


CASE ALERT



SECURING ASSETS IN CRISIS: WHAT BUSINESSES NEED TO LEARN FROM THE RECENT HIGH COURT RULING IN EDWIN TABARO (AS RECEIVER OF PAN AFRIC COMMODITIES LTD & ORIENT BANK LIMITED VERSUS MOHAMMED MOHAMMED HAMID & 2 OTHERS; MISC CAUSE NO. 34 OF 2020

INTRODUCTION

On 22nd April 2024, the High Court of Uganda (Commercial Division) delivered a Ruling in the above-mentioned matter, enforcing Sections 183 (2, 3 & 4) and 185 of the Insolvency Act. The Court reaffirmed the receiver's authority to demand and take over charged assets and documents of title from an indebted company emphasizing the necessity for the debtor's cooperation during the receivership process.

1. Background

On 15 November 2018, Pan Afric. Commodities (herein after called "the Company" received three credit facilities from Orient Bank (hereinafter called " the Bank") comprising of a letter of credit for USD 1,700,000 (United States Dollars One Million, Seven Hundred Thousand only) and two overdrafts of USD 600,000 (United States Dollars Six Hundred Thousand only) and UGX 1,000,000,000 (Uganda shillings One Billion).

The Company defaulted on the above facilities and the Bank appointed Edwin Tabaro (hereinafter called the receiver) as the Receiver which appointment was accepted by the Receiver on the 20th march 2020.

Since commencement of receivership, the 1st and 2nd respondents s") who were the directors of the company refused to avail the receiver with the charged assets and all company inventories, books of account, stocks and other assets to allow him to undertake receivership. As a result, the receiver commenced this legal action to obtain an order from court compelling the company and the Directors to handover the above charged assets and information.

At the hearing of the case, the company and the directors opposed the application on a number of grounds namely that; Debenture documents are public documents which can easily be accessed from the company registry by the receiver; that the receiver had all the management powers and custody of all documents and assets of the company and the failure to discharge his receivership duties is his own making; that receiver was acting illegally having given notice of receivership more than 14 days after the start of receivership; that the receiver had been in office for more than the time provided for in law.

2. Decision of the High Court.

In determining the matter, the Court pronounced itself on whether failure to publish a statutory notice by a receiver invalidates such an appointment, whether there is a time limit under the Insolvency Act, 2011 for conducting receivership, whether the directors of a company under receivership have powers to act on behalf of the company or instruct lawyers to represent the company and the power of a receiver to take over charged assets and information necessary for the conduct of the receivership.

Does failure to publish a statutory notice of appointment by a receiver invalidate such an appointment/

The Court held relied on Section 178(4) of the Insolvency Act and decided that the non-compliance with the notice requirement doesn't invalidate the appointment and accordingly, subject to the other provisions of the law, a receiver who fails to comply with Section 178(2) of the Insolvency Act remains validly appointed and their exercise of the powers of the receiver is not affected by the same. However, caution must be taken since a party aggrieved may commence proceedings against the receiver for any loss that they incur from non-compliance with Section 178(2) of the Insolvency Act subject to their existence of a valid cause of action. Further, institutions so empowered may prosecute the receiver under Section 178(6) of the Insolvency Act

Is there a time limit under the Insolvency Act 2011 for conducting receivership?

The Court held that there is no statutory timeframe in the Insolvency Act 2011 for conducting receivership. The court, however, decided that receivership may only be terminated by court or in accordance with the debenture under which the power to appoint a receiver is provided for, or such other valid agreement by the parties.

Do the directors of a company under receivership have powers to act on behalf of the company or to instruct lawyers to file a suit or defence?

On the above question, the Court decided that as a general rule, a suit or defence filed by a company should be duly authorised by a board resolution passed by the directors. However, section 181(2)(b) of the Insolvency Act 2011 creates an exception to the above rule by empowering the receiver to manage the affairs of the company and exercise the powers of the directors. Court therefore ruled that unless restricted by the debenture, the receiver essentially replaced the directors and took control of the company.

The Receiver, from the date of commencement of receivership, exercises the functions of the board. Consequently, the directors of a company in receivership do not have powers to instruct lawyers to institute or even defend a suit against the company.

The power of a receiver to take over charged assets of a debtor company.

The court held that receivership generally deals with a right conferred on the lender to appoint a third party (receiver) to recover the sums due and owing from the lender's business within the scope provided in the finance document (either to manage and take over all assets and the business, or just some of the assets).

The court observed further that the major duty of the receiver is to act bona fide to realise the assets of the company in the interests of the debenture holder. However, the receiver owes duties to the mortgagor akin to those of a mortgagee liquidating a pledged asset. For the receiver to be able to manage the affairs of a company to enable recovery of the sums that are due, the receiver ought to be provided with the charged assets and all necessary information and documents to enable the receivership to commence and continue.

On the available evidence, the court concluded that the Directors had violated Section 185 of the Insolvency act 2011 by failing to handover charged assets to the receiver. Court further emphasised the need for written record of handover of assets, or some sort of correspondence or photographic evidence during such handover events detailing specific dates or periods, times, and even the manner/mode of handing over the same.

Consequently, an order directing the directors to make available to the Receiver all documents and all information relating to all the property under receivership, within thirty (30) days from the date of the decision was issued in favour of the Receiver.

3. Relevance of the Decision.

The Court has interpreted the scope, nature and extent of its powers conferred by section 185 of the Insolvency Act 2011 to force an official of an indebted company to avail assets or documents that are necessary in the opinion of the receiver for the smooth conduct of receivership. The decision is therefore a useful tool for all insolvency practitioners for conducting smooth receivership.

The Court has also confirmed that any irregularities in the appointment of a receiver doesn't invalidate such an appointment. However, insolvency practitioners should be more vigilant and ensure that all the statutory formalities in appointment of a receiver are complied with because noncompliance may still lead to commencement of proceedings against the receiver for any loss that is incurred from non-compliance under Section 178(2) of the Insolvency Act subject to their existence of a valid cause of action.

Secondly, Lenders should ensure that debenture deeds and deeds of appointment of a receiver are comprehensively drafted since the appointment, conduct and termination of the receivership is only by court or in accordance with the debenture under which the power to appoint a receiver is provided for, or such other valid agreement by the parties.

It is advisable that in cases where there is handover of assets of an indebted company to the receiver, there should be a clear documentation of all the records of all assets, correspondence or photographic evidence detailing specific dates or periods, times, and even the manner/mode of handing over the same. This will be helpful in establishing the liability of a receiver in the event of any breach of duty.

AUTHOR



Norbert Nyakuni
Associate

Disclaimer

This legal alert is intended solely for informational purposes and does not constitute legal advice. The information provided herein is general in nature and may not fully address or consider the specifics of your individual circumstances. As such, it should not be relied upon as a substitute for professional legal counsel.

Legal matters can be complex and context-specific, and the applicability of legal principles can vary based on individual facts and circumstances. Therefore, it is important to consult with a qualified legal professional who can offer personalized advice tailored to your particular situation. Our firm is here to provide such guidance and ensure that your legal needs are met with the appropriate level of expertise and attention.

If you have any questions or require further assistance regarding the issues discussed in this alert, we strongly encourage you to reach out to us directly at disputeresolution@ktaadvocates.com. Our team of experienced advocates is available to offer the necessary legal support and advice to address your specific concerns.

