REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO 273 OF 2002

SHOWIND INDUSTRIES LTD…….....…….PLAINTIFF

VERSUS

GUARDIAN BANK LTD & ANOTHER…….DEFENDANTS

JUDGMENT

This is an application by Showind Industries Ltd, the plaintiff herein, to restrain Joy V Bhatt, the 2nd defendant, who is the appointed receiver of the plaintiff company, from continuing to discharge his duties as such receiver and for an order vacating such receivership. The receiver/manager was appointed by Guardian Bank Ltd, the 1st defendant, on 10th May 2001. The application which is appurtenant to a plaint filed on 5th March 2001 is made on the grounds essentially that the appointment of the receiver was pursuant to powers conferred by a debenture which is illegal and unenforceable; that the appointment was in any case premature and unlawful; and that the receiver/manager has so mismanaged the affairs and business of the company that unless stopped the company will collapse. The application is expressed to be brought under order 39 rules 2 (a), (3) and 9 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all other enabling provisions of the Law. It is supported by an affidavit sworn by Khilan B Shah on 5.3.2002. In opposition to the application there are grounds of opposition and replying affidavits sworn by the receiver/manager and by Narayanamurthi Sabesan, the General Manager of Guardian Bank, on 13th March, 2002.

The matter was argued before me on the 18.3.2002. The plaintiff's case as presented in the application itself and the submissions presented before me may be summarized as follows. First, the debenture pursuant to which the receiver/manager was appointed was null and void for reasons that it was not registered as required by law and it was not supported by consideration. Secondly, the power to appoint a receiver had not crystallized as there had been no formal demand and none of the events which under the debenture could have precipitated the appointment had occurred. Thirdly, the conduct of the receiver/manager was such as to justify a mandatory injunction to evict him from the premises. And fourth, the delay in presenting the application was not a relevant factor. A procedural point was also taken that the exhibits in the defendants affidavits had not been properly sealed as the written documents had not been individually sealed but the sealing was for bundles of documents.

For the defendants, the validity of the debenture instrument was defended on the grounds that the same was duly registered and was duly supported by consideration. It was further argued that as the instrument was under seal, no consideration was necessary anyway. On the appointment of the receiver, it was argued that the same was proper and lawful in that certain events of default had occurred. It was further argued that the appointment was consensual. The conduct of the receiver/manager was defended and it was argued that the plaintiff had acquiesced in the appointment of the receiver/manager and its Directors and Managers being part of the receiver's team, the plaintiff was estopped by conduct from questioning the appointment and conduct of the receiver. The delay in representing the application was also invoked. The defendants also argued that the plaintiff had not shown any exceptional circumstances to justify a mandatory injunction. Finally, the manner of sealing the various exhibits was defended as a long established practice.

Having considered all the material before me and the submission by the learned advocates for the parties, I take the following view of this application. The pith and marrow of it is to seek an order to terminate the receivership of the plaintiff company. What is sought is in effect an interlocutory injunction to vacate the receivership made on 10th May, 2002. As I understand the law, an interlocutory mandatory injunction is

granted very sparingly and only in exceptional circumstances such as where the applicant's case is very strong and straight forward. Moreover, as the remedy is an equitable one, it may be denied where it would be inequitable to grant the relief for the reason, for example, that the applicant's conduct does not meet the approval of a court of equity or his equity has been defeated by laches. I will determine this application on the basis of the above broad principles.

On the validity of the debenture itself two things may be said straight away. There is no merit in the contention that it was not duly registered. It is manifest from the plaintiff's own exhibit "KS 1" (- the debenture itself) that it was duly registered on 16th January 2001. And the argument that the debenture is void for want of consideration is legally untenable and spurious in point of fact. In that regard, it is very trite contract law that a contract under seal need not be supported by consideration for its formal validity. The debenture here is such an instrument. Furthermore, a consideration of paragraphs 4 –15 both inclusive of the affidavit of Narayanamurthi Sabesan (which is uncontroverted) and clause 2 (a) of the debenture shows beyond paradventrue that the instrument was intended to be a security for the continuation of credit facilities already granted and those to be granted in the future. The question of past consideration was therefore a moot one; it had no application in the circumstances of this case.

On whether the power to appoint the receiver/manager had crystallized, there is no denial that a formal demand had not been made. However, under clause 18 of the debentrue, no demand was necessary for the appointment of a receiver if any of the events set out in clauses 5,6 and 7 of the debenture or if the company failed to comply with any covenant, warranty or other obligation contained in the debenture. The first defendant's case is that the appointment was made without formal demand as the power of appointment had otherwise crystallized. In that regard, it is clear from the uncontradicted affidavit evidence of both Mr Sebesan and Mr Bhatt that the plaintiff company (i) had defaulted in payment of the monthly instalments of Kshs 700,000 towards repayment of the loan account contrary to clause 5 (a) of the debenture; (ii) was unable to pay its debts as they fell due for payment contrary to clause 5 (e) of the debenture; and (iii) had breached its covenants under clauses 16 (a), (g) and (s). So the power to appoint a receiver had crystallized contrary to the affirmation by the plaintiff. Furthermore, it is clear from paragraphs 18, 19 and 21 of Mr Sebesan's affidavit that the Directors of the plaintiff company had themselves agreed that a financial position had arisen where it was necessary to place the company under a protective receivership if its creditors were not to descend on its assets. So in a sense, apart from the fact that the power of appointment had crystallized, the appointment of the receiver/manager over the company was very much consensual.

On the conduct of the receiver/manager, I have after considering paragraphs 8-23 of Mr Bhatt's affidavit (which are uncontroverted) inclined to the view that the receiver has done everything possible to keep the company operational, that he has accounted for all payments received and that he is not guilty of any illegalities or improprieties. On the contrary, the matters complained of by the plaintiff company are the acts of its own Directors and Managers whom the receiver in his wisdom or lack of it opted to take under his wings upon his appointment.

As regards the sealing of the exhibits, I gave the plaintiff's advocate enough time to bring an authority from the Court of Appeal which he claimed supported his view that the defendant's exhibits were not properly sealed. In the event, he did not. I accordingly remain unpersuaded that the defendant's exhibits are not properly sealed. Had I been so persuaded, I would have taken it as no more than a procedural lapse which was either excusable or which at most required me to give directions on the resealing of the exhibits concerned.

From the above considerations, it is evident that the plaintiff's case has not impressed me as such a strong and clear one or one which otherwise would warrant the exercise of the discretion to grant an interlocutory mandatory injunction. Indeed even if the case had been considered on the lower standard required for an interlocutory prohibitive injunction, it would not have passed muster. No *prima facie* case with any probability of success is disclosed.

Last but not least, let me state this. Even if the plaintiff had satisfied me at a technical level that it had made out a case for the injunction sought, I would have declined to grant the same in the exercise of my

equitable discretion for two reasons. First, as I have already found, the appointment of the receiver/manager was with the express agreement and concurrence of the plaintiff company. There was acquiescence in it. As a court of equity I cannot countenance the plaintiff's approbation and reprobation of that appointment. Secondly, it is a hallowed maxim of equity that delay defeats equity. Sometimes that maxim is expressed in the form of another one: equity aids the vigilant, not the indolent.

Now considering that the appointment complained of was made in May, 2001, can the plaintiff company knock on the door of equity ten months later and be heard to complain of the illegality of the appointment? I would say no. Delay has defeated its equity.

For all those reasons the order of this court is that the plaintiff's application is dismissed with costs to the defendants.

Dated and delivered at Nairobi this 23rd day of May 2002

A.G RINGERA

JUDGE