

IN THE HIGH COURT FOR ZAMBIA  
AT THE COMMERCIAL REGISTRY  
HOLDEN AT LUSAKA  
(Civil Jurisdiction)

2020/HPC/0721

In the matter of Kapiri Glass Manufacturing Co. (2008) Limited (in Receivership)

In the matter of the Corporate Insolvency Act No. 9 of 2017

In the matter of Order 30 Rule 11 of the High Court Rules, Chapter 27

**BETWEEN:**

MARTIN MUTONDO (*Suing as Receiver/Manager  
of Kapiri Glass Manufacturing Co. (2008) Limited  
(in Receivership)*)

**PLAINTIFF**

AND

03 NOV 2020

DEVELOPMENT BANK OF ZAMBIA

**DEFENDANT**

Before the Honourable Mr. Justice K. Chenda on 3<sup>rd</sup> November 2020

*For the Plaintiff : Mr S. Nyirongo of Mulenga & Wallace Advocates*  
*For the Defendant : Mr M.M. Mukonde - In House Counsel*

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**JUDGMENT**

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**Legislation (primary and subsidiary) referred to:**

- (i) The Corporate Insolvency Act No. 9 of 2017
- (ii) The Corporate Insolvency (Forms and Fees) Regulations, 2019, Statutory Instrument No. 41 of 2019

**Case Law:**

- (iii) *Bidvest Food Zambia Limited & 4 Ors v CAA Import & Export Limited* - Appeal No. 04/2018

**Authoritative Texts:**

- (iv) Chitty on Contracts 29<sup>th</sup> Edition (2004), Vol. 1 (General Principles), London: Sweet & Maxwell

- (v) P. Watts & F.M. B. Reynolds, Bowstead and Reynolds on Agency, 19<sup>th</sup> Edition (2010), Sweet & Maxwell: London at article 56 page 288-289
- (vi) Halsbury's Laws of England 4<sup>th</sup> Edition (1990) Reissue Vol 1(2) at paragraph 121, page 86

## **1 INTRODUCTION AND BACKGROUND**

- 1.1 The Plaintiff commenced this action by originating summons<sup>1</sup> for recovery of remuneration and expenses relating to his services as receiver and manager of Kapiri Glass Manufacturing Co. (2008) Limited (the "**Company**") at the instance of the Defendant bank.
- 1.2 The Plaintiff's case was supported by a primary affidavit filed on 14<sup>th</sup> September 2020 and an affidavit in reply on 12<sup>th</sup> October 2020 following the Defendant's affidavit in opposition dated 7<sup>th</sup> October 2020.
- 1.3 The Plaintiff also filed written arguments on 14<sup>th</sup> September 2020, whilst the Defendant tendered its written arguments on 7<sup>th</sup> October 2020. The set of arguments was completed with a reply from the Plaintiff on 12<sup>th</sup> October 2020.
- 1.4 At the substantive hearing on 16<sup>th</sup> October 2020 Counsel for both parties substantially relied on the documents filed.

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<sup>1</sup> Amended on 6<sup>th</sup> October 2020

1.5 I am grateful to Counsel for the parties for the industry employed in the documents presented and after a careful consideration thereof alongside the submissions, my decision is as set out below.

## **2 FACTS, EVIDENCE AND ISSUES**

2.1 The following facts are common cause from the affidavit evidence:

- (i) the Plaintiff was appointed by the Defendant as receiver and manager of the Company to recover the monies owed by the Company to the Defendant as a secured creditor;
- (ii) the appointment was by letter dated 28<sup>th</sup> January 2019 from the Defendant to Plaintiff (the "**Letter of Appointment**") and a deed of appointment registered at PACRA on 21<sup>st</sup> February 2019 (the "**Deed of Appointment**");
- (iii) by letter dated 19<sup>th</sup> August 2020, the Defendant terminated the Plaintiff's appointment;
- (iv) the Plaintiff queried the termination in his letter dated 1<sup>st</sup> September 2020; and
- (v) following the termination, the Plaintiff has not been paid remuneration for his services nor for expenses incurred during his tenure of office as receiver of the Company.

