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IN THE SUPREME COURT OF ZAMBIA

APPEAL NO. 120/2006

HOLDLEN AT NDOLA

SCZ Judgment No. 32 /2008

(Civil Jurisdiction)

BETWEEN:

RICHARD NSOFU MANDONA

Appellant

And

ZAMBIA NATIONAL COMMERCIAL BANK PLC

1ST Respondent

And

ZAMBIA NATIONAL OIL COMPANY LIMITED

2ND Respondent

(in liquidation)

And

ATTORNEY-GENERAL

3rd Respondent

**Coram: Chirwa, Mushabati, JJs and Kabalata, AJS on 5th December, 2006
and 14th August, 2008.**

For the Appellant: Mr. P.J. Pendwe, of Pendwe and Company

For the 1st Respondent: Mr. M. Mutemwa, Mutemwa Chambers

For the 2nd Respondent: Mr. M.M. Mundashi, Mulenga Mundashi and
Company

For the 3rd Respondent: No appearance

JUDGMENT

Kabalata AJS delivered the judgment of the court.

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Cases referred to:

(1) Franco Russo and Brown Manda Appeal No. 114 Of 2005

This is an appeal against a judgment of the High Court which dismissed the appellants claim for the sum of US\$3,004,855 being the remuneration and costs and expenses of receivership of Zambia National Oil Company Limited.

The facts leading to this appeal can be briefly stated.

They are that the 2nd Respondent by an unlimited floating debenture dated the 28th November 1997, charged all its undertakings and all its property, assets, rights and its book debts as security in favour of the 1st Respondent for the repayment and discharge of a loan. On the 30th October 2001, the 1st Respondent, acting in pursuance of the debenture aforesaid, appointed the Appellant as the Receiver and Manager of all the undertaking, property, assets and rights of the 2nd Respondent. The Appellant accepted the appointment and immediately took office. According to the Deed of Receivership, the Receiver and Manager was entitled to remuneration as Receiver and Manager at his normal rates in the performance of his duties. At the time of the Appellants' appointment, the total debt under the debenture was US\$51,518,179-18. In the performance of his duties, the appellant, with the consent of the 1st Respondent

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engaged one Albert Lungisani Lungu as his agent or servant. On or before the 4th April 2002, through the efforts and instrumentality of the Appellant, the total debt was recovered. The whole sum was paid directly to the 1st Respondent by the Government of the Republic of Zambia as majority shareholder in both Respondents. Simultaneously with the payment of the debt, the 1st Respondent terminated the Appellant's appointment as Receiver and Manager. The 2nd respondent also resolved to go into voluntary liquidation. After negotiation, the 1st Respondent and the Appellant agreed on a scale fee of 5% of the total debt recovered. The Appellant rendered a bill of costs dated the 30th April, 2002 for a net balance of US\$2,296,855-00. Subsequently, the Appellant also passed on to the 1st respondent for reimbursement, his agents bill dated the 31st May, 2002 amounting to US\$708,000.

The Appellant issued a specially endorsed writ claiming the following; generally a declaration that the Appellant's remuneration is US\$2,500,000 being slightly less than 5% of the debt of US\$51,518,179-18 over and above the costs and expenses of receivership amounting to US\$778,924. As against the 1st Respondent, an order for specific performance of the 1st Respondent's covenant to pay the Appellant the sum of US\$3,004,855 or such sum as may be found. Secondly,

there were a number of alternative claims. There was a claim for judgment against the 1st Respondent for the sum of US\$3,004,855 the same having been guaranteed. There was a claim for damages in the sum of US\$3,004,855 under the Misrepresentation Act on the ground that the 1st Respondent had misrepresented to the Appellant that it would pay the receivers fees as agreed when in fact it had no such intentions. There was also a claim for the said sum of US\$3,004,855 for breach of implied terms that the Respondents would not interfere in the Appellants performance of his functions or prevent him from earning his remuneration or that the Respondents would not deal with the assets, rights and property of the 2nd Respondent so as to deprive the Appellant of his priority claim for his remuneration. There was a further claim for damages in the said sum of US\$3,004,855 for breach of statutory duty to preserve and protect the appellants' right to preferential payment. Finally, there was a claim for a declaration that the money and assets received by the 1st Respondent were received as constructive trustee for the payment of the Appellants' priority claims of which it had due notice and for an order for the payment over to the appellant

the sum of US\$3,004,855.

