

**N THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

(CORAM: MUNUO, J.A. NSEKELA, J.A., And MANDIA, J.A.)

CIVIL APPEAL NO. 67 OF 2007

SADOCK DOTTO MAGAI..... APPELLANT

VERSUS

- 1. WAMBURA EVARIST**
- 2. MARY MATEREGO**
- 3. J. NYANZA t/a NATHANIEL SERVICES**
- 4. MWEMA NYITUGA**
- 5. JOHN MAWAZO & ZULU NYAHENGE**
- 6. REGINA MASENYI**
- 7. MICHAEL NYEKUMBARA**
- 8. FISHPARK (T) LIMITED (under liquidation)**

.....**RESPONDENTS**

**(Appeal from the Judgement and decree of the High Court of Tanzania,
Commercial Division, at Dar es Salaam)**

(Massati, J.)

**Dated the 30th April, 2007
in
Commercial Case No. 70 of 2005**

JUDGEMENT OF THE COURT

16th July, & 1st August, 2011

MUNUO, J.A:

The Appellant, Sadock Dotto Magai, was the 2nd defendant in Commercial Case No. 70 of 2005 in the Commercial Division of the High Court of Tanzania at Dar es Salam. In the said suit, the 8th Respondent and the appellant were defendants No. 1 and 2 respectively. Respondents 1 to 7

were the plaintiffs. They sued the co- defendants for Tsh 84,249,394/= the purchase price of raw fish they had supplied to the 8th Respondent whose Receiver Manager was the appellant at the material time. The High Court entered judgement against the appellant personally in the quantum of Tsh 82,526,140/= plus interest on the ground that he had fraudulently conducted the purchase of fish from the 1st to 7th Respondents.

In the plaint, the claimants alleged that after being appointed a Receiver Manager of the 8th Respondent which was in financial doldrums, the appellant failed to inform the public of his appointment immediately. Instead, the appellant allegedly conducted business as usual thereby luring the claimants to continue selling raw fish to the 8th Respondent, not knowing that the Company was facing a serious financial crisis. In that regard, the claimants sold raw fish on credit and to date their debts have not been paid. Hence, the 1st to 7th Respondents instituted the suit against the appellant and the 8th Respondent, his principal. The appellant lost the case in the High Court. Subsequently, he lodged this appeal against the eight respondents.

Mr. Kamugisha, learned advocate, represented the appellant. The 1st to 7th respondents were represented by Mr. Buberwa and Muganyizi, learned advocates. The 8th Respondent was represented by Mr. Massawe, learned advocate. The parties filed written submissions and also orally argued the appeal at the hearing.

The appellant filed 4 grounds of appeal. He abandoned the 4th ground during the hearing. The three remaining grounds of appeal are:

- 1. That the learned judge erred in law and in fact in holding that the receivership business was not conducted in good faith by the appellant so he is personally liable for fraudulent trading even though the alleged fraud was not proved at the required standard in law or at all.*
- 2. The learned judge erred in law and in fact in holding the appellant personally liable for the 1st to 7th Respondents claims and not the Company (8th Respondent) on the basis that the Appellant decided to manage the 8th Respondent as a going concern*

after appellant was satisfied, on the strength of the financial due diligence conducted by the appellant that the Company was in a sound business condition, a fact which is not true, and without taking into account of the 8th Respondent's self commitment in the Debenture document that the latter would alone be liable for all the appellant's acts and defaults.

