



IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

INSOLVENCY PETITION NO. E002 OF 2020

IN THE MATTER OF THE INSOLVENCY ACT, 2015

AND IN THE MATTER OF BIZONE LIMITED

AND

IN THE MATTER OF AN APPLICATION FOR LIQUIDATION

JUDGMENT

1. What is before the court is a liquidation petition dated 23rd January 2020 and presented by Bankim Patel (also “the Petitioner”) in respect of Bizone Limited (“the Company”) which was incorporated under the repealed *Companies Act*. The Company is engaged in the business of printing and publishing.

2. Bankim Patel, a director of the Company, deponed in his affidavit sworn on 23rd January 2020 that the Company’s Board of Directors, at a meeting held on 10th January 2020, resolved that the company must be liquidated owing to its insolvency status and inability to pay its debt. The Petitioner stated that the Company, which has been in operation for over two decades, and has a portfolio of clients/customers across Kenya had been profitable for quite some time until 2015 when business slowed down due to the harsh economic conditions causing it to deplete its working capital.

3. The Petitioner stated that its assets, movable and immovable, are valued at Kshs. 98,000,000.00 while its liabilities amount to approximately Kshs. 350,000,000.00. It averred that despite approaching various banks, it has not received any positive feedback in order to shore up its capital position. The Petitioner stated that the Company has not been fully operational since the beginning of 2018. It shut down its operations in 2019 and as a result it cannot service its debt obligations as they fall due. The Petitioner states that it is only just and equitable that the court grants the following orders set out in the petition:

- a. The Company, Bizone Limited be and is hereby declared insolvent and placed under an interim liquidator.*
- b. The Honourable Court appoints the Official Government Liquidator to take over management of the Company.*
- c. Pending the final order of liquidation there be a stay of all pending proceedings whatsoever against Bizone Limited.*
- d. Such other orders be made as the Honourable Court deems fit in the interest of justice.*
- e. Costs be in the cause.*

4. The Company employees opposed the Petition through the Replying Affidavit sworn on 4th June 2020 by a former employee, Grace Wamira Njuguna. She depones that the Company has at least 64 employees, who also work for associated companies, on contract and permanent basis. She further depones that contrary to the averments in the Petition, the Company continued with business as usual until 28th November 2019 when it sent the employees on leave and informed to resume work on 7th January 2020. The employee understood that they had only gone on leave and not that the Company would be shut down.

5. Ms Njuguna believes that the Company has acted with mischief. She deponed that the employees were provided with a single leave form and informed that there were no printing papers to make a copy for each employee hence all employees present resolved to sign and attach a sheet with their signatures to the single leave form. They accused the Company of failing to pay employees their salaries from September 2019 despite the fact that they continued to work until 28th November 2019. When the employees reported back to work on 7th January 2020, they found their office locked up and a notice posted on the door with instructions that the leave period had been extended to 7th February

2020. They remain under the impression that they are employees of the Company as their personal items and documents still remain in the Company premises.

6. The employees accused the Company of concealing information regarding filing of the petition while they were on leave in order to deprive them of their lawful earnings and dues. Ms Njuguna depones that the Company failed to engage them in seeking how to settle their outstanding dues and that the Company compromised the representatives of their Union, Kupripupa Workers Unions, who never conveyed to them the fact that the Company was insolvent.

7. Ms Njuguna deponed that since filing the Petition, the Company has disposed a number of assets including motor vehicles and trucks in order to convince the court that the Company has no financial capacity to clear its debts and that the Company does not deserved the court's discretion in the matter. She also accused the Company of failing to pay statutory dues despite making deduction from the employees' salaries.

8. Ms Njuguna also deponed that the Petitioner is a man of means who is capable of paying his debts and that this case fails to meet the threshold. That he owns many high end luxury vehicles, properties in Runda, shares in an aviation company called Capital Airlines where he is the director of flight operations but also a beneficial owner of another company called JPB Works Limited. She thus prayed that the court dismisses the petition and order the Petitioner to pay their debts and costs of the suit.

9. The petition was advertised in the Daily Nation Newspaper on 20th February 2020 and fixed for hearing thereafter. Only the employees opposed the petition on the grounds set out in the deposition whose contents I have outlined above. Counsel for the petitioner and the employees filed written submissions which I have considered. The issue for resolution is whether, on the facts of the case, the petitioner has made out a case for liquidation of the Company on the ground that it is unable to pay its debts.

10. The petition is grounded on the allegation that the Company is unable to pay its debts and is insolvent. **Section 384** of the **Insolvency Act, 2014** ("the Act") provides the definition of 'unable to pay debts' as follows;

384. The circumstances in which a company is unable to pay its debts

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

(a) -----

(b) -----

(c) If it is proved to the satisfaction of the Court that the company is unable to pay its debts as they fall due.

(2) A company is also unable to pay its debts for the purposes of this Part if it is proved to the satisfaction of the Court that the value of the company's assets is less than the amount of its liabilities (including its contingent and prospective liabilities).

(3) The insolvency regulations may increase or reduce the amount specified in subsection (1)(a).

11. **Section 424** of the **Act** provides the circumstances under which the court may liquidate a Company. It states, at the material part, as follows:

424. Circumstances in which company may be liquidated by the Court

(1) A company may be liquidated by the Court if—

(a) the company has by special resolution resolved that the company be liquidated by the Court;

(b) -----

(c) -----

(d) -----

(e) the company is unable to pay its debts;

(f) -----

(g) -----

12. Finally, and relevant to this case is **section 427(1)** and **(2)** of the **Act** which sets out the powers of the court when presented with a liquidation petition as follows:

427. 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) -----

(4) -----

13. Has the petitioner made out a case for liquidating the Company? From the documents placed before the court, I am satisfied the Company is unable to pay its debt and is also insolvent. It has substantial debts among them a tax liability of about Kshs. 11,000,000.00 and Kshs. 37,000,000.00 owed to various debtors. While the employees have opposed the petition on the ground that they are owed substantial amounts of money and the application is not brought in good faith, I do not see this as reason not to grant an order of liquidation. Their case buttresses the fact that the Company has not been in operation and also owes them money. All the evidence point to the fact that the Company is unable to pay its debts and is insolvent. The employees may have the opportunity to present their claims during the liquidation process. Conversely, any disposal of assets or property will be investigated by the liquidator.

14. For reasons I have set out above, I now make the following orders:

(a) An Interim Liquidation Order be and is hereby issued in respect of the Company, **BIZONE LIMITED**;

(b) That the Official Receiver be and is hereby appointed as the Provisional Liquidator of **BIZONE LIMITED**;

(c) Cost of the petition shall be borne out of the Company assets.

DATED and DELIVERED at NAIROBI this 23RD day of OCTOBER 2020.

D. S. MAJANJA

JUDGE

Court Assistant: Mr. M. Onyango.