IN *RE:* RESOLUTE TANZANIA LIMITED (APPLICANT)

AND IN THE MATTER OF THE COMPANIES ORDINANCE (CHAPTER 212)

AND IN THE MATTER OF AN APPLICATION FOR EXTENSION OF TIME TO REGISTER A CHARGE

HIGH COURT OF TANZANIA
(*Commercial Division*)
AT DAR ES SALAAM

(Kalegeya, J.)

MISCELLANEOUS CIVIL APPLICATION No. 2 OF 2000

Company Law – Judicial interpretation of sections 79(1), 80 and 85 of the Companies Ordinance Chapter 212 – Whether payment of fine for late filing of a charge under section 80(3) is sufficient to validate a charge rendered void under section 79(1).

Charge - Late registration of a charge – Whether registration is valid without order of the court.

Resolute Tanzania Limited, the applicant, appeared before this Court seeking for, (*a*) judicial interpretation of sections 79(1), 80 and 85 of the Companies Ordinance Chapter 212 as they relate to an issue as to whether payment of fine for late filing of a charge under section 80(3) was sufficient to validate a charge rendered void due to non-registration and, in the alternative, if the answer to (*a*) is in the negative (*b*) an order extending time to register a charge on the Applicant's assets.

Held: (i) The registration of the Applicant's charge is proper regard being had to the conclusiveness of the Registrar's certificate in terms of section 82(2) Chapter 212.

(ii) ***Obiter:*** Once a company defaults in registering a charge on its property within the 42 days' period prescribed under section 79(1), Chapter 212 the said charge

can only subsequently be registered under an order of the court extending the period within which to register the same following an application by either the company or any other interested person in terms of section 85 of Chapter 212.

(iii) ***Obiter:*** The Registrar of Companies can impose a penalty on the defaulting company or any of its officers in terms of section 80(3) once the court has granted extension of time and the charge having been registered as a result.

Case referred to:

1) *Calico Textile Industries Ltd and the Registrar of Companies* (CAT) Civil Appeal Number 25 of 1993 (unreported)

Statutory provisions referred to:

1. Section 9(1), 79(1), 80, 80(3), 82(2) and 85 of the Companies Ordinance Chapter 212

Mr Rwechungura for the applicant

Mr Mkapa for the Registrar of Companies

RULING

(Delivered 28 July 2000)

Kalegeya, J.: Resolute Tanzania Limited, applicant, represented by Mr Rwechungura, Advocate, is before this Court seeking for:

(a) judicial interpretation of section 79(1), 80 and 85, the Companies Ordinance Chapter 212 as they relate to an issue whether payment of fine for late filing of a charge under section 80(3) is sufficient to validate a charge rendered void due to non registration; and, in the alternative, if the answer to (*a*) is in the negative;

(b) an order extending time to register a charge on Applicant's assets.

Mr Mkapa appeared on behalf of the Registrar of Companies.

Facts undisputed in this matter are as follows Acting under "a loan package" extended by Barclays Bank PLC, the Applicant contracted to create the following charges, to secure the loan in favour of the lender (Barclays Bank PLC):

> (i) Share Mortgage on all the shares held by the applicant in Samax (Mabangu Mining Limited first borrower)
>
> (ii) Share Mortgage on all the shares held by the applicant in Samax Mabangu (Exploration) Limited (the second borrower).
>
> (iii) Deed of Variation dated 5 November 1999 amending the fixed and floating charge dated 10 July 1998 between the Applicant and the Lenders.

The said charges were created on 5 November 1999. Statutorily, these were supposed to be registered with the Registrar of Companies by 16 December 1999, that is, within 42 days of their creation. However, they were not registered within that period. They were registered after over 80 days had passed: that is, on 31 January 2000. This was after the Applicant had paid the fine prescribed under section 80(3) of Chapter 212. Then the Registrar duly issued the relevant certificate of registration. Shortly after, however, notwithstanding having secured the said certificate, the Applicant being not sure of the legality of the course taken, through the services of Mr Rwechungura, Advocate, filed the present application.

Briefly, Mr Rwechungura's views are that, once the 42 days elapse without being registered, a charge becomes void and can only be validated by a court's order extending the said period on application by the Company or any interested person in terms of section 85 of the Companies Ordinance. He insists that section 80(3) simply prescribes a penalty for the Company or any of its principal officers for default but does not confer powers to the Registrar of Companies to simply impose the fine and proceed to register the charge on assumption that it has been validated in the process. In an honest, truth seeking submission, Mr Rwechungura insists that although they paid the fine and secured the certificate they believe that they are on the same footing as not having any. Mr Rwechungura, supported by his own

affidavit then impresses that in the event this interpretation of the law is found to be correct the court should be pleased to extend the period within which to act. As to why they were so late Mr Rwechungura deposes that up to the time when the charges were created stamp duty and "Capital Gains Tax" on the shares secured for the loan had not been paid due to "uncertainty in the position of the law" regarding "payment of duties and taxes by mining companies" and that "it took a long time by the applicant and its consultants on the one hand and TRA on the other hand to settle the matter finally..."

