

TANZANIA / JUDGMENT

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IN THE HIGH COURT OF TANZANIA (COMMERCIAL DIVISION) AT DAR ES SALAAM IN THE MATTER OF THE COMPANIES ORDINANCE CAP.212 AND IN THE MATTER OF A PETITION FOR WINDING UP OF TRI TELECOMMUNICATION TANZANIA LTD BETWEEN TANZANIA TELECOMMUNICATIONS COMPANY LTD 1ST PETITIONER TANZANIA REVENUE AUTHORITY 2ND PETITIONER TANZANIA COMMUNICATIONS COMMISSION 3RD PETITIONER VIP ENGINEERING AND MARKETING LTD .4TH PETITIONER AND TRI TELECOMMUNICATION TANZANIA LIMITED RESPONDENT R U L I N G KIMARO, J. TRI-TELECOMMUNICATION TANZANIA LIMITED hereinafter referred to as the Respondent is a private Company incorporated in Tanzania since May, 1994. The shareholders are TECHNOLOGY RESOURCES INDUSTRIES BERHAD of Kuala Lumpur Malaysia and VIP ENGINEERING AND MARKETING LIMITED. The former is a majority shareholder, holding 60% the shares. The latter is a minority shareholder, holding 40% of the shares. The principal objects for formation of the respondent was to promote, establish and carry on business of providing all kinds of telecommunication services and other objects. TANZANIA COMMUNICATIONS COMMISSION is a regulatory body responsible for licensing telecommunication operators in the United Republic of Tanzania, under the Tanzania Communications Act, No. 18 of 1993. The Commission licensed the respondent in 1995, February and December, for provision of land mobile services in the Coastal and Northern Zones respectively. The respondent is now under Winding Up proceedings. The petition for the Winding Up has been filed under Section 167 (e) of the Companies Ordinance Cap.212 and the Winding Up Rules

1929. The petition for the winding up was filed by three petitioners. They are the TANZANIA TELECOMMUNICATION COMPANY LIMITED, (hereinafter referred to as TTCL). The TANZANIA REVENUE AUTHORITY, (hereinafter referred to as TRA) and the TANZANIA COMMUNICATIONS COMMISSION (hereinafter referred to as The Commission). They are first to third petitioners respectively. The three petitioners are advocated by Mr. Mgullu (1st petitioner), Mr. Lugaiya (2nd petitioner) and Mr. Daffa (3rd petitioner). The petition was filed on 1st February, 2003. After the advertisement of the petition, as required by Rule 27 of the Winding Up Rule 1929, VIP ENGINEERING AND MARKETING LTD joined the proceedings in support of the petitioners. The petitioners are now four. The 4th petitioner is advocated by Dr. R.W. Tenga of the LAW ASSOCIATES ADVOCATES. When the petition

came for hearing on 25/04/2003, Dr. Twaib, Learned Advocate appearing for the Respondent, in these proceedings, raised an issue in respect of the appearance of the 4th petitioner. Dr. Tenga raised an objection, and I sustained the objection with instructions that reasons will be given in this ruling. The reasons will be given later. For the time being, it is important to see why the petitioners have filed this petition. The reasons for filing this petition are found in the affidavits deponed in verification of the petition as required by Rule 29 of the Winding Up Rules, 1929. It was mentioned earlier that the Commission (3rd petitioner) licenced the respondent for provision of land mobile cellular services. The affidavit of Abihudi Newton Nalingigwa, the Director General of the Commission, shows that the respondent was required to pay to the Commission, frequency fees and royalties. The respondent has not paid and it is now indebted to the Commission to the tune of T.shs 3,279,357,735.00 The affidavit of Bernhardt Niclaus, the Director and head of the Directorate of Financial Services in the 1st petitioner's company shows that; following the respondent's license for provision of land mobile cellular services in the United Republic of Tanzania, it entered into lease agreements with the 1st petitioner. The 1st petitioner leased circuits, indoor and outdoor spaces on towers and premises as well as security services. These services are referred to as services and facilities. The services and facilities were provided up to 31st January, 2003. In addition, the respondent entered into an interconnection agreement with the 1st petitioner where the 1st petitioner allowed the respondent to connect its licenced system/network to that of the 1st petitioner. The respondent was required to pay for the services and the facilities. It also failed to pay and it is now in arrears of payment to the tune of USD 11,125,967. Mr. O. Nasson, the Commissioner for Large Taxpayers in the 2nd petitioner has deponed that the respondent has defaulted in payment of taxes and now it is in arrears of T.shs 6,729,665,112. Mr. James Burchard Rugemalira is the one who deponed the affidavit in support of the petition for the 4th petitioner. His affidavit shows that he was appointed by the 4th petitioner, to represent it in the Board of Directors of the respondent. His affidavit is very long. It consists of 26 paragraphs. At the moment, there is one essential element to be noted. It is the confirmation of failure by the respondent to pay its debts. Mr. Rugemalira deponed that he is suspicious that the failure arises out of fraudulent acts by Technology Resources Industries Behard (Malaysia) which was managing the respondent. He has also shown that the 4th petitioner is also claiming from the respondent the sum of USD 18.628 million on the basis of suspected fraud upon the 4th petitioner (the minority) by majority shareholder in the respondent, namely Technology Resources Industries Behard Malaysia. All the deponents of the affidavit say they served several demand notices to the respondent, requiring it to pay the debts, but the respondent has not paid. Right now there is also a Civil suit in the High Court filed by the 4th petitioner against the respondent, the majority share holder and the 3rd petitioner. The 4th petitioner is seeking for a prayer of declaration, among others, that the conduct of the respondent under the Management control of Technology Resources Industries Behard, has unfairly prejudiced the interest of the 4th petitioner and is claiming for damages. The case is Civil Case NoA27 of 2001 and it is still pending at the High Court, Dar-es-Salaam District Registry. The demand notices, and

