm Limited and Two Others versus Uduru Makoa Page 12 of 44 Agricultural and Marketing Co-operative Limited and another, Civil Case No.04/2022 decided by Hon. Masabo, J., which held to the effect that "had the law intended to make the enclosure of the resolution a mandatory requirement it would have stated so". The Plaintiff's counsel submitted that the third school is the one that holds that a board resolution is a requirement but as a matter of evidence and therefore it should be produced during the trial and not during the preliminary objection stage in a case. They cited a number of decisions supporting this position including Dhow Mercantile (E. A) Limited and 2 others versus Yusuf Mulla and another, Civil case No. 16 of 2011 decided by Hon. Twaib, J., where it was decided that "a board resolution being a matter purely of evidence, is not an issue for preliminary determination in view of the rule in Mukisa biscuits' case". The Plaintiffs' learned counsel submitted that contrary to what was submitted by the learned counsel for the 3rd defendant, the decision of the Court of Appeal of Tanzania in Simba Paper Converters Limited (supra)

did not settle the dust on the conflicting decisions of the High Court of Tanzania on the requirement of a board of directors resolution. The Plaintiff's counsel submitted that in the case at hand, the Plaintiffs have not only pleaded that they are dully authorized to institute the case but also they have annexed their respective board resolutions as each one's authority to file the suit as evidenced in annextures PULA-14 and PULA-15 respectively. The Plaintiff's counsel submitted that in this case the 3rd defendant's counsel have challenged the attached board resolutions in Page 13 of 44 terms of their validity, contents, authenticity and credibility without providing any law that prescribes the format for a board resolution for the purpose of authorizing the institution of a suit which applies even where the Plaintiff shows that the 1st Plaintiff company was incorporated under the laws of Delaware, the United States of America. The learned counsel for the Plaintiff concluded their reply submissions on board resolution requirement by complaining that the 3rd Defendant's preliminary objection on lack of board resolution was un-procedurally extended during the written submissions to cover the 2nd Plaintiff too while the objection was specifically raised in respect of the 1st Plaintiff only. They argued that what was done by the 3rd Defendant's counsel amounted to professional dishonesty. With regard to the preliminary objection on lack of cause of action, the Plaintiffs' counsel submitted that the Agreement between the 1st Plaintiff and the 1st Defendant (annexture PULA-2) is a non-disclosure and non-competitive agreement through which the 1st Plaintiff undertook to furnish confidential information to the 1st Defendant, who in turn undertook, among others, not to use the information for any competitive commercial purposes or in any manner detrimental to the interests of the 1st Plaintiff. They argued that the obligations of the 1st defendant under the agreement, in terms of clause 4.4 of the agreement, were extended to other recipients of the confidential information who, by virtue of their close relationship with the 1st Defendant, might acquire the confidential information. They argued that under the clause 4.4 "any action by such person will be treated as the action of the recipient for the purposes of the agreement". The Plaintiff's counsel submitted that the 2nd, 3rd and Page 14 of 44 4th defendants are affiliates of the 1st Defendant as they are linked and interconnected with the 1st defendant hence affiliates within the meaning of the agreement. The Plaintiffs' counsel submitted that the cause of action of the plaintiffs as against the 3rd defendant is pleaded in many paragraphs of the Plaintiff including paragraphs 12/23, 26, 32, 35, 38, 39, 40, 42, 48, 49, 50, 52, 53, 54, 55, 56, 57 and 58 and that the Plaintiff is claiming against the 3rd defendant, as an affiliate of the 1st defendant, for breach of contract by acquiring 40,000,000 shares or investing USD 8,000,000 in Evolution/Chilalo Project which investment infringed the Plaintiffs commercial rights and interests and thereby affected plaintiffs' investment and marketing plans and strategies thereby causing a loss to the plaintiffs. They submitted further that at the preliminary stage, the court cannot determine questions of whether the 3rd defendant is or is not an affiliate of the 1st Defendant or whether or not the 3rd defendant invested any shares in the Evolution/Chilalo project and whether or not, by so doing, the 3rd Defendant has breached the agreement. On lack of locus standi, the Plaintiffs' counsel submitted that in the case at hand the issue of locus standi cannot be determined as a pure point of law. The Plaintiff's counsel submitted that in the case of Mechmar, the Court of Appeal held that the court in

