IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MNZAVAS, J.A., MFALILA, J.A., And LUBUVA, J.A.)

CIVIL APPEAL NO. 24 OF 1996

B e t w e e n

1. SHINYANGA REGIONAL TRADING CO. LIMITED
2. NYANZA BOTTLING COMPANY LTD. . . . APPELLANTS

A n d

NATIONAL BANK OF COMMERCE. . . . . RESPONDENT

(Appeal from the Judgement and Decree of the High Court of Tanzania at Tabora)

(MACKANJA, J.)

dated the 22nd day of September, 1995

in

Civil Case No. 26 of 1994

JUDGEMENT OF THE COURT

MFALILA, J.A.:

This appeal is against the judgement and decree of the High Court of Tanzania at Tabora in which judgement was entered in favour of the present respondent, the National Bank of Commerce. In the High Court, the National Bank of Commerce was the plaintiff, Shinyanga Regional Trading Company Ltd. was the first defendant and Nyanza Bottling Company Ltd. was the second defendant. In this appeal, the National Bank of Commerce will be referred to as the respondent, Shinyanga Regional Trading Company Ltd. as the appellant and Nyanza Bottling Company Ltd, which is not a party in this appeal will be referred to as the second defendant. The respondent's claim in the High Court was for a declaration that the sale of the godown on Plot No. 308 Block 'B' in Shinyanga township, executed between the appellant and the second defendant and its subsequent transfer

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was illegal. The respondent alleged in its plaint that the said godown was among the properties listed in the debenture which was issued by the appellant to secure an overdraft facility amounting to Sh. 50,000,000/= which it made available to the appellant. But according to the respondent, when the appellant failed to repay the loan within the stipulated time, it decided to sell the properties listed in the debenture after giving due notice. Among these properties was the said godown. The sale of the properties including the godown was conducted by public auction. Following this auction, the respondent averred, the appellant filed a suit in the High Court, Civil Case No. 18 of 1994 seeking among other reliefs, a declaration that the sale of the godown is null and void. However, according to the respondent, before this case, namely Civil Case No. 18 of 1994 was determined, the appellant sold and transferred the godown to the second defendant, and according to the respondent, this sale and transfer of the godown by the appellant to the second defendant was illegal because:

(a) By that time it had already sold the said godown at a public auction and the money so realised was deposited in the appellant's account.

(b) The said sale and transfer between the appellant and the second defendant was made without notice to it in breach of the mandatory provisions in the debenture.

(c) The said sale and transfer was effected before finalisation of Civil Case No. 18/94.

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(d) The said sale and transfer was effected in complete disregard of the caveat filed by the buyer of the property at the public auction which it organised.

In its written statement of defence, the appellant denied that its sale of the godown to the second defendant was unlawful or illegal and that it did not fail to repay the loan as alleged and that in any case no due and proper notice was given by the respondent before the sale of the godown. The appellant further averred that on 17/9/94 it repaid the entire loan to the respondent by depositing the sum of Sh. 63,542,025/25 in its account with the respondent as full settlement of the outstanding loan before the expiry of the agreed period on 30/9/94 and that the second defendant's credit note for Sh. 63,542,025/25 is evidence of this transaction. That following the deposit of this amount in its account with the respondent, it informed the respondent on 22/9/94 to treat this credit as settlement of the loan provided to them by the respondent.

On its part, the second defendant denied that the sale of the godown by the appellant was illegal because it was a bona fide purchaser for value without notice and that therefore it acquired a good title.

At the commencement of the trial, three issues were framed as follows:

1. Whether the sale and transfer of the suit premises by the first defendant to the second defendant was illegal.

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2. If the sale was illegal, whether the second defendant was a bona fide purchaser for value.

3. Whether in the circumstances, the plaintiff was entitled to sell the suit premises and whether he had title to pass to the purchaser.

