



IN THE MATTER OF FALCON COMMERCIAL (K) LTD.....PLAINTIFF

VERSUS

IN THE MATTER OF THE COMPANIES ACT.....DEFENDANT

RULING

Application dated 10.08.2007 seeks to strike out the petition filed herein on 04.07.2007, on the grounds that the petition is intended to enforce payment of a disputed debt.

The application is supported by the affidavit of Mr. Chetan Magdani Magdani. It is not disputed that the application is against a limited liability company registered under the Companies Act Cap 486 and that the petitioner is a provider of printing and advertising services to the Applicant, payment was on account.

When the petitioner raised an invoice and statement claiming Kshs. 1,068,843.50, the applicant protested and the bill was reduced to kshs. 1,027,083 /=. However, the applicant disputed this figure and forwarded payment for Kshs. 879,728 /=- which they admitted. The petitioner rejected this payment and insisted on being paid full amount. He returned the cheques before presenting them for payment. According to the applicant, they disputed kshs. 147,337 /=-. The reason given for rejecting the cheques is that the Respondent had filed this petition and the amount of Kshs. 897,728 /=- was not acceptable. There is evidence of dispute here.

The meaning of inability to pay is defined in the Act. Section 220 defines the inability to pay debts, thus :

1. If a creditor indebted to a company a sum exceeding Kshs. 1,000 /=- and statutory notice for 21 day is served and no payment is received, or
2. If execution of decree in favour of a creditor is returned unsatisfied, or
3. It is proved to court that the company is unable to pay its debts after taking into account the contingent and prospective liabilities of the company.

The applicant herein relies on the case of Intona Ranch Ltd. (In liquidation) Vs Joseph Thomas Obrien, Civil Appeal No. 107 pf 1990. Where the court said:

“The company having disputed the debts cited in the statutory notice but offered to pay the admitted portion, then the Respondent was not entitled to present the petition. To do so was tantamount to exerting pressure on the company to pay what was due and offered as well as the disputed portion”

Further, the court said.

“Petition for winding up order of a company should never be presented as a means of exerting pressure to pay even an admitted amount where there is no evidence of insolvency and inability to meet the debt.”

Again in Standard Ltd Exparte Tricon Paper International. Ringera J. (as he then was said.

“If a petition is intended to enforce the payment of a disputed debt, it will be treated as an abuse of process of court and will be struck out.”

I have perused the Respondents submissions I see that although the payment of Kshs. 879,728 was to be paid, the Respondent refused to accept the payment because it had already filed this petition and the amount was not in full settlement of the debt. The Respondent’s conduct in refusing to accept the payment was evidence that the debt was disputed. From the Applicants admissions, only a sum of kshs. 147,355.50 is disputed. The reasons why it is disputed is stated as not due as the Respondent was entitled to credit notes on account of rejected works. This is a dispute on the payment of the said sum. It was not a mere refusal. The Applicant said it was not due, if the works were rejected.

Upon receiving the Respondents submissions and authorities cited, it is clear that the Respondent in rejecting the amount admitted was pressuring the Applicant to pay even the disputed amount. What is unacceptable is the intention to pressurize the other party. As Ringera J. said, the proper procedure to enforce payment of disputed debts is to resort to civil courts for the trial.

There is no evidence here that the Applicant Company is insolvent. I have no hesitation in holding that the petition is an abuse of court process. The Respondents demonstrates that it wanted to pressurize the Applicant to pay the amount disputed. The petition was filed in bad faith.

I therefore allow the application and order that the winding up petition filed in this cause and dated 02.07.2007 against Falcon Commercial (K) Ltd be and is hereby struck out.

Costs of this application and the petition to be paid by Petitioner/Respondent.

It is so ordered.

DATED this 15th day of October 2008.

JOYCE N. KHAMINWA

JUDGE