

IN THE SUPREME COURT OF ZAMBIA  
HOLDEN AT LUSAKA  
(CIVIL JURISDICTION)

APPEAL NO. 4 of 2007

B E T W E E N:

LIVINGSTONE MOTOR ASSEMBLERS  
LIMITED (IN RECEIVERSHIP)

APPELLANT

AND

INDECO ESTATES DEVELOPMENT COMPANY  
LIMITED

1<sup>ST</sup> RESPONDENT

WEBSTER MWANSA  
ASSOCIATED STORES LIMITED  
TALWANDI ELECTRICAL LIMITED  
ALEX MUTALE AND 136 OTHERS

2<sup>ND</sup> RESPONDENT  
3<sup>RD</sup> RESPONDENT  
4<sup>TH</sup> RESPONDENT  
5<sup>TH</sup> RESPONDENT

CORAM: MAMBILIMA, DCJ; CHIBOMBA AND WANKI, JJS  
On 13<sup>th</sup> January 2011 and 16<sup>th</sup> January 2013

For the Appellant: Mr. N.K. MUBONDA, of D.H. Kemp & Co.  
For the Respondents: No Appearance

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## JUDGMENT

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MAMBILIMA, DCJ delivered the judgment of the Court.

### CASES REFERRED TO:

1. WATER WELLS LTD VS JACKSON (1984) ZR 98
2. GOSLING VS GASKELL AND GROCOTT (1895-1899) ALL ER 300

### LEGISLATION & WORKS REFERRED TO:

1. THE COMPANIES ACT, CAP 388 OF THE LAWS OF ZAMBIA

2. LIGHTMAN + MOSS THE LAW OF RECEIVERS OF COMPANIES 2<sup>ND</sup> EDITION PAGES 176 AND 185
3. HURBERT PICARDA, THE LAW RELATING TO RECEIVERS AND MANAGERS 1985, PAGE 137
4. PENNINGTON'S COMPANY LAW, 15<sup>TH</sup> EDITION , PAGE 564
5. L.C.B. GOWER, MODERN COMPANY LAW, 4<sup>TH</sup> EDITION PAGE 472

This appeal is from the decision of the High Court on an application by the Appellant's liquidator, one Germano Mutale KAULUNG'OMBE, to review a Ruling that was given by the Court on 20<sup>th</sup> October 1995.

The facts in this case are common cause. In May 1995, the Respondents filed a Petition in the High Court for an Order to wind up the Appellant Company and appoint a liquidator. The Order was granted on 5<sup>th</sup> August 1995. Messrs Kangwa Sombe and Company were appointed liquidators to work jointly with Mr. Bernard Leigh GADSEN, the receiver/manager who had been appointed by the Zambian National Commercial Bank (hereinafter sometimes referred to as **'the Bank'**)

The Affidavit in Support of the Summons for review was sworn by the Applicant, Mr. KAULUNG'OMBE. He deposed that after the Court had made an Order that the Appellant Company

be wound up, the receiver, Mr. GADSDEN applied to vary the Order of the

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Court praying that he alone should retain possession of all the assets of Livingstone Motor Assemblies Limited. Mr.

KAULUNG'OMBE deposed further:-

- "5. That this Court did by its Order made on the 20<sup>th</sup> October 2004 vary its earlier Order marked "GMK1" herein and came to vest all the assets in Bernard's custody so that he recovers in full the more than two hundred million Kwacha (200,000,000) due to the secured creditor, Zambia National Commercial Bank PLC before he could surrender what remained of the assets to me and from which I was to satisfy claims of the unsecured creditors.**
- 6. That the said Bernard Leigh Gadsden has sold assets of the Respondent Livingstone Mortor Assemblers Limited and collected a sum of over eight hundred million Kwacha (K800,000,000.00) but failed to pay the money to the Bank. A copy of Bernard Leigh Gadsden's statement to the bank confirming his collection of the money is produced and exhibited hereto marked "GMK3"**
- 7. That by reason of Bernard Leigh Gadsden's failure to pay the money to the Bank, the Bank has now written to me to demand that no payment should be made to the other unsecured creditors unless the Bank receives its eight hundred million Kwacha (K800,000,000.00). Copy of the demand letter from the Bank insisting on the payment of the eight hundred million Kwacha (K800,000,000.00) is produced and exhibited hereto marked "GMK4".**
- 8. That it is quite clear from the aforementioned that Bernard Leigh Gadsden has gone against the Order given by this Court in taking care of the interests of the secured creditor, Zambia National Commercial Bank PLC.**
- 9. That there is only one remaining asset of the Respondent Company which is Plot No. 2617, Livingstone and if this asset continues to vest in Bernard Leigh Gadsden he will sell it to the detriment of all the unsecured creditors who have waited patiently since 1995 for Bernard Leigh Gadsden to pay off the Bank.**
- 10. That in the premises it has become necessary to review the earlier Order of the 20<sup>th</sup> October 1995 that gave Bernard Leigh Gadsden sole custody of the assets of Livingstone Motor Assemblers Limited.**

