

UGANDA / JUDGMENT

Ndawula v Hiraa Traders (U) Limited (Miscellaneous Application 2159 of 2024) [2024] UGCommC 351 (30 October 2024) [2024] UGCommC 351

COURT
Commercial Court of Uganda

BEFORE
Stephen Mubiru, J

CASE / FILE NUMBER
Miscellaneous Application 2159 of 2024

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IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA COMMERCIAL DIVISION

Reportable Miscellaneous Application No. 2159 of 2024 (Arising from Civil Suit No. 0572 of 2013)

In the matter between

NDAWULA RONALD APPLICANT

And

HIRAA TRADERS (U) LIMITED RESPONDENT

Heard: 30th October, 2024. Delivered: 30th October, 2024.

Insolvency - section 44 (1) of The Insolvency Act - annulment of a bankruptcy order revocation of a bankruptcy order under exceptional circumstances - the court may rescind, revoke or set aside a bankruptcy order where it seems that the bankruptcy proceedings are an abuse of the process of the court - a key aspect of insolvency processes is the importance of speedy resolution. Delay in insolvency resolution is detrimental not only to the debtor in distress but to all of his creditors – the Court will decline to maintain the bankruptcy proceedings if it considers them to be an abusive attempt by the petitioner to use their continuing existence to effect payment of his debt

*Civil procedure - abuse of Court process - an abuse of process is defined through case law as the use of the court process for purposes, or in a manner, that deviates significantly from its ordinary and proper use - Legal proceedings should be used to obtain the advantages (remedies/relief) they are designed to bestow/provide - a mixed motive on behalf of the petitioner does not

Companies - dissolution and striking off the Register - section 134 (5) and (6) of The Companies Act - strictly speaking, once a company is dissolved, it is "dead" and no longer exists - proceedings against the corporation cannot be initiated or pursued unless the corporation has been revived - Rule 42 (1) of The Companies Regulations, 2023 - a company can be administratively restored if it has been struck off for less than twelve months.

The background;

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- [3] The applicant then applied to Court under Bankruptcy Miscellaneous Application. No. 1153 of 2020 to have the said bankruptcy order annulled, vacated or set aside. However, the said application was dismissed by the trial court in a ruling delivered on the 22nd December, 2020. The applicant, being dissatisfied with the decision, appealed to the Court of Appeal under Civil Appeal No. 259 of 2021. On 12th January, 2024 that appeal was dismissed with costs to the respondent, by reason of the fact that the grounds of appeal raised were stated in very broad and general terms in violation of the rules of the Court. The applicant was precluded from presenting arguments to the Court which were premised on non-specific grounds of appeal.
- [4] Thereafter the respondent on 12th August, 2024 filed Miscellaneous Application No. 1603 of 2024 under section 42 (4) of *The Insolvency Act* seeking leave to attach and sell the applicant's immovable property recently traced in Luwero District. The hearing of that application was adjourned to enable the applicant file supplementary affidavit providing proof of the applicant's ownership of the property so identified, and for the applicant to provide proof that it belongs to his family and contended. During the period of that adjournment, the applicant filed the current application on 15th October, 2024 whose hearing was duly fixed.

The Application;

- [5] The application by Notice of motion is made under the provisions of section 44 of *The Insolvency Act*, section 37 of *The Judicature Act*, section 98 of *The Civil Procedure Act*, and Rules 202 and 203 of *The Insolvency Regulations*. The applicant is seeking orders that; (i) the bankruptcy order dated 30th November, 2020 be annulled, revoked or set aside, and that (ii) the costs of this application be provided for. It is the applicant's case that the respondent, a private limited liability company that filed the bankruptcy petition, does not exist anymore, having been struck off the register of companies. After obtaining the bankruptcy order, the respondent did not carry out the mandatory statutory steps which follow a bankruptcy order. The bankruptcy proceedings are constraining the applicant's ability to earn a livelihood and exercise his rights. The bankruptcy proceedings are being misused and therefore it is in the interest of justice that the bankruptcy order be annulled, revoked or set aside.

