THE REPUBLIC OF UGANDA

THE INDUSTRIAL COURT OF UGANDA AT KAMPALA

LABOUR DISPUTE CLAIM NO. 275 OF 2014

[ARISING FROM CIVIL SUIT NO.258OF 2011]

MOHAMMED KISU AATA ……. CLAIMANT

VERSUS

UGANDA TELECOM LIMITED ……RESPONDENT

BEFORE:

1. **THE HON. JUDGE, LINDA LILLIAN TUMUSIIME MUGISHA**
   PANELISTS

   1.MS. HARRIET MUGAMBWA NGANZI

   2. MR. JACK RWOMUSHANA

   3. MR. EBYAU FIDEL

RULING ON PRELIMINARY OBJECTION

Background

In 2011, the Claimant filed Civil suit No. 258 of 2011 against the Respondent in the High Court of Uganda (Civil Division), for Ugx. 19,375,250/= general damages, costs, interest arising out of unlawful dismissal from employment and terminal benefits. The suit was subsequently transferred from the High Court to this Court under Labour Claim No. 275 of 2014 in 2014.

According to Counsel for the Respondent, on 28/04/ 2017 Respondent went into Provisional Administration and later on 22/05/2017, was placed under full-fledged Administration, in accordance with the insolvency Act 2011 and the Insolvency Regulations, S.I No.36 0f 2013.

When the Matter came up for mention on 25/10/2021, Mr.Wadembere Counsel for the Respondent raised Preliminary point of Law to the effect that, this claim before the Court is barred by law as the Respondent is in Administration under the Insolvency Act of 2011. The parties were granted leave to file submissions on the Preliminary Point of law.

SUBMISSIONS

It was submitted by Counsel for the Respondent that, the Respondent was placed under Administration effective 22nd May 2017, pursuant to Section 150 of the Insolvency Act 2011 (herein after referred to as the Act) by executing an Administration Deed and to it is still under administration.

He invited Court to take Judicial notice of the fact that the Appellant was placed under administration, by virtue of Section 56 (1) (j) of the Evidence Act and it is still in Administration to date.

It was his submission that, administration is an insolvency procedure which permits an insolvent Company to continue to trade while protected from creditor claims by a statutory moratorium, which allows the Company breathing space in which to re-organise, refinance or effect a sale of its business. It also allows a Company to achieve a better result for the Company's creditors as a whole rather than when the Company is placed into liquidation. It also enables the Company realise its property in order to make a distribution to the Company's secured or preferential creditors.

He cited, Section 164 of the Insolvency Act which provides for the effect of administration as follows:

(1) An administration deed shall bind—

(a) the company

(b) the company's directors and the secretary;

(c) the company's shareholders

(d) the administrators; and

(e) all the company's creditors in relation to the 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 liquidation of the company or proceed with an application; and

(b) expect 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.

and submitted that given Section 164 (1)(e) of the Insolvency Act, provides that once an Administration deed is executed it, binds all the Company's creditors in relation to claims arising on or before the day specified in the deed, regarding the payment of all or part of, its debts over an agreed period of time, designed to either salvage the company or distribute the company assets.

He cited the definition of the word Creditor in **Black's Law Dictionary** at page 375 to mean:

"One to whom a debt is owed or a person or entity having a claim against the debtor predating the order for relief concerning the debtor predating the order for

relief concerning the debt or one of whom any obligation is owed, whether contractual or otherwise and it definition of a claim to mean:

A legal assertion; a legal demand taken by a person wanting compensation, payment, or reimbursement for a loss under contract, or injury due to negligence, or the amount a claimant demands,

and the definition of a debt under **Section 2 of the Insolvency Act, 2011 to mean:**

"A debt or liability, present or future, certain or contingent and includes an ascertained debt or liability for damages. and the definition of Contingent in the Black's Law Dictionary at page 315 to mean: -

Possible, uncertain; unpredictable, dependent on something else; conditional

Counsel submitted that given that, the Administrator has not yet considered the Claimant's claim against the Respondent and the quantum he is entitled to, his claim is a contingent debt against the Respondent, therefore he is the Respondent's creditor.

