



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

WINDING UP CAUSE NO. 2 OF 2015

IN THE MATTER OF AVO-HEALTH EPZ LIMITED

AND

IN THE MATTER OF THE COMPANIES ACT (CAP 486) LAWS OF KENYA

RULING

1. Avo Health EPZ Limited (the Company) is an entity in financial distress. Its Winding up is sought by way of a Petition brought by Gregory Omusolo and Julius Kirinya (jointly called the Petitioners) under the provisions of the previous Companies Act (chapter 486 of The Laws of Kenya).

2. The Petition is supported by various persons who refer themselves as Creditors. They are Business Partners International Kenya SME fund, DSV Air and Sea Limited, David Cheruiyot, Allpack Limited, Victoria Estate Investment and Development Kenya Limited and Themis Investment Limited. Of all these supporting Creditors this Court will say something about the position of Themis for reasons that become apparent in a short while.

3. But first what is the case of the Petitioners? At the outset of these proceedings, the Petitioners stated that the company owed them a sum of Khs.11,400,000/= on account of a loan advanced by them to the Company. But in an Application dated 1st April 2015 in which the Company sought the dismissal of the Petition, the Company took the position that the claim was based on a Share Purchase Transaction between the Petitioners and one David Ruto Cheruiyot one of the Shareholders of the Company. An argument that no debt was owing by the Company and that, therefore, the Petition was based on a disputed debt.

4. There was however a change of circumstances on 23rd July 2015 when a Consent was entered between the Petitioners and the Company in the following terms:-

“By Consent:-

That this matter be marked as settled in the following terms and conditions.

1. That the outstanding amount of Kenya Shillings 8,361,500.50/- be paid by the Company as follows;
2. The sum of Kenya Shillings 4,180,750 being 50% of the outstanding amount be paid on or before the 28th July 2015.
3. That the balance be paid in equal monthly installments of Kenya Shillings 836,037.50 per month vide posted cheques from the Company commencing on the 30th August 2015 until payment in full.
4. That in default of payment of any installment a 2% interest will be charged every month and compounded against the gross amount outstanding.
5. The costs of the Petition be borne by the Company, they ought to be agreed failure to which they will be taxed.
6. Any party be at liberty to apply.”

5. It is common ground (or at least not disputed) that the Company only made part payment of Khs.4,180,750/= on 30th July 2015 and a similar sum has been outstanding upto the date of the hearing of these proceedings.

6. Explicit in the terms of the Consent was that a debt of Kshs.8,361,500.50 was to be paid by the Company. The Company undertook to pay that debt and indeed made part payment. That Consent had the effect of taking the wind out of the sails from the argument by the Petitioners that no debt was owing from the Company or that the debt was disputed.

7. There was then a second issue raised by the Company. An assertion that the very foundation of the debt which was a Share Transaction was an illegality as it offended the provisions of the Competition Act (Act 12 of 2010). Cited are sections 41,42, and 43 hereof. These read:-

“41.

(1) For the purposes of this Part, a merger occurs when one or more undertakings directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another undertaking.

(2) A merger contemplated in subsection (1) may be achieved in any manner, including—

(a) the purchase or lease of shares, acquisition of an interest, or purchase of assets of the other undertaking in question;

(b) the acquisition of a controlling interest in a section of the business of an undertaking capable of itself being operated independently whether or not the business in question is carried on by a company;

(c) the acquisition of an undertaking under receivership by another undertaking either situated inside or outside Kenya;

(d) acquiring by whatever means the controlling interest in a foreign undertaking that has got a controlling interest in a subsidiary in Kenya;

(e) in the case of a conglomerate undertaking, acquiring the controlling interest of another undertaking or a section of the undertaking being acquired capable of being operated independently;

(f) vertical integration;

(g) exchange of shares between or among undertakings which result in substantial change in ownership structure through whatever strategy or means adopted by the concerned undertakings; or

(h) amalgamation, takeover or any other combination with the other undertaking.

(3) A person controls an undertaking if that person—

(a) beneficially owns more than one half of the issued share capital or business or assets of the undertaking;

(b) is entitled to vote a majority of the votes that may be cast at a general meeting of the undertaking, or has the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that undertaking;

(c) is able to appoint, or to veto the appointment of, a majority of the directors of the undertaking;

(d) is a holding company, and the undertaking is a subsidiary of that company as contemplated in the Companies Act (Cap. 486);

(e) in the case of the undertaking being a trust, has the ability to control the majority of the votes of the trustees or to appoint the majority of the trustees or to appoint or change the majority of the beneficiaries of the trust;

(f) in the case of the undertaking being a nominee undertaking, owns the majority of the members' interest or controls directly or has the right to control the majority of members' votes in the nominee undertaking; or

(g) has the ability to materially influence the policy of the undertaking in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in paragraphs (a) to (f).

42.

1) The Authority may, in consultation with the Cabinet Secretary and by notice in the Gazette, set the threshold for any merger excluded from the provisions of this Part.

(2) No person, either individually or jointly or in concert with any other person, may implement a proposed merger to which this part applies, unless the proposed merger is—

(a) approved by the Authority; and

(b) implemented in accordance with any conditions attached to the approval.

