THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

MISCELLANEOUS APPLICATION NO.784 OF 2020

(ARISING OUT OF MISCELLANEOUS CAUSE NO. 173 OF 2017)

(ARISING FROM COMPANY 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 THE ADMINISTRATION DEED EXECUTED BETWEEN UGANDA TELECOM LIMITED AND THE ADMINISTRATOR

AND

IN THE MATTER OF AN APPLICATION FOR DIRECTIONS BY RUTH SEBATINDIRA SC THE ADMINISTRATOR OF UGANDA TELECOM LIMITED AS TO THE APPARENT INCONSISTENCY BETWEEN CLAUSE 5(b) AND 5(d) OF THE DEED OF ADMINISTRATION

BEFORE HON. JUSTICE SSEKAANA MUSA

RULING

The Applicant brought this application by way of Notice of Motion under Section 173 of the Insolvency Act, regulation 203(1) of the Insolvency Regulations, 2013 and Order 52 r 1of the Civil Procedure Rules, for orders that;

1. This Honourable Court gives directions regarding the Administrator's implementation of Clauses 5(b) and 5(d) relating to distribution of proceeds of the Administration.

2. The costs of this application be provided for.

The grounds in support of this application are set out in the affidavits of the Ruth Sebatindira SC, Administrator OF Uganda Telecom Limited-In Administration and the applicant herein which briefly states;

1. That upon assuming office, I perused the Administration Deed and noted that Clause 5(b) and 5(d) of the Deed both provided for the manner in which the company's assets and proceeds would be applied to the satisfaction of creditor claims.

2. That upon assuming office, I perused the Administration Deed and noted that Clause 5(b) of the Deed provided for distribution in accordance with the insolvency laws, 5(d) provided for a levelled treatment of all creditors, regardless of their classification under the Insolvency Act, 2011, in the event of realisation of an amount insufficient to fully satisfy the creditors' claims.
3. That it is therefore unclear whether the intention of the deed was to apply the order of priorities in the Insolvency Act, 2011 or to opt out of the application of the insolvency laws by creating their own mode of distribution of assets in the settlement of creditor claims in the manner depicted in Clause 5(d) of the Deed.

In the interest of time the Applicant's made brief oral submissions and also filed written submissions which this court has considered. The applicant was represented by *Mr. Kabiito Karamagi and Mrs Matovu Olivia Kyarimpa.*

The application is for directions and guidance from this court with regard to how distribution from this administration should be implemented in view of the manifestly apparent inconsistency from their literal and ordinary interpretation of the two clauses.

Clause 5(b) states; ***the proceeds from the sale of the business and/or the assets of UTL shall be distributed to creditors in accordance with applicable insolvency laws in Uganda***

Clause 5(d) states; ***in the event that the amount realized from the sale is not sufficient to enable the administrator to make full payment of the creditor claims, the creditors after receiving a report from the Administrator shall accept a prorated payment in satisfaction of their claims.***

The applicable insolvency law in Uganda as envisioned by clause 5(b) of the Deed is the Insolvency Act Section 12 and 13 of the Act (commonly known as the waterfall clauses) providing for settlement of claims in waterfall fashion of settling priority claims in accordance with those classes. Section 12 of the Act provides for payment of preferential debts to be paid in their ranking while section 13 provides for payment of non-preferential claims last in equal proportion.

The Administrator specifically seeks direction of this Honourable Court on the following questions:

a) The construction and interpretation of Clause 5(b) of the Administration Deed;
b) The construction and interpretation of Clause 5(d) of the Administration Deed;
c) The remedy appropriate or course of action for the Administrator, with the leave of Court, as to the inconsistency in light of the Administration Deed.

It was counsel's submission that it is important that court considered this application from the stand point that administration proceedings are meant to benefit the general body of creditors in accordance with the rights and interests they hold under the respective classes i.e secured creditors vs unsecured creditors.

The Administration deed, ideally, represents the will of creditors after the same having been approved at a meeting of creditors after considering the import of the proposed deed on each creditor's interest. Under the present deed, there is difficulty in establishing the will of the creditors.