the pleadings in Civil Case NoA27 of 2001 are annexures in this petition. This court will be making reference to the affidavits as and when the need arises, in the course of the determination of the issues before this court. The above background information explains why these winding up proceedings have been filed. The respondent is unable to pay its debts. Perhaps it is now an opportune time for the court to give reasons why Dr. Tenga's objection on the question of the 4th petitioner's locus standi was sustained when Dr. Twaib raised it. The issue of the locus standi of the 4th petitioner entering appearance in these proceedings was raised by the respondent in the affidavit of Gotfrid Stolis Tesha. He deponed that because the petition was filed by creditors, the 4th petitioner could not enter appearance because it does not fall in the category of creditors. It is a shareholder. Before the petition was heard, this court dealt with a preliminary objection raised by Dr. Twaib. The notice of preliminary objection was filed in this court on 11th March 2003. In the preliminary objection Dr. Twaib raised two points " i) That this petition is improperly before the court and/or is brought against the wrong person ii) That the relief's in paragraph. are legally untenable." The preliminary objection came for hearing on 10th April,

2003. On that day, Dr. Twaib said he was abandoning the first point of preliminary objection. He proceeded arguing on the preliminary objection on the prayers. The court heard all the parties and delivered its ruling on 15/04/2003. The preliminary objection which was abandoned by Dr. Twaib was the best opportunity for the issue of the locus standi of the 4th petitioner to be canvassed. When the issue was raised again, on the date which had been set for his reply, the court saw no sense in allowing it, because it was a buried issue. The court did not envisage a position which would allow Dr. Twaib to convince this court otherwise. The time when the issue was raised is also significant. It was raised when Dr. Twaib was giving a reply to the petitioner's case. It is worthy remembering that when the petition was called up for hearing on 22nd April, 2003 Mr. Cuthbert Tenga, the Advocate who appeared for the 4th petitioner, had prepared guiding notes for his oral submission which were supplied to the court and all the parties. There was no objection raised by Dr. Twaib. Moreover, Mr. James Burchard Rugemalira, showed in his reply to the counter affidavit of Gotfrid Stolis Tesha in paragraph 5,6 and 7 that the 4th petitioner was petitioning for winding up of the respondent as both creditor and shareholder. In terms of rule 33 of the Winding Up Rules, 1929 every person who intends to appear at the hearing of the petition can appear, so long as the petitioner(s) is/are notified in the manner prescribed by Rule 33. The rule does not provide for any format. The fourth petitioner gave notice for appearance to support the petition. Obviously, an affidavit verifying why the petition was being supported was important. This is what Rule 29 of the Winding Up Rules 1929 requires. Now it is time to examine the issues which emerge in the petition. It may be important for me to mention that the locus standi of the 4th petitioner's appearance's in this petition, did not feature in the petition as an issue, after Dr. Twaib abandoned his first point of preliminary objection. This court had to give a long explanation after Dr. Twaib had raised it again, at a wrong time. The locus standi of the fourth petitioner haVing been

determined, let me proceed to examine other issues. The petition is essentially for winding up and appointment of the liquidator for the respondent. Admittedly, the prayer for the winding up of the respondent has not been opposed. Indeed, Dr. Twaib did inform this court on 10th April, 2003 that the Receiver/Managers who have entered appearance to oppose the petition are neither objecting to the winding up of the respondent nor appointment of a Provisional Liquidator or liquidator. According to Dr. Twaib the interest of the Receiver/Managers is to ensure that interests of debenture holder are safeguarded and the only way to have these interests safeguarded is to let the Receivers/Managers operate simultaneously with the Liquidator. All the petitioners have vehemently opposed this proposition. Let me look closely at the question of the winding up before going into the other issues. There is no doubt that the respondent is heavily indebted and cannot pay its debts. This is a fact which has not only been raised by the petitioners. It is also admitted by the Respondent in the affidavit of Gotfrid Stolis Tesha at paragraph 4(c) filed in court on 11th March, 2003. It is also clear from the affidavit of Abihudi Newton Nalingigwa, that the third petitioner cancelled the respondent's license on 31st January,

2003. This fact is repeated in the affidavit of James Burchard Rugemalira, at paragraph 17 of his affidavit dated 31st March,

2003. The respondent has also closed business. Again, this is a fact which is deponed by Mr. James Burchard Rugemalira: (Refer paragraph 17 of his affidavit dated 31st March, 2003.) Mr. James Burchard Rugemalira has also deponed in his affidavit dated 31st March, 2003 at paragraph 12 that the respondent has refused to convene meetings of the Board of Directors of the Respondent Company and Statutory Annual General Meetings as required by the Articles Association of the Respondent and the Companies Ordinance. It has also refused to provide annual accounts or periodic annual accounts or periodic financial statement~ and Management Reports to the 4th petitioner who is the minority shareholder. On 22nd April, 2003, Mr. Cuthbert Tenga drew the attention of this court to some of the case law authorities that the 4th petitioner was relying upon to petition for the winding up of the respondent.

