I&M Bank Limited v Mitini Scapes Development Limited (Insolvency Cause E107 of 2024) [2025] KEHC 5491 (KLR) (Commercial and Tax) (30 April 2025) (Ruling)

Neutral citation: [2025] KEHC 5491 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

INSOLVENCY CAUSE E107 OF 2024

AA VISRAM, J

APRIL 30, 2025

IN THE MATTER OF MITINI SCAPES DEVELOPMENT LIMITED

AND

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

BETWEEN

I&M BANK LIMITED ..... CREDITOR

AND

MITINI SCAPES DEVELOPMENT LIMITED ..... AFFECTED COMPANY

A debenture holder under the repealed Companies Act may only appoint an administrator through a court order.

The ruling addressed whether a debenture holder, whose security predated the Insolvency Act, (debenture under Companies Act (repealed) could unilaterally appoint an administrator under the Insolvency Act's provisions. The creditor had appointed administrators based on an old debenture, which the company challenged. The High Court determined that sections 520 and 534 of the Insolvency Act, preclude direct administrator appointments by holders of pre-existing debentures. The court emphasized that recourse for such appointments lay with court appointed administrators under division 3 of the Insolvency Act, requiring a formal court order. Consequently, the application challenging the appointment was allowed, and the administrators' appointment was revoked.

Reported by John Ribia

Insolvency Law *– debentures – rights of debenture holders – power of debenture holder to appoint administrators – where the debenture predated the Insolvency Act – court appointed administrators - whether the holder of the debenture created prior to the commencement of the Insolvency Act (under the Companies Act (repealed), qualified to appoint an administrator under the provisions of the Insolvency Act - whether a debenture created prior to the Insolvency Act, could be considered a qualifying floating charge - whether the functions and legal nature of a receiver/manager appointed under a pre-existing debenture, governed by the repealed Companies Act, were*

equivalent to those of an administrator appointed under the Insolvency Act, and consequently, if the power to appoint one equated to the power to appoint the other - whether court-appointed administrators, constituted the legally prescribed recourse for holders of debentures made under the repealed Companies Act, particularly where direct appointment the Insolvency Act was not permissible - Insolvency Act (cap 53) sections 3(1)(c), 520, 522; 534, division 3 & 4; Insolvency Regulations, 2016 (Cap 53 Sub Leg) regulation 10(4)

***Statutes** – interpretation of statues – interpretation of sections 520 and 534 of the Insolvency Act – interpretation of phrase "under this part" - whether Sections 520 and 534 of the Insolvency Act, by defining an administrator as a person appointed "under this Part," precluded holders of debentures made under the Companies Act (repealed) that predates the Insolvency Act from making direct appointments under the Insolvency Act - whether an interpretation of the Insolvency Act that precluded holders of debentures predating the Act from making direct appointments of administrators aligned with the Act's overall purposive objective of providing a comprehensive and efficient framework for company rescue.*

Brief facts

The genesis of the application lay in a series of loan facilities extended by I&M Bank Limited, the creditor/ respondent, to Mitini Scapes Development Limited, the company/applicant. The facilities, advanced through various letters from April 2013 to February 2022, reached a sanctioned limit of Kshs. 325,000,000.. The security for these financial arrangements included an all asset debenture dated June 12, 2013, which covered all of the Company's assets.

Subsequently, the Company entered administration, prompting the present legal challenge. The core contention revolved around whether the creditor, as the holder of a debenture executed before the commencement of the Insolvency Act, possessed the statutory authority to unilaterally appoint an Administrator under the Insolvency Act. The dispute escalated when the Company moved the court, seeking to revoke or set aside the joint administrators' appointment, alleging procedural irregularities stemming from the debenture's pre-Act creation.

The applicant contended that the appointment of the joint administrators was irregular and ought to be set aside. Their primary argument was that the debenture held by the creditor predated the commencement of the Insolvency Act. They submitted that, consequently, the creditor did not possess a qualifying charge as specifically defined under section 534(1), (2), and (3) of the Insolvency Act, which was a prerequisite for making a direct appointment of an administrator.

The respondent vigorously defended the administrators' appointment, asserting its validity. They argued that debentures created prior to the Insolvency Act (made under the Companies Act (repealed)) could served as a valid basis for appointing administrators under the Insolvency Act. The respondent advocated for a purposive approach to interpreting the Insolvency Act, suggesting that the court should retrospectively appoint or regularize the administrators' appointment if necessary, to align with the broader objectives of the Insolvency Act.

