Shah v Gadhoke; SMP Capital Limited (Creditor) (Insolvency Cause E017 of 2021) [2023] KEHC 25088 (KLR) (Commercial and Tax) (10 November 2023) (Ruling)

Neutral citation: [2023] KEHC 25088 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

INSOLVENCY CAUSE E017 OF 2021

A MABEYA, J

NOVEMBER 10, 2023

BETWEEN

SUNIL M SHAH ..... APPLICANT

AND

HARVEEN GADHOKE ..... RESPONDENT

AND

SMP CAPITAL LIMITED ..... CREDITOR

RULING

1. Before Court is the application dated 14/3/2022 brought under Article 50(1), 159(2)(d) of the *Constitution of Kenya*, Section 605, 522,566, 604, 607, 611, 623, 692(2) of the *Insolvency Act* 2015, Regulation 10, 110, 111, 113 and 125 of the *Insolvency Act Regulations*.

2. The application seeks the removal of Harveen Gadhoke as the administrator of Malplast Industries Limited ("the Company") and for a declaration that he has contravened section 566(7) of the *Insolvency Act*. That consequently, the Court appoints the Official Receiver as the Administrator of the company.

3. In support of the application, the applicant relied on the grounds on the face of it and on the supporting affidavit sworn by the director of Malplast Industries Limited Dhrupun Sudhir Shah dated 14/3/2022. The applicant's case was that the administrator was appointed by Victoria Commercial Bank on 7/5/2021. He issued a statement of proposal on 7/8/2021 proposing the liquidation of the Company. That he refused to convene a creditor's meeting despite being informed by the creditors to do so.

4. Further, that he failed to revise his statement of proposal to conform to the legally prescribed format. It was contended that the administrator had initially stated that the creditors were 24 but the number

changed to 257 in the letter addressed to the Official Receiver. That any proposal from the suppliers for the purpose of increasing the company sales was not welcomed by the administrator and that he refused to provide information in support of his statement of proposal.

5. The applicant contended that the administrator was acting as a receiver manager which is contrary to the spirit of administration. That he was unable to perform his functions and maintain the objectives of administration. That it is therefore necessary to remove him to ensure the company is maintained as a going concern.

6. The administrator, HARVEEN GADHOKE, opposed the application vide a replying affidavit dated 3/4/2022. He stated that the company was managed by its directors who were members of the same company. That when he requested for the statement of affairs, they provided an incomplete statement of affairs prepared in the wrong format.

7. That from that statement of affairs, he realized that it did not contain the estimated realizable value of assets neither was there any value of stock and debtors. That he was given a list of creditors which showed that the company had over 103 trade creditors which number increased to 257.

8. That he discovered that Cheyne Row Investments Limited was the only customer of company and that it was also a sister Company with common directors and shareholders. That all the company's business had been diverted to this sister company leaving its role only to production of finished goods. That the assets of the company were dilapidated leading to a significant decline in production capacity.

9. He further stated that he maintained 214 employees but the revenue collected from the company was only enough for payment of their salaries, repayment of Victoria Commercial Bank Overdraft and electricity. He admitted that he did not call for a creditors' meeting since the law provides that he need not do so if he is convinced that the objectives of insolvency would not be met.

10. The application was supported by SMP Capital Limited in a replying affidavit sworn on 18/4/2023 by MEHUL SHAH. He stated that SMP Capital Limited had advanced a facility of Kshs.20 million to the company. The same was secured by 16 motor vehicles but the company had defaulted in making payments.

11. He stated that he had availed proof of the debt to the administrator and requested him to convene a creditors' meeting but he failed to do so. The administrator maintained 214 employees which burdened the company more. That the process of administration was not likely to give results that is beneficial to the creditors and the court should therefore remove the administrator and appoint an interim liquidator.

12. The application was canvassed by way of written submissions which I have considered.

13. I have considered the rival contestations, the submissions and the authorities relied on. The main issue for determination is whether the applicant has made out a case for the removal of the administrator.

14. The ground advanced for the removal of the administrator is that he failed to convene a creditors' meeting when called upon to do so, had given false information on the number of creditors, failure to keep proper accounts and working for the benefit of only one creditor.

15. On his part, the administrator admitted that he did not call for a creditors' meeting because according to him, section 569(1)(c) of the *Insolvency Act* absolves him from doing so if he believes the objectives of administration could not be met.

16. Section 568 of the *Insolvency Act* ("the Act") requires that a creditors' meeting be convened within 70 days from the time the company enters administration. Section 569 of the Act gives instances when the administrator is not required to convene a meeting. It provides that: -

> "(1) Section 568(1) does not apply if the statement of proposals states that the administrator believes-
>
> (a) that the company has sufficient property to enable each creditor of the company to be paid in full;
>
> (b) that the company has insufficient property to enable a distribution to be made to unsecured creditors otherwise than in accordance with section 474(2)(a); or
>
> (c) that neither of the objectives specified in section 522(1)(a) and (b) can be achieved.
>
> (2) However, the administrator shall convene an initial creditors' meeting if requested to do so—
>
> (a) by creditors of the company holding debts amounting to at least ten percent of the total debts of the company; and
>
> (b) in the manner, and within the period, prescribed by the insolvency regulations for the purposes of this section.
>
> (3) The administrator shall convene a meeting requested under subsection (2) for a date within the period prescribed for the purpose of subsection (2)(b).
>
> (4) The period so prescribed can be varied in accordance with section 622.
>
> (5) An administrator who fails, without reasonable excuse, to comply with subsection (3) commits an offence and on conviction is liable to a fine not exceeding five hundred thousand shillings."

