

AL SHAMS GLOBAL BVI LIMITED
versus
JOHN CHIKURA N.O.
and
DEPOSIT PROTECTION CORPORATION

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 19 May & 15 June 2016

Opposed Application

L. Uriri and *Mr T Mpofu*, for the applicant
S. Moyo, for the respondents

TAGU J: The applicant is a company registered in the British Virgin Islands whose principle place of business is Shed No. B1. AI Khabaissi, Dubai U.A.E. The first respondent is the Chief Executive Officer of the second respondent. The second respondent is the Deposit Protection Corporation, a body corporate created in terms of the Deposit Protection Corporation Act [*Chapter 24:29*], with the capacity to sue or be sued and being appointed as liquidator of Interfin Bank Limited.

The applicant brought this application for a declaratory seeking an order from this honourable court confirming the enforceability of certain Agreements concluded between the applicant and Interfin Bank Limited (before the later was placed into curatorship in April 2012) and complied with by the Curator for the period covering June 2012 to December 2014 and is now under liquidation. The relief sought is couched in the following terms-

“IT IS HEREBY ORDERED THAT:

1. The Assignment and Security Trust Deed concluded between Applicant and Interfin Bank Limited concluded in April 2012 be and are hereby declared binding and enforceable on First and Second Respondents;
2. First and Second Respondent be and are hereby ordered to adhere to the terms of the Security Assignment agreement and Security Trust Deed between Applicant and Interfin Bank dated April 2015;
3. The Applicant’s Legal Practitioners be and are hereby authorised to serve this Order on the Respondents.
4. First and Second Respondents shall pay Applicant’s Costs of this suit on a legal practitioner and client scale.”

What necessitated this application is the fact that between the periods of 2011 to 2012 the applicant purchased certain Bankers Acceptances (BA'S) from Interfin Bank Limited (now in liquidation) on a buy back basis. As security for the due payment upon maturity of the BA'S, Interfin Bank Limited provided security to applicant by way of cession of various agreements with the drawers and or issuers of the BA'S and cession of the security effected by the latter. In April 2012 the applicant and Interfin Bank Limited then concluded a Security Assignment and Security Trust Deed Agreements. The salient terms of the Assignment Agreement were that:

- a) Interfin Bank Limited ceded and assigned all rights and security it held in respect of certain contracts and the receivables therefrom to the applicant;
- b) The security and contracts assigned to applicant would be reassigned to Interfin Bank Limited upon repayment of all amounts due to the applicant;
- c) Interfin Bank Limited would provide applicant with any information or documents in relation to the assigned contracts or in relation to the security held in respect thereof;
- d) Interfin Bank Limited undertook to promptly commence legal proceedings against any issuer of the Bankers Acceptances or assigned contracts who defaulted in respect of either of; and
- e) Interfin Bank Limited would at the request of the applicant provide all reasonable administrative and operational support in connection with the enforcement of any judgment or award given against a counter party of an assigned contract.

Further, in terms of the Security Trust Deed signed in April 2012, Interfin Bank Limited confirmed that all its rights to and in the security furnished to it by the drawers and or issuers of the Bankers Acceptances were held in trust and for the benefit of the applicant.

As fate would have it, on or about 11 June 2011 Interfin Bank Limited was placed under curatorship by the Reserve Bank of Zimbabwe (RBZ) and Mr Peter Bailey was duly appointed curator of the troubled bank. The Agreements were then brought to the attention of the Curator who sometime in September 2012 confirmed that he was indeed bound by the terms of the Agreements and undertook to abide by the same since they were valid agreements. Mr Peter Bailey further confirmed that Interfin Bank Limited (now in curatorship) would continue to collect amounts in respect of the assigned security on account of applicant and or ceded accounts without any deductions in accordance with the terms and conditions of the Agreements. The Curator also provided applicant with regular updates on the progress and collecting outstanding amounts from debtors. The last update and account of

funds collected on behalf of the applicant totalled to US\$ 5 962 194.74 of which US \$ 5 472 304.74 was paid by the Curator to the applicant.

Trouble only started when Interfin Bank Limited was placed in final liquidation sometime in February 2015. It was then that the second respondent was appointed as the liquidator in accordance with the provisions of the Banking Act [*Chapter 24:20*]. The new liquidator was now not cooperating with the applicant. On 6 March 2015 a meeting was convened at the Reserve Bank of Zimbabwe involving representatives of the Reserve Bank of Zimbabwe, the applicant, Curator and the second respondent wherein the applicant was seeking whether the liquidator would confirm or not the validity of the Agreements. The second respondent indicated at that meeting that it would consider the Agreements and revert back to the applicant. Four months down the line no feedback came from the second respondent despite numerous reminders.