This court may have to establish whether the secured and priority creditors could have indeed signed away their rights, or whether the pensioners who battled in

court for such a long time for their retirement benefits actually understood the implications of the distribution clauses in Clause 5 of the Deed.

Analysis

Section 173(1) of the Act provides; ***that on application of an Administrator, Court may give directions on any matter concerning the functions of the Administrator.***

This provision gives the court wide discretionary powers to give directions on any function of an Administrator. This is rooted in the fact that the court may not be able anticipate the challenges the Administrator will face and as a consequence, the Administrator should always seek guidance and direction on unclear issues in order to protect the administrator from allegations of acting improperly or unreasonably. In the case of ***Coats v Sothern Cross Airlines Holdings Limited (In Liquidation)(1998) 16 ACLC 1393 at 1400***: Court held that the primary purpose of the Court's directions to a liquidator [is] the protection of the liquidator from allegations that he or she has acted improperly or unreasonably or has caused actionable loss.

The Court remains with the duty to guide the administration or liquidation process and the directions may be sought to ensure that the Administrator or Liquidator acts or is guided by the law.

The Australian case of ***Sanderson v Classic Car Insurances Pty Limited (1986) 4 ACLC 114 at 116*** identified the following four classes of cases which are amenable to application for directions;

(a) Guidance on matters of law;
(b) Questions involving legal procedure;
(c) Whether a liquidator should act on his commercial judgment to postpone a sale because he recognizes his legal duty ordinarily requires him to reduce the company's assets into cash as soon as possible; or
(d) Where there are two or more competing purchasers for the company's property and the liquidator can see that it may be alleged that the liquidator has in bad faith or in absurd or unreasonable or illegal way.

In another case of ***Re Mento Developments (Aust) Pty Limited(In Liquidation)-2009 VSC 343***, the Supreme Court of Victoria at Melbourne considered the proper scope of a liquidator's application for directions and observed that the procedure involves seeking guidance from the Court from accusation of acting unreasonably. The Court made reference to the decision of Mc Lelland J in ***Re G B Nathan and Co Pty Limited (In Liquidation)*** where it was stated as follows:

> *"Although the direction given under s 479(3)(equivalent to our section 173(1) of the Insolvency Act) is wide, it is usually only proper to exercise the power where the matter involves guidance to the liquidator on matters of law or principal or to protect him against accusations of acting unreasonably. The court does not usually consider it proper to intervene and make the liquidator's commercial decisions for him. Matters in respect of which a liquidator may seek, and obtain, directions or judicial advice may include guidance in matters of law, questions involving legal procedure, where the liquidator should act on his commercial judgment with regards to dealing with the company assets among others"*

The court should always give guidance when sought by the administrator or liquidator on matters indicated in the above authorities in order to save the process from accusations and counter accusations of acting illegally or unreasonably.

The applicant seeks court's directions in this case involving guidance on matters of law and legal procedure. The directions to be given by this court will aid to give clarity to the conduct of the administration particularly in as far as settlement of creditor claims is concerned.

It is the duty of this court to review the Deed and establish the will of the creditors for the Administrator's implementation. The court should be guided by the law on construction and interpretation of deeds.

In the case of **Testmony Motors Limited vs Commissioner Customs Uganda Revenue Authority – Civil Suit No. 004 of 2011**, this Honourable Court held that:

"The purpose of construction is to ascertain the meaning and the will or intent of the maker of the instrument in order that what is provided in the instrument may be enforced. Construction then has as implementation as one of its objectives. It therefore follows that the purpose of construing a deed is to ascertain the meaning for purposes of implementation."

The Court went on to describe the relationship between interpretation and construction of deeds. It held:

"Interpretation relates to the meaning of the words used while construction relates to ascertainment of the intention of the maker or author of the instrument. It follows that the purpose of construing a deed, will or other written instrument is to ascertain the meaning for purposes of implementation. Finally, there can be no construction without interpretation of words."

