

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

IN BANKRUPTCY

BANKRUPTCY CAUSE NO. 25 OF 2001

RE JOHN SOTIRIS DEMETRIOU (JUDGMENT DEBTOR)

Ex Parte KYNOCH OPTICHEM (MALAWI) LIMITED (LIQUIDATION)
(JUDGMENT CREDITOR)

BETWEEN:

KYNOCH OPTICHEM (MALAWI) LIMITED.....PETITIONER
(IN LIQUIDATION)

-and-

JOHN SORITIS DEMETRIOU.....RESPONDENT

CORAM: TEMBO, J

Msowoya, of Counsel for the Petitioner

Mbendera, of Counsel for the Respondent

Jere, Court Clerk

Tembo, J. This is a creditor's bankruptcy petition issued by Kynoch Optichem (Malawi) Limited against its debtor, Mr. John Sotiris Demetriou, in this ruling referred to as the Petitioner and Respondent, respectively. By this petition, the Petitioner is seeking a receiving order to be made by the court in respect of the estate of the Respondent. The Petition is verified by the affidavit of Johaan Hendrick Heyns, a duly appointed agent for the Petitioner. The Respondent has filed notice to oppose the petition.

When the matter was called for hearing, Mr. Mbendera raised a preliminary objection to the petition. In the main, Mr. Mbendera has argued that the petition had been issued out of time prescribed therefor under s.6(1)(c) of the Bankruptcy Act (hereinafter referred to as the Act); that a court order purportedly enlarging the time within which the Petitioner would have done so, under rule 315 of the Bankruptcy Rules, was void in that the court has no jurisdiction to extend the time prescribed under s.6(1)(c) of the Act, within which a petition ought to be issued upon a respondent committing the alleged act of bankruptcy.

Mr. Mbendera further contends that the petitioner's assertion that the Respondent had in fact made and filed in the court a declaration of his inability to pay his debts, as envisaged under s.3(1)(f), of the Act, by the mere fact that the Respondent had made a statement to that effect in an affidavit sworn by him in support of his application to pay the judgment debt by instalment, was misconceived. Finally, Mr. Mbendera contends that a declaration envisaged under s.3 (1)(f) of the Act ought to be made in compliance with rule 98 and Form 2 of the Bankruptcy Rules, and in the view of Mr. Mbendera a statement in an affidavit meant for supporting an application to pay a judgment debt by instalment cannot be said to constitute a declaration made in compliance with rule 98 and Form 2 in question. In the circumstances, Mr. Mbendera submits that the court should, without any further hearing, dismiss the petition.

In response to the foregoing objection, Mr. Msowoya, for the Petitioner, vehemently argued to the contrary and as follows: What does justice require the court to do in the circumstances set out in the petition; that the petition asserts that the Respondent has not yet paid up the judgment debt; and that the Petitioner is not able to pay up his judgment debt even today.

In the view of Mr. Msowoya, the statement by the Respondent in the affidavit the Respondent filed in support of his application to pay the judgment debt by instalment suffices for the purposes of s.3(1)(f) of the Act and rule 98 and Form 2 of the Bankruptcy Rules, especially in the light of the fact that the Respondent has not yet paid up the judgment debt. Yes, that such is the position in that the same was made and witnessed on oath as required by rule 98. As for Form 2, it is the contention of Mr. Msowoya that the same ought not unduly to constrain the court in its determination as to whether the

Respondent has indeed made a declaration of his inability to pay debts as envisaged under s.3(1)(f), of the Act. That as a matter of fact, rule 314 clearly provides that non-compliance with any of these Rules shall not render any proceeding void unless the court so directs.

Mr. Msowoya also maintains that the order for the extension of time is valid until set aside or quashed by the court. In that respect, Mr. Msowoya maintains that the court has jurisdiction under rule 315 to extend the time during which a Petitioner may present his petition pursuant to s.3(1)(f), of the Act.

