



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & TAX DIVISION**

**INSOLVENCY CAUSE NO. 10 & 13 OF 2017 (CONSOLIDATED)**

**IN THE MATTER OF NAKUMAT HOLDINGS LIMITED**

**AND**

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

**AND**

**IN THE MATTER OF AN APPLICATION FOR AN ADMINISTRATION ORDER**

**RULING**

**Introduction**

1. I have before me an application commenced by way of motion and seeking an Administration Order. The motion was filed on 30 October 2017 in the midst of two pending creditors' insolvency petitions which were consolidated through an order of this court made on 29 September 2017. There are also many other motions in this cause, some of which have been determined.
2. One may not help, but remember Charles Dickens' classic 19<sup>th</sup> century novel 'Bleak House'. In the novel, a satirical narrative is given of an infinite case *Jarndyce v Jarndyce*. The case has interminable legal proceedings with different claims and motions roped in the same proceedings. The instant insolvency cause is a stark reminder of *Jarndyce v Jarndyce*.
3. The court file is now in its third nine-inch volume. It is baggy and continues to grow by the day as different parties file motion and after motion. Besides, the Petitions and the respective responses, there have been motions by creditors for various reliefs including for permission to commence action against the allegedly insolvent company. There have also been motions to enable the exercise of proprietary rights. There have also been motions to pursue contempt proceedings. There is a motion for appointment of an interim liquidator. And, the current motion.
4. The disputes revolve around a company and its various creditors. Some of the disputes are pegged on common cause facts. Some are based on legal issues supported by contested facts and would most certainly not be suitable for trial through motion proceedings or through simple affidavit evidence.
5. I have my doubts as to whether Regulation 10 of the Insolvency Regulations, Legal Notice No. 47 of 2016 was intended to lead to a swamping of the court with motions claiming different and unrelated interests filed in the same cause. Not every application or motion was intended to be filed in the Petition, not least an application for administration orders. Such applications tend to be contentious demanding and

very inquisitorial as was exhibited by the current motion.

6. Unfortunately, the legislature is yet to prescribe rules to guide applications for administration orders or for liquidation. The court is left consequently with the discretion to determine whether the form or procedure adopted is the correct one, if only to promote the expeditious administration of justice.

7. I will however not strike out the current application as, in my view, it is the company's reaction to the consolidated liquidation applications.

### **Parties**

8. The applicant is Nakumatt Holdings Limited ("the Company"). It is a family business with three directors namely Ankour Atul Shah, Atul Kumar Maganlal Shah and Neel Atul Shah. The current shareholders are Atul Kumar Maganlal Shah and Nakumatt Group Ltd. Even from the mound of paper before me, it is unclear who the shareholders of Nakumatt Group Ltd are.

9. The immediate respondents would be two companies, namely Gold Crown Beverages Kenya Ltd and African Cotton Industries Ltd. The two filed petitions in this court seeking liquidation orders against the Company. I must point out at the onset that, African Cotton Industries Limited supported the current application.

10. There are creditors. I may class them as sundry suppliers, landlords, guarantors, secured creditors, employees and others. At the hearing of the instant application orders there were well over seventy creditors in attendance, through self or counsel. I found it unnecessary to reproduce their names in this ruling but the record is available in the court file.

11. No preferent creditor attended the hearing. They however exist in the form of the tax-man and the employees. The latter have filed Cause No. 1325 of 2017 before the Employment and Labour Relations Court seeking payment by the company of their dues. No secured creditors attended before me for the hearing of the application.

12. Generally, while some of the creditors supported the motion, some did not. There is affidavit evidence on record that the secured creditors support the appointment of an administrator.

