THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

M.A No. 866 of 2020

(Arising from Civil Suit No. 169 of 2013)

ZTE CORPORATION:::APPLICANT

VERSUS

UGANDA TELECOM LIMITED

(IN ADMINISTRATION):::RESPONDENT

BEFORE: HON. JUSTICE DUNCAN GASWAGA

RULING

[1] This is a ruling on an application brought under Section 164(1) and (2) of the Insolvency Act, 2011, Section 33 Judicature Act, Cap 13, Section 98 CPA and Order 52 rules 1 and 2 CPR for orders that; *leave of court be granted to the applicant to continue legal proceedings instituted against the respondent in* ***H.C.C.S No. 169 of 2013*** *and, for costs of the application.*

[2] The grounds of the application were set out in the affidavit of **Mr. Xue Jiaqi** in support of the application and they are that; the applicant filed **HCCS No. 169 of 2013** against the respondent seeking recovery of USD 6,738,272 for equipment supplied but not paid for, general damages, interest and costs of the suit. However, in the course of the proceeding, the respondent raised a preliminary objection as to the

existence of a cause of action against it which objection was rejected by this court. The respondent being dissatisfied with the said decision appealed to the Court of Appeal and Supreme Court whereupon the latter court ruled that the matter should be remitted to the High Court and heard expeditiously. While the parties were litigating in the Supreme Court, the respondent received an interim protective order against its creditors including the applicant and executed an administration deed on 29/05/2017. It was contended that the respondent had extended the period of administration without the permission of the applicant and further, that the administration process has gone on for years and the same is being abused by the respondent to shield themselves from creditor's claims. That the manner in which the administration is being conducted is infringing on the applicant's rights to property in the money claimed and the right to a fair hearing which is constitutionally provided for.

[3] The respondent opposed the application and stated that the applicant has only one option to recover the said monies, which is by waiting for the respondent to pay its creditors. That the process is in no way being abused but that the law automatically gives a moratorium to a company in administration. In further opposition, the respondent stated that in law, it is bound by the administration deed and precluded from commencing or continuing execution proceedings or other legal process or levying distress against the respondent or its property. The respondent concluded by submitting that the applicant had not given sufficient reason warranting the court to depart from the original intention of the legislature.

[4] Basically this application raises **two issues** to wit;

(i) ***Whether sufficient cause has been shown to warrant leave to proceed with the hearing of HCCS No. 169 of 2013; and***

(ii) ***Whether judgement can be entered on admission by the respondent of the applicant's claim in HCCS No. 169 of 2013***

Issue one:

[5] On this issue the applicant relied on the decision in **UTL Ltd Vs ZTE Corporation, SCCA No.3 of 2017** where the Supreme Court ordered that **HCCS No. 169 of 2017** ought to be returned to the High court and heard expeditiously and further, that the said decision is binding on this court. See **Fuelex Vs Uganda Revenue Authority, Constitutional Petition No.3 of 2019**. In addition, that the court ought to exercise its powers in Section 164(2) of the Insolvency Act and uphold the applicant's right to be heard as guaranteed in the Constitution of the Republic of Uganda, 1995.

[6] In response thereof, Counsel for the respondent submitted that the applicant is an admitted creditor of the respondent and therefore bound by the administration deed. As such, the applicant is precluded from commencing or continuing execution proceedings or other legal process. See **Brash Holdings Property Limited Vs. Katile Property Limited (1994) 12 ACLC 472; [1996] 1 VR 24**, **Uganda Telecom Limited Vs Ondoma Samuel t/a Alaka & Co. Advocates, HCMA No.0012 of 2018.** This basically means that granting the leave sought by the applicant would in effect frustrate the administration process. It was further submitted that courts have used their discretion *to grant leave for claims that have a proprietary nature, and where the company, the subject of the proceedings, is unsecured against liability.* Moreover, that the respondent has at all times applied for extension of

the administration as per the requirements of regulation 155(1) by seeking approval from the bank and thereafter getting court orders.

[7] In regard to the allegation of abuse of process the respondent stated that there is no abuse of process since the law puts an automatic moratorium on the legal process against the company in administration and if the applicant had intended to pursue a remedy addressing breach of the said constitutional provisions the recourse would have been to lodge a constitutional petition. See **Mbabali Jude Vs Edward Kiwanuka Sekandi, Constitutional Petition No. 0028 of 2012**. As regards the entry of a judgment on admission the respondent submitted that such matters are immaterial in an application seeking leave to proceed with legal proceedings under the Insolvency Act and further, that the order of the Supreme Court cannot override legal provisions of a statute considering that the issue of administration of the company was never brought to the Supreme Court's attention while the case was being adjudicated and as such it never had legal consideration.

[8] In a rejoinder Counsel for the applicant contended that the respondents have had three years to have the judgment of the Supreme Court reviewed under the slip rule as such the contention that the issue of administration was never brought to the attention of the Supreme Court cannot pass. Additionally, that the applicant showed sufficient cause to proceed with legal action vide Article 28 (1) & 44 of the Constitution, binding directives from the Supreme Court to proceed with hearing of **HCCS 169 of 2013** and the need to bring to a logical closure **HCCS No. 169 of 2013** whose claims are big and have been admitted by the respondent. Commenting on the article by BRI Ferrier titled

"Technical Insights Issue 1- 2016, Seeking Leave to Commence or Continue with proceedings against a company in winding up or administration" the applicant stated that it was couched in a foreign context not applicable to Uganda where the Constitution is the supreme law. Finally, that this court is not a wrong forum to invoke Article 28(1) and 44 of the Constitution of the Republic of Uganda and the prayers of the applicant in that regard are to be exercised under Article 50 of the Constitution of the Republic of Uganda.

[9] Section 164(1) and (2) of the Insolvency Act under which the application is majorly brought states thus:

> ***164. Effect of administration***
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> *(1) An administration deed shall bind—*
>
> *(a) the company;*
>
> *(b) the company's directors and secretary;*
>
> *(c) the company's shareholders;*
>
> *(d) the administrator; and*
>
> ***(e) all the company's creditors in relation to claims arising on or before the day specified in the deed.***
>
> *(2) Subject to subsection*
>
> *(3), a person bound by a deed shall not—*
>
> *(a) make an application for the liquidation of the company or proceed with an application; and*
>
> ***(b) except with the leave of the court and in accordance with the terms as the court may impose—***
>
> *(i) take steps to enforce any charge over any of the company's property; and*
>
> ***(ii) commence or continue execution proceedings or other legal process or levy distress against the company or its property.***

(3) Subsection (2) shall not prevent a secured creditor from exercising a power of enforcement of a charge over company property, except where the deed provides for it in relation to the secured creditor who voted in favor of the resolution for the execution of the deed.

[10] I find it imperative to first underscore the importance of having a company placed under administration and or provisional administration. The purpose of placing a company under administration is to have the company managed as a going concern with the possibility of it recovering. The effect of the administration deed therefore is to offer a temporary moratorium till the completion of the administration process which provides opportunity to the company to re-emerge out of indebtedness. This subject was discussed in detail in the case of **Uganda Telecom Limited v Ondoma, M.A No. 12 of 2018** by Justice Steven Mubiru in the following terms "*that provisional administration is designed to hold a business together while plans are formed either to put in place a financial restructuring to rescue the company, or to sell the business and assets to produce a better result for creditors than a liquidation.*"

[11] Therefore, according to **Section 143 (1) (f) (ii)** of the Act, provisional administration puts an immediate ring fence around the company and its assets so that no creditor can start or continue any action to recover their debts. Except with the provisional administrator's written consent or **with the leave of the court and in accordance with such terms as the court may impose**, proceedings, execution or other legal process cannot be commenced or continued and distress cannot be levied against the company or its property. So, generally, this

procedure is designed primarily to deal with situations when there is an urgent need to protect the value of a business from enforcement action by unpaid creditors. It is designed to forestall action or obtain a moratorium by having an administrator appointed. If, however, it is not possible for the company and its business to continue in existence, the administrator's task is to ensure a better return for the company's creditors and members than would result from an immediate winding up of the company.

[12] Of importance to note here also is that on the record of court the creditor in question, ZTE Corporation, is an admitted unsecured creditor who is now bound by the operation of section 164(1)(e) of the Act ever since the signing of the administration deed and or appointment of a provisional administrator on 29/5/2017. For it was held in **Brash Holdings Property Limited Vs Katile Property Limited (1994)12 ACLC 472; [1996] 1 VR 24** that "*all persons who have a claim against the company arising on or before the day specified in the deed, whether the claim be "present or future, certain or contigent, ascertained or sounding only in damages" are "creditors"* In **Uganda Telecom Vs Samuel Ondoma** (supra), it was stated that: "*an unsecured creditor with a claim arising on or before the day specified in the administration deed (which is normally the date of appointment of the provisional administrator) will be bound by the administration deed*". It should be stressed that creditors so bound may not commence or continue execution proceedings or other legal process or levy distress against the company or its property, except with the leave of court and in accordance with the terms as the court may impose (see section 164(2)(b)(ii) of the Act). This also means that

the rights of the creditor who is bound are found in the administration deed and nowhere else.

[13] **So, the question now is: when can court grant such leave for an unsecured debtor to execute any legal process against a company in administration?** Although the law has significantly placed restraint on creditors who may wish to effect recovery process against a company in debt, under administration or winding up, in order to save it and allow the administrator execute his / her statutory role, the same law has left a small window as a breather for deserving creditors, as circumstances may permit, to commence or continue execution proceedings or other legal process or levy distress against the company or its property. This determination was however entirely left in the discretion of the court. Be that as it may, the law hasn't given the category of cases to be considered or any guidance to the court on the circumstances and factors to take into account in granting such leave. It is therefore suggested that the concerned authority should as soon as possible consider developing cohesive guidelines and identified factors to assist and guide the courts while giving judicial effect to this provision of the law i.e when determining whether leave to proceed will or will not be granted. For the significance of those guidelines will be apparent to claimants who have instituted or intend to institute proceedings against a company, only to learn that the company has proceeded into liquidation or administration.

[14] As for now, the court shall exercise its good sense of judgment and discretion depending on the circumstances of each case and in addition borrow a leaf from pertinent precedents of other jurisdictions since the provisions under discussion, and indeed our entire

Insolvency law, are relatively new having come into force only in the year 2011 and the regulations in 2013. Extra caution too shall be exercised while considering whether to grant or not grant such leave in order to ensure that no injustice is caused to either party, for instance, by denying a deserving creditor an opportunity to move against the company and recover all their money well in time or by denying the company a chance to rescue the business, stabilize it and maximize its chances and advantages of continuing as a going concern to be able to pay off the outstanding debts and also deal with its other affairs as opposed to going into liquidation.

[15] According to section 164(2)(b)(ii) (supra) granting leave of court is the exception to the general rule. It is my humble view therefore that the general purpose of this legislation was to salvage insolvent companies by protecting them from debtors so they can continue trading while under administration and achieve better results for all the creditors, whether secured or unsecured, and the members. That is why in its wisdom, the legislature saw it fit to grant a statutory moratorium as opposed to liquidation to enable the company re-organize, re-finance and or re-pay its debts in an orderly and phased fashion, and where these interventions fail, effect a sale of its business. In addition, I think the purpose and function of these provisions on prohibitions is to ensure that a company in administration is not subjected to a multiplicity of actions which would be both expensive and time-consuming, and in some cases unnecessary, taking the administrator's attention and available funds away from the orderly winding up of the company. Had the insolvency law not put in place an automatic moratorium against a company in administration the objectives of

administration and the statutory role of the administrator would have been frustrated.

[16] There are several factors that a court can consider when determining leave applications. The cases of **Foxcroft Vs The Ink Group Property Limited (1994) 12 ACLC 1063, SC(NSW) & J & B Records Vs Brash Property Limited(1994) 12 ACLC 534** emphasized the need to establish that there is good reason for departing from the presumption underlying the legislation that the creditor ought not to be able to proceed against the respondent company in administration.

[17] In the case of **Foxcroft Vs The Ink Group Property Limited** (supra) it was first observed that

> *"There shall be a complete freeze of proceedings against the company during the administration so that the administrator can have time to assess the situation, and the company's creditors have an opportunity to work out the next position.....which will be in their common interest. To allow one creditor or potential creditor to proceed would not only take the administrator's attention from what he needs to do under the division in a relatively short period of time, but it would also involve costs in running the legal action...as well as perhaps giving the claimant some advantage over other creditors...* In conclusion the court rejected the application and held that *"accordingly, it seems to me that an application of this nature will rarely be granted."*

[18] As already intimated, there will be appropriate and deserving situations in administration where the courts will grant leave to a creditor to act against a company. The requirement for leave of court is imposed as a safeguard to avoid a situation where a company in administration is to be harassed and its assets wasted by unnecessary litigation. But

before any action can be brought or continued against a company, it would be prudent to investigate the intended litigation. The court in **Cassegrain Vs Gerard Cassegrain & Co Pty Ltd (in liquidation) (2012) NSWCA 435** indicated some of the factors that could influence the decision to grant leave to proceed as including:

> *".....the amount and seriousness of the claim; the degree and complexity of the legal and factual issues involved; the stage to which the proceedings, if commenced, have progressed; the risk that same issues would be relitigated if the claims were to be the subject of a proof of debt; whether the claim has arguable merit; whether the proceedings will result into prejudice to creditors; whether the claim is in the nature of a test case for the interest of a large class of potential claimants; whether the grant of leave will unleash an avalanche of litigation; whether the cost of the hearing will be disproportionate to the company's resources.....".* See also **The Commentary in Austin and Black's Annotations to the Corporations Act** (para 5.471B).

[19] Courts may also grant leave to bring claims that could not be proved in the winding up such as an injunction or a claim for proprietary interest because cases of this kind will have a bearing on the assets available and accordingly court resolution of the issues involved will ultimately benefit both the claimant and the winding up process. In the matter of **Bigdeal Artist Management Property Ltd (in liquidation) (2015) NSWSC 936** leave to proceed with a claim of a proprietary nature against a company in liquidation was being sought. According to the facts, the claimant was seeking to establish that particular monies paid to the company in liquidation by a third party were monies

held by the third party on trust for the claimant such that the monies were held by the company subject to the trust in favour of the claimant. In granting leave to proceed with the claim against the company the court found that "*the claim had a solid foundation; and further, that where a proof of debt procedure does not permit proprietary claims to be adequately advanced or adjudicated, granting leave to proceed was appropriate*". In the same vein, courts have recognized that leave may be granted in cases where the company was insured against the relevant liability. In such cases the claimant will seek leave to proceed against the company in liquidation in order to obtain payment from the insurer, who will usually be joined to the proceedings. Given that the proposed proceedings will not result in prejudice to the other creditors, and that the restriction on proceedings is not intended to provide protection to the company's insurer, the courts have shown a willingness to grant leave to proceed in applications of this kind as was the case in **In The Matter of Ozrac Engineering NSW Ltd (in liquidation) (2013) NSWSC 740**.

[20] The above cited authorities outlining the relevant factors are persuasive and may be applicable to our Ugandan situation *mutatis mutandis.* Of importance to note here also is the widely considered position by courts in many jurisdictions in recognizing that the differences between liquidation and administration are significant and the factors to take into account whether to grant or not grant leave to proceed may not necessarily be the same. See the detailed discussion on this subject in **Foxcroft** (supra) and **Cassegrain Vs Gerard Cassegrain & Co Pty Ltd (in liquidation) (2012) NSWCA 435** (supra). In other words, the winding up process is not impeded to the

same degree by allowing proceedings to continue, such that the courts are in a position to adopt a higher level of responsiveness to leave applications with respect to a company in winding up than is the case with proceedings against a company in administration.

[21] Back to the facts at hand, I have carefully considered the application for leave to proceed with legal proceedings against the respondent company in light of the above discourse. The respondent has been under administration pursuant to section 150 of the Act since the **22nd of May, 2017** while the applicant is an admitted creditor of the respondent and undoubtedly bound by the administration deed. As indicated above herein vide **Ondoma, Foxcroft and J & B Records** cases (supra) there must be good reason for departing from the presumption underlying the legislation that the creditor ought not to be able to proceed against the respondent company in administration. It was submitted that the applicant has a non-derogable right to be heard pursuant to Articles 28 and 44 of the Constitution. That the respondent's constitutional rights had been breached especially after the supreme court ruling of **11th October, 2017** in **UTL Ltd Vs ZTE Corporation, SCCA No.3 of 2017** where it was ordered that **HCCS No. 169 of 2017** ought to be returned to the High court and heard expeditiously. I do not agree with the submission that the said decision is binding on the High Court given the subsistence of a specific legislation providing for administration whose provisions had already been invoked.

[22] It is true, as submitted by the applicants vide the **Fuelex** case (supra) that these constitutional provisions protect and preserve the non-derogable right to a fair hearing. Yes, this right cannot be abridged.

However, the law creates rights to be followed where limitations are also permitted. For example, although the applicant's application has been heard in affair manner it could be refused. So, unless convincing reasons are given the applicant may not be exempt from the provisions of law. Some limitations must be permissible. I wonder why the parties and or their counsel (as officers of court) never alerted the Supreme Court about the placement of the respondent under administration before it rendered its decision. Anyway, that is and indeed remains the position! At the time of making its decision the Supreme Court was not aware of the existence of an administration deed.

[23] The provisions of section 164(2)(b)(ii) of the Act had already been invoked and the respondent placed under administration. According to the law no legal proceedings could be brought or continued against it unless with leave of court. Therefore, the legality or illegality of the proceedings against the respondent in administration was never discussed by the Supreme Court. Secondly, it is worth noting that orders of court cannot override a substantive provision of the law. For once the respondent was placed under administration all the court proceedings and orders, including the supreme court order in **UTL Ltd Vs ZTE Corporation, SCCA No.3 of 2017,** - which seems to have been inadvertently issued ceased. The impugned order stems from these proceedings. I say all this bearing in mind the doctrine of *stare decisis* i.e that a decision of a higher court of record binds all courts below that court.

[24] From the above discourse, I find that the applicant has not established a good cause or sufficient reason warranting the court to depart from the presumption underlying the Insolvency Act that the creditor ought

not to be able to proceed against the respondent company in administration. The applicant's claim is purely that of a monetary nature and not that of a proprietary nature or one where the company is insured against the liability the subject of the proceedings, which constitute part of the exceptions. The application lacks merit and should fail. The leave sought by the applicant is denied. With this conclusion, unless for academic purposes, I don't find it necessary to discuss the other remaining issues.

[25] Given the unique facts of this case I shall make no orders as to costs of this application.

Dated, signed and delivered at Kampala this 19th day of August 2021

Duncan Gaswaga

JUDGE