Issues

i. Whether the holder of the debenture created prior to the commencement of the Insolvency Act (under the Companies Act (repealed), qualified to appoint an administrator under the provisions of the Insolvency Act.

ii. Whether sections 520 and 534 of the Insolvency Act, by defining an administrator as a person appointed "under this Part," precluded holders of debentures made under the Companies Act (repealed) that predates the Insolvency Act from making direct appointments under the Insolvency Act.

iii. Whether an interpretation of the Insolvency Act that precluded holders of debentures predating the Act from making direct appointments of administrators aligned with the Act's overall objective of providing a comprehensive and efficient framework for company rescue.

iv. Whether a debenture created prior to the Insolvency Act, could be considered a qualifying floating charge.

v. Whether the functions and legal nature of a receiver/manager appointed under a pre-existing debenture, governed by the repealed Companies Act, were equivalent to those of an administrator appointed under the Insolvency Act, and consequently, if the power to appoint one equated to the power to appoint the other.

vi. whether court-appointed administrators, constituted the legally prescribed recourse for holders of debentures made under the repealed Companies Act, particularly where direct appointment the Insolvency Act was not permissible.

Held

1. The debenture gave power to the Bank to appoint a receiver manager in the event of default of payment. In addition, the instrument defined the power of the receiver manager. The aims and objective of administration of a company were listed under under section 522 of the Insolvency Act (the Act). The terms of the Debenture are similar to the aims and objectives set out in the Act. Clauses 18 and 20 of the debenture referred to the person appointed as a receiver and manager, and not just a receiver.
2. Had neither of the parties opposed the appointment of an administrator, the court would be tempted to reach the same conclusion based on the application of the terms of the debenture and the Insolvency Act.
3. The Insolvency Act contemplated at section 520, that an administrator was a person appointed under "this part" of the Act. The provision barred the appointment of an administrator other than in accordance with the statutory provisions set out in the Act. Parliament may, in the future, consider amending section 520 and 534 of the Act to bring the same in line with the broader objectives and purpose of the Act. Such an amendment may include language that expands the definition of an administrator, and allowed for the appointment of a person appointed by the legislation that was the predecessor to "this part". However, the law as at section 520 of the Act, stated that an administrator, in relation to a company, meant a person appointed under that Part to manage the company's affairs and property, and, if the context required, includes a former administrator.
4. The amendment was necessary because a purposive interpretation of the Act led to the conclusion that one of the purposes of the Act was to codify and provide a comprehensive legislative framework to regulate all insolvency matters in a single Act. The drafters of the legislation did not intend to extend the shelf life of the repealed provisions of the Companies Act for decades down the road. It seemed more probable that the provisions of administration were intended to benefit companies in need of immediate rescue, as and when they experienced financial challenges, and possible closure. Taking away the option for immediate appointment on the basis that floating charge that pre-dates the Act appeared illogical. Noting the inherent delays and backlog in courts, and reading the Act as a whole, it would be logical to extend the provisions of Division 4 of the Act to debenture holders that predate the Act and which substantially complied with the remaining substantive requirements set out in section 534(3).
5. The option to appoint an administrator was available only to the holder of a qualifying floating charge in accordance with section 534 of the Act, namely Division 4 of the Act. Moreover, the section defined a qualifying floating charge as either one that stated that the section applied to the floating charge; or purported to empower the holder of the floating charge to appoint an administrator of the company.
6. The Bank had not met the conditions set out above. It did not hold a qualifying floating charge over the applicant's property in the manner contemplated under section 534 of the Act. It could not purport to appoint the administrators pursuant to the section 534. The logic of section 534 appeared to be similar to the language set out in section 520 of the Act, which defined an administrator as a person "appointed under this part". The sections, read together, precluded a holder of debenture which pre-dated the Act from appointing an administrator in accordance with Division 4 of the Act.

