BERNARD LEIGH GADSDEN v KITWE MEAT MARKET LIMITED (1985) Z.R. 152 (S.C.)

SUPREME COURT
NGULUBE, D.C.J., GARDNER AND MUWO, JJ.S.
27TH MARCH, 1984 AND 19TH APRIL, 1985
(S.C.Z. JUDGMENT NO 9 OF 1985)

Flynote
Company - Winding up - Money Repaid to company by mistake - Plaintiff 's claim admitted - Constructive trust - Action for money had and received pointless.
Company - Winding up - Voluntary liquidation - Stay of proceedings - Power to stay proceedings against company - Companies Act, ss.141 and 189.

Headnote
The plaintiff, through a mistake of fact, repaid to a company much more than was owing on a loan. The company went into voluntary liquidation and the plaintiffs claim was readily admitted. The plaintiff sued for the sum paid by mistake as money had and received order to gain preference over the other creditors. The liquidator applied for a stay of the proceedings, and the application was dismissed by the High Court which held that a stay could only be granted where a company is being wound up by the court. The defendant appealed.

Held:
(i) There is power under ss.141 and 189 of the Companies Act, in the discretion of the court, to stay proceedings against a company in liquidation, whether voluntary or not;
(ii) A person who has paid money under a mistake of fact has an equitable proprietary right in priority to other creditors; the money is held by the defendant as constructive trustee. The action for money had and received was pointless.

Case referred to:
(1) Chase Manhattan Bank N.A. v Israel - British Bank (London) Ltd. [1981] lCh. D.105.

Legislation referred to:
Companies Act, Cap. 686, ss.141 and 189.

For the appellant: J.H. Jeary, of D.H. Kemp and Co.
For the respondent: H.H. Ndhlovu of Jaques and Partners.

Judgment
NGULUBE, D.C.J.: delivered the judgment of the court.

On 27th March last, we allowed this appeal with costs. As promised at the time, we now give our

reasons.

This is an appeal against the refusal initially by a District Registrar and subsequently by High Court judge to stay proceedings brought against the liquidator of a Company, namely, Industrial Finance Company Limited (henceforth called the Company). For convenience, we shall call the respondent, the plaintiff, and the appellant, the defendant, which is what they are in the action.

The plaintiff owed the Company some money which it borrowed by way of a loan. The loan was repaid but through a mistake of fact the plaintiff made further payments in the sum of K7,157.12n, which sum represented an excess of what was required to liquidate the loan. This mistaken overpayment was made during the period November,1976 to May,1977. In August, 1977, the Company went into voluntary liquidation. The plaintiff proved its claim which was readily admitted by the defendant in the liquidation. Some payments have been made to the Company's preferential creditors but none to the plaintiff and the

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ordinary creditors. On 25th February, 1982, the plaintiff took out a specially endorse writ against the defendant claiming the sum in question as money had and received by the defendant to the use of the plaintiff.

The defendant applied to the High Court for a stay of the proceedings on the ground that, as the plaintiff's claim had already been admitted, and since the liquidation was still in progress, further prosecution of the plaintiff's admitted claim would have the effect of preferring the plaintiff over the other ordinary creditors of the Company. For that reason, the defendant prayed that the action be stayed in accordance with the provisions of s.189 as read with s.141 of the Companies Act, Cap. 686. Section 189 reads:

> "Where a company is being wound up voluntarily the liquidators or any contributory to the company may apply to the Court to determine any question arising in the matter of such winding-up or to exercise, as respects the enforcing of calls, or in respect of any other matter, all or any of the powers which the Court might exercise if the Company were being wound up by the Court, if satisfied that the determination of such question, or the required exercise of power, will be just and beneficial, may accede wholly or partially to such application on such terms and subject to such conditions as the Court thinks fit, or it may make such other order or decree on such application as the Court thinks just."

Section 141 reads:

> "The Court may, at any time after the presentation of a petition for winding up a company under this Act and before making an order for winding up the Company, upon the application of the Company, or of any creditor or contributory of the Company, restrain further proceedings in any action, suit, or proceedings against the company, upon such terms as the Court thinks fit; the Court may also at any time after the presentation of such petition, and before the first appointment of a liquidator, appoint a provisional liquidator of the estate and effects of the Company, with all or such of the powers of an official liquidator as the

Court may order."

The Courts below dismissed the application for a stay on the ground that, in their understanding, the sections which we have quoted did not confer any power on the Court to stay the proceedings except where a Company is being wound up by the Court. It is quite plain to us that both the learned District Registrar and the learned appellate judge must have misread these sections. A proper reading thereof reveals quite clearly that there is power, in the discretion of the Court and in any given case, among other things, to stay proceedings against a Company in liquidation, whether voluntary or not. Mr Jearey's submissions on this point, with which Mr Ndhlovu quite properly concurs, must be upheld.

The major issue is whether, on the facts and in the circumstances of this case, the action should be stayed. The jurisdiction to stay is discretionary, and in its exercise regard must naturally be had to the primary

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objective of liquidation, namely the collection and distribution of the assets pari passu among the unsecured creditors after payment of any preferential debts. Having listened to the arguments on both sides, it is apparent that the action, as presently constituted, is quite pointless in that it seeks to establish a right to the payment of a debt which is not disputed and which has already been admitted in the liquidation. Indeed Mr Ndhlovu by his submissions freely admits that the object of the litigation is to secure for the plaintiff some priority or preference over the other creditors since, he argues, the plaintiff's money paid by mistake should not even be considered as part of the assets or the general fund of the Company available to the creditors at large. This is an attractive argument and it is quite probable, though not necessarily inevitable, that in a proper action in which that specific object is sued for, a court might be persuaded to determine that the plaintiff's money, in the circumstances of this case, is not part of the Company's assets and ought, therefore, to be refunded more or less forthwith. Mr Ndhlovu's argument would appear to be supported by the case of *Chase Manhattan Bank N.A. v Israel British Bank (London) Ltd.,*(1), which had similar facts to those obtaining here. That case supports the proposition that a person who has paid money under a mistake of fact has an equitable proprietary right, and may even trace his money which is to be regarded as having been held by the defendant as constructive trustee. In that case, the plaintiff was held to have more than creditor's right in the defendant Company's winding up, and that any assets in its hands representing the plaintiff's money did not belong to the defendant beneficially.

However, as pointed out by Mr Jearey (who otherwise concedes to the proposition for which Chase Manhattan is authority), Mr Ndhlovu's argument would be appropriate only on another occasion, in another setting and in an action properly constituted for that purpose. In the instant action, continued litigation would only occasion unnecessary costs and we are, in any case, satisfied that priority cannot be obtained in the fashion proposed by the action, as presently constituted.

It was for these reasons, that we allowed the appeal, reversed the Court below and granted a stay of the plaintiff's present action.

Appeal allowed