



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION - MILIMANI
WINDING UP CAUSE NO. 16 OF 2014
IN THE MATTER OF OPEN ENERGY LTD
AND
IN THE MATTER OF THE COMPANIES ACT (CAP 486 OF THE LAWS OF KENYA)
RULING

Introduction:

1. This Matter comes before the Court on a Petition for Winding Up. The Petition is brought by Milio International DMCC ("the Petitioner"), The Petition is brought for the winding-up of Open Energy Ltd ("the Company"). The Petition is dated 29th September and was filed on the same day. The Petition was heard before this Court on 20th February 2015 by way of Written Submissions and Highlighting.
2. The Petitioner is a company that appears to have been incorporated in the United Arab Emirates, more particularly Dubai. It describes itself as a Company incorporated in Dubai and carrying on business in Dubai. It is a subsidiary of Milio Commodities Limited. The Petition is brought under **Sections 218, 219(e) and 220(a)** of the **Companies Act Cap486** and **Rule 21** of the **Winding Up Rules**. The Respondent Company is a limited liability company incorporated under the **Laws of Kenya Cap 486** on 8th May 2012. From the objects of the Company quoted in the Petition it seems that the company was involved in the distribution of petroleum products.
3. The Ground that the Petition relies upon is that the Company is indebted to the Petitioner. The Petitioner served a Statutory Demand, 21 days have lapsed and the debt remains unpaid. The debt due at the date of the Petition was US\$350,000 (Three hundred and fifty thousand Dollars). The debt arises pursuant to a Loan Agreement between the Petitioner and the Company dated 13th November 2012. The Loan Agreement seems to have been entered into freely and the sums borrowed were received.
4. The Petition states; On 31st July 2014 Petitioner served a Letter of Demand upon the Company at its Registered Offices. The Petition also says (paragraph 5) that the monies demanded were paid to the Company pursuant to a loan agreement. The Company had defaulted in repayment. A copy of the Demand is supposed to have been exhibited to the Petition and Marked **MID-7**, but it is not. The Petition says that three weeks have elapsed since service of the Demand (paragraph 7). The Company has not met the demand and therefore the Petitioner avers that the company is insolvent and unable to pay its debts and prays that it be wound up. The Petition was filed on 29 October 2014. The Affidavit verifying the Petition was filed on 3rd October 2014. The Respondent Company first filed and served "An Affidavit in Opposition to the Intended Winding Up", which was filed on 11th November 2014. The Plaintiff filed a

Further Affidavit on 19th November 2014 and the Company a Further Affidavit in Opposition on 28th November 2014.

5. By way of the compliance procedure, the Parties attended before the Hon Deputy Registrar Nyambu to confirm compliance with **Rule 28** of the **Winding Up Rules**. The Deputy Registrar recorded that the Petition was filed on 29th September 2014, that the Verifying Affidavit was filed on 3rd October 2014 in compliance with **Rule 25**. It may be that she saw a copy of the Notice of Demand. The Petition was served and there was advertisement in compliance with **Rule 23**. On 3rd November 2014 the DR certified that the advertisement had been placed. The relevant Certificate was therefore issued. On 14th November 2014, the matter came before this Court for Hearing. However, in the meantime on or around 11th February 2015 the Company instructed Advocates who filed a Notice of Appointment. They also on the same day filed and served an Affidavit in Opposition to the proposed winding up, although they called it “the intended” winding up. The Hearing could not proceed and the Parties had agreed further directions, including that the Petitioner be allowed to file a Further Supporting Affidavit and the Respondent to have an opportunity to respond. The Petitioner’s Affidavit was filed on 19th November and the Company filed a “Further Replying Affidavit in Opposition” on 28th November 2015. The Matter was Listed for a Mention on 9th December 2014. When it came before the Court, the Parties were directed to file Written Submissions and for their Highlighting the Petitioner within 21 days and the Respondent within 21 days of Service (but would do it by 2nd February).