7. Section 734 of the Act expressly preserved the statutory rights of a debenture holder which pre-dated the Act. The section provided that such a debenture holder may appoint a receiver in accordance with the repealed provisions of the Company's Act. Section 734 stated that such a debenture holder make such an appointment if the appointment was either a past event, prior to the enactment of the Insolvency Act, or if the same required the holder to carry out any step or proceedings relating to that past event, even if it was a step or proceeding that was taken after commencement. Section 734 further stated that despite the repeal of the Companies Act and part V1 and IX of that Act, those parts and any of the provisions of that Act necessary for the operation continue to apply to the exclusion of the Insolvency Act to any past events. The import was that nothing precluded the Bank from still appointing a receiver manager in accordance with the terms set out in the debenture.
8. The Act did not deny such a debenture holder the right to appoint an administrator entirely. The Bank may still do so, however, the procedure was not immediate, and the same required an order of the court. The relevant process was set out in Division 3 of the Act, which related to the appointment of an administrator by the court.
9. An applicant seeking such an appointment ought to move the court formally in respect of the appointment it sought, and must set out the relevant grounds, and deposition in relation to the facts that it relied on for such an appointment of administration. The instant court would not make such an appointment retrospectively, where no application has been made, and *suo moto* in the manner suggested by the respondent, or in the instant circumstances.

Application allowed with costs.

Orders

i. *Order issued revoking/setting aside the appointment of the joint administrators of the respondent company.*

Citations

Cases

1. Cecilia Wangechi Ndungu v County Governement Of Nyeri & Cecilia Wangechi Ndungu v County Governement Of Nyeri (Petition 1 of 2014; [2015] KEELRC 1142 (KLR)) — Explained
2. I & M Bank Limited v ABC Bank Limited & First Community Bank Limited (Insolvency Cause E013 of 2018; [2021] KEHC 12977 (KLR)) — Explained
3. In re Arvind Engineering Limited (Insolvency Cause 03 of 2019; [2019] KEHC 12266 (KLR)) — Explained
4. Munya v The Independent Electoral and Boundaries Commission & 2 others (Petition 2B of 2014; [2014] KESC 38 (KLR)) — Explained
5. Tom Ochieng Wayumba v Director of Public Prosecutions (Constitutional Petition 112 of 2018; [2019] KEHC 7107 (KLR)) — Explained

Statutes

1. Civil Procedure Act (cap 21) — section 1A; 1B; 3; 3A; 63(e) — Interpreted
2. Companies Act (cap 486) — In general — Cited
3. Constitution of Kenya — article 40 — Interpreted
4. Insolvency Act (cap 53) — section 3(1)(c); 522; 534(1); 534(2)(a); 534(2)(b); 534(3); part VIII — Interpreted
5. Insolvency Regulations, 2016 (cap 53) — regulation 10(4) — Interpreted

Advocates

None mentioned

RULING

Introduction & Background

1. The Application before the Court primarily concerns the question of whether or not a holder of the debenture which predates the commencement of the *Insolvency Act* (No 18 of 2015) may quality to appoint an Administrator under the provisions of Division 4 of the statute.

2. It is not in dispute that by way of facility letters dated 20th April, 2013, 1st February, 2018, 5th March, 2019, 17th March, 2020, 3rd February, 2021 and 28th February, 2022, the Creditor, at the request of the Company, advanced a loan facility of up to a sanctioned limit of Kshs. 325,000,000.00/- to the Company which is presently in Administration.

3. The said facility was secured by *inter alia*, an all-asset debenture over all assets of the Company dated 12th June, 2013("the Debenture").

4. The Company defaulted on its payment obligations, which as at 15th April, 2024, was stood in arrears in the sum of Kshs.170,378,506.59/-. In the premises, on 28th May, 2024, the Creditor notified the Company that it had appointed, Kamal Bhatt and Dhir Kamal Bhatt as joint administrators.

5. On 29th May, 2024, the said appointment was advertised in the Daily Nation and stipulated that the administration took effect from 13th May, 2024, and pursuant to Part VIII Division 4 of the *Insolvency Act* (Chapter 53 of the Laws of Kenya) ("the Administrators").

6. As a result of the above appointment, the Company filed the Notice of Motion dated 29th May, 2024 ("the Application") pursuant to Section 3 (1) (c), 534 (1) and (2) of the *Insolvency Act*, Regulation 10 (4) of the *Insolvency Regulations*, 2016, Article 40 of the *Constitution* and Sections 1A, 1B, 3, 3A and 63 (e) of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) seeking to revoke and/or set aside the appointment of the Administrators.

7. The Application is supported by grounds on its face and the affidavits of Mbugua Gecaga, a director of the Company, sworn on 29th May, 2024 and 5th November, 2024.

8. The Application is opposed by the Creditor through the replying affidavit of its Head of Legal Department, Peris Chege, sworn on 4th July, 2024.

9. The Application was canvassed by way of written submissions. I will make relevant references to the same in my analysis and determination below.

