REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

INSOLVENCY CAUSE NO. 10 OF 2017

IN THE MATTER OF NAKUMATT HOLDINGS LIMITED

AND

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

AND

IN THE MATTER OF AN APPLICATION UNDER *S.*692 OF THE INSOLVENCY ACT

BETWEEN

NAKUMATT HOLDINGS LIMITED.....APPLICANT

AND

THE JUNCTION LIMITED.....RESPONDENT

RULING

Introduction

1. This is the second of two opposed applications filed under urgency by the parties.

2. In the instant motion, the Applicant ("Nakumatt") seeks orders under *s.*692 of the Insolvency Act No. 18 of 2015 ("the Act") to restrain the Respondent ("TJL") from closing and or interfering with Nakumatt's access, use, occupation and quiet enjoyment of its business property located on the premises known as Land Reference No. 330/7331, popularly known as the Junction Shopping Centre, pending determination of the Petition.

3. The other contested application between the parties had challenged this court's jurisdiction to entertain the instant application. The application had also faulted Nakumatt for not being candid with the court when it first moved the court for *ex parte* orders on 2 October 2017. I dispositively dealt with both issues of condour and jurisdiction and rendered a ruling on 11 October 2017.

4. I intended to be short in the instant motion, but the principal question which invited construction of a contractual document dictated otherwise.

Narrative

5. The background narrative was outlined in the ruling of 11 October 2017. However, for a better understanding of this ruling, I am constrained to rehash the narrative, which I have retrieved from both the pleadings and concessions made by the parties.

6. Nakumatt is a supermarket chain. It has been around for some time. It operates locally and regionally. It accepted lettable space at the Junction Shopping Centre in 2005 from TJL. Nakumatt was dubbed the anchor tenant. Its term absolute lapsed in January 2017. A fresh term was negotiated and a fresh lease agreement executed on 28 January 2017.

7. Nakumatt thereafter fell into an obvious financial blip and soon it could not meet its financial obligations. An Insolvency Petition, being the instant cause, was later filed by a creditor in May 2017. Then in complete disregard to the doctrine of assembly of creditors, where creditors run together, there was rush by individual creditors to be paid by Nakumatt. This prompted Nakumatt to seek the court's protection. All creditors were restrained from pursuing attachment, execution, sequestration and distress proceedings against Nakumatt. This was on 28 August 2017.

8. Conscious of the effect of the Order of 28 August 2017, Nakumatt in good faith engaged the creditors in lots and singularly. TJL was engaged singularly by Nakumatt on Nakumatt's liability and obligations under the lease arrangement.

9. Nakumatt's obligations to TJL were simply not limited to the payment of rent and occupation of space subject to the covenants and any rights reserved under the lease originally and, lately, the lease agreement. TJL saw more in Nakumatt. Nakumatt was to act as the anchor tenant and be the face of the Junction Shopping Centre. Perhaps, explaining why its supermarket retail business was to open through the hours of 0830 and 2200 daily.

10. Naturally, Nakumatt's financial woes did not leave TJL unaffected. Rent was not being paid. The stock on the shelves dwindled and so did human traffic into the Junction Shopping Centre. TJL was unhappy. It engaged with Nakumatt and a deal was struck.

11. The pact struck on 15 September 2017 was simple. Nakumatt was to give up its estate in TJL's premises by way of a surrender. The surrender date was agreed upon us 1 October 2017. Nakumatt however had a breather too. If it met various conditions, the surrender would be of no use. A side agreement ("the side Agreement") to the Surrender was consequently executed on the same day.

