IN THE SUPREME COURT OF APPEAL SITTING AT BLANTYRE

MSCA CIVIL APPEAL NO 51 OF 2015

(Being High Court of Malawi-Lilongwe District Registry - Civil Appeal No. 17 of 2013)

BETWEEN

ANDREW MPEMBA NYIRENDA

AND OTHERS — APPELLANTS

AND

BENARD ROP

(Receiver and Manager of charged property) — 1ST RESPONDENT

AND

SIMAMA GENERAL DEALERS LIMITED — 2ND RESPONDENT

CORAM: Justice Dr. J. M. Ansah, SC, JA

Justice D. F. Mwaungulu, SC, JA

Justice Anthony Kamanga, SC, JA

Theu of Counsel for the Appellants

Mvalo of Counsel for the Respondents

Mrs. Chimtande Recording Officer

JUDGMENT

Ansah, JA

I have read the judgments of my brother Justices Mwaungulu and Kamanga. I would, for the same reasons, concur with their finding.

Mwaungulu, JA

Background

Perhaps the best start is a company styled Tanganyika Investment Oil and Transport Company Limited. As the name suggests, Tanganyika Investment Oil and Transport Company Limited is a company registered in Tanzania. Tanganyika Investment Oil and Transport Company Limited own shares in a Malawian company, Nyasa Investiment Oil Company Limited. Tanganyika Investment Oil and Transport Company Limited borrowed $4 million from the Eastern and Southern Africa Trade Development (PTABank) on a mortgage on the property of Nyasa Oil Investiment Company Limited, title number Alimaunde 25/1054. Tanganyika Investment Oil and Transport Company Limited were in arrears, indebtedness rising to $ 16 million at some point. PTAbank sent demand notices. Tanganyika Investment Oil and Transport Company Limited never paid. Nyasa Oil Investiment Company Limited ceased substantially operating. Certain premises, under a petroleum storage hospitality service agreement with Injena Petroleum Company Limited, were a warehouse. Nyasa Oil Investiment Company Limited ceased paying employees. There are no voluntary or creditors' winding up proceedings. There is no declaration that the companies are solvent or insolvent. Under the mortgage, PTAbank on 1 February 2010 appointed Mr. Rop receiver of the property. PTAbank sold the property to Simama General Dealers Limited who paid $800, 000 and was to pay $500, 000 by installments.

Andrew Mpembo Nyirenda and others, employees of Nyasa Oil Investiment Company Limited, sued for wages in the industrial relations court. They on 29 October 2012 obtained an order of attachment before judgment that prevented and Simama General Dealers Limited remitting the balance to PTAbank. On 21 March 2013 they obtained judgment for $1, 229,060. The respondents unsuccessfully challenged the attachment order in the Industrial Relations.

The grounds of appeal

The High Court reversed the Industrial relations court for reasons that need no reproducing. They are in the reasoning. It suffices just to introduce the grounds of appeal in this court:

> 3.1 The Lower Court erred in law in suggesting that the Companies Act did not wholly apply to the matter.

3.2 The Lower Court erred in law in overlooking the definition of debenture as an "acknowledgment of debt" wide enough to cover the "Third Party First Charge herein"

3.3 The Lower Court erred both in law and/or in fact in holding that the charge herein was not a floating charge which would be subject to section 95 of the Companies Act.

3.4 The Lower Court incidentally erred in holding that the Appellants' unpaid wages do not fall under nor constitute outgoings affecting the charged property to wit Title Number Alimaunde 25/1054.

3.5 In any event the judgment of the Lower Court was erroneous in law in that it affectively contradicts the meaning of Section 34(3)(d) of the Employment Act which adequately protects the Appellant employees' terminal benefits from claims of creditors of all categories without exceptions.

3.6 The Lower Court erred in awarding the Respondents Costs.

The appellants regard ground 3.5 the gist of the appeal and, therefore, purportedly abandoning them, argue, in their skeleton arguments, grounds 3.1 to 3.4 *together*. Ground 3.5 is argued distinctly and emphatically. Ground 3.5, however, connotes and presupposes preceding grounds and, on the facts and arguments, ground 3.5 cannot resolve without considering grounds less emphasized or abandoned. In any case, under Order 3, rule 2 (6) of the Supreme Court of Appeal Rules, this court is not bound by the appellant's grounds of appeal. The appeal is not being allowed, this court can, therefore, make an appropriate order without hearing the respondent. On the other hand, there is just as much in the respondent's skeleton arguments. This may be necessary because under Order 3, rule 26 of the Supreme Court Rules, this court should give judgment that ought to have been given and even on matters and even if a party asked that only a certain part of the judgment be varied or reversed.

Section 34 (3) (d) of the Employment Act arises in the context of a company and in relation to bankruptcy or insolvency and winding up of a company. The attachment related to remuneration. Under sections 95 and 287 of the Companies Act, a cursory look, which would have been determinative, of the Employment Act covering remuneration during insolvency or bankruptcy would be almost inevitable. Priority of wages would, irrespective of insolvency or bankruptcy, arise when the receiver appointed under a mortgage disposes of proceeds of sale or income. Section 34 (3) (d) could not elude all. Sections 95 and 287 of the Companies Act, like section 34 (3) of the Companies Act, provide for preferential treatment of employee's remuneration. Section 34 (3) operates in the context of a company and in the context of a charge issued by a company and in the context of a receiver appointed under a company charge.

The Companies Act wholly applied to the proceedings

Contrary to the High Court finding the Companies Act generally and section 95 of the Companies Act in particular applied to the matter. In the Industrial relations court it was submitted that sections 95 and 287 of the Companies Act applied. Section 95 of the Companies Act, dealing with preferential payments, provides:

> 8. Where a receiver is appointed on behalf of the holder of any debenture of the company secured by a floating charge, or possession is taken by or on behalf of such debenture holder of any property comprised in or subject to the charge, then, if the company is not at the time in course of being wound up, the debts which in every winding up are under section 287, relating to preferential payments , to be paid in priority to all other debts, shall be paid out of any assets coming to the hands of the receiver or other person taking possession as aforesaid in priority to any claim for principal or interest in respect of the debentures.

It was contended for the appellants, therefore, that the particular mortgage was a floating charge and, consequently, wages would, since there were no winding up proceedings, under section 287 of the Companies Act, rank prior to claims of capital and interest. Section 287 of the Companies Act provides that subject to the provisions of this Act, in a winding-up there shall be paid in priority to all other unsecured debts all wages of any labourer or workman not exceeding one hundred Kwacha whether payable for time or for piece work, in respect of services rendered to the company during twelve months before the commencement of the winding-up

To prioritize sections 287 (1) (b)) of the Companies Act remunerations under section 95 of the Companies Act, six things must be established: there is a receiver, , there was a debenture, the receiver is appointed by a floating charge; the debenture was secured by a charge, the charge was a floating charge and there are no winding up proceedings. There were, as we see later, no winding up proceedings in this matter. The threshold of absence of winding up the company is met.

On application of the Companies Act under consideration the High Court said:

> For all I have reasoned above, I find that the lower court erred in its use of the Companies Act in this matter, more especially with reference to Section 95, when there was no "receiver appointed on behalf of the holder of any debenture of the company secured by a floating charge", there having been no debentures issued by the company, NIOT. Having thus determined, it is not incumbent upon this court to consider whether it was a fixed charge or a

> floating charge as law under which this distinction is relevant is not applicable in the present case.

I, most certainly, have difficulties denying that the Companies Act applied to the case. The company was the context of both the mortgage and employment. The High court further stated:

> Section 95 of the Companies Act would only have been applicable in this case if the receiver had been appointed receiver of the company and if a debenture had been issued by the company.

It would not, for purposes of section 95 have mattered whether the receiver was appointed for the company or not. Section 2 of the Companies Act defines a receiver to include the receiver appointed under a charge or otherwise:

> "[R]eceiver" includes an official receiver, and any person appointed as both receiver and manager, and any reference to a receiver of the property of a company includes a reference to a receiver of part only of that property and to a receiver only of the income arising from that property, or from part thereof ...

Section 95, however, is unconcerned with receivers appointed for the company. Section 95 is unconcerned with receivers appointed on other charges, fixed charges. Section 95 covers receivers appointed on debentures secured on a floating charge. The Companies Act, in general, and section 95, in particular, therefore, applied.

Moreover, there was a debenture here. Section 76 (1) of the Companies Act provides:

> A company may raise loans by the issue of a debenture or of a series of debentures or of debenture stock.

