**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA**

**MISCELLANEOUS APPLICATION NO.220 OF 2020**

**(ARISING FROM COMPANY CAUSE NO. 173 OF 2017)**

**IN THE MATTER OF UGANDA TELECOM LIMITED (IN ADMINISTRATION)**

**AND**

**IN THE MATTER OF AN APPLICATION BY RUTH SEBATINDIRA (SC) FOR DIRECTIONS IN RESPECT OF THE APPLICATION OF SECTION 12(6) OF THE INSOLVENCY ACT, 2011 TO PENSION CLAIMS MADE AGAINST THE COMPANY.**

**BEFORE HON. JUSTICE SSEKAANA MUSA**

**RULING**

The Applicant brought this application by way of Notice of Motion under Section 173(1) of the Insolvency Act, regulation 203(1) and 204 of the Insolvency Regulations, 2013 and Order 52 r 1of the Civil Procedure Rules, for orders that;

1. This Honourable Court gives directions with regard to ranking and treatment of pension claims submitted by Pensioners of the Company and Uganda Communications Employees Contributory Pension Scheme.

2. The costs of this application be provided for.

The grounds in support of this application are stated in the affidavit of the Administrator, Ruth Sebatindira SC, which briefly states;

1. That the company is indebted to ex staff of the defunct Uganda Posts and Telecommunication Company UP&TC that were inherited by the company, on account of unpaid pension adjudged due and payable by the High Court and the Court of Appeal of Uganda.

2. That one of the claims submitted against UTL-in administration is a claim for Shs. 258,600,000,000/= in unpaid pension arrears due to former UTL staff originally inherited from Uganda Posts and Telecommunication (UP&TC). Another claim submitted is by Uganda Communications Employees Contributory Pension Scheme (UCECPS) which also claims pension arrears for its members for a sum of approximately Ushs 13,671,000,000/=.

3. That UCECPS was established by Government of Uganda by way of an irrevocable trust deed executed in September 2004 retrospectively commencing 23rd December 1999. The scheme was established in accordance with Uganda Communications Act and Public Enterprises Reform and Divestiture Act for the benefit of permanent and pensionable employees of the then Uganda Posts and Telecommunications who were transferred to Uganda Telecom Limited. Other members of this scheme are permanent and pensionable staff of Uganda Posts Limited, Post Bank Uganda Limited and Uganda Communications Commission (UCC) that was inherited from UP&TC.

4. That according to company records, Uganda Telecom inherited 1,23o permanent and pensionable staff of the defunct UP&TC, constituting 76% of the disbanded entity's entire permanent and Pensionable staff, who all joined UCECPS. The scheme was also joined by staff recruited by UTL on permanent terms until 2007 when the recruitment policy was restricted to contract hiring.

5. That under Rule 8 of the rules of the Uganda Communications Employees Contributory Pension Scheme, each member was to contribute 5% of their salary per month while Uganda Telecom was required to make a contribution of 10% of each member's salary towards the member's retirement benefit.

6. That between years 1998 and 2003, the successor companies of the defunct UP&TC terminated/retired a number of inherited staff and paid them gratuity for services rendered to UP&TC and the successor entities. However, contests arose among the ex-UP&TC staff regarding their entitlement to pension as envisioned under the Uganda Communications Act and the Public Enterprises Reform and Divestiture Act.

7. Consequently, a representative action of nearly 850 ex UP&TC staff was commenced in HCCS No. 130 of 2003- Bernard Mweteise & Others V Uganda Telecom Ltd, Uganda Posts Ltd, Uganda Communications Commission, Post Bank Ltd, Attorney general and the Registered Trustees of UCECPS.

8. That the judgment was given in favour of the plaintiff's with a declaration that the Plaintiffs were Plaintiffs' and all former staff of UP&TC were entitled to pension calculated in accordance with original contracts with the defunct company taking into account the period of service with the original entity and its successor company. The decision was upheld on appeal by the court of Appeal.

9. That the Court of Appeal upheld findings of the Auditor General Special Audit report dated 7th December 2016 in which 72,581,678/= was due and payable based on verified 751 files out of the 1,720 submitted by all the successor entities at that time.

10. That the pensioners whose claims had not been verified by the Auditor General, the Court of Appeal ordered that the pension entitlements would be based on actuarial reports prepared by M/s ACTSERVE Actuarial Consultants earlier filed during the trial.

11. That UTL is currently the only member of UCECPS who initially regularly remitted members contributions. However, the company has made intermittent contributions since 2013 even as more of the inherited UP&TC

staff continues to retire. Consequently UCECPS claim against UTL in unremitted contributions stands at Ushs. 13,671,000,000.

