AVALON MOTORS LIMITED (in Receivership) v BERNARD LEIGH GADSDEN MOTOR CITY LIMITED (1998) S.J. 26 (S.C.)

SUPREME COURT
NGULUBE, C.J., SAKALA, CHIRWA, MUZYAMBA AND LEWANIKA,JJ.S.
9TH APRIL AND 4TH AUGUST, 1998.
(S.C.Z. JUDGMENT NO. 7 OF 1998)

Flynote
Company Law - Receiver - Legal status of receiver - Whether he can sue or be sued in his own name

Headnote
The company borrowed money from a bank and upon defaulting, the bank appointed the first respondent to be the receiver. There were allegations to the effect that the receivership was being conducted in a deliquent fashion to the serious disadvantage of the company, the shareholders and all concerned. As a result a new receiver was appointed. Meanwhile, an action was commenced against the former receiver who is the first respondent and also against the second respondent who sold the company's properties and assets allegedly at a grossly undervalued or give-away price. Such action was commenced in the company's name and a preliminary objection was taken by the defendants that the director and shareholder was not entitled to sue in the name of the company; only the new receiver could do so. The objection was sustained; the action was dismissed leading to this appeal

Held:
(i) Receivers as well as liquidators occupy a fiduciary relationship and are liable for their wrongdoing in relation to the mortgaged property
(ii) Whenever a current receiver is the wrongdoer (as where he acts in breach of his fiduciary duty or with gross negligence) or where the directors wish to litigate the validity of the security under which the appointment has taken place or in any other case where the vital interests of the company are at risk from the Receiver himself or from elsewhere but the Receiver neglects or declines to act, the directors should be entitled to use the name of the company to litigate.

For the appellant: Mr M.F.Sikatana, Veritas Chambers.
For 1st respondent: Mr A .W. Wood, Wood and Company.
For 2nd respondent: Mr M. Mulenga, Mulenga and Company.

Judgment
NGULUBE,C.J.: delivered the judgment of the court.

When we heard this appeal, we allowed the appeal and reversed the dismissal of the action upon the objection which was upheld below as to who should have been the plaintiff. Instead, we allowed an application to substitute the plaintiff so that the Director and shareholder who had sworn the affidavits in the case became the plaintiff and the action to proceed accordingly. We said that we would consider the company's own position by the new receiver in the reserved judgment. We also ordered that the costs so far occasioned by the shareholder/Director proceeding in the name of the company would be for the respondents in any event. We indicated the result of the appeal to facilitate the parties making progress in the main action. We said our reasons for the decision would be given later and this we now do.

The facts can be stated very briefly. the company borrowed money from a bank and upon defaulting, the bank appointed the first respondent to be the receiver. There were allegations to the effect that the receivership was being conducted in a deliquent fashion to the serious disadvantage of the company, the shareholders and all concerned.

We need not here go into detail concerning the nature of wrongdoing which was alleged save to note that an application was successfully made to the High Court to remove the first respondent from the receivership, in terms of the relevant provisions of the Companies Act. We understand that a new receiver was appointed. Meanwhile, an action was commenced against the former receiver who is the first respondent and also against the second respondent who was sold the company's properties and assets allegedly at a grossly undervalued or give-away price. Such action was commenced in the company's name and a preliminary objection was taken by the defendants that the director and shareholder was not entitled to sue in the name of the company; only the new receiver could do so. The objection was sustained; the action was dismissed leading to this appeal. It is not necessary for us to make any comments on the merits of the case which is to be tried below. Indeed, it would be improper for us to do so. It should also be noted that, contrary to the understanding of the real complainant (the plaintiff since substituted), the court below did not say anything which could suggest that a receiver or for that matter a former receiver is immune from suit for wrongdoing. There is no such blanket exemption or immunity. Receivers as well as liquidators occupy a fiduciary position. Learned Counsel for the 1st respondent very fairly and properly outlined the correct legal propositions in such matters in his extremely helpful and learned heads of arguments. It was thus common cause that the Receiver's fiduciary relationship with the company means that he/she owes it duties similar to those owed by a mortgagee. These include an obligation to exercise the powers conferred by the security in good faith as well as a duty of care. As the learned authors of Kerr on Receivers and Administrators (17th Edition) observed at pages 342 - 343:

> "Notwithstanding the relationship of principal and agent, however, the mortgagor cannot dismiss a Receiver since, for valuable consideration, he has committed the management of his property to an attorney whose appointment cannot be interfered with. As regards negligence, the Receiver cannot be in any better position than a mortgagee in possession. Hence, the Receiver is liable to the mortgagor in respect of gross or wilful negligence in respect of his acts whilst in possession of the mortgaged property or its produce."

There is a variety of other situations giving rise to duties and liability on the part of the Receiver for wrongdoing. It is here unnecessary to repeat these since recourse can be had to texts like Halsbury's Laws of England, 4th Ed; Vol.7 Kerr on Receivers and other reference works.

What is certain is that companies under receivership are not left without remedies in the event of wrongdoing by the Receiver. Misfeasance, gross negligence, anything amounting to fraud and various other breaches or

transgressions can result in a Receiver or former Receiver being sued. The true issue in this case was "who should sue"; or when can the directors and shareholders of the company still under receivership be allowed to maintain an action in the name of the company?

There can be no doubt whatsoever that the shareholders and Directors, as well as anybody who is properly interested and who has beneficial interests to protect can sue a wrongdoing Receiver or former Receiver in their own names and in their own right. In the case of an action against a former Receiver, a current Receiver if so minded can join the company in the action. However, as far as persons who are not Receivers suing in the company's name is concerned, we agree with Mr Wood that the circumstances when this will be permitted should

be limited. For instance, it would be improper for a current Receiver being sued in his own name by the company as this would amount to suing himself. See Magnum (Zambia) Limited v Basif Quadri (Receiver/Manager) and another (1981) ZR 141 (which held, inter alia, that a company under receivership has no locus standi independent of its Receiver). However, whenever a current receiver is the wrongdoer (as where he acts in breach of his fiduciary duty or with gross negligence) or where the directors wish to litigate the validity of the security under which the appointment has taken place or in any other case where the vital interests of the company are at risk from the Receiver himself or from elsewhere but the Receiver neglects or declines to act, the directors should be entitled to use the name of the company to litigate. There is no need for us to be exhaustive in our remarks nor to say any more in this case which is on-going in the court below

It was for the foregoing reasons that the appeal was allowed and substitution of the plaintiff made, in keeping with the spirit of Order 14 of the High Court Rules relating to joinder, non-joinder and misjoinder of parties.

Appeal allowed
