TAX CONSEQUENCES OF RECEIVERSHIP AND LIQUIDATION
IN ZAMBIA

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Be accepted for examination. I have checked it carefully and I am satisfied that it fulfills the requirements relating to format as laid down in the regulations governing Obligatory essays.

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Obligatory Essay on

TAX CONSEQUENCES OF RECEIVERSHIP AND LIQUIDATION IN ZAMBIA

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Submitted to the University of Zambia in partial fulfillment of the requirements of the Bachelor of Laws (LLB) Degree programme.

School of Law

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DECLARATION

I, Chewe Katongo Bwalya, do hereby declare that this dissertation is my authentic work and
that to the best of my knowledge information and belief, no similar piece of work has
previously been produced at the University of Zambia or any other institution for the award
of a Bachelor of Laws degree. All other works referred to in this dissertation have been duly
acknowledged.

Made this 21st day of November 2003,

by the said CHEWE KATONGO BWALYA

at Lusaka.
DEDICATION

PREFACE

This dissertation is divided into six chapters. The first chapter is mainly introductory and sets the parameters of the dissertation. The second chapter is a note on the methodology, an outline of the methods used in this research. The third chapter is an analysis of receivership and the tax aspects. This chapter advocates the ways in which a receiver may undertake his assignment competently and the possible implementation of tax minimizing techniques as a way of fulfilling his fiduciary duty. The approach in the fourth chapter draws certain similarities with chapter three except that it is concerned with the role of a liquidator. Discussed also are the tax aspects and ways in which the liquidator may beneficially wind up the company’s affairs. In both chapter’s three and four, the argument concerning the insufficiency of the eligibility clause (the basic qualifications of an individual considered before appointment as receiver or liquidator) and the general lack of safeguard mechanisms in the provisions dealing with receiverships and liquidations has been advanced. Chapter five deals with the priority of taxes. A distinction in the treatment of those taxes incurred prior to the receivership or liquidation with those incurred in the relevant period i.e. the period spanning the receivership or liquidation. The final chapter in this dissertation, chapter six, is a summary of the issues dealt with. It also embodies recommendations aimed at enhancing and improving receivership and liquidation practice in Zambia and advocates key legislative reforms and the establishment of institutions regulating the area of research. All in all, an interface between company law and the law of taxation is provided.

Finally, we wish to point out that a research in this area was fueled by the urgency of the topic and as a quest for possible solutions to the problems countenanced in our now
constricted corporate sector. We hope that this dissertation will not only provide good reading but also arouse further research by both professionals and academics alike.

Lusaka, 2003.                  C.K.B.
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The individuals mentioned above have made a significant contribution to the completion of this work in one way or another; to them all I am most grateful and share the credit for this work. For the errors and omissions which may blemish the rest of this dissertation, I am alone responsible.
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ABSTRACT

This era has witnessed increased activity on the corporate stage by various actors. However, the category that has captivated the attention of many are receivers and liquidators, not so much for their role in corporate recovery than for the consequences of their appointment which has earned them an unenviable reputation. The negative reputation has a lot to do with the unimpressive experience with receiverships and liquidations. However, these are processes essential to the survival of commerce. An evaluation of insolvency practice in Zambia over the last decade reveals particular misconceptions even on the part of practitioners. In response thereto we have examined the extent of a receiver’s or liquidator’s fiduciary duty owed not only to the creditor but also to the company (in the case of a receiver) and the members and other persons with a beneficial interest in both instances. The insolvency practitioner’s duty to minimize the company’s taxes has been considered and it has been submitted that the question whether the same should be legal or remain mere commercial morality will depend on the circumstances of each case. It is noted that the members of a company and the company itself have a remedy against an errant receiver or liquidator or one guilty of misconduct. The possibility has been enhanced by the doctrine in *Avalon Motors Limited (in receivership) v. Bernard Gadsden and Motor City Limited*¹, which in our considered view limits the rule in *Magnum (Zambia) Limited v. Basit Quadri & Grindlays Bank International Zambia Limited*² within commercially acceptable bounds and provides a basis upon which persons affected may obtain redress using the company’s name. One of the major weaknesses in this area of the law is the insufficiency or inadequacy of

¹ SCZ Judgment No. 7 of 1998 (Unreported).
² (1981) Z.R. 141
legislation, central to the weakness is the eligibility clause for both prospective receivers and liquidators under the Companies Act. We have, therefore, recommended legislative amendments and the institution and enhancement of certain safeguard mechanisms aimed at curing the mischief and raising the standards.
CHAPTER 1

Introduction

1.01 The corporate world in Zambia is today faced with an unprecedented number of
distresses and failures.\(^1\) There seems to be present a causal link between this
uncomfortable and unfortunate scenario and the political and economic policies pursued
over the last decade. One commentator has observed ‘that we are on the brink of
disaster, and that every move government makes just seems to make escape from the
disaster more improbable’.\(^2\) Some skeptics may of course doubt the accuracy of the
observation and justifiably so since Government alone may not be to blame, whatever
the case, the fact is that the consequences of privatization, competition from foreign
companies, adverse trading conditions, cash flow problems or a combination of these
and various other factors have adversely affected the corporate realm.

1.02 Consequently, ‘ Receivers and Liquidators have emerged as major players in the
corporate life of this country’.\(^3\) Concerns have been aired regarding the manner in which
these Receivers and Liquidators operate. Expressions of dissatisfaction with the
performance of their roles, particularly in high profile cases, are commonplace. There
seems to be a lack of appreciation of their functions and duties. Both the Receivers and
the Liquidators will need to drastically alter their approach to their respective functions.
For instance, the misconception in Zambia is that a receivership is the first step taken in
a process that must inevitably end in liquidation. There is therefore a pressing need for a
drastic change in the practice and a complementary review of the governing legislation.

\(^1\) Dr. B. K. E. Ng’andu, Liquidations and Receiverships Lessons and Challenges, Paper presented to the
Corporate Governance Forum Convened on 13\(^{th}\) September, 2002.


\(^3\) Dr. B. K. E. Ng’andu, supra.
1.03 Also of major concern is the fact that the Tax law relating to Receivership and Liquidation is not assembled in any convenient part of the tax legislation but rather it is to be found in isolated single sections, subparagraphs and provisos. Thus an attempt has been made in subsequent chapters to highlight this area which is admittedly, very technical. In addition, there is an analysis of the extent to which the Receiver or Liquidator can legally influence the extent of the Company’s tax liabilities and how he can maximize the amounts available to the charge holder, various creditors and others with a beneficial interest such as shareholders.

Receiverships.

1.04 A Receiver has been described as a person appointed for the collection or protection of property. He is appointed either by the court⁴ or out of court⁵ by individuals or companies. Where he is appointed by the court he is deemed to be an officer of the court and deriving his authority there from.⁶ Where his appointment is made by individuals or companies⁷ he is an agent and has such powers, duties and liabilities as are defined by the instrument under which he is appointed and the principles of the general law of agency.⁸

1.05 A company goes into receivership where a creditor, holding a charge over the company’s assets as security for a debt, appoints a receiver to realize the assets to repay the debt (or where a court appoints one). The form of security may be a fixed charge over specific assets, which prevents the company from dealing with the assets except

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⁴ s.108 Companies Act, Cap. 388 of the Laws.
⁵ s. 109, ibid.
⁶s.112
⁷s.113
with the creditors consent, or may be a floating charge over any part or all of a company’s assets with which the company is at liberty to deal with in the ordinary course of business. 

1.06 Before the development of the concept of a floating charge, security for a loan or other indebtedness took the form of a fixed mortgage of specific items of property. This mortgage conferred on the mortgagee the right to sell the property and to appoint a receiver. The function of the receiver was to receive and account to the appointee (mortgagee) for any income produced by the assets and to preserve the assets pending sale. Attendant to this method of securing credit were two limitations. First, the charge froze and prevented dealings with the property and naturally could not subject assets with which the borrower required to deal in the ordinary course of his business. Secondly, it has been observed that in the case of a charge by a business-owner the sale of the charged assets piecemeal was likely to achieve less than a sale of the business as a going concern, ‘for such a charge over specific assets did not confer any power on the mortgagee to sell the business as a going concern or to manage it as an interim measure pending sale’.

1.07 Thus the concept of a floating charge, a creation of equity, overcame these limitations. It reconciled the requirements of the borrower for freedom to proceed with

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11 Ibid.
12 Ibid.
his business undertakings while simultaneously availing the lender the most ample form of security. In Lord Hoffman’s words:\(^{13}\):

“The floating charge was invented by Victorian lawyers to enable manufacturing and trading companies to raise loan capital on debentures, offering a charge over the whole company’s undertaking, without inhibiting its ability to trade.”

1.08 In *Attorney-general v. Zambia Sugar Company Limited and Nakambala Estate Limited*,\(^ {14}\) Justice Gardner, A.D.CJ, adopted ‘the definition and effect of a floating charge’ as set out by Lord MacNaughten in *Illingworth v. Houldsworth*,\(^ {15}\) where he said:

“I should have thought that there was not much difficulty in defining what a floating charge is in contrast to what is called a specific charge. A specific charge I think, is one that without more fastens on ascertained or definite property or property capable of being ascertained and defined a floating charge, on the other hand, is ambulatory and shifting in nature, hovering over and so to speak floating with the property which it is intended to affect until some event occurs which causes it to settle and fasten on the subject of the charge within its reach and grasp.”\(^ {16}\)

1.09 The clarity of this definition is beyond question. That notwithstanding, the legal effect of a floating charge has still been the subject of ferocious litigation. As was evident in a recent Ruling by the learned Deputy Registrar on a Sheriff’s Interpleader delivered on the 21st February, 2003 in *Lonrho Cotton Zambia Limited and Kafue Textiles Zambia Limited and Commonwealth Development Corporation (Claimant)*\(^ {17}\). In the case cited, the Sheriff took out Interpleader Summons\(^ {18}\) for the courts determination as to which creditor was entitled to the assets seized by him in execution of the writ of *fieri facias* issued by Lonrho Cotton Zambia Limited against Kafue Textiles Zambia Limited.

