

TANZANIA / JUDGMENT

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IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA (COMMERCIAL DIVISION) AT
ARUSHA MISC. COMMERCIAL CAUSE NO. 2 OF 2023 IN THE MATTER OF THE COMPANIES ACT,
CAP. 212 AND IN THE MATTER OF WINDING UP OF THE PROMOTION OF RURAL INITIATIVES
AND DEVELOPMENT ENTERPRISES LIMITED BETWEEN PROMOTION OF RURAL INITIATIVES
AND DEVELOPMENT ENTERPRISES LIMITED..... 1st PETITIONER THE
TREASURY REGISTRAR.....2nd PETITIONER THE ATTORNEY
GENERAL.....3rd PETITIONER AND MARIAM OMAR MATOTOLA
AND 233 OTHERS..... ..1st OBJECTOR 2nd OBJECTOR CRDB BANK
PLC..... ALLIANCE LIFE ASSURANCE COMPANY
LIMITED..... 3rd OBJECTOR

RULING

Date of Last Order: 22/06/2024 Date of Ruling: 16/08/2024 GONZI, J. The paradoxical circumstances pertaining to the present petition are bemusing rather than amusing. The 2nd and 3rd Petitioners, after "winning" Court proceedings in Commercial Case No. 130 of 2016 by consent settlement Order of 18th October 2018, were able to secure ownership of the i 1st Petitioner Company which is also known as PRIDE Tanzania Limited, from its original founding individual members. A year later, they commissioned a special audit. The special audit report by the Controller and Auditor General of the Government (CAG) revealed that by 31st October 2019 the 1st Petitioner Company had total assets worth TZS. 19,973,740,840/= and had accumulated liabilities of TZS. 130,695,799,534/=, hence insolvent and unable to pay its debts. Upon this discovery, the new owner of the 1st Petitioner Company is now seeking to have the 1st Petitioner Company wound up by order of the Court on the ground of its inability to pay its debts (including debts owed to its 234 employees, CRDB Bank PLC and Alliance Life Assurance Ltd- the objectors herein). On the other hand, as among the creditors of the 1st Petitioner company, its 234 employees, CRDB Bank PLC and Alliance Life Assurance Company Limited, are objecting to the winding up of PRIDE Tanzania Limited unless and until their debts are firstly paid up in full by the 1st Petitioner Company or the Government that now owns the 1st Petitioner Company! The 234 employees of the 1st Petitioner Company, in addition, are demanding that the company should not be wound up until their fate in public service is determined by the Government as the new owner the 1st Petitioner Company. The 2nd Petitioner as the new owner of the company on behalf of the Government, on the other hand, maintains that the 234 employees are employees of

the 1st Petitioner Company as a separate legal entity and not of the owner of the company and so are its assets and liabilities. A myriad of interesting legal fantasies related to labour law, corporate law and insolvency law ensue. Some of them are the subject of this Ruling. 2 The Petitioners filed this case under Sections 279(1) (d) and 281 of the Companies Act, CAP 212 seeking for orders that:

- (a) The Company be wound up by this Honourable Court under the provisions of Section 279(1) (d) and 281(1) of the Companies Act CAP 212.
- (b) The appointment of a liquidator pursuant to section 295 (1) of the Companies Act, CAP 212 as revised; and
- (c) Such further orders and reliefs as this Honourable Court deems just, equitable and fit to grant. The Petition was verified by an Affidavit verifying petition sworn by Seraphine Tamba, Principal Officer of the 2nd Respondent. The petitioners stated that the 1st Petitioner is a Limited Liability Company whose new Board of Directors was duly appointed between June and August 2022 to undertake the roles and responsibilities of Board of Directors of the 1st Respondent. Annexure TR1 is a letter from the Office of Registrar of Companies at BRELA dated 23rd May 2023 showing the current members of the Board of Directors of the 1st Petitioner Company. The 2nd Petitioner is a Body corporate established under the provisions of the Treasury Registrar (Powers and Functions) Act, CAP 370 and successor in title of Consolidated Holdings Corporation vide Government Notice No.2023 published on 27th June 2014. 3 The third Petitioner is joined as the necessary party since the 1st and 2nd Petitioners are owned by the Government of Tanzania. According to Annexure TR 2 which is the Memorandum and Articles of Association of the 1st Petitioner Company, it was incorporated in 1993 with its headquarters at Arusha. The Memorandum and Articles of Association of the 1st Petitioner Company show that the 1st Petitioner was incorporated as a Company limited by guarantee with the first subscribers being:
 - 1. Iddi Simba, the Managing Director of International Finance Advisory Services Limited Dar es Salaam;
 - 2. Jonathan Campaigne, Chairman of Council for International Development, Nairobi;
 - 3. S. Odunga, Deputy Principal Secretary, the Treasury, Dar es Salaam;
 - 4. Dr. M. A. Kigoda, Civil Servant, National Planning Commission, Dar es Salaam;
 - 5. D. S. Dandi, Civil Servant, Dar es Salaam;
 - 6. George Kahama, Director General, Investment Promotion Center, Dar es Salaam; and
 - 7. Mrs. C. Nsekela, Civil Servant, Dar es Salaam. Being a Company limited by guarantee, each of the above stated members subscribed to the MEMARTS of the Company and the amount for 4 which each of the 7 subscribers was liable on winding up of the company was prescribed as TZS 20,000/= (Tanzanian Shillings Twenty Thousand only). Article 8 of the Memorandum of Association states that: "Every member of the company undertakes to

contribute to the assets of the company, in the event of its being wound up while it/he or she is a member or within one year afterwards, for payment of the debts and liabilities of the company contracted before it/he or she ceases to be a member, and the costs, charges and expenses of winding up, and for adjustment of the rights of the contributories among themselves such amount as may be required not exceeding Tanzania Shillings Twenty Thousand only (Shs.20,000/=)" In 2016, there was instituted in the High Court Commercial Division at Dar es Salaam, Commercial Case No. 130 of 2016 between Promotion of Rural Initiative and Enterprises Tanzania Limited (PRIDE) as the Plaintiff and the Ministry of Finance and Planning and the Attorney General as the 1st and 2nd Defendants respectively. The dispute was on ownership of, the 1st Petitioner Company. On 18th October 2018, however, the parties to Commercial Case No. 130 of 2016 reached an amicable settlement and prayed for the Court to mark the case as settled on the terms agreed out of Court. This Court on 18th October 2018, therefore, recorded the amicable settlement and pronounced an order that: 5 "Having heard the counsel appearing before me, I have noted that the only issue that was in controversy was on the ownership of PRIDE Tanzania and the same has been resolved amicably as submitted by the Counsels. Therefore, I hereby enter a consent Judgment to the effect that, PRIDE Tanzania is the property of the Government of the United Republic of Tanzania. The Counterclaim is hereby marked settled. I give no order as to costs. It is so ordered." The proceedings and Orders in Commercial Case No. 130/2016 were attached to the present Petition as Annexure TR 3. A letter from the Ministry of Finance and Planning, dated 9th September 2020 addressed to the 2nd Petitioner herein was attached as TR4. It instructed the 2nd Petitioner to put the 1st Petitioner under liquidation because a report of a team of experts that had done actuarial valuation of the 1st Petitioner company had found that actually the 1st Petitioner company had more debts/liabilities than its assets. The letter therefore concluded that the 1st Petitioner Company had no operating capital and was unable to pay its debts. Annexure TR 5 to the Petition is the Special Audit Report of February 2020 by the Controller and Auditor General of the Government. It shows the status of Assets and Liabilities of PRIDE Tanzania Limited up to 31st October

2019. At page 50 of the CAG's report, it shows that by 31st December 2016 PRIDE Tanzania Limited had total assets worth TZS. 85,415,172,678 and 6 liabilities of TZS. 148,908,757,926/= while by 31st October 2019 it had total assets worth TZS. 19,973,740,840/= and liabilities of TZS. 130,695,799,534/=. The CAG Report concluded by advising the Government to take immediate measures to mitigate against further losses caused by uncollected debts, liabilities under suits by landlords who have rented out their premises to PRIDE Tanzania Limited, Staff benefits and other debts including those owed to Financial Institutions. Annexure TR 6 is a Special Resolution of the new Board of Directors of PRIDE Tanzania Limited in a meeting held at Kibaha, Coast Region from 17th to 21st June 2023. The new Board of Directors that was appointed between June and August 2022, resolved that: "In consideration of financial incapacity, mismanagement of funds and poor management of PRIDE Tanzania Limited and after due consideration of the available options to salvage the same, the Board of Directors resolved that:

1. The Company be put under liquidation with immediate effect in terms of the Companies Act, CAP 212.
2. Considering the fact that the company is insolvent, the winding up of the same be though the Court which shall, for the purpose appoint the Liquidator in accordance with the Companies Act, CAP 212. 7
3. The Office of the Treasury Registrar being the custodian of Government assets by virtue of the Treasury Registrar (Powers and Functions) Act, CAP 370 shall, in collaboration with the Office of the Solicitor General, facilitate the filing of a Petition for winding up of the Company in Court pursuant to the Companies Act, CAP 212." It was from that background that the present petition was ultimately filed in this Court seeking winding up of the 1st Petitioner Company. The Petitioners were represented by Mr. Edwin Webiro, learned State Attorney assisted by Ms. Zamaradi Johanness and Mr. Zephania Elibariki Msuya, learned State Attorneys. Upon the petition being filed, it was advertised in Daily News and Habari Leo Newspapers of 16th August 2023. Three objectors showed up each claiming to be a Creditor of the 1st Petitioner Company and all three opposing or resisting the winding up of the 1st Petitioner Company. The first Objection was brought by "Unpaid Employees of the 1st Petitioner Company Collectively". They are 234 employees claiming a total of TZS. 6,601,945,723/= as of February 2021. They alleged that as their employer is a Government-owned institution, they have initiated Employment-related complaint with the Public Service Commission at Dodoma whereby in that case the Complainants are Mariam Omar Matotola and 233 Others versus PRIDE Tanzania Limited, Treasury Registrar and the Ministry of Finance and Planning. They have hired Mr. Baltazar Kitundu, learned Advocate, as their 8 Advocate therein. The employees appeared in this petition claiming to be unsecured Creditors of the 1st Petitioner Company and that their Claims include unpaid salaries, accrued leave, acting allowances and subsistence allowances. They stated that they oppose the petition at hand because it is improperly before the Court, based on resolution of Board of Directors who are different from the members who originally incorporated the Company. They also complained that no annual returns have been filed from 2017 and no audited financial statements exist. They are afraid that winding up of the 1st Petitioner Company will leave them with empty hands as there will be no one to pay them their accumulated entitlements. They entered appearance through the services of Mr. Harun Msangi, learned Advocate assisted by Mr. Baltazar Kitundu, learned Advocate. The second Objector who entered appearance was Alliance Life Assurance Limited of Dar es Salaam. Their Claim against the 1st Petitioner is founded on Decretal sum emanating from Judgment and Decree in Civil Case No.58 of 2018 which they won against the 1st Petitioner Company and were awarded Decree for TZS. 869,882,239/= with interest at 7% per annum from the date of Judgment on 16th October, 2019. Their decretal sum by the time of entering appearance was allegedly TZS. 1,052,557,509.19. They have instituted Execution Applications No. 7 and No. 45 of 2023 which are still pending. Their objection is premised on the fear that winding up of the 1st Petitioner Company will make it evade its legal obligations to satisfy the decree and hence pre-empt the pending execution application. They challenge the

Special resolution to wind up the company as invalid for not being presented to the Registrar of Companies for registration. Mr. Simon 9 Lyimo and Mr. Phares Kabitina, learned Advocates, represented the Company. The Third Objector who entered appearance was CRDB Bank PLC. The Bank opposes the petition due to its unpaid debt of TZS 12,050,745,634/ = which emanates from unsatisfied Decretal sum it won against the 1st Petitioner Company. Mr. Denis Mworira, learned Advocate, represented the Bank. When the case came for hearing, Mr. Edwin Webiro, learned counsel for the Petitioners, took the podium and addressed the Court that the petitioners have complied with all legal requirements including publishing the petition as directed. He argued that they received notice of appearance from three objectors. He submitted that the petitioners have filed a list of appearance under Rule 105 (1) of Insolvency Rules and have filed a certificate of compliance as per Regulation 102(1) of the Insolvency Rules. He stated further that the Petitioners have filed skeleton arguments in Court to form part of their submissions. Mr. Webiro, learned Counsel, submitted that they have advertised the Petition again in Government Gazette of 22nd September 2023 and that all parties have filed notice of appearance. Mr. Webiro, learned Counsel for Petitioners, submitted that the Petition is brought under Section 279 (1) (d) and 251(1) of the Companies Act, CAP 212 and is supported by an affidavit verifying the petition.. He submitted that the 1st Petitioner is a company which was registered on 5/5/1993 with Certificate of Incorporation No. 22982. In 2016, the Company instituted Commercial Case No. 130/2016 against the Ministry of Finance and the io Attorney General on a dispute over ownership of the company. The parties to Commercial Case No. 130/2016 reached an amicable settlement and filed a deed of Settlement in Court. The Deed of settlement stipulated that the Company is owned by the Government of Tanzania by 100% and that the shares are held by the Government through the 2nd Respondent. Mr. Webiro submitted that the Government formed an audit team to audit the 1st Petitioner's assets and liabilities whereby it was found to be insolvent. The Controller and Auditor General of the Government (CAG) was appointed to conduct a special audit of the 1st Petitioner Company. The Special audit revealed that the 1st Petitioner Company had liability of TZS 130 billion in debts while its assets were only TZS. 19 billion. He submitted that in that regard, the Government saw that the best way forward was to combine it with SELF MICROFINANCE, however, that plan was also found to be not feasible. Therefore, a resolution by members was made to wind it up. He submitted that the ground advanced for winding up the 1st Petitioner Company is its inability to pay its debts. He submitted that the Petition is brought under section 279 (1) (a), (d) and (e) and section 281 of the Companies Act, Cap 212. He argued that section 279(1) (a), (d) and (e) of the Companies Act CAP 212 allows a company to be wound up by seeking an order of the Court due to its inability to pay its debts. He submitted that the Petitioners have attached to the Winding up petition a resolution for winding up of the company by order of the Court as annexure TR 6. Mr. Webiro submitted that the proof that the company is unable to pay its debts can be seen in the Special Audit Report by the CAG which is annexed ii as annexure TR 5. He argued that the Special audit report by the CAG, annexure TR-5, shows that the company is unable to pay its debts as it has more debts than its assets. He submitted that another evidence that the company is

unable to pay its debts, is the Notice of appearance by the objectors herein who are among the creditors of the 1st Petitioner Company. He submitted that the Notices by objecting creditors prove that truly they are creditors to whom the 1st Petitioner Company is unable to pay its debts. He argued that the CAG Report shows that among the creditors of the 1st Petitioner Company are its employees who are shown at page 25 of the CAG report. The other creditor who is an objector is CRDB and is shown at page 21 whose debt is TZS. 12billion shillings. Alliance Life Insurance are also shown as creditors at page 23 of the CAG report. Mr.Webiro submitted that this proves that the company is insolvent/unable to pay its debts and hence it should be wound up. Mr. Webiro referred the Court to Annexure TR-6, and said that it is the Members' resolution. He submitted that the members of the 1st Petitioner Company have resolved to wind up their company. He submitted that there are plausible reasons for winding up of the 1st Petitioner Company. He referred this Honourable Court to relevant authorities which are also included in their skeleton arguments. These included the cases of: Miniso Tanzania Company Ltd, Winding Up Cause No. 4/2021 by the High Court Commercial Division and China Chang Group Ltd, Winding Up Cause No. 113/2017. He argued that in the foregoing cases the Court accepted two reasons of inability to pay debts and presence of the resolution to wind up the company, as enough to issue an order for winding up of the companies under the 12 provisions cited and relied upon in the present petition. He also added the case of Winding Up of Benson Informatics Ltd (2020) where at page 6 thereof the Court held that the reasons for winding up include the company's inability to pay its debts or that the company has more liabilities than assets. He cited the case of Marlink Tanzania Limited where at page 4 of the Court held that inability to pay debt is a ground for winding up of the company. Mr. Edwin Webiro, learned State Attorney prayed that the orders sought in this petition be granted for winding up of the 1st petitioner Company. He concluded by submitting that the Petitioners propose Registration Insolvency Trusteeship Agency (RITA) to be the liquidator and that the said RITA has accepted to act as such as per annexure "OSG 3" in the counter affidavit. He submitted that if the winding up order is issued, it will not affect the objectors anyhow because all the creditors will submit their claims to RITA and they will be paid their debts in the process of wining up of the company according to law. He submitted that the 1st objector's objection on lack of 2/3 majority of shareholders to pass the resolution for winding up is not relevant as the company is owned by the Government through the second Respondent (Treasury Registrar). He submitted that the petitioners have attached annexure TR 1- which is from BRELA. It shows the owner of the 1st Petitioner Company as the Government. Mr. Mworja Denis, learned Advocate for CRDB Bank PLC-the Third Objector, adopted their counter affidavit filed in Court and submitted that the bank won a decree against the 1st Petitioner for TZS 12 billion in 2018. He 13 submitted that the decree is not yet executed. He submitted that they have not received any report that the 1st Petitioner has failed to pay its debts. He argued that the audited report is for the period from 2016 to 2019 while this petition was filed in 2023. He therefore submitted that there is no current financial report in existence as the report y CAG is over 4 years old now. He argued that Annexure TR-5 at page 50 shows the listed debts of the 1st Petitioner which is about TZS 130 billion. He argued that in the

petition, however, a different figure is given on the existing debt and therefore the financial reports are not reliable due to the difference on figures presented to Court. He submitted that the CAG report is not a conclusive proof of failure by the 1st petitioner to pay its debtors. Mr. Denis Mworira, learned Advocate, submitted that section 279(1) (a) of the Companies Act, CAP 212 was relied upon by the petitioners in this petition but the relevant section is section 280 whereby inability to pay debts is explained under section 280 (c) and (d) which show that the Court should be satisfied of certain requirements before issuing an order for winding up of the company. He submitted that in the case at hand, as the financial report is of 2016 to 2019, there is no current report on the financial situation of the company. He argued that the petitioners therefore, have not complied with the legal requirements. Mr. Mworira learned counsel argued that section 280(d) of the Companies Act, CAP 212 provides a requirement of proof of inability by the company to pay its debts where creditors file execution in Court against the company. In the present petition, he submitted, despite having a decree against the 1st Petitioner, the Objectors have not filed any execution application in Court at all in respect of which it has failed to pay. 14 He argued that the Bank as a creditor has not even demanded the 1st Petitioner Company to pay under the decree. He submitted that the Petitioners have not shown that they qualify to bring the petition under the legal provisions relied upon. Mr. Denis Mworira, learned Advocate, submitted that the cases of Marlink Tanzania Ltd (supra) and that of Benson Informatics Ltd (supra) are distinguishable in that their circumstances were different. He submitted that there were no objection raised against the winding up orders sought in those cases. He argued that the China Chang case (supra) at page 4 in the 1st paragraph, explains that under section 280 of the Companies Act, CAP 212 the petitioner seeking winding up order on the ground of inability to pay debts, should prove that she was given a demand note to pay the debt in question that there should have been an expiry of at least 21 days after which the members can proceed to pass a winding up Resolution. He submitted that, more importantly, the petitioner should have failed to pay the debt demanded. He argued that in the present case, that is not the case. On the Miniso Company Tanzania Ltd case (supra), he argued that at page 4 there is a requirement that financial statements should be presented showing the petitioner's financial status after expiry of the 21 days. Mr. Denis Mworira, learned advocate, submitted that in the counter affidavit filed by the petitioners on 21/09/2023, at paragraph 10, the petitioners themselves say that the petition at hand is vexatious. Therefore, Mr. Mworira prayed that the same be dismissed with costs. 15 Mr. Baltazary Kitundu, learned Advocate, adopted the affidavits of Mr. Harun Msangi learned Counsel representing the unpaid employees of the 1st Petitioner who are the first Objector. He argued that the Petitioners have admitted that they have identified the creditors of the company to include the 234 employees. He submitted that generally the argument by the Petitioner is that the present petition is based on inability to pay its debts. However, he argued, throughout the affidavit verifying the petition and the submissions by the Petitioners, the 1st Petitioner was not represented by its principal officers. He submitted that the affidavit was sworn by a Principal officer of the 2nd Petitioner and not of PRIDE Tanzania Limited. He argued that PRIDE Tanzania Limited was abandoned throughout. Mr. Kitundu, learned advocate, submitted that