Section 81 (1) of the Companies Act reiterates debentures not secured by a charge. The receiver in section 95 can be appointed by a court or under a power in any instrument (sections 97 and 98 (1) of the Companies Act). It suffices for section 95 if the receiver is appointed in either manner by a floating charge. The receiver may be appointed for any part of the property of the company.

Moreover, the Registered Land Act, albeit tangentially, applied to the matter. The company issued the charge. Charges under the Registered Land Act can be made on company property (section 76 (2) of the Companies Act). Under section 86 (1) of the Companies Act must register charges created:

> Where a company creates any charge to which this section applies, it shall be the duty of the company within twenty-one days after the date of the creation thereof to cause the prescribed particulars

> of the charge (together with a certified copy of instrument, if any, by which the charge is created or evidenced) to be delivered to the registrar for registration:

Section 86 (2) (e) of the Companies Act covers charges on land, wherever situate, or any interest therein.

The proviso to section 86 (1) stipulates that registrations under other Acts, including the Registered Land Act, comply with section 86 (1) in the circumstances there described:

> Provided that if the instrument by which the charge is created or evidenced is registered under any Act other than this Act it shall be sufficient compliance with the requirements of this subsection if, within twenty-one days as aforesaid, particulars of the instrument sufficient to identify it, and such other particulars as may be prescribed, are delivered to the registrar for registration.

Section 86 (10) of the Companies Act includes mortgages as charges under Part V of the Companies Act:

> For the purposes of this Part ... the expression "charge" includes "mortgage.

Receivership becomes important and, therefore, the Companies Act covered the matter. Section 287 of the Companies Act applies generally and does not only apply to matters covered in section 95 of the Companies Act. The High Court, however, was correct that the receiver appointed on a debenture was only in respect of the property subject to the debenture and no more.

The company issued a debenture

The appellants attached the proceeds of sale because under a debenture, the mortgagee or chargee appointed a receiver. The High Court thought that there was no debenture. The Companies Act actually defines a debenture. Section 76 (1) of the Companies Act suggests that a court may borrow on debentures. It is a question of law whether the borrowing was by debenture. Section 2 of the Companies Act reads:

> "[D]ebenture" includes debenture stock, bonds and any other securities of a company, whether constituting a charge on the assets of the Company or not...

A mortgage is a security of a company and, therefore, a debenture under section 76 (1) of the Companies Act *(Knightsbridge Estates Trust Ltd* v. *Byrne* (1940) A.C. 613 at pp. 628-630;

Stamp Duties Act: Broad v. *Commissioner of Stamp Duties* 80 ATC 4578 at p. 4585; (1980) 2 N.S.W.L.R. 40, 50; *Bacon* v *Salamane* (1968) 112 C.L.R. 85, 90 and 97). Section 380 of the Consolidating Statute of 1929, United Kingdom, defined a debenture similarly. In *Knightsbridge Estates Trust Ltd.* v. *Byrne*, Romer, LJ, said:

> But s. 380 of the Act provides that unless the context otherwise requires the expression "debenture" in the Act includes "debenture stock, bonds and any other securities of "a company whether constituting a charge on the assets of "the company or not." Now the considerations to which I have referred certainly arouse a suspicion in my mind that when enacting s.74 of the Act, the Legislature had not ordinary mortgages of land in its contemplation. But I find it quite impossible to say that those considerations require that such mortgages should be excluded from the operation of the section. When applied to such mortgages the provisions of the section are quite sensible. They involve no absurdity and no inconsistency. On the contrary, if it be thought desirable that debentures in their popular meaning may be made irredeemable, it would seem to be both absurd and inconsistent to forbid a company to make its ordinary mortgages of land also irredeemable. I can find no legitimate reason for not attributing to the word "debentures" in s.74 the meaning given to it by s. 380.
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> The reason that induced Luxmoore J. to come to the opposite conclusion was this. Regarding the Act of 1929 as being, as indeed it is, a consolidating statute, he rightly said that it must be construed ordinarily so as to exclude any amendment of the previously existing law. But his attention was not drawn to the Companies Act, 1928. That was an amending Act passed with a view to the consolidation of the law which was affected by the Act of 1929, and one of the amendments made by the Act of 1928 was an amendment of the definition of the word "debenture" contained in s. 285 of the Act of 1908. As a matter of fact the Legislature had not in that section attempted to do what no one had succeeded in doing before, namely, give and exhaustive definition of the word "debenture." It contented itself with saying that "debenture", includes debenture stock. Then came the Act of 1928 in which a number of minor amendments to sections of the 1908 Act were set out in the Second Schedule. Among them was this: "Section 285. At the end of the "definition *(sic)* of debentures there shall be added the words '"bonds and any other securities of the company

> whether constituting a charge on the assets of the company or not'."
>
> Hence, the definition of "debentures" m s. 380 of the Consolidating Statute of 1929.
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> It was, however contended on behalf appellants that the words "any other securities" should be construed as referring to securities *ejusdem generis* as the genus to which the debentures belong . All I can say about this is that, if no one seems to know exactly what "debenture" means, no one can be expected what is *a ejusdem generis* indeed, the very fact that no one seems to know exactly what debenture means indicates pretty plainly that debenture is itself the name of a genus and not of a species. In my opinion the words "any other securities" mean what they say, and include all other securities of any kind whatsoever. .

The question of issuance is, therefore, subsumed in that Tanganyika Investment Oil and Transport Company Limited issued the mortgage, a debenture. Of course, the charge, even though registered under the Registered Land Act should have been registered and in the manner under section 86 (1) of the Companies Act. The reason why a second registration is required is so that those dealing with companies must, by one stop check on the company documents, be aware of the mortgage. This is Hoffman, L J in *Buchler and another v. Talbot and others,* [2004] 2 A.C. 298 at 305-06 (H.

> Section 395 ... was intended for the protection of the creditors of an insolvent company. It was intended to give persons dealing with a company the opportunity to discover, by consulting the register, whether its assets were burdened by floating and certain fixed charges which would reduce the amount available for unsecured creditors in a liquidation.

The High Court proceeded on that there was no debenture and concluded that there was not because there was no evidence of registration of the debenture. In relation to charges, however, failure to register them under section 86 (1) of the Companies Act results, under section 86 (9) of the Companies Act, in criminal proceedings. There is no suggestion that the charge is vitiated thereby. It must be that the charge still remains valid because section 86 (8) leaves it to the other party to register it. It would not be open to the other party to register it were it void based on the company's default. The unregistered deed remains valid against the granter company. Concerning an unregistered charge, in *In re Monolithic Building Company* [1915] 1 Ch 643, 667 Lord Cozens Hardy MR, a statement approved by the House of Lords in *Buchler and another v. Talbot and others,* [2004] 2 A.C. 298 at 305-06 (H) said:

> It is a perfectly good deed against the company so long as it is a going concern

There was, therefore, despite failure to register, if there was, a valid charge against the company.

There was no evidence in the industrial relations court on registration of the charge. It cannot, on that score, be concluded that there was no registration of the deed. The matter, however, can be resolved by understanding that in civil matters, the burden is on the claimant to prove the case against the defendant. This burden connotes raising, by evidence, a premise on which the claim should succeed. The premise must be established to the standard of proof on preponderances, balance of probabilities. In this respect, the respondent relied on a floating charge. It was incumbent on them to show that there was a charge floating or otherwise duly registered at the registrar of companies. It can, in the respondent's favour, be presumed, therefore, that the charge met all registration requirements. On the other hand, the company cannot plead non registration as a defence to against the charge against the receiver, even though the mortgagee had a duty to register it as well.

There was no floating charge

Section 34 (3) of the Employment Act creates preferential treatment over other creditors. In the context of a company, section 95 of the Companies Act, which offers employees preferential treatment against floating charge owners, is pertinent in considering whether, as the appellants allege, employees had preferential treatment against other debtors. The charge was a security for the debenture. Was it a floating charge? As seen, the industrial relations court, albeit raised by the appellants, never determined the question. The High Court, however, refused to answer it:

> For all I have reasoned above, I find that the lower court erred in its use of the Companies Act in this matter, more especially with reference to Section 95, when there was no "receiver appointed on behalf of the holder of any debenture of the company secured by a floating charge", there having been no debentures issued by the company, NIOT. Having thus determined, it is not incumbent upon this court to consider whether it was a fixed charge or a floating charge as law under which this distinction is relevant is not applicable in the present case.