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14 [1977] ZR 273(S.C) at p.274.
15 [1904] A.C. 355
16 at p. 358
17 1997/HP/2022 (Unreported). At the time of writing the Plaintiff being dissatisfied with the Ruling had since filed an Appeal to a Judge in chambers.
18 Pursuant to Order XLIII of the High Court Rules, Cap. 27 of The Laws of Zambia.
1.10 The undisputed facts of the matter were that in 1997 the plaintiff (Lonrho Cotton Zambia Limited) supplied cotton to the defendant (Kafue Textiles Zambia Limited) at the latter’s instance and request, thereby placing it under an obligation to settle its debt. The defendant defaulted in respect of an outstanding amount which compelled the plaintiff to institute legal proceedings against it. The plaintiff succeeded in its action and proceeded to execute the judgment by taking out a writ of fieri facias against the property of the defendant (now judgment debtor). Unknown to the plaintiff the defendant’s property was subject to a floating charge and the debenture holder, Commonwealth Development Corporation (the claimant), claimed to have priority over the goods seized by the Sheriff on account of the floating charge and argued that the judgment creditor (the plaintiff) could not claim priority since it was an unsecured creditor.

1.11 The judgment creditor argued that ‘a debenture usually creates a floating charge on the company’s assets and only where the charge has been crystallized, for instance by appointment of a receiver before the completion of execution by seizure and sale, do the rights of the debenture holders have priority over those of the execution creditors.’ The Deputy Registrar accepted this submission but was of the view that the security had automatically crystallized by virtue of the debenture provisions which stipulated that the security was to become ‘enforceable’, inter alia, in the event of the debtors assets being levied in execution. With due respect, the decision is assailable on the ground that ‘enforceable’ does not connote ‘crystallization’ but merely places the debenture-holder in a position where he is entitled to take further steps to recover his debt. These steps constitute the crystallizing event, an instance being the appointment of a receiver.

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19 In Yonah Shimonde and Another v. Meridian BLAO Bank (Z) Ltd. SCZ Judgment No. 7 of 1999, the Supreme Court held that ‘[o]nce there has been a judgment, the relationship becomes that of a judgment Creditor and a judgment debtor. The debt itself (that is, principal plus interest) becomes a judgment debt Carrying such interest if as may lawfully be ordered by the court in judgment.’

20 The Judgment creditor relied on the learned authors of PALMER’S COMPANY LAW vol.1 (1982) at
1.13 It has been argued that a receiver must ‘pay to the relevant authorities taxes and duties collected by him in the course of receivership dealings’. That he must therefore account to the relevant authority for any value added tax (VAT), pay as you earn P.A.Y.E...and other payments’. The precise legal position regarding taxation will depend on whether the receiver has been appointed under a floating charge or a fixed charge not affecting the whole or substantially the whole of a company’s assets.

Liquidation.

1.16 ‘liquidation and winding up are terms used to [denote] the process whereby a liquidator is appointed to collect in a company’s assets, and to distribute the proceeds in satisfaction of the company’s liabilities and then, if there is a surplus, to the company’s shareholders.’ The appointment of a liquidator is a fundamental step in terminating the existence of a company.

1.17 The order in which debts are settled is governed by law, and certain tax liabilities receive preferential treatment. The marginal note to s. 346 of the Companies Act reads ‘Preferential Debts’, as the note suggests, the provisions there under deal with other liabilities that are treated as preferential and take precedence over amounts due to unsecured creditors. We shall return to this subject in chapter 5.

1.18 In order to distinguish between costs of liquidation and the companies pre-liquidation liabilities the commencement of the winding-up is important and thus treated

p.582 and Order 17 Rule 1 paragraph 13 of the White Book,(1997).

as bringing to an end an accounting period of the company. This is especially cardinal in view of the provisions of s.346(1)(e)\textsuperscript{24}. For the purposes of applying the said section 'the date of the appointment of the receiver or of possession being taken, as the case may be, shall be the date of commencement of the winding up'.\textsuperscript{25}

1.19 A liquidator may be appointed by the court\textsuperscript{26}, in a compulsory liquidation. In this case he is an officer of the court. A highly esteemed authority has interpreted this to mean that the liquidator must act in an honest and impartial manner answerable to the court for the performance of his duties.\textsuperscript{27} A liquidator may also be appointed by the company's members\textsuperscript{28}, in a members' voluntary liquidation, or by it's creditors\textsuperscript{29}, in a creditors voluntary liquidation. In both these last two voluntary modes of appointment the liquidator is an agent for the company and can bind the company without incurring personal liability.\textsuperscript{30} The ranking or computation of the various tax liabilities is generally unaffected by the nature or mode of appointment. This is because s. 346 is one among the provisions that are 'applicable to every cycle of winding up'. The foregoing outlines the nature and scope of this dissertation.

\textsuperscript{21} See Chapter 5.
\textsuperscript{24} "s.346(1) Subject to this Act, in a winding-up there shall be paid in priority to all other unsecured debts—
(e) any tax, duty or debt payable by the company in respect of any period prior to the commencement
of the winding up, whether or not payment has become due after that date;"—Cap.388 of the Laws.
\textsuperscript{25} S. 110(2)—Companies Act.
\textsuperscript{26} s. 282
\textsuperscript{27} C.M. Schmitzhofer \textit{et al.}, Palmer's Company Law (vol.1) London: Steven & Sons para. 85-38, (1982).
\textsuperscript{28}s.310
\textsuperscript{29} s. 318(9)
\textsuperscript{30} C.M. Schmitzhofer \textit{et al. supra.}
CHAPTER 2

Methodology

Introduction

2.01 The cardinal feature in this chapter is a note on the Methodology. This pertains to the steps taken by the author to undertake and complete this research, the general scope of which has been laid out in the opening chapter. It necessarily answers questions relating to how the research has was proceeded with, the sources of information, the specific methodological tools employed to elicit the information and the rationale for the choice of methodology.

Definition and type of Methodology

2.02 In the Longman Dictionary of the English Language, the term methodology is defined as: "[A] body of methods and rules employed by a science or discipline."31

2.03 The quotation represents the strict grammatical meaning, which, in the context and scope of this research, has been modified. Thus the use of the term methodology herein refers to the choice and use of particular strategies and tools for data gathering and analysis.

2.04 The data collected for this work was subjected to legal analysis, a type of analysis running through the entire body of the research.

2.05 The Data-gathering methodologies used in the research primarily constituted interviews and independent observations both forming the substrate of Primary data. Secondary data was gleaned from statutes and subsidiary legislation, case law (local and
comparable foreign case law), books, articles and papers. Perhaps it should be mentioned at this stage that considerable assistance was drawn from the worldwide web (www) which proved to be a very valuable 'resource centre'.

Primary Data: Techniques and Form

Interviews

2.06 A number of individuals were interviewed by the author.\textsuperscript{32} Participants included those formerly engaged as receivers or liquidators (or having worked closely with individuals seized with the task of receivership or liquidation), legal counsel and officer for the Zambia Revenue Authority (Z.R.A.), Accountants, Auditors and practicing lawyers. Particular individuals were interviewed and consulted on more than one occasion. The form the interviews took varied from structured or semi-structured to open-ended and were recorded in note form.

Criteria for Selection

2.07 In view of the technical nature of the research a specific criteria was developed and adopted as a basis for the selection of participants. It soon became clear that the fact that a particular individual was known personally by the author and had sufficient time on his hands was not an adequate justification. For these reasons the following criteria was formulated:

\begin{itemize}
  \item 2.07.1 \textit{Academic and Professional Qualification.} An individual qualified to be a participant in this respect if he was either a lawyer (in some instances a working
\end{itemize}

\textsuperscript{32} The name and scope of the interview for each particular participant is given in subsequent chapters where appropriate.
knowledge of the law in the area of study sufficed) or an Accountant or Auditor with a certain level of understanding in the area of study.

2.07.2 Interest in Area of Study. In this respect the prospective participant had to display a particular interest in the area of study and willing to co-operate. This aspect was inculcated for the purpose of enhancing the level and quality of the input.

2.07.3 Individual's Prior Experience. This criterion was primarily intended to capture those individuals who were once receivers or liquidators of particular companies and those that worked closely with them. The latter category includes individuals who work or worked in the same organisations with persons appointed as receivers or liquidators and have, in some way, been concerned to a limited extent with the functions of the receiver or liquidator or have indeed acquired some understanding from mere observation from that vantage point.

2.08 The rationale for conducting interviews was perceived by the author as the best way of capturing the practical aspects obtaining in Zambia with regard to the area of study. This method also provided the author an opportunity of having his basic views and assumptions challenged, varied and re-enforced. Thus bringing to the fore the receiver's or liquidator's viewpoint. Looking at the other side of the proverbial coin so to speak. An attempt at reflecting that 'other side' has been made in succeeding chapters.

Secondary Data: Sources

Statutes and Subsidiary Legislation
2.09 The Companies Act, Cap. 388, the Customs and Excise Act, Cap. 322 the Income Tax Act, Cap. 323 and the Value Added Tax Act, Cap. 331 of the Laws of Zambia and the subsidiary legislation made thereunder have been referred to more extensively in this research compared to other pieces of legislation. Parliamentary enactments, being cardinal to the foundations of any legal framework, have been subjected to examination, analysis and close scrutiny. This has made it imperative for the author to suggest certain legislative reforms impinging on the area of research were, in the author's opinion, such reforms are necessary.

Case Law

2.10 Immense help has been drawn from judicial precedents set by both Zambian and foreign courts. Reported cases were readily available since they could be accessed in the Law Reports and electronically on CD-ROM. It is the securing of unreported cases that required extra effort on the part of the author. The Supreme Court library staff was particularly helpful in this respect. Copies of the relevant unreported cases were made available to the author by the said staff including an unreported South African judgment.33

2.11 With the creation of the Revenue Appeals Tribunal by Act no. 12 of 1998, there has been a significant increase in tax related jurisprudence. The Revenue Appeals Tribunal Act has imported provisions that applied to the three previous separate Tribunals and fused these provisions into the Revenue Appeals Tribunal. These tribunals were formerly constituted under the Value Added Tax Act, Cap 331, the Customs and Excise Act, Cap 322 and the Income Tax Act, Cap 323. The author had the rare privilege of gaining access to

33 First Merchant bank of South Africa t/a Wesbank v. The commissioner for South Africa Revenue Services CCT 1901/01 (Unreported), Decided on 16th May, 2002.
the Revenue Appeals Tribunal Consolidated Law Reports covering the years 1999 to 2002. The
decisions provided useful information regarding tax law principles.

