

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

MISCELLANEOUS CAUSE NO.21 OF 2019

OMER FARMING COMPANY LIMITED----- APPLICANT

VERSUS

REHOBOTH AGRICULTURAL MANAGEMENT SERVICES LTD-----RESPONDENT

BEFORE HON. JUSTICE SSEKAANA MUSA

RULING

The applicant filed an application set aside the respondent's Statutory Demand dated 23rd January 2019.

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 counterclaims and cross demands against the respondent for payments invoiced and paid for services not rendered by the respondent.

This application was supported by the affidavit of Estella Mujuni the Financial Controller of the applicant which sets out the grounds which briefly are;

- That the applicant and respondent entered into a Consulting Agreement for provision of management services of the applicant's farm business by the respondent effective 11th September 2017 with the object and purpose of having the Applicant's farm business investor-ready.

- That by letter dated 13th January 2019, the applicant terminated its contractual relationship with the respondent under the Consulting agreement for provision of management services of the applicant's business by the respondent.
- That the applicant in its termination letter dated 13th January 2019 requested the respondent to adjust its invoice for the accounting services not provided by the Chief Accountant and the Financial Director on the respondent's Transitional Management team, amounting to \$3000 for 16 months totalling \$48,000 as at the date of termination and demanded a refund of \$8000 being payment for initial forensic audit under clause 4 of the agreement that was not done by the respondent despite being paid for by the applicant.
- That the Applicant on the basis of the respondent's invoice No. 260917 dated 26th September paid the Respondent \$8000(plus 18% VAT) as fees for completion of detailed audit financial operations of OFC over the past 30 months which the respondent failed to do.
- That both the Chief Accountant and the Financial Director on the respondent's Transitional Management Team did not provide any valuable accounting services for which the applicant was invoiced and made to pay as part of the monthly consultancy fees.
- That the respondent through its Advocates by email served a statutory demand on the applicant dated 23rd January 2019 on the same day claiming payment for outstanding sums billed per invoice balance on invoice numbers 1110081(\$18,060), 1111018 (\$20,520), 1112018 (\$20,520), 1101019 (\$20,520) and \$20,520 being payment in lieu of notice of termination, as well as \$12,017 being legal fees for collection of outstanding sums owed by Omer Farming Co Ltd.
- That the applicant by letter dated 30th January 2019, has out rightly denied, disputed, contended, contested and counterclaimed against the respondent's demand letter.

- That the respondent's demand in the Statutory Demand dated 23rd January 2019 is not an ascertained demand and it is wholly disputed.
- That the applicant's total counterclaim and cross demand against the respondent is \$ 66,080 being accounting services not provided and a refund of for the forensic audit not delivered.

The respondent in reply or opposition to this application filed an affidavit through Peter Schuurs a director in the respondent company. He contended that the agreement referred to by the applicant was overtaken by events and is of no legal effect to the parties dealings.

The said termination by of the Agreement by the applicant was of no consequence since the agreement since the applicant was supposed to issue a 30 days notice before termination and that the termination would not be effectual unless the applicant had settled any and all outstanding obligations.

The respondent further contended that they rightly refused the applicant's request to adjust the respondent's invoices.

That the respindent's Chief Account and Finance Director provided extremely valuable services to the applicant, including financial management services by managing the cash flow and settlement of historical liabilities when the funds were made available by the applicant. The Finance Director oversaw all audit reports and attended board meetings of the applicant.

The respondent denied that the applicant is entitled to any refund of monies paid for services agreed in the initial agreement. The applicant has no valid counter claim against the respondent. In any event, even if the applicant had a counterclaim, the same would not be sufficient to extinguish the respondent's statutory demand.

That having been in charge of the applicant's affairs for a period of one and half years, the respondent is aware the applicant is heavily indebted to other creditors and is in fact insolvent. The applicant's liquidation is inevitable. Consequently, the respondent will suffer a grave injustice if this application is not dismissed.

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

The applicant was represented by *Ms Namara Ann* and the respondent was represented by *Mr. Kirunda Robert*.

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

ISSUES.

