



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

MILIMANI LAW COURTS

INSOLVENCY NOTICE NO. E 014 OF 2018

IN THE MATTER OF MIDLAND ENERGY LIMITED

AND

IN THE MATTER OF INSOLVENCY ACT 2015

MIDLAND ENERGY LIMITED..... RESPONDENT/APPLICANT

VERSUS

GEORGE MUIRURI T/A

LEAKEYS AUCTIONEERS..... 1ST APPLICANT/RESPONDENT

SYNERGY INDUSTRIAL

CREDIT LTD..... 2ND APPLICANT/RESPONDENT

RULING

1. The Notice of Motion dated 14th September 2020 seeks orders that are akin or really are in the nature of orders of mandamus. A remedy in public law. An early issue is whether the Court has jurisdiction to issue those orders in these proceedings.

2. The orders sought are:-

1.

2. *This Honourable Court be pleased to direct the Respondent i.e Energy and Petroleum Regulatory Authority to issue to the administrators the following licenses to enable the completion of the sale of the business and assets of Midland Energy Limited (Under Administration):-*

a. Import, export and wholesale of LPG in bulk and cylinders.

b. Transport of LPG in bulk.

c. Petroleum Business License (LPG).

d. Storage & Wholesale of LPG in cylinders – Midgas branded.

e. Storage & Filling of LPG in cylinders – Midgas branded.

f. Retail of LPG in cylinders – Midgas branded.

g. Transport of LPG in cylinders – Midgas branded.

h. Storage & Filling of LPG in bulk.

3. This Honourable Court be pleased to direct that the administrators shall be at liberty to transfer to the purchaser of the business and assets of Midland Energy Limited (Under Administration) the said licenses including:-

a) Import, export and wholesale of LPG in bulk and cylinders.

b) Transport of LPG in bulk.

c) Petroleum Business License (LPG).

d) Storage & Wholesale of LPG in cylinders – Midgas branded.

e) Storage & Filling of LPG in cylinders – Midgas branded.

f) Retail of LPG in cylinders – Midgas branded.

g) Transport of LPG in cylinders – Midgas branded.

h) Storage & Filling of LPG in bulk.

4. The costs of this application be met by the Respondent.”

3. Midland Energy Limited (Midland) is in financial distress and a secured creditor African Banking Corporation (ABC) placed it under administration with effect from 16th November 2018. So that the appointment of the Administrator would take effect, ABC lodged a Notice of appointment with this court on 19th November 2018. This would be pursuant to the provisions of section 537 of the Insolvency Act.

4. The tenure of the Administrators has been extended from time to time.

5.. On 28th January 2019, the creditors of the company approved a proposal by the administrators for the sale of the business and assets of the company to a new investor as a going concern. This, it is said, is likely to achieve a better outcome for the company’s creditors in tandem with one of the objectives of administrators (See section 522 of the Insolvency Act). But the proposed sale faces difficulty.

6. Prior to 2018, the company was a member of the now defunct LPG Cylinder Exchange Pool. This pool was established under the Energy (Liquefied Petroleum Gas) Regulations 2009 to govern the exchange of LPG cylinders among the LPG marketing

companies licensed by the then Energy and Regulatory Commission (ERC).

7. In the course of business the company incurred a debt to other LPG cylinder exchange pool members of Kshs.91,690,520.83 as at 23rd November 2017. Arising from its inability to settle the debt ERC revoked its company's LPG licences on 23rd November 2017. It is common ground that the licences have not been reinstated and stand revoked. This is not without significance!

8. The Energy and Petroleum Regulatory Authority (EPRA) is the successor to ERC and is the target of the current application. Julius Mumo Ngonga, one of the administrators of the company, explains why he thinks the orders sought are deserving.

9. EPRA is undoubtedly the industry regulator and one of its mandate is to licence anyone engaged in the petroleum business in Kenya as provided for under the Petroleum Act 2018. The administrators complain that EPRA's demand that the company first pays the incurred debt in exchange for licences is equivalent to it asking that the debt be treated in preference over other debts. That if the Respondent is not compelled to issue the licences as prayed in the application before court, then the administrators will not be able to execute and/or enforce the approved sale.

10. This Court is therefore beseeched as an Insolvency Court to issue the orders so as to enable the administrators complete the mandate as sanctioned by the creditors.

11. In urging this Court to find that it has jurisdiction to deal with this matter, the Applicant cites Article 165 of the Constitution which gives the High Court unlimited original jurisdiction in criminal and civil matters. The Applicant contends that this Court has extensive powers to deal with all matters pertaining to the insolvency of companies. That in addition, section 597 of the Insolvency Act enables the High Court, on application by an Administrator, to give directions with respect to the performance and exercise of the administrators' functions and powers and the conduct of the administration generally.