### ***The Application and the reliefs sought***

13. The application was launched under Part VIII Division 3 of the Insolvency Act No 18 of 2015 ("the Act"). In particular, the application sought the following reliefs :

i. ...

ii. ***THAT this Honourable Court be pleased to issue an administration order in respect of Nakumatt Holdings Limited ("Nakumatt").***

iii. ***THAT this Honourable court be pleased to appoint Peter Obondo Kahi of PKF Consulting Limited, Kalamu House, Grevillea Grove, Off Brookside Drive, P.O. Box 14077-00800 Nairobi as the administrator of Nakumatt ("Administrator").***

iv. ***THAT this Honourable Court be pleased to make any such or further orders as it may deem just and expedient to grant.***

v. ***THAT the costs of this Application be provided for.***

### **Background facts**

14. The Company is the owner of the 'Nakumatt' franchise. It operates self service retail stores locally.

For the last three or so decades, it has commanded an exceptional goodwill. It also had business outlets, still under the 'Nakumatt' brand within the East and Central African region. Most of its outlets have been an enticement to many mall owners. Customers walk into these outlets in their thousands daily. The result is that the Company has hitherto been an anchor tenant to many landlords. The success of the business also saw many suppliers and lenders get cozy with the Company. Credit was easily extended and the debts grew. The debts now run into billions of shillings. In short, the Company lapsed into a state of financial distress, and by the beginning of 2017 (if not earlier) the company was simply unable to pay its debts.

15. At the pinnacle of its business, the Company is said to have employed more than 6,500 employees spanning the East and Central African region, with an enviable annual turnover running into tens of billions of shillings. It must have achieved what many in the business of hypermarkets and supermarkets long for. Conversely, it must now be shocking to many others who find the Company seeking solutions in an insolvency process.

16. With its goodwill in tow, the Company was able to keep at bay the demanding creditors for a while. Whilst the preferent and the secured creditors appeared contented and bid their time, the other creditors could take the distress no more. In May 2017 one creditor filed for liquidation. Then another one also filed for liquidation in July 2017. The other unsecured creditors then joined the consolidated petitions in support of the liquidation proceedings. The supporting creditors number well over one hundred.

17. The Company engaged the creditors, as an assembly of creditors in the month of October 2017. The Company has also engaged the creditors individually. Reports of having agreed with specific creditors in one way or another continue to trickle in and go on record. The engagements have been extended to secured creditors and also with prospective bail out partners willing to extend financial support.

18. While the engagement with the secured creditors for rather obvious reasons has been successful, the engagement with a majority of unsecured creditors and some preferent creditors (employees) has been unsuccessful. The engagement with the prospective bail out partners has also been in a glacier-like motion. With the financial distress not getting any better and the creditors getting impatient, the Company has opted for administration. The Company says it is committed to honouring its financial obligations and would want to see itself afloat rather than be placed under liquidation.

19. With the support of the prospective bail-out partner, the secured creditors and some of the sundry creditors, the Company seeks this court's assistance in the form of an order for the appointment of a specific administrator who has promised to turn the Company's fortunes for the better.

## **Submissions**

### ***The Applicant submits***

20. The Company's case was urged by Mr. Kamau Karori assisted by Ms. Diana Ogula

21. Placing reliance on the founding affidavit of Atul Shah and the statement of Peter Obondo Kahi, counsel submitted that the application for an administration order met all the requisite statutory demands.

22. According to Mr. Karori, the Company was admittedly insolvent and this could be discerned from the many unpaid creditors as well as from the contents of paragraphs 9 through 13 of Mr. Atul's affidavit.

23. Mr. Karori further submitted that the statement of the proposed administrator was clear that the objectives of administration as outlined under s.522 of the Act would be achieved and that the creditors were better off with the administration than liquidation. To advance this argument further, Mr. Karori pointed to negotiations with a third party bail out partner which counsel submitted were at an advanced stage but the details had to be kept away from the creditors due to a confidentiality agreement.

24. Counsel relied on the case of **Re Kayley Vending Ltd [2009] EWHC 904** for the proposition that a

company applying for an order of administration was exempt from making certain information public.

