



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
INSOLVENCY CAUSE. NO. 8 OF 2016
IN THE MATTER OF F. M. MACHARIA (K) LIMITED
AND
IN THE MATTER OF THE INSOLVENCY ACT, 2015
JUDGMENT

Introduction

1. In any Petition brought for the purposes of liquidating a private company, the court has the discretion once the petitioner has established the right to bring a petition and established the grounds alleged, to make or deny the order sought. By the same vein the court also has an inherent jurisdiction to strike out any petition which is bound to fail or is an abuse of the process of the court.

2. In the instant Petition, the Petitioner seeks an order that the Company, F. M. Macharia (K) Ltd be liquidated pursuant to the provisions of the Insolvency Act, No. 18 of 2015. The company, despite having been duly served, has not contested the Petition.

Background facts and the litigation

3. On 2nd August 2016, the Petitioner (Rebe Gacambi) drafted and served a demand upon the Company. The demand was stated to have been made under Section 220 of the Companies Act (Cap 486). It was a demand for the company to pay the sum of Kshs. 1,467,117/- to the Petitioner within 21 days or face an application for a winding up order. The demand was not heeded and the Petitioner carried her threats forth by filing this petition on 14th December 2016.

4. The petition was later to be listed for hearing, and on 17 February 2017, the Petitioner gave her sworn testimony in court. The Petitioner testified that she was a general merchant. That she had supplied the Company with goods worth Kshs 1,999,117/= in 2013. The goods were in the form of rice and sugar. Petitioner further testified that the Company has paid an amount of Kshs. 532,000/- leaving a balance of Kshs. 1,467,117/- and that despite several demands the payment had not been made by the Company, leading to the formal demand of 2nd August 2016. The formal demand had also not been answered and the Petitioner was convinced that the Company could not pay the debt.

5. At the conclusion of the trial, having noted the contents of the statutory demand, the court asked

counsel for the Petitioner to also address the court on the effect of a notice issued under a repealed and non-existent piece of legislation. The Statutory demand had been stated as issued pursuant to Section 220 of the Companies Act (Cap 486) (now repealed).

Discussion and Determinations

A defective statutory demand?

6. The first question I need to answer is whether a statutory demand which refers to a repealed statute and section is valid for purposes of insolvency proceedings commenced and prosecuted under the Insolvency Act, No. 18 of 2015

7. Ordinarily, the consequence of repeal of a statute is that once the statute is repealed it is completely obliterated as if it never existed. It ceases to exist from a body of laws and so do all its provisions unless the new statute has a saving clause.

8. In the instant case, reference was made to a repealed section of statute. The statutory demand referred to Section 220 of the Companies Act (Cap 486). The demand itself satisfied the mandatory requirements of an insolvency statutory demand. The 4th edition of Halsbury's Laws of England Vol 7(2) at paragraph 1446 states that

“The statutory demand must be dated and be signed by the creditor himself or by a person authorized to make the demand on the creditor’s behalf. The statutory demand must state the amount of the debt and consideration for it or if no consideration the way if (debt) arises...The statutory demand must include an explanation to the Company of the following matters: (a) Purpose of demand and fact that if demand is not complied with, proceedings may be initiated for winding up; (b) time for compliance with notice if consequential is to be avoided and (c) methods of compliance open to the Company”
(footnotes omitted)

9. I have read the statutory demand issued by the Petitioner to the Company on 2nd August 2016 and which was produced in evidence as “P-Exhibit 3”. The demand was dated. It was signed by the Petitioner. It stated the amount of the debt with reasonable exactitude. It also stated the purpose of the notice; to wit, the intention to commence proceedings for court liquidation of the Company if no payment was made. It stated precisely the time for compliance.

10. As there is no prescribed form for the statutory demand, the question can only be one of substantial compliance and not just compliance. Substantial compliance is necessary for the simple reason that based upon the statutory demand the Company could be liquidated. The only blemish on the statutory demand was the reference to section 220 of the Companies Act (Cap 486) which was repealed on 18 January 2016.

11. I hold the view that the reference to section 220 of the Companies Act was not fatal. The notice is a fore-runner to any Petition being lodged and it no doubt operates as the statutory notification of the creditor’s intentions. If the content is appropriate then reference to a wrong section of the statute may be misleading but it causes no patent injustice. The same could apply where there is no reference at all to relevant sections of the statute.

12. Additionally, my reading of Section 1024 of the Companies Act No. 17 of 2015 lends support to the proposition that the reference by the creditor to the repealed section 220 in the statutory demand was not fatal but rather the notice was effective for all intents and purposes.

