REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 179 OF 2017

KITMIN HOLDING LIMITED.....PLAINTIFF

VERSUS

NOBLE RESOURCES INTERNATIONAL PTE LIMITED.....DEFENDANT

RULING

1. Noble Resources International PTE Limited (the Defendant) is desirous of commencing Liquidation proceedings against Kitmin Holdings Limited (the Plaintiff) and has issued a Notice under the provisions of section 384 of the Insolvency Act. These proceedings are triggered by that Notice and the Plaintiff has in a Notice of Motion dated 26th of April 2017 sought to restrain the Defendant from commencing, advertising or invoking Insolvency Proceedings against it pending the hearing and determination of the suit.

2. In a Plaint of even date, the Plaintiff alleges that the threat of Insolvency proceedings is premised on a debt that is disputed. Further that the notice issued by the Defendant is incompetent, illegal and unprocedural for the following reasons:

(i) It is issued by an entity unauthorized to practice in Kenya.

(ii) It fails to comply with the provisions of Section 427 of the Insolvency Act that mandates that other available remedies be pursued first.

(iii) The subject contract provides for arbitral dispute resolution mechanism.

(iv) Liquidation proceedings are excessive and unnecessary on a seriously disputed debt and financial engagement between the parties.

(v) The Plaintiff is a viable, operating company engaged in vital business and employing over 50 employees directly.

(vi) The Plaintiff Company has sufficient financial and collateral assets.

The Plaintiff also makes a Claim of USD 500,000.

3. There is common cause that on 14th January 2014, the parties herein entered into a Purchase Contract in which the Defendant was to purchase certain quantities of a commodity known as Chrome Ore Lumpy. The Plaintiff understood that the sums paid by the Defendant constituted a Joint Venture to be utilized in the acquisition of the commodity from third parties. Consequently, the Plaintiff avers that it got in touch with one such third party known as Simkan Agencies and that this was with the full knowledge of the Defendant and that certain sums paid by the Defendant to it was paid over to this third party. The Plaintiff therefore disputes any claim from the Defendant on account of the monies paid.

4. On the part of the Defendant, it sets out various Amendment Agreements to the main Purchase Contract which it alleges, largely dealt with changes to the purchase price. These agreements are dated 1st April 2014, 23rd April 2014, 26th April 2014, 30th July 2014. In addition, there was an agreement dated 30th December 2014 in which the parties concurred that an outstanding sum of USD 200,000 would be settled by the Plaintiff repaying a minimum amount of USD 10,000 per month. That pursuant to that agreement, the Plaintiff paid three installments of USD 10,000 on 27th January 2015, 4th March 2015 and 7th April 2015 respectively. And then Default!

5. Because there was default, Bowman Gilfillian Inc, the South African Attorneys for the Defendant sent a letter to the Plaintiff demanding payment of the sum of USD 170,000. There was a response to that letter by the Advocates of the Plaintiff. In a letter dated 9th December

2015 R.M. Mutiso Advocate admitted the debt but stated that the correct amount was USD 160,000 and not USD 170,000. In that letter, the Advocate raises the issue of the third party and also states that his client had invested almost USD 500,000 in certain operations at the behest and encouragement of the Defendant.

6. Subsequently, there was a foray of correspondence exchanged between the parties by way of email. It appears that there were discussions in which it was agreed that the Plaintiff would execute an acknowledgement of debt and repayment of agreement. This was not to be. Ultimately, the Defendant alleges that a sum of USD 150,000 was due after the Plaintiff paid a further sum of USD 10,000. This led to the Statutory demand dated 7th April 2017 issued by Bowman Gilfillian.

7. Under Section 424 (e) of the Insolvency Act, a Company may be placed under liquidation if it is unable to pay its debts. It is however the law that where the company demonstrates that there is a bonafide dispute to the debt, then Liquidation is not available. It would be an abuse of Court process for a Petition for Liquidation is to be commenced against a Company on the ground of inability to pay its debts when it is based on a truly disputed debt. This proposition is old hat and was succinctly reiterated in the decision of **Re Lympne Investments Ltd (1972) 2 All ER 385** where the court held;

> **"The companies' Court must not be used as a debt collecting agency, nor as a means of bringing improper pressure to bear on a Company. The effects on a Company of the presentation of winding up Petition against it are such that it would be wrong to allow the machinery designed for such Petitions to be used as a means of resolving disputes which ought to be resolved in ordinary litigation, or to be kept in suspense over the company's head while that litigation if fought".**

However, the Company must show that the debt is disputed on substantial and bonafide grounds and the onus of discharging this is obviously on the Company (see **Re Ghelani Impex Ltd (1975) EA 197).** If this were not so, then a Company would seek to avoid the ramifications of Liquidation by simply stating that a debt is disputed.