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As against the 2nd Respondent, there was a claim for judgment on admission of the sum of US\$3,004,855 on the ground that the liquidator on the 3rd April, 2002 admitted owing the Appellant K13,111,712,400 which at the time was the equivalent of US\$3,004,855. There was a claim for a declaration that the Appellant was entitled to be indemnified for his expenses and remuneration out of the assets for the expenses and remuneration in the sum of US\$3,004,855. There was a claim for an order that the said assets stand charged with the recovery by the Appellant of sums found due to him in priority to the liquidator and all the creditors generally. Finally, there was an injunction restraining the 2nd Respondent from disposing, dissipating or distributing its assets until the final determination of the action.

The 1st Respondent's defence to the Appellant's claim was that the Appellant did not have the exclusive power to determine the remuneration for the appointed agents or servants and that even if it were so their remuneration was to be derived from the Appellants' fees and not from the assets of the company. The Receiver Manager according to the debenture was entitled to remuneration of the normal rates in the performance of his duties to be agreed upon between the

Appellant and the 1st Respondent and there was no such agreement. The 1st

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Respondent reserved the right to remove any appointed Receiver from time to time and appoint another in his place. The decision, to terminate the Appellants' appointment as Receiver/Manager was in the 1st Respondents' absolute discretion and not due to the alleged payment of the debt. During the period that he was Receiver/Manager the Appellant paid himself a total sum of US\$274,000 without either the 1st or 2nd Respondents' prior consent and unilaterally treated this sum as an advance payment of fees for services rendered.

The 1st Respondent did not receive the sum of US\$51,518,179-18 from the 2nd Respondents' majority shareholders and neither did it collude with the 2nd Respondent or the Government of the Republic of Zambia to deprive the Appellant the right to deduct his fees. The Appellant has failed to justify his fees and to render an account outlining how the sum of US\$274,069, which he paid himself from the assets of the 2nd Respondent was arrived at.

The 1st Respondents' defence sets out a counter-claim for an order that an account be rendered by the Appellant outlining how the sum of US\$274,069 was arrived at.

The 2nd Respondents' defence was that the 2nd Respondent was at liberty to deal with its assets upon the receivership being lifted. The 2nd Respondent denied

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having colluded to deprive the appellant of his right to deduct fees from the 2nd Respondent's assets. It was the express condition of the Appellants' appointment that his remuneration would be at normal rates.

The 2nd Respondents' defence also set out a counter-claim. In the counter-claim the 2nd Respondent alleged that the Appellant paid himself a sum in excess of US\$274,000, out of the 2nd respondents' assets without the prior consent of the Respondents. The 2nd Respondent also counter-claimed an inquiry to fix the Appellants remuneration, an order that until the inquiry is completed the sum of US\$274,000 should be repaid to the 2nd Respondent, a declaration that the Appellant is an unsecured creditor for any amount in excess of the sum of US\$274,000 without the agreement of the Respondents, an order that the Appellant provides a proper account of receipts and payments made by him during the course of the receivership, a declaration that the Appellant must be personally liable to account for having raised the conditions of service of the former employees of the 2nd Respondent and, finally, damages for negligence and breach of duty.

The defence settled by the 3rd Respondent was exactly in the same terms as that which was settled by the 2nd Respondent. The same applies to the counter claim.

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After considering the evidence and the submissions of Counsel, the learned trial judge dismissed all the Appellants claims and hence this appeal.

There are eight grounds of appeal. The first ground is that whilst awarding the appellant his remuneration the trial court misdirected itself by omitting to award him his indemnity in the sum of US\$778,924-00.

