



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION

INSOLVENCY NOTICE NO. INP. E047 of 2020

FLAMCO LIMITED.....APPLICANT

AND

PRIME BANK LIMITED.....RESPONDENT

RULING

Introduction

1. The factual matrix which triggered the application dated 28th November 2020 the subject of this ruling is essentially uncontroverted. On 6th October 2020, Prime bank Limited (the Respondent) served Flamco Limited (the applicant) with a Statutory Demand dated 2nd October 2020 demanding payment of **Kshs. 18,262,920.30** being the amount of money due and owing from the applicant to the respondent arising from its overdrawn current account number **3000147737** as at 30th September 2020. The Statutory Demand required the applicant to pay the said sum within **21** days from the date of service in default the Respondent would commence liquidation proceedings against the applicant.

The application

2. After being served with the Statutory Demand as aforesaid, the applicant moved to this court vide its aforesaid application expressed under the provisions of sections **520 to 523, 530 to 533, 558, & 560 to 562** of the Insolvency Act, (the Act) and all other provisions of the law seeking a raft of orders. However, prayers **(a), (b), (c)** and **(e)** are spent. The applicant now prays that an order of administration and also an order that Peter Obondo Kahi be appointed the administrator. It also prays that the court grants any other orders it deems necessary and the costs of the application to be provided for.

3. In support of the application, the applicant states that it is currently unable to pay its debts as and when they arise, and that the Respondent served it with the aforesaid Statutory Notice under Section **384(1)** of the Act which was to expire on the 28th day of October 2020, and, the was apprehensive that upon its expiry, the Respondent may obtain liquidation orders against it. The applicant contends that its asset base is not able to liquidate the indebtedness, hence, its more prudent to place the company under administration to give it a chance to regain its feet so that it can pay off its debts.

4. The applicant states that it is capable of being turned around with the injection of capital as already sought from financial institution(s), but if the liquidation orders are issued against the applicant, it will immediately cease trading as a going concern and no financial institution will have any more dealings with it arising from the liquidation status.

5. The applicant states that it has a vast viable distribution network of edible (food items) goods, but its distribution network has been severely disrupted by the severe capital crunch with most of its suppliers insisting on upfront payment, a position the applicant attributes to a decision by one of its main bankers to withdraw its financial support which threw its entire supply chain into a spin.

6. Additionally, the applicant states that the devastating effects of the unprecedented Covid 19 on businesses exacerbated its situation beyond measure. However, it states that other than the severe cash crunch, it has a solid and functional business model. As a consequence, it seeks an administration order to enable it to turn around its fortunes, and, if allowed, it will appoint a seasoned Administrator, a one Mr Peter Obondo Kahi who will maintain the company as a going concern and to complete on-going negotiations for capital injection into the company.

7. The applicant states that such orders will afford the applicant an opportunity to turn around its fortunes by managing it back to profitability and thereby enable it to make a distribution to all its creditors. Further, that, the applicant has a huge workforce of 90 employees whose fate now hangs in the balance with the looming liquidation. Lastly, it states that it is in the best interests of the company and all the creditors it be placed under administration to give it a chance to turn around its fortunes rather than liquidating it because it will serve the wider interests of

substantial justice.

Respondent's Replying affidavit

8. Mr. George W. Mathui, the Respondent's Legal Manager, swore the Replying affidavit dated **18th** November 2020. He deposed that the application is bad in law and an abuse of court process because it was filed after taking effect of an insolvency notice, and that it is reactionary and contrived to impede the progress of liquidation proceedings which by virtue of the provisions of Section **431 (3)** of the Act had commenced.

9. He deposed that filing an application for an administration order at this stage of the proceedings is misconceived and an abuse of the spirit of the Act in so far as it is designed to exclude the entire body of the applicant's creditors; and that there is no statutory basis for restraining the Respondent from continuing the liquidation proceedings. Mr. Mathui deposed that even if the application had been competently presented, the same is without any merit as the material placed on record by the applicant does not in any way satisfy the statutory threshold in section **531** of the Act.

10. He averred that the applicant admits under oath that it is indebted to the Respondent; that it has failed to comply with the insolvency notice; that it failed the insolvency test under the Act; and that the Respondent is entitled to pursue the liquidation proceedings on account of the applicant's inability to pay its debts. He averred that the debt giving rise to the issuance of the insolvency notice has been outstanding since July, 2019. Further, he averred that prior to the issuance of the insolvency notice, the applicant was served with a demand notice dated 15/09/2020 requiring it to settle the amount owing.