Books, Articles, Papers

2.12 Books by respected authorities and others less renowned provided the bulk of
the legal principles obtaining in the area of research. Articles and Papers from the
national press and other media were used to assess public opinion and attitude towards
the issues covered.

Conclusion

2.13 The aforesaid is a brief outline on how the research was proceeded with and the
steps taken by the author to complete this undertaking, the sources of information used
in the study, and the rationale for the choice of methodology.
CHAPTER 3

Receivership: The Practice and Tax Aspects.

Introduction

3.01 This chapter has a twofold purpose. It is first intended to provide a critical analysis of receivership practice in Zambia. Secondly, it attempts to explore ways in which the receiver and manager may successfully influence a company’s tax liabilities. Assessing the possibility of creating a legal duty of minimizing the said tax liabilities for the benefit of the company, its members and other persons with a beneficial interest such as unsecured creditors. This presupposes a radical departure from the current legal position, which states that a receiver has no duty of care to the general body of creditors or the company.34 The author examines the possibility of creating this duty with the receiver’s well-established fiduciary duty35 serving as a backcloth. This proposition may be viewed as an appendage to what may be conveniently termed as a ‘fiscal maxim’ enunciated by Lord Clyde in Ayshire Pullman Motor Services and D.M. Ritchie v. I.R.C.36 where he said that:

“...No man in this country is under the smallest obligation, moral or other, so to arrange his legal relations to his business or to his property as to enable the Inland Revenue to put the largest possible shovel into his stores. The Inland Revenue is not slow – and quite rightly – to take every advantage which is open to it under the taxing statutes for the purpose of depleting the taxpayer’s pocket. And the taxpayer is, in like manner, entitled to be sure to prevent, so far as he honestly can, the depletion of his means by the Inland Revenue.”37

3.02 The analysis that follows in this chapter is thus aimed at the fulfillment of the said purpose. Necessary and consequential to that end is a brief outline on other ancillary yet closely connected issues such as, the appointment of a receiver and manager, his role, the company’s tax position vis-à-vis the Zambia Revenue Authority, the receiver’s possible

34 Latchford v. Beirne [1881] 3 All ER 705 at 709.
36 (1920) 14 T.C. 754
37 ibid. at pp. 763 – 764.
liability to the company in the event of the former carrying out his duties negligently or recklessly, occasioning a loss to the company.

Raising Capital.

3.03 A company has at its disposal various other options of raising funds apart from the subscription of share capital\(^{38}\) or borrowing money. These funds may be obtained by a straightforward unsecured loan; a bill of exchange, which is basically an instrument or document by means of which a series of debts may be discharged without the use of cash, or payment may be postponed by the granting of credit;\(^ {39}\) or simply by negotiating an extended credit from suppliers; or finally by means of a mortgage on the company's property or by issuing debentures.\(^ {40}\) The power to raise capital by borrowing is usually provided for in the company's articles.\(^ {41}\) The extent of this power and the manner in which it may be exercised may be restricted or subject to special sanction, such as a resolution of the company or the consent of a particular class of members thereof. A ceiling may also be placed on the amount that may be borrowed with, or without, further sanction, and the ability of the company, or its directors, to borrow a loan by means of a charge or debenture on the company's assets may also be restricted.

3.04 The effect of these restrictions so far as third parties without actual notice are concerned have been dispensed with altogether. This has been occasioned by the replacement of the old Companies Act, Cap.686, with a new one. Factors necessitating the enactment of the current Act were that under the old Act it was considerably difficult to start up a company, and secondly, once a company had been started, the directors and

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38 A company is at liberty to alter its share capital, unless its articles provide otherwise. See s. 74(1), Companies Act, Cap. 388.

39 M. Megrah et al., Byles on Bills of Exchange (23rd Edition), London: Sweet & Maxwell p.3 (1972)

40 s. 215(3), Companies Act, Cap. 388.

41 See Article 13 of the Standard Articles, First Schedule to the Companies Act, Cap.388.
the company were not sufficiently accountable for their actions to the shareholders or the general public.42 Prior to the changes of 1994, any person lending money to a company had to ensure that such borrowing was within the company’s power. If the borrowing was ultra vires any security given therefor was void and the lender lost the right to sue the company for the return of the loan. The legal position on the point has since shifted. Amendments have been made in such a way as to preclude directors from raising the internal want of authority to defeat a third party claim. These changes are enshrined in ss.23 to 25 of the Companies Act, Cap.388. Under s.23 no act of a company is to be held invalid by reason only that the act or transfer is contrary to the company’s articles or the Act. Section 24 extinguishes the applicability of the doctrine of constructive notice. Thus, no person dealing with a company is affected by or presumed to have notice or knowledge of the contents of the document concerning the company by reason only that the document has been lodged with the registrar. Section 25 is similarly protective of a person dealing with a company against the assertion by the company or guarantor that, inter alia, any of the articles of the company has not been complied with or that the shareholder agreement has not been complied with. As the law stands, it is no longer possible to raise internal irregularities against an innocent third party.43

3.05 Within the context of Company Law, most of the methods in which a loan may be secured fall within the general definition of a ‘debenture’. Under s.3 of the Companies Act, Cap.388, 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 the property of the body corporate, in respect of money that is or may be deposited with or lent to the body corporate…”

43 Bank of Zambia v. Chibote Meat Corporation Ltd. SCZ Judgment No. 14 of 1999 (Unreported)
3.06 The learned authors of *Lightmann and Moss, The Law of Receivers of Companies* have put it thus:

"a debenture is merely a writing of a company creating or acknowledging a debt and may be secured by a charge or charges over the assets of the company or may be unsecured."44

**Appointment of A Receiver**

3.07 A receiver *appointed by the court*: (i) is an officer of the court; (ii) is neither agent of the debenture holders nor the company;45 (iii) entirely supersedes the powers of the company and the authority of its directors in the conduct of its business which remain in abeyance during his appointment46; and (iv) is a fiduciary.47

3.08 A receiver *appointed out of court*: (i) is not an officer of the court; (ii) is, as usually provided for in a deed, agent of the company; (iii) he also entirely supersedes the powers of the company and the authority of its directors; (iv) and is a fiduciary.48 In respect of (iii) and (iv) the receiver's position appears the same as a receiver appointed out of court.

**Eligibility for Appointment: Insufficient Statutory Safeguards.**

3.09 Under the *Companies Act, Cap. 388*, s.111, a body corporate is not eligible for appointment as a receiver. The Act does not seem to demand any form of expertise or skill as a prerequisite for appointment. The Act merely stipulates that the receiver should not be:

- Under the age of eighteen years.

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45 See s. 112, *Companies Act, Cap. 388*.
47 *Re Gent, Gent Davis v. Harris* (1880) 40 Ch. 190.
48 *Palmer's Company Law, supra*, pp. 621 to 622.
• Under any legal disability.

• Prohibited or disqualified from acting by any order of court of competent jurisdiction.

• A mortgagee of the company.

• An undischarged bankrupt.

• A trustee under any trust deed for the benefit of debenture holders of the company.

• Save with the leave of the court; a person who has been convicted, within the previous five years, of an offence involving fraud or dishonesty.

• A person who has been removed, within the previous five years, from an office of trust by order of a court of competent jurisdiction.

3.10 It is worth noting that the minimum requirements set for the prospective receiver and manager hardly distinguish him from the ‘average person on the streets’. With due respect to the drafters, the focus is quite misplaced. These requirements focus on what the appointee should not be rather than what he should be. Absent from the statutory benchmarks are fundamental considerations such as his professional attributes which are the essence of a corporate recovery task. Dr. B.K.E. Ng’andu49 in his quite persuasive opinion concerning the statutory requirements, submits that:

“The appointment of a Receiver is often precipitated by signs that a company is in distress which may very well be a pointer to management failure. Under the circumstances it can be assumed that the required turnaround agent is one with skills, experience and expertise that probably the failed managers themselves might not possess. In short, the Receiver must be a highly skilled and experienced Corporate Manager in his own right, able to bring his wealth of experience and expertise to the task of getting a company out of trouble.”

3.11 The force of this submission is compelling. Its validity is certainly beyond question. However, a different viewpoint exists. The proponents of the different viewpoint argue that the prevailing legal framework regarding the conditions precedent set for the prospective receiver are sufficiently flexible to afford the debenture-holder enough latitude to appoint a receiver of his choice.\textsuperscript{50} It is debatable whether this factor outweighs the perceived weakness of the eligibility clause. The patent defect in the eligibility clause is the absence of a built-in mechanism that should enhance the receivership process. The onus is placed on the debenture-holder to find a competent and suitable candidate for the assignment. There is simply no guarantee of success in the debenture-holder’s quest.

Receiver’s Responsibilities.

3.12 The overriding responsibility of a receiver is to use the proceeds of the assets in his charge to repay the debenture-holder. However, he should not only contemplate the repayment of the debenture-holder. The receiver must also ensure that his actions do not occasion unnecessary damage to other interested parties, such as unsecured creditors, notwithstanding the basic rule that a receiver owes no duty of care to the general body of creditors or to the company. On this particular point Lord Milmo J., in \textit{Latchford v. Beirne}\textsuperscript{51} said:

“My attention has not been drawn to, or have I been able to find, any case in which it has been held that a receiver appointed under a debenture for the purpose of realizing the security owes any duty to the creditors or shareholder's of the company giving the debenture, or to a guarantor or debtor of the company in similar circumstances.”\textsuperscript{52} (emphasis supplied).

\textsuperscript{50} Interview with Mr. H. Mulenga, Manager in the Corporate Recovery Department, Deloitte and Touche, Lusaka – 1\textsuperscript{st} August 2003.
\textsuperscript{51} [1881] 3 All ER 705.
\textsuperscript{52} p. 709
3.13 In the recent past, the basic rule as stated by his lordship, has since been relaxed to a certain extent. It has now come to be accepted by authorities that a receiver is a fiduciary whether he be a court appointee or appointed under an instrument.\textsuperscript{53}

3.14 Furthermore, the receiver is under a statutory obligation to lodge with the registrar yearly abstracts of receipts and payments.\textsuperscript{54} It has been held that these abstracts, in a long receivership, can be complementary to the annual accounts of a company.\textsuperscript{55}

3.15 The receiver's responsibilities are similar to those of a liquidator in a winding-up where he is appointed under a floating charge of the whole or substantially the whole of the company’s undertaking. This is with respect to the submission of the statement of affairs and of periodical accounts.\textsuperscript{56} After the receipt of the company’s statement of affairs, it is imperative that the receiver submits a preliminary report to court in respect of; the amount of capital issued, subscribed and paid up and the estimated amount of assets and liabilities; the cause of the failure of the company, if it has failed, and; whether in his opinion further inquiry is desirable as to any matter relating to the position, formation or failure of the company or the conduct of its business.\textsuperscript{57}

3.16 The receiver is also obliged to lodge with the registrar accounts of his receipts and payments, and a statement of the position in the receivership verified by statutory declaration.\textsuperscript{58} The combined effect of these provisions would assist a competent receiver in acquiring the information necessary in coordinating his undertaking in such a way as


\textsuperscript{54} S. 117(1)(a).

