



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
INSOLVENCY NOTICE NO. E.014 OF 2018
IN THE MATTER OF MIDLAND ENERGY LIMITED
AND
IN THE MATTER OF INSOLVENCY ACT 2015

MIDLAND ENERGY LIMITED.....RESPONDENT/APPLICANT

Versus

GEORGE MUIRURI T/A

LEAKEYS AUCTIONEERS.....1ST APPLICANT/RESPONDENT

SYNERGY INDUSTRIAL CREDIT LTD.....2ND APPLICANT/RESPONDENT

RULING

1. The devise of Administration as an alternative to Insolvency is a new feature in our Insolvency laws. It is provided for under part VIII of the Insolvency Act No. 18 of 2015. These proceedings demonstrate tensions that can arise between Creditors of a Company under Administration.
2. Midland Energy Limited (the Company or Midland) is an entity under financial distress. In better times, it was granted credit facilities by African Banking Corporation Ltd (ABC Bank). As security for those facilities a fixed and floating debenture to secure the amount of Kshs.112,000,000/= was registered on 12th August 2012 in favour of ABC Bank. There was then a supplementary debenture registered on 10th October 2012 for Kshs.235,000,000/=.
3. Midland was not obtaining credit only from ABC Bank, Synergy Industrial Credit Limited (Synergy) advanced hire purchase facilities to Midland to assist it purchase Motor vehicles KCF 102A, KCF 103A and KCF 132A. A term and condition of the Hire Purchase Agreement was that motor vehicles KBW 537 X, KBU 381 J, KBW 550 J, KBZ 797 Z and KBZ 794 Z already under various Hire Purchase Agreements between the two would be held as additional security for the credit facilities advanced for the purchase of the 3 new vehicles.
4. Midland defaulted in its obligations to ABC Bank and Synergy. The Creditors took different paths in seeking relief for the default. Through Leakey Auctioneers, Synergy repossessed the vehicles under Hire Purchase on 20th December 2018. This was not without difficulty as Synergy had to seek the intervention of Court and obtained break-in orders and police assistance to carry out the attachment.
5. ABC Bank took a more benign approach. Perhaps! Through a Deed of 16th November 2018, the Bank appointed Anthony Matenze Muthusi and Julius Mumo Nganga as Joint Administrators to the Company. The power to place the Company under administration was reserved in the Debenture documents and available to Bank under section 534 of the Insolvency Act.
6. Through a Notice dated 16th November 2018 and filed in this matter on 19th November 2018, the Bank gave this Court Notice of the said appointment. As will emerge shortly, the giving of Notice has legal implications. On the very day the joint administrators took over the management of the Midland. On 21st November 2018 the joint administrators advertised the administration in a Notice published in the classified page of the 'STAR' newspaper. Then again, vide Notice NO. 12190 dated 19th November 2018 and published on 23rd November 2018, the joint administrators published a Notice of their joint appointment in the Kenya Gazette. In an affidavit of 18th January 2017 Anthony Muthusi (one of the administrators) depones that all Creditors of the Company were notified of the administration. Attached to his affidavit is a letter of 22nd November 2018 addressed to all Creditors.

7. As ABC Bank was pursuing this path, Synergy was pursuing theirs. On 20th December 2018, bolstered by the break-in order, the agents of Synergy visited the Company's premises and attached motor vehicles KBW 537 X, KCF 102 A, KCF 103 A and KCF 132 A.

8. Aggrieved by this state of affairs, the Company has filed the Notice of Motion dated 18th January 2018 for the following orders:

1. *Spent*

2. THAT pending the hearing and determination of the application herein inter parties, and order of injunction be and is hereby issued restraining the respondents whether by himself, employees, servants and/or agents or otherwise assigns and/or any person whatsoever acting on its behalf and/or under its mandate and/or instructions from advertising for sale, offering for sale, selling, transferring, or otherwise dealing in any manner the applicant's vehicles being motor vehicle registration numbers KBW 537X Ashok Leyland Truck, KBJ 381J Mercedes Benz 1823, KBW 550J Land Rover Discovery, KBZ 794 Z Leyland Ashok 8014 Truck, KBZ 797Z Leyland Ashok Dost Pick Up, KCF 102 A Leyland Ashok Partner Truck, KCF 03A Leyland Ashok Partner Truck and KCF 132 A Leyland Ashok Dost Pick Up.

