IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA

APPEAL NO.42/2004

B E T W E E N:

ZAMBIA NATIONAL OIL COMPANY LIMITED (IN LIQUIDATION) — 1ST APPELLANT
ZAMBIA NATIONAL COMMERCIAL BANK PLC — 2ND APPELLANT

AND

RICHARD NSOFU MANDONA — RESPONDENT

CORAM: LEWANIKA, DCJ., CHITENGI, MUSHABATI, JJS
On 15th September, 2005 and 27th June, 2006

For the 1st Appellant: M.M. MUNDASHI of Mulenga, Mundashi & Co.
For the 1st Appellant: M. MUTEMWA of Mutemwa Chambers
For the Respondent: P.J. PENDWE of Pendwe & Co

JUDGMENT

LEWANIKA, DCJ delivered the judgment of the court.

1. RE ARMSTRONG WHITWORTH SECURITIES LTD 1947, CH. 673
2. AMERICAN CYNAMID COMPANY VS ETHICON LTD 1975, A.C. 396
3. SHELL & BP ZAMBIA LTD VS CONIDARIS & OTHERS, 1975, Z.R. 17
4. TURKEY PROPERTIES VS LUSAKA WEST DEVELOPMENT COMPANY LTD 1984 ZR 88
5. SISKINA (CARGO OWNERS) VS DISTOS COMPANIA NAVIERA, S.A. THE SISKINA, 1977, 3A.E.R. 803

In this appeal we shall refer to the Respondent as the Plaintiff and the 1st and 2nd Appellants as the 1st and 2nd Defendants which is what they were in the court below.

The Plaintiff had instituted proceedings in the court below for the sum of US $3,004,855.00 being remuneration and the costs and expenses of receivership of the 2nd Defendant between 31st October, 2001 and 4th April, 2002 and for a mareva.injunction restraining the 2nd Defendant until final determination of this action or until further order from removing out of jurisdiction or from disposing of or transferring, charging or diminishing its assets below US$3,500,000.00.

The brief facts of this case can be stated as follows; pursuant to a debenture created by the 2nd Defendant in favour of the 1st Defendant, the 1st Defendant appointed the Plaintiff as the Receiver and Manager of all the undertaking, property, assets and rights of the 2nd Defendant. This appointment was subsequently terminated and the 2nd Defendant was placed under voluntary liquidation by Resolution of its members in April 2002. The Plaintiff rendered two bills to the 1st Defendant totaling US$3,004,855.00. The 1st Defendant is said to have declined to settle them and asserted that the said bills should be settled by the liquidator of the 2nd Defendant. The Plaintiff then instituted these proceedings to recover the said sum from the 1st Defendant and also a judgment in the said sum against the 2nd Defendant as indemnity. The Plaintiff also took out an application in the court below for the grant of an interlocutory mareva injunction in the

terms set out above. In his Ruling in the court below the learned trial Judge declined to grant the mareva injunction but made an order in the following terms:-

> ***"Therefore I order that the liquidator may proceed to collect the assets of the 2nd Defendant and sell them if need be. However, having done so, the liquidator should withhold the distribution of the assets themselves or the proceeds therefrom until the Plaintiff's matter has been determined."***

It is against this Order that the Defendants have appealed. Counsel for the Defendants has filed four grounds of appeal, namely:-

1. That the learned trial Judge erred in law in refusing the application for a mareva injunction and then proceeding to make a restraining order which in effect granted the injunction;

2. That the learned trial Judge erred by not taking into account that the Order he made would prevent the 1st Appellant from meeting the expenses of the liquidation and thereby effectively prevent the liquidation from continuing;

3. That the learned trial Judge erred in law and fact in not taking into account that the Plaintiff as an unsecured creditor does not have a sufficient claim of right to obtain a mareva injunction and/or an injunction in the form granted by the Judge;

4. That the learned trial Judge erred in law by making an injunction order without considering the legal principles relating to the exercise of his discretion to grant injunctions.

In arguing the first ground of appeal, Counsel for the Defendants submitted that the Plaintiff had applied for a mareva injunction restraining the 1st Defendant from removing from the jurisdiction of the court or from

disposing of, transferring, charging, dissipating, diminishing or in any way whatsoever dealing with any of its assets within the jurisdiction below the sum of US$3,500,000.00 until after the trial of this matter.

