REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & TAX DIVISION

INSOLVENCY CAUSE NO. E033 OF 2020

RE: IN THE MATTER OF THE INSOLVENCY ACT (NO.18 OF 2015)

AND

IN THE MATTER OF THE LIQUIDATION OF CYTONN HIGH YIELD SOLUTIONS LLP

CYTONN HIGH YIELDS SOLUTIONS LLP.....APPLICANT

VERSUS

ROSEMARY WAIRIMU KIONI.....RESPONDENT

AND

INSOLVENCY CAUSE NO. E034 OF 2020

CYTONN HIGH YIELDS SOLUTIONS LLP.....APPLICANT

VERSUS

MAUREEN WANJIKU GITATA.....RESPONDENT

AND

INSOLVENCY CAUSE NO. E035 OF 2020

CYTONN HIGH YIELDS SOLUTIONS LLP.....APPLICANT

VERSUS

EZEKIAL ODERA & 2 OTHERS.....RESPONDENTS

AND

INSOLVENCY CAUSE N0.E036 OF 2020

CYTONN HIGH YIELDS SOLUTIONS LLP.....APPLICANT

VERSUS

EMMA WAITHERERO NJENGA.....RESPONDENT

RULING

INTRODUCTION

1. This ruling determines four *ex parte* applications each dated **24th** December 2020 filed in Insolvency Cause Nos. **E 033** of 2020, **E 034** of 2020, **E 035** of 2020 and **E O36** of 2020 by **Cytonn High Yields Solutions LLP** (herein after referred as the applicant). The common thread between the four applications is that the applicant challenges the propriety of Statutory Demands issued against it by the respective Respondents in the said suits under section **17(3)(a)** or **(4)(a)** of the Insolvency Act[1](herein referred to as the Act).

2. The particulars of the Respondents claims against the applicant are as follows:--

a. **E033** of 2020, Statutory Notice dated **8th** December 2020 claims **Kshs.14,840,658/=.**

b. **E034** of 2020, Statutory Notice dated **11th** December 2020 claims **Kshs. 1,190,726/=**

c. **E035** of 2020, Statutory Notice dated **1st** December 2020 claims **Kshs. 6,424,954/-**

d. E036 of 2020, Statutory Notice dated **7th** December 2020 claims **Kshs. 21,590,244/-**

3. In the said Statutory Demands, the Respondents notified the applicant that in the event of failure to settle the debts within **21** days, they would institute Liquidation proceedings against the applicant.

4. The other common factor in the four applications is that the applicant being apprehensive of the devastating adverse impact any liquidation proceedings would have against it, it filed applications on **24th** December 2020 in the four suits under Section **692** of the Act seeking temporary injunctive orders against the Respondents restraining them from presenting/filing, serving and/or advertising any Winding Up Petition on the ground that the alleged debts are *bona fide* disputed.

5. The applications were auto-allocated to me on **28th** December 2020 and upon due consideration, I ordered that it would be prudent to hear them *inter partes.* I direct the applications to be served for *inter partes* hearing on **29th** January, 2021.

The instant applications

6. Vide separate applications dated **30th** December 2020 filed in each of the four files, the applicant moved this court seeking to review the orders made on **28th**December 2020. It also prays that this court grants prayers No. **3** to **7** (inclusive) of its application dated **24th** December 2020. It also prays for the costs to be provided for.

7. The applications are anchored on identical grounds. The core ground is that the applicant is challenging the propriety of the 21-day Statutory Demands requiring it to pay disputed amounts failure to which the Respondents would institute Liquidation proceedings against it.

8. The applicant states that concerned about the devastating adverse impact any liquidation proceedings would have against it, it filed the aforesaid applications under Section **692** of the Act seeking temporary injunctions against the Respondents from presenting/filing, serving and/or advertising any Winding Up Petition in respect of the alleged debts, but the court directed that it serves the application for *inter partes* hearing on **29th** January 2021.

9. The applicant states that prayers **1** to **7** (inclusive) of the said applications seeks *inter alia,* dispensation of service in the first instance and a temporary injunction against the Respondents restraining them from presenting/filing, serving and/or advertising any Winding Up Petition pending the *inter partes* hearing of the application do not appear to have been considered by the court.

10. It states that the Statutory Demands will lapse before the scheduled date of the *inter partes* hearing on **29th** January 2021, hence, unless this court grants temporary orders in terms of prayer **3** to **7** (inclusive) of the said application, these proceedings will be rendered otiose without any adjudication regarding its contention that the Statutory Demands are improper and/or unlawful because the Respondents will commence liquidation proceedings which would be a death knell for the applicant.

