

TANZANIA / JUDGMENT

TRA VS NAKUMAT T LTD

MISC COMM APPL NO

COURT
TANZLIIDECIDED
1 January 2018

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IN THE HIGH COURT OF TANZANIA (COMMERCIAL DIVISION) AT DAR ES SALAAM
MISCELLANEOUS COMMERCIAL APPLICATION NO. 253 OF 2018 (Original from Miscellaneous
Commercial Application No. 17 of 2018) IN THE MATTER OF COMPANIES ACL CAP 212 AND IN
THE MATTER OF AN APPLICATION FOR ADMINISTRATION ORDERS UNDER THE COMPANIES
ACL CAP 212 TANZANIA REVENUE AUTHORITY APPLICANT VERSUS

1. NAKUMAT TANZANIA LIMITED Is* RESPONDENT
2. KENYA COMMERCIAL BANK LIMITED (KCB BANK).....2^ RESPONDENT
3. JW LADWA (1997) LIMITED 3rd RESPONDENT

RULING

26/11/2018 & 07/12/2018 SEHEL, J, This is a ruling on application for leave for the applicant to apply for order of sale on goods attached under Warrant of Distress 1 such goods being subject to the Petition for administration in Misc. Commercial Cause No. 17 of 2018 which is pending before this Court. The application is made under Section 249 (1)(c) of the Companies Act, of 2012 and it is supported by an affidavit sworn by Moses Frederick Kinabo, an advocate of the applicant. The reasons advanced in the affidavit as why leave should be granted are such that the 1st respondent has an outstanding tax liability of Tshs. 2,228,622,596.43 as such on 29th December, 2017 a Warrant of Distress was issued on all assets of the 1st respondent in which Yono Auction Mart Ltd was appointed to collect and recover the outstanding tax liability. Yono Auction Mart started to carry stock count but never completed the exercise as Misc. Commercial Cause No. 17 of 2018 was instituted thus adversely affected the recovery measures. It is further deponed that the applicant intends to apply for an order of sale so that the goods are sold before they lose their value due to decay, destruction, extinction, expiry, damage, disposal, disappearance or any other event which may ultimately result to serious loss to all interested creditors in Misc. Commercial 2 Cause No. 17 of 2018 and the applicant is also facing challenges of storage costs, security costs and the risk of being sued as a major occupant of the premises of Nakumatt Supermarket Oysterbay. The 1st respondent on its counter affidavit acknowledged that there was a stock taking process whereby by end of August, 2018 the applicant together with the 1st and 3rd respondents completed the process and thereafter discussions of moving the said goods to another location

commenced. It was further deponed that the warrant of distress was suspended by operation of the law following the filing of the Administration petition; and the petition seeks to ensure advantageous and better realization of the company's assets for the benefit of all creditors therefore an order to sale will pre-empt and defeat the purpose of filing the petition. Other respondents did not file any counter affidavit to oppose the application. The hearing of the application was done orally on 26th day of November, 2018 whereby learned advocate Moses Kinabo appeared to represent the applicant; learned advocate Adrian Maro appeared to represent the 1st respondent; learned advocate Esther Matulile appeared to represent the 3rd respondent and the 2nd respondent was absent. It was argued by counsel Kinabo that the application for leave to apply for an order for sale is in respect of goods which are subject to Misc. Commercial Application 17 of 2018; the goods in question belongs to the 1st respondent currently they have been attached under a warrant of distress which was executed on 29th day of December, 2017 due to outstanding tax liabilities. The tax due have been outstanding for more than 300 days since the execution of the warrant of distress by the applicant. It was submitted that this situation has made it necessary for the applicant to take reasonable step to receive Government revenue. It was further argued that the 1st respondent is a subsidiary of Nakumatt Holdings in Kenya which operates chain of supermarkets in East Africa countries; the 1st respondent is not owning any properties in Tanzania apart from the goods attached under warrant of distress; applicant intends to apply for order for sale; and the 4 present application is important step for the applicant and other creditors for this case. The reason for seeking leave is that if the goods in question disappear the outcome of the main case will be nugatory; the value of the goods might be lost due to decay, destruction, extinction, expiry, damage, disposal, or disappearance; the applicant started recovery measures to recover tax liability owed by the 1st respondent by executing a warrant of distress on 29th December, 2017; total outstanding debt is Tshs. 2,228,622,596.43; efforts to recover taxed have been halted through filing Misc. Commercial Application No. 17 of 2018 which had an effect of subjecting all proceedings to an application for leave before taking any legal action; and the applicant faces challenges in respect of storage costs, security costs, and risk of being sued by the 3rd respondent who is the landlord of the 1st respondent where the goods are kept at the premises of Nakumatt Supermarket Oysterbay. Learned counsel Maro replied that the gist of Section 249 (1) (c) of the Companies Act of 2012 is to provide for moratorium in order for the companies' assets to be realized for the benefit of all 5 creditors including the applicant. To cement his submission, he cited the English case of *Re a Company No. 001992 of 1998* (1998) 4 B.C.C