He said that the Judge in the court below having found that this was not a proper case for the grant of the injunction should have simply dismissed the application as having no merit. That the trial Judge instead preceded to hold that:- ***"under company law the Respondent was entitled as a creditor to have the distribution of funds held up until his claim is ascertained."*** He said that the approach taken by the learned trial Judge was wrong and had no basis in law. That the trial Judge appeared to have relied on the case of **RE ARMSTRONG WHITWORTH SECURITIES LTD** [1] for the proposition that a contingent creditor is entitled to hold up the distribution of assets in a liquidation until his claim is ascertained. Counsel then went on to distinguish the facts of that case from this case. He said that the holding in that case related to the holding up of a final distribution to shareholders and winding up of the liquidation before known creditors had been taken care of. He submitted that the case never laid down a general principle of law that any contingent creditor who had a claim, real or imagined can stop a liquidator from paying ascertained and proved claims until his claim is proved in court.

Counsel further submitted that the holding of the court below which was based on an alleged principle of company law did not take into account the provisions of the Companies Act, Cap 388 of the Laws of Zambia which governs the liquidation of the 1st Defendant. He said that it is correct that under Section 345 of the Companies Act, a contingent and/or unascertained claim should be taken into account by a liquidator when making provision for creditors. However, this is not enough. The same statute also ranks creditors in order of priority. That section 246 of the Act provides for the Order of priority of preferential claims such as statutory dues (e.g. taxes, workers' compensation claims etc). That after the payment of preferential claims, other creditors are then considered starting with secured creditors and unsecured creditors. He pointed out that the Plaintiff's claim is unsecured. He said that the only right that Section 345 vests in the Plaintiff is that the liquidator should take note and recognize it as a contingent claim under the unsecured creditors. That the learned trial Judge clearly misapprehended the effect of Section 345 and the rights of the Plaintiff under company law purportedly on the strength of **RE: ARMSTRONG WHITWORTH SECURITIES LTD**[1]. He said further that the Order which the learned trial Judge granted had the further effect of non-suiting the 1st Defendant as the court below had proceeded to grant an Order which had

not been applied for and on which the 1st Defendant had not been given an opportunity to be heard.

As to the second ground of appeal, Counsel for the Defendants submitted that the liquidator as part of his functions not only collects assets and sell if need be, he also has to make payments in the normal process of running the liquidation. That in making the Order in the manner he did, the learned trial Judge overlooked one of the cardinal principles that a court has to take into account in determining whether an injunction should be granted or not, namely, the balance of convenience. He referred us to the case of **AMERICAN CYNAMID COMPANY VS CONIDARIS & OTHERS**[3] on the point. He said that the Plaintiff's claim is for fees based on a percentage of the amounts collected by him. That the 1st Defendant has denied this claim. He posed the question whether it is convenient for the Plaintiff to hold up the liquidation and in so doing prevent the liquidator from exercising his legal duties for the benefit of all the creditors during the period that his alleged right against the 1st Defendant is being ascertained? He submitted that not only will it not be convenient but it will be potentially detrimental and prejudicial to the rights of all the creditors of the 1st Defendant for the liquidation to be affected in the manner the trial Judge ordered.

In arguing ground 3 Counsel submitted that as already pointed out, the Plaintiff is not a preferential or a secured creditor. The only right he has is that the 1st Defendant should take note of his contingent unsecured claim. He said that the Order as framed by the learned trial Judge has granted the Plaintiff a right, which hitherto he did not have. He referred us to the case of **TURKEY PROPERTIES VS LUSAKA WEST DEVELOPMENT COMPANY**[4] on the point.

He said that the Plaintiff is an unsecured contingent creditor but through this Order, a situation has been created, where none existed before the commencement of these proceedings that the liquidator should not make any payments whether to preferential and secured creditors until his claim has been ascertained and settled. That the Order as granted has given the Plaintiff an order of preference where none existed before.

As to the fourth ground of appeal, Counsel said that the Plaintiff's claim in the main action as endorsed on the writ of summons is for the sum of US$3,004,855.00. He said that this is an ascertained and quantifiable amount. That in the event that the claim succeeds the position will be that the Plaintiff will stand in line with all other unsecured creditors in order of priority and preference. That this is a remedy which cannot be said to be

inadequate in the event he succeeds and that the grant of an injunction was not justified in the circumstances.

In reply Counsel for the Plaintiff submitted that the statement of claim herein does not only plead, inter alia, for an injunction but also for further or other relief. He said that this pleading is intended to enable the court do complete justice to any cause or matter so that the court is not restricted to the specific relief or remedy sought. That the court below was therefore perfectly entitled to make the most appropriate Order in the circumstances. He said that on an application for an injunction, the overriding duty of the court is to protect the contending interests of the parties so that no injustice is caused and that its final judgment is not rendered nugatory. That under this inherent jurisdiction the court below was on firm ground in refusing to turn a blind eye to the obvious need for an injunction. That the type or form of the Order was inconsequential.

