

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF DAR ES SALAAM

AT DAR ES SALAAM

EXECUTION NO. 63 OF 2021

(Arising from civil case no 129 of 2009)

BETWEEN

COAST TEXTILES LIMITED.....APPLICANT

VERSUS

FBME BANK LIMITED.....1st RESPONDENT

CONSOLIDATED HOLDING CORPORATION.....2nd RESPONDENT

FIVE STAR INVESTMENT LIMITED.....3rd RESPONDENT

RULING

MRUMA, J

The Applicants Coast Textiles Limited filed this application citing as enabling provisions **Order XXI Rule 51 of the Civil Procedure Code [Cap 33 R.E. 2019]** for an order that the sum of shillings 145, 946,500,641 and costs of taking out this application be realized from the

liquidators and in default thereof, the Director of the Deposit Insurance Board (the Liquidators of FBME bank be required to hold such amount of money and any interest) pending further orders of the court.

The Applicant is represented by Mr Joseph Rutabingwa of Rutabingwa & Co Advocates while the Respondents are represented by Mr Edwin Joshua Webiro, learned state attorney.

The matter initially proceeded before her worship Victoria Nongwa (Deputy Registrar), but on realizing that it involves issuance of a notice to show cause which in terms of **Rule 1 (j) of Order XLIII of the Civil Procedure Code**, she has no jurisdiction to issue, it was transferred to me.

Rule 51 of Order XXI under which the application is pegged provides that:

"Where the property to be attached is in the custody of the any court or public officer, the attachment shall be made by a notice to such court or officer requesting that such property and any interest or dividend becoming payable thereon may be held subject to further orders of the court from which the notice is issued"

A summons to show cause was issued against Mr Isack N Kiwili, the Director of Deposit Insurance Board, a liquidator of FBME Bank, the judgment debtor in this case. Because notice to show cause is personal writ, Mr Kiwili entered appearance in obedience to the summons. He filed an affidavit to counter the prayer made in the chamber summons.

In his affidavit Mr Kiwili contends that the banking business license of FBME was revoked by the Central Bank and the said bank was placed under compulsory liquidation on 8th May, 2017. Later on Deposit Insurance Board was appointed as a liquidator of that bank.

Following its appointment the DIB issued a notice calling upon all creditors of FBME Bank Limited to submit their claims for purposes of being registered and DIB proceeded with collection of assets of FBME Bank Limited within and outside the country.

It is further an assertion of Mr Kiwili that on 9th June 2017 the Applicant (Decree Holder) submitted to DIB its claims against FBME Bank Limited with supporting documents. The claims were duly registered. On 19th January, 2019 DIB wrote a letter to the Decree Holder informing her that an outstanding liability of Shillings 102, 330,305, 065.87 was registered and that payment would be in accordance with the procedures

provided for in the liquidation law. The decree holder was further informed that distribution of liquidation proceeds had not yet started and that creditors would be informed of the timing of distribution. It is Mr Kiwili's further assertions that on 30th September, 2021 the Decree holder while knowing that her claims had been registered by DIB filed this application claiming for payment of Shillings 145,946,500,641.00 and cost. It is the contention of Mr. Kiwili that FBME Bank Limited is being wound up therefore any execution or attachment cannot be put in force against its assets. He prayed that the application for execution be dismissed as it contravenes the law.

When he was cross-examined on his deposition, Mr Kiwili conceded that FBME Bank Limited was put under liquidation on 8th May 2017 and that by that time the decree in issue was in place and the first application for execution had already been determined and the said bank was ordered to pay. He also said that all assets and properties of FBME are currently under the liquidator DIB. He said that FBME was put under liquidation following revocation of its business licence by the Central Bank of Tanzania.

The decree holder filed a counter affidavit affirmed by Sudhir Kumar Lakhanipal contending that this Application has been filed after the

liquidator had refused to pay the decreed amount as ordered by the court and as per her promises.

From the arguments of both sides above there is no dispute that FBME was a private bank and also there is no dispute that FBME was not placed under liquidation for failure to operate or for failure to repay its debts. Paragraph 2 of the affidavit, Mr. Isack Kiwili the Director of DIB indicates that on May 8, 2017 the Central Bank of Tanzania revoked FBME's banking business license and put it under compulsory liquidation and thereafter appointed DIB as liquidator. It is therefore not an insolvent undergoing.

The DIB was established under Section 37 of the Banking and Financial Institutions Act 2006 and its role as liquidator are explained under section 41 of the same Act. The said section 41(a) provides that: Notwithstanding any other written law,

- (a) Where a bank or financial institution becomes insolvent, the Bank may appoint the Board to be a liquidator of the bank or financial institution and the appointment shall have the same effect as the appointment of a liquidator by the Court under the provisions of the Companies Act.

It therefore goes without saying that a liquidator appointed by the Bank under the Banking and Financial Institutions Act has the same effect and therefore powers as a liquidator appointed by the court under the provisions of the Companies' Act. Powers of a liquidator appointed by the Court are expounded under section 301 (i) of the Companies' Act No.12/2002 which provides as follows:

"The liquidator in a winding up by the Court shall have power with the sanction of the court or of the committee of inspection:-

- (a) To bring or defend any action or other legal proceedings in the name and on behalf of the company;
- (b) To carry on the business of the company so far as may be necessary for the benefit of winding up thereof;
- (c) To appoint an advocate to assist in the performance of his duties;
- (d) To pay any classes of creditors in full
- (e) To make any compromise, or arrangement with creditors or persons claiming to be creditors or having alleging themselves to have any claim present or future, certain or contingent ascertained or sounding only in damages against the company, or whereby the company may be rendered liable;

(f) To compromise all calls and liabilities to calls, debts and liabilities capable of resulting in debts and all claims present and future certain or contingent, ascertained or sounding only in damages, subsisting or supposed to subsist between the company and a contributory or alleged contributory or other debtor or person apprehending liability to the company, and all questions in any way relating to or affecting the assets or the winding up of the company, on such terms as may be agreed, and take any security for the discharge of any such call debt, liability or claim and give a complete discharge thereof "

The term creditor is not defined in both laws i.e. the Banking and Financial Institutions Act and the Companies' Act, but **Black's Law Dictionary 9th Edition by Bryan A. Garner** defines it as a person or company to whom money is owing. Thus the material facts deposed in this case the Applicant is a creditor of the Respondent.

