

AFRASIA BANK ZIMBABWE LIMITED
versus
THE WATTLE COMPANY LIMITED

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 22 February 2016 & 8 June 2016

Civil Trial

F. Siyakurima, for the plaintiff
A. Rutanhira with him *E.T. Moyo*, for the defendant

MUREMBA J: On 13 February 2015 the plaintiff issued out summons from this court claiming payment of money advanced to the defendant through a loan which money the defendant has failed to pay back. The claim is for the capital sum of US\$3 054 480.13 among other things.

On 29 April 2015, the plaintiff was placed under liquidation by an order of this court in terms of the Companies Act [*Chapter 24:03*].

On 19 June 2015, the defendant filed its plea to the plaintiff's declaration. In the plea the defendant among other things pleaded set off of the plaintiff's claim as against the claim of US\$ 2 900 000.00 being a debt ceded to the defendant by Meikles Limited. The defendant further stated that the basis of the debt was well stated in its counter-claim. The defendant then went on to make a counter-claim. In short the counter claim is to the effect that the plaintiff in convention owes Meikles Limited US\$2 900 000.00 which it acknowledged, but has refused to pay. The defendant said that Meikles Limited ceded to it that debt or claim. It is on that basis that it was making a counter-claim.

In its plea to the counter-claim plaintiff raised a preliminary point to the effect that the defendant could not make a counter-claim without first obtaining the leave of the court to sue the plaintiff which was now under liquidation. In terms of s 213 (a) of the Companies Act a company which is under liquidation can only be sued with the leave of the court.

At the pre-trial conference the defendant made an admission that it is liable to the plaintiff's claim.

Two issues were referred to trial. Firstly, whether or not the plaintiff is liable to the defendant's claim. Secondly, whether or not set off is available in the face of liquidation.

At the commencement of trial on 8 February 2016, the plaintiff pursued its preliminary point about the defendant lacking the *locus standi* to sue or to make a counter-claim in the absence of the court's leave to sue. Being alive to the provisions of the Companies Act which also make it a requirement for a liquidator of a company which is under liquidation to first obtain the leave of the court to sue or proceed with litigation I asked the plaintiff if it had obtained such leave. It is an issue that I raised *mero motu* seeing that the plaintiff was keen to have the defendant comply with the provisions of the Companies Act, yet the plaintiff itself had not furnished anything to show that it had also complied with similar provisions of the same Act.

In the case of *ZABG v Caleb Dengu & Anor* HH 583-15 I dealt extensively with the need for a liquidator to first obtain the leave of the court before proceeding with litigation even if proceedings had commenced before placement of a plaintiff company under liquidation. I made a finding that there is need for such leave to be obtained in terms of s 221 (2) (a) of the Companies Act. At page 6-7 I said:

“...one has to consider that the effect of a liquidation order is to freeze the affairs of the company with a view to preserve its assets. Any disposal of the assets of the company without the leave of the court is void (s 213 (c) of the Companies Act). When the affairs of the company have been frozen it means that they have been stopped or rendered motionless. The assets of the company are prevented from being used for that time. So when a liquidator is appointed he starts running the affairs of the company. I believe that if he wants to bring any legal proceedings to court on behalf of the company, be they fresh legal proceedings or proceedings which commenced before liquidation he has to seek the leave of the court. In my view the whole idea for seeking the court's leave even in proceedings which commenced before liquidation is to protect the company assets and prevent unnecessary expenditure of what would otherwise be available to satisfy the demands of the creditors. As correctly submitted by Advocate *Matinenga*, litigation involves costs and sometimes the costs that are involved can be disproportionate to the company's resources. Some legal proceedings may even result in prejudice to creditors. As such I do not believe it was the intention of the legislature to let the liquidator simply proceed with actions which commenced before liquidation without obtaining the leave of the court.”

In *casu* in response to my query the plaintiff's counsel stated that the plaintiff had been granted authority to sue by the Master of the High Court and promised to provide the authority. The plaintiff later provided a letter dated 8 February 2016 which emanated from the Master's office and was addressed to the liquidator of the plaintiff, Mr. Chikura. Upon receipt of this letter the defendant challenged it saying that it was not valid authority. The letter reads:

“RE: Masters Authority in terms of s 221 (2) (a) of the Companies Act [Chapter 24:03]:
Legal Proceedings for recovery of outstanding debts.

Reference is made to the first meeting of the Creditors of Afrasia Bank Ltd held on 31 July 2015.

