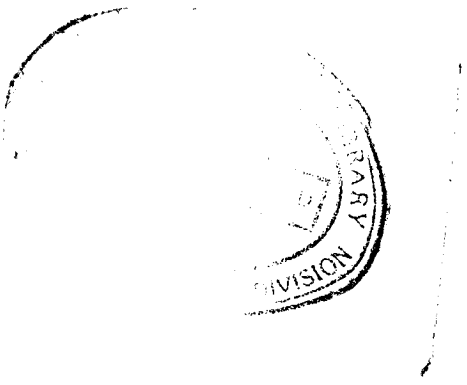
THE UNIVERSITY OF ZAMBIA

SCHOOL OF LAW

SHAREHOLDERS RIGHTS AND COMPANY RECEIVERSHIP: A CRITICAL ANALYSIS

BY

LOIS CHISOMPOLA



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ABSTRACT

Precedent in Zambian Company Law has laid down well established rules with regard to shareholder rights and aspects of receivership in general. This paper seeks to delve into the confusion that may arise when the courts depart from clearly laid out rules to pass precedent that erodes the very foundation on which receivership law is governed, that is, the rules governing receivership and their effect on the company as a going concern. This was evidenced in the recent case of Antonio Ventriglia v East and Southern African Trade and Development Bank and Robert Simeza.

This paper evaluates the above mentioned case and sets out the general framework of the law on receiverships with a view to show that this case departed from the basic rules as espoused in previous rulings of the courts. Secondly, the distinction between directors and shareholders' rights and roles is assessed in order to clearly outline the failure of the court in this case to distinguish which rights will be affected once a company undergoes receivership. Of relevance to this case is the fact that, it was unclear whether the court's intention was to recognise the applicants as shareholders or directors, as they served in a dual capacity.

This paper also recognises and evaluates the issues of locus standi and derivative actions with regard to shareholders seeking to take action against a receiver. This is with a view to establish the fact that the court should have determined whether the matter was rightly before the court and lack of capacity of the applicants to sue both the creditor and the receiver in their own names.

The paper further, brings to light two subsequent High Court cases that have been decided on the basis of the ruling in the aforementioned case that give evidence of the undesirable affects of this judgment and impracticability of its application. After considering the foregoing, this paper recommends that the Supreme Court, revisit this precedent on the basis that the court has made case law which departs from well established principles of law.

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DEDICATION

This paper is dedicated to my parents Evarist and Elizabeth Chisompola for always believing in my dreams, I am who I am today because of you.

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CHAPTER ONE

RECEIVERHSHIP AND SHAREHOLDER'S RIGTHS

1.0 INTRODUCTION

Receivership refers to a situation whereby the assets of a company are placed under the control of an independent person known as a receiver, either by court order or by agreement of the parties contained in a deed. It is the adequacy of recent precedent pronounced on some aspects of this remedy which affects the company, its shareholders and receivers that this paper seeks to make inquiry into.

One of the integral aspects of a good legal system is the ability of the law to adapt to the growing needs of society. Society is dynamic, it follows therefore, that that law too should be dynamic. However, recent precedence continues to show that certain aspects of our law are far from complete, as the courts in some cases neglect to clearly establish the rights of parties in a wide array of factual settings. This paper will look into the implications of the Supreme Court Judgment of *Antonio Ventriglia v East and Southern African Development Bank and Robert Simeza* (hereafter referred to as the Ventriglia case) in an attempt to show the inadequacy of this recent precedent in clarifying the rights of shareholders and basic principles of company receivership. It will look into the basic argument of this case with regards to the contractual agreement which justifies the appointment of a receiver and whether or not the law may interfere to balance the interests of the parties in spite of binding status of the security agreement.

The paper will analyse the issues of contention concerning the shareholders rights that arose in the aforementioned case. The issues of relevance to shareholder's rights and company receivership arising from the same are as follows:

Firstly, the grounds upon which a receiver was appointed so as to determine whether or not the alleged breach was ground enough for the appointment of a receiver and. In this case it was claimed by the receiver, that upon default, they had the right to usurp the powers of the board upon giving notice. The Applicant, however, disputed this claim and held the view that a receiver cannot be appointed over a company before it becomes going concern. The paper will clarify this position by bringing to light the actual common law rules on receivership, its purpose and scope. Further, the court in revoking the receivership did not clearl y state whether the receivership was a nullity from its inception or on what basis it was revoked.

Secondly, it was claimed in this case by counsel for the Respondents that upon the appointment of the receiver, the shareholders rights were extinguished. This was upheld by the learned trial judge in the High Court which counsel for the Appellant argued was miscarriage of justice. The paper will determine whether or not this assertion is true. It will aim to draw the distinction between directors' and shareholders' rights as the two are prone to be misunderstood or even overlap when one serves in dual capacities.

Finally, the paper will argue that the Applicants, as shareholders, did not have locus standi to sue the receiver in their own names. It will show that the general rule as established n the case of *Magnum (Zambia) Limited v Basif Quadri (Receiver/Manager) and another*[1] is that 'a company under receivership has no locus standi independent of its Receiver. It will emphasise the clear distinction between the company and the shareholders, as they each have separate legal personality'.

Therefore, this paper will draw conclusion that the law concerning shareholders rights and company receivership may have suffered a setback as the Ventriglia case created more doubt

[1] [1981] Z.R.141

than it did clarity over the rights of the parties involved. It will further show that there is a general lack of application of the basic rules of company law as regards receivership.

1.1 STATEMENT OF PROBLEM

It is the aim of this paper to establish the fact that the rights of a shareholder may have been misunderstood as evidenced in the Ventriglia case[2]. This case has brought to light a certain level of uncertainty in the law as to the effect on the rights exercisable by shareholders in a company under receivership. This paper will argue that the ruling in this case was inadequate as it does not clarify whether or not the shareholders rights were extinguished upon the receiver taking control of the management of the company that was a going concern and on what basis as the court made no ruling on the rights of the shareholders.

There is therefore a need to revisit the law to establish the actual rules as regards company receivership in relation to shareholders, their status, and to what extent if any, their rights may be extinguished in a company placed under receivership.

1.2 OBJECTIVES OF THE STUDY

The general objective of this study is to highlight and consider the inadequacy of the law propounded in the Ventriglia case regulating receivership in Zambia with a particular focus on shareholders rights. This study aims to look at the case of *Antonio and Manuela Ventriglia v East and Southern African Trade and Development Bank and Robert Simeza* to outline the deficiencies in the precedent to clarify the rights of shareholders and explore the case for its strengths and weaknesses.

[2] S.C.Z Judgment No. 13 of 2010

1.2.1 SPECIFIC OBJECTIVES

The specific objectives of this study are as follows: Firstly, to consider the extent the court may interfere once a binding contract has been signed with debenture holders and in whether such interference was justified in the Ventriglia case. Secondly, to consider the effect of receivership on shareholders and directors with particular regard to the effect that the Ventriglia judgment has had on this aspect of the law in Zambia. Thirdly, to consider whether shareholders have locus standi to bring an action against a receiver without using the company name and to what extent the aforementioned case clarified the position of the law in this regard.

1.3 RATIONALE AND JUSTIFICATION

This study is justified on the basis that it is cardinal to evaluate the comprehensiveness of receivership practices in Zambian company law in light of recent precedent. This need is exemplified from the fact that the instances of corporate borrowing are on the increase as result of the growth of the economy. The law too must develop with prevailing conditions and must be certain in order to create a proper basis for commercial practices and develop a clear understanding of the principles of company receivership in the event it becomes an inevitable consequence of corporate borrowing.

In this regard, this study will evaluate the adequacy of the law propounded in the recent Ventriglia case that covers three aspects of shareholders and company receivership, namely, the ability of the law to interfere with debenture deed and to what extent, the effect of receivership if any on shareholders rights, in what circumstances if any, shareholders have the right to sue the receiver in their own names. This is done with the aim the of showing that

precedent has created some doubt with regard to the special legal relationship between the shareholder, directors, receivers and the company.

1.4 RESEARCH QUESTIONS

The following are the questions this paper seeks to answer: Under what circumstances is it appropriate to appoint a receiver in a company before it becomes a going concern? In what capacity can shareholders of a company still under receivership be allowed to maintain an action against a receiver in their own names? What is the status and extent of rights exercised by shareholders in a company still under receivership? In what circumstances do shareholders cease to be shareholders or are the rights of shareholders extinguished upon receivership?

