THE REPUNLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

(COMMERCIAL DIVISION)

IN THE MATTER OF WINDING UP

OF MUDDU AWULIRA ENTERPRISES LTD

AND

MISCELLANEOUS APPLICATION NO. 287 OF 2004

(ARISING FROM COMPANIES CAUSE NO. 14 OF 2004)

PLEXUS COTTON LIMITED::::::::::::::::::::::::::::::::APPLICANT

VERSUS

MUDDU AWULIRA ENTERPRISES LIMITED:::::RESPONDENT

BEFORE: HON. JUSTICE GEOFFREY KIRYABWIRE

R U L I N G

This ruling arises from an application by way of chamber summons brought under sections 225(1) and 238 of The Companies Act (Cap 110); Rules 5(2), 7(1) & (2) and 27(1) & (2) of The Companies (winding up) Rules S1 85 – 1. The Application seeks orders that;

" *1. That an interim/provisional liquidator be appointed to secure, take possession of collect and protect and/ or safe guard the assets and undertakings of the company (Muddu-Awulira Enterprises Limited) and to*

carry on the business of the said company until the final disposal of the pending petition for winding up or further orders of court.

2. That the costs of the application be provided for."

The grounds for the orders are enumerated in the chamber summons and are said to be the following:-

1. The applicant M/s Plexus Cotton Limited has petitioned for a winding up order against the Respondent Company on the grounds of inability to pay its debts. Winding up proceedings commenced on 30th April 2004, there is a prima-facie case for winding up of the Respondent Company.

2. The Respondent Company has substantial cotton stocks in its ginneries based in Kasese, Kasese District, Parombo in Nebbi District and in a warehouse based in Kampala and elsewhere, which will be dissipated or disposed of or wasted or seized before the winding up order is made.

3. There is a dispute and conflict between the Respondent Company on the one hand, and the Uganda Ginners and Cotton Exporters Association (UGCEA) to which the Respondent Company is a member with regard to the alleged right to 13,300 bales of cotton lint belonging to the Respondent, which prolonged dispute/conflict may render it difficult for

the cotton stock to receive proper protection and may place the perishable cotton lint in jeopardy.

4. The Respondent Company is insolvent. There are outstanding debts of great magnitude.

5. The Respondent's Principal Director, one Godfrey Sentongo has conducted the affairs of the company casually without due regard to legal requirements.

6. There is need to protect the mortgaged assets for the benefit of all the creditors of the respondent.

7. For the purpose of ascertaining whether the company's business could be carried on effectively pending the issuance of an order for winding up.

8. To explore whether an arrangement can be reached with other creditors.

9. To enable the company to complete current contracts.

10. The company has defaulted on the payment of statutory levies (CESS) payable under the Cotton Development Act Cap 30 and has also not paid

Development collections/UGCEA levies and as such it is in the public's interest to appoint and Interim Liquidator.

11. The Respondent's Principal Director Godfrey Sentongo has managed the Respondent Company in a manner that is economically disadvantageous to the Respondent as against Associated Companies, and the Interim Receiver shall seek to put a stop to/set aside some of the transactions.

12. It is just and equitable that the appointment be made to preserve the assets of the respondent company for the benefit not only of the Petitioner but of all creditors (that will be applied in payment of the debts).

The application is supported by the Affidavit of Mathias Nalyanya external counsel of the applicant. On record also is an affidavit in reply by one Godfrey Sentongo Ddungu the Managing Director of the Respondent. Finally on record is also an affidavit in rejoinder again by Mr. Nalyanya. The Application and Affidavits have many annexure to them.

Counsel for the Applicants M/s lex Uganda Advocates & Solicitors filed written submissions which greatly assisted, in the expeditious handling of the application. The rest of the submissions in reply and rebuttal were oral in court.

For the applicants it was submitted that under S. 225(1) and 238 the court was empowered to make an interim or any other order and can appoint a provisional liquidator to take possession and protect the assets of a company at any time after the presentation of a winding up petition and before making a winding up order. The applicant on the 30th April 2004 presented before court a winding up petition on the grounds that the Respondent Company was unable to pay its debts, including the sum of US$ 319,295.99 which was awarded to the applicant by The Liverpool Cotton Association (LCA) plus interests and costs of the Appeal.

For its part the applicant put forward 3 test to be met in considering whether or not to grant an order appointing a provisional liquidator.

1). That the applicant has the locus stand (either a creditor/contributory) to be able to bring the application for a provisional liquidator.

