HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

MISCELLANEOUS CIVIL CAUSE NUMBER 110 OF 2003

BETWEEN

EVELYN MWAPASA FIRST APPLICANT

THOMAS FUNGULANI SECOND APPLICANT

AND

STANBIC BANK LIMITED FIRST RESPONDENT

AND

RAYMOND MELBOURNE DAVIES SECOND RESPONDENT

CORAM: DF MWAUNGULU (JUDGE)

Kapeta, Legal Practitioner, for the applicants

Msisha, S.C., Legal Practitioner, for the respondents

Beni, Official Court Interpreter

ORDER

This is an application for an interlocutory injunction. Mrs. Mwapasa, according to the applicants' and respondents' affidavits, is David Whitehead & Sons (Malawi) Limited's Chief Executive Officer. She is, according to the respondents' affidavits, an employee of ADMARC Investment Holdings Limited. ADMARC Investment Holding

Limited holds shares in David Whitehead & Sons (Malawi) Limited. Mr. Fungulani is an employee of David Whitehead & Sons (Malawi) Limited. Government, through ADMARC Investment Holding Limited, holds substantial shares in David Whitehead & Sons (Malawi) Limited. In compliance with privatization policy, Government intended and ended up, it appears, selling its undertaking in David Whitehead & Sons (Malawi) Limited. The applicants, who initially commenced the action under a writ, obtained an injunction on the action which this Court subsequently removed. When the applicants pursued judicial review proceedings against Government and the Privatization Commission, this Court granted an ex parte injunction in that matter, Miscellaneous Civil Application number 97 of 2003. The injunction stalled the sale abiding the judicial proceedings. After that injunction, Stanbic Bank Limited, a banker to David Whitehead & Sons (Malawi) Limited, who all along observed the sale of government's stake in David Whitehead & Sons (Malawi) Limited, appointed Mr. Davies receiver and manager under a debenture where David Whitehead & Sons (Malawi) Limited owes Stanbic Bank Limited over K150, 000, 000. The applicants seek an injunction against Stanbic Bank Limited's appointment of a receiver and manager.

The application was initially ex parte. The application is drafted in a misleading manner, I must confess. It starts as a judicial review concerning the applicants. It then introduces Stanbic Bank Limited and Mr. Davies as respondents. The prayer suggests the application was within an action, Miscellaneous Civil Application number 97 of 2003. This application is however put as a new cause, Miscellaneous Civil Application number 110 of 2003. On this basis this Court granted the injunction ex parte on a certificate of urgency, ordered the applicants to file originating processes within four days and set the matter for fourteen days later for a hearing inter partes. The respondents, shortly after service of the injunctions, applied ex parte for discharge of the injunction. The respondents served the applicants with the ex parte application. The application came before this Court exactly the date the applicants should, according to this Court's order, have filed the originating process.

The originating process was important, given the nature of the application before this Court before, to determine the action pretended against the respondents. The applicants, by the time of the hearing, had not lodged the originating process with the Court. Rather than hear the parties on discharge of the injunction, I ordered, with the consent of the parties, the proceedings to be inter partes for grant of an interlocutory injunction. The question before this Court is, therefore, whether, I should grant the interlocutory injunction in this matter. This presupposes the applicants contemplate an injunction action. The matter now is not, as Mr. Msisha, appearing for the respondents argues, whether this Court at the ex parte stage should have been more than or as perspicacious as it should be when hearing applications inter partes. Indeed on the very question on which Mr. Msisha submits this Court should have considered a threshold case for granting the ex parte injunction, namely locus standi, courts, except of course, in clear cases, rather than it prevent a court proceeding to determine the matter, defer the question to trial,.

Judges sitting at first instances know that in ordinary civil proceedings, the question whether an appropriate party is before the court, unless a party applies for removal or the court in its discretion takes it upon itself to act, is a matter at the trial. The position is not any different for judicial review proceedings where the court's leave precedes commencement of proceedings. In Ex Parte Argyll Group [1986] 1 WLR 763 at 773 Lord Donaldson said:

"The first stage test, which is applied upon the application for leave, will lead to refusal if the applicant has no interest whatsoever and is, in truth, no more than a meddlesome busybody. If, however, an application appears otherwise to be arguable and there is no other discretionary bar, such as dilalatoriness on the part of the applicant, the applicant may expect to get leave to apply, leaving the test of interest or standing to be re-applied as a matter of discretion on the hearing of the substantive application. At this stage the strength of the applicant's interest is one of the factors to be weighed in the balance."

The Court of Appeal in Axa Equity and Life Assurance plc and others v National Westminster Bank plc and others [1998] EWCA Civ 782 (7th May, 1998) followed this statement by Lord Donaldson. There is, as Mr. Msisha mentions and accentuated by the applicants' failure to the hearing of the matter commenced the proceedings, uncertainty about whether the applicants proceeded under the previous action or were to proceed by ordinary action or judicial review. On the principle as I have stated, this Court could grant the ex parte injunction notwithstanding the difficulties, now properly argued, of locus standi.

