

IN THE MALAWI SUPREME COURT OF APPEAL

AT BLANTYRE

M.S.C.A. CIVIL APPEAL NO. 6 OF 1985  
(Being Civil Cause No. 572 of 1983)

BETWEEN:

M'DINDE ESTATE LIMITED.....APPELLANT

- and -

C.B.M. FARM SERVICES LIMITED.....1ST RESPONDENT

- and -

COMMERCIAL BANK OF MALAWI LTD.....2ND RESPONDENT

Before: The Honourable Mr. Justice Unyolo, J.A.  
The Honourable Mr. Justice Mtegha, J.A.  
The Honourable Mr. Justice Kalaile, J.A.  
Fachi, Counsel for the appellant  
Ng'ombe, Counsel for the 1st & 2nd respondents  
Manda/Maore, Court Reporters  
Kadyakale, Law Clerk  
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JUDGMENT

Unyolo, J.

There is an appeal from a ruling of the High Court and the facts are as follows:-

The appellant, a limited company, is and was at all material times engaged in commercial farming at Namwera in Mangochi District. Things did not work out well and in 1982 the company was placed under receivership and a Receiver/Manager was appointed to manage its affairs in the usual manner. Subsequent to this, in 1983 to be precise, the directors on behalf of the company sued the two respondents seeking divers relief including damages for negligence.

It was pleaded that by an agreement the first respondents were appointed by the appellant to develop, supervise and manage the appellant's tobacco farm at Namwera, already mentioned, and that as a result of negligence and mismanagement on the part of the first respondents the appellant company got into financial difficulties with the result that it was placed under receivership by the second respondent, acting as debenture-holders, for failure to re-pay its overdraft.



The second respondent entered a defence denying being liable to the appellant and contending that the proceedings were irregular since the appellant company was in receivership under the control of the Receiver/Manager. It was contended that only the said Receiver/Manager and not the company's directors or shareholders could institute legal proceedings on behalf of the company.

We should have mentioned earlier that the appellant company appointed Messrs Fachi & Company to act for it in the matter. Interestingly, however, the Receiver/Manager at a later stage appointed Messrs Lilley Wills & Company also to act for the appellant company. This brought about a peculiar situation as neither firm was prepared to give way. After giving the matter some thought, the Registrar ruled that Messrs Fachi & Company were in his view properly instructed and that Messrs Lilley Wills & Company had no locus standi in the case. Messrs Lilley Wills & Company appealed. Mbalame Acting J., as he then was, allowed the appeal, holding, inter alia, that after the Receiver/Manager was appointed the directors and shareholders of the appellant company became functus officio and could not bring an action for a wrong done against the company. It is from that decision that the appellant appeals to this Court. Five grounds of appeal were filed. These are:-

- (i) That Learned Acting Judge erred in stating that the case of Newhart Developments Ltd. v. Co-operative Commercial Bank Ltd. is applicable on the present case.
- (ii) The Learned Acting Judge erred in saying that the Directors/Shareholders cannot bring an action for a wrong done against the company after the Receiver/Manager has been appointed.
- (iii) The Learned Judge erred in holding that the Shareholders/Directors cannot appoint a Legal Practitioner by their own choice when the Company is placed under Receivership vis-a-vis the Receiver/Manager.
- (iv) The Learned Acting Judge erred in stating that the duties of a Receiver is merely to collect the income and/or protect the property and assets of the company.
- (v) The Learned Acting Judge erred in entertaining M/s Lilley, Wills & Company as M/s Lilley, Wills & Company had no locus standi.

We think that the main issues in this appeal are those raised under grounds (ii) and (v), namely whether after the appointment of the Receiver/Manager the plaintiff company could not institute legal proceedings in its own right and secondly whether it was open to the Receiver/Manager to appoint another firm of legal practitioners to represent the appellant company in these very proceedings.



