

THE REPUBLIC OF UGANDA

**IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)**

**MISCELLANEOUS APPLICATION NO.221 OF 2020
(ARISING OUT OF COMPANIES CAUSE NO.30 OF 2019)**

IN THE MATTER OF THE INSOLVENCY ACT, 2011

AND

IN THE MATTER OF UGANDA TELECOM LIMITED – IN ADMINISTRATION

AND

**IN THE MATTER OF AN APPLICATION BY RUTH SEBATINDIRA SC. AS
ADMINISTRATOR OF UGANDA TELECOM LTD FOR COURT’S DIRECTIONS IN THE
ASSESSMENT OF REMUNERATION OF THE ADMINISTRATOR**

BEFORE HON. JUSTICE SSEKAANA MUSA

RULING

This is an application by the Administrator of Uganda Telecom Limited, Mrs. Ruth Sebatindira SC, is brought under Section 173(1) of the Insolvency Act, 2011, and r.203 (1) of the Insolvency Regulations S.I 36 of 2013 seeking orders that: this Honourable Court fixes the remuneration of the Administrator; and that costs of this application be provided for.

Uganda Telecom Limited, hereinafter referred to as “the company”, was placed under Administration on 22nd May 2017 following the sanctioning of deed of administration vide Miscellaneous Cause No.173 of 2017. Consequently, the Official

Receiver of Uganda was appointed the Administrator of the company to oversee the implementation of the deed.

There was intense negative publicity that the administration attracted following endless disagreements between some stakeholders and the Official Receiver regarding the execution of his duties. Consequently, one of the company's creditors – Ms. Uganda Communications Employees' Contributory Pension Scheme (UCEPS) – commenced Misc. Cause 30 of 2019 to replace the Official Receiver with a one Mwasame Nicholas as Administrator. However, Court on its own volition appointed Ms. Ruth Sebatindira S.C was appointed as office holder on January 2nd 2020.

While the Administrator has diligently executed her duties under the deed and successfully stabilised a company in crisis at the time of her appointment, there is no provision for remuneration for the services she and her team have provided. The determination of this issue has now become critical as key strategies are currently being laid to bring closure to the administration.

The administrator was represented by *Mr. Kabiito Karamagi* and *Ms. Matovu Olivia* of Ligomarc Advocates

Issues:

What in the circumstances of this case is the reasonable remuneration for the Administrator?

The Administrator's counsel cited the law under which the application was brought as follows;

Section 171(1)(b) of the Insolvency Act, 2011 states that an Administrator is entitled to a remuneration fixed by the Court on application for taxation and assessment of costs and fees of the Administrator or Provisional Administrator, where no remuneration is agreed upon by the Creditors. As is the case, the Administrator's remuneration was not agreed upon by the creditors. In addition, there are no remuneration rules or regulations made under the Insolvency Act that provide a basis for taxation or assessment of fees.

Section 171(2)(a) of the Insolvency Act in particular states that on application by the Administrator, Court may at any stage of the administration fix the remuneration of

the Administrator at a level which is reasonable. However, the Act does not define what amounts to “reasonable remuneration”.

The Administrator therefore prays that this Court exercises its jurisdiction under **Sections 171 (1) (b), 173(1) and 254 of the Act** to answer the question above mindful that of the fact that this case presents a major milestone in the advancement of insolvency law in Uganda.

Time Rates vs Percentage Basis

The Administrator’s counsel submitted that our Insolvency Act and practice is adopted from the insolvency law in the United Kingdom, it follows that we examine practices developed there and their suitability for our jurisdiction. The case of **Brook vs Read [2012] 1 BCLC 379**, a case relating to a remuneration dispute arising out of the liquidation of a small flower shop, is instructive on the matter. The case gives a fair history of the development of officer older remuneration against a background of public concern as to the levels sometimes reached by office-holders' fees and remuneration, together with a public interest in seeing that office-holders' duties are competently and properly carried out.

