IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM.

CONSOLIDATED MISC. CIVIL CAUSE NO. 49 OF 2002 AND MISC. CIVIL CAUSE NO. 254 OF 2003

IN THE MATTER OF THE COMPANIES ORDINANCE, CAP. 212

AND

IN THE MATTER OF COMPANIES WINDING-UP RULES, 1929

AND

IN THE MATTER OF A PETITION FOR WINDING UP INDEPENDENT POWER TANZANIA LTD (IPTL)

AND

IN THE MATTER OF AN APPLICATION BY M/S LAW ASSOCIATES ADVOCATES-THE CREDITOR OF IPTL OBJECTING WITHDRAWAL OF THE WINDING UP PETITION AND DISCHARGE/RELEASE OF THE PROVISIONAL LIQUIDATOR

BETWEEN

VIP ENGINEERING AND MARKETING LTD (VIP)...PETITIONER

AND

1. INDEPENDENT POWER

TANZANIA LTD (IPT).....1ST RESPONDENT

2. MECHMAR CORPORATION

(MALAYSIA) BERHAD.....2ND RESPONDENT

3. THE ADMINISTRATOR GENERAL/
   OFFICIAL RECEIVER AND PROVISIONAL
   LIQUIDATOR OF IPTL .....3RD RESPONDENT

AND BETWEEN

LAW ASSOCIATES
ADVOCATES, THE CREDITOR.....APPLICANT

AND

1. VIP ENGINEERING AND
   MARKETING LTD.....1ST RESPONDENT
2. THE ADMINISTRATOR GENERAL/
   OFFICIAL RECEIVER AND PROVISIONAL
   LIQUIDATOR OF IPTL .....2ND RESPONDENT
3. THE BANK OF TANZANIA.....3RD RESPONDENT

RULING

03/09/2013 & 05/09/2013.

Utamwa, J.

This is a ruling on some issues related to a notice (the notice) filed by **VIP Engineering and Marketing Ltd** (VIP) for withdrawal of its petition (herein after called the petition in short) for winding up the company, **Independent Power Tanzania Limited** (IPTL). According to the record, the petition was a result of a dispute between the two shareholders of IPTL, i.e VIP and **Mechmar Corporation (Malaysia) Berhad** (Mechmar).The petition was consolidated with another petition registered as Misc. Civil Cause No. 254 of 2003, which is irrelevant in this ruling. In the petition (consolidated), IPTL, Mechmar and the **Administrator General/Official Receiver and Provisional Liquidator**

of IPTL (Provisional Liquidator) are the first, second and third respondents respectively.

Upon VIP serving the notice to interested parties, **Law Associates Advocates** objected the withdrawal by filing a chamber summons/application praying for some orders. In that application the VIP, the Provisional Liquidator and the Bank of Tanzania (BOT) were impleaded as respondents No. 1, 2 and 3 respectively. However, VIP and the Provisional Liquidator raised an oral preliminary objection (PO) against the application. The BOT did not object the same. Along with that application, Mr. Malimi learned counsel also appeared in court saying that he was representing the **Joint Liquidators of Mechamar Corporation (Malaysia) Berhad.** Mr. Malimi conceded to the withdrawal of the petition, but objected to the consequent orders prayed by VIP. The Provisional Liquidator, VIP and Mechmar resisted against the protest made by Mr. Malimi learned counsel. The representation of parties was as follows: Messrs Ngalo and Didas for VIP, Mr. Makandege for IPTL and the Provisional Liquidator, Mr. Lutema for Mechmar, Mr. Mnyele for the Law Associates (the applicants) and M/s. Violet for the BOT. This ruling thus decides on the above matters cumulatively.

