THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

MISCELLANEOUS APPLICATION NO.1162 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 COURT'S DIRECTIONS IN RESPECT OF THE VERIFICATION AND DETERMINATION OF CLAIMS BY UCOM LIMITED, A SHAREHOLDER IN THE COMPANY, AND ITS PARENT COMPANIES LAP GREENN LIMITED AND LIBYAN POST TELECOMMUNICATIONS AND INFORMATION TECHNOLOGY HOLDING COMPANY (LPTIC).

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. Directions regarding the treatments and admission of claims in the consolidated sum of USD.$ 68,735,931.00 submitted by UCOM Limited and its parent companies LAP GreenN and Libyan Post Telecommunications and Information Technology Holding Company.

2. The costs of this application be provided for.

The grounds in support of this application are stated in the affidavits of the Administrator, Ruth Sebatindira SC, and Ms. Prossy Kembabazi which briefly states;

1. That the company's majority shareholder, UCOM Limited, together with its parent companies-LAP GreenN Ltd and Libyan Post Telecommunications and Information Technology Holding Company submitted claims for a sum of USD$ 68,735,931.(approx.UGX 247,370,995,154/=)

2. The verification requires the intervention of this Honourable Court to conduct an inquiry into claims to give a final determination on the claims.

3. That the determination of this claim could have far reaching consequences on account of prevailing international sanctions against the Government of Libya and its assets including the said shareholders in UTL.

4. That it is in the best interests of the general body of creditors that these claims which constitute a big percentage of the total claims are verified and conclusively determined.

5. That the said claim submitted the monies owed as detailed below:

    a) LAP GreenN Ltd –Shs 219,553,650,154/= (USD $ 61,004,444.47);
    b) UCOM Limited Shs. 10,902,703,000/= (USD $ 3,029,487.95); and
    c) Libyan Post, Telecommunications and Information Technology Holding Company (LPTIC) Shs 16,914,642,000/= (USD $ 4,7000,000)

6 That as a result of a subsequent review and verification process, the Administration team held meetings with representatives of the said companies on 19th July 2017 as a result of which the entities submitted additional evidence to support their claims.

7 However, the review of the new evidence submitted by the companies has still left me insufficiently satisfied to effectively make a pronouncement on the claim for which reasons I now seek this courts intervention to ensure an effective and fair verification of the majority shareholder's claims.

8 That in addition, the verification relating to these claims is potentially contentious as it involves colossal sums of money and interests of a foreign government that is still the subject of international sanctions. Further, the claims arise out of many years of some questionable or unclear intercompany transactions some of which involve multiple third parties that also have their own disputes arising from these dealings.

9 That UCOM Ltd states that its claim of 10,902,703,000.00 is a shareholder loan recorded and recognised in the UTL's financial statements of 2013 and it arises from a technical Assistance Agreement dated 2nd June 2000 executed between Government of Uganda and UCOM Ltd.

10 That on 2nd June 2000, the Government of Uganda entered into a Share Purchase Agreement (SPA) with UCOM Limited under which UCOM purchased 2,040,000 shares representing 51% of the paid up capital of UTL.

11 That the Government of Uganda and UTL also executed a Technical Assistance and Commitment Agreement (TACA) with UCOM's shareholders; namely: Detecon GMBH and Telecel International Limited, to provide technical assistance in the form of 'Seconded Managers' to assist in the management of the company's telecom operations.

12 That under the said agreement, Detecon GMBH and Telecel International Limited, seconded to UTL their personnel that filed the positions of Managing Director, Chief Financial Officer, Chief Operating Officer and Chief Marketing Officer.

13 That at a subsequent date, UCOM Ltd assumed the rights and obligations of its shareholders under this contract and continued seconding managers to UTL and paying them directly.

14 That sometime in 2010/2011, the company started experiencing financial difficulties and from time to time, the Senior Managers, who were more

often Libyan or other foreign nationalities seconded by UCOM and its shareholders, requested for funding from LAP GreenN Ltd. – the parent company of UCOM – to facilitate day to day running of the business including payment of suppliers and creditors.

15 That the practice at time was that the Chief Finance Officer, the Chief Operations Officer and the Managing Director, who in all instances were secondments from UCOM, directly dealt with the UCOM or its parents companies in such matters without any other person's involvement. As such, it was never clear how much was requisitioned for, how much was obtained from any of the said entities or who had paid.