12. In the side Agreement, Nakumatt agreed inter alia that:

> *1.* ***In the event that:***
>
> > *a.* ***The Tenant pays in full all the outstanding dues to the landlord arising in respect of the Lease including arrears of rent, service charge, VAT, legal fees and utilities due and owing or before the Surrender Date ("Outstanding Dues"); or***
> >
> > *b.* ***The Tenant;***
> >
> > > *i.* ***Pays Twenty Million Kenya Shillings (KES. 20,000,000) to the Landlord on or before the Surrender Date;***
> > >
> > > *ii.* ***Subject to (iii), undertakes to the Landlord to pay Twenty Million Kenya Shillings (KES. 20,000,000) plus utility charges to the Landlord monthly thereafter until such time as all Outstanding Dues have been paid;***
> > >
> > > *iii.* ***Undertakes to the Landlord to pay all Outstanding Dues and be current on all monthly obligations in respect of the Lease on or before 31 March 2018; and***
> > >
> > > *iv.* ***Demonstrates to the reasonable satisfaction of the Landlord that it is taking***

verifiable steps before the Surrender Date to restock the premises to previous levels of normal trading by 1st December 2017, the Landlord agrees that it shall not enforce the provisions of the Surrender and the Surrender shall stand terminated and be of no legal effect with effect from the Surrender Date.

2. ***The Surrender shall be held by the Landlord's Advocates, Kaplan & Stratton, on their undertaking to return the Surrender to the Tenant if the Tenant fulfils its obligations under clause 1 of this agreement on or before the Surrender Date provided that if the Tenant fails to fulfil its obligations under clause 1 of this agreement on or before the Surrender Date, the Landlord's Advocates will be entitled to release the Surrender to the Landlord to enable the Landlord to enforce the provisions of the surrender.***

13. Nakumatt settled for option 1(b) above. Nakumatt honored 1(b)(i) above. Nakumatt also honored 1(b)(ii) and (iii), then wrote to TJL on 28 September 2017 stating that it had also complied with 1(b)(iv) above. TJL was however not impressed. Having on 25th September 2017 earlier engaged Nakumatt, TJL returned a verdict that Nakumatt had not fully met the terms of the side Agreement. The Surrender was no longer to be held in escrow. It was to take effect, and immediately for that matter, on the surrender date. Thus, on 1 October 2017, TJL effected the Surrender deed, prompting Nakumatt to launch the instant motion on 2 October 2017.

Arguments

Nakumatt submits

14. In arguments before the court, Mr. Martin Munyi and Ms. Diana Ogula submitted that TJL had been unreasoanable in effecting the surrender as Nakumatt had honoured its part of the bargain satisfactorily. Counsel insisted that there was evidence before the court to demonstrate that Nakumatt had demonstrated to the reasonable satisfaction of the TJL and the court that, Nakumatt had met all the conditions.

15. Counsel submitted that TJL could not unilaterally purport to verify the compliance (or non-compliance) on the part of Nakumatt with the terms of the side Agreement. Counsel insisted that the intention of the parties was to include both parties in the verification process. In particular, counsel also pointed out to the various photographic images to show that Nakumatt had fully restocked its shelves as dictated by the side Agreement.

16. Counsel finally pointed to the orders of 28 August 2017 and *s.*430 of the Act to claim that Nakumatt was entitled to the injunction sought.

TJL Submits

17. Mr. Peter Gachuhi, in opposition, pointed out that despite challenges to show how it was going to restock pursuant to Clause 1(b)(iv) of the side Agreement, Nakumatt had failed to produce any documentary evidence to satisfy TJL. Counsel insisted that Nakumatt had failed to demonstrate that it was compliant and that its operations would be back to the optimum come December 2017.

18. Mr. Gachuhi wound up his submissions by insisting that the orders of 28 August 2017 did not apply to the instant case as a surrender does not equate execution or re-entry at all. Mr. Gachuhi insisted that the court's jurisdiction was still wanting.

The Issue(s)

19. I have reflected on the pleadings. I have also considered the submissions of counsel as well as the circumstances of this case. I deem two issues to arise. The first principal question is whether the conditions precedent (or the terms of the side Agreement) were satisfied by Nakumatt. Secondly; what is the effect of a surrender of lease or a conditional surrender of lease?