The notice was filed in court on 26/08/2013 under rules 4 (1) and 36 (2) of the Companies Winding up Rules 1929 (the Rules) and was duly endorsed by the Registrar of this court before it was served to interested parties. As hinted earlier the notice aims at withdrawing the petition upon an agreement (the agreement) executed on the 15th day of August, 2013 (but signed on the 19th August, 2013) in Dar es salaam Tanzania, between VIP and another company going by the name of **Pan Africa Power Solutions (T) Limited (PAP)** incorporated under the laws of Tanzania. The agreement, which is attached to the notice,

testifies *inter alia*, that VIP has sold all of its shares in IPTL to PAP and the former conveys to the latter its 30% shares and rights, title and interests in IPTL and any other interests connected to the shares including monies or part thereof, which VIP is entitled in the Tegeta Escrow Account (the Escrow Account) kept with the BOT (see articles 1. 5 and 3. 3 of the agreement).

Following the notice, VIP prayed this court, through its counsel, Ngalo and Company Advocates, (see the notice by the counsel, titled RE: EVIDENCE OF SERVICE AND ADVERTISEMENT OF THE NOTICE OF WITHDRAWAL OF THE PETITION FOR WINDING UP IPTL, dated 30th August, 2013, presented in court on the same date and the proposed orders attached there to) to make the following orders;

1. That this court marks the petition as duly withdrawn with no order as to costs.
2. That the appointment of the Provisional Liquidator be terminated.
3. That the Provisional Liquidator shall hand over all the affairs of IPTL including the IPTL Power Plant (the plant) to PAP, which has committed to pay off all legitimate Creditors of IPTL and to expand the plant capacity to about 500 MW and sale power to TANESCO at a Tariff of between Us Cents 6 and 8/Unit in the shortest possible time after taking over in the public interests.
4. That parties are free to commence new independent claims in any court with competent jurisdiction against any party should they fail to reach amicable settlement out of court on any issue which arose in IPTL.
5. That the court has taken judicial notice of the agreement between VIP and PAP.

The respondents in the petition, i.e IPTL, the Provisional Liquidator and Mechmar agreed to the notice and the orders so prayed by VIP.

Subsequent to the notice, the applicants filed the application mentioned above under a certificate of urgency. The application is preferred under rules 4 (1), (2) and (3), 8 (2), 36 and 224 of the Rules, ss. 68 (e) and 95 of the Civil Procedure Code, Cap. 33, R. E. 2002 and any other enabling law. It is supported by an affidavit of one **Rosan Mbwambo** and seeks for the following orders;

a. The withdrawal of the petition and the discharge/release of the Provisional Liquidator should not be allowed before the applicants' debt, together with statutory interests as well as legal fees for representing VIP in the winding up proceedings is paid in full from the monies in the Escrow Account with the BOT.
b. That the BOT may be restrained from releasing the monies from the Escrow Account to PAP or to any other person whatsoever till the applicants' debt and legal fees are fully paid from the said account.
c. That the Provisional Liquidator may be restrained from handling over the affairs of IPTL to PAP or any other person whatsoever, till the applicants' debt and legal fees are fully paid from the monies in the Escrow Account.
d. That, costs of the application be provided for.
e. Any other order and or relief as this court may deem fit and appropriate in the circumstances.

The contents of the affidavit supporting the application are to the effect that, the applicant provided legal services to IPTL in some matters (not these consolidated petitions), but it has not paid the instruction fees despite repeated demands. The Provisional Liquidator was accordingly notified of the fees but he has not paid the same too. It is also stated in the affidavit that the terms of the agreement will make it difficult for the debt to be paid to the applicants, hence the orders enlisted above.

On the other hand, Mr. Malimi learned counsel informed the court that, his client does not object the withdrawal of the petition, but disputes the orders prayed by VIP saying that, VIP and PAP had no mandate to execute the agreement and pray for the orders.