16 That by 2012, UCOM and its parent companies and the seconded managers claimed the group companies had disbursed a sum of USD. 25,718,028.00 (United States Dollars Twenty Five Million Seven Hundred Eighteen Thousand Twenty Eight). At the same time, the company needed new money for its investments. Accordingly, management prepared a Board paper seeking authorisation to borrow USD. 50,000,000.00 from LAP GreenN through which it would formalise the borrowings of the monies already disbursed and obtain financing for the investment it needed to make.

17 That as part of the verification process, a reconciliation of the UTL/UCOM transactions it was established that UTL's payments on account during the period 2007-2014 exceeded the amounts due for that period by a sum of shs. 3, 353,817,727. It was further established that in 2014, UTL met all the expenses of the seconded staff but still paid 462, 317,000 to UCOM Ltd on account of secondments for the same period.

18 It was also established that a debit balance in the sum of Shs. 1,292, 733,247 on the UCOM Technical account, which was intercompany account through which UTL payments made on behalf of UCOM Ltd were recorded.

Therefore, accordingly to the UTL's accounts records reviewed, it is UCOM Ltd that is indebted to the company in the sum of Shs. 4,644,557,974/=.

19 That the LAP GreenN claim, which constitutes 88% of the consolidated claim, states that the company's debt was established pursuant to an Amended, Consolidated and Related Loan Agreement (AMRLA) dated 3rd December 2014 in which UTL acknowledged indebtedness to the company, under what it termed as Existing Loan Arrangements, to the tune of USD $ 62,586,995 as at 31st January 2014, although an amended schedule to the agreement claimed a sum of USD $ 61, 006,444.47.

20 That consequently, the UTL Board approved the said borrowings by a circular resolution dated 12th December 2012 after securing a no objection from the Government of Uganda. The company was authorised to sign a Shareholder Loan Agreement for a sum of USD 50,000,000 that included a sun of approximately 24,000,000 that had already been disbursed and utilised by the company.

21 That I personally participated in the preparation of an agreement for this borrowing and had the same submitted to LAP GreenN for execution but the same was never returned and the matter was never finalised.

22 That sometime in 2014, the seconded managers proposed that the company signs an Amended, Consolidated and Restated Loan Agreement for an alleged borrowing of USD. 62,586,995.00 from LAP GreenN.

23 That however, the legal department advised against this agreement because the payments supposedly made by LAP GreenN could not be adequately verified.

24 That the legal department observed that some UTL creditors on the schedule of payment were not named, others unknown while ZTE

Corporation in particular, another company on the list, still had a subsisting suit against the company.

25 That I have since learnt that the agreement was signed by the Company's then Managing Director, Mr. Ali Amir, who was seconded to the position by LAP GreenN and UCOM under the TACA agreement.

26 That however, I am aware that Government of the Uganda and the Board of UTL did not approve the signing of this agreement.

27 That I aware of the Account Treatment Agreement that was supposedly signed by UTL and LAP GreenN. This agreement came to my knowledge around the time the seconded managers proposed the company signs an Amended, Consolidated and Restated Loan Agreement for an alleged borrowing of USD. 62,586,995.00 from LAP GreenN.

28 That I am aware that the agreement makes reference to settlement agreements that LAP GreenN entered into with ZTE Corporation and Tecnotree in respect of payment of UTK liabilities. However, I have never been availed any copies of these agreements and I was never involved in their drafting.

29 That as part of the verification process, the schedule to AMRLA was reviewed and it lists 113 payment transactions said to have been, made by LAT GreenN to various creditors of UTL between March 2011 and December 2014 on the supposed understanding that UTL would repay LAP GreenN and established that 41 payments listed in schedule totalling the sum of USD. 6,813,000 were made to unascertainable persons. All reviews of UTL fiancé records and inquiries with UTL finance staff have not yielded any helpful information regarding identity of the creditors that LAP GreenN claims to have paid.

30 That it has been established that numerous documents show that there where instances where LAP GreenN executed and performed contracts with suppliers for the benefit of various Telecom companies within its group, including UTL, or payments made for shared services or suppliers within the group. It is therefore unsafe to determine UTL's indebtedness to LAP GreenN without LAP GreenN making clear explanations regarding the extent of its dealings and transactions entered with and on behalf of the company.

