

**IN THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

2022/HPC/0176

BETWEEN:

EVEN AMI CIVIL ENGINEERING LIMITED

PETITIONER

AND

L.M ENGINEERING LIMITED

12 MAY 2022

RESPONDENT

Before Honourable Mr Justice K. Chenda in Chambers on 12th May 2022.

For the Petitioner : Mr B.J. Abwino of Ranchod Chungu Advocates

For the Respondent : Mr M. Nyirenda of SLM Legal Practitioners

EX-TEMPORE RULING

On Application to Dismiss Petition on Point of Law and for Abuse of Process

Legislation referred to:

1. The Corporate Insolvency Act No. 9 of 2017, ss. 56 and 57

Rules of Court:

2. The Rules of the Supreme Court of England 1965, contained in the White Book 1999 Edition, Order 14A Rule 1(1) and explanatory note 18/19/18

Case law:

3. *Castanho v Brown & Root (UK) Ltd & Anr* (1981) 1 All ER 143 at p.148
4. *Amadeus International Limited v Rana Marketing Limited - Appeal No. 84/2008 at p.J18*
5. *Anderson Mazoka & Ors v Levy Mwanawasa & Ors* (2005) ZR138 at p.158-159

1 INTRODUCTION

- 1.1 The Petitioner as an unsatisfied creditor took out this action for winding up of the Respondent company. The Petitioner also made an application for appointment of a provisional liquidator which I directed to be heard *inter partes*.
- 1.2 However, before the said interlocutory hearing and before I could also hear the petition, the Respondent launched its own an application seeking dismissal of this action *in limine*:
 - 1.2.1 on a point of law; and
 - 1.2.2 for alleged abuse of the process of the Court.
- 1.3 I scheduled both applications for hearing today and decided to hear and dispose of the Respondent's application first since its outcome has the possibility of affecting the fate of the substantive matter.
- 1.4 After listening attentively to the arguments verbalised from the Bar and studying the competing documentation followed by a careful consideration, my decision is as set out below.

2 THE CONTENTED ABUSE OF PROCESS

- 2.1 In the case before Court the Petitioner and Respondent are respectively the judgment creditor and debtor in the sum of K725,000 by virtue of a consent judgment dated 18th February 2022 entered in cause 2021/HPC/0613.

- 2.2 The affidavit evidence also shows that the judgment debt is the subject of a pending application for payment in instalments in the said cause coupled with a subsisting order for stay of execution.
- 2.3 It is the pursuit of this petition in these circumstances that lead the Respondent to complain that it constitutes an abuse of the process of the Court.
- 2.4 The **Rules of the Supreme Court of England²** (“RSC”) contain a useful exposition on the topic of ‘abuse of process’ and the Court’s power to deal with it summarily. The explanatory note 18/19/18 in particular provides:

“18/19/18

‘Abuse of the process of the Court’

*Para. (1)(d) confers upon the Court in express terms powers which the Court has hitherto exercised under its inherent jurisdiction where there appeared to be “an abuse of the process of the Court.” **This term connotes that the process of the Court must be used bona fide and properly and must not be abused. The Court will prevent the improper use of its machinery, and will, in a proper case, summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation** (see *Castro v. Murray* (1875) 10 Ex. 213; *Dawkins v. Prince Edward of Saxe Weimar*; *Willis v. Earl Beauchamp* (1886) 11 P. 59, per Bowen L.J. at 63).”*
(Emphasis added)

- 2.5 Equally insightful but brief are the words of Lord Scarman in the English case of ***Castanho v Brown & Root (UK) Ltd & Anr³***:

“The court has inherent power to prevent a party from obtaining by the use of its process a collateral advantage which it would be unjust for him to retain--” (Emphasis added)

- 2.6 In the case before Court it has not been established by the Respondent that this petition has been deployed as a tool of oppression or vexation against it.
- 2.7 The Respondent has also not demonstrated that the Petitioner is otherwise using this action to achieve some collateral purpose.
- 2.8 Infact since there is an undisputed debt due from the Respondent to the Petitioner, it shows that the latter arguably had just cause to petition, subject to further interrogation at the substantive hearing.
- 2.9 This can be contrasted with a situation where a debt is contested as guided by the Supreme Court in ***Amadeus International Limited v Rana Marketing Limited***⁴ wherein Wood, JS stated at page J18 that:

“It was not necessary for the respondent to embark on winding up proceedings concerning a debt that was contested and found to be statute barred. This, as the learned trial Judge properly adjudged, was an abuse of the petition procedure.” (Emphasis added)

- 2.10 Thus there is no basis for me to rule that the filing and prosecution of the petition constitutes an abuse of the legitimate process of this Court. Consequent to that the Respondent’s ground for dismissal of the petition, anchored on this, is unsuccessful.

3 THE CONTENTED POINT OF LAW

- 3.1 The contention under this limb is that the petition was premature having been allegedly filed less than 30 days after the date of a statutory demand for payment as prescribed by s. 57(3)(a)(i) of the **Corporate Insolvency Act**.¹
- 3.2 The Respondent's argument is tempting to accept given the fact that the demand letter exhibited by it is dated 17th March 2022 whilst the petition was filed less than two weeks later on 30th March 2022.
- 3.3 However, the Petitioner has in its opposing affidavit exhibited a preceding demand letter dated 21st February 2022, thereby demolishing the evidential basis of the Respondent's argument.
- 3.4 Furthermore, close perusal of s.57(3)(a) of the **Corporate Insolvency Act** relied on by the Respondent shows that its application is confined to a debt comprising 'a prescribed fee'.
- 3.5 The Respondent has not established that the judgment debt due from it to the Plaintiff qualifies as, or stems from 'a prescribed fee' in terms of s.57(3)(a). Thus the date of filing the petition versus date of last demand letter is of no legal significance.
- 3.6 This too is fatal to the Respondent's point of law argument and ground, which I hereby dismiss.
- 3.7 The business in this application should ordinarily end here but I did at the hearing invoke the provisions of Order 14A Rule 1(1) of the **RSC** to raise the following issue from the Bench:

'Whether given the status of the Petitioner as a judgment creditor, the petition can be brought on grounds of the Respondent's inability to pay before the Petitioner has first exhausted the processes of execution of the consent judgment in cause 2021/HPC/0613.'