We hereby confirm that the Master, at the said meeting authorised you as liquidator to immediately recover all outstanding accounts, in the name and on behalf of the Afrasia Bank Zimbabwe Ltd, pursuant to the provisions of s 221 (2) (a) of the Companies Act [Chapter 24:03].

For the avoidance of doubt, the authority given to you at the meeting of 31 July 2015 covers any and all outstanding accounts/debtors, not just the top 10 debtors of Afrasia Bank Zimbabwe Ltd.

Please proceed accordingly

R. Mukavhi
Additional Master- Insolvency”

Because of the challenge to the authority, the counsels filed heads of argument on the issue and then argued the matter on 22 February 2016. In arguing the issue the defendant’s counsel submitted that in a case where the plaintiff company has been placed in liquidation the liquidator can only proceed with litigation in one of the following 3 circumstances. Firstly, after obtaining the leave of the court in terms of s 221(2) (a) of the Companies Act. Secondly, with the authority of a resolution of Creditors and Contributories duly passed at a joint meeting thereof in terms of s 221 (4). Thirdly, with the authority granted to him by the Master in terms of s 218 (4) (a) or the proviso to s 221 (2) (a).

It was Mr. *Rutanhira’s* argument that the letter dated 8 August 2016 which the plaintiff produced is not the authority that was granted by the Master on 31 July 2015. He challenged the plaintiff to produce same instead of just producing the purported confirmation letter. On the other hand, Mr. *Siyakurima* argued that the Additional Master’s letter is enough confirmation of the authority that was granted by the Master.

The law

Section 221(2) of the Companies Act provides:

- “(2) The liquidator shall have power, with the leave of the court or with the authority mentioned in subsection (4) or in paragraph (a) of subsection (4) of section *two hundred and eighteen*—
- (a) to bring or defend in the name and on behalf of the company any action or other legal proceeding of a civil nature and, subject to any law relating to criminal procedure, any criminal proceeding:
- Provided that immediately upon the appointment of a liquidator or a provisional liquidator the

Master may authorize upon such terms as he thinks fit legal proceedings for the recovery of any outstanding accounts, the collection of which appears to him to be urgent”

My understanding of s 221(2)(a) is that for the liquidator to bring any action or legal proceeding on behalf of the company he has to obtain the leave of the court. In the absence of the leave of the court the liquidator can do so on the authority of the Master which the Master grants pursuant to s 218(4) (a). S 218(4) (a) provides:

“(4) Where no name of any person has been submitted to the Master for appointment as liquidator as a result of the summoning of a meeting of creditors or contributories in terms of section *two hundred and twenty-one* the Master may—
(a) appoint any fit person as the liquidator of the company and may authorize such liquidator to exercise such of the powers set out in subsection (2) of section *two hundred and twenty-one* as the Master may think fit”

What I make of s 218 (4) (a) is that the Master may appoint a liquidator in cases where the meeting of creditors or contributories has not led to the submission of the name of any person for appointment as a liquidator. It is in such a case that the Master may give his authority to the liquidator whom he would have personally appointed to institute legal proceedings in terms of s 221 (2) (a). However, in terms of the proviso to s 221 (2) (a), for the Master to grant such authority two requirements have to be met. The first requirement is that the authority has to be granted immediately upon the appointment of the liquidator. Immediately means without delay, right away or at the very moment. The second requirement is that the authority should only relate to legal proceedings which pertain to the recovery of monies the collection of which appears to him to be urgent. I would therefore agree with Mr. *Rutanhira* that the proviso was aimed at dealing with urgent collections which could not wait for the seeking of the leave of the court. So if the Master does not grant the authority immediately upon appointing the liquidator and if it is not for an urgent collection of a debt, the liquidator will have to apply to the court for its leave in order for him to institute legal proceedings on behalf of the company.

It is therefore my understanding that s 221 (2) (a) and s 218 (4) (a) seek to make a distinction between a liquidator who is appointed by the court and a liquidator who is appointed by the Master. Where a company is placed under liquidation by an order of the court, for the liquidator to institute legal proceedings on behalf of the company he has to obtain the leave of the court. However, in a case where the appointment of the liquidator is not by an order of the court, but by the Master in terms of s 218 (4) (a), in order for the liquidator to institute legal proceedings, he may obtain the authority of the Master, but this

authority has to be granted immediately upon his appointment and it should be in respect of urgent collections of outstanding accounts only. I take the proviso to mean that if the authority of the Master is not granted immediately and for urgent collections, the liquidator may then obtain the leave of the court to sue.