The appeal record does not have the appellants' submission in the High Court. The respondent submitted that the charge was on fixed land and, therefore, not a floating charge.

The appellant's counsel acknowledged the difficulty and paucity of authority on the definition of a floating charge *(Re Bullas Ltd* [1994] 1 B.C.L.C. 485; [1994]B,C.C. 36, C and *Royal Trust Bank v National Westminister Bank pie* [1996] BCLC 485. He, however,

commended to the Industrial relations court statements in the House of Lords in *Government Sock Investment Co v Manila Railway Co Ltd* [1897] AC 81. He submitted, based on *Re Bui/as Ltd* that contemporary approaches base on the parties' intentions. Relying on *Siebe Gorman & Co Ltd v Barclays Bank Ltd* [1979] Lloyds Rep 142; *Re Permanent House (Holdings) Ltd* [1988] BCLC 563; *Re Portbase (Clothing) Ltd* [1993] Ch 388; *Re Armagh Shoes Ltd* [1982] N159; and *Re G E Tunbridge Ltd* [1995] 1 BCLC 34, the appellants argue that a floating charge is possible on fixed assets. The appellants, based on *Re Cimes Tissue Ltd* [1995] BCLC 409, submit that a floating charge is possible even with limited permission to use the asset without the mortgagee's permission. The appellant's counsel relied on *Re G E Stunbridge* [1995] 1 BCLC 34 contending that, where the status of an asset is uncertain, there is a floating charge, where classifying the asset as a fixed charge would paralyze the whole enterprise.

En passant, Re Bui/as Ltd, to the extent that it suggests that whether there is a floating charge or not depends on the intention of the parties and, therefore, construction of the instrument, is overruled by Re *Richard Dale Agnew* [2001] U.K.P.C. 28; and *Smith (Administrator to Cosslett) (Contractors) Ltd v Bridgend County Borough* Council[2001]l]UKHL 58.

A floating charge can be made over land *(British South Africa Company v De Beers Consolidated Mines Ltd* [1910] 2 Ch 502; *First Caribbean International Bank (Barbados) Limited Appellant v the Belize Bank Limited and others* (the Court of Appeal of Belize AD 2009 Civil Appeal No 30 of 2008 *Siebe Gorman & Co Ltd v Barclays Bank Ltd, Re Permanent House (Holdings) Ltd, Re Portbase (Clothing) Ltd, Re Armagh Shoes Ltd* [1982] N159 and *Re G E Tunbridge Ltd* [1995] 1 BCLC 34). That the mortgages covered land, a fixed asset, partly answers the problem. The problem becomes intractable because what a floating charge is, until recently, as the appellant's counsel submits, renders itself to little clarity, if at all. In *First Caribbean International Bank (Barbados) Limited Appellant v the Belize Bank Limited and others,* Sosa, J, said:

> I respectfully share the principal reservation developed by Mr Williams in his submissions before this Court (though, conspicuously, not in the court below). The decisions in *Agnew* and *Spectrum,* if I may say so with respect, deal with the proper approach to the question whether the parties to a particular security document have created a fixed charge or a floating charge. I do not presume to question these decisions. This, however, is not a case in which such a question arises nor one in which the adoption, with necessary adaptation, of the approach taken in those important appeals, is paramount in dealing with the true issue under consideration here.

In *Buchler and another v. Talbot and others,* [2004] 2 A.C. 298 at 305-06 (H.L.), comprising of Nicholls, Hoffmann, Millett, Rodger and Walker LJJ, Lord Hoffman said:

> In England and Wales floating charges are a judge-made, or judge-approved, type of security. They originated in the early days of the development of company law in the 1870s. They are a means whereby a financier, typically a bank, provides a company with money on the security of the company's assets which continue to be used and turned over in the ordinary course of business until, when certain events happen, the charge 'crystallises' into a fixed charge on the assets then within its scope. Notable among crystallising events are the appointment of a receiver by the charge holder or the company being wound up.

On the facts of this case, it matters less whether the charge here, a debenture, was a floating charge. As Lord Nicholls points out, many events crystallise a floating charge into a fixed charge. A floating charge, as happened here, crystallizes when a receiver is appointed under the charge *(In re Brightlife In re Christonette Int'l Ltd* [1982] 1 W L R 1245). In *Joshua Tetley & Son, Ltd v Griffin Hotel Co, Ltd (In re Griffin Hotel Co, Ltd)* [1941] 1 Ch 129, 135:

> But that conclusion on the construction and effect of the statutory provisions leaves open the question whether in the supposed events there is, when the winding up takes place, any floating charge or any property subject to that charge. In my judgment, sub-s. 4 (b) of s. 264 only operates if at the moment of the winding up there is still floating a charge created by the company and it only gives the preferential creditors a priority over the claims of the debenture holders in any property which at that moment of time is comprised in or subject to that charge. In the present case the debenture held by the plaintiffs contained a floating charge over all the borrowers' property. On December 9, 1938, that charge ceased to float on the property and assets of which Mr. Veale was appointed receiver. The charge on that day crystallized and became fixed on that property and those assets. It remained a floating charge on any other assets of the borrowers.

In fact a floating charge crystallises with a notice of demand upon default *(In re Brightlife* [1987] 1 Ch 200 [203]. Hoffman J said:

> I would therefore respectfully prefer the decision of the New Zealand Supreme Court in *In Re Manurewa Transport Ltd.* [1971] N.Z.L.R. 909, recognising the validity of a provision for automatic crystallization, to the contrary dicta in the Canadian case I have cited. For present purpose, however, it is not necessary to decide any questions about automatic crystallization. The notices under clauses 3(B) and 13 constitute intervention by the debenture-holder

> and there is in my judgment no conceptual reason why they should not crystallize the floating charge if the terms of the charge upon their true construction have this effect.

The floating charge, if there was one, crystallized when PTAbank, as mortgagee, demanded payment. By the appointment of a receiver, therefore, there was no floating charge. Mr. Rep's appointment was on a fixed charge, not a floating charge. Under Section 95 of the Companies Act the appointment must be on behalf of the holder of any debenture of the company 'secured by a floating charge.'

The present case, therefore, is much like In *In re Barleycorn Enterprises Ltd, Mathias and Davies (a Firm) v Down* [1970] Ch 465 whose facts Lord Millett succinctly summarises in *Buchler and another v. Talbot and others,* paragraph 40

> In reaching this decision the Court of Appeal, as they were bound to do, followed the reasoning of the Court of Appeal (Lord Denning MR, Sachs and Phillimore LJJ) in *In re Barleycorn Enterprises Ltd, Mathias and Davies (a Firm) v Down* [1970] Ch 465. In that case the charge did not crystallise until the company was ordered to be wound up and no receiver was ever appointed, so that the assets in question, though subject to the floating charge, remained under the control of the liquidator. The Court of Appeal decided that in such a case the expenses of the winding up are payable out of the assets subject to the charge in priority to both the preferential creditors and the claims of the charge holder. In the present case the charge holder appointed receivers who collected and realised the assets subject to the floating charge and paid the preferential creditors before the commencement of the winding up. The earlier decision is thus technically distinguishable; but it cannot sensibly be distinguished, for its rationale applies as much to the one situation as to the other.

The House of Lords overruled *In re Barleycorn Enterprises Ltd, Mathias and Davies (a Firm) v Down* on other grounds. It is because crystallization could occur to a floating charge that section 95 requires that a floating charge must subsist and exist at the time of appointment of a receiver before preferential parties, including employees, must take precedent over otherwise secured creditors, whose security is a floating charge. This is precisely because secured creditors are unaffected by preferential creditors. This is our law in Malawi since local legislation is in *pari materia* and *in tandem* with English law.

Lord Hoffman traces the history of the legislation in *Buchler and another v. Talbot and others.* I can only, therefore, quote two statements on the subject matter:

> The 1883 and 1888 Acts were concerned with the distribution of "the assets of any company being wound up". They were not concerned with assets to the extent to which they belonged to secured creditors, and accordingly did not affect assets over which the company had given a charge whether fixed or floating. Preferential creditors were thus given priority over other unsecured creditors in the distribution of the company's free assets...

He continued

> It is necessary to appreciate what section 2 of the 1897 Amendment Act and its successors did and, even more importantly, what they did not do. .... So the assets available for payment of general creditors in a winding up remained the primary source of payment of the preferential debts. Such assets do not include charged assets, which are not available for payment of the general body of creditors until the claims of the charge holder have been satisfied.