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**11. That I crave this honourable Court to review its Order of the 20<sup>th</sup> October 1995 which gave sole custody of the assets of the Respondent Company to Bernard Leigh Gadsden."**

Meanwhile the Petitioners had applied for contempt of Court proceedings against the receiver/manager. They were given the

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return date of 20<sup>th</sup> October 1995 but before the summons could be heard, the parties came up with a Consent Order which stated:

- "1. That while the winding-up stays in place, the receiver and manager for the Zambia National Commercial Bank Limited continues with the receivership until completion.**
- 2. That Messrs Kangwa Sombe and Company be sole liquidators to whom the receiver will be handing over his assignment.**
- 3. That the receiver and manager for the Bank furnishes his returns to the Registrar of Companies and Messrs Kangwa Sombe and Company.**
- 4. That the receiver and manager for the Bank be excluded from being a joint liquidator to avoid conflict of interests."**

Upon considering the application for review, the Judge was of the view that it was not necessary because the Orders that were given on 20<sup>th</sup> October 1995 were couched in very clear language. According to the Judge, the bone of contention was the first Order which stated that the receiver/manager was to continue with the receivership until completion. He opined that this Order did not make the receiver/manager to be a liquidator.

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He referred to Section 286(1) of the Companies Act which states as follows:

**“Where a winding-up order has been made or provisional liquidator has been appointed, the liquidator or provisional liquidator shall take into his custody or under his control all the property and things in action to which the Company is or appears to be entitled.”**

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According to the Judge, ***“it is clear from this piece of legislation that the control of assets of a liquidated company is in the liquidator and not the receiver/manager.”*** He went on to state that in this case, the role of a receiver/manager to administer the affairs of the liquidated company ended at the time that the company was wound up. That once the Appellant Company was wound up, the role of the receiver/manager was to safeguard the interests of his principals through the liquidator. The Judge stated further; ***“The Order under review merely confirmed the position of the receiver/manager in that he was to continue as a receiver/manager until such time that his assignment was completed. It does not vest the assets of the Company***

***under his custody and control to the exclusion of the liquidator who is in fact the legally authorized person to administer the affairs of a wound up company.”***

The Judge was surprised that the receiver/manager had not channeled some of the funds that he had realised from the sale of some of the assets to his principals, but opted to pay creditors whose interests were to be taken care of by the liquidator as

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directed in the Order that was given by the Court. He explained that his Order of 20<sup>th</sup> October 1995 did not vest the assets of the company in the custody and control of the receiver/manager but merely extended his receivership on behalf of his principals.

The Judge alluded to the provisions of Section 107 to 118 of the Companies Act which deal with receiverships. It was his view that none of these provisions gave power to a receiver/manager to run or manage a liquidated company. He stated that where our laws provide for a procedure to be followed in a particular situation, reliance on foreign authorities is not necessary unless there exist a lacuna. For this proposition, he referred to the case of **WATER WELLS LTD VS JACKSON**<sup>1</sup> in which it was held:

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**“No need arises to draw a parallel between the Rules of the Supreme Court of England and those of the High Court Rules of Zambia when the latter Rules make it abundantly clear as to the position in question.”**

The Judge went on to state that if a receiver desired to impugn the conduct of a liquidator, he was at liberty to invoke the provisions of **SECTION 284 OF THE COMPANIES’ ACT<sup>1</sup>**. The Section states as follows:-

