IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

INSOLVENCY NOTICE NO. E013 OF 2020

IN THE MATTER OF THE INSOLVENCY ACT, 2015

AND IN THE MATTER OF

HOGGERS LIMITED (IN ADMINISTRATION)

BETWEEN

HOGGERS LIMITED (IN ADMINISTRATION) .....APPLICANT

AND

JOHN LEE HALAMANDRES.....1ST RESPONDENT

SANTIE BOTHA.....2ND RESPONDENT

DARREN PAUL HELE.....3RD RESPONDENT

CHRISTOPHER HARDY BOULLE .....4TH RESPONDENT

NORMAN ADAMI.....5TH RESPONDENT

THETELE EMMARANDA (EMMA) MASHILWANE .....6TH RESPONDENT

NICOLAOS (NIK) HALAMANDARIS .....7TH RESPONDENT

DEON JEFT..... 8TH RESPONDENT

KELEBOGILE (LEBO) NTLHA .....9TH RESPONDENT

ALEXANDER (ALEX) KOMAPE MADITSE .....10TH RESPONDENT

FAMOUS BRANDS MANAGEMENT

COMPANY (PYT) LIMITED.....11TH RESPONDENT

JAMES OUMA .....12TH RESPONDENT

RULING

Introduction

1. There are two applications for the court's determination. The first is a Notice of Motion dated 25th September 2020 filed by Hoggers Limited (in Administration) (hereinafter "the Company"). It is filed under the provisions of **sections 522, 560** and **692** of the **Insolvency Act,**

2015 ("the ***Insolvency Act***"). In the main, it seeks an order restraining the Respondents, "*from terminating, de-branding or interfering in any manner whatsoever with the Franchise license for "Debonairs" and "Steers" brand for the period of the administration unless with the administrator's approval or an order of this honourable court for the following seven (7) outlets: Debonairs Pizza Muindi Mbingu Street, Steers Muindi Mbingu Street, Debonairs Pizza Ngong Road, Steers Ngong Road, Debonairs Pizza Kiambu Road, Steers Donholm; and Debonairs Donholm"*. It also seeks an order for the, "*royalties due to the 11th Respondent for the period of administration be treated as the administrator's expenses."*

2. The application is supported by the affidavit of the Administrator, Owen Koimburi. It is opposed by the replying affidavit sworn on 20th August 2020 by Andrew Blackbeard, the 11th Respondent's Operations Executive for the Africa and Mauritius region.

3. Following the court's directions on 29th September 2020, the 11th Respondent, Famous Brands Management Company (PYT) Limited ("Famous Brands") filed the Notice of Motion dated 5th October 2020 made principally under **section 63(e)** of the ***Civil Procedure Act (Chapter 21 of the Laws of Kenya)*** and **Order 40 Rule 2** and **4** of the ***Civil Procedure Rules*** seeking the following orders;

> *a. A declaration that the Notices of Termination, Notice of Non-Renewal and Notice of Expiry issued by the 11th Respondent/Applicant (hereinafter "the 11th Respondent) were validly issued in accordance with the various Franchise Agreements and should therefore be complied with by the Company/Respondent*
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> *b. A permanent injunction do issue restraining the Company/Respondent (hereinafter "the Company"), whether by itself, its servants, agents, subsidiaries, associates, third parties or in any other manner, from operating the Ngong Road, Muindi Mbingu, Kiambu Road and Donholm Outlets under the 11th Respondents trademark.*
>
> *c. A permanent injunction do issue restraining the Company, whether by its servants, agents, subsidiaries, associates, third parties or in any other manner from trading using the 11th Respondents intellectual property including its formulations, recipes and/or specially formulated products.*
>
> *d. The Company by a mandatory injunction be immediately compelled to take down all Steers and Debonairs Pizza branding at the Ngong Road, Muindi Mbingu, Kiambu Road and Donholm outlets and immediately cease from operating or representing itself as a franchise of the 11th Respondent.*
>
> *e. That in the event of default within the timeframe set by the Court, the 11th Respondent be at liberty to engage a licensed auctioneer to debrand the company's premises at the cost of the Company.*
>
> *f. Costs of this application.*

4. The application is supported by the affidavits of Andrew Blackbeard and James Ouma, the Franchise Manager and 12th Respondent's sworn on 5th October 2020. It is opposed by the replying affidavit of Owen N. Koimburi sworn on 23rd October 2020.