3. THAT pending the hearing and determination of this application inter partes, this Court be pleased to order the immediate release by the Respondents of proclaimed units being motor vehicle registration being motor vehicle registration numbers KBW 527X Ashok Leyland Truck, KBJ 381J Mercedes Benz 1823, KBW 440J Land Rover Discovery, KBZ 794 Z Leyland Ashok 8014 Truck, KBZ 794 Z Leyland Ashok Dost Pick Up, KCF 102 A Leyland Ashok Partner Truck, KCF 03A Leyland Ashok Partner Truck and KCF 132 A Leyland Ashok Dost Pick Up.

4. THAT an order of injunction be and is hereby issued restraining the Respondents whether by himself, employees, servants and/or agents or otherwise assigns and/or any person whatsoever acting on its behalf and/or under its mandate and/or instructions from advertising for sale, offering for sale, selling, transferring, or otherwise dealing in any manner the Applicant's vehicles being motor vehicle registration numbers KBW 537X Ashok Leyland Truck, KBJ 381J Mercedes Benz 1823, KBW 550J Land Rover Discovery, KBZ 794 Z Leyland Ashok 8014 Truck, KBZ 797Z Leyland Ashok Dost Pick Up, KCF 102 A Leyland Ashok Partner Truck, KCF 03A Leyland Ashok Partner Truck and KCF 132 A Leyland Ashok Dost Pick Up.

5. THAT this Court be pleased to order, the immediate release by the Respondents of proclaimed units being motor vehicle registration numbers KBW 537X Ashok Leyland Truck, KBJ 381 Mercedes Benz 1823, KBW 550J Land Rover Discovery, KBZ 794 Z Leyland Ashok 8014 Truck, KBZ 797Z Leyland Ashok Dost Pick Up, KCF 102A Leyland Ashok Partner Truck, KCF 03A Leyland Ashok Partner Truck and KCF 132 A Leyland Ashok Dost Pick Up.

6. The costs of this Application be awarded to the Applicant/administrators.

9. Central to Administrators' case is that by dint of section 560(1)(b) of the Insolvency Act there can be no repossession and/or transaction in the property of the Company under administration other than with the consent of the Administrator or the approval of the Court.

10. For Synergy, it was argued that the Company breached the terms of the Hire Purchase Agreements and it was entitled to act as it did. Secondly, that the very act of the Company going into administration is an act of default. Synergy points to clause 12 of the letter of offer which sets out what constitutes an event of default, one of which is the appointment of a Receiver, liquidator, trustee, sequestrator or similar officer being appointed over all or any of the assets of the Hirer. The appointment of an administrator clearly falls in this category.

11. Then there is further development. In an affidavit sworn by Jacob Meeme, a Legal officer of Synergy, he depones that of the four vehicles attached, three were sold on 29th December 2018 by way of private treaty and are now in the possession and custody of the third party purchasers. At the hearing of application, it was agreed by Counsel for the parties that the unsold motor vehicle KCF 132 A be released to the Administrators and a Court order was made to that effect. In the mind of Synergy, therefore, the present application has been overtaken by events. The Administrators retort that the sales were in breach of statute and therefore null and void. For that reason, this Court is asked to restore the possession back to the Company and that there would be no difficulty in doing so because the vehicles are still registered in the name of the Company.

12. The design of our current Insolvency Laws is to give a second chance to financially distressed Companies. A break from the past where the fate of an ailing Company would invariably be a Winding up or liquidation order. Administration is one of the alternatives to liquidation and is provided for in part VIII of the Act. The objectives of administration are set out in Section 522 of the Act to be as follows:-

“(1) The objectives of the administration of a company are the following:

(a) to maintain the company as a going concern;

(b) 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);

(c) 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) The administrator shall perform the administrator's functions with the objective specified in subsection (1)(a) unless the

administrator believes either—

- (a) that it is not reasonably practicable to achieve that objective; or
- (b) that the objective specified in subsection (1)(b) would achieve a better result for the company's creditors as a whole.

(4) The administrator may perform the administrator's functions with the objective specified in subsection (1)(c) only if—

- (a) the administrator believes that it is not reasonably practicable to achieve either of the objectives specified in subsection (1)(a) and (b); and
- (b) the administrator does not unnecessarily harm the interests of the creditors of the company as a whole”.