17. From the foregoing, it is clear that the administrator is not required to convene a meeting when he forms the opinion that a company is able to pay the creditors in full, or it has insufficient property to pay its creditors, or when he is convinced that the objectives of administration would not be met.

18. However, that discretion is overridden by section 569(2) which provides that despite the provision as to the necessity of not convening a meeting in the above instances, an administrator is nevertheless under a duty to convene an initial creditor's meeting if a request is made by creditors whose debt is more than 10%. In this regard, for the creditors to qualify to requisition the creditors' meeting in such circumstances, they should demonstrate to the administrator that they hold 10% of the debts of the company.

19. In the present case, there was no evidence to show that the requisition for the meeting was made by creditors holding 10% of the total debts of the company. Further, the requirement for security for the meeting was not met. I do not find any fault on the part of the administrator on this aspect.

20. On the conduct of the administrator in the administration, he averred that he was unable to keep the company as a going concern since the output of the company had reduced due to the dilapidation of the assets of the company. He faulted the directors for transferring the business of the company to its sister company which was its only customer.

21. According to him, the amount recovered from the company could only pay the employees, utilities such as electricity and Victoria Commercial Bank Overdraft.

22. In *Kimeto & Associates Advocates v KCB Bank Kenya Limited & 2 others* (Insolvency Petition E004 of 2019) [2021] eKLR, while considering removal of an Administrator, the court observed: -

> "When the Legislature enacted the *Insolvency Act*, 2015, it made it clear what the objectives of the Act are. They are clearly set out in section 522 of the Act. In this regard, all decisions made by the Insolvency Court as relates a company under administration must align to the said objectives. As a child is to a Family Court, so is a company under administration to the Insolvency Court; every decision must be made in the best interest of that company.... In this regard, an administrator must at all times align his decisions and actions with the best interest of the company. His duty and loyalty goes beyond the debenture holder who appoints him as such or as receiver. He must undertake his role in a manner that promotes the company as a going concern, where possible, to enable it repay off its debts and be discharged from administration and receivership."

23. The objectives of Administration are set out in section 522 of the *Insolvency Act* (the Act) as follows: -

> "
>
> "(1) The objectives of the administration of a company are the following:
>
> (a) to maintain the company as a going concern;
>
> (b) to achieve a better outcome for the company's creditors as a whole than would likely to be the case if the company were liquidated (without first being under administration);
>
> (c) to realize the property of the company in order to make a distribution to one or more secured or preferential creditors.
>
> (2) Subject to subsection (4), the administrator of a company shall perform the administrator's functions in the interests of the company's creditors as a whole.
>
> (3) The administrator shall perform the administrator's functions with the objective specified in subsection (1)(a) unless the administrator believes either —
>
> (a) that it is not reasonably practicable to achieve that objective; or
>
> (b) that the objective specified in subsection (1)(b) would achieve a better result for the company's creditors as a whole.
>
> ..."

24. In order to establish whether or not the conduct of the administrator warranted his removal, it is important to establish whether the objectives of administration are being met. In this case, according to the administrator's statement of proposal dated 5/8/2021, the company could not continue as a

going concern and therefore suggested that it should be liquidated. The administrator relied on the statement of affairs given by the company directors which showed that the total asset book value as at 31/5/2023 was Kshs. 397,972,944/- against the total liabilities of Kshs 2,260,696,530/-.

25. In *Re Nakumatt Holdings Limited* [2017] eKLR, it was held that: -

> " The Company is evidently unable to pay its debts. For all the reasons stated in this ruling, the Company, in my judgment, has however not shown to the required standard that an administration order is reasonably likely to achieve an objective of administration. I am not satisfied that this is a case for administration for the following additional reasons. The level of indebtedness may be beyond salvage and neither the company nor the administrator has taken the time to address this. Secondly, there has been a lack of candor on the part of the company which in my judgment appears to have been intended to only benefit the company, yet administration as a process ranks both the company and creditors in any rescue mission on equal footing".

26. In view of the foregoing, the court is of the view that 12 months have already lapsed since the appointment of the administrator. Nothing had been or can be done to aid in turning around the company. The company's liabilities far exceed the assets and the best recourse would be to liquidate the company.

27. In *Cape Holdings Limited (Under Administration) v Synergy Industrial Credit Limited; I&M Bank Limited (Creditor); Registrar of Companies (Interested Party)* (Insolvency Cause E049 of 2021) [2023], when the court found itself in a more or less same situation held that: -

> " The Court's finding is that it has not been demonstrated that the objectives of administration had been met or that the administrator is deserving the exercise of the Court's discretion to extend the term sought. An administrator ought to act in the best interest of the entire body of creditors, not just one of them. The Court is not convinced that the administration was serving the interests of all the creditors in this case. No evidence has been provided to show whether it is feasible and beneficial for CPL to continue as going concern. There has been no mention of how the administrator has secured funding from the proceeds of the company or how the statutory purpose of administration is to be met. The Court reiterates that there is absolutely no evidence of the administrator performing any administration work towards achieving the objectives of the Act after calling for the creditors meeting in early 2022."

28. In view of the forgoing, the Court finds that the applicants request for a new administrator is not merited. The evidence before Court is overwhelming that the company cannot be resuscitated and any attempt to extend the administration amounts to postponing the inevitable. The Court's view is that the creditors interests would be best addressed during liquidation of the company and not administration.

29. In the premises, the Court finds no merit in the application and dismisses the same with costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 10TH DAY OF NOVEMBER, 2023.

A. MABEYA, FCI Arb

JUDGE

3