Danish Breweries Company East Africa Limited v Erro Immobilienverwalttungsgesellschaft MBH [ERRO GMBH] (Insolvency Notice E029 of 2022)
[2022] KEHC 16885 (KLR) (Commercial and Tax) (21 December 2022) (Ruling)

Neutral citation: [2022] KEHC 16885 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

INSOLVENCY NOTICE E029 OF 2022

DAS MAJANJA, J

DECEMBER 21, 2022

BETWEEN

DANISH BREWERIES COMPANY EAST AFRICA LIMITED ..... DEBTOR

AND

ERRO IMMOBILIENVERWALTTUNGSGESELLSCHAFT MBH [ERRO GMBH] ..... CREDITOR

RULING

1. This insolvency cause arises from the Creditor's statutory demand dated September 7, 2021 ("the Statutory Demand") served upon the Debtor. The Statutory Demand was for EUR 2,320,000.00 being the principal amount plus interest in respect to a convertible loan issued for 24 months from August 12, 2019 with interest at rate of 8% p.a. The loan matured and the Debtor defaulted in repaying it leading to the Creditor issuing the Statutory Demand. The Debtor has now filed the application dated April 20, 2022 seeking to set it aside.

2. The application is filed pursuant to section 17(2)(d) and 384 of the *Insolvency Act* No. 18 of 2015 ("the Act") and Regulation 10 of the *Insolvency Regulations*, 2016 ("the Regulations"). The Application is supported by the affidavit and supplementary affidavit of James Kirunyu Kimani in his capacity as the Debtor's Director sworn on April 20, 2022 and September 7, 2022 respectively. The Creditor opposes the application through the affidavit and further affidavit of its director, Detlef Artur Huehne, sworn on May 31, 2022 and December 5, 2022 respectively. The parties also filed written submissions to support their positions in the matter.

3. In support of its application, the Debtor confirms that it was served with the Statutory Demand. It however denies that the Creditor has proved or shown that the convertible loan was issued as alleged or that the amount claimed is owed and payable as claimed. It claims that any such convertible loan

ordinarily would be a security with both debt and equity features such that a creditor hold security in equity matching the debt and the Creditor has not specified any such security and any due and reasonable exercise of any option under the convertible loan. The Debtor further contends that it is solvent hence able and willing to pay all its undisputed debts. It therefore prays that the Statutory Demand be set aside.

4. In response to the application, the Creditor states that on August 12, 2019, Linus Wangombe Gitahi, Christopher White, Bounty Global Management and Nirav Maheshkumar Dave, as shareholders of the Debtor, executed a Conversion Loan Agreement ("CLA"). Under the CLA, the Debtor's board had authority to conclude the CLA with its shareholders or third parties for a maximum amount of EUR 4,000,000 until December 31, 2019 which would bear interest at a rate of 8% p.a. It was a term of the CLA that it would lapse upon termination or after a term of 24 months or upon the Debtor receiving a conversion request whereupon the loan would become due for repayment within 10 business days after the lapse of the loan.

5. Pursuant to the CLA, the Creditor issued a EUR 2,000,000.00 convertible loan to the Debtor which it contends the Debtor never serviced it causing it to make demand for payment. The Creditor states that on April 28, 2021, the Debtor acknowledged the debt of the loan and made an offer to make full payment together with a premium of EUR 50,000 and an extra EUR 20,000, which was never paid and the loan matured on August 12, 2021.

6. The Creditor argues that since the Debtor has not responded to the Statutory Demand, the application lacks merit. It argues that the application lacks merit as the Debtor has not demonstrated that it has a counterclaim, set off or cross demand that equals or exceeds the amount of debt in the demand or the debt is disputed or the creditor holds some security in respect of the debt claimed in the demand. It urges that the Debtor has not given sufficient reasons why the Statutory Demand should not give rise to insolvency proceedings. Further, that the failure to answer to the said demand, demonstrates that it is insolvent.

7. In answer to the Creditor, the Debtor states that the Creditor has not shown that it was a party to the CLA in that it has not signed it and that it has not exhibited any accession agreement as required under the CLA. The Debtor further states that the alleged acknowledgment of debt was issued in the name of Dayton Enterprises Limited which is a different entity from the Debtor. It contends that the Statutory Demand is only a means to exert pressure upon it to admit the disputed debt without following the proper channels set out in the CLA of dispute resolution through arbitration. In the circumstances, the Debtor submits that it has satisfied the grounds for setting aside the Statutory Demand.

8. In its further affidavit, the Creditor states that the Debtor's shareholders were the initial board according to the Debtor's shareholder agreement and that the accession agreement as required by Clause 2.3 of the CLA was duly executed. The Creditor confirms that the letter acknowledging the debt dated April 28, 2021 was under the letter head of Dayton Enterprises Limited, a shareholder of the Debtor as shown in the Debtor's CR 12 dated August 3, 2021.

9. The main issue for determination is whether the court should set aside the Statutory Demand. A Statutory Demand is ordinarily issued where a company is unable to pay its debts. Section 384(1) of the Act outlines the circumstances in which a company is unable to pay its debts as follows:

    (1) For the purposes of this Part, a company is unable to pay its debts—

        a. if a creditor (by assignment or otherwise) to whom the company is indebted for hundred thousand shillings or more has served on the company, by leaving it at the company's registered office, a written demand requiring the company to pay the debt

and the company has for twenty-one days afterwards failed to pay the debt or to secure or compound for it to the reasonable satisfaction of the creditor;

b. if execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part; or

c. if it is proved to the satisfaction of the Court that the company is unable to pay its debts as they fall due. [Emphasis mine]

10. The Regulation 16 and 17 of the Regulations provide outline the grounds for setting aside a Statutory Demand and the procedure to be followed once it has been issued. The provisions state, in part, as follows:

> 16. Application to set aside statutory demand
>
> (1) The debtor may, apply to the Court for an order to set aside the statutory demand—
>
> (a) within twenty-one days from the date of the service on the debtor of the statutory demand; or
>
> (b) if the demand has been advertised in a newspaper, from the date of the advertisement's appearance or its first appearance, whichever is the earlier.
>
> (2) Subject to any order of the court under regulation 17 (7), time limited for compliance with the statutory demand shall cease to run from the date on which the application is lodged with the court.
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> Regulation 17 (6) on Hearing of application to set aside statutory demand states,
>
> (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.