11. The applicant states that there is sufficient reason to review the orders made on **28th** December 2020 and grant injunctive relief as appropriate to preserve the subject matter of these proceedings.

The applicant's advocates submissions

12. In his submissions, Mr. Amoko, the applicant's counsel graphically reiterated the grounds enumerated on the face of the applications and the supporting affidavits and urged the court to preserve the subject matter by granting the interim orders sought. He pleaded with the court to invoke its inherent powers and grant the orders sought.

Determination

13. A convenient starting point is to address the applicant's advocates invitation to this court exercise its inherent powers and grant the orders sought. Courts derive their power from the Constitution and the statutes that regulate them. The jurisdiction of each hierarchy of the courts is limited within the boundaries of the written law apart from the High Court which is sometimes said to have inherent jurisdiction to do things not specifically provided for. Historically, the high court, in addition to the powers it enjoyed in terms of statute, has always had additional powers to regulate its own process in the interests of justice. This was described as an exercise of its inherent jurisdiction. Freedman C J M, citing I H Jacob *Current Legal Problems,* adopted the following definition of 'inherent jurisdiction'[2]

> *". . . the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of the law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them…"*

14. Jerold Taitz, in his book, *The Inherent Jurisdiction of the Supreme Court*[3] succinctly describes the inherent jurisdiction of the high court as follows:-

> *". . .This latter jurisdiction should be seen as those (unwritten) powers, ancillary to its common law and statutory powers, without which the court would be unable to act in accordance with justice and good reason. The inherent powers of the court are quite separate and distinct from its common law and its statutory powers, eg in the exercise of its inherent jurisdiction the Court may regulate its own procedure independently of the Rules of Court."*

15. Similar inherent jurisdiction is enjoyed by the English Superior Courts. I.H. Jacob in an article entitled *"The Inherent Jurisdiction of the Court'* ***[4]***quoted by Jerold Taitz (supra) states: -

> *"[it] exists as a separate and independent basis of jurisdiction, apart from statute or Rules of Court ... It stands upon its own foundation, and the basis for its exercise is ... to prevent oppression or injustice in the process of litigation and to enable the court to control and regulate its own proceedings ... [it] is a necessary part of the armoury of the courts to enable them to administer justice according to law. The inherent jurisdiction of the court is a virile and viable doctrine which in the very nature of things is bound to be claimed by the superior courts of law as an indispensable adjunct to all their other powers ... it operates as a valuable weapon in the hands of the court to prevent any clogging or obstruction of the stream of justice."*

16. The inherent jurisdiction of the high court has long been acknowledged and applied by courts.[5] However, a court's inherent power to regulate its own process is not unlimited. It does not extend to the assumption of jurisdiction which it does not otherwise have. In *National Union of Metal Workers of South Africa & others v Fry's Metal (Pty) Ltd*[6] it was held: -

> *"While it is true that this Court's inherent power to protect and regulate its own process is not unlimited – it does not, for instance, "extend to the assumption of jurisdiction not conferred upon it by statute. . ."*

17. The question flowing from all these references is; what can the High Court do, in exercise of its inherent jurisdiction, to achieve the desirable justice and practicality in the prayers sought in the instant applications which the law does not specifically provide for? In this respect, it must be mentioned at the outset the inherent powers of the court are not an open licence for the court's exercise of unlimited discretion. In most instances, it is invoked to effect procedural fairness between the parties where a statute falls short of doing so or where there is a gap in the law. The inherent power claimed is not merely one derived from the need to make the Court's order effective, and to control its own procedure, but also to hold the scales of justice where no specific law provides directly for a given situation.[7]

18. The law permits anyone to present a winding up petition against a company without first requiring the would-be petitioner to establish they are eligible to present and pursue the proposed winding up petition. A would-be petitioner is not required to undergo any pre-presentation process of judicial scrutiny, to ensure that the would-be petitioner is in fact eligible to present and pursue the petition. This leaves the winding up process vulnerable to abuse. Unless the court has some power to restrain, the process can be used as a device to pressurize a company into paying a debt the company genuinely and substantially disputes; or against which the company can deploy a genuine and substantial cross claim.

