Kenya Afrotech Limited v Swissport Kenya Limited (Insolvency Cause E006 of 2021) [2023] KEHC 18535 (KLR) (Commercial and Tax) (2 June 2023) (Ruling)

Neutral citation: [2023] KEHC 18535 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

INSOLVENCY CAUSE E006 OF 2021

FG MUGAMBI, J

JUNE 2, 2023

BETWEEN

KENYA AFROTECH LIMITED ..... APPLICANT

AND

SWISSPORT KENYA LIMITED ..... RESPONDENT

RULING

Brief Facts

1. Before the court is an application dated December 13, 2022. It is brought under sections 384, 424 (1) (e) and (g), 428, 692(1) (2), (3) and (4), 696, 697 and 608 of the *Insolvency Act*, 2015 and regulations 10,15,16 and 17 of the *Insolvency Regulations* 2016 and all other applicable provisions of the law.

2. The orders sought in the application are as follows;

    i. Spent

    ii. That pending the hearing and determination of this application inter parties, the respondent whether by itself, its agents, assigns, employees or any other person be and is hereby restrained, by way of an injunction from doing or committing any of the following acts:

    a. Advertising, gazetting or otherwise or in any other manner whatsoever giving notice to the public, or to any interested parties, of the fling of the instant Petition filed in this matter as well as the Statutory Demand in this cause dated October 7, 2020.

    b. In pursuance to the said Petition and the Statutory Demand, otherwise or in any other manner whatsoever giving any notice to the public or to any other interested parties, in relation to the filing of the Creditors Petition herein, whether such notice be by way of the advertising or the gazettement thereof or otherwise

iii. That the instant Petition and the Statutory Demand filed in this cause dated October 7, 2020 be and is hereby set aside.

iv. That costs of this application (and if prayer 3 of this Notice of Motion is granted, the costs of the cause) be provided for.

3. The applicant's case is premised on the grounds on the face of the application, the supporting affidavit and further affidavit both sworn by Andrew Wachira dated December 13, 2022 and February 7, 2023 respectively and written submissions dated February 7, 2023.

4. In summary, the applicant's case is that the respondent filed an insolvency petition against the applicant on February 5, 2021 claiming a sum of USD 205,837. This was after the expiry of a statutory demand it had issued against the applicant. Following consultations between the parties the principal debt had been fully settled save for the legal fees and the VAT.

5. Accordingly, the applicant's contention was that the debt stated in the statutory demand dated October 7, 2020 as due and owing was disputed. The applicant further states that the amount was overstated because the parties had agreed to maintain the VAT rate that the applicant had been paying when dealing with other clients in the industry. The applicant also averred that legal fees were to be agreed upon and that the amount that the applicants had paid previously was paid on a without prejudice basis.

6. The applicant further stated that the advertisement of the insolvency petition if allowed would not reflect the actual position of the applicant since the full debt had been settled. Such advertisement would however injure the applicant company's character, credit, goodwill and reputation. The applicant argued that it was not insolvent as it was in a position to settle its debts as and when due and that it was a going concern with an asset base of Kshs. 700 million shillings. The applicant therefore took issue with the statutory demand as premature and meant to embarrass it and coerce it into settling the overstated debt.

7. The application was opposed by way of a replying affidavit dated January 20, 2023 sworn by Racheal Ndegwa and buttressed by written submissions dated March 10, 2023. The respondent's position was that the total debt due from the applicant was USD 205,837 as stated in the statutory demand. This amount was inclusive of both VAT and legal fees and the same was agreed upon as the final amount to be settled by the applicant.

8. The respondent submits that the VAT returns in question had already been filed with KRA and it was therefore wrong to claim that this was disputed, the statutory demand having been filed in 2020. The respondents view this as an afterthought meant to frustrate its petition.

9. The respondent argues that the applicant's payment of USD 5,900 and a further USD 5000 towards the outstanding amount was prima facie evidence that the applicant had acknowledged being truly indebted. The respondent stated that the applicant had paid a total of USD 140,028.15 leaving a debt of USD 65,808.85. Even if this court were to find that there was a disputed amount in legal fees, respondent submitted that the debt of USD 57,985.85 was still above the threshold set by section 384 of the *Insolvency Act* as a debt worth petitioning over.

10. The respondent also averred that in any case, a dispute in the amount of debt was not sufficient ground for setting aside the statutory demand. Counsel submitted that the applicant had failed to meet the full obligations for setting aside the statutory demand despite being afforded adequate time to settle the debt.

11. Finally, the respondent submitted that no sufficient reasons were given by the applicant to dismiss the petition or set aside the statutory demand. Particularly, the applicant had no counter claim or set off or cross demand and the petition being a creditor's right, was not reserved as a measure of last result, so long as the creditor had complied with the law.

Analysis

12. I have considered the pleadings, the submissions and the authorities relied on by the rival parties. The main issue that emerges for determination is whether the statutory demand of October 7, 2020 should be set aside.

13. The justification for the insolvency petition would be the statutory demand which is evidence that the debtor is unable to make good a debt due and owing. The statutory demand replaces the requirement for a bankruptcy act under the repealed *Bankruptcy Act*, cap 53. In my view, once the statutory demand is dismissed, the petition cannot therefore stand as there is no evidence of insolvency unless the other forms of evidence under section 384(1) of the *Insolvency Act* are proved.

14. This section provides for the circumstances under which a company is unable to pay its debts. It reads as follows: -

> 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.
>
> d. 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).