The respondent called only one witness in support of its case; its legal officer Mr. Makenena Ngero. He told the trial Court that they were requesting the Court to nullify the sale of the godown by the first defendant to the second defendant because this sale was effected when the same godown had already been sold by the plaintiff in exercise of its powers as debenture holder under clause 3 of the debenture. This clause, he said, empowered the debenture holder to sell the charged property in the event of a default in repaying the loan so secured. Mr. Ngero told the trial Court that the sale of the godown by the first defendant to the second defendant was subsequent to the sale by the plaintiff at a public auction on 22/8/94. Mr. Ngero mentioned two other matters which in his view tainted the legality of the sale transaction between the two defendants. These were first, that according to the terms of the debenture, the borrower could not sell or transfer the property so charged without the consent of the debenture holder. Secondly, that after the godown was sold by the plaintiff through a public auction, the first defendant filed a civil suit in Court praying for a declaration that the sale by the plaintiff was illegal, but before the Court determined the case, the first defendant went ahead and sold the property to the second defendant. It was for this reason, he said, that the second defendant cannot claim to be a bona fide purchaser for value

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because he had notice of the sale of the godown by the plairtiff.

On its part, the appellant also called one witness, its erstwhile General Manager, Hamisi Shilla Kitonka. He told the trial Court that the appellant obtained an overdraft facility from the respondent's Maronga branch in Shinyanga township amounting to Sh. 50,000,000/=. This loan, he said, was secured by a debenture, but he denied that the debenture had any restriction on the appellant's right to deal with the properties so charged, saying that the appellant was free to sell any of these properties provided approval was sought and obtained from its Board of Directors. Mr. Kitonka added that the loan plus interest of Shs. 13m was to be cleared by 30/9/94, but in June the respondent recalled the overdraft and demanded payment within 14 days. The appellant requested for extension of time in which to pay. When this request was rejected, he said, they had no alternative but to sell one of the appellant's properties to raise the required money. It was decided to sell one of the godowns which they sold to the second defendant for 60,000,000/=. When this amount was paid on 17/9/94, it was deposited into their account with the respondent to clear the overdraft but they were informed that the overdraft had been cleared. They did not know how the overdraft had been cleared. In these circumstances, Mr. Kitonka concluded, the sale of the godown to the second defendant by the appellant was perfectly legal.

After hearing all the evidence and the submissions, the learned trial judge answered the first issue in the affirmative, namely that the sale and transfer of the suit premises by the appellant to the second defendant was illegal, because it was contrary to the terms of the debenture which prohibited the

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appellart from alienating any of its property without the consent of the respondent as the debenture holder except of course in the ordinary course of its business.

With regard to issue 2, the learned judge answered it in the negative, namely, that the second defendant was not a bona fide purchaser for value without notice because the sale of the godown between the two was tainted with fraud.

Lastly, the learned trial judge answered the third issue in the affirmative, that the respondent had a good title to pass. In the circumstances, the learned judge entered judgement for the plaintiff as prayed, and, also declared that the sale and transfer for the godown by the appellant to the second defendant was illegal, null and void. The judge also made a consequential order that the register of titles be rectified by deleting the registration of the second defendant as owner thereof and further that the purchaser at the public auction be registered under Section 61 (1) of the Land Registration Ordinance Cap. 334.

This decision aggrieved Shinyanga Regional Trading Company Limited which then filed this appeal, the memorandum thereof consisting of six grounds of appeal.

Before dealing with the appeal on merits, there is a point which we feel is of such importance, though not part of this appeal that it should be dealt with to avoid it misleading the lower courts if not the High Court itself.

At the commencement of the trial, Counsel for the defendants raised a preliminary objection which is so pointless both in fact and law that we feel the trial judge should not have expended so much energy and time trying to

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resolve it. In his preliminary objection, Counsel for the defendants urged the Court to dismiss the case against the second defendant because in his view it was wrongly joined. Counsel told the trial Court that the second defendant was wrongly joined because the suit in question is founded on two unrelated contracts. One contract was what he called a debenture contract under which the respondent advanced Sh. 50m to the appellant and that since the second defendant was not a party to this contract, it could not be sued on it. The second contract, he submitted, involved the sale of the godown by the appellant to the second defendant to which the respondent was not a party, hence it could not sue on it. We remarked that this objection was pointless both in fact and in law, because it is clear to anyone reading the plaint that the respondent was not suing on any contract even if there was such a thing as a debenture contract or agreement in law. The respondent was simply challenging the legality of the sale and transfer of property over which it believed it had a legal charge. This is the factual position. On the legal front, there is no such thing as a debenture contract or agreement in law for the simple reason that such contract is impossible to make. A contract, like tango takes two to materialise. But a debenture, being simply a document issued by a company as evidence of its indebtedness which is normally secured by a charge over its property, can only be made and issued by one side, namely the borrowing company. Therefore, since Counsel was making submissions on points whose legal significance he did not obviously understand, the judge should have dismissed the objection in a few lines, mostly asking Counsel to make himself more familiar with concepts in company law. Unfortunately,

