



IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

INSOLVENCY CAUSE NO. E017 OF 2020

IN THE MATTER OF THE INSOLVENCY ACT, 2015

AND IN THE MATTER OF

ATHI RIVER STEEL PLANT LIMITED (IN RECEIVERSHIP)

BETWEEN

CREDIT GUARANTEE INSURANCE CORPORATION OF AFRICA.....APPLICANT

AND

PONANGIPALLI VENKATA RAMANA RAO.....1ST RESPONDENT

ATHI RIVER STEEL PLANT LIMITED (IN RECEIVERSHIP).....2ND RESPONDENT

RULING

1. It is common cause that on 18th May 2018, the 1st Respondent (“the Receiver”) was appointed receiver of the 2nd Respondent (“the Company”) by several lenders; Bank of Africa, Commercial Bank of Africa (now NCBA Bank PLC), I & M Bank and KCB Bank Kenya Limited (“the Lenders”) under powers conferred on them under their respective Debentures executed by the Company. The appointment was further extended by the Lenders for a further period of 12 months from 18th May 2020 and sanctioned by the court on 22nd June 2020 for a period of 12 months from the date of the order. The Receiver deponed that at the time of appointment, the Lenders were collectively owed Kshs. 6.445 billion by the Company which remained unpaid despite demand.

2. The Applicant contends that it is a creditor of the Company as a result of rights ceded to it by Macsteel International Holding BV which had supplied steel bullets to the Company. It claims the Company owes it USD 4,175,000.00 which it seeks to recover. It has moved the court by a Notice of Motion dated 22nd September 2020 made, inter alia, under **sections 723 and 723A** of the *Insolvency Act, 2015* (“the Act”), **sections 1A, 1B, 3A and 63(e)** of the *Civil Procedure Act* seeking the following orders:

[1] Spent

[2] THAT pending hearing and determination of this Application a Stay Order does issue against the 1st Respondent from disposing off/selling the 2nd Respondent and/or its assets.

[3] THAT the 1st and 2nd Respondents do provide Financial Statements both audited and unaudited together with all Supporting Documents for the period of Receivership from 18th May to date.

[4] THAT costs of the Application be provided for.

3. The application is grounded on the supporting and supplementary affidavits of the Applicant’s General Manager, Claims, Collections and Bonds sworn on 17th September 2020 and 21st October 2020 respectively. The application is opposed by the Respondents through the Receiver’s Replying Affidavit sworn on 13th October 2020. As is evident from the prayers in the application, which I have set out above, the main issue is whether the court should order the Receiver to provide the information requested. The order for stay, is in my view, ancillary to

the main relief as it sought, “pending the hearing and determination of the Application.”

4. The Applicant claims that its debt was admitted and appears in the Company’s books of account and list of debtors but since it was placed under receivership, the Receiver has not supplied any information or steps being taken in regard to the process. It further claims that the Receiver has commenced the process of sourcing for buyers to purchase the Company without involvement or communication with the creditors. The Applicant states that it requested for information from the Receiver several times but he declined to comply with the statutory duties under the *Act* as administrator of the Company.

5. By the letters dated 7th May 2020, 25th June 2020, 3rd September 2020, the Applicant’s Advocates requested for the following documents pursuant to **section 723A** of the *Act*: financial status of the Company before and after receivership, financial statements and supporting documents, audited financial statements and supporting documents, stay order alluded to in the email sent to the Applicant on 25th June 2020 and the list of potential buyers.

6. In response to the application, the Receiver deponed that when he took over the running of the Company, he requested the directors to provide a Statement of Affairs but to date he has not received the report. He also deponed that the directors attempted to remove him by filing **Machakos High Court Insolvency Petition No. 16 of 2018** but were unsuccessful. He further stated that there is further litigation to which the Lenders are parties in the Court of Appeal related to the case in Machakos namely; **Nairobi Civil Appeal No. 592 of 2019** and **Nairobi Civil Application No. 374 of 2019** which are yet to be heard.

7. Following his appointment, the Receiver states that he published a notice on 29th May 2018 in the Daily Nation notifying all and sundry creditors and the general public of his appointment and informing anyone with a claim against the Company to forward the same to him. On the same day, he requested the Directors to provide him with information relating to moveable and immoveable assets, creditors with an age analysis together with securities held and their addresses, trade and other debtors, list of bank accounts with bank balances and all details required under **section 564** of the *Act*. He states that to date he has not received the information requested and since he received the Applicant’s Advocates letter dated 6th December 2019, he was not aware of its debt and in any case, the Applicant had not responded to his earlier notice calling on creditors to provide him with information.

8. The Receiver states that the Lenders are owed over Kshs. 7.577 billion and have now issued statutory notices under their respective charges. Despite the notices, the Company Directors have not made any concrete offers to resolve the debt. In his view, the receivership is the only way the secured lenders can be repaid the colossal amount they are owed. He further explained that through assistance of some of the Lenders providing financial support, he had been able to get the plant running to the extent that it has generated a turnover of Kshs. 1.5 billion with resultant profits for the period between 28th May 2018 to August 2020.

9. The Receiver further states that neither the *Companies Act (Repealed)* from which his mandate is derived and nor the *Act*, require him to furnish an unsecured Lender with the Company’s Financial Statements. Despite the foregoing, he states that he has exhibited to the court the Company’s Financial Statements. Further and without any legal requirement to do so, he has filed bi-annual returns with the Official Receiver save for the period affected by the COVID-19 pandemic. He avers that the financial reports are now public records available to the Applicant.

10. In supplementary affidavit sworn on 21st October 2020, the Applicant challenged the Financial Statements provided. It decried the fact that the Statement did not reflect the cash injection made by the Lenders, that they were for a very limited period of three months and it was impossible to tell if the same had been audited or not since crucial information was missing. The Applicant stated that it could not respond to the Receivers notice to creditors as it was not directed to international creditors.

11. The Applicant stated that the Receiver has been aware of the Company’s creditors since documents relating to the same including valuation reports were filed in the Machakos suit. It added that from the financial extracts, it is clear that the Receiver does not wish to disclose all material information as prescribed by insolvency law hence it is difficult to know if the creditors will be paid all their debts.

12. In light of the aforesaid facts, the parties filed written submissions in support of their respective positions. As I stated the issue is whether the court should order the Receiver to provide information to the Applicant. The Applicant has invoked **section 723A** of the *Insolvency Act* (as amended by the *Business Laws Amendment Act, 2020*) which provides as follows:

723A (1) A creditor may request information from a relevant insolvency practitioner and the insolvency practitioner shall provide the information within —

(a) five business days after receiving the request; or

(b) such longer period as may be agreed upon between the creditor and the insolvency practitioner.

(2) If the relevant insolvency practitioner is satisfied that an extension of time is required due to the nature of the request under subsection (1), the insolvency practitioner may, by notice to the creditor in writing, extend the period for providing the information.

(3) A notice under subsection (2) shall —

(a) be given to the creditor making the request;

(b) specify the period within which the requested information shall be provided; and

(c) specify the reasons for the extension of time.

13. Counsel for the Applicant submitted that the duty to disclose information is a statutory duty imposed on the Receiver by virtue of his office as an Insolvency Practitioner. He further submitted that the aforesaid provision is couched in mandatory terms and empowers any creditor to request any information and that failure to respond to a request amounts to a criminal offence. Counsel added that this provision is intended to ensure transparency in the insolvency process by a statutory duty bestowed upon him by the virtue of his office hence compliance is mandatory.

14. The Applicant contends that in order for a creditor or court to be satisfied that the operations of a company under receivership or administration are being carried out properly, it is important that the information requested be available. As regards the documents submitted by the Receiver, the Applicant submits that they are inadequate and incomplete, which makes it difficult for it to form an opinion whether the Company is a going concern or should indeed be sold. However, the Receiver has made recommendation that in order to pay the debenture holders, the assets of the company have to be sold in order to settle the debt.

15. The Applicant submits that it is entitled to request for that information as prescribed by the law and that **section 723A** of the **Act** does not include conditions to be met first before a creditor can request for information and neither does it give room to the Receiver to decide who to give the information.

16. In opposing the application, Counsel for the Respondents submits that a receiver does not have an active duty to submit a record of accounts to unsecured creditors under **section 351(2)** as read with **section 353** of the **Companies Act (Repealed)**. This view was premised on the fact that the Receiver's duty to account is limited to the Registrar of Companies, the Company in Receivership and the Debenture- Holder who appointed the Receiver as was stated in **Suraya Holdings Limited & 2 Others v CFC Stanbic Bank Limited ML HCCC No. 78 of 2014 [2015] eKLR** that:

[24]... From the outset, let it be known that, the law especially on the duties of Receiver appointed by the court and the one appointed out of court by a debenture-holder is no longer seen as disparate. The niche development in law is found in the difference between a mere receiver and a receiver and manager...Receiver and Manager will have power to deal with the property, run the business of the company and appropriate the proceeds thereof in a proper manner for the benefit of the debenture-holder first, and the company and the secured creditors and the guarantors of the company... Given the very nature of the position of Receiver and Manager who has control over the property of the company and is running the enterprise as a going concern as is the case here, doubtless, has a duty to account to the law, the debenture- holder and the Company. Emphasis added.

17. The Respondents assert that there being no duty to provide such information to an unsecured creditor, the Receiver has willingly produced the Company's Financial Statements taking into account **section 723A** of the **Act** hence the application has not merit and should be dismissed.

18. The Respondents have raised the issue that the Receiver was appointed by the Lenders under their respective Debentures prior 18th January 2016 when the **Act** came into force. Counsel for the Respondents submitted that the rights of the secured creditors to contractually appoint a Receiver under the provisions of **section 690(4)** of the **Act** were preserved and that the Receiver in this case is not Administrator and/or akin to an Administrator under the **Act**.

