

**IN THE HIGH COURT FOR ZAMBIA
AT THE DISTRICT REGISTRY
AT KITWE**

2000/HK/205

(Civil Jurisdiction)

BETWEEN:

MAHENDRA SRILAL RODRIGO

1ST PLAINTIFF

QUADRANT ELECTRONIC LIMITED

2ND PLAINTIFF

AND

SHARAD NAYEE

DEFENDANT



**IN THE HIGH COURT FOR ZAMBIA
AT THE DISTRICT REGISTRY
AT KITWE**

2000/HK/274

(Civil Jurisdiction)

- IN THE MATTER OF** : The Companies Act Chapter 388 of the Laws of Zambia
- IN THE MATTER OF** : Zarold Limited
- IN THE MATTER OF** : A Floating charge dated 11th February, 1999

BETWEEN:

SHARAD NAYEE

APPLICANT

AND

STEVEN C. M. MALAMA(sued as Receiver of Zarold Limited)

1ST RESPONDENT

MAHENDRA SRILAL RODRIGO

2ND RESPONDENT



Before: E.M. Hamaundu, J

For the Plaintiffs/2nd respondent: Mr S. Twumasi, Messrs Kitwe
Chambers

For the Defendant/Applicant : Mr W. A. Mubanga, S.C.,
Messrs Permanent & Chilupe
Chambers

For the 1st Respondent : Not represented

JUDGMENT

Legislation referred to:

Companies Act, Chapter 388 of the Laws of Zambia, Section 371

The two consolidated matters stem from the same financial transaction between the parties. In order to put the dispute in the two actions in clear perspective I will give a brief account of the undisputed facts leading to the dispute, so that the relationship between the two actions is clear.

In July 1998, the two plaintiffs Mahendra Rodrigo and Quadrant Electronic Limited entered into a financial and business transaction with the defendant Sharad Nayee and his company called Zarold Limited. In the course of that transaction, the company Zarold Limited executed a floating charge over its assets

in favour of the 1st plaintiff, Mahendra Rodrigo on 11th February 1999. The terms of the floating charge empowered Mahendra Rodrigo to appoint a receiver upon the occurrence of any one of a number of events which would render the money secured by the charge to become payable. Pursuant to those terms, Mahendra Rodrigo did, on 29th February, 2000, appoint Steven C. M. Malama as receiver of Zarold Limited. On 19th May, 2000, Mahendra Rodrigo and Quadrant Electronics Limited issued a writ of summons against Sharad Nayee, claiming the sum of US\$52,500. In response, Sharad Nayee also issued originating summons on 7th July, 2000, challenging the appointment of the receiver.

The contention by the plaintiffs in their action was that on 27th July, 1998, Sharad Nayee borrowed a sum of US\$43,125 from the 1st plaintiff, Mahendra Rodrigo, and that Sharad Nayee signed a promissory note to that effect. Again, on 13th August, 1998 Sharad Nayee and his company Zarold Limited jointly bought from the 2nd plaintiff Quadrant Electronics Limited, various assets and stock totalling the sum of US\$29,375. Of the total money that was owed, a sum of US\$52,500 remains unpaid. In defence, Sharad Nayee admitted signing the promissory note for the sum of US\$43,125 but denied having received the amount, saying that it had merely been

an arrangement to assist the plaintiffs with tax obligations. Sharad Nayee also admitted having bought the assets and stock of Quadrant Limited but went on to explain that, infact, the price of US\$29,375 had been settled.

The contention by Sharad Nayee in his application under the Companies Act was that the appointment of a receiver over Zarold Limited was void on the following grounds;

- (i) that the 1st plaintiff did not comply with the mandatory requirement to lodge a notice with the Registrar of Companies within seven days of the appointment;
- (ii) that at the time that the receiver was appointed, Zarold Limited had already been struck off the Register of Companies; and
- (iii) that, in any event, the price for the assets and stock having been paid and the sum indicated on the promissory never having been paid to Sharad Nayee, the grounds for appointing a receiver had not arisen.

In defence to Sharad Nayee's application, the 1st plaintiff contended that there was no delay in the filing of the notice and that Zarold Limited had, infact, not been struck off the register.

Mahendra Rodrigo testified on behalf of the plaintiffs. His testimony was as follows:

He was a shareholder and Managing Director of the 2nd plaintiff, Quadrant Electronics Limited. He also knew the defendant Sharad Nayee, who was a business colleague.

