THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

MISCELLANEOUS APPLICATION 344 OF 2019

(ARISING FROM COMPANY CAUSE NO. 25 OF 2018)

IN THE MATTER OF SUNSHINE AGRO PRODUCTS LIMITED
(IN ADMINISTRATION)
AND

IN THE MATTER OF THE INSOLVENCY ACT 2011

BEFORE HON. JUSTICE SSEKAANA MUSA

RULING

This application is brought under section 98 of the Civil Procedure Act and regulation 155, 202,203(1) and 204 of the the Insolvency regulations 2013, SI 36 of 2013.

The application was opposed by one of the Creditors ROOT CAPITAL through an affidavit of Josephine Muhaise

The applicant seeks for orders;

a) Clause 5.1(a) and 5.2.7 of the Administration Deed entered into between Sushine Agro Products Limited (Administration) be varied and extended by another three months with effect from 25th day of May 2019.

b) The Administration of Sunshine Agro Products Limited (In Administration) be extended by a further period of 90 days with effect from 25th May 2019.

The main grounds for this application are;

a) On the 18th day of February, 2019, this honourable court issued protective orders in favour of Sunshine Agro Products Limited and varied clauses 5.1(a) and 5.2.7 of the administration deed and extended the 90 days period by three months effective 25th February 2019. Further, the period of Administration was extended by a further 90 days effective 25th February.

b) The extended period of administration is due to elapse on 25th May 2019.

c) That the majority of the creditors of the Company have no objection to an extension of the period of Administration as requested by the company at the Creditors Meeting held on 17th May 2019.

d) That the company has indicated that it requires an extension of the administration period by an additional 90 days with effect from 25th May 2019 in order to follow up on the developments relating to an agreement with the CEO of Root Capital Inc, the secured creditor to explore modalities for restructuring their loan to the company.

e) That the extension is supported by Africa Enterprise Challenge Fund and Stichting Rabobank Foundation who advanced securities in the amounts of US $ 500,000/= and EUR 142, 800 respectively to the company who together comprise the majority of creditors to the company by percentage.

The secured creditor opposed the extension on technical grounds that Sunshine Agro unilaterally filed Misc Application No. 73 of 2019 for orders seeking to extend the time of administration.

That the court heard and granted the orders but the said orders were contrary to the provisions of the Insolvency Act and regulations, 2013.

That no resolution was passed by the creditors of Sunshine Agro permitting the extension or variation of the deed as sought by the applicant.

That there has not been any agreement between Sunshine Agro and Root Capital Inc on rescheduling of the company facility. The discussions have been frustrated by the applicant having failed to provide crucial information that has been requested by Root Capital.

That this application for extension can only be filed with a progress report by the administrator for the period since the date the company entered into administration.

The applicant's counsel contended that following a failure of a collective decision of creditors at the Creditors' meeting of 17th May 2019, the company wrote to the administrator requesting that the administrator applies to court requesting an extension of 90 days.

It was their case that the section 167 of the Insolvency Act confers wide discretion to be exercised in determining this application. That there is no fetter whatsoever of the court as no conditions or criteria are laid down in law that the applicant must satisfy before the court can exercise its discretion in his/its favour.

That Regulation 155(2) provides for attachment of the progress report if any is in existence. Therefor according to counsel the application is not found wanting by mere reason that there is no progress report of the administrator.

In addition, it was the contention of the applicant's counsel that section 167 of Insolvency Act provides;

"An Administration deed may be varied by a resolution passed at a creditors meeting"

The application of the above provision is directory and not mandatory because of the use of the word "may". According to them, whether or not a resolution was passed or is attached to the application, the court still retains discretion to grant the orders that are sought for.

The rest of the creditors have met and consented to the variation and extension of the Administration deed. It is not denied by the secured creditor that they have met and are exploring alternative ways of restructuring this debt.

Lastly, counsel for the applicant submitted that the existence of a specific procedure, provision or remedy cannot operate to restrict or exclude the courts inherent jurisdiction under section 98.

NUCCPTE vs NIC SCCA No. 17 of 1993 and Joseph Byamugisha T/A J.B.Byamugisha Advocates vs National Social Security Fund Civil Reference No. 19 of 2012.

The Counsel for the secured creditor contended that the variation can only be done by all the creditors of the applicant and not a few of the creditors as implied by the counsel for the applicant.

That by making an order without a resolution/agreement of all creditors concerned, the court would be unilaterally amending the terms of the deed without their consent especially in light of section 164 of the Insolvency Act. That the court is bound to enforce the intention of the parties in the agreement and not to rewrite terms of the contract of the parties.

The counsel submitted that there must be a progress report at the time of application and according to his interpretation of Regulation 155(2) of the insolvency regulation mandates that the application to court be accompanied with a progress report.

It cannot be alleged that the administrator cannot provide a progress report because the security has not been sold.