1.5 METHODOLOGY

This paper intends to achieve its objectives by referring to a number of authorities on this matter. It will draw information from authors of books, journals and scholarly articles who have systematically analyzed the issues. This study, in addition will refer to the case of Antonio Ventriglia v East and Southern Trade and Development Bank as well as a plethora of relevant authorities to elucidate the fact. It will also attend to the internet with a view to disseminating current information. Finally interviews will be conducted with receivers, *experts on company law and legal practitioners.*

1.6 HISTORICAL DEVELOPMENT OF RECEIVERSHIP

Receiverships date back to the sixteenth century. They were the invention of the courts of equity, and involved the appointment of a receiver by the court. Until the nineteenth century, they offered the only type of receivership remedy available to creditors. The private receivership emerged when mortgagees sought to create a device that would insulate them

from the liability imposed on mortgagees who took possession of the land, and yet would take them with a cheaper and more accessible alternative to a court appointment[3].

The solution was to include a clause in the mortgage that gave the mortgagee the power to appoint a private re ceiver to collect in the rents and turn them over to the mortgagee. Although the mortgagee made the appointment, the receiver was treated as the agent of the debtor. The unusual feature of this contractual arrangement was that the debtor did not have the power to direct the receiver or to dismiss the receiver. The private appointment became the most common form of receivership used by secured creditors. It was less expensive because it required less supervision by the court, and the obligations and duties of the privately appointed receiver were less onerous than those imposed on a court appointed receiver.[4]

1.7 SHAREHOLDERS AND DIRECTORS

The emergence of the company as a self-owning entity distinct from the shareholders had a corresponding effect on the nature of directors' fiduciary duties[5]. Duties shifted from being owed to the shareholders to being owed to a company now emptied of people. Correspondingly, legislation such as the Limited Liability Act 1855 divorced shareholders from financial responsibility for the company's financial arrangements. Shareholders' ownership in the company became ownership of the newly reconceptualised share, and in ownership of this property, shareholders were protected through statutory limited liability and through voting rights in the company. The doctrine of separate corporate personality meant

[3] The historical development of the privately appointed receiver is described in *Gaskell v. Gosling*, [1896] 1 Q.B. 669 at 691-2, per Rigby, L.J.

[4] Jacob Ziegel, "The Privately Appointed Receiver and the Enforcement of Security Interests: Anomaly or Superior Solution?" in *Current Developments in International and Comparative Corporate Insolvency Law*, (Oxford, Clarendon, 1994) http:// www.ssrn.com visited on 3rd January, 2012

[5] Simon Goulding, *Company Law* (London: Cavendish Publishing Limited , 1999), 300.

that the shareholder did not own the assets of the company: 'neither a shareholder nor a simple creditor of a company has any insurable interest in any particular asset of the company'[6].What they did own was title to revenue and other residual rights of ownership such as voting rights. Thus a shareholder remained the owner, by dint of owning a *function* of the company – the fruit of its activity, that of making profits. With shareholders' interests and ownership more clearly delineated, describing the boundaries of the company should have been, in principle, much simpler. The company was everything that the shareholder did not own. It was assets, human and tangible, contracts, business associations and goodwill. In short it was the productive assets of the company divorced, in law, from human ownership. Taken as a whole, companies now represented the productive assets of society as a whole.

1.8 SHAREHOLDERS' DERIVATIVE ACTIONS

This type of action enables current and former members and officers of a company to bring an action on behalf of the company, or intervene in proceedings to which the company is a party. This action, known as the statutory derivative action, was introduced to rectify the perceived inadequacies of the common law derivative action.

There are three elements: (a) The action is brought by a member of the company; (b) the cause of action is vested in the company; and (c) relief is sought on the company's behalf.

A derivative claim is expressly confined to the enforcement of directors' duties which are specified as 'only in respect of a cause of action arising from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director of the company'. As such, a derivative claim may be brought in respect of an alleged breach of any of the general duties of directors in the Act, including the duty to exercise reasonable care, skill, and diligence. The inclusion of negligence means that any instance of a director's

[6] Macaura v Northern Insurance [1925] AC 619 (HL)

breach of his duty of care and skill can prima facie, even if capable of being ratified form the basis for a derivative claim.

1.9 CONCLUSION

This chapter has explored the meaning of the term receivership, the historical background of private receiverships, the distinction between shareholders and directors functions in the modern day company and shareholders derivative claims. This paper will essentially look at each of these aspects in light of the Ventriglia case with a view to establish whether the judgment in question shows a balanced application of the relevant rules of company law. Further this paper will look at the effect of this judgement on two subsequent High Court judgements that followed this ruling.

CHAPTER TWO

THE STATUS OF A CONTRACTUAL APPOINTMENT OF RECEIVER AT LAW AND AS DECIDED IN THE VENTRIGLIA CASE

2.0 INTRODUCTION

Borrowing is an important means by which a company can finance its activities and the overwhelming majority of companies have the power, express or implied, to borrow money[1]. The contract for security must comply with the usual contractual rules if it is to be legally enforceable. In practice, most contracts to provide security are made by deed. The contract can only be enforced in accordance with its terms. A security holder is entitled to act within all the powers that this deed confers including the usurping of the powers of the board of directors to manage a company. It is the extent to which the court may interfere with or set aside these terms when a receivers is appointed, that this chapter will discuss with a view to show the inadequacy of the Ventriglia case in addressing important aspects of company receivership.

2.1 BACKGROUND AND FACTS

The history of this case is that the two appellants were shareholders on a company registered as Zambezi Portland Cement Limited. The 1st Respondent is a Body Corporate, a Financial Institution providing Banking and Financial Services and established by Charter pursuant to Chapter 9 of the Treaty for establishment of Preferential Trade Area for East and Soutehrn Africa States with its registered office at NSSF Complex, 23rd Floor, Bishops Road, Nairobi Kenya. The 2nd Respondent was a Receiver Manager for Zambezi Portland Cement,

[1] General Auction Estate and Monetary Company v Smith [1891] 3 Ch 432

appointed by the 1st Respondent some time in 2005. This company, Zambezi Portland Cement Limited applied for a loan from the 1st Respondent for the construction of a cement making plant in Ndola on the Copperbelt Province in the Republic of Zambia. The 1st Respondent accepted the proposals and agreed to finance the project with an initial loan of $12,000,000. A loan agreement to that effect was executed. After the execution of this loan facility agreement 1st Respondent executed a mortgage deed and debenture covering five properties including the property on which the cement plant is situated. By December 2007, 95% of the project was completed. The loan repayment was scheduled to begin on 30th June, 2008 and the Appellants made a payment on 3rd July, 2008. On 4th July, the 1st Respondent wrote giving them notice of default as well as on 8th July demanding immediate repayment. On the 14th July, the 2nd Respondent issued a letter to the Appellants stating that he was appointed as receiver by the 1st Respondent and he enclosed a notice to that effect.

2.1.1 APPELLANTS' SUBMISSIONS

The appellants argued before the High Court that even if there was a breach alleged to have been committed by the company, the valuation of the cement plant, on which theh 1st Respondent had security was three times the amount lent and it was unreasonable for the 1st Respondent to appoint a receiver. Further, they argued that the 1st Respondent should have resorted to the method of settling disputes stipulated in the loan agreement which was to declare a dispute. They further argued that the appointment of a receiver was done in bad faith. Finally, they argued that a receiver cannot be appointed for a company before it becomes a going concern as the receiver was appointed just two weeks before the project was to be commissioned.

2.1.2 RESPONDENTS' SUBMISSIONS

The respondents submitted that the appellants did in fact default in their loan payment and further breached a clause by pledging a property it had pledged to the 1st respondent to a third party. It was for this reason that the 1st Respondent appointed the 2nd Respondent as reciver to execute all debts under the debenture and mortgage executed between the 1st Respondent and Zambezi Portland Cement Limited. The 1st and 2nd Respondents also argued that the two appellants ceased to be shareholders in the company.

2.1.3 SUPREME COURT JUDGMENT

The High court initially granted an ex parte injunction restraining the receiver of Zambezi Portland Cement Limited, from carrying out his duties. The injunction was subsequently discharged by the High Court after the finding that it could not continue to apply to the receiver as the PTA Bank enjoyed immunity. However, the Supreme Court in its judgement of 23rd April 2010 reinstated the injunction when it ruled that Robert Simeza (as Receiver) be restrained from performing his function as receiver and that the assets of Zambezi Portland Company be secured "Pendante Lite" (pending litigation). Further in its ruling the Court recognized Antonio Ventriglia and Manuela Sebastiani Ventriglia as Directors of the Company.

