



**Jumra Limited v S. C. Johnson & Son Kenya Limited (Insolvency Notice E024 of 2021)  
[2022] KEHC 11529 (KLR) (Commercial and Tax) (28 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 11529 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
INSOLVENCY NOTICE E024 OF 2021  
DAS MAJANJA, J  
JULY 28, 2022  
IN THE MATTER OF THE INSOLVENCY ACT, 2015  
AND IN THE MATTER OF JUMRA LIMITED (A DEBTOR)**

**BETWEEN**

**JUMRA LIMITED ..... APPLICANT**

**AND**

**S. C. JOHNSON & SON KENYA LIMITED ..... RESPONDENT**

**RULING**

1. Jumra Limited (“the Debtor”) has filed the Notice of Motion application dated 24<sup>th</sup> May 2021 made under section 384 of the *Insolvency Act*, 2015 (“the *Insolvency Act*”) seeking to set aside a Statutory Demand dated April 16, 2021 (“the Statutory Demand”) issued by the S. C. Johnson & Son Kenya Limited (“the Creditor”) demanding payment of KES 13,757,587.96 based on a non-exclusive Distributorship Agreement (“the Agreement”).
2. Under the Agreement, the Creditor appointed the Debtor as a non-exclusive Distributor of its products within Nairobi and Lower Eastern provinces and its environs within the Republic of Kenya.
3. The application is supported by the grounds on the face of the application and the affidavit of its director, Raju Prabhulal Shah, sworn on May 17, 2021. It is opposed by the replying affidavit of the Creditor’s Head of Sales, Mary Ochieng, sworn on June 6, 2022. The application was canvassed by way of written submissions.
4. The grounds in support of the application are set out on the face and may be summarized as follows:



- a) Under the Agreement, the Debtor would purchase products exclusively from the Creditor which it would resell under its own name and on its own account within the designated territory over a specified period of time.
  - b) On September 12, 2019 and September 16, 2019, the Creditor raised an issue as to the rebate granted to the Debtor whereupon the Debtor responded explaining its position in respect to the rebate paid on the in-market-sales which had earned the Debtor a credit note of 2% as agreed.
  - c) The Debtor claims that the Creditor did not provide it with proof of achieving the in-market-sales which resulted to the rebate granted, instead, the Creditor, through a letter forwarded to the Debtor on 27<sup>th</sup> September 2019, placed onerous obligations on the Debtor to proceed and purchase products worth not less than KES 524,000,000.00 net of VAT between July 1, 2019 and June 30, 2020.
  - d) The Debtor proceeded to issue a termination notice to the Creditor on November 1, 2019 in accordance with the Agreement which the Creditor acknowledged.
  - e) That the rebate issue remained unresolved until 2021, when the Debtor reached out to the Creditor requesting for an order of shoe creams. The Creditor indicated they it could not process the order until the rebate issue was resolved on its terms. The Debtor rejected the proposal whereupon the Creditor served on it the Statutory Demand.
  - f) The Debtor does not acknowledge the debt and asserts that a dispute exists as to how the Creditor raised the issue of the credit note, justify its calculation, proceeded and paid the Debtor the amounts in the credit note and now seeks the Debtor to reimburse the said amount.
  - g) The Debtor therefore contends that on the basis of the dispute, the court should allow its application and set aside the Statutory Demand.
5. The Debtor contends that it does not acknowledge the debt which is disputed on the basis of the unresolved rebate issues. The Debtor argues that the debt being disputed cannot be equated to inability of a company to pay its debts. It also submits that since the debt amount is an issue arising from the Agreement, the dispute should proceed to arbitration in accordance with Clause 19.4 thereof or in the alternative, the debt amount should be pursued through ordinary civil proceedings and not through insolvency proceedings. The Debtor urges the court to set aside the Statutory Demand for being incompetent and abuse of the court process otherwise the Debtor would be subjected to corporate execution without a fair hearing process.
  6. The Creditor opposes the application. It states that the application is only intended to delay the fair and expeditious recovery of an undisputed debt. It contends that when the Debtor wrote the letter of September 12, 2019 citing unpaid rebates it responded providing an explanation why the Debtor did not qualify for the rebate claimed. The Creditor asserts that the Debtor has not disputed the outstanding amount due save for the issue of alleged unpaid rebates, which it conclusively responded to. The Creditor contends that as the Debtor was in arrears, it issued the Statutory Demand as the debt remains undisputed. It states that there is no basis to set aside the Statutory Demand as it does not have sufficient grounds to dispute the debt.
  7. The main issue for determination is whether the court should set aside the Statutory Demand. The first ground for consideration is whether the court should do so on the basis that there is an alternative remedy. I say so because the dispute between the parties is based on the Agreement which at section 19 deals with disputes. It states, in part, as follows:



### 19.3 Non-Binding Negotiation

(A) The Parties shall attempt in good faith to resolve any Dispute promptly by negotiation between senior executives who have authority to settle the matter. To commence a non-binding negotiation .....

### 19.4 Arbitration

(A) Any dispute arising out of or relating to this Agreement, including the breach, termination or validity thereof, which is not resolved by a non-binding procedure ..... shall be finally resolved by arbitration in accordance with the CPR Institute for Dispute Resolution Rules for Non-Administered Arbitration of International Disputes, by a sole arbitrator to be appointed by the Parties or in default of agreement by the Chartered Institute of Arbitrators (Kenya Chapter) ..... The arbitrator is empowered to award damages as provided in this Agreement.