11. He averred that if the applicant had any genuine interest in pursuing any alternative processes/procedures or safeguards with the aim of turning around its business, it had ample time to do so without having to wait for the insolvency notice to lapse, hence, the filing of the application smacks of bad faith and amounts to an abuse of the spirit of the law. Further, that the applicant failed to disclose the full extent of its liabilities and assets thus depriving the court the opportunity to consider, against the dictates of the provisions of the Act.

12. Mr. Mathui deposed that the proposed administrator Mr. Peter Kahi lacks independence and cannot provide any reasonable basis for the assertion that the company is likely to be turned round, and that there is no basis upon which the proposed administrator would make conclusions in his preliminary opinion.

13. He also deposed that if the applicant were to continue as a going concern, it would require a significant injection of working capital yet the only likely prospect injection discernible from the applicant's affidavit is the undocumented discussions with KCB Bank Limited for financing of an unspecified amount. He deposed that the applicant has failed to demonstrate any reasonable prospect of continuing operations as a going concern to realize a better outcome for its creditors if an administration order were to be made being one of the objectives of administration as envisaged in the provisions of section **531** of the Act.

14. Mr. Mathui averred that the application is unmerited because the applicant has not been able to demonstrate any credible rescue plan for its business operations to ensure that the administration order sought would achieve any of the statutory objectives of administration.

Brookside Dairy Limited's Affidavit in Support of the Petition

15. Jacqueline Hinga, the Group Legal Officer at Brookside Dairy Limited, (the company) a Supporting Creditor deposed that the company supplied milk and/or milk related products to applicant. She deposed that the amount due and owing from the applicant to the company is **Kshs. 2,483,432.50/=**, and the applicant is unable to pay its debts and should be put under administration.

Bank of Baroda (Kenya) Limited, a Secured Creditor's Replying affidavit

16. Mr. Martin Karanu, the Legal Manager of Bank of Baroda (Kenya) Limited, a Secured Creditor deposed that the applicant applied for various facilities from the Bank, and it executed various Charge documents over Title Number Nakuru/municipality/Block 6/39 to secure the advances granted by the Secured Creditor, namely: - Charged dated 29.1.2019 to secure **Kshs. 18,400,000/=**; Further Charge dated 20.4.2017 to secure **Kshs. 22,468,750/=**; **2nd** Further Charge dated 3.9.2018 to secure **Kshs. 51,654,000/=**; **3rd** Further Charge dated 27.11.2019 to secure **Kshs. 3,650,000/=**.

17. He deposed that the applicant executed various all assets Debentures to secure advances made to it by the Bank as follows:- Debenture dated 7.6.2010 for Kshs. 230,000/=; Further Debenture dated 5.9.2011 for Kshs. 110,094,000/=; **2nd** Further Debenture dated 10.12.2012 for **Kshs.30,215,000/=**; **3rd** Further Debenture dated 30.7.2014 for **Kshs.44,304,000/=**; **4th** Further Debenture dated 19.7.2016 for **Kshs.92,654,000/=**; **5th** Further Debenture dated 9.8.2017 for **Kshs.132,554,000/=**; **6th** Further Debenture dated 5.9.2018 for **Kshs.38,554,000/=**; and **7th** Further Debenture dated 29.11.2019 for **Kshs.71,650,000/=**.

18. Mr. Karanu deposed that the applicant also caused to be registered in the joint names with the secured creditor **17** motor vehicles to secure advances to it by as per log books marked MK4. He averred that the applicant is indebted to the Bank for the sums enumerated in the statements marked **MK5** and that the Bank ranks in priority over all other Creditors as provided under paragraph **2(c)** of the second Schedule of the Act.

The Applicant's advocates submissions

19. Mr Aduda, the applicant's advocate submitted that in 2016, the applicant began experiencing problems due to delayed payments by its customers to whom it had extended credit facilities and withdrawal of support by one of its key supporters as a consequence of which the applicant was not able to pay its debts. He also attributed the problems facing the applicant to challenges caused by the COVID 19 pandemic.

He also referred to the list of creditors enumerated in the schedule annexed to his affidavit.

20. Mr. Aduda submitted that as result of the indebtedness, the applicant applied to this court under sections 522 and 531 of the Act seeking an order of administration. He argued that before filing the application, the company sought the services of an insolvency practitioner who under took an independent in-depth review and an assessment of the company and filed a report identifying the problems bedeviling the company and made recommendations regarding turning round the fortunes of the company. He submitted the administration of the company will achieve better results as opposed to liquidation and dispelled the argument that the application was made in bad faith.

21. Mr. Aduda submitted that the Respondent has misread section 431 (3) of the Act and also argued that the fact that the applicant moved to court after the Statutory Demand was served does not mean that the application is reactionary because section 431 provides for when a liquidation order can be made not when it can be commenced. He submitted that at this stage, no liquidation proceedings or Petition have been filed.

22. Counsel argued that the applicant is indebted to its creditors and there is a possibility of turning the company round. He argued that the object of the administration under section 522 is to preserve the company as a going concern for a better outcome for the creditors. He submitted that the attempt by the Respondent to liquidate the applicant is frowned upon by section 522 (b) of the Act. He argued that the court has an obligation under section 522 to satisfy itself (a) whether the company is capable of paying its debts, and (b) whether the administration is likely to achieve the desired objective. Counsel urged the court to consider *administration v liquidation* and referred to *In Re Hi-Plast {2019} e KLR* which considered what it means for a company to be indebted stating *inter alia* that a demand must be made and it must remain unsatisfied and argued that the applicant has brought itself with the said provisions.

23. Additionally, Mr. Aduda cited *Midland Energy Ltd v Leakey Auctioneers & Another {2019} e KLR* in which the court stated that the design of insolvency law is to give a chance to the company. He argued that the company should be insulated from aggressive creditors who intend to run the company down. He argued that the Respondent has made a run on the company's assets and submitted that this court has a duty to protect the applicant against such creditors. He argued that liquidation is a drastic and final blow to the company which leaves it with no opportunity to grow. Citing *In Re Hi-Plast {2019} e KLR*, counsel argued that threshold for test of solvency is low. He argued that the company only needs a chance to turn around its fortunes, and, that the Respondent is not without a remedy because it can fall back to section 91 of the Act.

Supporting Creditor's advocates submissions

24. Mr. Maina, counsel for Brookside Ltd supported the application. He adopted the applicant/s advocates submissions. Also, Mr. Gathaiya, counsel for Bank of Baroda (Kenya) Limited, a Secured Creditor submitted that all the debts due to the Bank are secured by way of charges and debentures, and that the assets are unavailable to the other debtors. He urged the court to bear this position in mind.

The Respondent's advocates submissions

25. Mr. Mutua, the Respondent's counsel argued that the applicant did not reply to the factual matters in the Respondent's replying affidavit and urged the court to take the depositions as uncontroverted. He argued that the court cannot issue an administration order during liquidation proceedings. He argued that the applicant's application is reactionary because it was prompted by the Statutory Demand and that it was filed after the Notice had taken effect.

26. Mr. Mutua argued that a purposive reading of section 431 and *Regulation 77(b) of the Insolvency Regulations* should lead to a finding that filing the application at this state runs fowl of the spirit of the Act. He argued that an application of this nature ought to be filed at the earliest opportunity possible, possibly upon presentation of the Petition and advertisement so that wiling participants can also be heard. He urged the court to consider the purpose of section 561 of the Act and find that the orders sought are contrary to statute.

27. Additionally, Mr. Mutua argued that the applicable tests have not been met, among them a likelihood that if the order is granted, it will obtain a better result or reasonable prospect of turning round the business of the company. He singled out the absence of a detailed disclosure of the company's assets or preferential employees or debts. He took issue with the fact that the applicant relies on a report prepared by the proposed administrator which is self-serving and lacks condor and its of little probative value because it was prepared for a particular purpose.

28. Mr. Mutua submitted that the company is in financial distress and that there is no indication that the applicant seeks to inject more capital nor is there a document to support the said position. He argued that there is nothing to show that the company has real or reasonable prospect to turn round. To fortify his argument, he relied on *Re Nakumatt Holdings Limited {2017} e KLR* which enumerated the applicable principles in cases of this nature. Additionally, he cited *in re Hi-Plast Ltd {2019} e KLR* which adopted the reasoning in *Re Nakumatt Holdings Limited {2017} e KLR*. He distinguished the authority cited by the applicant arguing that the application was by creditors and there was full disclosure by the applicants and that the court was satisfied that there was a complete arrangement for injection of capital unlike in this case. As for the *Midland case* he argued that the applicant referred to paragraphs which were *orbiter* as opposed to the *ratio decidendi* of the decision, and argued the decision has no bearing to this case. He implored the court to find that the application has not meet the threshold and reject it.

Determination

29. I am clear in my mind that the only issue for determination is whether the applicant has satisfied the twin tests laid down in section 531 of the Act which provides that the court may make an administration order in relation to a company only if satisfied—(a) that the company is or is likely to become unable to pay its debts; and (b) that the administration order is reasonably likely to achieve an objective of administration.

30. The determination of the above issue involves an exercise in statutory interpretation as it concerns, in one way or another, ascribing meaning to the above section and the various provisions of the Insolvency Act implicated in this application. It is necessary to say something about the process of statutory interpretation. In *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13 para 18 Wallis JA dealt with the approach to be adopted generally when meaning must be attributed to a written document:

“Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The “inevitable point of departure is the language of the provision itself”, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.”

31. A court must consider whether there is a sensible interpretation that can be given to the relevant provisions that will avoid anomalies. That involves the application of two further principles of interpretation: endeavoring to give a meaning to every word and every section in the statute and avoiding construing provisions as having no meaning; and reconciling sections of a statute that appear to be in conflict if that is possible. In addition, section 3 of the Act provides guidance on the objects and application of the Act. The section states: -

3. (1) *The objects of this Act are—*

a) to establish and provide for the operation of a framework for the efficient and equitable administration of the estates of insolvent natural persons and unincorporated entities comprising natural persons, and the assets of insolvent companies and other bodies corporate, that maintains a fair balance between the interests of those persons, entities, companies and bodies and those of their creditors;

b) in the case of insolvent natural persons and unincorporated entities comprising natural persons, and insolvent companies and other bodies corporate whose financial position is redeemable—

i. to enable those persons and entities to continue to operate as going concerns so that ultimately, they may be able to meet their financial obligations to their creditors in full or at least to the satisfaction of those creditors; and

ii. to achieve a better outcome for the creditors as a whole than would likely to be the case if those persons and entities were adjudged bankrupt;

c) in the case of insolvent companies and other bodies corporate whose financial position is redeemable—

i. to enable those companies and bodies to continue to operate as going concerns so that ultimately they may be able to meet their financial obligations to their creditors in full or at least to the satisfaction of those creditors; and

ii. to achieve a better outcome for the creditors as a whole than would likely to be the case if those companies and bodies were liquidated; and

d) in the case of insolvent natural persons and unincorporated entities comprising natural persons, and insolvent companies and other bodies corporate whose financial position is irredeemable—to provide an orderly system for adjudging those persons bankrupt and for the efficient and optimal administration and distribution of their estates for the benefit of their creditors;

e) in the case of insolvent companies and other bodies corporate whose financial position is irredeemable—to provide an orderly system for liquidating the affairs of those companies and bodies and for the efficient and optimal administration and distribution of their assets for the benefit of their creditors.

(2) This Act applies to natural persons, partnerships, limited liability partnership, companies and other corporate bodies established by any written law.

32. The Preamble to the Act gives an insight into what is sought to be achieved by the Act. The Act is first and foremost, an act of Parliament to amend and consolidate the law relating to the insolvency of natural persons and incorporated and unincorporated bodies; to provide for and to regulate the bankruptcy of natural persons; to provide alternative procedures to bankruptcy that will enable the affairs of insolvent natural persons to be managed for the benefit of their creditors; to provide for the liquidation of incorporated and unincorporated bodies (including ones that may be solvent); to provide as an alternative to liquidation procedures that will enable the affairs of such of those bodies as become insolvent to be administered for the benefit of their creditors; and to provide for related and incidental matters.

33. It can thus be seen that the primary focus of the legislation is to ensure revival and continuation of the corporate debtor by protecting the corporate debtor from its own management and from a corporate death by liquidation. The Act is thus a beneficial legislation which puts the corporate debtor back on its feet, not being a mere recovery legislation for creditors. The interests of the corporate debtor have, therefore, been bifurcated and separated from that of its promoters/those who are in management. Thus, the resolution process is not adversarial to the corporate debtor but, in fact, protective of its interests.