6. The Parties were directed to list the matter during the last two weeks of February, It was listed on 20th February 2015 when it was heard. Hearing was by way of written submissions that were then highlighted by the respective counsel. The Ruling was to be delivered thereafter in April. Unfortunately, that was not feasible due to essential training and the Judge being unwell during the preceding fortnight. The delay and any inconvenience arising is regretted.

The Petition

7. The Petition is brought under **Sections 218, 219(e) and 220(a)** of the **Companies Act Cap486** and **Rule 21** of the **Winding Up Rules**. The provisions are set out below.

8. The Grounds relied upon are that the Company is indebted to the Petitioner. The amount of the debt said to be due is US \$350,000 (Three hundred and fifty thousand Dollars). The debt arises pursuant to a loan agreement between the Petitioner and the Company dated 13th November 2012 (the “Loan Agreement”).

9. On 31st July 2014 the Petitioner says it served a Statutory Demand upon the Company at its Registered Office. A copy of the Demand is said to have been exhibited to the Petition and marked ‘**MID7**’. Three weeks have elapsed since the Demand was served and the company has not met the demand. The Petitioner avers that the company is deemed to be unable to pay its debts and insolvent, therefore and prays that it be wound up.

10. The Petition is signed by a Mr. Simon Walker, Legal Director of the Petitioner pursuant to a Power of Attorney. Paragraph 2 of the Declarations contained in that document states “2. *The Granter will from time to time, ratify and confirm whatever the attorney lawfully does or causes to be done pursuant to ‘His Power of Attorney’ That suggests the authority given is not absolute, but subject to confirmation and ratification.* No confirmation and ratification appears on the file but the preceding phrase suggests that ratification is automatic. Mr. Walker says, on oath that he is “*duly authorised*”. The Petitioner is Milio International DMCC. It describes itself as a Company incorporated in Dubai and carrying on Business in Dubai. It is the subsidiary of Milio Commodities Limited.

11. The Verifying Affidavit is also sworn by Simon Walker, as stated above. It Exhibits copies of the following documents:-

1. Certificate of Incorporation for the Petitioner (**SW1**).

2. Trading Licence (**SW2**) expiring 13/4/2015
3. Board Resolution dated 16th February 2011 (**SW3**)
4. Memorandum and Articles of Association
5. Power of Attorney

12. Milio Commodities Ltd is registered in the British Virgin Islands. By a Board Resolution dated 16th February 2011, that Company resolved to set up the Petitioner Company and appoint John Hart as the Sole Manager, Director and Secretary. In addition, John Hart was granted a power of attorney including the right to initiate, defend, commence or settle legal actions on the company's behalf; and to retain any accountant, attorney or other adviser deemed necessary to protect the company's interest....". It seems that delegated power has been further delegated to the Deponent of the Verifying Affidavit, Mr. Simon Walker. He also states that he is a Solicitor.

13. The allegations contained in the Petition are that:

1. The Respondent Company is indebted to the Petitioner in the sum of US\$350,000 (three hundred and fifty thousand US Dollars)
2. That the Company entered into a loan agreement with the Petitioner on 13th November 2012;
3. On 31st July 2014 the Petitioner served a Demand upon the Company asking for payment of the sum demanded. The Demand letter is said to be annexed to the Petition (but is not annexed to the filed copy). The DR certified compliance which suggests that it had been there previously.
4. Three weeks have passed since service of the demand and it has not been paid.
5. Therefore, Company is insolvent and unable to pay its debts.

14. The Affidavit of Service sworn by Pamela Ombok states that she served the Petition and accompanying Verifying Affidavit upon a Doris Bondi the Receptionist. The Process Server says she was given "*a winding up petition dated 9th September 2014*" according to paragraph 2 of the Affidavit of Service, which is not the same as the Petition on the file (29th September) "*together with a petition sworn on 1st October 2014....*"

15. Giving the Petitioner the benefit of the doubt, I take the former to be a typographical error and the latter to mean an incomplete reference to the Verifying Affidavit which was in fact sworn on 1st October 2014. The Affidavit of Service was filed on 24th October 2014 and again on 30th October 2014. Giving the Petitioner the benefit of the doubt is justified in these circumstances as the Respondent has not raised any discrepancies as to service.

