



Qed Solutions Limited v Daedal Procurement Systems (PTY) (DPS) (Insolvency Notice E007 of 2022) [2022] KEHC 16883 (KLR) (Commercial and Tax) (21 December 2022) (Ruling)

Neutral citation: [2022] KEHC 16883 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY NOTICE E007 OF 2022**

**DAS MAJANJA, J
DECEMBER 21, 2022**

BETWEEN

QED SOLUTIONS LIMITED APPLICANT

AND

DAEDAL PROCUREMENT SYSTEMS (PTY) (DPS) RESPONDENT

RULING

1. The Applicant (“QED”) has moved this court through an application dated August 17, 2022 seeking to set aside the statutory demand dated January 26, 2022 and served on July 27, 2022 issued by the Respondent (“Daedal”) demanding payment of ZAR 621,833.00 equivalent to approximately Kshs 4,353,577.20 (“the Statutory Demand”). The application is filed pursuant to sections 16, 384 and 692 of the *Insolvency Act, 2015* (“the Act”) and the Regulation 16 and 17 of the *Insolvency Regulations, 2016* (“the Regulations”).
2. The application also seeks stay of proceedings of HCCOMM Misc Appl No E002 of 2022, Qed Solutions v Daedal Procurement System Pty Dps or in the alternative the file be availed to this court for hearing and determination of both applications. I struck out that matter on October 17, 2022 on the ground that the application was premature. It is therefore not necessary to address the arguments relating to those proceedings as the matter is now closed.
3. The application is supported by the affidavit of Alex Wainaina Mbugua, the founder and chairman of QED, sworn on August 17, 2022. It is opposed by Daedal through the replying affidavit of its Operations Director, Nicolas Labadarios, sworn on August 12, 2022. The parties’ advocates made brief oral submissions in support of their respective positions.
4. The case by QED is that it has genuine and substantial grounds for disputing the debt claimed by Daedal. It states that it entered into a contract with Sentigol Pty (“Sentigol”) on April 3, 2013 for the



- distribution and sale of an IT solution known as Tendersure. The contract was renewed and signed by Nicolas Labadarios as the new executive director of Sentigol. QED states that it learnt that liquidation proceedings had been commenced against Sentigol and was advised by Nicolas Labadarios that Daedal had been involved in transferring the assets of Sentigol including the Tendersure to a new company.
5. QED contends that Daedal proposed that they start a similar contractual relationship as that between QED and Sentigol to sell the Tendersure. They ultimately entered into a contract on September 27, 2019. Under the new contract, QED would act as the sole agent for Daedal in the distribution and sale of the Tendersure in African countries excluding Southern Africa. QED contends that it was coerced to sign the contract and in order to protect its business interests it requested for proof of acquisition and transfer of Sentigol assets including the Tendersure which was never furnished. QED states that it also learnt that Daedal had purchased all the fixed assets including Tendersure for a mere ZAR 15,000.00 equivalent of Kshs 106,800.00 as at January 5, 2022 which was a gross undervalue and which was likely to have been done through a fraudulent transaction. QED states that following the discovery of the fraud, it withheld further payments until proof of ownership of the Tendersure was provided. This led to Daedal issuing the demand dated July 22, 2021 to QED's advocates. QED denies any liability over the alleged dispute and demands to be furnished with all the documents and information.
 6. QED contests the jurisdiction of this court to adjudicate over the matter as the contract stipulated that it would be construed according to the Laws of South Africa. It further states that Daedal, being a foreign company, with no place of business or known assets in Kenya sought to furnish security for costs and provide a certificate for compliance.
 7. QED disputes the contract upon which the debt is grounded and points out that Daedal has not shown how the amount claimed is computed. Further, QED contends that it has not used Tendersure since April 2020 as it developed its own system. It states that Daedal's Tendersure was eventually shut down in February 2021 hence it cannot be paid for a system that is no longer in operation. In conclusion, QED submits that the Statutory Demand should be set aside as it has the ability to pay its debts.
 8. In response, Daedal submits that the existing debt is based on the contract dated July 27, 2019 which QED has not been disputed and that QED withheld payment despite demand being issued to it. Daedal contends that it does not need to carry on business in Kenya in order for it to recover the debt as long as it can prove the debt. It also states that it does not require a certificate of compliance or to deposit security for costs as sought by QED in order pursue the debt.
 9. The main issue for determination is whether the Statutory Demand should be set aside. The jurisdiction and grounds upon which the court may set aside a statutory demand issued under section 384 of the *Insolvency Act* are set out in Regulation 17(6) of the *Regulations* 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 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.



10. On issue of existence of debt, it is not in dispute that there exists a debt between the parties. QED confirms that it had been paying the debt but withheld the payments when Daedal failed to provide certain documents in relation to the transfer of business from Sentigol to Daedal which it had requested. Once Sentigol had been liquidated the parties entered into a new agreement dated September 27, 2019. Clause 1.5 of the said agreement provides that, “This Agreement shall be governed by and construed in accordance with the laws of South Africa.”
11. Looking at the totality of the evidence on record, I agree that the claimed debt is disputed on substantial grounds. More particularly, Daedal has not shown or demonstrated how the debt claimed is made up. In other words, even if QED admits it owes some money, the question of how much is still in issue and I doubt that a liquidation petition is a forum for determination of such a question. Moreover, there is the question of relationship between Daedal and QED in relation to the liquidation of Sentigol. Daedal has not demonstrated, in its replying deposition, that the debt is not affected by the subsequent arrangements.
12. The subsequent agreement dated September 27, 2019 provides that the agreement shall be governed by the laws of South Africa. This is important because, in order to determine the QED’s liabilities and any other issue arising out of that contractual relationship, the court would have to consider adjudicate the issue under South African law. Assuming that the court would assume jurisdiction, foreign law is a question of fact (see *DP Bachbeta v Government of the United States of America* NRB CA Civil Appeal No 111 of 2006 [2011] eKLR). If the matter goes ahead, the insolvency court would be required to wade through questions of fact which ought to be decided in a different forum.
13. For the reasons I have set out, I find and hold that the debt is disputed on substantial grounds. I allow the application dated August 17, 2022 with costs to the Applicant. The costs are assessed at Kshs 50,000.00.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF DECEMBER 2022.

D. S. MAJANJA

JUDGE

Court Assistant: Mr. M. Onyango.

Mr Nderitu, SC with him Ms Obiero instructed by Nderitu and Partners Advocates for the Debtor/Applicant

Ms Kageha instructed by Mwamuye Mzungu Solomon Advocates LLP for the Creditor/Respondent.