2). That the pending petition presents a prima-facie case for winding up of the company.

3). That the assets will be dissipated wasted or disposed of in the interim period between the filing of the petition for winding up order and the wind up being made.

It appears that these tests are largely derived on the authority of **Mc Pherson's Law of Company Liquidation** by **Dr. Andrew R. Keay** 1st edition sweet & Maxwell P 259.

Counsel for the Applicant has argued that the Applicant is indeed a Creditor by virtue of the Respondent Company having failed to pay a debt of US$ 319,295.99 to the Applicant. This debt arises from the earlier mentioned arbitral award made against the Respondent in favour of the Applicant. It was therefore argued that the Applicant was in the position of a Judgment Creditor. As a Judgment Creditor with a liquidated claim there was nothing stopping it from presenting a winding up petition within the meaning of section 223(a) (c) of The Companies Act and Rule 27(1) of the winding up rules there under. In this regard he referred the to the Judgments of **Lord Justice Philmore** in **Re a Company** (1915) I Ch 520 at Pgs 198-199 and **Justice Law** (Ag VP) **in Re Ghelani Impex Limited** [1975]EA 197.

Counsel for the Applicant further argued that a prima-facie case for winding up had been made. To establish a prima-facie case counsel for the applicant argued that an

"Applicant must show existence of a debt, it must show that the respondent neglected to pay or to comply with the notice of demand. That there is no

reasonable cause for omission and the fact that the debt is not disputed or if disputed the dispute is not bonafide".

Counsel for the applicant has submitted that the Respondent has failed to raise substantial and or bonafide grounds for disputing the debt. It is argued that the Respondent has only raised technical arguments, which fail to meet the test. The debt therefore in the eyes of the Applicant stands undisputed.

It is further submitted by counsel for the Applicant that the Respondent is insolvent. It is stated that in addition to the debt of the Applicant, the Respondent has failed among others to pay the debts of The Cotton Development Organisation, The Uganda Cotton Exporters Association, National Water and Sewerage Corporation and The South West Nile Co-operative Union. The Company is also said to be indebted to banks, its cotton has been ceased and water supply cut off. Counsel for the Applicant while referring to the Respondent accounts Annex 'K' (prepared by Sam Bisase & Co Certified Public Accountants) to the Affidavit in reply said they were not reliable. This is because not all the liabilities of the Respondent Company were disclosed in the balance sheet of the Company.

It was argued that if these liabilities were added the company would indeed be shown to be insolvent.

As to whether the Respondent Company's assets will be dissipated counsel for the Applicant argues that it is necessary to protect the assets for an equal distribution in event of a winding up order being made. It has been argued that The Cotton Development Organisation has taken enforcement action against the Respondent Company by ceasing its stocks and legal action has commenced against the Respondent Company in Gulu, which could affect its stocks there.

Counsel for the Applicant then showed court other examples of where a provisional liquidator had been appointed. These included the following:-

1. In the case of urgency.
2. To keep the status quo and to prevent anybody getting priority.
3. Threat from mortgages and Debenture holders.
4. Where special circumstances and the public interest so demands.
5. Where the affairs of the company may have been conducted casually with due regard to given legal requirements.
6. Where the Company is trading at a loss and will incur further liabilities.
7. Where there is paralysis caused by Intra-Company disputes or substantial conflict between directors.

Counsel for the applicant then concluded that this was a proper case for an order appointing an interim liquidator and that R. 28 of The Companies Winding up

Rules had been complied with that a certificate of deposit of fees had been procured.

In reply counsel for The Respondent referred court to another set of grounds for court to consider in granting a provisional liquidator. These grounds are on the authority of **The Digest** Vol 10 (1) companies (parts 2 (21) – 4(10)) 1990 2nd reissue Butterworth & Co P. 407. Though these grounds do not in substance contradict the ones enumerated by counsel for the Applicant they are worth outlining here.

1. The Prima Facie ground for winding up – Admission by company's own petition – or some other admission. The court will only appoint a provisional liquidator in a winding up matter where either the company has presented the petition or some way admitted that it must be wound up.
2. Where the petitioner is other than the Company – court is to be satisfied that petition is unopposed. A provisional liquidator will not in general be appointed before the hearing of a winding up petition not presented by the company, unless the court is satisfied that the petition is unopposed.
3. Where the company supports the petition.
4. Where there is Jeopardy to assets.