determining whether or not the plaintiff has a cause of action, has first to answer the question why does the plaintiff lack locus standi to sue. It was argued that in the present case, that question would involve going into the evidence. The Plaintiffs' counsel submitted that in the case at hand, the locus standi of the 1st Plaintiff is by virtue of being a party to the Contract while the locus standi of the 2nd plaintiff is by Page 15 of 44 virtue of being an affiliate of the 1st Plaintiff. The plaintiffs' counsel adopted their argument with regard to locus standi to apply to the preliminary objection of lack of cause of action since the two points are related. On the preliminary objection relating to lack of jurisdiction, the Plaintiffs' counsel submitted that the 3rd Defendant's counsel usurped the position and submitted for and on behalf of the 2nd, 1st and 4th defendants as well, whom they do not represent. The plaintiffs' counsel submitted that Clause 13 of the Agreement between the 1st Plaintiff and the 1st Defendant (Annexure PULA 2 to the plaint) does not provide for choice of forum and thus the jurisdiction of this court is not opted out. Further, the Plaintiffs' counsel argued that there is no law that prohibits foreigners with no residency, place of business or properties in Tanzania to be sued in Tanzania or barring the Tanzanian courts from having jurisdiction over them. The Plaintiffs' counsel referred the court to its previous decisions in Euro Petrol Limited versus Zambia National Oil Co. Limited and another, Commercial Case No.68 of 2001 where all the parties to the suit were foreigners, the law applicable to the dispute was Zambian law and none of the parties had residence or business in Tanzania. The Court in finding that this court had jurisdiction held that: "generally the factors to be taken into account include the nature of the dispute, the legal and practical issue involved, questions of local knowledge of the matter, availability of witnesses and their evidence. There is no need of comparison of procedures, methods, reputation, or standing Page 16 of 44 courts of one country compared to the other., the court should consider the parties' mutual intention; should decide on system of law within which the contract has its closest and real connection, which would not create any unnecessary delays and inconvenience. The court would be guided that finding justice cannot be obtained in the alternative forum or that it may be obtained at excessive cost. The court's task must have regard objectively to various factors pointing one way or the other and to estimate, as best as it can, where the preponderance lies." The Plaintiff's counsel argued that the case at hand is properly filed in this court because nowhere in the plaint have the plaintiffs averred that the alleged breach of contract happened in South Africa. They argued that the relevant factors for consideration in determining jurisdiction are the ones laid down in the Europetrol's case above. Further, the Plaintiffs' counsel submitted that under paragraphs 58 and 59 of the Plaint, the Plaintiffs have provided facts for jurisdiction of the Court which were pleaded in accordance with Order VII Rule 1(f) of the Civil Procedure Code. They argued that the subject matter of the agreement was the envisaged graphite mining business situated at Ruangwa District, Lindi Region, Tanzania hence the business is not in South Africa but in Tanzania. The Plaintiffs' counsel referred the court also to the case of Sinotruck International and TSN Logistics Limited, Commercial Cause No. 13 of 2021 where this court ruled Page 17 of 44 that it had jurisdiction to hear a petition on a matter where the contract had been executed in China and the applicable laws were agreed to be the laws of China.

The plaintiffs' counsel argued that this court is the most ideal forum to handle the dispute at hand because it possesses technological facilities and systems for remote hearing of cases and the court has been efficient in minimizing delays and costs. They submitted that, actually, the 3rd Defendant has already submitted herself to the jurisdiction of the court by filing the Written Statement of Defence, entering appearances in court and filing written submissions. They concluded that the 3rd defendant is not inconvenienced, therefore. The Plaintiff's counsel prayed that the preliminary objections be dismissed with costs. By way of a brief rejoinder, the 3rd Defendant's counsel responded to the submissions by the Plaintiffs' learned counsel. On propriety or otherwise of the preliminary objections at hand, in view of the rule in Mukisa Biscuit's case (supra), they argued that the Mukisa Biscuit case specifically recognizes jurisdiction and time limitation as among the pure points of law. they argued that a preliminary objection arises from clear implication out of pleadings and that point is argued on the assumption that all facts are correct. On locus standi, they argued that the Mechmar case did not establish a general rule that locus standi is not a pure point of law under the position in Mukisa Biscuits case. It was submitted that the 3rd defendant is not asking the court to look beyond the bare pleadings to determine whether or not any of the plaintiffs can sue the 3rd defendant for breach of a contract where neither the 2nd nor the 3rd defendants were parties to. Page 18 of 44 On absence of Board resolution, the learned counsel submitted that at page 8 of the CRDB case, the issue of Board resolution was held to be not a matter of fact but one that goes to the competence of the suit and therefore one that affects jurisdiction. They insisted that in the case of Simba paper Converters , the Court of appeal has decided, as of 19th May 2023, that board resolution is mandatory for a company to sue in Tanzania. They further submitted that the pleaded facts under paragraph 63 of the plaint and the attached pleadings are purported to be board resolution but they are not. On lack of cause of action, the 3rd defendants counsel argued that the 3rd defendant acknowledges the doctrine of privity of contract but in this case she is sued on the interconnectivity and alleged link with the 1st defendant without the Plaintiff showing an authority to justify that. They reiterated that under the confidentiality agreement clause 4(i), even if the 3rd Defendant were liable under the contract, the liability of the affiliates including the 3rd defendant, would vicariously revert to the 1st defendant only. On court's jurisdiction, the 3rd Defendant's learned counsel submitted that on the basis of Salim kibora's case, the question of jurisdiction can be raised at any time even by the court suo mottu. On section 18(a), (b), (c) of the CPC, the 3rd Defendant's counsel submitted that no authority has been cited by the plaintiff's counsel to challenge the position taken in Well worths Hotels and Lodges case. The 3rd Defendant's counsel submitted further that the cases of Europetrol and Sino Truck were on conflict of law and not on jurisdiction of the courts. Jurisdiction is a creature of statutes. They argued that jurisdiction cannot be implied by a party taking part in proceedings reluctantly. They argued that in Euro petrol case the products were Page 19 of 44 stored in Dar es salaam. They submitted that the case of Sinotruck did not consider section 18 of the CPC. After going through the rival submissions by the parties' learned counsel and having revisited the cited authorities and pleadings in the case file, I am now better placed to determine the preliminary objections raised by the

