REPUBLIC OF KENYA

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

BANKRUPTCY & WINDING-UP CAUSE 23 OF 1981

IN THE MATTER OF WILDLIFE SHOP LIMITED

AND

IN THE MATTER OF COMPANIES ACT CAP 486 LAWS OF KENYA

JUDGMENT

The Company was incorporated under the title Wildlife Shop Limited in accordance with the Companies Act on the 20th of May 1980. It was originally part of the East African Wildlife Society, a registered society, who is the Petitioning Creditor in this case, and the Petition, filed on 28th September 1981, seeks the winding-up of the Company by the Court under Provisions of s.219 (e) of the Companies Act, CAP 486.

The ground on which the Company is said not to be able to pay its debts is a sum of shs. 750,395/- due for goods sold and delivered, rent and franchise fees, and this sum was demanded, less shs 9,700/-,by a letter of 22nd July this year, the terms of which are set out in paragraph 7 of the Petition. Mr Fraser, who appears for the Petitioning Creditor, has submitted that this debt and demand brings the case fairly and squarely within s.220(a) of the ACT and that the Company is thereby deemed to be unable to pay its debts.

In addition tot he Petitioning Creditor three other creditors have given notice under the Rules of debts due to them, of which the Diners Club supports the proposed winding-up, and Kenya Litho Limited, and Marketing and Publishing Limited, oppose it. Apart from short affidavits verifying the Petition, and its advertisement in the Gazette and Daily Nation under Rule 23 two other Affidavits had been filed by the time the Petition came on for hearing on 30th October. The first of these was that of Mr Lalani, a Director of the Company, and the second that of Mr Leakey, the Vice Chairman of the Petitioning Creditor, and there are several conflicts of fact between these two Affidavits. Annexed to each Affidavit is a copy of the Heads of Agreement, in draft form, dated7th April 1980, which since appears to have been adopted by signature of the parties. Also annexed to the Affidavits are a number of letters passing between the Society, the Company, the Accountants, and the Advocates' of the parties, commencing on the 25th June 1980 and ending with the letter from Hamilton Harrison and Mathews to Archer and Wilcock of 16th September 1981. For convenience the two sets of correspondence have been amalgamated, placed in chronological order and paginated.

The Agreement provides for the sublease of the shop in the Hilton hotel Building to the Company for a period of two years in return for Company the taking-over all the existing liabilities under the existing sub-lease, and paying to the Society additional rent of 15,000/- per month. The house and furniture is also let to the Company for shs. 6,000/- a month, and is said to be occupied by one of the Directors. The

"additional rent" is stated in the notes at the end of the agreement to be in lieu of proposed ten percent franchise or royalty payments and is, as I understood Mr Fraser, included in the Society's claim, which is secured by a debenture. This debenture is referred to in Archer and Wilcock's letter of 18th May 1981,which concludes by saying that the company cannot afford to make any larger payments than the terms indicated in the letter, and that is the only way that the shop could remain in business. These proposals, however, were not wholly acceptable to the Society as Messrs Hamilton Harrison and Mathews said in their letter of 25th May 1981, in which they insist inter alia on personal guarantees from Mr Sawyer and Mr Lalani.

Further correspondence between the Advocates relating to the moratorium on the payments ensued, but on the 15th July Hamiltons formally demanded the payment of the debt set out in the Petition, and sent a copy of the statutory demand with their letter of 22nd July. Further correspondence are the sum of shs 64,174/- in respect of the two Directors redundancy pay, and the dispute over the value of the stock and there was even a suggestion that someone had illicitly removed some of the stock. Mr Fraser pointed out that the redundancy pay was not due by the company to the Directors, but by the Society, and he referred to clause 9(b) of the Agreement, whereby they agreed to wave their redudancy claims as therein set out.

Accordingly to Mr Leakey's Affidavit the proportion of the rent the Company had to pay under Clause 3(1) (b (1) of the Agreement was shs 3,700/- per month, and it is alleged that no rent for either the shop or the house has been paid in respect of the months of August and September 1981. October, of course, is subsequent to the filing of the petition. Mr Fraser said that the rent for August and September totalled shs 19,400/- not shs; 19,700/- as set out in Paragraph 9 of Mr Leakey's Affidavit, but I do not quite see how this sum is arrived at on the figures given.

