REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Civil Suit 56 of 2006

HIGHLANDS MINERAL WATER COMPANY LIMITED.....PLAINTIFF

VERSUS

SAFEPAK LIMITED…….DEFENDANT

R U L I N G

By a Chamber Summons application dated and filed in court on 9th October, 2006, the applicant has sought the following prayers: -

1) THAT service of this Chamber Summons be dispensed with in the 1st instance, as the object of granting this application will be defeated by delay.

2) A temporary injunction may issue against the Defendant company to restrain it from filing a petition under Section 220 of the Companies Act or to take any other steps under the Companies Act until the determination of this suit.

3) THAT this order be served upon the Defendant Company.

4) THAT the court may order inter-parties hearing of this application.

5) Costs be awarded for in this application.

The application was premised upon the following grounds that: -

(a) The invocation of Section 220 of the Companies Act by the Defendant to wind up the Plaintiff was manifestly oppressive, unjust and an abuse of the process of the court.

(b) THAT the sole object of issuing a Statutory Notice by the defendant is to coerce the plaintiff to withdraw its application.

(c) THAT Section 220 of the Companies Act does not issue in the matter.

The application was further supported by the affidavit of one, Ashwin Karsandas Padia in which he reiterated and expounded on the grounds set forth as aforesaid. In amplification of the said grounds, the deponent states that both the applicant and respondent had over a long period of time been engaged in business dealing. Whereas the Plaintiff bottles water commonly known as “Highlands”, the Defendant supplied it with the packaging bottles, or P.E.T. bottles. According to the deponent the impasse that has culminated in this suit arose out of an application to the Kenya Intellectual Property Institute (K I P I) for

Registration of "S" design bottle by the applicant. Apparently, the Respondent had made a similar application to the same institute much earlier. However the applicant's application was nonetheless processed and published. When this fact was brought to the attention of the Respondent they protested to the applicant and demanded that it withdraws the application for registration of the "S" shaped bottle. The deponent further avers that when the applicant refused to back down, their business relationship became sour forcing the applicant to offer to settle the outstanding account due to the Respondent in the sum of Kshs.133,880,494/95 by monthly instalments of Kshs.1,500,000/=. This offer was rejected by the Respondent who demanded full settlement of the account once and for all. Unable to get the full settlement of the account, the Respondent then issued and served on the applicant Statutory Notice under ***Section 220*** of the Companies Act which act led to the instant suit. To the applicant, the company has the ability to settle the outstanding account and that the notice was therefore issued in bad faith and was calculated to pressurize the Plaintiff in to settling the outstanding account. That the Respondent's action is malicious, oppressive, unjust and calculated to extort money from the applicant and ruin its reputation.

The exparte application was placed before Justice Khamoni on 11th October, 2006 who upon hearing counsel for the applicant granted the application in terms of prayers 1, 2, 3, 4 and 5 in the manner following: -

" ***1) THAT the above being the position Chamber Summons herein dated 9th October, 2006 be and is hereby certified urgent and same be served for inter-parties hearing on a date to be taken by the parties at the Registry on priority basis.***

2) THAT meanwhile a Temporary Ex-Parte Injunction hereby granted in terms of prayers (2) (3).

3) THAT in terms of prayer number (2) to subsist until the date of hearing of inter-parties hearing of the Chamber Summons.

4) Costs of the Chamber Summons be in the cause."

Though a temporary ex-parte injunction ordinarily can only be granted for a maximum of fourteen (14 days) under ***order XXXIX*** of the Civil Procedure Rules it was not until 5th March, 2007 that the application came up for inter-parties hearing. This was almost 5 months after the temporary injunction had been granted. Strictly speaking therefore and in terms of the holding in the case of ***Wanjiku v Esso Kenya Limited,*** the ex-parte temporary injunction granted as aforesaid lapsed at the expiry of 14 days, in which case then there would be nothing for me to confirm. However, the order by Justice Khamoni was that the temporary injunction would last until the hearing of the application inter-parties. Although I have my own misgivings about this last bit of the order, nonetheless it is an order of a Judge of co-ordinate jurisdiction as me and I cannot therefore purport to question it as by doing so I may inadvertently be sitting on appeal of a fellow judge's order. Further it is not lost on me that if the Respondent was so aggrieved regarding the irregularity of the order, it would have moved with alacrity to have the same vacated. I will say no more on the issue.

When the order was served on the Respondent, it reacted by filing a replying affidavit. The thrust of the Respondent's argument as captured by the affidavit is that the applicant acknowledges that it owes the Respondent a sum in excess of Kshs.33,000,000/=. That the Respondent was therefore within its legal right to issue the winding up notice dated 21st September, 2006 and was also within its right to institute winding up proceedings against the applicant by filing a winding up petition as the applicant had failed to comply with the winding up notice. That it is not true that the sole object of issuing a Statutory Notice by the Respondent was to coerce the applicant to withdraw its application for the registration of "S" shaped bottle as stated in the application. It was also not correct that the impasse between the applicant and the Respondent arose out of a misunderstanding regarding the application for registration of the "S" shaped bottle by the applicant. To the Respondent the issue of winding up petition against the application was totally different and distinct matter, from that of the applicant's application for Registration of "S" shaped bottle. Finally, the Respondent deponed that after issuing winding up Notice, the applicant had three weeks set out in the Notice within which to settle the debt. It did not. If the applicant had positively responded, and settled the account within the period there would have been no need for the Respondent to

file the winding up cause. To that extent, the Respondent maintains that the application lacks substance, is scandalous, frivolous, vexatious, bad in law and an abuse of the court process.

In his oral submissions before me, Mr. Mahan, counsel for the applicant stated that there was a winding up cause at Milimani Commercial Courts by the Respondent against the applicant which has been stayed pending the outcome of this suit. That the applicant was forced to come to court in order to stop the Respondent's blackmail. That the applicant having given the Respondent business in excess of Kshs.700,000,000/=, over the years, there was no basis for the Respondent threatening to wind up the applicant for a debt of Kshs.33,880,494/59. Though Counsel conceded that the aforesaid amount was due and owing to the Respondent and that the applicant was willing to pay, it could not do so under duress, blackmail and extortion. Counsel maintained that the Respondent's action in the circumstances was oppressive, unjust and an abuse of the court process.

In response, Miss Malik, learned counsel for the Respondent submitted that the ex-parte injunction granted having lapsed, the Respondent was within its rights to commence winding up proceedings against the applicant. Accordingly the prayers sought in the plaint may have been overtaken by events. Counsel further submitted that the applicant having admitted owing the amount which amount is exactly the same claimed in the petition, the Respondent was entitled by Statute to wind up the applicant for the debt. Counsel then poised a rhetorical question – if the applicant has all the assets exhibited in the affidavit in support of the application why is it not able to settle the account due to the Respondent? As regards the issue of "S" shaped bottle, Counsel contented that it was a side issue that is still being canvassed before Kenya Industrial Property Tribunal. It is only after a decision thereon would have been made by the Tribunal that this court may have jurisdiction to entertain the matter by way of appeal. For this proposition Counsel referred the court to the Kenya Industrial Property Act.

Counsel doubted whether the applicant had in the circumstances established a *prima facie* case to warrant the granting of the orders sought. Counsel referred me to several authorities on this issue for instance, *Mrao Limited v First American Bank of Kenya*

ed and 2 Others [2003] K L R 126, Re Tweeds Garages Limited [1962] ALL E R 121, Re Global Tours and Travel Limited [2001] I.E.A. 195, Re – The Standard Limited [2002] 2 E A 617 and Re – Rainbow Manufacturers, [2003] I E A 253. Counsel therefore urged me to dismiss the application.

As I understand it, the principles which guide the court in deciding whether or not to grant an Interlocutory Injunction are now well settled. In the celebrated case of *Gella v Cassman Brown and Another [1973] E A 358,* the court of appeal for East Africa summarized them as follows: -

*"…….First, an applicant must show a prima facie case with a probability of success. Secondly, an Interlocutory Injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an a****ward of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience (E.A. Industries v Trufoods [1972] E A 420……."***

So that if the applicant was to succeed in this application, it must first and foremost demonstrate that it has a *prima facie* case with probability of success and that if the application was not granted it will suffer irreparable loss not compensatable with an award of damages. Lastly in the event of doubt, balance of convenience will come into play. Has the applicant been able to satisfy any of these principles? I am afraid to say from the onset that it has not. Looking at the pleadings, it is the applicant's main contention that the winding up cause has been initiated against it maliciously, oppressively and for ulterior motives, one of which is to force it to capitulate and pay the amount due from it to the Respondent in the sum of Kshs.33,880,494/59. It is significant to note that the applicant does not deny owing this amount. Indeed by its own letter dated 6th September, 2006, the applicant did admit that the "…….***.Net balance outstanding is Kshs.33,880,494/95 (Kenya Shillings Thirty Three Million Eight Hundred Eighty Thousand Four Hundred Ninety Four Cents Fifty Nine Only)……."*** It is also instructive that the applicant through its advocates Messrs Bali-Sharma and Bali-Sharma Advocates by a letter dated 18th September 2006 were the ones who intimated to the Respondent " ***business relationship between our***

clients and your company have now come to such a turn that, there can be no further dealings between our clients and your company, from what we have been informed, a mode of conduct by you bordering on back of decorum of an ordinary congenial behaviour has surpassed any desire to continue further dealings." Further in the same letter the applicant made an offer to liquidate the sum owed to the Respondent of Kshs.33,880,494/59 by monthly instalments of Kshs.1,500,000/= with effect from October 2006. This offer was rejected by the Respondent. Thereafter the applicant made no counter offer. I do not think that the applicant then expected the Respondent to sit on its laurels and wait for such time as the applicant was ready and willing to settle the account at its own pace. It was bound to commence recovery proceedings. The choice as to the mode of recovery of a debt owed to a creditor from a debtor really depends on the creditor. If there is more than one mode, as in the instant case, I would imagine that such creditor would go for the process which is list expensive, expedient and yet most effective. In the instant case, much as the Respondent could have filed suit against the applicant seeking to recover the amount owed and which any event is admitted, however, it opted to pursue the more drastic and effective way of commencing the winding up proceedings against the applicant. In so doing, the Respondent cannot be accused of malice or extortion nor can it be said that by invoking ***Section 220*** of the companies Act, the Respondent was manifestly being oppressive and unjust to the Applicant or that it was abusing the process of court. Yes there may have been a dispute between the applicant and Respondent regarding the application for the registration of the bottle hitherto referred to as "S" design. Yes the Respondent may have been miffed by K I P I fast tracking the registration by the applicant of the bottle design. However, it was not the Respondent who broke off the business relationship as a result. It was the applicant who did so. Naturally, and since the Respondent was owed a colossal sum of money, it was only right that the Respondent moves with alacrity to recover what it was truly owed. In any event whether the winding up proceedings were actuated by malice and bad faith are matters which can be dealt with at the substantive hearing of the winding up cause. If at the hearing of the winding up cause, the applicant was able to demonstrate satisfactorily that the winding cause was initiated and actuated for ulterior motives, the trial court will not be oblivious to that fact and will accordingly make appropriate orders including dismissing the winding up cause. Essentially what I am saying is that the allegations of malice, coercion, extortion, oppression and abuse of court process in commencing winding up proceedings by the Respondent against the applicant have been canvassed in a wrong forum. They should have and should form part of the applicant's defence to the winding up cause. To my mind therefore, the applicant has not on the face of it demonstrated that it has a *prima facie* case with a probability of success. What is a *prima facie* case? According ***to Mrao Limited case (Supra) "A prima facie case in a civil application includes but is not confined to a "genuine" and an "arguable case." It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter……"*** The court went further to state that "……***But as I earlier endeavoured to show, and I cited ample authority for it, a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant case upon trial. That is clearly a standard which is higher than an arguable case……"*** On the material before me, I do not see the applicant's right which has been infringed. The applicant conceded that it owes the Respondent the money. That money has not been repaid to date. Even after being served with the Statutory Notice and given a window of 21 days, the applicant still did not make efforts to pay. Instead what does it do; it rushes to this court for injunction to restrain the Respondent from pursuing a legally recognised process of recovering debts owed by registered companies. Taking all the foregoing into consideration I am even tempted to hold that the applicant has come to a court of equity with dirty hands and has failed to show utmost good faith. To that extent therefore no *prima facie* case is established to warrant the granting of the Interlocutory Injunction.

I am fortified in this holding by an observation in Halsbury's Laws of England, 4th Edition at Page 345. The learned authors state "……***..A company will be granted an injunction to restrain the presentation of a petition only if there is evidence that it would be an abuse of the process. If a petitioner has sufficient grounds for petitioning, his motive (for example, malice) is no bar. A claim for damages will lie for presenting a winding up petition maliciously and without reasonable cause even though no special damage can be proved……"*** So there it is, if the applicant thinks that the winding up proceedings were actuated by anything else other than the respondent's sheer desire to recover its debt, its remedy lies elsewhere and not an injunction to stem the winding up proceedings.

Malice is not a bar to a winding up cause provided the Petitioner has valid and sufficient grounds for commencing winding up proceedings.

With regard to whether the applicant will suffer irreparable loss which would not adequately be compensated for by an award of damages, regrettably the applicant did not demonstrate to my satisfaction the irreparable loss that it may suffer. The applicant merely stated in the affidavit in support of the application that "….***..That my company has the ability to pay and from the transactions herein my company has paid a sum of Kshs.704,987,814/94 to the Defendant company and the debt outstanding if at all is four months only…….That due to this dispute over the bottle the notice was issued to pressurize the Plaintiff company and extort from it, not from any other reason and this discourse by the Defendant company illustrates that the Defendant company had adopted this action out of malice and to malign the Plaintiff Company and ruin its reputation in the general business community…"*** so that the applicant's worry really is that the action by the respondent was to malign the applicant and ruin its reputation. I do not think that reputation is the kind of thing you can loose forever. And if you do though not easily quantifiable, in damages, it can however be done. Further if the applicant was to pay the amount as it claims it has the capacity to do so, what loss of reputation if any, will it suffer if it was to pay before the winding up process goes full circle? In my view therefore, there is no irreparable loss that the applicant may suffer that is incapable of compensation by an award of damages.

Finally on the question of balance of convenience, I think the scales tilt in favour of the Respondent again. The money owed to the Respondent by the applicant having been admitted, I think it is only fair that the Respondent be allowed to pursue the process of recovery. The Respondent cannot be expected to wait forever to recover its money that is clearly admitted and where the applicant boldly states it has the capacity to pay.

Finally, I observe that one of the prayers in the plaint is "……***Permanent injunction against the Defendant company from issuing any process under the Companies Act Chapter 486 Laws of Kenya…."*** In the application before me the applicant has similarly sought: -

"……***A temporary injunction may issue against the Defendant company to restrain it from filing a petition under Section 220 of the Companies Act or to take any other step under the Companies Act until the determination of this suit….."***

It would appear that these prayers may have been overtaken by events as correctly submitted by the counsel for the applicant. Both counsels have conceded that there is currently a winding up cause at Milimani Commercial Courts pending hearing. What was sought to be injuncted thus has come to pass. Would it not therefore be futile to grant the order sought in the Chamber Summons as aforesaid? If I were to grant the order, this court would in effect be acting in vain. One would have expected that knowing that this was the case, the applicant would perhaps have moved to amend the prayers in the application as appropriate. It did not and accordingly I cannot see how I can possibly grant such a prayer.

In conclusion, it is my view therefore that the applicant is not entitled to the injunction prayed for in this application. Accordingly, the application is dismissed with costs to the Respondent. For the avoidance of doubt, the temporary injunction hitherto granted herein by Justice Khamoni on 11th October 2006 is hereby lifted and vacated.

Dated 19th this day of March 2007.

M. S. A. MAKHANDIA

JUDGE