despite winning the case in 2018 that declared PRIDE Tanzania Limited as a Government owned company, the Government has done nothing in PRIDE Tanzania Limited apart from the 2018 special audit. Her submitted that the 1st Petitioner was audited and was found to be indebted with no capacity to pay its debts which means that the 1st Petitioner was abandoned by the Government after having taken it over. He argued that the Government after abandoning PRIDE Tanzania Limited, is now coming through the backdoor for seeking winding up of the Company. Mr. Kitundu, learned advocate, submitted further that employees of the company are not creditors of the Government. He submitted that until 2017 the employees were at work and they were abandoned in 2018. He argued that after they were abandoned by the Government, they lodged their complaint with the Public Service Commission where their matter is still 16 pending till now and that the matter cannot proceed as there is this case on the same matter in Court. Mr. Kitundu, learned advocate, submitted that in this petition inability to repay the debts is advanced as a ground for winding up. He submitted that the Government after taking over PRIDE Tanzania Limited in 2018 should have paid the employees' debts some 5 years earlier under the procedures of resolution of labour disputes. Mr. Kitundu, learned advocate, submitted that in the present petition, the resolution for winding up was made by the 1st Petitioner's Board of Directors rather than the members of the 1st Petitioner Company. He submitted further that the four cases cited by Mr. Webiro, learned State Attorney, are all distinguishable as they are with respect to winding up of privately owned companies which have individual owners. He argued that the case at hand is owned 100% by the Government of Tanzania. He insisted that employees are not ordinary creditors of the company and as such they should have been paid by the Government that owns the company since the Government has not gone bankrupt and it does not reject the fact that it owns PRIDE Tanzania Limited. Mr. Kitundu, learned counsel, argued that the financial report accompanying the winding up petition should not have been one made by the CAG and, at any rate, the report is of 2019 hence outdated. He prayed that in the event that the Court, decides to proceed and grant the petition, the employees still pray that they be considered explicitly for payment in full 17 according to the procedures and the laws having in mind the laws governing employment and labour relation matters, MEMARTS of the Company, Public Service Regulations and any other provisions of the law. Mr. Simon Lyimo, learned Advocate for Alliance Life Assurance- an objector, also made his submissions. He adopted their affidavit opposing the winding up petition filed in Court on 14th September, 2023. He submitted that Alliance Life Assurance Limited is a creditor to 1st petitioner by way of decree in Civil Case No.58/2018 which awarded her TZS. 869,882,239/= . He submitted that the said decree has not been executed despite several attempts to try to execute it. He submitted that the last attempt to execute the decree was by Execution No.45/2023 at Dar es Salaam High Court sub- registry where it was struck out due to pendency of the present petition. He submitted that they oppose the winding up because of the following reasons. Firstly, Mr. Lyimo, learned counsel submitted, the petition is not accompanied by current financial position to show that the petitioner is not in operation. He submitted that section 279(1) (b) of the Companies Act, CAP 212 provides that the company should have failed to commence a business in a year after

incorporation or suspended its business in a whole year. He reasoned that the CAG report attached herein is of 2019 while the petition was filed in 2023. That was four years after the CAG's report. He argued that the period is too long and the affairs of the company might have changed in between and the first petitioner therefore might have been in a position to pay its debts. He argued that the CAG's report - Annexure TR 5, does not fit in the said section on inability by a company to pay its debts or 18 being insolvent since it does not substantiate the current financial statement and affairs of the 1st Petitioner Company. Secondly, Mr. Lyimo, argued, the special resolution attached to the petition as annexure TR 6 is invalid as it was not submitted to Registrar of Companies. The special resolution is mandatory under section 279(1) (a) and the resolution was passed but not by the proper authority. It also was not registered by Registrar of Companies at BRELA. The essence of notifying the Registrar of Companies is that he is the custodian of all books of a registries of companies in Tanzania and should therefore be notified that the company is about to be wound up. Mr. Lyimo, learned Advocate, submitted that the third reason for resisting the petition on the part of Alliance Life Assurance Ltd, is that the legal process resorted to for the winding up of this company is not proper. He argued that under paragraph 7 of the petition, the 1st Petitioner Company is shown as being wholly owned by the Government. Hence it is a Public Corporation. Mr. Lyimo argued that in that regard the proper law to be resorted to was the Public Corporations Act and not the Companies Act CAP

212. He submitted that the procedure to wind up a public corporation is provided under section 57A of Public Corporation Act. He submitted that under that provision the legal requirement is that the responsible Minister is required to prescribe the applicable procedures and regulations when one Public Corporation is about to be wound up. Mr. Lyimo, therefore, argued that the petitioner has misconceived the current provisions of the law and 19 hence the petition ought to be dismissed by the Court as it is tainted with a lot of irregularities. On the cases cited by the Petitioners, Mr. Simon Lyimo, learned counsel, submitted that they are distinguishable. He argued that the cases cited were referring to Private companies while the company at hand is a public corporation which does not fall within the facts of those cases. He submitted that the cited cases be disregarded in entirety. By way of rejoinder, Mr. Edwin Webiro, learned State Attorney submitted as follows. He argued that that the 1st Petitioner is a Limited Liability Company incorporated under the Companies Act, CAP 212 on 5th May, 1993 with Incorporation Certificate No. 22982 and that on 18th October, 2018, the Consent Settlement Order declared the Government as the sole owner of the 1st Petitioner Company. He submitted that the company is unable to pay its debts as it has assets of TZS. 19,973,740,840/= and liabilities of TZS. 130,149,148,000/= hence it is unable to pay its debts in terms of section 279(1) (a) to (e) of the Companies Act, CAP 212. The CAG Report annexure TR 5 is a clear proof of inability to pay debts. Mr. Webiro submitted further that it is not true that Annual returns are not being filed for years. He argued that annexure OSG 2 is made up of the Annual Returns of the 1st Petitioner Company from 2017 to 2022. On requirement of two thirds members' quorum for the company to pass a valid resolution for winding up of the 1st Petitioner Company, he submitted that such

requirement under Article 73 of the Articles of Association of the 1st Petitioner Company is impracticable. He argued that 20 the 1st Petitioner is wholly owned by the Government through the 2nd Petitioner as the Sole Shareholder thereof. Hence, he argued, it is impossible to implement Article 73 of the Articles of Association of the 1st Petitioner Company. He argued that that is why the resolution for winding up of the 1st Petitioner Company was passed by the new Board of Directors instead of Members. He relied on China Chang Group case (*supra*) for the position that Directors can pass a winding up resolution of a company. On application of Public Corporations Act to wind up of the present the company, Mr. Webiro, learned Counsel, submitted that the responsible Minister has not yet published the special regulations and procedures under the Public Corporations Act for winding up of public corporations and, therefore, for the time being, it is the Companies Act CAP 212 which is used also to wind up public corporations. On the prayer for employees to be paid by the Government by way of a special arrangement, Mr. Webiro submitted that all persons to whom the company is owed are termed creditors regardless of their status. He argued that the law stipulates procedures for a company under liquidation to pay the creditors. He insisted that employees are among the creditors of the company and are eligible to be paid according to the requirements of the law. On the argument that PRIDE Tanzania Limited is owned by the Government 100%, hence the Government is not unable to pay the company's debts, Mr. Edwin Webiro, learned State Attorney argued that a company is, in law, a separate person from its owners and directors. Hence 21 the Government as the owner cannot be obliged to pay the debts of the 1st Petitioner Company. On proof of 1st Petitioner's failure or inability to pay debts, Mr. Webiro submitted that under section 280 of the Companies Act, CAP 212, there are 4 scenarios. He submitted that under paragraphs (c) and (d), a company can be wound up if the Court certifies that the company is unable to pay its debts or that its assets are lesser than its debts. He submitted that even in absence of a demand notice by a creditor for the company to pay its debts, there is enough evidence in this case that the company is unable to pay its debts because the available evidence shows that its assets are lesser than its liabilities. He referred the Court to the CAG report as clear evidence of the company's inability to pay its debts. He added that even the Objectors herein have not objected to the accuracy of the CAG's report. On the financial report being outdated since 2019, Mr. Webiro, learned State Attorney submitted that the 1st Petitioner Company is not operating since then. Therefore, he argued, there is no other report and there can be no other current report. He reiterated that the fact that there are creditors opposing this petition is also a clear evidence of the 1st Petitioner Company being indebted and being unable to pay its debts. Also, the resolution of the Board of Directors of the company is another clear proof of its inability to pay debts. Mr. Webiro argued that all the cases cited by the petitioner are relevant for the determination of this petition since they address the circumstances in which winding up of a limited liability company can be wound up. 22 On the argument that the counter affidavit by the Petitioners supporting the petition and responding to the objectors' affidavits, shows that the application at hand is vexatious, Mr. Webiro, learned State Attorney, submitted that the argument is not true. He submitted that the Counter affidavit was being written against the affidavit made by the 1st objector. He