The question for determination is, therefore, whether, on the facts, this Court should grant an interlocutory injunction against Stanbic Bank Limited's appointment of a receiver under the debenture. A court, since American Cyanamid Co v Ethicon Ltd [1975] 1 All ER 504, may, where there is an issue for trial, on a balance of justice grant an interlocutory injunction to preserve the status quo before, through trial, it determines the rights between parties. There must be an issue of fact or law the court, without delving deeply in the evidence or consideration of the law, should determine. A court must at this stage avoid resolving complex legal questions appreciated through factual and legal issues only trial can afford and unravel. On the other, where the legal issue is clear and simple, the court should resolve it and refuse or allow the injunction. Such a course saves time and cost.

Between the employees and the debenture holder the court cannot, on any principle I know, entertain an employees' injunction against the debenture holder's right to appoint a receiver to realize her security. The shareholders, in this case Government through ADMARC Investment Holding Limited, or the company, could not on proof of default, prevent the debenture holder appointing a receiver under the debenture. The employees

cannot. I base my conclusion on the dissenting judgment of Rigby, L.J. in Gosling v Gaskells [1896] 1 QB 669 at 692 where he said that for a valuable consideration the mortgagor, through a debenture, commits management to a receiver whose appointment he cannot interfere with:

"Lord Cranworth, in the case referred to, was speaking of a mortgage of lands; but the same doctrine apples to all kinds of property, being founder, as it is, not upon any considerations peculiar to the law of real property, but upon the contract between the debtor who gives and the creditor who takes the security. Of course the mortgagor cannot of his own will revoke the appointment of a receiver, or that appointment would be useless. For valuable consideration he has committed the management of his property to an attorney whose appointment he cannot interfere with. The appointment so made will stand good against himself and all persons claiming through him, except incumbrancers having priority to the mortgagee who appoints the receiver."

The House of Lords in Gosling v Gaskells [1897] AC 575 approved Lord Justice Rigby's judgment.

In Shamji v Johnson Matthey Bankers [1991] BCLC 36, Shamji's group of companies owed around £21 million to the bank. Negotiations failed between the company and the bank to find finance to pay the debt. The bank appointed a receiver. Shamji applied for an injunction on the grounds that this was a breach of an agreement not to appoint and that the bank owed a duty of care to the plaintiffs not to appoint a receiver while they were actively seeking alternative finance. The Court of Appeals held that no such duty was held by the bank. The Court of Appeal approved Hoffman Jude's judgment at first instance that, provided it did not act in bad faith, the bank owed no duty of care to the company in exercising rights to appoint a receiver under the charge. Shamji v Johnson Matthey Bankers is much like this case and cannot be distinguished from it.

In Downsview Nominee Ltd v First City Corporation Ltd [1993] BCC 46, a very important decision on principles applying to debenture holders' exercise of their powers, the Privy Council, on an appeal from New Zealand, held that a debenture holder can exercise his powers to appoint a receiver although the consequences disadvantage the borrower provided the debenture holder acts in good faith and minds her duty to subsequent encumbrancers and to the mortgagors to use the powers solely for purposes of securing money owed on the mortgage.

In my judgment, it matters less that under the Privatisation Act all government interests vest in the Privatisation Commission. Nothing in the Privatisation Act suggests different treatment from the Companies Act for Government as a shareholder in a company under the Companies Act. In this case moreover Government acts through ADMARC Investment holdings Ltd. The Companies Act and the general law prescribe to receivers, of course after appointment, duties and protections for employees. What the Companies Act and the general law do not do is to raise the position of employees vis-à-vis the

appointment of a receiver by a debenture holder any higher or better than the shareholders or the company.

The point argued vehemently by Mr. Kapeta, appearing for the applicants, is that Stanbic Bank Limited cannot act on the debenture Government, as a shareholder, having promised paying and actually paying part of the loan for David Whitehead & Sons (Malawi) Limited. Mr. Kapeta invokes correspondence, undisputed by the bank, between the bank and Government. Mr. Kapeta relies on a statement of Abbott CJ in Welby v Drake (1825) 1 C & P 557, where, a creditor having sued a son after accepting half the sum from the father in satisfaction of the debt, that, "… by suing the son he [the creditor] commits fraud on the father, whom he induced to advance money on the faith of such advance being a discharge of his son from further liability." Similar reasoning appears in Cook v Lister (1863) 13 CB (N.S) 543 followed in Hiramchand Panamchand v Temple [1911] 2 KB 330. Similar considerations prevail in equity: see Hughes v Metropolitan Railway (1877) 2 App.Cas. 439. These cases, all relied on by Mr. Kapeta, including Central London Property Trust Ltd v High Trees House Ltd [1947] 1 KB 130 can be distinguished from the present on two aspects. In all the cases the third party paid a lesser sum in satisfaction of the whole debt. Stanbic Bank Limited all along wanted and insisted for David Whitehead & Sons (Malawi) Limited's and Government's payment of the whole debt. David Whitehead & Sons (Malawi) Limited and Government have paid only a sixth of the whole debt. Mr. Kapeta argues that even though David Whitehead & Sons (Malawi) Limited and Government only paid a sixth of the debt, the promise is sufficient. He relies on a passage in Chitty on Contracts, paragraph 235:

"Alternatively, it can be said that the court will not help a creditor to break a contract with a third party by allowing him to obtain a judgment against the debtor. On the contrary, it has been held that where a (the creditor) expressly contracts with B (the third party) not to sue C (the debtor) and A nevertheless sues, B can intervene as to obtain a stay of the action. This possibility would extend to the case where the consideration provided by B was a promise by B to pay A …"

The right to intervene based on the promise, even by this passage, remains the contractor's, not the debtor's. The debtor, David Whitehead & Sons (Malawi) Limited, could not intervene on the promise to stay proceedings. The applicants are neither David Whitehead & Sons (Malawi) Limited, the company, nor its directors. They are employees.