(a) Ebrahim Vs Westbourne Galleries and Others [1937]A.C 360

(b) Re a Company (No.00596 of 1986) ChD.133

(c) Blisset Vs Dnid, 10 Hare 493

(d) Symington Vs Symington's Quarries Ltd (1905) 8F.121

(e) Re Yenidje Tobacco Co Ltd (1916) 2 Ch 426

(f) Thomson Vs Drysdale 1925S.C322 Some of the authorities cited above require the court to give a minority shareholder, the right to apply to the Court under Section 167 (f) of the Companies Ordinance, Cap 212 to wind up a company on the grounds of oppression. In the affidavit of Mr. James Burchard Rugemalira dated 31st March, 2003, it is deponed that on the instructions of the Majority shareholder, the respondent, who was under the Management

control of such Majority shareholder, arrogantly, deliberately and oppressively refused to convene proper Board Meetings and Annual General meetings since the beginning of January 2000 to date. Mr. James Burchard Rugemalira is of the opinion that the stone walling of information by the respondent has been oppressively done, in order to cover up and allow the respondent and Technology Resources Behard, to illegally and fraudulently transfer away the assets of the respondent. The conclusion which this court reaches is that the position of the respondent as exposed above, justifies an order that the Respondent be wound up. The next issue for consideration is the Appointment of Provisional Liquidator or liquidator. The petitioners' proposed Mr. Peter Claver Bakilana be appointed Provisional liquidator or liquidator because at the moment, there is no Official Receiver in existence in Tanzania who could be appointed by the Court as Official Receiver/liquidator as required by Sections 184 and 287 of the Companies Ordinance, Cap.212. Dr. Twaib conceded that there is no Official Receiver appointed under the Companies Ordinance much as he recognised the appointment of the Administrator General as an Official Receiver under Section 74 of the Bankruptcy Ordinance Cap.25. This court takes note that there was no objection raised in respect of the proposal made by the petitioners. This means, there is no reason for this court for not approving the appointment of the proposed Provisional Liquidator or liquidator. Now comes the gist of the contention in this petition and that is the appointment of the Joint Receivers/Managers. Two issues arise. The first is the validity of the debenture under which Mr. Anael P. Kavishe and Gotfried S. Tesha claim to have been appointed. The second is the position of the Receiver/Managers in these winding up proceedings in relation to the liquidator appointed by the Court. The Debenture is said to have been executed between the respondent and the Citibank Tanzania Ltd. This is the Debenture relied upon by the Citibank Tanzania Ltd to appoint the Receivers/Managers of the respondents, an appointment made on 14th January 2003. The question on the validity of the debenture was raised by Mr. James Burchard Rugemalira in his affidavit dated 31st March, 2003 at paragraph 13. He denied that there was a proper Resolution of the Directors of the Respondent on 19th February, 2001 to pass the Resolution alleged to have authorized the creation of the Debenture. The copy of the Debenture is annexure to the affidavit of the deponent (VIP7). As the validity of the document was being challenged, oral evidence had to be given. One Mr. Riaz Hussein Somji testified for the fourth petitioner. The testimony of Riaz Hussein Somji in court on 24th April, 2003 supported the fourth petitioner's assertion that there had never been passed a proper Board of Directors Resolution by the Respondent on 19th February 2001. The court was shown Annexure VIP 3 and VIP 4 to confirm Mr. Somji's appointment by the fourth petitioner to be its representative on the Board of Directors of the Respondent. The appointment was effective February, 2000. Through the same Annexures, VIP 3 and VIP 4, Ahmed Daya's representation on the Board of the Respondent was terminated: The respondent was duly informed. The court was also informed that in terms of Article 11 of the Articles of Association of the respondent, the 4th petitioner retained the right to terminate its representation by Mr. Ahmed Daya on the Board of Directors of the respondent. A copy of the Articles of Association was filed in Court as Annexure VIP 6. According to the witness, the representation of the 4th petitioner by Mr.

Daya on the Board of Directors of the respondent was terminated in June, 2000 after the 4th petitioner learnt that Mr. Daya was still holding meetings with the majority share holder and the respondent. Further testimony of Mr. Riaz Hussein Somji was that between February, 2000 and April, 2001 he was the only Director appointed by the 4th petitioner to represent it on the Board of Directors of the Respondent. Although Mr. Muslim Remtullah was appointed by the 4th petitioner in April, 2001 to represent it on the Board of Directors of the Respondent, he resigned in July, 2001. His vacancy was filled by the reappointment of Mr. James Burchard Rugemalira, to be the second representative of the 4th petitioner on the Board of Directors of the Respondent since October, 2001. According to Mr. Somji, neither himself, nor the 4th petitioner was given any notice or agenda for a Board Meeting on 19th February, 2001 or at any time. In terms of Article 12 of the Articles of Association of the Respondent, the Respondent was required to hold Board meetings at least two times a year. However, the Respondent refused to convene and hold even a single proper Board Meeting. Mr. Somji said since he was the only representative of the 4th petitioner on the Board of Directors of the respondent and he did not attend any Board meeting of the respondent between February, 2000 and April, 2001 or after, there was no valid Resolution of the Board of Directors of the Respondent, that could have given authority to the respondent to issue a Debenture on 6th April, 2001 and so the Debenture is invalid. Responding to questions from Dr. Twaib why he has not taken any action if the debenture is invalid, Mr. Somji stated that Mr. James Burchard Rugemalira, the other Director representing the 4th petitioner on the Board of the Respondent, had been given full authority by the Board of Directors of the 4th Petitioner to protect and defend in every way he deemed necessary, the interests of the 4th petitioner in the Respondent. Mr. Somji conceded being made aware of the appointment of the Receiver/Managers for the respondent through the press and that the appointment was made by the Citibank Tanzania Ltd. However, he said no action was taken by him because the mandate on what should be done had been left on Mr. James Burchard Rugemalira. He also confirmed that his appointment into the Board of Directors of the Respondent had a backing of minutes and the Board Resolution of the 4th petitioner and a copy could be supplied to the court, if so directed by the Court. On the question whether his Directorship in the Respondent was registered with the Registrar of Companies, the answer was that it was the responsibility of the 4th petitioner to notify the Respondent its nominees and termination of representations on the Board of the Respondent. That was done. It was then the duty of the Company Secretary of the Respondent to file or remove the names of the Directors of the Respondent from the records of the Registrar of the Companies, on the basis of the communications given by the 4th petitioner. The re examination by Dr. Tenga focused on the details of the notice which was given by Receivers/Managers of which Mr. Somji replied that it was not possible to tell whether the notice was reference to the debenture dated 6th April, 2001. The witness confirmed knowing that the respondent was indebted to Citibank but he said the person having much information was the other Director, Mr. James Burchard Rugemalira. A question on format and procedure for notification about appointments and terminations of Directorship representation on the Board of Directors of the Respondent was answered that communication by letters was