\textsuperscript{55} Smith \textit{etd. v. Middleton} [1979] 3 All ER 842,847.

\textsuperscript{56} s. 116, \textit{Companies Act, Cap.388}.

\textsuperscript{57} s. 288 as read together with s.116.

\textsuperscript{58} s.388(1) as read together with s.116.
to effect a turnaround of a company in distress. Since, as a probable consequence, he would have known what led to the distress.

The Tax Position.

3.17 In s. 2 of the Income Tax Act, Cap. 323, a company means any company incorporated or registered under any law in force in Zambia or elsewhere. Any company in receipt of income which has a source or deemed source in Zambia is liable to tax whether that company is resident or non-resident.\textsuperscript{59} The basis of the tax jurisdiction under the aforesaid is the Territoriality (or Source) principle\textsuperscript{60}. Tax is also payable on a resident company’s income received from a source outside Zambia where such income is by way of interest or dividends. A company is resident in a jurisdiction where the central management and control of its business or affairs are exercised within the Republic for that charge year.\textsuperscript{61} The basis of taxation in this regard is the Residence (or Domiciliary) principle.\textsuperscript{62} It was opined in De Beers Consolidated Mines Ltd. v. Howe (Surveyor of Taxes)\textsuperscript{63} that the test of residence of a company, for the purposes of income tax, is not where it is registered, but where it really keeps house and does its real business. The real business of the entity is carried on where the central management and control actually abides.\textsuperscript{64} This is a question of fact.

The Taxpaying Agent.

3.18 The fundamental characteristic of any corporate body is that it exists as a legal entity, or person, distinct from its members.\textsuperscript{65} Thus the company has the capacity, rights,

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\textsuperscript{59} s.14(a), Income Tax Act, Cap 323.
\textsuperscript{61} S.4(3) Income Tax Act, Cap. 323.
\textsuperscript{62} R.N. Simbyakula supra n. 27
\textsuperscript{63} [1906] A.C. 455.
\textsuperscript{64} 488 per Lord Loreburn L.C. See also s.4(3) of the Income Tax Act, Cap. 323
\textsuperscript{65} Salomon v. Salomon & Co. Ltd [1897] A.C. 22
\end{small}
powers and privileges of an individual save as are inconsistent with the Companies Act and limitations inherent in its corporate nature. Though the 'obsession' of the concept of legal personality is to proceed as nearly as possible upon the analogy of an individual, a company can only execute its tasks through natural persons. It can only have knowledge and form an intention through its human agents.

3.19 In recognition of this fundamental characteristic, the Income Tax Act, Cap.323, provides that the Director, Secretary or an individual concerned or appearing to be concerned with the management of the company's business, is the company's tax paying agent. Where the company is being wound-up or liquidated, the liquidator, receiver or manager of the company, is the taxpaying agent. The legal consequences that flow from this position, inter alia, are that every taxpaying agent, in respect of the income which he receives as an agent, is subject in all respects to the same duties, responsibilities and liabilities as if that income were received by him beneficially and is assessed and charged in his own name in respect of that income. However, any such assessment is deemed to be made upon him as an agent. Any tax credits or deduction which might have been claimed by a company is allowed in the assessment made upon its taxpaying agent as such agent. Every taxpaying agent who pays tax in respect of income assessed on him is entitled to be indemnified for the payment by his principal.

3.20 Section 69(1) of the Income Tax Act, Cap.323 envisages the receiver/manager as taxpaying agent. Specific mention is not made of a receiver where a company is not in liquidation, however, where the receiver is also appointed manager such one is captured

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66 s.22(1), Companies Act, Cap.388.
67 D.P.P. v. Kent and Sussex Contractors Ltd. [1944] 1 K.B. 119 per Macnaghten, J.
68 s.69(1), Income Tax Act, Cap.323.
69 Ibid.
70 s. 67(1).
by the phrase; 'or any individual concerned or appearing to be concerned in the management of a company's business', in the said section. The construction placed upon this section is consistent with the rule governing the construction of taxing Acts. The rule states that in a taxing Act, one has to look at what is clearly said. There is no equity about tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied.\(^73\) The receiver/manager's position as taxing agent is put beyond question where he is appointed of the whole or substantially the whole of the undertaking of the company on behalf of the debenture-holders secured by a floating charge. In such a case the Board of Directors is, for all practical purposes, inoperative just as in liquidation\(^74\) during the period of appointment. Thus in such a setting the receiver/manager is responsible for the company's taxes and it seems to be not only law but established practice.\(^75\)

**Receiver a Fiduciary.**

3.21 The receiver's position is that of a fiduciary. *Re Magadi Soda Company Ltd*\(^6\) is instructive on this point, *Eve J.* held that a receiver appointed by the court:

"not only fills a fiduciary position towards all debenture-holders, but his appointment to an office of such responsibility presupposes that he will discharge his duties with punctilious rectitude."

It is conceded that a receiver or manager is concerned not for the benefit of the company but for the benefit of debenture holders in realizing the security. Consequently the whole purpose of the appointment and all the powers, which are conferred on him, are ancillary to that purpose.\(^77\) However, *Eve J.*'s statement is indicative of underlying obligations which a receiver should be compelled to carryout.

\(^{71}\) s.67(2).
\(^{72}\) s.68
\(^{73}\) *Brandon Syndicate v. Inland Revenue Commissioners* [1921] 1 K.B. 614. See also *Galaun Holdings Limited v. Z.R.A.* 2000/RAT/06.
\(^{74}\) *Zambia Building and Civil Engineering and Contractors Ltd. v. Janina Georgopoulos* (1972) Z.R. 228 (H.C.)
\(^{75}\) Interview with Mr. H. Mulenga, see n. 17
\(^{76}\) (1925) 41 T.L.R 297
\(^{77}\) *Re B. Johnson & Co. (Builders) Ltd.* [1955] 1 Ch.634.
3.22 A superficial analysis would seem as though a receiver is fiduciary for the debenture holder and not for the company despite the fact that he may be expressed in the debenture to be agent of the company. Aside from any provision in a debenture deed designating a receiver as agent for the company, section 113(1) of the Companies Act accords him the status of agent or officer of the company and not of the debenture holder. But this position does not automatically translate into the fact that the company is responsible for the contracts that he enters into. He is, however, entitled to an indemnity out of the property in respect of which he has been appointed in the face of liability arising thereon. Such an indemnity is subject to the condition that the said contract was entered into by the receiver 'in the proper performance of his functions'. Though the phrase “proper performance of his functions” is not easily ascertainable, it provides the company with an opportunity of challenging the propriety of an indemnity and providing a basis for the proposition that a receiver is answerable to the company for the conduct of his affairs. Authority for the aforesaid is found in the Australian case of Expo International Pty Ltd. v. Chant where Needham J. explained the duty owing to the company by the receiver as:

‘an obligation to exercise his powers in good faith [implicit in the duty is the obligation not to sacrifice the company’s interests recklessly], an obligation to act strictly within and in accordance with the conditions of his appointment and an obligation to account after the debenture holders’ security has been discharged not only for surplus but also for the conduct of his receivership’.

3.23 This, inter alia, directly or indirectly benefits the shareholders. The validity of this position is buttressed by what Ackerman J. had to say in First Merchant Bank of South Africa

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78 Palmer’s Company Law, supra. See Para. 3.08
79 s. 114(1), Companies Act.
80 S. 114(2)
81 (1980) ACLC 33, 34.
Limited t/a Wesbank v. The Commissioner for the South African Revenue Services, and First National Bank of South Africa limited t/a Wesbank v. the Minister of Finance:

"It is trite that a company is a legal entity altogether separate and distinct from its members, that it’s continued existence is independent of the continued existence of its members, and that its assets are its exclusive property. Nevertheless, a shareholder in a company has a financial interest in the dividends paid by the company and its success or failure because she "...is entitled to an aliquot share in the distribution of the surplus assets when the company is wound up."" (emphasis supplied).


3.24 The phrase ‘tax planning’ has been misunderstood, albeit nothing more sinister is meant than that a man should make an intelligent appreciation of the incidence of tax and would take it into account as a relevant factor in planning his business transactions.

A persons attempt to reduce the burden of tax should not be judged as anti-social and subjected to condemnation without taking into account the method adopted. If one lawful course ‘involves the payment of more tax and another less, the choice between them raises no moral issue’. It is trite that what the law permits cannot, in a branch of the law to which equity is a stranger, be reprehensible.

3.25 The mode of receivership practice that inevitably ends in reduced tax burdens is obviously not in the interest of the Zambia Revenue Authority whose goal is to maximize revenue collection. The same cannot be said of the company in distress, the shareholders, unsecured creditors or guarantors, who are desirous of it having sufficient funds for distribution. Receivership assignments executed in good faith and due diligence will almost invariably presuppose, inter alia, the implementation of tax planning.

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82 Case CCT 19/01 (Unreported), Decided on 16th May 2002.
84 Galann Holdings Limited v. Z.R.A. 2000/RAT/06.
85 D.A. Shirley et.al. supra n.50.
86 Value Added Tax, Objective and Aim: http://www.zra.org.zm/vat/vatfunction.htm. This web page was visited on 7th April, 2003.
mechanisms which may lead to reduced tax liabilities. This would be viewed as one of the ways in which a receiver may fulfill his fiduciary duty. In *Avalon Motors Limited (in receivership) v. Bernard Gadsden and Motor City Limited* the Supreme Court held that the receiver’s fiduciary relationship with the company means that he owes it duties similar to those owed by a mortgagee which included an obligation to exercise the powers conferred by the security in good faith as well as a duty of care. The liability of a receiver to a company where the company, due to the receiver’s negligence or recklessness foregoes any relief or is made to suffer penalties, is not beyond reasonable contemplation.