It is unclear, however, from the judgment whether the court was of the view that the receivership was a nullity from its inception or whether the debenture debt had been discharged. If the court restrains a receiver from performing his duty and recognises the directors of such company, what then is the legal position pending litigation as the rights of the parties have not been fully determined? It must be stated that this uncertain situation continues to subsist while the parties' attempts to assert their rights, whatever they may be, have been met with little success.

2.2 THE GRANT OF INJUNCTION TO SUSPEND RECEIVER: JUSTIFIABLE?

This judgment left more questions than answers as the Supreme Court did not give adequate reason for the upholding of this injunction. It is trite law, as held in the case *American Cynamide v Ethicon*[2] (which sets out the guidelines on whether or not to grant an injunction) which can be summarised as follows:

> Firstly, that the Plaintiff must establish that he has a good arguable claim to the right he seeks to protect. Secondly, that the court must not attempt to decide this claim on the affidavits; it is enough if the plaintiff shows that there is a serious question to be tried. Thirdly, if the Plaintiff satisfies these tests, the grant or refusal of an injunction is a matter for the exercise of the Court's discretion on the balance of convenience.

There is no right of appeal from the Supreme Court and its decision is final. However the justification of the Supreme Court upholding such injunction did not meet the criteria contained in the aforementioned case. This Chapter will look into what the law requires for the receiver's power to be revoked and the extent to which the court may interfere in a strictly contractual agreement.

Clause 6[3] of the debenture deed provided for the appointment of a receiver and Clause 13 provided that the debenture would be a continuing security. What then would be the status of the creditor's rights and how can they be enforced if the receiver is restrained from carrying out his duties on a basis which is not given by the court. It follows that whoever is appointed as receiver would be bound the by the said judgment. Clearly, the Bank may not pursue this avenue of enforcing their rights, the question remains as to what compelling reasons did the

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[2] [1975] AC 396

[3] Zambezi Portland Cement Limited and East and Southern African Trade and Development Bank Loan Agreement

Supreme court have to reinstate the injunction which seems to have created more questions than answers.

2.3 BASIC ASPECTS OF RECEIVERSHIP

Issues of concern and of particular relevance to this study are in relation to the technicalities of company receivership. The appellants in this case argued that a receiver cannot be appointed in a company before it becomes a going concern. This chapter will look into the basic aspects of receivership with reference only to receiverships by way of a debenture deed with a view to determine whether or not the Supreme Court judgment was in line with the law on receivership as it stands.

Firstly, a receiver is appointed to safeguard the interests of debenture holders in enforcing the security for their loan.[4] A receiver may be appointed in two ways, either by application by the debenture holders to court but for the purposes of this paper, this form of appointment will not be looked into. The second form of appointment is regulated by the terms of the debenture deed. It is often necessary to consult the debenture deed to establish whether a receiver can or will be appointed and if he has been appointed, the powers he has. The relationship between the receiver and the company will also have to be ascertained from the terms of the deed. In this case the second respondent Mr Simeza was appointed by virtue of Clasue 6 and the debenture under which he was appointed was held to be a continuing charge. This loan agreement granted the receiver the powers to manage the company in order to realise the debt of the creditor.

> A receiver and manager for debenture-holders is a person appointed by the debenture-holders to whom the company has given powers of management pursuant to the

[4]Paul Goldenberg, *A Guide to Company Law* (Oxfordshire: CCH Editions Limited, 1990), 211.

contract of loan constituted by the debenture and as a condition of obtaining the loan, to enable him to preserve and realise the assets comprised in the security for the benefit of the debenture-holders[5].

The company gets the loan on terms that the lenders shall be entitled, for the purpose of making their security effective, to appoint a receiver with powers of sale and of management pending sale, and with full discretion as to the exercise and mode of exercising those powers[6]. The primary duty of the receiver is to the debenture-holders and not to the company. He is receiver and manager of the property of the company for the debenture holders, not manager of the company. The company is entitled to any surplus assets remaining after the debenture debt has been discharged, and is entitled to proper accounts[7].

However, this position was disputed in the case of *R v Board of Trade, ex parte St Martin Preserving Co Ltd* [8], where Phillimore J said:

> There is clear authority for the proposition that, where a receiver and manager is appointed by the court, his function as manager confers a duty on him to preserve the goodwill and property of the company, both in the interests of the mortgagee and of the mortgagor. If this is true for a manager appointed by the court, is it to be said that a manager appointed by a debenture holder to act as the agent of the company has no similar obligation? As previously stated, the fact that an action of the receiver and manager may be primarily designed to serve the interests of the debenture holder and to that extent be his affair, does not, in my judgment, prevent it being an affair of the company, whose future may depend on such action carried out in its name. If he is

[5] L.B.C Gower, *Gower's Principles of Modern Company Law* (London: Sweet and Maxwell, 1992), 199.
[6] Richard Walton, *Kerr on the Law and Practice of Receivers* (London: Sweet and Maxwell, 1963), 250.
[7] [1955] 2 All ER 775
[8] [1964] 2 All ER 561

the agent provided for in the debenture, why should he not be answerable for his conduct of "its affairs"?

Therefore the position at law is that a receiver will be agent for the both the debenture holders and the company. A debenture or trust deed often gives power to appoint a receiver and manager in specified events. Such a power is a fiduciary power and if an appointment is made which is not for the benefit of the debenture holders but with a view to the benefit of the company or third persons, the court will interfere and appoint its own receiver[9]

> A "debenture" is defined as a document issued by a body corporate that evidences or acknowledges a debt of the body corporate, whether or not it constitutes a charge on property of the body corporate, in respect of money that is or may be deposited with or lent to the body corporate...' No precise definition of the word debentures can be found but various forms of instruments are called debentures. A debenture is a document which either creates or acknowledges a debt.[10]

A debenture is a contractual document and is therefore subject to all the rules of contract. to a large extent it is outside the reach of the court and the debenture holder will be entitled to enforce their rights upon the happening of an event giving rise for their intervention. Clause 8.1 of the deed provided:

> Notwithstanding the foregoing provisions of this Agreement, in any of the following events, PTA Bank shall by notice to the Borrower, suspend the right of the Borrower to make withdrawals on account of the PTA Bank Loan or declare the principal amount of the PTA Bank Loan then outstanding together with all unpaid interest which has accrued to be due and payable immediately in which latter case the

[9] (1964) 2 All ER 561
[10] Halsbury's Laws of England Volume 9, Fourth edition (London: Butterworths, 1988) 1059

securities issued hereunder shall become enforceable and all sums due by the Borrower to PTA Bank under this Agreement shall become payable forthwith notwithstanding anything to the contrary or in the security documents contained.

This clause was to apply if among other instance there was a, Failure by the borrower to pay on the due date any principal moneys or interest or other money falling due under this agreement or any other agreement between PTA Bank and the Borrower. It is therefore established that the debenture deed provided for the appointment of a receiver.

2.4 APPOINMENT OF RECEIVER JUSTIFIED : EVENT OF DEFAULT

Secondly, did an event amounting to a default occur which justified the appointment of the second respondent as receiver? In this case the Respondent claimed that a default had occurred hence the right to appoint a receiver arose at the moment of default. The principal occurrences in respect of which an event of default will be stated to occur are failure to pay interest or an instalment of principal when due, non-compliance with any other covenant in the agreement[11] to mention but a few. The first respondent stated that in addition to defaulting in payment, the applicant further pledge property which they had agreed to assign to the Bank to a third party which amounted a grave breach of the loan agreement. Clause 3.5 of the loan agreement provided that *any* failure to observe or fulfil any obligation on the part of the borrower to be observed or fulfilled under this agreement would amount to a default for which the Bank was entitled to suspend its obligations to the company.

2.4.1 OBLIGATION ON RECEIVER

Unless otherwise stipulated, there is no obligation on the lender, to notify the borrower that he is in arrears or to allow him further time to pay and the right to enforce the debt may arise

[11] Chitty on Contracts Vol. 2 *Specific Contracts* (London: Sweet and Maxwell, 2004), 1919

automatically upon the occurrence of an event of default. The mortgage deed registered on 16th September 2005 provided in Clause 3(vii) that 'the Statutory power to appoint a Receiver may be exercised by the Bank at any time after payment of the moneys secured has been demanded and the borrower shall have made default for one month in paying the same' An event of default did then occur justifying the appointment of receiver.