We will deal with ground (ii) first. In Multi-Holdings Limited & Another vs. Uganda Commercial Bank (1971) A.E. 238 the plaintiff companies instituted proceedings for a declaration that the appointment by the defendant of Receivers/Managers under a debenture was void. The defendant objected that the plaintiffs could not maintain the action in their own names in that although the companies continued to exist their powers were suspended as under the debenture the Receivers/Managers had become the sole agents of the companies and that it was only through the said Receivers/Managers that the companies could institute any legal proceedings. It was argued on the part of the plaintiffs that the powers of the companies were suspended only in reference to the conduct of their own business and could not be construed as precluding the companies from challenging by legal proceedings commenced in their names the validity of their appointment of Receivers/Managers. It was held by the Court that where a Receiver/Manager is appointed out of Court, as in the present case, whether he is the agent of the company or of the debenture holders is a matter of construction of the instruments authorising his appointment and that in such a case his powers and duties must depend on the terms of his appointment.

Clause '8' of both debentures in the Multi-Holdings case provided as follows:

"A Receiver/Manager so appointed shall be the agent of the company and the company shall alone be liable for his acts, defaults and remuneration and he shall have authority and be entitled to exercise powers hereinafter set forth in addition to and without limiting any general powers conferred upon him by law."

There then followed six sub-clauses giving specific powers and a seventh sub-clause giving general powers and sub-clauses (a) and (g) thereof provided as follows:

- "(a) To take possession of and get in all or any part of any property hereby charged and for that purpose to take proceedings in the name of the company or otherwise as may seem expedient.
- (g) To do all such acts and things as may be considered to be incidental or conducive to any of the matters and powers aforesaid and which the Receiver can and may lawfully do as agent for the company."

It was held that although sub-clause (a) gave the Receiver/Manager power to take legal proceedings such power only related to the taking of legal proceedings in the getting in of property and did not include the power to take legal proceedings in respect of matters not specifically mentioned.



The Court also expressed doubt that the Receiver/Manager appointed by the debenture-holders would dare to take legal proceedings against such debenture-holders considering the de facto relationship between them. In the end the Court held that the companies were entitled to maintain the proceedings in that case.

The next case is Newhart Developments vs. Co-operative Commercial Bank (1978) All E.R. 896. The facts of that case are set out in extensio in the ruling of the Court below and we do not find it necessary to recount them in this judgment. The Court below took the view that the facts of that case were materially different from those in the present case. The differences were firstly that the case involved only a Receiver as distinct from Receiver/Manager and secondly that the Receiver there was given power to take proceedings in the Company's name. While we would with respect agree that there were these circumstances in the Newhart case, it is noted that there were similar facts as well. For example the Receiver there was, as in the present case, an agent of the company. Secondly, although it appears that he was a mere Receiver, it is significant, in our judgment, that he was given power not only to collect the property charged by the debenture but also to carry on the business of the company. He was in other words effectively a Receiver/Manager. The case is actually useful. What happened was that after the appointment of the Receiver, the company, without his concurrence or consent, filed proceedings against the defendant, the debenture-holders, for damages for breach of contract. The defendant applied to have the writ set aside on the ground of irregularity in that it was issued without the Receiver's knowledge or consent. The Registrar dismissed the application and the defendant appealed to a judge who allowed the appeal and ordered the writ to be set aside on the ground of irregularity. The plaintiff appealed. The defendant contended, as is being contended in the instant case, that on the appointment of the Receiver, the plaintiff company was divested of all power to bring an action and only the Receiver could institute and prosecute the action in question. It was held that a provision in a debenture empowering the Receiver to bring an action in the name of the company whose assets were charged was merely an enabling provision investing the Receiver with the capacity to bring such action and did not divest the company's directors of their power to institute proceedings on behalf of the company provided that the proceedings did not interfere with the Receiver from collecting the company's assets or prejudicially affect the debenture-holders by imperilling the assets. The Court went on to observe that the Directors were under a duty to bring an action which was in the company's interests and that to pursue that right of action did not amount to dealing with the company's assets so as to require the Receiver's consent or concurrence.