In their PO against the application, the learned counsel for VIP, IPTL and the Provisional Liquidator raised about five points of objection. However, in my view all the points of PO revolve around only two points: one, that the application is brought under wrong section of the law, and two, that the reliefs sought by the applicants are not maintainable by this court. As to the first point of PO, Mr. Ngalo learned counsel for VIP essentially argued that, the prayers sought are injunctive by nature and no proper law is cited that gives the court powers to make such orders pending nothing in court. He also argued that the petition is for winding up IPTL, and the applicants are not parties there in. What the applicant claims are only legal fees against IPTL and not against VIP, and even if the petition is withdrawn IPTL will remain. The applicant has not thus cited any law giving him *locus standi* to file the application. He also argued that, there are specific legal provisions for taxing legal fees, i. e. GN. No. 515 of 1991, the applicant could not thus bring the application the way they did. Mr. Makandege for IPTL and the Provisional Liquidator also added that, s. 61 of Advocate Act, Cap. 341 R. E. 2002, provides for the procedure applicable for an advocate to recover his legal services costs. The procedure includes commencement of an action upon complying with some requirements. The two counsel thus submitted that the court was improperly moved.

As to the second point of PO Mr. Makandege argued that the application is an abuse of law and public police which encourages parties to withdraw matters from court and settle them amicably. He cited Order XXIII rule 1 (1) of Cap. 33 as the offended law. He also maintained that, the Provisional Liquidator cannot be compelled to

proceed with his duties because, he is there pending winding up of IPTL only, which said winding up is no longer preferred by VIP. Messrs Ngalo and Makandege thus prayed the court to strike out the application for incompetence and consider the notice as un-impeded.

In reply, Mr. Mnyele learned counsel for the applicants argued that, what Mr. Makandege raised was not a proper PO in law as it related to matters of facts and not of law. He submitted that, Mr. Makandege touched the merits of the application in his arguments. He also contended that, whether or not the applicants complied with s. 61 of Cap. 341, that does not preclude them to file this application. He also argued that, this court has powers to entertain this application because the applicants cited rule 36 of the Rules and s. 95 of Cap. 33 which give the court powers to entertain the prayers in the application especially prayers (d) and (e). He contended further that, under rule 36 of the rules, the right to withdraw a petition for winding up is not automatic. The court has jurisdiction to give orders on the withdrawal and substitute any creditor or contributory of the company. The applicants, as undisputed creditors of IPTL, are thus applying to be the substitute petitioners as the VIP is trying to withdraw it. He added that the applicants have thus, interests and *locus standi* to file the application under rule 36 of the Rules. He further submitted that, s. 95 applies to the application because there are no other specific provisions of the law that gives powers to this court to grant the prayed orders. He also argued that, this court has powers to issue injunctions on matters that do not fall under order XXXVII of Cap. 33.

Mr. Mnyele also argued that, by citing the above indicated provisions, the court was properly moved and it should not be overwhelmed by undue procedural technicalities in deciding matters in court for, this is the contemporary approach by the courts of this land. He cite article 107A of the Constitution of the United Republic of

Tanzania, 1977, Cap. 2 R. E. 2002 (the Constitution), to support his argument.

In his rejoinder, Mr. Ngalo submitted that, rule 36 of the Rules carters for substituting a creditor or contributory of a company as a petitioner for a petition for winding up the company, but in the chamber application at hand, the applicants made no any prayer for them to substitute VIP in the petition, the prayer was only mentioned by Mr. Mnyele during his submissions. He underscored that ss. 68 and 95 of Cap. 33 cannot give powers to court to grant the prayers No. (a) – (c) in the application as they are mere supplementary provisions. He also emphasised that there are various decisions of courts to the effect that wrong citation of legal provisions is fatal to applications.

In addition to Mr. Ngalo's arguments, Mr. Makandege rejoined that, rule 36 of the Rules must be read together with s. 61 of Cap. 341. For that matter the applicants are not the kind of creditors envisaged under rule 36 because their procedure is covered under s. 61 of Cap. 341 which is the Principal Act. He added that, one of the canons of statutory interpretations is that, one Act cannot be construed as negating the other. He also submitted that, the applicants' worries that their claim will not be attended if the petition is withdrawn is not founded because the Provisional Liquidator has taken care of the same and it will be submitted to the IPTL.