Analysis and determination

20. I must first hasten and point out that the issue of jurisdiction which Mr. Gachuhi seemed to ask the court to revisit is not merited. I already determined that the court has jurisdiction. My rendition of 11 October 2017, especially at paragraphs 37 through 41, is relatively clear. As I have not been asked to review my ruling of 11 October 2017, I will not even attempt to replicate my earlier decision. I say no more on the issue of jurisdiction.

21. It leaves me with two substantive issues and I will first consider the issue of alleged breach(es) by Nakumatt of the side Agreement.

22. TJL does not contest the fact that Nakumatt settled for option two of the pre-surrender conditions. Nakumatt paid Kshs. 20,000,000/= to TJL under Clause 1(b)(i) of the side Agreement. Nakumatt also undertook to pay TJL Kshs. 20,000,000/= monthly plus utility charges until all the rent arrears, service charge, VAT and legal fees (" the outstanding dues") were cleared. Nakumatt further undertook to pay the outstanding dues prior to 31 March 2018.

23. TJL however disputes Nakumatt's contention that Nakumatt had demonstrated, to the reasonable satisfaction of TJL, that Nakumatt had prior to the surrender date of 1 October 2017 taken or was taking verifiable steps to restock the supermarket to previous levels of normal trading by 1 December 2017.

24. In support of its contentions, Nakumatt exhibited a letter drafted on 28 September 2017 as well as another one of 1 October 2017. In the former letter, as is of relevance, Nakumatt stated as follows:

> "***We have already taken verifiable steps to restock the premises to previous levels of normal trading. You can also notice the change of our stock in the last two weeks. We have increased our stock in the branch by about Kshs. 64,000,000/= between the 15th of September and today"***
>
> **…**
>
> ***We are committed to the Junction branch and <u>will continue to take further steps to restock the premises in the coming days to ensure that the premises [sic] as restocked to previous levels of normal trading by 1st December 2017</u>"***
>
> ***Accordingly, we have fulfilled each of our obligations in accordance with Clause 1(b) of the Agreement, in accordance with Clauses 1 and 2 of the Agreement, please arrange for the surrender to be returned to us by [sic] Kaplan & Stratton immediately".*** [emphasis mine]

25. TJL was not satisfied and on 1 October 2017 stated as much. TJL insisted that Nakumatt had not taken any verifiable steps to satisfy the landlord of the restocking. TJL also pointed out that Nakumatt had not availed any documentation that could help determine that normal trading levels would be attained by 1 December 2017. Finally, TJL also insisted that there was no evidence of capital injection that would lead to clearing off the outstanding dues.

26. During the hearing, Nakumatt asserted that it was the duty of TJL to seek all the clarifications and information whilst verifying the steps taken. TJL on the other hand, insisted that it was simply Nakumatt's duty to avail all necessary information. The parties were at cross-roads.

27. I did not hear either party to contend that the side Agreement or more specifically, that any part of Clause 1(b) thereof was vague or unclear. I did not also hear either party to complain that the agreement was obtained under any form or sense of coercion, fraud, undue influence or duress. The legality and validity of the agreement has also not been challenged. Instead, TJL gave the Clause 1(b)(iv) its own approach. TJL contended that it was the duty of Nakumatt to "demonstrate" to the reasonable satisfaction of TJL that it was taking verifiable steps before the surrender date to restock.

28. Nakumatt on the other picked on the 'reasonable test' and insisted that it had done what was expected

of it and any reasonable person would be expected to take note and if any other additional information was required it could be availed. In this context, Nakumatt pointed to the prolific affidavit of Atul Shah sworn on 9 October 2017. It ran some 400 odd pages, inclusive of the annexures.

29. My view is that the case for Nakumatt must rest on a proper judicial interpretation of Clause 1(b)(iv) of the side Agreement.

