THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

MISCELLANEOUS CAUSE NO.42 OF 2015

IN THE MATTER OF A PETITION FOR WINDING UP OF SPRINGS INTERNATIONAL HOTEL LIMITED (DEBTOR)

AND

IN THE MATTER OF THE INSOLVENCY ACT 2011

SPRINGS INTERNATIONAL HOTEL LTD---------- APPLICANT

VERSUS

1. **HOTEL DIPLOMATE LTD**
2. **BONEY M. KATATUMBA----------RESPONDENTS**

BEFORE HON. JUSTICE SSEKAANA MUSA

RULING

The applicant filed an application set aside the respondent's Statutory Demand dated 4th March 2015.

The main ground upon which this application is premised is that;

The applicant disputes all the debt claimed by the respondent in the statutory demand.

The Applicant has appealed the decision of the Court from which the costs the subject matter of the debt arise and has filed an application for stay of execution which is still pending in court listed as Miscellaneous Application No. 676 of 2015.

Secondly, the statutory demand Notice dated 04/03/2015 is premature because there is no execution issued by the court against the applicant which has been returned unsatisfied as provided under section 3(b) of the Act.

This application was supported by the affidavit of Patrick Muheirwoha a Director of the applicant which sets out the grounds which briefly are;

- That the applicant and respondent have been involved in litigation which resulted vide Civil Suit No. 227 of 2011.

- That upon the applicant losing the case against the respondent, they filed a Notice of Appeal and a letter requesting fir proceedings and the same was served on the respondents counsel M/s Tusasirwe and Co Advocates on the 23/12/2014 who in turn filed a Notice of the respondents Address and served the same on the applicants counsel on 06/01/2015.

- That the applicant has not attempted to execute the decree in HCCS No. 227 of 2011 as provided under section 3 of the Act.

- That there is a serious dispute as to whether the costs in the decree in HCCS 227 of 2011 are payable pending appeal of the same decree/decision of the High Court because the act of payment would render the appeal nugatory.

- That the applicant filed an application for stay of execution of the decree pending appeal in Miscellaneous Application No. 677 of 2015 and it is pending a decision.

- That the High Court Execution division issued a warrant of arrest against the respondents for a payment of a sum of 512,135,000/= which has never been settled by the respondent.

- That the respondent are indebted to the applicant in a sum of 471,234,472/=

The respondent in reply or opposition to this application filed an affidavit through Angella Katatumba a director in the respondent company. She contended that

there is no dispute as to whether the sum of 40,900,528/= claimed in the statutory demand.

The applicant filed a Notice of Appeal and went into slumber and that it is now 4 years and the applicant has never taken steps to file the appeal. The application for stay of execution was last fixed for hearing on 17th June 2015 and the applicant has never taken any steps to fix it for hearing and clearly the same has been abandoned.

At the hearing of this application court directed the parties to file written submissions which the parties filed.

The applicant was represented by *Mr Kibuuka Musoke Augustine* and the respondent was represented by *Mr.Tusasirwe Benson*.

I have considered the respective submissions before arriving at this decision. The parties raised the following issues for determination.

ISSUES.

1. ***Whether the statutory demand served on M/s Rubumba & Co Advocates was defective to the extent that it did not comply with the provisions of the law and therefore a nullity.***

2. ***Whether there is a substantial dispute as to the debt of 40,900,528/=.***

3. ***Whether the statutory demand notice was premature in as far as there was no execution issued by court against the applicant which had not been returned as provided under section 3(b) of the Insolvency Act.***

The applicant's counsel submitted that then statutory demand is invalid and or defective because it was made by the applicant's advocates, or it was not made in accordance with the Rule 4 of Insolvency Regulations and the applicant as the debtor was not notified of the right to apply to set aside and lastly that the statutory demand was not served personally.

The respondent's counsel submitted that the statutory demand was made for and on behalf of the debtor. Secondly that the failure to follow the prescribed form did not cause any substantial injustice unto the applicant. Lastly, that the statutory demand service of statutory demand on the agent is one of the ways of serving the corporation.

Resolution

***Section 43 of the Interpretation Act* provides;**

Where any form is prescribed by Act, an instrument or document which purports to be in such form shall not be void by reason of any deviation from that form which does not affect the substance of the instrument or document or which is not calculated to mislead.

The failure to follow the form as prescribed in the law or regulation does not necessarily render the document void. However the court must establish whether the applicant has suffered any prejudice or injustice by the failure to follow the form.

The applicant has not shown any injustice or prejudice suffered for not following the prescribed form in the present case. The want of form shall not render the statutory demand invalid or void.

The applicant also contended that the statutory demand was served on a wrong person contrary to Regulation 5 of the Insolvency Act. It is true that the statutory demand was served on the advocates of the applicant.

Regulation 5(2) of the Insolvency Regulations provides for alternative ways and means through which the debtor must be served;

Where the debtor cannot be found, the demand may be served on the debtor-

a) *At the registered office or place of business of the debtor;*
b) *By sending it to the address of the debtor by registered mail;*
c) *By serving the legal representative of the debtor if known;*
d) *By any other manner determined by court.*

The respondent's counsel did not attempt effect service using the first available options before he served on the purported legal representative of the debtor. This was wrong to the extent that the statutory demand is not merely a document like an ordinary letter. It has far reaching consequences and the same could actually lead to initiating winding proceedings against the company if it is not responded to within 10 days.