As to the objection lodged by Mr. Malimi learned counsel, the respective counsel for VIP, IPTL, Provisional Liquidator and Mechmar submitted to the effect that, Mr. Malimi had no *locus standi* to address the court as his client was not a party to the petition from the beginning. Mr. Malimi tried to convince the court that he had made an interverner application to be joined in the petition, but the court noted that there is not any application to that effect in these consolidated petitions (Misc. Civil Cause No. 49 of 2002 and Misc. Civil Cause No. 254 of 2003)

except that, his application is in other petitions (No. 112 of 2009 also consolidated with another petition).

I will now consider the PO raised against the application. The first point of the PO is on wrong citation of the provisions of law. As observed previously, the application is preferred under rules 4 (1), (2) and (3), 8 (2), 36 and 224 of the Rules, ss. 68 (e) and 95 of Cap. 33, and any other enabling law. The issue here is whether or not these are the proper provisions of law for moving this court to grant the prayed orders. In my view, rule 4 (1) – (3) of the Rules relates to the role of registrars of this court in matters of winding up companies. Rule 8 (2) of the Rules only provides that every application apart from the petition shall be brought by way of motion.

Rule 36 of the Rules provides for substitution of creditors or contributory of a company where a petitioner for winding up withdraws his petition. The rule thus applies to a creditor or contributory who moves the court so that he can be made a substitute to the petition for winding up upon the original petitioner withdrawing himself from the same. However, as rightly argued by Mr. Ngalo counsel for VIP, the applicants in the present application have not applied for any order to that effect. The mere argument by Mr. Mnyele in his replying submissions that the applicants intend to be made substitute petitioners in the petition cannot be considered positively because that intention is neither in the chamber application nor in the affidavit supporting it.

Moreover, the applicants did not mention anywhere that they are desirous of prosecuting the petition. This is one of the mandatory condition that they had to meet for moving this court under rule 36 or the Rules. Rule 36 of the Rules is therefore, also not properly cited in the application at hand for, the orders sought in the application are not those envisaged under the rule.

Rule 224 of the Rules provides for *inter alia,* the applicability of the High Court practice in situations where no any other provisions of the law is made by the Act. As to s. 68 (e) of Cap. 33, the same applies as supplementary provision as Mr. Ngalo rightly argued, because, its wording is to the effect that the court may make such other interlocutory orders as may appear to it to be just and convenient, to prevent the ends of justice from being defeated subject to any rules in that behalf. In fact, even the sub-heading under which s. 68 is placed in Cap. 33 is self explanatory, it is titled "PART VI; SUPPLEMENTAL PROCEEDINGS (ss 68-69)." Headings of the Parts, divisions and subdivisions into which a written law is divided are very relevant in construing statutory provisions because they form part of the written law, see s. 26 (1) of the Interpretation of Laws Act, Cap. 1, R. E. 2002. It follows thus that, s. 68 (e) of Cap. 33 cannot stand alone as an enabling law, and in the application at hand, there is not any other cited relevant provision with which s. 68 (e) of Cap. 33 can be relied upon.

In regard to s. 95 of Cap. 33 it is trite law that it applies only where there is no any specific provisions of law available. But in the matter at hand, there are specific provisions for an advocate to recover his fees, as rightly argued by Mr. Makandege leaned counsel for the Provisional Liquidator, i. e. the provisions of s. 61 of Cap. 341. For this reason, rule 224 of the Rules will also not apply.

The applicants also relied on the expression "and any other enabling law" as part of legal provisions under which the application was preferred. But this blanket statement is not helpful for purposes of moving a court of law, see also the case of **Elizabeth Stephen and another v. AG [2006] TLR. 404**.