31 That LAP GreenN also relied on the ARMLA and an Account Treatment Agreement dated 5th November 2013 entered with UTL under which LAP GreenN alleges to have assumed and paid liability of UTL debts to Huawei Technology Co. Ltd and its subsidiaries in the sum of USD $ 12,360,161: Tecnotree in the sum of USD 1,713,231 and ZTE in the sum of USD 6,138,270.

32 That under the Account Treatment Agreement (ATA), UTL novated its claim of USD 6,326,705 against another entity called Gemtel Ltd to the LAP GreenN which thereafter became principal creditor for the said debt.

33 That ZTE and Huawei Technology Co. Limited, together with its subsidiaries, have also submitted their claims totalling USD. 19,167,695.

34 That it has been established that Libyan Post Telecommunications and Information Technology Holding Company, the parent owner of UCOM Ltd and LAP GreenN, is a Government of Libya owned company responsible for Libyan Government Investment portfolio in the telecom sector. The country is currently under economic sanctions imposed by the United Nations and other members of the international community.

The applicant served the application on the three companies through their known agents in Uganda and advocates MMAKS who declined service and there is an affidavit of service by Hadad Sekajja.

The respondents were also served through email by Joshua Ogwal through one of their contacts Stewart Simpson and copied in Rajab and Benrajab who acknowledged receipt but claimed he was unable to download the documents.

The Administrator took out an application for substituted service and they duly served through emails of the different contact persons and this was deemed effective service. This court allowed the applicant to proceed with the hearing.

In the interest of time the Applicant-Administrator filed written submissions which this court has considered. The applicant was represented by *Mr. Kabiito Karamagi* and *Ms. Rita Birungi Baguma*

Determination

Whether the claims admitted can be subjected to verification by court?

The application is for Directions regarding the treatments and admission of claims in the consolidated sum of USD.$ 68,735,931.00 submitted by UCOM Limited and its parent companies LAP GreenN and Libyan Post Telecommunications and Information Technology Holding Company.

Applicant's counsel submitted that, although the Administrator has held meetings with these companies' representatives as part of the verification process, explanations given appear to be insufficient for the Administrator to make a safe pronouncement. The claims themselves appear to rise out of many years of some questionable or unclear intercompany transactions some of which involve multiple third parties that also have their own disputes arising from these dealings.

The intention of the Administrator in commencing these proceedings is to cause an inquiry into these claims and the alleged transactions giving rise to them. This inquiry would be of assistance in obtaining all the necessary information essential to a proper pronouncement on the claim. The need to bring this matter before this Court is made more pronounced by the colossal sums of money involved and the commercial interests of a foreign government that is still the subject of international sanctions.

It was counsel's submission that Administrator's power to verify claims is derived under, Clause 5(a) of the Administration Deed gives the Administrator the power to *'adjudicate upon, admit and pay creditor's claims out of the proceeds of the sale of the available property'.* It would appear then that the power to reject claims is implied in the Clause. However, it is not clear whether this power is also grounded in Statute.

Counsel submitted that sections 140 of the Insolvency Act, 2011 embeds the purpose of a Provisional Administration as transitory in nature as the company and its creditors agree on a rescue settlement that will be implemented during administration. The section requires a Provisional Administrator to exercise his or her powers in a manner which he or she believes on reasonable grounds to be likely to achieve at least one of the following objectives:

i) the survival of the company and the whole or any part of its undertaking as a going concern;
ii) the approval of an administration deed under section 150; and,
iii) a more advantageous realization of the company's assets than would be effected in a liquidation.

However, the powers provided to the Provisional Administrator in S.150 of the Act for the effective performance of his or her duties do not appear to include the express power to verify claims. My Lord, S.165 of the Act provides that the purpose of an Administrator is to supervise the execution of an administration deed. It would appear that the law in this regard does not also offer the Administrator powers to verify or adjudicate claims.

In fact, Sections 6 – 14 of the Act, which deal with creditor claims, appear to limit the process of submission and verification of claims to liquidations and individual bankruptcy processes as seen by their repeated reference to trustees and liquidators. Sections 2 and 6 of the Act, in particular, expressly define the term claims to those claims submitted in liquidation and bankruptcy.

The claims received are verified under an elaborate provision in r. 175 – 178 of the Insolvency Regulations. The process requires an Office Holder in the

insolvency proceedings to make a pronouncement on the claim upon which any dissatisfied creditor may appeal the decision to the Court.

When seen from the above perspective, it is then arguable that the exclusion of this process from administration proceedings was deliberate. In any event, the administration process is normally a high – level involvement for purposes of achieving a quick business turn around for the distressed entity. As such, an administration process may not require a verification of creditor claims. On the other hand, liquidation and individual bankruptcy process by their nature inevitably require verification of claims.

The contrary view to the argument though is that Sections 6 – 14 of the Act also apply to administration processes. As can be seen from UTL administration, some administrations can be far more engaging to involve the calls, examination and verification of claims. It is then reasonable to expect that the law envisioned this. How then might administration process include the claim – verification process? The answer to this enigma could lie in the definitions of the words "liquidation" and "bankruptcy". These two words are not defined in the Act. However, Black's law dictionary, 9th Ed., at page 1015 defines liquidation as

> *'the act of settling a debt by payment or other satisfaction."*

At page 166, Bankruptcy is defined as;

> *"A statutory procedure by which a debtor obtains financial relief and undergoes a judicially supervised reorganisation or liquidation of the debtor's assets for the benefit of the creditors."*

Therefore, the legal definition of the term bankruptcy would mean that the above sections also apply to administration proceedings. This position seems to be supported by r. 172 of Insolvency Regulations which provides that a person claiming to be a creditor of an insolvent and wishing to recover his or her debt in whole or in part shall submit a claim in writing to the office holder and shall state whether the creditor is claiming as a secured or an unsecured creditor.

Regulation 3 defines an insolvent to include a company in administration or a company in liquidation. Further, an Office Holder is defined as any person who

acts as an insolvency practitioner in any insolvency proceedings. Lastly, insolvency proceedings are defined as proceedings under the Act or Regulations.

This therefore follows that the claims to be submitted under r.172 of the Regulations include those submitted in Administration proceedings. If the above interpretation is correct, then it is reasonable to conclude that the Administrator is required to verify claims in accordance with r. 175 – 178 of the Insolvency Regulations.

However, the counter argument to this position could also be that the provisions of the Regulations are inconsistent with the express provisions and likely intentions of the Act. Therefore, to that extent, the provisions of the Regulations are rendered void by S. 18(4) of the Interpretation Act. The enigma still remains. It would be helpful if this Honourable Court could offer assistance and guidance on the seeming contradictions at play here.

Therefore, it is likely that Clause 5 of the Administration Deed was included as a caution to give the Administrator the requisite powers for his functions under the deed. Indeed, if this Court is to find that the Act does not give the Administrator powers to verify claims, it would be perfectly legal for creditors to provide for those powers in an Administration Deed.

The question though is whether that Administrator is bound to follow the verification and adjudication procedure laid out in r. 175 – 178 of the Act. The UTL administration being the pioneer process in this jurisdiction, this Court has a duty to develop jurisprudence and precedence for future Administrators appointed under similar circumstances. The Administrator has made pronouncements with regard to some claims. However, pronouncements have been reserved in peculiar cases like this one before Court because of the need for appropriate directions to resolve the issues raised.

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 Administrator comes before this Court for guidance and assistance in determining the treatment of the parent companies' claims because of the intricate and unclear dealings they had with UTL where they were also intricately involved in its management affairs.

Secondly, the other issue for determination is whether the debts associated with a shareholder, should be subordinated to the settlement of other creditor's claims. The question in the instant case is far more direct as we are dealing is a majority shareholder in the company.

Counsel submitted that it is unclear how claims due to shareholders on the basis of their contractual transactions with the company should be treated. The question we put before Court was whether shareholders of an insolvent are permitted to claim in *pari passu (i.e. equally)* with unsecured creditors.

Analysis

Section 173(1) of the Insolvency Act, 2011 provides that upon an application for Court's directions, the Court may give directions on any matter concerning the functions of the Administrator. In ***Re: UTL - An application by Ruth Sebatindira SC., for directions on the continuation of her mandate as the Administrator of Uganda Telecom Limited - Misc. Application No. 783 of 2020,*** this Honourable Court guided on the application of Section 173(1) of the Insolvency Act, 2011 under which the Applicant seeks directions. It held: -

> *"This provision gives the court wide discretionary powers to give directions on any function of an Administrator. <u>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</u>.*

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." – emphasis mine

Furthermore, in the recent case of ***Re: UTL - 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 - Miscellaneous Application no.220 of 2020,*** this Court stated;

'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.'*

My Lord, this Court further added that.

'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****'.*

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."

Therefore the question of whether the administrator has power to verify claims of different creditors 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 which are suspicious or questionable.

The powers of this court in interpreting statutes extends to giving full effect of legislations and its 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 their claims were wrongly left out or questioned by the administrator would make applications to the court to challenge such decisions.

Whether the Administrator has power to verify claims presented in the Administration process.

Clause 5(a) of the Administration Deed gives the Administrator the power to *'adjudicate upon, admit and pay creditor's claims out of the proceeds of the sale*

of the available property'. It would appear then that the power to reject claims is implied in the Clause.

Sections 140 of the Insolvency Act, 2011 embeds the purpose of a Provisional Administration as transitory in nature as the company and its creditors agree on a rescue settlement that will be implemented during administration. The section requires a Provisional Administrator to exercise his or her powers in a manner which he or she believes on reasonable grounds to be likely to achieve at least one of the following objectives:

i) *the survival of the company and the whole or any part of its undertaking as a going concern;*
ii) *the approval of an administration deed under section 150; and,*
iii) *a more advantageous realization of the company's assets than would be effected in a liquidation.*

However, the powers provided to the Provisional Administrator in S.150 of the Act for the effective performance of his or her duties do not appear to include the express power to verify claims. Section 165 of the Act provides that the purpose of an Administrator is to supervise the execution of an administration deed. It would appear that the law in this regard does not also offer the Administrator powers to verify or adjudicate claims.

In fact, Sections 6 – 14 of the Act, which deal with creditor claims, appear to limit the process of submission and verification of claims to liquidations and individual bankruptcy processes as seen by their repeated reference to trustees and liquidators. Sections 2 and 6 of the Act, in particular, expressly define the term claims to those claims submitted in liquidation and bankruptcy.

The claims received are verified under an elaborate provision in r. 175 – 178 of the Insolvency Regulations. The process requires an Office Holder in the insolvency proceedings to make a pronouncement on the claim upon which any dissatisfied creditor may appeal the decision to the Court.

Sections 6 – 14 of the Insolvency Act also apply to administration processes. As can be seen from UTL administration, some administrations can be far more engaging to involve the calls, examination and verification of claims. It is then

reasonable to expect that the law envisioned this. How then might administration process include the claim – verification process? The answer to this enigma could lie in the definitions of the words "liquidation" and "bankruptcy". These two words are not defined in the Act. However, Black's law dictionary, 9th Ed., at page 1015 defines liquidation as

> *'the act of settling a debt by payment or other satisfaction."*

At page 166, Bankruptcy is defined as;

> *"A statutory procedure by which a debtor obtains financial relief and undergoes a judicially supervised reorganisation or liquidation of the debtor's assets for the benefit of the creditors."*

Therefore, the legal definition of the term bankruptcy would mean that the above sections also apply to administration proceedings. This position seems to be supported by r. 172 of Insolvency Regulations which provides that a person claiming to be a creditor of an insolvent and wishing to recover his or her debt in whole or in part shall submit a claim in writing to the office holder and shall state whether the creditor is claiming as a secured or an unsecured creditor.

Regulation 3 of the Regulations defines an insolvent to include a company in administration or a company in liquidation. Further, an Office Holder is defined as any person who acts as an insolvency practitioner in any insolvency proceedings. Lastly, insolvency proceedings are defined as proceedings under the Act or Regulations.

It can be properly deduced that the claims to be submitted under r.172 of the Regulations include those submitted in Administration proceedings. If the above interpretation is correct, then it is reasonable to conclude that the Administrator is required to verify claims in accordance with r. 175 – 178 of the Insolvency Regulations.

The above reasoning is buttressed in fact that while interpreting a special statute, which is a self-contained code, the court must consider the intention of the

Legislature. The reason for this fidelity towards the legislative intent is that the Statute has been enacted with a specific purpose, which must be measured from the wording of the statute strictly construed. The Insolvency Act and regulations made under the Act must be given the same treatment in order to achieve the intended purpose.

Whenever an Act comes up for consideration like in the present case the Insolvency Act, it must be remembered that it is not within human powers to foresee manifold sets of facts which may arise, and even if it were, it is impossible to provide for them in terms free from all ambiguity. A judge cannot simply fold his hands and blame the draftsperson. He must set to work on the constructive task of finding the intention of the Parliament, and he must do this not only from the language of the Act, but also from a consideration of the social conditions which gave rise to it and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give "force and life' to the intention of the Legislature. A judge should ask himself the question of how, if the makers of the Act had themselves come across this ruck in texture of it, they would have straightened it out? He must do as they would have done. A judge must not alter the material of which the Act is woven, but he can and should iron out the creases. ***See Vipulbhai M. Chaudhary v Gujarat Cooperative Milk Marketing Federation Ltd [2015] AIR SC 1960; Seaford Court Estates v Asher [1949] 2 All ER 155***

The Legislature often fails to keep pace with the changing needs and values. It is not realistic to expect that it would have provided for all contingencies and eventualities. It is, therefore, not only necessary but obligatory on the courts to fill the lacuna. When the courts perform this function, implicitly delegated to them to further the object of legislation, which stands implicitly delegated to them to further the object of the legislation and to promote the goals of the society or put it negatively, to prevent the frustration of the legislation or perversion of the goals and values of society. So long as the courts keep themselves tethered to the ethos of the society and do not travel off its course, so long as they attempt to furnish the felt necessities of the time and not to refurbish them, their role in this respect has to be welcomed.

Therefore, the duty of the courts is to ascertain and give effect to the will of Parliament as expressed in enactments. In the performance of this duty, the judges do not act as computers into which are fed the Acts and the rules for the construction of statutes and from which issues forth the mathematically correct answer. The interpretation of Statutes is a craft as much as a science, and the judges, as craftsmen, select and apply the appropriate rules as the tools of their trade. They are not legislators, but finishers, refiners and polishers of legislation which comes to them in state requiring varying degrees of further processing. ***See Corocraft Ltd v Pan American Airways Inc [1968] 3 WLR 714 at 732***: ***Vipulbhai M. Chaudhary v Gujarat Cooperative Milk Marketing Federation Ltd(Supra)***

The role of the court as succinctly stated above allows this court to give an interpretation that furthers the object and purpose of the legislation. The verification of claims by the Provisional Administrator should be directly read into the Insolvency Act in order to give full effect of the law as intended by the legislature. It is the bounden duty of the Administrator to ascertain and verify claims before they are considered for settlement; otherwise baseless claims may be included to the detriment of the genuine creditors of company under insolvency.

This court agrees with the submission of counsel for the applicant that Clause 5 of the Administration Deed was included as a caution to give the Administrator the requisite powers for his/her functions under the deed. There is no harm in the Administration deed giving extra powers and obligations which may include verification of claims since it is an agreement of the creditors and the company. Such power of verification of claims must be exercised with caution and not as *carte blanche* to question straight forward claims which are undisputed.

The Administrator is bound to follow the verification and adjudication procedure laid out in r. 175 – 178 of the Insolvency Regulations. Alternatively the Administrator may seek directions of court of the best mode of verifications depending on the circumstances of the particular case at hand.

<u>The question before Court is whether shareholders of an insolvent are permitted to claim in *pari passu (i.e. equally)* with unsecured creditors.</u>

The House of Lords was faced with a similar challenge in the case of ***Soden and another vs. British Commonwealth Holdings PLC (in administration) and another [1997]4 ALL ER 353.*** The Court in that case was asked to consider the interpretation and application of the S. 74(1) and (2)(f) of the English Insolvency Act 1986 which states as follows:

> *"When a company is wound up, every present and past member is liable to contribute to its assets to any amount sufficient for payment of debts and liabilities and the expenses of the winding up and for the adjustment of the rights of the contributories among others.*
>
> *(2) This is subject as follows:*
>
> *(f) a sum due to any member of the company (in his character of a member) by way of dividends, profits or otherwise is not deemed to be a debt of the company, payable to that member in a case of competition between himself and any other creditor not a member of the company, but any such may be taken into account for the purpose of the final adjustment of the rights of the contributories among themselves."*

In interpreting this provision of the Act, the House of Lords held as follows: -

> *"Section 74(2)(f) of the 1986 Act required a distinction to be drawn between sums due to a member in* ***his character of a member by way of dividends, profits or otherwise, and sums due to a member of a company otherwise than in his character as a member****. The word 'by way of dividends, profits otherwise' are illustrations of what constitute sums due to a member in his character as such. They neither widen, nor restrict the meaning of that phrase. But the reference to dividends and profits are examples of sums due in a character of a member entirely accords with the view I have reached as to the meaning of the section since they indicate rights founded on the statutory contract and not otherwise.*
>
> *Moreover, the construction of the section which I favour accords with principle. The principle is not 'members come last': **a member having***

> ***a cause of action independent of the statutory contract is in no worse position than any other creditor****. The relevant principle is that the rights of members as members come last, i.e. rights founded on the statutory contract are, as the price of limited liability, subordinated to the rights of creditors based on other legal causes of action. The rationale of this section is to ensure that the rights of members as such do not compete with the rights of the general body of creditors."*

The Court defined the statutory contract as the bundle of rights and liabilities created by the memorandum and articles of association as well as the rights and obligations that are conferred upon a member of a company by law. This covenant is unmistakable in S. 21 of our Companies Act, 2012. My Lord, we also referred this Court to the Australian case of ***Sons of Gwalia Limited (Administrators Appointed) v Margaretic (2005)55 ASCR 365***. The Federal Court was asked to consider a somewhat similar provision contained Section 563A of the Australian Corporations Act, 2001 which states that:

> *"Payment of a debt owed by a company to a person in the person's capacity as a member of the company, whether by way of dividends, profits or otherwise, is to be postponed until all debts owed to, or claims made by, persons otherwise than as members of the company have been satisfied."*

This provision is an import from the English Companies' legislation of 1892, the Companies Act 1862 (UK). In considering its interpretation, the Australian Federal Court held:

> *"What determines the present case is that the claim made by the respondent is not founded upon any rights he obtained or any obligations he incurred by virtue of his membership of the first appellant. He does not seek to recover any paid-up capital, or to avoid any liability to make a contribution to the company's capital. His claim would be no different if he had ceased to be a member at*

the time it was made, or if his name had never been entered on the register of members. The respondent's membership of the company was not definitive of the capacity in which he made his claim. The obligations he sought to enforce arose, by virtue of the first appellant's conduct, under one or more of the statutes mentioned in the earlier description of the respondent's claim.

…

For the reasons already given it would be wrong to conclude that, on the true construction of s 563A of the Act, the debt owed to the respondent is owed to him in his capacity as a member of the first appellant."

The essence of these holdings is that in considering claims submitted by members of a company, a determination must be made as to whether the claim of the member creditor arose from an entitlement under the *statutory contract with the company* (i.e. obligations imposed by the Memorandum and Articles of Association and company law) or whether the claim arose *independent of the statutory contract and purely on a different cause of action.*

Although, the Insolvency Act appears not to have provisions similar to the S. 74(1) and (2)(f) of the English Insolvency Act of 1986 and Section 563A of the Australian Corporations Act of 2001. This court would be guided by the above cases to give effect to our law and avoid any absurdities of ranking the shareholders *pari passu* with other creditors. It would be grossly unfair to the general bodies of creditors to allow a shareholder creditor to press his/her shareholder rights ahead of or even in the same ranking of other unpaid creditor claims. This appears to be a case where Court may have to intervene to be bring credibility to the insolvency process.

The parent companies in this case-*UCOM Ltd, LAP GRENN Ltd and LIBYAN POST TELECOMMUNICATIONS AND INFORMATION TECHNOLOGY HOLDING COMPANY (LPTIC)* were not mere by standers in the affairs of UTL. They actively participated

in the management of the company by seconding employees to the top management positions in the company, and took full responsibility for the company's management. However, the manner in which some of the loans that are being claimed against the company were secured and the refusal or inability of the companies to offer a proper explanation for their claims does raise a strong suspicion that there was a deliberate attempt by the parent companies to allocate an unfair risk on the legitimate creditors of UTL. In the circumstances, it may be fair that a structural subordination of their claims can be considered so as to give value to the wider faculty of creditors.

Therefore, it is reasonable to conclude that the parent companies cannot sustain their claims against UTL. As their seconded employees were in charge of the company's management, it is reasonable to conclude that they were well aware of the on goings in the company. It would therefore be fair to conclude that the signing of these settlement agreements, the parent companies were well aware of significant financial difficulties of their subsidiaries. Therefore, the signing of the AMRLA was meant to secure position on the creditor list. It appears that it is this sort of thing that S. 9 of the Insolvency Act is meant to guard against.

The debts or claims of the majority shareholder should be subordinated to the settlement of other creditors claim and a structural subordination of their claims can be considered.

It is so ordered.

SSEKAANA MUSA
JUDGE
11th March 2022