

Judgment: Criminal and Civil aspects of Bankruptcy

El Ameir Noor

a.noor@tamimi.com

Zane Anani

z.anani@tamimi.com

The discussion also highlights the fact that the new law will help business confidence and financial restructuring. The current bankruptcy legislation (contained within Book Five of the Commercial Transactions Law No. 18 of 1993) has not been tested much in the courts and the judgment discussed below dates from 1997. However, this judgment gives us an example as to how the UAE courts decided a case where the trader/claimant applied for voluntary bankruptcy.

In summary:

1. Bankruptcy rules form part of public policy due to their connection to the UAE's credit system. As a result, the fact that bankruptcy rules form part of public policy means that bankruptcy provisions in the Commercial Transactions Law apply notwithstanding the fact that the case was filed in 1991 before the Commercial Transactions Law of 1993 (the "CTL") came into force. This is because the legal consequences of the bankruptcy manifested after the CTL came into force and therefore the CTL automatically governs the proceedings. It is clear upon reviewing the court's decision that Article 645 of the CTL allows any trader, who ceases to pay his commercial debts when due, to be declared bankrupt on the basis that "it merely implements the prevailing commercial rules in comparative legislation that was in force prior to the Commercial Transactions Law."
2. The Court of Appeal in this case was correct when it declared the trader (who had ceased paying his commercial debts when they fell due) bankrupt;
3. The Criminal Court, not the Civil Court, has jurisdiction over an offence of negligent/contributory bankruptcy which is a criminal offence pursuant to articles 418 and 419 of the Federal Penal Code. In this case the Civil Courts could entertain the civil case only and looked into whether or not the requirements of bankruptcy were met in the Claimant's (the trader's) case. Even if the trader was contributory negligent, the civil court can not adjudicate the matter as this falls under the jurisdiction of the criminal court.

The Claim:

The owner of a bakery (the Claimant) brought a civil action before the Abu Dhabi courts against a bank and others, seeking a declaration of her bankruptcy and an attachment order against the bakery's property. The intention being that the property would be subjected to an inventory count and then either placed under administration or sold and the proceeds distributed pro rata among the creditors according to their respective claims. The claim was made on the basis of her inability to pay the bakery's outstanding debts which became in excess of its assets.

Court of First Instance:

The Court of First Instance dismissed the case.

Court of Appeal

The Bakery Owner appealed before the Court of Appeal. On 26.06.96 the Court of Appeal quashed the Court of First Instance's decision and declared the Claimant bankrupt. The Court of Appeal requested the Execution Judge to distribute the proceeds from the sale of the bakery's assets among the creditors taking into account the provisions on secured claims and public and private preferential claims. The Bank appealed to the Supreme Court.

Supreme Court

1. The Bank argued that the Court of Appeal incorrectly applied the law by applying Article 645 of the CTL on the basis that the case was brought in 1991 while the law in question was issued in 1993.

The Supreme Court rejected the Bank's argument on the basis that bankruptcy rules, which promote good credit, are part of public policy, and the CTL automatically applies. As mentioned in the summary above, the legal consequences of the bankruptcy manifested after the CTL came into force and it is therefore irrelevant that the proceedings commenced in 1991.

2. The second argument made in the Bank's appeal is that the Court of Appeal neglected to consider that the Trader was bankrupt as a result of her contributory negligence; therefore she is criminally liable under the Penal Code. As a result, the Bank argued that the Civil Court should not have proceeded to adjudicate. Again, the Supreme Court rejected this decision on the basis that when a court has to consider a trader criminally liable for the crime of bankruptcy by contributory negligence, the criminal court must consider Articles 418 and 419 of the Penal code which exclusively sets out the instances in which a trader shall be considered bankrupt through negligence and the civil courts do not have jurisdiction to try a criminal offense for which it has no jurisdiction.

3. The Bank's third argument was that the Court of Appeal decision did not take into account the impact of the recession.

The Supreme Court rejected this argument. The requirement in Article 177-2 (sic) of the Civil Procedure Law that the statement of appeal to cassation include a statement of the grounds of appeal means that the grounds, according to the settled practice of this Court, be clearly stated and identified by unambiguous wording that explains the fault the appellant is attributing to the decision, his position, and the effect on the decision. The Bank had not disclosed its intentions in its previous arguments.

Based on the foregoing, the Bank's appeal was dismissed.