8. At this stage of the proceedings, the Court is considering an Application for Temporary Injunction. So as to deserve an order of Injunction on the basis that the debt is disputed, the Plaintiff must for a start demonstrate that it has made out a Prima Facie case in that respect. In assessing the viability of the Plaintiff's position, it is not the place of a Court considering an Interlocutory Application to carry out a mini-trial.

9. So, what is the basis for the Plaintiff alleging a disputed debt? The Plaintiff takes a position that there is no debt because the sums paid by the Plaintiff was a joint venture applied for the acquisition of ore from a third party. Secondly, that as a result of certain representations made by the Defendant, the Plaintiff expended a sum of USD 500,000 on acquisition of mining licenses, sites and engaging third parties and which sum it seeks to claim from the Defendant.

10. In respect to whether the money was a payment into a joint venture, this Court has not had an explanation from the Plaintiff as to why it acknowledged a debt of USD 200,000 in the contract of 30th December 2014. That contract is reproduced below;

> **REPAYMENT**
>
> **It is mutually agreed between SELLER and BUYER that the outstanding repayment amount of USD 200,000 (U.S. Dollars Two Hundred Thousand) to be settled by BUYER by repaying minimum USD 10,000 (U.S. Dollars Ten Thousand) per month. The outstanding repayment amount can also be offset through Chrome Ore and Manganese Ore products which are proven in specifications.**
>
> **The monthly repayment of minimum USD 10,000 shall be remitted from SELLER to BUYER through telegraphic transfer (T/T) remittance on/before 25th of each month.**
>
> **If, after 3rd month of repayment (i.e. March 2015), no product has been shipped as form of repayment, then the repayment amount shall increase to USD 20,000 per month from April 2015 until fully repaid.**
>
> **This Addendum is signed through scan/email and is legally binding on both BUYER and SELLER.**

There is an unequivocal promise by the Plaintiff to repay the sum of USD 200,000.

11. A term of the contract was that the outstanding amount could also be offset through delivery of Chrome Ore and Manganese ore products. There is no evidence that payments by way of ore deliveries was made. In respect to money, there does not seem to be a dispute that the Plaintiff made payments as follows;

- **27th January 2015 - $10,000**
- **4th March 2015 - $10,000**
- **7th April 2015 - $10,000**
- **19th May 2015 - $10,000**
- **18th July 2016 - $5,000**

- **16th Aug 2016 - $5,000**

The Prima Facie evidence is that the Plaintiff admitted owing the Defendant USD 200,000 as at 30th December 2014 and only paid a total sum of USD 50,000 towards discharge of that debt. As the onus of demonstrating that there is indeed a bonafide dispute as to the debt lies with the Plaintiff, it bore the duty of demonstrating that the acknowledgement agreement was entered inspite of an alleged Joint Venture Agreement. The Plaintiff does not appear to have, this far, explained why the acknowledgement agreement was unconditional and unqualified and made no reference to this supposed side arrangement.

12. As regards the claim for USD 500,000, there is a loud silence as to when this was incurred. If it was prior to the acknowledgment of 30th December 2014, then no explanation has been tendered as to why the Plaintiff made an unconditional admission of indebtness. If after, then the Plaintiff does not say so. Perhaps the Plaintiff will at later stages of these proceedings demonstrate that the claim is merited but at this stage this Court does not see any such evidence.

13. The only conclusion to be drawn is that the Plaintiff has not made up a prima facie case that the Defendant's demand is for a real disputed debt.

14. This would also be the opportune moment to deal with the argument that the Notice is faulty because the parties had agreed that any dispute arising between them would be resolved through Arbitration. Indeed, the contract of 14th January 2014 has the following Arbitration clause;

LAW AND ARBITRATION

> **This contract shall be governed by and constituted in accordance with English Law and any dispute arising out of or in connection with this contract including any question regarding its existence, validity or termination, shall be referred to and finally resolved by Arbitration in Singapore in accordance with the arbitration rules of the Singapore International Arbitration Center ("SIAC Rules") at present in force, which rules are deemed to be incorporated by reference in this clause. The tribunal shall consist of one (1) Arbitrator to be appointed in accordance with the SIAC Rules. The language of the Arbitration should be in English. The seat, or legal place, of Arbitration shall be in Singapore.**
>
> **The Arbitration expenses shall be borne by the losing party unless otherwise awarded by the tribunal.**

15. The simple answer to this argument would be that the Court's finding that the Plaintiff has not demonstrated, on a Prima Facie basis, that the debt is disputed has to be a finding that it has not demonstrated that it has a Prima Facie case with probability of success worth of submission to Arbitration. As a corollary the mere existence of this Alternative Dispute Resolution cannot defeat the Notice issued.