Applicant's submissions

10. The Company submitted that the appointment of the joint Administrators was irregular as it was premised on charges and Debentures which were executed and registered before the Act was enacted.

11. The Company further submitted that the Creditor is not a holder of a qualifying charge within the meaning of Section 534(1), (2) & (3) of the *Insolvency Act*. The same reads as follows:-

    534. Holder of floating charge may appoint administrator

        (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.

12. The Company contended that the Creditor could not have a "qualifying" charge because the Debenture was executed prior to the enactment of the Act and the law could not apply retrospectively to it. Additionally, it submitted that the Debenture did not meet the test set out in Section 534(2)(a) and (b) because the Debenture did not expressly state that Section 534 of the *Act* applies to it, or purports to empower the holder of the qualifying floating charge to appoint an Administrator of the Company.

13. In support of the above position, the Company relied on the decision of the High Court in *I&M Bank Limited v ABC Bank Limited & another* [2021] KEHC 12977 (KLR) ("the ABC Bank")

Respondent's submission

14. In opposition to the Application, the Respondent/Creditor submitted that the appointment of administrators under a debenture predating the Insolvency Act may still remain valid, and that this position has been affirmed by the High Court in the decision of *re Arvind Engineering Limited* [2019] KEHC 12266 (KLR) ("Arvind Engineering")

15. It further argued that this Court had the power to retrospectively appoint or regularise the appointment of the Administrators in the event it found that the court ought to make such an appointment. It relied on several persuasive United Kingdom-based decisions and an Irish decision to show that the said foreign courts had adopted retrospective appointments, where appropriate.

16. The Respondent urged the Court to adopt a purposive approach to statutory interpretation, and find that the *Act*, when read as a whole, holistically, together with its objects and purpose, did not restrict the holder of the Debenture predating the *Act* from appointing an Administrator.

17. In support of a purposive interpretation, the Respondent relied on the Supreme Court decision of *Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 others*, Supreme Court Petition No. 26 of

2014 [2014] eKLR as quoted in *Tom Ochieng Wayumba v Director of Public Prosecutions* [2019] eKLR which emphasized a purposive approach to statutory interpretation in the following terms:-

> "The object of the court in interpreting legislation is to give effect so far as the language permits to the intention of the legislature. ... The days have long passed when courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted." (Emphasis mine)
>
> See also: The Court of Appeal in *County Government of Nyeri & Anor. v Cecilia Wangechi Ndungu* [2015] eKLR

Analysis and Determination

18. I have considered the submissions set out above together with the relevant authorities and the applicable law.

19. The sole issue for determination is whether the appointment of the joint Administrators should be set aside and/or revoked? However, in order to reach a conclusion in relation to this issue, the Court must consider whether the holder of the Debenture created prior to the commencement of the *Insolvency Act* No.18 of 2015 ("the Act"), may qualify to appoint an Administrator under the provisions of the *Act*?

20. I take note from the outset that the contradictory decisions referred to and relied on by both parties emanate from the High Court. At present, the Court of Appeal has not pronounced itself on this issue, and therefore, I am not bound by either of the decisions. I am however well guided by the insightful and erudite conclusions reached by each of the Learned Judges. I remain cognizant that the facts of the present matter differ from what was before my brother Judges, and the facts in each of those cases also differed from one another, which may account for the contradictory conclusions reached in each matter.

21. It is also worth briefly stating that in one of those matters, namely, *Arvind Engineering Limited* *supra*, neither of the parties were opposed to the appointment by the Bank of an Administrator. The question was rather, which of the parties, the Company, or the Bank, ought to make the appointment? A further issue was whether the Bank could make the appointment directly, and in priority over the Company, as a Debenture holder? The situation was different in the *ABC Bank case* because the appointment of an Administrator was challenged on the basis that there was more than one bank that held a debenture, and or charge in relation to the subject company. The rival bank argued that it would be prejudiced in the event of such an appointment.

22. In the *ABC Bank case* the late Majanja J., held as follows at paragraphs 30 to 3:-

> 30. I am in agreement.....that the coming into force of the *Insolvency Act* did not invalidate or render unenforceable debentures that predated the *Act*. It preserved the provisions of the *Companies Act* (Repealed) which entitle that the holder of a debenture to appoint receivers/ managers in the event of default. While it is clear that [the] debenture could not incorporate provisions of the *Insolvency Act* which was not in force at the time when it was drawn, I hold that this mere fact does not preclude the debenture holder from appointing an Administrator in line with Part VIII Division 3 of the *Insolvency Act*. (Emphasis mine)
>
> .....

