

**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
MISCELLANEOUS CIVIL CAUSE NO. 62 OF 2004**

- and -

MISCELLANEOUS CIVIL CAUSE NO. 63 OF 2004

- and -

MISCELLANEOUS CIVIL CAUSE NO. 114 OF 2004

- and -

MISCELLANEOUS CIVIL CAUSE NO. 134 OF 2004

- and -

IN THE MATTER OF KATUNDU HAULAGE LIMITED

- and -

IN THE MATTER OF CANE PRODUCTS LIMITED

CORAM: CHIMASULA PHIRI J.

Njobvu of Counsel for the petitioners

C. C. Mhango of Counsel for the respondents

Mrs Malani – official interpreter.

RULING

Chimasula Phiri J,

This is an appeal by the petitioners against the order of the Assistant Registrar made on 10th May 2005 ordering consolidation of the petitions.

Appeals to a judge in chambers are by way of rehearing. In arguing this appeal, Mr Njobvu submitted that there are 4 petitions for winding up by various companies – namely PGI Ltd, Finance Bank Limited and Skylinks Travel Bureau. The Finance Bank Limited commenced two petitions, one against Cane Products Limited and the other against Katundu Haulage Limited. He stated that the respondents made a part-payment to PGI Ltd and Finance Bank Ltd but nothing was paid to Skylinks Travel Bureau. The part-payments were made after the petitions had already been presented in court.

Mr Njobvu has argued that the summons for consolidation were taken out in January 2005 on the basis that the petitions were not brought up in good faith and are tainted with malice. He has contended that the Assistant Registrar ordered a consolidation of the petitions on the basis that there is a common question of fact in all the petitions, namely whether the respondents have failed to repay the debts and secondly the court will have to determine the existence of malice in the cases matters involving **PGI Ltd** and **Skylinks Travel Bureau**. My Njobvu has submitted that the transactions giving rise to the 4 petitions are different and it was wrong to consolidate them. Further, Mt Njobvu has argued that since no part-payment was made in **Skylinks Travel Bureau** matter, a consolidation is detrimental i.e. the respondent is employing a delaying tactic as against the petitioner. Lastly, Mr Njobvu has argued that the issue of malice was not substantiated by the respondents. He prayed that the petitions be deconsolidated so that each petition is held separately.

Mr Mhango argued that these petitions are presented by the same legal house and the normal procedure is that once a petition is presented the other creditors would be joined to support the petition but not commence other fresh petitions.

Mr Mhango has argued further that the consolidation saves time as well as costs. He submitted that the 2 petitions presented by Finance Bank Limited against Cane Products Limited and Katundu Haulage Limited arise from one transaction.

Mr Mhango has further contended that in the cases of **PGI Ltd** and **Skylinks Travel Bureau**, the respondents have raised issue of malice and that this can be articulated once and for all in one trial. In addition, a winding up petition seeks equitable remedy and as such, the respondents would contend that the petitioners are not coming to court with clean hands. Mr Mhango submitted that there is no merit in questioning the Assistant Registrar's Ruling. There would be no frustration of the petitioners' interests as the matters would be speedily disposed of by a single judge in a day hence no delay.

Mr Njobvu made a reply to the effect that there are different defences raised in these petitions hence prejudice and embarrassment would occur in a consolidated hearing. Furthermore, the petitioners are seeking a legal remedy and not an equitable remedy hence the issue of clean hands does not exist.

I have carefully considered the above arguments. I have looked at the Summons to consolidate the petitions to wind up. There is an affidavit in support thereof sworn by Mr Mhango. I have not been able to see any affidavit in opposition in the 4 case files. Basically, it means that in so far as the facts are concerned from the affidavit there is no challenge and must be admitted as unchallenged evidence.

The petitioners cannot be heard arguing against the consolidation of the matter involving the **Finance Bank Limited** because even in the notice of appeal the petitioners prayed for variation that the petitions in Miscellaneous Civil Case Numbers 62 and 63 of 2004 be consolidated. In so far as these petitions are concerned, there is no merit in the appeal.

I will now consider the issue of malice. The affidavit in support of the summons in paragraphs 10, 11 and 12 clearly sets up defence of malice on the part of **PGI Limited, Skylinks Travel Bureau and Presscane Limited** respectively. This has not been challenged by any affidavit in opposition by the petitioners. The petitioners cannot at this stage be allowed to challenge the issue of malice raised by the respondents because this was clearly raised in the affidavit in support of the summons. The only issue I can entertain is whether the petitions seek legal remedy only or equitable remedy as well.

The court has power to order the compulsory winding up of a company: see Section 204(1)(a) of the Companies Act (“the Act”).

A company may be wound up under an order of the court on the petition of any creditor of the company: See Section 212(1)(b) of the Act.

The court may order the winding up of a company if the company is unable to pay its debts: See Section 213(1)(d) of the Act.

A company is deemed to be unable to pay its debts if a creditor to whom the company is indebted in a sum exceeding K100 then due has served on the company a written demand under his hand requiring the company to pay the sum so due, and the company has for 21 days thereafter neglected to pay the sum or to secure or compound it to the reasonable satisfaction of the creditor: See Section 213(3)(a) of the Act.

A company is deemed to be unable to pay its debts if it is proved to the satisfaction of the court that the company is unable to pay its debts: See Section 213(3)(c) of the Act.

The fact that the petitioner has made repeated application for payment, and that the company has neglected to pay, affords cogent evidence that it is unable to pay its

debts: See Palmer's Company Law (London: Stevens & Sons Limited, 1968) 21st Edition, at page 738.

A petitioning creditor who cannot get paid a sum presently payable has, as against the company, a right, *ex debito justitiae*, to a winding up order. *Re Western of Canada Oil Co* (1873) LR 17 Eq 1; *Re Amalgamated Properties of Rhodesia (1913) Limited* [1917] 23 Ch D 210.

The views I have are that the petitioners are seeking a legal remedy. However, the respondents have clearly demonstrated that the legal remedy sought has an overlapping effect of swallowing an equitable remedy which the respondents would avail themselves at the trial. This equitable factor exists in both the **PGI Ltd** case as well as the **Skylinks Travel Bureau** in that there is subtle way in which the petitioners would wish to eliminate Cane Products Limited as claimants by seeking their winding up.

I wish to agree with the findings of the Assistant Registrar that the consolidation was in line with Order 4 Rule 9 of the Rules of the Supreme Court. I find no fault with the order of the Assistant Registrar made on 10th May 2005 and I uphold it. The appeal is dismissed with costs.

MADE in chambers this 2nd day of December 2005.

Chimasula Phiri

JUDGE