3.26 The difficulties of suing a receiver by a company posed by the High Court decision of *Magnum (Zambia) Limited v. Basit Quadri & Grindlays Bank International Zambia Limited* have been mitigated. On a preliminary issue concerning the feasibility of an action by a company against its receiver. Counsel for the plaintiff argued that the principles of agency should apply and thus ‘a company could maintain an action against the receiver if it is found that he had acted unlawfully or had misconducted himself in any way.’ Counsel further argued that ‘it would be absurd to permit the receiver to act against the interests of the company and it was equitable therefore for the company to sue its agent, namely, the receiver in the circumstances.’

3.27 The first defendant’s counsel responded by contending that the kind of agency in issue was different and distinct from agency as understood under the common law, and

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88 S.C.Z. Judgment Mo.7 of 1998  
89 (1981) Z.R. 141
that only if the agency were of the common law type would the plaintiff’s contention be valid.

3.28 Entering judgment on the preliminary issue the court held that the action against the receiver was irregular. The rationale for the position was that:

“A receiver who was an agent of the company under the receivership was there to secure the interests of the debenture holder and in those circumstances the company concerned was debarred from instituting legal proceedings against its receiver/manager. It would be an absurd proposition to suggest otherwise.... Quite clearly a company under receivership has no *locus standi* independent of its receiver. As long as the company continues to be subjected to receivership, it is the receiver alone who can sue or defend in the name of the company.”

3.29 Drawing exceptions to the rule laid down in the *Magnum Case* (above) the Supreme Court in *Avalon Motors Limited (in receivership) v. Bernard Leigh Gadsden and Motor City Limited*9 held that:

“[W]here 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 had 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.”

3.30 The success of an action for negligence or breach of fiduciary duty is very much dependent on that skill and diligence which a reasonably competent and careful receiver is expected to exercise. Practical difficulties may arise in determining what skill or diligence a reasonably competent receiver may possess in the absence of any statutory benchmarks laying down minimum standards.92 The vital interests of a company referred to in the *Avalon Case* (above) would include, *inter alia*, the funds available for distribution to preferential and other creditors. The receiver is therefore under a duty not to dissipate

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90 145 per Moodley J.
91 *supra* See n.2
92 See paragraph 3.09 – 3.11 (above).
the funds available. However, it is quite unreasonable or onerous to impose a duty that is impossible to fulfill. It is for this very reason that a minimum standard of skill and competence is advocated for, above and beyond the insufficient conditions in the Companies Act. This should be viewed in the wide context of a receiver's duties and functions.

3.31 Argument has been put across to the effect that, though a receiver may be a fiduciary and owe a duty of care to the company, creating a legal duty to minimise taxes may countenance practical difficulties, since payment of tax which has been correctly assessed is clearly within the law. That notwithstanding, a receiver should however be obliged morally to legitimately influence tax liabilities for the benefit of the company and those that may claim under it. A rider being that, where he acts recklessly or is grossly negligent with respect to the company's tax liabilities occasioning a diminution of funds, he should be adjudged to have breached a legal duty for which liability attaches. This would be where he intentionally remits incorrect returns which exposes the company to criminal liability and fines.

Incidents of Tax Planning.

3.32 The receiver must therefore ensure, in the context of tax planning, that opportunities for reducing or eliminating a tax liability are considered so that he may maximize the surplus available to a charge-holder. Practice reveals that both principle and overdue moneys are applied mutually in repayment of interest with the balance being deemed to repay the principal owing and due. This mode of payment is appropriate where there are sufficient funds available for the satisfaction of the debt. Where this is not the case i.e. where the proceeds realized are insufficient to fully satisfy the charge-holder's claim, payment of principal in priority to interest is advantageous since interest
payments are subject to taxation in the hands of the recipient, whereas capital repayments are, in general, not taxable. This is obviously in the interest of creditors.

3.33 It is particularly important that the contracts for the sale of assets on whose disposal tax is payable should provide for Value Added Tax (VAT) to be charged. If a contract is for a stated sum with no reference to VAT it is taken to be a VAT-inclusive price. A trader cannot escape the requirement to account for or pay VAT merely because he has failed to tax his customer. Thus, failure to take account of the tax in agreeing the terms of the sale will lead to a diminution in the funds available to meet the claims on the receiver and for return to the company. Whilst in most cases the receiver is not the person making the supply he is nonetheless responsible for compliance with the administrative requirements of value VAT the period of his administration.

3.34 As already pointed out, tax credits or deduction which might have been claimed by a company is allowed in the assessment made upon its taxpaying agent as such agent under the Income Tax Act. Section 29(1)(a) of the Income Tax Act provides that:

"in ascertaining business gains or profits in any charge year, there shall be deducted the losses and expenditure other than of a capital nature, incurred in that year wholly and exclusively for the purposes of the business...."

94 Section 7 of the Value Added Tax Act, Cap. 331 provides the legal basis upon which ZRA charges VAT. VAT is charged on supplies of goods or services made by a taxable supplier in the course or furtherance of a business that takes place in Zambia. When goods forming part of the assets of a business are sold, under a power exercisable by some other person such as a receiver or liquidator, in satisfaction of a debt owed by a company (being a taxable person) those assets are deemed to be supplied by the company in the course or furtherance of its business; s. 2(2)(c), Value Added Tax Act, Cap. 331.
95 Central African Chambers v. ZRA 1999/RAT/64. see also s.46, Value Added Tax Act, Cap. 331.
97 See paragraph 3.19 (above) Pursuant to s.17(a) of the Income Tax Act, income includes gains or profits from any business for whatever period of time carried on.
In construing this provision, the Revenue Appeals Tribunal, in *Zambia Consolidated Copper Mines Ltd. v. Zambia Revenue Authority*,98 said that according to the tenet of the provision any expenditure incurred by a business wholly and exclusively for that business as long as it is not of a capital nature, such expense is deductible from the gross income of the business in order to arrive at the income to be taxed. A competent receiver would therefore seize this opportunity and set off the revenue expenditure against the revenue receipts. This would increase the amount available for distribution. The onus of adducing sufficient evidence to support the claim that the expenses were of a revenue nature is on the receiver. An inference that the expenses were of a capital nature will be drawn where such evidence is not adduced.99

**Receivers: The Zambian Misconception**

3.35 In the final analysis, therefore, a competent receiver, when undertaking his duties, is reasonably expected to formulate strategies which have the effect of rescuing a company in liquidity problems, some of which have been stated in the preceding analysis. Such strategies may also be in the charge-holder’s interest. It has been submitted that:

“A Receiver, is for instance, expected to provide for consideration options for the restructuring of the company which may involve specific proposals for consideration by lenders. At this stage selling the company is the least of his concerns.”100 (emphasis supplied).

3.36 The validity of the preceding submission can hardly be denied. If this were the approach assumed by Receivers in Zambia their role may not have fallen into disrepute.

The facts in *Development Bank of Zambia and Livingstone Saw Mills Limited v. Jet Cheer*
Development (Z) Limited are representative of the sharp practice that may be employed by some receivers justifying the negative perception. After a valid rescission of the contract by the principal of an agreement for the sale of two stands in the case cited, the receiver, without the knowledge of his principal and with the fraudulent concurrence of the Respondent’s Attorney, obtained duplicate Certificates of Title to two stands (one of which fell outside the mortgage under which he was appointed) the subject matter of the rescinded contract, and purported to execute assignments for the conveyance of the stands to the Respondent notwithstanding the rescission of the contract. The Supreme Court did not make a secret of its displeasure and proceeded to nullify the conveyance on account of the fact that, inter alia, the notice to rescind the contract with which the respondent did not comply was valid.

3.37 Furthermore, occasions on which a receiver has been able to repay the chargeholder in full by effecting changes to the business structure as are necessary to make it profitable, discharging the indebtedness, and returning the company to the control of the directors, are admittedly few. As a result, receivers are viewed with contempt especially by shareholders and employees, justifiably so, since their appointment is, as current practice suggests, the first step in stripping the company’s assets and leaving it worse than he found it – if there is anything left of it. This scenario presents us with the need for institutional frameworks as a counter or safeguard measure against these and other issues discussed herein before.

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102 PricewaterhouseCoopers, supra n. 87
CHAPTER 4

Liquidation: Practice and Tax Aspects.

Introduction.

4.01 This chapter focuses on liquidation or winding-up\textsuperscript{104}, a process which culminates into the termination of the company’s existence. Pennington in his Pennington’s Company Law\textsuperscript{105} describes winding-up or liquidation ‘as the process by which the management of a company’s affairs is taken out of its directors hands, its assets are realized by the liquidator, and its debts and liabilities are discharged out of the process of realization and any surplus of assets remaining is returned to its members or shareholders.’ The end result of this process should not be an excuse for carrying out the assignment negligently or at worst incompetently or carelessly by the liquidator. In contrast with the preceding chapter, which dwelt on the receiver and his efforts at implementing turnaround strategies for the company, we are here concerned with the liquidator and the manner in which he ought to undertake his assignment of terminating the company’s existence. Naturally, similar issues as those discussed in the preceding chapter arise, and have been adopted, except under a different contextual setting. Therefore, issues such as liquidation practice in Zambia and the Tax position of a company in liquidation form an essential part of this chapter. These two broad issues have been discussed and an outline of other issues such as, \textit{inter alia}, the responsibilities and the legal relations and obligations that may arise between the liquidator and the members, creditors and the revenue authority.

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\textsuperscript{103} The practical suggestions and recommendations on how this trend may be reversed have been addressed in sufficient detail in CHAPTER 6.
\textsuperscript{104} See para. 1.16.
\textsuperscript{106} Princess of Renis v. Bos (1871) L.R. 3 H.L. 176,193. Pennington in his Pennington’s Company Law, at p. 839
Modes of Winding-up.

4.02 The existence of a company incorporated under the Companies Act, Cap.388 cannot be terminated except through the machinery of winding-up. The same goal may be attained by removal from the register as a defunct company under s. 361 of the Companies Act. Commercially, winding-up or liquidation will either take place because of insolvency in which case winding-up is a form of company bankruptcy procedure or for reasons which do not connote insolvency, for instance, the liquidation of parastatals in Zambia which was motivated by changes in the economic order (liberalization) prompting a need to attract foreign investment with the view of accelerating private sector participation and development.

