



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**MISC NO. 211 OF 2019**

**ZAKHEM INTERNATIONAL CONSTRUCTION LTD.....APPLICANT**

**VERSUS**

**MULTIPLE ICD (KENYA) LIMITED.....INTENDED PETITIONER**

**RULING**

1. Notice of Motion dated 4<sup>th</sup> June 2019 is filed by Zakhem International Construction Limited (Zakhem). Zakhem's prayer is for restraining order to stop Multiple ICD (Kenya) Limited (Multiple) from proceeding to file and advertise the intended insolvency petition, and for the statutory demand, dated 15<sup>th</sup> May 2019 be set aside and/or vacated. The grounds of that application are that Zakhem was served with a statutory demand on 15<sup>th</sup> May 2019, which does not comply with insolvency Act, Zakhem is not indebted to Multiple because Multiple has inter-mingled with its accounts, there is a court order in HCCC 292 of 2018 freezing all Zakhem's bank accounts, and Multiple had agreed to withdraw the statutory demand.

2. In response and in opposition to the application Multiple, through its managing director, deponed by its replying affidavit denied intermingling of Zakhem's account and further that Zakhem had acknowledge its debt. The Multiples managing director further stated that on receiving the statutory demand Ibrahim Zakhem personally called him and promised that Zakhem would pay the debt by end of June 2019.

**ANALYSIS**

3. I need to begin by saying that neither of the parties provided to the court a copy of the statutory demand envisaged under section 384 of the Insolvency Act. That section 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).*

4. It is Zakhem's contention, and indeed a ground in support of the application, that the statutory demand served upon it does not comply with Insolvency Act. The burden to prove that the statutory demand is defective lay with Zakhem, see section 107 of the Evidence Act. Having not sighted the statutory demand I am unable to confirm its conformity or otherwise to the statutory requirement.

5. Zakhem, although denied owing Multiple the debt claimed, Ksh 3,786,590.80, Zakhem did, on or about 17<sup>th</sup> February 2018, confirm in writing to Multiple's auditors its indebtedness for that amount. Zakhem's learned advocate, by letter dated 22<sup>nd</sup> October 2018 confirmed

payment would be made of the amount due to Multiple. The only impediment to making payment, according to that advocate, was the court action where Zakhem's bank accounts were frozen. There is, therefore sufficient proof of admission of the debt owed to Multiple. Section 384 (2) of Insolvency Act, reproduced above, provides that a company is unable to pay debt if proved to the satisfaction of the court the value of the company's assets is less than liabilities. Zakhem submitted and also deponed by affidavit that it is able to pay its debts. Zakhem had a burden to prove and show that it has assets that exceed its liabilities. This it did not prove.

6. Finally Zakhem stated that it would have paid the debt had it not being for the court order which froze its bank accounts. Two issues come of that statement. Firstly Zakhem admitted its indebtedness to Multiple, through Multiples auditors in February 2018. It is to be noted that the court case, where Zakhem's accounts were frozen, was filed in July 2018. Secondly Zakhem failed to prove to this court that but for the freezing order of this court it would have paid Multiple debts.

7. On the whole the Notice of Motion dated 4<sup>th</sup> June 2019 fails for the reasons set out above. Accordingly that Notice of Motion is dismissed with costs.

**DATED, SIGNED and DELIVERED at NAIROBI this 14th day of APRIL, 2020.**

**MARY KASANGO**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the **COVID-19 pandemic** and in light of the directions issued by **his Lordship, the Chief Justice on 15<sup>th</sup> March, 2020**, this decision has been delivered to the parties online with their consent. They have waived compliance with **Order 21 rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court.

**MARY KASANGO**

**JUDGE**