Between 5th January, and 15th July 1998, the defendant Sharad Nayee borrowed from him some sums of money in instalments. The amounts accumulated to the sum of US\$43,125. The defendant issued a post-dated cheque for this amount. When the 1st plaintiff was about to deposit the cheque, Sharad Nayee said that he had no money and needed some more time to pay. It was then agreed that he should issue a promissory note. The note did contain a schedule showing the dates and amounts by which he was going to liquidate the sum owed. The promissory note was dated 27th July, 1998. The defendant paid a sum of US\$12,500 on 11th August, 1998, according to the schedule. Thereafter, he has not paid any other money on that debt.

The 1st plaintiff's testimony continued as follows:

On 13th August, 1998, he sold the stock of the shop in Kitwe to the defendant and his company Zarold Limited. The total value of the stock was US\$29,375. The defendant paid a sum of US\$7,500

towards this price on or about 31st September 1998, leaving a balance of US\$21,875. This debt was owed to the 2nd plaintiff Quadrant Electronics Limited, but the 1st plaintiff bought and took over the debt on 11th February, 2000. This meant that there was now owing a sum of US\$30,625 on the promissory note and a sum of US\$21,875 on the price of the stock, bringing the total amount due to US\$52,500.

In cross-examination, the 1st plaintiff said that the promissory note was not executed in order to enable the plaintiffs evade tax. He also said that the money owed on the promissory note and on the sale of the stock were consolidated. Then Zarold Limited signed a debenture as security for the consolidated sum.

That was the case for the plaintiffs.

The defendant, Sharad Nayee testified at the hearing. The following was his testimony: Sometime in July 1998, he was informed by one of his business associates that a shop that was next to his was up for sale. He approached the owner of that shop, who is the 1st plaintiff Mahendra Rodrigo. The goods in the shop were of an electrical nature; his shop was also trading in like items. Mr Rodrigo had a price for each item of goods and, in addition, he wanted a sum of US\$20,000 for the business's goodwill.

The defendant continued and stated that; he did not intend to buy the whole stock. So, he instead looked at the list of the items in order to select those that he wanted. The total value of the goods that he had selected came to US\$52,200. When the sum for goodwill was added to the price of the stock, the total price for the shop came to US\$72,000. By agreement between the parties, this amount was split in two parts: a sum of US\$43,000 was documented in a promissory note while a sum of US\$29,375 was documented in the sales agreement. This latter sum represented the goods that were invoiced. The amount reflected in the promissory note represented the price of the goods that were not invoiced since the 1st plaintiff wanted to avoid paying value added tax on them. A few months down the line, differences arose between them. The areas of disagreement were: first, the 1st plaintiff had misrepresented the volume of the sales and the turnover of the shop. Secondly when the sum of US\$20,000 as goodwill of the business was agreed upon, it had been on the assumption that the defendant was taking over a running company. In reality, however, the defendant was only taking over the tenancy and part of the goods. Therefore, the defendant started disputing the figure of US\$20,000 for goodwill which he had earlier accepted.

The defendant admitted that he did have difficulties in keeping up with the repayment schedule. He went on to say that, as a result, the 1st plaintiff came up with the idea that they execute a floating charge on the assets of Zarold Limited. The document was drawn and they both signed it in January, 1999.

The defendant continued as follows: After the execution of the floating charge, he made several payments, both by cheque and cash. About US\$16,000 was paid on the sale agreement. There were further various cash payments that he made but which the 1st plaintiff refused to sign for when he collected them. There were also some cheque payments made to the 1st plaintiff's nominated off-shore companies. In March, 2000, the 1st respondent appointed a receiver, Mr Steven Malama who remained in place for two to three months. The defendant successfully challenged the receivership.

The following were the defendant's responses in cross-examination: According to a clause in the floating charge, the charge was in addition to the promissory note and the sales agreement. He did instruct a Mr Steve Dyson to pay US\$12,500 on 11th August, 1998 towards the money reflected on the promissory note.

That was the case for the defendant.

Mr Steven Malama, the 2nd respondent in the matter commenced by Sharad Nayee, did not testify. I am aware that Mr Steven Malama, the receiver in this matter, was an eminent lawyer. I am aware also that Mr Steven Malama died several years ago, before this matter reached the defence stage. Hence, the reason for the absence of his testimony.