The applicant served the application on the affected parties in order to guide court and also to be heard on the matter before the court makes any directions. These parties are Uganda retirement Benefits Regulatory Authority, Uganda Communications Employees Contributory Pensions Scheme, Judgment Creditors (in Bernard Mweteisi & Others v Uganda Telecom & Others HCCS No. 135 of 2003), Attorney General.

They all filed different affidavits which in principle are similar to what the Administrator has put forward and re-emphasize the need to give the contributions given by pensions as a preferential treatment.

Uganda Retirement Benefits Regulatory Authority filed an affidavit through Rita Nansasi Wasswa-Director Legal Services: She contended interalia that it is true that the contributions claimed by the pensioners were not saved under the National Social Security Fund (NSSF) as envisaged by section 12(6) of the Insolvency Act of 2011. It is URBRA's prayer that Court exercises its discretion to find it befitting to treat the pensioner's claim in the same light as it would treat contributions made under the NSSF Act since the pensioners belong to a legally established and licensed retirement benefits scheme. UCECPS just like NSSF is one of the retirement benefits schemes licensed under the URBRA Act.

Uganda Communications Employees Contributory Pensions Scheme through its Chairperson David Nkojjo in support of prioritizing payment of the decretal sum as Pension/contributions made to NSSF.

- That the former employees of UPTC are concerned that Uganda Telecom Ltd assets may not be sufficient to meet all the claims of its creditors and hence pray that this honourable court may accord high priority to pension claims to rank ahead of other claims.
- That section 12(6) of the Insolvency Act, 2011 is silent about the ranking of Pension claims because the Insolvency Act did not specifically envisage

Government and public Enterprises owned by the Government failing to pay their Employees' pension obligations.

- That section 12(6) of the Insolvency Act which gives priority to contributions made to National Social Security Fund but not pension entitlements under the Pension Act would be discriminatory against Public Sector Employees who are entitled to pension payments which is unconstitutional and contrary to public policy.

Chris Nkuzingoma a former employee of Uganda Posts and Telecommunications Corporation and party to the suit of Bernard Mweteise & Others v Uganda Telecom & others also swore an affidavit in support of the application.

- That the court ordered UTL to pay the pension to all the former staff of UP&TC who were transferred to UTL.
- That section 12(6) of the Insolvency Act did not provide for liquidation or receivership of a government institution and did not provide for government employees.
- That it will be in the interest of justice and good faith principles that pension payments are recognised together with NSSF payments as they are both retirements that accrue upon retirement of the employee

In the interest of time the Applicant and other interested parties made written and also brief oral submissions which this court has considered. The applicant was represented by *Mr. Kabiito Karamagi* and *Mrs. Matovu Olivia Kyarimpa* while the other interested parties like Attorney General was represented by *Mr. Adrole Richard,* URBRA was represented by *Mr. Segawa Moses;* UCECPS was represented by *Mr. Kwesigabo Johnson* and *Mr. Kizito Ssekitoleko* and the Judgment holders/Creditors in Civil Suit No.135 of 2003 was represented by *Mr. James Orima*

The application is for directions by court in respect of application of Section 12(6)(b) of the Insolvency Act to pensions claims made against the company.

The issue that arises is; ***Whether the Pension claims by ex-staff and unremitted contributions to UCECPS should be ranked as preferential debts under the Insolvency Act.***

The applicant's counsel submitted that Section 12 of the Insolvency Act provides for payment of preferential debts to be paid in their ranking. The order of payment requires that the debt taking precedence in rank is settled first in full before the next. Section 12(6) limits ranked employee contributions to benefits payable under the National Social Security Fund.

According to the applicant's counsel this would render claims under the Judgment and the contributions due to UCECPS as non-preferential debtors whose payments would be affected equally with other creditors in this class after the settlement of all preferential debts. As the assets of the company are currently unable to satisfy its debts, this would leave the pension claims effectively valueless.

This will affect a great number of people as submitted by all the interested parties since it would affect over 1200 families who are the potential beneficiaries of the pension claims which has made over time.

It was their submission that the Administrator is often required to make complex, important and time-critical commercial decisions. The threat of criticism, challenge and possible litigation is always at the back of the office holders' minds and in the current environment, is increasingly at the forefront with regard to claims in issue. The tool of comfort is in section 173(1) of the Insolvency Act which states that on application of an Administrator, Court may give directions on any matter concerning the functions of the Administrator.

The applicant proposed to court that it be pleased to either classify the pension claims in the following options;

a) Rank them in the Preferential Class under section 12(6)(b);
b) Rank them in Non-Preferential class under section 13;
c) Rank a preferential claim in the Non-Preferential class; and/or
d) Order the Government of Uganda to intervene for the pensioners.

