



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

INSOLVENCY CAUSE NO. 14 OF 2018

IN THE MATTER OF THE INSOLVENCY ACT (NO. 18 OF 2015)

AND

IN THE MATTER OF ARM CEMENT PLC (UNDER ADMINISTRATION CLAUSE)

RULING

1. Before me is the **Notice of Motion dated 16th September 2019**. It is filed by the applicant **Pradipkumar Harjivanda Paunrana**, against **Muniu Thoithi & George Weru**, the respondents. The applicant seeks the following prayers:

a) ***THAT*** this Court be please to deem the guarantee dated 9th September 2019 provided to the respondents to have been issued in full compliance with the Ruling and order of this Honourable Court.

b) ***THAT*** in the alternative to the above prayer this Court be pleased to provide clarification and qualification as to the nature and terms of guarantee required to satisfy the condition as to the nature and terms of guarantee required to satisfy the condition set by this Court for subsistence of the order of injunction issued on 5th September 2019.

c) ***THAT*** the Court be pleased to issue such further Orders as it may deem in the interest of justice.

2. The respondents were appointed on 17 August 2018, as joint administrators of **ARM Cement PLC (under administration)** herein after the company. This was following the company's default on the payment of its financial obligation to **UBA Bank Limited**. UBA Bank Limited is a Debenture holder and holder of a Qualifying Floating Charge. At a meeting of the company's creditors dated 23 October 2018, the creditors approved the administrators' proposal to undertake a process of identifying strategic investor(s) in the company with a view to sell all or some of the assets of the company. The term of the administration of the joint administrators of the company was due to lapse on 16th August 2019. That term has been extended.

3. According to the administrators the company was in dire financial state and that it was clear from the onset of the administration that the practical option for saving the business and safeguarding the employment of over 1,000 employees was to find a suitable investor. Since the creditors approved the proposal to sell assets of the company the respondents after obtaining a bank guarantee from the **National Cement Company Limited (NCCL)** entered into a sale agreement for the sale of assets of the company to NCCL.

4. The applicant file an application herein on 11th July 2019. In entertaining that application, ex parte, the court granted interim order restraining the administrators from sale and transfer of the company's assets and/or its shares. Those orders were extended and finally were vacated on 5th September 2019 when the court granted the following orders:

b. ***Until 19th September 2019 an order is hereby issued restraining the administrators of ARM Cement PLC (under Administration) their employees, agents and/or assigns from selling, offering for sale, transferring and/or dealing in any manner whatsoever with the Kenyan assets of the ARM Cement PLC (under Administration) and/or proceeding with or undertaking any further acts in furtherance of the proposed sale of the cement and non-cement assets and the business in Kenya of the ARM Cement PLC (under Administration) to National Cement Company Limited.***

c. ***The Oder in (b) above is granted on condition that the applicant shall provide to the administrators an irrevocable bank guarantee for 20% of Ksh. 6.5 Billion on or before 10th September 2019. The administrators shall determine whether the bank guarantee of the applicant meets their requirement for the sale of the Kenyan assets of ARM Cement PLC (under Administration) . Failure to provide a bank guarantee for the stated amount on the stated date and failure to satisfy the administrators on the quality or validity of such bank guarantee will lead to the vacation of the order made in (b) above.***

5. It is that order that the application under consideration addresses. In his affidavit the applicant deposed and put forward various

imputations. One of those imputations was that the conduct of the respondents, in approving the applicant's guarantee, was irregular and was not in the interest of the company's creditors. The applicant stated that following the order of this court on **5th September 2019**, he forwarded to the respondents a draft guarantee. That the draft guarantee was in conformity with the one provided by the NCCL. The applicant then deponed:

“THAT my family and the Jaswant S. Rai Group's consortium had confirmed its willingness to provide a guarantee on similar terms as the (sic) and the consortium accordingly utilized the terms of the aforementioned guarantee as a basis for the form of guarantee prepared and submitted to the respondents for their approval.”

6. The applicant's contention is that the respondents refused, neglected and/or otherwise failed to approve the contents of the afore stated form of guarantee proposed by the applicant. That the respondent unreasonably delayed its response to the applicant's proposed form of guarantee until the day before the date set by the court by its ruling of 5th September 2019. That the respondents in giving their response and in rejecting the applicant's proposed form of guarantee the respondents gave onerous conditions, such as that the amount of the guarantee would be forfeited by the applicant in the event the applicant failed to sign the agreement for sale of the purchase of company's assets; that the guarantee amount would be utilized to offset the expenses and costs which have accrued on the part of the respondents in respect to the legal fees herein; and that the guaranteed amount would be payable before the execution of the sale agreement.

7. The applicant deposed that with a view to meeting the time line set in the Ruling of 5th September 2019 he abstained an irrevocable bank guarantee, on 10th September 2019, for 20% of what his consortium offered as a purchase price for the Kenyan assets of the company, that is USD 13,000,000. It is the rejection of that guarantee that the applicant alleges was unfounded and that unless the court intervenes the respondent intends to conclude the transaction with NCCL which would render the applicant's application of 11th July 2019 nugatory.

8. The respondents opposed the application through the affidavit of Muniu Thoithi, one of the respondents. He denied that there was undue delay in approving the guarantee. He annexed to his affidavit emails and correspondence exchanged between the applicant's and the respondents' counsels in that regards. He further deposed the rejection of that the guarantee provided by the applicant was not arbitrary or unreasonably as alleged. That it was based on the administrator's objective to provide deal certainty and protect the interests of the creditors by requiring that recovery in the guarantee in the following scenarios:

a) the applicant (or any consortium of the applicant and any other persons constituting the purchasers) declining or being unable to sign the agreement for sale whenever called upon to do so by the administrators; or

b) the applicant (or any consortium of the applicant and any other persons constituting the purchasers) being in breach of any term of the agreement for sale including failure to fulfill its obligation to pay any amount payable under or pursuant to the terms of the agreement for sale; or

c) the applicant failing to pay any amount for which the High Court may order him to pay pursuant to the Insolvency Cause Number 14 of 2018 or any ancillary suit.

9. The respondent stated that the applicant in disregard of the afore going consideration arranged a guarantee issued by Diamond Trust Bank on his behalf and on behalf of Jaswant Singh Rai. According to the respondent that guarantee failed to satisfy them on its quality or validity because it was conditional on a consortium of the applicant and Jaswant Singh Rai.

ANALYSIS

10. What the applicant seeks from this court is either a finding that the respondent have acted unreasonably in rejecting his guarantee or that the court reviews its order of 5th September 2019 which order laid the responsibility on the respondents to verify the guarantee. Those are the two issues that I see presented by the applicant's application.

11. Was the rejection, by the respondents, of the applicant's guarantee unreasonable to attract the intervention of this court? To answer that question one needs to consider to whom was the order of 5th September 2019 made. It was made in favour of the applicant. It was not made in favour of Jaswant S. Rai or in favour of a consortium. Yet the guarantee presented by the applicant to the respondents included these parties as actors in the transaction. Secondly the court order in my view is very clear that, it was the respondents (that is the administrators) who were to 'determine whether the bank guarantee of the applicant meets their requirement'. The court order further provided that the respondents were to be satisfied on the quality and validity of the bank guarantee provided by the applicant.

12. The respondents by their affidavit and the annexed letter of their counsel dated 9th September 2019 had this say: that the applicant's guarantee was conditional and was couched in words which were fundamentally different from the clear and express words of the court order; and it failed to appreciate that while NCCL's guarantee was signed and binding the applicant's guarantee was anchored on a court order.

13. I have looked at the guarantee of the applicant and I indeed do concur with the respondents' determination on the quality and the validity of the same. That guarantee includes, as stated before other parties who are not part of this action and who are therefore not beneficiaries of the court order of 5th September 2019. To have a guarantee which includes these third parties is sufficient reason to reject the same. It does also seem that the applicant's guarantee is conditional or dependent on a "Consortium Agreement". Such an agreement whose terms are unknown not only by the respondents but also by this court is to leave the transaction exposed and vulnerable. It is almost like introducing a 'hidden card' or hidden motive.

14. My response to the first issue above is that the respondents were not unreasonable in their rejection of the applicant's guarantee to attract the intervention of this court.

15. The second issue is directed at seeking a review of the court order of 5th September 2019.

16. The applicant essentially relied on the same facts on this issue as in the first issue. In my view the decision of the respondents cannot be faulted since the guarantee provided by the applicant was deficient as stated above. There being no new or important matters that the applicant has brought before court there is no basis for review of the order of 5th September 2019. Most importantly it ought to be noted that the order of 5th September 2019 did not provide that the guarantee of the applicant had to be mirror image of the one provided by NCCL, not at all. The second issue therefore also fail.

CONCLUSION

17. It follows from the above discussion that application dated 16th September 2019 is misconceived and without merit. The same is hereby dismissed with costs to the administrators and the interested party.

DATED, SIGNED and DELIVERED at NAIROBI this 26TH day of SEPTEMBER, 2019.

MARY KASANGO

JUDGE

Ruling Read and Delivered in Open Court in the presence of:

Sophie..... **COURT ASSISTANT**

..... **FOR THE APPLICANT**

..... **FOR THE COMPANY**