25. To assist the court in making a decision though counsel informally offered all the documents concerning the bail out to the court. Still placing reliance on the case of **Re Kayley Vending Ltd (Supra)**, counsel urged the court to exercise its discretion in favour of the Company and issue an administration order as it would be more beneficial to the creditors, employees and suppliers as opposed to liquidation. Counsel also pointed out that there is no substantive objection to the application and that the proposed bail out partner as well as the secured creditors supported the application.

### ***Respondents' arguments***

26. The Response to the application was rather muted.

27. Some of the creditors opposed the application while most simply left the determination to court. Strong opposition came especially from creditors who held the view that there had been no full disclosure by the Company. The opposing creditors also pointed out that the secured creditors “may take everything”.

28. The few creditors who submitted in support, held the view that administration is better than liquidation and they were willing to take their chances with the former process. One creditor, Nestle (Kenya) Ltd, while submitting in support urged me to issue an “interim administration order” to enable full disclosure by the Company.

### **Discussion and Determination**

#### ***Issue***

29. The core issue that I have to grapple with is this : has the Company satisfied the statutory requirements to enable me grant the reliefs sought. The substantive relief sought is one for an Administration Order under the Act.

#### ***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.

## **Statutory provisions**

34. The statutory indexation of administration of insolvent companies is under Part VIII of the Act. The relevant sections, for purposes of the instant application, read as follows:

### **522. The objectives of administration**

1. *The objectives of the administration of a company are the following:*

*(a) 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);*

*(b) 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. ...

4...

### **531. Conditions for making administration orders**

*The Court may make an administration order in relation to a company only if satisfied—*

*(a) that the company is or is likely to become unable to pay its debts; and*

*(b) that the administration order is reasonably likely to achieve an objective of administration.*

### **532. Who may make an application to the Court to for an administration order in respect of company**

*(1) An application to the Court for an administration order in respect of a company may be made only by the following persons:*

*(a) the company;*

*(b) the directors of the company;*

*(c) one or more creditors of the company;*

*(d) a combination of persons specified in paragraphs (a) to (c);*

*(e) any other person of a class prescribed by the insolvency regulations for the purposes of this section.*

*(2) As soon as is reasonably practicable after the making of an application for administration, the applicant shall notify—*

*(a) any person who is or may be entitled to appoint an administrator of the company under section 534; and*

*(b) such other persons (if any) as may be prescribed by the insolvency regulations for the purposes of this section.*

(3) *An application for administration may not be withdrawn without the approval of the Court.*

(4) *In subsection (1), “creditor” includes a contingent creditor and a prospective creditor.*

### **533. Powers of the Court on hearing application for administration order**

(1) *On hearing an application for an administration order in respect of a company, the Court may-*

*(a) make the administration order sought;*

*(b) dismiss the application;*

*(c) adjourn the hearing conditionally or unconditionally;*

*(d) make an interim order;*

*(e) treat the application as a liquidation application and make any order that the Court could make under section 426*

*(f) make any order that the court considers appropriate.*

35. I must first point out that company administration provisions are not unique to our jurisdiction. They exist in most common law jurisdictions: see for example United Kingdom’s Insolvency Act 1986 (as amended by the Enterprise Act 2002), the Canadian Companies’ Creditors Arrangements Act, Uganda’s Insolvency Act of 2011 and Part 5.3A of the Australian Corporations Act 2001.

36. I also hasten though to point out that any administration processes intended to operate as a business rescue avenue must be tailored for our particular social and economic conditions. Consequently, even though Part VIII of the Act is almost the equivalent of the UK Insolvency Act 1986, care must be taken when interpreting and applying the same. It may otherwise not thrive with the same gusto. As Lord Denning stated in **Nyali Ltd v Attorney General [1955] 1 All ER 646, 653:**

***“...you cannot transplant it [ English Law] to the African continent and expect it to retain the tough character which it has in England”.***

37. I will consequently consider the essentials of administration proceedings whilst keeping in mind Kenya’s unique socio-economic character.