The respondent's affidavit in reply;

- [6] By the affidavit in reply of its director, the respondent averred that Bankruptcy Cause No. 003 of 2020 legally declared the applicant bankrupt and the order of bankruptcy against the applicant has never been used for political purposes. Instead, the applicant should be ordered to pay the respondent's debt so that the bankruptcy orders are revoked as they resulted from his inability to pay the debt. Hiraa Traders (U) Ltd is legally registered in URSB and exists and even appears in court in pursuance of justice. The bankruptcy proceedings have not been overtaken by events and the applicant should not be allowed to use that so

that he is discharged from bankruptcy. The bankruptcy order still serves a purpose and the applicant should be ordered to pay the respondent's debt so that the bankruptcy order can be set aside. The respondent has never conceded that bankruptcy should be lifted; it can only be lifted when the decree is satisfied. Bankruptcy and execution remedies are all legally provided for under the relevant laws and hence the respondent can pursue both as provided for. Although bankruptcy proceedings are for collective realisation of assets for the benefit of all creditors, it does not stop the respondent from pursuing the realisation of its debt that has been pending for over ten years against the applicant. It would be injustice if the bankruptcy order is annulled, revoked or set aside as the proper proceedings were followed that led to the applicant to be declared bankrupt.

The submissions of Counsel for the applicant;

- [7] Counsel for the applicant submitted that the applicant seeks to set aside the bankruptcy order, under section 44 (1) of *The Insolvency Act*, relying on the first limb. There are circumstances which have arisen necessitating it. The respondent does not exist anymore. It was struck off the Register on 14th August, 2023 for failure to file annual returns. Annexure "C1" is an extract of the notice on the gazette. The respondent is listed as Company 65,362 on the list. There is an official letter from the Registrar General, Annexure "C2" conforming that position. No steps were taken to move the bankruptcy proceedings forward since the order was issued on 30th November, 2020. The order must be served on the Official Receiver; a public notice to the creditors; a meeting of creditors to appoint a trustee; the trustee realise the assets and distributes. Sections 24 – 30 of the Act. Regulations 25 to 36 of the Regulations. The order was overtaken by events since the petitioner does not exist anymore. The proceedings are constraining his capacity to earn a livelihood.
- [8] Secondly, the proceedings are being misused for political motives. The petitioner intends to prevent the applicant from pursuing elective office. The applicant was Chairman of Luwero District and NRM Chairman for the district before the proceedings and replaced by Haji Naduli. It was after election; they contested at the same election. He replaced him at the party and the District. 2006 to 2011. Mr. Sekabira Denis is the MP of the area who competed with the applicant in the 2021 Parliamentary elections for Katikamu North. When the order was granted on 30th November, 2022 and three days later the director of the respondent wrote to the Electoral Commission to disqualify the applicant as a candidate. Annexure "A" was written by the respondent. The Commission replied on 29th December, 2022 informing him that the applicant had been disqualified as a candidate. It is also wrong to use insolvency for pressurising one to pay. He never took steps since 2020 and now he wakes up to seek execution. There was inactivity until now with impending elections. It is the political opponent who have sworn affidavits. The school was auctioned and Sekabira bought it. Para 29 of the affidavit in support, the petitioner claims the applicant has valuable assets to satisfy the debt.

- [9] The respondent concedes the order ought to be lifted. Even if there was reinstatement they ran out of time. The window for applying for restoration expired on 14th August, 2024. Restoration was under section 263 previously 265A now.

There is no power of restoration under the Act. It is in the Rules that the power is conferred and this raises issues of capacity to confer a power by regulations which is not provided for by the parent Act. In **Niwamanya Roseline v. Happy Charles and Four others*, H. C. CS No. 582 of 2022* it was held that once a company is dissolved, it is "dead" and no longer exists. Accordingly, the dissolved company cannot sue. Proceedings against the corporation cannot be initiated or pursued unless the corporation has been revived.

