

KS TRUST
versus
AFRASIA BANK ZIMBABWE
and
MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 14 and 30 September, 2016

Opposed matter

S Ushewokunze, for the applicant
G Madzoka, for the respondents

MANGOTA J: On 18 February 2015, K.S. Trust [“the trust”] concluded an agreement of sale with Afrasia Bank Zimbabwe Limited [“the bank”]. The trust purchased from the bank a certain piece of land [“the property”] situated in the district of Salisbury. The property, Lot 2 of Lot 19 Block C of Avondale, is 1982 square metres in extent. It is held under deed of transfer 657/2015. Its selling price was \$176 000.

In line with the parties’ contract, the trust paid a deposit of \$35 905.81. It, on 27 February 2015, deposited the balance of \$140 000 into its conveyancers’ trust account.

In an effort to move the process which related to the implementation of the contract forward, the bank’s general manager one Hashmon Matemera did, on 24 February 2015, sign a power of attorney to pass transfer and the seller’s declaration. On 23 March, 2015 the conveyancers secured the rates assessment from the City of Harare. On 26 March, 2015 the Zimbabwe Revenue Authority assessed tax and furnished the conveyancers with the same.

Whilst the abovementioned processes were in progress, the conveyancers received information to the effect that the bank was, on 18 March 2015, placed under provisional liquidation. These addressed a letter to the liquidator. They did so on 7 April, 2015. They, in the letter, sought the liquidator’s opinion on whether or not they could proceed to pay tax in anticipation of the transfer. The liquidator advised them to wait a bit as he wanted to verify facts before they paid the tax. In June 2015, he advised them to wait for the first creditors’ meeting. On 23 October, 2015 he emailed and advised the conveyancers that their client’s

matter was still under review. They were eventually referred to the liquidator's agent one Alex Dera whom they said exchanged several correspondences with them on the matter. It was only on 24 November, 2015 that Mr Dera wrote advising the conveyancers that the liquidator was not sanctioning the sale. He gave reasons which, according to him, persuaded the liquidator to take the position which he took.

The concerns of the trust and its conveyancers were that:

- (i) the liquidator's agent conveyed to them the impression that the sale was being considered and a response would be furnished to them;
- (ii) the liquidator's agent, Mr Dera, sold the property to another person for the sum of \$140 000 whilst he was aware of the contract which the trust and the bank had concluded;
- (iii) the liquidator informed them that he did not accept the agreement of sale as, in his opinion, accepting it was tantamount to preferring one creditor (the trust) ahead of other creditors in contravention of the Insolvency Act;
- (iv) the liquidator misled them into believing that their case was receiving the liquidator's active attention when the latter person was, in fact, selling the property to another person without first cancelling the contract which the trust and the bank concluded on 18 February, 2015;
- (v) the bank was involved in a double sale and the second sale was for a price which was lower than that which the trust offered to pay for the property.

They, therefore, moved the court to determine who, between the trust and the new purchaser, should get transfer of the property.

APPLICATION AND COUNTER-APPLICATION

Following the bank's placement under provisional liquidation, the trust filed the present application. It applied for leave to sue the bank. It premised its application on s 213 (a) of the Companies Act [*Chapter 24:03*]. It narrated the matters which are stated in the background portion of this judgment as its reasons for wanting to sue the bank. It moved the court to grant leave to it to sue the bank.

The liquidator who stood in the shoes of the bank opposed the application. He raised the following *in limine* matters:

- (i) exhausting domestic remedies;
- (ii) material non-joinder of interested parties;
- (iii) delay in instituting proceedings - and

(iv) incompetent relief

He proceeded to deal with the substance of the application. He moved the court to dismiss the application for leave to sue the bank.

The liquidator did not stop at opposing the application for leave to sue. He counter-applied for an order setting aside the agreement of sale of 18 February, 2015. He moved the court to return to him the title deed which related to the property. He premised his counter-application on s 45 of the Insolvency Act [*Chapter 6:04*]. He incorporated into his counter-application each and every fact and submission which appeared in his opposing affidavit.

The liquidator's counter-application caught the trust unawares. It placed the trust in an invidious position. It left the trust in a situation which made it difficult, if not impossible, to countenance. The counter-application, the trust correctly stated, went to the core of the trust's application for leave to sue. It, in other words, introduced into the application for leave to sue the ultimate relief which the trust wanted to seek from the court after the grant of its application for leave to sue. The trust could not and did not, therefore, know what procedure to adopt under the stated circumstances.