### **Objectives and essentials of administration**

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.

39. In this regard, the architecture of the Act allows various affected persons to seek the appointment of an administrator of the Company.

40. Thus directors or shareholders may appoint an administrator under s.541 of the Act. Secured creditors too, may appoint an administrator where such secured creditors hold a floating charge: see s.534 of the Act. In both instances, the appointment may be made without the court’s intervention. The third instance is where a company or its directors or its creditors, including contingent and prospective creditors, may approach the court under s.532 of the Act for an Order placing the company under an insolvency

practitioner as an administrator to commence the process of achieving the under s.522 of the Act and to exercise the prescribed statutory functions.

41. For the court to grant the order for administration, the court must be satisfied that the company is or is likely to become unable to pay its debts and that the order if made is reasonably likely to achieve an objective of administration. These requirements are set out under s.531 of the Act and they are the essentials of an application, the kind currently before me. Where the essentials are not met the court has the option of dismissing the application or even making an interim order: s.533. I also hold the view that where the essentials are met the court may still exercise any of the options available under s.533 of the Act, as it deems appropriate but with the objectives of Part VIII in mind.

### ***A matter of discretion***

42. Mr. Kamau Karori submitted on behalf of the Company that the exercise of the court's powers under s.531 of the Act is discretionary. In this regard, counsel relied on a paragraph in the case of **Re Kayley Vending Ltd [2009] EWHC 904** where the court stated that:

***“[19]...Whether or not [sic] application is opposed, the making of an administration order is discretionary and the court must be satisfied in exercising that discretion that an administration order is appropriate rather than for instance allowing any winding up petition to proceed”.***

43. A cursory look at s.522 (objectives of administration) and S.531 (Court's powers) of the Act is likely to lead to the immediate conclusion that, with a view to promoting the objectives of administration as a process in insolvency, the court has no option but to grant the orders once satisfied that the company is insolvent and that one of the objectives of administration is likely to be achieved.

44. I have however closely perused s.531 of the Act in the context of Part VIII of the Act. I would agree with Mr. Karori that the court has a discretionary power to issue or refuse an order for administration of a company. The discretion under s.531 of the Act, in my view, is not discretion in the strict sense but in the loose sense. Discretion in the loose sense, of course, indicates no more than the application of a value judgment while discretion in the strict sense would be confined to instances where the court adopts any one of a range of options prescribed but which there may well be a justifiable difference of opinion as to which one is the most appropriate. The choice must however be properly made on the correct principles and no injustice manifestly seen to be occasioned: see **Coffee Board of Kenya v Thika Coffee Mills Ltd & 2 others [2014]eKLR**.

45. Section 533 of the Act points to discretion in the loose sense. It provides the court with an unlimited range of options to adopt upon hearing an application for an administration order. The options include allowing the application, dismissing the application, adjourning the application (during hearing for any reason), making an interim order, treating the application as one for liquidation (under s.426) and, more critically, making “any other order that the court considers appropriate”. All the options if exercised would be legitimate and the discretion is made wide when the court is allowed to make any such order that it may deem appropriate.

46. The court, in my view, must thus have regard to a variety of diverse and contrasting factors before reaching an ultimate conclusion. The court is not to be limited to the provisions of s.531 of the Act though this section must be the first stop.

47. Without limitation, I may index the following factors to be considered in the exercise of discretion whether or not to make an Administration Order. First, the two factors outlined under s.531 as to whether the company is insolvent and if the administration order is likely to achieve an objective of administration as outlined under s.522. The court ought also to keep in mind the general objectives of administration as a process in company law oft invited as an alternative for an ailing company instead of liquidation.

48. Other factors include; the effect of an order under s.533 would have on society generally, the rights of the creditors as balanced with that of the company to continue to survive, the conduct of the parties

through the litigation period and especially the period after the filing of the application for liquidation, the insolvency level of the company both commercially and under the balance sheet and, last but not least, the proposal if any made by the company and its proposed administrator. I do not however deem this list as exhaustive but the most essential factors which must be shown are those found under s.531 of the Act.