The second respondent's silence on the issue crippled the applicant's legal practitioners who were now unable to proceed with legal proceedings (already commenced upon the Curator's instructions) before this honourable court because the rules of this honourable court require confirmation from the second respondent that they can proceed to act on behalf of Interfin Bank Limited.

The applicant now wants this court to intervene and make a declaration in the matter as per the draft order.

The respondents took several points in the opposing affidavit styled preliminary objections and filed a counter claim. The preliminary objections can be summarised as follows-

- 1) That there are material disputes of facts which cannot be resolved on the papers;
- 2) That there was no valid indebtedness between the applicant and Interfin Bank Limited (in liquidation) due to lack of prior exchange control approval; See *Macape (Pty) Ltd v Executrix Estate Forrester* 1991 (1) ZLR 315 (S) at 320.
- 3) That applicant unlawfully transacted without a registered Branch Office of a foreign company;
- 4) Impeachable transactions under the Insolvency laws; See *M&C Holdings (Pvt) Ltd v Guard Alert (Pvt) Ltd* 1993 (2) ZLR 299 (H); and
- 5) Proceeding against a company in liquidation without the prior approval of this Honourable Court. See *Schierhout v Minister of Justice* 1926 AD 99 at 109, *ZFC Limited v KM Financial Solutions (Pvt) Ltd & Another* HH47-15.

The respondents' draft order in the counter claim which is based mainly on the preliminary objections is couched in the following terms-

“**WHEREUPON** after reading papers filed on record and hearing Mr S Moyo for the Applicant, it is ordered that:

1. The Security Assignment Agreement and the Security Trust Deed entered into between the Respondent and Interfin Bank Limited (in liquidation) in 2012 be and hereby set aside.
2. The Respondent be and is hereby ordered to refund any and all payments received by it in terms of such agreements.
3. The Respondent be and is hereby ordered to pay the costs of this application.”

The respondents, who are the applicants in the main matter, also took some point *in limine* against the counter claim. They also raised the same point that there are disputes of facts in the counter claim which cannot be resolved on papers.

At the hearing of the matter all the counsels agreed that since there are two matters before the court, that is, the main matter and the counter application, and that in both matters preliminary points were taken, it was prudent that a holistic approach be adopted so that parties argue on the matter as a whole without firstly dealing with preliminary points separately. In my view the approach adopted by the parties is commendable and that is the approach that this court adopted in this case.

The main application before the court seeks a declaration that the Assignments and Deeds concluded by the applicant and Interfin Bank Limited (now in liquidation) in 2012 are binding as between the parties and the consequential relief is that the respondents be ordered to adhere to Agreements in question. On the other hand the respondents in the counter claim are seeking to have the said agreements set aside and other consequential reliefs. The court will endeavour to deal first with each point raised above as preliminary issues separately before dealing with the main and counter application respectively.

1. MATERIAL DISPUTE OF FACTS

Mr *Uriri* submitted that at no time did the respondents raise any issue of disputes. He said the applicant's representatives had engaged the respondents in respect of the Agreements at a meeting held at the Reserve Bank of Zimbabwe and the respondents did not give a response but simply said that they would respond. But four months down the line none of them came up with any explanation despite several reminders and that the Agreements had not been placed in issue. He referred to letters dated the 22nd May 2015 and the email dated 23 June 2015 respectively. Further, he said the Curator had accepted the Agreements in terms of s 55 (1) (b) of the Banking Act [*Chapter 24:20*]. According to Mr *Uriri* up to the time of

the lodging of this application no response came from the respondents hence it cannot be said there are disputes known to the applicant that cannot be resolved on papers.

Mr *Moyo* in his submissions told the court that a dispute of fact renders an application for a declaratory order fatally defective. He said it is not competent to seek a declaratory order where there are factual disputes. To the contrary, and in reference to his counter claim he argued that a dispute of fact does not defeat an application for recovery of the amount made in terms of s 45 of the Insolvency Act [*Chapter 6:04*].

In casu, it is not disputed that from the time the respondents took over as liquidators of Interfin Bank Limited from the Curator of the same Bank, despite meetings and numerous written reminders the respondents did not communicate their position to the applicant vis-à-vis the Agreements. Up to this day the position of the respondents *vis-a-vis* the Agreements were hidden to the applicant until they spoke through the opposing affidavit. It cannot therefore be said with any stretch of imagination that there were disputes known to the applicant prior to the filing of this application. In the case of *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA) at 375 the court held that:

“A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed....When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied.” (underlining is mine).