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the learned judge went so far as to commend Counsel for what he called his "lucid submissions", and throughout the proceedings and in his judgement, the learned judge talks of "debenture agreement". If left uncorrected it can create a wrong impression in the lower courts that there are such things as debenture contracts and agreements in company law. Although the words of Chitty, J. in Long vs. Abercorris State & Slab Co. (1887) 37 Ch. D 260 at page 264 to the effect that:

> "I carrot find any precise legal definition of the term "debenture", it is not either in law or commerce a strictly technical term or what is called a term of art"

sound severely pessimistic on the meaning and nature of debentures, it does not mean that the term is incapable of having a precise meaning or that its meaning is so elastic as also to be a species of contract. Of course the rights of the debenture holder are contractual rights against the borrowing company, but these contractual rights relate to the agreement to lend by the lender and to borrow by the creditor. Debentures then are species of documents issued by companies evidencing their indebtedness which /the indebtedness/, is normally but not necessarily secured by a charge over the company's property. Debentures which do not provide a charge are called naked debentures. In sum then debentures are a class of securities issued by companies.

Having put the legal and factual position on the correct footing, we are now in a position to deal with the appeal before us.

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As we have already indicated, the appellant filed a six point memorandum of appeal, but in our view the controlling ground is ground No. 3, in which the appellant complained that the learned judge erred on point of law and fact in holding that the debenture agreement (sic) Ex. P1 is a valid debenture for the 1993/1994 loan. We say this is the controlling ground because the way this ground is determined will affect the outcome of the entire appeal. On this point, depends the determination of the question in ground one, that is whether the sale and transfer of the godown by the appellant to the second defendant was legal. It will also determine the question in ground 5, that is whether the respondent was entitled to sell the godown and pass the title to the purchaser.

The learned trial judge made the decision on the validity of the debenture while dealing with issue No. 3 which was whether in the circumstances, the plaintiff was entitled to sell and pass title to the purchaser. As already indicated, the learned judge answered this issue in the affirmative holding that the plaintiff had a good title to pass, but we feel that the first part of the issue which is whether the plaintiff was entitled to sell the premises under the terms of the deberture was not clearly dealt with. This question was a subject of detailed analysis by Counsel for the appellant in his final written submissions. In his detailed submissions, learned Counsel stated that the plaintiff (present respondent) was not entitled to sell the godown to recover its loan, because firstly the respondent did not have such power under the debenture under which it purportedly acted. In law, Counsel stated, the remedies available to the debenture holder in case of default in the paymert of the principal amount or interest,

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are to sue for the recovery of the outstanding amount; to file a petition in Court for the winding up of the company; to exercise any of the powers conferred by the debenture i.e. appointing a receiver or if the debenture does not contain such powers, the debenture holder may apply to Court for the appointment of a receiver and/or manager, or an order for sale or foreclosure. Learned Counsel stated further that as the deberture relied upon by the plaintiff did not confer on it any power of sale, it was incumbent upon it to apply to the Court for an order of sale. Hence, he concluded, as it had neither the power of sale under the deberture nor a Court order to sell the godown by public auction, the sale effected by the respondent was illegal, therefore null and void and no title was thereby passed.

The second reason given by learned Counsel in his submission was that when the respondent proceeded to auction the godown on 20/8/94, it had already been sold on 10/8/94 hence there was no subject matter to sell on 20/10/94. In these circumstances, he stated, both the auctioneer and purchaser acted under a mistake of fact as to the existence of the subject matter so that under Section 30 (1) of the Law of Contract Ordinance Cap. 433, the resulting contract of sale was void.