4.03 The different kinds of winding-up under the Companies Act, Cap. 388. are; Compulsory winding-up by the Court and Voluntary winding-up. The latter may either be a Members' voluntary winding-up or a Creditors' voluntary winding-up. The grounds for compulsory winding-up cover situations of insolvency and solvency. A members' voluntary winding-up presupposes solvency whereas a creditors' voluntary winding-up presupposes insolvency.

Compulsory Winding-Up.

4.04 There are various circumstances in which the court may order the winding-up of a company. Thus under the Companies Act, Cap.388, the court may order a winding-up on any of the following grounds:

(a) Where the company has by special resolution resolved that it be wound-up by the court;

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108 S.272
(b) Where the company does not commence its business within twelve months after its incorporation or suspends its business for a whole year. The courts jurisdiction is discretionary and the fact that the petitioner can establish this ground does not give him an automatic right to an order.\textsuperscript{109}

(c) Where the company is unable to pay its debts. Under this head the petitioner must not only prove the company’s inability to pay the debts but also that that the debt is due and payable. The coincidence of the two factors is cardinal. Thus where the company disputes a debt in good faith a winding-up order will not issue. The dispute should however be based on substantial, reasonable and specific grounds.\textsuperscript{110}

(d) Where the period, if any, fixed for the duration of the company by the articles or the event, if any, occurs on the occurrence of which the articles provide that the company is to be dissolved;

(e) Where the number of members is reduced below two; or

(f) Where, in the opinion of the court, it is just and equitable that the company should be wound-up.\textsuperscript{111} There is no precise definition of the circumstances in which this would apply and clearly the court must exercise its own discretion. The categories of what is ‘just and equitable’ are never closed. For instance, where a petitioner, through no fault of his own\textsuperscript{112}, is prevented from taking part in the management of the affairs of a company through representation on the board of directors and where the same is contrary to the spirit of joint ventures between the parties which had been completely destroyed, and there is no other order which is desirable or competent for the court to make, a winding order is


\textsuperscript{110} \textit{In re Taw International Leasing Corporation} (1978) Z.R. 152(H.C.) This case was decided according to s. 138 of the old \textit{Companies Act, Cap. 686}. The law, however, remains good.

appropriate.\textsuperscript{113} However, where there is a going concern which might suffer by
the making up of a winding-up order, Courts will be reluctant to make such an
order.\textsuperscript{114}

Presentation of Petition.

4.05 According to s. 271(1) of the \textit{Companies Act, Cap. 388}, a petition for a winding-up
order may be made by: a company; any creditor, including a contingent or prospective
creditor, of the company; a member; any person who is the personal representative of a
deceased member; the trustee in bankruptcy of a bankrupt member; any liquidator of a
company appointed in a voluntary liquidation\textsuperscript{115}; or the registrar of companies.

Voluntary Winding-Up.

4.06 A company may be wound-up voluntarily if it so resolves. The resolution is a \textit{Special
Resolution} \textsuperscript{116} unless the period fixed by the articles for the duration of the company has
expired or the event for which the articles provide that the company is to be dissolved
has occurred.

4.07 A voluntary winding-up may either be a \textit{members' voluntary winding-up} or a \textit{creditors'
voluntary winding-up}. A Members’ voluntary winding-up is a Creditors’ voluntary winding-

\textsuperscript{112} As this is an equitable remedy, the petitioner must come with clean hands.
\textsuperscript{113} \textit{Townup Textiles and Another v. Tuta Zambia Limited} (1988-89) ZR 93(SC).
\textsuperscript{114} \textit{Lusaka Meat Supplies Limited and Another v. Sceptel} (1974) ZR 28 (SC) See also C.M. Schmitzof \textit{et.al,}
\textsuperscript{115} For a comprehensive treatment of 'Compulsory Winding-Up of a Company in Voluntary Liquidation'
\textsuperscript{116} This is where the resolution is passed by a majority of not less than three-fourths of the votes cast by
the members in personor by proxy. See s.156(3), \textit{Companies Act, Cap.388}. 
up unless the directors have filed a declaration of solvency.\textsuperscript{117} This is a written declaration by the directors to the effect that, having made a full inquiry into the company’s affairs, they are of the opinion that the company will be able to pay all its debts in full within twelve months of the commencement of the winding up.\textsuperscript{118} It is imperative that the declaration is made within five weeks prior to the commencement of the winding-up.\textsuperscript{119} It must include a statement of the company’s assets and liabilities at the latest practicable date before the making of the declaration.\textsuperscript{120}

Effects of Winding-Up.

4.08 There are various differences that exist between \textit{Compulsory winding-up} and a \textit{Voluntary winding-up}, some of which have already been alluded to, however, their analysis is beyond the scope of this chapter. Emphasis is therefore placed on what obtains in both modes of winding-up.

4.09 In a \textit{Compulsory winding-up} the employees of a company are automatically dismissed and the liquidator assumes the powers of management previously enjoyed by the directors. Similarly, in a members’ voluntary winding-up the liquidator replaces the directors of the company unless he decides to retain them.\textsuperscript{121}

\textsuperscript{117} S.314(1)  
\textsuperscript{118} s. 308(1)  
\textsuperscript{119} s.308(3)(b)  
\textsuperscript{120} s. 308(2)  
\textsuperscript{121} s.310 (2), \textit{Companies Act, Cap. 388},
Liquidators' Powers and Responsibilities.

4.10 The liquidators' statutory powers in every mode of winding-up are numerous though the exercise of some of them is subject to the courts’ approval or the Committee of Inspection or indeed meetings of creditors and members. 122 Where an unusual difficulty presents itself, he is at liberty to seek the guidance of the courts.

4.11 The important statutory powers of a liquidator are: the conduct of legal proceedings; 123 carrying on of business of the company so far as may be necessary for beneficial winding-up; 124 to enter into compromises with members or creditors; 125 to dispose off the companies assets by way of sale; 126 to execute all deeds, receipts and other documents in the name of the company and may for that purpose, when necessary use the company's seal; 127 to borrow and give security for charging assets. 128

The Eligibility Clause.

4.12 Under the Companies Act, Cap. 388, s.332, a body corporate is not eligible for appointment as a liquidator but an individual. The Act does not seem to demand any form of expertise or skill as a prerequisite for appointment as liquidator and thus what has already been said on the subject concerning the receiver 129 is hereby adopted, the only rider being that in liquidation the liquidator is not concerned with the survival of the company as a going concern but with the realization of the company's assets and applying the proceeds to pay the creditors and other liabilities. The excess is then

122 s.289 (Compulsory winding-up) and s.321 (Voluntary winding-up)
123 s.289(3)(a) (Compulsory winding-up)
124 s.289(2)(a) (Compulsory winding-up) and s.321(a) (Voluntary winding-up)
125 s.289(2)(c) (Compulsory winding-up) and s. 321(a) (Voluntary winding-up)
126 s289(3)(c) (Compulsory winding-up) and s.321 (a) (Voluntary winding-up)
127 s.289(3)(d) (Compulsory winding-up) and s.321(a) (Voluntary winding-up)
128 s.289(3)(g) (Compulsory winding-up) and s.321 (a) (Voluntary winding-up)
129 See paras. 3.09 – 3.11
distributed among the shareholders. This realization, however, does not dispense with
the need for suitable professional credentials needed for a successful assignment. The
statute does not provide sufficient safeguards.

Transactions after Appointment and Taxation.

4.13 The liquidator has a statutory power to carry on the business of the company during
the four weeks following the date of the winding-up order where such continuation is
necessary for the satisfactory winding-up.130 The liquidator, with the authority either of
the court or Committee of Inspection, may carry on the business of the company beyond
the four weeks after the winding-up order. The continuation of the company’s business,
albeit temporarily (under the name of the company), makes it subject to taxation under
the various taxing Acts by the Z.R.A. Any gains or profits from the company’s business
during this period is treated as income131 the same applies to dividends received during
the same period.132 This income is taxable under s. 14(1) of the Income Tax Act.133
Similarly, the Value Added Tax Act134 captures transactions made during this period. It
effectively provides that anything done in connection with liquidation or intended
liquidation is a supply of goods or services in the course or furtherance of a business135
and is therefore taxable under s. 7(1) of the Act.136

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130 s.289(1) and s.321(a)
131 s.17(a), Income Tax Act, Cap.323
132 s.5(2)(a) Income Tax Act,Cap.323.
133 Cap. 323
134 Cap. 331
135 s. 2(2)(c), Cap.331
136 Cap. 331. Under this Act, the definition of taxable supplies has been extended to include those made
not just in the course or furtherance of a business but also those ancillary or connected to the main
business. See Galaun Holdings Ltd. v. Z.R.A. 2000/RAT/06

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4.14 Thus, in the computation of the company’s tax, the liquidator as taxpaying agent should see to it that the company does not forego any tax relief to which it is entitled. In this regard s.29(1)(a) of the Income Tax Act stipulate as follows:

"in ascertaining the business profits in any charge year, there shall be deducted the losses and expenditure other than of a capital nature, incurred in that year wholly and exclusively for the purposes of the business...."

Section 29(1)(a) is the manifestation of the well settled principle of taxation which states that subject to the limitations imposed by a statute, revenue expenditure is setoff against revenue receipts. The import of this provision is that any expenditure incurred by a business wholly and exclusively for that business as long as it is not of a capital nature, is deductible from the gross income of the business in order to arrive at the income to be subjected to tax.