16. On 3rd November 2014, the Deputy Registrar certified there had been compliance to the requirement for advertisement (**Rule 25**) and she issued the certificate of compliance so the matter could proceed. However, less than 2 weeks later the Petitioner sought leave to file and serve a Further Supporting Affidavit. Leave was given and the Respondent was given corresponding leave to file a Reply.

17. The Replying Affidavit in Opposition was filed on behalf of the Respondent on 11th November 2014 and was sworn by a Tony Wanyama, one of the Directors of the Company. The Affidavit opposes the Petition and states that the Company is a going concern.

18. The Affidavit in Opposition refers to the Petition dated 29th September 2014 and Affidavit sworn on 10th October 2014. It was in fact sworn on 1st October and filed on 3rd October. Again, I take that to be a

typographical error. It is said that the company is a going concern and owns a 4% shareholding in Pacific Investments Limited obtained pursuant to a Shareholders Agreement dated 16th October 2012 (*TW2*). The Petition is opposed.

19. The Deponent states that is is “aware of” the Loan agreement dated 13th November 2012, that is referred to in the Petition. It is said that Petitioner failed to disclose to the Court that the Loan Agreement was for a secured loan. The Company therefore admits the Loan Agreement and by implication that the funds were advanced. It alleges that the Loan was secured. The security was to be the Company’s 4% shareholding in Pacific Seaboard. The phrase used is that “*The Advance was made against security furnished by the Respondent’s Company. The security is described as 4% shareholding in “Pacific Seaboard Investments Company” and the 4% shareholding in Pacific Seaboard Investment Limited.*”. I assume that is intended to be a reference to the same entity. The Deponent does not explain why he feels that is material in the face of a demand for repayment. A secured debt may equally be repayable. It is said the shares were obtained pursuant to a shareholders’ agreement dated 16th October 2012 (*TW-2*) Unlike the Petitioner, the Respondent does exhibit a copy of the Loan Agreement and the Demand Notice dated 31st July 2014.

20. The Deponent relies on Clause 5 of the Loan Agreement as justification for saying the Petition “**is malicious, in bad faith and has side- stepped the very clear and legitimate expectation of the Parties**”. Clause 5.4 of the Loan Agreement is set out in the Affidavit and it provides that “*In the event of any breach of this Agreement, the Lender may enforce against the security and take ownership of the Shares which are the subject of the security.*” However, the next Clause, 5.5 provides that “**The Lender has the sole right and discretion to demand payment in full of the facility**”. That suggests the lender is entitled to make an election. It seems that in this case it did so.

21. Mr Wanyama then goes on to assert that by Instituting Winding Up Proceedings the Petitioner has shown bad faith and it is malicious as it has side-stepped the very clear and legitimate expectations of the Parties under the Loan Agreement. He says the Loan Agreement provided for security and that security is still available to be applied in off-setting the amounts still due. He also asserts that the Petition was “*filed through material non-disclosure.*” The Petitioner disputes the Company’s ownership of that security. A petition for winding up follows an inter partes procedure therefore it does not carry the same responsibilities as to full and frank disclosure expected on an ex parte application. Mr Wanyama also states at paragraph 16 that there are other options build into the Loan Agreement apart from Winding Up. He says that the Petitioner has conducted a campaign of intimidation against the Respondent Company and its Directors as evidenced by the Letter of 17th October 2014.

22. The Affidavit admits the Demand Letter was served on 31st July 2014 and responded to on 19th August 2015 (*TW4*). The Response sets out Clause 5.5 of the Loan Agreement and states that the loan is secured in the 4% shareholding. Clause 5.5 says “**the lender has the sole right and discretion to demand payment in full of the facility.....**” That phrase is followed by the word “**and**”. The last letter in Exhibit *TW4* is completely unrelated as it is a “*cease and desist*” letter is included instead of the Response dated 25th August 2014.