The learned trial judge dealt with the question on the assumption that the respondent's loan to the appellant was still secured by the debenture and that in selling the godown to recover the loan, the respondent was properly exercising its professed power of sale. After discussing what happens at a sale by public auction, and as to when the contract is concluded, pointing out that such a transaction is subject

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to the doctrine of caveat emptor, the judge concluded as follows:

> "This explains why Section 51 (1) of the Land Registration Ordinance does not require, in cases where property is sold by a lender in the exercise of his professed power of sale, the registrar or purchaser to enquire whether any default has occured. The power of sale need not be absolute, it is enough that a reasonable man, prudently investing his money in land will have reasonable grounds upon which to believe that the lender has power to sell the property. In my view such power is presumed to exist where the sale is by public auction. The power to sell or to be specific, the lender's professed power of sale at the public auction in question is protected by the operation of the doctrine of estoppel. There are several types of estoppel, but estoppel by reputation is more relevant here. By this doctrine, where the owner of property by words or conduct represents or permits or permits it to be represented that another person is the owner of goods or other properties, any sale of such property by that person is valid against the true owner as if the seller was actually the owner thereof as regards anyone buying such property on reliance on the reputation. It has also been said that estoppel would arise if the true owner represents or permits it to be represented that he had no interest in the goods. In this case that is how DW.1 behaved. He made no attempt to stop the sale until 6 days later when he filed a suit in Court. Hence the first defendant

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> is estopped from asserting that the plaintiff could not pass a good title to the purchaser".

In support of these views the learned judge quoted the remarks of Devlin, J. in the English case of Distributor Ltd. vs. Goldring 1957 2 QB 600 at page 608:

> "The class of questions which relate to how far a person who is not the real owner of goods, but who appears to the world, or rather to those who deal with him as owner; and who deal with him on the faith of his apparent ownership should be called to confer upon a third party a greater title than he himself has -----."

And in an earlier case, Commonwealth Trust vs. Aktoy /1926/ A.C. 72, it was decided that "if someone permits goods to go into possession of another, with all the insignia and indicia of apparent title, it would be inconsistent with legal principle to permit the transaction to be upset". However the difference with the present case which the learned judge apparently missed is that in this case the appellant did not permit the premises to go into the possession of the respondent, to the contrary, he did not or refused to surrender the title deeds thereof, and did not register the debenture as required by law.

But as we have already stated, these findings of the learned trial judge were predicated on the premise that the security provided by the debenture was available to the respondent at the time it decided to sell the godown to realise the amount of the loan. Indeed, ever the two reasons

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given by Counsel for the appellant in his written submissions on issue No. 3, were based on the same assumption and throughout the proceedings in the High Court, the case proceeded on that basis. Both sides in the case saw the wisdom of engaging the services of more experienced Counsel to argue their respective cases in this Court. In recognizing the talents of Counsel on both sides, we want to say that the parties could not have made better choices. Both Mr. Rweyemamu who marshalled the appellants' case, and Professor Fimbo who resisted the appeal on behalf of the respondent, left no stones unturned in their respective fights both at factual and legal levels. Our wish is that such high level performance will become standard to the greater majority of the members of the Tanzania Bar.

In arguing the appeal, Mr. Rweyemamu learned Counsel for the appellants, discarded the premise adopted throughout the trial both by the trial Court and Counsel who appeared in that Court, that the security provided by the debenture was still available to the respondent at the time of the sale of the godown by public auction. Mr. Rweyemamu submitted that as the debenture was not registered, the loan extended by the respondent to the appellant remained unsecured. He added that under Section 79 of the Companies Ordinance, Cap. 212, an unregistered debenture is void against the liquidator and any creditor of the company. Therefore, he said, the rights of the respondent as an unsecured creditor, was to demand repayment within 42 days after its loan became unsecured. After this period, he said, the respondent could not go back to the debenture and purport to exercise the power of sale under it. The only course open to the respondent as an unsecured creditor, he added, was to proceed by way of ordinary civil suit to

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recover its unsecured loan. With regard to the allegation that the appellants' sale of the godown to the second defendant was tainted with fraud, Mr. Rweyemamu submitted that the fraud, if any, could only affect the sale to the second defendant if at the time of this sale, the loan advanced by the respondent was still secured by the debenture. This is because, he contended, there can be no fraud in the sale to the second defendant if the debenture no longer acted as security for the respondent's loan. With the debenture no longer in force, he said, the godown was not encumbered, with the consequence that the appellant was free to dispose it in any manner it wished. This freedom, he added, extended to the manner in which the appellant treated the proceeds of such sales. As a corollary to their argument, Mr. Rweyemamu submitted that as the respondent, the debenture holder, no longer had any rights under the debenture, it could not purport to exercise the power of sale under that debenture even if the said debenture provided such power, hence the respondent had no right to sell the godown, he had no title in the godown which he could pass to any buyer.

On his part, Prof. Fimbo dealt with the debenture at three levels. These were the validity of the deberture at the time the respondent decided to auction the godown. The powers of the debenture holder and the fraudulent acts of the appellant company.

With regard to the status of the debenture at the time the godown was being auctioned by the respondent, Professor Fimbo submitted that it was still in force. He conceded that the debenture was not registered, but added that it was

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not registrable under Section 8 (2) (d) of the Registration of Documents Ordinance Cap. 117 because a debenture does not create a trust, and sub-section (2) (k) of the same Ordinance excludes all documents relating to land from registration under the Ordinance. The only law, he said, which requires registration of debentures is the Companies Ordinance Cap. 212 under Section 80, and that the consequences of non-registration are listed in Section 79. But, he added, the only way in which this debenture could be extinguished or brought to an end was through the conditions in Paragraph 17 being satisfied and that there is no evidence indicating that these conditions were satisfied, hence in his submission, the debenture was still subsisting at the time the respondent decided to auction the godown under it.

Regarding the powers of the debenture holder, Professor Fimbo conceded that no receiver or manager was appointed and that under the terms of the debenture, the respondent could not exercise the power of sale directly, but he urged this Court to accept the trial judge's justification of the respondent's direct exercise of the power of sale, namely that it was exercising its professed power of sale as lender and that this professed power of sale exercised through a public auction, is protected by operation of the doctrine of estoppel.

Lastly, regarding the appellarts' fraudulent acts, Professor Fimbo painted the following picture of the appellant's conduct and actions which he said were fraudulent and that therefore the subsequent sale of the godown by the appellant to the second defendant was void. He said that the appellant issued a debenture to the respondent on the security of which

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the respondent lent moneys to the appellant. After completion of this agreement for an overdraft facility secured by the deberture, the appellant behaved in the following manner. Firstly, it failed or neglected to register the deberture with the Registrar of Companies. Secondly, the appellant failed to hand over title deeds to the respondert of the properties charged by the deberture. Thirdly, the appellant suffered distress by the Income Tax Department and upon the sale of its motor vehicle in satisfaction of this distress, the appellant deposited with another bank, CRDB, the proceeds of such sale cortrary to the provisions of paragraph 4 of the deberture which provided that during the continuance of that security (the debenture), the respondent would be appointed and act as the sole banker of the appellant. Fourthly, that the appellant failed to pay the loan after receiving rotices from the respondent. Lastly, that even after learning of the sale of the godown through public auction; sending its officials to the auction and informing its customer of this sale, the appellant still went ahead not only with the sale of the godown to the second defendant, but actually proceeded to execute a deed of transfer in its favour. In addition, Prof. Fimbo wert on, at the hearing of Civil Case No. 18/94, the appellant committed another act of fraud, in that it concealed from the High Court the act of transfer of the godown to the second defendant. By concealing vital information from the Court, Professor Fimbo submitted, the appellant was defrauding it. Quoting a decision of this Court in Mtumwa Rashid vs. Abdallah Idd And Another Civil Appeal No. 22 of 1993, Professor Fimbo asserted that a transaction like the one in the present case, which is tainted with fraud, is void and should be set aside. On this principle,

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he urged this Court to set aside the sale and transfer of the godown by the appellant to the second defendant.

In our view, these strongly opposed positions can only be resolved by the Court applying the relevant provisions of the law. The debenture Exbt. P1 was not registered both under the Registration of Documents Ordinance Cap. 117 and the Companies Ordinance Cap. 212. The effect of this non-registration according to Mr. Rweyemamu was to render the debenture uneffectual leaving the respondent's loan to the appellant unsecured. Section 9 of the Registration of Documents Ordinance provides as follows:

> "9. No document of which the registration is compulsory shall be effectual to pass any land or any interest therein or render such land liable as security for the payment of money, or be received as evidence of any dealing affecting such land unless and until it has been registered."

Prof. Fimbo's answer to this was that this provision cannot invalidate the debenture because it was not registrable under Cap. 117 Section 8(2) (d) thereof, as it did not create a trust and that it was also excluded by the provisions of Sub-section (2) (k). We agree, and that for that reason, the debenture's effectiveness cannot be determined by Section 9 of the Registration of Documents Ordinance Cap. 117. But the debenture was most certainly compulsorily registrable under the Companies Ordinance. Section 8[illegible] thereof provides as follows:

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"80 (1) - It shall be the duty of a company to send to the Registrar for registration the particulars of every charge created by the company and of the issues of debentures of a series, requiring registration under the last foregoing Section (S. 79) but registration of any such charge may be effected on the application of any person interested therein. /emphasis is ours/

(2) Where registration is effected on the application of some person other than the company, that person shall be entitled to recover from the company the amount of any fees properly paid by him to the registrar of the registration.

(3) If any Company makes default in sending to the registrar for registration the particulars of any charge created by the Company, or of the issues of debentures of a series requiring registration as aforesaid, then, unless the registration has been effected on the application of some other person, the Company and every director, manager, secretary or other person, who is knowingly a party to the default, shall be liable to a fine not exceeding twenty thousand shillings for every day during which the default continues."

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And Section 79 provides as follows:

> 79 (1) - Subject to the provisions of this part of this Ordinance, every charge created after the fixed date by a company registered in the territory and being a charge to which this section applies shall, so far as any security or the company's property or undertaking is confered thereby, be void against the liquidator and any creditor of the company, unless the prescribed particulars of the charge, together with the instrumert, if any, by which the charge is created or evidence, or a copy thereof verified in the prescribed manner, are delivered to or recovered by the registrar for registration in a manner required by this ordinance within forty two days after the date of its creation, but without prejudice to any contractual obligation for repayment of the money thereby secured, and when a charge becomes void under this section the morey secured thereby shall immediately become payable.
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> (2) This section applies to the following charges.
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> (a) A charge for the purpose of securing any issue of debentures.
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> (f) A floating charge on the undertaking or property of the company.

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This section then applied to the debenture Exbt. P1 issued by the appellart. Professor Fimbo conceded that the debenture Exhbt. P1 was required to be registered under Section 80 of the companies ordinance and that the relevant penalties for default are spelt out in Section 79, but he submitted that despite this non compliance with Section 80, the debenture was still in force because, in his submission, the only way in which this debenture could be brought to an end was through the realisation of the conditions in paragraph 17 of the debenture and that there is no evidence that the conditions in that paragraph had been satisfied. We appreciate the ingenuity of the argument, but with respect it has no validity. A private agreement cannot replace the clear terms of the law of the land. No one is allowed to contract out of the law. Sections 80 and 79 of the Companies Ordinance, are quite clear as to the registration of charges and the consequences of non-registration, that if the charge is not registered within forty two days, it becomes void, and the loan so secured becomes immediately payable. Therefor, since this debenture was not registered under Section 80 within forty two days, it became void at the end of that period. The respondent's overdraft facility became unsecured, the debenture as it were passed out of existence. All that the respondent was left with were his contractual rights to recover the debt under ordinary civil litigation. When therefore the respondent embarked upon the exercise of its purported power of sale under the debenture, and sold the godown through a public auction, it had no such right of sale, it had no interest in the godown which it could pass to any buyer. The sale of the godown by the respondent was null and void and therefore no interest passed to the buyer.

