THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA
[COMMERCIAL DIVISION]

COMPANY CAUSE NO. 07 OF 2021

IN THE MATTER OF AFRICELL UGANDA LIMITED

AND

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

BETWEEN

THE OFFICIAL RECEIVER::PETITIONER

AND

AFRICELL UGANDA LIMITED:::::::::::::::::::::::::::::::::: RESPONDENT

BEFORE: HON. LADY JUSTICE ANNA B. MUGENYI

RULING

The Petitioner filed this Petition under Sections 57 (a), 91, 92, 93 (2) and 254 of the Insolvency Act No. 14 of 2011, and Rules 85 and 86 of the Insolvency Regulations 2013 seeking for a winding up Order against the Respondent, an order for appointment of a Liquidator, and for costs of the Petition.

The Petition was supported by the affidavit sworn by Mustapher Ntale, the Director Insolvency and Receivership, raising the following grounds:

That the Respondent is a limited liability company incorporated in Uganda to carry on the business of telecommunications. That at the time of filing this Petition, it had nominal share capital of UGX 262,934,860,000/. That on the 9th day of

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September 2021, the Respondent published a notice in the Daily Monitor Newspaper that it would close its operations in Uganda by 7th October 2021. That the Petitioner noted that the Respondent had not commenced the formal process of winding up by lodging the relevant documentation with the Registrar of Companies, therefore on 21st September 2021, the Petitioner invited the Respondent to a meeting to discuss their exit strategy.

That at the meeting of 23rd September, the Respondent assured the Petitioner that it was solvent and was in the process of settling all its liabilities and terminating all its contracts. That they also promised to lodge its documentation for winding up. That on 7th October 2021, Bank of Uganda notified the public that that the Respondent would cease offering mobile money services. On 15th October 2021, the Petitioner received a letter from Nangwala, Rezida and Company Advocates raising concerns on the availability of funds on the Respondent's accounts and seeking for an update on the steps taken to safeguard the interests of creditors.

That they also drew their attention to a letter from Bowmans highlighting the Respondent's disregard for a Court Order in Miscellaneous Application No. 1226 of 2021 where Court ordered for the freezing of funds on the Respondent's accounts but that on 7th October 2021, with intent to defeat the Court order, the Respondent had transferred USD 272,000 from the account held with Citi Bank, leaving a balance of USD 2,400. That it is in the interests of justice that all company creditors that this Court makes a winding up order against the Respondent.

The Respondent filed their Reply to the Petition supported by an affidavit in support sworn by Houssam Jaber, the Chief Executive Officer of the Respondent Company wherein he admitted to the fact that the Respondent was a Defendant in Civil Suit No. 382 of 2016 Fontana Auto parts (U) Ltd V Africell (U) Ltd where that debt claimed of UGX 200,000,000/ is a contingent and contested debt that cannot be used to ignite insolvency claims. That upon being issued with an order to provide security for costs in that matter, the Respondent provide a bank guarantee of UGX 200,000,000/ on 5th November 2021.

He added that the Respondent is a solvent company with the ability to pay its debts and is not aware of any creditor at the risk of being prejudiced by its exit from the telecom market in Uganda, and that it is conducting its exit according to the guidelines and requirements set down by Uganda Communications Commission. They therefore prayed that the Petition be dismissed with costs, for having no merit.

REPRESENTATION

The Petitioner was represented by the Legal Department of the Uganda Registration Services Bureau whereas the Respondent was represented by KTA Advocates.

RULING

The Issues for determination by this Court are:

1. **Whether the Petitioner has grounds for an order for insolvency.**
2. **What are the available remedies?**

Issue 1:

Whether the Petitioner has grounds for an order for insolvency

It was submitted for the Petitioner that since the Respondent issued public notices to wind up their business and there is no record of a formal application for winding up yet they had requested for time to do so, they be compelled to commence the

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proper winding up process as provided for under the law. Counsel added that if it is solvent, it should proceed under the Companies Act and that they do not deny in their pleadings that they are closing business in Uganda.

In reply, Counsel for the Respondent submitted that this Petition was brought under the Insolvency Act and therefore that Court must be satisfied that there is inability to pay debt which is defined in Section 3 of the Act. He added that the grounds under that section do not exist in this case therefore that this Petition cannot pass on that ground alone. He further submitted that it is the Respondent's right to cease carrying on business and that the time when it shall wind up is also the Respondent's preserve as long as it continues existing and it meets all the other legal requirements. He concluded that the Petition must fail as there is no creditor with a contingent debt or any complaint of an unsatisfied debt before the Petitioner.

In rejoinder, Counsel for the Petitioner submitted that at the time the Petition was filed, the Petitioner had a complaints of monies yet to be paid but that the Respondent settled that creditor as the Petition went ahead. However, he added that insolvency proceedings are not meant to benefit only one person, therefore, that they still seek the Court's indulgence for the Respondent to follow the proper procedure for winding up business in Uganda as they were dealing in communication business which is of public interest dealing with many clients.

I have carefully looked at the submissions and authorities presented by both Counsel. Under ***Section 57 (a) of the Insolvency Act***, it is true that liquidation of a company may be by the Court. Specifically, under ***Section 92 (1) (f) of the Act*** the Court may appoint a liquidator on the application of the official receiver. Sub-section (2) thereof provides:

"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 3."

From the above, the Court must be satisfied that a Company is unable to pay its debts before making the order. Inability to pay debts is explained under ***Section 3 of the Act*** as follows:

"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 the possession or control of a receiver or some other person enforcing a charge over that property."

Whereas none of the circumstances of this case discloses any of the grounds stated in Section 3 (1) above, sub-section 3 provides that nothing prevents proof of inability to pay debts by other means.

In this case, the Petitioner in paragraph 12 of the Petition and paragraphs 15 and 16 of the Affidavit in support, stated that they received a letter from Nangwala, Rezida and Co. Advocates raising concerns about the availability of funds on the accounts of the Respondent after they had proceeded to transfer USD 272,000 from its Citi Bank account leaving only a balance of USD 2,400, the same day that Court had ordered for the freezing of all its accounts.

However, during the hearing, Counsel for the Petitioner admitted that they had a complaint from one creditor at the time of filing the suit and that when they went to garnishee the accounts of the company, they found when the company had transferred all the monies to an unknown destination but that after this application was filed, the Respondent paid the outstanding money to the complainant. Whereas, Counsel added that this Petition would serve in public interest for other creditors, I find that the Petitioner did not produce proof of any existent debts, hence no grounds for the grant of the Order. This Court cannot, therefore, appoint a liquidator under Section 92 (2) of the Insolvency Act.

In the premises, I find that this Petition has no merit and is hereby dismissed.

No order as to costs.

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HON. LADY JUSTICE ANNA B. MUGENYI

DATED:5/12/2023