



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: TUNOI, SHAH & BOSIRE, J.J.A.

CIVIL APPLICATION NO. NAI. 358 OF 2000 (UR 176/2000)

BETWEEN

NATIONAL HOSPITAL INSURANCE FUND.....APPLICANT

AND

HERITAGE BANK LIMITED (IN LIQUIDATION).....RESPONDENT

(Application for stay of execution in an intended appeal from the ruling and order of the High Court of Kenya at Nairobi (Hewett, J) dated the 14th September, 2000

in

MISCELLANEOUS CAUSE NO. 404 OF 2000)

RULING OF THE COURT

The respondent, Heritage Bank Limited, was placed in liquidation on 13th September, 1996 by the Central Bank of Kenya and the Deposit Protection Fund Board was appointed as liquidator. The said Board appointed Mr. T.M. Ariithi as the liquidation agent to oversee the liquidation of the said Bank.

By 31st March, 2000 a sum of Shs.27.4 million (Shs.27,400,000/=) became available to the liquidator for distribution, by way of a first dividend, to the bank's creditors. Having considered the options available Mr. Ariithi decided that if a sum of Shs.500,000/= or less was paid out to each of the 115 small depositors and 28 members of the bank's former staff only 21 depositors would be left to be catered for in any future dividends. Mr. Ariithi was of the view that if only 21 depositors were left out the administration and winding up expenses would be minimized.

The small depositors had no problem as they were going to be paid in full or almost in full. Many of them were owed sums not exceeding Sh.500,000/=. The problem was that of two main creditors, namely, National Hospital Insurance Fund, the applicant here, and National Oil Corporation. The bank's indebtedness to these two creditors was in the sums of Shs.281,232,191/80 and Shs.21,396,268/94 respectively, which worked out to about 82% of the bank's indebtedness.

Mr. Ariithi wrote to all the bank's creditors setting out what he proposed to do. Most creditors concurred with Mr. Ariithi. National Oil Corporation did not. It objected. It wrote to Mr. Ariithi saying that the first

dividend ought to be paid on a pro rata basis. The applicant did not respond to Mr. Ariithi's letter.

Having got the consent of most of the creditors to the scheme proposed by him, Mr. Ariithi applied to the superior court seeking confirmation of the as mandated by section 242 of the Companies Act, Cap.486, Laws of Kenya. The superior court (Hewett, J) sanctioned the scheme of payment proposed by Mr. Ariithi. The applicant and National Oil Corporation objected to the sanction sought by the liquidator on the ground that the scheme deprived them of their normal pro rata payment. It is true to say that in normal circumstances such payments are made on pro rata basis.

The Companies Act, however gives discretion to the liquidator, for good reason, to propose payments of dividends in a different manner. Such discretion of course must be exercised judiciously. The liquidator was of the view that the applicant had, recklessly and without caring for the welfare of the contributors to National Hospital Insurance Fund, deposited large sums of money in a small bank, unadvisedly and without concern for economic reasons and that therefore, he ought to take care of the interest of the small depositors and it was for that reason that he proposed the particular scheme.

It can be seen that the powers of the liquidator, which though discretionary, are not limited to payments of dividends on pro rata basis only. It is also clear that the court has discretion to sanction a scheme of payment other than one on pro rata basis. What is sought to be challenged in the intended appeal, is the exercise of discretion by the learned Judge.

We are dealing with an application under Rule 5(2)(b) of the Rules of this Court and not the appeal itself and therefore the less we say on the issue of the intended appeal being arguable the better it would be. We can only say that in all the circumstances which were narrated to the learned Judge, he did not, prima facie, exercise his discretion wrongly.

We do not therefore find any arguable point in the intended appeal. Having come to this conclusion we see no need of inquiring into whether or not the appeal, if successful, would be rendered nugatory.

This application is dismissed with costs.

Dated and delivered at Nairobi this 21st day of December, 2000.

P.K. TUNOI

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JUDGE OF APPEAL

A.B. SHAH

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JUDGE OF APPEAL

S.E.O. BOSIRE

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JUDGE OF APPEAL

I certify that this is
a true copy of the original.

DEPUTY REGISTRAR.