According to him, the claim having arisen when filed Civil Suit No. 258 of 2011 against the Respondent in the High Court of Uganda (Civil Division), rendered the claimant a contingent creditor of the Respondent whose claim is bound by the administration Deed. He argued that this was because the majority of the Respondents creditors voted in favour of the execution of the Administration Deed and in accordance with *regulation 4(b) of the third schedule to the Insolvency Act,* the decisions at a creditors' meeting are binding if they are approved by the majority of the creditors.

He relied on ***Brash Holdings Property Limited verses Katile Property Limited (1994) 12 ACLC 472; [1996] 1 VR 24*** cited by Hon. Justice Stephen Mubiru in ***Uganda Telecom***

Limited versus Ondoma Samuel T/A Alaka & Co. Advocates HCMCA No. 0012 of 2018, in which 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.*

Therefore, the Claimant by operation of law is precluded from commencing or continuing execution proceedings or other legal process or levying distress against the Respondent or its property. This means that the rights of the Claimant are found in the Administration deed and nowhere else. He relied on ***Uganda Telecom Limited versus Ondoma Samuel T/A Alaka & Co. Advocates (Supra),***and ***ZTE Corporation versus Uganda TelecomLimited (In Administration) HC. Misc. Application No. 866 of 2020,***for this proposition.

citing ***BRI Ferrier titled Technical Insights Issue 1 – 2016, seeking leave to commence or continue with proceedings against a company winding up or administration***, he insisted that, section 164(2) (b) (ii) of the Insolvency Act, prohibits the commencing or continuing of Court proceedings against a company under Administration and to allow the proceedings against the Respondent to continue would render the objectives of administration and the statutory role of the Administrator futile. He also cited ***Foxcroft versus The Ink Group property Limited (1994) 12 ACLC 1063, SC (NSW) in*** which this position was considered as e follows:

> ***"… There shall be a complete freeze of the 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 net 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 …. Accordingly, it seems to me that an application of this nature will rarely be granted."

It was further his submission that, the Respondent was cognisant of the fact that, the statutory restrictions on actions and proceedings is accompanied by a power of the court to grant leave to proceed; but the relevant sections give no direct indication of the circumstances under which such leave is to be granted. As a result, the power to grant leave has been exercised by the courts in caution and in accordance with well-established judicial guidelines.

He insisted that in light of the article by BRI Ferreir (supra), although the Courts have recognised that there will be situations where it would be appropriate to grant leave, in administration, such as where the company is insured against the liability, the subject of the proceedings or where the claim against the Company involves a proprietary remedy, it will be difficult in the normal course to obtain leave to continue with proceedings against a company in administration.

According to him, only claims that have a proprietary nature are allowed to continue and given that, the claim before the Court is purely monetary in nature it does not fall in any of the situations referred to the above.

He insisted that the holding in ***Uganda Telecom Limited versus Ondoma Samuel T/A Alaka & Co. Advocates (Supra)*** *which cited* ***Foxcroft versus The Ink Group property Limited (1994) 12 ACLC 1063 and J &*** **B Records versus Brash Property Limited (1994) 12 ACLC 534,** that; there must be something which establishes 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, was the correct position of the law.

He contended that, the claimant has never sought leave of the Court to proceed with legal proceedings against the Respondent, as provided for under regulation 203 (1)of the Insolvency Regulations 2013. He relied on ***Ogilvie Grant and Another versus East (1983) 1 ACLA 742,*** cited in the article by ***BRI Ferreir*** referred to above, where Mcpherson J, observed that:

> ***"What is substituted for litigation in the ordinary form is a procedure by which a claimant lodges a verified proof of debt with the liquidator/Administrator, who admits or rejects it wholly or in part, and from whom an appeal lies to a Judge ….there can be no doubt that ordinarily such a procedure is, and is designed to be, much more expeditious and less expensive than ordinary procedures by way of action."***

He reiterated that, without significant restraint on proceedings against the Respondent Company under Administration, the objectives of the Administration and the statutory role of the Administrator will be frustrated.

