

MAGNUM (ZAMBIA) LIMITED v BASIT QUADRI (RECEIVERS/MANAGER) &
GRINDLAYS BANK INTERNATIONAL ZAMBIA LIMITED (1981) Z.R. 141
(H.C.)

HIGH
MOODLEY,
24TH
(1981/HN/456)

COURT

JUNE,

1981

J.

Flynote

Civil procedure - Company under receivership - Right of action - Whether has locus standi independent of its receiver/manager - Whether can sue its receiver/manager.

p142

Company - Receivership - Legal proceedings where company under receivership - Who can institute.

Headnote

A preliminary issue was raised in this case as to whether it would be in order for the court to allow the proceedings to continue on the basis that the plaintiff should be Magnum (Zambia) Limited when in fact this company was already under receivership and the receiver/manager appointed under a debenture was the first defendant.

The learned counsel for the plaintiff argued that the principles of agency should apply in this case and that the assets of the company should not be interfered with simply because it could maintain an action against the receiver if it was found that the receiver had acted unlawfully or had misconducted himself in any way.

The defendant on the other hand, contended that the plaintiffs could not properly bring an action in the present form against the defendants when it was apparent that the plaintiff was a company under receivership and that the first defendant was the receiver/manager of the said plaintiff company appointed by the second defendant, under the terms of a debenture entered into between the second defendant and the plaintiff.

Held:

- (i) A receiver who is an agent of the company under receivership is there to secure the interests of the debenture holder and in those circumstances the company concerned is debarred from instituting legal proceedings against its receiver/manager.
- (ii) A company under receivership has no locus standi independent of its receiver. As long as a company continues to be subjected to receivership, it is the receiver alone who can sue or defend in the name of the company.

Cases referred to:

- (1) Pender v Lushington [1877] 6 Ch. 70.
- (2) Re Clifton Place Garage Ltd [1970] 1 All E.R. 35.

For the plaintiff: R.B. Mumba of Ezugha, Musonda and Co, & Dr Mushota of Lusaka Partners.

For the 1st defendant: S. Malama of Jacques & Partners.

For the 2nd defendant: H. Chilonga of A.E. Clark & Co.

Judgment

MOODLEY, J.: On the 2nd of June, 1981, this Court granted an Ex parte summons for an interim injunction at the instance of the plaintiff Magnum (Zambia) Limited restraining the first defendant, Basit Quadri, receiver/manager, from dealing with the plaintiff's assets until such a time that he accounts for his receipts and payments. Subsequently, the plaintiff caused a summons for a committal order for contempt of Court to issue in respect of the first defendant-on the grounds that he had refused to abide by the terms of the interim injunction. The matter

p143

was then adjourned so that the first defendant could appear before this Court to answer the charge of alleged contempt of court. He was represented by Mr Malama of counsel. As a result of the discussions between the court and counsel for both parties it was decided that in the light of the fact that the acts complained of in the interim injunction had been committed prior to the date when the interim injunction was issued, the said interim injunction should be discharged and the issues should be determined by a speedy trial. The parties were given leave to dispense with pleadings and they were required to file affidavits dealing with the issues that had arisen in the matter. In the light of these directives the hearing commenced this morning. The defence contended that the plaintiffs, as presently described, cannot properly bring an action in the present form against the defendants when it was apparent that the plaintiff was a company under receivership and that the first defendant was the receiver/manager of the said plaintiff company appointed by the second defendant under the terms of a debenture entered into between the second defendant and the plaintiff.

The Court then decided to determine as a preliminary issue the question whether it would be in order for this Court to allow the proceedings to continue on the basis that the plaintiff should be Magnum (Zambia) Limited when in fact this company was already under receivership and the receiver/manager appointed under a debenture was the first defendant.

Mr Mumba for the plaintiff has argued that the principles of agency should apply in this case and that the assets of the company should not be interfered with simply because it was under receivership and that the company itself could maintain an action against the receiver if it is found that the receiver had acted unlawfully or had misconducted himself in any way. He submits that the receiver was appointed under debenture and Magnum (Zambia) Limited although under receivership was the principal in this case and that where an agent acts to the detriment of his principal, as in this case, then the principal had the right to bring proceedings against his agent to account for his actions. He cites the cases of *Pender v Lushington* (1) and *Re Clifton Place Garage Ltd* (2) which in the opinion of the court have no direct relevance to the issues in this case. He contends that the only reasonable course that could be taken in such circumstances is for the company to institute proceedings against the agent who in this case was the receiver, if it was found that the agent had acted *mala fide* or unlawfully. He submits that the company is in existence at the

present moment, and has not been wound-up or liquidated. It would be absurd to permit the receiver to act against the interests of the company and it was equitable therefore for the company to sue its agent, namely, the receiver in the circumstances.

