

UGANDA / JUDGMENT

In the matter of Venture Communications Uganda Limited (Company Cause 39 of 2011) [2013] UGHCCD 869 (20 December 2013)

[2013] UGHCCD 869

COURT

HC: Civil Division (Uganda)

BEFORE

Musoke, J

CASE / FILE NUMBER

Company Cause 39 of 2011

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT KAMPALA (CIVIL DIVISION) IN THE MATTER OF VENTURE COMMUNICATIONS UGANDA LIMITED AND IN THE MATTER OF THE COMPANIES ACT CAP 110 COMPANIES CAUSE NO. 039 OF 2011

BEFORE: ON. LADY JUSTICE ELIZABETH MUSOKE

RULING

This action was brought by way of a petition under Section 222 (a) of the Companies Act (Cap. 110). It is for orders that the petitioner be wound up by the court under Section 222 (a) & (e) and Section 223 (c) of the Companies Act and for any other order as shall be just in the premises.

From the pleadings, Venture Communication Uganda Ltd, the petitioner, was incorporated in Uganda on 1st July 2002* under the Companies Act with a share capital of Shs. 100 million divided into 10,000 shares of Shs. 10,000= each with the object of carrying on business of establishing computer networks, wireless networking and computer sales; carrying on the business of software sales, email and internet service providers, computer engineering and network consultants; and carrying on the business of computer schools and training of consultants, and other incidental objects as provided in the Memorandum of Association.

It has been stated further in the pleadings that for several years past, the petitioner suffered severe loss in the course of its business; has not paid dividends to its shareholders since incorporation; is unable to pay its debts and the shareholders are anxious that the petitioner be wound up. It is for these reasons that a petition to have the company wound up was presented to this court.

The petition was supported by an affidavit sworn by one of the petitioner's director, **Johannes Christiaan Engelbrecht** who deposed that the petitioner had indeed suffered loss in the course of its business and was therefore unable to pay its debts and therefore should be wound up.

Several affidavits were filed in opposition to the winding up petition by the unsecured creditors of the petitioner, Viz, s & J Constructors Ltd, Nakawuka Enterprises Ltd, Uganda Revenue Authority (URA) and *MIS* Africa Line (U) Ltd.

For URA, an affidavit by Deborah Mwesigwa, working with URA in the Debt Collection Unit was filed, in which he deposed that the petitioner was indebted to URA in the amounts of Shs. 3,463,283,059= being VAT and Corporation tax arrears for the period of 2004 to 2009. It was further averred that the petition was brought in bad faith and tainted with fraud in a bid to avoid payment of the outstanding debt despite several demands to the petitioner to clear the same.

For S & J Constructors Ltd, an affidavit was sworn by its Managing Director, Simaly Tom Andrew, in which he deposed that the petitioner was - - - .. inGleeted-te l1is- oompany in--the sums-of US-Dollars 39.2-54:6- and Shs:- 14,341,327= arising from a sub-contract with the petitioner. He stated that much as the petitioner's advocates promised to verify and settle the company's debts as owed by the petitioner, no attempt had been made to payoff the said debts.

For M/S Africa Line (U) Ltd, Mubiru Emmanuel, the Managing Director thereof averred that the petitioner was indebted to his company in the sum of Shs. 354,864,191= arising out of a court decree vide Civil Suit No. 424 of 2009 executed on 14/06/2011; which remained unsatisfied despite attempts to secure payment of the same.

For Nakawuka Enterprises Ltd, Lugayavu Wilberforce, the Managing Director thereof, averred that the petitioner was indebted to Nakawuka Enterprises Ltd in the sums of Shs. 624,601,374= and US Dollars 62,059; and that it had not shown any attempts to pay its debts.

It was averred by all the deponents in their respective affidavits in opposition to the winding up petition that if the winding up order was granted by this court before the creditors' claims were settled, the interests of justice would be defeated.