Lord Hoffman then traces the history of the floating charge and its impact on preferential debts. Preferential payments were to accord preference to certain debts among unsecured creditors. Companies, therefore, resorted to floating charges. By crystallization, preferential payments were unavailable. The 1897 Amendment Act intended to prioritise preferred payments over floating charges, not fixed charges:

> The 1897 Amendment Act did not affect the operation of the 1888 Act in any relevant respect. The 1888 Act continued to govern the payment of preferential debts out of the assets comprised in the winding up. What the 1897 Amendment Act did was to allow the preferential creditors recourse if necessary to a further source for payment of their debts, viz the assets comprised in a floating charge. Section 2 applied in a winding up (whether or not there was also a receivership). Section 3 applied in a receivership (but only if the company was not in the course of being wound up at the relevant date).
>
> Section 2 of the 1897 Amendment Act provided that in the winding up of a company the preferential debts should, so far as the assets of the company available for payment of general creditors were insufficient to meet them, have priority over the claims of holders of any floating charge and be paid accordingly out of the property comprised in such charge. This later became section 319(5) of the Companies Act 1948 ("the 1948 Act") and is now section 175(2)(b) of the 1986 Act.

There is a long discussion by Lord Hoffman in *Buchler and another v. Talbot and others* the upshot of which is that, under section 95 of the Companies Act, if there is no crystallization of floating charges, floating chargees are in the same position as other creditors. This is an area of reform. Our statutes have been framed in the same way. In Australia, under the concept, once a floating charge, always a floating charge, legislation is effected that the charge must be a floating charge at the time of creation, not at the time of winding up. Without such amendment, the law remains the same. Lord Hoffman said:

> Even before the decision in *Barleycorn* a possible defect had been revealed in the drafting of the legislation. In *In re Griffin Hotel Co Ltd* [1941] Ch. 129 Bennett J had construed the expression "floating charge" in the relevant statute to mean a charge which was still floating at the date of the winding up. If the charge holder succeeded in appointing a receiver, or the charge automatically crystallised, before the moment at which the company was put into liquidation, the preferential creditors would have no priority. This was corrected in Australia, where the expression "floating charge" was defined to mean a charge which was "a floating charge at the date of its creation". Once a floating charge, always a floating charge for the purpose of the priority of the preferential debts. The Cork Committee thought that this was probably the test in England also, but considered that it would be prudent to add a definition on the lines of the Australian legislation; "Insolvency Law · and Practice" (June 1982) (Cmnd 8558) p 356, para 1578; and this was done in the 1986 Act.
>
> Such a change would not have affected the position in *Barleycorn,* where no receiver was appointed and the charge was still floating at the moment of the winding up. But it does affect the position in the present case, where the receiver was appointed and the charge crystallised long before the date of the winding up order. But for the change in the definition of "floating charge" the preferential debts (let alone the costs and expenses of the winding up) would not have enjoyed priority over the claims of the charge holder under Section 40 (which is in fact the relevant Section) or Section 175.

There was a fixed charge

There was, however, no floating charge but a fixed charge *in limine.* Despite earlier uncertainty, there is consensus about the anatomy rather than the definition of a floating charge. It is contended by the appellants that, based on the nature of the business, there was a floating charge. That stated as a general principle, this court would not object to it. On the other hand,

even if there was a floating charge, the floating charge crystallized when the chargor demanded payment. At appointment of a receiver, therefore, there was no floating charge, there was a fixed charge. On these principles, there was a fixed charge here. Under section 95 of the Companies Act, the employees would only have been preferred if the receiver was appointed on a debenture secured by a floating charge.

As will be seen shortly, property subject to a charge is outside insolvency or bankruptcy proceedings and, therefore, section 34 (3) of the Employment Act does not apply.

Section 34 (3) of the Employment Act

It is contended for the appellants that, in any case, the appellants would be prior to the chargee's claims because of section 34 (3) of the Employment Act. Section 34 (3) of the Employment Act provides that

> On the insolvency or winding-up of an employer's business, the claim of an employee or those claiming on his behalf to wages and other payments to which he is entitled under this Act or any contract shall have priority over all other creditors, including the State and the social security system, for ...wages, overtime pay, commissions and other forms of ... holiday pay ...and ... severance pay, compensation for unfair dismissal and other payments due to employees upon termination of their employment.

The appellants rely on this court's decision in *Standard Bank Ltd and another v Luka and others* (2012) Civil Appeal No 1 (MSCA) (unreported) and submit that the words 'all other creditors" refer to all creditors, secured and unsecured.

Of course, the word 'creditor,' if read alone, comports creditors, secured or unsecured. The word 'creditor' should, however, be read in its context in section 34 (3), in relation to the whole Act and its legal and historical context. From this panorama, the word 'creditor' in section 34 (3) of the Employment Act can only mean unsecured creditors and other secured creditors other than the chargee or mortgagee.

First, the scheme of the Companies Act, the Bankruptcy and, recently, the Insolvency Act, is to help unsecured creditors. It has something to do with secured creditors, but not those who are chargees or mortgagees. There are condign reasons expressed by Cotton and Jessel LJJ in *In re David Lloyd &Co* (1877) 6 Ch D 339 but I found this statement of the law by James, LJ, most informative and informing:

> These sections in the *Companies Act*, and the corresponding legislation with regard to bankrupts, enabling the Court to interfere with actions, were intended, not for the purpose of harassing, or

impending, or injuring third persons, but for the purpose of preserving the limited assets of the company or bankrupt in the best way of distribution among all the persons who have claims upon them. There being only small fund or a limited fund to be divided among a great number of persons, it would be monstrous that one or more of them should be harassing the company with actions and incurring costs which would increase the claims against the company and diminish the assets which ought to be divided among all the creditors. But that has really nothing to do with the case of a man who for the present purpose is to be considered as entirely outside the company, who is merely seeking to enforce a claim, not against the company, but to his own property. The position of a mortgagee under such circumstances is, to my mind, exactly similar to that of a man who said, "You the company have got property which you have taken from me; you are in possession of my property by way of trespass, and I want to get it back again." A landlord might say, "You have property under lease from me; you have broken the covenants of the lease, and I have a right of re-entry in consequence of that breach." The company ought not, because it has become insolvent or has been minded to wind up its affairs, to be placed in a better position than any other lessee with regard to his lessor. So with regard to a mortgagee. The mortgagee says, "There is some property upon which I have a certain specific charge, and I want to realize that charge. I have nothing to do with the distribution of your property among your creditors, this is my property." Why a mortgagee should be prevented from doing that I cannot understand. Power was given to the Court to interfere with actions by restraining them or not allowing them to proceed, but this power was given because it was understood that the Court would exercise it with a due regard to the rights of third persons, persons who were not members of the company, and who had not to come in and claim to share in the distribution of the company's assets among the creditors, and who were not therefore *quasi* parties to the winding- up proceedings. The Court would have due regard to the rights of independent persons. A mortgagee is, to my mind, such an independent person, and his rights ought not to be interfered with because his mortgagors have chosen to become insolvent and to have a winding up.

These sentiments form basis of Lord Justice Hoffman's statement in *Buchler and another v. Talbot and others,* [2004] 2 A.C. 298 at 305-06 (H.L where he said:

> Bankruptcy and companies liquidation are concerned with the realisation and distribution of the insolvent's free assets among the unsecured creditors. They are not concerned with assets which have been charged to creditors as security, whether by way of fixed or floating charge. Secured creditors can resort to their security for the discharge of their debts outside the bankruptcy or winding up. Assets subject to a charge belong to the charge holder to the extent of the amounts secured by them; only the equity of redemption remains the property of the chargor and falls within the scope of the chargor's bankruptcy or winding up... Such a creditor is a person who "... is to be considered as entirely outside the company, who is merely seeking to enforce a claim, not against the company, but to his own property" *per* James LJ in *In re David Lloyd & Co.* (1877) 6 Ch. D. 339, 344.

Secondly, secured creditors proceedings are sui generis and aliunde insolvency and bankruptcy proceedings *(In re David Lloyd &Co, Buchler and another v. Talbot and others,* [2004] 2 A.C. 298 at 305--06 (H.L *In re Regents Canal Ironworks Co, Ex p Grissell.* Section 9 of the Bankruptcy Act reinforces this:

> (1) On the making of a receiving order the official receiver shall be thereby constituted receiver of the property of the debtor, and thereafter, except as directed by this Act, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall commence any action or other legal proceedings unless with the leave of the Court and on such terms as the Court may impose.
>
> (2) But this section shall not affect the power of any secured creditor to realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed.