32. ABC has argued that whatever name used, the duties of the receiver/manager under its debenture are co-extensive with those of an administrator appointed under the *Insolvency Act* hence for all intents and purposes, just as it is entitled to appoint a receiver, it is also entitled to appoint an administrator. I disagree with this position because section 520 of the *Insolvency Act* ascribes a specific meaning to the term "administrator" and it relates to the manner of appointment rather than to the functions. It states, "administrator", in relation to a company, means a person appointed under this Part to manage the company's affairs and property, and, if the context requires, includes a former administrator." (Emphasis not mine)

33. It follows that although the functions of a receiver/manager may be conterminous with those of an administrator under the *Insolvency Act*, they are cannot be equated nor can the power to appoint a receiver or receiver manager under a debenture predating the *Insolvency Act* be equated to the power to appoint an administrator under section 534. This difference is not merely textual; it is substantive. Under section 524, an administrator is required to, "perform the administrator's functions as quickly and efficiently as is reasonably practicable" bearing in mind the objectives of administration set out in section 522 of the *Insolvency Act* which include maintaining the company as going concern, achieving a better outcome for the company's Creditor's as a whole than would likely to be the case if the company were to be liquidated and to realise the property of the company in order to make a distribution to one or more secured or preferential Creditors. This position of an administrator is fortified by section 525 which provides that, "An administrator is an officer of the Court, whether or appointed by the Court or not." (Emphasis mine)

34. On the other hand, a receiver/manager appointed under a debenture is not an officer of the court although the court may intervene in certain instances in performance of its duties. It does not have the responsibilities and obligations to the general body of Creditors, whether secured and unsecured and cannot be called upon to account as such but is an agent of the company or the debenture holder (see *Surya Holdings Limited and Others v CFC Stanbic Bank Limited* ML HCCC No. 78 of 2014 [2015] eKLR and *Lochab Brothers v Kenya Furfural Company Limited & Others* [1983] KLR 257). Further unlike the process of receivership, administration offers specific benefits including a moratorium on legal processes under section 560 of the *Insolvency Act*.

35. In deciding whether or not the administrator and receiver/manager are one the same, the court is called upon to give meaning to the words of the statute and I agree with the Court of Appeal in *Parminder Singh Sagoo & another v Neville Anthony Dourado & another* (*supra*) citing with approval several decisions including *Alien v Thorn Electrical Industries Limited* [1967] 2 All ER 1137 held that the court must give words their natural and ordinary meaning in the context in which they appear. As I have shown, the *Insolvency Act* is clear on the meaning of the term administrator, the manner of appointment and the incidents of a company under administration. The terms "receiver/manager" have a long history in English common law and doctrines equity and nothing would have been easier for the legislator to adopt them in the new statute. The purpose of the *Insolvency Act* was to break away from the old law and give way to the current practice that places a premium on rescuing or restructuring the company as a going concern rather than winding it up. I therefore hold that a receiver/manager appointed under the debenture or security document is different from an administrator appointed under the provisions of the Insolvency Act." (Emphasis mine)

.....

36. The issue whether [...] is entitled to appoint an administrator under its debenture, turns to whether it holds a qualifying floating charge under section 534(2) of the *Insolvency Act*. I think it is not in dispute that the instrument could not make reference to the provision the *Insolvency Act* since it was not in existence at the time. As to whether it purports to empower [...] to appoint an administrator, I think not in light of the meaning ascribed to receiver/manager and administrator I have set out above. (Emphasis mine)

37. The finding I have made does not mean that ABC is not entitled to appoint a receiver/ manager under the debenture as this power is specifically preserved under section 734(2) of the *Insolvency Act* 734(2) of the *Insolvency Act* which states:

> 734(2) Despite the repeal of the *Companies Act*, or of Parts VI to IX of that *Act*, those Parts, and any other provisions of that Act necessary for their operation, continue to apply, to the exclusion of this *Act*, to any past event or proceeding preceding, following, or relating to that past event, even if it is a step or proceeding that is taken after commencement.