The case ably demonstrates that the repealed insolvency regimes, like the subsisting Insolvency Act, provided for the determination of remuneration for an office holder on the basis of time rates, or a percentage of realizations and distributions. Court relied on an earlier case **In Re Carton Ltd (1923) 39 TLR 194**, which held thus to demonstrate when court would apply either method:

*"The Court as a general rule only fixes remuneration on a time-basis if there is no other method which would operate to give the liquidator fair remuneration. Experience has shown that the time occupied by a liquidator and his clerks affords a most unreliable test by which to measure the remuneration. Even the best accountant may spend hours over unproductive work, let alone his more or less efficient staff of clerks...**The Court has long since come to the conclusion that the proper method to adopt whenever it is practicable is to assess the remuneration according to the results attained.**"*

The Court in the Brook case also noted that although remuneration on the basis of a percentage of realizations and distributions had the merit of being a payment by

results, that basis has been criticized in cases of easily realized assets to disproportionately high remuneration, and in a complex case to poor recompense in relation to the amount of work involved.

The judgment **IN RE CAR REPLACEMENTS LIMITED (cited and relied on in IN THE MATTER OF MOULDPRO INTERNATRIONAL LIMITED – IN LIQUIDATION (2018) IECA 88)** was more critical of the time rate basis for providing little to encourage expedition in the office holder’s completion of his work. Seeming to seek a compromise, the Mouldpro International Limited – In Liquidation case used both the time rates and percentage basis. The continuing contention between these two options is reflection of an unresolved debate and Court appear to use either when they deem fit.

In the present case, we submit that S.171 (1) and (2) of the Act gives this Court the discretion to apply either of the options. However, as this Court will observe, Annexure ‘C’ proposes the use of percentage basis in the determination of the remuneration. Paragraphs 6 – 10 of the affidavit clearly demonstrate the reasons for this, including the intensity and complexity of the assignment which required a multidisciplinary team to handle the assignment.

The absence of standard/uniform rates makes the challenge even more profound. The time rate basis is also hard to quantify because of engagements that may be difficult or even impossible to justify. Such engagements could include off record meetings with key stakeholders (e.g. informers), payments for information, hours spent waiting for a key official (a politician, civil servant or even Court) to attend a scheduled meeting that the other party is late for, etc etc. In the face of such fluidity and considering the time invested in the conduct of this assignment, the application of time rates to meet the justifiable expectation of the professionals involved in the assignment is certain to lead to an exorbitant bill.

On the other hand, assessment of remuneration on percentage basis against agreed deliverables is a widespread and well-established custom as evidenced by probably all the remuneration regimes for professionals in Uganda. The basis brings predictability and certainty to all stakeholders, most importantly, it is remuneration for results attained.

Criteria used in the determination of administrator's remuneration

The Brook's case cites the Insolvency Rules of 1986 (as amended) to provide the following criteria for the determination of an office holders remuneration:

- a) the complexity (or otherwise) of the case,
- b) any respects in which, in connection with the administration of the estate, there falls on the insolvency practitioner (as trustee) any responsibility of an exceptional kind or degree,
- c) the effectiveness with which the insolvency practitioner appears to be carrying out, or to have carried out, his duties as trustee, and,
- d) the value and nature of the assets in the estate with which the trustee has to deal.

The case also relied on the **Practice Statement: The Fixing and Approval of the Remuneration of Appointees (2004) (The Practice Statement)**, which is akin to Practice Directions in our jurisdiction, whose objective is to ensure that the remuneration of an appointee which is fixed and approved by the court is ***fair, reasonable and commensurate with the nature and extent of the work properly undertaken by the appointee*** in any given case and is fixed and approved by reference to a process which is consistent and predictable. The key guiding principles under the Practice Statement are listed below.