In her book, ***The Interpretation of Deeds, Wills and Statutes in British India, K. Shelley Bonnerfee*** lays out the various rules of interpretation of deeds.

a) The meaning of any clause is to be collected from the entire instrument, and all its parts are to be construed with reference to each other:

Explaining this rule, the Learned author states as follows:

"There are many cases upon the construction of documents in which the spirit is strong enough to overcome the letter; cases in which it is impossible for a reasonable being; upon a careful perusal of an instrument, not to be satisfied from its contents that a literal, a strict, or an ordinary interpretation given to particular passages, would disappoint and defeat the intention with which the instrument, read as a whole, persuades and convinces him that it was framed. ***It is a true rule of construction that the sense and meaning of the parties in any particular part of an instrument may be collected ex antecedentibus consequentibus; every part of it may be brought into action in order to collect from the whole one uniform and consistent sense if that may be done****."*

This implies that the Court is called upon to interpret the Administration Deed as a whole, looking at every aspect therein and determining which of the two clauses is consistent with the spirit of Deed.

b) The word or phrase in a deed…to which no sensible meaning can be given, must be eliminated.

In the regard, the Learned author states that:

> *"The Court has no power to alter the words or to insert words which are not in the instrument, but it may, and ought to construe the words in a manner most agreeable to the meaning of the maker, and may reject any words that are merely insensible. If possible, effect must be given to every word of an Act or other document; but if there is a word or phrase therein to which no sensible meaning can be given, it must be eliminated.*
>
> *…*
>
> *Where a word or phrase occurs in an instrument to which no sensible meaning can be attached, it is treated as if it was not inserted in the instrument at all, and it does not affect the rest of the document. In dealing with such words, and phrases, the Court proceeds on two well-known maxims: "Surplus agium non nocet" – Mere surplusage does not injure the instrument; and "Utile per inutile non vitiator" – Surplusage does not vitiate that which in other respects is good and valid."*

The decision of the Court in **Testmony Motors Limited vs Commissioner Customs Uganda Revenue Authority** bridges the relationship between construction and implementation of Administration Deeds, as strictly applied to this Application.

This would be consistent with the fundamental duty of an Administrator under **Section 165 of the Insolvency Act, 2011** which is to supervise the implementation of the Administration Deed. It is therefore reasonable to conclude that in implementing the Administration Deed, the Administrator is guided by the principles of construction of deeds.

It is also reasonably expected that in supervising the implementation of the Administration Deed, the Administrator will be required to interpret the Deed as

a whole, gathering and implementing the words and phrases according to their literal and ordinary meaning unless such meaning is inconsistent with the spirit of the Deed generally.

The question though is to what extent can an Administrator elect to sever the word or phrase that is apparently inconsistent with the spirit of the rest of the Deed? This cannot be a simple issue given the interests that are represented and intended to be preserved by the Administration Deed. It is for this reason that the Administrator should always seek the directions of the Court as to any apparent inconsistency in Clauses and Terms of the Administration Deed.

The courts should not render the document or contract unenforceable simply because it uncertain or ambiguous. Courts do not expect documents prepared by parties to be drafted with utmost precision and certainty. Indeed, courts strive to give effect to the agreements, and not to render them nugatory. The clarity should be sought through the exercise of interpretation and considering the document as a whole. The reason the court has regard to the relevant context is that it places the court in 'the best possible position to ascertain the parties' objective intentions by interpreting the expressions used by them in their proper context. See ***Sembcorp Marine Ltd v PPL Holdings Pte Ltd [2013] 4 SLR 192***

Whether the construction and interpretation of Clause 5(b) is consistent with the spirit of the Administration Deed:
Clause 5(b) stipulates as follows:

"The proceeds from the sale of the business and/or the assets of UTL shall be distributed to the creditors in accordance with the applicable insolvency laws in Uganda."

Upon the ordinary construction of the words used in Clause 5(b) of the Deed, it is clear that the parties to the Deed and those bound by it, intended that they would apply the rules of distribution under the waterfall clauses of Section 11, 12 and 13 of the Insolvency Act, 2011. This interpretation is consistent with the general spirit of the Deed as gathered from the law applicable to the Deed, being

the Insolvency Act, 2011 and the Insolvency Regulations, 2013. In addition, recital (c) in the deed not only provided the dim financial position leading to the commencement of the administration process but also lists key statutory creditors with priority ranking under the waterfall clauses of the of the Insolvency Act.