He further said that Section 346 of the Companies Act obliges the liquidator to recognize, protect and give effect to the claims of all the creditors of the company. That if a liquidator proceeds to distribute all the assets of the company to the exclusion of known creditors whose claims are contingent, then the liquidator would defeat the very essence of Section 345.

As to the second ground of appeal, Counsel said that the arguments advanced do not support this ground as they relate to the fourth ground and which arguments were already advanced in the court below and were not accepted. He said that the Order specifically authorized the liquidator to proceed with the liquidation. That what is restrained is merely the distribution, and that any legitimate liquidation expenses should therefore be met in the usual manner.

As to the third ground of appeal, Counsel for the Plaintiff submitted that the Plaintiff is essentially claiming that as receiver and manager, he has preferential claims and a lien on the 1st Defendant's charged assets. That his claims have priority over all other creditors including the liquidation and that these claims are based on Clause 9 of the debenture as well as sections 110 and 346 of the Companies Act. He said that this priority claim and the lien reinforced the need for restraint and that the court below was alive to these fundamental claims by the Plaintiff. He said further that even if the Plaintiff were an ordinary creditor, which is denied, he would still be entitled to the protection of Section 345 as that Section is not limited to secured creditors.

As to the fourth ground of appeal, Counsel said that the court below bore in mind the general principles regarding the grant of injunctions when it

made the Order complained of. He urged us to dismiss the appeal as it lacked merit.

We are indebted to Counsel for the Plaintiff and for the Defendants for their submissions which have been of great assistance to us in arriving at our decision. We have also considered the contents of the affidavits that were filed herein in support of and in opposition of the application for the grant of a mareva injunction.

We shall first consider the first ground of appeal. It is common cause that the Plaintiff was appointed by the 1st Defendant as Receiver Manager of all the undertaking, property, assets and rights of the 2nd Defendant pursuant to a debenture created by the 2nd Defendant in favour of the 1st Defendant. The Plaintiff's appointment was subsequently terminated and the 2nd Defendant was placed under voluntary liquidation by resolution of its members in April, 2002 and a liquidator was appointed. The Plaintiff rendered two bills to the 1st Defendant totaling US$3,004,855.00 for services rendered as Receiver Manager. The 1st Defendant declined to settle the bills and asserted that the said bills be settled by the liquidator of the 2nd Defendant. This is what prompted the Plaintiff to institute these proceedings to recover the said monies and the Plaintiff also applied for a mareva injunction restraining the 2nd Defendant until final determination of this

action or until further Order from removing out of Jurisdiction or from disposing of or transferring, charging or diminishing its assets below US$3,500,000.00. In his Ruling the learned trial Judge in the court below made the following finding:-

> ***"In summary, therefore, the relief of mareva injunction, which the Plaintiff sought is not the correct one because the 2nd Defendant is in liquidation. However, under company law he is entitled as a creditor to have the distribution of funds held up until his claim is ascertained."***

This holding by the learned trial Judge runs counter to the provisions of Sections 345 and 346 of the Companies Act, Cap 388 of the Laws of Zambia. Section 345 of the Companies Act provides that a contingent and/or unascertained claim should be taken into account by a liquidator when making provision for creditors. Section 346 of the same Act ranks creditors in order of priority. Section 346 provides for the Order of priority of preferential claims such as statutory dues. After the payment of preferential claims, other creditors are then considered starting with secured creditors and unsecured creditors. The Plaintiff's claim against the 2nd Defendant is unsecured. As such the only right that Section 345 of the Companies Act vests in the Plaintiff is that the liquidator should take note and recognize it as a contingent claim under the unsecured creditors. The Order made by the learned trial Judge has the effect of granting the Plaintiff

a priority that he does not have and which is not supported by any provision contained in the Companies Act. For these reasons, we would allow the appeal on the first ground and set aside the Order of the court below. In the circumstances, we find it otiose to consider the other grounds of appeal. We grant the costs of the appeal to the 1st and 2nd Defendants and they are to be taxed in default of agreement.

D.M. Lewanika
DEPUTY CHIEF JUSTICE

P. Chitengi
SUPREME COURT JUDGE

C.S. Mushabati
SUPREME COURT JUDGE