- a) Justification** - It is for the appointee who seeks to be remunerated at a particular level and/or in a particular manner to justify his claim and in order to do so the appointee should be prepared to provide full particulars of the basis for and the nature of his claim for remuneration. This is particularly key because the Statement states precisely the evidence required to support a claim, which is not the case in our jurisdiction.
- b) The benefit of the doubt** - The corollary of the guiding principle above is that on any application for the fixing and approval of the remuneration of an appointee, ***if after considering the evidence before it and after having***

regard to the guiding principles on professional integrity there remains any element of doubt as to the appropriateness, fairness or reasonableness of the amount sought to be fixed and approved (whether arising from a lack of particularity as to the basis for and the nature of the appointee's claim to remuneration or otherwise) such element of doubt should be resolved by the court against the appointee.

- c) **Professional integrity** - The court should give weight to the fact that the appointee is a member of a regulated profession (where such is the case) and as such is subject to rules and guidance as to professional conduct and (where such is the case) the fact that the appointee is an officer of the court.
- d) **The value of the service rendered** - The remuneration of an appointee should reflect and should be fixed and approved so as to reward the value of the service rendered by the appointee, not simply to reimburse the appointee in respect of time expended and cost incurred.
- e) **Fair and reasonable** - The amount of the remuneration to be fixed and approved by the court should be fair and reasonable and represent fair and reasonable remuneration for the work properly undertaken or to be undertaken.
- f) **Proportionality** –
 - i) **Proportionality of information** - in considering the nature and extent of the information which should be provided by an appointee in respect of an application for the fixing and approval of his remuneration the court, the appointee and any other parties to the application shall have regard to what is proportionate by reference to the amount of remuneration to be fixed and approved, the nature, complexity and extent of the work to be completed (where the application relates to future remuneration) or that has been completed by the appointee and the value

and nature of the assets and liabilities with which the appointee will have to deal or has had to deal;

ii) Proportionality of remuneration - the amount of remuneration to be fixed and approved by the court should be proportional to the nature, complexity and extent of the work to be completed (where the application relates to future remuneration) or that has been completed by the appointee and the value and nature of the assets and/or potential assets and the liabilities and/or potential liabilities with which the appointee will have to deal or has had to deal, the nature and degree of the responsibility to which the appointee has been subject in any given case, the nature and extent of the risk (if any) assumed by the appointee and the efficiency (in respect of both time and cost) with which the appointee has completed the work undertaken;

Although the Mouldpro International case exclusively addressed time rate remuneration, the following principles applicable that it applied are equally important in the exercise of its discretion.

- a) **Fairness/Reasonable** – arguing that Court was not bound by scales of fees, although it is entitled to take them into account in the determination of fair remuneration.

- b) **Professionalism** – due regard should be given to the level of seniority and expertise of the office holder and the work and the importance/value of the work to the client.

It was their submission that the above guidelines provide a good basis for this Court to make a determination on the matter. It is not in contest that the administration of the company has had a long and chequered past of endless disagreements and stakeholder dissatisfaction. The complexity of this assignment is evidenced by the toxic negativity that characterised the administration for nearly two years pitting the different arms of government against each other forcing the intervention of the highest office in the land.

That the Administrator has since effectively stabilised the company's operations without a recorded incident since her appointment speaks to the effectiveness of the work done and the efforts and energies committed to attain this achievement.

As stated in paragraph 6 and 7, the Administrator had to constitute and deploy a team of multi-disciplinary professionals that effectively delivered on tasks broadly listed in annexure D. As also mentioned, the strategies laid could lead to the closure of the administration months ahead of the November deadline. In addition, the Administrator and her team have successfully conducted the following tasks imposed by Law and by the Administration Deed:

- a) Continued to trade in the short term to preserve value pending the development and implementation of a long-term sustainable business plan;
- b) Rationalized operational costs in an attempt to return the company to profitability;
- c) Engaged Ministry of Finance and obtained a firm commitment that outstanding amounts due to the company from the Government/Government departments will be paid in the coming financial year;

The Administrator's counsel submitted that, the responsibility given to the Administrator under this assignment was highly usual. As the first administration case in Uganda and a recorded history of stakeholder disagreements, the Administrator had the unenviable position of correcting what had already gone wrong without the benefit of precedent. Her responsibility over Uganda's oldest telephone network required that she ensured continuous availability service on a 24/7 basis against aggressive and far more resourced competition. This task has been made all the more difficult because of the fast paced changes in the telecom industry while the company continues to operate on a negative balance sheet.

