



**Seokang Limited v Foundation Piling Limited (Insolvency Petition 16 of 2018)
[2023] KEHC 3287 (KLR) (Commercial and Tax) (20 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3287 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY PETITION 16 OF 2018**

DAS MAJANJA, J

APRIL 20, 2023

BETWEEN

SEOKANG LIMITED PETITIONER

AND

FOUNDATION PILING LIMITED RESPONDENT

JUDGMENT

1. The Respondent (“the Company”) is the subject of the Petitioner’s liquidation petition dated 22nd January 2019. It was incorporated on 8th May 2002 with a share capital of Kshs. 90,000 divided into 900 shares of Kshs 100 each. The Company engages in the business of civil engineering works and general construction.
2. The Petitioner has filed this creditor’s petition under section 425(1)(b) of the *Insolvency Act*, 2015 on the ground that the Company is insolvent and unable to pay its debts on account of a decree issued against it in Nairobi Magistrates Court, Milimani Civil Suit No. 6224 of 2016, Seokang Limited v Foundation Piling Limited. According to the judgment and decree dated 6th March 2017, the Company was directed to pay the Kshs. 17,444,927.00 as the principal sum, interest of Kshs. 3,925,108.57 as accrued interest to the date of judgment and which continues to accrue interest at 2.5% per month until payment in full together with costs certified as Kshs. 592,618.00.
3. As at the date of filing the petition, the Company had paid Kshs. 7,000,000.00 only leaving a balance of Kshs. 15,102,751.21. Before commencing these proceedings, the Petitioner served on the Company a statutory demand dated 4th April 2018. The Company filed an application to set aside the statutory demand in ML HC COMM Insolvency Notice No. 2 of 2018 which it withdrew. The Petitioner therefore seeks to liquidate the Company on the grounds that it is unable to pay its debts.



4. The Company has filed a replying affidavit sworn by its Managing Director, Ronald King'ang'i, sworn on 14th June 2019. It states that it has paid the debt leaving a balance of Kshs. 9,862,653.00 at the time of filing the affidavit. It states that it is unable to settle the full amount at once as it is also indebted to Credit Bank Limited which holds a debenture over its assets for Kshs. 90,000,000.00. It states that when the Petitioner attempted to execute the decree, Credit Bank Limited objected to execution on account of its fixed and floating debenture.
5. The court directed that the matter be determined by way of affidavits and written submissions.
6. The circumstances under which a company may be liquidated are to be found in section 384(1) and (2) of the *Insolvency Act*, 2015 which provides as follows:

384

- (1) For the purposes of this Part, a company is unable to pay its debts—
 - (a) If a creditor (by assignment or otherwise) to whom the company is indebted for hundred thousand shillings or more has served on the company, by leaving it at the company's registered office, a written demand requiring the company to pay the debt and the company has for twenty-one days afterwards failed to pay the debt or to secure or compound for it to the reasonable satisfaction of the creditor;
 - (b) If execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part; or
 - (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).

7. It is not in dispute the Petitioner is the holder of a decree in its favour which has not been satisfied. The attempt to execute the decree was unsuccessful due to objection proceedings lodged by Credit Bank Limited. The Company does not dispute that it was served and received a Statutory Demand. It did not pursue its application to set aside the demand was withdrawn. The Petitioner has therefore satisfied the threshold provided by section 384(1)(a) and (b) of the *Insolvency Act*. The Petitioner rightly cites *Rosenback & Co Pty Ltd v Singh's Bazaars Ply Ltd* 1962 SA 593 where the court held that:

That the court will have regard to the fact that a creditor who cannot obtain payment of his debt is entitled as between himself and the company ex-debits justifier to an order if he brings his case within the Act. He is not bound to give time. The fact that there is due to the petitioner's a liquidated sum, then the debt is not disputed, and where the petitioner has demanded payment without success, affords cogent prima facie evidence of the company, inability to pay its debts, and is the ordinance must commonly vetted (sic) on." [Emphasis mine]

8. In its response and submissions, the Company disputes the amount claimed and asserts that it has been making payment and will continue to do so until the debt is settled. The schedule attached in its deposition shows that the last payment was made in October 2021. It is not clear when the debt will be cleared leaving the court to conclude that the Company is insolvent and unable to pay its debts.



9. The powers of the court are outlined in section 427 of the *Insolvency Act* and it provides as follows:
- 427(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.
10. Under the aforesaid provision, the court has discretion as to whether to liquidate a company upon hearing of the liquidation petition bearing in mind that liquidation is the death knell for a company. Furthermore, I have considered the circumstances of the case and in particular the fact that the Company indicates it is willing to resolve the debt. Granted that the debt is a judgment debt that was incurred in 2017, I will give the Company time to pay off the debt but if it defaults, the court will have no option by to issue a liquidation order.
11. I therefore allow the petition and make the following orders:
1. The Company is granted ninety (90) days from the date hereof to clear the debt due to the Petitioner.
 2. In the event the debt is not cleared within the time so limited, the court shall issue a liquidation order on a date certain to be fixed by the court.
 3. Costs in the proceedings shall be in the cause.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF APRIL 2022.

D. S. MAJANJA

JUDGE

Court Assistant: Mr. M. Onyango.

Mr Nderitu instructed by Awele Jackson Advocates LLP for the Petitioner.

Mr Onyango instructed by A. I. Onyango and Company Advocates for the Company.