2.2 The affidavit evidence however reveals the following controversy between the parties -

(i) the Plaintiff alleges:

- a) that through his initiatives there were various options identified for the recovery of the debt owed by the Company to the Defendant;
- b) that he incurred various expenses during the course of duty as receiver; and
- c) that the Defendant sent him a letter purporting to terminate his appointment as receiver when in fact not; and
- d) that the Defendant has not addressed the issue of the Plaintiff's remuneration and expenses as receiver of the Company.

(ii) the Defendant counter alleges:

- a) that the appointment of the Plaintiff was validly terminated;
- b) that the Plaintiff is not entitled to remuneration since he did not make any recoveries towards the debt of the Company; and
- c) that the Deed of Appointment has provision for meeting expenses which are substantiated and properly incurred.

2.3 The issues for determination as I see them therefore are:

- (i) was the termination of the Plaintiff's appointment as receiver of the Company by the Defendant lawful; and
- (ii) how are the Plaintiff's remuneration and expenses as receiver of the Company to be treated?

### 3 ANALYSIS

#### *The Contention of Termination of the Plaintiff's Appointment*

3.1 The **Corporate Insolvency Act**<sup>2</sup> (the "**CI Act**") recognizes in section 4(3) that a receiver can be appointed (without a Court order) pursuant to a contractual instrument. I reproduce the exact wording as follows -

*"4. (1) Where a charge over property of a company has become enforceable, the Court may, on the application of the chargee, appoint a receiver of the property.*

*(2) The Court may, in the case of a floating charge, whether or not the charge has become enforceable, on the application of the chargee, appoint a receiver of the property and undertaking of the company if the charge is satisfied that events have occurred or are about to occur which render it unjust to the chargee that the company should retain power to dispose of the company's assets.*

*(3) A person may appoint a receiver under deed of appointment.* (Emphasis added)

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<sup>2</sup> No. 9 of 2017

3.2 The **CI Act**, in section 20, also provides for various ways in which the appointment of a receiver can come to an end which include:

- (i) death;
- (ii) resignation;
- (iii) cessation of registration as an insolvency practitioner;
- (iv) a terminal Court order; and
- (v) by revocation of the deed of appointment.

3.3 In that regard, of the most relevance to this case is section 20(3), reproduced as:

“20. (1) ---  
(2) ---  
(3) A receiver may be removed by the Court, on application to the Court by the holder of a charge by virtue of which the receiver was appointed, or by revocation of the deed of appointment.” (Emphasis added)

3.4 Coming to the case before Court, the Deed of Appointment contained the following in clause 5:

“The Bank may terminate the Receiver/Manager’s appointment at any time by notice in writing. Upon that termination the Receiver/Manager shall promptly give up possession and control of the Security Assets to or as directed by the Bank.” (Emphasis added)

3.5 It is thus without a doubt that the Deed of Appointment had a termination clause.

3.6 The learned authors of **Chitty on Contracts**<sup>3</sup> offer the following guidance on clauses for termination by notice and their operation:

*“Requirements as to notice. Where the terms of the contract expressly or impliedly provide that the right of termination is to be exercised only upon notice given to the other party, it is clear that notice must be given for the contract to be terminated pursuant to that provision. Any notice must be sufficiently clear and unambiguous in its terms to constitute a valid notice...”*<sup>4</sup>

(Emphasis added)

3.7 In the recent judgment of the Supreme Court in **Bidvest Food Zambia Limited & 4 Ors v CAA Import & Export Limited**<sup>5</sup>, Malila, JS pronounced as follows with respect to termination clauses and the sanctity of contracts:

*“Where a provision for termination exists in the distributorship contract, the courts will uphold freedom of contract. Where in the present case, no termination clause existed, the contracts were determinable by reasonable notice.”*<sup>6</sup> (Emphasis added)

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<sup>3</sup> Volume 1 (General Principles), 29<sup>th</sup> Edition (2004), London: Sweet & Maxwell

<sup>4</sup> Ibid., at para 22-050, pages 1307-1308

<sup>5</sup> Appeal No. 04/2018

<sup>6</sup> Ibid., at J48

3.8 Coming to the case before Court, the evidential record shows the issuance of a letter by the Defendant dated 19<sup>th</sup> August 2020 to the Plaintiff<sup>7</sup> stating:

*"19<sup>th</sup> August 2020*

*The Receiver Manager  
Kapiri Glass Manufacturing Co. (2008) Limited (In Receivership)  
Kapiri Mposhi  
Zambia*