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**“(1) Where, in the winding up of a Company by the Court, a person other than the official receiver is the liquidator, the official receiver shall take cognizance of his conduct and if the liquidator does not faithfully perform his duties and duly observe all the respect to the performance of his duties, or if any complaint is made to the official receiver by any creditor or member in regard thereto, the official receiver shall inquire into the matter, and take such action as he thinks fit.**

**(2) The official receiver may at any time require any liquidator of a Company which is being wound-up by the Court to answer any inquiry in relation to any winding up in which he is engaged, and may apply to the Court to examine him or any other person on oath concerning the winding-up.**

**(3) The official receiver may direct an investigation to be made of the books and vouchers of a liquidator.”**

The Judge ended his Ruling by observing that the question that was before him was not really one for review but clarification. According to him, the Order under review was not ambiguous. It was his view that the liquidator was the right person to take charge of the assets of the Respondent Company, and that the

proceeds that would be realized from the sale of assets should be paid to various creditors in preferential order, beginning with secured creditors.

The Appellant was not satisfied with this Ruling. It filed a Memorandum of Appeal containing seven grounds. These are that:

- “1. Having found that the application for review was not necessary, the Court below misdirected itself in law when it proceeded to review and/or clarify the Consent Order dated 20<sup>th</sup> October 1995;**
- 2. The Court below misdirected itself in fact and in law when it held that the Appellant above named was not under receivership;**
- 3. The Court below misdirected itself in law and in fact when it held that once the Appellant above-named was wound-up the role of the**  
**receiver/manager was to safeguard the interest of his**  
**principals through the liquidator;**
- 4. The Court below misdirected itself in law and in fact when it held that the order under review did not vest the assets of the Company under the custody and control of the receiver/manager to the exclusion of the liquidator;**
- 5. The Court below misdirected itself in law and fact when it held that the proceeds from the sale of some of the assets should have been paid to the debenture holder and not any creditor;**
- 6. The Court below misdirected itself in law when it held that the role of a receiver/manager was to manage the affairs of an ‘on-going business concern’ in order to protect the interest of his principals;**
- 7. The Honourable Court below misdirected itself in law when it construed Section 286(1) of the Companies Act Cap 388 of the Laws of Zambia to mean ‘that the control of assets of a liquidated company is in the liquidator and not the receiver/manager.’ (SIC)”**



The learned Counsel for the Appellant filed detailed heads of arguments in support of the grounds of appeal which he augmented with oral arguments.

The Respondents, on the other hand, have conceded to all the seven grounds of appeal. In their heads of argument, they state that this appeal is nugatory in that the subject matter asset has been sold off and the Bank was paid its moneys. In a supplementary record of appeal, they have produced a copy of a Memorandum of Discharge evidencing this fact. In the circumstances, the parties should have executed and filed a Consent Order allowing the appeal. Mr. MUBONDA, the learned

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Counsel for the Appellant, informed the Court, however, that they tried to get the Respondents to enter into a Consent Order, but they were spurned. This, in our view, is most unfortunate because the concession by the Respondents means that there is no dispute between the parties. On this account, the appeal is allowed.

We however, feel obliged to pronounce ourselves on some of the views expressed by the Judge in the lower Court. The main issue in contention relates to the powers of a receiver and a liquidator in a company undergoing liquidation. The dispute in this case is between the receiver/manager appointed by the debenture holder, the Zambia National Commercial Bank and a liquidator appointed by the Court, pursuant to a petition for winding up filed by the 1<sup>st</sup> to the 4<sup>th</sup> Respondents. The question that arose for determination was this: **Who should have custody of the assets of the Appellant Company between the receiver/manager and the liquidator?**

The learned Counsel for the Appellant submitted that the position taken by the Court below, that once the Appellant Company was wound up, the role of the receiver/manager was to

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support the interest of his principals through the liquidator, is contrary to the position of the law in this area. He submitted that the relationship between the receiver/manager on one hand and the liquidator on the other, is aptly propounded by **LIGHTMAN + MOSS** in their book **THE LAW OF RECEIVERS OF**