Mr Malama for the first defendant, the receiver/manager argues that the kind of agency in issue is different and distinct from agency as understood under the common law. There was little in common between an agent under common law and an agent appointed under a debenture. He submits that Mr Mumba's argument would be valid if the agency was a common law type of agency. The receiver/manager on the other

p144

hand was the agent of the company and this peculiar relationship resulted from the instrument of appointment which, in this case, was the debenture. An agency resulting from a receivership had little in common with the ordinary type of agency, because the powers of an agent in respect of a receivership were clearly set out in the instrument of appointment of a receiver. Thus where a receiver under a debenture misconducts himself in any way the company under receivership had no powers to dismiss the receiver. The powers of dismissal are vested in the debenture holder. He cites the case of *Re Johnson & Co. Ltd* (3), to support his argument that a receiver/manager who is an agent of the company owes no duty to the company. The appointment of a receiver by the debenture holder empowers the receiver to realise, unimpeded, the debenture holder's security. In those circumstances, the company as such could not maintain an action against the receiver because it is the receiver who in effect sues in the name of the company and defends in the name of the company. Thus in this action, in the name of the company, the receiver is sued and, in the name of the company, the receiver defends. The proceedings where the company under the receivership of the first defendant has in fact sued the first defendant in his capacity as receiver/manager, were irregular and that the action which has been commenced in its present form should not be allowed to proceed.

I have considered the arguments in this matter and I have looked at the authorities cited in support of the rival arguments. I must say that none of these authorities cited bear any direct relevance to the preliminary issue. Paragraph 885 of Halsbury's Laws of England (Fourth Edition) reads as follows: "Where the receiver is appointed under a document which provides that the person appointed receiver is to be the agent of the company, and that the company is alone to be answerable for his acts, contracts, and defaults, neither the trustees nor the debenture holders are personally liable in respect of contracts entered into by him, even in respect of contracts entered into after the company has gone into liquidation. When a receiver is declared to be the agent of the company he has power to sue in its name . . .".

In *Kerr on Receivers* (Fourteenth Ed.) at page 174 it is stated: "A receiver acquires no right of action by virtue of his appointment: he cannot sue in his own name as receiver, e.g. for debts to a company, or to parties over whose assets he has been appointed receiver; nor can the court authorise him to do so. In such cases he must maintain the action in the name of the person or persons who would be entitled to sue from his appointment. A receiver may, however, acquire a right of action to sue in his own name: for instance, as the holder of a bill of exchange; etc." At page 308 it is stated that debentures and debenture trust deeds usually provide in express terms that the receiver

was to be agent for the company, as in the case of the statutory power, but that the omission to state in the debenture in express term that the receiver was to be the agent of the company did not necessarily prevent him from doing so. The question was of construction in each case. It goes on to say that the receiver's agency for the company was one with very peculiar incidents.

p145

"Thus the principal may not dismiss the agent, and his possession of his principal's assets is really that of the mortgagee who appointed him. He owes no higher duty to the principal than that of a mortgagee in possession." Halsbury's Laws of England (Third Edition) paragraph 723 reads: "The party having the conduct of the action in which the receiver has been appointed is the proper person to apply to the Court. A receiver should not make application in his own name, unless the parties to the action have refused to do so or have no *locus standi*."

In the case of *Re B. Johnson & Co., Limited* (3) Sir Raymond Evershed, M.R., at page 779 states as follows: "It has long been recognised and established that a receiver and manager so appointed is, by the effect of the statute law, or of the terms of the debenture, or both, treated as the agent of the company, in order that he may be able to deal effectively with third parties while in possession of the company's assets and exercising the various powers conferred on him. In such a case as the present, at any rate, it is quite plain that a person appointed as receiver and manager is concerned, not for the benefit of the company but for the benefit of the mortgage bank, to realise the security: That is the whole purpose of this appointment; and the powers which are conferred on him . . . are . . . really ancillary to the main purpose of the appointment which is the realisation by the mortgagee of the security . . . by the sale of assets. This case dealt with the winding-up of a company, namely, *B. Jonson & Co. Ltd.* The bank had appointed A as receiver and Manager. A immediately terminated the active operations of the company and subsequently the unsecured creditors of the company presented a petition for the compulsory winding-up of the company. A contributory of the company issued a summons in the winding-up under the Companies Act, 1948, to have examined the conduct of A while acting as receiver and manager until the winding-up order was made. Now it should be observed that the company under liquidation was not cited as the plaintiff in this matter. The plaintiff in that case was a contributory of the company and the defendant was the receiver whereas in the instant case the plaintiff company is described as a company which was under receivership and the defendant was its own receiver.

A receiver who was an agent of the company under receivership was there to secure the interests of the debenture holder and in those circumstances the company concerned was debarred from instituting legal proceedings against its receiver/manager. It would be an absurd proposition to suggest otherwise. Apart from principles of law, mere common sense would dictate against the argument put forward by Mr Mumba. If the action was allowed to proceed in its present form, it would be tantamount to suggesting that the receiver can institute proceedings against himself. Quite clearly a company under receivership has no *locus standi* independent of its receiver. As long as a company continues to be subjected to receivership, it, is the receiver alone who can sue or defend in the name of the company. Thus on the preliminary issue, I hold that legal proceedings in the instant case have been irregularly

p146

commenced because, in law, the plaintiff company which is under receivership is precluded from suing its receiver/manager. Accordingly, the auction in its present form is dismissed.

Action dismissed