Background

5. From the parties' depositions, the underlying facts leading to this case are not in dispute. The Company entered into seven separate Franchise Agreements with Famous Brands which is a licensee of trademarks of Debonairs Pizza and Steers and has oversight over the entire Steers brand and Franchise Agreement for a term expiring on 28th February 2024.

6. Under the Franchise Agreements, the Company was licensed to operate food outlets under the brand names Debonairs Pizza and Steers along Muindi Mbingu Street, Ngong Road, Donholm and Kiambu Road. In order to finance its operations such as leasing strategic locations, refurbishing premises, training employees and procuring insurance, it borrowed money from DTB Bank secured by a floating charge over the Company's assets including its undertaking, goodwill assets, book debts, uncalled capital and all other property including stock in trade.

7. According to the Administrator, the Company owes the Bank about Kshs. 50 million. The estimated deficiency/surplus of assets after floating charges is Kshs. 67,323,568/- which is also the total assets available to unsecured creditors. Consequently, the Company entered administration on 19th February 2020. The notice of administration was published in the Kenya Gazette on 26th February 2020. The Administrator informed the Company's creditors including Famous Brands about his appointment. He also informed them that he would be setting out the objectives of the administration for considerations by all creditors.

8. The dispute between the parties revolves around, the termination of the Franchise Agreements. On 10th June 2020, the Administrator received two letters from the lawyer for Famous Brands terminating two of the Franchise Agreements for Debonairs and Steers Ngong Road. On 30th June 2020, he received another letter indicating that Famous Brands would not be renewing the Franchise Agreement for Debonairs and Steers Kiambu Road when it expires on 31st July 2020. He also received another letter dated 10th July 2020 notifying him of termination of the Franchise Agreement for Debonairs and Steers Muindi Mbingu Street.

9. The reasons for termination and non-renewal by Famous Brands was that the Company had breached the terms of the Franchise Agreements by failing to adhere to the operational standards of the Debonairs Pizza and Steers brand following evaluations carried out at the Company's outlets on 24th April 2020, 5th May 2020 and 1st June 2020 through its Franchise Manager, the 12th Respondent. The Company was also accused of failing to pay post administration royalties for the period between 19th February 2020 to 31st May 2020.

10. Andrew Blackbeard and James Ouma, explained the reasons for non-renewal and termination of the Franchise Agreements. Through several franchise agreements, Famous Brands granted the Company license to run Debonairs Pizza and Steers branches as follows;

Debonairs Pizza Muindi Mbingu Street	26th August 1999	25 years
Steers Muindi Mbingu Street	24th April 1997	25 years
Debonairs Pizza Ngong Road	1st July 2018	3 years
Steers Ngong Road	1st July 2018	3 years
Debonairs Pizza Kiambu Road	1st August 2019	1 year
Steers Donholm;		
Debonairs Pizza Donholm		

11. According to Famous Brands, the Licence to run the Kiambu Road Debonairs Pizza outlet provided that 3 months before the expiry of the Agreement, the Company had to communicate its intention to continue its relationship in order for the parties' to have an opportunity to negotiate the terms of a new Agreement. Since the Company failed to express its notice of intention to renew the Licence, the agreement lapsed on 31st July 2020.

12. Apart from providing for monthly payment of royalties to Famous Brands on account of the use of Trademarks, the Franchise Agreement outlines strict operational standards for the outlets physical and operational infrastructure as well as food, to ensure that the Company managed the branded business in compliance with the global franchise standards.

13. Andrew Blackbeard and James Ouma, explained the reasons for non-renewal and termination of the Franchise Agreements. Mr Blackbeard deponed that as the Company was performing poorly leading to decline in brand reputation. In August 2019, Famous Brands entered into a conditional agreement with the Company to purchase the seven Steers and Debonairs Pizza outlets the Company was running in Kenya. Unfortunately, the agreement fell through as the Company failed to satisfy conditions precedent. When the Company went under administration on 19th February 2020, outstanding royalties from the Company for the six outlets stood at Kshs. 6,116,231.49.