The appointment of the receiver which gave rise to the action by Sharad Nayee is said to have been precipitated by the alleged debt owed by Sharad Nayee on the promissory note and the sales agreement which is the subject of the action by Mahendra Rodrigo and Quandrant Electronics Limited. Therefore, the resolution of the second action will largely depend on the resolution of the first action. I have set out at the beginning the undisputed preliminary facts. As for the rest of the facts, the dispute lies in whether the defendant, Sharad Nayee owes any money to the two plaintiffs. On that dispute, the points of differences are these: While the plaintiffs contend that sum of US\$43,125 reflected in the promissory note was actually borrowed by, and remitted to, Sharad Nayee the latter contends that, in fact, he did not receive that money physically; but that he had merely executed the promissory note in order to assist the 1st plaintiff avoid paying tax on the amount reflected thereon.

The second point of difference is that, while the plaintiffs contend that there is still money owing on the price for the shop and its stock, the defendant contends that the price was fully paid.

I have seen the promissory note dated 27th July, 1998, which is on record and states that Shard Nayee and Zarold Limited promised to pay to Mahendra Rodrigo the sum of US\$43,125. According to that note, that money was to be paid in the following manner;

- (i) A sum of US\$12,500 on 11th August, 1998
- (ii) A sum of US\$7,500 on 31st August, 1998
- (iii) A sum of US\$15,000 on 30th October, 1998 and;
- (iv) A sum of US\$8,125 on 31st December, 1998

The note also stated that should there be default in payment of any of the instalments, then the whole amount would become due.

I have also seen the sales agreement dated 13th August, 1998 between the 2nd plaintiff Quadrant Electronics Limited of one part and Sharad Nayee and Zarold Limited of the other part. The agreement was for the sale of the stock in the 2nd plaintiff's shop to Sharad Nayee and Zarold Limited. The price of the stock was

US\$29,375. According to that agreement, the price was to be paid in the following manner;

- (i) a sum of US\$7,500 on 21st September, 1998;
- (ii) a sum of US\$15,000 on 30th November 1998; and
- (iii) a sum of US\$6,875 on 31st December, 1998.

That agreement also provided that, in the event of default in payment on any of the instalments, the whole purchase price would become due.

Then, I have also seen the floating charge, which the parties also refer to as the debenture. This was dated 11th February, 1999. That charge acknowledged the debt said to be owed as evidenced by the promissory note. It also acknowledged the debt said to have been created by the sale agreement. It also acknowledged that Sharad Nayee and Zarold Limited were in default of payments on those two instruments. As security for whatever amount was remaining unpaid, the deed went on to charge, by way of floating charge, all the property of Zarold Limited; that is, stocks, bonds securities, fixtures, plant and machinery etc. As I have set out earlier, the 1st plaintiff was empowered to appoint a receiver over Zarold Limited in the event, among several other events, of Sharad

Nayee and Zarold Limited defaulting on their obligations under the promissory note and the sale agreement. According to that deed, the total outstanding amount then was US\$52,500. The deed then went on to give the two borrowers a grace period of three months from the date of signing the deed. Thereafter, the borrowers were to pay this sum within three months. In the meantime, the deed provided that an interest rate of 2% per month would be applied on the sum due as from 1st January, 1999 which interest the borrowers were obliged to be clearing, monthly.

The question now is, was the sum of money stated in the promissory note merely an arrangement to enable the 1st plaintiff evade paying tax? The documents that I have examined strongly suggest otherwise. The promissory note was executed by the defendant in July, 1998. Yet, almost seven months later, in February, 1999, the sum showing in the promissory note was still being acknowledged by the parties as a debt that the defendant had incurred. That acknowledgment was contained in a floating charge; a document which posed very serious consequences on the property of Zarold Limited. I do not think that, when the defendant, Sharad Nayee, was signing the floating charge, he was still assisting the 1st plaintiff to evade tax. Therefore, I find the 1st plaintiff's version more

plausible; that the defendant had borrowed some sums of money totaling US\$43,125 which culminated into the execution of the promissory note. I, accordingly, find that as a fact.

The next question is, did the defendant pay the money outstanding on the sale agreement. In answering that question, the starting point is the floating charge. According to that deed which was signed by the parties on 11th February 1999, there were some sums of money still owing on both the sale agreement and the promissory note; the total amount come to US\$52,000. Therefore, as at 11th February, 1999, the defendant and Zarold Limited were still owing money on the promissory note and the sale agreement. So if the defendant did clear the amount outstanding on the sale agreement, that could only have been after 11th February 1999. The 1st plaintiff's testimony was that the only payments made by the defendant were as follows:

- (i) A sum of US\$12,500 on the promissory note, on 11th August, 1998, leaving a balance of US\$30,625
- (ii) A sum of US\$7,500 on the sale agreement, on 31st September, 1998, leaving a balance of US\$21,875.