In their scheduling memorandum, the agreed issues were;

- 1. Whether the petitioner should be wound up.
- 2. Whether the petitioner is indebted to the creditors.

It was submitted for the petitioner that it was unable to pay its debts in as far as it failed to satisfy, in whole, the decree dated 14/06/2011 in favour of M/S Africa Line (U) Ltd for the sum of Shs. 354,864,191=. It is also submitted that the petitioner was allegedly indebted to URA and had failed to discharge its tax liability amounting to Shs. 3,463,283,059= being VAT and Corporation Tax arrears for the period of 2004 - 2009. In this regard, Counsel referred to Sections 223 (b) and (a) of the Companies Act, Cap 110. He also stated that a special resolution was passed by the shareholders of the petition to have the company wound up given its inability to pay its debts.

Counsel further contended that this court ought to make the winding up order so as to protect the petitioner from harassment and some creditors from piecemeal realization and unequal distribution. He referred court to *Re-International Tin Council* [1987] Ch 419 at 456 and stated that a winding up petition is not simply a means of enforcing a debt, it is also designed to protect the debtor company from harassment and other creditors from harassment, and some creditors from piecemeal realization and unequal distribution, and to substitute a system of *pari passu* distribution for individual enforcement. It was also Counsel's submission that if this court

declined to grant the winding up order, the other creditors may fail to realize a single cent due to the fact that whereas URA had powers to issue notices, the other creditors could not; - It was therefore submitted that the petitioner had a legitimate interest in presenting this petition to court so as to stop the harassment suffered at the hands of the creditors.

In reply, it was contended for URA that the petition before court was bad in law in so far as it did not comply with Section 42 of the Stamps Act Cap 324 as such the petition ought to be struck out accordingly.

In rejoinder, it was submitted for the petitioner that the affidavit in issue being one sworn in verification of a petition, was not an instrument chargeable with stamp duty under section 42 of the Stamps Act.

I have looked at Section 42 of the Stamps Act, Cap. 342 as referred to by learned Counsel; it states;

"No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of the parties authority to receive evidence, or shall be acted upon, registered or authenticated by any such person, or by any public officer, unless the instrument is duly stamped."

Section 1 (n) on the other hand defines "instrument" to include; "Every document by which any right or liability is or purports to be, created, transferred, limited, extinguished or recorded."

Section 2 (1) (a) provides;

"Subject to this Act and exemptions contained in the schedule to this Act, the following instruments shall be chargeable with duty of the amount indicated in that schedule as the proper duty therefore respectively, "

- (a) Every instrument mentioned in that schedule which, not having been previously executed by any person, is executed in Uganda after the commencement of this Act and relates to any property situate, or to any matter or thing done or to be done, in Uganda
- (b) ... " (c) "

The schedule lists "Affidavit including an affirmation or declaration" as one of the instruments chargeable with stamp duty.

This court is of the view that an affidavit in support of a petition which is a pleading before this court does not create a right or liability. If any right or liability was to arise out of this pleading it would only arise at the conclusion of the trial. The affidavit which is part of the petition is not such an instrument as envisaged by the Stamps Act. The inclusion of 'Affidavits' in the schedule to the Act would only refer to the affidavits that create, transfer, limit, extend or extinguish a right or liability which the affidavit in question does not. I am not inclined to grant the prayer to strike the said affidavit out with the effect that the petition would remain

unsupported by an affidavit on the ground of non-payment of stamp duty, Court will proceed to dispose the petition on its own merit.

I now turn to the merits of the petition.

It was also submitted for URA that the petition was brought in bad faith and is tainted with fraud. It was stated that whereas the petitioner contracted with several clients including Alcatel, Bank of Uganda, Zain Uganda, Erickson Uganda, Huawei Uganda and Ministry of Finance, it received payments therefrom but failed to remit taxes due to URA. It is further submitted for URA that the directors of the petitioner being signatories to its accounts siphoned the petitioner's money from the accounts and ignored the petitioner's tax obligation. The petitioner on the other hand failed to keep proper books of accounts contrary to Section 129 of the Income Tax Act Cap 340 and Section 147 of the Companies Act. It was therefore contended that the winding up of the petitioner and the conduct of its directors prior to the filing of the petition was the final step in their tax evasion scheme.