He therefore prayed that, the preliminary point of law is sustained, the claim be dismissed with costs and the claimant be directed to submit its claims to the Respondents Administrator in accordance with the provisions of the act and the regulations thereunder and in the alternative, Court should stay the proceedings before in respect of this matter pending determination of the Respondents Administration period.

In reply, Counsel for the Claimant submitted that, this matter has been pending since it was filed in the High Court under Civil suit No. 258 of 2011. He stated that the parties filed the relevant pleadings and he also the Claimant also filed his witness statement.

It was his submission that, as preliminary points, certain claims have been asserted as facts which need to be proved. For instance, at page 1 of it's submissions, the Respondent has claimed that it was "placed under Administration effective 22nd May 2017, subsequent to the Respondent and the Administrator, pursuant to Section 150 of the Insolvency Act 2011 (herein after referred to as "the Act") executing an Administration Deed. To date the Respondent Company is still in Administration". Counsel argued that Counsel for the Respondent needed to prove that, the Respondent is under Administration and there was a running Administration Deed. He insisted that, there is no evidence on the record to prove that the Respondent, UTL is in Administration. He further submitted that, there is no evidence to show that, there is a running Administration deed to which the claimant could possibly be subject.

He refuted the submission by Counsel for the Respondent, regarding the invitation to court "*by virtue of the Section 56 (1) (j) of the Evidence Act , "… to take judicial notice of the fact that the Appellant was placed and to- date, is still under Administration pursuant to the provisions of the Insolvency Act 2011 and the regulations thereunder."*

It was his submission that indeed Section 55 of the Evidence Act provides that, "no fact of which the Court will take judicial notice need be proved" and it was also true that, Section 56 (1) of the Evidence Act states facts which Court must take judicial notice of. Therefore, even if UTL was in administration (which has not been proved) this is not a matter which Court can take judicial notice of under Section 56 (1). Counsel for the Respondent states that, Court should judicially notice that UTL is in administration

under section 56 (1) (j) of the Evidence Act, yet Section 56(1) (e) the Act states that, **the commencement, continuance and termination of hostilities between Government and any other state or body of persons,"** which is totally irrelevant and no court can take judicial notice of the allegation that UTL "is in administration".

He further contended that, any entity which is in administration, would be in such administration for a specified period of time, but no evidence has been provided to show that the period within which the Respondent is in administration.

He contended that, the main argument that, the Claimant is a **contingent creditor** and is therefore subject to the provisions of the Insolvency Act cannot arise because the Claimant filed the suit /claim way before the respondent was allegedly put in administration and his claim is still pending before this Court and it has not yet been quantified by the Court. In any case, Counsel for Respondent has not proved that, the respondent is in administration. He insisted that the Respondent had to first prove that:

(i) That UTL is in administration

(ii) That it is in administration for a specific named period

(iii) That there is an Administration Deed to which the claimant is subject.

and none of the above has been proved.

He contended that Counsel for the Respondent has not established any legal basis for the sustenance of this objection and they have shown that there is no evidence that the Respondent is in administration and even if it was, the duration of the administration has not been stated. Therefore, the objection has no merit, it should be dismissed with costs to the claimant and both parties should be directed to complete their trial bundles and evidence so that the matter is set down for hearing.

In the alternative and in the unlikely event that the Court believes that the Respondent is in administration and that the claimant is a possible contingent creditor, then as Counsel for the respondent has prayed, the proceedings of the Court may be stayed till the so-called administration of the respondent has ended.