learned counsel for the 3rd Defendant. I will start with preliminary objection with respect to lack of court's jurisdiction despite the fact that the learned counsel argued it last. It is upon satisfying myself that the court is vested with the requisite jurisdiction that I can be empowered to entertain the other points of preliminary objections raised in this case. As it was stated in the "MV Lilian S" case [1989] 1 eKLR that: - "Jurisdiction is everything, without it, a Court has no power to make one more step. Where the Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction." On lack of jurisdiction, the learned counsel for the 3rd defendant argued that the requirements of section 18 (a), (b) and (c) of the Civil Procedure Code, Cap 33 of the Laws of Tanzania have not been fulfilled as to warrant this Court to exercise jurisdiction over the 3rd Defendant. The 3rd defendant's learned counsel submitted that under paragraph 59 (e), (f) and (h) of the plaint, the Plaintiffs have attempted to connect the Page 20 of 44 defendants with the jurisdiction of this court due to the defendants' alleged investment in the Chilalo Project and the 1st defendant's inter relationship with the alleged affiliates. They argued that, however, the same plaint under paragraph 31 shows that the Chilalo Project in Ruangwa District, Lindi Region, Tanzania is owned by another entity called Ngwena Tanzania Limited which is not a party to the suit at hand. They argued further that under paragraph 13 of the Plaint the said Ngwena Tanzania Limited is, in turn, shown as being indirectly owned by the 4th Defendant through an Australian entity which also is not a party to the suit at hand. I have given the argument its due consideration and I find that this argument by the learned counsel for the 3rd Defendant is factual and hence one that calls for evidence. It needs evidence on whether or not the 3rd defendant is involved in the business of Evolution/Chilalo graphite project in Ruangwa District, Lindi Region Tanzania, the Plaintiffs in their plaint have pleaded that the 3rd Defendant is involved as an investor in the Chilalo project. It is the rule that a preliminary objection should be raised on the assumption that what is pleaded by the other side is correct. It cannot be raised on the basis of facts which are disputed. Such facts cannot be used to form basis of the preliminary objection by the other party. To quote the Court of Appeal for Eastern Africa in the case of Mukisa Biscuits Manufacturing Company LTD v West End Distributors LTD (1969) EA 696, at page 701, Sir Charles Newbold P., had this to say:- A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or what is the exercise of judicial discretion. Page 21 of 44 In the instant case, the 3rd Defendant is disputing what is pleaded by the Plaintiffs in the plaint under paragraphs 59 (e), (f) and (h) of the Plaint about the defendants having business in the Chilalo graphite mine at Ruangwa, Lindi, Tanzania. It was wrong for the 3rd Defendant's counsel to, on one hand, contradict the allegations of the Plaintiffs pleaded in the plaint by adducing incompatible pieces of evidence through the Written Statement of Defence, and then on the other hand, to use the Defendant's own introduced pieces of evidence that created contradictions, as the basis to raise a preliminary objection. The contradicted facts give rise to factual issues. Factual issues are resolved by

evidence. Where evidence is needed to determine an issue, such an issue cannot be validly raised as a preliminary point of objection in law. The learned counsel for the 3rd Defendant further submitted that Clause 13 of the Agreement annexed as PULA-2 shows that the agreement was executed in Sandton South Africa and is governed by the laws of South Africa. The alleged breach of confidentiality was done by e-mails whose domain is outside Tanzania, from officials of the Plaintiff to officials of the 1st defendant both being entities registered outside Tanzania. The 3rd Defendant's counsel argued that the cause of action arose in South Africa. Again, these contentions are factual and dependent on the evidence of the case to determine them. The 3rd Defendant's counsel have not shown that the email domain name restricts the geographical sphere for using the said email address. They have not substantiated that an email address whose domain name is South African, cannot be used by any one while he is outside South Africa. At any rate to substantiate that fact Page 22 of 44 would call for evidence and thereby depriving the issue legality to be dealt with as a preliminary point of objection. To appreciate the argument of the 3rd Defendants counsel on lack of jurisdiction due to choice of South African Courts over Tanzanian Courts, the 3rd Defendant's counsel made reference to Clause 13 of the Confidentiality Agreement. I reproduce the Clause 13 of the Confidentiality Agreement: "The terms of this agreement shall be governed by the laws of South Africa and the Grantor shall be entitled to all rights and remedies available for any breach by the Respondent under this agreement". The clause above clearly says nothing on choice of court or forum for dispute settlement. It only chooses the applicable laws. Choice of laws other than Tanzanian laws does not necessarily constitute choice of another forum for dispute resolution. The choice of law clause, also known as a governing law clause, allows the contracting parties to choose the substantive law of the appropriate state to apply to their contract. The choice of forum clause on the other hand allows the contracting parties to confer personal jurisdiction on the courts of the appropriate jurisdiction to adjudicate disputes under their contract. Choice of the governing law and choice of the forum clauses deal with two distinct issues: (1) the choice of law that is to govern any dispute arising under the agreement; and (2) the choice of forum where disputes will be heard. It is common in international trade for parties to choose the applicable law to their contract as well as the forum to handle their dispute and that forum can be an ordinary court or Page 23 of 44 an arbitral tribunal. In the book by Anthony Connery, titled Manual of International Dispute Resolution, Commonwealth Secretariat (2006) at page 187 it is stated that: Despite the increasing use of international commercial arbitration backed up by the New York Convention, litigation in the national courts is probably still the major international dispute resolution process in use. In the context of international contracts, the major problem in relation to litigation is the prospect for one of the parties of that litigation taking place in the courts of a foreign country, conducted in a foreign language and under a foreign system of law. However, litigation may be the dispute resolution process used for a variety of reasons. It becomes apparent, therefore, that a choice of foreign law can be perfectly justified in litigation taking place under the national courts in the same way that it can be used in arbitration proceedings before the arbitrator or before the courts where challenge or recognition and enforcement of the arbitral award is