*Attention: Mr. Martin Mutondo*

*Dear Sir,*

*RE: TERMINATION OF RECEIVERSHIP - KAPIRI GLASS  
MANUFACTURING CO. (2008) LIMITED*

*We refer to the above captioned subject.*

*We refer to your appointment of Receiver of Kapiri Glass Manufacturing Co. (2008) Limited by the Development Bank of Zambia.*

***Kindly be advised that your appointment as Receiver under the Offer of Appointment as Receiver date 28<sup>th</sup> January 2019 is hereby terminated with immediate effect. Kindly return to us all documentation availed to you by ourselves in your capacity as Receiver.***

***Further, please be advised that all expenses incurred during the Receivership will be paid by the Company upon production of supporting documentation.***

*You are further requested to immediately file at the Companies Registry the Notice of Ceasing to act as Receiver or Receiver and Manager.*

*Kindly acknowledge safe receipt and feel free to contact the undersigned for any clarification you may have on the matter.*

*Yours faithfully,*

*Development Bank of Zambia*

*Dr. Samuel Bwalya  
MANAGING DIRECTOR" (Emphasis added)*

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<sup>7</sup> Appearing in the affidavit in support of originating summons as exhibit "MM2"

3.9 The wording of the letter was clear and unambiguous that the Defendant was notifying the Plaintiff of the immediate revocation of his appointment as receiver of the Company.

3.10 Thus based on:

- (i) section 20(3) of the CI Act which recognises freedom to terminate; and
- (ii) clause 5 of the Deed of Appointment which prescribed the mode of termination,

3.11 I find that the appointment of the Plaintiff was validly revoked by the Defendant through the letter of 19<sup>th</sup> August 2020.

***The Contention of the Plaintiff's Remuneration and Expenses***

3.12 The **CI Act** in section 11 confers a right of remuneration on a receiver and prescribes the formula and ceiling for remuneration

***"11. (1) Subject to subsection (2), a receiver is entitled to the payment of a fee which shall be a percentage of the proceeds of the receivership.***

***(2) Despite the generality of subsection (1), the fee payable to a receiver shall not exceed an amount that may be prescribed by statutory instrument.*** (Emphasis added)

3.13 The CI Act also recognises that where the receivership is constituted by a deed of appointment, it shall be governed by that deed. I reproduce section 13(1) for reference:

**"13. (1) A receiver appointed under a deed of appointment shall, subject to section 14, be considered to be an agent and officer of the company, and not an agent of the persons by or on behalf of whom the receiver is appointed, and the receiver shall act in accordance with the deed of appointment under which the receiver is appointed, and with any directions of the Court specified in an order of the Court."**  
(Emphasis added)

3.14 As for the ceiling on remuneration expressed in section 11(2) of the CI Act, the prescription thereof is found in the **Corporate Insolvency (Forms and Fees) Regulations, 2019**<sup>8</sup> which in regulation 12 also recognises the freedom of contract as follows -

"12. (1) **A receiver, business rescue administrator or liquidator shall, on taking instructions, agree with the client, the fee payable.**

(2) **Despite sub regulation (1), the fee payable to a receiver, business rescue administrator or liquidator shall not exceed**

(a) **ten percent of the net proceeds of receivership or liquidation; and**

b) **five percent of the net assets of the company in the case of business rescue.**" (Emphasis added)

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<sup>8</sup> Statutory Instrument No. 41 of 2019

3.15 In the case before Court, the Deed of Appointment had the following prescription on remuneration in clause 4:

**"The remuneration of the Receiver/Manager for the performance of his duty shall be a fee of 2% (Two per centum) of the recovered amount."** (Emphasis added)

3.16 Therefore, provided that there is evidence of a recovery made by the Plaintiff, then he would be entitled to be paid 2% of that recovery but up to a maximum amount of ten percent of the net proceeds of the receivership.

3.17 In ***Galaunia Farms Limited v National Milling Company Limited***<sup>9</sup>, the Supreme Court reaffirmed that the burden to prove any allegation is always on the one who alleges.

3.18 I have searched the evidence before Court and found no conclusive record of an inflow of funds attributable to the Plaintiff as part of the debt recovery for which he was appointed by the Defendant.