2.4.2 DID BREACH OF ARBITRATION CLAUSE NULLIFY APPOINMENT

However, in this case, the appellant claimed that the contract contained a clause stating that the parties should declare a dispute before any further action could be taken. The question that this cases raises in this regard, is whether the intervention of the court in restraining the receiver from performing his duty acted as a setting aside of the receivership. Did the court acknowledge a contractual breach on the part of the respondent?

Clause 16 of the mortgage provided,

> In the event that there is any conflict between the provisions of this Mortgage and the Loan Agreement, the provisions of the Loan Agreement will prevail provided and the parties hereby agree that the applicable law and arbitration under the Rules of Conciliation and Arbitration of the International Chamber of Commerce as provided for in the Loan Agreement shall apply to all matters between the parties hereto save and except for realisation of security and the exercise by the Bank of any other rights reserved for it under this Mortgage in which case the Laws of Zambia shall apply.[12]

It must be noted however that, both the clause on the declaring of disputes and appointment of a receiver were contained in the same deed. There is no statement as to which would take preference. Further, the said clause specified conflict between the provisions of the mortgage

[12] East and Southern African Trade and Development and Zambezi Portland Cement Mortgage Deed

and the loan agreement, it did not could not have been envisaged to suspend the creditor's right to appoint a receiver in order to realise the debt upon the happening of any event as specified in the deed.

2.5 JUSTIFICATION FOR COURT'S INTEREFERENCE

As the debenture deed is a contractual document, the court must only interfere where there has been a breach of the contract, misrepresentation or duress and any factor that operates to vitiate a contractual agreement. In the case of *Cripps (Pharmaceuticals) Ltd, R A Cripps and Son Ltd v Wickenden and another* [13]the appointment could not be impugned on the ground that insufficient time had been allowed to S after the demands had been made for, where money was repayable on demand, all a creditor had to do was to give the debtor time to get the money from some convenient place; he was not obliged to give the debtor time to negotiate a deal which might produce the money; in the circumstances it was clear that the companies had neither the money nor any convenient place to which they might go to get it.

Further, in the above case, the appellants argued that the time within which the receiver was appointed was too short. However, the court held that even though the interval between demand and appointment was still shorter, it was not unreasonable. From the facts of the Ventriglia case, the appellants did argue that the period of notice was short and before the appellants had the chance to respond a receiver was appointed, however this cannot be used as a ground to impugn the appointment as was held in aforementioned case. The court will abide by the terms of the debenture deed provided they are reasonable.

2.6 APPOINTMENT IN BAD FAITH

[13] (1973) 2 All ER 606

In addition to this, another claim that arose in the Ventriglia case was that the appointment of receiver was made in bad faith. One would ask therefore, whether the restraining of the receiver was an acknowledgment by the court that the decision was made in bad faith and therefore a nullity. As already mentioned the appointment of a receiver is a fiduciary power. One must look at the purpose and a role of a receiver to determine whether or not this fiduciary power is prone to abuse. The East and Southern Trade Development Bank claimed two breaches of important terms of the contract occasioned by the company by virtue of which it invoked the clause entitling it appoint a receiver. There was no bad faith or abuse of this fiduciary power.

It must be stated that the appointment of a receiver is one of several other remedies available to debenture holders, who also have recourse to other avenues of recovery open to creditors generally.[14] But if provided for in the debenture deed then it may very well the most appropriate remedy envisaged by the parties that entered the said agreement.

It is important to note that debentures and other mortgages or charges issued by a company are not exempt from the rules against clogging the equity of redemption. However a debenture may be made irredeemable.[15]

2.7 POWER OF SECURED CREDITOR

The power of a secured creditor to appoint a receiver under his security may be exercised, assuming that all conditions necessary for the appointment have been satisfied, at any time the creditor chooses; and as regards timing, he owes no duty either to the company or to any guarantors to select any time other than one which suits his own convenience. In making such

[14] Goldenburg, *213*
[15] Halsbury's Laws of England, 1061

an appointment the secured creditor is under no duty to refrain from doing so because this may cause loss to the company or its unsecured creditors[16]

2.8 APPOINTMENT OF RECEIVER BEFORE COMPANY IS GOING CONCERN

Secondly, what is the stance of the law concerning the appointment of a receiver over a company before it becomes a going concern? The law provides the following:

> When a company on whose assets debentures are charged is a going concern the court will at the instance of the holders of the debentures appoint a receiver and manager provided that the company is carrying on a business which is included in the charge and which it is advisable to continue in the interests of the debenture holders for the more beneficial realisation of the security[17]

In summary, the appointment of a receiver may very well have been justified in light of the facts of the case. However, the Supreme Court did not make a ruling on this matter but proceeded to suspend the receiver from carrying out of his duties on grounds upon which were not stated. Further the court identified the two issues to be determined in the aforementioned case as (a) whether or not the first respondent was right to appoint the receiver at that stage (b) whether or not there was a breach of the loan agreement. The court did not proceed to decide on this issue as it did on other grounds of immunity raised in the case. It however proceeded to restrain the receiver from performing his function without stating the position of law or basis for this ruling. The Court did not state whether the receivership was revoked or was a nullity form its inception. It did not state the rights of the parties *pendante lite*. Further, as will be discussed in the subsequent chapter, this judgment

[16] Re Potters Oils Ltd [1986] 1 All ER 890
[17] Halsbury Laws of England , 1067

raised more questions than answers as lower courts have struggled to ascertain the status of the parties and the company under receivership to date.

2.9 CONCLUSION

This chapter has considered the facts of the case and their application to the basic aspects of the law on receivership. The chapter has also highlighted the justifications for the appointment of a receiver and tried to establish whether or not the Court was on firm ground to grant an injunction restraining the receiver from performing his duties.

CHAPTER THREE

THE EFEECT OF RECEIVERSHIP ON SHAREHOLDER'S RIGHTS AND EFFECT OF VENTRIGLIA JUDGMENT

3.0 INTRODUCTION

In the Ventriglia case, Counsel for the applicants argued before both the High Court and Supreme Court that receivership was not an appropriate remedy as the receiver was appointed without consideration of the rights of the plaintiff as shareholders. The question to be determined is what rights of the shareholder should the creditor consider, if any, before he enforces his right to appoint a receiver? Secondly, what effect will the appointment of a receiver have on the rights of the shareholder? Thirdly, this chapter will look into the subsequent confusion that the Ventriglia case has brought concerning the rights of the said shareholders and directors of the Zambezi Portland Distributors. It will focus on the fact that effect of the appointment of a receiver acts as a suspension of the servants of the company but it was unclear from the judgment what the status quo ante of the parties to the litigation was after judgment was passes resulting in subsequent confusion. The Ventriglia judgment may seem to have set a bad precedent as the lower courts have struggled to interpret the effect of the receivers' suspension.

3.1 POWERS OF RECEIVER APPOINTED BY SECURITY AGREEMENT

'The law on receiverships stemmed from the common law which provided that, the powers of a privately appointed receiver are derived from the security agreement pursuant to which the receiver is appointed. In addition, the deemed agency provision that is typically found in the security agreement provides that a receiver acts as agent of the company. This gives a privately appointed receiver the power to carry on the business as agent of the debtor'.[1] As a

[1] Wood, Roderick , *The Regulation of Receiverships*. Annual Review of Insolvency Law (Toronto: Thomson, 2010) , 243

result of the historical development of receiverships briefly outlined in Chapter One, the law that governed court appointed receivers was different from the law that governed privately appointed receivers. The former was governed by equitable principles, while the latter was derived from common law contract and agency law principles.

3.2 RECEIVERS DUTY TO SHAREHOLDERS

A privately appointed receiver at common law was under a more limited duty than a court appointed receiver. The receiver was only required to consider the interests of the secured creditor.[2] Although a privately appointed receiver also owed a duty to the debtor and to persons holding lower ranking interests in the assets to act in good faith and to obtain the best price reasonably obtainable[3], the receiver was not required to consider their interest in determining the timing of the sale. The assets could therefore be sold immediately even if a delay might greatly enhance their recovery. It is not entirely clear whether this state of the law has been altered by statute. The Companies Act in Section 113 provides that receivers be deemed in relation to the property or undertaking to be an agent and officer of the company and that he shall act in accordance with the instrument under which he is appointed. The Act not go further to state any other parties to whom such receiver may owe a duty. The only further obligation imposed upon a receiver is that he has an obligation to act in good faith and in a commercially reasonable manner. However, Zambian courts have not extensively analyzed the nature and extent of the duty to act in a commercially reasonable manner, and there remains considerable uncertainty as to whether it requires a privately appointed receiver to consider the interests of others in determining the timing of the sale.