38. Parts VI to IX of the *Companies Act* (Repealed) deal, inter alia, with the powers of a debenture holder to appoint a receiver and manager over the assets of a company. Under section 734(1)(i) of the *Insolvency Act*, "the appointment of a receiver of in respect of the company by holders of the company's debentures," is a past event and therefore excluded from the legal incidents of Part VIII of the *Insolvency Act*. The manner of appointment and activities of receivers and managers under debentures pre-dating the *Insolvency Act* continue to be regulated by the provisions of the *Companies Act* (Repealed) (see also *KSC International Limited (Under Receivership) and Others v. Bank of Africa (K) Limited and Others* (Supra))."

23. On the other hand, in *In re Arvind Engineering*, the court, considering the question concerning appointment of an administrator, but based on different facts, reached the opposite conclusion. Tuiyott, J. (as he then was) stated as follows from paragraphs 15 to 16 of the above decision:-

> " 15. ..... The power of a Receiver and Manager (also called Receiver Manager) is wider than that of a Receiver. The Receiver and Manager has the extra and important managerial function. Once appointed under the provisions of Clause 19, the Receiver and Manager takes up many of the roles which ordinarily belong to the Directors of the Company. A key function of the Receiver and Manager is to keep the company as a going concern. Weighing in on the differences between the between the Receiver and The Receiver and Manager, Gikonyo J had this to say in *Surya Holdings Limited & 2 others v. CfC Stanic Bank Limited* [2015] eKLR;
>
> > " [24] From the outset, let it be known that, the law especially on the duties of Receiver appointed by the court, and the one appointed out of court by debenture-holder is no longer seen as disparate. The niche development of the law is found in the difference between mere receiver and ''receiver and manager''. The difference is not a moot issue but a matter of law. ''Receivers and Managers'' entails not only receiving rents and profits, or getting in outstanding property, but also carrying on or superintending a trade, business or undertaking of the company.

> Receiver and Manager will have power to deal with the property, run the business of the company and appropriate the proceeds thereof in a proper manner for the benefit of the debenture-holder first, and of the company, secured Creditors and guarantors of the company. Receiver and Manager is an agent of the Company, but stand in a fiduciary relationship with and owes duties to both parties. Given the very nature of the position of Receiver and Manager who has control over the property of the company and is running the enterprise as a going concern as is the case here, doubtless, has a duty to account to the law, the debenture-holder and the company"

...

16. To be emphasised is the role of a Receiver and Manager in superintending and managing the Company as a going concern not only in the best interest of the debenture holder but also the Company. This is also one of the central objectives of Administration (See section 522 and paragraph 13 of this decision). There lies some commonality between the past concept of Receiver-manager and the contemporary concept of Administration. So as not to disadvantage debenture holders who hold debentures that predate the Act, there is need to give a purposive interpretation to the provisions of section 534(2)(b).This Court does hold that as the debenture instruments held by the Bank empowered the Bank to appoint a Receiver-manager whose many powers and functions are akin to that of an administrator then the Bank is deemed to have power to appoint an administrator. In that way the Bank is a holder of a qualifying floating Charge. That does it for the first issue." (Emphasis mine)

24. Having considered the cases above, I turn my attention to the terms of the Debenture. It is evident that the same gives power to the Bank to appoint a receiver manager in the event of default of payment. In addition, the instrument defines the power of the receiver manager. I reproduce the provisions of appointment and powers donated:-

> 18. Appointment of receiver
>
> at any time after demand for payment of the money secured or without demand upon the happening of any of the event set out in clauses 5,6, and 7 above or if the company failed to comply with any covenant, warranty or other obligation herein contained:
>
> 24.1. the Bank or any officer of the Bank may appoint in writing any person or persons (whether an officer of the Bank or not) to be a receiver and manager or receivers and managers jointly and severally of the property and assets hereby charged or any part thereof upon such terms as to remuneration or otherwise as the bank decides and may from time to time remove any receiver manager or receivers and managers so appointed and appoint another or others; or
>
> 24.2. the Bank may take possession of all or any of the property hereby charged; or
>
> 24.3. the bank may take both courses of action.
>
> ...

20 powers of receiver

Every receiver and manager so appointed (hereinafter called the receiver) is the agent of the company and the company alone is liable for his axe defaults and remuneration and he has the powers hereinafter set forth in addition to any general powers conferred on him by law.