451. Counsel Maro further argued that the petition for administration order in Misc. Commercial Application No. 17 of 2018 should take precedence over any other matter against the company. It was the view of the counsel that what the applicant is praying can be granted under the administration order as the applicant will be able to present its claims to the administrator. He further argued that the granting of leave at this stage will damage the company as It will pre-empt and defeat the purpose of administration petition. He said the criteria for granting leave is found in the case of *In Re Rhoda Waste Disposal Ltd* [2000] 3 WLR 1304 where it was held: "... in deciding in the exercise of its discretion whether to grant

leave to proceed against the company the court should have regard not only to the interests of the company's creditors but also to the seriousness of the conduct alleged against the company and its officers..... 6 It was thus argued that the applicant must have shown the conduct of the 1st respondent was so serious to warrant leave of the court. He contended that the applicant other than showing that it has levelled distress has not shown any serious conduct of the 1st respondent. For perishable goods, he contended that the applicant has failed to provide a detailed list of goods to ascertain the need or otherwise in granting leave. He concluded by praying for the application to be dismissed. The learned counsel for the 3rd respondent, Ms. Matulile had no objection to the application though she proceeded to make her own prayers. For the purposes of this application, I will not consider her prayers since the only application which is before me is an application for leave to institute proceedings against the 1st respondent and not any other application. Learned advocate Kinabo in his rejoinder reiterated that the law allows the applicant to seek leave and that the cases cited are persuasive and not binding upon this Court. 7 From the submissions made by the counsels, the court is invited to determine whether it should grant leave or not as sought by the applicant under Section 249 (1) (c) of the Act. The Section reads: "During the period begging with the presentation of a petition for an administration order and ending with the making of such an order or the dismissal of the petition:

- (o) ...
- (b)
- (c) No other proceedings and no execution or other legal process may be commenced or continued, and no distress may be levied, against the company or its property except with the leave of the court and subject to such terms as aforesaid. " My reading of the above Section is that once there is an application for petition for administration order no other proceedings, execution or other legal process may be commenced or continued except with the leave of the court and it is for this 8 Section that prompted the applicant to come to this court requesting leave for an order of sale of goods. The reasons advanced as to why this court should grant the prayer, are stated in the affidavit in support of the application; that the 1st respondent has tax liability; there is in place a Warrant of Distress; a Bailiff one Yono Auction Mart already appointed; Goods to be sold some of them are perishable thus necessitated for their quick disposal; and the premises are needed by the owner. The question that follows is whether the applicant is entitled, as against all other creditors, to be granted leave to apply for an order for sale of goods which are subject to administration orders in Misc. Commercial Cause No. 17 of 2018. Strictly speaking the Court has a discretion as to whether to allow the applicant's prayer for leave but that is a judicial discretion which the Court exercises upon well established principles. There are no hard and fast principles. Each case must be determined on its own merits. It is well known principle that the purpose of putting moratorium is to give a breathing space for the company while the 9 company is under new management of the administrator who seeks to achieve one or more of the purposes set out under Section 247 (3) of the Companies Act of

2012. In Re Atlantic Computer Systems Pic

[1990] BCC 859; [1992] Ch 505 at page 528 Lord Nicholls, L.J said: "There is a moratorium on the enforcement of debts and rights, proprietary and otherwise, against the company, so as to give the administrator time to formulate proposals and lay them before the creditors, and then implement any proposal approved by the creditors." It is anticipated for an order for administration to be an interim and temporary measure and to allow proceedings to be made against the company will defeat the whole purpose of the petition for administration order. In *Re a Company* (Supra) at page 3 Harman, J said: "...if it is plainly quite contrary to the whole essence of the administration petition that anything be done during the pendency of such a petition to continue with legal proceedings and to do anything which may be seen in public interest to damage the company. That is why, for example, re-entry of premises pursuant to an order, the execution of a distress and so on are prohibited; first, to enable the company to be preserved for the administrator to get hold of and make the best he can of the purpose for which he was appointed; and, secondly, because the whole essence of Section 10, and following on Section 11, is that the administration process is to have priority over all other processes." Further Edward Bailey, Hugo Groves, and Cormac Smith in their book titled "Corporate Insolvency: Law and Practice", 2nd Edition, Butterworths printed in 2001 at page 135 item 4.31 said: "The freeze imposed on presentation of the petition can be lifted if the court grants leave to third party to take proceedings against the company, though such application would be more likely to occur after the order is made given the short span between petition and hearing. Further, it is unlikely that the court would look favourably upon an application in that hiatus as the status quo should be preserved until an order is made, favourably or not as the case may be." It discerns from the above authorities as I said, once the petition for administration is put in motion then all other proceedings are stayed pending unless the Court grants leave. However, such leave would likely be made after the order for administration is given as it is anticipated that there is a short span of the hearing and the granting or otherwise of the order of the administration. The main reason of having in place such a moratorium is to give the company a breathing space. Applying the above to the matter at hand, it is complained by the applicant that the 1st respondent is in tax arrears which the applicant has already appointed a certified bailee and the applicant is intending to apply for an order of sale so as to recover its dues. It is also complained that the goods attached are in danger of being destroyed and or decay as such the denial will highly prejudice not only the applicant but all other creditors. It is further complained that the applicant is facing risks in respect of storage costs, security and being sued by the landlord. All these reasons explained by the applicant, much they are highly persuasive but they do not outweigh the main purpose of having a moratorium in place. The paramount factor now is to preserve the status quo until an order is made, favourably or not as the case may be for the betterment of all creditors including the applicant. To grant leave will frustrate the whole purpose of freeze and place the company under unnecessary pressure from its creditors. In the end I find that, the application, made by the applicant at this stage where

petition has not yet been determined, lacks merit. The reasons stated do not warrant at the moment the grant of leave. Therefore, the application is dismissed with costs. It is so ordered. DATED at Dar es Salaam this 07th day of December, 2018. 07th December, 2018.

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