The AG submitted that UCECPS like National Social Security Fund is a pension scheme created under clause 90 of the Uganda Communications Act of 1997 as a retirement benefit scheme. It should be considered under the provisions of section 12(6)(b) of the Insolvency Act.

According to AG the Insolvency Act is discriminatory and unconstitutional in that it does not recognize any other statutory fund other than payments made under the National Social Security Fund and thus discriminates against the pensioners' claims and other retirement schemes under the Uganda Retirement Benefits Regulatory Authority Act (URBRA).

The inadvertent omission by the legislature of not including Uganda Communications Employees Contributory Pension Scheme and any other fund in the Insolvency Act is that it will render the former workers' pension claims worthless as the administrator will have no option but to classify its treatment of their claims in the non-preferential debt and thus cause unfairness.

***Analysis***

The applicant (as an Insolvency office holder) is required to make complex, important and time-critical commercial decisions and do so from the '*front line'*. In making decisions, there is an obvious threat, challenge and possible litigation with regard to such decisions made. Section 173(1) of the Insolvency Act provides that ***on application of an Administrator, Court may give directions on any matter concerning functions of the Administrator.***

The above provision gives the Administrator some comfort whenever faced with any dilemma in administration especially on decisions to be taken that may contemplate potential repercussions for administration and its stakeholders. Court direction on any contentious or unclear issue becomes a tool of comfort. In the case of ***Nortel Networks UK Ltd and Other Companies [2016]EWHC 2769 (Ch)***, the court explained the effect of a court direction as a blessing of the Office holders' action.

The same importance was buttressed in the case of ***Coats v Southern Cross Airlines Holdings Limited(In Liquidation) (1998) 16 ACLC 1393 at 1400***, court held

that the primary purpose of the Court's direction 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. See ***Re Mento Developments (Aust) Pty Limited (in Liquidation) 2009 VSC 343***

The court should be reluctant to intervene for purposes of making commercial decisions for the Liquidator/Administrator. The directions of court must be sought in such special circumstances involving guidance on matters of law; questions involving legal procedure; 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 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 acted in bad faith or in an absurd or unreasonable or illegal way. See ***Sanderson v Classic Car Insurances Pty Limited (1986) 4 ACLC 114 at 116***

In the case of ***Re G B Nathan and Co Pty Limited (in Liquidation) 24 NSWLR 674*** Mc Lelland J stated as follows;

> *"Although the discretion given under s 479(3) (equivalent to our 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 matter 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 question of whether pensions claim should be ranked under preferential claims and yet the Insolvency Act only ranks NSSF contributions is a serious legal issue that the Administrator ought to be guided by court. This application is justified in order to avoid the administrator being labeled unfair or unreasonable in refusing to include or in including the claims under preferential treatment.

The Insolvency of a company may prove traumatic for employees, especially those who have invested years of effort and skill in the enterprise. A range of outcomes for employees may be triggered by insolvency, and the law, in some respects, seeks to minimize the negative consequences of insolvency on employees. Therefore, issues of fairness come to the fore, as do considerations of rescue and design of rules that allow efficient transfer of enterprise. See ***Corporate Insolvency Law, perspectives and principles by Vanessa Finch 2nd Edition Cambridge University Press at page 754***

In some jurisdictions, pension debts are usually treated as preferential. Unpaid employee contributions are preferential to the extent of sums deducted from pay by the employer in the last 4 months but not yet paid to the pension scheme. The employees ought to be considered on a special pedestal as to the entitlements to payment of their pension in full even if the employer has no funds. They should be spared the delays involved in allowing insolvency process to run their full course in meeting their preferential pension claims. See ***Corporate Insolvency Law, perspectives and Principles***

The pensioners under the different schemes are aggrieved since the Insolvency Act does not rank their claims as preferential and yet contributions to National Social Security Fund are treated as such. The law is silent about ranking pension claims because it was not envisaged that government and enterprises owned by government could ever fail to pay employees' pension when it is due.

It appears that section 12(6) of the Insolvency Act only prioritizes contributions made under national Social Security Fund but not Pension entitlements under Pensions Act or other legally established and/or other licensed pension schemes which is discriminatory against public sector employees thereby being unconstitutional and contrary to public policy.

Before the divestiture of UP&TC, all employees were entitled to pension under UP&TC Act and regulations computed in accordance with the pensions Act. In addition, Section 89(1) & (3) of the Uganda Communications Act provides that; *All former employees of the Corporation (UP&TC) are entitled to retirement benefits*

*and pension and a contributory fund shall be established for the benefit of those employees.*

Uganda Communications Employees' Contributory Pensions Scheme was formed as a government entity to manage retirement benefits and pension of employees who were formally employed by public enterprises that were restructured from UP&TC to form UTL. Therefore, the pension arrears and claims anchored in the law and ought to be prioritized and treated in the same rank like employees benefits in the private sector under the National Social Security Fund Act cap 222.