The submissions of Counsel for the respondent;

- [10] Counsel for respondent submitted that the respondent is still on the Register. It was re-instated on 25th October, 2024 and the returns were updated. Copies are attached to the affidavit in reply. The company exists. The Court can confirm it through the URSB Portal. The court has to confirm that the de-registration is no longer effective. Under section 21 of **The Insolvency Act**, once one is declared bankrupt they are supposed to file a statement of affairs. His hands were tied by the Order of stay from the Court of Appeal. The Court of Appeal decided only recently on 12th January, 2024. He then made the choice of recovery by attachment and sale of the applicant's identified property. He has applied for leave under **The Insolvency Act** but desires for insolvency to continue alongside execution. It is in August, 2024 when the respondent made the application. The respondent is not using the insolvency proceedings for political ends. The applicant is influential and not many people are willing to disclose his property. Haji Nadduli is retired and did not swear the affidavit for political reasons. He is helping the respondent who applied out of frustration, is aggrieved and following the law. he swore the affidavit for purposes only of informing the Court about the status of the applicant.

The Decision;

- [11] According to section 44 (1) of **The Insolvency Act**, the court may annul bankruptcy order, whether or not the bankrupt has been discharged from the bankruptcy, or if at any time, it appears to the court that, basing on any grounds existing at the time the order was made, the order ought not to have been made. A bankruptcy order can be annulled on one of the following grounds: (i) if it can be shown to the court that there was no justification for the making of the bankruptcy order in the first instance; (ii) if it can be shown, that all of the debts and expenses of the bankruptcy have been paid in full or secured to the satisfaction of the court; (iii) it is also possible to obtain an annulment of a bankruptcy order where a bankrupt subsequently enters into a voluntary arrangement which is approved and accepted by the creditors. None of these grounds have arisen in the instant case.

- [12] Under the same provision, the Court has the power to revoke, set aside, review, vary or rescind any order it has made in the exercise of its jurisdiction under the Act. The court may rescind, revoke or set aside a bankruptcy order if there are exceptional circumstances justifying the exercise of the Court's discretion and where there is a material difference to the position as it was known to the court when the order was originally made. When considering an application to rescind, revoke or set aside a bankruptcy order, the court is free to consider any new material that was not considered at the time the bankruptcy order was made.

i. The proceedings being an abuse of Court process.

- [13] The court may rescind, revoke or set aside a bankruptcy order where it seems that the bankruptcy proceedings are an abuse of the process of the court. It is trite that bankruptcy proceedings may not be used or threatened for the purpose of obtaining some collateral advantage. The general rule is that court proceedings may not be used or threatened for the purpose of obtaining for the person so using or threatening them some collateral advantage to himself, and not for the purpose for which such proceedings are properly designed and exist, and a party so using or threatening proceedings will be liable to be held guilty of abusing the process of the court and therefore disqualified from invoking the powers of the court by proceedings he has abused (see *In re Majory*, a debtor [1955] Ch 600*).
- [14] Legal proceedings should be used to obtain the advantages (remedies/relief) they are designed to bestow/provide. Personal insolvency proceedings are designed to provide (if the applicable criteria are met) a creditor with a bankruptcy order, so that the creditor might receive his due share for the debt he holds, from the bankrupt estate. A creditor's attempt to threaten or use the personal insolvency processes, not to obtain any proper advantage(s) (or at least, not exclusively), but to also obtain collateral advantages, will render that purpose, an "improper purpose," "ulterior purpose," "extraneous purpose," "collateral purpose," "illegitimate purpose" or "unlawful purpose," which can (though might not) render the threatened use/use of the personal insolvency proceedings, an abuse of process.
 - [15] The Court considers the dominant purpose, which in this context means the ruling, prevailing, paramount or most influential purpose. Where the proceedings have more than one purpose, the court will assess its purpose objectively, taking into account all the relevant circumstances. Where the petitioner wants a bankruptcy order to be made, but recovering its debt through the bankruptcy process is not its dominant purpose, that will be considered to constitute an abuse of process.
 - [16] For example, in the Irish case of *McGinn v. Beagan* [1962] IR 364* which concerned the long-running personal feud between the town clerk of the Castleblayney Urban District Council and a town councillor, the town clerk took an assignment of debts owed by the councillor, and petitioned for his bankruptcy. The judge found, as a fact, that the town clerk did not have the purpose of recovering any money, but was motivated by the sole purpose of making the councillor bankrupt and unseating him from the town council. Moreover,

insolvency proceedings should not be used as a debt collection tool. Bankruptcy/winding up orders should only be granted after other modes of execution have been exhausted. "It is trite law that the Companies Court is not, and should not be used as (despite the methods in fact often adopted) a debt-collecting court. The proper remedy for debt collection

is an execution upon a judgment, a distress, a garnishee order, or some such procedure" (see **Re a Company* (No. 001573 of 1993) [1983] B. L. C 492*).