3. *The learned Judge erred in law and in fact when he made the findings that the Appellant must have known that the 8th Respondent was insolvent yet allowed it to enter into further credit transactions and that the appellant's failure to show in the business documents that the 8th Respondent was under receivership and furthermore that his failure to file an abstract with the Registrar of Companies all reflected fraud and fraudulent intentions on the part of the appellant.*

Submitting on grounds 1 and 2 of the appeal, counsel for appellant faulted the learned judge for finding that:-

- (i) *The appellant ought to have known that the 8th Respondent was insolvent and yet he continued to purchase raw fish from PW1, PW2, and PW3 on credit.*
- (ii) *The appellant did not disclose or publish that the 8th Respondent was under receivership.*
- (iii) *The appellant never filed any abstract with the Registrar of Companies.*

Counsel for the appellants also criticised the trial Court for hastily concluding that the appellant had fraudulently induced the fish mongers to sell fish to the 8th Respondent. Fraud was not proved at the required standard, counsel for the appellant maintained. He cited section 17 of the Contract Act, Cap. 345 P.E. 2002 which defines fraud as meaning any of following acts committed by a party to a contract.

- (a) *The suggestion, as to fact, of that which is not true by one who does not believe it to be true.*
- (b) *The active concealment of a fact by one having knowledge or belief of the fact.*
- (c) *A promise made without any intention of performing it;*
- (d) *Any other act fitted to deceive*

(e) *Any such act or omission as the law specifically declares to be fraudulent.*

Citing the cases of **R.G. Patel versus Lalji Makanii (1957) E.A 314 at page 317** and **Oman Yusuf versus Rahma Ahmed Abdulkadr (1987) TLR 196**, counsel for the appellant observed that the trial Judge was aware that allegations of fraud must be strictly proved. **In Omar Yusuf's** case cited *supra*, it was held:

"when the questions whether someone has committed a crime is raised in civil proceedings that allegation needs to be established on a higher degree of probability than that which is required in ordinary civil cases, the logic and rationality of the rule being that the stigma that attaches to an affirmative finding of fraud justifies the imposition of a strict standard of proof."

It was the contention of the appellant's counsel that the intention to defraud and deceive the fish mongers was not proved by the evidence adduced at the trial so the learned trial judge should have dismissed the suit with costs. On this, counsel for the appellant referred to the case of

Lelievre and Dennis versus Gould (1893) IQB 491 at page 498

wherein Lord Esher held:

"A charge of fraud is such a terrible thing against a man, that it cannot be maintained in any Court unless it is shown that he had a wicked mind what is a wicked mind? If a man tells a wilful falsehood, with the intention that it shall be acted upon by the person to whom he tells it, his mind is plainly wicked, and acting fraudulently."

In the absence of proof of a guilty intent or inducement or deception, what ever omissions the appellant Receiver Manager might have made in the course of his duties, such breaches did not amount to fraud, counsel for the appellant urged. There was therefore, no justification for the learned Judge to order the appellant to be personally liable for the losses the 1st to 7th Respondents suffered when they supplied raw fish to the 8th Respondent on credit which debts have remained unpaid to date.

With regard to ground 2 of the appeal, Mr. Kamugisha contended that the appellant Receiver Manager exercised due diligence in the performance of his duties after financial due diligence. The evidence of DW2, the appellant, to this effect was uncontroverted, counsel for the appellant observed. He further contended that since the receiver manager was on agent of Fishpak (T) Ltd, the principal, the latter was liable for paying the fish the 1st to 7th Respondents supplied to the company for export and sale locally.

Emphasizing that the appellant was on agent of the 8th Respondent, that there was no fraud employed to purchase fish from the 1st to 7th Respondent fishmongers, and more importantly, no supply of fish by the said fishmongers continued after the financial due diligence report which could otherwise hold the appellant personally liable. In the absence of personal liability to the appellant who is no longer receiver manager, the 8th Respondent should pay the claimants, counsel for the appellant asserted. The appellant prayed that the appeal be allowed with costs and that the 8th Respondent be ordered to pay the claims of 1st to 7th Respondents.

Mr. Erasmus Buberwa, and Mr. Godwill Muganyizi, learned advocates, appeared for the 1st to 7th Respondents. During the hearing and in their written submission, counsel for the 1st to 7th Respondents fully supported the decision of the High Court that:-

- (i) The appellant ought to have informed the 1st to 7th Respondent that the 8th Respondent, Fishpak (T) Ltd. was insolvent.
- (ii) The appellant was aware the 8th Respondent was insolvent but fraudulently omitted to disclose the same to the 1st to 7th the Respondents.
- (iii) The appellant made no attempt to publish the receivership status on the Companies documents.
- (iv) The appellant never filed an abstract with the Registrar of Companies as required by Law.

