

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA**

**COMPANY CAUSE NO.005 OF 2019**

**IN THE MATTER OF A PETITION FOR WINDING UP OF SPRINGS INTERNATIONAL  
HOTEL LIMITED (DEBTOR) BY BAHADUKALI MOHAMMED ALI VIRANI**

**AND**

**IN THE MATTER OF THE INSOLVENCY ACT NO. 14 OF 2011**

**BAHADUKALI MOHAMMED ALI VIRAN ----- PETITIONER**

**VERSUS**

**SPRINGS INTERNATIONAL HOTEL LTD-----RESPONDENT**

**BEFORE HON. JUSTICE SSEKAANA MUSA**

**JUDGMENT**

The petitioner filed petition for winding up of the respondent company on ground of failing to pay debts arising out of HCCS No. 731 of 2014 between the same parties.

The petitioner contends that the respondent is indebted to him in a sum of US \$ 83,625 and 8,000,000/= which arose out of a judgment in H.C.C.S No. 731 of 2014 Bahadukali Mohammed Ali Virani v Springs International Hotel.

The respondent has made several applications for stay of execution and he failed to provide security for due performance of the decree.

The respondent was served a statutory demand on 25<sup>th</sup> May 2018 but he neither applied to set it aside nor made any payment of the sums indicated therein. Therefore the company is unable to pay its debts

The respondent on the other hand denied being indebted to the petitioner in the sums set out and he contended that H.C.C.S No. 731 of 2014 is subject of an appeal to the court of Appeal.

The respondent denied ever being served with the statutory Demand as required by Insolvency Act and therefore the petition for winding up is misconceived.

The respondent applied for a stay of execution in the High Court and the stay was granted however the terms of stay were oppressive compelling the respondent to apply to the Court of Appeal for a stay of execution with less oppressive terms.

That the Court of Appeal has to finally and conclusively decide the appeal before the respondent can be stated to be unable to settle the decretal sums as awarded by the High Court.

The petitioner did not serve a statutory Demand on the respondent on 25/05/2018 as alleged or at all. The respondent company is solvent and able to pay lawful debts.

### **Submissions**

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

The Petitioner was represented by *Mr Zimula Stephen* and the respondent was represented by *Mr.Bwango Badru*.

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 duly served on the respondent before filing of the winding up petition?***
- 2. Whether the respondent is unable to pay its debts?***

The petitioner's counsel submitted that the respondent was duly served with a statutory demand on 25<sup>th</sup> May 2018 and the respondent has refused to honour her financial obligations.

That all the efforts made for recovery of the money have been futile since the respondent is heavily indebted and attempts to garnishee the respondent's bank account were futile since there were no monies.

The petitioner attempted to attach property of Springs International Hotel Limited but he was not successful since no properties of the respondent could be traced.

A search at the company registry indicated that the respondent company is heavily indebted.

The respondent counsel in his submissions contended that the company disputes the decretal sum and that it has filed a notice of Appeal and requested to be furnished with a typed copy of the proceedings and the decision.

The said appeal is pending in the court of appeal and the said appeal shall be rendered nugatory if at all an order for winding up the respondent is issued by this honourable court.

Furthermore, the respondent contends that there is no record of a statutory demand having been issued by the applicant as required under section 3(b) of the Insolvency Act.

The above section further requires that there must be shown an attempt that execution proceedings have been filed against the company to be wound up and the orders of execution have been defeated by reason of failure on the part of the company to satisfy the order.

The respondent has further filed an application for stay of execution in the court of appeal which is yet to be heard and or determined by the court of Appeal. It is

therefore important that no order of winding up the respondent company be issued pending the determination of both the appeal and application for stay of execution.

### **Determination**

The respondent contended that the statutory demand was not served the company contrary to Regulation 5 of the Insolvency Act.

**Section 4(d) of the Insolvency Act** provides that; *A statutory demand shall be served on the debtor*

**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.*

According to the evidence on record the petitioner states that the respondent was served with a statutory demand for payment of the decretal sums on 25<sup>th</sup> May 2018. There is a faint stamp of Spring Hotel International Ltd and name of the person; Mulondo Abdu and signature of the person who allegedly served the statutory demand.

The evidence of service is not supported by any affidavit of the person who served to give further and better particulars of how the service of the Statutory demand was effected.

The absence of an affidavit of service by the person who effected service leaves this court in doubt whether proper service of the statutory demand was ever made on the respondent.

This was wrong or non-effective service 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.

Indeed, it triggered the insolvency proceedings or petition to wind up the respondent company whose consequences are far reaching.

The petition is incompetent to that extent since there is no proof of service of a Statutory demand on the respondent.

***Whether the respondent is unable to pay its debts?***

A company becomes insolvent when it is no longer able to meet its debts and/ or when liabilities exceed its assets. A business can be cash insolvent but still they may have assets that exceed liabilities, therefore the corporate debtor should make all its efforts to resolve its cash insolvency.

The petitioner's counsel submitted the respondent has failed to satisfy the decree in Civil Suit No. 731 of 2014 between the parties out of which the amount due arose. The petitioner concedes that indeed the respondent filed a Notice of Appeal and a letter requesting for proceedings.

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 731 of 2014 and the same was granted however the terms of stay of execution were oppressive compelling the respondent to apply to the Court of Appeal for a stay of execution with less oppressive terms and the same is still pending trial in the Court of Appeal.

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

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.***

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 attach a return of court of unsatisfied claim and also inform court whether the judgment debtor has not appealed against the decision being enforced before running to court to initiate insolvency proceedings through a statutory demand and petitioning for winding up.

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 respondent disputes the amount claimed and has initiated an appeal process upon which if successful in the Court of Appeal, there will not be any debt. The petitioner is aware that the respondent has initiated an appeal process by way of filing a Notice of Appeal together with a letter requesting for proceedings.

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.

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 or a debt that is subject to an appeal process.

It would be unfair for the respondent to be wound up on a debt 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. He can apply to court to have the Notice of Appeal struck out.

In the result, this petition is dismissed with no order as to costs.

I so order

**SSEKAANA MUSA**  
**JUDGE**  
**26<sup>th</sup>/03/2020**