**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA**

**MISCELLANEOUS CAUSE NO.24 OF 2018**

**MBALE RESORT HOTEL LIMITED---------- APPLICANT**

**VERSUS**

**BABCON (U) LIMITED----------RESPONDENT**

**BEFORE HON. JUSTICE SSEKAANA MUSA**

**RULING**

The applicant filed an application set aside the respondent's Statutory Demand dated 24th August 2018.

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 respondent through her lawyers to wit M/s J.B Byamugisha Advocates delivered a statutory demand to the applicant seeking payment for the payment of UGX 685,620,522 that allegedly arises from CADER Arbitration Cause No. 21 of 2008 and Miscellaneous Application No. 265 of 2010.

The said statutory demand is grossly misleading and manifestly erroneous as there are no sums due and owing to the respondent.

The Applicant is aggrieved by the said statutory demand as it risks being prejudiced and subjected to liquidation especially on account of an alleged debt, whose existence it substantially disputes.

This application was supported by the affidavit of James Wokadala the Chairman and the Managing Director of the applicant which sets out the grounds which briefly are;

- That the applicant and respondent have been involved in litigation which resulted in Arbitration Cause No. 21 of 2008 and Miscellaneous Application No. 265 of 2010 out of which the respondent's lawyers alleged a sum of UGX 685,620,522/= arose.

- That between 2008 and 2017, the applicant and respondent were involved in Arbitration and a series of related court proceedings that went all the way on to the Supreme Court. These included;
    a) **Babcon (U) Limited vs Mbale Resort Hotel Ltd**- Arbitration Cause No. 21/2018 at the Center for Arbitration and Dispute Resolution.
    b) **Mbale Resort Hotel vs Babcon (U) Limited** Misc. Application No. 265 of 2010 at Commercial Division of High Court.
    c) **Babcon (U) Limited vs Mbale Resort Hotel Limited**- Civil Appeal No. 87 of 2011 at the Court of Appeal
    d) **Babcon (U) Limited vs Mbale Resort Hotel**-Civil Appeal No. 6 of 2015 at the Supreme Court of Uganda

- That upon the applicant losing the case against the respondent before the arbitrator, they filed an application challenging the award at the High Court vide misc. Application No. 265 of 2010. The High Court partially granted the said application and consequently set aside the special damages of UGX 1,272,700,857/= and General damages of UGX 100,000,000/=.

- That the respondent was dissatisfied with the ruling of the High Court and it filed an appeal to the Court of Appeal vide Civil Appeal No. 87 of 2011. In its Judgement among other things held that the high Court did not have jurisdiction to vary the Arbitral Award as it had done and that it ought to have set aside the entire Arbitral Award.

- That the respondent was equally dissatisfied with the Judgment of the Court of Appeal and it filed an Appeal to the Supreme Court vide Civil Appeal No. 6 of 2015. In its judgment the Supreme Court upheld the findings of the Court of Appeal and dismissed the respondent's appeal for being incompetent.

- That on account of that background, the applicant is certain there is no debt due and owing to the respondent following the decision of the Court of Appeal and the Supreme Court.

- That the statutory demand that was served by the respondent on 24th August 2018 contains material falsehoods and is grossly misleading as it seeks for sums that are non-existent and fictitious. The said Statutory demand was issued malafides.

The respondent in reply or opposition to this application filed an affidavit through Godfrey Zaribwende the Managing Director of the respondent company. He contended that there is award by the arbitrator arising out of the arbitration cause.

The said award was contested on application by the applicant and high court made partial modification to the arbitral award which the Court of Appeal struck out the ruling of court with costs and later the Supreme Court dismissed the appeal as well.

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

The applicant was represented by *Mr Paul Rutisya* and the respondent was represented by *Mr.Byamugisha Albert*.

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

***ISSUES.***

1. ***Whether there is a debt due and owing to the respondent from CADER Arbitration Cause No. 21 of 2008.***

The applicant's counsel submitted that the center of the dispute substantially relates to the fact that there is no money arising from the arbitral award that is due and owing to the respondent because the said awards were set aside in their entirety following the decisions of the court of Appeal in Civil Appeal No. 8 of 2011 and Supreme Court Civil Appeal No. 6 of 2015. The sums claimed are therefore fictitious and grossly misguided.