Counsel further submitted that to allow the petition would be to avoid and abet the tax evasion scheme perpetrated by the petitioner, hence causing revenue loss. See *A. R. Vs Commissioner Income Tax Case No. 44* [1956] 2 EATC 202 and *Abraham Vs Tait* [1935] 2 EACA 51.

Counsel conclusively invited court to dismiss the petition.

In rejoinder, it was contended for the petitioner that whereas it was submitted for URA that the petitioner's money had been siphoned from its accounts by the signatories thereto and the conduct of the petitioner's directors prior to the filing of the petition was the final step in their tax evasion scheme, there are no such averments in Mwesigwa's affidavit sworn on behalf of URA. This was merely Counsel's submission from the Bar and no evidence had been adduced to substantiate the said allegations.

It was further contended that although fraud was allegedly committed by URA on the part of the petitioner, no evidence was adduced to prove the same. In that regard the allegations remained baseless and unfounded.

The other creditors that opposed the petition did not file their submissions.

I now turn to the resolution of the issues.

The primary ground in this petition is the petitioner's inability to pay its debts under Section 222 (e) of the Companies Act. The Section provides;

A company may be wound up by the court if- (d) The company is unable to pay its debts. Section 223 on the other hand gives instances when a company is deemed to be unable to pay its debts and these are;

- *a) If a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding one thousand shillings then due has served on the company, by leaving it at the registered office or the company, a demand under his or her hand 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;*
- *b) If execution or other process issued on ^a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part; or*
- *c) If it is proved to the satisfaction of the court that the company is unable to pay its debts, and in determining whether a company is unable to pay its debts the court shall take into account the contingent and prospective liabilities of the company\ ⁿ

The petition is founded on the ground that the petitioner is unable to pay its debts in terms of Section 222 (e) and Section 223 (a) having failed to satisfy the decree in favour of *MIS* Africa Line (U) Ltd for a sum of Shs. 354,864,191=. The second ground on which this petition is premised is the inability to pay debts due to the fact that the company has suffered severe loss since its incorporation.

Much as the petitioner alleges in its pleadings that it had operated at a loss since its incorporation, no evidence has been adduced to prove the alleged loss. There is no evidence that any returns have been filed so as to assess whether the company has indeed been operating at loss.

It is also noted that the petitioner has not made any statement of accounts of its assets and liabilities so as to help this court arrive at an informed decision as to whether or not the company is solvent/a going concern.

It is further contended that the alleged debt accruing to URA is disputed by the petitioner and that no assurance of payment has ever been made by the petitioner in that regard. It is the law that when the debt is not disputed, the court has the mandate to decide whether there was inability to pay the debt and why. Where the debt is disputed, investigation is required to prove otherwise and this cannot be done in a petition like the one before this court.

A winding up order may not be made on a debt which is disputed by the company; the court must see that the dispute is based on a substantial ground and if there is a genuine dispute, the petition must be dismissed or stayed. See *Halsbury's Laws of England* (4 *Edition) Volume* 7 *page* (3) *page* 1543 and also *Regal Pharmaceuticals Ltd Vs Maria Assumpla Pharmaceuticals Ltd Companies Cause No. 20/2010.*

Additionally, allegations of fraud have been raised by URA on the part of the petitioner. In my view these would require investigation to be carried out so as to resolve such a dispute. Allegations of fraud or near fraud cannot properly be decided on a petition, but the same require viva voce evidence in an ordinary suit.

For the above reasons, I find that the petition lacks merit and is therefore dismissed.

I make no orders as to costs.

Elizabeth Musoke JUDGE 20/12/2013

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