13. So as to achieve that objective, the Company must be insulated from aggressive Creditors who could cause a run of the Company assets. The statute contemplates that upon such protection a Company will not be distracted from precipitate action and so the Administrator will be able to perform his function in the interest of all of the Company's Creditors. The insulation of the Company is provided by way of a moratorium from other legal processes. Section 560 and 561(4) provides that moratorium as follows:-

“560.(1) While a company is under administration—

(a) a person may take steps to enforce a security over the company's property only with the consent of the administrator or with the approval of the Court;

(b) a person may take steps to repossess goods in the company's possession under a credit purchase transaction only with the consent of the administrator or with the approval of the Court;

if the Court gives approval—subject to such conditions as the Court may impose;

(c) a landlord may exercise a right of forfeiture by peaceable re-entry in relation to premises let to the company only with the consent of the administrator or with the approval of the Court; and

(d) a person may begin or continue legal proceedings (including execution and distress) against the company or the company's property only with the consent of the administrator or with the approval of the Court.

(2) In giving approval for a transaction under subsection (1), the Court may impose a condition on, or a requirement in connection with, the transaction.

561. Interim moratorium when application for administration order has been made

(4) When this section applies, the following provisions have effect:

(a) a resolution may not be passed for the liquidation of the company;

(b) the Court may not make an order for the liquidation of the company;

(c) a person may take steps to to enforce security over the company's property only with the approval of the Court;

(d) a person may take steps to repossess goods in the company's possession under a hire purchase agreement only with the approval of the Court.

(e) a landlord may exercise a right of forfeiture by peaceable re-entry in relation to premises let to the company only with the approval of the Court;

(f) a person may begin or continue legal process (including legal proceedings, execution, distress and diligence) against the company or property of the company only with the approval of the Court;

(g) a person may take steps to enforce security over the company's property only with the approval of the Court;

(h) a person may take steps to repossess goods in the company's possession under a hire purchase agreement only with the approval of the Court”.

14. As to when the appointment of an Administrator is deemed to take effect will depend on the nature of appointment of the Administrator. In the matter before Court ABC Bank appointed the Joint Administrators in its capacity as a holder of a floating charge. The power to make that appointment is drawn from section 534 of the Act which provides:-

- “(1) The holder of a qualifying floating charge in respect of a company’s property may appoint an administrator of the company.
- (2) For the purposes of subsection (1), a floating charge is a qualifying floating charge if it is created by a document that—
- (a) states that this section applies to the floating charge; or
 - (b) purports to empower the holder of the floating charge to appoint an administrator of the company.
- (3) For the purposes of subsection (1), a person is the holder of a qualifying floating charge in respect of a company’s property if the person holds one or more debentures of the company secured—
- (a) by a qualifying floating charge that relates to the whole or substantially the whole of the company’s property;
 - (b) by a number of qualifying floating charges that together relate to the whole or substantially the whole of the company’s property; or
 - (c) by charges and other forms of security that together relate to the whole or substantially the whole of the company’s property and at least one of which is a qualifying floating charge”.

This Court will not venture into the procedure in which the Joint Administrators were appointed because that has not been challenged here.

15. Under the provisions of Section 538, the appointment of an Administrator appointed by a holder of a float charge takes effect when the requirements of section 537 are satisfied. Section 537 provides as follows:-

- “1) A person who appoints an administrator of a company under section 534 shall lodge with the Court—
- (a) a notice of appointment that complies with subsections (2); and
 - (b) such other documents as may be prescribed by the insolvency regulations for the purposes of this section.
- (2) A notice of appointment complies with this subsection if—
- (a) it includes a statutory declaration by or on behalf of the person who makes the appointment—
 - (i) that the person is the holder of a qualifying floating charge in respect of the company’s property;
 - (ii) that each floating charge relied on in making the appointment is (or was) enforceable on the date of the appointment; and
 - (iii) that the appointment is in accordance with this Part; and
 - (b) it identifies the administrator and is accompanied by a statement by the administrator—
 - (i) that the administrator consents to the appointment;
 - (ii) that in the administrator’s opinion the purpose of administration is reasonably likely to be achieved; and
 - (iii) giving such other information and opinions of a kind prescribed by the insolvency regulations for the purposes of this section.
- (3) A statutory declaration under subsection (2) is not effective unless it is made during the period prescribed by the insolvency regulations for the purposes of this section”.

16. My reading of the provisions of Sections 534 and 537 are that, the appointment of an Administrator takes effect upon the appointer lodging with the Court a Notice of appointment which is compliant with the provisions of section 537. In this case the Notice of appointment was lodged with Court on 19th November 2018 and that is the day when the Administrator’s appointment was deemed to take effect.