12. Part VIII of the Insolvency Act makes a raft of provisions for the administration of insolvent companies. Section 521 defines administration in the context of insolvent companies and reads:-

“521. What is administration”

For the purposes of this Act—

(a) a company is “under administration” while the appointment of an administrator of the company continues to have effect;

(b) a company “enters administration” when the appointment of an administrator takes effect;

(c) a company ceases to be under administration when the appointment of an administrator of the company ends in accordance with this Part;

and

(d) a company does not cease to be under administration only because an administrator vacates office (whether through resignation, death, removal or otherwise).”

13. Section 522 is then on the objectives of administration:-

“522. The objectives of administration

(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);

(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.”

14. If there was any doubt, the above provisions make it clear that administration of insolvent companies under the Insolvency Act is all about trying to maintain a distressed company as a going concern so as to achieve a better outcome for the company's creditors as a whole or to realize the property of the company in order to make a distribution to one or more secured or preferential creditors. The interests of the company's creditors as a whole is a central theme in administration of the distressed company. It would therefore seem clear enough that it is a device or mechanism that exists in private law. Private law being:-

“The body of law dealing with private persons and their property and relationships”

(Black's Law Dictionary, Tenth Edition).

15. On the other hand, EPRA is a statutory body and its mandate to issue licences under of the Petroleum Act is a regulatory function. What the applicant asks this Court to do is to direct EPRA to issue certain licences to the company and to then transfer them to the proposed purchasers. The remedy sought is one in the realm of public law, an order for mandamus.

16. It does not seem tenable that this Court can grant the writs in these private law proceedings. And the applicant cannot be heard to grieve about lack of an avenue for legal redress because there is no reason why the administrators should not have commenced judicial review proceedings.

17. But even if this Court were to find that it had jurisdiction, still it will not grant the orders.

18. The Applicant submits that the Court can issue the orders on the strength of section 83 of the Petroleum Act which reads:-

“(1) A licensee shall not transfer or otherwise divest Transfer of any rights, powers or obligations conferred or imposed upon licence or the licensee by the licence or permit without the consent of the licensing authority.

(2) The licensing authority may, on application by any of the following persons, transfer a licence or permit –

- a. in the case of a death of the licensee, to the legal representative;
- b. in the case of the bankruptcy of the licensee or assignment for the benefit of the licensee's creditors generally, to the lawfully appointed trustee or assignee;
- c. in the case of a corporation in liquidation, to the lawfully appointed liquidator;
- d. in any case where the licensee becomes subject to a legal disability, to any person lawfully appointed to administer the licensee's affairs;
- e. or in the case of voluntary transfer of the undertaking, to the new owner of the undertaking.

(3) The licensing authority shall satisfy itself of the legal, technical and financial competence of the transferee to carry out the undertaking.

(4) The transferee shall undertake in writing to comply with the conditions of the licence or permit.

(5) The licensing authority shall not withhold any consent to any application to transfer unless it has reason to believe that public interest is likely to be prejudiced by the transfer.”

19. The entire basis of the application is premised upon a misconstruction of those provisions. In the matter at hand no licences exist. They were revoked on 23rd November 2017 and have never been reissued. Section 83 is about transfer of an existing licence or permit from the holder of a licence or permit to a transferee. In considering whether or not to give consent to a proposed transfer, the licensing authority is required not to withhold consent unless it has reason to believe that it is not in the public interest to grant it. The provision is not about grant of a new licence/permit or its renewal.

20. As to whether or not this Court should force the hand of the licensing authority to grant the licences, the Court cannot ignore the reasons proffered by EPRA for refusing to do so. Clause 10(1) and 10(2) of the 7th schedule of the Petroleum (Liquefied Petroleum Gas) Regulations, 2019 reads:-

“10. (1) An application for the renewal of licence by a brand owner, shall be granted where the brand owner has paid all the debts accrued pursuant to the obligations under the LPG Cylinder Exchange Pool Agreement and as verified in the final invoice issued under paragraph 4(1) of this Schedule.

(2) A brand owner shall submit a letter of confirmation of clearance of the debt from the creditor.”

21. To insist that payment of the incurred debt be made before a renewal of the licence is not to turn the incurred debt into a preferred debt as suggested by the Applicant. It is simply salutary to the reality of the law that a licence shall not be renewed to a brand owner unless all debts accrued pursuant to the obligations under the LPG Cylinder Exchange Pool Agreement have been paid.

22. The Application of 14th September 2020 is without merit and is dismissed with costs.

DATED, SIGNED AND DELIVERED IN COURT AT NAIROBI THIS 2ND DAY OF JUNE 2021

F. TUIYOTT

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17th April 2020, this Ruling has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

PRESENT:

Nixon: Court Assistant

Miss Omari for Applicant

Miss Mwangi for First Community Bank



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