4.15 Similarly, relief for bad and doubtful debts is provided for in s.43A of the Income Tax Act. However, two conditions must be established before bad and doubtful debts are allowed. First, the debt can only be allowed to the extent that they have been included in the income of the person claiming the deduction. Secondly, the debts must be proved to the satisfaction of the Commissioner General to be bad or likely to become bad. The combined effect of these deductions is to increase the amount of disposable income available for distribution to creditors and members in a winding-up. The need to exercise due care and skill is premised on the same philosophy as that of a receiver in a receivership. A liquidator is therefore a fiduciary to the members and other creditors in a

137 See para. 3.19
138 Cap. 323
139 Zambia Consolidated Copper Mines Ltd. v. Z.R.A. 1999/RAT/05 See also M.D. Kamuwanga p.125
141 Cap.323
142 Lusaka Water and Sewerage Company Ltd v. Z.R.A. 1999/RAT/36
143 Losses made during this period may also deducted from the gross income of the company in liquidation under s.30 of the Income tax Act, cap. 323.
144 See paragraphs 3.21 – 3.23
winding-up and civil liability may attach where he is grossly negligent under the rule in *Avalon’s Case* independent of other statutory remedies but subject to the *Act*. In the *Avalon’s Case*, the Supreme Court in, it’s obiter, said:

“It should 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 is immune from suit for wrong doing. There is no such blanket exception or immunity. Receivers as well as *liquidators occupy a fiduciary position*.” (Emphasis supplied)

**Overview of Liquidation**

4.16 In the quest to improve economic efficiency and stimulate economic growth through private sector participation, the Government decided to close down most of the parastatals. It has however come to light that the manner in which the liquidation assignments were carried out was not impressive. According to the audit of the liquidation of ZIMCO Ltd., Metal Marketing Corporation (MEMACO), United Bus Company of Zambia (UBZ), Lima Bank and Zambia Airways Corporation (ZAC), irregularities were revealed in the manner in which the liquidation process was undertaken. These irregularities manifested in the appointment of the liquidators, the failure by the liquidators to declare interest, weaknesses in the supervision of the liquidation process and irregularities in the disposal of properties, application of proceeds and payment of the liquidation fees. The Auditor’s Report further revealed that former directors in certain cases omitted to prepare statements of affairs and also noted the absence of audited accounts prior to liquidation. The absence of audited accounts made it difficult to ascertain the completeness of the assets and liabilities taken over at


145 A liquidator’s exercise of power is subject to the control of the court. See s. 189(4), *Companies Act*, Cap.388.

146 See n. 145


149 PAC Report
the time of liquidation.\textsuperscript{151} Conspicuous in some cases was the absence of any time frame within which the liquidation was to be completed.\textsuperscript{152} The generally long duration of the liquidation process had serious financial implications.

4.17 It would seem that no lessons were learnt from the liquidation of parastatal organizations since we have witnessed a recurrence of similar irregularities.\textsuperscript{153} For instance the appointment of Mr. G. Sokota as liquidator of the Zambia National Oil Company (ZNOC) was perceived to be a matter of serious conflict of interest by Mr. Dipak Patel\textsuperscript{154}, and justifiably so, since the said appointee was the chairman, at the time, of Standard Chartered Bank in Zambia which was owed an unsecured debt of $8 million by ZNOC.\textsuperscript{155} Being an unsecured creditor, Standard Chartered Bank had no priority of payment but having its chairman as liquidator of its debtor would conjure up, in a reasonable person’s mind, the apparent possibility of it ‘buying’ priority. The concern is not so much with the possibility, which may never have been, but with the apparent possibility.

Conclusion.

4.18 Though there are more statutory safeguards in a liquidation process protective of the members and creditors\textsuperscript{156} the same have not been exploited as evidenced by the liquidation of parastatal organizations. The insufficiency with regard to the qualifications permeates the whole fabric of the practice affecting it adversely. There is therefore a

\textsuperscript{151} ibid.
\textsuperscript{152} ibid.
\textsuperscript{153} See ‘Ex-ZNOC Chief Executive accuses liquidator of acting illegally’ – The Post, Wednesday April 9, 2003.
\textsuperscript{154} Then F.D.D. Member of Parliament for Lusaka Central.
\textsuperscript{155} The Post, April 13, 2002.
\textsuperscript{156} Ss. 285(2) and 290, \textit{Companies Act}, Cap. 388.
pressing need for reform in this area of stature law. This would positively impinge on the liquidator’s ability to influence the tax liability of the company.
CHAPTER 5

Priority of Payments.

Introduction.

5.01 The overriding responsibility of a receiver is to use the proceeds of the assets in his charge to repay the debenture holder.\textsuperscript{157} Similarly, one of the important statutory powers of a liquidator is to dispose of the company’s assets by way of sale\textsuperscript{158} and pay off the liabilities, the surplus going to the members. The law, recognizing the fact that the proceeds or funds may not suffice to extinguish all the debts and liabilities, provides for an order of payment with debts or liabilities ranking according to their preference. This chapter is therefore, a brief discourse on that aspect, with special emphasis on tax obligations.

Order of Preference.

5.02 A receiver acting under a fixed charge settles the charge-holder’s debt out of the net proceeds after his costs and remuneration; the surplus is surrendered to the company.\textsuperscript{159} Section 101 of the \textit{Companies Act, Cap.388} provides that, subject to any consent (express or implied) given by any person who would otherwise be entitled to priority, charges registered have priority in relation to one another in accordance with the times at which they were lodged. This principle is applicable to both receiverships and liquidations. The procedure relating to a floating charge is quite different from that of a fixed charge. Section 110(1) of the \textit{Companies Act, Cap. 388}, provides that where a receiver is appointed on behalf of the holders of any debentures of the company secured by a floating charge

\textsuperscript{157} see para. 3.12
\textsuperscript{158} see para. 4.11 see also \textit{Bernard Leigh Gadsden v. Kitwe Meat Market Ltd.} (1985) ZR 152(SC) at pp.154 – 155.
\textsuperscript{159} \textit{Batten v. Wedgwood Coal and Iron Company} (1884) 28 Ch.D. 317.
and the company is not at the time of appointment being wound-up, preferential creditors are to be paid in priority to all other debts out of the assets coming into the hands of the receiver. Section 110(1), aforementioned, specifically imports the order of payments applicable in every mode of winding-up as provided for under s. 346 of the Companies Act. Under such circumstances the date of appointment of the receiver is deemed to be the date of commencement of the winding-up.

5.03 The order of payment in every winding up is that provided in s. 346 aforementioned. These payments, known as preferential claims, are to be made after secured debts and other pre-preferential claims have been extinguished but in priority to unsecured debts. At law, in any liquidation, secured creditors are paid first and unsecured creditors rank pari passu after secured creditors and other preferential claims.\textsuperscript{160} The company’s members are last in line and are entitled to the surplus distributed among them according to their rights and interest in the company.\textsuperscript{161} In receivership the surplus is a preserve of the company. Section 327, applicable only to all modes of voluntary winding-up prioritizes the payment of all proper costs, charges and expenses of and incidental to the winding-up including the remuneration of the liquidator above all other claims out of the assets of the company. An interpretation placed on s.309 of the English Companies Act 1948, which is the equivalent of our s.327, by the learned authors of Buckley on the Companies Acts\textsuperscript{162} is that the phrase ‘all other claims’ must mean all other claims at the date of the winding-up. That if the liquidator (more specifically the estate in liquidation) incurs obligations, these come first. This certainly includes costs which a liquidator has

\textsuperscript{161} See ss. 298(2) (compulsory winding-up) and 319 (voluntary winding-up)
been ordered to pay out of the assets, but, as to whether these costs include taxes is not expressly stated and for this reason warrants some detailed analysis.

5.04 In a compulsory winding-up, the court has discretion, in the event of the assets being insufficient to satisfy the liabilities, to make an order relating to the payment out of the assets - the costs, charges and expenses incurred in the winding-up. The order of priority governing the said payments is also subject to the courts' discretion.163

5.05 The remuneration of the receiver or liquidator is a preferential claim. However one unsettling realization concerning the former is that the fees are not proportional to the work they do. Practice suggests that receivers charge their fees on an hourly rate in the dollar currency. A protracted receivership may thus lead to a diminution of funds that could have been available for meeting other liabilities. The legal setup is such that the outcome of the assignment has no bearing on the remuneration. It has been suggested that this may be a contributing factor to the quality of the receiver's input. Ultimately, it is the lenders, shareholders and employees who bare the brunt.164 In contrast with the receiver, the committee of inspection, creditors or the court may determine the liquidator's fees.165 On the basis of s.320166 any member, creditor or liquidator may apply to court to review the remuneration of the liquidator. These legal safeguards if exploited would keep the liquidator's remuneration within acceptable bounds.

163 s. 298(3), Companies Act, Cap. 388.
164 Dr. B.K.E. Ng'andu, , Liquidations and Receiverships Lessons and Challenges, Paper presented to the Corporate Governance Forum Convened on 13th September, 2002.
165 ss. 285(compulsory winding-up) and 316 (voluntary winding-up), Companies Act, Cap. 388
166 Companies Act, Cap. 388.
Taxes Incurred Prior to Receivership or Winding-up.

5.06 Tax and any interest due on tax (also deemed as tax) under the *Value Added Tax Act* constitutes a debt to the Republic and is recoverable at the suit of the *Commissioner General* or anyone acting under his authority in any court of competent jurisdiction. Section 79(1) of the *Income Tax Act*, is to that effect. These taxes or debts fall into the category of preferential claims whose order of priority is outlined in s. 346(2) of the *Companies Act*. According to the mentioned provisions, any tax, duty or rate payable by the company in respect of any period prior to the commencement of the winding-up or the receivership, ranks third in priority. The date of commencement of either the winding-up or receivership is the determining factor in terms of priority. The question as to whether or not payment has become due after that date (of commencement) is not subject to consideration. The rationale for this may be found in the fact that the commencement of the winding-up or the receivership may occur before the varying due dates for remitting of taxes in the various taxing statutes. Taxes incurred prior to the commencement of the winding-up or receivership are therefore preferential claims and rank third in that category.

Taxes Incurred After Date of Commencement.

5.07 As already established in *Chapter 3*, a receiver effectively takes control and running of the companies business where the charge has crystallized over the assets of the company, and in *Chapter 4*, that the liquidator may continue to carry on the companies business beyond the statutory provision of four weeks for the beneficial winding-up of the company. In a liquidation this may be aimed at the preservation of the of the

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167 S.22(1) *Value Added Tax Act, Cap.331.*
168 Cap. 323.
169 S.346 is applicable to receivership where a receiver has been appointed under a floating charge which has since crystallized. See s.110, *Companies Act, Cap.388.*
company’s goodwill. In any case i.e. receivership or winding-up, the transactions and employment to which the tax liabilities attach form an integral part of that carrying on of the business. These liabilities may represent an expense of preserving the goodwill (where the liquidator intends to sell the business of the company as a going concern), which is an asset of the company, or may be an expense or cost incurred in the beneficial winding-up of the company or the realization of the assets or running of business in a receivership. In Re Grey Martin Ltd.\textsuperscript{171} the liquidator applied to the court for directions on the question, \textit{inter alia}, whether VAT, pay as you earn (PAYE)\textsuperscript{172} and national insurance contributions (NIC) for the relevant period constituted expenses of the provisional liquidation and/or liquidation. The court held that where a tax liability was incurred as a result of the proper performance of a provisional liquidator’s duties, that liability constituted expenses incurred in the winding-up within the meaning of s.156 of the \textit{Insolvency Act 1986} (English Act). It is worth noting that s.156 of the \textit{Insolvency Act 1986} is in the same wording as s. 298 (3) of our \textit{Companies Act} and is therefore quite persuasive on what should apply in this jurisdiction. By virtue of ss.110 and 346, this should apply to receiverships.