Considering that the arbitral awards were set aside by the Supreme Court, it follows that there is lawful or factual justification whatsoever for the respondent to make claims for any sums arising from the CADER Arbitration Cause No. 21 of 2008.

The applicant's counsel further submitted that there is indeed a substantial dispute that is worthy of judicial consideration. In the case of ***Regal Pharmaceuticals Limited v Maria Assumpta Pharmaceuticals Limited Company*** Cause No. 20 of 2010 court held that;

> *".....the question whether a debt has been disputed on substantial ground should be considered analogously in the same way as an Application for leave to defend a summary suit under Order 36 of the Civil Procedure Rules.*
>
> *In such cases the court does not go into the merits of the suit but tries to establish whether there are bonafide triable issue of fact or law raised by the intending defendant which would require adjudication after taking evidence viva voce."*

In the case of ***Tallington Lakes v Ancasta International Boat Sales*** [2012] EWCA Civ 1712, [2013] All ER it was similarly held that:

> "*…If the company can demonstrate that the alleged debt on which the petition is founded is genuinely disputed on substantial grounds, the court will strike out the petition. There are exceptions to this principle…"*

The court accordingly held that the extent to which any court should go in determining whether there is a dispute in relation to the existence of a debt of a debt, is not intended to be lengthy or detailed one since a long and elaborate hearing is neither practical nor appropriate and would likely result in a wasteful duplication of court's time.

It was counsel's contention that institution of insolvency proceedings against a company especially when done in bad faith, can have devastating effects on an entity's overall reputation in the market place and stifle the conduct of its business operations.

Insolvency proceedings should not by any means be used as a convenient short cut to levy improper distress on a company to pay a disputed debt.

The respondent's counsel submitted that the Supreme Court confirmed the High Court decision as can be deduced from the judgment of Justice Mwondha when she noted that;

> *"Counsel for the appellant argued that by varying the instead of either leaving it intact or setting it aside as a whole the court ended up as an appellate court on the merits of the award which the Act does not permit. He said that Section 34(1) provides for setting aside.*
>
> *With respect to counsel for the appellant S 34 does not prohibit varying the arbitral award so in my view the court has discretion to act as it did which is within the law. I therefore accept counsel for the respondent's submissions and the comment in Redform & M. Hunter, Law and Practice of International Commercial Arbitration London: Sweet & Maxwell 2004) at page 404. The purpose of setting aside, is to modify in some way the award in part or whole. These grounds would fail"*

All the Justices of the Supreme Court then dismissed the appeal with costs.
According to respondent's counsel there is no room for the applicant to claim that there is no debt due and owing. Secondly, The applicant did not appeal to those courts in respect of that part of the award which was upheld by the High Court..

The part of the award which was upheld by the High Court and finally by the Supreme Court is the basis of the statutory demand which was served on the applicant.

***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 pulling 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 or Arbitral award 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) *The execution issued against the debtor in respect of a judgment debt has been returned unsatisfied in whole or in part; or*
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.

This court agrees with the submission of counsel that the institution of insolvency proceedings against a company especially when done in bad faith, can have devastating effects on an entity's overall reputation in the market place and stifle the conduct of its business operations.

Insolvency proceedings should not by any means be used as a convenient short cut to levy improper distress on a company to pay a disputed debt.

The applicant disputes the amount claimed and contends that there is no debt due since the Supreme Court set aside the award of the arbitrator. "*Considering that the arbitral awards were set aside by the Supreme Court, it follows that there is no lawful or factual justification whatsoever for the respondent to make claims for any sums arising from the CADER Arbitration Cause No. 21 of 2008."*

This court will not get involved in determining whether there is a dispute or not arising out of the different court decisions. It is up to the parties to seek clarity from the appropriate court.

The statutory demand of the respondent dated 24th August 2018 is set aside.

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

**Obiter dictum**

*The creditors or judgment creditors are advised to consider a debt settlement proposal, voluntary arrangement or debt repayment scheme. This can be a very cost effective way of recovering debts through settlement instead of Insolvency proceedings. However, the importance of issuing statutory demands should also be upheld in deserving circumstances; Statutory demands serve an important public interest because they tend to discourage or prevent insolvent companies from continuing to trade.*

***SSEKAANA MUSA***
***JUDGE***
***1st/11/2019***