It was argued on behalf of the Appellant that although under S. 24(6) of the Conveyancing Act 1881 the receivers' commission includes both his remuneration as well as the costs charges and expenses of the receivership, clause 9 of the debenture is to the effect that the receiver must not only provide for his commission under S. 24(8) (iii) but must also provide for his indemnity out of the monies received before he can service the debenture debt. In other words, his indemnity is over and above his remuneration.

In dealing with this issue, the learned trial judge found that there was no evidence that the Government of the Republic of Zambia owed the 2nd Respondent the sum of US\$51,518,179-18. There was no evidence either that the said sum was raised,

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for example, through calls on unpaid shares, for had that been the case, the learned trial judge would have been willing to accept that the sum constituted part of the money received even if it was paid directly. Since there was evidence that the assumption by the Government of the debt of US\$51,578,179-18 was concluded separately without the initiation or participation or even knowledge of the appellant, the learned trial judge concluded that the sum of US\$51,518,179-18 is not part of what constitutes money received by the Appellant. In our view, the learned trial judge did not misdirect himself when he refused to award the Appellant his indemnity in the sum of US\$778,924-00.

In ground two it was argued that by limiting the Appellants' remuneration to 5% of what he directly received rather than what was in fact paid in total discharge of the debenture debt, the trial court violated the settled canons of construction of deeds.

However, the deed appointing the Appellant as receiver did not specify the rate of commission. Our view is that and we agree with the findings of the lower court, that when the receivership came to an end, the Appellant prepared a receivership report which detailed the receipts and payments during the receivership period.

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According to the report, the sum of K3,415,195,112-75 was received. According

to the Appellant's own testimony at page 546 of the record of Appeal, a total of K1,152,624,050-28 was appropriated as fees and expenses for himself and his accountant which represents about 50% of what was realized during the period, a situation of which not surprising the auditor-General frowned upon (see supplementary record of appeal page 3-5).

The Appellant has taken the view that he is entitled to 5% of the amount of US\$51,518,179-18 on the basis that this was part of the assets of the company that came to the company through him as receiver to which he is entitled in accordance with Section 24 of the Conveyancing Act of 1881. However, the evidence which was before the lower court, clearly shows that if at all the amount was collected, it never came to the company, the 2nd Respondent and subsequently to the Liquidator where from he was entitled to be paid.

The trial court was therefore on firm ground when it ruled that the Appellants' claim should be limited to 5% of amounts actually collected and realized during the receivership.

The deed appointing the Appellant as receiver did specify the rate of commission to be charged by the Appellant. However, the debenture deed as read with the

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deed of appointment was subject to Section 24(6) of the Conveyancing Act of 1891 which provided as follows:

"The receiver shall be entitled to retain out of any money received by him, for his remuneration, and in satisfaction of all costs, charges, and expenses incurred by him as receiver, a commission at such rate, not exceeding five percentum on the gross amount of all money received, as is

specified in his appointment, and if no rate is so specified, then at the rate of five percentum on that gross amount, or at such higher rate as the court thinks fit to allow, on application made by him for that purpose.”

It is quite clear therefore that the above provision of the law was applicable to the receivership in issue, namely that the Appellant was entitled as remuneration, to a commission not exceeding 5% on the gross proceeds of the realization of the receivership.

It was argued on behalf of the Appellant in ground three that the trial court misdirected itself when it held that the sum of US\$51,518,179 was not part of the receivership and was not realized through the receivership. However, the testimony of the 1st Respondent was that after the cessation of the receivership, the 3rd respondent assumed the debts by way of assignment so that the debt

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ceased to exist in the books of the 1st Respondent. Indeed, the testimony of DW1 Amos Siwila is cogent and was unshaken on that aspect. It is abundantly clear that the decision by the Government of the Republic of Zambia to take over the 2nd Respondent’s debt, rendered the continuation of the receivership, nugatory. The law in such circumstances allows for the discharge of a receiver.