**COMPANIES<sup>2</sup>**, wherein it is stated: ***“....generally speaking, during the period of any receivership of a company in liquidation, the receiver’s administration takes precedence and a liquidator has a secondary role. This is the case whether the receiver is appointed before or after the commencement of winding-up.”*** Counsel also referred to a book by Hurbert PICARDA, entitled **THE LAW RELATING TO RECEIVERS AND MANAGERS<sup>3</sup>** in which it is stated, inter alia, that:

***“While a compulsory winding up order or the commencement of a voluntary winding up brings about a cesser of the agency of the receiver and manager, some of his powers survive the death of his agency. He may continue the company’s business, though not so as to impose fresh liabilities on the company. He is of course entitled to take possession of the assets comprised in the debenture, and so that power remains. He may continue to get in and realize all the company’s assets both real and personal comprised in the debenture.”***

Counsel submitted that the Appellant executed a debenture with Zambia National Commercial Bank under which there was a

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floating charge on all its undertakings, property assets and rights as security for a loan that was advanced to it. The debenture specified that the happening of certain events would entitle the debenture holder to appoint a receiver/manager. The receiver to

be so appointed was clothed with powers that were stipulated in the debenture and these included the taking of possession or collecting any property comprised in the security. The powers also included the carrying on or managing the business of the company. Counsel contended that in these circumstances, the role of the receiver/manager could not be secondary to that of the liquidator as was held by the learned Judge in the Court below. It was his view that the receiver/manager was supposed to play the primary role and take precedence over the liquidator in terms of the administration of the assets of the Appellant Company. In support of his submission, Counsel referred us to a number of cases, one of which is that of **GOSLING VS GASKELL AND GROCOTT**<sup>2</sup> in which it was stated that the position of a receiver was not altered by the Order for winding up of the company.

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Counsel further submitted that under the debenture, the entire undertaking of the Appellant and all its property assets and rights were charged as security to Zambia National Commercial Bank for a loan that was advanced to it. The appointment of the

receiver/manager was to take possession and collect all the property that was comprised in the security and realize it. To buttress his argument, Counsel referred us to the book by Robert R. PENNINGTON entitled **PENNINGTON'S COMPANY LAW**, wherein it is stated that receivers were primarily appointed to realize Company assets comprised in the debenture holder's security and to distribute the proceeds to the debenture holders in satisfaction of their claims and to return any surplus proceeds or unrealized assets to the company which may then continue to carry on its undertaking or go into liquidation if it is insolvent or has insufficient assets left to continue. It is the argument of the Appellant that the liquidator will only be entitled to the surplus, if any, or unrealized assets, after satisfaction of the debenture holder's claims.

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It is the contention of Counsel for the Appellant that the Court below further misdirected itself in law when it held that the role of a receiver/manager was to manage the affairs of an ongoing business concern in order to protect the interest of his

principals. According to Counsel, the net effective of this holding by the Court is that the role of receiver/manager of a company shall terminate once a company ceases to be a going concern. He argued that this is a misdirection because clearly, the role of receiver/manager survives the winding up order. To buttress his argument, Counsel again referred us to **LIGHTMAN + MOSS** in their book, **THE LAW OF RECEIVERS AND COMPANIES**<sup>2</sup> on the position that obtains after the winding up of a company in receivership. These learned authors state:

**“The winding up order or resolution for winding up terminates the receivers’ agency for the company. The powers given by the debenture to exploit the company’s undertaking and assets, however, continue unaffected, save only that they cannot be exercised so as to create any new debt or fresh liability. The receiver can, therefore, carry on the business of the company, get in and realize the company’s assets and take proceedings in the name of the company to recover assets. He may do so either as agent for the debenture holder or as principal.”**

Counsel further argued that the Court below misdirected itself in law when it construed Section 286(1) of the Companies Act to

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mean that the control of assets of a liquidated company is in the liquidator and not the receiver/manager. Counsel submitted that the crucial words in this Section are ***‘property and things in***

***action to which the company is or appears to be entitled.'***

Counsel submitted that if the company has been charged by way of a floating charge ***“on all its undertaking, property assets and rights whatsoever and wheresoever,”*** as stated in Clause 2 of the Debenture in this case, and, the debenture holder proceeds to appoint a receiver/manager, then there are no assets over which the liquidator can have custody or control. He argued that in such circumstances, the liquidator will simply have to wait for the debenture to be discharged and once this is done, he can have the right to any surplus assets thereafter. Counsel submitted that the liquidator is only entitled to the control of assets which lie outside the charge and that in this case, there were no such assets. He stated further that all assets in this case were charged and were therefore under the control and custody of the receiver/manager. That such would have to be realized or disposed of under the terms of the debenture. To support his contention, Counsel referred us to