[17] On the other hand, a mixed motive on behalf of the petitioner does not necessarily amount to abuse of process. When the creditor has two or more purposes in presenting the petition for obtaining a bankruptcy order, one of which is the lawful purpose of seeking to obtain a share in the bankruptcy, a second purpose, however important that might seem to the creditor, is insufficient to justify stigmatising the petition as an abuse of the court's process (see **Re Maud* [2016] EWHC 2175 (Ch*). In **Re Swindon Town Football Co Ltd* [2022] EWHC 2071 (Ch) para 35*, it was held that;

> ...the presentation of a petition by a person who has an undisputed debt will only be an abuse in two situations: the first is where the petitioner does not really want to obtain the liquidation or bankruptcy of the company or individual at all, but issues or threatens to issue the proceedings to put pressure on the target to take some other action which the target is otherwise unwilling to take. The second is where the petitioner does want to achieve the relief sought but he is not acting in the interests of the class of creditors of which he is one or where the success of his petition will operate to the disadvantage of the body of creditors.

[18] Considering the potential consequences upon property and status which bankruptcy proceedings provide, the court will always look strictly at the conduct of a creditor using or threatening such proceedings; and if it concludes that the creditor has used or threatened the proceedings at all oppressively, for example, in order to obtain some payment or promise from the debtor or some other collateral advantage to himself properly attributable to the use of the threat, the court will not hesitate to declare the creditor's conduct extortionate and will not allow him to make use of the process which he has abused. The standard of proof though to show that the proceedings are an abuse of court process is high.

- [19] When the creditor engages in pursuit of insolvency proceedings in respect of a debt which is otherwise undisputed, the creditor's conduct will amount to an abuse where he does not really want to obtain bankruptcy of the individual at all, but issues the proceedings to put pressure on the debtor to take some other action which the target is otherwise unwilling to take. In the instant case, the respondent obtained the bankruptcy order was issued on 30th November, 2020. Nearly four years down the road, the proceedings have not been moved forward. Although by that order the applicant was declared bankrupt, the Official Receiver was never appointed as interim receiver of his estate, for the preservation of his estate as a bankrupt. Consequently, for the last four years or so, no trustee has ever been appointed to collect, realise as advantageously as is reasonably possible distribute, the applicant's estate.