Mr Mkapa for the Registrar of Companies, briefly conceded that the obtaining practice has been that payment of penalty, without any Court order extending the time, validated the otherwise void charge under section 79(1) but expressed reservations regarding the legality of that practice.

In line with the Applicant's prayers issues framed are as follows:

> 1. Whether payment of fine for late filing of a charge under section 80(3) of Chapter 212 is sufficient to validate the charge rendered void under section 9(1) of same Chapter
>
> 2. If payment of fine is not enough to validate the charge whether in the circumstances there are sufficient grounds for extension of time in which to effect the filing.

I will start with issue one – whether payment of penalty validates the void charge or whether it is mandatory that extension of time has to be secured first.

As the matter concerns the interpretation of the provisions of the law the same must be reproduced as I hereby do. Section 79(1) which makes a charge void for non-registration states:

> 9(1) Subject to the provisions of this part of this Ordinance every charge created after the fixed date by a company registered in the Territory and being a charge to which this section applies shall so far as any security on the company property or undertaking conferred thereby be void against the liquidator and any creditor of the company, unless

the prescribed particulars of the charge, together with the instrument, if any by which the charge is created or evidenced or a copy thereof verified in the prescribed manner are delivered to or received by the Registrar for registration in a manner required by this Ordinance within forty two days after date of its creation but without prejudice to any contract or obligation for repayment of the money thereby secured, and when a charge becomes void under this section the money secured thereby shall immediately become payable.

Section 80 needs to be produced in full for clarity. The section provides:

Section 80(1) It shall be the duty of a company to send to the registrar for registration the particulars of every charge created by the company and of the issues of debentures of a series requiring registration under the last foregoing section, but registration of any such charge may be effected on the application of any person interested therein.

(2) Where registration is effected on the application of some person other than the company that person shall be entitled to recover from the company the amount of any fees properly paid by him to the registrar on the registration.

(3) If any company makes default in sending to the registrar for registration the particulars of any charge created by the company or of the issues of debentures of a series requiring registration as aforesaid then unless the registration has been effected on the application of some other person the company and every director manager secretary or other person, who is knowingly a party to the default shall be liable to a fine not exceeding one thousand shillings for every day during which the default continues.

Section 85 runs as under:

85 The court on being satisfied that the omission to register a charge within the time required by this Ordinance or that the omission or mis-statement of any particular with respect to any such charge or

in a memorandum of satisfaction, was accidental, or due to inadvertence or to some other sufficient cause or is not of a nature to prejudice the position of creditors or shareholders of the company or that on other grounds it is just and equitable to grant relief may on the application of the company or any person interested and on such terms and conditions as seem to the court just and expedient order that the time for registration shall be extended or as the case may be that the omission or mis-statement shall be rectified and may make such order as to the costs of the application as it thinks fit.

I should state from the outset that my research using the limited literature at my disposal, has not landed me on any authority dealing with a similar issue. However, the wording of sections 79(1), 80 and 85 of Chapter 212 read together and guided by the general spirit created under the whole of Part IV (Registration of Charges) under which the said sections fall leaves the interpretation attached thereto by the applicant intact and sound.

Section 79(1) clearly makes a charge on a company's property or under taking void as against the liquidator or any creditor of the company unless registered with the Registrar of Companies within 42 days of its creation. This period starts to run from the time when the instrument creating the charge is executed. However the same section provides that this voidability is subject to the provisions of the Companies Ordinance falling under that part Part IV. Under this part the sections which are relevant to that issue are section 80 and 85. Section 80(1) places a duty for registering a charge on the Company which creates the charge. It adds however that application for registration may also be made by any person interested in the charge. Section (2) absorbs the cost element from the person, other than the Company, who applies to have the charge registered, costs incurred are recoverable from the Company. Then follows the seemingly controversial subsection; subsection (3) in very clear terms regarding liability for default in registration of a charge, the subsection prescribes a penalty to the Company and its principal officers (for example Director, Manager Secretary), who were knowingly parties to the default, fixed so as not to exceed TZS. 1 000 for every day during which the default continues. If however the registration has been effected on the application of another person the penalty is not payable.