11. The Debtor argues that the debt is disputed on substantial grounds. On this issue, the Court of Appeal, in Universal Hardware Limited v African Safari Club Limited MSA CA Civil Appeal No. 209 of 2007 [2013] eKLR, provided the following guidance after reviewing several decisions:

> The thread running through these authorities is that in entertaining a petition to wind up a company on account of non-payment of debts, the court must be satisfied that the debt is not disputed on substantial grounds and is bona fide. If it is, then the winding-up

> proceedings are not the proper remedy. The substantial dispute must be the kind of dispute that in an ordinary civil case will amount to a bona fide, proper or valid defence and not a mere semblance of a defence. It is not sufficient for a company to merely say for instance that we dispute the debt. The company must go further and demonstrate on reasonable grounds why it is disputing the debt.

12. Although the Debtor contests the basis of the debt forming the basis of the Statutory Demand, the Creditor has furnished the CLA which is executed by the shareholders of the Debtor. In addition, and annexed to the Creditor's further affidavit is the Accession Agreement signed on August 12, 2019 on behalf of the Debtor stating as Clause 2.2 that, "The Company accepts the granting of a Convertible Loan as described herein." There is also clear and uncontroverted evidence that the Debtor received EUR 2,000,000.00 in its nominated account.

13. As regards the admission, while I agree that the acknowledgment dated April 28, 2021 is written on the letter heard of Dayton Enterprises Ltd, which is a shareholder of the Debtor and therefore a separate legal entity, the substance of the discussion and the admissions related to the debt owed by the Debtor. However, even disregarding the letter on that account that it does not relate to the subject debt, what is clear and uncontested is that the Statutory Demand duly served on the Debtor has not been answered.

14. Juxtaposing the facts of the case and the Regulations and in particular Regulation 17(6), there is no evidence or at any rate the Debtor has not shown that it has, "a counterclaim, set-off or cross-demand which equals or exceeds the amount of the debt or debts specified in the statutory demand." Nor do I find that the debt is disputed on grounds which appear to the Court to be substantial.

15. Finally, the Debtor claims that the Creditor has not shown that it is insolvent. Under section 384(1)(a) of the Act, a company is deemed unable to pay its debts if it fails to act on a Statutory Demand as required. The failure to act on a statutory demand is prima facie evidence of insolvency and once the Creditor has exercised its statutory right to issue such a demand, the burden falls on the Debtor to show that it is not insolvent or is in position to pay its debts. The Debtor must provide material, facts and evidence, upon which the court may conclude that the Company is not insolvent. This is a burden that the Debtor has not discharged in this case. It must be recalled that at this stage, the debtor is being given an opportunity to show why the creditor should not be given an opportunity to liquidate the company.

16. The Debtor is correct to state that the debt of liquidation should not be used to pressure a company to pay its debts. This would amount to an abuse of the court process. This is what the Court of Appeal observed on the subject in *Matic General Contractors Limited v Kenya Power and Lighting Company Limited* [2001] eKLR as follows:

> In the case of in Re a Company [1984] 2 Ch 349, it was held that where a petition against a company is presented ostensibly for a winding up order, but really for another purpose, such as putting pressure on a company, the court has an inherent jurisdiction to prevent such an abuse of process, and will do so, without requiring an action to be commenced, by restraining the advertisement of the Petition, and staying all proceedings upon it. I have no doubt in my mind that the Learned Judge was right in placing emphasis on the Appellant's motives, which in my view, were completely dishonourable. A winding up order is a draconian order. If wrongly made, the company has little commercial prospect of reviving itself and recovering its former position. If there is any doubt about the claim that seems to me to require that the Court, should proceed cautiously. Here was a debt which Kenya Power disputed vigorously on substantial grounds and the appellant was threatening Kenya Power with what really amounted to imminent corporation execution. Kenya Power

had no alternative but to approach the Court for redress having regard to the appellant's intransigence.

17. I agree with the sentiments of the Court of Appeal in the aforesaid case but with a caveat. The case was decided prior to the enactment of the *Insolvency Act*, 2015 where a Company under the threat of winding up, as the process was known, was not afforded an opportunity to contest and set aside the statutory demand. This opportunity is now afforded to a company to satisfy the court that the statutory demand issued under section 384(1)(a) of the Act as a prelude to a liquidation petition is unwarranted.

18. In this case and for the reasons I have set out above, I am not satisfied that there are grounds to set aside the Statutory Demand dated September 7, 2021. I dismiss the application dated April 20, 2022 with costs to the Creditor which I assess at Kshs. 50,000.00. The Creditor may present the Liquidation petition after 90 days of this order.

DATED and DELIVERED at NAIROBI this 21st day of DECEMBER 2022.

D. S. MAJANJA

JUDGE

Court Assistant: Mr. M. Onyango.

Mr Mwaniki instructed by Muri Mwaniki Thige and Kageni LLP Advocates for the Debtor/Applicant

Ms Kidunduhu instructed by TripleOKLaw LLP Advocates for the Creditor/Respondent.