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But even if the debenture Exbt. P1 had been properly registered and was valid at the time of the sale of the godown by the respondent, it would make no difference on the validity of the sale by the respondent, because, under the debenture the respondent had no direct power of sale. All that the debenture provided was for the appointment of a receiver in the event of a default. The receiver would then act in the interests of both the lender and the borrower. The respondent could not act as receiver under the debenture. As Katiti, J., remarked in a ruling in Civil Application No. 18/94 relating to the same subject matter:

> "the defendant (present respondent) reserved itself (sic) a blank cheque, to recover its money i.e. appoint itself a prosecutor, judge, pass judgement/decree execute the same, initiate the public auction and pocket the proceeds thereof."

In his submission, Prof. Fimbo was aware of this difficulty. As invicated earlier, he conceded that no receiver was appointed in terms of the debenture, nevertheless, he urged this Court to agree with the trial judge's justification of the respondent's action, namely, that it was properly exercising its professed power of sale. This may be so, but if the respondent had any power of sale, professed or otherwise, such power could only be derived from the debenture which spelt out the mode of exercising it namely through a receiver duly appointed. The respondent had no direct power of sale which it purportedly exercised in this case. In the circumstances, the respondent had no interest in the godown which it could pass to the purchaser at a public auction. The sale was therefore null and void. But as we have already found, the debenture had

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already been rendered void at the time of the sale of the godown by public auction. We therefore agree with the complaint in ground 3 of the memorandum of appeal that the learned trial judge erred in law and fact in holding that the deberture was valid for the 1993/94 loan. It was rendered void after forty two days for non-registration.

We said earlier that this was the controlling ground of appeal, because the way this ground is resolved would effect the outcome of the appeal. It would affect the determination of the complaint in ground one namely whether the sale and transfer of the godown by the appellant to the second defendant was legal. The trial judge ruled that it was not in that it was tainted with fraud. But this finding was based on the premise that the debenture was valid and subsisting at the time the two sales by the respondent and the appellant were undertaken and concluded. Since we have found that the debenture was already void at the time of the two sales, the godown was not in any way encumbered as the respondent's loan was unsecured, the appellant was free to deal with it in any manner it wished. There could be no fraud in the appellant selling its unencumbered property or depositing the proceeds of any such sale in any bank it wished, since the debenture which restricted its banking transactions to the respondent was no longer in existence. Hence the instances of fraud enumerated by Professor Fimbo against the appellant have no relevance. We therefore say that the sale and transfer of the godown by the appellant to the second defendant was perfectly legal.

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Our resolution of the complaint in ground 3 also effectively determines the complaint in ground 5 that is whether the respondent was entitled to sell the godown and pass the title to the purchaser at the public auction. The learned trial judge found that he had such right and title, but we have already held in the course of determining the complaint in ground 3 that the respondent was not entitled to sell the godown and had no title to pass to the purchaser. With these findings, the complaints in grounds 4 and 6 automatically fall away, ground 2 was abandoned. However, we would like to say in connection with the complaint in ground 6 that we agree with it. The trial judge was wrong to grant reliefs which were not asked for in the pleadings, namely the rectification of the register and the registration of the purchase at the public auction.

Before we end, we would like to point out that the respondent found itself in this predicament largely through the ineptitude of its legal department. For instance, how could the respondent's legal department sit idly by without monitoring the security of the loan the respondent had advanced to the appellant? The respondent's legal department was either negligent or incompetent, for we cannot see how they could have failed to ensure that the appellant complied with Section 80 of the Companies Ordinance, or taken steps themselves and registered the debenture as they are empowered by Sub-section (1) of that section, because the respondent was surely "a person interested therein". After such registration, the respondent could then have compelled the appellant to comply with Section 83 of the Ordinance that is endorsing the certificate of registration on the debenture.

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The result of our findings on grounds 1, 3 and 5 is that this appeal succeeds. We allow the appeal and set aside the judgement and order of the High Court. The appellant will have its costs of this appeal and those in the Court below. We also allow costs for two Counsel as well as the preparation of the record because if the record was defective or incomplete, the rules allowed the respondent to file a supplementary record. The costs so incurred would then be considered.

DATED AT DAR ES SALAAM THIS 28TH DAY OF FEBRUARY, 1997.

N.S. MNZAVAS
JUSTICE OF APPEAL

L.M. MFALILA
JUSTICE OF APPEAL

D.Z. LUBUVA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

(M.S. SHANGALI)
DEPUTY REGISTRAR