When you add the two balances, they come exactly to US\$52,500. This was the position obtaining as at 11th February, 1999 when the

floating charge was signed. I have not seen any evidence of payments after the floating charge was executed. That means that the amount still remains owing. It follows, then, that the 1st plaintiff was on firm ground when, on the 29th February, 2000, he invoked a clause in the floating charge that empowered him to appoint a receiver. It follows, further, that the defendant cannot impeach the appointment of the receiver on the following grounds contained in the originating summons;

- (i) that the sum of U\$43,125 was never remitted to the defendant and Zarold Limited;
- (ii) that the plaintiffs have no proof to show the actual transfer of money amounting to US\$43,125;
- (iii) that, in any event, the promissory note was stage managed to enable the plaintiffs evade tax; and
- (iv) that the money owed on the sale agreement had been settled.

It only remains to be seen whether the appointment can be revoked on the other grounds set out in the originating summons. One other ground that the defendant advanced in the summons is that Zarold Limited was irregularly placed under receivership

because by that time it had already been struck off the register of companies.

In response to that contention, the 1st plaintiff exhibited a gazette notice which reversed an earlier notice by the Registrar of Companies which had purported to state that Zarold Limited was struck off the register of companies. I have seen both gazette notice number 422 of 1999, dated 12th November, 1999, which gave notice that Zarold Limited was one of the companies that would be struck off after three months if no cause to the contrary was shown, and gazette notice number 316 of 2000, dated 18th August, 2000 which revoked gazette notice number 422 of 12th November, 1999. The latter notice stated that the earlier notice had been issued inadvertently. What is important to note also is that, after the expiration of three months from the issuance of the first notice, the Registrar did not issue another notice under **S.361(5)** declaring that Zarold Limited had now been struck off the Companies Register. I, therefore, find as a fact that Zarold Limited was never struck off the register of companies. Consequently, the appointment of the receiver cannot be revoked on the ground that, at the time of the appointment, Zarold Limited had been struck off the register of companies.

The last ground upon which the defendant would like the appointment of the receiver revoked is that the 1st plaintiff did not lodge a notice with the Registrar of Companies within 7 days of appointing Mr Steven Malama as receiver of Zarold Limited.

The defendant exhibited a notice of appointment filed by the 1st plaintiff under **Section 109(1)** of the **Companies Act** notifying the Registrar that he had appointed Mr Steven Malama as Receiver of Zarold Limited. According to that notice, the appointment was made on the 29th February, 2000, while the notice itself was lodged on 8th March, 2000. Clearly, the notice was lodged a day outside the period of 7 days. The contention by Mr Steven Malama, who was the 1st respondent in the defendant's action, was that the consequences of documents being filed out of time were now in the sole discretion and responsibility of the Registrar of Companies under **Section 371(3) and (4)**. According to Mr Malama, when the Registrar received and filed the notice of appointment on 8th March, 2000, the registration became valid.

I agree with Mr Malama. **Section 371(3)** of the **Companies Act** provides:

“subject to this section, where any document or particulars are lodged with the Registrar after the end of

the period fixed for its lodgment, the Registrar shall accept it for registration upon payment of such additional fee as may be prescribed.”

Subsection (4) of the said section provides:


“The Registrar may reduce or waive any additional fee imposed under Subsection (3) if he is satisfied that the failure to lodge the document or particular was caused or continued solely through administrative oversight and that no person is likely to have suffered damage or to have been prejudiced as a result of the failure.”

In this case, it was open to the Registrar to reject the 1st plaintiffs notice when it was presented a day after the period had elapsed. The fact that the notice was allowed to be lodged means that the Registrar may have accepted it under either of the above two provisions. Therefore, the notice of appointment was perfectly lodged. It follows, then, that the appointment of the receiver cannot be revoked on the ground as contended by the defendant that the notice of appointment was filed outside the period of 7 days.

All the grounds mounted by the defendant to challenge the appointment of the receiver have failed. The defendant's entire action, consequently, follows suit; and is dismissed.

The plaintiffs, on the other hand, have proved in their action that the defendant, Sharad Nayee, owes the sum of US\$52,500. I enter judgment in that sum with interest at 2% per annum from the date of issue of writ, until the date of judgment. Thereafter, the same rate of interest shall continue to apply until the date of payment. The plaintiffs will have costs of the two consolidated actions.

Dated the^{8th} day of^{December} ~~January~~ 2017

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E. M. Hamaundu
HIGH COURT JUDGE