In *casu* it was submitted on behalf of the plaintiff that the plaintiff was placed under liquidation by an order of this court. It has not been submitted that the plaintiff's liquidator was appointed by the Master in terms of s 218 (4) (a). It is therefore wrong for the plaintiff to say that it is relying on an authority which it says was granted to the liquidator by the Master on 31 July 2015 because this is not a case where the Master could grant authority to the liquidator to sue. Since the liquidation was ordered by the court the plaintiff ought to have obtained the leave of the court to sue in terms of s 221 (2) (a).

Even if the plaintiff's interpretation of s 221 (2) (a) and s 218 (4) (a) was sound and it is accepted that in the present matter the Master's authority suffices for the plaintiff to proceed with litigation, still the plaintiff failed to provide that authority by the Master. I am not satisfied that the letter by the Additional Master confirms valid authority which was given by the Master to the liquidator on 31 July 2015, to proceed with litigation. To begin with, the letter of 8 February 2016 itself is not the authority, but it is the confirmation of the authority which was purportedly given by the Master on 31 July 2015. It was therefore necessary for the plaintiff to produce that authority that the Master granted on 31 July 2015. I cannot envisage a situation where such authority can be granted verbally. It can only be given in writing because tangible proof thereof is a requirement in the ensuing legal proceedings. Mr. *Siyakurima* could not explain why the plaintiff did not have the requisite written authority by the Master. Instead, he said that he could furnish the minutes of the creditors' meeting which was held on 31 July 2015. He said that it was at that meeting that the Master gave his authority to the liquidator to sue. I allowed him to produce the minutes thereof. However, in those minutes as correctly argued by Mr *Rutanhira* there is nowhere where the Master granted his authority to the liquidator to sue or to proceed with litigation. The minutes are titled "Minutes of Proceedings at the First Meeting of Creditors of Afrasia Bank Limited in Liquidation". The relevant portions of the report which is not paginated which Mr. *Siyakurima* referred to pertain to some questions and answers which were exchanged between the creditors and Mr. Saruchera, the liquidator's agent. Mr. Saruchera informed the meeting that the liquidator was making efforts to recover as much of the debts as possible. The only time that the Master is referred to in the minutes is when he thanked Mr. Saruchera and the

liquidator, Mr. Chikura for the report. Clearly, the Master did not give his authority to the liquidator to sue or proceed with litigation in the minutes that the plaintiff's counsel produced. So on 31 July 2015, at the creditors' meeting no authority was given by the Master to the liquidator to sue or to proceed with litigation as the Additional Master's letter of 8 February 2016 seeks to portray.

Mr *Rutanhira* submitted that the liquidator can also act on the authority of a resolution of Creditors and Contributories duly passed at a joint meeting thereof in terms of s 221 (4) which reads:

“ He may, with the authority of a resolution of creditors and contributories, duly passed at a joint meeting thereof, do any act or exercise any power for which he is not by this Act expressly required to obtain leave of the court.”

Since the leave of the court is expressly required for the liquidator to institute legal proceedings on behalf of the company in terms of s 221(2) (a), it means therefore that s 221 (4) is not applicable in this case. S 221 (4) only deals with situations where the leave of the court is not required.

In the absence of the leave of the court to continue with the present legal proceedings after the plaintiff had been placed under liquidation, the plaintiff's claim cannot be proceeded with.

Whether or not the defendant can make a counter-claim against the plaintiff a company which is under liquidation without first obtaining the leave of the court.

A counter claim is a claim which the defendant could have instituted by way of a separate action against the plaintiff. The fact that it has been brought as a counter claim should not deprive the defendant of any rights which he would have had with regard to a claim in convention. See *Herbstein and Van Winsen The Civil Practice of the High Courts of Appeal of South Africa* 5th Ed Volume 1 @ p 667. In terms of r 123 of the High Court Rules, 1971 if the plaintiff's claim is stayed, discontinued or dismissed the defendant can still proceed with his counter-claim. In terms of r 124 the court may for good cause shown order the plaintiff's claim and the claim in reconvention to be tried separately. In terms of r 120 (1) of the High Court Rules a claim in reconvention is a cross-action. It is my considered view therefore that the defendant requires the leave of the court to commence or proceed with such action against a company which is under liquidation in terms of s 213 of the Companies Act which provides that:

“In a winding up by the Court-

- a) No action or proceeding shall be proceeded with or commenced against the Company except by the leave of the Court and subject to such terms as the Court may impose.”