adequate and proper. Mr. Somji said he was also aware of changes having taken place in the Directors' names that had been filed by the Respondent with the Registrar of Companies without following any particular procedure. Finally, Mr. Somji noted that even though Article 5 (a) of the Articles of Association of the Respondent states that the general meeting, ordinary or extra ordinary shall, appoint any number of directors, the Respondent refused to convene any general or extra ordinary meeting and/or proper. Board meetings and that even the extra ordinary general meeting that was requisitioned by the 4th petitioner was not convened by the respondent. On the other hand Mr. Anael Patrick Kavishe, one of the Receiver/Managers of the Respondent was the witness presented by the Respondent to prove the validity of the Debenture. His evidence was that, upon his appointment by the Citibank Tanzania Limited, his first duty was to check on the validity of the Debenture. What he did was to establish whether the Debenture was a document duly registered with the Registrar of Companies. He got confirmation from the Registrar of Companies that the Debenture was duly registered in May 2001. In short that was the only evidence tendered to support what was deposed by Gotfrid Stolis Tesha in his counter affidavit at paragraph 7. During cross examination by Mr. Daffa and Dr. Tenga, the witness for the respondent admitted having read all the clauses of the Debenture and having carried out due diligence on the respondent. However, he failed to confirm to the court on whether he was acting as an Agent of the Citibank Tanzania Ltd as he had told the court earlier, in examination in chief, or he was an Agent for the respondent. The question which follows now is whether the invalidity of the Debenture has been proved. The contention by the fourth petitioner is that although the Debenture - Annexure VIP 6 is shown to have been made pursuant to a Resolution of the Directors of the Respondent dated 19th February 2001, there was no proper meeting convened for that purpose. From what is deposed in the affidavit of 31 March, 2003 of Mr. James Burchard Rugemalira, in paragraphs 6,7 and 8 and the oral evidence of Mr. Riaz Hussein Somji, in February 2000, the 4th petitioner had only one Nominee Director in the Board of the Respondent. It was Mr. Riaz Hussein Somji. Mr. Riaz Hussein Somji testified that during the whole period of his directorship in the Board of the Respondent, he neither received a notice for a meeting nor agenda, let alone the agenda for the Debenture dated 19th February 2001 whose validity is now being contested. The attention of this court was drawn to Article 7 of the Articles of Association of the Respondent which gives the necessary quorum for transaction of business. This court also takes note that there was neither Minutes nor a Resolution brought by the Respondent to prove the validity of the Debenture. While submitting in Court in defending the validity of the Debenture, Dr. Twaib cautioned this court that even if the court will find that the Debenture is defective, the 4th petitioner has not made any prayer regarding the defect of the Debenture. He requested the Court to ignore the pleadings as of no particular consequence. He also cautioned the court that the Debenture Holder, that is Citibank Tanzania Ltd is not a party to these proceedings and it would be prejudiced if the Debenture is invalidated by the court because it would be condemned unheard because of internal problems between the Respondent and the 4th petitioner. Dr. Twaib is of a view that the obligation of the Citibank Tanzania Ltd was only to ensure that the Respondent registered the Debenture. Once that is