16. There is then an assertation that the Notice of 7th April 2017 was issued by an entity unauthorized to practice in Kenya. It is not disputed that Bowman Gilfillian is a Foreign legal firm. It is not disputed that its members are not qualified to act as Advocates in Kenya. There is no evidence that as Foreign Advocates, Advocates practicing in the firm have been admitted to practice as Advocates in Kenya. Advocates of the said firm do not qualify to practice as Advocates in Kenya under the provisions of Section 9 and 11 of the Advocates Act. Does this invalidate the Notice made by the firm on 7th April 2017?

17. The notice, and there is consensus on this, is issued in terms of Section 384 of the Insolvency Act. Section 384 (1) provides as follows;

> **(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 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, a Decree or Order of any Court in favour of a creditor of a company is returned unsatisfied in whole or in part;**
>
> **(c) If it is proved to the satisfaction of the Court that the company is unable to pay its debts as they fall due.**

The demand is a forerunner to the presentation of a Petition to Liquidate a Company on the grounds that a Company is unable to pay its debts. It is evidence that the company has been given an opportunity of 21 days to pay the debt or to secure or compound for it to the reasonable satisfaction of the Creditor and has failed and must therefore be taken to be unable to pay the debt.

18. The notice issued under section 384 (1) of the Insolvency Act is similar to the notice that was required by Section 220 (a) of the Repealed Companies Act. In this regard I accept the correctness of the following statement by Azangalala J, (*as he then was*) in **In Re The Prime Outdoor Network Limited (2005) Eklr,** "**In my view an Advocate acting on the instructions of a Company is competent to issue a Notice under Section 220 (a) of the Companies Act. The validity of the demand in my view may be challenged by the instructing Company but a debtor cannot defeat a Petition on the basis that a demand was made by an Advocate whose authority is not challenged**".

The statement would hold true for a Notice under Section 384 (1) of the Insolvency Act.

19. In issuing the Notice, the Advocate acts as an agent of the client. I take an interim view that while the Foreign Firm, unless permitted within the parameters of the Advocates Act, cannot practice in Kenya and cannot therefore file a petition in Court on behalf of its Advocates. It can nevertheless issue the demand notice contemplated by section 384 of the Insolvency Act as an agent of the Creditor. And this is not to downplay the Pivotal role the Notice plays prior to the commencement of Liquidation Proceedings. Although the Notice is evidence like any other that demonstrates the Company's inability to pay it is of a vital importance because it gives the Company a final chance to pay the debt or face the dire consequences of Insolvency. It is an intimation that serious action is contemplated against the Company. That said, this Notice, in my view, can be given by the Creditor or his agent. In this event Bowman Gilfillian was the Agent of the Defendant.

20. That said the Insolvency Court may take a different view in which case the Defendant will ran into headwinds in the course of Insolvency Proceedings. On my part however, and on interim basis, I am not persuaded that this is sufficient reason to injunct the presentation of a petition.

21. Does the Defendant infringe on the provisions of Section 427 of the Insolvency Act? The section provides;

> **(1) On the Hearing of a Liquidation Application, the Court may make such of the following Orders as it considers appropriate:**
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> > **(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.**
>
> **(2) However, the court may not refuse to make a Liquidation Order on the ground that the company's assets have been mortgaged to an amount equal to or in excess of those assets, or that the company has no assets.**
>
> **(3) If the Application is made by members of the company as contributories on the ground that it is just and equitable that the company should be Liquidated, the Court shall make a Liquidation Order, but only if on the opinion that –**
>
> > **(a That the Applicants are entitled to relief either by Liquidating the company or by some other means; and**
> >
> > **(b) That, in the absence of any other remedy, it would be just and equitable that the company should be liquidated,**
>
> **(4) Subsection (3) does not apply if the Court is also of the opinion that-**
>
> > **(a) Some other remedy is available to the Applicants; and**
> >
> > **(b) They are acting unreasonably in seeking to have the company liquidated instead of pursuing that other remedy.**

On the architecture of the provisions of Section 427, the provisions of subsection 4 only applies to Liquidation Applications brought by members of the company as Contributories on the grounds that it is just and equitable that the company should be liquidated. I therefore agree with Counsel of the Defendant to that extent.

22. However, under the Provisions of Section 427 (1)(d), an Insolvency Court may make any Order that, in its opinion, the circumstances of the case require and this extends to Liquidation Applications brought on the grounds that the Company is unable to pay its debts. Under Section 427 (1)(d), the Insolvency Court may take the view that another remedy other than an Interim Liquidation Order is available to the Creditor.

23. The Plaintiff has taken the view that the step of Liquidation is draconian and should not be permitted to commence because:-

> (a) The remedy of Arbitration is contractually binding and available to the parties;
>
> (b) The remedy of Insolvency is unreasonable and excessive as it is an ongoing concern with substantial and critical operations in the Mining Industry employing 17 employees (directly) and 50 casuals (indirectly).