The above seems to be buttressed by Clause 2(a) which stipulates that the Administrator shall administer the deed with the powers, functions and duties conferred by this Deed – such duties including settlement of claims - the Insolvency Act, and any other law in force. Further, Clause 3 of the deed reiterates settlement of creditor's claim in accordance with the terms of the deed and applicable insolvency laws i.e. the Insolvency Act and Regulations. Finally, Clause 4(k) of the Deed stipulates that the powers contained in the Deed are **in addition** to the general powers granted to Deed Administrators under the Insolvency Act and other law in force.

The analysis of the above Clauses appears to suggest that the intention of the Deed was to apply the waterfall clauses in the Insolvency Act and its Regulations in the distribution and settlement of claims. In which case, the language, phrasing and construction of Clause 5(b) would be deemed consistent with the spirit of the Deed.

Whether the construction and interpretation of Clause 5(d) is consistent with the spirit of the Administration Deed:

Clause 5(d) of the Deed stipulates as follows:

"In the event that the amount realised from the sale is not sufficient to enable the administrator to make full payment of the creditor's claim, the creditors, after receiving a report from the Administrator shall accept a prorated payment in full satisfaction of their claims."

Upon construction of the words, and the phrasing used therein, the following is clear:

a) The clause effectively does away with the priority ranking of creditors as contained in Sections 11, 12 and 13 of the Insolvency Act, 2011;

b) The clause effectively does away with the statutory subordination of the secured creditors' claims as contained in Section 12(2), by which subordination it is universally concluded that secured creditors rank lower than preferred creditors but higher the non-preferred creditors;

c) The clause effectively does away with the extent of settlement of claims such as the extent of settlement of all wages and basic salary, which the law limits to four months, the settlement of claims by the Uganda Revenue Authority, which the law limits to 12 months preceding the commencement of the insolvency proceedings, among others and the settlement of unsecured creditors' claims on a *parri passu* (equal and equitable footing) basis.

Secondly, once it is established that the Clause effectively reclassifies creditors, the literal meaning of a *"pro-rated"* payment ought to be considered to confirm if it is consistent with the general body of the Deed. **Black's Law Dictionary, 9th Edition, at page 1340** defines *"pro-rate*" as *'to divide, assess, or distribute proportionately'.* It also defines the term *pro-rata* as *'Proportionately, according to an exact rate, measure, or interest'.*

From the above, the literal and ordinary meaning of Clause 5(d) is to effect a proportional distribution to all creditors regardless of where they rank in the *waterfall* established by the Insolvency Act and its regulations, according to an exact rate, measure or interest.

Importantly, there is nothing in the deed that expressly states that the Trade Development Bank (formerly known as Preferential Trade Area Bank – PTA Bank) expressly agreed to waive its rights and enter this arrangement. Similarly, there is nothing in the deed that suggests that priority claimants such as URA, NSSF expressly agreed to waive their rights in such an arrangement. In the absence of

these assurances, it may be unsafe to rely on this clause in the distribution and settlement of claims.

It can be deduced from the above analysis that the clause 5(d) was redundantly included after the spirit of 5(b) had been included deriving its mandate from the Insolvency laws-under the waterfall provisions. There is nothing in the Deed to suggest otherwise than the application of the Insolvency provisions under the Insolvency Act. The correct presumption would, in such a case, be that the order of clauses beginning with application of the waterfall provisions was deliberate. It was not the intention of the parties to dilute the waterfall clauses by providing for prorated payment of all creditors.

As a general rule of interpretation, nothing is to be added or taken from a deed. However, when there are adequate grounds to justify an inference, it is the bounden duty of the court to do so. The intent is clear from entire deed and the construction or interpretation must eschew interpolation and evisceration. The court has to choose between the alternative interpretations that may have been given by reading both clauses and appreciate the best intended meaning before discarding the other.

In sum, this court directs that the Administrator should apply the waterfall provisions as set out under Sections 11, 12 and 13 of the Insolvency Act.

It is so ordered.

SSEKAANA MUSA
JUDGE
5th February 2021