In view of these omissions, counsel for the 1st to 7th Respondents, urged, the appellant fraudulently lured their clients to sell fish on credit so the learned judge rightly held him liable to personally pay for the fish.

The learned advocate for the 1st to 7th Respondents further contended that the fishmongers discharged the onus of proving their case on the balance of probabilities. They cited the case of **P.M. Jonathan versus Athuman Khalfan (1981) TLR 175** at page 182 wherein it was held that;

"The case may be proved by a preponderance of probability but there may be degrees of probability within that standard. The decree depends on the subject matter. A civil court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require in considering whether negligence were established. It does not adopt so high a degree as in a criminal court even when considering a charge of criminal nature, but still it does require a degree of probability which is commensurate to the occasion."

Learned counsel for the 1st to the 7th Respondents also cited the case of **Hornal versus Neuberger Products (1956) 3 All E.R.970 at Page 977** in which Hudson, L.J. stated, and we quote:

"Just as in civil cases the balance of probability may be more readily tilted in one case than in another, so in criminal cases proof beyond

*reasonable doubt may be more readily obtained
in some cases than in others."*

The 1st to 7th Respondents' counsel asserted that the appellant fraudulently continued to purchase fish on credit from his clients although he was fully aware that the 8th Respondent was insolvent and under receivership so he should personally be ordered to pay the amount claimed by the seven fish mongers. In those circumstances fraud was established beyond reasonable doubt, the advocate of the 1st to 7th Respondents maintained.

With regard to ground 2 of the appeal, counsel for the 1st to 7th Respondents referred us to the text book titled, "**Tolley's Insolvency Law**": **issue No. 19 at page 4333** wherein it is stated that:-

"if he causes the company to incur greater liabilities under post appointment contracts than there are assets available for their discharge, he could risk personal liability for fraudulent trading though perhaps not for wrongful trading."

It is the contention of the claimants that the appellant was appointed on the 18th May, 2000 to be the receiver manager of the 8th Respondent so the knew that the 8th Respondent was insolvent. That knowledge notwithstanding, the appellant continued to buy fish from the claimants so he should be held personally liable to pay for the fish the 8th Respondent Company purchased on credit.

Mr. Thomas Massawe, learned advocate, represented the 8th Respondent, Fishpak (T) Ltd which is under liquidation. Adopting his written submission, counsel for the 8th Respondent stated that initially the suit was between the 1st to 7th Respondents versus the Appellant, Mr. Sadock Dotto Magai. The Liquidator of the 8th Respondent, Fishpak (T) Ltd was joined after being appointed vide an order of the Commercial Division of the High Court of Tanzania on the 23rd December, 2003 in Miscellaneous Commercial Case No. 5 of 2003 between **Savings and Finance Ltd. Versus Fishpak (T) Ltd.** At that time, the appellant was the receiver manager of the 8th Respondent. Counsel for the 8th Respondent further stated that despite the intervention of the 8th Respondent's liquidator, there was no achievement gained. The liquidator visited the premises of the

company from the 26th April, 2004 to the 04/05/2004 but found the factory had been closed down.

On the liability of the appellant, counsel for the 8th Respondent contended that the trial court properly held the appellant personally liable for the claims lodged against him because he negligently transacted business. Had he faithfully discharged his duties he would have informed the 1st to the 7th Respondents that the 8th Respondent was insolvent. Had the appellant fully involved himself in the operations of Fishpak (T) Ltd, the loss the 1st to 7th Respondents suffered would have been avoided. Supporting the decision of the learned judge, counsel for the 8th Respondent faulted the Appellant/Receiver Manager for failing to cooperate with the liquidator of the 8th Respondent and for continuing to buy fish on credit from the claimants although he knew that the principal was insolvent. Instead of working with the liquidator, counsel for the 8th Respondent observed, the appellant appointed a new management namely Karim Lalani and Jahangil Group to conduct the fish business and report to him. The appellant was also the signatory of the company, counsel for the 8th Respondent further observed, which was why the learned judge rightly held him personally liable for paying for the fish the company bought on

credit from the claimants. Arguing that the appeal is lacking in merit, learned counsel for the 8th Respondent prayed that the appeal be dismissed with costs.