submitted that the paragraph was showing that the objection was vexatious and an abuse of Court process. One could not, reasonably, attack his own application, and therefore, that statement was a slip of the pen only. He concluded by reiterating the prayers made in the petition. I have carefully gone through the rival arguments of the learned counsel for the parties herein. I have also read the relevant documents filed by all the parties pertaining to the present petition. I should keep records clear by saying that Mr. Harun Msangi, learned Advocate for the 1st Objector had issued upon the Petitioners a notice to produce documents. It was vehemently resisted by Mr. Edwin Webiro, learned State Attorney as being inapplicable to proceedings of this nature where there is no trial stage of tendering exhibits. Mr. Webiro is right. I strike out the Notice to produce and I will therefore proceed to determine the merit of the petition. Before going into the gist of the application itself, there are some preliminary points worth being considered and determined first. One such preliminary issue is on the propriety or otherwise of the petition being supported by a special resolution of the Board of Directors of the 1st Petitioner Company rather than a special resolution of its members. This is a question that touches on locus standi. Locus standi is a rule of equity whose 23 roots are entrenched into the jurisdiction of the Court thereby affecting its competency to entertain a matter before it. In *Peter Mpalanzi vs Christina Mbaruku* (Civil Appeal 153 of 2019) [2021] TZCA 510 (23 September 2021), it was held that: "Locus standi is a rule of equity that a person cannot maintain a suit or action unless he has an interest in the subject matter. Unless a person stands in a sufficient dose relation to the subject matter so as to give a right which requires protection or infringement of which he brings the action, he cannot sue on it- see *Godbiess Lerna v. Mussa Hamis Mkanga and 2 Others*, Civil Appeal No. 47 of 2012 (unreported). Further, locus standi is a point of law rooted into jurisdiction. It is for that reason that it must be considered by a Court at the earliest opportunity or once it is raised. Emphasis supplied) From the arguments by the learned counsel for the petitioners and the objectors, I have noted that there was some sort of generalization of the winding up procedures and processes without paying regard to the mode of winding up preferred by the Petitioners in the present petition. The authorities submitted by the Petitioners and the objectors were related to members' voluntary winding up of the company. The objections were also more or less reflective of members' voluntary winding up processes. It happens that the Petition at hand was brought under the provisions of 24 section 279 (1) and 281(1) of the Companies Act, CAP 212 and is seeking compulsory winding up order by the Court. The preliminary procedures thereof are slightly different from, although at times they do overlap with, those applicable to members' voluntary winding up, as it shall become apparent in the course of determination of the petition. Section 279(1) of the Companies Act, CAP 212 provides: "279.-(I) A company may be wound up by the Court if

- (a) the company has by special resolution resolved that the company be wound up by the Court;
- (b) the company does not commence its business within a year from its incorporation or suspends its business for a whole year;

- (c) the number of members falls below two;
- (d) the company is unable to pay its debts; (ej the Court is of the opinion that it is just and equitable that the company should be wound up." The locus standi to bring a petition for winding up of a company under section 279(1) of the Companies Act, CAP 212 is prescribed by section 281(1) thereof which provides that: n281.-(1) An application to the Court for the winding up of a company shall be by petition presented. 25 subject to the provisions of this section, either by the company or by any creditor or creditors (including any contingent or prospective creditor or creditors), contributory or contributories, or by an administrator, or by all or any of those parties, together or separately:" The statutory locus standi under the above provision was considered by this Court in the Matter of Winding up by the Court of "Mwananchi Insurance Company Limited" between Elias Masija Nyang'oro and Edna M. Nyang'oro Versus Mwananchi Insurance Company Limited, Misc. Civil Cause No. 21 of 2017, this Court as per Hon. Maige, J., (as he then was) held that: "This takes me to the issue of the locus standi of the petitioners to petition for winding up of the company. The instant petition is preferred under section 281 (1) of the Companies Act. Under the said provision, it is apparent that a petition for winding up of a company can be preferred by the company itself, creditors, administrator or contributories." I understand that the words "the company itself" refer to the Members of the Company and not its Directors. A company may make a petition for its voluntary members'winding up, when the members of the company have so resolved by passing a special resolution. Directors are not necessarily members of the Company. In the article by Corporate Finance Institute, CFI 26 on <https://corporatefinanceinstitute.com/about-cfi/>) in "Limited Liability Company (LLC), Combining the aspects of both partnerships and corporations, observe that: "Rather than shareholders, business owners of limited liability companies are referred to as members." The High Court of India in the case of Kedar Nath Agarwal v. Jay Engineering Works Limited (1963) 33 Com Case 102 Cal., as per Hon. Gowans, J., observed that: "in some situations and contingencies, the "member" may be different from a "holder". A member may be a holder of shares but a holder may not be a member..."member" has a distinct connotation in the Companies Act. He is either a subscriber of a memorandum of a company or a person who agrees to become a member of a company and whose name is entered in the register of members." In the present case, the 5 Directors who passed the Special Resolution of the Board of Directors in their Meeting held at Kibaha for winding up of the 1st Petitioner Company were not Members of the Company in terms of Section 281(1) of the Companies Act, CAP 212. 27 Also, I understand that the word "administrator" under section 281(1) of the Companies Act, CAP 212 does not refer to Directors or Managers of the Company. The word "administrator" refers to an administrator appointed by virtue of an administrative order under section 247(2) of the Companies Act CAP 212.1 reproduce the relevant part: "(2) An administration order is an order directing that, during the period for which the order is in force, the affairs, business and property of the company shall be managed by a person ("the administrator") appointed for the purpose by the Court." Now, it follows that the special resolution to have the 1st petitioner company compulsorily wound up by Court was passed by way of a special