The defendant filed its plea together with the counter-claim on 19 June 2015 after the plaintiff had been placed in liquidation on 29 April 2015. It was therefore necessary for the defendant to obtain the leave of the court first before filing its counter claim. As correctly argued by the plaintiff’s counsel, s 213 prohibits commencing any action or proceeding against a company in liquidation without the leave of the court. The provision is without any exception whatsoever. The provision does not say if a counter claim is made by the defendant in a suit initiated by a company which is under liquidation as the plaintiff, then there is no need for the defendant to first obtain the leave of the court. In *Schierhout v Minister of Justice* 1926 AD 99 @ 109 Innes CJ said,

“It is a fundamental principle of our law that a thing done contrary to the direct prohibition of the law is void and of no force or effect....And the disregard of a peremptory provision in a statute is fatal to the validity of the proceedings affected.”

Another issue that I need to deal with is the issue of set off which the defendant raised. It was the defendant’s argument that since it had pleaded set off as a defence in its plea to the plaintiff’s claim it was therefore not required to seek or obtain the leave of the court in terms of s 213 of the Companies Act. I do agree with the defendant’s argument because set off is a complete defence to a claim. In *Metallon Gold Zimbabwe v Golden Million (Private) Limited* SC 12/15 the Supreme Court said;

“The doctrine was explained by Innes CJ in *Schierhout v Union Government* 1926 AD 286 at p 289-290 as follows:-

The doctrine of set of set off with us is not derived from statute and regulated by rule of court, as in England. It is a recognized principle of our common law. When two parties are mutually indebted to each other, both debts being liquidated and fully due then the doctrine of compensation comes into operation. The one debt extinguishes the other *pro tanto* as effectually as if payment had been made. Should one of the creditors seek thereafter to enforce his claim, the defendant would have to set up the defence of *compensatio* by bringing the facts to the notice of the court-as indeed the defence of payment would also have to be pleaded and proved. But compensation once established, the claim would be regarded as extinguished from the moment the mutual debts were in existence together.”

In *Commissioner of Taxes v First Merchant Bank Ltd* 1997 (1) ZLR 350 (s) at 353 C Gubbay CJ said:

“At common law, set off or compensation is a method by which mutual debts, being liquidated and due, may be extinguished; if unequal, the smaller is discharged and the larger is proportionally reduced.”

The above authorities make it clear that where the defence of set off is pleaded both the plaintiff's and the defendant's claim must be liquidated, without need to be proven. In a case where the defendant also has a claim against the plaintiff, but that claim is not liquidated the defendant cannot plead the defence of set off to the plaintiff's claim. Instead the defendant should make a counter claim because his claim will need to be proven. The defendant cannot jointly raise the defence of set off and make a counter claim at the same time as was done by the defendant in the present case. The defendant should not embody the subject matter of the counter claim in the plea. See Herbstein and Van Winsen *The Civil Practice of the High Courts of Appeal of South Africa* 5th Ed Volume 1 @ p 667. At p 667 Herbstein and Van Winsen further state that:

“the fact that the rule allows the counter claim to be set out in a portion of the document containing the plea does not mean that the averments in the plea should be allowed to become mixed up with those in the counter claim. However, “a defendant who admits the plaintiff's claim may plead that payment is excused by reason of the counter claim and request that judgment on the plaintiff's claim be postponed until judgment is given on the claim in reconvention. This may be done even if the amount of the counter claim does not exceed that of the claim in convention.”

Delaying the delivery of judgment in convention until the counter claim has been adjudicated upon is desirable because the amounts of the two judgments are then set off against each other. This kind of set off is different from the plea of set off that is raised as a defence to the plaintiff's claim which I have discussed above.

In casu the defendant's claim against the plaintiff is not liquidated. It is a claim for interest arising from the money that was banked by Meikles with the Reserve Bank of Zimbabwe in the plaintiff's account in 2007. That money having been returned to Meikles in 2010, it is claimed that that money accrued interest for the 3 years (from 2007 to 2010) it was banked at the Reserve Bank of Zimbabwe at the rate of 8 % per annum. The interest and the rate of interest are both heavily contested by the plaintiff. Clearly the defendant's claim is not liquidated and it will need to be proven. The claim cannot be raised as defence of set off, but as a counter claim. However, if the defendant had a valid defence of set off there would not have been any need for it to obtain the court's leave to raise that defence against the plaintiff's claim.

In view of the foregoing it is ordered that

- 1) The plaintiff's claim is struck off the roll for failure to establish *locus standi* to bring this action.

- 2) The defendant's counter claim is struck off the roll for failure to establish *locus standi* to bring it.
- 3) Each party is to bear its own costs.

Sawyer & Mkushi, plaintiff's legal practitioners
Scanlen & Holderness, defendant's legal practitioners