23. The Deponent asks for a valuation of the security/shareholding to be carried out and to be purchased pursuant to Clause 5.4 of the Loan Agreement. The Petitioner has made its election, in any event it is said that the Company does not own the shares.

24. The Affidavit, quite inappropriately, descends to making submissions in particular paragraph 19. The assertion that the court is supposed to have to “**protect local companies**”. That clearly emanates from someone who is not conversant with the Constitution and therefore the law and in particular the principles of equality before the law.

25. Paragraph 21(a) says the Respondent Company has offered its shareholding in Pacific Seaboard to be applied to pay off the debt. There is no supporting documentation (i.e contemporaneous evidence) to show that the offer was made and the identity of the person to whom it was made. That is a serious

omission if such evidence exists. The alternative is that it does not exist and the 5.4 clause 5.5 election can be made.

26. The Petitioner's Affidavit in reply to the Affidavit in Opposition was filed and sworn on 19th November 2014. The gist of what is said is that the loan was not in fact secured because the Respondent Company did not own the Shares on 13th November 2012 and does not own them even now (as at the date of Affidavit). It is said the Respondent Company failed to comply with the condition precedent for the Shareholders Agreement for it to obtain those shares. If that is true the argument in relation to security would be misleading and arguable deliberately so, given that the evidence is given on oath.

27. Any suggestion that the Respondent owns shares in Pacific Seaboard Investments Ltd (now Millio Enterprises) are false and misleading according to the Petitioner.

28. I have also read through the Parties Submissions and the Authorities relied upon, both those that are relevant and on point and those that are not.

29. The Respondent Company filed a further affidavit on 28th November 2014 (not within the seven days provided within the Order of 14th November 2014). Although there was no application to extend time and this lateness caused delay, I take the contents into account. The Affidavit consists entirely of legal argument. That is not any more appropriate for the Petitioner than for the Respondent.

30. The Legal Arguments advanced can be summarised thus:

1. Simon Walker has no legal authority to depose to the facts set out therefore both his affidavit should be struck out;
2. The Share Register Annexed to the Second Affidavit is of no probative value because it is not authenticated.
3. The Petitioner is not a party to the Shareholders Agreement so does not have capacity to depose to its contents;
4. There is no evidence before the Court that the Petitioner took over Pacific Seaboard Investment Ltd.
5. The Petitioner is casting aspersions on the integrity of the loan agreement which forms the foundation of the Petition which amounts to approbation and reprobation.
6. The Loan Agreement provides that the Security was being offered for the advance.
7. The Security "***was to be applied to offset the loan***" and there is no evidence that the security is inadequate.
8. That the Petitioner's Memorandum of Association at Clause 3 states the Company may not carry on any banking business or any business of financial bro.....or financial advisory services unless licenced. The making of a loan is banking business and is therefore an illegal act.

Petitioner's Submissions

31. The Written Submissions on behalf of the Petitioner raise a number of issues. For the sake of brevity they to can be summarised, as follows:

1. The Petition was filed on 29th September 2014 and it seeks the winding up of the Respondent for failure to pay the debt of USD\$ 350,000 to the Petitioner.

2. The submissions then go on to refer to the Loan Agreement dated 13th November 2012 and states that “ the loan was to be repaid within 12 months of down effectively 13th December 2013”, thereby equating the date of signing with the drawdown.

3. Paragraph 4 of the submissions then seek to introduce evidence of emails that does not appear in the Petition the Affidavit of Verification or the Supplementary Affidavit.

4. The submissions state “there is no denial of the debt therefore “the Respondent is unable to pay its debts on in accordance with Section 219 (e) and Section 220(a) of the Companies Act should be wound up by the Court.

Respondents Argument against the Petition contained in its Submissions

32. Similarly, the Respondent’s Company’s arguments are summarised below in the form of a list. They are:

1. Winding up is a draconian remedy and should only be resorted to as a very last resort by a creditor.

2. The Loan Agreement dealt with “Banking Business” which was ultra vires the objects set out in the Petitioners Memorandum of Association and thus (is) illegal and unenforceable in law.