- [20] Generally, the overriding objective of the rules of procedure is to enable the court to deal with cases justly and at proportionate cost. This includes ensuring that the parties are on an equal footing, saving expenses, dealing with cases in ways that are proportionate to the complexity and importance of the issues, ensuring cases are dealt expeditiously and fairly, and allotting to each case an appropriate share of the court's resources, while taking into account the need to allot resources to other cases. In the same vein, insolvency proceedings aim at efficient and equitable realisation and distribution of the debtor's assets while balancing the interests of the various stakeholders.
- [21] The structuring of bankruptcy procedures is aimed at the efficient resolution of uncertainty about debtors' and creditors' current status and future prospects. The proper administration of justice hinges on the timely and efficient resolution of disputes. Significant delays could be harmful in situations where ongoing uncertainty reduces the ability of the insolvent to make a fresh start. The Court will therefore decline to maintain the bankruptcy proceedings if it considers them to be an abusive attempt by the petitioner to use their continuing existence to effect payment of his debt. In such situations the Court will order a dismissal.
- [22] Evidence of very long period of procedural inactivity by a claimant often gives rise to an inference that the claimant has no real intention of progressing the claim. However, that inference can be rebutted if there is a satisfactory explanation for the delay. The respondent has explained away the period from 30th November, 2020 up to 12th January, 2024 as one during which it was restrained by a court injunction from moving the process forward. There is no explanation though for the period of about ten months or so that has elapsed since then. The respondent instead has opted to seek leave to attach certain items of property, thereby intending to take them out of the insolvency process, which process appears to have stalled for all intents and purposes.
- [23] A key aspect of insolvency processes is the importance of speedy resolution. Delay in insolvency resolution is detrimental not only to the debtor in distress but to all of his creditors. When insolvency litigation is deliberately delayed or prolonged, it not only clogs the judicial system but also undermines the principles of fairness and equity that courts strive to uphold. It is bound to clog the judicial system, leading to a backlog of cases and further delays in other proceedings, along with increased costs. Prolonged delays can lead to diminished quality of evidence and undue stress for the parties involved. Consequently, "warehoused" claims should be struck out unless compelling reasons justify otherwise.
- [24] An abuse of process is defined through case law as the use of the court process for purposes, or in a manner, that deviates significantly from its ordinary and proper use. This broad definition grants the court considerable discretion in determining whether a party's conduct constitutes an abuse. A unilateral decision by a claimant to delay pursuing a claim for a substantial period could be an abuse of process (see *Asturion Foundation v. Alibrahim* [2020] 1 WLR 1627*). For a claim to be struck out for want of prosecution, there has to be an inordinate and inexcusable delay causing a substantial risk that a fair trial was not possible

or serious prejudice to the defendant (see **Birkett v. James* [1978] AC 297* and **Grovit v. Doctor* [1997] 1*

WLR 640). Courts exist to resolve disputes, and any action not pursued with the intention of resolution constitutes an abuse of process.

[25] By reason of the prolonged unexplained delay since 12th January, 2024, the Court is extremely concerned about the prospect of maintaining a process that has failed to properly safeguard the interests of the debtor and third parties, and instead opened up the door to abusive misuse of the insolvency provisions for purposes for which they (and the resources allocated their operation) were not intended, by deliberately "warehousing" or delaying its prosecution to its logical conclusion. While some delays are inevitable in the judicial process, prolonged stalling is considered as undermining the integrity of the legal system. A delay of this nature leads to stale proceedings which bring the litigation process into disrespect. This ground alone justifies the rescission, revocation or setting aside of the bankruptcy order.

ii. The petitioner having been struck off the Register of Companies.

[26] According to the **Collins English Dictionary**, the term "Striking Off" means: "to remove or erase from (a list, record, etc.) by or as if by a stroke of the pen." It is defined by Rule 2 of **The Companies Regulations, 2023** as the process of removing a defunct company from the register until it is restored on the register or deregistered in accordance with the Act or those Regulations. Striking a company off the Register of Companies is a form of enforcement mechanism used by the Registrar of Companies to compel corporations to comply with statutory obligations. If the company is carrying on business for five years or more without updating its file by way of filing annual returns are required by sections 132 to 136 of **The Companies Act**, the Registrar is entitled to assume that the company does not exist. However, beyond this assumption, the law prescribes that the Registrar notifies the company to file a statement of solvency and notice to show cause why the company should be maintained on the register. It is worth noting that a strike off can happen to a company even if it is still trading.

- [27] On the other hand, dissolution takes this a step further; a company is dissolved when its assets are distributed, and it ceases to exist altogether. Strictly speaking, once a company is dissolved, it is "dead" and no longer exists. Accordingly, the dissolved company cannot be sued (see **Vasudevan v. Icab Pte Ltd* [1987] SLR(R) 46*) or hold any property. As a result, proceedings against the corporation cannot be initiated or pursued unless the corporation has been revived. The debts of a corporation, either to or from it, are totally extinguished by its dissolution (see **Coxon v. Gorst* [1891] 2 Ch. 73*; **Re Westbourne Grove Draper Co.* (1878) 39 L. T. 30*; and **Russian & English Bank v. Baring Brothers & Co Ltd* [1932] 1 Ch. 435; [1936] A. C. 405*). Suing corporations after dissolution and distribution of assets is generally a fruitless endeavour. As long as the dissolved company remains dissolved, a potential creditor's claim against the dissolved company is legally unenforceable. Company

dissolution is therefore the formal legal end to a company's legal existence and is achieved by the company being formally struck off the register.