17. There is then an obligation placed on the holder of the floating charge to give notice of the appointment to the Administrators and other persons set out in the Insolvency Regulations. Section 539 provides as follows:-

- " (1) As soon as is reasonably practicable after the requirements of [section 537](#) are satisfied, the person who appointed the administrator under [section 534](#) shall notify the administrator, and such other persons as may be prescribed by the insolvency regulations for the purposes of this section, that those requirements have been satisfied.
- (2) A person who, without reasonable excuse, fails to comply with subsection (1) commits an offence and on conviction is liable to a

fine not exceeding five hundred thousand shillings”.

18. The need to give this Notice promptly is informed by the fact that certain legal implications flow from the appointment of the Administrator and so the persons prescribed in the regulations and who have an interest in the Company will need to know of the appointment as soon as it happens. The persons to whom the Notice would be given (for purposes of section 539) are prescribed by regulation 109 to be :-

- (a) The Court
- (b) Official Receiver
- (c) The Directors of Company
- (d) Contributory of company and
- (e) The Company’s Creditors

19. By dint of regulation 108, the announcement of the Administrators appointment should be published in the Kenya Gazette and one or more newspapers that are widely circulated within Kenya. ABC bank published this announcement in the ‘STAR’ publication of 21st November 2018 and Kenya Gazette of 23rd November 2018. This Court is not told that the ‘STAR’ newspaper does not widely circulate within Kenya and I take it that it satisfies the criteria set out in regulation 108. Applying the law, the appointment of the Administrator took effect on 19th November 2018 and Synergy is deemed to have had Notice of the appointment on 21st November 2018 and at the very least on 23rd November 2018.

20. Once the appointment of the Joint Administrators took effect, then Synergy were barred by the provisions of Section 560 of the Act from repossessing the vehicles without the consent of the administrator or approval of Court and the repossession that happened on 20th December 2018 would therefore be contra statute. If however, one is to excuse Synergy for lack of knowledge because the Notice of appointment came on 21st November 2018 and 23rd November 2018, the sale of the vehicles cannot be excused because this happened on 29th December 2018. Synergy cannot plead lack of knowledge because the Notice was published as required by the law and Synergy was deemed to have been duly notified.

21. Sections 560 and 561 of the Act are explicit that the moratorium bars the repossession of goods in a Company’s possession over a Credit purchase transaction and/or hire purchase agreement. Under section 2 of the Act a Credit Purchase Transaction means a hire-purchase agreement, a conditional sale agreement, a chattel leasing agreement or a retention of title agreement. Synergy being the owner under the Hire Purchase Agreement did not have any special privilege over the other Creditors of the Company.

22. Before I turn to make the orders herein, I need to make an observation. Many people do not read the Kenya Gazette or classified pages of the newspapers and can run the risk of dealing with the property of a Company under administration in a manner that is contrary to the law because of lack of knowledge that the Company has been placed under administration. The makers of the Insolvency Regulations may wish to make it a requirement that a Notice of appointment of an Administrator be lodged with the Registrar of Companies. In this way anyone who wishes to deal with a Company’s property can simply do a search on the Company so as to find out whether or not it is in administration.

23. The harder part of the decision is the nature of orders that the Court should make. Three (3) vehicles have been sold and this Court is told are in possession of the purchasers. Yet if administration as an alternative remedy to insolvency is to be efficacious then property of a Company under administration must be protected as robustly provided in statute. So as to strike a blow for this new devise in our Insolvency laws, this Court will be making an order that either the possession of the vehicles be restored to the Company or all monies received upon their sale be paid to the Company. But before I make those final orders, I think it is just that the Court hears the purchasers of three vehicles.

24. In the meantime and pending further orders of this Court, the Administrators shall be at liberty to repossess motor vehicles KBW 527 X, KCF 102 A and KCF 103 A. Once repossessed, the Joint Administrators shall not part with their possession until further orders of the Court. Bearing in mind that the purchasers of the vehicles may be innocent purchasers and should therefore not be embarrassed by this Court order, repossession will be preceded by a 7 day notice to the Purchasers to surrender the vehicles on their own volition. The need for an aggressive repossession can, hopefully, be avoided.

25. Parties to take a hearing date when the purchasers will be heard.

Dated, Signed and Delivered in Court at Nairobi this 19th day of February, 2019.

F. TUIYOTT

JUDGE

Present:

Mugutia for Applicant

Mutava for Respondent

Nixon- Court Assistant