Therefore, provided that the receiver has acted in good faith, he will have no obligation to consider the interests of the shareholders as claimed by the applicants in the aforementioned

[2] *In Re B Johnson & Co. (Builders) Ltd.* [1955] Ch. 634
[3] *Downsview Nominees Ltd. v. First City Corp. Ltd* [1993] A.C. 295

case. The receiver will not be bound by the rights of the shareholders as the scope of his powers generally do not encroach into the scope of the shareholders powers. His role is simply to perform those duties ordinarily performed by the directors with the purpose of securing the assets of the company. It is necessary therefore to make a distinction between directors and shareholders' rights to ascertain if at all a receiver may at any appoint affect the rights of the shareholder.

3.3 SHAREHOLDERS RIGHTS AS DISTINCT FROM DIRECTORS' RIGHTS

Firstly, the status of a shareholder in relation to the company must be determined in order to show the clear distinction between rights arising from a security agreement and running of the company and any rights that a shareholder may have in relation to the company.

3.3.1 HISTORICAL DEVELOPMENT OF DISTINCTION BETWEEN SHAREHOLDER AND DIRECTOR ROLES

At common law, shareholders as beneficial owners had both an interest in the company's assets and (unless there was an agreement in the deed to the contrary) undertook unlimited liability for the company's debts[4]. The emergence of the company as a self-owning entity distinct from the shareholders had a corresponding effect on the nature of directors' fiduciary duties. Duties shifted from being owed to the shareholders to being owed to a company now emptied of people. The emergence of the company as a self-owning entity distinct from the shareholders had a corresponding effect on the nature of directors' fiduciary duties[5]. Duties shifted from being owed to the shareholders to being owed to a company now emptied of people. Correspondingly, legislation such as the Limited Liability Act 1855 divorced shareholders from financial responsibility for the company's financial arrangements.

[4] L.E. Talbot, *Critical Company Law* (Oxon : Routledge-Cavendish, 2007),109
[5] Paul Goldenberg, *A Guide to Company Law* (Oxfordshire: CCH Editions Limited, 1990) ,160.

Shareholders' ownership in the company became ownership of the newly reconceptualised share, and in ownership of this property, shareholders were protected through statutory limited liability and through voting rights in the company.

The doctrine of separate corporate personality meant that the shareholder did not own the assets of the company: 'neither a shareholder nor a simple creditor of a company has any insurable interest in any particular asset of the company'[6].What they did own was title to revenue and other residual rights of ownership such as voting rights. Thus a shareholder remained the owner, by the mere fact of owning a *function* of the company – the fruit of its activity, that of making profits. With shareholders' interests and ownership more clearly delineated, describing the boundaries of the company should have been, in principle, much simpler.[7] The company was therefore comprised of assets, human and tangible, contracts, business associations and goodwill. In short, it was the productive assets of the company divorced, in law, from human ownership.

3.4 SHAREHOLDERS INTERESTS

As already mentioned, any obligations, liabilities and or assets of the company, do not fall within the scope of the shareholder's interest. Further, a debenture deed when signed is signed between the company and the creditor, it does not have within its contemplation the rights of shareholders as these are separate persons from the company which the creditor contracts with. In this regard, the creditor owes no duty to a shareholder before he enforces his right to appoint a receiver.

[6] Macaura v Northern Insurance (1925) AC 619 (HL)
[7] Talbot, 111

Secondly, it has been established that the rights of shareholders are very distinct from those of directors although the two may be difficult to separate in companies where the directors are shareholders. At common law, while shareholders became increasingly detached from any personal involvement in the company, the company's directors remained both

conceptually and practically bound to the management of its working assets. In this model of the company, the relationship between director and shareholder is entirely severed and no longer mirrors the relationship that subsists between partners in a firm. Instead, a director's fiduciary duty is owed to an entity distinct from shareholders and no longer represents a fiduciary relationship owed to the shareholders.[8]

3.5 THE EFFECT OF RECEIVERSIHIP ON SHAREHOLDERS AND DIRECTORS

The separation in law between directors and shareholders can cause confusion in private companies. If two or three people set up a company together they often see themselves as 'partners' in the business. That relationship is often represented in a company by them all being both directors and shareholders. The problem with this is that company law requires some decisions to be made by the directors in board meetings and others to be made by the shareholders in general meetings. To complicate matters further, some decisions have to be made by the directors, but only with the shareholders' consent.

In the Ventriglia case, submissions made both on behalf of the Appellants and Respondents mirrored this lack of distinction between the two very distinct roles. Evidence on record showed that the Ventriglias were directors of the company and they were further held to be the shareholders of the same. The court did not clearly state whether it recognised the

[8]L.E. Talbot, Critical Company Law (Oxon : Routledge-Cavendish, 2007) 112

Ventriglias as directors or as shareholders. During the course of proceedings, Mr Sangwa did submit that upon the appointment of the receiver, the shareholders' rights were extinguished. These 'extinguished' rights referred to were not the stated and the court did not clarify this claim.

3.5.1 SPECIFIC RIGHTS ATTACHING TO SHAREHOLDERS

The main rights which usually attach to shareholders are: (a)adopting, altering or revoking a constitution (b) altering shareholder rights (c)approving a major financial transaction (d) appointing and removing directors (e) approving an amalgamation (f) putting the company into liquidation; and (g) the appointment and removal of directors[9]. The more detailed of rights are as follows:

Firstly, the right to attend general meeting and vote. Typically shares carry one vote each but there may be non-voting shares or shares with multiple votes. Some shares may carry the right to vote only in particular circumstances[10]. Secondly, to a share of the company's profits.

> The distribution of profits is paid by means of a dividend of a certain amount paid on each share. A dividend may be paid only if the company has made profits and to the extent that it decides to distribute them. In the absence of any provision to the contrary, dividends must be paid in proportion to the shares held by each shareholder, but it is becoming increasingly common for articles to provide that the company's

[9] Companies Act, Chapter 388 of the Laws
[10] Simon Goulding, Company Law (London: Cavendish Publishing Limited, 1999),121

shares are divided into different classes and for the directors (or shareholders) to be able to vary the dividends allocated to these classes[11].

If a company is under receivership this right may be suspended until the debt is discharged however, such right will not be extinguished. Thirdly, to a final distribution on winding up. If the company is wound up and all the creditors are paid, the remaining assets are available for

division among the members[12]. This may be in two stages: (1) a return of capital; (2) distribution of surplus capital[13]. Some shares may be given a priority as to one or both of these, or excluded from participation in any surplus.Fourthly,To receive a copy of the company 's annual accounts. That the company be run lawfully i.e. in accordance with the Companies Act, the general law and the company's constitution. Finally ,in most circumstances only the members of the company will have the legal right to sue to make the company act lawfully, and even they may be restricted in their ability to sue under the common law rule in Foss v Harbottle. Pursuant to section 72 the Companies Act. A company shall not have or claim a lien on shares on which there is no unpaid liability, nor shall any such lien extend to any sums due from the shareholder except in respect of the unpaid liability on the shares.[14]

3.5.2 EFFECT OF RECEIVERSHIP ON BOARD OF DIRECTORS

The appointment of a receiver functions to suspend the powers of the board of directors whose role it is to run the company on behalf of the shareholders The appointment of a

[11] Goulding, 122
[12] Section 298(2) of the Companies Act, Chapter 388 of the Laws of Zambia
[13] L.B.C Gower, *Gower's Principles of Modern Company Law* (London: Sweet and Maxwell, 1992), 765
[14] CAP 388 of the Laws of Zambia.

receiver does not of itself causes the officers of the company (i.e directors and the secretary) to cease to hold office.

However, both in law and in practice, the position of the officers of the company changes. The officers of the company are still subject to the normal requirements of company law to make appropriate returns to the registrar of companies and also to deal with such matters as the preparation of company accounts. However, the role of the officers is diminished in practical terms because from the time of his appointment, the administrator acting as the deemed agent of the company, with power to do all such things as may be necessary for the management of its affairs, business and property is effectively in charge of the company's affairs[15]

The general position of law is that in the even of a receivership the directors and secretary of the company continue to be entitled to exercise their powers as such provided that no action which they take in any way prejudices or impedes the actions of the receiver in carrying out his functions as established in

3.5.3 RESTRICTION ON RIGHTS OF RECEIVER

The powers of a receiver and manager may be restricted because of the purpose for which his power may be exercised. Generally when appointed an administrator or receiver-manager has wide powers to manage the affairs of the business and property of the company to which he has been appointed, he may therefore do all such things as may be necessary for the management of the affairs, business and property of the company. However, there exist two limitations on this power.

