THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

[COMMERCIAL DIVISION]

COMPANY CAUSE IP NO. 0003 OF 2023

IN THE MATTER OF THE INSOLVENCY ACT, 2013

IN THE MATTER OF THE INSOLVENCY REGULATIONS 2011

AND

IN THE MATTER OF A PETITION FOR WINDING UP FRAVOLT TECHNICAL SERVICES LIMITED (IN LIQUIDATION) BY SHAREHOLDERS

BEFORE HON LADY JUSTICE HARRIET GRACE MAGALA

JUDGMENT

Background

This petition was brought under sections 91 and 92 of the Insolvency Act No. 8 of 2011(now Cap 108 of the Laws of Uganda), regulations 85 and 86 of the Insolvency Regulations S.I No. 36 of 2013, section 98 of the Civil Procedure Act Cap 71 and section 33 of the Judicature Act then Cap. 13 and now Cap.16 by M/s Fravolt Technical Services Ltd, hereinafter referred to as “the Company”. The shareholders are seeking to wind up the Company.

The Petition states that the Company is indebted in the sum of UGX. 221, 079,886 being the amount of money claimed by the Respondent, Ugx. 11,000,000 being the amount claimed by UNBS, Ugx. 5,000,000 being salary arrears for employees and

Ugx. 3,000,000 being rental arrears. The Company is unable to pay its debts and is therefore, insolvent. The Petitioner prayed that the court winds it up, making an order for the liquidation of the company, the liquidator Tumwebaze Elias be appointed to take over the affairs of the Company and liquidate the same in accordance with the law and with such orders as may be necessary and just in the circumstances.

In reply, URA stated that the Petitioner registered with her for tax purposes vide Tax Identification Number (TIN) 1000125014. That according to the Petitioner's ledger balance, it has an outstanding tax liability of UGX. 244,364,659 as at the date of swearing the Affidavit in reply.

Appearance and representation

The Petitioner was represented by M/s Mugarura, Kwarisiima & Co. Advocates while the Respondent was represented by the Legal Services & Board of Affairs Department of Uganda Revenue Authority.

Issues for determination

1. Whether the petition raises grounds for winding up the company?
2. What are the remedies for the creditors?

Determination

Issue 1: Whether the petition raises grounds for winding up the company?

A company is insolvent if it is unable to pay its debts, largely upon satisfying the requirements under **sections 2** and **92(1) (a) & (2) of the Insolvency Act Cap. 108; and regulations 85(1) & 2** and **86 of the Insolvency Regulations S.I No. 36 of 2013**.

Section 2(1) & (2) of the Insolvency Act No. 14 of 2011 provides that:

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

a) the debtor has failed to comply with a 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 possession or control of a receiver or some other person enforcing a charge over that property.

(2) On a petition to the court for the liquidation of a company or bankruptcy order, evidence of failure to comply with a statutory demand by the creditor, shall not be admissible as evidence of inability to pay debts unless the application is made within thirty working days after the last date for compliance with the demand."

Section 92 of the Act provides that:

"(1) Subject to subsection (2), the court may appoint a liquidator on the application of-

a) the company;

(2) The court may make an order under subsection (1), if it is satisfied that the company is unable to pay its debts within the meaning of ***Section 2****.*

Regulation 85 (2) of the Insolvency Regulations S.I No. 36 of 2013 provides that:

Mubagane

> *"A petition to liquidate a company may be presented to the court where the company-*
>
> *a) has been served with a statutory demand and is unable to comply with the demand;*
>
> *b) is unable to pay its debts;*
>
> *c) has agreed to make a settlement with its creditors or entered into administration."*

The Petitioner submitted that this court was vested with powers to appoint a liquidator if it was satisfied that the company was unable to pay its debts pursuant to the shareholders' petition to wind up the company. The Petitioner submitted that the Respondent issued the company with tax assessments marked as **Annexure "D".** However, the company has still failed to pay the debt.

It was the submission of URA that the Petitioner has not been served with a statutory demand, neither has execution of a judgment debt been unsatisfied nor is any of the company's property in the possession or control of any receiver. The Respondent submitted that the Petitioner has further not provided any alternative proof of the company's failure to pay its debts, particularly books of accounts of the company. Subsequently, the Petitioner has not discharged the burden of proving that the company is incapable of paying its debts, and therefore, the petition does not disclose sufficient grounds for the liquidation of the company.

The **Halsbury's Laws of England 5th Edition Volume 16 para 392 at page 335** states the grounds for winding up by court one of which include inability by the company to pay its debts.

Mugagga

At **pages 338 and 339 paragraph 394**, it was stated that a company, not being an unregistered company, is deemed unable to pay its debts:

> *"if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding £ 750 then due, has served on the company, by leaving the same at its registered office, a written demand in the prescribed form ('the statutory demand') requiring the company to pay the sum so due, and the company has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor.*
>
> *Inability to pay debts may be shown in other ways than by proof of non-compliance with the statutory demand, as, for example, where a bill of exchange or promissory note has been dishonored at maturity, or a judgment creditor has not issued execution because the company's solicitor has told him that there are no assets, or no unmortgaged assets, on which he may levy. The court may infer that the company is unable to pay its debts as they fall due if it fails to pay an undisputed debt, payment of which has been demanded by the creditor. Even if there is evidence showing that the company has a large surplus of assets over liabilities, the court may infer that the company is insolvent if it has failed to pay a debt which has been duly demanded. The court will, however, be slow to infer insolvency if payment has not been duly demanded."*