8. The Agreement binding the parties is clear that disputes arising from breach, termination or validity shall be determined through arbitration proceedings. In the first instance, the parties are required to engage in nonbinding negotiation. If the matter is not resolved, then arbitration proceedings should commence. The Debtor states that in a meeting held on 17<sup>th</sup> September 2019, parties attempted to resolve the dispute but were unable to reach a conclusion. It therefore submits that the second port of call should be to arbitration process and not court proceedings.
9. I therefore hold that the parties bound themselves to resolve the dispute by arbitration and as I stated in *Re Libyan Arab African Investments Company Kenya Limited* ML IN No. E031 of 2020 [2021] eKLR, “[The] dispute resolution mechanism between the parties cannot be short-circuited by issuing a statutory demand under the *Insolvency Act*.” *In Re Kenya Airfreight Handling Limited* ML IP No. E016 of 2019 [2021] eKLR, the court declined stayed the winding up petition on the ground that there existed alternative remedies including arbitration under the subject shareholders’ agreement.
10. Although a party who seeks to refer a matter to arbitration ought to apply for stay of proceedings under section 6 of the *Arbitration Act*, I do not think that failure to invoke the aforesaid provision is fatal to this case. It is now settled that since liquidation of a company is a draconian remedy, the court will not liquidate a company if there exists an alternative remedy (see *Re: Kenya Airfreight Handling Limited* (Supra)). Thus, even if the matter would go forward, the Creditor would still be met with the same objection and the court would refuse to liquidate the Company.
11. Turning to the other grounds for setting aside, these are provided under Regulation 16 and 17 of the Insolvency Regulations. In particular, Regulation 17(6) provides as follows:

17 (6) The Court may grant the application if—

- (a) the debtor appears to have a counterclaim, set-off or cross-demand which equals or exceeds the amount of the debt or debts specified in the statutory demand;
- (b) the debt is disputed on grounds which appear to the Court to be substantial;
- (c) it appears that the creditor holds some security in respect of the debt claimed by the demand, and either paragraph (6) is not complied with in respect of the demand, or the Court is satisfied that the value of the security equals or exceeds the full amount of the debt; or
- (d) the Court is satisfied, on other grounds, that the demand ought to be set aside. [Emphasis mine]



12. Regulation 17 (6) of the Insolvency Regulations essentially gives the grounds upon which a statutory demand can be set aside. The court in *Flower City Limited v Polytanks & Containers Kenya Limited* (Insolvency Cause 033 of 2020) [2021] KEHC 34 (KLR) (Commercial and Tax) elucidated these grounds and stated as follows:

- (3) ..... The rationale for applications of this nature is to enable the debtor to satisfy the court that he genuinely disputes the debt.
- (4) Simply put, a debtor must demonstrate the existence of a genuine dispute. Though it may not be possible to provide a closed list of the elements of a genuine dispute, the applicant must:-
  - a. show a plausible contention requiring investigation;
  - b. be bona fide, genuine and real;
  - c. be in good faith and show a prima facie plausibility;
  - d. truly exist in fact, and contain a serious question to be tried;
  - e. be something more than mere bluster or mere assertion;
  - f. be a claim that may have some substance;
  - g. have a sufficient degree of cogency to be arguable;
  - h. have objective existence; and
  - i. have sufficient factual particularity.

A genuine dispute therefore should not: -

- a. be spurious, hypothetical, illusory or misconceived;
- b. be plainly vexatious or frivolous;
- c. be so devoid of substance that no further investigation is warranted;
- d. be merely spurious claim, bluster or assertion; and
- e. be merely fanciful or futile.

13. The Debtor has attached correspondence between itself and the Creditor in respect to the debt. It disputes the debt on the basis of the rebates which the Creditor states that the Debtor did not qualify for. It also disputes the amount of KES 13,757,587.96 demanded which it seeks explanation as to how the Creditor proceeded to raise the issue of the credit note and to justify by calculation. Based on the reasons given, the court would be required to examine the various contention by the parties and apply its mind in resolving the dispute. Resolving this issue requires this court to conduct a mini trial and make a judgment as to the nature and extent of indebtedness. This is not the purpose of the application. I therefore come to the conclusion that the debt is disputed on substantial grounds. Coupled with the fact that the dispute between the parties must be resolved by arbitration under the Agreement, I am constrained to set aside the Statutory Demand.

14. For the reasons I have set out, I allow the Notice of Motion dated May 24, 2021 on terms that the Creditor's Statutory Demand dated April 16, 2021 be and is hereby set aside. The Creditor shall bear the costs of these proceedings assessed at KES. 35,000.00 only.

**SIGNED AT NAIROBI**



**D. S. MAJANJA**

**JUDGE**

**DATED AND DELIVERED AT NAIROBI THIS 28<sup>TH</sup> DAY OF JULY 2022.**

**D. CHEPKWONY**

**JUDGE**

Court Assistant: Mr. M. Onyango.

Mr Kivindyo instructed by TripleOKLaw Advocates for the Debtor/Applicant.

Mr Oyoo instructed by Kaplan and Stratton Advocates for the Creditor/Respondent.