3. The Loan Agreement is otherwise contra statute and illegal and hence unenforceable. (ex turpi causa non oritur actio)

4. There is no proof that the Respondent is unable to pay its debts to the Petitioner.

5. **Section 221 (a) and (b)** are not applicable the situation at hand contemplates **(c)**.

6. The Loan was secured per the Loan Agreement and Advocates’ letter dated 19th August 2014.

7. Security has not been valued nor purchased.

8. Another remedy is available – Section 222 (b) of the Companies Act.

9. There is an alternative remedy. The Respondent does own a 4% shareholding in Pacific Seaboard Investment Ltd (now Milio E & P Ltd) a true and copy of the Shareholders Agreement is exhibited (at **TW-2**) and its validity has not been challenged.

10. Winding up should not be available to blackmail a company through threats of winding up (***Vadag Establishment vs. Yashvin Shretta & Others (2002) 2 EA 588***)

11. Petition being used for a collateral purpose winding up should not be used as an Instrument to compel the payment of a debt (section 5), a winding up cause is not a debt collecting forum (***Bently Trowel Ltd Nairobi HC WC NO. 5 of 1999 (unreported).***) and ***Lympne Investments Ltd 1972 2 All ER 385 at 388.*** The companies court must not be used as a debt collecting agency.

12. The Jurisdiction clause in Loan Agreement (clause 8.1) provides for the Applicable law to be the Law of England and Wales

13. The Procedure used by Petitioner was not in accordance with the ***Companies Act (cap 48 Laws of Kenya) note the winding up Rules 1961 (as amended) (LN 14/1983).*** As no evidence to prove that they adhered to **Rule 23** and so should be struck out.

33. As stated above, the Petitioner filed a Reply. It is summarised as follows:

1. The Petitioner is not governed by the Banking Act Cap 488, Laws of Kenya as it is governed by the Laws of the Dubai Multi Commodities Centre.
2. The Petitioner submits the debt arose out of a valid contract entered into in the usual way of business by a Petitioner “whose interests are in oil, crude oil and petroleum products”.
3. Respondent’s Argument that private parties cannot advance each other money and contractual terms are contrary to known and accepted commercial practice.
4. If Respondent correct Restitution.
5. The cases alluded to by the Respondent have no bearing or materiality to the facts of the case.
6. It also repeats paragraphs 19-20, 21-29,
7. Respondent has not demonstrated ownership of any shares in Milio E & P Ltd.
8. In relation to Applicable Law, this is not an application to have the Loan Agreement interpreted.
9. The procedure adopted has been in compliance with **Rules 23-28** and has been certified so.
10. That leads to the conclusion that it is in the interests of Justice for Respondent to be wound up.

The Factual Background

34. Again in the interests of brevity the background as it appears from the pleadings, evidence and submissions is summarised below.

1. Both Parties are Limited Liability Companies. The Respondent is incorporated in Kenya, the Petitioner in Dubai.
2. There is no dispute that the Petitioner made a loan of USD 350,000 to the Respondent. What is in dispute is the terms of that loan. A copy of the Loan Agreement dated 13th November 2012 appears as Exhibit TW (2/3) to the Respondents Replying Affidavit, the Petitioner having neglected to Exhibit to the Petition or the Verifying Affidavit.
3. The Loan agreement provides that the loan was secured. That fact was omitted from the statutory Demand and the Petition. The security was the Respondent Companies 4% Shareholding in Pacific Seaboard Investment Company. A copy of the shareholders agreement is exhibited to the Affidavit in Opposition dated 6th November as Exhibit TW3.

The Law

34. The scheme provided for in the Companies Act is very straightforward. It provides for certain steps to be taken and if not the consequences set out in Section 220 of the Companies Act follow. The relevant Sections are set out above

The Issues Requiring Determination?

35. The Issues that arise for determination are:

1. Are the Affidavits of Simon Walker defective fatally or otherwise?
2. is the debt properly due?

3. Does the Respondent own 4% of the Shares in Pacific Seaboard Investments Ltd (now Milio ECP Ltd)?
4. Has the Petitioner acted maliciously in “instituting” the Petition?
5. Should the Respondent be wound up under the provisions of the Companies Act and the Winding up Rules.
6. Is the Respondent unable to pay its debts?
7. If so should an order for winding up be made under the Companies Act and the Winding Up Rules?
8. Is the debt properly due and payable?
9. Does the Respondent own 4% of the Shares in Pacific Seaboard Investments Ltd (now Milio ECP Ltd)
10. Has the Petitioner behaved maliciously in “instituting” its decision? And if it has should that make a difference to the Court’s Decision?

Reasoning and Decision

36. Although the issues are separately identifiable, they can be answered together.

1. The first question is, was there a debt?

The Petitioner states that it advanced US\$ 350,000 to the Respondent. That advance is admitted by the Respondent. The next question is, was there a demand for repayment. Again it is not contested that the Petitioner served a Statutory Demand on the Respondent Company on 31st July 2014.

2. If the Respondent Company made payment or otherwise compromised the debt that would have been an end to the matter. It did not. The debt still exists. Loans, even informal advances are not gifts, they are intended to be repaid usually on the terms agreed. That is the legitimate expectation of the Parties to such an agreement.

3. The Respondent Company instead referred to security in the form of 4% shareholding in a company called Pacific Seaboard Investments Limited. The Respondent raised that in correspondence and then in its Affidavit. Applying the principle of “*he who asserts must prove*”, the burden of proving the existence of that Security rests squarely with the Respondent. That has not been done. The Respondent does suggest at a share sale. There is no evidence that the sale was completed. There are no share certificates produced. There is no receipt showing stamp duty was paid. In fact nothing categoric. Even if, it was appropriate for the court to conduct such an inquiry during winding up proceedings, the Respondent and/or its Advocate state that only parties to an agreement are entitled to rely upon it and remark on its contents. If that were to apply, the court does not have privity and therefore no locus to comment on its comments. That argument cannot be sound.

4. All the while the debt remains unpaid and the Petitioner and Respondent’s relationship further deteriorates and there are counter allegations.

5. The Respondent also attempts to challenge the evidence before the court by saying Mr. Simon Walker is not duly authorized to swear the Affidavit or “*he has no legal authority to depose to the matters*”. The correspondence Exhibited, in particular, the emails dated 18th June 2014 and 21st July 2014 show Mr. Walker was included in these communications. Further he has a Power of Attorney from the Petitioner stating that he is authorised to swear these Affidavits.

6. Demonstrating that it too had little faith in its own argument, as a last ditch attempt the Respondent puts forward the issue of illegality. Why was this not put forward in the response of 19th August 2014 challenging the Statutory Demand? The Respondent's current lawyers are a firm that acted for the Petitioner in the past so the terms of the Memorandum of Association are unlikely to have been a "Sudden revelation" as alleged.

7. The Respondent relies on the decision of my learned sister Judge, Christine Meoli in for the ex turpi causa non oratio action proposition That is a well established principle but the underlying facts relied upon must be demonstrated and proved.

The Law

37. As stated above, the Petition is brought under Sections **218, 219(e) and 220(a)** of the **Companies Act and Rule 21 of the Companies Winding Up Rules**. They provide as follows They provide as follows:

Section 218:

"The High Court shall have jurisdiction to wind up any company registered in Kenya"

Section 219:

A company may be wound up by the court if–

(a) the company has by special resolution resolved that the company be wound up by the court;

(b) default is made in delivering the statutory report to the registrar or in holding the statutory meeting;

(c) the company does not commence its business within a year from its incorporation or suspends its business for a whole year;

(d) the number of members is reduced, in the case of a private company, below two, or, in the case of any other company, below seven;

(e) the company is unable to pay its debts;

(f) the court is of opinion that it is just and equitable that the company should be wound up,.....

Section 220(a):

A company shall be 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

38. Whether the Company is actually solvent and trading is not a consideration that applies to ground (a) but rather ground (c) of **Section 220 of the Companies Act**. I note that despite repeated threats, during the period between 19th December 2014 and the Hearing of this Application, the Applicant has not made any Application for the striking out or setting aside of the Petition. Clearly that was an empty threat. The Petition and Supporting Documents were placed on the file after the Application was filed under certificate. These show clearly that not only had there been advertisement in the Kenya Gazette but also

in the Daily Nation

39. **Rule 24** provides for service at the registered office of the company or principal place of business etc.

Rule 25 provides *that* :-

“Every petition shall be verified by an affidavit, which shall be sworn by the petitioner, or by one of the petitioners if more than one, or, where the petition is presented by a corporation, by a director, secretary or other principal officer thereof, and shall be sworn and filed within four days after the petition is presented, and such affidavit shall be prima facie evidence of the contents of the petition.”

40. Turning now to deal with the deal issues that arise. The first is, was there a lawful debt that has been demanded? Either the Petitioner is right or the Respondent, when it asserts the Loan is illegal, is right. The Loan was made by a foreign entity with the right and powers to do so. It seems to be a one-off transaction. There is absolutely not evidence before the Court that the Petitioner provides Banking Services in Kenya on a regular basis with or without a licence.

41. If the Respondent’s arguments are right and it was the case that the Loan was an illegality, that makes the Respondent Company and its Directors accessories to that fact and complicit in any crimes committed. That raises questions about seizure of the proceeds of crime etc pursuant to the money laundering legislation. The Company’s Director’s Affidavit is uncharacteristically cagey on the issue. They are not offering up the “proceeds of the crime” they are so ready to complain about. That begs the question as to their bona fides in raising it and also whether they themselves have any faith in that argument. I have considered the evidence and the arguments and I find that neither the Loan Agreement, not the Loan itself was illegal. I therefore find and hold that the debt, the subject of the demand is properly due .

42. As to the issue of Security. It is not necessary for the Court to decide whether or not the alleged security exists. Clause 5.5 allows for the Lender to make an election for immediate payment. That election has been made. The debt is due and payable. The company itself has not made any efforts to liquidize the purported security and apply it to the debt. I need say no more about that.

43. Even if the Court had found to the contrary, in other words that the Loan was illegal, then the Company would not receive a windfall. It would be expected to make restitution. There would be no grounds for it to keep the Loan. In that case the debt would arise and again the Notice of Demand applies to it.

44. Irregularities in the Petition, if any – as none are demonstrated, can be remedied by rectification, so are not necessarily fatal.

45. As to the issues of public policy and blackmail, there is no evidence before the Court of any blackmail. It is the Company that seeks to exert some sort of dominance over the Petitioner by raising issues as to its supposed “foreign” and therefore lesser status.

46. The public policy considerations that do apply is that Parties should be free to enter their own agreements and the Courts should allow and enforce those bargains. Loans are not gifts and are expected to be re-paid. They are made to be repaid. That is the sound business, economic and moral principle.

47. Therefore, knowing the funds were received pursuant to a loan, the Company could not have properly contemplated anything other than repayment, so demand for that repayment cannot rationally be perceived as an attempt at blackmail.

48. The debt is properly due and properly demanded. 21 days have lapsed since the Notice of Demand was served. The Deputy Registrar has confirmed compliance. Therefore it is appropriate under the Rules that a Winding up order is made and liquidator appointed. It is so Ordered

ORDER

1. Winding Up Order made
2. Order to be served on the Official Receiver
3. Costs in the Insolvency

Order accordingly,

FARAH S. M. AMIN

JUDGE

SIGNED AND DELIVERED AT NAIROBI THIS 8TH DAY OF April 2016.

In the Presence of:

Clerk: Isaiah Otieno

Mr Ayisi for the Applicant

Ms Mavika HB for Mr Masika for the Respondent