Firstly, it must be borne in mind that these powers are conferred on an administrator as agent of the company therefore, *prima facie,* the administrator has no greater power than the

[15] Fletcher et al, *The Law and Practice of Corporate Administrations* (London: Butterworths, 1994),240

company itself as his principal. Thus it was held in *Re Home Treat Ltd*[16] that an administrator had no power to commit the company to *ultra vires* acts i.e outside the scope of the objects of the company set forth in the objects clauses or articles of association. Secondly, the administrator's powers are only exercisable for the purpose set out in the administration order or security agreement[17].

3.6 COURTS POWER TO REGULATE RECEIVERSHIPS

Courts had very little ability at common law to supervise the conduct of a privately appointed receiver. This was in marked contrast with court appointed receivers who obtained their powers from the court and were subject to the direction and supervision of the court. Zambia does not have legislation which particularly deals with the regulation of receiverships[18] as do other jurisdictions. New Zealand, for example, has a Receivership Act which determines the scope and powers of the court and attempts to legislate on all aspects of receivership.

Nevertheless, like the common law position, the Zambian courts power to interfere with privately appointed receivers is limited. Since these appointments are made by a security agreement, both parties agree to be bound by such terms. However, the court will maintain the power to grant an order removing, replacing or discharging a receiver or any such order as may necessary to determine the rights of the parties. The court therefore is given the power to supervise the conduct of privately appointed receivers. In addition, in other commonwealth jurisdictions, statutes provide that a court has the same power to make orders in respect of privately appointed receivers as it has in respect of court appointed receivers[19].The power to determine the validity of an appointment of a receiver is one of the widest powers the court

[16] (1991) BCLC 705 per Harman J at 706
[17] Fletcher, 242
[18] Richard Walton, *Kerr on the Law and Practice of Receivers* (London: Sweet and Maxwell 1963), 199
[19] *Personal Property Security Act*, R.S.A. 2000

may exercise under the law of receiverships. The court also has the power to remove a receiver once the objectives have been achieved.

3.7 ATTEMPTS TO REGULATE RECIVERSHIPS IN THE UK

Receivership law was first developed in England, and virtually all the foundational principles of receivership law can be traced to the early judicial decisions of English courts. This body of law remains crucially important to the commonwealth countries, including Canada, that continue to utilize receiverships. Yet in the birthplace of the receivership, the institution of the receivership has almost disappeared as a legal response[20].

The recommended approach to regulation was relatively benign. Receivers of the whole or substantially the whole of the company's property were renamed as "administrative receivers", but the legislation did not radically change the nature of the office. The legislation provided for greater disclosure of information, and dealt with issues such as the liability of receivers on post-receivership contracts. Administration was not itself a restructuring regime. Instead, it operated as a "holding mechanism" that maintains the status quo until a decision can be made as to the most efficacious response to the problem. This may involve an arrangement under which the creditors agree to a compromise of their claims, but it might also involve a going concern sale of the business. The U.K. statute did not purport to modify the basic duty that is owed by a privately appointed receiver. Accordingly, the primary duty of a receiver is owed solely to the secured creditor for whose interest the receiver was appointed, and a receiver is not under a duty to consider the interest of other creditors.

[20] Fletcher, 2

3.8 EFFECT OF VENTRIGLIA JUDGMENT ON SHAREHOLDERS' RIGHTS

The ruling in the Ventriglia case may have raised more questions than answers as regards the status of shareholders rights in the company as it stands. In the case of *Finsbury Investment v Antonio Ventriglia and Ors*[21], Judge Wood in his ruling of 5th May, 2010 ruled that by virtue of the Supreme Court judgment the directors had power to take charge of the property and management if the company but that the company was still under receivership. This amounts to a situation of confusion. If a company is under receivership, the rights of the directors are suspended until the debt is discharged or the receivership is revoked by a court of competent jurisdiction.

By virtue of the company being in receivership, the board of directors could not purport to exercise management and control over the company. In a later judgment concerning the same matter on 12th July, 2010, Justice Wood sought to clarify the courts stance on the interpretation of the Supreme Court Judgment, he stated, ' ...it would be most undesirable for me to interpret judgment of a superior court' he further stated that the Ventriglias had misinterpreted his previous ruling when they assumed that they had the power to manage and control Zambezi Portland Cement Limited. He said he simply stated that the court recognised them as being authorised to secure property. Judge Wood in this case further restrained the Ventriglia's from holding themselves out as shareholders.

In the case of *Antonio Ventriglia v East and Southern African and Trade Development Bank and Robert Simeza and Alfred Jack Lungu*[22], the High Court on 30th June, 2010 upheld the ruling of the Supreme Court that the receiver be restrained from performing his duties. This

[21] 2008/HPC/0366
[22] 2008/HN/268

was prior to Justice Wood's refusal to recognise the directors as having the power to control and manage Zambezi Portland Cement Limted.

3.9 CONCLUSION

This chapter has established the fact that receiver has no duty to consider the interest of the shareholders once his duty to secure the assets on behalf of the creditor materialises. The paper has further discussed effect of the receivership on shareholders and directors with a view to drawing a distinction between the two. It also briefly looked at the position of courts rights to restrict privately appointed receivers in Zambia and in the UK receiverships Finally this paper focuses on the effects of the Ventriglia judgment by focusing on two rulings made by the High Court in which the inability to interpret the Ventriglia judgment can not be over emphasised.

CHAPTER FOUR

SHAREHOLDERS' LOCUS STANDI

4.0 INTRODUCTION

The Supreme Court in the Ventriglia case held among other things that there was evidence on record that the Appellants were still Directors of Zambezi Portland Cement Limited on the basis of *Avalon Motors Limited(In Receiverhsip).* However, the court may have ignored one important holding of this case which is that directors may only sue in the name of the company against a receiver. In this case however, the directors who were also shareholders sued in their own names. Was this an oversight by the court on the procedural issues of locus standi? This chapter seeks to look into the aspects of locus standi of shareholders.

4.1 CASELAW ON LOCUS STANDI

The case if *Avalon Motors (in Receivership)*[1] *v Bernard Leigh Gadsden and Motor City Limited t*he 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. The court held among other things,

> 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

[1] [1998] ZR 4

from elsewhere but the Receiver neglects or declines to act, the directors should be entitled to use the name of the company to litigate.

In the case of *Magnum (Zambia) Limited v Basit Quadri (Receivers/Manager) & Grindlays Bank International Zambia Limited*[2] A preliminary issue was raised in this case as to whether it would be in order for the court to allow the proceedings to continue on the basis that the plaintiff should be Magnum (Zambia) Limited when in fact this company was already under receivership and the receiver/manager appointed under a debenture was the first defendant *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'.

4.2 PURPOSE OF DETERMINING LOCUS

'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'[3]. One of the issues that should have been considered 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?

In effect, when a suit is taken out against a receiver or directors, the suing shareholder claims to be acting on behalf of the corporation, because the directors and management or receiver are failing to exercise their authority for the benefit of the company and all of its

[2] (1981) ZR 141
[3] Richard Walton, *Kerr on the Law and Practice of Receivers* (London: Sweet and Maxwell 1963), 230

shareholders[4]. This type of suit often arises when there is fraud, mismanagement, self-dealing and or dishonesty which are being ignored by officers and the Board of Directors of a corporation. While, under traditional corporate law, shareholders are the owners of a corporation, they are not empowered to control the day-to-day operations of the corporation[5].Instead, shareholders appoint directors, and the directors in turn appoint officers or executives.

4.3 NATURE AND PURPOSE OF DERIVATIVE ACTIONS

Derivative suits permit a shareholder to bring an action in the name of the corporation against the parties allegedly causing harm to the corporation.

> If the directors, officers, or employees of the corporation are not willing to file an action, a shareholder may first petition them to proceed. If such petition fails, the shareholder may take it upon himself to bring an action on behalf of the corporation. Any proceeds of a successful action are awarded to the corporation and not to the individual shareholders that initiate the action[6].

This action enables current and former members and officers of a company to bring an action on behalf of the company, or intervene in proceedings to which the company is a party. This action is known as derivative action.