This discourse was to determine whether according to American Cyanamid Co v Ethicon Ltd there are issues between the applicants, employees of the company, and Stanbic Bank Limited, the debenture holder, and Mr. Davies, the receiver appointed, that ought to be tried to justify the applicants the interlocutory relief. On the facts and law there are no issues to be tried. The shareholders, Government and ADMARC investment Holdings Limited, on proof of default of payment, could not prevent Stanbic Bank Limited, the debenture holder, appointing a receiver. Government, not the applicants,

could intervene on behalf of David Whitehead & Sons (Malawi) Limited, the debtor, against Stanbic Bank Limited's promise to Government that Government would pay David Whitehead & Sons (Malawi) Limited's debt. Employees cannot stop a debenture holder appointing a receiver. There is no issue of law or fact between the parties that ought to be tried.

The applicants' situation is not improved by suggesting David Whitehead & Sons (Malawi) Ltd is in fact sold. Only the new owners or David Whitehead & Sons (Malawi) Ltd, not the employees, could, if it were possible, act against the debenture holder's appointment of a receiver.

Mr. Kapeta further argues there ought to be an injunction against Stanbic Bank Limited appointment of a receiver because the receiver's appointment would undermine the results of a judicial review where the applicants question Government's decision through the Privatisation Commission to sell David Whitehead & Sons (Malawi) Limited at a certain price. Stanbic Bank Limited, a debenture holder, naturally, is not part of those proceedings. Under privatization, Government, as a shareholder, wants to sell its shares and thereby affect ownership of David Whitehead & Sons (Malawi) Limited. Government tried, when selling its shares in David Whitehead & Sons (Malawi) Limited, to work out David Whitehead & Sons (Malawi) Limited's liabilities with the Stanbic Bank Limited. Stanbic Bank Limited demanded, unsuccessfully, payment from David Whitehead & Sons (Malawi) Limited and Government. There was default on the loan and Stanbic Bank Limited was entitled to appoint a receiver. The Privatisation Commission clearly acts as agent of Government as shareholder in a company. The rights of the Privatisation Commission on behalf of the shareholder are not any better than the shareholder's. The shareholder cannot, where there is default on payment, stop the debenture holder exercise of the power to appoint a receiver. The Privatisation Commission's power, as shareholder, to sell Government's shares is subject to the debenture holder's right, in case of default, to appoint a receiver. Consequently, whichever way the judicial review decision goes, it has no, if not little, consequences on the debenture holder's right, in case of default in payment, to appoint a receiver. Moreover that power, if it was available, could only be exercised by shareholders or the company, not by the applicants who are only employees.

Of course, if judicial review proceedings are successful Government could, under the Privatisation Act, renegotiate the sale stalled by stay of proceedings and an injunction in those proceedings. I do not think even that affects the rights of Stanbic Bank Limited, the debenture holder to appoint a receiver. The Receiver and Manager could sell the company. I do not think for once that the Receiver Manager, given powers the law gives her (see Greenwood v Algeciras (Gibraltar) Railway [1894] 2 Ch 205; and Lathom v Greenwich Ferry (1895) 72 L.T. 790) and the duty, as a mortgagee to act in good faith (per Jenkins, LJ in Re B Johnson & Co (Builders) Ltd [1955] 1 Ch 634 at 662), would operate in a way prejudicial to the interests of the company or employees. The receiver manager has statutory obligations to employees. The Receiver Manager could hive.

Hiving, despite, stringent formalities, affords more protection for employees. Unfortunately, in this country we do not have the equivalent of The Transfer of Undertakings (Protection of Employment) Regulations 1981, UK. The outcome of the judicial proceedings in no way affects Stanbic Bank Limited's rights as debenture holders. In fact the whole exercise is subject to Stanbic Bank Limited's right to appoint a receiver under the debenture. I do not think Stanbic Bank Limited's forbearance to appoint a receiver for the David Whitehead & Sons (Malawi) Limited's default affected for as long as there were negotiations for sale affected Stanbic Bank Limited's rights under the debenture. In any case, the employees are not parties to the debenture, the company is. The consequence of allowing the injunction are Stanbic Bank Ltd may fold up too if David Whitehead & Sons (Malawi) Limited's difficulties remain unresolved soon or later. The receiver or manager could sell, including selling by hiving, the concern with equal or better protection to the concern and employees.

I refuse the interlocutory injunction.

Made in Chambers this 15th Day of July 2003

D F Mwaungulu

JUDGE