ultimately sought. Choice of applicable law does not necessarily entail choice of forum of the same state whose law has been chosen. In *East African Breweries Limited Versus GMM Company Limited*, (2002) TLR 12 where it was held that: Page 24 of 44 "Parties to a contract are free to choose the law that would apply in the event of a dispute and that the parties in this case were free to agree that the law that was to govern their distribution agreement was Kenya law/" Again, it seems the [learned counsel for the 3rd Defendant have missed the point under Clause 13 above. The law of South Africa has been chosen to govern the "terms of the agreement". This means the terms of the Confidentiality Agreement will be governed by the substantive law governing agreements of this kind as applicable to South Africa. That law can be the statutory law regulating contracts of such kind in South Africa. It can as well be the regional and international conventions governing international trade to which South Africa is a party. Clause 13 of the Confidentiality Agreement above, on the other hand, does not stipulate the applicable procedural law in resolving the disputes which might arise from the terms of the agreement. The procedural law is the one that governs the procedures of dispute resolution in the forum court such as the Commercial Court Rules and the the Civil Procedure Code in the Commercial Division of the High Court of Tanzania. Practically, the issues of jurisdiction of courts are more related to the procedural laws than the substantive laws. The applicable procedural laws have not been prescribed in clause 13 of the Confidentiality Agreement, above. It is therefore not correct for the 3rd Defendant's learned counsel to argue that this court lacks jurisdiction simply because the applicable substantive law is of a different country. I should hasten to add that even if the said clause 13 of the Confidentiality Agreement had contained a choice of forum other than this court, that Page 25 of 44 would not have ousted the jurisdiction of this court to entertain the dispute. Rather it could have operated to stay the proceedings only pending referral of the parties to their chosen forum. This is the settled position in Tanzania as it can be seen in the decision of the Court of Appeal of Tanzania in *Sunshine Furniture versus Maersk (China) Shipping Co. Ltd and Nyota Tanzania Ltd* Civil Appeal No.98 of 2016 where the Court of appeal held that: "we endorse the above view by the learned author that the court in which the suit is instituted has the discretion to stay the suit once it learns of existence of an agreement between the parties to sue in a particular forum, whether foreign or not. For, it neither can dismiss the suit because it has not heard and determined it on the merits nor can it strike it out because, except for the choice of a different forum, it is otherwise competent to try the matter. The high court in the instant matter, we think, should have stayed trying the suit pending the institution and determination of the claim in the court of Rome. On that basis we vacate the dismissal order and substitute for it an order staying the suit in the high court, commercial division. To cap it all, the 3rd Defendants learned counsel in insisting that this dispute centered upon breach of confidentiality agreement in respect of exploitation of graphite minerals at Evolution/Chilalo project in Ruangwa District, Lindi Region, seem-to have watered Page 26 of 44 down the spirit of the section 11 (2) of The Natural Wealth and Resources (Permanent Sovereignty) Act, 2017 which, inter alia, intended that disputes arising from extraction, exploitation or acquisition and use of natural wealth and resources should be adjudicated by judicial bodies or other organs established in the United Republic

and in accordance with laws of Tanzania. The learned counsel for the 3rd Defendant submitted that the 3rd Defendant is an entity registered in the Republic of South Africa as per paragraphs 7,8, 12 and 13 of the Complaint and hence that the 3rd Defendant is outside the local limits of Tanzania; does not carry out business in Tanzania; it is not a resident of Tanzania. The learned counsel submitted that the 3rd Defendant, being a foreign company, cannot do business in Tanzania without obtaining certificate of compliance under section 435 of the Companies Act, Cap