The powers of this court in interpreting statutes extends to giving full effect of legislations and it major purpose guided by existing principles elucidated under different case law or judge-made laws and principles.

Sometimes, it may be seen to be wrong for the court to take such a course because it would involve a judge effectively overruling the lawful provisions of a statute or statutory instrument. It would be highly problematic in practice because it would throw many liquidations and administrations into confusion: the law would be uncertain, and many creditors who felt that the statutory ranking caused them unfair prejudice would make applications to the court.

In the case of ***The Joint Administrators of Lehman Brothers [2017] UKSC 38***, the court observed that;

> *"Further, despite its lengthy and detailed provisions, the 1986 legislation does not constitute a complete insolvency code. Certain long-established Judge-made rules, albeit developed at a time when the Insolvency legislation was far less detailed, indeed by modern standards sometimes positively exiguous, nonetheless survive. Provided that a judge-made rule is well established, consistent with the terms and underlying principles of current legislative provisions, and reasonably necessary to achieve justice, it continues to apply. And, as Judge-made rules are ultimately part of the common law, there is no reason in principle why they cannot be developed, or indeed why new rules cannot be formulated. However, particularly in the light of the full and detailed nature of the current insolvency legislation and*

*the need for certainty, any judge should think long and hard before extending or adapting an existing rule, and, even more, before formulating a new rule. This reasoning is consistent with our established court rulings on the functions of court in the interpretation of Statutes.*

The reservations for ranking pension claims or unremitted contributions should be appreciated from the unique circumstances of the present case and this court would not be making a case for interference with the Insolvency legislation at all times when any creditor feels dissatisfied with the waterfall ranking. The mandatory nature of the language used in the legislation should be always upheld and the question would rather be an interpretation of activities against the waterfall ranking and not diluting the effectiveness of the provision.

Section 12(6) of the Insolvency Act prioritises contributions to National Social Security Fund as a Preferential Debt. This would imply any payment of a like nature ought to be treated as such. That in my view would be the purpose for which the legislation or provision was intended. Any interpretation that gives a contrary view to the purpose of this provision would be absurd and contrary to policy considerations of protecting pension like contributions.

This court agrees with the arguments made by the applicant and other stakeholders like AG and UCECPS & URBRA that it would be discriminatory to treat private employees' contributions as directly protected by Insolvency Act and yet the public employees' contributions and pension claims are not given the same treatment. The contributions to NSSF and contributions to UCECPS are of the same genus and ought to be taken as such in order to avoid any absurdity. It is equally true that the legislators never included contributions to other pension schemes due to the fact that they never existed at the time under a recognized benefits scheme and the law never envisaged a public enterprise ending up in a form of Administration like a private entity or company.

Where the language of a Statute is extremely general and not clear, contextual background has to be taken in consideration for arriving at a clear interpretation. Neither the text nor the context can be ignored. Both are important. That interpretation is best, which makes the textual interpretation match with the

contextual. A Statute is best interpreted when the interpreter knows why it was enacted.

The interpretation must depend on the text and context. The interpretation is best which makes the textual interpretation match the contextual. A Statute is best interpreted when we know why it was enacted. *With this knowledge, the Statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a Statute is looked at in the context of its enactment, with the glasses of the statute-maker provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the Statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as whole and discover what each section, each clause, each phrase and each word meant and designed to say as to fit into the scheme of the entire Act. No part of a Statute and no word of a Statute can be construed in isolation. The Statutes have to be construed so that every word has a place and everything in its place.* See ***Dalco Engineering Private Ltd v Shree Satish Prabhakar Padhye [2010] AIR SC 1576***

The contextual interpretation should applied to contributions payable under the National Social Security Fund as including any contributions payable to any retirements benefits scheme so that it is not looked at as an isolated act or scheme. The purposive interpretation must be applied in order to discern its true import.

The court has a duty to take a broad and commonsensical view of the provisions in order to give effect to general scheme of the Insolvency Act. It is not proper in such a case to indulge in hairsplitting approach and find an escape route for defeating the rights of employees to have their contributions and pension claims ranked as preferential debt under Insolvency Act.

The contributions to UCECPS and Pension claims by former employees can equally be interpreted to fall within the same rank and class as Contributions to National Social Security Fund as provided under section 12(6)(b) of the Insolvency Act.

It is so ordered.

***SSEKAANA MUSA***
***JUDGE***
***5th February 2021***