Sections 2(1)(a) and **2 of the Insolvency Act Cap. 108** and **Regulation 85(2) of the Insolvency Regulations SI No. 36 of 2013,** explain that the Court will render a company unable to pay its debts, upon evidence being shown that the debtor has failed to comply with a statutory demand of the creditor after the lapse of 30 days. Further, inability to pay debts may also be shown in other ways than by proof of non-compliance with the statutory demand as stated under **Section 2(1)(b) & (c) of the Insolvency Act Cap. 108** and **Section 2(3) of the Act.**

The Petitioner does not dispute that it was neither served with a statutory demand as submitted by URA nor has it provided Court with any other evidence to prove its inability to pay the debts under **Section 2(1) & (3) of the Insolvency Act Cap. 108.** However, the Petitioner submitted that it was able to prove that it has failed to pay its debts by any other means except failure to satisfy a statutory demand. It submitted that the company was served with tax assessments of Uganda Revenue Authority but the company has failed to pay the debt or any part of the debt; and even if Court was to award costs against the company, the company will still be unable to pay any.

In the case of ***Cornhill Insurance vs Improvement Services [1986] 1 W.L.R 117,*** Harman J. relied on the observation of Sir George Jessel M.R in ***In re Globe New Patent Iron and Steel Co. (1875) L.R. 20 Eq.337, 338,*** *where he ruled that the company could be wound up whenever it was proved to the satisfaction of the court that the company was unable to pay its debts. Upon the facts there he had evidence that the company had not paid its debts and therefore was satisfied that it was unable so to do. He ignored any question of statutory demand rightly in my respectful view and said that that is merely another way of establishing the case.*

This being civil claim, the general position of the law regarding the burden of proof is that the burden lies on the party who asserts the affirmative of the issue or question in dispute. See **section 101-103 of the Evidence Act and the *decision of Stephen***

Mubiru J. in Premier Commodities (U) Ltd Vs. Kiir for Services & Construction Co. Limited HCCS No. 0126 of 2019 at page 5.

The Petitioner other than stating that she failed to pay the taxes owed to URA, UNBS, the Landlord and salaries; she neither proves the she failed to pay nor adduces any evidence in court to show these liabilities and failure to pay the same. This Court cannot also ignore the necessity of a statutory demand to first be issued to the Petitioner; and or any other evidence that the company had not paid its debts; and therefore be satisfied that it was unable to do so.

Court also takes cognizance of the Respondent's evidence at paragraph 7 of the Affidavit in reply to the petition wherein it was stated that the Petitioner's liability to URA was to the tune of UGX. 244,364, 659. The Petitioner on the hand averred at paragraph 7 of the Petition that the money claimed by the Respondent is UGX. 221,079,886. Court, in the absence of a statutory demand is not certain of the exact debt. There is also no evidence on the court record of failure by the Petitioner to comply with the demand.

In the case of ***Mann and Another vs. Goldstein and Another [1968] 1W.L.R 1091 at page 1097-1103, Ungoed Thomas J.*** stated that:

> *"But what if the debt is disputed by the company on some substantial ground but it appears that the company is unable to pay its debts?...The strongest statement which I have seen in favour of the plaintiff's contention is that of Kekewich J. in* ***New Travellers' Chambers Ltd v. Cheese and Green 70 L.T. 271, 272****:*
>
> *"Of course the question whether this is a debt or not may possibly be tried by a winding-up petition; but it has been said over and over again, that the*

Mugagga

presentation of a winding-up petition is not a convenient, and often not a proper method of trying a disputed debt. If there is any reasonable ground for disputing the existence of the debt-if the question is not a mere question of quantum, but whether there is in fact a debt or not- a petition ought to be presented, and therefore the court ought to restrain the presentation of the petition."

…But there is, in my view, a substantial defence to the whole of Mr. Goldstein's claim and, as I have indicated, the Companies Court is not the proper court to decide the issue that thus arises."

I am persuaded by the above authority to consider the Petitioner's debt with the Uganda Revenue Authority. The Petitioner attached to the Petiiton what looked like a photograph taken of a letter that was not dated from the Uganda Revenue Authority informing the Petitioner to pay her outstanding tax liability of UGX. 202,079,886.91999999 by 13th March 2023. The Petitioner also submitted that the sum has risen to UGX. 221, 079,886 and with other debts which the company is unable to pay. However, URA averred that the current outstanding tax liability was Ugx. 244,364, 659.

According to the Petitioner's submissions in rejoinder, it was inferred that even if the tax liability had risen to Ugx. 244,364,659, the company would still be unable to pay any outstanding debts. I find that much of the evidence on both sides was very unsatisfactory. All that is clear, is that there is an outstanding tax liability evidence of which has not been properly presented in court by either party and the tax liability is disputed. Regarding the other debts, the Petitioner only makes mention of them but does not adduce evidence to prove the same.

I am therefore of the view that the Parties cannot determined the liability through a winding up petition. This calls for the need for both parties to adduce evidence to fully determine the matter of controversy between them.

Having established that a statutory demand was never served upon the Petitioner, that the Petitioner has not adduced any evidence to prove her inability to pay the debts and the same debts have not been proved by the Petitioner; this Court is certain that the Petitioner has not satisfied the grounds to wind up the company.

The Petition is dismissed with costs to the Respondent.

Signed and dated at Kampala this 5th day of August 2024.

Harriet Grace MAGALA

Judge

Delivered online (ECCMIS) this 8th day of August 2024.