19. The Applicant takes a different view and submits that in June 2020, the Receiver sought extension of his term pursuant to the **Act** and the **Regulation 141(2)** of the **Insolvency Regulations** in a manner similar to a Receiver Manager in a manner set out in **section 594** of the **Act**. Further, that the Receiver Manager was appointed after the commencement of the **Act** and has been undertaking functions relying on some of the provisions of the **Act** and is in fact an Insolvency Practitioner as prescribed by the **Act**. It submits that since the appointment of the Receiver Manager was not a past event as set out in **section 734** of the **Act**, the provisions of the **Act** apply to him.

20. It is not in dispute the Receiver was appointed prior to commencement of the **Act**, he is therefore an, "administrative receiver" as provided under **section 690** thereof which provides as follows:

690(1) In this section, "administrative receiver" in relation to a company, means –

a. a receiver or manager of the whole (or substantially the whole) of the company's property by or on behalf of the holders of any debentures of the company secured by a charge which, as created, was a floating charge, or by such a charge and one or more other securities; or

b. a person who would be such a receiver or manager but for the appointment of some other person as the receiver of part of the company's property.

(2) The holder of a floating charge in respect of the company's property may not appoint an administrative receiver of the company.

(3) An appointment made in contravention of subsection (2) is void.

(4) This section does not apply to the holder of a floating charge that was created before the commencement of this section or to an appointment of an administrative receiver made before that commencement.

(5) This section applies despite any provision of an agreement or document that purports to empower a person to appoint an administrative receiver (by whatever name).

(6) This section is subject to the exceptions (if any) prescribed by insolvency regulations for the purposes of this section. [Emphasis mine]

21. By making appointment of an administrative receiver null and void, the purpose of the aforesaid provision is to bring all administrators appointed under security documents under the purview of the **Act** and infuse the process of administration with the objects of the **Act** set out in **section 522**. The **Act** has however preserved the power of the debenture holders to appoint administrative receivers for floating charges created before its commencement. This position is fortified by **section 734** of the **Act**, deals with “*past events*” which occurred before coming into operation of **Part VI to X** of the **Act**. Administration is covered by **Part VIII** and is therefore excluded. Under **section 734(1)(i)**, “*the appointment of a receiver of in respect of the company by holders of the company’s debentures,*” is a past event and therefore excluded from the legal incidents of **Part VIII** of the **Act**.

22. From the aforesaid, provisions the appointment of the Receiver, having pre-dated the commencement of the **Act**, is a past event and his responsibilities are governed by the Debenture and appointing instrument. However, that is not the end of the matter as **section 723A** of the **Act** is an unconditional free standing provision of the **Act**. A reading of **section 723A** of the **Act** is plain and obvious in so far as it imposes on the Insolvency Practitioner an unconditional obligation to provide information to a creditor, whether secured or unsecured. The duty does not exist in a vacuum but in relation to an Insolvency Practitioner’s statutory duties hence the use of the word “*relevant insolvency practitioner*”. These duties are in relation to the insolvency, administration and or liquidation. Unlike other provisions of the **Act** relied on by the Respondents, the application of **section 723A** is not excluded on account of the time the Receiver was appointed.

23. Apart from the fact that the Receiver is an Insolvency Practitioner licenced to practice under the **Act**, he is not oblivious of the application of the provisions of the **Act** in certain instances. On 22nd June 2020, this court sanctioned extension of the term of the Receiver for a period of 12 months on his own application. Further, the Receiver invoked **section 564** of the **Act** to seek information from the Directors of the Company. All this goes to show and I now find that the Receiver is bound to supply information requested by a creditor under **section 723A** of the **Act**.

24. The Applicant exercised its right to request for information from the Receiver by the letters dated 7th May 2020, 25th June 2020 and 3rd September 2020 through its Advocates. The Receiver did not respond to those letters. Having reached the conclusion that the Receiver has a duty to comply with **section 723A** of the **Act**, I direct the Receiver to comply with the request under the aforesaid provision.

25. In conclusion I allow the Notice of Motion dated 22nd September 2020 on the following terms:

a. The 1st Respondent, the Receiver, is directed to the respond to the Applicant’s request for information requested in the letters dated 7th May 2020, 25th June 2020 and 3rd September 2020 as required by **section 723A** of the **Insolvency Act, 2015**.

b. The Respondents shall bear the costs of this application.

DATED and DELIVERED at NAIROBI this 18th day of DECEMBER 2020.

D. S. MAJANJA

JUDGE

Court Assistant: Mr. M. Onyango.

Mr Wachira instructed by Abdullahi, Gitari & Odhiambo Advocates, LLP for the Applicant.

Mr Muchiri instructed by Oraro and Company Advocates for the Respondents.