It will be seen both in the Multi-Holdings case and the Newhart case that a company under receivership can institute legal proceedings and maintain an action in its own name. The courts there rejected the argument that only the Receiver or Receiver/Manager could institute such proceedings or that the same had to be instituted with his consent or concurrence. With respect we are of the view that both these cases were correctly decided.

The other case cited before us was Moss Steamship Company Limited vs. Whinney (1912) A.C. 254. That case however differs from that here in that there the Receiver/Manager was appointed by an order of the court unlike in the present case where the Receiver/Manager was, as already indicated, appointed by the debenture holders out of court. In the former case, the powers of the Receiver/Manager are conferred by the court whereas in the latter case his powers are to be found in the instrument authorizing his appointment, i.e. the debentures themselves.

There are three debentures in the present case and the powers given the Receiver/Manager there are similar in all of them. These provide as follows:-

"A Receiver so appointed shall be the agent of the company and shall have the following powers and for that purpose may employ any managers, agents, clerks or servants at such remuneration as he may think fit and for any of the purposes aforesaid may raise any sum or sums of money and may charge such sum or sums upon the property or assets hereby charged to this debenture or otherwise and by way of addition to and without limiting the powers of such Receiver:

- (a) To take possession of the property or assets charged by this debenture.
- (b) To carry on or concur in carrying on the business of the company.
- (c) To sell or concur in selling any of the property or assets charged by this debenture.
- (d) To make any arrangements or compromise which he may think expedient.
- (e) To do such other acts and things as he may consider to be incidental or conducive to any of the matters and powers aforesaid."

It will be noted from the foregoing clauses that the Receiver/Manager in the present case, unlike in the Multi-Holdings case and the Newhart case, was not given specific



powers to institute legal proceedings. And as already pointed out case law authority holds that the powers of a Receiver/Manager appointed out of court must depend on the terms of his appointment. Section 98 of the Companies Act also provides that a Receiver so appointed must act in accordance with the instrument under which he was appointed otherwise he would have to apply to the court for directions if there were any matters arising in connection with the performance of his duties, namely those duties he is authorised to do under the instrument, such as, in the present case, the collecting of the property or assets charged by the debentures, the selling of the same and the carrying on or concurrence in the carrying on of the business of the company.

All in all, we find that the powers conferred on the Receiver/Manager in the present case do not divest the directors and shareholders of the appellant company of their inherent power to institute proceedings on behalf of the company. Further we do not think that by instituting the proceedings in this case, the said directors and shareholders were, on the available facts, in any way interfering with the Receiver/Manager from collecting the company's assets nor were the said assets and property thereby necessarily imperilled. Indeed, the action taken by the appellant would be for the benefit of the company and its creditors generally should the appellant succeed in this matter. However we are not here making any comment as regards the merits or otherwise of the plaintiff's action.

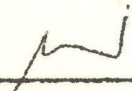
In short, we are satisfied and find that the appellant was entitled to institute the proceedings in this case notwithstanding the fact that the company was under Receivership and a Receiver/Manager appointed. The ground of appeal on this aspect accordingly succeeds.

We now turn to ground (v). We can say at once here that this ground of appeal too must succeed. The parties in this matter, so far, are the appellant company, which is represented by Messrs Fachi and Company, and the two defendants. The first defendant is not represented but the second defendant is represented by Mr. Ntaba. The Receiver/Manager is not a party at all and consequently he has no locus standi in the matter nor have his legal practitioners.

In the circumstances, the appeal succeeds. The decision of the Court below is set aside and it is our order that the appellant company be at liberty to continue with the action if it is minded so to do. The Receiver/Manager is to pay the costs both here and below.

Pronounced in open Court on this 8th day of September, 1988 at Blantyre.

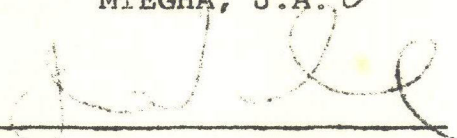
(Signed)

  
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UNYOLO, J.A.

(Signed)

  
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MTEGHA, J.A.

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KALAILE, J.A.