We have been told that hitherto the Registrar of Company's interpretation of section 80(3) is that any company in default of registering a charge could at any subsequent time, outside the 42 days' period simply pay the fine not exceeding TZS. 1 000 per defaulting day get the charge registered and secure a certificate. This is exactly what happened with the Applicant's case. According to the Registrar, a defaulting company and any interested person have two avenues at their disposal either to apply to the Registrar who would automatically register the charge though late in presentation, with a qualification that if it is a company, it must pay a fine or make an application before the court for extension of time, in which case, if the applicant is a company the penalty is waived.

As I have already observed that interpretation is deplorably wrong. Section 80 simply prescribes whose duty it is to register a charge: prescribes who else can apply for registration in case the one bestowed with the duty defaults and that the liability for costs incurred in registration would still lie with the one upon whom the duty rests. And then it prescribes a penalty for the one who defaults in his duty, exonerating in the process any other person who applies to salvage the situation. Nowhere does this section even suggest that the application for late registration would be made to the Registrar. In fact the wording in section 80(3) makes it clear that the penalty shall be paid after the Registration has been effected. In other words payment of penalty is not a prerequisite to late registration of a charge. This presupposes completion of another procedure. The subsection states.

> Section 80(3) If any Company makes default in sending to the Registrar for registration the particulars of any charge requiring registration then unless the registration *has been effected on the application of some other person* the Company ... shall be liable to a fine ... [emphasis supplied]

Clearly the above underlined wording shows that section 80(3) is just a penalty provision. It presupposes that an application will have been lodged, heard and extension of time granted followed by registration. If the application for extension of time was made by a person other than a company the penalty provision is not applicable, but it is, if it was made by the company. The court is empowered under section 85 to extend time on such 'terms and conditions" as may seem "just and expedient". In my view, this however, does not include the penalty prescribed under section 80(3), because as I have already explained the penalty prescribed under section 80(3), comes in after leave to file a charge outside the 42 days' period has been granted and charge registered. What it means is that imposition of the penalty is left to the Registrar of Companies. The court's duty is limited to granting or refusing to grant extension of time. If the court refuses to grant extension of time, the question of penalty does not arise. The Registrar of Companies has to register the charge once the court extends time. He cannot question the order. Once he registers the same then, depending on circumstances of a particular case, which in my view would include the observations of the court in apportioning the blame for the late registration and only if the applicant is a company whose property was put on charge, the Registrar decides on the amount payable as a penalty by the said company. The subsection simply prescribes the maximum "not exceeding 1000 – per day defaulted". The Registrar may decide to impose anything less than that.

Again, if the existing interpretation was correct, there would be no reason of including "any person interested" under section 85. Why? As no penalty is imposable where the charge is registered by "any other person" is there any reason why such person would decide to use this seemingly circuitous or costly procedure of applying to the court instead of going straight to the Registrar?

The above apart, the necessity of making a formal application before the court becomes necessary and logical regard being had to the fact that other persons' interests accruing after creation of the charge may otherwise be put in jeopardy.

All in all, therefore, I hold that a proper interpretation of the provisons as sought by the applicant is that once a company defaults in registering a charge on its property within the 42 days' period prescribed under section 79(1) Chapter 212 the said charge can only subsequently be registered under an order of the court extending the period within which to register the same following an application by either the company or any other interested person in terms of section 85 of Chapter 212. The Registrar of Companies can only impose a penalty on the defaulting company or any of its officers in terms of section 80(3) once the court has granted extension of time and the charge having been registered as a result. The amount to be imposed as a penalty is within the discretion of the Registrar of Companies provided it does not exceed TZS. 1000 per defaulted day. Where does the above conclusion lead us to?

We have already found as a fact that the Registrar, believing that he was treading along the right legal track, simply imposed a fine on applicant which was duly paid, registered the charge outside the 42 days period and issued a Certificate of Registration under section 82(2) of Chapter 212. Such last mentioned certificate is conclusive evidence that the provisions of the Ordinance have been complied with. It provides.

> Section 82(2) The registrar shall give a certificate under his hand of the registration of any charge registered in pursuance of this Part of this Ordinance stating amount thereby secured and the certificate shall be conclusive evidence that the requirements of this Part of this Ordinance as to registration have been complied with ...