resolution of the Directors and not members of the 1st Petitioner Company. Do the members of the Board of Directors, also, have locus standi under section 281 (1) of the Companies Act to present a petition for compulsory winding up of the company? My answer would depend on the mode of winding up being pursued and the grounds upon which the petition is brought. If it is a voluntary member winding up which is being pursued, the special resolution for winding up of the Company cannot be passed by Directors of the company, rather by the company's Members. The members themselves or through their directors may then present the petition in Court in the name of the company. On the other hand, if it is a compulsory winding up order which is being pursued before the Court, Directors of the company are among the persons who are competent to pass the special resolution for winding up and present in Court the petition seeking the Court's order for compulsory winding up of the company under any of the grounds stipulated under section 279(1) (d) and (e) of the Companies Act, CAP 212. The locus standi of the directors to present the petition for winding up as such, stems from section 281(1) of the Companies Act, CAP 212 when read together with Rule 90(2) of the Companies (Insolvency) Rules 2005 made under the Companies Act CAP 212. Rule 90(2) falls under Part VI of the Insolvency Rules which part applies to winding up by the Court. Rule 90(2) of the Companies (Insolvency) Rules provides: "Except as provided under sub-rules (3) and (4) or by any particular Rule, the Rules shall apply whether the petition for winding up is presented by the company, the directors, one or more creditors, one or more contributories, the Minister, the Official receiver, or any person entitled under any enactment to present such a petition." Rule 90(2) of the Companies (Insolvency) Rules, 2005 therefore is the basis for the locus standi of the Directors of the company to present a petition for compulsory winding up by the Court. I should however, hasten to add before it becomes too late that, Rule 90(2) of the Insolvency Rules might be misleading if taken outside its proper context. Therefore, for clarity, a word or two must be said here about these powers and locus standi of directors of a company to pass a resolution and present a petition for Court's order for compulsory winding up of the company they manage. 29

- (i) Where a compulsory winding up petition is presented by the directors, they must petition in their own names rather than in the name of the company; and, (ii) In the absence of a formal board resolution, the directors must act unanimously in presenting the petition. (iii) However, if the majority of directors at a board meeting have resolved that the company should be wound up, an individual director in his own name, may present a petition separately. For the foregoing principles see *Re Instrumentation Electrical Services Ltd* [1988] B.C.L.C. 550 which was quoted with approval by this Court (as per Hon. Sehel, J, as she then was) in Misc. Commercial Application No. 217 Of 2016 in the Matter of Dovetel (T) Limited T/A Sasatel Tanzania (In Administration) and Dr. Peter Jonas Chitamu Versus Mary Bundala and First Seal Company Limited. I should hasten to add that the same principles above stated are also reflected under Rule 90 (2) of the Companies (Insolvency) Rules, 2005 where the law states that: "The petition for winding up [may be] presented by the company, the directors, one or more creditors, one or more contributories, the Minister, the Official

receiver, or any person entitled under any enactment to present such a petition." The above provision signifies that in presenting the petition for compulsory winding up by the Court, directors, as distinct persons from the company which they manage, may present a petition for winding up of the company, in their capacity as directors acting either unanimously as one body or discordantly where one or several directors may, in their individual names, present the petition for winding up by the Court. In absence of a special resolution of the board of directors, the directors must act unanimously in presenting the winding up petition but only do so in their individual names, not in the name of the company. Where the directors have passed a special Board resolution to that effect, the directors could present the winding up petition discordantly or separately. One thing however, remains intact, whether acting unanimously or discordantly, the directors of a company have a locus standi to legally present a petition in their own names for orders of the Court for compulsory winding up of the company they manage. In doing so the directors will not be representing members of the insolvent company any more, but rather protecting creditors of the insolvent company. The locus standi is given to directors qua directors, and not in their usual agent- principal capacity for and on behalf of the company. This is because once a company is in financial trouble (insolvency), directors' duties shift from shareholders to creditors. Petitioning for compulsory winding up by the Court may be one of the directors' ways to protect the company's creditors from incurring losses. In terms of Rule 90(2) of the Companies (Insolvency) Rules, 2005, the company as a legal entity, through a special resolution passed by its members, may also bring a petition for winding up of the company. That is, in the name of the company. It is worth noting that in this case too, directors as agents or Managers of the company, may still play an active role like signing the "pleadings" and attending the proceedings for and on behalf of the company. However, the winding up petition presented by the Company must be initiated by the Company through its Members special resolution and the winding up petition must be presented in Court in the name of the Company as the petitioner. There are other persons with locus standi in terms of section 281(1) of the Companies Act and Rule 90(2) of the Companies (Insolvency) Rules, 2005. For the purpose of determining the present Petition, however the differential treatment of locus standi of the company and of the directors, to petition for winding up by the Court, is relevant. In the present case, the Directors of the 1st Petitioner Company stated in their special resolution that the company is unable to pay its debts and they, therefore, caused to be filed in Court this Petition for its compulsory winding up by order of the Court. The petition was presented on the ground of insolvency. In this regard, the directors' duty had thereby shifted towards the Creditors and not the Members of the Company. Contrary to the requirements of the law, the directors passed the special resolution for winding and caused the Petition for winding up to be presented in the name of the company itself instead of their own individual names as directors. That is where the problems started. For that course taken by the Directors to be valid, the petition ought to have been presented by the directors in their own names and not in the name of the company. If they wanted to bring the winding up petition in the name of the company, there was a requirement for the Members' resolution in terms of section 279(1)(a) of the Companies Act, CAP 212. The same

is missing. In effect, the present petition has mixed features of being presented by the directors and of being presented by the company while lacking completeness in either side. Existence of the special 32 resolution of the Board of Directors for winding up of the 1st petitioner due to its insolvency, presupposes that the Directors were about to institute the present Petition in their own individual names, acting discordantly and divided. But that was not done. Not a single director's name appears as such in the list of the Petitioners. Instead, they filed the present petition in the name of the Company as the 1st Petitioner without having the mandate to do so on behalf of the company and in absence of a Members' resolution that the company be wound up. They have filed the present petition in the name of the company as the 1st Petitioner and the name of the Member as the second petitioner. No allegations were made that the 2nd petitioner is a contributory to the 1st Petitioner. Not only did the Directors of the 1st Petitioner lack the locus standi to present the petition in the name of the Company itself, but also, they lacked the mandate to pass the special resolution for compulsory winding up of the 1st Petitioner Company by the Court order. The attached records from the Registrar of Companies and the un-opposed statements in the Petition show that the 1st Petitioner is owned by the 2nd Petitioner as the sole owner thereof. That is to say since the date of the Court's Consent Settlement Order in 2018, that declared the 1st Petitioner Company to be the property of the Government (through the 2nd Petitioner), the Sole Member of the 1st Petitioner Company is the 2nd Petitioner only. The Petitioners have attached Annexure OSG 1 to the petition being the detailed search report from the Registrar of Companies at BRELA that shows the current status of the 1st Petitioner Company as being owned by the Treasury Registrar. Therefore, the 2nd Petitioner became, and has remained to be, the sole shareholder and 33 member of the 1st Petitioner Company despite the fact that when the company was formed in 1993, it had 7 individual members and the fact that the minimum number of shareholders for private companies is two. Interestingly, the Memorandum and Articles of Association of the 1st Petitioner Company regarding decision making in the 1st Petitioner Company, have not been altered at all, save for details on the new shareholding. They remain the same to date. Back to the issue at hand. Do the provisions of the Articles of Association of the 1st Petitioner Company allow a special resolution for winding up of the company to be passed by the Board of Directors? The answer is in the negative. Do the Articles of Association of the 1st Petitioner Company allow sole membership? The answer, again, is in the negative. The relevant Articles of Association of the 1st Petitioner Company provide that: "Article 3: The number of Members with which the Company proposes to be registered is seven but the Board may from time to time register an increase of Members. Article 4: The subscribers to the Memorandum of Association and such other persons as the board shall admit to membership shall be members of the Company. Article 11: No business shall be transacted at any general meeting unless the quorum of Members is 34 present at the time when the meeting proceeds to business; save as herein otherwise provided three Members for the time being present in person or by proxy shall be a quorum. Article 73 The company shall not be dissolved except by a resolution of two thirds of the Members of the Company in General Meeting duly convened for that purpose." (Emphasis added) The special resolution passed by the Members