19. Where such an unjustified insolvency proceeding is presented or pursued, it amounts to 'abuse of process.' It is an abuse of the unconstrained right to present insolvency proceedings against a company. To enable companies facing an unjustified winding up petition to bring the abuse before the courts, the law provides an injunctive jurisdiction to the court. On a company's application, the court can issue an order prohibiting (i) a would-be petitioner from presenting insolvency proceedings or a winding up petition, or if the proceedings have already been presented, the petitioner from taking any further steps in the proceedings. Depending on where the proceedings have reached, this may mean, prohibiting advertisement of the petition or further prosecution of it. The court may also go a step further, and strike out the proceedings.

20. An injunction can also be obtained where the petition is bound to fail. Buckley LJ in *Bryanston Finance Ltd v De Vries****[8]*** said: -

> *'If it could now be said that, on the available evidence, the presentation by the defendant of such a petition as is described in the injunction would prima facie be an abuse of process, the plaintiff company might claim to have established a right to seek interlocutory relief. Otherwise, I do not think it can. If it were demonstrated that such a petition would be bound to fail, it could be said that to present it, or after presentation to seek to prosecute it, would constitute an abuse."****[9]***

21. A company's ability to apply to the court, enables a company to trigger early judicial scrutiny into the merits of the petition to be presented/presented against it. It enables the court to evaluate, at an early stage, the petitioner's standing (formerly known as 'locus standi') to bring the petition and the *prima facie* merits of the Petition. Abusive petitions (issued or threatened) are thereby subjected to scrutiny, and unjustified petitions identified and restrained, before any, or any further, unwarranted harm is caused to the company in question.

22. The prevention of the abuse of the process of the court is the very essence of the whole of this court's jurisdiction to restrain the presentation of a winding-up petition.[10] Conversely, where upon judicial evaluation, the would-be petitioner is found to have proper grounds for bringing the winding up petition, the petition will be well-founded, and so the presentation, advertisement and pursuance of that petition will not be abusive. Consequentially the petition ought not to be restrained, but permitted to run its course. Any damage thereby caused to the respondent company is just a natural and unavoidable consequence of the winding up process.

23. Widespread knowledge that a company is subject to a creditor's winding up petition can cause that company serious harm. Where the creditor's winding up petition is warranted, this harm may just be an unfortunate consequence of a valid legal process being pursued against it. However, where the creditor's winding up petition is unwarranted, and is eventually dismissed because it is unwarranted, its dismissal will be 'cold comfort' to the company where, in the intervening period between presentation and dismissal, the company has suffered irreparable reputational and operational damage. A helpful and concise summary of the law set out in the judgment of Norris J in *Angel Group Ltd v British Gas Trading Ltd*[11] is worth citing: -

"*The principles to be applied in the exercise of this jurisdiction are familiar and may be summarized as follows: -*

a. A creditor's petition can only be presented by a creditor, and until a prospective petitioner is established as a creditor, he is not entitled to present the petition and has no standing in the Companies Court: Mann v Goldstein [1968] 1 W.L.R. 1091;

b. The company may challenge the petitioner's standing as a creditor by advancing in good faith a substantial dispute as to the entirety of the petition debt (or at least so much as will bring the indisputable part below £750).

c. A dispute will not be "substantial" if it has really no rational prospect of success: in Re A Company (No.012209 of 1991) [1992] 1 W.L.R. 351 at 354B.

d. A dispute will not be put forward in good faith if the company is merely seeking to take for itself credit which it is not allowed under the contract: ibid. at 354F.

e. There is thus no rule of practice that the petition will be struck out merely because the company alleges that the debt is disputed. The true rule is that it is not the practice of the Companies Court to allow a winding up petition to be used for the purpose of deciding a substantial dispute raised on bona fide grounds, because the effect of presenting a winding up petition and advertising that petition is to put upon the company a pressure to pay (rather than to litigate) which is quite different in nature from the effect of an ordinary action: in Re A Company (No.006685 of 1996) [1997] B.C.C. 830 at 832F.

f. But the court will not allow this rule of practice itself to work injustice and will be alert to the risk that an unwilling debtor is raising a cloud of objections on affidavit in order to claim that a dispute exists which cannot be determined without cross-examination (ibid. at 841C).

g. The court will therefore be prepared to consider the evidence in detail even if, in performing that task, the court may be engaged in much the same exercise as would be required of a court facing an application for summary judgment: (ibid. at 837B).'

