

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA SITTING AT ARUA**  
**MISCELLANEOUS CIVIL APPLICATION No. 0012 OF 2018**

**(Arising from High Court Misc. Application Nos. 009; 010; of 2018 and No. 021 of 2015 )**

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**UGANDA TELECOM LIMITED ..... APPLICANT**

**VERSUS**

10 **ONDOMA SAMMUEL t/a Alaka and }  
Company Advocates } .....RESPONDENT**

**Before: Hon Justice Stephen Mubiru.**

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**RULING**

This is an application under section 33 of *The Judicature Act*, section 98 of *The Civil Procedure Act*, section 164 (1) of *The Insolvency Act* and Order 52 rules 1 and 3 of *The Civil procedure*  
20 *rules* seeking and order setting aside a Garnishee Order Nisi, a declaration that the respondent is bound by the applicant's administration deed, and costs. In the affidavit supporting the application, the applicant avers that it instructed the respondent to represent it in an application before the High Court seeking revision of a decision of a Chief Magistrate's Court and an application for stay of execution. That upon discharging his responsibilities, the respondent filed  
25 and caused taxation of an advocate - client bill of costs which the respondent then sought to recover against the applicant by way of garnishee proceedings, despite the applicant having been under provisional administration at the material time.

The respondent opposes the application and by his affidavit in reply contends that having been  
30 instructed on 11<sup>th</sup> November, 2015 to represent the applicant in the said proceedings and discharged his duty, he is entitled to recover his professional fees from the applicant by way of the impugned garnishee proceedings due to the applicant's failure to pay despite several reminders to that effect. Most of the work done in representing the applicant occurred in July,

2017 and the advocate-client bill of costs was taxed on 20<sup>th</sup> November, 2017, long after the administration deed was executed on 22<sup>nd</sup> May, 2017 and therefore he is not bound by the deed.

The undisputed facts constituting the background to this application are that on 5<sup>th</sup> November, 5 2015 the applicant instructed the respondent to represent it before the High Court in proceedings seeking revision of a decision of a Chief Magistrate's Court and an application for stay of execution. The respondent accepted the instructions on 11<sup>th</sup> November, 2015. The respondent filed the necessary pleadings, argued the applications and secured a decision in favour of the applicant on the application for a temporary injunction on 9<sup>th</sup> December, 2015 and on the 10 revision on 20<sup>th</sup> July, 2017. The respondent demanded for payment of his professional fees for the services rendered to no avail. The respondent then caused a client-advocate bill of costs to be taxed and a sum of shs. 10,000,000/= was awarded on 20<sup>th</sup> November, 2017 by the Taxing Officer. The respondent subsequently sought to recover the sum by way of garnishee proceedings when he secured a Garnishee Order Nisi on 19<sup>th</sup> February, 2018. By a consent 15 interim order dated 28<sup>th</sup> February, 2018, that Garnishee Order Nisi was stayed pending the disposal of this application.

In the meantime, the applicant had on 28<sup>th</sup> April, 2017 secured an interim protective order from the High Court, under the provisions of *The Insolvency Act* and thereafter at the Creditor's 20 meeting of 10<sup>th</sup> May, 2017, an Administrator of the applicant was appointed. On 22<sup>nd</sup> May, 2017 an administration deed was executed between the applicant and the Administrator, and it was subsequently varied extending the administration to cover the period ending 22<sup>th</sup> November, 2017.

25 Represented by Mr. Onencan Ronald, the respondent contends that he is not bound by this administration deed since his claim arose long after it was executed. On the other hand, through Mr. Kibuuka Rashid, the applicant contends that the respondent is bound by the administration deed and consequently by law, from seeking to enforce recovery of the debt by execution though garnishee proceedings. The court therefore has to determine whether or not the applicant's 30 administration is a bar to the respondent's garnishee proceedings.

Under section 140 of *The Insolvency Act, 2011* it is evident that provisional administration is a rescue mechanism for insolvent companies which allows them to carry on running their business, in order to stabilise the company's position and maximise its chances of continuing in business as an alternative to liquidation or a precursor to it. A company seeks provisional administration with the aim of; - ensuring its survival and the whole or any part of its undertaking as a going concern, or securing a more advantageous realisation of its assets than would be effected in a liquidation. The procedure 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.

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. 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.

Under section 148 (3) (a) of the Act, a creditors' meeting may resolve that the company executes an administration deed as specified in the resolution. This is in the nature of a binding agreement between the company and its creditors about payment of all, or part of, its debts over an agreed period of time, designed to either salvage the company or distribute the company's assets. Regulation 146 (1) of *The Insolvency Regulations, 2013* requires the notice of the meeting to consider the proposal of an administration deed to every creditor of the company of whose claim and address the provisional administrator is aware. According to section 164 (1) (e) of the Act, once executed, the administration deed binds all the company's creditors in relation to claims

arising on or before the day specified in the deed. It is therefore binding on all the members, unsecured creditors and any secured creditors of the company who consent to being bound, who had notice of the meeting and were entitled to vote. Unless a Court makes an order to the contrary, the deed does not prevent a secured creditor from realising or otherwise dealing with its security.

An unsecured creditor with a claim arising on or before the day specified the administration deed (which is normally the date of the appointment of the Provisional Administrator) will be bound by the administration deed. 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 the court and in accordance with the terms as the court may impose (see section 164 (2) (b) (ii) of the Act). This means that the rights of the creditor who is bound are found in the administration deed, and nowhere else (see *Roder Zelt-und Hallenkonstruktionen gmbh v. Rosedown Park Pty Ltd and another* (1995) 13 ACLC 776 and *J & B Records Ltd v. Brashes Pty Ltd* (1995) 16 ACSR 285, 13 ACLC 458).

In *Brash Holdings Pty Ltd v. Katile Pty Ltd* (1994) 12 ACLC 472; [1996] 1 VR 24, it was held 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 contingent, ascertained or sounding only in damages" are "creditors." The Court held that "claims arising on or before the day specified in the deed" should be read as having the same content as the expression "debts or claims the circumstances giving rise to which occurred before the relevant date" and so this contemplates future or contingent debts or claims (See also *Lam Soon Australia Pty Ltd (administrators appointed) v. Molit (No 55) Pty Ltd* (1996) 22 ACSR 169 and *Selim v. McGrath* (2003) 177 FLR 85). This means that the following claims are caught by the administration deed if they arose before the date specified in the administration deed:(a) all debts payable by the company; (b) all claims against the company, whether: (i) present or future;(ii) certain or contingent; (iii) ascertained or sounding only in damages. Claims against the company which, if the company were being wound up, would be provable in the winding up.

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Future or contingent claims do not include costs orders which have not been made before the administration deed begins. A creditor whose claim would result from a court / arbitral order for costs sought is not a creditor with a provable claim if that court / arbitral order was not made prior to the administration deed commencing (see *Larkden Pty Ltd v. Lloyd Energy Systems Pty Ltd* [2011] NSWSC 1567) For example in *BE Australia WD Pty Ltd (subject to a Deed of Company Arrangement) v. Sutton* [2011] NSWCA 414), the respondent claimed that her work arrangements with BE Australia were 'unfair' within the meaning of the labour laws. She initiated proceedings in the Industrial Relations Commission seeking to have the relevant arrangement varied to make BE Australia liable for her termination without prior notice or payment in lieu. Before her case was heard, BE Australia went into administration and entered into an administration deed. Under the law, claims would be caught by an administration deed if "the circumstances giving rise" to them occurred before the administrators were appointed. In answer to the issue whether her claim was caught by the administration deed, the Court of Appeal held that while her claim under the labour laws entitled her to apply for an order, it did not entitle her to recover amounts from BE Australia unless an order had been made in her favour. As there was no existing legal obligation on the part of BE Australia towards Ms Sutton, the court found that she did not have a provable "claim" and she was not a "creditor."

In both cases, the courts were required to determine whether a claim was caught by an administration deed. In both decisions, the question of whether the circumstances giving rise to the claim occurred before the company went into administration turned on the nature of the claim itself. If all the elements of a claim exist prior to a company entering administration, that claim will be provable even if there has not been a formal adjudication of the claim by a court or arbitrator. The decision in *Larkden Pty Ltd v. Lloyd Energy Systems Pty Ltd* [2011] NSWSC 1567 went one step further in suggesting that the existence of a "basal fact" necessary to bring the obligation into being will be sufficient, and that it is not necessary that the breach or event giving rise to the claim must have occurred before the relevant date. This approach requires identification of the elements of the substantive obligation that the claim represents and assessment of whether those circumstances revealed the existence of a basal fact necessary to bring the substantive obligation into being.

As the source of legal liability for a costs order is the exercise by the court of its discretion to make the costs order itself, it was held in the *Larkden Pty Ltd Case* that the costs order was neither a present claim arising on or before the date of administration nor a contingent claim in existence at that date. It was not therefore provable. In such a case, the claim would be a mere  
5 expectancy since there is no liability to pay costs until the court has exercised its discretion and made an order to that effect.

In contrast, in *Lam Soon Australia Pty Ltd (admin apptd) v. Molit (No 55) Pty Ltd 22 ACSR 169*, the court held that a claim under an existing lease for rent payable in the future is an existing  
10 right, not a mere expectancy, and was admissible to proof. It is clear from that decision that future liabilities for rent payable under a lease entered into by a company before it went into administration is a debt which (although not due to be paid before the administration commences), is incurred before the administration commenced. The landlord could therefore prove for the full amount of rent due for the full term of the lease if the company entered into an  
15 administration deed.

It emerges therefore that in order to determine whether a claim is subject to an administration deed, the court has to examine whether the legal obligation giving rise to that claim arose prior to the company going into administration, or not. If the company has bound itself by contract or  
20 committed a wrong before the administration deed's commencement, then, in the eyes of the law, it had already incurred a liability. In *Lumweno and Co. Advocates v. Transafrica Assurance Company Ltd C. A. Civil Appeal No. 95 of 2004*, it was held that although the full instruction fee to defend a suit is not earned the moment a defence has been filed, such that an advocate will not ordinarily become entitled at the moment of instruction to the whole fee which he may ultimately  
25 claim, the obligation to pay an advocates fee attaches upon instruction and the quantum increases with the progression of the proceedings.

In the instant case, from the moment the applicant instructed the respondent and the respondent accepted to represent it, the applicant placed itself under an existing obligation to pay the  
30 respondent's legal fees as a contingent liability of the applicant company, whose final quantum would be determined by the duration of the proceedings, among other factors. A future claim is

distinguishable from a contingent claim, in that, while both are founded on an obligation existing as at the commencement of the administration deed, a future claim will arise at some time thereafter while a contingent claim arises with immediacy. An advocate's professional fee in these circumstances is not in the nature of a future claim but rather a contingent claim that was in  
5 existence at the date of the administration deed. The respondent's claim being one the circumstances giving rise to which occurred before the relevant date, is thus bound by the applicant's administration deed.

Under Regulation 163 (2) of *The Insolvency Regulations, 2013*, the Administrator is required to  
10 send notice of intention to pay creditors' claims to all creditors whose addresses are known to the administrator and to invite the creditors to prove their debts. Under Regulation 172 (1) (2) thereof, proving a debt requires submitting a claim in writing to the Administrator stating whether the creditor is claiming as a secured or an unsecured creditor, in the latter case of which the Administrator may require the claim to be verified by a statutory declaration. This appears to  
15 be the only option available to the respondent for the recovery of his fees. Whereas section 164 (2) (b) (ii) of *The Insolvency Act* empowers court to grant leave in accordance with such terms as the court may impose for a creditor otherwise bound by an administration deed to nevertheless commence or continue execution proceedings or other legal process or levy distress against the company or its property, the respondent has not moved court to that effect in the current  
20 proceedings. There must be something which establishes that there is good reason for departing from the presumption underlining the legislation that the creditor ought not to be able to proceed against the company in such circumstances (see *Foxcroft v The Ink Group Pty Ltd (1994) 12 ACLC 1063* and *J & B Records v Brashes Pty Ltd (1994) 12 ACLC 534*). The aim of an administration deed is to provide the company with the opportunity to restructure and trade out  
25 of its financial difficulty. Having regard to all of the foregoing factors there is in my view no basis to justify the exercise of the Court's discretion in favour of the respondent and accordingly the application is allowed. The Decree Order Nisi is hereby set aside. Each party is to bear its costs of this application and the proceedings leading to the Decree Order Nisi.

Dated at Arua this 15<sup>th</sup> day of March, 2018.

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Stephen Mubiru,  
Judge  
15<sup>th</sup> March, 2018.

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