done, the Debenture became enforceable against the Respondent regardless of any allegations of defects. After all, the Debenture was registered and made a public document in May 2001 and all this time the 4th petitioner stood by doing nothing about it. Dr. Twaib concluded that the 4th petitioner cannot now be heard to deny the validity of the Debenture. According to Dr. Twaib, the inside dealing rule has now been developed to protect innocent parties like the Citibank Tanzania Ltd. Let me comment that there was no witness from the Registrar of Companies to confirm before this court whether the Registrar ascertains on the validity of the Debenture before accepting the same for registration and custody. If the Registrar is merely a custodian of the documents the argument by Dr. Twaib will not assist him. Registration is not conclusive evidence of the validity of the Debenture. Mr. Lugaiya for the second petitioner submitted that the inside dealing rule requires that the individual directors who commit fraudulent acts should be personally responsible and not the Respondent. As for the omission by the 4th petitioner for prayers in the invalidity of the Debenture, Mr. Lugaiya said the court should not hesitate to make a proper order in the event that the Debenture is found to be invalid by this court because the finding will support the petitioner prayers that Anael P. Kavishe and Gotfrid s. Tesha (the Joint Receivers/Managers) of the Respondent, should hand over to the Provisional liquidator, all assets of the Respondent. Dr. Tenga on the other hand, adopted the testimony of Mr. Riaz Hussein Somji and the affidavit of Mr. James Burchard Rugemalira and emphasized that the Respondent failed to contradict the evidence of the 4th petitioner, that there was no valid Board Resolution of the Respondent that authorized the creation of the said Debenture. Dr. Tenga said that although Mr. Kavishe, the Receiver/Manager came to Court to give evidence against the invalidity of the Debenture, he avoided bringing a copy of the Body Resolution which actually is the central issue controlling the validity of the Debenture. Dr. Tenga relied on the affidavit and oral evidence of the 4th petitioner, that the Debenture was invalid for want of proper authority and that had not been contradicted by the respondent. He prayed for a declaration that the Debenture is invalid. I have thoroughly given consideration to the evidence given by both sides in these proceedings. The affidavits deposed by Mr. James Burchard Rugemalira and the annexures as well as the oral evidence of Mr. Riaz Hussein Somji and the evidence of Mr. Anael P. Kavishe. The 4th petitioner's evidence show that Mr. Riaz Hussein Somji was the only bonafide Director in the Respondent, appointed to represent the 4th petitioner, in the period between February, 2000 and April, 2001. The purported Debenture is alleged to have been authorized by a Board Resolution dated 19th February, 2001. The testimony of Mr. Riaz Hussein Somji is that he never attended any Board Meeting during his Directorship I am satisfied that without Mr. Riaz Hussein Somji being given Notice to attend the Board Meeting, as required by Article 12 of the Respondent's Articles of Association and consequently without his haVing attended any such Board meetings, in terms of Article 7 of the Articles of Association of the Respondent, there could not have been the necessary quorum to pass a valid and binding Board Resolution of the Respondent. I therefore hold that the Debenture created by the Respondent on 6th April, 2001 under a purported Resolution of the Respondent dated 19th February, 2001 is invalid for want of binding legal authority of the Respondent to issue such instrument. It has not

been disputed by the Respondent, that the Notifications by the fourth Petitioner of the appointment of Mr. Somji and termination of Mr. Ahmed Daya as shown in Annexure VIP 3 of 24th February, 2000, and Annexure VIP 4 of 14th June, 2000 were received by it. It seems to me that the Respondent was of a mistaken view that the right to appoint Directors was in terms of Article S (a) of the Articles of Association, only vested in General Meetings. According to undisputed evidence of Riaz Somji, and paragraphs 24,27,28,29, 30, 31 and 32 of the plaint in Civil Case No. 427 of 2001, (High Court) (DSM Registry) produced in this Court by the 4th Petitioner as Annexure VIP2, the 4th Petitioner, requisitioned for an Extra Ordinary General Meeting to take place on 10th July, 2000, but the Respondent refused to convene and hold such requisitioned Extra Ordinary General Meeting. Certainly, Article S (a) of the Articles of Association of the Respondent cannot be construed to mean that only General Meetings have authority to appoint Directors of the Respondent. In my considered opinion, the proper construction of Article Sea) of the Articles of Association of the Respondent, is that a General Meeting has authority to increase the number of Directors beyond the initial number of five Directors, two representing the 4th Petitioner and three presenting the majority shareholder. This can be done under the following circumstances: One, where the powers of the shareholders to appoint their representative Director became withdrawn by consent of the two shareholders. Two, the general meeting abandons the requirement that the quorum of the Board of the Respondent requires at least one Director nominated by each shareholder present. While the total number of Directors on the Board of Directors of the respondent remained five, the 4th Petitioner had a right to appoint or terminate the two members it may have appointed on the Board of Directors of the Respondent. Article Sea) should not be read in isolation of Articles S(b) and Article 11 of the Articles of Association of the Respondent. They have to be read together. It is clear from Article 11 that each shareholder has the right to appoint some of the Directors on the Board of the Respondent. Once the right has been exercised, each shareholder also has the right to terminate such appointment. It is disingenuous on the part of the Respondent to fail or refuse to convene proper Board and General Meetings, or to fail to register with the Registrar of Companies the name of Mr. Riaz Hussein Somji as a Director of the Respondent and to fail to de-register the name of Ahmed Daya whose tenure of Directorship was terminated by the Shareholder who appointed him, namely the 4th petitioner, since February

2000. While the Respondent had knowledge of Mr. Ahmed Daya's termination, that he had no authority to represent the 4th petitioner since June 2000, it allowed him to sit in the meeting of February, 2001. It is not clear in which capacity Mr. Daya sat on the meeting and for whose benefit. By then Mr. Daya had no authority to commit the 4th Petitioner with any matter. He was no longer its representative. As Article 7 of the Articles of association of the Respondent required at least one nominee in the Board of the Respondent so as to get the necessary quorum for transaction of business. This obligation by the 4th petitioner was discharged by the nomination of Mr. Somji in February, 2000. The nomination was dully communicated to the Respondent. It then follows that the appointment of the 4th

