

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)

Winding Up Cause 12 of 1986

In The Matter of Plastic Products (K) Ltd and In The Matter of The Companies Act,

CAP 486

Judgment.

By a petition presented in court on 14th May, 1996, Mepal Plastics Kenya Limited, seeks a winding up order against Plastics Products (K) Ltd. (hereinafter called "the company") on the grounds that the company is insolvent and unable to pay its debts and that it is just and equitable that the company should be wound up. The petition alleges that the company was indebted to the petitioner in the sum of Shs 5,242,745/= being the balance of the amount due for goods sold and delivered by the petitioner to the company and unpaid bills of Exchange particulars of which were well within the knowledge of the company. The petition further alleges that a statutory notice in terms of section 220(a) of the Companies Act demanding payment within three weeks was served on the company on the 20th March, 1996 and that more than three weeks had passed since that demand and the company had neglected to pay or satisfy the said sum in whole or in part or to make any offer to the petitioner to secure or compound the same. The petition was duly verified by an affidavit of a Director of the petitioner.

The company filed a replying affidavit on 12th June 1996. That affidavit was sworn by A.N. Kilonzo, the Company's General Manager. The essence of the reply is that the company was not indebted to the petitioner as claimed and that there was a serious dispute as to the exact principal amount and interest owed by the company to the petitioner and accordingly the petition should be rejected. The company concurrently with that reply filed an application seeking orders to prohibit the company from advertising the petition and the removal of the petition from the file of the proceedings or in the alternative that the petition be stayed or struck out. That applicant was essentially on the basis that the debt claimed was in the dispute and it was an abuse of the process of the court to petition for winding up in those circumstances. By 18th July 1996 when the application came before me for hearing the petition had been advertised and the petitioner had satisfied the Registrar that it had complied with the winding up Rules as it was required to do by Rule 28 of the Companies (Winding Up) Rules. Mr Kabaka, the petitioner's advocate, in the circumstances abandoned the first prayer in the application. I heard argument on the other prayers and on the authority of RETWEEDS GARAGES LTD [1962] 1 All E.R. 121. I dismissed the application on the grounds that as long as the petitioner was a creditor for a sum which would otherwise entitle him to a winding up order a dispute as to the precise amount owed is not a sufficient answer to a Winding UP Petition and in the premises the petition was not an abuse of the process of the court. I further stated that only a bonafide dispute as to the entire amount demanded in a notice to pay would provide such an answer.

The petition itself was heard before me on 6th November, 1996. It was common ground that after my dismissal of the application to remove the petition from the proceedings or stay or strike out the same, the company came along and paid the entire principal amount owed to the petitioner. The only unpaid claim was in respect to interest demanded. Mr Kibaki impressed on me that it would be unjust and inequitable to make a winding up order in those circumstances particularly as the reason for the non payment of interest was that it is disputed. Mr Lepelley, advocate for the petitioner, submitted that as there was no question but that interest is payable on dishonoured bills of Exchange and the Petitioner had not tendered any amount in respect thereof I should make the order and suspend its operation if I felt that it would be in the interest of justice so to do, in order to enable the company to pay the interest.

I have considered those submissions. In view of the Company's payment of the principal amount in the

course of these proceedings and in view of the fact that the interest being claimed is highly disputed on the grounds inter alia that the rates on which it is applied are arbitrary, I am unable to find that the otherwise entitle him to a winding up order a dispute as to the precise amount owed is not a sufficient answer to a Winding Up Petition and in the premises the petition was not an abuse of the process of the court. I further stated that only a bonafide dispute as to the entire amount demanded in a notice to pay would provide such an answer.

The petition itself was heard before me on 6th November, 1996. It was common ground that after my dismissal of the application to remove the petition from the proceedings or stay or strike out the same, the company came along and paid the entire principal amount owed to the petitioner. The only unpaid claim was in respect to interest demanded. Mr Kabaka impressed on me that it would be unjust and inequitable to make a winding up order in those particularly as the reason for the non payment of interest was that it is disputed. Mr Lepelley, advocate for the petitioner, submitted that as there was no question but that interest is payable on dishonoured bills of Exchange and the Petitioner had not tendered any amount in respect thereof I should make the order and suspend its operation if I felt that it would be in the interests of justice so to do, in order to enable the company to pay the interest.

I have considered those submissions. In view of the company's payment of the principal amount in the course of these proceedings and in view of the fact that the interest being claimed is highly disputed on the grounds inter alia that the rates on which it is applied are arbitrary, I am unable to find that the company is insolvent and unable to pay its debts, or that it is otherwise just and equitable to wind it up. I accordingly dismiss the petition. However, as the principal amount was only paid after the presentation of the petition, I order that the company will pay the cost of and incidental to the petition.

November 25, 1996

Ringera, J