With prime assets that are a target of land grabbers and a network reach (masts and base stations) spread across the country, this administration has been far from a

mere armchair job. That the Government of Uganda, a dominant stakeholder with a kin attachment to UTL, has openly expressed its preference for the couple's resuscitation against all odds has made this responsibility even heavier. As a perceived national asset, UTL is an invaluable brand to Ugandans which leaves little room for the administrator to make any error.

Lastly, the Administrator was appointed by Court on its own volition after due consideration of the expertise and professional reputation of her law firm in restructuring of debts and insolvent entities. The Administrator is a ranked Advocate of this Honourable Court and, because of the weight of responsibility placed on her by this Court, has had to deploy all her seven partners and associate partners on this assignment.

Justification for the proposed Schedule of Fees - Annexure C

The Administrator's counsel proposed a schedule of fees, Annexure C, that places an upper limit of 15% against any realisations and distributions. The rates are also phased out against three deliverables at the rate of 5% each so that the 15% is only payable cumulatively against each milestone realised.

It was their contention that this rate is fair considering the factors discussed above. The proposed rates are generous considering that Advocates, for example, are entitled to charge 8% - 10% instructions fees on litigation that does not attract the kind of risk and responsibility the administration has to bear. The proposed rates are more than reasonable if viewed from the point that S.22 (8) of the Mortgage Act limits professional fees for realisation of mortgaged assets to 5%. It is also fair when viewed against the Australian case of **AAA Financial Intelligence Ltd – Liquidation (NO.2) 2014 NSWSC 106** where Court fixed remuneration of the office holder to 20%. In *Independent Contractor Services Pty Ltd (NO.2 2016 NSWSC 106)*, remuneration was allowed at nearly 16% of the distribution.

Determination

This court appointed the present administrator in order to address the national concern and avoid the squabbles that were going on between the official receiver who was in charge of the company and other interested parties (Government).

The court at the time of appointment did not consult the creditors or stakeholders since there was an urgent need to resolve the impasse and in the same vein did not fix any remuneration for the administrator who immediately started work in accordance with the appointment.

This application has been filed in a timely manner after the administrator has done most of the work required and been able to assess the magnitude and complexities involved in the administration. It is indeed a novel area which has not been experienced before and there is no legislation giving the basis of the manner in which the assessment of costs or legal fees would be made.

This court will draw guidance drawn from other common law jurisdictions in order to arrive at what would be a fair and reasonable remuneration for the administrator.

The Administrator was appointed by this court to administer the Administration Deed executed by creditors of the company. The assignment required urgent need to stabilise the company operations by restoring public and stakeholders' confidence following several months of bickering between the Official receiver and some government officials.

The nature of work required the administrator to ensure continuity of the business in the short term to preserve the value of the company pending the implementation of a long term sustainable business plan and to source for an investor/business partner to recapitalise and operate business affairs of the company. This task required the administrator to undertake a comprehensive restructuring of the company.

The Administrator contends that because of the long history of the company's losses, undercapitalisation, underinvestment, the company has continued to record a month on month negative cash flow, and this has demanded from the team lined up by the Administrator to do extraordinary amounts of work and effort to restructure the company within tight schedules in order to protect value of the creditors.

The nature of work executed by the Administrator, has required of her office to constitute a multidisciplinary team of experienced professional comprising of engineers, Advocates, Accountants, financial analysts and all partners and associates of her firm to undertake the different tasks aimed at restructuring the company in a timely manner.