3.19 I am therefore not convinced that he had earned his right to remuneration in respect of his tenure as receiver.

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<sup>9</sup> (2004) ZR1 at page 9

3.20 Further and without derogation to the provisions of section 13 of the **CI Act** (*which deal with the position of the Plaintiff in relation to the Company for acts done during his tenure of office*), I am also fortified (*over the Plaintiff's relationship with the Defendant under the Deed of Appointment*) by the learned authors of **Bowstead and Reynolds on Agency**<sup>10</sup> who have this to say in article 56 page 288-289:

**"AGENTS' REMUNERATION DUE UPON THE HAPPENING OF AN EVENT**

**(1) Where an agent is entitled to his remuneration upon the happening of a future event, his entitlement does not arise until that event has occurred.**

**(2) The event upon which the agent's entitlement to remuneration arises is to be ascertained from the terms of the agency contract.**

**(3) Where the event upon which the agent's entitlement to remuneration arises does not occur, the agent will not be entitled to receive remuneration on a quantum meruit basis unless provision for this is expressly made in the agency contract or unless a term can be implied into the agency contract in order to give it business efficacy or otherwise to give effect to the intentions of the parties.** (Emphasis added)

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<sup>10</sup> P. Watts and F.M. B. Reynolds, 19<sup>th</sup> Edition (2010), Sweet & Maxwell: London

3.21 In the case before Court, it is manifestly clear from the Letter of Appointment and Deed of Appointment that the Plaintiff was engaged to recover the debt due to the Defendant from the Company.

3.22 The Plaintiff is not entitled to remuneration as:

- (i) there is no evidence of a recovery at his instance;
- (ii) the Letter of Appointment and Deed of Appointment did not provide for remuneration on a *quantum meruit* basis if there was no recovery; and
- (iii) it cannot be implied that he should be remunerated on a *quantum meruit* basis as the mechanism of the Letter of Appointment and Deed of Appointment was such that the funds recovered through the Plaintiff were to also serve as a source for the payout of his remuneration.

3.23 Additionally and within the same context as 3.20 above, the learned authors of **Halsbury's Laws of England**<sup>11</sup> exposit that:

"An agent who is prevented from earning his remuneration by the conduct of the principal, is entitled to recover damages only if he can show some term of the contract of which the principal is in breach."  
(Emphasis added)

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<sup>11</sup> 4<sup>th</sup> Edition (1990) Reissue Vol 1(2) at paragraph 121, page 86

3.24 There can be no question of liability on the part of the Defendant for having prevented the Plaintiff from earning a remuneration when the Defendant terminated his appointment. This is because as has been found earlier, the termination was lawful.

3.25 As for payments (and / or refunds) for any qualifying expenses incurred by the Plaintiff during his tenure as receiver, they would need to be treated as a secured debt payable by the Company (not the Defendant) and also in accordance with clauses 3 and 8 of the Deed of Appointment.

3.26 Authority in this regard is the dictate of the **CI Act** in section 20(4) reproduced as:

**"(4) Where a receiver vacates office -**

**(a) the receiver's remuneration and any expenses properly incurred by the receiver; and**

**(b) any indemnity to which the receiver is entitled out of the property of the company; shall be paid out of the property of the company which is subject to a charge and such remuneration shall have priority in accordance with this Act as a secured creditor."** (Emphasis added)

3.27 There is no exception provided for in the CI Act to the position under section 20(4).

**4 CONCLUSION AND ORDERS**

4.1 The evidence before Court shows that the Plaintiff was validly appointed and later removed (by the Defendant) as receiver of the Company.

4.2 Whereas the CI Act and Deed of Appointment conferred a right of remuneration on the Plaintiff, the Plaintiff has not proven, on a balance of probabilities, that he made any debt recovery to earn his remuneration. Further, the circumstances before Court do not otherwise entitle the Plaintiff to remuneration on a *quantum meruit* basis.

4.3 The Plaintiff is, in the premises, only entitled to payment for expenses that qualify under section 20(4) of the CI Act, albeit with due regard to clauses 3 and 8 of the Deed of Appointment.

4.4 The originating summons accordingly fails on all grounds but I will order that each party bears their own costs in order to pave way for amicable engagement over any outstanding issues in respect of the revoked appointment.

Dated at Lusaka this 3<sup>rd</sup> day of November 2020.

  
K. CHENDA  
Judge of the High Court