If there were, therefore, bankruptcy or insolvency proceedings, the rights of secured creditors are unruffled. They remain the same throughout. This court in *Standard Bank Ltd and another v Luka and others* never considered section 9 of the Bankruptcy Act. The court never defined the word creditor. The court only considered whether the word 'creditors' in section 34 (3) included secured and unsecured creditors.

It is true that a chargee or mortgagee in relation to the money owing is a creditor, in the general sense. Indeed, when the chargee or mortgagee moves against money, he will be a creditor, in the general sense. When, moving against property subject of a charge or mortgage, the chargee or mortgagee, not the mortgagor, owns, by the conveyance, the property. The charger or the mortgagor only has a right in equity of redemption. The property is not the charger's or the mortgagor's and, therefore, unavailable to creditors or the liquidator.

Section 34 (4) applies on the insolvency or winding-up of the employer's business, not to property of third parties, like landlords and chargees. Any other view comports that a landlord would lose property (not owned by the bankrupt or insolvent employer) on the insolvency or bankruptcy of a lessor employer. This is why Jessel, L J in *In re David Lloyd & Co* said

> Now, as a rule, a mortgagee has a right to realise his security, and of course, as incidental to that, a right to bring an action for foreclosure. Those who say that he should be restrained from bringing or proceeding with such an action must either show some special ground for restraining him, or must say, "We can offer the mortgagee all he is entitled to, foreclosure or sale, as the case may be, at once, without any proceedings in the action" ... But, short of that, it appears to me that the court ought to not under the 87th section of the Act interfere with the rights of a mortgagee.

Cotton LJ also said:

> The present action is brought by a mortgagee to enforce his security. Certainly in a bankruptcy a mortgagee stands in a somewhat favoured position, because under section 12 of the Bankruptcy Act, he has a right after adjudication to go on with his foreclosure action in order to realise his security. Other creditors who are not mortgagees are not in such favoured position. Why in the case of a winding-up of a company a mortgagee should be in a worse position I cannot see.

The bankruptcy of or insolvency of an employer, except as permitted by statute, cannot affect a chargee or mortgagee. Permitting such a course would be interference with property rights (of a mortgagee) that can only be justified by a clear legislation to that effect. In *Buchler and another v. Talbot and others,* [2004] 2 A.C. 298 at 305-06 (H.L Lord Hoffman said:

> It would clearly have been inappropriate to allow unsecured but preferential debts to be paid out of assets charged by way of fixed charge in priority to the claims of the holder of the charge. This would have been an unwarranted interference with the property rights of the charge holder.

I also agree with Lord Hoffman that this would not make any business sense and would actually be adverse to borrowers and lenders alike:

> By making it very difficult for businesses to raise money on the security of their assets it would also have been contrary to the interests of both lenders and borrowers.

The ignominy of floating charges, namely, that it was possible then for the lender and borrower to assign virtually the whole undertaking to floating charges, leaving preferential creditors in the same position as unsecured creditors needed addressing:

> But the development of the floating charge, which enabled a company to grant a charge over the whole or substantially the whole of its undertaking, and which was still of recent origin in 1883, changed the picture. The existence of a floating charge deprived the preferential creditors of much of the benefit which the 1883 and 1888 Acts were intended to give them. It enabled the charge holder to withdraw all or most of the assets of an insolvent company from the scope of the winding up and leave the liquidator with little more than an empty shell and nothing with which to pay preferential debts.

Section 34 (4), in this respect, wants clarity and specificity. It is undermined by section 9 (2) of the Bankruptcy Act that preserves chargees' and mortgagees' rights and section 95 of the Companies Act which only excepts charges or mortgages of a particular kind, floating charges, excluding the rest of the charges. Section 95 of the Companies Act exempts only where a receiver is appointed by a debenture secured by a floating charge that has not crystallized up to the time of ending up of the company.

Finally, the word 'creditor' is limited by context, it cannot, therefore, be applied to all creditors. The creditors must be such 'on insolvency or winding-up.' These two expressions limit the creditors in question. There are, however, insular problems with the words used. There are no problems with the words 'winding up,' they connote a specific event. In relation to companies, winding up can be by members, voluntary or by creditors. The word 'on,' in section 34 (4) of the Employment Act, just means on the happening of these certain event. The word 'insolvency' has no statutory definition in all statutes it is used. Section 2 of the Insolvency Act refers to 'insolvency proceedings:

> "insolvency proceedings" means a collective judicial or administrative proceedings, including an interim proceeding, pursuant to a law relating to insolvency whether personal or corporate in which the assets and affairs of a debtor are subject to control or supervision by a judicial or other authority competent to

> control or supervise that proceeding, for the purpose of reorganization or liquidation;

Juxtaposed against bankruptcy, in normal parlance, it, on the meaning touted by the appellants' counsel, precedes bankruptcy where the latter comports court proceedings or process following insolvency. In this sense insolvency just denotes, without a legal process, inability to pay ones debts. The Companies Act as it was at the time of these proceedings used the connotation of inability to pay debts. The Companies Act then never defined 'inability to pay debts. Section 2 of the Insolvency Act 2016 does:

> "inability to pay debts" has the meaning ascribed thereto to m section 182 and section 183;

Section 182 of the Insolvency Act, 2016 provides:

> (1) Unless the contrary is proved, and subject to section 183, a company shall be presumed to be unable to pay its debts as they become due in the ordinary course of business where-
> (a) the company has failed to comply with a statutory demand in terms of section 184;
> (b) execution issued against the company in respect of a judgment debt has been returned unsatisfied;
> (c) a person entitled to a security interest over the whole or substantially the whole of the property of the company has appointed a receiver under the instrument creating the security interest; or
> (d) an arrangement between a company and its creditors has been put to a vote in accordance with the provisions of section 156 and has not been proved .

Under this definition, section 34 (4) of the Employment Act would apply even if the company was not being wound up or bankrupt. It would mean that at any point, even there is no prospect of closing the company, section 34 would apply. This comports that section 34 (4) can be invoked each time, a mortgagee or chargee fails to pay debts of whatever description. That probably makes common sense; it certainly does not make business or practical sense. The word 'on' would be very ambiguous. Section 287 of the Companies Act however does not render itself to such ambiguity; preferential payments base on a period before a specified event. Section 251(1) of the Companies Act, however, reads:

> If the liquidator is at any time of the opinion that the company will not be able to pay or provide for the payment of its debts in full within the period stated in the declaration made under section 248 he shall forthwith summon a meeting of the creditors and lay

> before the meeting a statement of the assets and liabilities of the company.

The title to the section reads, 'Duty of liquidator to call creditors' meeting in case of insolvency.' Titles and side notes are not part of the legislation, they aid interpreting. In this respect the section seems to lead to what 'in case of insolvency' means. It is in contradistinction to solvency in section 248(1):

> Where it is proposed to wind up a company voluntarily the directors of the company or the majority of them may ... make a written declaration to the effect that they have made a full inquiry into the affairs of the company, and have formed the opinion that the company will be able to pay its debts and liabilities in full within such period not exceeding twelve months after the commencement of the winding up as may be specified in the declaration.

Section 248 (2) suggests a declaration:

> There shall be attached to the declaration a statement of affairs of the company showing-
>
> (a) the assets of the company, and the total amount expected to be realized therefrom;
>
> (b) the liabilities of the company; and
>
> (c) the estimated expenses of winding-up,
>
> made up to the latest practicable date before the making of the declaration.

Section 248, therefore, much like section 284 of the Companies Act recognises a declaration, of some sort of insolvency or solvency for winding up proceedings based on solvency or otherwise of a company. It is insufficient that a company is unable to pay its debts where the members' application for winding-up bases on insolvency. The uncertainty in section 34 (3) heightens because of the words 'insolvency and winding up.

Does their use comport that it is only employees of companies who benefit? In another distinction, it is said that insolvency refers to corporate where bankruptcy refers to natural persons. Certainly, generally, winding up only refers to companies. It must be that the legislature had company employees in mind. It is companies that are a basis of section 34 (3) of the M Employment Act.