From the observations I have made above, it is clear that, all the provisions of law cited above neither give to the applicants the right to

the orders prayed into the chamber application/summons nor empowers this court to grant such orders. It is the law that in applications, an applicant must cite the provisions of law which gives to him the right for the orders sought in the chamber application/summons, and the law that empowers the court to grant the order sought, otherwise the application becomes incompetent, see the Tanzania Court of Appeal decision in **Chama Cha Walimu Tanzania v. The Attorney General, Civil Application No. 151 of 2008, at Dar es Salaam** (unreported). The applicants in the application under discussion did not meet the two conditions.

On the other hand, the arguments by Mr. Mnyele learned counsel for the applicants that the existence of s. 61 of Cap. 341 does not preclude the applicants from making this application under rule 36 of the Rules carries no weight because, if that interpretation is upheld, then rule 36 of the Rules (which is made in a mere subsidiary legislation) will contradict s. 61 of Cap. 341 which is enacted in an Act of Parliament. In law a subsidiary legislation cannot contradict any Act of Parliament, see s. 36 (1) of Cap. 1 and the ruling of this court (dated 01/11/2010) in **James Francis Mbatia and 2 others v. The Attorney General and 2 others, High Court Misc. Civil Cause No. 101 of 2010, at Dar es Salaam** (Unreported). I thus answer the issue negatively to the effect that, the provisions cited above are not the proper provisions of law for moving this court to grant the prayed orders in the chamber application.

The legal effect of wrong citation of law in applications is well known, in the case of **Chama Cha Walimu Tanzania** (supra at page 18-19)**,** the Court of Appeal held that; the omission is not a procedural technical matter within the scope of article 107A of the Constitution, it is a serious omission that goes to the root of the matter, it renders the application incompetent and liable to be struck out. Indeed, there is a

heap precedents by the same court to that effect, and I need not exhaust their list here. It follows therefore that, the argument by Mr. Munyele that the effect of the omission is not fatal under the auspices of article 107A of the Constitution that presses courts to ignore procedural technicalities is not forceful enough because, he cited no precedent overruling the above cited decision which is binding to this court under the doctrine of precedents (*stare decisis*) as it applies in our jurisdiction. Moreover, the Court of Appeal in **Zuberi Mussa v. Shinyanga Town Council, Court of Appeal Civil Application No; 100 of 2004, at Mwanza** (unreported) remarked that article 107A (2) (e) of the Constitution did not encourage courts to disregard procedural laws, but it constrains them to administer justice in strict compliance with the requirements of the law. The same position was underscored by the Court of Appeal in **Mohamed Enterprises (T) Ldt v. Masoud Mohamed Nasser, Court of Appeal Civil Application No. 33 of 2012, at Dar es salaam** (unreported). In this case the Court of Appeal underlined strict compliance to the rules for purposes of consistence in the legal practice, unless that course results into injustice. It is thus my settled vie that, courts cannot condone every non-compliance to procedural rules. It can only condone non-observance of the rules that does not go to the root of the matter. The omission in the case at hand, i.e. wrong citation of a proper law has been held as an omission going to the root of the matter and thus not forgivable as per the **Chama Cha Walimu Tanzania** case (supra).

I would have disposed of the PO for the first point alone, but I find the second point of PO as also worthy discussing as a supplemental point and for purpose of future practice. The issue in respect of the second point of PO is therefore, whether or not the prayed orders in the chamber application are maintainable. In the first place I agree with Mr. Makandege that, the law of this country is in favour of the parties