212. This argument does not qualify as a preliminary objection. It is factual. The Plaintiffs did not merely plead only under paragraphs 7,8,12 and 13 the way that the 3rd defendant, in their view, is connected to their case. The Plaintiffs have alleged that the 3rd Defendant and all the other defendants have invested in the Evolution/Chilalo graphite project in Ruangwa District, Lindi Region, Tanzania. Whether or not that allegation is correct, is a matter of evidence and, as such, it cannot be disposed of by way of preliminary objections. The allegations of the 3rd Defendant not possessing a certificate of compliance in Tanzania, further accentuates the factual nature of this preliminary objection thereby pushing it further from the ambit of a valid preliminary objection in law. Page 27 of 44 The 3rd Defendant has raised the issue of non-conformity to Section 18 the Civil Procedure Code that the conditions thereof have not been fulfilled. There is a misconception there. The section does not govern jurisdiction of this court which has unlimited jurisdiction throughout Tanzania mainland. That section has relevancy to the determination of the place to institute the suit and it can be resorted to where there are more than one courts in Tanzania where the suit may be instituted. The Plaintiff has to consider the factors mentioned thereunder such as residence of the defendant, where cause of action arose and place of business of the defendant. The jurisdiction of the High Court is provided under Article 108(1) and (2) of the Constitution of the United Republic of Tanzania, which provides that: 108.-(1) There shall be a High Court of the United Republic (to be referred to in short as “the High Court”) the jurisdiction of which shall be as specified in this Constitution or in any other law.
- (2) Where this Constitution or any other law does not expressly provide that any specified matter shall first be heard by a court specified for that purpose, then the High Court shall have jurisdiction to hear every matter of such type. Similarly, the High Court shall have jurisdiction to deal with any matter which, according to legal traditions obtaining in Tanzania, is ordinarily dealt with by a High Court provided that: the provisions of this sub article shall apply without prejudice to the jurisdiction of Page 28 of 44 the Court of Appeal of Tanzania as provided for in this Constitution or in any other law. Lastly, while submitting on jurisdiction of the court, the 3rd defendants counsel argued that if this Court continues to entertain the case at hand and passes a judgment and decree, the enforceability thereof will not be possible as all the Defendants are foreigners with no properties in Tanzania. This argument, in my view, was not well thought of and is neither here nor there. If a court of law were to consider the prospects of its decisions and decrees being implemented, as the condition to exercise jurisdiction it could not register nor pass decrees in some cases as some defendants sued in courts would do all they could to avoid execution- and some

litigants are , extremely poor. The Court in determining whether or not to assume jurisdiction over a matter does not leap forward in time to assess the possibility of its decision being successfully enforced against the defendant. Jurisdiction is a creature of a statute. At any rate, the argument by the 3rd defendant's learned counsel was made without regard to the fact that states have mechanisms for reciprocal enforcement of foreign judgments. In Tanzania, for example, there is the Reciprocal Enforcement of Foreign Judgments Act, Cap 8 of the Laws of Tanzania. Thus contrary to the argument by the learned counsel for the 3rd defendant, it is not impossible to enforce a judgment of a Tanzanian court abroad as the same can be enforced directly where there is a reciprocal agreement for the direct enforcement thereof or it can be enforced by way of an action under the doctrine of obligation, in the absence of a the reciprocal arrangement. See for Page 29 of 44 example the decision of the Court of Appeal of Tanzania in Willow Investment Versus Mbomba Ntumba and Two Other TLR 1996. Now to the preliminary point of objection pertaining to lack of valid board resolutions. The Plaintiffs have attached annextures PULA 14 and PULA 15 as the Board resolutions authorizing the 1st and 2nd plaintiffs respectively to institute the case at hand. PULA 14 is a letter from the Chairman of the 1st Plaintiff Company to Dr. Mary Mildred Stith, Director, PULA graphite Partners Tanzania Limited titled "authority to pursue legal proceedings against African Minerals Limited (ARM) and affiliates." The letter ends with a sentence: "this letter therefore constitutes your mandate and authority and whatever decision you will make will bind the company". Annexure PULA 15 on the other hand is a Board Resolution of PULA Graphite Partners Tanzania Limited which at paragraph 1 thereof states that at a meeting of the Board of the company whose date is not disclosed in the resolution, the Company is "authorized to institute and prosecute to the end the civil case before the High Court of Tanzania against African Rainbow Minerals Limited (ARM) and its affiliates for breach of confidentiality Agreement between PULA group and ARM". The above annexed "board resolutions" stem from the averments pleaded by the Plaintiffs under Paragraph 63 of the Complaint that: The institution and pursuit of the present suit and other proceeding therefrom either ancillary or incidental thereto have been sanctioned by resolutions of each Plaintiff copies Page 30 of 44 of which are attached hereto marked "PULA-14" and "PULA- 15" for the 1st and 2nd Plaintiffs respectively. The 3rd Defendant has raised authenticity and validity issues with regard to the board resolutions pointing out the weaknesses in each and thereby concluding that no valid board resolutions exist in law. The 3rd Defendant has therefore attacked the competency of the suit filed without attaching the proper board resolutions which, in view of the 3rd Defendants counsel, is a mandatory requirement in Tanzania following the decision of the Court of Appeal of Tanzania in Simba Paper Converters Limited versus Packaging and Stationery Manufacturers Limited and Dr. Steve K. Mworira, Civil Appeal No.280 of 2017, delivered by the Court of Appeal of Tanzania at Dar es salaam on 23rd May 2023. The Plaintiffs have defended themselves by stating that the questions of validity of the attached Board resolutions are matters of fact and not ones capable of being entertained as preliminary objections and further that there is no legal requirement for a company to attach a board resolution in order to sue, so long as the company has complied with the provisions of Order XXVIII of the Civil Procedure Code by