- 1. *Whether the applicant is indebted to the respondent to a tune of \$112,157?***
- 2. *Whether this matter is properly before the court?***
- 3. *What are the remedies available to the parties?***
- 4. *Whether the application was served within the statutory time?***

Whether the applicant is indebted to the respondent to a tune of \$112,157?

The applicant's counsel submitted that it is not indebted to the Respondent to the tune of USD 112,157 (United States Dollars One Hundred Twelve Thousand One Hundred Fifty Seven). The Applicant disputes Invoice No. 1110018 dated 11th October 2018 to the tune of \$18,060 (United States Dollars Eighteen Thousand Sixty), Invoice No. 1111018 dated 11th November 2018 to the tune of \$20,520 (United States Dollars Twenty Thousand Five Hundred Twenty), and Invoice No. 1112018 dated 11th December 2018 to the tune of \$20,520 (United States Dollars Twenty Thousand Five Hundred Twenty) and contends that the same were duly paid by the Applicant.

In addition, Applicant counterclaims against the Respondent to the tune of \$66,080 (United States Dollars Sixty Six Thousand Eighty) inclusive of VAT of 18%. Upon termination of the Consultancy Agreement, the Applicant asked the Respondent to provide it with a final invoice for services rendered which invoice would exclude accounting services to the tune of USD 48,000 (United States Dollars Forty Eight Thousand) that had not been provided by the Respondent and also demanded a refund of USD 8000 (United States Eight Thousand Dollars) for a forensic audit that the Respondent had not carried out. From the pleadings attached by the Respondent it is very clear that there is no forensic audit report that was done.

Annexure C to the Affidavit in Reply that the Respondent seeks to rely upon is not a forensic audit but rather an ordinary financial report. According to the applicant's counsel this is evidence, that the Counterclaim of the Appellant has substantial merit.

In addition, this matter as noted under issue number 1 is subject of a dispute that needs to be proved through the dispute settlement mechanism agreed to by both parties. It is premature to issue a statutory demand when the debt is unascertained like in this case.

The law of insolvency aims at enforcing rights and not establishing them. This point has been emphasized by Lord Hoffmann at 15, 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.

The respondent's counsel submitted that the Applicant is indebted to the Respondent for the total amount of USD 112,157 (United States Dollars One Hundred Twelve Thousand One Hundred Fifty-Seven) and the instant Application should be dismissed for the following reasons:

- (i) The Applicant has not paid the outstanding invoices and sums as set out in the Statutory Demand;
- (ii) The Applicant has not established any substantive reasons why the sums invoiced have not been paid;

(i) **The Applicant has not paid the outstanding invoices to the Respondent**

The Respondent provided consulting services to the Applicant for their farming and agricultural business from the period ending January 2019 as per the consulting agreement of August 2018.

Clause 4 (a) of the subsequent Agreement provided that the Respondent would be compensated on a monthly basis. The Respondent dutifully invoiced the Applicant throughout the existence of their contractual relationship, for services provided therein, although the Applicant delayed in making payments, if at all.

Whereas the Respondent invoiced the Applicant for the months of October, November, December 2018 and January 2019; the Applicant has wantonly refused, neglected and disregarded its obligations to the Respondent. We note that the Applicant is fully aware of this debt as they attached the relevant invoices to hereinafter Mujuni's Affidavit in support of the Application at A-5 to A-7.

The respondent's counsel contends that the Applicant has failed to prove that she paid the monies owed to the Respondent. She purported to establish payment by relying on invoices issued by the Respondent, which is only proof and an admission that monies owed and not that monies paid.

According to respondent's counsel, there was an unequivocal and self-authenticating admission of indebtedness by the Applicant by way of the invoices marked A-5 to A-7 of Mujuni's Affidavit in Support of the Application and we seek judgment on the same.

The Applicant cited the decision in **Cambridge Gas Transportation Corp v. Official Committee of Unsecured Creditors of Navigator Holdings Plc [2007] 1 AC 508** on the principle that the purpose of bankruptcy proceedings, whether personal or corporate, is not to determine or establish the existence of rights, but to provide a mechanism of collective execution against the property of the debtor by creditors whose rights are admitted or established. The

respondent's counsel agrees with this principle and submits that the Respondent in this case is one such creditor.