5. In the case of urgency the court may appoint a provisional liquidator without the consent of the company to take possession of an protect assets, but not to distribute them until further order.
6. In Public interest.

In addition to the above counsel for the Respondent argued that person presenting the petition must be a creditor. He argued that the Applicants claimed to be creditor by virtue of an arbitration award. He broadly argued that for the Applicant to be a creditor on the basis of an Arbitration Award the Award must be converted into a Judgment for execution to levy.

In this regard he referred me to **The Law and Practice of Commercial Arbitration In England** by **Sir Micheal J. Mustil** 2nd ed. The Arbitration Award he further argued was a debt but not a debt due for payment (emphasis mine) within the meaning of S 223 of The Companies Act.

Counsel for the Respondent further strongly argued that a petition should not be brought where there is evidence of solvency and disputed debt. In this regard he referred me to **Mann & Anor** v **Goldstein** [1968] 2 ALL ER 768 at 773. Counsel for the Respondent stated that the Respondent Company controlled 16% of all lint exported from Uganda was not insolvent and a disputed the Arbitral award in favour of the Applicant vide Miscellaneous Application No. 295

of 2004 now before the High Court of Uganda. In this regard he further argued that the Respondent Company cannot be said to have neglected to pay the debt.

Counsel for the Respondent submitted the petition for winding up was not bona fide in that it was designed to pressure the Respondent Company to pay a debt that was not due.

He said that in this regard the court should not be used as a debt collection agency and referred me to **Re Lympne Investments Limited** [1972] ALL ER P. 385 at 388 Counsel for the Respondent said that his clients were trading and so the cumulative claims referred to by the Applicants were nothing more than their day to day operations. As such for example the company would incur loans which it is paying and water bills which it has cleared.

Counsel for the Respondent denied that there had been seizure of it clients Cotton stocks by the Cotton Development Organisation. He said that the Respondent Company has been paying its CESS dues as evidenced by annex 'C' to the Affidavit in reply and as long as The CESS dues are paid The Cotton Development Organisation will allow them to export to fulfill their contracts.

He concludes by saying that non of the grounds for the appointment of the provisional liquidator have been met so the application should be dismissed.

The legal arguments presented by counsel for the two parties were formidable and have been of great assistance to court. The main issues for court to decide in this application is whether a provisional liquidator should be appointed by court pending the hearing of the winding up petition presented by the same applicant against the Respondent Company.

Section 238(1) of the Companies Act provides.

*"The Court **May** appoint the official receiver to be the liquidator provisionally **at any time** after the presentation of a winding up petition and before the making of a winding up order"* (emphasis mine).

An appreciation of section 238 (1) of The Companies Act and the various authorities cited by both parties makes it clear to me that the appointment of a provisional liquidator is an exercise of Judicial discretion. This means that the court will have to inquire into the grounds of the application very carefully and satisfy itself that it is just and equitable to appoint a Provisional Liquidator. It must be understood that the appointment of a liquidator is an interim and not a final remedy. This means that whether or not a provisional liquidator is appointed the petition for winding up must be heard on its merits to determine

whether or not a winding up order should be made. A further appreciation of section 238 (1) and the authorities show that the court, at any time after the presentation of the winding up petition and before a winding up order is made, on application to it can order the appointment of a provisional liquidator. This to my mind mean that during the said Interim period between the presentation of the petition for winding up and the possible grant of a winding up order the appointment of a Provisional Liquidator remains an on going interim remedy available to the parties involved. Various tests/grounds for court to consider in granting an order for a Provisional Liquidator have been put forth by both parties and they are not quite the same though yet again they remain instructive. The following common threads seem to hold the grounds together.

1. If the application for a provisional liquidator is made by the company itself or it has in some way supported the petition for winding up then the court will normally grant the order.
2. Where the application is presented by an applicant other than the company then court has to satisfy itself that the applicant has the locus standi (as either a creditor/contributory) to bring the application.
3. That the pending petition presents a prima-facie case for winding up the company, which is not substantially opposed.

4. That the assets of the company will be dissipated, wasted or disposed of in the interim period between the filing of the petition to wind up and the winding up order being made
5. Where Public interest necessitates that a provisional liquidator be appointed.

6. In cases of urgency a Provisional Liquidator may be appointed.

In the case before me the Respondent Company does not support the application for the appointment of a provisional liquidator. Accordingly I cannot grant the order under that ground.