- 3.8 I invited submissions from Counsel and the Petitioner argued that since multiple demands for payment were made and unheeded, there is no bar to the Petitioner taking out these winding up proceedings without first exhausting the enforcement mechanisms available in cause 2021/HPC/0613.
- 3.9 The Respondent's submission on the issue was that it would be in the interests of justice for the Petitioner to enforce the consent judgment before resorting to a winding-up petition.
- 3.10 From the originating process, the Petitioner seeks the winding up of the Respondent on the ground of inability to pay its debt pursuant to ss. 56 and 57 of the **Corporate Insolvency Act**. I reproduce the text of the sections as:

"56. (1) Subject to this section, a company may be wound-up by the Court on the petition of-

(a) the company;

(b) a creditor, *including a contingent or prospective creditor of the company;*

(c) a member;

(d) a person who is the personal representative of a deceased member;

(e) the trustee in bankruptcy of a bankrupt member;

(f) a liquidator of the company appointed in a voluntary liquidation; or

(g) the Registrar or Official Receiver.

57. (1) The Court may order the winding-up of a company on the petition of a person other than the Official Receiver if-

(a) the company has by special resolution resolved that it be wound-up by the Court;

(b) the company is unable to pay its debts;

(c) ---;

(d) ---;

(e) ---;

(f) ---; or

(g) ---.

(2) The Court may order the winding-up of a company on the petition of the Registrar or the Official Receiver on the grounds specified in subsection (1) (b), (d), (e) or (f) or on the ground that the company has persistently failed to comply with any of the provisions of this Act.

(3) For purposes of this section, a company is unable to pay its debts if-

(a) there is due, from the company to any creditor, including a creditor by assignment, a prescribed fee, and-

(i) the creditor has, more than thirty days previously, served on the company a written demand requiring the company to pay the amount due; and

(ii) the company has failed to pay the sum or to secure or compound it to the reasonable satisfaction of the creditor;

(b) 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) the company is unable to pay its debts as they fall due.

(4) *The Court shall, in determining whether a company is unable to pay its debts, take into account the contingent and prospective liabilities of the company.*” (Emphasis added)

3.11 In *Anderson Mazoka & Ors v Levy Mwanawasa & Ors*⁵ the Supreme Court guided as follows in terms of interpretation of legislative provisions -

“It is trite law that the primary rule of interpretation is that words should be given their ordinary grammatical and natural meaning. It is only if there is ambiguity in the natural meaning of the words and the intention of the legislature cannot be ascertained from the words used by the legislature that recourse can be had to the other principles of interpretation...” (Emphasis added)

3.12 Applying the aforesaid principles, my interpretation of s. 57 (3) of the **Corporate Insolvency Act** is that (a) and (c) thereunder relate to a debt that has not been endorsed by the the adjudicative system of the Courts while (b) relates to a debt that has crystallised into a judgment debt.

3.13 Thus where a debt has graduated into a judgment debt, a would be petitioner must adhere to the requirement under s.57(3)(b) of the **Corporate Insolvency Act** to exhaust the enforcement mechanisms available for realising the judgment debt, which if unsuccessful can be grounds for a winding-up petition.

3.14 In the case before Court, there is no record that the Petitioner (as judgment creditor in cause 2021/HPC/0613) followed through with its threat of execution against the Respondent.

3.15 Further, the fact that there is a pending application for payment in instalments and a subsisting stay of execution means that the process of execution would logically follow (if necessary) after the ongoing post judgment business is concluded. Accordingly, this winding up petition is premature.

4 CONCLUSION AND ORDERS

4.1 Under the **Corporate Insolvency Act**, a winding up petition on grounds of inability to pay may (in a manner of speaking) be made by two categories of creditors:

- (i) creditors whose debt has not been endorsed by a Court of competent jurisdiction (s. 57(3)(a) and (c); and
- (ii) judgment creditors (s.57(3)(b).

4.2 Where the intending Petitioner is a judgment creditor, he must first exhaust the processes of execution available in the cause where the judgment (or payment order) was entered before resorting to a winding up petition under the **Corporate Insolvency Act**.

4.3 Any resultant petition must state and exhibit proof that execution was attempted but unsuccessful (partially or wholly) in realising the judgment debt.

- 4.4 A winding up petition brought by a judgment creditor before such execution is levied is premature and liable to be dismissed by the Court (on its own volition or upon application).
- 4.5 The Petitioner herein having failed to heed the above, before commencement of this action, renders the petition premature and it is hereby dismissed.
- 4.6 With the substantive matter at an end it is otiose to hear the interlocutory application for appointment of a provisional liquidator.
- 4.7 Given that the petition was precipitated by the neglect of the Respondent to settle the judgment debt and also that the termination was on a point of law from the Bench, it would be fair and just for each party to bear its own costs. So I order.

Dated at Lusaka this ^{12th} ----- day of ^{May} ----- 2022.


K. CHENDA
Judge of the High Court