49. I turn to the essential factors.

50. I have been unable to trace any local decision which has considered the most essential factors to be satisfied. None of the parties to these proceedings also availed any local decision to me. The essential factors are those outlined under s.531 of the Act. As already identified, these are; firstly, that the company in question, is unable or is likely to be unable to pay its debts and secondly, that an administration order is reasonably likely to achieve an objective of administration.

51. English decisions interpreting almost similar provisions under the Insolvency Act 1986 are in plenty and would certainly offer guidance. Of the first factor (inability to pay debts), the court in **Re Colt Telecom Group PLC [2002] EWHC 2815** held that the words “*is or is likely*” to be unable to pay its debts meant that it is more probable than not that the company will be unable to pay its debts.

52. There should be no problem adopting a similar approach for the purposes of our Act. A company is unable to pay its debts if it is commercially insolvent and commercial insolvency will be established once it is shown that demand has been made and not heeded or that persistent requests and consistent promises to pay have not been honoured. Once there is evidence of financial distress, then the first precondition for an administration order under s.531 of the Insolvency Act would be deemed to have been met. An applicant or the company, in my judgment, need not prove a balance sheet insolvency and neither will proven balance sheet solvency be enough to show that the company is in a position to pay its debts.

53. I would consequently, for purposes of Part VIII of the Act, view it that a company “is or is likely to be unable to pay its debts” when it is shown that the company has failed to pay over any amount in terms of an obligation under a contract including to pay its employees. The failure must however subsist for a reasonable period of time.

54. The second pre-condition under s.531 of the Act is that the administration order is reasonably likely to achieve an objective of administration. The key words are “reasonably likely”, while the objectives are those as outlined under s.522 of the Act. The objectives under s.522 stated are three fold: (i) Maintain company as a going concern; (ii) achieve a better outcome for the company’s creditors as a whole than would be likely if the company were to be liquidated; and (iii) realize the property of the company in order to make a distinction to one or more secured or preferential creditors.

55. In this regard, and again drawing from the English decisions which have interpreted a statutory provision almost in *pari materia* our s.522 and s.531 (b) of the Act, the phrase ‘*reasonably likely*’ has been interpreted in the context of administration proceedings to mean “*a real prospect*” that an objective of administration will be achieved: See **Re Mutual International Insurance Co. Ltd [2004] EWHC 2430**.

56. I would however approach and lay the test differently.

57. My view is that the use of the word ‘likely’ connotes probability and the degree of the probability is then founded in the qualifying word or the general context of the statute. The qualifying word is ‘reasonably’ which in my view does not result in an actual or existent probability. The statute could thus not have meant that the prospect of achieving any of the objectives or all of the objectives under s.522 of the Act must be real. In my view, the use of the phrase “reasonably likely” indicates that something less is required. It is not and should not be that achieving the objectives is a real prospect or real probability. If the facts indicate a reasonable possibility of the company being maintained and rescued as a going concern, then the court must be deemed to have been satisfied under s.531(b) of the Act and it may then exercise its discretion in favour of granting the order.

58. The general object of Part VIII also dictates that I avoid the higher threshold imposed by the English courts. Focus under s.531(b) is to achieve any one of the objectives of administration. It could be to maintain the business. It could also be to ensure the creditors as a whole get something out of the process which enjoins the administrator to continue the business. It would defeat the aim and object of the statute if we adopted a high threshold, yet the aim and object is to give the company a second chance. The general scheme of the Act is also to prevent a negative impact on the economic and social scene by rescuing companies through administration rather than liquidating them. Thought about the employees and their families, the creditors, the suppliers must vibrate through the courts mind. Thought about the fact that in Kenya, obtaining credit when one is under any semblance of insolvency is most difficult, must also hover around.