There can be no doubt that FBME bank Tanzania Limited was compulsorily placed under liquidation by the Central Bank of Tanzania (the Bank). Similarly there is no dispute that the Applicant's company holds a court decree against FBME Bank Tanzania Limited dated 27th day of July 2015 which is a period of two years before the said bank was put under

compulsory liquidation. The question that follows is whether the said decree can be executed by order of the court.

It has been submitted generally that the execution of such decree will be void because the judgment debtor's bank is being wound up. In his show cause affidavit the Director of the liquidator has asserted under paragraph 7 that since FBME Bank Limited is being wound up, any execution against its assets would be void.

By so asserting probably the liquidator had in mind section 365 of the Companies' Act which provides that:

"In every winding up (subject in the case of insolvent companies to the application in accordance with the provisions of this Act of the law of bankruptcy), all debts payable on a contingency, and all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages, shall be admissible to proof against the company, a just estimate being made, so far as possible, of the value of such debts or claim as may subject to any contingency or sound only in damages or for some other reason do not bear a certain value"

I have carefully considered the Applicant's application as disclosed in the pleadings. The Applicant's application is for an order of execution of that decree by an order requiring the liquidator to pay decreed amount to the decree holder. The law as quoted in the above provision of the law requires debts and claims to be proved and ranked (by the liquidator for purposes of paying them. On the other hand section 61(2) of the Banking and Financial Institutions Act prescribes the procedures and orders in which the liquidator should pay according to priority. It has been suggested that in view of the decision of the Court of Appeal in **Civil Appeal No 29 of 2017 between North Mara Gold Mines Limited Versus Diamond Motors Limited** (Unreported) where any company is being wound up by court any attachment, sequestration, distress or execution put in force against the assets of the company after commencement of the winding up shall be void. The basis of the decision of the Court of Appeal was section 284 of the Companies Act which provides that:-

"in a winding up by the court, any disposition of the property of the company, including things in action and any transfer of shares, or alteration in the status of the members of the company, made after the

*commencement of the winding up, shall
unless the court otherwise orders be void"*

The court in the North Mara Gold Mines (supra) went on to hold that the said section is to the effect that any disposition of a company's assets or property after presentation to court of a winding up petition is void unless the court directs otherwise. Under Section 286 (2) of the Companies' Act the law says that the winding up of a company by the court is deemed to commence at the time of presentation of the petition for winding up.

In the application before me as of the date of this ruling this court doesn't have the benefit of knowledge of the nature and of any winding up and/or insolvency proceedings filed in any court so as to be able to determine whether granting this execution application would contravene the provisions of sections 284 and 365 of the Companies' Act or not. But assuming that there is winding up proceedings presented in court, section 284 quoted above is to the effect that even where there is a court winding up proceedings court may direct otherwise which means it may order execution to proceed.

As stated at the outset, there is nothing in terms of evidence to show that FBME is insolvent or that at the time of revocation of its banking business licence and compulsory liquidation order or subsequent to that

period it was unable to repay its loans or any other liability so as to term it as an insolvent bank. Accordingly and in my view the question of unfair distribution of its liabilities to its creditors, and other stake holders cannot arise.

Secondly it would be inconceivable and contrary to the provision of Article 107A of the Constitution which declares court as final authority in deciding rights of the parties to subject a court decree to the scrutiny of the liquidator of a company under liquidation. Decree of the court is the formal expression of an adjudication which so far as regards the court expressing it, conclusively determine rights of the parties with regard to the matter (See Section 3 of the Civil Procedure Code Cap 33 R.E. 2019). If the matter has been conclusively determined by the court it cannot be re adjudicated by a liquidator as to ascertain the parties claim in terms of section 365 of the companies Act. In my view a decree is not a claim against the company. It is an entitlement which has been conclusively proved and determined thus, it is not the subject of section 365 which deals with "claims against the company".

I thus, decline the invitation to make a finding that execution process against FBME bank will be void and contrary to the provisions of the law as suggested. To the contrary I find that the Applicant has right

to execute its decree as prayed. Accordingly I grant the Applicant's application and order the liquidator of FBME to satisfy the decree against FBME pursuant to the provisions of Order XXI Rules 51 and 55 of the Civil Procedure Code [Cap 33 R.E. 2019] as prayed in the application.

Order accordingly,



A handwritten signature in black ink, appearing to read "Mruma".

A. R. Mruma,

Judge.

20/5/2022

20/5/2022

Coram: Hon. A. R. Mruma

For the Plaintiff/D/Holder - Mr Rutabingwa for Application

For 1st Defendant /Judgment/Debtor

For the 2nd Defendant/J/Debtor

For the 3rd Defendant/J/Debtor

Mr Edwin in Joshua

Webiro for J/debtor

Cc: Delphina

Mr. Rutabingwa:

The matter is coming for ruling, the Director of DIB is not is not in court.

Mr. Webiro:

It is true that the Director is not around but he was on the way coming. He is asthmatic.

Court:

Ruling delivered.



A. R. Mruma
A. R. Mruma

Judge

20/5/2022.