The Respondent strongly contends that she is not indebted to the Applicant whatsoever. The Applicant wrongly asserts that she is owed the amount of USD 56,000 being monies paid for accounting services and an audit report allegedly not provided. The Respondent provided these services to the Applicant under the first agreement and proved as much.

Further, the subsequent agreement did not provide for the forensic audit report as alleged by the Applicant. The Applicant is once again erroneously relying on an agreement that was superseded by the valid subsequent agreement and is of no legal consequence. The Respondent contends that the Applicant is simply trying to distract the court from the pertinent issues herein.

On the basis of the above submission, the respondent prayed that Court finds that the Respondent is not indebted to the Applicant at all.

Determination

The main issue for determination is whether the applicant is indebted to the tune of **\$112,157** and thus this would justify the issuance of the statutory demand the respondent issued.

Section 4(2) of the Insolvency Act provides that;

A statutory demand shall-

(a) be made in respect of a debt that is not less than the prescribed amount and in case of a debt owed by-

- (i) An individual is a judgement debtor; or*
- (ii) A company is an ascertained debt, but need not be a judgment debt.*

The use of the word ascertained in the legislation is used for a purpose and definitely that purpose must be given its full effect. A debt can only be ascertained by both parties agreeing to the same or having a common position to it. A debt cannot be certain if one of the parties is disputing the same.

Once a debt is not yet ascertained then it means that a right has not yet been established in order to trigger the Insolvency proceedings by way of issuing a statutory demand.

The bankruptcy 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

This court agrees with the submission of the applicant to the extent that the law of insolvency aims at enforcing rights and not establishing them. This point has been emphasized by Lord Hoffmann at 15, 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.

The sum effect of failing to have the debt ascertained or an ascertained debt is that it would automatically raise triable issues that would invite court to set aside the statutory demand.

In determining whether the statutory demand ought to be set aside on the merits, courts have applied a test laid down in the case of *Tan Eng Joo v United Overseas Bank Ltd* [2010] 2 SLR 703, Singapore High Court held that a statutory demand ought to be set aside if there are triable issues to go for trial.

Similarly, in the case of *Wong Kwei Cheong v ABN-AMRO Bank NV* [2002] 2 SLR(R) 31, court held that a court should not conduct a full hearing of the dispute and adjudicate on the merits. All

the debtor needs to show is that he disputes the debt on substantial grounds that raise triable issues. It is up to the court to determine whether the triable issues are genuine and bonafide.

In the present case, the applicant disputes the sums claimed as due as per the invoices issued and the same are not ascertained debts and could be subject to proof of works or reconciliation of accounts. It is clear that there is a clear dispute between the sums claimed on the invoices and also counterclaim dispute between the parties.

The respondent acknowledges that indeed the applicant disputed the sums and demanded for a meeting to reconcile or agree on the amounts but they declined to meet the applicants for reasons best known to them.

There seems to be issues arising out of interpretation of the Consultancy Agreements and definitely this would invite court's intervention and determination of rights and obligations of the parties.

The agreement has provision for referring any disputes to Mediation or Arbitration. It therefore implies that parties should explore other alternative modes of addressing their disputes before they can trigger insolvency proceedings.

The statutory demand was merely used to bring improper pressure to bear on the company in order to collect an unascertained debt in this case. It would be wrong to allow the machinery designed for clear cases of insolvency to be used as a means of resolving disputes which ought to be settled in ordinary litigation. ***See Re Lympne Investments Ltd [1972] 2 All ER 385***

This court is unable to answer this issue either in the positive or negative since the determination of this issue would involve an interrogation of the entire transaction as per the agreements between the applicant and respondent through a full hearing or trial to resolve the disputes.

This court would in circumstances set aside the statutory demand since there is a substantial dispute whether there is debt or whether the debt is owing or is due. The statutory demand also included sums which do not arise out of the core transaction such as the legal costs or fees of \$12,017.

I have not found it necessary to resolve the rest of the issues since this application was solely intended to set aside the statutory demand

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

SSEKAANA MUSA

JUDGE

14th/06/2019