The restructuring work so far undertaken by the team, has required among other things; the conduct of legal, commercial and financial due diligence on the company affairs; the preparation of comprehensive business strategies and plans; raising capital for the company; the management of the operations of the company; the conduct of negotiations with potential partners, investors and stakeholders.

That owing to the complexity of the assignment placed on the Administrator and engagement of the multi-disciplinary team, it would not be pragmatic to quantify the work done (or to be undertaken) using the approach of a bill of costs which would require the administrator to attribute a specific charge for each task. This is because the tasks undertaken or to be undertaken require application of different professional disciplines, and yet no specific scale that provides a basis against which uniform fees can be charged to properly remunerate the different professional disciplines.

Section 171(1)(b) provides that; An Administrator is entitled to remuneration fixed by the court on application for taxation and assessment of costs for the administrator or provisional administrator, where no remuneration is agreed upon.

Section 171(2)(a) of the Insolvency Act provides that on application by the Administrator, Court may at any stage of the administration fix the remuneration of the Administrator at a level which is reasonable

As submitted by counsel, there are no guidelines on how the remuneration is supposed to be fixed under the Insolvency Law, therefore regard is made to other jurisdiction which have been experienced similar matters and specifically under the common law jurisdiction.

The basis for fixing the administrators remuneration may be fixed as ;

- (a) As a percentage of the value of property which the administrator has to deal with; or
- (b) By reference to the time properly given by the administrator and his or her staff in attending to matters arising; or
- (c) As a set amount.

The payments to an administrator should be fair and reasonable reflections of the work necessarily and properly undertaken.

This court agrees with the applicant's counsel that 'time based charging' encourages overcharging.

Secondly, charging for services by hour does not encourage an efficient allocation of time and time allocated can prove difficult to dispute, often the fees accrued are substantial and there is no formal mechanism for review. For example an Accountant or Lawyer may spend hours over unproductive work, let alone his/her more or less efficient staff.

In the case ***Cedenco J v Australia Pty Ltd (in Liquidation)***[2019] FCA 93; Justice Besanko noted that hourly charges were always excessive.

In Re Carton Ltd (1923) 39 TLR 194, which held thus to demonstrate when court would apply either method:

*"The Court as a general rule only fixes remuneration on a time-basis if there is no other method which would operate to give the liquidator fair remuneration. Experience has shown that the time occupied by a liquidator and his clerks affords a most unreliable test by which to measure the remuneration. Even the best accountant may spend hours over unproductive work, let alone his more or less efficient staff of clerks...**The Court has long since come to the conclusion that the proper method to adopt whenever it is practicable is to assess the remuneration according to the results attained,**"*

Where the remuneration is fixed as a percentage, different percentages may be used for different things done by the administrator in order to attain fairness and

reasonableness. According to *Creditors Guide to Administrators Fees. England and Wales*. The fixing of percentages shall be guided by the following;

- Complexity or size (or otherwise) of the case.
- Any responsibility of an exceptional kind or degree which falls on the administrator.
- Effectiveness with which the administrator appears to be carrying out, or to have carried out, his or her duties.
- The value and nature of the property which the administrator deals with.
- The need to employ third parties to assist in the administration.

Guided by the above, the court should appreciate the nature of work involved insolvency Administration. The work of administering is inherently expensive because of the intensive nature of the investigation of accounts that the administrator must analyse and understand. In addition to the due diligence that must be done to ensure that the property of the company is secured from third parties who may wish to deal with it fraudulently or in a manner prejudicial to the company. Furthermore, there is also an aspect of the day to day management of the entity in insolvency that calls on special skills to ensure that the company stabilises during these turbulent times.

Proportionality is a major consideration and guiding factor in fixing remuneration for administrators.