In the present case the facts averred as constituting the dispute were not known and have not been brought to the attention of the applicant before the filing of the application. If ever there was or is any dispute of fact in existence, it only existed in the mind of the respondents who did not see it proper to bring them to the attention of the applicant despite numerous reminders. The applicant relied on the position taken by the Curator and properly assumed that the Agreements were valid. All that the applicant wanted was the approval of the Liquidator. In my view I find the point raised by the respondents to be baseless and I dismiss it.

2. LACK OF EXCHANGE CONTROL APPROVAL

The argument by the respondents was that there was no exchange control approval granted to Interfin Bank Limited (in liquidation) to enable it to incur indebtedness to a foreign resident. Hence any alleged indebtedness by Interfin Bank Limited (in liquidation) to

applicant was illegal, null, void and of no force and effect. The applicant who is a foreigner disputed that fact. The applicant submitted that assuming there was such a need, the obligation to secure the approval fell squarely on the Zimbabwean Resident. In the present case the applicant argued that Interfin Bank Limited and the respondents cannot rely on its own default. In support of this contention the applicant relied on the case of *Hattingh & Ors v Van Kleek* 1997 (2) ZLR 240.

It was the applicant's contention that at the time the Agreements were concluded there was no need for such exchange control approval because the nature of the transactions were ones which the Reserve Bank of Zimbabwe had previously allowed and no such approval was required. To support its contention the applicant referred the court to exhibit "JS9" a letter by the Senior Division Chief Exchange Controller dated 3 September 2013 addressed to Metbank by the Reserve Bank of Zimbabwe (RBZ) from which the RBZ confirmed amongst other things that-

- "a) the local money market is open to foreign investors as long as the investments were conducted through normal banking channels with documentary evidence of inward transfer of funds. This includes the Bankers Acceptances (BAs) that Al Shams Global is interested in".
- b) Foreign Entities like the applicant could purchase BAs and
- c) In line with ECD1 of July 2009, disinvestment proceeds are free remittable offshore to Investors in foreign currency.
- c) A letter written by the Reserve Bank of Zimbabwe to Renaissance Financial Holdings wherein loans which were within the USD5M threshold were authorised without referral to Exchange Control."

Mr *Uriri* further submitted that in the present case there was no remittance of foreign currency outside Zimbabwe as evidenced by an email dated 21 September 2012 written by the Curator Mr Peter L Bailey to a Mr Mataruka wherein he said-

".....Because Al Shams Global's legal practitioners were writing to me on the same subject I thought it proper to respond to them. Not only have I provided them with a full accounting of funds collected where the debts have been ceded to Al Shams, but I have also arranged for the funds concerned to be remitted to Dube, Manikai and Hwacha's account and they have confirmed safe receipt telephonically."

Finally Mr *Uriri* cemented his argument by referring to a letter dated 7 March 2012 to the Directors of Savanna Tobacco (Private) Limited which bore the details of the BAs held by Al Shams Global BVI Ltd and the bank details to which payments were to be directed as follows:

"Bank Ecobank
Branch Borrowdale
A/C No 00365039010201
Beneficiary AL Shams Global"

In view of the forgoing I am satisfied that exchange control was not required for the purchase of BAs and for Interfin Bank Limited (in liquidation) to have honoured and fulfilled them. The argument by Mr *Moyo* that there was no valid indebtedness between the applicant and Interfin Bank Limited (in liquidation), and that any alleged indebtedness by Interfin Bank Limited (in liquidation) to the applicant was illegal, null, void and of no force and effect is misplaced. The respondents failed to appreciate that the Reserve Bank of Zimbabwe had by that time opened the money market to foreign investors and no exchange approval was required. The second point is therefore dismissed.

3. TRANSACTING WITHOUT A BRANCH OFFICE

The applicant's director is Jayesh Shah who is resident in Zimbabwe. The company in which he is a director is registered in the British Virgin Islands whose principal place of business is Shed No. B1, AL Khabaissi, Dubai, U.A.E. He has been carrying out various transactions, principally lending transactions in Zimbabwe on behalf of the applicant. The applicant loaned and advanced money to Kingstons Holdings (Pvt) Ltd, Interfin Bank Limited (in liquidation), Savannah Tobacco (Pvt) Ltd, Renaissance Merchant Bank Limited (liquidated) and Trust Bank Limited (in liquidation). The respondents claimed that the applicant does not have a registered branch of a foreign company in Zimbabwe. They claimed that the transactions done by the company in Zimbabwe by the applicant were illegal and were prohibited in terms of section 330 of the Companies Act [Chapter 24.03] and are therefore void.