24. I am fully conscious that I cannot go into the merits of the applicant's pending applications because the task before me is to determine whether there are grounds for to review the orders issued on 18th December 2020 and grant the injunction sought. However, it would suffice, without delving their merits to state that the test for judging the company's challenge to the debt(s) founding the Statutory Demands has been phrased in the authorities variously as being that the debt must be disputed on *bona fide* grounds, or on substantial grounds, or both. Lord Greene MR said in *Re Welsh Brick Industries Ltd**[12]** 'I do not think that there is any difference between the words "bona fide disputed" and the words "disputed on some substantial ground.* However, the modern approach is that the challenge to petitioner's standing as a creditor must be advanced in good faith and must raise a substantial dispute.

25. For completeness, it is noted here that the test is the same, whether the application is for dismissal/strike out of the petition, or for an injunction restraining it. In *Re Company (No.0160 of 2004),* David Donaldson QC, said, *"It is common ground and plainly the case that the test as regards striking out or restraining the presentation or advertisement of a petition must be the same."*

26. The corollary of this being a separate element is that, an honestly advanced, but thoroughly bad reason for disputing a debt, will not be enough to warrant an injunction against the would-be petitioner.[13] The rule is not whether or not the company simply alleges that the debt is disputed - a bare assertion. The company's assertion must be made on substantial grounds (as well as in good faith).[14]

27. A reading of the grounds cited in the **4** applications shows that the applicant is advancing two grounds. *One,* it is disputing the debts. ***Two,*** it is apprehensive of the consequences of the advertisement. At the *inter partes* hearing, the applicant will bear the onus of establishing the tests discussed above. At the *ex parte* stage, I was persuaded that it would be prudent to hear the applications *inter partes*. This will afford the court the opportunity to weigh both parties case and make a determination on whether or not the applications satisfy the above tests. At the *ex parte* stage, I find no reason to depart from the said position or to review or vary the said orders. This is because mere denial of a debt is not enough. Much more will be required at the *inter partes* stage.

28. As for fear of adverse publicity, it is my position that this not a ground for the court to grant the orders sought *ex parte.* Insolvency proceedings are class actions by their very nature. This is the reason why the proceedings are advertised. More important, as stated earlier whereas widespread knowledge that a company is subject to a creditor's winding up petition can cause that company serious harm, where the creditor's winding up petition is warranted, this harm may just be an unfortunate consequence of a valid legal process being pursued against it. However, where the creditor's winding up petition is unwarranted, and is eventually dismissed because it is unwarranted, its dismissal will be 'cold comfort' to the company where, in the intervening period between presentation and dismissal, the company has suffered irreparable reputational and operational damage. Any damage thereby caused to the respondent company is just a natural and unavoidable consequence of the winding up process.

29. Guided by the jurisprudence discussed above and the conclusions arrived at, it is my finding that the applicant has not established any basis for this court to vary, set aside or review the orders made on **28th** December 2020 nor has the applicant established any grounds for this court to issue the temporary orders of injunction. Consequently, the applicant's applications filed in the four suits dated **30th** December 2020 are hereby dismissed with no orders as to costs.

Dated, Signed and Delivered at Nairobi this **4th** day of January 2021

John M. Mativo

Judge

[1] Act No. 18 of 2015.

[2] *Montreal Trust Co v Churchill Forrest Industries (Manitoba) Ltd* 1972 21 DLR (3d) 75 at 81 quoting I H Jacob, Current Legal Problems (1970) p 51.

[3]Jerold Taitz, University of Cape Town, Juta, 1985.

[4] (1970) 23 Current Legal Problems 23 at pp. 51-52.

[5] *Ritchie v Andrews* (1881-1882) 2 EDL 254; Conolly v Ferguson 1909 TS 195.

[6] 2005 (5) SA 433 (SCA) para 40 citing *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A) at 7 F. 6

[7] Se Ex parte *Millsite Investment Co (Pty) Ltd* 1965 (2) SA 582 (T) at p 585F-G Vieyra J and *Union Government and Fisher v West* 1918 AD 556.

[8] *(No. 2) [1976] Ch 63, said at 77*

[9] See *Charles Forte Investments Ltd v Amanda [1964] Ch 240.*

[10] See *Mann v Goldstein* {1968} 1 WLR 1091, Ungoed-Thomas J, at 1099.

[11] {2012} EWHC 2702 (Ch); [2013] BCC 265, at paragraph 22.

[12]{1946} 2 All ER 197 at 198.

[13] See *Taylor's Industrial Flooring Ltd* [1990] BCC 44, Dillon LJ at page 50.

[14] See Chadwick J again from *Re a Company No.006685 of 1996*, at 832: