REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

MILIMANI LAW COURTS

INSOLVENCY CAUSE NO. 11 OF 2018

IN THE MATTER DEVELCO INVESTMENTS LIMITED

AND

IN THE MATTER OF THE INSOLVENCY ACT NO. 18 OF 2015

SPENCON HOLDINGS LIMITED (UNDER ADMINISTRATION).....PETITIONER/APPLICANT

JUDGMENT

1. This Court is asked to determine not just the merits of these insolvency proceedings but also its propriety.

2. Spencon Holdings Limited (Spencon) is currently under Administration. The nature and objective of Administration is set out in Division 1 of Part VIII of the Insolvency Act. From statements of annual returns of Develco Investment Limited (the Company) for the year 2016 (which are not disputed),Spencon holds 12,250 shares in the Company while Jitendra Chotabhai Patel (Jitendra) and Naveen Sharma each hold 875 shares.

3. This Petition to liquidate the Company is brought by Spencon although presented by its Joint Administrators being Muniu Thoithi and Kuria Muchiri. Their capacity to present this Petition is challenged and is a controversy that I am called upon to resolve.

4. Anyhow, in the Petition dated 27th February 2018 which is verified by the affidavit of Mr. Thoithi the reasons for bespeaking the liquidation are as follows:-

a) The Company has been dormant and has not been trading over a period exceeding one year.

b) The directors of the Company, namely Andrew Brown, Hurley Doddy and Carolyn Campbell have since resigned from their offices as directors of the Company and this has created a vacancy in the office of directors.

c) The principal shareholder constituting 87.5% majority shareholding in the Company is the Petitioner herein, which has been placed under administration in Insolvency Petition No. 6 of 2016 at the High Court in Nairobi. It is asserted that for the objectives of that administration to be met, which includes to realise the property of the Company in order to make a distribution to one or more secured or preferential creditors of the Petitioner, the Company ought to be liquidated and any realized amounts be made available for distribution to creditors.

d) In it is the circumstances necessary that the affairs of the Company are properly wound up through liquidation by the Court.

5. Importantly, the liquidation is sought on the reason that it is just and equitable to do so. Section 424(1) (g) of the Insolvency Act is the home for such plea.

6. Jitendra opposes the Petition and thinks it to be incompetent. He argues that as the Company is not registered under the Companies Act 2015, the provisions of Part VI of the Insolvency Act 2015 do not apply to the Company and accordingly Sections 424 and 425 of the Act (which are part of Division 6 of Part VI) upon which the Petition rests are inapplicable. Secondly, that Muniu Thoithi and George Weru who seek to be appointed joint liquidators are incapable of being appointed as this would be in direct conflict with and breach of Section 438 (1) and (2) of the Act.

7. In addition, it is said that the Petition is signed and brought by a person who has not established any legal standing or capacity to sign or file the Petition on behalf of Spencon. Perhaps an auxiliary argument is that the Petition is signed and brought by a person who does not have power under the Insolvency Act to apply for liquidation of the Company.

8. On the merit of the Petition it is assailed as being prejudicial to the interests of Jitendra who does not want the Company liquidated.

9. He asserts that the Company is not a trading company and was initially formed to hold a property known as LR Number 11329 situated in Kasarani (the Kasarani property) and that to allege that it has been dormant and not trading for over one year is spurious and misleading. As to the vacancy in directorship, it is argued that there is nothing stopping the shareholders of the Company from appointing new directors and that Jitendra is indeed willing and able to serve as a director if so appointed.

10. There is further assertion that the assets of the Company can be realized more efficiently and cheaply by simply appointing new directors and authorizing them to sell the assets instead of engaging an expensive and cumbersome process of liquidation to achieve this. It is also contended that the Petitioner has not produced any evidence of the assets and liabilities of the Company to demonstrate that its liquidation will realise any surplus for distribution to shareholders.

11. Jitendra discloses that the Company is embroiled in two legal suits being ELC HCCC No. 3 of 2009 Terakate Properties Limited –vs- Develco Investments Limited & 2 Others and E.LC. HCCC No. 58 of 2011 Zacharia Njenga Kamiti & Ant. –vs- Develco Investments Limited & 2 Others which are still pending. The Petitioner is criticized for failing to disclose this. It is alleged that liquidation will seriously impact upon the pending suits and cause the same to be delayed indefinitely since the grant of a liquidation order against the Company will effectively and automatically stay all legal proceedings against the Company under Section 432 (2) of the Insolvency Act.

12. This Court has considered the arguments for and against the Petition and returns the following view of the issues raised. Of companies registered pre the Companies Act 2015 and Insolvency proceedings:

13. Part VI of the Insolvency Act deals with liquidation of Companies and Section 381 is on the scheme of those provisions and reads:-

> "1) This Part applies to the liquidation of a company registered under the Companies Act, 2015.
>
> (2) A liquidation may be either—
>
> (a) voluntary in accordance with Divisions 2 to 5; or
>
> (b) by the Court in accordance with Division 6.
>
> (3) This Division and Divisions 7 to 10 relate to liquidation generally, except when otherwise stated".

14. The submission by Jitendra is that as the Company was registered on 4th January 1991 under the auspices of the repealed Companies Act (Cap 486), the Insolvency Act is inapplicable.

15. This argument may appear attractive but is certainly flawed in the face of a wholesome reading of the statute. As pointed out by the Petitioner, the place to start is by understanding what the phrase "a company registered under the Companies Act, 2015" means. Under Section 2 of the Act a Company is:-

> "a company or foreign company registered under the companies Act 2015".

16. Turning to Companies Act, 2015, Section 3 defines a Company as:-

> "a company formed and registered under this Act or an existing Company".

That provision is then very explicit as to what is an existing company:-

> (a) a company formed and registered under the repealed Act; or
>
> (b) a company that was formed and registered under either of the repealed ordinances (as defined by that Act).

17. It would overly narrow if Section 381 of the Insolvency Act was to be construed as applying to companies coming into existence after the commencement of Companies Act, 2015. It would mean that the progressive provisions of Part VI of the Insolvency Act would not apply to the hundreds of Companies which predate the 2015 statute. Indeed an argument similar to that taken by the Jitendra was rejected in Yussuf Abdi Adan v Hussein Ahmed Farah & 3 others [2018] eKLR where the Court of Appeal held:-

> "[21] We do not agree with the appellant that the filing of the petition could be deemed as a "past event" simply because the Company had been incorporated under the repealed Companies Act Cap 486. If the winding up petition had been filed before commencement of the Insolvency Act the petition would have been properly before the Court, even if during its pendency the Companies Act Cap 486 had been repealed. But that was not the case".

18. I would think that the scope of application contemplated by Section 381 of the Companies Act was to include companies, past and present, registered under our past and present national statutes dealing with registration of Companies.

Locus of Spencon as a contributory to bring the Petition.

19. Section 425(1) of the Insolvency Act reads:-

> "(1) An application to the Court for the liquidation of a company may be made any or all of the following:
>
> (a) the company or its directors;
>
> (b) a creditor or creditors (including any contingent or prospective creditor or creditors);
>
> (c) a contributory or contributories of the company;
>
> (d) a provisional liquidator or an administrator of the company;
>
> (e) if the company is in voluntary liquidation—the liquidator".

20. Spencon brings this Petition as a contributory, but Jitendra thinks that it cannot because Spencon has fully paid up for all its 12,250 shares in the Company. Indeed, all the Company's 14,000 shares are fully paid up.

21. The argument by Jitendra is hinged on the provisions of Sections 383(1) and 385 (1), (2) of the Act read together. Section 383 (1) provides the definition of a contributory:-

> "Contributories" means—
>
> (a) means all persons liable to contribute to the assets of a company if it is liquidated; and
>
> (b) for the purposes of all proceedings for determining, and all proceedings before the final determination of, the persons who are to be treated as contributories for the purposes of this Part— includes all persons alleged to be contributories;

22. Section 385 is on liability of present and former members and reads:-

> "(1) When a company is being liquidated, every present and former member is liable to contribute to its assets to any amount sufficient for payment of its debts and liabilities, and the expenses of the liquidation, and for the adjustment of the rights of the contributories among themselves.
>
> (2) Subsection (1) is subject to the following provisions:
>
> (a) a person who was formerly a member of the company is not liable to contribute if the person has ceased to be a member for twelve months or more before the commencement of the liquidation;
>
> (b) a person who was formerly a member of the company is not liable to contribute in respect of any debt or liability of the company contracted after the person ceased to be a member;
>
> (c) a former member is not liable to contribute, unless it appears to the Court that the existing members are unable to satisfy the contributions required to be made by them;
>
> (d) in the case of a company limited by shares—a contribution is not required from a member exceeding the amount (if any) unpaid on the shares for which the member is liable as a present or former member;
>
> (e) nothing in the Companies Act, 2015 or this Act invalidates any provision contained in a policy of insurance or other contract whereby the liability of individual members on the policy or contract is restricted,
>
> or because of which the funds of the company are alone made liable in respect of the policy or contract;
>
> (f) an amount due to a member of the company as dividends, profits or otherwise is taken not to be a debt of the company, that is payable to the member in a case of competition between the member and any other creditor who is not a member of the company, but any such amount can be taken into account for the purpose of the final adjustment of the rights of the contributories among themselves.
>
> (3) In the case of a company limited by guarantee, a member is not liable to contribute more than the amount that the member has undertaken to contribute under the company's guarantee.

23. Citing Subsection 2(d) of Section 385, Jitendra asserts that a fully paid up member cannot be a contributory and so Spencon is excluded from the category of contributories who can launch a liquidation petition. This seemingly enticing argument may not be entirely correct.

24. Section 383 (1) defines a contributory to be any person liable to contribute to the assets of a company upon liquidation. By dint of Section 385(1) every present and former member of the company is liable to make a contribution to the assets and is therefore a contributory. What however Subsection 2(d) does is to limit the contribution of a member to the amount unpaid on shares which he would be liable as a present or former member. Logically therefore a fully paid up member would not be liable to make a contribution. That said the fully paid up member does not cease to be a contributory for purposes of bringing insolvency proceedings simply because he/she will not be liable to make a contribution to the assets upon liquidation. Just like any other present member, a fully paid member may have an interest in the outcome of liquidation proceedings. Take for example where a fully paid up contributory takes a view that because of a stalemate between shareholders as to the management of a company, it is just and equitable that it be liquidated, there the fully paid up contributory could still be interested in any surplus assets at the end of the process. The constricted meaning of a contributory suggested by Jitendra would have the effect knocking out a very important class of persons from presenting liquidation proceedings.

25. The decision of Burnden Group Holdings Ltd -vs- Hunt, 2018 WL 01308726[2018] cited to this Court by Spencon discusses when the expression "contributory" should be used in a broad sense in respect to English Insolvency Act 1986 from which we our statute heavily borrows. Norris J said;-

> "The Section does not say "*contributory*" shall mean every person liable to contribute to the assets, but every person liable under this Act to contribute. We must look, then, to the other provisions of the Act, to see who are the other persons liable under this Act to contribute, and ongoing back to the 38th Section we find an exact definition (which is then quoted)… it seems to me that the persons who were indicated by this section as liable to contribute to the assets of the company were the members and past members of the company.
>
> > "I therefore hold that Group is a "*Contributory*" for the purposes of making an application under IR r.4.79 because for the purposes of the Act and the Rules holders of fully paid shares are generally to be taken as "contributories".

26. As I conclude that Spencon, though fully a paid member, is a contributory for purposes of Section 425 (1) (c) and can therefore bring an application for liquidation, it is not lost to this Court that even Jitendra (a fully paid up member) has in these proceedings described himself as a contributory right from his Notice of Intention to Appear in the Petition dated 22nd October 2018. What an irony!

Of the power of the administrator of Spencon to present this petition on behalf of Spencon and if the Petition is properly signed.

27. Another objection to the Petition is that it is signed and brought by a person without legal standing or capacity to sign or file the Petition on behalf of Spencon. Although the exact nature of this objection was not elaborated, the Court understands it to be a challenge to the legal authority of the administrators of Spencon to commence these proceedings on behalf of Spencon.

28. The answer to this objection would be found in the general powers granted to administrators by section 580 of the Act which reads:

> 580. General Powers of administrator
>
> (1) The administrator of a company may take any action that contributes to, or is likely to contribute to, the effective and efficient management of the affairs and property of the company.
>
> (2) A provision of this Part that expressly permits the administrator to do or not to do a specified act does not limit the effect of subsection (1).
>
> (3) A person who deals with the administrator of a company in good faith and for value need not inquire whether the administrator is acting within the administrator's powers.

Spencon holds substantial shares in Develco and those shares may be taken by Spencon as part of its assets. The administrators of Spencon are entitled to take a view that one way of effectively or efficiently managing the asset in those shares is by seeking the liquidation of Develco and it is within their legal power to commence this Petition.

29. I turn to the next objection. The Petition is signed by Muniu Thoithi. It is argued by Jitendra that Muniu has not provided proof that he is indeed an Administrator of Spencon. But in his affidavit of 18th April 2018, Muniu annexes a copy of Gazette Notice No.9605 which is a copy of the notice of the appointment of Kuria Muchiru and himself as joint administrators of Spencon. That settles the matter.

30. What it does not settle, however, is a related objection that once there is a joint appointment, then both administrators needed to sign the Petition and not as solely done by Muniu.

31. In the affidavit verifying the Petition, Muniu depones that he is a joint administrator of the Petitioner and is duly authorized not only to make the affidavit on behalf of the Petitioner but also to lodge the Petition. I must think that it would be ideal for joint administrators, when taking up an action that requires their joint participation, to demonstrate that both concur to the action as the law expects them to act jointly in the discharge of their lawful duties. However, as there is no evidence that Kuria who did not sign the Petition does not support it or that directors of Spencon themselves oppose the cause, I take it that this is a matter for the internal management or affairs of the Petitioner which should not unduly concern Jitendra, an objector. I would not uphold the objection.

The Merits

32. The Petitioner seeks that this Court do grant the liquidation Order because it is just and equitable to do so. Cited to the Court and accepted by it is that the decision in Re Garnets Mining Co Ltd [1978] eKLR provides a useful guide to a Court mulling over a liquidation application premised on the just and equitable rule:-

> "So a summary of the way to approach the issue of whether or no to wind up a company under the just and equitable rule is this. It is a matter for the discretion of the court. The discretion is a very wide one. It will be a matter of fact whether the company should be wound up or not under this rule. Each case will depend on its own circumstances: Loch v John Blackwood Ltd [1924] AC 783 and Re Bleriot Manufacturing Air Craft Co (1916) 32 TLR 253. There must be a sound induction of all the facts to justify the exercise of the discretion. There is no general rule for this (Davis & Co Ltd v Brunswick (Australia) Ltd [1936] 1 All ER 299) and categories should be avoided (Re Straw Products Pty Ltd [1942] VLR 222, Ebrahimi v Westbourne Galleries Ltd [1973] AC 360), though illustrations assist."

33. One proposition in support of the Petition is that the Company has been dormant and has not been trading over a period exceeding one year. As between the parties before Court there are conflicting assertions as to whether the Company was simply one to own landed assets or was a manufacturing or trading Company. Hear what Jitendra depones:-

> "[6] The Petitioner's claim that the Company has been dormant and not trading for over one year is spurious and misleading. The company was initially formed to hold a property known as L. R Number 11329 situated in Kasarani, Nairobi (hereinafter called "the property) and was not intended to be a trading company in any event. Accordingly the fact that it may not have traded is no valid ground or reason to liquidate it as sought".

Owning land is consistent with one of the objects of the Company (see Clause 3(n) of the Objects of the Company). In the face of the challenge by Jitendra, the Petitioner was under duty to provide evidence that what Jitendra had asserted was not true. I hold it that it has not been proved that the Company is dormant. It cannot be that simply because the Company may have failed in one of its objects then it is so inactive as to justify liquidation. The Court is unable to hold that the substratum of the Company has gone.

34. In reaching this decision the Court has considered that the Company is involved in two pending litigation which involves LR. No. 11329 which has been a key asset of the Company. This again was not disputed by the Petitioner. In view of the pendency of that litigation and without more material before it, the Court is unable to tell whether the object empowering the Company to own property is spent.

35. Let me examine the assertion that the Company should be liquidated because all the three Directors have resigned and so there is a vacancy in the office of Directors. What has not been shown to this Court is that a meeting of the Company has been called to replace these directors and that such effort has still failed to fill the gap. In other words, it has not been demonstrated that it is either not feasible to elect or appoint other Directors to run the Company or that the option is not available. Again, it has not been alleged that there is a deadlock between shareholders as to how the affairs of the Company should be managed or conducted.

36. On hearing a plea for Liquidation, a Court has a wide array of Orders which it can make. That is the design of the provisions of section 427 of the Act. This is because companies face different challenges and a one size fits all solution may neither be possible nor desirable .Section 427 reads:-

> "Powers of Court on hearing of liquidation application
>
> (1) On the hearing of a liquidation application, the Court may make such of the following orders as it considers appropriate:
>
> (a) an order dismissing the application;
>
> (b) an order adjourning the hearing, conditionally or unconditionally;
>
> (c) an interim liquidation order; or
>
> (d) any other order that, in its opinion, the circumstances of the case require.
>
> (2) However, the Court may not refuse to make a liquidation order on the ground only that the company's assets have been mortgaged to an amount equal to or in excess of those assets, or that the company has no assets.
>
> (3) If the application is made by members of the company as contributories on the ground that it is just and equitable that the company should be liquidated, the Court shall make a liquidation order, but only if of the opinion that—
>
> (a) that the applicants are entitled to relief either by liquidating the company or by some other means; and
>
> (b) that, in the absence of any other remedy, it would be just and equitable that the company should be liquidated,
>
> (4) Subsection (3) does not apply if the Court is also of the opinion that—
>
> (a) some other remedy is available to the applicants; and

(b) they are acting unreasonably in seeking to have the company liquidated instead of pursuing that other remedy".

37. Regarding an application of this nature which is by Contributories on the just and equitable ground, subsections 3 and 4 are a pointed direction as to how the Court should deal with the application. In the matter before me it seems premature to Order liquidation. Put differently the Petitioners have not satisfied the Court that they are entitled to the relief of liquidation just yet.

38. But before the Court makes its final orders, one other issue remains outstanding. It was the case for Jitendra that even if a liquidation order was deserved, it would be inappropriate to appoint Thoithi and Weru as liquidators as they are also the administrators of Spencon. That there would be serious conflict of interest. The truth of the matter is that Thoithi only and not Weru is one of the administrators of Spencon. So, would Thoithi be a suitable candidate for appointment as an liquidator herein view of the apprehension raised by Jitendra?

39. Other than in the circumstances set out in section 441 of the Act, upon making a liquidation order, the Court would ordinarily appoint the Official Receiver as liquidator. See section 438(1) and (2):-

> 438. Functions and powers of Official Receiver in relation to office of liquidator.
>
> (1) Subsections (2) to (7) have effect, subject to section 441 when the Court makes an order for the company to be liquidated.
>
> (2) The Official Receiver becomes the liquidator of the company and continues in office until some other person becomes liquidator under this Part.

By powers granted under section 439 the Official Receiver (being the Liquidator) may cede that appointment to another person but with notice to the Court. On other occasion the Official Receiver gives his concurrence to the appointment of such other person before or at the point the liquidation order is made. Yet given the critical role of the Liquidator, and which often involves balancing competing interest of various parties, a person appointed (not being the Official Receiver) must be one who passes the neutrality test. I very much doubt that Thoiti who is in charge of the affairs of one of the shareholders would pass that test. Had the Court been inclined to make a liquidation order, it would not have appointed Munui Thoithi as one of the liquidators.

40. Back to the final orders. The Court will give an opportunity to the opposing Contributory to requisition the company for the holding of a special General Meeting for purposes of election or appointment of new directors. Jitendra to take those steps within the framework of the law and within 120 days hereof.

41. For now the Court holds back the making of any final Orders and any party shall be at liberty to move the Court after the holding of the Special General Meeting or for any other reason. Costs on this matter shall abide the eventual outcome of the proceedings.

Dated, Signed and Delivered in Court at Eldoret this 28th Day of April 2020

F. TUIYOTT

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17th April 2020, this Judgment has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

PRESENT: