



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Winding Up Cause 8 of 1996

In The Matter of Safina Ltd and In The Matter of Companies Ltd

Ruling

By this chamber summons under the Companies (Winding Up) Rules brought under a certificate of urgency, the debtor company Safina Ltd (the company) a limited liability company incorporated under the Companies Act (Cap 486), has applied for orders that (1) the Petitioner be restrained from advertising the Petition and proceedings be restrained from advertising the Petition and proceedings on the Petition be stayed pending the hearing and final determination of the application and (2) that the petition filed herein be struck out as being an abuse of the process of the court the debtor having settled its debt in full.

On 18th April 1996 Lady Justice Aluoch granted the first prayer herein above mentioned and now the application before me is only in respect of the second prayer.

On 12th March, 1996 the Petition Devji Meghji & Bros Lt (Petitioner) filed this Petition seeking an order that the company be wound up by the court under the provisions of the Companies Act. The ground on which the Petitioner sought the said order is that company is unable to pay the debt.

In the Petition it is alleged that on 27 February 1995 the Petition caused to be served upon the company a demand in writing requiring the company to pay the sum due by it namely Shs 3,135,075/- for goods sold and delivered by the Petitioners to the company at its request or arrange to compound for it to their satisfaction within 3 weeks from the date of service of the said demand.

In response to the said demand the company paid Shs 1,025,075/- leaving a balance of Shs 2,110,000/- still unpaid. For the rest of the debt the company wrote to the Petitioner's advocate that it was trying to sell some of its assets and would pay as soon as it was able to sell them. The Petitioner waited for the payment but ultimately on 12 March, 1996 it filed the petition seeking to wind up the company.

In the petition the Petitioner has claimed Shs 2,110,000/- together with interest thereon from July 1994 at the court rate.

I have noted that in the said statutory demand under s 220 (a) the Petition had not claimed interest on the outstanding debt. I have also noted that in the petition interest is claimed at the court rate of 12% p.a whereas in the particulars of interest supplied to the company interest has been claimed at 18% p.a. The amount claimed on account of interest is Shs 1,022,769/-.

A day after the petition was filed that is on 13 March, 1996 when the petition had not yet been served on it, the company by its cheque paid a sum of Shs 2,100,000/- to the Petitioner's advocates which the company mistakenly thought was the balance whereas later on it realized that the payment was still short

of Shs 10,000/-. That sum of Shs 10,000/- was paid by the company by its advocate's letter dated 17.4.1996.

So when the petition was served on 13 April, 1996 the entire amount demanded by the said notice of demand namely 3,135,075/= except the said sum of Shs 10,000/- had been paid. The said sum of Shs 10,000/- was paid a few days after. The dispute now between the parties is whether or not the company agreed to pay interest on the overdue account.

By their letter of 14.3.1996, the Petitioner's advocates acknowledged receipt of the company's payment of Shs 2,100,000/- and for the first time claimed from the company an additional sum of Shs 3,286,775/- as "agreed" interest at 1 ½ per cent per month. They also claimed Shs 78,000/- as their costs including VAT. This amount of interest was subsequently revised by the Petitioner by their advocate's letter dated 28.3.1996 to Shs 1,022,769/- about one third original demand. By their letter dated 22nd March, 1996 the company's advocates wrote back that the company never agreed to payment of interest.

The Petitioner on the other hand claims that each invoice carried an express printed note that all overdue accounts will be charged interest. The printed note on the invoices reads.

"All accounts are due for payment on the 20th of the month following the purchases. 1.5. interest charged per month on overdue accounts". However as I have already said no demand for interest was made in the notice of demand. There was considerable correspondence between the parties after the expiry of the said notice of demand. There is no mention of interest in the correspondence until it was claimed for the first time in the petition.

On behalf of the company it has been forcefully argued that to entitle the Petitioner to claim interest on overdue account there should be a Memorandum of an agreement in writing to that effect between the parties under s 3 of the Contract Act. No such memorandum was ever entered into between the parties. Thus there is a dispute regarding that sum of Shs 1,022,769/- now being claimed by the Petitioner.

Buckley on Company Acts 12th Edition at p 452 reads:-

"A winding up petition is not a legitimate means of seeking to enforce payment of a debt which is bonafide disputed by the company. A petition presented ostensibly for a winding up order but really to exercise pressure will be dismissed and under circumstances may be stigmatized as scandalous abuse of the process of the court..... The modern practice is to dismiss such petitions....."

Again in the next paragraph it is said:

"Great damage might obviously be done to a solvent company by a winding up petition presented by an unreasonable creditor whose debt the company are able to pay and willing to pay but to whom they bonafide believe they are not indebted..... If a petition has been presented the court may on motion stay all proceedings under it or dismiss it."

The right of the petitioner creditor to apply for a winding up order against a company is not his individual right alone. It is a representative right exercised for the benefit of all the creditors. In my view if the company has been able to pay the petitioning creditors debt of 3,135, 075/- as originally demanded by the notice of demand of 27 February, 1995, it cannot be said to be insolvent. The only reason the company has refused to pay the additional sum of 1,022,769/- being now claimed by the Petitioner is that it contends it never agreed to pay it. The court will not allow its machinery to be used to enforce payment of a disputed debt. It is against public policy and commercial morality. It is an abuse of the process of the court. I am therefore of the view that if the company has paid the debt originally demanded by the Petitioner by its demand dated 27.2.1995 although belatedly but before the petition is advertised the petition should not be allowed to proceed further.

For these reasons and on the judicial authority of Buckley (supra) I dismiss the petition. However as the company failed to pay the debt originally demanded for one year and over after the service of the letter of

statutory demand which necessitated for the Petitioner to present the petition, I award costs of the petition to the Petitioner which shall be taxed and certified by the Taxing Master of this court.

June 27, 1996.

Pall J.