THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL DIVISION

MISCELLANEOUS APPLICATION NO.1163 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 AS ADMINISTRATOR OF UGANDA TELECOM LIMITED ON THE ADMISSION OF CLAIMS BY HUAWEI TECHNOLOGIES CO. LIMITED, HUAWEI INTERNATIONAL PTE. LIMITED, HUAWEI TECHNOLOGIES (UGANDA) CO. LIMITED AND ZTE CORPORATION.

RUTH SEBATINDIRA SC.,]
THE ADMINISTRATOR]
OF UGANDA TELECOM LIMITED] APPLICANT

VERSUS

1. **LAP GREENN LIMITED]**
2. **HUAWEI TECHNOLOGIES CO. LIMITED]**
3. **HUAWEI INTERNATIONAL PTE. LIMITED]**
4. **HUAWEI TECHNOLOGIES (UGANDA) CO. LIMITED]**
5. **ZTE CORPORATION] RESPONDENTS**

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;

a) Directions for the admission of competing claims submitted by Huawei Technologies Co. Limited, Huawei International PTE. Limited and Huawei Technologies (Uganda) Co. Limited and LAP GreenN Limited;

b) Directions on the admission of claims submitted by ZTE Corporation

(c) 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, which briefly states;

1. That the Administrator has received competing claims from the 1st respondent and 2nd-4th respondents.

2. The verification requires the intervention of this Honourable Court to conduct an inquiry into the 1st respondent dealings and transactions regarding the claim submitted by respondent which appear doubtful and unclear.

3. That among the claims received for verification and settlement include those submitted by the 2nd – 4th Respondents as per particulars below:
   a. Huawei Technologies Co. Limited whose claim for a sum of USD. 14,253,059.01 (United States Dollars Fourteen Million Two Hundred Fifty-Three Thousand Fifty-Nine and a tenth of a Cent Only) is attached hereto and marked ***'A'***;

   b. Huawei International Pte. Limited whose claim for a sum of USD. 14,399 (United States Dollars Fourteen Thousand Three Hundred Ninety-Nine Only) is attached hereto and marked ***'B'***; and,

c. Huawei Technologies (Uganda) Co. Limited whose claim for a sum of USD. 4,900,237 (United States Dollars Four Million Nine Hundred Thousand Two Hundred Thirty-Seven Only) is attached hereto and marked ***'C'***.

4. That at the same time, 1st Respondent, which is also known as LAP GreenN, submitted an amended claim against UTL for a sum of USD. 61,006,444.47 which includes a sum of USD. 12,360,161.00 it allegedly paid to the 2nd – 4th Respondents on behalf of UTL.

5. That in the course of execution of my duties as Administrator of UTL, I have come to learn that the 1st Respondent is a company registered in Mauritius and the sole shareholder in UCOM Limited, the majority shareholder of the UTL holding 69% of the company's stock.

6. That in in the course of my verifications and investigations of these competing claims, I have established that on 23rd June 2013, the 1st Respondent entered into a settlement agreement with 2nd Respondent, as parent company of the 3rd and 4th Respondent companies, relating to unspecified liabilities owed to it and its subsidiaries by the 1st Respondent's subsidiaries that include UTL.

7. That under the agreement, the 1st Respondent expressly agreed to pay to the 2nd Respondent a sum of USD. 65,000,000.00 in full and final settlement of all and any claims by and against the entities and their respective subsidiaries.

8. That the agreement further required all the 1st Respondent's subsidiaries affected by the settlement agreement to issue Corporate Guarantees to the 2nd Respondent as security for the 1st Respondent's settlement of its obligations to the 2nd Respondent under the settlement agreement. Accordingly, on 30th September 2013, UTL issued the 2nd Respondent a Corporate Guarantee to the limit of USD. 7,060,000.00 as security for the 1st Respondent's obligations.

9. That execution of this agreement preceded the filing of HCCS No. 570 of 2012 – Huawei Technologies Co. Ltd & Huawei International PTE Ltd vs Uganda Telecom Ltd, and HCCS No. 584 of 2012 – Huawei Technologies Ltd & Huawei Technologies (Uganda) Ltd vs Uganda Telecom Ltd, under which the said companies sued UTL for breach of contract. Both cases were subsequently withdrawn in accordance with the terms of the settlement agreement.

10. That following the undertakings made by the 1st Respondent to the 2nd 3rd and 4th Respondents, the 1st Respondent, as the beneficial owner of the majority stock of UTL, and UTL executed an Amended, Consolidated and Restated Loan Agreement (AMRLA) on 3rd December 2014 under which the parties attempted to formalise all its pre-existing informal lending and indirect shareholder investments made by the 1st Respondent in UTL.

11. That in addition, UTL and the 1st Respondent entered into an Account Treatment Agreement (ATA) dated 5th November 2013 under which UTL novated its claim of USD. 6,326,705.00 against another entity called Gemtel Ltd to the 1st Respondent which thereafter became principal creditor for the said debt.

12. That under the AMRLA agreement, the 1st Respondent claimed to have entered into a series of informal lending and shareholder investments to UTL to the tune of USD 62,586,995. The sum was subsequently revised to the already stated sum of USD. 61,006,444.47 and includes the also already stated sum of USD. 12,360,161 claimed by the 2nd – 4th Respondents.

13. That further, under the said Agreement, the 1st Respondent was to charge interest of 2.5% p.a. on the above monies.

14. The however, the propriety of AMRLA agreement is an issue for which I also seek directions of this Honourable Court as the borrowing that was created is different from that that was sanctioned by UTL Board.

15. That the 1st Respondent later defaulted on its obligations under the settlement agreement whereupon the 2nd Respondent enforced its guarantee against UTL and on 15th May 2015, commenced HCCS No. 311 of 2015 – Huawei Technologies Co. Ltd vs Uganda Telecom Ltd. for a sum of USD. 7,060,000.00, the sum stipulated in the guarantee.

16. That on 16th March 2015, a day later, the 2nd Respondent commenced arbitration proceedings against the 1st Respondent in London, United Kingdom, upon which it obtained an award on 4th April 2016 for:

    a) USD. 58,452,833.39 being the principal amount found due to the 2nd Respondent under the Settlement Agreement together with interest in the sum of USD. 8,452,833.39;

    b) USD. 286,746.10 in legal costs;

    c) £92,504.47 in reimbursement costs of the arbitration;

    d) Interest on the above sums awarded at 8% per annum from the date of the Award until payment.

17. That subsequently, on 30th May 2016, the 1st and 2nd Respondents executed another Settlement Agreement under which they provided for the payment of a sum of USD. 58,832,083.96 in settlement of the above award. This sum was agreed to be due and owing as at 4th April 2016, the date of the arbitral award, and comprised the principal debt of USD. 50,000,000 and accrued interest and costs of USD. 8,832,083.96.

18. That after the execution of this settlement agreement, proceedings in HCCS No. 311 of 2015 – Huawei Technologies Co. Ltd vs Uganda Telecom Ltd were withdrawn upon the record that UTL had met all her obligations to the plaintiff.

19. That based on the above facts, I believe that the claims by the 2nd – 4th Respondents ought to be directed at the 1st Respondent as they arise out of the settlement agreement dated 30th May 2016.

20. That however, in view of the large sums involved, the complicated intra company dealings demonstrated above and the contentions that may arise from the verification process, I seek this Court's guidance and directions on the admission of the competing claims submitted by the 1st and 2nd – 4th Respondents.

21. That in addition to the 2nd - 4th Respondents, both the AMRLA dated 3rd December 2014 and the ATA dated 5th November 2013 state that the 1st Respondent also assumed and paid UTL's liability to a company called Tecnotree in the sum of USD 1,713,231 and another called ZTE Corporation, the 5th Respondent, in the sum of USD 6,138,270.

22. That both the AMRLA and ATA also state that the 1st Respondent had entered into separate settlement agreements with the two said companies. However, despite my best efforts, I have not been unable to obtain a copies of these agreements from the company's records.

23. That notwithstanding the representations by these agreements I have not received a claim from Tecnotree and neither has the 1st Respondent claimed the monies it claimed to have paid on account of UTL's indebtedness.

24. That the 1st Respondent subsequently amended its claim of payment of monies owing to the 5th Respondent which has since submitted its claim.

25. That however, I am concerned by the lack of transparency in these transactions and as such, I seek this Honourable Court's directions with regard to the admission of the claim by the 5th Respondent.

26. That the Respondents therefore ought to make honest disclosures regarding their dealings for me to make a proper determination on the verification process.

The applicant served the application on the 1st respondent through their known agents in Uganda and advocates MMAKS who declined service and there is an affidavit of service by Hadad Sekajja.

The 1st respondent was 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. They indeed made a response by letter which is indeed an acknowledgment that service of the court process in the different modes was effective. 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.* The 2nd – 4th Respondents were represented by *Mr*. *Alex Kibandama* and 5th Respondent was represented by *Mr. Kavuma Terrence*

Determination

Whether the claims submitted by the 1 – 4th Respondents can be subjected to verification by court and are competing claims?

It was the submission of the applicant's counsel that the Administrator comes before this Court for guidance on a matter of law and comfort for a crucial decision to be made regarding the treatment of the respondent creditors' claims. The pleadings before this Honourable Court clearly show a contest over claims submitted for admission. These contests have their origins in dealings between the Respondents that require closer scrutiny. As such, the issue before this Court

is how the Administrator should treat the competing and unclear claims submitted before her by the Respondents.

Therefore, this application ought not to be interpreted as an adversarial proceeding. Counsel countered the assertion that the application was intended to circumvent or avoid the Respondents' respective claims contending that the argument was misplaced as the Administrator took no personal advantage in anyone's gain or loss.

Counsel argued that the action simply seeks Court's guidance and clarification regarding the Administrator's functions that relate to the treatment of the claims now brought before Court and that the participation of the Respondents should be for the purpose of contributing to the guidance sought.

The applicant's counsel submitted that the 1st Respondent's claim is simple. The Respondent claims to have settled the sum of USD. 12,360,161 that UTL owed to the 2nd – 4th Respondents. However, the 2nd – 4th Respondents claim the monies were never paid.

According to the affidavit of Ms. Priscilla Mutebi, filed on behalf of the 2nd – 4th Respondents, the basis of the Respondents' claims lies in contractual relations that culminated in a breach occasioned by UTL for which they commenced HCCS No. 584 of 2012 and HCCS No. 570 of 2012 against UTL for USD. 10,247,501.00 and USD. 2,777,290.29, respectively, for telecommunication equipment and services rendered to Uganda Telecom Ltd (UTL). The consolidated claim of these suits was USD. 13,024,791.29. On its part, UTL counter sued for breach of contract and supply of substandard equipment for which it sought a reimbursement over USD. 17,000,000.00 in HCCS 584 of 2012 alone.

These suits were settled when the 1st Respondent intervened and signed a settlement agreement dated 23rd June 2013 with the 2nd Respondent for USD. 65,000,000 to resolve the ongoing payment disputes between their respective subsidiary/group entities across the continent. This agreement was attached and marked as annexure **'F'** to the Administrator's affidavit and the recital therein read as follows:

> ***'WHEREAS**: Outstanding payments are due from the LG (LapGreenN) subsidiaries (as defined below) to the Huawei subsidiaries (as defined*

*below) for the supply of services and equipment. The extent of these liabilities is in dispute. Huawei and certain Huawei subsidiaries have instituted proceedings against LG and certain of the LG Subsidiaries in certain jurisdictions**. The Parties have agreed to settle the disputes on the terms and conditions set out in the agreement' (emphasis)***

This recital only emphasizes that the purpose of this agreement was for the two parent companies to conclusively settle payment disputes arising from dealings with their respective subsidiaries.

Clause 5 of the agreement provides that the consolidated settlement sum of USD. 65,000,000.00 would be payable in 5 instalments by 31st December 2013. Clause 2.2 of this agreement made it a condition precedent for the delivery to the 2nd Respondent of a guarantee executed by UTL and other affected subsidiary companies under the settlement together with certified Board resolutions authorizing the issuance of those guarantee. Consequently, UTL provided a guarantee for USD. 7,060,000.00 and the requisite board resolution.

Clause 4.4 of the agreement provided that upon fulfilment of those conditions, all suits commenced by the 2nd Respondent's entities would be withdrawn. Counsel argued that the wording of the formal Consent Decrees was unambiguous. Each decree filed in Court, annexures '**H4 and H5'** to the Administrator's affidavit, simply states that *'the suit and counterclaims are withdrawn'.*

Counsel also contended that the gist of the settlement agreement entered by the parties is best explained in paragraph 13 of the affidavit Ms. Priscilla Mutebi, the 2nd – 4th Respondents' Company Secretary/Head of Legal. The paragraph referred to reads as follows:

13. That on 23rd June 2013, the 1st and 2nd Respondents entered into a Settlement Agreement ("the First Agreement") wherein the 1st Respondent as the majority shareholder in Uganda Telecom Limited undertook to pay all the outstanding sums due to the 2nd – 4th Respondents on behalf of Uganda Telecom Limited. (Emphasis)

It is apparent that the 1st Respondent defaulted on its obligation under the settlement agreement upon which the 2nd Respondent commenced HCCS No. 311 of 2015 against UTL on the basis of the guarantee. Counsel this Court to the plaint

filed in that suit, attached as annexures **'H9'** to the Administrator's affidavit, as confirmation that the sum sued for was USD. 7,060,00.00.

A day after the commencement of the said suit, the 2nd Respondent commenced arbitration proceedings against the 1st Respondent based on its breach of the settlement agreement. The 2nd Respondent's request for arbitration proceedings was attached and marked **'I1'** to the Administrator's affidavit. The 2nd Respondent subsequently obtained an award against the 1st Respondent for a consolidated sum of approximately USD. 60,000,000.

The 1st and 2nd Respondents then entered into another settlement agreement dated 30th May 2016, annexure **'J'** to the Administrator's affidavit. Under this agreement, the 1st Respondent committed itself to pay approximately USD. 65,000,000.00 in scheduled payments in full and final settlement of the award. Counsel stated that that the effect of this settlement agreement was so supersede the earlier settlement agreement entered in 2013.

Schedule 1 of the new settlement agreement expressly required the 1st Respondent to pay USD. 3,000,000.00 by June 2016. Clause 2 made this payment and the provision of the 1st Respondent's Board resolution authorizing the creation of the indebtedness conditions precedent to give effect to the agreement. Counsel also referred this Court to Clause 6.4 which expressly provides that subject to the performance of each party's obligations, each party shall-

> '*release and discharge all actions, claims and demands in any jurisdiction that it, its affiliates or any of them may have or may have against the other party or any of its affiliates arising or connected with the outstanding debt obligations*. (Emphasis)

On 11th October 2016, 4 months after the signing of the second settlement agreement, the 2nd Respondent entered a consent order in HCCS No. 311 of 2015 under which the suit was wholly withdrawn. Counsel referred this Court to the Order, annexure **'L'** to the Administrator's affidavit, which states that:

> *'The defendant having met all her obligations, HCCS311 of 2015 Huawei Technologies Co. Ltd vs Uganda Telecoms Limited is hereby withdrawn'.*

Counsel argued that the only import of this Order is that the 2nd Respondent was so content with the 1st Respondent's performance of the agreement that it went ahead to give full effect to clause 6.4 of the settlement agreement.

Counsel submitted that, the situation presented by these facts is a classic case of what is termed as *'double proof or double dividend'* in insolvency. Double proof occurs where there is more than one claimant for a debt in insolvency. Common law has since established what is referred to as *the rule against double proof*. This rule simply states that an insolvent estate can only accept one creditor claim for each debt that the insolvent entity owes.

Counsel further submitted that the Administrator's review of the facts of the case and the documents submitted appear not to support the Respondents' claim for the following reasons.

a) Mischievous Double Proof Claim

The Administrator contended that a simple study of the claims attached as annexures **'A', 'B' and 'C'** to her affidavit shows that the Respondents' claims fall into two components:

i. USD. 12,107,693.00 being the consolidated claims of the 2nd – 4th Respondents stated to have incurred before 2013.

ii. USD. 7,060,000.00 owed to the 2nd Respondent which is said to have incurred on 30th September 2013. However, the Administrator contends that the origin of this claim is in the first settlement agreement of 2013.

The Administrator contends that the claim in paragraph (i) above is the original claim with its origins in the contracts for supply of equipment and telecommunications services as already described above. However, the Administrator contends that the claim in paragraph (ii) doesn't have its origins in any supply contract. She further contends that its roots are in the first settlement agreement under which UTL was required to give a guarantee for the sum of USD. 7,060,000.00.

Counsel referred this Court to the guarantee and board resolution, annexures **'G1 and G2'** to the Administrator's affidavit, to show that UTL signed these documents on 30th September 2013, the date the Respondents claim the indebtedness was created. Counsel therefore argued that this liability could only have crystallized, not on the date of creation, but on the date of default which happened in 2015 and upon which the 2nd Respondent commenced HCCS No. 311 of 2015 and arbitration proceedings against the 1st Respondent.

Counsel argued that the more mischievous design was the Respondents' hope to gain both the original claim and monies secured by the guarantee. Counsel argued that this was a double proof claim on its own as the first settlement agreement did not intend to create an additional liability. At worst, they further argued, it served to create a settlement indebtedness for UTL and in which case, the Respondents certainly could not have it both ways!

b) No Right of Recourse against UTL

Counsel also argued that a review of the documents and the facts as presented by the 1st – 4th Respondents appears to demonstrate that the 2nd – 4th Respondents signed away their rights to claim against UTL. Counsel referred Court to Clause 6.4 of the second settlement agreement and the Consent Order entered in HCCS 311 of 2015, which they contended are explicit in their import. Counsel therefore surmised that the 2nd – 4th Respondent's right or recourse appears to be against the 1st Respondent only.

Counsel further buttressed their argument with what they termed as an express admission in paragraph 13 of Ms. Priscilla Mutebi's affidavit and the 2nd Respondent's letter to the Administrator, annexure **'K'** to the Administrator's affidavit, which states that;

> *'We write to clarify that our claim against Lap GreenN is valid. Our claim arises out of multiple commitments, by Lap GreenN, including the settlement agreement……As at 4th April 2016, Lap GreenN owed*

<u>Huawei a total of USD58,832,083.96</u> which amount still attracts interest as long as it or portion thereof remains outstanding'

Counsel submitted that it cannot be reasonably expected that the Respondents believe that they have a right of claim against UTL in view of the above letter and that any complaints of defaults are no concerns for UTL.

c) 2nd – 4th Respondents' Conduct

Counsel also argued that the conduct of the 2nd – 4th Respondent also appear to buttress the conclusions drawn above. Counsel argued that when the 1st Respondent defaulted on its obligations under the first settlement agreement, 2nd respondent commenced HCCS No. 311 of 2015 against UTL for the sum of USD. 7,060,000.00 based on the guarantee issued under that settlement agreement. Further, the 2nd Respondent commenced arbitration proceedings against the 1st Respondent under the terms of that settlement agreement.

However, the 3rd and 4th Respondents, who had earlier been commenced HCCS No. 570 of 2012 and No. 584 of 2012 along with the 2nd Respondent, did not file any action for the balance of approximately USD. 5,000,000.00 that would have otherwise been due on their claim. Counsel submitted that that can only be because they understood their claim would be limited to the USD. 7,060,000.00 based on the guarantee issued and the terms of the settlement agreement.

Counsel further submitted that the right to that claim of USD.7,060,000 also extinguished when the parties signed a Consent Order in HCCS No. 311 of 2015 under which the 2nd Respondent stated that UTL has performed all its obligations. That consent signed before Court by the two parties represented by their counsel shouldn't be taken lightly.

On the other hand, the 2nd – 4th Respondents contended that they are owed a consolidated claim of USD.19,167,695 by UTL. Counsel for Respondents submitted

that the sum of 12,360,161 of the said claim accrued before 2013 for the supply of telecommunication equipment and services, and that the USD 7,060,000 was incurred on the basis of a guarantee deed executed by UTL. Counsel argued consolidated claims arises out of two contract and that 1st Respondent has never settled the debts arising out of the same.

Counsel submitted that it is an established principle under the double proof rule that all claims by creditors are provable as debts against company whether they are present or future certain or contingent, ascertained or sounding only in damages. The 2nd – 4th Respondents Counsel further submitted that the sum of USD.7, 060,000 never crystallized on 30th September 2013 as the applicant contends. Counsel submitted that the 2nd respondent filed a summary suit to recover the guaranteed sum after the respondent failure to comply with the terms of the First Settlement Agreement. The 2nd respondent further instituted arbitration proceedings against the 1st respondent for breach of the 1st Settlement Agreement at the London Court of International Arbitration.

Following the arbitration Award, the 1st and 2nd respondent entered into a Second Settlement Agreement dated 30th May 2016 which provided for the fulfillment by the 1st respondent of the terms of the Final Award. Counsel therefore submitted that there is no double proof of claim to the respondent as the sums arise from different contracts against Uganda Telecom Ltd and the sum remains outstanding and never paid by either the 1st Respondent as majority shareholder for UTL or Uganda Telecom Limited. Counsel therefore surmised that the applicant's argument that the respondents signed away their rights to claim against UTL was wrong.

The 5th Respondent's Counsel submitted that the 1st Respondent on 24th October 2013 executed an agreement with the 5th respondent to compromise HCCS 169 of 2013 by settling the applicant's indebtedness to the 5th respondent. A negotiated sum of $6,410,090 was agreed upon as a compromise of the entire suit.

However, Counsel contends that the said agreement did not take effect because the 1st Respondent breached a condition precedent in clause 2.2 of settlement agreement. Counsel submitted that the agreement became ineffective, and that the 1st respondent never paid any coin in settlement to the 5th defendant.

Counsel also argues that the Administrator swore an affidavit dated 10th November 2020 in Misc. application No. 866 of 2020 in which she informed the Commercial Division of the High Court of Uganda that the applicant had been admitted as a creditor and based on which the Commercial Court made a finding on the respondent's admission as a creditor that precludes this Court from granting the prayers sought against the respondent in this application.

Regarding powers to verify claims, it was Applicant counsel's submission that the Administrator's power to verify claims is derived under, Clause 5(a) of the Administration Deed. The Clause 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'.* While it would appear then that the power to reject claims is implied in the Clause, Counsel contends that 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. 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.

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

This court had has made numerous rulings relating to an Administrator's powers seek court directions under ***Section 173(1) of the Insolvency Act, 2011.*** 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. 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.*
>
> *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.'*

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****'.*

In the more recently concluded case of ***An application by Ruth Sebatindira SC for Courts Directions in Respect of the Verification and Determination of Claims by UCOM Limited and its Parent Companies PAP GREENN Limited and Libyan Post Telecommunications and Information Technology Holdings Company – Misc. Application no. 1162 of 2020,*** this court more specifically with the Administrator's powers to verify claims.

This court held that the question of whether the administrator has power to verify claims of creditors constituted 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.

This Court considered extensively Clause 5(a) of the Administration Deed in Misc. Application 1162 of 2020 (supra) and noted that it 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'.*

This Court also directed that the Administrator be bound to follow the verification and adjudication procedure laid out in r. 175 – 178 of the Insolvency Regulations, or alternatively, seek directions of court of the best mode of verifications depending on the circumstances of the case at hand.

This Court reasoned that in 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 must 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.

As it did in Misc. Application 1162 of 2020, 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 question before Court is whether claims of the 2nd to 5th respondents should be included on the list of unsecured creditors.

The administrator has a duty not to admit suspicious claims under the administration. The Insolvency Act does not provide express guidelines in the adjudication and verification of claims. However, r. 13 of the Insolvency (Insolvency Practitioners) Regulations S.I No. 55 of 2017 and Schedule 2 of the Regulations requires the Administrator to undertake her assignment with integrity, objectivity, professional competence and due care.

The Regulations expressly place on the Administrator a continuing duty to maintain professional judgment, act diligently under applicable technical and professional standards, and ensure that clients receive professional service. It is therefore reasonable to conclude that the verification process is guided by the integrity, professionalism, diligence and competence expected Office Holder.

The court agrees with the submission of the applicant that the Administrator has to apply the professional standards on how to treat the 1st Respondent's claim which is highly suspect largely because of the conduct of the 1st Respondent in the financial management of the company. It should follow that where the Administrator should make reasonable effort to inquire into claims, creditors and affected parties should also make equal effort to provide all relevant information to dispel any suspicions that may arise regarding their claims. The natural

sanction for failure to provide satisfactory answers should be the rejection of their claims.

Under the principle or rule of Anti-Double Proof, an insolvent estate can only accept one creditor claim for each debt that the insolvent entity owes. The outcome of any such deliberation might offer the 2nd – 4th Respondents benefit of the rule against double proof. This rule provides that where a Principal creditor and a surety/guarantor submit claims arising from the same indebtedness, priority is given to the full settlement of the creditor. It matters not that the guarantor may have made a partial payment towards that indebtedness. This rule therefore protects creditors where competing claims are submitted by a guarantor or surety. ***Kaupthing Singer & Friedlander Ltd (in administration) (No 2) [2012] 1 AC 804***

There was a tripartite arrangement which resulted in signing agreements and undertakings among the parties. The 2nd – 4th Respondents as UTL's principal Creditors; and, the 1st Respondent as surety or guarantor for UTL's indebtedness to the 2nd - 4th Respondents.

A review of the documents and the facts as presented by the 1st – 4th Respondents appears to demonstrate that the 2nd – 4th Respondents signed away their rights to claim against UTL. Clause 6.4 of the second settlement agreement appears clear on this. The Consent Order in HCCS 311 of 2015 is perhaps more explicit. Therefore, 2nd – 4th Respondent's right or recourse appears to be against the 1st Respondent only.

The above position is also buttressed by the fact that the parties signed consent which removed any rights that had accrued and any such right was also extinguished when the parties signed a Consent Order in HCCS No. 311 of 2015 under which the 2nd Respondent stated that UTL has performed all its obligations.

The 5th Respondent, ZTE Corporation, submitted a claim for the sum of USD 6,738,272 (United States Dollars Six Million Seven Hundred Thirty – Eight Thousand Two Hundred Seventy – Two Only). This claim was subject of HCCS No. 169 of 2013 in which the 5th Respondent states that the claim arises out of a contract for the design, implementation and maintenance of a backbone link for UTL.

UTL disputed this claim in its written statement of defence contending that the Respondent had breached the terms of the contract and failed to perform its obligations under the agreement. As already stated, the Account Treatment Agreement submitted by the 1st Respondent in support of its claim stated explicitly that the 1st Respondent had paid the 5th Respondent's claim on the basis of a settlement agreement.

This claim is also the subject of HCCS No. 169 of 2013. The hearing of that suit was stayed following the commencement of administration proceedings against the company. Sometime in October 2020, the 5th Respondent commenced Misc. Application No. 866 of 2020 seeking leave for the hearing of the suit to proceed during the pendency of the administration. However, that application was dismissed with Court noting the supremacy of the proceedings under the Insolvency Act.

The 5th respondent's claim was filed in court although it was strangled by the Insolvency law that bars such actions while the company is under insolvency. The claim seems to be supported by the nature of the services rendered which may not be in dispute. The contention by the company is simply a statement that they were paid without any proof of such payment. The Company equally had the burden to produce the supporting evidence for the payment which was not done. This court would be inclined to believe that this debt was due and owing. The claim should be considered among the unsecured creditors unless there is any evidence to the contrary to prove payment.

In sum therefore, this court directs the Administrator to reject both the 1st Respondent and 2nd – 4th Respondents' claims for the reasons already given. The 2nd – 4th respondents should pursue their claim against the 1st respondent (LAP GREENN LIMITED)

The 5th respondent claim be considered among the unsecured creditors of the company.

Whether the Administrator can instruct her law firm to represent her in these proceedings.

Counsel for the 5th Respondent raised concerns about the Administrator's choice of representation in these proceedings. The Administrator was represented by Ms. Ligomarc Advocates, where she is known to be a Founding and active Partner. Counsel contends that UTL has a functional legal department that ought to have represented her in these proceedings to save unnecessary costs for an already distressed company. Counsel further contended that the Administrator's choice of representation raises conflict of interest issues and runs contrary to S.9 & 11 of the Anti-Corruption Act especially in view a lack of clarity about the manner of the firm's appointment and mechanisms for determination of fees. Counsel therefore sought this court's guidance on the propriety of the Administrator's decision in this regard.

Counsel for the Administrator counter argued that the Administrator's decision is no different from the common practice in insolvency across the globe. Counsel argued that the objection raised is premised on a misconception that the Administrator is only another Chief Executive Officer. Counsel submitted that the primary function of an Administrator is to restructure a distressed company and ensure its sustainability, and that the executive powers vested in him/her are therefore primarily for the purposes of implementing the restructure.

Counsel added that because of the nature of this task on hand, an Administrator doesn't come to job on his own. He/she appoints a team that he/she works with to ensure objectivity and impartiality. In this case, counsel argued that the Administrator's representatives before this court were part of the Administrator's team from Ligomarc Advocates assigned to offer legal and litigation support to the Administration.

I am not persuaded that the choice that the Administrator's choice of Ligomarc Advocates raises issues of impropriety. I agree with Counsel for the Administrator that this practice is a custom in insolvency practice, and I am inclined to believe that the sort of legal support offered here is exactly what this Court expected when exercising its discretion to appoint the applicant as Administrator in Companies cause 30 of 2019.

I have had the benefit of reading the ruling of Justice Lydia Mugambe in the above matter and it is apparent to me that that fact that the reputation of Ligomarc Advocates as arguably the largest insolvency firm in Uganda played a key role in the exercise of her discretion to appoint Mrs. Ruth Sebatindira SC. It therefore reasonably expected that the skill and size of the firm would be made available to the resolution of the UTL distress problems.

In my view it would set a dangerous precedent for this Court to limit the choice of consultants that should be available to an office holder for the proper function of his duties in the manner proposed by the 5th Respondent's counsel. The suggestion that the Administrator ought to have instructed UTL's legal department does not take into account that fact that the department may lack the technical skill, motivation or even objectivity required for these instructions.

Further, as was the case in the Administrator's appointment, office holders are often appointed to office based on the skills that they have built in insolvency practice. It is highly unlikely that they will have built these skills with people they haven't worked with. It is therefore important that office holders are left to freely choose the consultants that they are comfortable to work with to fully indulge their restructuring creativity and find practical solutions for distressed entities.

I also find that the 5th Respondent's concerns about an absence of mechanisms of assessing the firm's fees to be unfounded. S. 171 of the Insolvency Act provides for taxation of the Administrator's fees. Counsel for Administrator submitted to this court that the firm's representation would constitute billable hours for the Administrator. In fact, this Court has already given guidance on how the Administrator's fees should be charged, and it is expected that this sort of work will be billed accordingly. In the premises, I find no fault in the Administrator's choice of Ligomarc Advocates as her choice of counsel in these proceedings.

I so Order

SSEKAANA MUSA
JUDGE
14th December 2022