KERR ON RECEIVERS, 12th edition, para. 3 lines 1 to 3 on page 316 provides:

“If in the course of proceedings, the continuance of a receiver becomes unnecessary, he will be

discharged.”

The Appellant did not adduce any evidence to show that the undertaking to pay US\$51 million by the Government was a result of his efforts. In fact, during cross examination in the court below at page 547 of record of appeal, he conceded that he had not seen the letter from Government advising Zambia National Commercial Bank about its decision to take over the debt. This letter is at page 234 of the record of appeal, and, it was not copied to the Appellant. Quite obviously, this was because he was not privy to the decision.

With regard to the claim by the Appellant for payment of his alleged commission by the 1st Respondent on equitable grounds, misrepresentation and generally under his deed of appointment as receiver, there is no basis for such payment. The

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Appellant conceded at page 547 of the record of appeal that the 2nd Respondent, in principle, bore the responsibility for payment of his fees. Indeed the Appellants admission is in line with clause 8 of unlimited Floating Debenture executed between the 1st and 2nd Respondents on 28th November 1997 which is at pages 151 to 160 of the record of appeal under which he was appointed. It provides as follows:

“Every receiver or receivers so appointed shall be deemed to be the agent or agents of the

company and the company shall solely be responsible for his or their acts and defaults and for his or their remuneration.”

In our view, the issues of misrepresentation and equity canvassed by the Appellant are wholly misconceived. The 2nd Respondent does not deny its responsibility to pay him fees except that by his own report at the termination of receivership, he did not collect the US\$ 51 million from government. There is also no evidence of any sort that the payment by Government of the debt was as a result of his own efforts. In any case, his mandate was to collect from the 2nd Respondent and not from the Government.

As for the Appeal for non award of the Appellants' costs on the 1st and 2nd respondent's discontinued counter claims in ground 7, this was not before the

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court because in terms of Order 59/1/22/3 of the White book 1988 edition, no Appeal on costs lies to this court without leave of the judge in the court below. There is no evidence on record that such leave was granted by the learned trial judge. In any case the award of costs is in the discretion of the court taking into account the fact that the trial court found that the Appellants' colossal claims had no merit. It is not as if the Appellant had succeeded on one claim and the Respondents had succeeded on another claim or the Respondents had failed on

other claims see our dictum in **Franco Russo and Brown Manda Appeal No. 114 of 2005¹**.

It was also argued on behalf of the Appellant that the trial court erred in law by refusing to enter judgment on admissions in the sum of K13,111,712,400-00. In our view, there was no basis on which the trial court could have ordered that judgment be entered against the 2nd Respondent on admission. As the record will show, page 557 lines 5-10, Lawrence Ndimba, Liquidation Manager for the 2nd respondent testified that there was a letter sent out to the Appellant as contingent creditor. It was his position that a Statutory Notice is sent to all creditors whether actual or contingent for them to prove their claims in the

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liquidation. He was emphatic that the notice was not an acknowledgement of the debt. Creditors have to prove their claims and as against the 2nd

Respondent, no such proof existed. Having found that the Appellant had failed to prove his claims against the Respondents, the need to adjudicate on the alleged indemnity did not arise.

Finally, the argument that any conversion of any award from US dollars to Kwacha had to be at the exchange rate obtaining in May, 2002 when the debt fell due is neither here nor there. The judgment of the lower court clearly shows that the learned trial judge in his judgment proceeded on the basis that the Appellants' claim was substantially for the sum of US\$3,004,855. Having dismissed all the

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claims against the 1st and 2nd Respondents, we do not appreciate the import of the Appellants' argument on this issue.

We therefore find that the Appellants Appeal fails in its entirety and it is hereby dismissed with costs to be taxed in default of agreement.

D.K. Chirwa
SUPREME COURT JUDGE

C.S. Mushabati
SUPREME COURT JUDGE

T.A. Kabalata
ACTING SUPREME COURT JUDGE