Petitioner of a second Board Member was only exercised as a matter of right and not an obligation. Such right was however, exercised by the 4th Petitioner in October, 2001, by the re-appointment of Mr. James Burchard Rugemalira back into the Board of Directors of the Respondent. Perhaps it is important for me to go back to the point which was raised earlier by Dr. Twaib, on the fate of the Citibank, in the event that the Debenture would be found invalid. Dr. Twaib had submitted that such a finding would unfairly prejudice Citibank because they would be condemned unheard. Dr. Tenga correctly replied that the petition was advertised in February, 2003. The advertisement meant due Notice given to all the Creditors and Parties of the respondent, Citibank Tanzania Ltd being no exception. These are winding up proceedings which do not require specific service. That is why there is always advertisement. If the Citibank Tanzania Ltd was interested to be heard, the procedure for it to be heard is well prescribed by Rules 33, 34 and 35 of the Winding Up Rules 1929. The Respondent has no right to speak for a third party, namely the Citibank Tanzania Ltd, who has elected not to be heard by requesting this court not to perform its duty. I would add that, I find it very curious indeed that Citibank Tanzania Ltd, with all the prior notices it was given by the 4th Petitioner as revealed to this court in paragraphs 14, 15, 16 and 17 of Mr. James Burchard Rugemalira's affidavit dated 31st March, 2003 chose not to take steps to perfect the Debenture. Instead, it proceeded to appoint Receivers/Managers of the Respondent in January, 2003, under a defective Debenture, whose defect it was made aware of on 11th December, 2001. The 4th Petitioner served upon it with copies of the Complaint and Chamber application in Civil Case No. 427 of 2001, which were produced to the Court by the fourth Petitioner as Annexures VIP 14 and VIP 15. This court takes note that Mr. Kavishe had also told this court that he regarded himself as an Agent of Citibank Tanzania Ltd. There is therefore no doubt that he will have been reporting and showing to Citibank Tanzania Ltd, the affidavits of the fourth petitioner filed in Court, particularly paragraphs 13, 14, 15, 16, 17, 19 and 20 of the affidavit of Mr. James Burchard Rugemalira dated 31st March,

2003. The paragraphs make reference to Citibank Tanzania Limited. This means that if the Citibank Tanzania Ltd was disputing the pleadings of the fourth petitioner, which they had been made aware of as early as 31st March, 2003, it could have filed a counter affidavit to answer the assertions of James Burchard Rugemalira. The Respondent could then have properly adopted the same as part of its evidence. However, nothing of the sort has been done. The Respondent was given leave to file a Counter Affidavits by 4th April, 2003. It was an opportune time to bring affidavit evidence from appropriate officers of the Citibank Tanzania Ltd. Another opportunity was lost on 22nd April, 2003, when the Court granted the Respondent leave to call witnesses to prove the validity of the Debenture. The Citibank Tanzania Ltd Officials would have then told the court what they had. Both opportunity were not used. This court wonders how it should protect a person who is deliberately not willing to be heard by the court. Dr. Twaib for the Respondent made a submission that the 4th Petitioner is estopped to challenge the validity of the Debenture because it was registered with the Registrar of Companies in May, 2001, and since then, the 4th Petitioner did

nothing. Under such circumstances, the 4th Petitioner should either be estopped or should be taken to have waived its right to object to the validity of the Debenture. With all due respect to Dr. Twaib, this court disagrees. In the first place, there are no pleadings in court by the Respondent that the 4th Petitioner was late to complain about the invalidity of the Debenture. All that the Respondent said in paragraph 7 of the Counter affidavit of Gotfrid Stolis Tesha dated 4th April, 2003, in reply to paragraphs 13 and 14 of James Burchard Rugemalira's affidavit dated 31st March, 2003 when the validity of the Debenture was being challenged was that the petition was not the proper forum to challenge the validity of the Debenture. Nevertheless, the 4th Petitioner told the court in paragraph 11 of James Burchard Rugemalira's reply to the Counter Affidavit of Gotfrid Stolis Tesha that the 4th Petitioner was entitled to challenge the Debenture upon being made aware of its existence, and that knowledge of this particular Debenture dated 6th April, 2001 was first gained by the 4th Petitioner through these proceedings. There is no evidence brought by the Respondent to contradict the 4th Petitioner on this point. I would also say that the Citibank Tanzania Ltd had a moral duty either to inform or find out from the 4th Petitioner, the status of the Debenture that the Respondent had issued to it in February, 2001 when the fourth Petitioner made Citibank Tanzania Ltd aware on 11th December 2001 that the Respondent was conducting its business irregularly. What is more, is the failure by the Respondent to call Ahmed Daya and some Officers from the Citibank Tanzania Ltd to tell the court the other side of the coin on the challenged Debenture. That was done despite of the fact that the Respondent was aware that she had not filed documents in court to prove the validity of the Debenture. The only prima facie conclusion to be drawn from the conduct of Citibank Tanzania Ltd, is that, perhaps Citibank Tanzania Ltd was actually running the business of the Respondents Company and was part of the problems of the Respondent. It is therefore not surprising that the Citibank Tanzania Ltd did not bring any witness or act upon the invitations of the 4th Petitioner to join efforts to request the court to appoint independent inspectors to check on the irregularities of the Respondent, and an Independent Receiver/Administrator of the Respondent for reforming and recapitalizing the Respondent and turning it round to a going concern status in order to save the operating licence of the Respondent. This invitation was made way back on 7th January 2002 (Annexure VIP4). There is nothing on record to tell the court what steps were taken by the Citibank Tanzania Ltd upon receiving Annexures VIP8, VIP14 and VIP 15. What is clear is that the Citibank Tanzania Ltd, almost one year later, on 14th January, 2003 appointed Receivers/Managers of the Respondent. By then it was too late to save the operating licence of the Respondent and the 3rd Petitioner cancelled the Respondent's operating licence because of the continued breach of material operating licence conditions. It would seem to me that either Citibank Tanzania Ltd was negligent in not taking the necessary steps proposed by the 4th Petitioner, that would have saved the operating licence of the Respondent, or it deliberately allowed the licence to be lost, but in both situations Citibank Tanzania cannot be escape being blamed. Its wide experience is recognised. Its conduct in as far as the Respondent is concerned is surprising. This court having held that the Debenture dated 6th April, 2001 that appointed the Receiver/Managers

of the Respondent became invalid in as far as Citibank Tanzania Ltd is concerned, at latest on 11th December, 2001, when, the Debenture Holder, Citibank Tanzania Ltd was served with papers, from which it should have been concerned and taken steps with the Respondent to perfect the defects in the Debenture, there no further point for me to consider the issue whether or not the Receivers/Managers have the right to operate side by side with the liquidator. However, since determining the issue may guide the Commercial Community in future instances, where there are defects in the Debenture, I will consider the issue in relation to the powers of the Liquidator. The important provisions of the law which shall guide these proceedings are as follows:

1. In terms of Section 174 (2) of the Companies Ordinance Cap. 212, the Winding Up Proceedings of the Respondent Company commenced on 17h February, 2003 when the Petition was presented and filed in this court.
2. Under section 182 of the Companies Ordinance, Cap.212, the court is empowered to appoint a Liquidator or Liquidators for purposes of conducting the proceedings in the Winding Up of the Respondent and performing such duties in reference thereto as the court may impose. As already stated the name of the person proposed by the first, second and third Petitioners to be the Provisional Liquidator is not disputed by any of the parties: There is no reason for not approving that person.
3. Under Section 173 of the Companies Ordinance Cap.212, after 17h February 2003, when the Petition for Winding Up the Respondent had already been presented to this court, any attachment distress or execution up in force against the estate of the Respondent became void to all intents.
4. Under Section 179 of the Companies Ordinance Cap.212, the Court has power to appoint some other person to act as the official Receiver instead of the official Receiver that is the Administrator General and Assistant Administrator General.
5. Under Section 188 of the Companies Ordinance Cap.212, once the Liquidator or the Provisional Liquidator is appointed by the court, he shall take into his custody, or under his control all the property and things in action which the Respondent is or appear to be entitled
6. Under 190 (2) (g) of the Companies Ordinance Cap.212, the Liquidator shall have power with the sanction of the court to appoint an agent to do any business which the Liquidator is unable to do for himself.
7. Under Section 207 of the Companies Ordinance Cap.212, the court has a right to adjust the rights of the contributories among themselves and distribute any surplus among the persons entitled thereto.

8. Under Section 210 (1) of the Companies Ordinance Cap.212, the court may at any time after making of a Winding Up order, summon before it any officer of the Respondent or person known or suspected to have in his possession any property of the Respondent or supposed to be indebted to the Respondent, or any person whom the court deems capable of giving information concerning the promotion, formation, trade, dealings, affairs or property of the Respondent.
9. Under Section 211 of the Companies Ordinance Cap.212, the court has power to require the attendance of any director or other officer of the Respondent at any meeting of Creditors or of contributories for the purpose of giving information as to trade, dealings, affairs or property of the Company.
10. Under Section 269 (1) of the Companies Ordinance Cap.212, if in the course of the Winding Up of the Respondent it appears that any business of the Respondent has been carried on with intent to defraud creditors of the Respondent, or creditors of any other person, or for any other fraudulent purpose the court on application of the Liquidator or Creditors, or contributory of the company, may if it thinks proper so to do, declare that any % of the creditors, whether past or present of the Company, who were knowingly parties to the carrying on the business in manner aforesaid shall be personally responsible without any limitation of liability for all or any of the debts or other liabilities of the Respondent as the court may direct.
11. Rule 76 of the Companies (winding Up) Rules 1929, provides that the duties imposed on the court in a Winding Up by the court, with regard to the collection of the assets of the Respondent, and the application of assets in discharge of the Respondent's liabilities shall be discharged by the Liquidator as an Officer of the Court.
12. Rule 77 of the Companies (Winding Up) Rules, 1929, states that any contributory, trustee, receiver, banker or agent or officer of the Respondent shall on notice from the Liquidator pay, deliver, convey, surrender or transfer to or into the hands of the Liquidator any money, property, books or papers, which happen to be in his hands for the time being and to which the Respondent is prima facie entitled
13. Rules 89, 90, 91, 92, 93, 95, 100, 105, 106, 107 and 108 of the (Winding Up) Rules 1929 require every creditor of the Respondent to prove his debts and claims, against the Respondent, to the Liquidator. In particular, Rule 93 provides that an Affidavit proving debts shall state whether the Creditor is or is not secured, and Rule 105 provides that the Liquidator shall examine every proof of debts lodged with him, and the grounds of the debts.
14. Rules 104 and 113 of the Companies (Winding Up) Rules, 1929, provide for the mechanism for the hearings by the Liquidator in the first instance and where parties are dissatisfied, they have the right to appeal to the court.