In any event, however, the mortgage or chargee is extraneous to the equation. The mortgagee or chargee, when appointing a receiver under the mortgage or charge, comes in as an owner. The property under the charge is not subject of insolvency or bankruptcy proceedings. Section 34 (3), therefore, does not refer to chargees or mortgagees who, in acting against the property the subject of the charge or mortgage, come in as owners. It refers to secured creditors whose securities are not in the form of charges, unsecured and preferred creditors. Chargees and mortgagees on fixed charges are not creditors and are, therefore, not covered by section 34 (3) of the Employment Act. Section 95 of the Companies Act must be understood as only allowing specific charges, floating charges, to be subjected to preferential debts and in the circumstances described in the section. *Standard Bank Ltd and another v Luka and others* must be overruled by this same court.

Standard Bank Ltd and another v Luka and others was *per in curium.* The matter here involved a company and the Companies Act applied. Section 286 (2) preserves the rights of secured and unsecured creditors:

> Subject to section 287, in the winding up of an insolvent company the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors and debts provable and the valuation of annuities and future and contingent liabilities as are in force for the time being under the law relating to bankruptcy in relation to the estates of bankrupt persons, and all persons who in any such case would be entitled to prove for and receive dividends out of the assets of the company may come in under the winding-up and make such claims against the company as they respectively are entitled to by virtue of this section.

Section 287 (1) of the Companies Act then specifically places employees' remunerations as preferred debts only among unsecured creditors and not secured creditors:

> Subject to the provisions of this Act, in a winding-up there shall be paid in priority to all other unsecured debts... all wages of any labourer or workman... all wages or salary (whether earned or not wholly or in part by way of commission) of any clerk or servant in respect of services rendered to the company during twelve months before the commencement of the winding-up ...all amounts due in respect of workers' compensation under any written law relating to workers' compensation accrued before the commencement of the winding-up;

Section 286 (1) of the Companies Act applies the Bankruptcy Act to insolvency of companies:

> In every winding up (subject, in the case of insolvent companies, to the application in accordance with the provisions of this section of the law relating to bankruptcy in force for the time being), all debts payable on a contingency, and all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages, shall be admissible to proof against the company, a just estimate being made so far as possible of the value of such debts or claims as are subject to any contingency or sound only in damages or for some other reason do not bear a certain value.

Section 9 (2) of the Bankruptcy Act excludes chargees and mortgagees from insolvency and bankruptcy proceedings:

> (1) On the making of a receiving order the official receiver shall be thereby constituted receiver of the property of the debtor, and thereafter, except as directed by this Act, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall commence any action or other legal proceedings unless with the leave of the Court and on such terms as the Court may impose.
>
> (2) But this section shall not affect the power of any secured creditor to realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed.

Prioritising of wages, as described, only arises when there are winding up proceedings or insolvency as discussed. Mortgages and charges are excluded from insolvency and bankruptcy proceedings. Mortgagees are not creditors, but owners of property. *Standard Bank Ltd and another v Luka and others* should not be followed or be distinguished, short of overruling it.

The appeal should, therefore, be dismissed with costs to the respondent. The High Court, having dismissed the appeal, used its discretion properly, in my judgment, in awarding the respondents the costs.

Kamanga, JA

1. Introduction

This is an appeal against the judgment of Honourable Justice Mwale in the High Court - Lilongwe District Registry- delivered on 27thJune, 2014, reversing the decision of the Industrial Relations Court delivered on 26th August, 2013 that an amount of US$500,000 , being the balance of the proceeds of the sale of charged property in respect of which the 1st respondent had been appointed Receiver and Manager, and payable by the 2nctrespondent to the Eastern and Southern African Trade and Development Bank ("PTA Bank") should be made available to the appellants, employees of the Nyasa Investment Oil and Transport Company Limited ("NIOT"), to liquidate their claim for unpaid wages against NIOT.

2. Background

2.1 The facts of this case, in so far as they are relevant in this appeal, are not in dispute. The appellants are employees NIOT. NIOT has a sister called Tanganyika Investment Oil and Transport Company Limited ("TIOT"). The shareholders of NIOT and TIOT are apparently the same, and are based in Tanzania.

2.2 In 2003, TIOT secured a trade finance facility of US$11 million from PTA Bank. In 2006, TIOT secured an additional trade finance facility of US$4 million from PTA Bank, thus bringing the total amount to US$15 million. With respect to the additional trade finance facility of US$4 million, PTA Bank sought security, and NIOT agreed to charge its property, a developed fuel storage depot known as Alimaunde 25/1054 in Lilongwe (the "charged property"), to PTA Bank. Subsequently, a formal third party charge (the "Charge") was executed by NIOT, as chargor, and PTA Bank, as chargee, pursuant to, and under, the Registered Land Act. The Charge was registered at the Lilongwe Land Registry as Application 533/2006. All the transactions relating to the Charge were duly effected in accordance with section 60 of the Registered Land Act.

2.3 TIOT subsequently defaulted on its servicing obligations under the Trade Finance Facility Agreement with PTA Bank and, after several letters of demand, PTA Bank, on 14 December, 2009, in exercise of its powers under clauses 10 and 13.1 of the Charge and section 68 of the registered Land Act, by Deed of Appointment, appointed the 1strespondent as receiver and manager of the charged property, with power to receive only income, rents and profits, if any, of the charged property, on behalf of PTA Bank, in accordance with section 69 of the Registered Land Act.

2.4 The 1st respondent, in its capacity as receiver and manager of the charged property, also gave NIOT ninety days' notice of default; but despite the notice, the default was not remedied. It is also common ground that the charged property had been sublet by NIOT to a company known as Injena, without the consent of PTA Bank, and despite the indulgence of the 1st respondent, no income was recovered from Injena by the 1st respondent in respect of that transaction.

2.5 PTA Bank, in exercise of its powers under clauses 10 and 13.5 of the Charge and under section 68 of the Registered Land Act, subsequently decided to sell the charged property to Simama General Dealers Limited, the 2nctrespondent. Under the Sale Agreement dated 1st October, 2012 between PTA Bank and Simama General Dealers Limited the charged property was sold for US$1,300,000. It was agreed that the amount was payable in two installments - an initial payment of US$800,000 and a subsequent payment of US$500,000 within twelve months from 29th August, 2012.

2.6 It is common ground that for some time NIOT had not been paying the appellants, its employees, and had accumulated and owed the appellants the aggregate sum of US$1,229,000 in respect of salary arrears, unpaid wages and housing allowances since 2006. After the initial payment of US$800,000 was made by the 2°drespondent to PTA Bank, in accordance with the Sale Agreement for the charged property, the Appellants sued NIOT, the Benard ROP, the receiver and manager of the charged property, (the 151respondent) and the Simama General Dealers Limited (the 2°drespondent)in the Industrial Relations Court and, on 26th August, 2013, obtained a judgement which in effect held that Benard ROP, the receiver and manager of the charged property, was liable for the amounts owed to the appellants, and that the judgement obtained by the appellants against NIOT can be satisfied with the proceeds of the sale of the charged property; and, accordingly, that the remaining balance of US$500,000 in the hands of Simama General Dealers Ltd, the 2°drespondent, should be paid over to the appellants.

2.7 Benard ROP, the receiver and manager of the charged property, and Simama General Dealers Limited, being dissatisfied with the judgement of the Industrial Relations Court, appealed to the High Court - Lilongwe District Registry; and the High Court on 27th June, 2014, reversed the decision of the Industrial Relations Court delivered on 26th August, 2013. The appellants in turn, being dissatisfied with the judgment of the High Court, have appealed to this Court.

3. Grounds of Appeal

3.1 The appellants, by their Amended Notice of Appeal filed on 2th April, 2015,filed the following Grounds of Appeal-

> " *3.1 The lower Court erred in law in suggesting that the Companies Act did not wholly apply to this matter.*
>
> *3.2 The lower Court erred in law in overlooking the definition of debenture as an "acknowledgement of debt" wide enough to cover the "Third Party First Charge therein".*
>
> *3.3 The lower Court erred both in law and/or in fact in holding that the charge herein was not a floating charge which would be subject to section 95 of the Companies Act.*
>
> *3.4 The lower Court incidentally erred in holding that the Appellants' unpaid wages do not fall under nor constitute outgoings affecting the charged property to wit Tile Number Alimaunde 2511054.*
>
> *3.5 In any event the judgement of the lower Court was erroneous in law in that it effectively contradicts the meaning of section 34 (3) (d) of the Employment Act which adequately protects the Appellants employees ' terminal benefits from claims of creditors of all categories without exceptions.*
>
> *3.6 The lower Court erred in awarding the respondents costs.* ".