In rejoinder, Counsel for the Respondent insisted that, it is a well-known fact that the Respondent has been in Administration since April, 2017 pursuant to the provisions of the Insolvency Act 2011 and the Regulations there under of 2013 and it for this reason, that it did not deem it necessary to avail Court with the relevant documents to prove that fact because they strongly believe that this fact was not disputed by Counsel for the Claimant and secondly that the Court would take judicial notice of it.

He conceded that, Section 56 (1) (j) of the Evidence Act inviting Court to take Judicial notice of the fact that the Respondent is in Administration was erroneously cited and accordingly it should be disregarded. It was his submission, that in any case, citing the wrong law is not a ground for the dismissal of an action provided that the irregularity does not go to the jurisdiction of the Court and has not occasioned injustice to the other side. He relied on **Saggu versus Roadmaster Cycles (U) Limited [2002] 1 EA 258** where **Mpagi-Bahigeine JA** at page 262 held that; citation of a wrong rule was not fatal if it did not go to the jurisdiction of the Court. He quoted her Lordship as she then was as follows:

> *"Regarding the second point in objection that the notice of motion did not cite the law under which it was being brought. The general rule is that where an application omits to cite any law at all or sites the wrong law, but the jurisdiction to grant the order sought exists, then the irregularity or omission can be ignored and the correct law inserted."*

He argued that Counsel submission notwithstanding, under Section 55 of the Evidence Act, this Court is clothed with power to take judicial notice of certain facts. He insisted that, the Respondent is in Administration and Court should take judicial notice of this fact. He further argued that, in the event that, Court is inclined to agree with Counsel for the Claimant's argument regarding judicial notice, Court should consider section 56 (3) of the Evidence Act Cap 6, which provides that, if the court is called upon by any person to take judicial notice of any fact, it may refuse to do so until that person produces such book or document as it may consider necessary to enable it to do so. According to Counsel the Respondent has enclosed the relevant documents to this submission to prove that the Respondent is in Administration.

He refuted the contention that, Administration is for a specific period of time because the law does not provide a specific period of time within which the administration period of a company should end. In any case, the Court is vested with power to extend the Administration period under Regulation 155 of the Insolvency Regulation 2013 and the Respondent's administration period was extended in accordance with the law.

He asserted that, for the Claimant to state that it was not a creditor simply because his claim was filed in 2013 way before the Respondent was placed in administration and the claim is still pending before this court is a total misconception of the legal mechanism of administration and on the contrary the fact that by his own admission, his claim against the Respondent arose before the Respondent was placed in administration, made him a contingent creditor as defined in Black's law Dictionary and it was immaterial whether or not the claim has been quantified.

According to Counsel, Section 164 (2) (b) of the insolvency Act, bars the Claimant from commencing or continuing legal process against the Respondent therefore he submit his

claim or proof of debt to the Administrator in accordance with Regulation 172 (6) of the Insolvency Regulations, to establish the final quantum he is entitled, to if at all.

He insisted that the Preliminary Objection should be sustained because the claimants claim against the respondent makes him a contingent creditor.

DECISION OF COURT

In determining this preliminary objection, the Court has to establish whether the Respondent is in administration and if so, whether this is a bar to the proceedings in this case

The Insolvency Act 2011, under section 140, provides for provisional administration to insolvent Companies to allow them to carry on their businesses and in **Uganda Telecom Vs Ondoma Sammuel t/a Alaka and Company Advocates (supra)**, it was stated that, it was a means of stabilizing the Company's position and to maximize the chances of continuing in business as an alternative to liquidation or as a precursor to it. It is intended to ensure the protection of the value of the business from enforcement action by unpaid creditors, by appointing an administrator. It is designed to keep a Company in business as plans to rescue it through either financial restructuring, selling of its assets for the benefit of the creditors is undertaken as opposed to liquidation. (see section 143(1)(f)(ii) of the Act.

Section 148(3)(a) of the Act provides that the creditors may resolve that the company executes an administration deed which binds the Company and its creditors and sets out among others, the proposed administrator of the deed, the nature and duration of the moratorium, the mode of payment of its debts and how to deal with Company assets.

