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Livingstone Motor Assemblers Limited (In Receivership) v Indeco Estates Development Company and Others (Supreme Court Judgment No. 1 of 2013)

Ntemena Mwanamwambwa¹

Facts

The appeal stems from a winding-up petition filed in the High Court by the respondents seeking an order to commence winding-up proceedings as well as the appointment of a liquidator in respect of the appellant, Livingstone Motor Assemblers Limited. The latter was heavily indebted to several creditors, including the respondents and the Zambia National Commercial Bank (ZANACO) which had commenced receivership proceedings and appointed a receiver/manager extra judiciously, prior to the High Court granting the winding-up order. Disgruntled by the grant of the order, the receiver/manager made an application to vary it so that only he would retain possession of the appellant's assets for purposes of discharging his functions as receiver/manager in favour of the bank.

That application thus culminated in an appeal lodged in the Supreme Court to review a ruling passed by the High Court sometime in October 1995, to the effect that the making of a winding-up order in respect of a company already undergoing receivership, "does not vest the company's assets under his custody and control to the exclusion of the liquidator who is in fact the legally authorized person to administer the affairs of a wound up company."

Holding

The Supreme Court in this case had an opportunity to review the High Court's order which was at the heart of contention in this matter. Simply put, who between the two external managers superintending over two varying insolvency proceedings, should have preferential custody and control of the company's assets? The court thus held that where a company is undergoing receivership and liquidation simultaneously, the receiver shall have primary custody and control of all the charged assets, deal with the same to the satisfaction of the debt owed to his secured creditor and surrender the residue of the assets (if any) to the liquidator for the benefit of the unsecured creditors.

Significance

This case² was the first of its kind, which raised several novel issues. Notwithstanding the fact that it was heard while the repealed Companies Act, Chapter 388³ was still in force, the issues discussed herein are in tandem with the counterpart provisions in the current Corporate Insolvency Act 2017, being the successor of the repealed Act in respect of corporate insolvency matters. Thus, for purposes of clarity, reference will be made to both the provisions of the repealed Act, cited in the court's judgment and their respective equivalent substituted provisions in the current Corporate Insolvency Act 2017.

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² Livingstone Motor Assemblers Limited (In Receivership) v Indeco Estates Development Company and Others (Supreme Court Judgment No. 1 of 2013).

³ The Act was repealed and replaced by two pieces of legislation, namely the Companies Act No. 10 of 2017 in respect of company law during the solvent state of a company and the Corporate Insolvency Act No. 9 of 2017 in respect of the financial distress and solvent state of a company.

The court highlighted that going by section 286(1) of the Companies Act, CAP 388 (now repealed), the passing of a winding-up order which among other things also appoints a liquidator in compulsory winding-up proceedings, vests him with the custody and control of the company's property and all property to which the company is entitled.

Section 286(1) of the repealed Companies Act, CAP 388 provided that:

Where a winding-up order has been made or a provisional liquidator has been appointed, the liquidator or provisional liquidator shall take into his custody or under his control all the property and things in action to which the company is or appears to be entitled.⁴

Its replacement, section 71(1) in the Corporate Insolvency Act 2017 now provides that:

Where a winding-up order is made or a provisional liquidator is appointed, the liquidator or provisional liquidator as the case may be, shall take into custody or under control the property and things in action to which the company is or appears to be entitled.⁵

It is worth noting that this provision has been retained in section 71(1) of the Corporate Insolvency Act 2017.⁶ The court further qualified its reasoning on the basis that such vesting is only applicable in the absence of any subsisting receivership proceedings commenced in favour of a secured creditor of the same company. Thus, in relation to the facts of the case, Messrs Kangwa Sombe and Company as liquidators of the appellant would have had sole custody and control of the company's assets in the absence of any subsisting receivership proceedings commenced prior to the passing of the winding up order in respect of the appellant.

With regards to the status of a liquidator of a company simultaneously undergoing receivership, the court opined with the aid of English authority, that the liquidator's role is secondary, so that the receiver takes precedence over the custody and control of all the company's charged assets, for the benefit of his secured creditor. Thus, following the discharge of the secured debt, the remainder of any assets in his hands were to be handed over to the liquidator for purposes of discharging debts owed to the company's unsecured creditors. The court emphasized that this position remains unchanged regardless of whether a receiver was appointed prior or after the passing of the winding-up order.⁷ It is thus notable from this portion of the court's judgement that it took cognizance of the fact that secured creditors are a special specie of creditors who do not rank *pari passu* with unsecured creditors as they stand outside liquidation proceedings.⁸

Reference was also made to Section 110 of the (repealed) Act, which provided that:

Where-

(a) a receiver is appointed, on behalf of the holder or trustee of any debenture of a company that is secured by a floating charge; or

(b) possession is taken by or on behalf of such a person;

of property comprised in or subject to the charge, then, if the company is not at the time in the course of being wound-up, the debts which in every winding-up are, under section

⁴ Section 286(1) of the now repealed Companies Act, Chapter 388 of the Laws of Zambia.

⁵ Section 71(1) Corporate Insolvency Act No. 9 of 2017.

⁶ *Ibid*, supra note 5. The language from the counterpart repealed provision has been retained in this provision, save with very minor modifications.

⁷ Lightman + Moss *The Law Of Receivers Of Companies* 2nd Edition Pages 176 And 185.

⁸ Hurbert Picarda, *The Law Relating to Receivers and Managers* 1985, Page 137.

three hundred and forty-six (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 the person taking possession in priority to any claim for principal or interest in respect of the debentures.

The import of the above provision as stated by the court, was that as the provision applied then, as long as there were no winding-up proceedings subsisting in respect of the same company, a receiver was required to pay secured debts in priority to the debts owed to the unsecured creditors listed in section 346 of the repealed Act.⁹ In fact, the court acknowledged that the repealed Act made no provision addressing the status of a receiver in respect of a company undergoing receivership and liquidation simultaneously. However, the lacuna appears to have been addressed to a certain extent in section 127(6) of the Corporate Insolvency Act, in relation to secured creditors in whose favour a floating charge was created.

The provision states:

Where the available assets of a company are insufficient to meet any preferential debts specified in subsection (1), and any amount payable in priority as specified in subsection (3), the debenture holders under any floating charge created by the company, shall have priority over creditors, and shall be paid in accordance with the priority ranking specified in the Moveable Property (Security Interest) Act, 2016.

Notwithstanding the fact that her ladyship's sentiments were not specifically addressed in the current Act, the case under discussion is still good law despite the enactment of the Corporate Insolvency Act 2017.

Conclusion

Nine years since judgement was passed in this case and five years post the enactment of the Corporate Insolvency Act 2017 the Supreme Court's judgement in this case is still sound as it illustrates that it possible for liquidation and receivership to occur simultaneously. The case also emphasizes the fact that secured creditors are a special specie of creditors who have priority over unsecured creditors listed in the perking order table of the Act¹⁰ and therefore not affected by liquidation proceedings.

⁹ Section 346 of the repealed Companies Act, Chapter 388 of the Laws of Zambia made provision for the perking order table for unsecured creditors in a compulsory winding-up.

¹⁰ Section 127 of the Corporate Insolvency Act No. 9 of 2017 provides for the perking order table in liquidation proceedings, aimed at ensuring the orderly payment of creditors' claims in a *peri passu* manner.