3.2 The appellants, accordingly, sought the following relief-

(a) "a reversal of the judgement of the lower Court"; and

(b) that "the 1st respondent do pay the appellants the proceeds of the sale of the Appellants' employer judgement debtor's only assets namely Tile Alimaunde 2511054 hitherto attached to the judgement obtained by the Appellants against the said judgement debtor in the Industrial Relations Court Lilongwe under Matter No. 501 Of 2012. ".

3.3 During the hearing of this appeal on 2ih November, 2015, Counsel for the appellants informed the Court that the appellants have abandoned all Grounds of Appeal, except Ground of Appeal No 5, namely, that *"....the judgement of the lower Court was erroneous in law in that it effectively contradicts the meaning of section 34 (3) (d) of the Employment Act which adequately protects the appellants employees' terminal benefits from claims of creditors of all categories without exceptions".* Accordingly, Counsel for the appellants made, and the Court heard, arguments and submissions relating only to this Ground of Appeal.

4. The appellants' argument s and submissions

4.1 During the hearing of this appeal Counsel for the appellants argued and submitted that in terms of the decision of this Court in *Standard Bank Limited and Raymond Davis v Luka and Others and Import and Export (Malawi) Ltd (In Liquidation)* MSCA Civil Appeal No. 1 of 2012 employees' benefits are protected from creditors of all categories in accordance with section 34 (3) (d) of the Employment Act; that the decision of the Industrial Relations Court was for all practical purposes intended to secure the appellants' employment benefits; that the decision of the Industrial Relations Court was and is consistent with section 34 (3) (d) of the Employment Act; and that the decision of the High Court reversing the Industrial Relations Court is erroneous in law in that it effectively contradicts the clear meaning of section 34 (3) (d) of the Employment Act.

4.2 During the hearing of the appeal and in response to a question posed by the Court on the applicability of section 34 (3) (d) of the Employment Act in this matter, and specifically whether there was a formal declaration of insolvency or formal winding up proceedings in this matter, Counsel for appellants conceded that section 34 (3)(d) of the Employment Act applies in cases of "insolvency or winding up of an employer's business". However, Counsel for the appellants argued and submitted that although there was no formal winding up in this matter, the appointment of the receiver and manager is a sign that NIOT was insolvent. Counsel for the appellants also referred the Court to the *Legislative Guide on Insolvency of United Nations Commission on International Trade* which defines "insolvency" as "when a debtor is generally unable to pay its debts as they mature or when its liabilities exceed the value of its assets", and Counsel invited this Court to adopt and apply that definition in this matter.

5. The respondents' arguments and submissions

5.1 During the hearing of this appeal Counsel for the respondents argued and submitted that section 34 (3) (d) involves two distinct circumstances, namely, on a declaration of insolvency and on the winding up of the employer's business; that, in so far as winding up is concerned, this could be voluntary or compulsory; and that if a declaration of insolvency or winding up is effected there will be documentary evidence to that effect.

5.2 Counsel for the respondents also argued and submitted that there was no evidence to support the assertion or suggestion that NIOT had declared insolvency at the time that the charged property was sold by PTA Bank to Simama General Dealers Limited, the 2nd respondent; furthermore, there was no evidence to support the assertion or suggestion that NIOT had undergone or was in the process of undergoing any form of liquidation or winding up, whether voluntary or compulsory; indeed there was no liquidator or receiver appointed in respect of NIOT. NIOT as a company was for all intent and purposes operational but just dormant.

5.3 Counsel for the respondents also argued and submitted that the 1st respondent was appointed receiver and manager by PTA Bank only in relation to the charged property in accordance with clauses 10 and 13.1 of the Charge and pursuant to section 68 of the Registered Land. In addition, it was argued and submitted that it was not the receiver and manager, the 1st respondent, who sold the charged property, but PTA Bank itself as chargee under the Charge. TIOT had defaulted under the Trade Finance Facility Agreement; the additional trade finance facility of US$4,000,000 was secured by the charged property, and PTA Bank sold the charged property directly to Simama General Dealers Ltd. It was argued and submitted that this is a common and normal bank practice. Consequently, it was argued and submitted by Counsel for the respondents, that it is not necessary to engage in an analysis of the application of section 34 (3) (d) of the Employment Act as that section cannot and does not apply in this matter.

5.4 Counsel for the respondents further argued and submitted that PTA Bank sold the charged property in exercise of its rights under the Charge and under the Registered Land Act, and this was not a transaction that should involve the appellants as employees of NIOT.

5.5 In relation to the decision of this Court in *Standard Bank and Raymond Davis v Luka and Others and Import and Export Malawi Ltd (In Liquidation)* Counsel for the respondents argued and submitted that the employees in this case and those in the *Standard Bank case* are on different legal footing in that *Standard Bank Case* was a clear case of liquidation in which an order for liquidation was obtained from the court. However, in the present case there is no evidence to suggest that any winding up process had been initiated in relation to NIOT. It was further argued and submitted that in the *Standard Bank case* the appointed receiver went beyond his powers by exercising the powers of a liquidator through which he sold both the property mortgaged to Standard Bank and other company assets, and that he repaid the loan to Standard Bank from a collective fund; no distinction was made between the sale proceeds from the mortgaged property and the proceeds from the realization of other company assets. In the instant case, it is argued and submitted, the US$1,300,000 realized from the sale of the charged property was not as a result of any liquidation process, but as a result of the exercise of statutory and contractual powers of sale by PTA Bank as chargee of the charged property. Consequently, it is argued and submitted, the principle of *stare decisis* cannot be applied in this case as the *ratio decidendi* of the *Standard Bank case* is not applicable to the set of facts in the present case.

6. Issue for Determination

6.1 The principal issue for determination in this appeal is whether section 34 (3) (d) of the Employment Act is applicable in this matter, and if so, whether that section may, therefore, be invoked by the appellants to enable them to have a first call on the US$500,000 payable by the 2nd respondent to PTA Bank.

6.2 Section 34 (3) (d) of the Employment Act provides as follows-

> *"(3) On the insolvency or winding up of an employer 's business, the claim of an employee or those claiming on his behalf to wages and other payments to which he is entitled under this Act or any contract shall have priority over all other creditors, including the State and the social security system, for the following amounts-*
>
> > *(d) severance pay, compensation for unfair dismissal and other payments due to the employees upon termination of their employment. ".*

6.3 Section 34 (3) (d) of the Employment Act is triggered in two circumstances, namely, on a declaration of insolvency and on the winding up of the employer's business. Where neither of these two circumstances obtain, the section does not, in my considered view, apply.

6.4 It is clear from the court record that no formal process had been initiated for the winding up of NIOT and, unlike the *Standard Bank case,* no liquidator had been appointed in relation to the business of NIOT. However, Counsel for the appellants argued and submitted that, although there was no formal winding up of NIOT, the appointment of the receiver and manager is a sign that NIOT was insolvent. Counsel for the appellants also referred the Court to the *Legislative Guide on Insolvency of United Nations Commission on International Trade* which defines "insolvency" as *"when a debtor is generally unable to pay its debts as they mature or when its liabilities exceed the value of its assets",* and invited this Court to adopt and apply that definition in this matter.

6.5 With all due respect to Counsel for the appellants, the court record clearly establishes that the receiver and manager was appointed by PTA Bank, the chargee of the charged property in accordance with clauses 10 and 13.1 of the Charge and section 69 of the Registered Land Act. The appointment by PTA Bank of the receiver and manager by itself is not, in my view, sufficient to justify the inference that NIOT was insolvent. It should also be remembered that NIOT was not the principal obligor under the Trade Finance Facility Agreement; the principal obligor was TIOT. NIOT in effect granted security to PTA Bank through the Charge to secure the additional US$4,000,000 trade finance facility provided by PTA Bank to TIOT. It is principally the default of TIOT under the Trade Finance Facility Agreement that triggered the appointment by PTA Bank of the receiver and manager in relation to the charged property. It is certainly not proper to impute insolvency on NIOT based on the default of TIOT under the Trade Finance Facility Agreement. Furthermore, the *Legislative Guide on Insolvency* to which the Court was referred by Counsel for the appellants is but a practical guide for legislative drafters and, useful though it may appear, is not relevant in this matter. In any event, if, as it is alleged on behalf of the appellants, NIOT was insolvent, then the burden is on the Appellants to show, on a balance of probabilities, that such is the case. In my considered view, that burden has not been

discharged. On the available evidence I find that section 34 (3) (d) of the Employment Act is not applicable to this matter as asserted by the appellants, or at all.