24. On the remedy of Arbitration, the Court has already found that the Plaintiff has failed to demonstrate that there is a substantial and serious dispute as to the debt which will be submitted to Arbitration.

25. Insolvency Proceedings should not be presented for purposes of putting pressure to bear on a Company to pay an otherwise truly contested debt and neither should it be brought in bad faith or for collateral purposes. In the decision of **In Re Matter of Alamin Insurance Brokers Limited Vs In Re Matter of the Companies Act (2009) Eklr** Hon. Kimaru J, quoted the Court of Appeal in **Matic General Contractors Limited Vs Kenya Power and Lighting Company Limited** (2001) eKLR 3493 when it stated;

> **"In the case of In Re a Company [1984] 2 Ch 349, it was held that where a petition against a company is presented ostensibly for a winding up order, but really for another purpose, such as putting pressure on a company, the court has an inherent**

jurisdiction to prevent such an abuse of process, and will do so, without requiring an action to be commenced, by restraining the advertisement of the Petition, and staying all proceedings upon it. I have no doubt in my mind that the Learned Judge was right in placing emphasis on the Appellant's motives, which in my view, were completely dishonourable. A winding up order is a draconian order. If wrongly made, the company has little commercial prospect of reviving itself and recovering its former position. If there is any doubt about the claim that seems to me to require that the Court, should proceed cautiously. Here was a debt which Kenya Power disputed vigorously on substantial grounds and the appellant was threatening Kenya Power with what really amounted to imminent corporation execution. Kenya Power had no alternative but to approach the Court for redress having regard to the appellant's intransigence".

26. It may be argued that where a Creditor has an efficacious alternative remedy of pursuing payment of an outstanding debt, then presentation of Liquidation Application should be viewed as improper and oppressive. This is because Liquidation Proceedings may turn out to be the death knell of the Company. If, without deciding, the Court accepts the proposition to be correct then it was upon the party asserting that there is a feasible alternative remedy to demonstrate its existence. In this case the onus, again, falls on the Plaintiff.

27. The Plaintiff states that Arbitration is an alternative remedy but this Court has discounted it because it has failed to show that the debt is disputed. The Plaintiff has not proposed any other alternative remedy that is open to the Defendant. On the other hand, the Defendant has shown that the Plaintiff made an unconditional admission of the debt as far back as 30th December 2014 and made a proposal to pay the debt by way of instalments. After some time it fell back on its promise and a last payment was received in May 2015. Six months later, on 4th December 2015, the Defendant through its legal representative made a demand for payment. On 9th December 2015, the Plaintiff through its Advocates offered to pay the debt through delivery of Ore. This offer was rejected through a letter of 14th December 2015.

28. Two payments of USD 5,000 each were made on 18th July 2016 and 16th August 2016 respectively and notwithstanding many other promises no further payments has been made since 16th August 2016. Some of these promises are in the emails of 23rd November 2016 and 6th December 2016. In both emails the Plaintiff promises to pay the debt within the time frame or in their words of the email of 23rd November 2015 "within the overall time frame". I understand this overall time frame to be the time frame set out in the proposed acknowledgments of the debt and repayment Agreement sent by the Defendant to the Plaintiff for its signature. In it the Principal debt of USD 160,000 was to be paid in monthly instalments of USD 5,000 with effect from 15th July 2016. This would take 32 months. The Plaintiff was happy to make the two monthly payments of USD 5,000 even without signing up to the agreement.

29. Even if it is assumed that the Defendant should be bound by the terms of its own unsigned agreement, the Plaintiff had fallen back in payment of at least 7 monthly instalments by the time the Statutory Demand of 7th April 2017 was given. The demand called on the Plaintiff to pay up the debt or secure or compound it to the reasonable satisfaction of the Defendant. The Plaintif has done none.

30. This chronology of events demonstrates that the debt has been outstanding from, at least, 30th December 2014. This would be 28 months before the Statutory Demand was issued. The Creditor has indulged the Plaintiff on several occasions. The Plaintiff has neither paid the debt nor made proposals on how to secure it. Given the overall circumstances of this case, is the Creditor to pursue recovery of this undisputed debt through Arbitration or a Civil Suit or further negotiations? I am afraid I cannot find Prima Facie evidence that the conduct of the Defendant in pressing on with the Liquidation of the Plaintiff is improper or oppressive or intended to achieve a collateral or malicious purpose.

31. The upshot is that the Notice of Motion of 26th April 2017 is hereby dismissed with costs.

Dated, Signed and Delivered in Open Court this 7th day of June 2018

F. TUIYOTT

JUDGE

In the presence of:

Mbiya h/b for Omondi for Respondent

Mutiso for Plaintiff/applicant

Nixon-Court Assistant