30. As was suggested by Lord Hoffman in the now celebrated case of **Investors Compensation Scheme *v* West Bromwich Society [1998] 1 All ER 98,** contractual documents are to be interpreted according to the common sense principles by which any serious utterances would be interpreted in ordinary life. Lord Hoffman then outlined the following five principles for construction of contract :

> *1.* ***Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.***
>
> *2.* ***The background was famously referred to by Lord Wilberforce as the "matrix of fact", but this phrase is, if anything, an understated description of what the back-ground may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have effected the way in which the language of the document would have been understood by a reasonable man.***
>
> *3.* ***The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent….***
>
> *4.* ***The meaning which a document (or any other utterances) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammar; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax (see*** **Mannai Investment Co. Ltd –v- Eagle Star Life Assurance Co. Ltd [1997] 3 All ER 352, [1997] 2 WLR 945*).***
>
> *5.* ***The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had . Lord Diplock made this point more vigorously when he said in Antaios Cia Naviera SA v Salen Rederierna AB, The Antaios [1984] 3 All ER 229, 233, [1985] AC 191, 201:***
>
> > ***"…if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense".***

31. In my view, the Lord Hoffman principles are certainly not the sole guide for purposes of modern construction of commercial contracts. They constitute proper but not exclusive guidelines.

32. Where the parties do not allege ambiguity or vagueness and there is clear evidence that the parties exhaustively negotiated the contractual terms, elements of both subjectivity and objectivity must be invited to the contract in the cause of interpreting it. This is why the court will seek to bind the parties to their bargain and avoid redrafting it for the parties: see ***National Bank Of Kenya Ltd v Pipe Plastic Samkolit (K) Ltd And Another*** **(2002) EA 503**. It matters not that there may be aspects of the contract which are unfavorable to one party. In any event, parties often end up with unfavorable bargain for the simple reason that there is no law against parties making unreasonable contracts so long as the language is

clear. Subjectively, the parties will be bound to their bargain.

33. By the same vein the court ought to be prepared to consider any underlying commercial purpose of the contractual obligation to make the contract intelligible to even non-businessmen not familiar with any particular industry. In this regard, objectivity creeps in and the court must cease to consider what one or other party privately intended when it agreed to the words in the contract.

34. Under the side Agreement, Nakumatt was to "demonstrate to the reasonable satisfaction" of TJL the steps it was taking before the surrender date to restock the premises to levels of normal trading by December 1, 2017. It was the obligation of Nakumatt to give the demonstration. The word to "**demonstrate**" as a verb is susceptible of two meanings. The concise Oxford English Dictionary 11th Ed defines the word to mean either to "*clearly show the existence or truth of "* or to "*give a practical exhibition and explanation of "* something. Words however convey meaning according to the circumstances in which they are used. The circumstances, and thus context, must always be identified and considered before the process of interpretation or during the process even where there is no ambiguity.

35. In the context of the side Agreement between TJL and Nakumatt, either meaning of the word "demonstrate", in my view, is free of any mythical elements that may avoid or invalidate the side Agreement. Clause 1(b)(iv) of the side Agreement must however also be read in its entirety and in a manner that makes more commercial sense in the context and circumstances of the case.

36. In this respect, it is critical to note that TJL was to be satisfied that the restocking of the premises and normalcy resumed by 1 December 2017. This, in my view, could not be achieved by simple display or exhibition of stock. There was need to do more and prove or validate the process of restocking. In addition to the display, Nakumatt was duty bound to expound on the process and plans for restocking running through 1 December 2017. I would deem the obligation of Nakumatt to be the more detailed and wider demonstration of ability to restock the premises rather than a narrower display of stocks available for the moment. I would deem the obligation of Nakumatt to have entailed plans to restock. It is for this reason that there was a time-frame of 1 December 2017. It was certainly not enough to simply write to TJL on 28 September 2017 and make an additional promise that it (Nakumatt) would continue to take steps towards restocking.

37. To its credit, Nakumatt restocked and displayed the stock. Before the court, this was proven via photo-imagery. TJL was however not satisfied. It wanted more. It wanted to see a capital base, perhaps as proof that the restocking would be sustained through and beyond 1 December 2017. It is for this reason, contended TJL, that on 25 September 2017 TJL demanded evidence of capitalization which Nakumatt was not able to avail. Instead, Nakumatt is said to have replied that the process was still underway.