Mr Frazer referred in detail to Mr Lalani's Affidavit. He said of the sum claimed by the Society, only a small proportion was genuinely disputed by the Company, namely shs 83,455/-, the majority of which related to the disputed sum for the stock. Accordingly, Mr Frazer submitted, there was no substantial dispute as regards the Society's debt, and his clients were therefore entitled ex debito justitiae to a winding-up order on the authority of the East African case of R v. Ghellani Impex 1975 EA at p. 200, and of Re Tweeds Garages 1962 1 Ch p 406. In the former case Law J.A. said:

"The respondent company has been duly served with the notice of demand prescribed by s. 220 (a) of the Companies Act. It has failed to pay the sum demanded, or to secure r compound it to the petitioner's satisfaction. The respondent company is resident in Kenya, and could discharge the debt by payment in Kenya. In these circumstances the petitioner is entitled as of right to the order which he seeks, unless the respondent company can show that the debt is disputed on substantial and bona fide grounds, the onus of discharging this being on the respondent company"

Mr Fraser continued by saying that this was a typical case of commercial insolvency, and the fact that the company might have other assets which could at a future date be realised could not affect this position.

Mr Baraza, appearing initially for the Company as well as the two opposing creditors, asked for a St Thomas'Dock order (1876 2 Ch D p 121) so as give the Company a chance to trade and pay off its debts, as, indeed, was in effect asked for in the corresondence as well as in Mr Lalani's affidavit. Mr Baraza submitted that under s.336 of the Companies Act the court must have regard to the wishes of all the creditors, not just the petitioning creditor, in deciding whether to wind-up the Company. He did, however, state that the other creditors referred to in paragraph 9 of Mr Lalani's Affidavit meant the creditors other than the petitioner, who, according to the list, total in value shs 251,402.60. Mr Baraza also explained that the shs 330,000/- stated in paragraph 8 of the Affidavit to be due to Kenya Litho Limited was in fact split up, as to shs 145,831.40 due from the Petitioner and the sum stated in the list due from the Company. This apparently arose because, while the attention was to hive off the shop as from1st January 1980,(as indeed appears from clause 3(1) (a)of the agreement), this did not in fact take place until May. Accordingly Kenya Litho supplied goods in the belief they were doing so to the Company, although legally this was to the Society until the Company was incorporated on the 20th May 1980. Hence the discrepancy. This difference is of course very material, not only as to the state of the Company's

indebtness, but also as to the weight to be given to the views of that particular creditor.

In the case of Tweeds Garages (supra) Plowman J, dealt with the debts which were undoubtedly due from the Company, then with the disputed debt. He said that the account was a running account between the Petitioning creditor and the Company, and that although, ultimately, it was conceivable there would be a credit balance to the Company, that depended on a number of factors, and made no difference to the question of the indebtedness of the Company at a particular point of time. He rejected the suggestion that because a part of the debt might be disputed, that this constituted a bona fide disputed debt within the principles set out in Buckley on the Companies Acts.In the 22nd Editionof Palmer's Company Law, p 86 there occurs the following passage:

"Almost the only answer open to the company is to show that the debt claimed is bona fide disputed, in which case a winding-up petition is not a proper mode of enforcing it. Where the debt is undisputed, it is futile for the company to say, "We are able to pay our debts, but we do not choose to pay this particular debt." The court will not listen to such a defence."

Plowman J in the case quoted above concluded his judgement by saying that it was unjust to refuse a winding-up order if the Petitioner was admittedly owed money which had been disputed as to the precise amount owing he gave the example of a debt of ten thousands pounds of which a paltry sum of ten or twenty pounds was off. Mr Fraser submitted that the example and the principles adopted by Plowman J in Re Tweeds Garages were on all four with the present case.

The present case was adjourned on the terms, inter alia, that the Company would make no further payments until the resumed hearing, and that a further affidavit would be filed specifying any payments made since the filing of the Petition. It was said that the Standard Bank has been paid approximately 70,000/- recently, but when the hearing resumed on the 9th October, with Mr Sampson then separately representing the two opposing Creditors, Mr Baraza, but that the overdraft had been frozen and so any money paid in the Company's account remained there.

Mr Lalani filed a further affidavit listing all the creditors other than the Petitioning Creditor, and the amount of the debt to each. If the Kenya and Overseas Creditors are added together, they amount a total of shs 641,649/45 not, as Mr Fraser pointed out in his reply, 500,000/- as stated in paragraph 9 of Mr Lalani's first affidavit. Mr Fraser also pointed to the amount said to be due to Kenya Litho, stating that there was a discrepancy of shs 10,449/- between that and the amount stated at the end of paragraph 3 of Mr Lalani's latest affidavit. Both, in turn, differ from the total of the two amounts referred to by Mr Baraza as due to Kenya Litho before and since May 1980 in his submissions on 30th October.