In the case of ***Uganda Telecom Limited vs Ondoma Samuel t/a Alaka and Company Advocates Miscellaneous Application No. 0012 of 2018***; *Justice Stephen Mubiru* noted;

> "***that Under Section 140 of the Insolvency Act 2011, it is evident that provisional administration is a rescue mechanism for the insolvent companies which allows them to carry on running their business, in order to stabilise the company's position and maximise its chances of continuing in business as an alternative to liquidation or a precursor to it. A company seeks provisional administration with the aim of;-ensuring its survival and whole or any part of its undertaking as a going concern, or securing a more advantageous realisation of its assets than would be affected in a liquidation. The procedure designed primarily to deal with situations when there is an urgent need to protect the value of a business from enforcement action by unpaid creditors. It is designed to forestall action or obtain a memorandum by having an administrator appointed. If, however, it is not possible for the company and its business to continue in existence, the administrator's task is to ensure a better return for the company's creditors and members than would result from an immediate winding up of the company***."

Provisional administration provides breathing space to achieve a turnaround or structured exit and is designed to hold a business together while plans are formed either to put in place a financial restructuring to rescue the company, or to sell the business and assets to produce a better result for the creditors than a liquidation.

A deed of company arrangement is a binding arrangement between the company and its creditors governing how the company affairs will be dealt with, which may be agreed to as result of company entering a voluntary administration. It aims to maximise the chances of the company, or as much as possible of its business continuing, or to provide a better return for the creditors than an immediate winding up of the company or both.

It is aimed to administer the affairs of the company in a way that results in a better return to creditors than would have received if the company had instead been placed straight into liquidation.

A deed of arrangement may indeed be taken as a contract but it is a process guided by the court. The court retains power to regulate it and it can be varied by the court depending on the circumstances of the case.

It is true that Creditors of a company, with consent of the administrator may vary the terms of a deed of company arrangement by a resolution passed at a meeting. The administrator of the deed may convene a meeting for the purpose of variation of the deed

Where a particular secured creditor has not agreed to be bound by the deed and the creditor's dissent threatens the validity of the entire deed, the court is permitted to order that the creditor refrain from exercising its security.

The deed of company Arrangement binds all unsecured creditors, even if they voted against the proposal. It binds the secured creditors if they voted in favour of the deed. In certain circumstances, the court can also order that the people are bound by the deed even if they did not vote for it.

The court under section 167 Insolvency Act retains some measure of control of the variation of the administration deed and the law does not seem to stop the court from exercising any of its powers to grant appropriate order. The court has the power to cancel a variation of a deed either wholly or in part on application of any creditor and make such order as it thinks appropriate.

It is true that this is continuous process of the insolvency proceedings and the earlier applications cannot be severed from the present one since they are all aimed at achieving the same goal.

Section 167 of the Insolvency Act provides for a resolution passed at a creditors meeting. It is not clear whether it is a resolution by all creditors or of some. But the court ought to remain in charge of the process under section 167(2) of the Insolvency Act. See ***The Royal Bank of Scotland NV v TT International [2012] 2 SLR 213***

This court can vary the variation orders under its inherent powers as set out in the section 167(2) of the Insolvency Act " ***the court may, on application of a creditor or the administrator, cancel or confirm the variation, in whole or in part and subject to conditions as it thinks fit and may make other order as it thinks appropriate."***

The court can vary the deed of arrangement and this would not mean that the court is writing a contract for the parties since the Insolvency proceedings are aimed at assessing the viability of the company to continue in operation or have an orderly manner of winding up for the benefit of all the creditors.

The Administrator has stated that the company requires an extension of 90 days in order to follow up on the developments relating to an agreement with the CEO of Root Capital Inc, the secured creditor to explore modalities for restructuring their loan to the company.

This court believes this is a good reason to justify the extension sought and accordingly vary the deed of company agreement for all the benefit of the company creditors.

The secured creditor is being opposed to the application for its own benefit since it is the only beneficiary of the available asset. The argument that this asset is not registered in the names of the company cannot be used to defeat the main aim of trying to save the company or having an orderly winding up of the company for the benefit of all creditors.

Lastly, the secured creditor opposes this application because there is no progress report attached to the application as envisaged under Regulation 155(2) of the Insolvency regulations.

According to counsel for the secured creditor this renders the application incompetent and liable to be dismissed by this court.

This court agrees with the secured creditor's counsel that there must be a report availed to court in order for the court to assess the progress of the administration and guide the court in exercising its discretion to extend the time or not.

However, I do not agree that the unavailability of the report or the failure to attach one should render the application incompetent. This regulation does not provide so and there is no sanction for the failure to attach one. It is indeed true that there may be situations where there is nothing to report ever since the administrator took over the company management.

The purported oral report as was given at the creditors meeting on 17th May 2019 is not what the law envisages but rather a written report detailing whatever relevant information the creditors would like to know and the same would be extended to any creditors who may not have attended the creditors' meeting.

This court directs that the applicant's Administrator should file a report ever since the time he took over the administration as required even if, it is a one page or paragraph report that the property has not sold or dealt with in anyway.

This court grants an order extending the administration for a further 90 days. Accordingly, clause 5.1 (a) and 5.2.7 of the administration deed is varied by extending the periods therein by a similar term of 90 days with effect from 25th May 2019.

I so order

SSEKAANA MUSA
JUDGE
09th/07/2019