59. I would consequently adopt and state that the words ‘reasonably likely’ must be read to mean ‘reasonable prospect’ and not a higher threshold. Each case however must be considered on the basis of its own facts as presented to the court, noting that the court retains a discretion whether or not to make the order.

### **The instant application**

60. I return to the application before me.

61. It is common cause that the company is unable to pay its debts. It is in financial distress and unable, to pay its debts within the contemplation of s.531 (a) of the Act. There is admission by the company in the founding affidavit of Atul Shah. The number of creditors is also telling. The demands run into billions of shillings and many demands for payment remain unheeded. I am satisfied that under s. 531 (a) of the Act the company is unable to pay its debts.

62. My determination of the instant application however turns on whether there is a reasonable prospect, on the facts laid before the court, that an order of administration as sought will achieve any one of the objectives of administration. The company says it will. Some of the creditors too said it will. The Petitioner too held the same view. Other creditors half-heartedly supported. While others strongly opposed.

63. Most of the creditors in support of the application simply viewed it as the better option, relative to a liquidator being appointed. The supporting landlords, for example, viewed it as an exit route quite oblivious to the fact that an administrator’s core function is to rescue the business and this would entail having to keep most if not all the business premises intact.

64. The creditors who opposed were mainly of the view that there was simply not enough material information to enable the creditors to make any informed decision as to whether or not to support the proposal for an administrator to be appointed and continue the wait for payment. By extension, it was argued that the court too was not served with adequate material to be deemed satisfied that an administrator if appointed would maintain the company as a going concern and/or ensure that the creditors were in better stead than if the company were liquidated.

65. The opposing creditors led by Dr. Kamau Kuria (for Githunguri Dairy Farmers Society Ltd) and Mr. P. Ogolla (for Parkside Development Limited) were especially critical of the company’s failure to disclose details of the proposed merger or acquisition with a third party Tusker Mattresses Limited (“Tuskys”). Even some supporting creditors led by Mr. Peter Gachuhi (for Nestle Kenya Ltd) complained of the lack of information. In the end, the creditors suggested that only limited or interim orders of administration be issued. Other creditors urged the court to flatly reject the application or adjourn and allow perusal of information by an anointed counsel.

66. In a pithy rejoinder, Mr. Karori for the company pointed out that the company was bound by a confidentiality agreement and release of information, except to the court, would jeopardize and indeed scatter the intended agreement with Tuskys. Counsel added that the negotiations were at an advanced stage and were currently with the regulator, the Capital Markets Authority for approval. And with a twist,

counsel willfully handed over a bundle of the registration papers and agreements to the court whilst urging the court to keep the material confidential.

67. Mr. Karori then referred the court to the case of **Re Kaysley Vending Ltd (supra)** for the proposition that the sheer lack of information, where the information missing was of a commercially sensitive nature, should not bar the court from granting the order for administration. Counsel added that the information availed was adequate as it revealed how the company was to go about achieving the objectives of administration.

68. I hasten to point out that the information availed, as it were, is constituted in the founding affidavit of Mr. Atul Shah. Mr. Shah admits that the company is commercially insolvent. Mr. Shah also reveals that the secured creditors of the Company have also formally signaled their support for the proposal to appoint an administrator. Finally Mr. Shah reveals that Tuskys is willing to inject the sum of Kshs. 650 million into the Company by way of a loan to meet operational costs including paying landlords and employees. Tuskys is also guaranteeing the suppliers upto Kshs. 3 billion to ensure that the supply of stocks to the company resumes.

69. The only other relevant and additional information made public through the application before the court is contained in a statement by the proposed administrator. Complete with an impressive looking resume, the proposed administrator states that based on his professional assessment he holds the opinion that “*the administration of the company is reasonably likely to achieve a better outcome for the company’s creditors as a whole than would be the case if the company was liquidated.*”

70. The proposed administrator pegged his opinion mainly on the intended funding by Tuskys. According to him, administration would enable the company to trade once Tuskys funds was availed. He however did not address the effect of such funding vis-a-vis the creditors by reflecting on the terms and conditions of the funding.