34. Viewed from the above backdrop, I now turn to examine the scheme Part VIII of the act which provides for Administration of Insolvent Companies. Section 522 of the Act provides the objectives of administration which are (a) to maintain the company as a going concern; (b) to achieve a better outcome for the company's creditors as a whole than would likely to be the case if the company were liquidated (without first being under administration); (c) to realize the property of the company in order to make a distribution to one or more secured or preferential creditors.

35. Section 523 provides that a person may be appointed as administrator of a company—(a) by administration order of the Court in accordance with Division 3; (b) by the holder of a floating charge under section 534; or (c) by the company or its directors under section 541. It is important to mention that under section 528 of the Act, an administrator cannot be appointed if the company is in liquidation because of—(a) a resolution for voluntary liquidation; or (b) a liquidation order. In the instant case the company moved the court after being served with the Statutory Demand and before the filing of the liquidation Petition. The import of this is that the application is properly before the court.

36. Division 3 of Part VIII deals with appointment of administrators by the Court. Section 530 defines an administration order. It states “An administration order is an order appointing a person as the administrator of a company and providing for the administration of the company by that person. As stated earlier, section 531 provides the twin conditions for making administration orders. It is important to mention that the word “and” is used immediately after paragraph (a). The import of the use of the word “and” is that the court must be satisfied that the two conditions are met; i.e. (a) that the company is or is likely to become unable to pay its debts; and (b) that the administration order is reasonably likely to achieve an objective of administration.

37. Section 532 stipulates who may make an application to the court to for an administration order in respect of company as follows: -

(1) An application to the Court for an administration order in respect of a company may be made only by the following persons:

(a) the company;

(b) the directors of the company;

(c) one or more creditors of the company;

(d) a combination of persons specified in paragraphs (a) to (c);

(e) any other person of a class prescribed by the insolvency regulations for the purposes of this section.

(2) As soon as is reasonably practicable after the making of an application for

administration, the applicant shall notify—

(a) any person who is or may be entitled to appoint an administrator of the company under section 534; and

(b) such other persons (if any) as may be prescribed by the insolvency regulations for the purposes of this section.

38. A reading of the above provisions leaves no doubt that the Act incorporates a carefully thought business rescue regime. This regime aims at facilitating the rehabilitation of a company that is financially distressed. The aim of this regime is to restructure the affairs of a company in such a way that either maximizes the likelihood of the company continuing in existence on a solvent basis or results in a better return for the creditors of the company than would ordinarily result from the liquidation of the company. The primary objective of the business rescue provisions is to save the company as a going concern. If this is not possible, then the secondary object or goal is to restructure the company in such a way that shareholders and creditors will still get a return on their investments, which is better than the return that they would have received should the company be liquidated.

39. As stated above, the precise language of section 531 only gives two conditions under which a court can grant an order of administration, i.e. (a) that the company is or is likely to become unable to pay its debts; and (b) that the administration order is reasonably likely to achieve an objective of administration. As pointed out above, the use of the word “and” between the two paragraphs means that both conditions must be met. There is no contest that the company is unable to pay its debts. The Statutory Demand remains unsatisfied. The supporting creditors remain unpaid. The company also admits its unable to pay its creditors. The debts are not disputed. In fact, the basis of the applicant's application is that its contention that it is currently unable to pay its debts as and when they arise. The applicant also states that its asset base cannot able liquidate its indebtedness, hence, its more prudent to place the company under administration to give it a chance to regain its feet so that it can pay off its debts.

40. The long and shot of the foregoing is that the applicant has satisfied the first condition under section 531 (a). The hard part begins. That is whether it meets the second condition is paragraph (b) of the said section. Put differently, did the applicant discharge the burden placed by paragraph (b) by presenting evidence to this court to be satisfied that the said condition has been met. In *Stellenbosch Farmers Winery Group Ltd & Another v Martell & Others* 2003 (1) SA 11 (SCA) at para 5, the South African Supreme Court of Appeal explained how a court should resolve factual disputes and ascertain as far as possible, where the truth lies between conflicting factual assertions. It stated: -

“To come to a conclusion on the disputed issues, a court must make findings on:-

i. The credibility of various factual witnesses;

ii. Their reliability; and;

iii. The probability or improbability of each party's version on each of the disputed issues

In light of the assessment of (a), (b) and (c), the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be a rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the lessor convincing will be the latter. But when all factors equiposed, probabilities prevail."

