

IN THE HIGH COURT FOR ZAMBIA

2010/HPC/0629

AT THE COMMERCIAL LIST REGISTRY

HOLDEN AT LUSAKA

(CIVIL JURISDICTION)

BETWEEN:

DANAIT TRANSPORT LIMITED

PLAINTIFF

AND

ZAMBEZI PORTLAND CEMENT LIMITED

DEFENDANT

Before Hon. Mr. Justice Nigel K. Mutuna this 4th day of July 2012

For the Plaintiff: Mr. G. Locha of Mweemba & Co.

For the Defendant: Mr. J. Mulongo of Messrs Z. Muya & Co.

R U L I N G

Cases referred to:

- 1) *Magnum (Z) Limited -Vs-Quadri (receiver/manager) and Grindlays Bank International (Z) Limited (1981) ZR page 141***
- 2) *Avalon Motors Limited (in receivership)-Vs-Gadsden & Motor City Limited (1998) ZR page 41***
- 3) *Fresh Mint Limited & Others-Vs-Kawambwa Tea Company (1966) Ltd (2008) ZR, Volume 2, page 32***

Other Authorities referred to:

1. Companies Act, Cap 388

2. Kerr on Receivers

This is Defendant's application for misjoinder and joinder. It seeks an order to strike out the Defendant as party and to join of the receiver to the proceedings as sole Defendant.

The application is brought by way of summons filed on 3rd November, 2011, in support whereof is an affidavit and skeleton arguments of even date. The Plaintiff's response is by way of an affidavit in opposition and skeleton arguments filed on 22nd December, 2011.

The brief facts of this case as they relate to this application are that the Plaintiff commenced this action against the Defendant on 21st October, 2010 by way of writ of summons and statement of claim. The claim as it is endorsed in the said writ of summons and statement of claim relates to a contract entered into by the parties on 24th March, 2010, by which the Defendant contracted the Plaintiff to provide transport services for haulage of cement from Ndola to Lusaka. At the time of execution of the said contract, the Defendant was in receivership.

Arising from the said contract the Plaintiff rendered various invoices which the Defendant settled except for invoice number 316 in the sum of K60,014,920.00.

It is contended by the Defendant that since the contract in issue was entered into whilst the defendant was under receivership, the receiver is liable under the contract.

The affidavit in support of the application is sworn by one Daniele Ventriglia. It reveals the fact that the Defendant was from 14th July, 2008 to 29th April, 2010, in receivership under the charge initially of Robert Mbonani Simeza

then Alfred Jack Lungu. Further, that since the Defendant was under receivership, she is informed and verily believes that the receiver is liable for all contracts entered into during the receivership.

The affidavit in opposition was sworn by one Petros Naizghi who confirmed that indeed the Defendant had been in receivership at the time of execution the contract in dispute. He averred further, that the terms of appointment of the receiver were in accordance with the deed of receivership which do not prescribe that the receiver will be personally liable for acts done in his office as receiver. Further that, the Defendant is no longer in receivership and is a viable company capable of suing and being sued, as such the Plaintiff had no choice but to sue the Defendant.

The application came up for hearing on 16th April, 2012.

The gist of the argument by Counsel for the Defendant, Mr. J. Mulongo was that the receiver is liable for the contract in dispute in this matter because it was executed at the time the Defendant was in receivership. In articulating the argument my attention was drawn to section 114 of the **Companies Act** and the cases of **Magnum (Z) Ltd-Vs-Quadri (receiver/manager) and Grindlays Bank International (Z) Ltd(1)** and **Avalon Motors Limited (In receivership) -Vs-Gadsden & Motor City Limited(2)**. He therefore prayed that the Defendant should be struck off from the action and the receiver placed in its stead.

In the Plaintiffs arguments, counsel for the Plaintiff Mr. D. Locha argued thus: the mere fact that a company is placed under receivership, does not mean that it is dissolved completely; the contract entered into between the Plaintiff and Defendant is a valid contract by officers of the Defendant and there is no evidence to show that they had no authority to contract on behalf of the Defendant, therefore the Defendant is bound by the contract; the receiver exercised due care and there is nothing wrong he did in relation to the contract to make him personally liable; the provisions of section 114 of the

Companies Act are only applicable if a company is still in receivership not in a situation such of the one in this case where the Defendant is now a viable company; and there is nothing at law which precludes a third party from suing a company over contracts which were entered into at the time the company was in receivership.

In articulating the foregoing arguments, counsel made reference to **Kerr on Receivers** and the case of **Fresh Mint Limited and Others-Vs Kawambwa Tea Company (1966) Ltd (3)**. He prayed that the application be dismissed.

I have considered the affidavits and submissions by counsel for the two parties. The determination of this application hinges on the interpretation and effect of section 114 of the **Companies Act** and the two cases namely **Magnum (Z) Limited(1)** and **Avalon Motors Limited (2)**. Section 114 of the **Companies Act** states as follows:

“A receiver of any property or undertaking of a company shall be personally liable on any contract entered into by him as receiver except insofar as the contract expressly provides otherwise.”

On the other **Magnum(Z) Limited (1)** case states as follows at page 142

“(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 receivership/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.”

While the **Avalon Motors Ltd(2)** case states as follows:

“(1) shareholders and directors, as well as any body who is properly interested and who has a beneficial interest to protect can sue a wrong doing receiver or former receiver in their own names and in their own right.”

The **Magnum (1)** case whose principle was restated in the **Fresh Mint Limited (3)** case confirms the fact that the receiver is an agent of the company under receivership. It goes further and clothes the receiver with the locus standi to be sued and to sue on behalf of the company for as long as the company remains in receivership. As such agent, the receiver has the authority to enter into contracts that bind the company. It must follow therefore, that once a company ceases to be in receivership, as in this case, it is the company that assumes the locus standi to sue and be sued and is responsible for any obligations under any contracts entered into by the receiver. I therefore agree with the argument by counsel for the Plaintiff that the rightful person to sue in this matter is the Defendant and not the receiver because the company now has the capacity to be sued as a viable concern. I am fortified in my finding by virtue of the fact that the basic principle of the law of agency states that the principal will be liable for the act of its agents. I also agree with the argument by counsel for the Plaintiff that 114(1) of the companies Act is only of effect whilst the company is in receivership. This arises from the fact that the receiver stands in the shoes of the company and as such if he enter into any contract he must be made liable whilst the company is in receivership.

The liability of a receiver as envisaged in the **Avalon Motors Ltd** case relates to an erring receiver during and after the receivership, which action must be taken by interested parties against the receiver and not to absolve the company from a suit by a third party as is sought to do in this matter.

In view of my findings in the preceding paragraphs I find no merit in this application and I accordingly dismiss it with costs. I further direct that the matter come up for a status conference on 28th day of August 2012 at 9:20 hours.

Leave to appeal is granted

Delivered this 4th day of July 2012

NIGEL K. MUTUNA

HIGH COURT JUDGE