of the Board of Directors of the 1st Petitioner Company, instead of Members of the Company, to have the 1st Petitioner Company wound up/ dissolved, sharply contrasted with the provision of Article 73 of the Articles of Association of the 1st Petitioner Company. These are the current Articles of Association which the Petitioners attached to their Petition seeking the winding up of the 1st Petitioner Company. They are still applicable in the running of affairs of the 1st Petitioner Company. The Articles of Association of the 1st Petitioner Company were therefore violated. The violation of Articles of Association of the Company is not a matter to be taken lightly since the memorandum and articles of association of a company constitute the basic law regulating the conduct of the affairs of the company. In *Re Cuthbert Cooper & Sons Ltd*

[1937] Ch 392, the Court in emphasizing the paramount role of the MEMARTS of a company, held that: 35 "Each company had its common law in the form of its memorandum and articles of association which should be sufficient for its disputes," According to the Articles of Association of the 1st Petitioner Company, Directors are appointed by members of the company by majority votes in the general meetings of the company. Article 31(a) provides: "The number of the Directors shall not be less than three or more than ten and they shall be appointed by the Company in General Meeting. The First Directors shall be appointed by the Subscribers to the Memorandum of Association." It is the position of the Petitioners herein that the 2nd Petitioner has failed to secure the requisite quorum for making decisions through its general meetings in conformity with its Articles of Association. However, while the Petitioners insist that the 1st Petitioner Company is governed by the Companies Act, CAP 212 and not by the Public Corporations Act, the 2nd Petitioner purportedly appointed in office the present new Board of Directors. Under the Companies Act, CAP 212, the appropriate way for the 2nd Petitioner to appoint Directors of the 1st Petitioner Company had to be done pursuant to Article 31(a) of its Articles of Association as stipulated above. That is by majority votes in the Members' general meeting whose quorum is at least three members while the company has only one member. Could the 2nd Petitioner abrogate the provisions of the Companies Act and Articles of Association of the company and resort to the procedures under the Public 36 Corporations Act in appointing the Board of Directors of the 1st Petitioner Company? Well, in this case, the Petitioners were adamant that the company is regulated by the Companies Act, CAP 212 and not the Public Corporations Act. I will not enlarge the issues in that aspect, therefore. Whereas the Petitioners complain that it is impracticable to have adequate quorum for decision making pursuant to the Articles of Association and provisions of the Companies Act, the same 2nd Petitioner somehow managed to make decisions and thereby appoint a new board of directors which required convening a general meeting with the minimum quorum of three members. The new Board passed the resolution for compulsory winding up of the 1st Petitioner Company. I wondered how would that be legally possible? It must be borne in mind that the Petitioners were firm that the 1st Petitioner Company is regulated by the provisions of the Companies Act and not the Public Corporations Act. Mr. Webiro, learned State Attorney, emphasized that it is the Companies Act, CAP 212 that governs the winding

up of the present company. This is because it was incorporated under the Companies Act, CAP 212 and that the Minister has not made any special rules of procedure for winding up of Public Corporations under the Public Corporations Act. If the Petitioners are firm that the Companies Act CAP 212 is the applicable law for the processes of compulsory winding up of the present 1st petitioner company, then the law was supposed to be complied with. The 1st Petitioner Company was formed under the Companies Act, CAP 212. It has its own Memorandum and Articles of Association. Its management, conduct of affairs and winding up should comply with the provisions of the Companies Act and the Articles of Association of the 1st Petitioner Company. 37 Two arguments were advanced by Mr. Edwin Webiro, learned Counsel, in an attempt to justify the non-conformity to the requirements of the Articles of Association and provisions of the Companies Act, in the process of compulsory winding up of the 1st Petitioner Company by order of the Court. Mr. Webiro submitted that the non-compliance with the provisions of the Companies Act and the Articles of association of the 1st Petitioner Company should be condoned because it was, and it is, impracticable for the same to be complied with since the 1st Petitioner Company is wholly owned by one shareholder only namely the 2nd Petitioner. He added that in the case of China Chang group Ltd (supra) the Court allowed a resolution which was passed by Directors of the Company to be used in support of the petition to wind up the company by order of the Court. I will start with that argument on the rule in the Matter of Petition For Winding Up of China Chang Group Ltd (Winding Up Cause 113 of 2017) [2018] TZHCCoMD 24 (13 February 2018). This Court (Hon. Sehel, I, as she then was) at page 4 had the following to say: "As I said the petition was filed following the special resolution passed by the company directing the director to file to this Court a petition for winding up. The said resolution was passed on 10th day of April, 2017 and it is attached to the petition." (emphasis added) It is obvious that the special resolution in the China Chang Group case (supra) was passed by the Company. That is by the Members. The resolution 38 directed the Director (as an agent or manager of the Company) to file the Petition for winding up. Reading the decision in that case, it is apparent also that the petition was brought under section 279 (1) (a) of the Companies Act CAP 212, hence, it was founded on the ground that the company had by special resolution resolved that the company be wound up by the Court. That is not the case in the case at hand. In the case at hand, as it can be seen in the contents of the Petition, the Petitioners have relied upon section 279 (1)

- (d) of the Companies Act, CAP 212. The ground of bringing the present petition seeking compulsory winding up by the Court is that the company is unable to pay its debts. The very first prayer in the petition reads: "(a) The Company be wound up by this Honourable Court under the provisions of Section 279(1)(d) and 281(1) of the Companies Act CAP 212." Therefore, the case of China Chang Group (supra), is inapplicable to the facts obtaining under the present case. Further, in that case the special resolution to wind up the company was not passed by the Directors like in the case at hand, rather, it was passed by the Company itself which eventually directed its director to file the petition for winding up in the name of the company. The argument by the learned counsel, therefore, is unfounded.

The procedure followed in the China Chang group case perfectly suited the requirements of the legal provision under which it was brought and the ground for winding up that was relied upon in that case. The petition 39 in the case at hand does not conform to the legal requirements of section 279 (1) (d) of the Companies Act on which it is premised. I will turn next to the issue of impracticability of compliance with the Articles of Association of the 1st Petitioner Company and the provisions of the Companies Act CAP 212. Mr. Webiro, learned Counsel for the Petitioners, submitted that compliance with the Articles of Association, and thus, the Companies Act, was impracticable in the circumstances of this case due to quorum deficiency. Whereas this argument would be plausible in appropriate circumstances, it does not help the Petitioners in the case at hand. Once it is not disputed that the 1st Petitioner Company is regulated by the provisions of the Companies Act, CAP 212, then it follows that the Petitioners had a legal hurdle to surmount before they could be justified to dispense with the requirements of the Articles of Association of the 1st Petitioner Company and of the Companies Act CAP 212. The gate way to dispensing with the impracticable provisions of the Articles of Association of the 1st Petitioner Company and of the Companies Act CAP 212 is under section 137 of the Companies Act, CAP 212. It provides: "137. -(1) If for any reason it is impracticable to call a meeting of a company in any manner in which meetings of that company may be called, or to conduct the meeting of the company in the manner prescribed by the articles or this Act, the Court may, either of its own motion or on the application of any director of the company or of any member of the 40 company who would be entitled to vote at the meeting, order a meeting of the company to be called, held and conducted in such manner as the Court thinks fit.

- (2) Where any such order is made, the Court may give such ancillary or consequential directions as it thinks expedient; and these may include a direction that one member of the company present in person or by proxy shall be deemed to constitute a meeting.
- (3) Any meeting called, held and conducted in accordance with an order under this section shall for all purposes be deemed to be a meeting of the company duly called, held and conducted." It is clear that an application of this kind can either be initiated by the Court suo mottu or be made by a member or a director of the company. In order for a member or director of the company to successfully move the Court under section 137(1) of the Companies Act or for the Court to invoke its powers on its own motion as such, either of the following alternative circumstances must be satisfied. The first set of circumstances is that it must be established that for any reason it is impracticable to call a meeting of the company in any manner in which meetings of the company may be called. The second set of circumstances is where it is impracticable to conduct the meeting of the company in the manner 41 prescribed by the company's articles of association or by the Companies Act. The scope and utility of section 137 of the Companies Act was well elaborated in the persuasive case of *Wheeler v Ross* (2011) EWHC 2527 which interpreted section 306 of the Companies Act of the United Kingdom- a statute in parimateriaXn the Companies Act of Tanzania. The wording of section 306 of the UK Companies Act is identical in its wording to section 137 of the Companies Act, CAP 212 of the Laws of Tanzania. Hence it is a useful external aid as an

interpretational tool of the relevant Tanzanian legal provision. Similar language in statutes with common purpose is normally interpreted in the same way. In the case of *Wheeler vs Ross* (supra) the Court in interpreting the above provision observed that: "The purpose of the s306 order was to allow the applicant to enforce his rights as majority shareholder by overcoming the deficiency in him holding an inquorate extraordinary general meeting; the order was merely one of the steps necessary to put the governance of the company into a viable state.....it must be remembered though, that the Court's power is discretionary and fact sensitive. The Courts will take a broad approach to the provisions under s.306 where they feel the provisions under the articles are being exploited. This will enable the 42 company to overcome practical difficulties created by either the articles, shareholder agreements or the Act." Deduced from the above quotation, it is plain that section 137 of the Companies Act, CAP 212 of the Laws of Tanzania is intended to enable a member or director of a company to overcome the quorum deficiency in him to call or conduct a meeting of the company in which he is eligible to vote by overcoming the difficulty of lacking the requisite quorum as prescribed in the articles of association of the company, a shareholders agreement or as laid down in the Companies Act. The provision is intended to put the governance of the company into a viable state by overcoming practical difficulties created by the articles of association, shareholder agreements or the Companies Act. In short, the provision is intended to be used for a cause that is beneficial to the practical and viable governance of the company and not otherwise. In determining whether the Court's discretion ought to be exercised, the Court proceeds on a holistic assessment, which "entails an assessment of whether there is indeed impracticability and whether such impracticability is of a sufficient degree as to call for the intervention by the Court. Now, in the present case, after the Court order in 2018, the 2nd Petitioner became the sole Member of the 1st Petitioner company holding all the shares therein. As the Petitioners insist that this company is regulated by the provisions of the Companies Act, CAP 212 and the Articles of Association, the 2nd Petitioner as the majority shareholder and a member entitled to vote in the company's meetings, ought to have resorted to section 137 of the Companies Act and cure the quorum deficiency created by Article 11 of the 43 1st Petitioner Company that requires a minimum of three members present in person or by proxy before a quorum could be obtained to pass valid resolutions. Through Section 137 of the Companies Act, CAP 212, the 2nd Petitioner could regularize the management affairs of the 1st Petitioner Company in terms of its membership and Board of directors. Making use of section 137 of the Companies Act, the Petitioners could also remove the quorum deficiency in passing a special resolution by members for winding up of the 1st Petitioner Company. That procedural step of paying visit to section 137 of the Companies Act, CAP 212 was necessary before the Petitioners could correctly travel the road of seeking a Court order for compulsory winding up of the 1st Petitioner Company under section 279(l)(d) of the Companies Act CAP 212 without adhering to its Articles of Association. As the legal prerequisites were not complied with, I find that the present petition has been brought in violation of the Articles of Association of the 1st Petitioner Company and provisions of the Companies Act, CAP 212 under section 281(1) and Rule 90(2) of the Companies (Insolvency)

Rules

2005. The Petition for compulsory winding up of the company due to insolvency, presented by the Company in its own name, based on a special resolution made by Members of the Board of Directors of the company instead of Members/Shareholders, is irregular. The regularity of appointment of the Members of the Board of Directors under the provisions of the Companies Act, CAP 212 in view of the quorum deficiency of the 2nd Petitioner, was not sufficiently canvassed either. Instead of the Members of the Company passing the special resolution for winding up their company, 44 the Members of the Board of Directors did that. Instead of the Members of the Board of Directors presenting the petition at hand in their own names, it was the Company that presented it. The 1st and 2nd petitioners who presented the petition lacked the supporting members' special resolution to present the petition for compulsory winding up whereas the members of the Board of Directors who passed the compulsory winding up resolution did not present the petition in their own names in Court. There was a mismatch. This petition was therefore, in effect, brought by persons who lacked locus standi under section 281(1) of the Companies Act, CAP 212. Lack of locus standi is a matter that goes to the jurisdiction of the Court. Lack of locus standi, deprives the Court of its jurisdiction to entertain the present petition. Without jurisdiction, I have no mandate to consider and determine the other equally contentious and interesting arguments made by the learned counsel for the parties herein. I heeded to the advice given by Hon. Nyarangi, J.A., of the Court of Appeal of Kenya in the case of "MV Lilian S" [1989] 1 KLR, who observed 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." 45 Lack of locus standi on the part of Members of the Board of Directors who passed the special winding up resolution and who presented this Petition for the winding up of the 1st Petitioner Company in the name of tly Company, deprives the Court of its jurisdiction. This Court does, therefore, hereby downs tools in respect of the present petition for winding up of the 1st Petitioner Company. I proceed to dismiss the petition with costs. It is so ordered. Ruling is delivered in Court this 16th day of August, 2024 in the presence of Ms. Lilian Machage, Senior State Attorney assisted by Mr. Zephania Msuya, State Attorney for the Petitioners; Mr. Baltazar Kitundu, learned Advocate for the first Objector (Employees); Mr. Simon Lyimo, learned Advocate for the second Objector (Alliance Life Assurance Limited) and Ms. Kerry Mra, learned Advocate for the 3rd Objector (CRDB Bank Limited). A. H. GONZI JUDGE 16/08/2024 46

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