Proportionality of information - in considering the nature and extent of the information which should be provided by an appointee in respect of an application for the fixing and approval of his remuneration the court, the appointee and any other parties to the application shall have regard to what is proportionate by reference to the amount of remuneration to be fixed and approved, the nature, complexity and extent of the work to be completed (where the application relates to future remuneration) or that has been completed by the appointee and the value and nature of the assets and liabilities with which the appointee will have to deal or has had to deal;

Proportionality of remuneration - the amount of remuneration to be fixed and approved by the court should be proportional to the nature, complexity and extent of

the work to be completed (where the application relates to future remuneration) or that has been completed by the appointee and the value and nature of the assets and/or potential assets and the liabilities and/or potential liabilities with which the appointee will have to deal or has had to deal, the nature and degree of the responsibility to which the appointee has been subject in any given case, the nature and extent of the risk (if any) assumed by the appointee and the efficiency (in respect of both time and cost) with which the appointee has completed the work undertaken;

The Federal Court in the case of *Templeton v Australian Securities Investments Commission [2015] FC AFT 137*; the full bench maintained the position that considering proportionality as a concept in remuneration is one of the factors that should be taken into account when the court is exercising its discretion to approve an external administrators remuneration.

This court in exercise of its discretion guided by the complexity of the case, professional integrity and professionalism of the administrator, the value of the subject matter, it is fair and reasonable that the administrator is remunerated at different percentages for the different work done in the course of administration.

REMUNERATION AND FEES CHARGEABLE:

	Activity Classification	Professional Skills Deployed	Rate of Charge	Basis of Charge	Justification for Charge
1	Management of the Business with a view to optimizing benefit to Creditors	Engineers; Accountants; Advocates	5%	To be charged against the consideration of any sale of assets/ business of the Company undertaken for the purpose of optimizing recoveries for creditors	Benchmarked against other Insolvency Officers, including Receivers and Managers
2	Restructuring of Business	Financial Analysts; Engineers; Advocates	5%	To be charged against the value of the consideration of any Agreement of Sale or Partnership or other Agreement entered into with the aim of ensuring both a recovery of value for creditors as	Benchmarked against rates charged internationally for restructuring work

				well as the continuity of the business of the Company, whether in its current form or through an alternative structure/ legal vehicle	
3	Raising of Capital for Business	Financial Analysts; Accountants; Advocates	5%	To be charged against actual capital commitments raised for investment into the restructured business, whether the funds are raised for investment in the business be in its current form or through alternative structures/ legal vehicles.	Benchmarked against fees charged for capital raising mandates

Additional Guidelines:

- Where any two or more of the above activities are successfully performed, the fees shall be charged cumulatively.
- Fees for Item 1 (Management) to be accrued and paid upon the completion of a sale or partnership transaction.
- Item 3 will be charged only against additional funding raised for investment into the business to meet capital and operational expenses over and above any consideration for any sale of the assets/ business for the benefit of creditors.
- In the event that the Administrator is removed/terminated prior to the completion of the sale or restructuring, the fees payable would be half what would have been paid to the Administrator if the sale or restructuring had been completed. Such payment is to be made before assumption of office of a new Administrator.

Save in exceptional cases, court will not interfere with the assessment of what the administrator is presented as being a fair and reasonable fee. This is because it is generally accepted that questions which are solely of quantum of costs are matters which the applicant is best suited to provide based on work done and complexity of the matter.

Secondly, an exceptional case is where it is shown expressly or by inference that in assessing and arriving at the quantum of the fees, the applicant applied, a wrong principle. In this regard, application of a wrong principle is capable of being inferred from an award of an amount which is manifestly excessive or manifestly low.

Thirdly, the court should interfere only on being satisfied that the error substantially affected the decision on quantum and that upholding the amount allowed would cause injustice to one of the parties.

In the final result for the reasons stated herein above this application succeeds and I make no order as to costs since this is part of the work of the administrator.

It is so ordered.

Dated, signed and delivered be email and whatsApp at Kampala this 29th day of May 2020

Ssekaana Musa
Judge