It is the contention of Counsel for the Claimant that, the Respondent did not adduce any evidence to show that the Respondent was in administration. The Respondent in rejoinder attached evidence of an order of the High Court extending the Administration of the Company for a further 12 months from the 29/10/2021. The Claimant/Respondent to the Preliminary objection did not seek leave to rejoin. We have no reason to doubt that the Administration deed is still in place until 29/10/2022. In the circumstances, this resolves the issue of the administration of the Company.

Having established that, the Respondent is in Administration, what remains is to determine whether section 164(2)(b) applies to this claim.

Section164(2) provides that:

"(2) Subject to subsection (3), a person bound by a deed shall not-

(a)make an application for liquidation of the company or proceed with

an application; and

(c) except with leave of the court and in accordance with the terms as the court may impose; and

(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 second 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 voted in favour of the resolution for execution of the deed.

The question that we must resolve now is whether the Claimant is a creditor as envisaged under section 164. Counsel for the Respondent cited the definition of the word Creditor in **Black's Law Dictionary** at page 375 to mean:

> *"One to whom a debt is owed or a person or entity having a claim against the debtor predating the order for relief concerning the debtor predating the order for relief concerning the debt or one of whom any obligation is owed, whether contractual or otherwise and it definition of a claim to mean:*
>
> *A legal assertion; a legal demand taken by a person wanting compensation, payment, or reimbursement for a loss under contract, or injury due to negligence, or the amount a claimant demands,*

In our view this definition presupposes that the debt has been quantified and ascertained. **Section 2 of the Insolvency Act, 2011 defines debt to mean:**

> *"A debt or liability, present or future, certain or contingent and includes an ascertained <u>debt or liability for damages.</u> and the definition of* Contingent in the Black's Law Dictionary at page 315 to mean: -
>
> *Possible, uncertain; unpredictable, dependent on something else; conditional*

Our interpretation of Section 2 of the Insolvency Act, is that, the debt must be quantified and provable therefore the contingency in this case is for a quantified debt and not one that has not yet been ascertained.

We therefore, associate ourselves with the holding in **Ondoma** (supra) that, contingent claims do not include costs and orders which were not have not been made before the administration deed begins. According to Ondoma(supra) which cited ***Larkden Pty Ltd***

Vs Llyod Energy Systems PTY Ltd [20110 NSWSC 1567 and BE Australia WD Pty ltd (subject of a deed Company arrangement) vs Sutton [2011] NSWCA 414), a creditor whose claims 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.

We are persuaded by the holding in ***BE Australia WD Pty ltd (subject of a deed Company arrangement) vs Sutton(supra)***, which was cited in **Ondoma** as follows: "… *where the Respondent claimed 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, 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.'*

We think the instant case is on all fours with the BE Australia(supra) because the Claimant's claim was not yet resolved and quantified before the administration deed came into force. In the circumstances, the Claimant does not qualify to be considered a creditor, without a provable claim, as counsel for the Respondent would like this court

to believe. This being the case he cannot proceed make any claim via Regulation 172(6) of the Insolvency Regulations for the verification of the final quantum of his case.

Although he has a right to claim against the Respondent under the labour laws, having been placed in administration, and given the wording of section 164(2) (b) (ii) of the Insolvency Act(supra), the continuance of his Claim against the Respondent which is in administration cannot stand and is barred until the expiry or termination of the current administration deed which as we already established, was extended for another 12 months from 29/10/2021.

In the circumstances the proceedings of this case are stayed until the termination or expiry of the administration deed. No order as to costs is made.

delivered and signed by:

1.THE HON. JUDGE, LINDA LILLIAN TUMUSIIME MUGISHA ……

PANELISTS

1.MS. HARRIET MUGAMBWA NGANZI ……

2. MR. JACK RWOMUSHANA ……

3. MR. EBYAU FIDEL …….

DATE: 17/12/2021