15. Section 163 of the Companies Ordinance, Cap.212 gives the High Court exclusive jurisdiction to wind up any Company registered in Tanzania. It is obvious from the above cited provisions of the Law of the country that once the Winding Up proceedings of the Respondent commenced on 1st February, 2003, all actions by Receivers/Managers of the Respondent were accordingly stayed. This legal position is applicable even to Receivers/Managers appointed under a valid Debenture. Regarding the issue of the appointment of Experts by the Liquidator to investigate the Respondent Company and Citibank Tanzania Ltd, I note that the prayer by the 4th Petitioner in Annexure VIP 1 only referred to the investigations of the Respondent and the Majority Shareholder of the Respondent. When Mr. Cuthbert Tenga, Advocate for the 4th Petitioner made his submission in court on 22nd April, 2002 he raised high concern about the conduct of the Citibank Tanzania Ltd. Given the views and observation already made above, regarding the conduct of Citibank Tanzania Ltd, I am of opinion that the interest of justice requires a thorough investigation of the Respondent and its relationship with the Citibank Tanzania Ltd. The Respondent has not convened Board or General Meetings since 2000. It is necessary to establish whether there were other businesses done by the Respondent that were carried out without proper authority, in the same way as the Debenture dated 6th April, 2001 or whether the refusal by the Respondent to convene proper Board and General meetings was a means to cover up fraudulent acts as pleaded by the 4th Petitioner in paragraphs 12, 17, 18, 20 and 21 of the affidavit of James Burchard Rugemalira dated 31st March, 2003. I have had to make this long ruling because the Petition has special circumstances. First, the claims of the 4th petitioners alone are about USD 40.0 million. This is before considering other creditors of the Respondent who did not choose to be heard by the court at this stage. Secondly, there is also an issue of USD 14.0 million cash collateral with Citibank Tanzania Ltd which in terms of Annexure VIP 11 was represented by the Respondent to be available as a bond to the third Petitioner for the Respondent's performance of its licence obligation. This was raised by the 4th Petitioner. Lastly, there is also on the scene, Receivers/Managers appointed under a Debenture which I have held to be invalid. Let me come to the final part of this ruling and that is the prayers. Having exposed the circumstance pertaining to the petition and the opinion of this court, I now order as follows:
- (a) On the basis of the application by the Petitioners to this court under Sections 167 (e) and (f) of the Companies Ordinance Cap.212 TRI TELECOMMUNICATION TANZANIA LIMITED shall hereby be wound up and it is hereby ordered to be wound up.
 - (b) Given the reasons already stated elsewhere in this ruling, the Debenture dated 6th April 2003, issued by the Respondent to Citibank Tanzania Ltd and Citibank N.A. Bahrain is hereby declared invalid and cannot bind the Respondent.

- (c) Originally the Petitioner's prayed for an appointment of a Provisional Liquidator. The second Petitioner told the court that the circumstances have now changed given the evidence which was brought by the fourth Petitioner. They are now asking for a Liquidator instead of a Provisional Liquidator. Having considered all aspects, I appoint Mr. Peter Clever Bakilana as the Liquidator of the Respondent, under section 182 of the Companies Ordinance, Cap. 212, with orders that:
- i) Anael P. Kavishe and Gotfrid S. Tesha (the Joint Receivers/Managers) of the Respondent under the invalid Debenture) shall prepare two statements of Affairs of the Respondent namely, as of 14h January, 2003, and as at 1:1h June, 2003 in accordance with the format of Form No.22 and lists 1)1" to I'M" of the Companies Winding Up, Rules, 1929 properly sign the statements, handover and Account for all the affairs of the Respondent to the Liquidator, as required by section 188 of the Companies Ordinance Cap.212 and Rules 76 and 77 of the Companies(Winding UP) Rules, 1929. ii) The Liquidator shall exercise his powers under Section 190 (2) (g) and, in consultation with all the Petitioners, shall appoint experts to investigate and submit to the court for further orders, the Respondent's Affairs since 1999 to date, including the relationship of the Respondent with Citibank Tanzania Ltd on the position of the USD 14.0 million cash collateral with Citibank, that the Respondent represented was available as performance bond for the Respondent's performance of its material obligation under the licence. iii) The Liquidators Remuneration to be determined by reference to section 187 of the Companies Ordinance, Cap.212 and to be based upon 12.5% gross realization. iv) The costs of the Liquidator for providing any security as may be determined by the court under the provisions of section 184 (e) of the Companies Ordinance Cap.212 or his costs and those of the experts he shall appoint, be defrayed from the Assets of the Respondent that are within the hands of the Liquidator.
- v) The wishes of the petitioners to be sought in every important matter that affects their interests. vi) The costs incurred by Anael P. Kavishe and Gotfrid S. Tesha as Joint Receivers/Managers of the Respondent and taken out of the Assets of the Respondent shall be recovered by the Liquidator from the Citibank Tanzania Ltd unless the court orders otherwise. vii) The names of the Directors, Company Secretary and other officers of the Respondent who handed over to the Receivers/Managers, the Affairs of the Respondent to be disclosed in writing by the Receivers/Managersto the Liquidator as evidence of a signed statement to the handover certificate by Receivers/Managersto the Liquidator. viii) The Liquidator to recover any money paid by the Receivers/Managersto Citibank Tanzania Ltd, out of the Assets of the Respondent since 14h January, 2003. ix) All Creditors and Contributors including all the Petitioners are required to prove to the Liquidator the debts and claims they allege against the Respondent, and the Liquidator shall examine all proofs of debts and claims as provided for under Rules 89,90,91,92, 93, 95, 104 and 105 of the Companies(Winding Up) Rules 1929.

- x) Save as expressly stated in the above orders or as ordered by the Court here below, the Liquidator shall be guided strictly by the relevant provisions of the Companies Ordinance, cap.212, and the Companies (Winding Up) Rules, 1929 unless ordered otherwise by the court.
- (d) That at an opportune time, the court shall adjust the rights of the two shareholders in the Respondent as required by Section 207 of the Companies Ordinance, Cap.212.
- (e) That any of the Creditors that the Liquidator will prove to have carried out any business of the Respondent with intent to defraud other creditors of the Respondent or Creditors of any other person, whether past or present, such creditors, who were knowingly parties to the carrying on the business in such manners, shall be personally responsible, without any limitation of liability for all or any debts or other liabilities of the Respondent as mandated by Section 269 (1) of the Companies Ordinance, Cap.212.
- (f) That the costs of this Petition be borne by the Respondent
- (g) In terms of Rules 38 of the Companies (Winding Up Rules (1929) the Petitioners are required to leave forthWith, at the Registrar's Office, all the documents for the purpose of enabling the Registrar to draw up and complete the above orders for purposes of effecting Notices for Services of the Court orders. It is accordingly ordered. N.P.KIMARO, JUDGE 07/06/2003

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