- [28] Both striking-off and liquidation have the same outcome; that the company is dissolved, or, in other words, ceases to exist as a legal entity. Once the company has been dissolved or struck off, it will cease to exist as a legal person and is therefore unable to trade or carry out any of the legal functions of a company. Proceedings for or against the corporation cannot be initiated or pursued unless the corporation has been restored to the Register.
- [29] Under Section 134 (5) and (6) of *The Companies Act*, if the company does not respond to the notice or show cause why it should not be struck off the register for noncompliance with sections 132 to 136 of *The Companies Act*, the Registrar is brought to the conclusion that the company merely exists on paper but is not in operation and therefore issues a notice of striking the company off the register in the gazette and newspaper of wide circulation. The moment a company is struck off the register, it ceases to carry on business. The company can no longer trade, sell company assets or become involved in any other business activities. For all

intents and purposes, the business is closed. If the directors do not file accounts or reply to any communications from Registrar, then the company will be struck off the Companies Register and cease to exist. Striking off effectively removes the company from the register and means it cannot legally operate since it ceases to exist as a legal entity. As soon as the name is struck off, it becomes available for other companies to use, and the owners can no longer engage in any other business activities under the company name.

- [30] On 14th August 2023, the Registrar of Companies, pursuant to section 134 (6) of *The Companies Act* struck off 186,000 companies from the register of companies for failing to file annual returns and a statement of solvency. The respondent is listed as Company 65,362 on the list. Companies desirous of being restored onto the register were required to apply to the Registrar of companies by 30th August 2024. Companies that failed to apply for restoration by that date would be deregistered and their names made available for use by other interested applicants.
- [31] A company can be administratively restored if it has been struck off for less than twelve months. With regard to the striking off that occurred on 14th August 2023 an applicant was required to create an individual account on the Online Business Registration System (OBRS) and commence a data update application in respect of their struck off company. They would then be prompted to make an application for restoration. Upon approval, the applicant would be able to update the company data, file beneficial ownership information (form 1) and annual returns. Although the respondent has adduced evidence of having filed annual returns, by a letter dated 15th October, 2024 the Registrar General certified the status of the respondent as at that date being one of having been struck off the Register. The respondent has not furnished proof of having initiated the process of its restoration unto the register, after 15th October, 2024.

- [32] In any event, according to Rule 42 (1) of *The Companies Regulations, 2023*, a company struck off the register may apply for restoration within twelve months from the date it was struck off the register. That being the case, the respondent could not be restored onto the register administratively after 14th August 2024 when the twelve months' period elapsed. Any restoration after that date may require a court order, that is if the time limited by the rule is enlarged for sufficient cause. Moreover, Rule 42 (3) thereof requires the application for restoration of a company to be in writing stating the grounds for restoration of the company on the register. The respondent has not furnished Court with a copy of any such application.
- [33] Where the Registrar is satisfied by the grounds for seeking restoration, he or she is required to issue a notice of intention reinstate the company on the register to be published in the Gazette for a period of thirty days (see Rule 42 (4) thereof). Since by 15th October, 2024 the respondent remained struck off the register, the time is simply inadequate of any processes commenced thereafter to have resulted in restoration of the applicant onto the register as of today. For all intents and purposes, the respondent by reason of being de-registered, ceased to exist as a legal person on 14th August 2023 and is therefore unable to carry out any of the legal functions of a company. Proceedings for or against the respondent cannot be pursued unless and until it has been restored to the Register. The bankruptcy order cannot remain in abeyance pending the restoration of the respondent on the register, a process whose duration is indeterminate and outcome speculative at this stage. It is for this and the other reason explained before, that the application was allowed, and the bankruptcy order was set aside with no order as to costs.

Delivered electronically this 30th day of October, 2024 ...Stephen Mubiru.....

Stephen Mubiru Judge, 30th October, 2024

Appearances;

For the applicant : M/s M/s Nambale, Nerima & Co. Advocates and Legal Consultants.

For the respondent : M/s Tamale and Company Advocates.

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