When he continued his address on the 9th November, Mr Baraza said that his client Company was resisting the Petition, not so much on the disputed amount of the debt as quantified in paragraph 9 of Mr Leakey's Affidavit, but because the decision to do so on the part of the Society was premature and oppressive. He pointed out that it was clear from the agreed correspondence that all the amounts due arose from the Company's obligations under the Heads of Agreement, that it was impossible in the course of some 18 months trading for the Company not to be behind in certain respects in its payments due to the Society over that period, particularly in view of the recession and the Company's cash –flow problems, and that if a winding-up was to be granted on the same position of insolvency. It was not, for example, a case of repeated demands by the Petitioner for liquidated sum, being met by silence or refusal to pay.

The correspondence, Mr Baraza said, showed that there were genuine negotiations between the parties with a view to seeking indulgence in respect of some of the instalments, which were in arrears, and a genuine attempt on the pat of the Company to secure a re-scheduling of its debts. For instanace in the letter of 18th August 1981 there is an offer to make a first payment of the royalty debts immediately in return for the rescheduling thereof (which was rejected by Hamilton in their next letter). At the end of that letter there is a clear statement that the business in improving. Accordingly, as the company was bound to experience some difficulty at the beginning of its life, and for the first 18 months or so, it was quite unfair

on the part of the Petitioning Creditor to crystallise the debt at any given time as the amount stated in the statutory demand,namely shs 750,395/-. Clearly there had been a progressive hardening of the Society's attitude, and by the end of May they were insisting on a debenture and the Directors' personal guarantees. The debenture was signed and registered on 24th June 1981, and I note intheir letter of 15th July Hamilton' s state that the Society would not even discuss a moratorium until these securities were executed. Even so they had never undertaken to grant any indulgences. Mr Baraza in effect asked me to infer that the securing of the execution of these documents, albeit without prejudice to the granting of a moratorium, provided evidence that genuine negotiations were going on with regard to re-scheduling the amounts due. He also referred to s.314 of the Act whereby the debenture would become invalid in the event of a winding-up, and said that this was further support for the view that there would be no benefit to the Society by achieving this and was correspondingly, another indication of oppressive conduct. Towards the end of the correspondence Archer and Wilcock are recorded as hoping the Court would take a "more moderate" attitude than the Petitioning Creditor.

These submissions were repeated and adopted by Mr Sampson on behalf of the two opposing Creditors. He referred me to a passage in Palmer on Company Law, part of which I have already quoted, relating to the inability of a Company to pay its debts under s.223(d) of the Companies Act 1948, which corresponds to sub-paragraph (c) of our section 220. He also quoted a passage indicating that an order would be refused if it was not generally to the benefit of the Creditors, but only to the Petitioning Creditor. Accordingly the obvious inference was that if the Society intended to benefit anyone at all it could only benefit itself by this Petition. This, therefore, should not be granted, at least immediately, in view of the very advanced negotiations that were going on between the advocates for the parties.

Mr Sampson supported a St Thomas' Dock Order, and suggested that 12 months would be a fair period for the Company to be given an opportunity to dig itself out of its present problems; at least six months should be given, and this was in accordance with the Affidavit of Mr Awinyo, the Company Secretary of Kenya Litho, to the effect that their debt would be cleared by July 1982 if the present monthly instalments of 15,000/- could be allowed to continue.

In his reply Mr Fraser referred to the discrepancies in the amounts that I have mentioned and alleged that the latest figures produced by Mr Lalani and annexed to his Affidavit of 9th November, showed that the Company's position had deteriorated further. He heavily criticised the petty cash payment in Ex. SML2 of shs. 74,625./25. How, he said, could a Company incur that mount in petty cash payment and said it was a further indication of preferential treatment to others. Mr Fraser also emphasised that the agreement for the debenture was contained in the Heads of Agreement as long ago as May 1980, and yet it was not executed until June 24th this year. He suggested that Kenya Litho were being paid regularly so as to gain support from a substantial creditor. Mr Fraser also referred to the letter of 22nd July, whereby his clients reiterated that there had been no undertaking by them to grant a moratorium (a matter to which I have already referred, in relation to earlier letters) and that since the debenture was not executed within the time limit given no moratorium had been agreed to and the statutory notice was accordingly being served.

