

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION
WINDING UP CAUSE NO. 22 OF 2014

AND

IN THE MATTER OF VALUE PAK FOODS LIMITED

AND

**IN THE MATTER OF THE INSOLVENCY ACT(CHAPTER 53 OF THE
LAWS OF KENYA)**

BETWEEN

THE OFFICIAL

RECEIVER.....APPLICANT

AND

NASIR HAIDERALI JESSA.....1ST

RESPONDENT

ZULFIKAR HAIDERALI JESSA.....2ND

RESPONDENT

RULING

Introduction & Background

1. By an application dated 5th February 2024 and made under inter alia **section 433** of the ***Insolvency Act***, and **Regulation 10** of the ***Insolvency Regulations, 2016*** seeking orders to compel the Respondents, being the former directors of *Value Park Limited*("the Company") to file the Statement of Affairs and that

warrants of arrest be issued against them for their failure to comply, with the assistance of the Central Police Station in Nairobi. The application is supported by the affidavit of CYRUS NJENGA, a Senior Assistant Official Receiver, sworn on 5th February 2024 and opposed by the Respondents through the replying affidavit sworn by the 1st Respondent on 10th February 2025. The application has been canvassed by way of written submissions which I have considered and I will be making relevant references to the same in my analysis and determination below.

Analysis and Determination

2. From the parties' submissions, the parties urge the court to determine the following issues:

- a) *Who should submit a statement of affairs of a Company and what are the repercussions of not doing so?*
- b) *Whether orders of another court of concurrent jurisdiction would prohibit the directors of a company from filing a statement of affairs?*
- c) *Whether the Respondents may disobey the Court Order of 26th October 2015, issued in Nairobi HC COMM No. 522 of 2015.*
- d) *Whether the Official Receiver has discharged his Statutory Mandate over the proceedings in Nairobi HC COMM No. 522 of 2015.*

- e) *Whether the Respondents may be arrested for failure to comply with Section 433 of the Insolvency Act.*
- f) *Whether the court should compel the Respondents to file a Statement of Affairs with the Official Receiver.*

Submission of statement of affairs

3. The Official Receiver avers that the Court issued a winding-up order for the Company on 17th August 2016, and the Official Receiver was appointed as the Liquidator. They contend that the directors have a statutory duty under **section 433** of the ***Insolvency Act*** to submit a Statement of Affairs to the Official Receiver but that despite multiple written requests and reminders sent over several years from 2016 to 2022 both directly and through their counsel, the directors have consistently failed or refused to file the required statement. That this failure has made it impossible for the Official Receiver to proceed with the liquidation, hindering the administration of the Company's assets for the benefit of its creditors. The Official Receiver contends that the directors are acting in bad faith and deliberately delaying the process, to the detriment of the Company's creditors.
4. In response, the Respondents depone that a *Mareva* injunction order was issued by the Court on 26th October 2015 in ***Nairobi***

HCC No. 522 of 2015 (Imperial Bank Limited vs W.E Tilley (Muthaiga) Limited & 19 Others which restrained the Defendants therein including the Company and the Respondents from managing, operating, and/or dealing, in any manner whatsoever, with the Company's assets, accounts, and affairs pending hearing and determination of that suit. They aver that the suit is still pending and has never been heard or determined and state that this injunction immediately prevented them from accessing the Company's premises, assets, accounts, and books and that any attempt to do so to compile a Statement of Affairs would constitute contempt of court.

5. They allege that the Official Receiver, who took over management after the 2016 liquidation order, was negligent and they cite a break-in and vandalism at the Company premises, which led to the loss of assets, implying that even if they were allowed access now, the records may be gone or compromised. The Respondents claim that their advocates informed the Official Receiver about the existing injunction in a letter dated 15th January 2019 and they state the Official Receiver was therefore aware of the legal barrier but chose to disregard it. The Respondents contend that creating an accurate Statement of Affairs is impossible because they have been barred from the Company for over 8 years, they cannot rely

on memory alone to fulfill the statutory requirement for a verified, accurate account of the Company's assets and liabilities and that even if a Statement of Affairs were filed, the liquidation process cannot proceed because the Company's core assets remain frozen by the orders issued in 2015.

6. They state it is unjust to threaten them with arrest for obeying one court order, that is the 2015 injunction, while being punished for not violating it to comply with another, that is the liquidation order. Thus, the Respondents state that the Official Receiver's application is unmerited and they urge the court to dismiss it with costs.
7. It is not in dispute that as per **section 433(1)** of the ***Insolvency Act***, the Official Receiver may require certain persons to submit a statement relating to the Company's affairs as follows:

433. Official Receiver may require certain persons to submit statement relating to company's affairs

(1) If the Court has made a liquidation order or appointed a provisional liquidator in respect of a company, the Official Receiver may require some or all of the prescribed persons to make out and submit to the Official Receiver a statement of affairs relating to the company.