41. It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case, the onus is obviously not as heavy as it is in a criminal case. Nevertheless, where the onus rests on the plaintiff, or where there are two mutually destructive stories, the plaintiff can only succeed if he satisfies the court on a preponderance of probabilities that his version is true, accurate, and therefore acceptable, and the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding, whether that evidence is true or not, the court will weigh up and test the plaintiff's allegations against the general probabilities.

42. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the court will accept his version as being probably true. If, however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false.

43. I must stress that in such circumstances when one talks about a plaintiff having discharged the onus, which rested upon him on a balance of probabilities, one really means that the court is satisfied on a balance of probabilities that he was telling the truth and that his version was therefore acceptable. Where a consideration of probabilities fails to indicate where the truth probably lies, the court estimates the relative credibility of the witnesses. In finding facts or making inferences in a civil case, it seems to me that one may, as Wigmore conveys in his work on evidence, "...by balancing probabilities select a conclusion which seems to be more natural or plausible conclusion amongst several conceivable ones, even though that conclusion may not be the only reasonable one." (Cited in *Govan v Skidmore, 1952 (1) SA 732 (N)*).

44. To satisfy the second condition under section 531 above objectives, it must be shown that that the administration order is reasonably likely to achieve an objective of administration. Simply put, it must be shown that it is reasonably probable that the company is viable and capable of ultimate solvency and that it could, within a reasonable time, become a successful concern by providing a better return for creditors. However, each case must be considered in its own merits and the words reasonable prospects maybe defined by looking at various factors that would indicate the existence of such prospects in a given case. In *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd [2011] ZAWCHC 442; 2012 (2) SA 423 (WCC) (25 November 2011)*, the court acknowledged different features that maybe dealt with in an application to prove the existence of a reasonable prospect of rescuing a financially distressed company. These features are as follows: -

a) *the likely costs of rendering the company able to commence with its intended business, or to resume the conduct of its core business;*

b) *the likely availability of the necessary cash resource in order to enable the ailing company to meet its day-to-day expenditure, once its trading operations commence or are resumed. If the company will be reliant on loan capital or other facilities, one would expect to be given some concrete indication of the extent thereof and the basis or terms upon which it will be available;*

c) *the availability of any other necessary resource, such as raw materials and human capital; and*

d) *the reasons why it is suggested that the proposed business plan will have a reasonable prospect of success."*

45. The court stated that the above features must be actual and not mere speculation, as it will not be considered as enough to convince the courts that reasonable prospects do exist and that the company will be rescued. The court held that it would be difficult to conceive of a business rescue plan with a reasonable prospect of success unless such plan addressed the cause of the demise or failure of the company's business and offered a remedy that had a reasonable prospect of sustainability.

46. In *Koen & another V Wedgewood Village Golf & Country Estate (Pty) Ltd & others [2012] 2 SA 378 par 14*, a business rescue application was made after the liquidation proceedings were instituted. This had the effect of suspending the liquidation proceedings to give the court the opportunity to adjudicate the business rescue application. One of the issues that had to be determined by the courts was reasonable prospect. The court stated that in order for it to decide whether there is a reasonable prospect, it must be provided with that when considered it will persuade the court to place the company under business rescue rather than liquidation. Further to this the court stated that such evidence must be concrete have ascertainable details which will allow the court to decide on the issue. The court further stated that vague and speculative submissions in the application papers will not be enough to provide an appropriate basis for a court to make the required determination that there is a reasonable prospect of rescuing the financially distressed company.

47. On the issue of what reasonable prospect means, the Supreme Court of South Africa in *Propspec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd & another 2013 (1) SA 542 (FB)*, held that this phrase was properly described as a yardstick higher than a mere *prima facie* case or an arguable possibility but lesser than a reasonable probability. The court further stated that this phrase visualizes a prospect based on reasonable grounds to be established by a business rescue applicant based on all the facts before the court. What is required is a determination that the future prospects of rescuing the business appear to be reasonable.