the respective company's officials signing and verifying the Complaint. I will dispose of this preliminary objection by considering the two contentious arguments presented by the parties' counsel on this point. Is it mandatory for a company when instituting a suit to attach a Board resolution authorizing the company to institute a case against another person? The 3rd Defendant's counsel has relied on a number of decisions of the High Court and the Court of Appeal of Tanzania, notably the decision in *Simba Paper Converters Limited versus Packaging and Stationery Page 31 of 44 Manufacturers Limited and Dr. Steve K. Mworira* (supra), I asked myself whether the said decision makes it mandatory for a company to file a board resolution while filing a suit in court? I am alive to what the Court of Appeal of Tanzania held at page 18 of the Judgment after having made reference to the famous case of *Bugerere versus Sebaduka* which is used by most lawyers as the authority for the requirement to have a board resolution for a company while instituting a suit. The Court of Appeal of Tanzania held at page 18: 'We subscribe to the said position to the extent that it relates to the institution of a suit by one or more directors in the name of company whereas in the present matter it resolves on the internal conflict within the company, in any other case we will be hesitant to extend the rule any further mindful of the legal position relating to the power of the company to be sued in its own name, this position is well summed up by Pennington's Company Law, 15th edition, London, Butterworths by Robert Pennington thus: "The intention of the legislature was undoubtedly that the court should assist the company to achieve its expressed objects by implying all powers necessary for it to do so... on the whole the courts have been liberal in implying powers. Thus powers have been implied to do acts obviously appropriate to the carrying out on of any business such as appointing agents and engaging Page 32 of 44 employees; and instituting, defending and compromising legal proceedings." The above reflects a correct legal position to which we fully subscribe. " In view of the above reproduced portion of the decision by the Court of Appeal of Tanzania, the position which is settled is that a board resolution is only mandatory for the institution of a suit by one or more directors in the name of the company where the suit revolves on the internal conflict within the company. The court of appeal in the *Simba Paper Converters* case, in no uncertain terms, refused to extend the requirement of board resolutions in other situations where the dispute does not revolve on internal disputes within the company. In both the *Bugerere's* case and the *Simba Paper Converters* Case, the suits revolved around internal disputes within the company and the ratio decidendi in those cases were narrow ones confined to their respective

facts.

In *SM Holdings Limited Versus National Bank of Commerce Limited and Sanlam General Insurance Tanzania Limited*, Commercial Case No. 134 of 2022, delivered on 19th April 2024, this Court (Morris, J.) well underscored the position of the law, to which I am in full agreement with. That is: "It is not a misplacement, in my view, if I add that the essence of incorporation is to minimize interferences in the internal affairs of the duly registered company. That is why the law empowers directors to run the day to day errands of Page 33 of 44 the corporate person. Further,

so long as a company has ample legal means to intercede in the wrongly initiated court proceedings; enjoining such company to reveal too much of almost its daily operations, to me, amounts to an overly intrusion into its privacy. I, also, put it forward an argument that if such compulsive interferences continue indiscreetly; parties to cases will poke their noses into otherwise confidential matters of companies. After all, where will the finish line be placed thereafter? Possibly, after production of the resolution, attacks will be directed towards the competency of those who passed it; the coram and authenticity of signatures of those in attendance; scope of mandate of such signatories under the articles of association; and so-on-and-so-forth." As I fully subscribe to the above position of Lord Morris,J., I would like to add that in law there is a general legal principle or doctrine of "ostensible authority". 'Ostensible authority' is the power an agent has to affect the legal relations of its principal. Where such authority exists, the agent will have the power to bind the principal to contract. In the case of *Hely-Hutchinson v Brayhead* [1968] 1 QB 549 Lord Denning MR held: I need not consider at length the law on the authority of an agent, actual, apparent, or ostensible.. It is there shown Page 34 of 44 that actual authority may be express or implied. It is express when it is given by express words, such as when a board of directors pass a resolution which authorises two of their number to sign cheques. It is implied when it is inferred from the conduct of the parties and the circumstances of the case, such as when the board of directors appoint one of their number to be managing director. They thereby impliedly authorise him to do all such things as fall within the usual scope of that office. Actual authority, express or implied, is binding as between the company and the agent, and also as between the company and others, whether they are within the company or outside it. In my view, when a company appoints directors the general public is entitled to take on the face of it that the Directors of the company have been authorized to transact all business for and on behalf of the company as its agents without there being the need for them to inquire into compliance with the internal processes which took place within the company in appointing its authorized agents to act on its behalf. To impose a mandatory requirement for directors of a company to produce in court a board resolution while filing a suit in the name of the company, against an outsider to the company, would defeat the very concept of a company being a corporate person. This is because, in my view, when one deals with the directors in their capacity as such, he is Page 35 of 44 dealing with the company which the respective directors manage. One meets the company as a corporate person when he meets the directors thereof. When the directors appear in court, they do not leave the company back in the office, they are the company. When directors have signed pleadings, it is their company that has signed. A company is a legal person who is living only in the eyes of law. It is a formulation of law which lacks both body and mind. It cannot act on its own. It can act only through some human agency. Directors are those persons through whom a company acts and does business. A company is an artificial person and it functions through human agents i.e. the directors. Institution of court proceedings is part and parcel of, and incidental to, the business of the company for which the directors are responsible. Demanding directors to produce a board of directors' resolution authorizing them to institute judicial proceedings in the name of their company, would unfairly impose an unnecessary burden to the outsiders dealing with the company to have to peep in, monitor and scrutinize the internal compliance mechanisms and processes of the company which they are not part of, and

therefore, they have no control thereof. On the other hand, it would make the dealings of the company extremely difficult by imposing the need for directors to meet and pass a resolution to institute a case even in circumstances where the articles of association of the particular company do not require the passing of directors' board resolution for that kind of company's business. In modern times directors in both private and public companies might be scattered across the world and the need to file a suit might arise urgently making it difficult for the directors to follow the legal formalities of convening a meeting to pass and sign a board resolution. It Page 36 of 44 should be noted that corporation is among the constitutive methods of social control by the law. The constitutive method of social control through law is such that the law constitutes a group of people into a single legal entity, with a legal name, legal rights, duties, liabilities and protection, separate from the individual persons, for the purpose of effective legal control. After the members and directors of the company engage in internal processes in their company in accordance with their own set rules and regulations, they collectively transact with the outsiders through their directors. When the directors present themselves as the company by signing and verifying the pleadings in the name of the company, it would be a retrograde and re-inventing of the wheel for the court, in the absence of any complaint by the members of the company (cases of ■internal disputes within the company), to turn back the arms of the clock and start inquiring into the compliance with the internal protocols of the company by requiring a board resolution, authorizing the directors to sue, to be filed in court. Ensuring compliance with the internal protocols in the company is not a duty imposed upon the strangers dealing with the company such as defendants sued by the company or those who sue it, who in fact, are not better placed to do so. It is the duty of the members of the company. In law, directors are agents of the company. In terms of section 39 (1) and (2) of the Companies Act, Cap 212, a deed is executed by the company under its common seal and if signed by a director and the secretary of the company, or by two directors of the company. In terms of Order XXVIII Rule 1 of the CPC in suits by or against a corporation, any pleading may be signed and verified on behalf of the corporation by Page 37 of 44 the secretary or by any director or other principal officer of the corporation who is able to depose to the facts of the case. That is the law in respect of transaction of company's business for both ordinary and court room businesses. In the same way that Courts do not ask for papers showing authority to institute suits by local and central governments because there are statutory laws authorizing the persons signing pleadings for and on behalf of the local or central governments, there is equally a law in the form of articles of association of the company read together with the Companies Act which confers ostensible authority to directors to institute a suit in the name of the company. They need not exhibit in court a copy of a board resolution as their power is prescribed in the articles of association which, having been registered with the Registrar of Companies, are public documents accessible to any needy person. Everyone is deemed to know the law. The 3rd defendant's preliminary objection on lack or validity of board resolution by the Plaintiffs, would still suffer another defect even if it were a legal requirement that a board resolution is needed for directors to institute a suit in the name of the company. In the circumstances, the present preliminary objection on board resolution, is more factual rather than a pure point of law. The Plaintiffs have attached to their plaint two documents which they call board resolutions. On the face of it they look like board resolutions authorizing the Director

to institute cases against the 1st defendant and her affiliates. The Plaintiffs have also pleaded under paragraph 63 of the plain that they have attached two Board resolutions as annextures PULA-14 and PULA -15. The 3rd Defendant in her preliminary objection, has attacked the validity of the attached Page 38 of 44 purported board resolutions. In my view, the issue therefore changes from being one of complete absence of a board resolution to one of validity of the attached board resolutions. That issue goes to, and calls for, evidence. However, in law a preliminary objection can only be raised in respect of ascertained facts pleaded in the pleadings or which arise therefrom by necessary implications, on the assumption that what is alleged by the other side is correct. A party to the suit cannot introduce inconsistent facts to those introduced by the other side and then raise a preliminary objection founded on the inconsistent facts thereby introduced by himself. Before the 3rd defendant raising the preliminary objection on lack of a board resolution, she was supposed to firstly assume what the Plaintiff had pleaded in the plaint and annextures thereto were true and undisputed, then the 3rd defendant could have been justified to raise a preliminary objection based solely on the facts pleaded by the Plaintiff in the plaint. Therefore, the preliminary objection on board resolution is hereby overruled. I will determine in tandem the preliminary objections related to lack of cause of action and locus standi. The learned counsel for the 3rd Defendant argued that in *Peter Mpalanzi versus Christina Mbaruka*, (Civil Appeal No. 153 of 2019), it was held that locus standi is a point of law rooted in the court's jurisdiction and the court has a duty to determine it at the earliest when it is raised. The Learned counsel for the 3rd Defendant submitted that to have locus standi, the Plaintiff has to show that his right or interest has been breached or interfered with. They argued that as the 3rd Defendant and 2nd Defendant are not parties to the agreement between the Plaintiff and the 1st Defendant, the Plaintiffs have no rights under the agreement which entitles them to Page 39 of 44 bring a claim against the 3rd defendant. The 3rd defendant's learned counsel argued that under the doctrine of privity of contract, the 3rd Defendant is not a party to the contract between the Plaintiffs and the 1st defendant, but that she is just being sued on the alleged interconnectivity and link between the 3rd Defendant and the 1st defendant, without the Plaintiffs showing a legal authority to justify that. The learned counsel for the 3rd Defendant submitted that under the clause 4(i) of the Agreement between the 1st Plaintiffs and the 1st Defendant it is provided that even if the affiliates of the 1st defendant are liable under the contract, the liability of the affiliates would vicariously attach to the 1st defendant only, In my view, the preliminary objections with regard to locus standi and cause of action as raised and argued in this case, cannot be determined without resorting to evidence of the case and without the court interpreting Clause 4 of the Confidentiality agreement as to whether or not the 3rd defendant is privy to the agreement and or an affiliate of the 1st Defendant. The essence of the defence of the 3rd defendant in her Written Statement of Defence is that she is totally a stranger to the Agreement between the 1st Plaintiff and the 1st Defendant and therefore she cannot incur any right or liabilities under it. It is this same line of defence which is indirectly advanced as a preliminary objection under the name tags of lack of cause of action and lack of locus standi by the Plaintiffs. In my view, as the two preliminary objections, as argued in this case, are factual rather than legal, they do not qualify to be dealt with as preliminary objections. Both counsel have cited the case of *Mukisa Biscuits Manufacturing Company LTD Page 40 of 44 Vs. West End*

Distributors LTD (1969) EA 696. At page 700 Law, J.A observed as follows So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by dear implication out of the pleadings, and which, if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving to the suit to refer the dispute to arbitration. At page 701 Sir Charles Newbold P. had this to say:- A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or what is the exercise of judicial discretion. In National Insurance Corporation of (T) Ltd and Parastatal Sector Reform Commission Versus Shengena Limited, (Civil Application No. 20 of 2007, the Court of Appeal of Tanzania, at Dar Es Salaam), when the matter was called for hearing two Preliminary Objections were¹ raised namely:

1. That this application is incompetent at law as there are other remedies available in the matters intended to be revised.
2. That this application does not demonstrate that it falls within the established grounds for revision. A preliminary issue arose in the course of determining the preliminary objection. The issue was whether or not the preliminary objections raised constituted valid preliminary Page 41 of 44 objections in law? The Court of Appeal after restating the above quoted position of the law on preliminary objections, as stated in the celebrated case of Mukisa Biscuits Manufacturing Company Limited (supra) held that: We take that to be the position of the law on the meaning of a preliminary objection. With this in mind we ask ourselves: does the so called preliminary objection in the instant case pass this test? We think it does not. The two so called points of objection are not self-proof. They are subject to proof by some other material facts. For the foregoing reason we dismiss the respondent's preliminary objection with costs in the cause. I have asked myself whether the two preliminary objections on lack of locus standi and cause of action by the Plaintiffs, as raised by the 3rd Defendant's counsel, in the circumstances of the present case, fit within the meaning of a preliminary objection in the eyes of the law? I am guided by the words of the Court of appeal in the above referred case that whether or not a particular point qualifies as a preliminary objection, does not depend on the name-tag given to it, but rather on whether or not, in the prevailing circumstances of the particular case, it passes "the test of self-proof. It should not be subject to proof by some other material facts." I find that the preliminary objections on lack of locus standi and cause of action in this case are founded, not on the pleading by the plaintiffs, but rather on the pleadings brought by the 3rd Defendant through her Written Statement of Defence. That goes contrary to the requirement of being pure points of law and of being argued on the assumption that what is pleaded by the other party (plaintiff) is correct. If we assume that all what the Plaintiffs have stated in the plaint and its annexures is correct, and if we do not consider the incompatible averments of the 3rd Defendant in her Written Statement of Defence and its annexures, we cannot reach to the conclusion that the Plaintiffs have no locus standi and cause of action to sue the 3rd Defendant, As a general rule, save for few preliminary points of objection related to res

judicata, a preliminary objection cannot be self-induced by a party pleading some facts and introducing some evidence in the case, Page 42 of 44 so as to form its basis for raising a preliminary objection thereon. The preliminary objections on lack of locus standi and cause of action in the case at hand emanate from the evidence of the 3rd Defendant controverting the averments made by the plaintiffs. Those are not pure issues of law and, therefore, are matters which should be better reserved for trial. I thus overrule them. In the end, I find that all the preliminary objections raised by the 3rd Defendant are without merit. I proceed to dismiss them with costs payable by the 3rd defendant to the Plaintiffs. In this case, there is an oral application by counsel for the 4th Defendant to be allowed to file a Written Statement of Defence out of time. Also there is a formal application by the 1st and 2nd Defendants vide Misc. Misc. Commercial Application 9135/2024. I direct that the 4th Defendant should bring a formal application to join the Commercial Application 9135/2024 filed by 1st and 2nd Defendants so that her arguments can be backed up by evidence in affidavit and the court can be in a position to determine the fate of the 1st, 2nd and 4th defendants, who did not file Written Statements of Defence on time, to participate in the proceedings of this case. It is so ordered. JUDGE 10/05/2024 Page 43 of 44 Ruling is delivered in court this 10th day of May 2024 in the presence of Nzaro Kachenje and Safari Mallata learned advocates for the Plaintiffs accompanied with Dr. Mary Stith, Principal officer of the Plaintiffs companies on one hand and Mr. Allen Lerna, Advocate for 1st and 2nd defendants; Ms. Faiza Salah, Advocate for the 3rd Defendant and Mr. Gerald Nangi, Advocate for the 4th defendant. Page 44 of 44

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE	https://media.tanzlii.org/media/judgment/311693/source_file/PULA_GROUP_LLC_VS_AFRICAN_RAINBOW_MINERALS_LTD_COMM_CASE_NO_149_OF_2023_RULING_HON.GONZI.J..pdf
CASE PAGE	https://chat.esheria.ai/case-law/tanzania/PreliminaryObjection-tanzlii-2023--6a3ea52c3b1caa912982597e

Prepared on 13 October 2026 · Esheria