71. I must first point out that I have reviewed the case of **Re Kayley Vending Ltd (Supra)**. In my understanding, the case does not stand for the proposition that the company has a free hand in deciding which information to avail and which to withhold. The company seeking an administration order cannot decide for itself which information is commercially sensitive. Instead, the decision in **Re Kayley Vending Ltd** expressly suggested that the company must by way of an affidavit identify and separate such information as it deems commercially sensitive or, as in this case, protected by a confidentiality agreement and then seek the courts orders to exclude the same. In brief, it is the court to decide what ought to be left out once the company requests.

72. Secondly, it is also important to note that whilst the UK English insolvency laws have regulated the bare minimum information through a document known as the Statement of Insolvency Practice (**SIP**) 16 of 2015 (U.K). SIP details information to be availed to the court by a company seeking administration, our current legislative regime has no similar regulations. Perhaps, the Attorney General’s chamber together with Insolvency Practitioners should give this a priority and come up with such minimums so as to ensure that the noble and novel statutory process of corporate business rescues under Part VIII of the Act succeeds.

73. Thirdly, I am also aware that since **Re Kayley Vending Ltd** ,several English counts have adopted a different approach. The approach has been to cause companies seeking administration on the basis of prior elaborate plans for revival to avail such information to the creditors and to the court so long as they have something to do with achieving the purpose see for example **Re Johnson Machine and Tool Co. Ltd & Another [2010] EWHC 582** and in **Re Bowen Travel Ltd [2012] EWHC 3405**.

74. In **Re Bowen Travel Ltd (Supra)** the court was clear that directors of a company will not be allowed simply to pick and choose what details to give to the court when they seek an administration order. The court stated as follows:

*“... it is, in my judgment, essential that the evidence presented to the court is reliable. Implicit in*

***the noun ‘reliable’ in this context is not only that it is accurate evidence and true in so far as it is factual, but also that a clear account is given of all potentially relevant facts and circumstances”...(emphasis)***

75. The principle is clear.

76. A creditor who takes up insolvency proceedings for liquidation of a company unable to pay its debts and such other creditors who join in such proceedings should not be caught unawares with an application for an administration order which lacks full disclosure. It is no doubt true that whenever a company faced with a liquidation application responds by making an application for an administration order, creditors should not assume that they will be given a full picture. The court however expects a full picture to be given to both the court and all parties.

77. What information then is the court supposed to receive?

78. Under s.531 of the Act, the court is to be satisfied that an administration order is ‘reasonably likely’ to achieve an objective of administration. I have determined that ‘reasonably likely’ equates, in the context of the statute a reasonable (not real) prospect. The emphasis is on ‘reasonable’ –which means that the prospect must be based on reasonable grounds. A speculative suggestion is not enough. Neither is a statement *simpliciter* that the company or the proposed administrator believes that an objective of administration will be achieved. It is the applicant who seeks to and must satisfy the court of the prospect. He must thus by way of affidavit in support of the motion establish the reasonable grounds, including an indication of how long the turnaround is expected to take.

79. In my judgment, the evidence to be presented must also be beyond a prima facie case but not to the level of real prospect. In this regard, the applicant for an administration order must provide a substantial measure of detail about the proposed plans to maintain the company as a going concern and/or to settle with creditors in a better mode than a liquidator if one were to be appointed would. A factually sound foundation would suffice but not to the level of proving the prospect as that would make the threshold to be real rather than reasonable.

80. As the process of administration is not only for the benefit of the company but also for the creditors, any information that is likely to affect the creditors whether positively or adversely must be disclosed to help assist the court as well as the creditors to make an informed decision and choice in an objective manner.