38. The circumstances leading to the side agreement as well as the surrender were clear to all parties and to the court. Nakumatt were under a grim financial strait. TJL would have insisted on an immediate surrender but Nakumatt was able to convince it otherwise: that normalcy would resume. So the parties set a time-line of end September for Nakumatt to show how this would happen. Nakumatt says it did by restocking. TJL says this would be short lived and that it was not satisfied that even by 1 December 2017 normalcy would have resumed. Objectively, I would agree with TJL.

39. The evidence availed to TJL was wanting. Even before the court, the available evidence is not, in my view, sufficient to convince a reasonable man fully seized with the information and background facts that Nakumatt (at the Junction) is capable of resuming normalcy by 1 December 2017. What has been availed can be deemed as only for the moment and no more. If the evidence is available, it has not been laid before the court and, by extension; it was not given to TJL.

40. I am not satisfied that Nakumatt has objectively shown that it could and will resume normalcy by 1 December 2017. Subjectively thus, TJL must be deemed not to have been reasonably satisfied as of 30 September 2017 with Nakumatt's action and steps towards restocking. I find Nakumatt to have been in breach of Clause 1(b) (iv) of the side Agreement.

41. That brings me to the effect of the Surrender.

42. It is a common cause that surrender is a consensual and mutual yielding of the tenant's estate to the landlord. It cannot be forced upon either party. It is not a conventional way of terminating a lease.

43. Nakumatt has however contended that notwithstanding the effect and purport of the Surrender Deed of 15 September 2017, the provisions of *s.*2 of the Act as read together with *s.*430 of the Act, would bar TJL from carrying the surrender forward. In Nakumatt's view, a surrender amounts to a re-entry or termination of a lease which is prohibited under the law and which prohibition was reinforced by the orders of this court issued on 28 August 2017. Nakumatt contended therefore that it was protected and TJL could not enforce the surrender until after determination of the petition.

44. In my view, the argument by Nakumatt it falls short of both law and logic in the circumstances of this case.

45. Whether expressed or implied, a surrender is essentially a consensual transaction. Once the parties' intention is clear, it takes effect immediately unless held in escrow as was in this case. When it takes effect it drowns the tenant's interest which then merges with the landlord's reversion. It takes effect only when the parties agree. It is therefore not an involuntary process, which is what *ss.*2 and 430 of the Act (which both prohibit re-entry or termination of a lease) contemplate.

46. In the instant case, Nakumatt was aware of the consequences of the surrender which, I must state was carefully drafted after a series of negotiations (see the series of email correspondence annexed to the founding affidavit of Atul Shah and marked NAK-2). Nakumatt voluntarily executed the side Agreement as well as the Surrender Deed. The parties had in mind the substantial result of bringing about an end to their relationship unless the tenant Nakumatt met certain conditions. This was not withstanding the existence of the court order of 28 August 2017. The tenant agreed to a voluntary re-entry.

47. Insolvency provisions and law do not prohibit a company facing insolvency proceedings from giving up its rented premises back to the owner. Insolvency law however prohibits the owner from forceful a take back or re-entry. There was no forceful re-entry or termination by TJL in this case. Rather, Nakumatt voluntarily surrendered the demised premises whilst fully aware of the court orders and the provisions of the Act.

48. I would agree with Mr. Gachuhi that *s.* 2 and *s.*430 of the Act do not apply in the circumstances and the result is that TJL by invoking the surrender already expressed an unequivocal acceptance of the premises from the tenant Nakumatt. Nakumatt, for the avoidance of doubt and due to the consensual nature of the surrender is not insulated by the court order of 28 August 2017 or the provisions of *s.* 430 of the Act.

Disposal

49. I conclude that Nakumatt has not proven its case to my satisfaction and I see no reason to invoke the powers under *s.*692 of the Act. The Application dated 2 October 2017 fails and is dismissed with costs to JTL.

50. Orders accordingly.

Dated, signed and delivered at Nairobi this 18th day of October, 2017

J.L.ONGUTO

JUDGE