

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL DIVISION

COMPANY CAUSE NO. 040 OF 2016
IN THE MATTER OF COMPANIES ACT
AND
IN THE MATTER OF PRO-PRIDE LIMITED
AND
IN THE MATTER OF AN APPLICATION FOR AN ORDER OF A CREDITORS
MEETING

BEFORE: HON. MR. JUSTICE STEPHEN MUSOTA

RULING

This application is brought under order 34 (A) rule 6 (o) of the Civil Procedure Rules and section 234 of the Companies Act 2012 seeking orders as stated in the Chamber Summons but especially that the applicants be authorised to call, hold and conduct a meeting of affected Creditors for the purpose of consideration and if deemed advisable, passing, with or without variation, a resolution to approve a proposed plan for compromise and arrangement with Creditors of Pro-Pride Limited.

The application is supported by the affidavit of John Truett Adams Managing Director of the applicant Company who explains that the Company is not performing well financially and so this application should be allowed.

At the hearing of the application Mr. Kabiito Karamagi appeared for DFCU Bank a Creditor served with the application. Ms. Akello Evelyne appeared for the applicant. The Managing Director of the applicant a one Adams was in court together with Ziwa Musoke the Financial Manager.

Counsel for the applicant submitted that this application is for authorisation of a Creditor's meeting to discuss a compromise and arrangement. Counsel prayed that court orders that those entitled to attend are Creditors with voting claims and their Proxy Holders, representatives of the applicants, Members of the Board of Directors and their legal and Financial Advisors and any other person may be admitted to the meeting on invitation of the chair. Further counsel prayed that court orders Mr. Paul Asiimwe an Advocate of the High Court under Supra Law Associates Kampala proposed by Directors to preside as the Chairperson and subject to this order of Court he shall decide any matters in the meeting. Counsel also prayed that the order allows adjournment of the meeting to one or more times to a date as the chair deems necessary and desirable. Further counsel submitted that the affidavit in support of the application explains the details about the Company and circumstances under which it is operating and shows that the Company is struggling financially as has been well demonstrated in the Annexures to the affidavit.

Counsel also submitted that at present, there are no operations and the staff is laid off. That the liabilities of the Company exceed the assets and the applicant Company is liable for winding up due to its insolvent state. That each passing day makes the position of the Company precarious. That the Directors however, remain expectant that their operations in the Oil Sector will pick up and the applicant will benefit and improve its financial position. The Directors passed a resolution authorising a compromise to Creditors in respect of the debt and to commence proceedings under section 234 and 235 of the Companies Act. Counsel then prayed that Court grants the applicant a date when the meeting can happen and the rest of the prayers.

Counsel Kabiito Karamagi for the DFCU Bank who was one of the Creditors served with the application and whom Court allowed to address it submitted that he came as a friend of Court. He submitted that a reading of section 234 of Companies Act and order 38 rule 1 of the Civil Procedure Rules appears to support that the applicant's proceedings are ex-parte and it is so even

in the England where the law came from. But counsel submitted that since his client was served they can make comments on the application.

He went on to submit that a compromise of Creditors is a serious matter and the application must demonstrate seriousness. That they ought to summon affected Creditors but these are not mentioned or how many they are. Disclosure of them and their number would reveal the magnitude of the problem to be solved which also helps seeking the appropriate quorum for the meeting. That in prayer 4 they suggest a quorum of two. Supposing there are 10 or 20 Creditors then a quorum of 2 would be unfair.

Secondly, Learned Counsel submitted that the applicant seeks to summon the meeting and have all manner of people because they do not mention who the representatives are. That the prayer in paragraph 3 suggests the meeting will be flooded with representatives of the applicant. This has the risk of overwhelming Creditors so there is not enough information availed by the applicants, which would help if a list is provided. Counsel also submitted that the applicants propose their participants come on invitation of the chair. That there is another risk here. Counsel also said the applicants propose Paul Asiimwe to chair the meeting but it would be good for Court to know with certainty that he is aware and willing to chair the meeting and that he is not conflicted in this role. A simple statement from him to Court would be helpful.

Further Mr. Kabiito observed that the applicants submitted unverified audited statements so no one is able to verify that they are proper. That Court has been ambushed by late delivery of statements which demonstrates the application and Creditors' rights are not treated with seriousness. That Annexure "D" are signed by Jimmy Ziwa Musoke Financial Administrative Manager who is in Court now so it would be helpful if he swore an affidavit of his own. That the presence of Ziwa before Court and some of the Management of the Company is at odds with and contradicts the submission of the applicant's Counsel and the averments of Adams who in paragraph 9 of the affidavit in support of the application states that all staff of the applicant

Company were laid off. That if this were to be the case, then Mr. Ziwa would not be introduced here.

Finally, counsel submitted that the applicants talk of a plan or compromise to be presented to Creditors but they can do this under section 235 of the Companies Act. To demonstrate seriousness and commitment the applicant ought to have given this court an idea of this plan so that Court does not make an order blindly. That there seems to be a sense of optimism that business is picking up but there is no basis on which this conclusion is being made. That therefore this application sets a precedent. This Court set the bar for this application which falls short of critical information. That Court can make an order and set high the bar because the application is ex-parte. So Mr. Kabiito prayed that the application be dismissed and the applicant files something better providing the right information.

In rejoinder, Ms. Akello Evelyn for the applicant, added that, yes the application is ex-parte, and so the applicants were only being civil in serving the Creditors. That in not writing to other Creditors, the applicant intended to call all and that the applicant did not find it necessary to list all of the Creditors. That notice will be published in the news papers and regarding the audited accounts being an ambush the applicant apologized. That Ziwa's being in Court was intended to shed light on some audit areas. That Ziwa is registered as the applicant Company's Financial and Management Administrator. He is not actively working but still throwing light on earlier audit. That the applicant thought they would come and plan together. That the applicant Company is optimistic business will pick up. Counsel then reiterated the earlier prayers.

On 25th January 2017 this court received a letter from Kalenge Bwanika Ssawa Company Advocates on behalf of their then client Crane Bank Limited expressing similar concerns as Kabiito Karamagi. In the letter the said firm was requesting that Court directs the applicant to produce the Company resolution on this matter, the proposal between the Company and the Creditors or a class of them, list her Creditors, disclose their identity and claims to be affected by the said compromise and how much is owed to avoid misuse and abuse of Court process. The

firm also expressed concern that they had never been served with a copy of the proposal or compromise.

I have carefully considered the application and submissions of counsel and friends of this Court. The views of Mr. Kabiito Karamagi and M/s Kalenge Bwanika Ssawa Company Advocates are quite helpful and address the very concerns this Court had when it first addressed its mind to this application.

This application is brought under section 234 of the Companies Act 2012 which states that:

“234. Power to compromise with Creditors and Members.

- (1) Where a compromise or arrangement is proposed between a Company and its Creditors or any class of them or between the Company and its Members or any class of them, the Court may, on the application of the Company or of any Creditor or member of the Company or where the case of a Company being wound up, of the liquidator order a meeting of the Creditors or class of Creditors or of the Members of the Company or class of Members as the case may be, to be summoned in such manner as the court directs.***

- (2) Where the majority in number representing three-fourths in value of the Creditors or class of Creditors or Members or class of Members as the case may be, present and voting either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the court, be binding on all the Creditors or the class of Creditors or on the Members or class of Members as the case may be and also on the Company or in the case of a Company in the course of being wound up, on the Liquidator and Contributories of the Company.***

- (3) *An order made under subsection (2) shall have no effect until a certified copy of the order has been delivered to the Registrar for registration and a copy of the order shall be annexed to every copy of the Memorandum of the Company issued after the order has been made or in the case of a company not having a Memorandum, of every copy so issued of the Instrument constituting or defining the Constitution of the Company.*
- (4) *Where a Company defaults in complying with subsection (3), the Company and every officer of the Company who is in default is liable to a fine not exceeding ten currency points for each copy in respect of which default is made.*
- (5) *In this section and section 235, "Company" means any Company liable to be wound up under this Act and "arrangement" includes a reorganisation of the share capital of the Company by the consolidation of shares of different classes or by the division of shares into shares of different classes by both or by both methods." (emphasis mine)*

What comes out clearly under that section is that certain things must be in place in order for Court to order a meeting under section 235 (1) of the Companies Act 2012, and these are:

1. *There must be a proposed compromise or arrangement so this Court expects that a copy of the proposed compromise must be attached to the application.*
2. *That compromise or arrangement must be between*
 - a. *a Company and its Creditors or any class of them; or*
 - b. *the Company and its Members or any class of them*

This means the proposal must clearly show whom it intends to affect because once approved it is binding on all creditors or that a particular class of Creditors $\frac{3}{4}$ of whom approved the proposed compromise or arrangement. So this also helps to determine the quorum. A list of Creditors or Members with whom the proposed compromise is intended would be necessary and very helpful. In fact a list of all Creditors, their addresses and contacts, and amount owed and nature of debt to them should be clearly indicated.

3. *There must be an application by;*
 - i. ***the Company.***
 - ii. ***any Creditor.***
 - iii. ***Member.***
 - iv. ***the Liquidator.***

In this case the application is there and it is by the Company itself. It is also clear that the Company is having some financial difficulty as is stated in the affidavit in support of the application but there are statements of the Company's financial position or audit which are not interpreted by affidavit or explained in any way.

I find that the standard for this application should be higher than what the applicants have presented to Court today.

Under section 234, once the Court finds that it is proper to do so then it may order a meeting of the Creditors or class of Creditors or of the Members of the Company or class of Members as the case may be, to be summoned in such manner as the Court directs. So this means that the Court must decide whether or not to make that order and when it decides to make the order it must set the conditions on how the meeting should be summoned.

For the reasons I have outlined, I find that this application is not competent due to the insufficient information and limited disclosure by the applicant. This Court is unable to give proper directions on the steps to be taken. I therefore, dismiss the application with no orders as to costs.

Before I take leave of this matter, I must observe that there appears to be no regulations on how to go about applications of this nature even if the section itself guides on what is expected. It is necessary and I propose that the Registrar of Companies and the Minister responsible for justice come up with rules to guide the process in such application as required under section 294 (1) of the Companies Act 2012.

The Chief Registrar should notify the Registrar of Companies and responsible Minister accordingly.

I so order.

Stephen Musota

J U D G E

06.03.2017

06/03/2017:-

Mr. Fred Obbo appearing with Ms. Evelyn Akello for the applicant.

Milton Clerk.

Mr. Obbo:-

This was an ex-parte application. We are ready to receive the ruling.

Court:-

Ruling read and delivered.

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**AJI ALEX MACKAY
DEPUTY REGISTRAR**

06/03/2017