81. *In casu*, the Company contends that it has done enough to satisfy the court and further that it has confidentially availed evidence to the court which must be treated with utmost confidence. It is true a voluminous set of records inclusive of the company’s financial statements for the years 2012 to 2016 was availed informally to the court. I must point out that the court is not a litigant and the instant application in any event is not an ex parte motion. All the parties are entitled to the information availed to the court, even if it means binding them to confidentiality or redacting any material. The moment a party however declines to release information on the basis of confidentiality, it must be deemed that the information is not admissible as far as that party is concerned, and especially when the refusal is in a general form.

82. Additionally, the court had on 17 October 2017 made an order for disclosure of information as may affect the creditors’ position. The Company then declined to release the information and is still mulish on releasing the information to any creditor.

83. I consequently do not deem it appropriate to solely, and subjectively for that matter without the benefit of the creditors’ input, to use the confidentially availed material to make a determination or arrive at a decision. I have consequently and deliberately so avoided the material, notwithstanding one of the creditors counsel’s request that an anointed creditors leader to make comments on the confidential report on behalf of the other creditors. This latter suggestion would also not be tenable in light of the difference in opinion amongst the creditors.

84. Applying the approach of a reasonable prospect to rescue the company from liquidation which now appears imminent, can it be said that the court is satisfied with the material placed before it?

85. There is no doubt that the administration is a less drastic measure than liquidation. It would be easier to trade when the company is in administration than in liquidation. Given the established goodwill of the company, it may not be difficult to revive the customers' confidence.

86. I must however not be concerned with the customers only but also with the creditors. In this regard, I am concerned that the level of the Company's indebtedness has not been clearly revealed and neither can it be easily discerned from the documents availed by the company. I am also concerned that I have been unable to ascertain with ease the likely costs of rendering the company able to resume full scale trading as before. There is a likelihood of an agreement being struck with the 3<sup>rd</sup> party partner. The document availed and attached to the affidavit of Mr. Atul Shah reveals that Tuskys intends to purchase a majority stake in the Company. It also reveals that Tuskys has agreed to or is willing to lend the company Kshs. 650,000,000.00. It is however unclear whether this will now be a subordinated debt or not. It is also unclear whether the price of the shares sold will be injected to the company. The price itself, I confess, is unknown.

87. The availability of the cash resource likely to enable the company to meet its day to day expenditure is revealed but the basis and terms upon which such resource will be available is lacking. In my view such information if given would have helped the court and the creditors to an extent, to make more informed determination.

### **Conclusion and disposal**

88. The Company is evidently unable to pay its debts. For all the reasons stated in this ruling, the Company, in my judgment, has however not shown to the required standard that an administration order is reasonably likely to achieve an objective of administration. I am not satisfied that this is a case for administration for the following additional reasons.

89. The level of indebtedness may be beyond salvage and neither the company nor the administrator has taken the time to address this. Secondly, there has been a lack of candor on the part of the company which in my judgment appears to have been intended to only benefit the company, yet administration as a process ranks both the company and creditors in any rescue mission on equal footing: See s.522 of the Act.

90. Another factor that prompts me to deny the application is the company's conduct since the liquidation application was filed. It is common knowledge and now on record that the company has engaged some creditors separately and individually. It has also let go some of its some its business premises. In my judgment, such conduct does not fit or marry well with a company intent in a business rescue plan. All creditors, as s.522 of the Act dictates, ought to be afforded equal treatment which unfortunately has not been the case.

91. By way of disposal; I reiterate that taking the totality of the evidence properly placed before the court and considering the circumstance and litigation history of this matter, I am not convinced and satisfied that that an order for administration if made as requested is reasonably likely to achieve an objective of administration as detailed under the Act.

92. The application dated 30 October 2017 by the Company for an Administration Order is dismissed but with no order s to costs.

93. Orders accordingly.

**Dated, signed and delivered at Nairobi this 16<sup>th</sup> day of November, 2017.**

**J.L.ONGUTO**

**JUDGE**