7. Review of the proceedings in the Industrial Relations Court

7.1 I have had the opportunity to review all the evidence and documents on the court record, and I take the liberty, pursuant to Order III rule 2 (6) and Order III rule 26 of the Supreme Court of Appeals Rules, (Cap. 3:01 *sub. leg p.14),* to consider and determine the question whether the attachment of the US$500,000 payable by the 2nd respondent to PTA Bank by the Industrial Relations Court was properly grounded.

7.2 As indicated earlier in this judgement the facts in this case establish that in 2003, TIOT secured a trade finance facility of US$11 million from PTA Bank. In 2006, TIOT secured an additional trade finance facility of US$4 million from PTA Bank, thus bringing the total amount to US$15 million. PTA Bank sought security for the additional trade finance facility of US$4 million, and NIOT agreed to charge its property to PTA Bank. Subsequently, a formal Charge was executed by NIOT, as chargor, and PTA Bank, as chargee, pursuant to, and under, the Registered Land Act. The Charge was registered at the Lilongwe Land Registry as Application 533/2006; all this was effected in accordance with section 60 of the Registered Land Act. TIOT subsequently defaulted on its servicing obligations under the Trade Finance Facility Agreement with PTA Bank, and after several letters of demand, PTA Bank on 14 December, 2009, in exercise of its powers under section 68 of the Registered Land Act and under clauses 10 and 13.1 of the Charge, by Deed of Appointment appointed the 1st respondent as receiver and manager of the charged property, with power to receive only income, rents and profits, if any, of the charged property, on behalf of PTA Bank, in accordance with section 69 of the Registered Land Act. PTA Bank and the 1st respondent, in its capacity as receiver and manager of the charged property, both gave appropriate notice of default; but despite the notice, the default was not remedied. Consequently, PTA Bank, in exercise of its powers under clauses 10 and 13.5 of the Charge and under section 68 of the Registered Land Act, decided to sell the charged property to Simama General Dealers Limited, the 2nd respondent, under the Sale Agreement dated 1st October, 2012 for US$1,300,000, it being agreed that the amount was payable in two installments - an initial payment of US$800,000 and a subsequent payment of US$500,000.

7.3 In my considered view, to the extent that all the transactions with respect to the creation of the Charge herein were premised on, and processed in accordance with, the relevant provisions of the Registered Land Act, the resolution of the issue of the disposition of the proceeds of the sale of the charged property should have regard to scheme or relevant provisions of the Registered Land Act, namely, section 72 of the Act. It should be emphasized that there is no evidence or suggestion from the court record that, in relation to the processing of the Charge and the disposal of the proceeds of the sale of the charged property, the relevant provisions of the Registered Land Act were not complied with. Indeed, the only issue raised on behalf of the appellants in this appeal is that "the judgement of the lower Court was erroneous in law in that it effectively contradicts the meaning of section 34 (3) (d) of the Employment Act which adequately protects the appellant employees' terminal benefits from claims of creditors of all categories without exceptions", and that, as between PTA Bank and themselves, the appellants have a better claim to the US$500,000payable by the 2nd respondent to PTA Bank.

7.4 The legal right of a chargee or a mortgagee to sell charged property in order to recover a loan is well recognized and entrenched in our legal system. Banks, building societies and other financial institutions routinely rely on charges to secure funds that they lend. Indeed, section 68 (2) of the Registered Land Act recognizes two options available to a chargee or mortgagee in the case of a default; that section in effect provides that, if a chargor fails to remedy a default after three months' notice, the charge may appoint a receiver of the income of the charged property, or sell the charged property.

7.5 The legal right of a chargee or a mortgagee to sale charged property in order to recover a loan has also been recognized by our Courts in several cases, including *Mkhubwe v National Bank of Malawi* [2000-2001] MLR 261 and *Kalimbuka v Stanbic Bank Limited* [2004] MLR 117.In *Mkhubwe v National Bank of Malawi* (at p 265) Mwaungulu J. as he then was, in my view, correctly summarized the position as a chargee or mortgagee as follows-

> *"....If a borrower fails to pay a lender, if there is security for the loan, justice demands that the lender recourse the security, irrespective of the hardship on the borrower. Justice is not met by the borrower having the benefit of both the funds and the security. The chargee's right to the security is underlined by statute .....".*

The Honourable Judge further correctly observed that, subject to giving the chargor the appropriate statutory notice, the chargee need not inform the chargor about the remedy he will employ; that the chargee's right springs immediately there is a default; and that the chargee need not inform the chargor that the chargee will sell the property, or stipulate the time of sale. The legal right of a chargee to sale charged property in case of a default was also expressly recognized in *Kalimbuka v Stanbic Bank Limited.*

7.6 Section 72 of the Registered Land Act deals with the application of purchase money of charged property. That section provides that purchase money received by a chargee who has exercised his power of sale, if the charged property is unencumbered, shall be applied first, in payment of costs and expenses properly incurred and incidental to the sale; second, in accordance with the provisions of the charge to discharge the money due to the chargee at the date of the sale; third, in the payment of subsequent charges; and the residue of the money so received shall be paid to the person who immediately before the date of the sale was entitled to redeem the charged property.

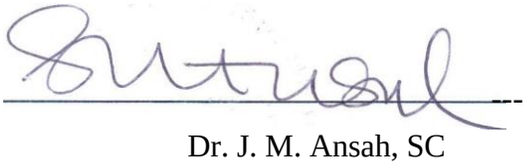
7.7 In terms of clause 9 of the Charge the parties thereto agreed that the charged property would secure the repayment of an amount of at least US$$4,000,000. In the instant case only US$1,300,000 was realized from the sale of the charged property. In my considered view, on a proper interpretation of section 72 of the Registered Land Act, the access by PTA Bank to the proceeds of the sale of the charged property ranks higher in priority than the claim by the appellants against NIOT. I, accordingly, find that entire amount of US$1,300,000 which was realized from the sale of the charged property is payable to PTA Bank in accordance with section 72 of the Registered Land Act. The Appellants do not have a better priority claim than PTA Bank, and the Appellants are not entitled to use balance of US$500,000 to satisfy their claim against their employer, NIOT. It is, accordingly, ordered that the amount of US$500,000 be released to PTA Bank forthwith.

8. Conclusion

8.1 In conclusion, section 34 (3) (d) of the Employment Act is not applicable to this matter as asserted by the appellants, or at all. Furthermore, the institution of the proceedings in the Industrial Relations Court to attach the amount of US$500,000 payable by the 2nd respondent to PTA Bank was misconceived, and the decision of the Industrial Relations Court to attach the amount of US$500,000 was erroneous.

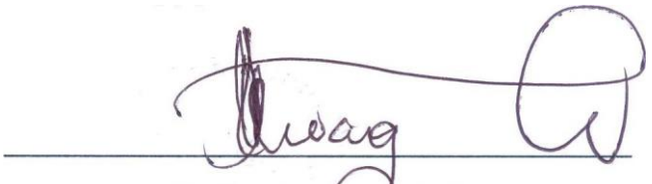
8.2 This appeal is dismissed, and costs are awarded to the Respondents.

Pronounced at Blantyre this 26th day of April, 2016



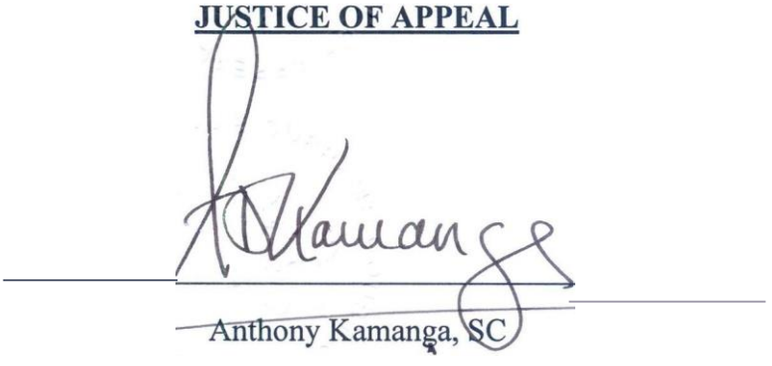
Dr. J. M. Ansah, SC

JUSTICE OF APPEAL



D. F. Mwaungulu, SC

JUSTICE OF APPEAL



Anthony Kamanga, SC

JUSTICE OF APPEAL