14. Under the Franchise Agreements, Famous Brands was entitled to inspect the Company's outlets to ensure the standards of workmanship relating to layout, equipment, fixtures and fittings were in compliance with its global standards. On 4th February 2020, the Famous Brands Support Manager based in South Africa conducted an evaluation of the two Ngong Road outlets. On 5th February 2020, a further evaluation was conducted on the Muindi Mbingu Street and Kiambu Road outlets. According to his assessment, the outlets scored poorly. Some of the issues he noted were a faulty walk-in freezer, a refrigerator and an oven thermometer that were not working, insufficient stock and outlets stocked with the wrong cheese.

15. As Famous Brands was concerned by the fact that the Company had been placed under Administration coupled with the challenges arising from the COVID-19 pandemic, its Franchise Manager, James Ouma, the 12th Respondent, conducted a follow up evaluations on various dates. He reported that all four outlets failed, with the exception of the Steers Muindi Mbingu Street outlet which had been closed on 1st April 2020 due to insufficient stock and licensed products, leading to massive damage and disrepute of the brand. The results of the evaluations were sent to the Administrator on 4th May 2020. The Franchise Agreement provided that the Company was to adhere to operational standards and it had a period of between 5-10 days within which to remedy any breach notified to it.

16. In an email dated 7th May 2020, the Administrator indicated that from his perspective the Company should not be paying the royalties. He further wrote that the operational standards in the Franchise Agreements were cumbersome and that he could source cheaper supplies and that he did not intend to adhere to the terms of the Franchise Agreements. Famous Brands contended that this was contrary to the terms of the Franchise Agreements. Famous Brands then proceeded to conduct a third round of evaluations on four outlets located on Muindi Mbingu Street and Ngong road on various dates between 21st April 2020 and 9th June 2020. According to Famous Brands, all the outlets scored poorly.

17. Mr Blackbeard deponed that despite being given sufficient time to rectify the issues highlighted in the evaluations, the Administrator failed to do so. He was of the view that failure to do so posed a health risk as perishable food was being stored in faulty refrigerators and cooked in fryers without temperature gauges. He further deponed that the operational standards were not simply about brand repute and customer satisfaction but public health and safety standards. In light of those concerns, the Administrator demanded that evaluations be carried out by a third party and that refurbishment be undertaken in five years' time.

18. According to Mr Blackbeard, the Company's position was not satisfactory as Administration could not allow the breach the terms of the Franchise Agreements. Famous Brands took the decision to terminate the Franchise Agreements. In order to prevent the outlets from being completely shutting down, it waived its non-compete clause in the Franchise Agreements to allow the Company to continue to trade in any other such name, manner, shape or form. It complains that the Administrator continues to operate the outlets in a manner that its brands and that from the Administrator's actions, the Company has no intention of remedying the breaches especially those regarding operational standards.

19. Famous Brands contends that the Company owes it Kshs. 1,025,856.78 on account of accumulated post-administration royalties for the six outlets as at the end of May 2020. Although the Administrator made a proposal on 28th May 2020 to make an immediate payment of Ksh. 200,000.00, Famous Brands did not accept it due to the fact that the Administrator indicated that the same was subject to him not paying some suppliers and employees salaries.

20. The Administrator's case is that the approach taken by Famous Brands in conducting the inspections and evaluations carried out by Mr John Ouma was antagonistic rather than collaborative with the sole intention of terminating the Franchise Agreements.

21. The Administrator deponed that in an email dated 7th May 2020, he communicated his frustration concerning the manner and frequency of the inspections and evaluations. He requested that the evaluation be conducted by an independent person as the 12th Respondent had a conflict in the matter but this request was denied in contravention of Clause 8.12 of the Franchise Agreements which provided that the requirements on service and method had to be reasonable. He stated that the 5 to 7 days given after each evaluation to carry out maintenance was unrealistic and rigidly imposed without consultation. He argued that although Famous Brands had a right to carry out evaluations under Clause 8.6 of the Franchise Agreement, the discretion to do so should not be exercised in bad faith or arbitrarily by demanding unrealistic timelines.

22. The Administrator deponed that Famous Brand's assertion that the outlets are run down was exaggerated and so was the assertion that he lacks the expertise to oversee the restructuring of the Company. The Administrator stated that he has the technical expertise on how to reduce operational costs and put in place measures to aid the financially distressed Company while adhering to the set standards and obligations imposed by the company's trade. He deponed that the issues raised during the evaluations were duly considered and reasonable corrections and repairs made.

23. The Administrator argued that that Clause 8.6 must be read with Clause 26 of the Franchise Agreements which provides that the 11th Respondent cannot demand maintenance or refurbishing more than once in every five years. Further that Clauses 29.10.1 and 29.10.2 of the Franchise Agreements implores parties to act in good faith by providing that the 11th Respondent may grant an extension to the Company if it cannot comply with the terms of its obligations under the Franchise Agreements. The Administrator also queried the provision in the Franchise Agreements that compelled the Company to obtain supplies from one list of suppliers, irrespective of whether the supplier was overcharging and yet there were other alternatives. He considered the position taken by the 11th Respondent inflexible. As regards demands for payment of royalties, the Administrator sought indulgence and proposed a payment plan which was rejected without a counteroffer.

24. The Administrator contends that if the court allows the application by Famous Brands, it will greatly prejudice the Company as its main business is anchored on the Franchise Agreements. He contends that the demands for de-branding would violate the statutory moratorium in place as the de-branding would defeat the purpose and objectives of administration which are to maintain the company as a going concern in order to achieve a better outcome for the Company's creditors than liquidation. The Administrator further states that the demand for de-branding is an attempt to steal a march on the larger body of creditors as to de-brand the outlets will result in the Company losing its goodwill which it will not be able to realize for the benefit of the floating charge holder and other creditors.

25. The Administrator stated that on 28th August 2020, he held a creditor's meeting and by a majority, they voted to allow the Company to continue as a going concern under administration, enter into a scheme of arrangement with the creditors whilst looking for a friendly debt/equity strategic investor to revamp the business. He pointed out that the outlets have recorded a steady increase in monthly revenue from February 2020 when the Company was placed under Administration taking into consideration the prevailing market conditions caused by the pandemic and that at end of June 2020, the monthly revenue increased by Kshs.7 million. The Administrator depones that without Famous Brand's trademarks, the Company has very low chances of survival.

26. The Administrator submits that Famous Brands will not suffer any prejudice as its brands will continue to be maintained as the parties shall conduct joint evaluations to ensure that the operational standards are maintained throughout the administration period. Further that the royalties due when treated as an administration expense will rank ahead of the floating charge holder. He contends that it is in interests of all the secured and unsecured creditors of the Company that its application is allowed. In any case, he argues that Famous Brands will be at liberty to move the court in any case of non-compliance and he is ready and willing to work jointly with it to ensure the highest possible standards are maintained.

Submissions; the Statutory Moratorium

27. The issue in this case is whether Famous Brands should be allowed to terminate or refuse to renew the Franchise Agreements following the appointment of Administrator in light of the statutory moratorium that took effect in terms of **section 560** the ***Insolvency Act*** which states as follows:

> *560. Moratorium on other legal process while administration order has effect*
>
> *(1) While a company is under administration—*
>
> *(a) a person may take steps to enforce a security over the company's property only with the consent of the administrator or with the approval of the Court;*
>
> *(b) a person may take steps to repossess goods in the company's possession under a credit purchase transaction only with the consent of the administrator or with the approval of the Court; if the Court gives approval—subject to such conditions as the Court may impose;*
>
> *(c) a landlord may exercise a right of forfeiture by peaceable re-entry in relation to premises let to the company*

only with the consent of the administrator or with the approval of the Court; and

(d) a person may begin or continue legal proceedings (including execution and distress) against the company or the company's property only with the consent of the administrator or with the approval of the Court.

(2) In giving approval for a transaction under subsection (1), the Court may impose a condition on, or a requirement in connection with, the transaction.

28. The Administrator's case is that the termination of the Franchise Agreements and demands for de-branding by Famous Brands violate the statutory moratorium. The Administrator founds its case on the objectives of administration set out in **section 522** of the ***Insolvency Act*** which, inter alia, recognizes the value of the business entity and focus on maintaining it as a going concern by avoiding the liquidation process for benefit of all the creditors including employees. The Administrator contends that the termination would prejudice the Company severely as its main business is anchored in the Franchise Agreements. He argues that termination of the Franchise Agreements during the pendency of the statutory moratorium is an interference with the due administration of justice and threatens the attainment of the objectives of administration.

29. Counsel for the Administrator submits the statutory moratorium only suspends the rights of any creditor from taking any enforcement measures against the Company during its pendency and that non-payment of royalties before and during the period of administration cannot form the basis for the termination of the franchise agreements. Counsel cited ***Barclays Mercantile Business Finance Ltd and Another v Sibec Developments Ltd*** **[1992] 1 WLR 1253,** where the court held, *"The section imposes a moratorium on the enforcement of the creditor's rights but does not destroy those rights."* Counsel submitted that Famous Brands will therefore be at liberty to terminate the Franchise Agreements after the period of administration which period is limited as provided for in the law hence it does not stand to suffer any prejudice

30. Famous Brands submits that it is entitled to terminate the Franchise Agreements as the Company has been in continuous breach by failing to uphold the operational standards in each outlet despite various evaluations being conducted. That the Company was given ample time to rectify the specific breaches that were identified and it failed to do so. It submits that the Company has expressly acknowledged default in its primary contractual obligations namely it has failed to pay royalties in consideration for a benefit it has continued to enjoy at the expense of Famous Brands. Counsel for Famous Brands asserts its right to terminate the Franchise Agreements and the duty of the court to enforce that right. It cites ***Ngere Tea Factory Company Ltd v Alice Wambui Ndome*** **[2018] eKLR** where the Court held that, "*A party cannot run away from the terms of its agreement. It has often been stated that the Court's functions are to enforce contracts that the parties enter into. The court cannot rewrite the party's agreements*."

31. Counsel submits that a Court-mandated reinstatement of the Franchise Agreements would put the Company in a position where it would be a beneficiary of its own admitted breaches of contract and the Company would remain obligated to honour the Franchise Agreements, a situation which the Administrator has already termed as untenable, unnecessary and excessively expensive. In effect, the Court would effectively insulate the Company from meeting its obligations and leave Famous Brands without any remedy. Counsel further submitted that once the Agreements were lawfully terminated, it was untenable for the court to reinstate the Agreements as the Company has no contractual rights to be enforced.

32. Famous Brands submits that the fact that the Company is under Administration, does not grant it license to seek to penalise its trading partners. It contends that what the Company seeks herein is akin to asking the Court to compel suppliers to continue supplying the Company with goods despite not receiving payment. It further submits that the Company having failed to seek a renewal of the Franchise Agreement for the Kiambu Road outlet now seeks to hide behind the cloak of administration to arm-twist Famous Brands to enter into a new Franchise Agreement despite the fact that the Franchise Agreement has expired. On the whole, Famous Brands relies on the principle stated in ***National Bank of Kenya v Pipelastic Samkolit (K) Ltd & Another*** **[2001] eKLR** where the Court of Appeal held that a court of law cannot rewrite a contract between the parties and the parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded.

33. The Administrator reiterates that the termination of the Franchise Agreements was unlawful because the termination was done during the pendency of the statutory moratorium and that it was done in bad faith with the sole intention of frustrating the purposes of the Franchise Agreements in a bid to disengage with a Company in financial distress. In the latter case, the Administrator cited the ***Yam Seng Pte Limited v International Trade Corporation Limited*** **[2013] EWHC 111 (QB)** to support the proposition that parties in a contractual commercial relationship have the obligation of dealing with each other in good faith and not to break off contractual engagements without reasonable cause. The Administrator submits that the arguments by Famous Brands and the authorities cited relate to normal contractual relationships between parties and not companies in distress. He further submitted that Famous Brands failed to address the protection given to companies in distress under the provisions of the ***Insolvency Act***.

Determination

34. The starting point for consideration of this case must be the provisions of **section 522** of the ***Insolvency Act*** which set out the objectives of administration as follows;

522. The objectives of administration

(1) The objectives of the administration of a company are the following:

(a) to maintain the company as a going concern;

(b) to achieve a better outcome for the company's creditors as a whole than would likely to be the case if the company were liquidated (without first being under administration);

(c) to realise the property of the company in order to make a distribution to one or more secured or preferential creditors.

(2) Subject to subsection (4), the administrator of a company shall perform the administrator's functions in the interests of the company's creditors as a whole.

(3) The administrator shall perform the administrator's functions with the objective specified in subsection (1)(a) unless the administrator believes either—

(a) that it is not reasonably practicable to achieve that objective; or

(b) that the objective specified in subsection (1)(b) would achieve a better result for the company's creditors as a whole.

(4) The administrator may perform the administrator's functions with the objective specified in subsection (1)(c) only if—

(a) the administrator believes that it is not reasonably practicable to achieve either of the objectives specified in subsection (1)(a) and (b); and

(b) the administrator does not unnecessarily harm the interests of the creditors of the company as a whole.

35. Several cases have shed light on the purposes of the ***Insolvency Act***. In ***Midland Energy Limited v George Muiruri t/a Leakeys Auctioneers & another*** **[2019] eKLR** Tuiyott J., explained the purpose of administration as follows;

1.The devise of Administration as an alternative to Insolvency is a new feature in our Insolvency laws. It is provided for under part VIII of the Insolvency Act No. 18 of 2015. These proceedings demonstrate tensions that can arise between Creditors of a Company under Administration.

….

12. The design of our current Insolvency Laws is to give a second chance to financially distressed Companies. A break from the past where the fate of an ailing Company would invariably be a Winding up or liquidation order. Administration is one of the alternatives to liquidation and is provided for in part VIII of the Act.

….

13. So as to achieve that objective, the Company must be insulated from aggressive Creditors who could cause a run of the Company assets. The statute contemplates that upon such protection a Company will not be distracted from precipitate action and so the Administrator will be able to perform his function in the interest of all of the Company's Creditors. The insulation of the Company is provided by way of a moratorium from other legal processes.

36. On the same note, Onguto J., in ***In re Nakumat Holdings Limited*** **[2017] eKLR** observed as follows:

Administration of companies in general

30. The concept of administration of companies was substantively invited into our jurisdiction and laws by the Act. The Act came into force on 11 September 2015. This was after the Companies Act (Cap 486) was jettisoned and a new Companies Act enacted. The new Companies Act 2015 consolidated the law relating to incorporation, registration, operation, management and regulation of companies. The long title of the Insolvency Act, on the other hand, provided for inter alia "the liquidation of incorporated and unincorporated bodies (including ones that may be solvent)…, alternative to liquidation procedures that will enable the affairs of such of those bodies as become insolvent to be administered for the benefit of their creditors…" [emphasis mine]

31. Up till 2015, it is apparent that a company in financial distress was met often with the liquidation culture (ignited voluntarily, or by a creditor or subject to the courts supervision): see Part VI of the Companies Act (Cap 486) (repealed). A company that was unable to pay its debts but did not want to ascribe to the liquidation culture also had the option of either compromising with its creditors and or undergoing a reconstruction of the company through amalgamation or merger with another company and the liabilities duly transferred: see ss.207-210 of the repealed Companies Act (Cap 486).

32. The liquidation culture, still subsists under the new insolvency laws in addition to compromises, arrangements, reconstruction and court supervision.

33. Administration, though, is now a tool intended to offer breathing space for insolvent companies whilst also putting better returns and packages for creditors, not ordinarily available in liquidation. And, unlike compromises, administration as an alternative rescue process leads to a stay of past and future legal proceedings as per ss.560 & 561 of the Act hence making it cheaper for the company.

….