(3) No merger as described in section 41 carried out in the absence of an authorizing order by the Authority, shall have any legal effect, and no obligation imposed on the participating parties by any agreement in respect of the merger shall be enforceable in legal proceedings.

(4) Payment of the full purchase price by the acquiring undertaking shall be deemed to be implementation of the merger in question for the purposes of this section, and payment of a maximum down payment not exceeding twenty percent of the agreed purchase price shall not constitute implementation.

(5) Any person who contravenes the provisions of this section commits an offence and shall be liable on conviction to imprisonment for a term not exceeding five years or to a fine not exceeding ten million shillings, or both.

(6) The Authority may impose a financial penalty in an amount not exceeding ten percent of the preceding year's gross annual turnover in Kenya of the undertaking or undertakings in question.

43.

(1) Where a merger is proposed, each of the undertakings involved shall notify the Authority of the proposal in writing or in the prescribed manner.

(2) The Authority may, within thirty days of the date of receipt of the notification under subsection (1), request such further information in writing from any one or more of the undertakings concerned".

The argument being that the Share Transaction required approval from the Competition Authority which was neither sought nor obtained.

8. If the Share Transaction was illegal, then the Consent of 23rd July 2015 would therefore be illegal and the Petitioners case could crumble.

9. The proposition by the Company is really without basis. A merger that requires the approval of The Competition Authority is one that results in an entity or entities directly or indirectly acquiring or establishing direct or indirect control over the whole or part of the business of another undertaking and which merger is not excluded by the Authority (Sections 41 (1) and (2) read together with 42(1)). What amounts to control is elaborated in subsection 3 of section 41. Now, the case for the Company is that if the purported Share Purchase Agreement and Transfer had succeeded then the Petitioners would acquire 10% shares in the Company. By another side of its mouth the Company depones that Mr. Ndungu is the majority Shareholder of the Company. It seems elementary that even if the Petitioners had acquired 10% Shares in the Company they would not acquire control of the Company as contemplated by Section 41(3) of The Competition Act. This argument is feeble and without merit.

10. The Petition was presented in the era of the retired Companies Act (Chapter 486)(hereinafter the Act) and the provisions of that Act would be both the procedural and substantive Law governing these Proceedings.

11. Section 219 of The Act provides that one of the circumstances under which a Company may be wound up is when it is unable to pay its debts (paragraph (e) of Section 219). By dint of the provisions of Section 220, a Company is deemed to be unable to pay its debts:-

(a) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding one thousand shillings then due has served on the company, by leaving it at the registered office of the company, a demand under his hand requiring the company to pay the sum so due and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor; or

(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, and in determining whether a company is unable to pay its debts the court shall take into account the contingent and prospective liabilities of the company."

12. Given the evidence before this Court which includes the fact that the Company has been unable to pay the Petitioners debt since 30th August 2015, more than three years now, I find that the Company is unable to pay its debt even in the face of the Winding up Notice given earlier on 9th September 2014. But before making the drastic Order of Winding Up, this Court has to consider whether it can grant an alternative order as proposed by Themis and the Company itself.

13. The story of Themis is told in the Replying Affidavit of Richard Njoba (a Director thereof) who deponed (in the affidavit sworn on 17th March 2016), that in or about August 2014, the Company approached Themis with a request that Themis makes an equity contribution in the Company. Themis agreed to invest the sum of Khs.25,000,000 into the business and in return it was to be given 51% of the issued/authorized shareholding in the Company. On 8th August 2014 a Share Sale Agreement was executed to effect that arrangement. On the basis thereof Themis paid Khs.14,528,700/- into the Company. Themis complains that it is oppressed and the Court should consider an alternative remedy by way of change of Management.

14. This proposal does not find favour with the Petitioners. The reasons they give sound plausible. There is no tangible evidence presented to this Court to back the proposition for an alternative remedy and its viability. There is no evidence that the current Directors of the Company are willing to hand over the management of the Company to the Directors of Themis or its nominees. Further, notwithstanding considerable passage of time, the Company has not put forward any proposals as to how it intends to settle the debt owed to the Petitioners.

Whilst an Insolvency Court should always be willing to give a struggling Company a second chance, it must be demonstrated that the arrangement proposed as an alternative to a liquidation order is viable and has some prospects of turning round the fortunes of the Company. And the onus is on the party seeking the alternative remedy to show its feasibility. Now, neither Themis nor the Company give any tangible evidence or proposal to back up their plea.

15. In the end the Petition is merited and the Court grants the following Orders:-

- (a) That Avo Health EPZ Limited be and is hereby wound up by Order of Court under the provisions of the Companies Act (chapter 486 Laws of Kenya).
- (b) The Official Receiver is hereby appointed the Receiver or Liquidation Agent for winding up purposes.
- (c) All costs of the Petition including those of the participating Creditors shall be paid by the Company.

Dated, Signed and Delivered in Court at Nairobi this 18th day of January, 2019.

F. TUIYOTT

JUDGE

PRESENT:

Mwangi h/b Rono for DSV

Odera for Themis

Wanda for Allpack

Mungai for Mwangi for Victoria

Onyancha for David Ruto

Mungai for Muriuki for Petitioner

Nixon - Court clerk