48. In interpreting the phrase reasonable prospect, it should be noted that the notion of a prospect is barely something that is certain. By its very nature a prospect is future observing and reliant on upon a number of variables and embraces a level of jeopardy to the extent that the

future is hardly capable of accurate prediction. What is essential is not certainty but a determination on the facts and on the evidence presented to the court that the future prospects of rescuing the business appear to be reasonable. In *Zoneska Investments (Pty) Ltd t/a Bonatla Properties (Pty) Ltd v Midnight Storm Investments 386 Ltd [2012] 4 All SA 590 (WCC)*, the court defining reasonable prospect referred to the ordinary interpretation and held that the oxford English dictionary defines the phrase ‘prospect’ as both the possibility or likelihood of some future event that will occur. The court further held that the definition of ‘possibility’ refers to something that may happen. The stated further that case ‘likelihood’ is defined as the state or fact of something being likely or probable.

49. Back at home in *In re Nakumat Holdings Limited [2017] eKLR* the court had this to say: -

88. The Company is evidently unable to pay its debts. For all the reasons stated in this ruling, the Company, in my judgment, has however not shown to the required standard that an administration order is reasonably likely to achieve an objective of administration. I am not satisfied that this is a case for administration for the following additional reasons.

89. The level of indebtedness may be beyond salvage and neither the company nor the administrator has taken the time to address this. Secondly, there has been a lack of candor on the part of the company which in my judgment appears to have been intended to only benefit the company, yet administration as a process ranks both the company and creditors in any rescue mission on equal footing: See s.522 of the Act

50. By now it is clear that decided cases are in agreement as to what reasonable prospect means, that is, there must be facts before the court on which if considered in their totality, the court can conclude that there is reason to believe that the company will be rescued if the order is granted. The applicant is required to set out sufficient facts from which a court would be able to assess the prospects of the plan succeeding in meeting this objective before exercising its discretion. This would include an assessment of the practical feasibility of the plan provided by the insolvent practitioner.

51. On the burden of proof, cogent evidential foundation to support the existence of a reasonable prospect that the desired object can be achieved must be placed before the court to enable it to make a proper decision based on the facts provided. Where there is a reasonable possibility of the company being rescued, a court may exercise its discretion in favour of granting an administration order.

52. The Act provides for an alternative mechanism for a distressed company. It involves placing a company under the management and control of an administrator (an insolvency practitioner. The practitioner must then develop and produce a rescue plan (plan) to rescue the company and ensure its continued existence, alternatively to ensure a better return for creditors than if the company were to be immediately placed in liquidation. I have examined the documents presented before me. I am afraid, the applicant exhibited a long list of creditors, confirming its immense indebtedness an inability to pay its debts. No cogent business rescue plan was placed before this court. No business model was placed before me to persuade the court that indeed there is a reasonable probability of turning around the company. No time frames were suggested nor is there evidence of how the capital if any will be injected save for mentioned the name of KCB Ltd. Cogent evidence to demonstrate the ready availability of capital is not an option but a core requirement. It is admitted that one of the applicant’s bankers withdrew its support to the company.

53. There is already an admission that the asset base of the company is not able to liquidate the company’s indebtedness. There is no mention of how the asset base will be increased. I am not persuaded from the material before me that the applicant has demonstrated any reasonable probability of turning the company round to warrant the orders sought. The court after considering all the evidence provided by the applicant finds that there is no reasonable prospect that the proposed plan will have the benefit for creditors or the company.

54. The powers of the court on hearing an application of this nature is prescribed in section 533 of the Act which provides that:- (1) On hearing an application for an administration order in respect of a company, the Court may— (a) make the administration order sought; (b) dismiss the application; (c) adjourn the hearing conditionally or unconditionally; (d) make an interim order; (e) treat the application as a liquidation application and make any order that the Court could make under section 426; (f) make any other order that the Court considers appropriate.

55. Considering the long list of the company’s creditors exhibited by the applicant, and in view of the fact that these proceedings were not advertised, and considering that insolvency proceedings are by their very nature class actions, it would not be prudent to consider the provided under paragraph (e) above which empowers this court to treat the application as a liquidation application and make any order that the court could make under section 426 of the Act. I am also conscious that the parties did not address the question whether the court should grant the said order. Consequently, the only appropriate order for me to issue is as provided under paragraph (b) of the above section. Accordingly, I dismiss the applicant’s application dated 28th November 2020 with costs to the Respondent which shall be costs in the liquidation proceedings.

Right of appeal

Orders accordingly

SIGNED, DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF JUNE, 2021

John M. Mativo

Judge

Delivered electronically via e-mail