5.08 In \textit{Re John Willment (Ashford) Limited}\textsuperscript{173}, the receiver while in the charge of the company caused it to trade and received VAT payments in respect of the supplies subject to VAT. The question put to the court was whether the receiver could apply the sums of VAT received by the company to repay the debenture holder, notwithstanding the company’s obligation to pay a similar amount in terms of VAT to the customs and

\textsuperscript{170} s.346(1)(c).
\textsuperscript{171} [1999] 4 All ER 429.
\textsuperscript{172} Payable under s.71 of the Income Tax Act, Cap. 388.
\textsuperscript{173} [1979] 2 All ER 615
excise. Brightman J. held that causing the company to default would constitute causing the company to commit a criminal offence, and in the circumstances the discretion could only properly be exercised in favour of remitting the tax. In the case of PAYE, failure by the receiver or liquidator to remit the tax would also constitute a fraud on the employees since this is an amount deducted from their earnings as tax by the employer and should be applied only for that purpose. Whether the liquidator or receiver has a discretion in the remittance of these taxes is a very doubtful proposition.

Conclusion.

5.09 Two conclusions could safely be reached in the light of what has been discussed in this chapter. First, those taxes incurred prior to winding-up or receivership (as described in s. 110 of the Companies Act) are preferential claims and rank third in that category. Secondly, taxes incurred during the relevant period are expenses of the winding-up or receivership and therefore, rank first in priority. Thus ranking becomes one of the inducements for engaging legitimate practices that will minimize the tax burden.

174 s. 346(2), Companies Act, Cap. 388.
175 This position was confirmed by Mr. A. Muvwende, Legal Officer – ZRA, during an interview, Lusaka, on 10/10/03.
176 For a detailed account on priority see s. 346, Companies Act, Cap. 388.
CHAPTER 6

Institution and Enhancement of Safeguard and Regulatory Mechanisms.

Introduction.

6.01 This is the final chapter in the dissertation and is therefore intended to summarise the issues that have been analysed. Secondly, the author recommends specific changes in the legal and institutional framework within which Receivers and Liquidators operate with particular emphasis on the issues raised. A final and general conclusion marks the last statement in the dissertation.

Summary.

6.02 This dissertation was set against the background of an unprecedented number of corporate distresses and failures. This economic malaise has seen the emergence, on the corporate stage, of receivers and liquidators whose contribution especially in major cases has not been impressive. Within this setting the dissertation has examined the role of these practitioners with regard to a company under receivership or liquidation and further, the treatment of the company's taxes prior to and within the period of their appointment and operation.

6.03 In relation to receivership an attempt has been made at showing that the receiver is a fiduciary of the company and debenture-holders whose duties extend but are not limited to the implementation of turnaround strategies in the management of the company with possible liability in the event that there is a breach of his fiduciary duty or gross negligence. This realization has set the stage for the discussion of tax law as it
relates to the receiver and the company under receivership. That the receiver is a tax-
paying agent and as a fiduciary he is under an obligation to minimize the tax liability of
the company which implies a claim to tax relief on behalf of the company.

6.04 The discourse on liquidation has been proceeded with more or less on the same
lines as that on receivership. Unlike the receiver who ought to consider ways of rescuing
the company from sliding into oblivion, the liquidator’s fundamental concern is how to
beneficially terminate the company’s existence. Thus good practice is advocated while
paying particular attention, as in the chapter dealing with receivership, to the aspect of
tax planning and suggesting particular incidences in some respects.

6.05 The treatment of tax liabilities of a company in receivership or liquidation is
determined according to the period in which they accrue. In terms of priority therefore,
taxes that accrue before the dates of appointment of a receiver or a winding up order
rank third in the order of preferential claims and those incurred within the relevant
period i.e. during the receivership or liquidation, are treated as expenses and are ranked
first in the order of preference. It is this status or priority of taxes in receivership or
liquidation that should produce a desire in the receiver or liquidator to implement certain
tax minimizing mechanisms necessarily increasing the amount that may be available for
distribution.

6.07 In view of the task that lies before a receiver or liquidator, it has been contended
that the statutory minima governing their suitability for appointment are inadequate.
Owing to the technical nature of their respective assignments it has been suggested that
more should have been legislated in this regard. Looking through statutory requirements,
the receiver\textsuperscript{177} or liquidator\textsuperscript{178} is not any different from the average man on the street. As can be imported from the hypothesis that this dissertation was setout to prove -- that the attainment of the receiver's or liquidator's objective i.e. minimization of tax liabilities and the successful completion of the assignment, hinges on the wealth of knowledge and understanding in the area of the law that the receiver or liquidator possesses. In this light therefore, the statutory benchmarks do nothing to inculcate this requirement. The onus to find a suitably qualified person is on the appointing authority. This is clearly not the best scenario.

**Recommendations.**

*Qualifications.*

6.08 The eligibility clauses for both receivers and liquidators need significant reform. It is commonplace that the professional credentials of a receiver or liquidator has a pervasive influence on the quality and outcome of an assignment. Thus we would recommend that any individual seized with the task either of receivership or liquidation, in addition to meeting the statutory benchmarks, should satisfy the following:

6.08.1 He should be a qualified lawyer with a bias in Insolvency law. If not a qualified lawyer, the prospective appointee should be well versed in this area of the law.

6.08.2 He should be a qualified corporate manager with considerable experience. He should have held a senior position for a minimum of two years in a viable concern. Prior experience in getting a company out of financial distress would be

\textsuperscript{177} s.111 *Companies Act, Cap.388.*

\textsuperscript{178} s.332
a significant consideration. Such an individual would bring his experience and expertise to bear on his prospective assignment.

6.08.3 The prospective appointee should be a qualified accountant or auditor, or express a manifest proficiency in the field. This is cardinal especially where the said receiver or liquidator is seized with the task of reducing the company's taxes to a bare minimum within the legitimate bounds of the law.

A Professional Body.

6.09 The formation and registration of a professional body for individuals with the necessary competence of undertaking a receivership or liquidation under the laws of the jurisdiction is imperative. This body would be responsible for the following:

6.09.1 Certification of Insolvency Practitioners. In order to positively influence the calibre of the practitioners, we would recommend that this body should have the legal mandate to license or certify insolvency practitioners. This will certainly assist in raising the standards in this area of corporate practice. Members licensed or certified by this body will, as a precondition for membership, have fulfilled the Qualifications recommended above.

6.09.2 Formulation of a Practitioners' Code. If it is conceded that Insolvency practice is a profession then a further concession should be made regarding the desirability of formulating a regime of rules and regulations governing members of the profession and prescribe their rights and duties. The Code will, inter alia, address the qualification, remuneration, professional standing, ethics, and the prescription of a procedure against undesirable conduct. The professional body
should be the appropriate authority burdened with the coining or formulation of this code indispensable to practice, as it will serve as a standard of measurement.

Establishment of an Independent Tribunal.

6.10 Another very important innovation would be the establishment of a tribunal. This tribunal would have the jurisdiction to hear the complaints pertaining to a receiver’s or liquidator’s conduct from parties with a sufficient or legitimate interest in the liquidation or receivership. Complaints would range but not limited to, incompetence, dishonesty, fraud, sharp practice and breach of the Practitioners’ Code.

6.11 The procedural rules with respect to the institution of proceedings before the tribunal should be laid down by the Professional Body. The tribunal should have investigative powers and the hearing of matters should be inquisitorial. In addition, the tribunal should have the jurisdiction to make orders with which the parties should be under a legal obligation to comply with. In the event of non-compliance, in the case of members, the tribunal should recommend that the Professional Body take disciplinary measures which may include suspension or withdrawal of membership.

Conclusion.

6.12 The issues raised in the dissertation transcend the corporate realm and find expression in economic and political consequences. Receiverships, which in most cases translate into Liquidations, and Liquidations have been topical issues which have vexed both the government and citizens alike and have further exercised the minds of scholars. Not only has the constriction of the number of existing corporate entities narrowed the tax base i.e. the termination of the existence of taxable entities and consequential job losses leading to reduced collection of revenue that accrues to the government in the
form of PAYE and other taxes, but it has also had severe socio-economic and political ramifications.

6.13 Let it be put on record that we are not opposed to the institution of corporate recovery mechanisms; however, we certainly express dissatisfaction with the manner in which these assignments have been undertaken. This has been the primary motive for the above recommendations. For it is trite that law may be a very important catalyst in effecting necessary changes in corporate recovery practice. We are not suggesting that these legislative and institutional changes and innovations are a panacea for our current problems than we are submitting that it is certainly the best start. Change is certainly a recurring phenomena and it will certainly take its course with or without the active involvement of the lawmaker. And if such changes are such as the lawmaker does not desire he should then play an active role.

6.14 It is important to note that recently the employees of Supreme Furnishers Ltd. successfully had revoked the appointment of a provisional liquidator by Supreme Furnishers Ltd. Revoking the appointment, the court said that the provisional Liquidator should be ‘acceptable to both the workers and Supreme Furnishers’. 179 The reason for the revocation of appointment was that the provisional liquidator’s conduct brought suspicion in the minds of the employees concerning his impartiality.

6.15 The case cited above signifies the taming of public discontent into something more meaningful and formidable. However, more needs to be done in order to sustain and institutionalize the positive change. As the position stands today there is only so much that can be raised up as safeguard and regulatory mechanisms in this area of the law. The

179 'Court revokes appointment of Supreme Furnishers Liquidator' The Post, Friday, 24th October, 2003.
implementation of the foregoing recommendations are imperative in the quest for order and efficiency.
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REPORT