The applicant disputed the fact that section 330 of the Companies Act applies in this case. For avoidance of doubt section 330 of the Companies Act provides that-

“330 Requirements as to foreign companies

- (1) Subject to subsection (14) every foreign company which intends to establish a place of business in Zimbabwe shall submit to the Minister –
 - (a).....
 - (b).....
 - (c).....
- (2).....
- (3) No foreign company establish a place of business within Zimbabwe unless it is registered and for such purpose shall lodge with the Registrar-
.....”

Under (a) - (c) of sub(s) 330 (1) of the Companies Act are listed requirements that are to be lodged with the Minister by a foreign Company that intends to establish a place of business in Zimbabwe. Further, from sub(s) (3) to sub(s) (8) of the same Act are listed

additional requirements that the foreign company that wants to establish a place of business in Zimbabwe has to submit to the Registrar.

In my view the correct interpretation to be placed on section 330 of the Companies Act that appears to have eluded the respondents' legal practitioner is that the foreign company has to exhibit an intention to establish a place of business in Zimbabwe. Nowhere is it stated in the Companies Act that every investor in Zimbabwe have to have registered a local office in Zimbabwe. These BAs were a money market transactions and the applicant was not required to first have a local office before buying the BAs on the open market. In any case the respondents conceded that Jayesh Shah is a resident of Zimbabwe. Further, reference to transaction than Interfin Bank Limited (in liquidation) was irrelevant to the merits of this application because the respondents themselves are not privy to those transactions. For the foregoing the point that the foreign company needed to have a registered office in Zimbabwe before buying BAs on the open money market lacks merit and it is hereby dismissed.

4. IMPEACHABLE TRANSACTIONS UNDER INSOLVENCY LAWS

Section 43 (2) of the Insolvency Act [*Chapter 6:04*] provides that-

“43 Undue preferences

(1) In subsection (2)-

(a).....

(b)....

(2) Every disposition of his property made by a debtor at a time when his liabilities exceeded his assets with the intention of preferring one creditor above another may be set aside by a court if the estate of the debtor is thereafter sequestrated.”

In casu the respondents are alleging that the Agreements were entered into in 2012 and at the beginning of 2012 Interfin Bank Limited (in liquidation) was in a precarious financial condition. The respondent relied on an audit report which they claimed was done by Pricewaterhouse Coopers who stated among other things that the Bank incurred a loss of US\$58 380 220 for the year ended 31 December 2011. They argued that the applicant and the Chief Executive Officer of Interfin Bank Limited (in liquidation) were aware of this fact. They referred to other instances that showed that the applicant's financial condition was not healthy. It was their contention that the transaction was aimed at preferring the applicant to other creditors.

The applicant denied the allegations on the basis that there was no debtor-creditor relationship between the applicant and the bank and averred that the nature of transaction did not amount to a disposition. What the respondents are alleging are mere bald and unsubstantiated allegations that the bank was insolvent. For example the applicant argued that

the respondents did not produce the alleged audit reports. In any case they argued that what transpired was purely a money market transaction and Al Shams did not deposit money into Interfin Bank but into the beneficiaries. They referred to exhibits on pp 15 to 17 as well as a statement of account on p 42 of the record where Interfin Bank was merely an agent through which various moneys were conveyed from clients to applicant. Finally the applicant argued that the relief being sought here is not against Interfin Bank but the respondents.

Having examined the documents referred to by the applicant it is indeed correct that Interfin Bank was merely a vehicle through which the various debts were channelled to the applicant otherwise there was no relationship of debtor and creditor between the applicant and the Bank. So whatever transaction was done could not be interpreted as a disposition by a debtor in favour of a particular creditor at the expense of other creditors. If it is true that the financial position of the bank was in a precarious position then, unfortunately the respondents failed to avail the audit report in question. Theirs is merely a bald assertion. Be that as it may what the respondents are failing to appreciate is that this application is not brought against the bank but the respondents as liquidators who stepped into the shoes of the Curator and cannot seek to set aside the decision of the curator through these proceedings. This brings me to the last point raised by the respondents which I will deal with in detail below.

