




Countering abuse of insolvency processes: The Judge's perspective

Hon. Justice Musa Ssekaana


24th March, 2022

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Insolvency Law in Uganda


- The Insolvency Act is the principal legislation governing insolvency in Uganda which is supported by the Insolvency Regulations, Insolvency Practitioners Regulations and Insolvency (Investigation & Prosecution) Regulations
 - The Insolvency Act provides for liquidations, receivership, administration, bankruptcy, arrangements and cross-border insolvency.
 - The Companies Act, 2012 has provisions for compromises with creditors, arrangements, amalgamation and voluntary winding-up.
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Nature / Purpose of Insolvency Proceedings

- Generally, insolvency proceedings aim at efficient and equitable realisation and distribution of the debtor's assets while balancing the interests of the various stakeholders.
 - In the **Matter of Maria K Mutesi Bankruptcy Petition No. 5 of 2011** court stated that; “Proceedings in bankruptcy are meant to compulsorily administer a person's estate for the benefit of his or her creditors generally. The primary objective of bankruptcy law is to administer the estate of an insolvent so as to enable him or her pay his or her debts. The law facilitates a fair and equal distribution of available property of the petitioner among the creditors. Secondly the object of the law is to free the debtor of his or her debts in order that the debtor may make a fresh start as soon as the debtor is discharged by the court. Thirdly bankruptcy proceedings enable the Court, the Official Receiver and the creditors as well to establish the reasons of the insolvency of the debtor and presumably deter people from rashly incurring debts which they are unable or unwilling to pay.”
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Nature of Insolvency Proceedings

Cont'd


- The proceedings must be initiated in a Court with competent jurisdiction in order to achieve this purpose:
 - The Insolvency Act mandates the High Court of Uganda to have jurisdiction over all matters concerning companies and in Cross Border Insolvency matters. (See **S.254 (1) & (2)**)
 - Jurisdiction in respect of personal bankruptcy whose subject matter is below Shs.50,000,000/- is now vested in Chief Magistrates. (See **S.254 (3)**)
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Abuse of Insolvency Processes


- Abuse of insolvency proceedings generally refers to the institution of insolvency proceedings in bad faith and can be manifested in different ways, e.g.
 - Commencing insolvency proceedings before exhausting other modes of execution. Insolvency proceedings should not be used as a debt collection tool. Bankruptcy/Winding up orders should only be granted after other modes of execution have been exhausted. **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 in fact 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.

Abuse of Insolvency Processes Cont'd

- Debtors /Borrowers who don't want to settle their obligations and apply insolvency orders to defeat creditors' claims. (see *Tibeingana v Vijay Reddy Misc. Cause no. 286 of 2019*)
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Abuse of Insolvency Processes Cont'd

- Where the debt is generally disputed. See In The Matter of a Petition for Winding Up of Springs International Hotel Limited (Debtor) by Bahadukali Mohammed Ali Virani, Company Cause No.005 of 2019 – “It would be unfair for the respondent to be wound up on a debt which is still subject to an appeal process.”
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Abuse of Insolvency Processes Cont'd

- Secured Creditors selling debtors' assets at undervalue and later claiming for the balance of the debt from the liquidator.
- Commencing Insolvency Proceedings with the aim of benefiting a single creditor. Insolvency proceedings are not intended as a means for a single creditor to enforce his debt. They must benefit the general body of creditors. See ***Chan Siew Lee Jannie vs Australia and New Zealand Banking Group Ltd [2016] 3 SLR 239***


Tools and Options to Counter Abuse of Insolvency Processes

- The Courts have an overriding duty to promote justice and prevent injustice and should not entertain insolvency proceedings if they would amount to an abuse of the process of the court.
 - The law has empowered Judicial Officers with a number of mechanisms and tools to prevent abuse of the insolvency processes.
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Tools and Options to Counter Abuse of Insolvency Processes

- Powers of Court to inquire into the affairs of the Insolvent
 - Section 22 of the Insolvency Act allows Court to order for public examination of the debtor on his affairs, dealings and property.
 - Section 23 of the Act empowers Court to require any person to file an affidavit containing an account of his dealings with the debtor.
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Tools and Options Cont'd

- Courts' Powers to set aside voidable transactions
 - These are laid out in Sections 16–18 Insolvency to include transactions at under value, voidable charges created within a year preceding the liquidation and insider dealings.
 - Court may make an orders requiring a person to pay to the liquidator, receiver or trustee, in respect of benefits received by that person as a result of the transaction, the sums which fairly represent those benefits or requiring property transferred as part of the transaction to be restored to the company or the bankrupt's estate.
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Tools and Options Cont'd

- Discretion of Court in making/ revoking insolvency orders
 - Insolvency orders are only made if court is satisfied. See Sections 20, 92(2) and 120.
 - Insolvency orders can be annulled, revoked, set aside or modified. See sections 44, 134 and 169
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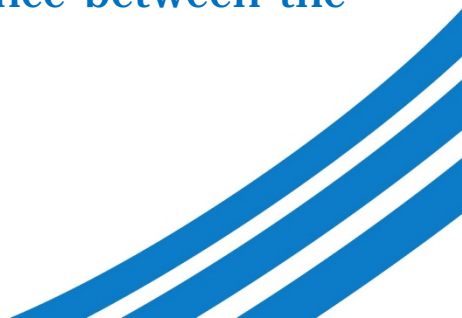
Tools and Options Cont'd

- Courts' Supervision of Insolvency Processes
 - Sections 51, 117, 136, 173 and 195 give Court supervisory powers over insolvency office holders and the court may give directions on any matter arising during the course of the insolvency; confirm, reverse or modify any act or decision of the insolvency office holder, order an audit of the accounts; and review or fix the remuneration of the liquidator.
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Tools and Options Cont'd

- Powers to remove an insolvency office holder
- Sections 52, 118, 174 and 196 empower Court to remove any insolvency office holder on specified grounds and appoint any other person to take over
- In ***Ranchodhai Patel v Mukwano Enterprises Ltd & Sylvester H. Wambuga*** (Liquidator African Textile Mills Ltd) S.C.C.A No. 06 of 2017, the Supreme Court held that the liquidator's actions were fraudulent, unlawful and in breach of his legal duty of care to ATM Ltd. Court removed the liquidator from office and directed the shareholders to appoint another liquidator.
- Also see in Re: Uganda Telecom Limited (In Administration) Company Cause-2019/30)

Conclusion

- Insolvency cases in Uganda are increasing with the growth of the economy and sensitization. We should be mindful of the fact that insolvency proceedings instituted in bad faith can have adverse effects on an individual or entity's overall reputation and stifle the conduct of its business.
 - Insolvency proceedings should not by any means be used as a convenient short-cut to levy improper distress on an individual or company to pay a disputed debt.
 - Courts will not aid debtors to delay / avoid payment by hiding under insolvency proceedings. Courts will therefore strike a balance between the competing debtors' and creditors' interests.
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Thank you