20.1 to enter (either personally or by his servants or agents and either accompanied by workmen and others or not so accompanied) upon any land or buildings where any property or assets hereby charged may for the time being he or it upon any other land or buildings owned or occupied by the Company;

20.2 to take possession of collect and get in all or any part of the Security and for that purpose to take all proceedings in the name of the Company or otherwise as he thinks fit and whether by court action or by arbitration;

20.3 to sell or let or concur in selling or letting any of the Security in such manner and generally on such terms and conditions as he thinks fit and to carry any such sale or letting into effect;

20.4 to carry on manage or concur in carrying on and managing the business of the Company or any part thereof;

20.5 in the course of carrying on or managing the business of the Company to do all acts which may be done in the ordinary conduct of the business for the protection of the assets used therein and for obtaining a return therefrom and if for that purpose the receiver may claim damages for any wrong done to the business;

20.6 for the purpose of carrying on the business of the Company and of defraying costs, charges, losses or expenses (including his remuneration) incurred by him in the exercise of the powers, authorities and discretions vested in him and for all other purposes thereof or any of them to raise and borrow money by charging the Security or any part thereof either in priority to this Debenture or otherwise and at such rate of interest and on such terms and conditions as he thinks fit and no person lending such money need enquire into the propriety or purpose of the exercise of this power nor see to the application of the money provided that the receiver may not exercise this power without obtaining the prior written consent of the Bank but the Bank incurs no liability to the lender or the Company or otherwise howsoever by reason of the giving or refusing of if consent whether absolutely or subject to any limitation or condition;

20.7 to make any arrangement or compromise which he thinks expedient in the interest of the Bank;

20.8 to make and effect all such repairs, improvements and insurances as he thinks fit and to renew such of the plant, machinery and other effects of the Company whatsoever as are worn out, lost or otherwise unserviceable;

20.9 to appoint, dismiss and remove managers, accountants, workmen, servants and agents upon such terms as to remuneration or otherwise as he thinks fit;

20.10 to purchase, lease, erect or otherwise acquire and develop or improve properties and other assets, machinery, plant and equipment without being responsible for loss or damage;

20.11 to make calls conditionally or unconditionally on the members of the Company in respect of its uncalled capital and unpaid premiums on share issues hereby charged and to sue in the name of the Company or otherwise for the recovery of moneys becoming due in respect of calls so made and to give valid receipts for such moneys and the provisions contained in the Company's Articles of Association in regard to calls apply mutatis mutandis to calls made under this authority and this authority subsists during the continuance of this Debenture notwithstanding any change in the Company's directors and is exercisable by the receiver to the exclusion of the powers of the directors and the powers given and moneys due thereunder are assignable;

20.12 to incorporate a subsidiary company or companies of the Company and to sell assets to that company or companies;

20.13 to carry out work on the Company's property and to do anything necessary for its realisation;

20.14 from time to time to substitute and appoint one or more attorneys under him for all or any of the purposes of this Debenture and at his pleasure to remove them;

20.15 to sever and sell plant and machinery and other fixtures separately from the property to which they may be annexed; and

20.16 to do all such other acts and things as may be considered to be incidental or conducive to any of the matters or powers aforesaid and which the receiver if may lawfully do as agent for the Company.

25. Further to the above, the aims and objective of Administration under Section 522 of the *Act*, are 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); and

(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.

26. Looking at the above, it is evident that the terms of the Debenture are similar to the aims and objectives set out in the *Act*. This was also the case in *Arvind Engineering*. Reading the said terms, it is also evident that Clauses 18 and 20 reproduced above, refer to the person appointed as a receiver and manager, and not just a receiver. Again, this was also the position in *Arvind Engineering*.

27. Following the logic in *Arvind Engineering*, had neither of the parties opposed the appointment of an Administrator, I would be tempted to reach the same conclusion based on the application of the terms of the Debenture and the law as set out above.

28. I also prefer the purposive approach to the statutory interpretation, which approach was adopted by the court in *Arvind Engineering*, and I agree that the conclusion reached in that matter accords with the purpose and objective set out in the *Act*.

29. However, in the present matter, the facts are different. The appointment has been impugned and the rationale set out in the *ABC Bank case* is therefore more relevant. The Applicant has specifically stated that the Respondent is not the holder of a qualifying floating charge. I will therefore address this issue and the relevant provisions.

30. The first hurdle I encounter with the impugned appointment by the Bank is that the *Act* contemplates at Section 520, that an Administrator is

> " a person appointed under this Part".

This is the same issue that my late brother Majanja, J encountered, and found the same to be germane. The issue may not simply be wished away, and bars the appointment of an Administrator other than in accordance with the statutory provisions set out in the *Act*.

31. Parliament may, in the future, consider amending Section 520 and Section 534 of the *Act* to bring the same in line with the broader objectives and purpose of the *Act*. Such an amendment may include language that expands the definition of an administrator, and allows for the appointment of a person appointed by the legislation that was the predecessor to "this part". However, the law as it stands, is found at Section 520 of the *Act*, which presently states that an "administrator, in relation to a company, means a person appointed under this Part to manage the company's affairs and property, and, if the context requires, includes a former administrator".

32. Why do I say that Parliament may consider amending the above sections in the future? Because a purposive interpretation of the *Act* leads me to understand that one of the purposes of the *Act* was to codify and provide a comprehensive legislative framework to regulate all insolvency matters in a single Act. I do not think the drafters of the legislation intended to extend the shelf life of the repealed provisions of the *Companies Act* for decades down the road. It seems more probable to me that the provisions of administration were intended to benefit companies in need of immediate rescue, as and when they experienced financial challenges, and possible closure. Taking away the option for immediate appointment on the basis that floating charge that pre-dates the *Act* appears illogical. Noting the inherent delays and backlog in courts, and reading the *Act* as a whole, it would be logical to extend the provisions of Division 4 of the *Act* to debenture holders that predate the *Act* and which substantially

comply with the remaining substantive requirements set out in Section 534 (3). That however, is an issue for the Law Reform Commission to consider in the future.

33. Having stated the above, I turn to applicable law as it reads at present. The second hurdle as briefly stated above, rests in the provisions set out at Section 534 of the *Act*. It reads as follows:-

> 534. Holder of floating charge may appoint administrator:-
>
> (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.

34. Based on the above, it is evident that the option to appoint an Administrator is available only to the holder of a "qualifying" floating charge in accordance with this section of the *Act*, namely Division 4 of the *Act*. Moreover, the section defines a qualifying floating charge as either

> (a) one that 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.

35. Based on the record before me, the Bank has not met the conditions set out above. It does not hold a "qualifying" floating charge over the Applicant's property in the manner contemplated under Section 534 of the *Act*. It therefore cannot purport to appoint the Administrators pursuant to the said Section 534.

36. The logic of Section 534 appears to be similar to the language set out in Section 520 of the *Act*, which defines an administrator as a person "appointed under this part". The above sections, read together, preclude a holder of Debenture which pre-date the *Act* from appointing an administrator in accordance with Division 4 of the *Act*.

37. I therefore ask myself, what then is the recourse available to such a Debenture holder? The answer is found at Division 3 of the *Act* and in the transitional provisions of the Act at Section 734. Section 734 of the *Act* expressly preserves the statutory rights of a Debenture holder which pre-dates the *Act*. The section provides that such a Debenture holder may appoint a receiver in accordance with the

repealed provisions of the *Company's Act*. Section 734 states that such a Debenture holder make such an appointment if the appointment was either a past event, prior to the enactment of the *Insolvency Act*, or if the same requires the holder to carry out any step or proceedings relating to that past event, even if it is a step or proceeding that is taken after commencement. The said section further states that despite the repeal of the *Companies Act* and part V1 and IX of that *Act*, those parts and any of the provisions of that Act necessary for the operation continue to apply to the exclusion of the *Insolvency Act* to any past events. The import of the above, is that nothing therefore precludes the Bank from still appointing a receiver manager in accordance with the terms set out in the Debenture.

38. Finally, it is worth stating that the *Act*, as presently drafted, does not deny such a Debenture holder the right to appoint an administrator entirely. The Bank may still do so, however, the procedure is not immediate, and the same requires an order of the court. The relevant process is set out in Division 3 of the *Act*, which relates to the appointment of an administrator by the court. I would however add, that an Applicant seeking such an appointment ought to move the court formally in respect of the appointment it seeks, and must set out the relevant grounds, and deposition in relation to the facts that it relies on for such an appointment of administration. I am not persuaded that this Court may make such an appointment retrospectively, where no application has been made, and suo moto in the manner suggested by the Respondent, or in the present circumstances. I therefore decline to make such orders.

Conclusion and Disposition

37. Based on the reasons set out above, I find and hold that the Application is with merit and is allowed with costs.

38. An order is hereby issued revoking/ and or setting aside the appointment of the joint Administrators of the Respondent company.

DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 30TH DAY OF APRIL, 2025

ALEEM VISRAM, FCIARB

JUDGE

In the presence of;

..... Court Assistant

..... for Creditor

..... for Company