Similarly, like in the early noted earlier it is up to the party to show the prejudice suffered and also move court to extend the time within which to apply for making or serving an application to set aside the statutory demand.

The respondent's counsel could not be seen to challenge the applicant's application for late filing after he had failed to effect service on the address of the applicant or through its registered mail address. The application was properly filed in court in the circumstances surrounding the least effective mode of service of the statutory demand made by the respondent.

Whether there is a substantial dispute as to the debt of 40,900,528/=.

The applicant's counsel submitted that the judgment in Civil suit No. 227 of 2011 between the parties out of which this bill arose is subject of an Appeal. A Notice of Appeal was filed in the High Court and a letter requesting for proceedings was also filed in court.

The applicant has done whatever it takes to commence the appeal at the Court of Appeal but he has not yet been furnished with the record of proceedings which is a fundamental part of the record. This is the first step of filing an appeal to the court of Appeal.

The applicant has also filed an application in the high Court for stay of execution of the decree in Civil Suit No 227 of 2011 and it pending before the execution division of the High Court.

The respondent's counsel contended that after the high Court had dismissed the suit, the respondent's costs were taxed and allowed at that figure. The same have never been contested. The respondent made a formal demand which was not responded to and they later made a statutory demand.

The Insolvency Act cannot have intended to prohibit winding up petitions whenever a creditor simply claims he disputes the debt. The purpose of the law providing for applications of this nature is to enable the debtor satisfy court that he genuinely disputes the debt.

Resolution

The bankruptcy/insolvency proceedings are not intended as a means for a single creditor to enforce his debt but are instead a method for the collective realisation of the assets of the debtor in order to maximise recovery for the general body of creditors. See ***Chan Siew Lee Jannie vs Australia and New Zealand Banking Group Ltd*** *[2016] 3 SLR 239*

The same principle was reiterated in the case of **Cambridge Gas Transportation Corp v Official Committee of Unsecured Creditors of Navigator Holdings Plc** [2007] 1 AC 508

> ***"The important principle is that bankruptcy, whether personal or corporate is a collective proceeding to enforce rights and not to establish them"***

Where parties seek to establish their rights like in this case, then actioning the insolvency trigger as in this case is not the proper procedure to undertake. The Companies Court cannot properly be used for the purpose of debt collection. **In Re A Company (No. 001573 of 1993 [1983] B. L. C 492 Harman J**

> ***…." It is trite law that the Companies Court is not , and should not be used as (despite the methods infact often used adopted) a debt – collecting court. The proper remedy for debt collecting is an execution upon a judgement, a distress, a garnishee order, or some procedure.***

In the present case, the respondent has not made any attempt to execute the order of taxation through the normal execution proceedings as set out under the Civil procedure rules rather has straight away triggered insolvency proceedings.

Section 3 of the Insolvency Act provides;

(1) Subject to subsection(2) and unless the contrary is proved, a debtor is presumed to be unable to the debtor's debts if-

a) The debtor has failed to comply with the statutory demand;

b) <u>The execution issued against the debtor in respect of a judgment debt has been returned unsatisfied in whole or in part; or</u>

c) All or substantially all the property of the debtor is in the possession or control of a receiver or some other person enforcing a charge over that property

This court is of the view that when the debt arises out of court proceedings like in the present case, the successful party i.e judgment creditor should try to enforce the judgment through the known execution procedures rather than running to court to initiate insolvency proceedings through a statutory demand.

The judgment creditors' statutory demands are often used by creditors as a method of debt recovery-issued to force a debtor company into paying a debt or risk being wound up.

Judgment creditors should not rush to take up bankruptcy/insolvency proceedings immediately upon default of payment by debtors, but should look to bankruptcy as a last resort for debt recovery and only after all other avenues for recovery have failed or proven unsuccessful. Otherwise the Bankruptcy/Insolvency court would be flooded with winding-up petitions, so pursuing a winding-up in every such cases will be an abuse of the court process.

In addition, insolvency proceedings should not be used to black mail companies through the threat of winding up proceedings every time a company disagrees with a would be creditor or every time the company denies indebtedness.

The applicant disputes the amount claimed as taxed costs since they have initiated an appeal process upon which if successful in the Court of Appeal, there will not be any debt. The respondent is aware that the applicant has initiated an appeal

process by way of filing a Notice of Appeal and the same was served on the respondent's counsel together with a letter requesting for proceedings.

It would be unfair for the applicant to pay for taxed costs arising out of a matter which is still subject to an appeal process. If at all the applicant believes that the intended appeal is intended to delay execution or is used to abuse court process, there are procedural safeguards to check the same.

The statutory demand of the respondents dated 04/03/2015 is set aside.

In the result, this application is allowed with no order as to costs. I so order

Obiter dictum

This court takes judicial notice of the fact that the parties have several cases pending in court and as result there is likely to be compounding of debts. The court should not allow either party to use the winding up proceedings as a means of putting pressure on each other's company. The court has inherent jurisdiction to prevent such an abuse of the process.

SSEKAANA MUSA
JUDGE
21st/06/2019