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the book by L.C.B. GOWER, **MODERN COMPANY LAW**, who described such charges as equitable. The author states:

**“Such a charge is, therefore, a particularly valuable means whereby a business concern can raise money without removing any of its property from the business. The charge remains floating and the property liquid until some default is made and the debenture holder takes steps to enforce his security or until winding up commences. When that occurs, the charge crystallizes and is converted into a normal fixed charge on the assets of the company at the time of crystallization.”**

Counsel submitted that in this case, the debenture holder intervened and appointed a receiver through a deed which was registered by the Registrar of Companies and in the circumstances, all the property should be in the control and custody of the receiver/manager.

We entirely agree with the views of the various authors that have been referred to us. They represent the correct position of the law on the relationship between a receiver and a liquidator in a winding-up of a company. It is our view that the Court below seriously misdirected itself on fundamental issues in this relationship. Granted, Section 286(1) of the Companies Act stipulates that where a winding-up order has been made and a liquidator appointed, that liquidator takes into custody and control



all the property and things to which the company is entitled. But this is a case in which there is no receiver appointed. It is trite that a debenture holder can appoint a receiver if a charge on a company's property has become enforceable. This was the situation in this case. The Bank appointed a receiver pursuant to a debenture under which a floating charge was created over all the property of the Appellant Company while the 1<sup>st</sup> to the 4<sup>th</sup> Respondents petitioned to wind up the company.

The provisions governing receivers are found in Division 5.3 of the **COMPANIES ACT**<sup>1</sup>. The provisions run from Sections 107 to 118. The Judge was alive to these provisions. They cover various aspects, including the appointment of receivers by the Court or otherwise than by the Court; and, eligibility for one to be appointed as a receiver. Under Section 110 of the Act, a receiver is required to pay preferential creditors in priority to all other debts in a case where there is no winding up Order. There is no provision in this Division dealing with the status of a receiver/manager in a case where there is a liquidator overseeing the winding up of a company. It is our considered view, therefore, that in this respect, a lacuna

does exist and there is therefore, a need to draw a parallel between the laws of England and those of Zambia.

We agree with the position propounded by **LIGHTMAN + MOSS**, in their book **THE OF RECEIVERS OF COMPANIES**<sup>2</sup> that during the receivership of a company in liquidation, the receiver's administration takes precedence and a liquidator takes a secondary role regardless as to whether the receiver was appointed before or after the commencement of the winding up. The rationale for this is found in the words of **HUBERT PICADA**<sup>3</sup>, that ***".....the right to appoint a receiver is virtually absolute: the debenture holders as secured creditors stand outside the liquidation."***

In this case, it is not in dispute that the Bank was a secured creditor. It appointed a receiver under a legal instrument to recover money loaned to the Appellant; there was a floating charge on the Appellant's ***"....undertaking and all its property whatsoever and wheresoever both present and future..."*** The charge crystallized on all the property of the Appellant when the Bank sought to enforce the security through the appointment

of the receiver. The receiver therefore, should have had custody and

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control of all the property comprised in the charge. It was therefore, a misdirection on the part of the Court to have held that the control of assets of a liquidated company is in the hands of the liquidator and not the receiver. The receiver is under a duty to perform his function and recover the money for his secured creditor. If he has a surplus, it is surrendered to the liquidator. Against this background, we would have nevertheless allowed the appeal had the grounds been contested.

On costs, we have found that the documents in the supplementary record of appeal show that this matter could have been settled by consent way back in 2006 when the loan was repaid and the security discharged. By pursuing the appeal, the Appellant was therefore pushing an open door. But as there were serious misdirections in the judgment of the lower Court, which could only be corrected through a hearing of the appeal in this Court, we grant the Appellant fifty per centum (50%) of the costs.

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I.C. Mambilima  
DEPUTY CHIEF JUSTICE

H. Chibomba  
SUPREME COURT JUDGE

M.E. Wanki  
SUPREME COURT JUDGE