The application has been brought by an applicant other than the company so I must satisfy myself that the applicant is indeed inter alia a creditor. For the applicant it has been argued that by reason of an arbitral award in their favour against the Respondent Company for US $ 319,295.99 they are indeed creditors. The Respondent have argued that the said debts comprised in the arbitral award is not yet enforceable so it cannot be said to be due and owing. Counsel for the Respondent Company therefore says the Applicant cannot be said to be a creditor. I do agree that the arbitral award obtained by the Applicant is not yet enforceable because it has to be converted into a Judgment under Arbitration and Conciliation Act [Cap 4]. However again

such conversion is only necessary if the holder of the award would like to enforce it as a decree of court. I agree with Mr. Wakida Co. counsel for the applicant when he argues that arbitral awards when made are supposed to be binding and can be paid even without enforcement as a decree of court if the other party accepts the award. In such a case the arbitral award is used not with a view to its enforcement as such but as evidence of a debt. **Re Ghelani Impex Limited [1975] E.A 197** is followed.

An arbitral award is a debt, which the holder can go to the company and demand payment. Whether payment is made or not is another matter. In this case the Applicant presented the award to the Respondent Company and was not paid. He thus becomes a creditor who for purposes of the winding up proceedings and like others must prove his debt.

The Applicant now as creditor must show a prima-facie case for winding up which is not substantially opposed. It would appear that the strongest case the Applicant has against the Respondent is the Arbitral award even though he has tried to lead evidence of other claims not being their own that have not been paid. The Applicant argues that its claim based on the arbitral award is not disputed. Only technical excuses are raised. However it cannot be glossed over that the Respondent Company have formally objected to the

award by application to the High Court. That matter remains pending so I must find that the arbitral award is indeed contested.

To do otherwise is to risk determination of a matter, which is not in my court. As to the other claims, the other claimants following the advert of the petition have indicated that they shall appear before court to support the petition. I think it is fair and just that they prove their own debts. I find that this ground has not been satisfied.

As to the ground that the assets of the company will be dissipated wasted or disposed of during the interim period the onus to prove this lies with the Applicant. Much of arguments on this ground centred around the possibility of The Cotton Development Organisation ceasing the stocks of The Respondent Company.

In this regard the applicant relies heavily on correspondence to their counsel from Cotton Development Organisation annex 'L' and a letter from counsel for the Respondent to The Cotton Development Organisation annex 'J' both part of the affidavit in Rejoinder. Annex 'J' and 'L' when read together gives the impression that The Cotton Development Organisation has held on to stock of the Respondent so that CESS and development levy can be paid. It is not clear if this amounts to a seizure as counsel for the Applicant claims.

However Annex 'K' to the Affidavit in Rejoinder which is letter from counsel to The Cotton Development Organisation M/s Barya, Byamugisha & Co. Advocates to counsel for Respondent Company is quite instructive in the matter and reads at P 7.

"*Lastly but by no means least, even in the event that our client was guilty, which is denied, your client (Muddu Awulira Enterprises Limited) is a subject of a winding up petition vide companies cause No. 14 of 2004 of which our client has been given notice by the petitioner (plexus cotton Limited) and the bales in question although subject to UGCEA lien for the development levy which CDO is authorized to collect on its behalf, are its property and CDO though it MD is not ready to flout the provisions of The Companies Act (Cap 110) which impose on obligation on it and her not to dispose of the property of a company (like your client) in respect of which winding up proceedings have commenced*" (additions and emphasis mine).

So there does exist a lien of sorts but no threat of disposal; that settles that matter. There is also reference to a court case in Gulu against the Respondent Company but that is said not to have taken off yet.

I accordingly find that this ground, has not been met.

As to the ground of Public Interest though this was a ground in the chamber summons it this was not argued before me so I make no finding on it.

I would like to add that in applications for interim orders such as these, in the event that there is doubt as to whether the order should be granted it is trite law that the court should decide based on the balance of convenience. In this case the full hearing of the petition is in 4 days time on the 25th May 2004. That means in 4 days time the court will start to hear the petition and be in a better position in the presence of other creditors to determine the petition for winding up and or make further orders. No compelling case of urgency has been made for the interim control of the company within this very short time. The balance of convenience therefore lies with the Respondent Company. A change of control within this short time will be disruptive.

I accordingly dismiss this application. This does not mean that the application cannot be made again during the hearing of the petition before the order is made if there are compelling circumstances to to so.

Costs of this application to follow the petition.

Hon. Justice Geoffrey Kiryabwire

Date 21/05/2004