15. The Court of Appeal in *Universal Hardware Limited v African Safari Club Limited*, MSA CA Civil Appeal No. 209 of 2007 [2013] eKLR, summarized the position regarding striking out of a petition on account of a disputed debt as follows:

> "...A disputed debt on substantial and bona fide grounds cannot be the subject of winding-up proceedings on account of the company's inability to pay its debts. The case law and scholarly writings are categorical that a creditor's petition should not be entertained if it is to enforce a debt that is disputed and the company is solvent, otherwise it will be treated as a scandalous and abuse of the process of the court and will be struck out on that basis."

16. A balance must therefore be maintained between a worthwhile dispute and a dispute that is meant to frustrate a creditor and delay the process of the petition. As regards what is a substantial and bona fide dispute, the Court in *Re Global Tours and Travels Limited* [2001] EA 195 stated that:-

> " ...In entertaining a petition to wind up a company on account of non-payment of debts, the court must be satisfied that the debt is not disputed on substantial grounds and is bona fide. If it is, then the winding up proceedings are not the proper remedy. A substantial dispute must be the kind of dispute that in an ordinary civil case will amount to a bona fide, proper or valid defence and not a mere semblance of a defence. It is not sufficient for a company to merely say for instance that we dispute the debt. The company must go further and demonstrate on reasonable grounds why it is disputing the debt."

17. Regulation 17(6) of the Act which lays down grounds for setting side a statutory demand is also pertinent. It provides that;

The court may grant the application if-

a. The debtor appears to have a counterclaim, set-off or cross demand which equals or exceeds the amount of the debts specified in the statutory demand;

b. The debt is disputed on grounds which appear to the court to be substantial;

c. It appears that the creditor holds some security in respect of the debt claimed by the demand, and either paragraph (6) is not complied with in respect of the demand, or the court is satisfied that the value of the security equals or exceeds the full amount of the debt; or

d. The court is satisfied, on other grounds, that the demand ought to be set aside."

18. The applicability of regulations 16 and 17 of the *Insolvency Act* has been a subject of judicial discussion in many instances. It seems generally agreed that the court still retains inherent jurisdiction to strike out a statutory demand that is not well founded and amounts to an abuse of the court process notwithstanding that a specific provision does not exist in the regulations and that the factors underlined in regulation 17(6) of the Insolvency Regulations governing the exercise of discretion to strike out a statutory demand in case of bankruptcy are equally relevant in the case of insolvency of a Company.

19. The threshold in regulation 17 has been accepted as a proper indication of what should be considered in setting aside a statutory demand for a company. (See *Kwale International Sugar Company Vs EPCO Builders limited & 2 others* [2020] eKLR amongst others).

20. I have looked and considered the record and the documents filed by rival parties. Each of the parties makes averments in their affidavit but does not attach sufficient documentation to prove its averments. For instance, the respondent states that the parties agreed to an all-round figure of USD 205,837 as payable by the applicant. There is no evidence by way of a written agreement or correspondence to back up this averment.

21. The applicants aver that there was an agreement regarding the amount of VAT that would be charged to the applicant by the respondent. It states that this rate was the same as that which the applicant would pay when dealing with other entities in the business. Instead of producing this agreement between itself and the respondent, the applicant provided an agreement with another party who is not the respondent.

22. In the absence of any evidence before the court, two pertinent questions remain; what is the true amount owing to the respondent if any and what is the status of the VAT and legal fees claims? I agree with the Court in *Flower City Limited v Polytanks & Containers Kenya Limited* (Insolvency Cause 033 of 2020) [2021] KEHC 34 (KLR) that the burden is for the debtor company to show a fairly arguable basis for setting aside the statutory demand.

23. The applicant attached a reconciliation of the account as at 2nd November 2022. The summary indicates that an amount of USD 103,489.55 had been paid to the respondent between 1st January 2021 and 30th September 2022. The respondent had paid a further USD 5,900 towards legal fees against an amount of USD 12,823.88 which is indicated as disputed. There was also an outstanding VAT amount of USD 58,110.73 which is indicated as disputed.

24. The respondent disputes this statement and argues that the applicant had paid a total of USD 140,028.15 leaving an amount of USD 65,808.85. It was averred by the respondent that even if this court were to find that there is a disputed amount towards legal fees, that amount would be USD 7,823 leaving a debt of USD 57,985.85. This debt would still entitle the respondent to advertise the petition. Save for these components it is not disputed that a part of the debt has been paid off, whether that is towards the principle amount or was part of the lump sum agreed is not clear. The essence of this analysis is that the true amount of what is due and owing is a factor that needs to be determined.

25. This Court is also cognizant of the policy framework and spirit of the *Insolvency Act* 2015. Unlike the repealed *Bankruptcy Act,* the current legislative framework requires Courts to be cognizant of the need to enable companies and bodies to continue to operate as going concerns so that ultimately, they may be able to meet their financial obligations to their creditors in full or at least to the satisfaction of those creditors. This of course, should be balanced against the rights of creditors on a case to case basis. This of course places the burden on the debtor company to make good its debt so as to survive the insolvency.

26. In the current circumstances, this court is sitting as an insolvency court and cannot get into the substance of the rest of the evidence submitted to determine parties' rights. The right forum for this interrogation and determination would be before a civil court. I am convinced that the effect of allowing the statutory demand herein against the applicant and the subsequent winding-up petition and advertising of that petition would be to put upon the company pressure to pay rather than to litigate its rights. This is not the objective of insolvency proceedings.

27. In addition, the issue of a statutory demand and consequent presentation of a liquidation petition may well undermine the policy objective of the Act. The parties herein ought to attempt a reconciliation of the outstanding amounts, if any so as to avoid the statutory demand being premature.

Determination and final orders

28. That said, I find that the application to set aside the statutory demand dated the October 7, 2020 has merit and it is hereby allowed. The applicant shall have the costs of this application.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 2nd DAY OF JUNE 2023.

F. MUGAMBI

JUDGE

Court Assistant: Ms. Lucy Wandiri.