8. As submitted by the Official Receiver, **section 433(3)** states that “prescribed persons” include those who are or have been officers

of the company like the former directors, those who took part in the formation within 12 months before the relevant date, and those who are in the Official Receiver's opinion capable of giving the information required. The Respondents agree that they are capable of submitting the said statement of affairs but that they are handicapped by the freezing orders issued by the court in **Nairobi HCC No. 522 of 2015**. Going through the said orders which have been annexed by the Respondents, I am unable to agree with their averment that the orders restrained them from **"....managing, operating, and/or dealing, in any manner whatsoever, with the Defendants' assets, accounts, and affairs...."** The said orders only restrained the Company and the Directors from dealing with the Company's assets and it did not restrain them from submitting a Statement of Affairs of the Company to the Official Receiver.

9. The obligation to file a Statement of Affairs under **section 433** of the **Insolvency Act** is a separate, positive statutory duty to report on the Company's historical financial position to the Official Receiver. It does not constitute dealing with the assets themselves. The order was not a blanket prohibition on all interaction with the Company's records, nor did it absolve the

directors of their core fiduciary and statutory duties to cooperate with the liquidation process.

10. Further, whereas the alleged vandalism at the Company's premises is regrettable, this still, does not relieve the Respondents of their obligation. The Statement of Affairs is to be prepared from the directors' knowledge and records. The Respondents have not demonstrated that they possess no records, memory, or information whatsoever regarding the Company's affairs prior to the freezing order. Their duty was to submit the best account they could provide, not to use the subsequent vandalism as a pretext for providing no account at all.
11. It is for the above reasons that I find that the Respondents have not established a lawful excuse for their delay in submitting the statement of affairs. My findings dispose of the other issues for determination as follows. The orders of the court of concurrent jurisdiction in **Nairobi HCC No. 522 of 2015** did not prohibit the directors of the company from filing a statement of affairs with the Official Receiver and the Respondents would not be disobeying the Court Order of 26th October 2015, issued in **Nairobi HC COMM No. 522 of 2015** if they submit the statement of affairs to the Official Receiver. On the statutory mandate of the Official Receiver over the proceedings in **Nairobi HC COMM No. 522 of 2015**, it has

been rightly submitted that upon receiving the statement of affairs, the Official Receiver will be in a position to file an application to formally stay those proceedings.

12. On whether the Respondents may be arrested for failure to comply with **section 433** of the ***Insolvency Act*** I am in agreement with the Respondents that under **subsection (8) and (9)** therein, the only prescribed form of punishment is the payment of a fine not exceeding Kshs.500,000.00/= initially, and Kshs.50,000.00/= for each day of continued failure. However, while it is true that the ***Insolvency Act*** does not contemplate punishing a convicted person for this offence by imprisonment or in any way limiting their personal liberty, the court retains the power to punish contempt of its orders by committal to civil jail.

Conclusion and Disposition

13. In the foregoing, I now issue the following orders:

- 1) The prayer to compel the former directors, NASIR HAIDERALI JESSA and ZULFIKAR HAIDERALI JESSA (the Respondents), to file a Statement of Affairs of VALUE PAK FOODS LIMITED (In Liquidation) with the Official Receiver is hereby allowed.**
- 2) The Respondents shall jointly and/or severally make out and submit to the Official Receiver a Statement of Affairs relating to VALUE PAK FOODS**

LIMITED (In Liquidation) within Thirty(30) days from the date of this Ruling.

3) The Official Receiver shall, within the thirty (30) days granted in paragraph 2 above take active steps to join the proceedings in *Nairobi HCC No. 522 of 2015; Imperial Bank Limited (In Receivership) vs W.E. Tilley (Muthaiga) Limited & 19 others* to safeguard the interests of the Company and its creditors

4) In default of compliance with paragraphs 2 above, and particularly upon the expiry of the thirty (30) days:

i. The Official Receiver shall be at liberty to impose the fines against the Respondents, as provided for under Section 433(8) and (9) of the Insolvency Act.

5) The Respondents shall bear the costs of this application.

DATED SIGNED AND DELIVERED virtually at NAIROBI this 22ND DAY OF OCTOBER 2025

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J.W.W. MONGARE
JUDGE

IN THE PRESENCE OF

1. Mr. Njenga for the Applicant/ Official Receiver.
2. Mr. Donpolt Orwenyo for the Respondents.

3. Amos- Court Assistant

ORIGINAL