The issue before us is whether the appellant fraudulently purchased fish on credit from the 1st to 7th Respondents.

We are mindful of the appointment of the appellant as Receiver Manager under the Debenture, Exhibit D7 which spells out his duties. The said Debenture also provides for the collection and the distribution of the funds collected as well as the maintenance of an account. The appellant was, under the said Debenture, accountable to the authority which appointed him.

The Debenture, Exhibit D7 clearly states that it was made under Clause 66 of the Company's Memorandum and Articles of Association pursuant to a Resolution of the Directors of the Company dated the 21st October, 1996.

Clauses 10, 11 and 12 of the Debenture provide for the appointment and powers of a receiver manager. The National Bank of Commerce appointed the appellant the Receiver Manager of Fishpark (T) Ltd, the 8th Respondent as stipulated under clause 10 of the Debenture which states, verbatim:

"10 At any time after the principal moneys hereby secured become payable either as a result of lawful demand being made by the Bank or under the provisions of Clause 9 hereof the Bank or any officer of the Bank duly authorized in that regard may appoint in writing any person or persons whether an officer or officers of the Bank or not to be a receiver manager or joint receivers and managers of the property and assets hereby charged or any part thereof upon such"

Having been appointed the receiver manager of Fishpak (T) Ltd by the Bank, the appellant acquired and exercised the powers listed under Clause 11 which reads in part:

"11. Every receiver and manager so appointed (hereinafter called a "Receiver" shall be the agent of the Company and the Company shall alone be liable for his acts, defaults and remuneration and he shall have authority and be entitled to general powers hereinafter set forth in addition to and without limiting any general powers conferred on him by law; (a).....to.....(i)."

In view of clause 11, the appellant was, in our considered opinion, fully mandated by the Debenture to buy fish from the 1st to the 7th Respondents as stipulated under Clause 11 (d), (g) and (i). Clause 11 allowed the appellant, then the agent of the NBC, to transact fish business for the 8th Respondent and as stated in clause II.

"...and the Company shall alone be liable for his acts or defaults and remuneration."

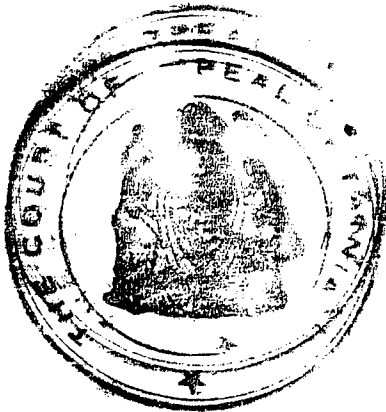
Under Clause 12 the receiver had to keep and maintain an account for paying debts the Company owed the Bank and other claimants.

In the light of the clear terms of clauses 10, 11 and 12, we find no justification for holding the appellant personally liable for the claims against

the Company. He transacted business for his principal, the Bank in accordance with the terms of the Debenture, Exh, D7. The appellant committed no fraud in those circumstances. For that reason, we reverse the decision of the learned judge and order the 8th Respondent, Fishpak (T) Ltd to pay the claims of the 1st to 7th Respondents. We accordingly allow the appeal with costs to be paid by the 8th Respondent.

DATED at **DAR ES SALAAM** this 25th day of July, 2011.


E.N. MUNUO
JUSTICE OF APPEAL



H. R. NSEKELA
JUSTICE OF APPEAL

W.S. MANDIA
JUSTICE OF APPEAL

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


DEPUTY REGISTRAR
COURT OF APPEAL