withdrawing their matters in court and encourages amicable settlement outside courts, see order XXXIII rule 1 (1) of Cap. 33. In addition to that, article 107A (2) (d) of the Constitution instructs courts to promote such moves in resolving disputes. The Court of Appeal also once observed that, parties to courts proceedings are at liberty to compromise their rights in civil cases by agreements, and courts should respect their compromises unless they amount to abuse of court process or violate the law or public policy, see **Ibrahim Said Msabaha v. Lutter Symphorian Nelson and Attorney General, Civil Appeal No; 4 Of 1997, at Dar-Es-Salaam** (unreported). I am not convinced that the agreement by the parties to the petition offends the law or public policy. Now, in the present matter, parties in the petition have agreed to settle the matter outside court and withdraw the petition. An alien to that petition cannot thus be heard objecting the move by the parties unless he expressly indicates the law that permits him to act so, but in this case, I have observed above that the applicants did not do so. I thus hold the issue posed above positively that the prayers in the application are un-maintainable.

For the above reasons, I uphold the PO and I consequently strike out the application. I will however not make any order as to costs because, the respondents in that application filed no any counter affidavit against it and they merely argued their PO orally in court giving incomplete citation of cases which were indeed not accessible by the court for the incompletion in citing.

As to Mr. Malimi's objection to the notice I am of the view that, as long as his client was not a party to the petition, and as long as his client's intervener application to be joined as a party is not in the present consolidated matters (as noted by the court during the hearing of this matter), he cannot be heard objecting the orders so prayed in the notice as rightly argued by the respective counsel for VIP, IPTL, the

Provisional Liquidator and Mechmar. But even if the application for Mr. Malimi's client was made under the present consolidated petitions, that would not change the above position because the court has not made any order yet to join his client as a party to these consolidated petitions. Mr. Malimi's objection is thus turned down.

Having held as above, I find no reason as to why this court should not consider the notice positively and grant the orders prayed by VIP and agreed by all other parties to the petition. It is in fact, more so considering the fact all other interested parties if any, including the applicants, can still have other avenues to pursue their rights against IPTL or VIP. In fact, the withdrawal of the petition will not extinguish the existence of those two companies according to the notice and the prayed orders. The only change that will be effected by the agreement by VIP and PAP is on the shareholders of IPTL. Again, one of the purposes of the prayed orders upon withdrawal of the petition as agreed by the parties in the petition is to honour the commitment of PAP to pay off all legitimate Creditors of IPTL. And all the parties to the petition do not dispute the applicants' claim against IPTL. What they dispute is only the argument that the same can act as an impediment to the notice and the orders prayed therein.

At this juncture, and for the sake of justice, and as long as the claim by the applicants is not disputed by IPTL, the Provisional Liquidator and all other parties in the petition, I find it just to make an order in relation to the applicants' claim following the orders prayed by VIP and agreed by all other parties to the petition. It is ordered under the powers vested upon this court under s. 95 of Cap. 33 that, IPTL shall consider the payment of that claim as soon as possible in honour of the commitment of PAP and the prayer enlisted as number 3 herein above, for which the VIP sought an order of this court.

I therefore, order and mark the petition withdrawn as prayed. I also grant all the orders prayed by the VIP and accompanying the notice as enlisted from No. 1-5 herein above, and as agreed by the parties to the petition (i.e IPTL, the Provisional Liquidator and Mechmar). Under the circumstances of this matter demonstrated herein above, I will make no any order as to costs for the withdrawal of the petition. It is accordingly ordered.

JHK. UTAMWA
JUDGE
05/09/2013

05/09/2013

CORUM; Hon. Utamwa, J.
For the Petitioner-Mr. Ngalo and Steven Kamara advocates
For the applicant- Mr. Mnyele advocate.
For the Respondents- Mr. Makandege and Mr. Mustafa Ismail advocates
CC; Mrs. Kaminda.

Court; Ruling delivered in the presence of Messrs. Ngalo and Kamara for VIP, Mr. Mnyele for Law Associates Advocates, Mr. Makandege for IPTL and Provisional Liquidator and Mr. Mustafa Isamail for BOT, in chambers this 5th day of September, 2013.

J.H.K. UTAMWA

JUDGE.

05/09/2013