

**IN THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA**

(Civil Jurisdiction)

2017/HPC/0233



BETWEEN:

KEREN MOTORS LIMITED (In Receivership)

PLAINTIFF

AND

BARCLAYS BANK ZAMBIA PLC

DEFENDANT

Before Lady Justice B.G Lungu on 21st June, 2017 in chambers at Lusaka.

For the Plaintiff, Mr. W. Mubanga (SC), Messrs Chilupe and Permanent chambers

RULING

Cases referred to

1. *Fresh Mint Limited, Heman Jallan, Thompson Llyod And Ewart Limited V Kawambwa Tea Company (1966) Limited (2008) Z.R. 32 Vol. 2 (S.C);*
2. *Magnum (Zambia) Limited V Basit Quadri (Receivers/Manager) & Grindlays Bank International Zambia Limited (1981) Z.R. 141 (H.C.).*

Legislation referred to:

1. *Section 113(2), Companies Act, Cap 388 of the Laws of Zambia*

This is an application on the part of the Plaintiff for an Order for leave to institute proceedings against the Defendant. The application is brought forth by way of Ex parte Summons dated 19th May, 2017, filed together with an Affidavit in Support sworn by Clement Mugala, the Receiver and Manager of the Plaintiff company. The application rides on the back of Skeleton Arguments and List of Authorities of even date.

The Affidavit in Support reveals that on 28th February, 2017 the deponent was appointed as Receiver and Manager of the Plaintiff company in relation to all its current and future assets, undertakings and properties, including its book debts. The Affidavit further shows that the Plaintiff company seeks to institute proceedings against the Defendant.

In presenting the application before Court, State Counsel Mubanga placed reliance on the Affidavit in Support. The main thrust of his argument appears to be a contention that under section 113(2) of the Companies Act, CAP 388 of the Laws of Zambia, the Receiver requires leave of Court in order to proceed to institute civil proceedings against the Defendant.

I have carefully considered the application made on behalf of the Plaintiff and find that a convenient starting point in evaluating the submissions and arguments on this issue is section 113(2) of the

Companies Act, upon which the application is premised. Section 113(2) reads as follows:

"The court may, on the application of such a receiver, make any order it thinks fit giving directions in relation to any matter arising in connection with the performance of the receiver's functions or declaring the rights of persons before the court or otherwise."

My interpretation of section 113(2) is that where a Receiver applies to Court for directions in relation to any matter arising in connection with the performance of the receiver's functions or for a declaration of the rights of persons before Court, the Court is vested with authority to make such orders or declarations as requested, as it deems fit.

I have keenly interrogated section 113(2) and do not see any stipulation therein whose effect is to direct or prescribe that a Receiver shall or should obtain leave of Court prior to instituting civil proceedings.

Nonetheless, I have studied and considered the Skeleton Arguments filed in support, wherein the Plaintiff captures the case of ***Fresh Mint Limited, Heman Jallan, Thompson Llyod And Ewart Limited V Kawambwa Tea Company (1966) Limited (2008) Z.R. 32 Vol. 2 (S.C)***¹. In that case, the Supreme Court held, *inter alia*, that:

"A company under receivership has no locus standi independent of its Receiver. As long as a company continues to be subjected to receivership, it is the Receiver alone who can sue or defend in the name of the company."

The Skeleton Arguments also drew the Court's attention to the case of *Magnum (Zambia) Limited V Basit Quadri (Receivers/Manager) & Grindlays Bank International Zambia Limited (1981) Z.R. 141 (H.C.)*², which case predates the *Fresh Mint & Others vs. Kawambwa Tea Company*. In that case, a cardinal question before the High Court was whether a company in receivership had *locus standi* independent of its Receiver/Manager, to which the Court ruled that a company under receivership had no *locus standi* independent of its Receiver.

As it set out the holding of the Supreme Court in *Fresh Mint & Others vs. Kawambwa Tea Company* and that of the High Court in *Magnum (Zambia) Limited V Basit Quadri (Receivers/Manager) & Grindlays Bank*, the Plaintiff elected not to offer any correlative rationalization. I have searched, without success, for a semblance of a nexus between the authority cited and this application for leave to institute proceedings. It seems to me that one is far removed from the other.

In my view, the cited cases actually give credence to the position that a receiver of a company in receivership has inherent and

exclusive authority to sue or defend in the name of the company, without any prerequisite for seeking leave.

Coming to the application *in casu*, the Receiver has not applied for any directions with respect to the performance of his functions or any declarations of the rights of the litigants before court. That being so, this application falls outside the ambit of section 113(2) of the Companies Act, as I have interpreted it.

In view of the foregoing, and considering the absence of any cited law prescribing the need for a receiver to obtain leave to institute proceedings, and bearing in mind the cases of ***Fresh Mint & Others vs. Kawambwa Tea Company*** and ***Magnum (Zambia) Limited vs. Basit Quadri (Receiver/Manager) & Another*** which stress the *locus standi* of a receiver of a company in receivership, I am without doubt that the Plaintiff's application for leave to institute proceedings against the Defendant is misconstrued, unnecessary and irregularly before me. Consequently, the application is dismissed for irregularity.

Dated this 23rd Day of June, 2017



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Judge B. G. Lungu
High Court