5. PROCEEDING AGAINST A COMPANY IN LIQUIDATION WITHOUT THE PRIOR APPROVAL OF THIS HONOURABLE COURT.

This issue should not detain this court long. It is indeed correct position of the law as stated by the respondents. In terms of s 213 of the Companies Act [*Chapter 24:03*] proceeding with or commencement of an action against a company in liquidation without the leave of the Honourable court is prohibited. If one looks at the parties cited in this application it is crystal clear that the parties who are sued and who are appearing before this court are the applicant, Al Shams Global BVI Limited against Mr John Chikura, in his capacity as the Chief Executive Officer of the second respondent who is the Deposit Protection Corporation, the liquidators of Interfin Bank Limited (in liquidation). Nowhere is Interfin Bank cited as a party.

I agree with the submissions by the counsels for the applicant that this cause is not against Interfin Bank. It is against Interfin Bank's liquidator. The respondent in this case is that liquidator. The premise of this cause is that the liquidator is an administrative authority under the Administrative Justice Act [*Chapter 10:28*]. Under s 3 of that Act the liquidator is enjoined to act reasonably, promptly and fairly. See s 68 of the Constitution of Zimbabwe,

2013. In short the cause *in casu* seeks to coerce the respondent in his official and personal capacity not Interfin Bank to respond to the queries that the applicant made and went for months without being addressed. In my view, where a Curator or Liquidator fails to act reasonable and or fairly in the conduct of his or her duties as such, the Curator or Liquidator can be sued without the leave of the court. It is only the company or the individual who is placed under curatorship or liquidation who can only be sued with the leave of the court. I am not aware of any provision in the Companies Act or any other Act that says a Curator or Liquidator cannot be sued without the leave of the court where the cause has nothing to with the company under Curatorship or liquidation. It is only were the company under liquidation is being asked to perform certain functions that the leave of the court is required. But where it is the liquidator himself or herself is the one who is being asked to do or not to do certain things, then the liquidator can be sued without citing the company under liquidation. The contention by the respondents is therefore baseless and it is dismissed.

Having disposed of the preliminary points I now turn to deal with the main application and the counter application.

THE COUNTER CLAIM

I decided to deal with the less problematic counter claim. I must hasten to state on the onset that after reading the points taken in the counter claim they deal mainly with the points that I have just disposed of. I will therefore not labour much on them save to say that the counter claim has no merit and it is dismissed with costs.

ON THE MERITS

The gist of this application is that the court is being asked to declare that the BAs are valid and binding on the respondents. As I said earlier the cause *in casu* seeks to coerce the respondents to respond to the queries that the applicant made and went for months without being addressed.

In my view, having considered the circumstances of this case the BAs are valid. Their validity is derived from s 55 (2) (e) of the Banking Act. I say so without hesitation because although the respondents' contention is that the curator acted ultra vires powers, as opposed to ultra vires capacity, the following is common cause. It is common cause that the curator had the capacity to act as he did by reason of s 55 (2) (e) of the Banking Act. It is undisputed that the curator exercised administrative power within the capacity created by s 55 (2) (e) of the Banking Act when he accepted the BAs. Further, it is not in dispute that the curator

reported the exercise of his power to the Reserve Bank of Zimbabwe (RBZ) and the RBZ did not object to such exercise of power and therefore tacitly approved the conduct of the curator.

The respondents all along being aware of the above position did not take any action to impugn the curator's right to proceed as he did under that provision. If the respondents were unhappy with the decision of the curator they had various channels to act not only through the Insolvency Act, but also through the Companies Act, Administrative Court and the Banking Act respectively. Respondents were aware of the request by the applicant as far back as the meeting of 6 March 2015 held at the Reserve Bank of Zimbabwe on the issue of the Agreements but did nothing to date. It follows therefore that in view of the concession that the curator acted *intra vires* capacity, the powers exercised by him cannot be impugned in the circumstances *in casu*. The curator's conduct puts paid to the question of the legal and binding nature of the agreements which were in the watchful eye of the RBZ. They are in my view lawful and are binding on the respondents. A declaration to that effect must necessarily follow.

In the result I make the following orders

It is hereby ordered that

1. The Assignment and Security Trust Deed concluded between the applicant and Interfin Bank concluded in April 2012 be and are hereby declared binding and enforceable on 1st and 2nd respondents;
2. The 1st and 2nd respondent be and are hereby ordered to adhere to the terms of the Security Assignment agreement and Security Deed between the applicant and Interfin Bank dated April 2015;
3. The counter claim be and is hereby dismissed;
4. The applicant's legal practitioners be and are hereby authorized to serve this Order on the respondents;
5. 1st and 2nd respondents shall pay the applicant's costs of this suit on a legal practitioner and client scale.

Atherstone & Cook, applicant's legal practitioners
Scanlen & Holderness, respondents' legal practitioners