Can this Court assail the same at this stage and declare it ineffective? I have carefully considered the matter and have reached a conclusion that the conclusiveness as prescribed under section 82(2) precludes this Court from so acting. Judicial interpretation in Britain, in respect of the provision of the Companies Ordinance which is in *pari materia* with our section 82(2) prohibits such move. **Pennington's Company**

Law, (5 ed), at page 539, summarizing the ruling position gives a synopsis of various decisions as follows:

> Because of the conclusiveness of the certificate the mortgage or charge is effective against all parties according to its terms even if the particulars submitted to the Registrar are inaccurate as to the amount secured or the property subject to the mortgage or charge or the date on which it was created or apparently any other matter. This is so whether the particulars for registration are submitted by the company or by the mortgagee or chargee. Moreover the court cannot quash or annul the certificate issued by the Registrar on an application for judicial review of his decision to issue it because the conclusive effect of the certificate has to be respected even if the Registrar made a mistake of law or an unreasonable decision of part in registering the mortgage or charge (for example the Registrar issued a certificate of registration after permitting the applicant to amend or substitute a new application more than twenty one days after the mortgage or charge was created).

When urging this Court to accede to the proposition that the certificate issued is as good as nothing because the procedure was not followed, Mr Rwechungura cited a (CAT) decision in *Calico Textile Industries Ltd v. The Registrar of Companies* (1) wherein it was decided that a court can order rectification of a certificate issued by the Registrar of Companies under that provision if fraud in its acquisition is proved. This authority is not relevant and I am sure Mr Rwechungura failed to land on one which is relevant not because of lack of ingenuity or capacity in search of legal materials, for he is a counsel with quite the opposite of such wanting characteristics, but because our Companies Ordinance has not substantially been tested at the doors of our Courts.

The *Calico* case(1) is irrelevant as there is no fraud in the matter before us. It is purely a misinterpretation of the provisions of the law, and the Registrar, has all along, genuinely been acting in a lot many cases, the way he acted in this matter. There is no injustice or related which is committed to any person directly or directly connected to the charges. In my view although I have a lot of reservations regarding the entire field covered by the British judicial interpretation (quoted above) on the conclusiveness of Registrar's certificates (I can only hope and await a fitting opportunity when they would be subjected to judicial test relating to circumstances prevailing in our Tanzanian environment). I am of the considered view that the present situation is one of the justified instances where the conclusiveness of such certificate is unquestionable. I hold therefore that the registration of the applicant's charge is proper regard being had to the conclusiveness of the Registrar's certificate in terms of section 82(2) Chapter 212. I hurriedly add however that it is Court's expectations that, from now onwards, the Registrar will employ a proper interpretation of the law as provided in this ruling. With this finding the alternative prayer dies naturally.

Finally, I should commend, both Mr Mkapa and Mr Rwechungura's ingenuity in their pursuit of justice by their endeavour to seeing to it that the law is complied with I say so because, to start with Mr Rwechungura, having secured a certificate of Registration as he did not many would have taken up the burden of putting into motion legal machinery whose end results are unknown to the promoter. On the other hand, Mr Mkapa exhibited what many don't have. Most employees in managerial positions especially civil servants, are abhorred of being corrected on what they are used to and what they believe to be correct. He did not hesitate to express his negative feelings about the obtaining procedure. We should all emulate this attitude for the growth and development of our laws.

CRDB BANK LIMITED *v.* JOHN KAGIMBO LWAMBAGAZA

HIGH COURT OF TANZANIA
(*Commercial Division*)
AT DAR ES SALAAM

(Nsekela, J.)

COMMERCIAL CASE No. 10 OF 2000

Civil Practice and Procedure – Summary Procedure – defendant fails to file written statement of defence after having been granted leave to appear and defend – Order VIII (2)(b) or Order XXXV Rule 2(2).

The plaintiff bank sued the defendant under Order XXXV: Summary Procedure of the Civil Procedure Code1966 for recovery of money due on a loan. The defendant was granted leave of the court to appear and defend the suit unconditionally. He was ordered to file a written statement of defence on or before 27 June 2000. The defendant failed to comply with this Court order. Counsel for the plaintiff prayed for a hearing date in order to prove the suit *ex parte* under Order VIII, rule 14(2)(*b*) of the Civil Procedure Code as amended by GN Number 422 of 1994. The court considered whether the provision cited by counsel for the plaintiff was applicable in light of the purpose of Order XXXV of the Civil Procedure Code.

Held: (i) The purpose of Order XXXV of the Civil Procedure Code on Summary Procedure is to enable a plaintiff to obtain judgment expeditiously where the defendant has in effect no substantial defence to the suit and to prevent such a defendant from employing delaying tactics to postpone the day of reckoning;

(ii) Order XXXV is self-contained in so far as it relates to suits stipulated thereunder;

(iii) Since the defendant defaulted in filing his Written Statement of Defence on or before the 27 June 2000, then Order XXXV, rule 2(2), and not Order VIII, rule 14(2)(*b*), came into play;