I do not fully agree with Mr Fraser that the St. Thomas's Dock Authority has been superseded by the closing words of sub-section 225 of the English Companies Act which was first enacted in 1907 and which corresponds to sub-section 1 of our section 222. I think there is still a discretion to make that order if it shown that there will be absolutely no benefit to the Petitioning Creditor by the making of an immediate order of winding-up. The general undersirability of standing over a Petition was stated as early as 1867 by CAIRNS L.J. In re The Metropolitan Railway Warehousing Co (Ltd.) 1867 36 L.J. Equity N.S. p. 830 he said:

"I am averse to adjourning or suspending the petition, for this reason, that I think it is always a very inconvenient thing for a company to have a pending petition for a winding-up order hanging over their heads. I think the Court should as far as possible, either make an order upon the petition for the winding-up of the company it is is a fit case, or, if not, dismiss the petition. There are many cases in which it cannot be done; but where that can be done, I think that is the better course, and the more so, because it is well known, if the petition is adjourned, it is adjourned with this consequence imminent over the company, if the winding-up order is made, the winding-up will date back to the presentation of the

petition, and avoid, therefore, or imperil anything that has been done by the company in the meantime. I think the better course is to dismiss this petition."

Re St. Thomas Dock Company 1876 2 Ch. D 116 was a case where there was no such benefit to the Petitioner. There the Company's only asset was the Dock which was already secured not only by the Petitioner's debenture but by other debentures. If the Company was given a fair opportunity of working the dock then it was likely that some profit would be made which would produce assets for the Creditors whereas the immediate sale of the Dock would not have improved the Petitioner's prospects of payment. Moreover, applying section 91 of the Companies Act 1862, which corresponded to section 336 of our Act, to which Mr Baraza referred and asked me to apply in this case, it was clear that there were sufficient in value of the Creditors opposing the Petition to persuade the court to give the Company a chance to trade. The Company's case was that there had been a series of misfortunes for which they were not responsible, and that the Dock had only begun to earn money some two months before. Given a chance it would be likely to be very prosperous and a little time would enable them to pay off at least some of the debts. Accordingly the Petition was ordered by the Master of the Rolls to stand over for six months. The Courts position is very finely balanced by the following passage from COTTON L.J's judgment in Re Chapel House Colliery Co. 1883 24 CH. D. at p. 268:

"The rule that a creditor of an insolvent company is entitled as of right to a winding-up order is only laid down by Lord Cranworth as a general not a universal, rule, and the observations of Lord Selborne in the Western of Canada Company's Case (1) support the view that the maxim in fact amounts to this – that if there are assets it is as a general rule the right of the creditors to have them made available by a winding-up order. The observations of the late Master of the Rolls in In re. St. Thomas's Dock Company (2) dealwith the maxim as having the meaning which I attribute to it. The very ordering petitions of this kind to stand over is in itself an adoption to a limited extent of the principle I have mentioned. In my opinion a petition ought not to be presented when it is clear that it cannot produce any result in the way of payment of debts. The wishes of the debenture-holders are not to be disregarded, but the main ground on which I rest in the present case is that nothing can be got for anybody by a winding-up"

I think the circumstances of the St. Thomas Dock case were very different from the present. The letter from Hamilton's of 15th July 1981 sets out the state of the parties accounts in detail from July 1980 until the end of June 1981. These accounts covered franchise, house rent, shop rent, payments for stock and management fees right up to them. This is apart from the rent due for August and September 1981. Looking at those accounts and the Affidavits on both sides it seems clear to me that, in the absence of re-scheduling agreement o a moratorium, neither of which were granted because of the stated defaults of the Company, the end amount is clearly due and owing by the Company to the Petitioning Creditor. Indeed only a small part of the debt, as Mr Fraser emphasized, is disputed in Mr Lalani's first Affidavit. His second Affidavit shows that he position has even further deteriorated.

In these circumstances the facts clearly fall within para (a) of section 220, and the Petitioning Creditor does not have to rely to sub-paragraph (c) of the section, as seems to have been the case in Tweeds Garages (supra), where there was a running account between the parties, so that their respective financial positions varied from day to day. I regard the position under sub-paragraph (a) of the section as entitling the Petitioning Creditor to have an order for winding-up ex debito justitiaeu once he shows the existence of a genuine debt, and the lack of any genuine dispute as to a substantial part of it, followed by the statutory notice and the expiration of the 3 week period. The only brake on this is the discretion of the 3 week period. The only brake on this is the discretion of the Court which undoubtedly exists and is conferred by section 219. This is an equitable jurisdiction, and if there was any ground for thinking that it would be unjust and unfair either to the Company or to the Creditors substantially, either in number or in amount, and if it was shown that it would be of no, or only marginal, benefit to the Petitioner to wind-up the Company at this stage then I might be prepared to stand the Petition over as in the St. Thomas Dock case.

However, I am not satisfied that any of these things have been shown on the available evidence. In my view there is a genuine debt, which is not substantially disputed, followed by the notice under section 220(a) of the Act. In these circumstances the Petitioning Creditor is, in my judgment, entitled to a

winding-up order, which I make accordingly.

Dated and delivered at Nairobi this 9th day of December 1981.

A.R.W HANCOX

JUDGE.