Mr. Msowoya, therefore, prays that the court should dismiss the objection raised; and thereupon allow the petition to be determined by granting that a receiving order be made for the regulation and protection of the estate of the Respondent.

To begin with it is expedient to point out that, in the view of the court, the operative and applicable provisions of the law for the determination of Mr. Mbendera's preliminary objective are s.3(1)(f) and 6 (1)(c) of the Act and as these are read together with rules 98, 314 and 315 of the Bankruptcy Rules.

To that end, let it be noted that ss.3 (1) (f) and 6 (1) (c) of the Act expressly provide that a debtor commits an act of bankruptcy where he files in court a declaration of his inability to pay his debts or presents a bankruptcy petition against himself. And in that respect, a creditor shall not be entitled to present a bankruptcy petition against a debtor unless the act of bankruptcy on which the petition is grounded has occurred within three months before the presentation of the petition. Rule 98 and Form 2 of the Bankruptcy rules make provision as to the manner and form in which a declaration envisaged by s.3 (1) (f) of the Act ought to be made.

It is the considered view of the court that the law on this point had intended that a judgment debtor wishing to do so, ought to voluntarily make the declaration and to expressly intend it to be used for the purposes of s.3 (1) (f) of the Act. This is why Rule 98 and Form 2 are quite clear in that respect. The fact, therefore, that a judgment debtor has made such a declaration ought not to be inferred from statements made and meant for proceedings other than bankruptcy proceedings.

In the instant case it is submitted that a bankruptcy act be inferred from the Respondent's statement in an affidavit in support for an application to pay a judgment debt by instalment. It is trite law that the party seeking an order of the court, in that regard, sanctioning payment of a judgment debt by instalment ought to make a full disclosure of his financial affairs, thus his assets and liabilities. The intention being that the court considering the application therefor ought to make an appropriate order which does not prejudice the interests of the parties; that where the disclosure shows that the applicant has adequate means or resources to meet his obligations under a judgment, the court

would decline to grant the prayer to pay debt by instalment. On the other hand, where it is clear from the disclosure that the applicant would indeed only make it upon being allowed to do so, the court thereupon makes an order allowing the application to pay the debt by instalments. There is no denying the fact that there are no other motives or purposes for that law. So, it is idle for anyone to attempt to constitute any statement in an affidavit meant for that purpose as a declaration of a debtor's inability to pay a judgment debt, under s.3 (1) (f) of the Act.

Besides the foregoing, where an act of bankruptcy has in fact been committed, there is a duty on the Petitioner to present his petition within three months of the date of that act. A reading of the Act as a whole does not imply any right on the part of the court to have the limitation as to time to be relaxed. Rule 315 when read carefully does not extend its application to the extension of the period within which a petition has to be presented upon an act of bankruptcy taking place. It is in that respect interesting to note that the limitation of the period in that regard is expressly prescribed in the Act itself, thus s. 6 (1) (c). On the other hand Rule 315 allows the court power to extend or abridge anytime appointed by the rules or fixed by any order of the court for doing any act or taking any proceedings. It is the considered view of the court that if any enlargement or restriction of the period prescribed under s. 6 (1) (c) of the Act, were ever intended, provision to that effect would expressly have been made in the Act itself and not in the Rules. If indeed the rules had ever made provision to that effect, such provision would have expressly said so. Nothing of the sort has been prescribed. In the circumstances, the order purportedly extending time prescribed under s.6 (1) (c) of the Act made pursuant to an application under Rule 315, is void **ab initio**.

In the circumstances, the court would accept the preliminary objection by Mr. Mbendera. Be that as it may, the Petitioner is at liberty to proceed against the Respondent anew on the basis of other alleged acts of bankruptcy, including the one under s. 3 (1) (f) of the Act. The petition dismissed accordingly.

Costs for the Respondent.

Made in Chambers this 11th day of December, 2001, at Blantyre.

A.K. Tembo

JUDGE