38. Running through Part VIII of the Insolvency Act is the recognition of the value of a business entity as a going concern as well as a juristic person. There is focus under s.522 of the Act on "a going concern" and avoidance of liquidation process, for the sake of persons dealing with or who have dealt with the company. There is a clear attempt to secure and balance the opposing interests of creditors, traders, employees as well as shareholders. The company is to be maintained, whilst creditors also made happier with the hope of full recovery."

37. Turning to the tenor and effect of a moratorium, the court in ***Cook v Mortgage Debenture Ltd*** **[2016] EWCA Civ 103** outlined the purpose and effect of a moratorium under the ***Insolvency Act*** following the appointment of an Administrator as follows;

In the case of liquidation and bankruptcy, the purpose of these provisions is essentially twofold. First, given that the property of the company or individual stands under the statute to be realised and distributed, subject to any existing interests, among the creditors on a pari passu basis, the moratorium prevents any creditor from obtaining priority and thereby undermining the pari passu basis of distribution. Second, given that both a liquidation and bankruptcy contain provisions for the adjudication of claims by persons claiming to be creditors, the moratorium protects those procedures and prevents unnecessary and potentially expensive litigation. In circumstances where the potential liability of the company or bankrupt is best determined in ordinary legal proceedings, as for example is often the case with a personal injuries claim, the court will give permission for proceedings to be commenced or continued, but usually on terms that no judgment against the company or individual can be enforced against the assets of the estate.

In the case of an administration, this is not a sufficient description of the purposes of the moratorium in paragraph 43(6). An administration may be a prelude to a liquidation or, once an administrator gives notice of an intention to make distributions to creditors, may become a substitute for a liquidation. In such circumstances, the purposes described above apply also to the moratorium in the case of an administration. But before that point is reached, the principal purpose of an administration is either to rescue the company itself as a going concern or to preserve its business or such parts of its business as may be viable. The purpose of the moratorium is to assist in the achievement of those purposes. The moratorium on legal process against the property of the company best preserves the opportunity to save the company or its business by preventing the dismemberment of its assets through execution or distress. The moratorium on legal proceedings serves the same purpose by preventing the company from being distracted by unnecessary claims. As Nicholls LJ put it in In re Atlantic Computer Systems plc [1992] Ch 505 at 528, the moratorium provides "a breathing space". Once again, however, the court will readily give permission for proceedings to be commenced or continued where it is appropriate to do so. [Emphasis mine]

38. The scope of the moratorium and whether the act of terminating the Franchise Agreement is covered by the moratorium calls for consideration of the meaning of **section 560** of the ***Insolvency Act***. The circumstances of this case do not fall within **sections 560(1)(a), (b)** and **(c)** thereof as Famous Brands is not the holder of any security which it now seeks to enforce, or a person seeking to repossess goods in possession of the Company under a credit purchase transaction or a landlord seeking to enter the premises. The question in terms of **section 560(1)(d)** is whether the termination of the Franchise Agreements amount to, *"legal proceedings …. against the company"* which can only begin or continue with the consent of the administrator or with the court's approval.

39. There is a dearth of decisions on the ***Insolvency Act*** in Kenya, hence it is necessary to refer to other jurisdictions that have enacted similar legislation. In ***Bristol Airport PLC v Powdrill*** **[1990] Ch. 744**, the Court of Appeal in England considered whether the detention of an aircraft amounted to proceedings within the meaning of **section 11(3)(d)** of the ***Insolvency Act,*** **1986** which provided for the moratorium as follows:

(3) During the period for which an administration order is in force (d) no other proceedings and no execution or other legal process may be commenced or continued, and no distress may be levied, against the company or its property except with the consent of the administrator or the leave of the court and subject (where the court gives leave) to such terms as aforesaid.

Sir Nicolas Browne-Wilkinson, VC rejected the position taken by the administrators and the trial court that proceedings covered every sort of step against the company, its contracts or its property which may be taken and the intention of Parliament by **section 11** was to prevent all such actions without the leave of the court or consent of administrators as such the detention of the aircraft required the leave of the court as being other proceedings. He held that:

…… *the natural meaning of the words "no other proceedings . . . may be commenced or continued" is that the proceedings in question are either legal proceedings or quasi-legal proceedings such as arbitration. …… the reference to the "commencement" and "continuation" of proceedings indicates that what Parliament had in mind was legal proceedings. The use of the word "proceedings" in the plural together with the words "commence" and "continue" are far more appropriate to legal proceedings (which are normally so described) than to the doing of some act of a more general nature.*

In my judgment, however anxious one may be not to thwart the statutory purpose of an administration, the judge's formulation must be too wide. If the word "proceedings" has this wide meaning, all the other detailed prohibitions in section 11(3) would be unnecessary. Moreover such a construction would introduce great uncertainty as to what constituted commencement or continuation of proceedings. Would the acceptance of a repudiation of a contract by the company constitute a "proceeding"? Would a counter-notice claiming a new tenancy under the Landlord and Tenant Act 1954 be a "proceeding"? In my judgment, the judge's view would produce an undesirable uncertainty which, in view of my construction of section 11(3)(c), it is unnecessary to introduce into the Act.

40. The issue also arose in ***Re Olympia and York Canary Wharf Ltd*** **[1993] BCLC 453** where the court held that the service of a contractual notice purporting to make time of the essence, or for the purpose of terminating a contract by reason of repudiatory breach by the company which has gone into administration was held not to amount to judicial steps of the kind covered by the moratorium under **section 11(3)(d)** of the ***Insolvency Act, 1986*** hence consent or leave was not required. In reaching this conclusion, Millet J., observed that if service of a contractual notice is part of a legal process, it is difficult to understand when it is supposed to commence of continue as those words *"commence"* and *"continue"* indicate a process which has an independent existence apart from the step by which it is commenced or continued.

41. I agree with the position that the statutory language, by referring to legal proceedings, necessarily narrows the scope and application of the moratorium to proceedings of judicial or quasi-judicial nature. This position is also supported by Ray Goode in ***Principles of Corporate Insolvency Law*, Sweet and Maxwell, para. 11-69** where the learned author states as follows in relation to self-help remedies;

> *While there is a general prohibition on the institution of proceedings without the consent of the administrator or the permission of the court, the only self-help remedies falling within para. 43 of Sch B1 are those mentioned earlier, namely the taking of steps to enforce a security or to repossess goods in the company's possession under a hire-purchase agreement, the exercise of a right to forfeit a lease by peaceable re-entry and the levying of a distress. So the moratorium does not cover exercise of a right to set-off or combination of accounts, or a right to terminate or rescind a contract, accelerate monetary liability under a contract or give other contractual notice.*

42. Although the words used in the English statute are slightly different from those obtaining under our statute, the use of the words *"begin"* and *"continue"* in relation to legal proceedings in **section 560(1) (d)** of the ***Insolvency Act*** attracts the same reasoning I have set out above. The statutory moratorium was not freeze the exercise of all contractual rights except those specifically mentioned in the ***Act***. The termination and non-renewal are simple acts that take effect upon service of the respective notice. The Franchisor does not require to do anything further for the notices to take effect.

43. Since the termination and non-renewal of the Franchise Agreements are not legal proceedings within the meaning of **section 560(1)(d)** of the ***Insolvency Act***, termination and non-renewal of the Franchise Agreements do not require consent of the Administrator or leave of the court.

44. Having reached the conclusion that the termination and non-renewal of the Franchise Agreements do not require consent of the Administrator or leave of the court to take effect, I find that the Administrators application for injunction must fail. On the other hand, in order for Famous Brands to take any other proceedings, it must seek the consent of the Administrator or apply for leave to commence proceedings against the administrator. The application by Famous Brands by-passes that process and must therefore fail.

Disposition

45. For the reasons I have outlined, I now dismiss the Notice of Motion dated 25th September 2020 and the Notice of Motion dated 5th October 2020. There shall be no orders as to costs.

DATED and **DELIVERED** at **NAIROBI** this **20th** day of **JANUARY** 2021.

D. S. MAJANJA

JUDGE

Court Assistant: Mr. M. Onyango.

Mr Odhiambo instructed by Kieti Advocates LLP for the Administrator.

Mr Musangi instructed by Mukite Musangi and Company Advocates for the Respondents.