However, many other commentators have suggested that – despite its limitations – shareholder litigation has an important role to play in effective corporate governance. Coffee

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[4] Walton, 232
[5] Paul Goldenberg, *A Guide to Company Law* (Oxfordshire: CCH Editions Limited, 1990), 235
[6] L.B.C. Gower, *Gower's Modern Company Law* (London: Sweet and Maxwell, 1992), 647.

and Schwartz argue that the derivative action plays an important role in deterring directors (and or receivers in this context) from breaching their duties and punishing breaches. Others

have argued that derivative litigation is a useful deterrent to management dishonesty[7]. This is echoed in the discussion of another author who argues that, although there is a concern as to how much justice is received from a derivative suit, derivative actions play a useful role in deterring directors and officers from wrongful behaviour[8].

The derivative action must provide a balance between giving an effective remedy to shareholders while at the same time allowing the directors of a company reasonable freedom from shareholder interference. This is based on the principle that, generally speaking, shareholders should have little say in the ordinary management of a corporation[9]. As a consequence:

The ideal derivative suit statute would balance the public concern for management accountability and the corporation's concern in avoiding frivolous and unfounded claims, while maintaining the derivative action as a viable method of enforcing accountability in the modern corporation.

4.4 DERIVATIVE ACTIONS: THE RULE IN FOSS V HARBOTTLE

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[7] John C Coffee and Donald E Schwartz, *'The Survival of the Derivative Suit: An Evaluation and a Proposal for Legislative Reform'* (1981) 81 *Columbia Law Review* 261

[8] Thomas P Kinney, *'Stockholder Derivative Suits: Demand and Futility Where the Board Fails to Stop Wrongdoers'* (1994) 78 *Marquette Law Review* 172

[9] Lawrence A Larose, *'Suing in the Right of the Corporation: A Commentary and Proposal for Legislative Reform' (1986) 19* University of Michigan Journal of Law Reform 499

The common law is encapsulated in what is known as the rule in *Foss v Harbottle*, which comprises two related components. In *Foss v Harbottle,* Sir James Wigram VC stated that in respect of wrongs done to the company, 'the corporation should sue in its own name and in its corporate character, or in the name of someone whom the law has appointed to be its representative[10]'.

However, the classic statement of the rule was not in the case itself, but by Jenkins LJ in *Edwards v Halliwell*:

> The rule in Foss v Harbottle, as I understand it, comes to no more than this. First, the proper plaintiff in an action in respect of a wrong alleged to be done to a company or association of persons is prima facie the company or the association of persons itself. Secondly, where the alleged wrong is a transaction which might be made binding on the company or association and on all its members by a simple majority of the members, no individual member of the company is allowed to maintain an action in respect of that matter for the simple reason that, if a mere majority of the members of the company or association is in favour of what has been done, then *cadit quaestio.*[11]

The rule in *Foss v Harbottle*, then, comprises two principles. The first limb is known as the "proper plaintiff" rule and is based upon the principle that a company is a separate legal entity, distinct from its shareholders[12]. A wrong done to the company is not a wrong done to the shareholders, and should be redressed by the company itself, taking action in its own name. The second limb is known as the "internal management" principle. The courts will not interfere with

[10] Foss v Harbottle [1843] 2 Hare 461, 491; 67 ER 189
[11] [1950] 2 All ER 1064 at 1066
[12] *Salomon v Salomon & Co* [1897] AC 22,

the internal management of companies where those acting in management do so acting within their powers[13].

4.5 EXCEPTIONS TO THE RULE IN FOSS V HARBOTTLE AS APPLIED TO THE CASE IN QUESTION

Although based on sound corporate law principles, the rule can lead to manifest injustices. As a consequence, a number of exceptions to the rule in *Foss v Harbottle* were developed:

(a) The illegal or ultra vires act exception .Where an action was illegal or ultra vires the company, a shareholder could sue to restrain the action, because the majority could not ratify acts ultra vires the company[14]. In the Ventriglia case, the receiver did not perform any act that was ultra vires his powers hence this exception did not apply.

(b) The special majority exception. Where an action was taken in breach of a requirement in the constitution requiring a special majority to authorise the action, a member could sue to challenge the validity of the resolution[15]. This exception was also not present in the Ventrgilia case

(c) The personal rights exception: Where the personal rights of the shareholder had been infringed, the rule in *Foss v Harbottle* did not apply, for the shareholder could sue in their own name to protect their personal rights. Although a simple concept in theory, distinguishing in practice between personal and corporate rights can be a difficult task[16].

(d) The fraud on the minority exception. Where the action amounted to a fraud on the minority and the wrongdoers were in control of the company, the minority

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[13] Robert Dick, 'A Reconsideration of the "Justice" Exception to the Rule in *Foss v. Harbottle*' *University of British Columbia Law Review(1964-6):* 547http://www.ssrn.com.

[14] K W Wedderburn, 'Shareholders' Rights and the Rule in Foss v. Harbottle' Cambridge Law Journal (1957): 194

[15] P.L. Black, The Rule in Foss v. Harbottle, Corporate Governance and the Derivative Action (LLM Thesis, University of Melbourne, 1983)

[16] P F Hanrahan, 'Distinguishing Corporate and Personal Claims in Australian Company Litigation' Company & Securities Law Journal (1997):15

shareholders were permitted to bring an action against the wrongdoers on behalf of the company[17]. Whereas any right of action under the first three exceptions was personal, an action brought under the fraud on the minority exception was derivative, and it has thus been described as 'the only true exception' to the rule in *Foss v Harbottle*. In order to bring a common law derivative action, the plaintiff had to bring evidence that 'the defendants were in a position of control within the company and had perpetrated a fraud on the minority'. Due to the ambiguity of these terms, proving fraud and control was by no means an easy task[18]. English courts adopted a conservative approach to control, usually requiring that the defendants control a majority of the voting shares, which made derivative actions difficult to bring except in small private companies, and anything less than expropriation of corporate assets would be unlikely to be considered fraud. As a consequence, it was difficult to bring an action under this exception[19].

(e) The interests of justice exception. There has been debate as to whether a fifth exception existed based on the "interests of justice". That is, the courts would permit a shareholder to bring an action despite the rule in *Foss v Harbottle* when the interests of justice required it. Boyle has succinctly stated the position:

> There has ... been a thin but steady stream of obiter dicta ... which adopt a more flexible approach to Foss v Harbottle. They are to the effect that a minority action will be allowed by exception to the rule whenever justice

[17] Stefan Lo, 'The Continuing Role of Equity in Restraining Majority Shareholder Power' Australian Journal of Corporate Law (2004) 16

[18] Anthony, Boyle. Minority Shareholders' Remedies (Cambridge: Cambridge University Press, 2002)

[19] Stanley Beck, 'The Shareholders' Derivative Action', Canadian Bar Review 159(1974) 52

requires it in the circumstances of the case, even though the requirements of one of the established exceptions cannot be met[20].

Sealy argued that the interests of justice was not so much an exception but 'the very foundation of the court's willingness to lend its aid to a minority member who seeks redress for a corporate wrong'[21]. Another commentator argued that the "interests of justice" was not an exception to the rule as it was 'too nebulous, vague and infinitely elastic[22].

Unless, the applicants could prove any of these exceptions, they did not have the locus standito bring the action before the court as they were not even party to the security agreement that was signed between the company and the creditor.

4.6 CONCLUSION

In conclusion, the Supreme Court did not take into consideration the fact that the applicants did not have the right to sue in their own names. Further, in the case of *Finsbury Investment v Antonio Ventriglia and Ors*[23], the shareholders in the above case were claimed to have misrepresented themselves as shareholders of the Zambezi Portland Cement Limited when in actual fact they no longer held shares in the said company. This was addressed by the High Court judge who held that the action was not rightly before the court because the applicants did not disclose that they were not shareholders. However, whether or not they disclosed this fact, the court should have taken cognisance of the fact that they did not have the right to sue

[20] Anthony Boyle, 'A Liberal Approach to Foss v. Harbottle' Modern Law Review 603(1974) : 52
[21] L S Sealy, 'Foss v. Harbottle – A Marathon Where Nobody Wins' (1981) 40 Cambridge Law Journal 29
[22] O A Osunbor, 'A Critical Appraisal of "The Interests of Justice" as an Exception to the Rule in Foss v. Harbottle' (1987) 36 International and Comparative Law Quarterly 1
[23] 2008/HPC/0366

the receiver in their own names but should have brought an action in the name of the company. Unless they could prove that one of the exceptions to the rule in *Foss v Harbottle* had been satisfied, the application should not have been entertained.

CHAPTER FIVE

5.0 CONCLUSIOINS AND RECOMMENDATIONS

The objective, in the preceding chapters, has been to outline the inadequacy surrounding the ruling in the case of *Antonio Ventriglia v East and Southern African Trade and Development Bank and Robert Simeza.* This work has outlined the efforts advanced in clarifying the position and rights of the receiver and shareholders in the aforementioned case and the subsequent effect of the same. It has further, shown that the court departed from the basic aspects of receivership as laid out in precedence. It further outlined the departure of the *locus standi* of the parties in the matter and laid out the law on derivative claims. This chapter shall therefore draw conclusions from the preceding chapters as to the adequacy of the judgment and make recommendations to determine what needs to be done in order to strengthen the principles of receivership and shareholders' rights. It seeks to do so with a view to determine what really is the law in order to eliminate any confusion concerning the status of such rights.

5.1 CONCLUSIONS

Firstly, from the preceding chapters, this paper has been shown that the Ventriglia case rather than clarify the position of the highest court created two conflicting judgment with regards to the position of the shareholders and the receiver. What the Supreme Court did was relieve the receiver of his duties without actually declaring the receivership a nullity. The Creditor was therefore, of the opinion that the right appoint a receiver to protect his interests in the company still subsisted. Acting under this assumption, the creditor proceeded to appoint another receiver in the place of the first receiver with a view to safeguard their interest in the company. The receiver and creditor were held to be in contempt of court by the High Court in a subsequent judgment. The appointment of the second receiver was nullified and he was

relieved of performing such function. The court did not state at this point what the status of the creditor's rights under the security agreement were. The basis of this subsequent dismissal is unclear, as the Supreme Court did not state that the receivership was in fact a nullity.

This resulted in two further judgments which instead of providing a clear clarification of the parties rights by the Supreme Court judgment ruled that neither receiver nor shareholders had any right to deal with management of the company. In this regard, the shareholders had no right to appoint directors to manage the company, or reappoint themselves as they had prior to the appointment of receiver, been directly responsible for management of all the affairs of Zambezi Portland Distributors. Justice Wood's refusal to recognise the directors as having the power to control and manage Zambezi Portland Cement Limited, is evidence of the court's recognition of the validity of the receivership. The judge in his own words stated, the directors had power to take charge of the property and management of the company but that the company was still under receivership.

Further, a court of equal jurisdiction in another case relating to the same facts, held that, in accordance with the Supreme Court's ruling, the receiver was restrained from carrying out his duties. Due to the variance of these judgments, there is neither a uniform interpretation nor practical application of the Supreme Court ruling, in fact the court declined to interpret the Supreme Court's ruling. In the words of Judge Wood, '...it would be most undesirable for me to interpret judgment of a superior court' .

The law on receiverships has over the years developed comprehensively and dynamically. This ruling creates what at law would seem to be an absurdity. If a company is under receivership, ideally the receiver must have control over its management. The common law

as evidenced in the cases in this work, is couched in a clear unambiguous way. Zambian precedent has upheld the same basic aspects of receivership as espoused in English Common law and has at no time departed from these well-established principles until the passing of this judgment. It would seem that this latest precedent has had undesirable effects and there is need for the Supreme Court to either clarify this judgement.

Secondly, this research has shown that the distinction between shareholders and directors rights may become blurred in situations where the one functions in dual capacities. It is the duty of the court to clarify this position. Unfortunately, it was unclear in the Ventriglia case whether or not the court recognised the appellants as shareholders or as directors. Of further importance is the issue of the status of directors in a company under receivership. The Supreme Court recognised the appellants as directors of the company and did restrain the receiver from the performing his duties pending litigation, without nullifying the reciversh ip.

Subsequent litigation revealed that the High Court was of the view that the company was still under receivership but the court did not dare to make an interpretation of the Supreme Court ruling. Such a situation creates an unstable environment for a company to function in and what seemed like a fairly stable company law regime may be thrown into question with the coming of this recent precedent. The negative effects of this ruling continue to be felt by all the parties involved in this case as the creditor is precluded from enforcing his rights, the directors have not been given management of the company and the wait continues for a final reconciliation of the rights of all the parties involved.

Thirdly, this research has shown that the court may have misquoted the precedent set in the Avalon Motors case by using the same as a basis of recognising the right of the shareholders to bring an action without stating in what capacity this is tenable at law. In the aforementioned case, the court held,

> 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.

In this particular case, the directors who were also shareholders wished to litigate the validity of the security under which the receiver's appointment had taken place. By the authority of this case, the action should not have been commenced independent of Zambezi Portland Cement Limited, the company.

Having established the above, this research proceeds to make recommendations. These recommendations are modelled to render an opinion on ways in which the Supreme Court can rectify the conflicting views brought to light by the two High Court Judgments.

5.2 RECOMMENDATIONS

5.2.1 CLARIFICATION OF THE PRACTICAL APPLICATION OF THIS RULING

It must be stated that in order for any kind of doctrine of precedent to be set , there must be reliable records of decisions in previous cases and this is especially necessary for the doctrine

of *stare decisis* to operate. A precedent influences future decisions[1]. The principle of stare decisis should not be used to cover bad law. There is a need for judicial activism to set that law as it should be and not as it is. The court must move away from precedents like those set in *Abel Banda v The People* [2], in which the Supreme Court had to resolve which of two conflicting decisions represented good law and having made that choice had to consider the principle of stare decisis. The court stated:

> The problem before us therefore is that we have made case law which we have now realised is indefensible. The principle of stare decisis requires that a court should abide by its ratio decidendi in past cases. Put simplistically in order to have certainty in the law, decisions of courts should be consistent and should not be so readily changeable as to make it at any given time what the law is on a given issue. In order to uphold this principle therefore past decisions should not be exploded for the sole reason that they are wrong. Courts should stand by their decisions even if they are erroneous unless there be a sufficiently strong reason requiring that such decisions should be overruled.

Given the confusion resulting from the Ventriglia judgment, it would only be in the interest of justice that the Supreme Court clarify the issues raised in this judgment and state how tenable it is at law to restrain a receiver and yet not grant management and control to directors. The court created what may be deemed to be an impractical situation. By recognising directors but not revoking the receivership, a situation was created that does not adhere to general company law principles. If in so rendering this judgment, the court meant it

[1] C, Anyangwe, An Outline of the study of Jurisprudence (Lusaka: UNZAPress, 2005), 161
[2] (1986) Z.R. 105

to be exceptional this should have been stated in its *ratio decidendi*. However much of the judgment was spent on clarifying the issues of immunity of the first respondent.

5.2.2 CLARIFICATION OF THE STATUS OF SHAREHOLDERS AND CREDITORS

The Court must further clarify what the status of the shareholders creditors in such a situation will be and what can they do in a situation where their appointed managers cannot take control or manage a company under receivership and neither can the receiver. Would such shareholder still be entitled to receive dividends once declared? Further, what becomes of the security agreement and the rights arising from it in favour of the creditor? As the shareholders right will not necessarily be extinguished upon the appointment of a receiver, what will the effect be if neither receiver nor board of directors are running the company as a going concern? This ruling has brought more answers than questions in every regard.

5.2.3 PROVIDING FOR MORE COMPREHENSIVE DERIVATIVE CLAIMS

Derivative claims may be reformed as part of a wider drive to improve our Company Law. A favourable corporate legal environment should offer: (1) easy access to the corporate form; (2) minimum interference with management, and (3) appropriate investor protection. The last two features are at the heart of any rules which govern derivative actions. This is because the challenge is to steer a middle course between excessive reliance on a litigation remedy and judicial recourse for the shareholders on the one hand, and unreasonable interference in the affairs of the company on the other hand. There are already rules in existence concerning the locus parties in company actions but perhaps the Supreme Court's willingness to overlook the

standing of the director's shows that the court is beginning to lean towards a more flexible approach to derivative actions.

5.3 CONCLUSION

It is the ultimate conclusion of this paper, in light of the foregoing, that the irregularities surrounding the Antonio Ventrgilia v East and Southern African Trade Bank and Robert Simeza can well be clarified if a comprehensive review of the ruling was made on the matters of law in contention. It is difficult to form a nexus between the interpretation and application of the core principles of company receivership and shareholders rights and the case at hand. This chapter, in summary, has shown the three main weaknesses of the Ventriglia case in clarifying the certain issues of relevance to shareholders' rights and company receivership

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