13. Section 1024 of the Companies Act, 17 of 2015 is intitled ”Continuity of the law” and it reads as follows

(1) If a provision of the repealed Act is re-enacted by this Act (with or without modification) the effect of the provision continues subject to this Act.

(2) (3), (4).....

(5) Any reference (express or implied) in an enactment or document to a provision of the repealed Act is to be interpreted (so far as the content allows) with respect to a time, circumstances or purpose in relation to which the corresponding provision of the Act, as being or as including a reference to the corresponding provision of this Act .

14. The specific parts of the Companies Act (Cap 486) dealing with the winding up of companies was repealed and instead the Companies Act No. 17 of 2015 came into play. The latter statute no longer deals with insolvency and liquidation of companies. The Insolvency Act No. 18 of 2015 instead does. The relevant portion of the Insolvency Act is Section 384. The section is the equivalent of the repealed section 220 of the Companies Act (Cap 486). Section 384, like its predecessor section 220, defines the inability of a company to pay its debts.

15. The Insolvency Act does not have an equivalent continuity of law section but I hold the view that Section 1024 could apply with equal force to all matters concerning insolvency where Section 220 of the repealed Companies Act is applicable or is relied upon. Pursuant to section 1024 of the Companies Act, it must be deemed that the reference to section 220 of the repealed statute was to a corresponding provision in the Insolvency Act and in particular to Section 384 of the Insolvency Act.

16. It is my view that the legislature could not have intended that there be a continuity provisions for all actions and acts under the repealed Companies Act through statutory provisions re-enacted in the new statute but not for matters relating to insolvency. It cannot and must not be lost that the insolvency process was all along guided by the repealed statute.

17 . I would also add that Section 734(2) of the Insolvency Act appears to allow steps taken pursuant to provisions of the repealed Act when it stipulates as follows:

“(2) Despite the repeal of the Companies Act or parts VI to IX of that Act, those parts and as other provision of that Act necessary for the operation, continue to apply to the exclusion of the Act, to any past event and to any step or proceedings, following , or relating to that past event, even if it is a step or proceeding that is taken after the commencement”

18. The issuance of a statutory demand is a step which had to be undertaken pursuant to the Companies Act prior to the institution of a winding up Petition. The fact that in the instant case the step was taken after the repeal of the Companies Act would not be fatally defective by reason only that reference was made to Section 220 of the repealed Act.

19. I hold that the statutory demand was effective and valid.

To liquidate or not to liquidate

20. I now come to the question as to whether I should make an order for the liquidation of the Company.

21. The Petitioner has proven that she is a creditor for the purposes of Part VI of the Insolvency Act. The evidence tendered before me established that the Petitioner had supplied goods to the Company at the Company’s request and the goods were not fully paid for even after the invoices, which were produced as evidence, were delivered to the Company. The Company has not challenged this fact.

22. The Petitioner has also established that it issued a statutory demand for purposes of Section 384 of the Insolvency Act (even though reference was made to section 220 of the repealed Companies Act). The notice or demand was not heeded and the consequence was this Petition. The debt has not been disputed and neither has the Company challenged or contested the Petition. Accordingly, I find that the Petitioner has established that the Company is unable to pay its debts. The Petitioner has discharged the burden as required by law.

23. Finally, the Petitioner also testified that the Company has assets. It was however not clear as to what value should be imposed on the assets. I am ready however to accept the Petitioners' testimony that the Company's assets do not match the liabilities. This is uncontested.

Conclusion and disposal

24. The debt was and is genuine. It is appropriate to conclude that the Company is unable to pay its debts and that the Petitioner has proven her case on a balance of probabilities. I will allow the Petition as it is just and equitable that the Company be wound up.

25. I am satisfied that under Section 384 of the Insolvency Act 2015, the prayers sought in the Petition are merited.

26. Before making my final orders, I noticed that the Petitioner and the Company share the same postal address. I wonder whether this is a coincidence or whether the two parties have an association. I hope not, but trust the liquidation process confirms the position.

27. In the final analysis, I enter judgment as follows

(a) The Company F. M. Macharia (K) Ltd is hereby to be liquidated under the provisions of the Insolvency Act, 2015.

(b) The costs of the Petition are to be paid to the Petitioner out of the assets of the Company.

(c) The Official Receiver is to be constituted as the liquidator of the Company.

Dated, signed and delivered at Nairobi this 11th day of April 2017.

J.L.ONGUTO

JUDGE