In an effort to resolve the matter which has been created, the trust's legal practitioners addressed a letter to the liquidator's legal practitioners. The letter is dated 22 February, 2016. It reads, in part, as follows:

"Dear Sirs

RE: K.S. TRUST V AFRICA BANKING LIMITED HC 801/16

We refer to this matter in which you have filed a counter-application.

As you are aware, our application to the court is to get permission to sue Afrasia Bank Zimbabwe which is in liquidation and the intended suit relates to Lot 2 of Lot 19 Block C Avondale, measuring 1982 square metres [hereinafter called "the property"]

We notice that in your counter-application you delve into the substantive issue/ matter for which we intend to sue and it therefore means your client agrees that the High Court should entertain the property issue between the parties, in which event there would be no more need for us to continue fighting over the issue of leave to sue.

We accordingly propose that we agree that:

1. you consent to our application for leave to sue;
2. we do our opposing papers (and possibly a counter-application) dealing with the validity/cancellation of the agreement and whether or not the liquidator should be ordered to transfer the property to our client.

We believe this is a more expedient and mutually convenient manner of having this matter finalised.

.....
.....

Our view is that only the court can finalise this property wrangle. Further, by virtue of your counter-application in the matter, the court is already unavoidably seized with the substantive issue of the property.

We kindly request that you come back to us by close of business today so that we know which route exactly we are taking.”[emphasis added]

The liquidator’s legal practitioners responded on the same date that the trust’s legal practitioners wrote to them. They acknowledged receipt of the trust’s letter. Their short response was that they would take instructions from the liquidator and revert to the trust in due course.

The trust heard nothing from the liquidator’s legal practitioners from 22 to 26 February, 2016. The trust filed its opposing papers to the counter-application on 26 February, 2016. The next thing which came the way of the trust was the liquidator’s Heads of Argument. These were filed with the court on 9 March, 2016.

At the hearing of the application and the counter-application, the trust successfully applied for upliftment of the bar and condonation for late filing of its Heads. The parties remained *ad idem* on the point that both applications had to be heard and determined together. The consensus of the parties in the mentioned regard persuaded the court to issue the following directive (s):

- (i) both applications would be heard and determined at the same time;
- (ii) the trust should file its counter-application on the issue which related to the property on or before 3 August, 2016;
- (iii) the liquidator would file his opposing affidavit to the trust’s counter-application on or before 17 August, 2016;
- (iv) the trust would file its answering affidavit, if any, on or before 28 August, 2016;
- (v) the trust would file supplementary heads, if any, on or before 31 August, 2016;
- (vi) the liquidator would file his supplementary heads, if any, on or before 7 September 2016.

When hearing of the matter resumed on 14 September 2016, the liquidator conceded that the application for leave to sue had been overtaken by events. He urged the court to focus

its attention on the counter-application. His concession was, in the court's view, properly made. The trust's application for leave to sue was, therefore, granted as prayed.

COUNTER-APPLICATION

The liquidator incorporated the contents of his opposing affidavit to the trust's application for leave to sue in his counter-application. He filed his counter-application on 11 February 2016. Amongst what he raised in that affidavit were four preliminary matters. The court will deal with these, each in turn, after which it would proceed to consider the substantive aspects of the counter –application.

The first *in limine* matter-exhausting domestic remedies- was more relevant to the application for leave to sue than it was to the counter- application. The liquidator could not, as a matter of logic, urge the court to decline jurisdiction when he, by the counter-application, invited the court and the trust to deal with the propriety or otherwise of the agreement of sale of 18 February, 2015. The Master of the High Court did not have the jurisdiction to deal with such matters as related to whether or not the parties' agreement of sale was void or voidable. That aspect of the case reposed in the court. In any event, s 171 (1) (a) of the Constitution of Zimbabwe confers jurisdiction upon the court to hear and determine the counter - application. The section reads:

“171 JURISDICTION OF HIGH COURT

(1) The High Court-

- (a) has original jurisdiction over all civil and criminal matters throughout Zimbabwe [emphasis added.
- (b)
- (c); and
- (d)

The above cited section as read with s 69 (3) of the country's Constitution renders the liquidator's first preliminary issue devoid of merit.

The section reads:

“69. RIGHT TO A FAIR HEARING

- (1)
- (2)
- (3) Every person has the right of access to the courts..... for the resolution of any dispute.”

The trust had and has a dispute with the liquidator. It, as a matter of right, chose to have that dispute determined by the court. The liquidator could not, under the circumstances, hide behind the finger and insist that the trust's case be dismissed on the flimsy reason that it

did not exhaust internal remedies. Those were available to the trust in the application for leave to sue. They were no longer available to it in the counter-application. The liquidator's first preliminary matter could not and did not, therefore, hold.

The liquidator couched his second preliminary matter in the phrase *material non-joinder of interested parties*. He cited the following as such interested persons whom he said were not joined to the counter-application:

- (a) the liquidator and/or the liquidator's agent;
- (b) the third party who purchased the property which is the subject of the dispute in the current counter-application-and
- (c) the bank's creditors.

The trust's response to the second *in limine* matter was simple. It stated that the application was served on the liquidator and the latter's agent. It submitted that the fact that the liquidator's agent stated in the founding affidavit that he was appointed as such, was authorised to depose to the affidavit on behalf of the bank and was familiar with the facts of the counter-application showed that the bank, the liquidator and the liquidator's agent were all seized with the counter-application. They, it argued, supported each other's position on the matter which related to the counter-application. It insisted that it could not cite the new purchaser of the property as the liquidator did not furnish it with his/her names or the agreement of sale which the liquidator concluded with him/her.

The assertions of the trust were *in sync* with the observations which the court made on this aspect of the case. The court remained alive to the fact that the liquidator's agent effectively represented the bank and the liquidator. There was, therefore, no need on the part of the trust to have cited the liquidator or the latter's agent as parties to the counter-application. There was also no need for the trust to have cited the bank's creditors. The liquidator effectively represented these. The counter-application was, in fact, a result of the liquidator's apparent effort to protect creditors of the bank. Citing these would have been superfluous on the part of the trust.

The issue of the new purchaser of the property was totally unclear to all and sundry. The liquidator made every effort to withhold his names and his physical address. He produced nothing by means of which the purchaser could have been identified and served with process. The secrecy with which the liquidator treated the matter which related to the new purchaser left a number of questions in the mind of any reasonable person. One was left to wonder if such a purchaser did, in fact, exist.

The trust referred the court to r 87 of the High Court Rules, 1971. The rule states in clear and categorical terms that misjoinder or non-joinder of a party is not fatal to a cause or matter which is before a court for determination. It was, accordingly, on the basis of the foregoing that the court's considered view was that the liquidator's second preliminary matter was misplaced. It did not hold.

The liquidator wrote on 24 November, 2015 advising the trust that he would not be enforcing the agreement of sale of 18 February, 2015. The trust filed the present application with the court on 28 January, 2016. It could not, by any stretch of imagination, be suggested that the trust delayed in instituting proceedings which related to the trust's assertion of its rights. A delay of two months could not be said to have been inordinate let alone seriously inordinate. The Prescription Act [*Chapter 8:11*] which the trust cited in support of its argument states that the period of prescription of a debt is three (3) years. The prescribed period cannot in any way compare with the delay of two months which the liquidator complained of. It is, once again, evident that the liquidator's third *in limine* matter was/is without merit.

The liquidator's last preliminary matter did have a bearing on the substance of the counter-application. For the avoidance of doubt, the court repeated that matter along the under mentioned lines:

- “(a) the relief which the trust moved the court to grant to it was incompetent,
- (b) Section (2) of the Insolvency Act states that transfer of a property amounts to a disposition;
- (c) in terms of section 213 (a) of the Companies Act dispositions of property owned by a company in liquidation made after the commencement of winding up are void – and
- (d) the trust's request to have the property transferred to it could not be done at law (emphasis added)

The Liquidator premised his abovementioned argument on s 213 of the Company Act [*Chapter 24:03*]. The sections heading reads: **Action stayed and avoidance of certain attachments, executions and dispositions and alteration of status**. The body of the section reads as follows:

“In a winding up by the court –

- (a)
- (b)

- (c) Every disposition of the property,, of the company, made after the commencement of the winding up shall, unless the court otherwise orders, be void". (emphasis added).

Two points stand out clearly from a reading of the above cited section. The first is that the section confines itself to a winding up by the court. The second is that, even where the winding up is at the instance of the court, disposition of the property of a company which is made after the commencement of the winding up may not be void if, in the opinion of the court, circumstances support that position.

The winding up which is under consideration was not in terms of s 213 of the Companies Act. Reference is made in this regard to minutes of the meeting of the bank's board of directors. The meeting took place on 24 February, 2015. Some portions of the minutes read:

“4.1 Meeting with Dr Mahtani and the RBZ

The Board chairman, CLW, HN and LM held meetings with Dr Mahtani as well as the RBZ Governor to map the way forward in the face of recommendations by the major shareholder for ABZL to handover the banking licence.

The RBZ was of the counsel that handing over of the banking licence would be the best solution in the current circumstances where the major shareholder has abandoned its investment. The RBZ was of the view that the Afrasia Zimbabwe directors may not have a basis for holding on to the licence. Once the decision to surrender the licence has been made, the RBZ would immediately take control of the Bank and appoint a provisional liquidator.

.....

.....

At the meeting held at the RBZ, the Governor, the Deputy Governor, the Registrar of Banks expressed appreciation to the directors present,....., for the remaining directors outside the shareholder appointees' integrity, diligence and fiduciary responsibility to strive to keep the bank afloat until the major shareholder decided to hand over the licence. They further assured the directors that by handing over the licence, all the directors would not be black listed as a result of their tenure and would not be liable for any claims.

....

4.2 Resolution to surrender the banking licence

Following the decision by Afrasia Bank Limited (Mauritius) (ABL), the single major shareholder for Afrasia Zimbabwe Holding Limited to surrender the Afrasia Bank Zimbabwe Limited (ABZL) banking licence, it was resolved that the licence be surrendered to the Reserve Bank of Zimbabwe as of close of business on 24 February, 2015." (emphasis added).

In the view which the court holds of the matter, the liquidator's submission on that aspect of the counter-application could not hold. The section which he relied upon was inapplicable to the present case. The winding up was not at the instance of the court. It was a

members' voluntary winding up. This was at the instance of the bank's major shareholder. He, for his own unspecified reasons, decided to, and did actually, withdraw his investment from the Zimbabwean banking sector and surrender his licence to the Reserve Bank of Zimbabwe. The court, therefore, remains of the firm view that the contract which the parties concluded on 18 February 2015 was not void. It was voidable.

It is common cause that, on 18 February 2015, the bank and the trust concluded a contract of sale between them. The bank sold to the trust the property which is the subject of this counter-application. It is also not in dispute that, exactly one month after the sale, the bank was placed under provisional liquidation.

The liquidator who stood in the shoes of the bank refused to honour the agreement of sale. His reasons for the refusal were that honouring the same would be tantamount to preferring the trust above other creditors of the bank. He relied on ss 42 (2) and 43 (2) of the Insolvency Act in the mentioned regard. He moved the court to set aside the agreement of sale.

The trust, on the other hand, moved the court to confirm the agreement. It placed reliance on the same sections of the Insolvency Act which the liquidator cited in support of his argument.

It is pertinent for the court to examine the two sections and others which, in its view, would assist in the resolution of the case which is before it. Section 42 (2) of the Insolvency Act [*Chapter 6:04*] ("the Act") reads, in part, as follows:

"Voidable preferences

(1)

(a)

(b)

(2) Subject to this section every disposition of his property made by a debtor within the period of six months immediately preceeding -

(a) the sequestration of his estate: or

(b) if he is dead and his estate is insolvent, his death; which has the effect of preferring one of his creditors above another may be set aside by a court if, immediately after the making of the disposition, the liabilities of the debtor exceeded the value of his assets.

(3)"

Section 43 of the Act makes reference to what are termed undue preferences. It reads, in part, as follows:

“43 undue preferences

(1)

(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.”

What is clear from the two cited sections is that the court has a discretion to confirm or to set aside the disposition. The decision which the court takes will invariably be influenced by the circumstances which the parties place before it for determination.

The liquidator’s submission *in casu* was that:

- (i) the parties concluded the sale a few days before the bank’s board of directors passed a resolution to surrender the banking licence;
- (ii) the sale was concluded with the intention of preferring the trust above other creditors;
- (iii) the sale was concluded not more than six months before the liquidation of the bank;
- (iv) when the sale was so concluded the bank’s liabilities exceeded the value of its assets – and
- (v) the sale was not concluded in the ordinary course of business.

Only one of the five matters which the liquidator advanced supported the position which he took. This was that the parties concluded the sale a month before the board of directors of the bank resolved to surrender the banking licence. The liquidator’s assertion which was to the effect that the sale was concluded not more than six months before the liquidation of the bank was superfluous. It was a repetition of the matter which he had already stated in para (i) above.

The liquidator produced no evidence in support of the contention that at the time that the parties signed the contract, the bank’s intention was to prefer the trust above other creditors. His assertion in the mentioned regard was more of an assumption than it was a fact. The comments of the Reserve Bank Governor, his Deputy and the Registrar of Banks as confirmed in the minutes of the Board of Directors’ meeting of 24 February, 2015 dispelled the liquidator’s statement which was to the effect that the bank’s liabilities exceeded the value of its assets. A reading of the comments which are contained in the foregoing portions

of this judgment showed that the opposite of what the liquidator stated was the case. The court was at a loss as to what the liquidator meant to convey when he stated that the sale was not concluded in the ordinary course of business. The fact that the bank had properties one of which it offered to sell to the trust spoke volumes of its multifaceted functions. The liquidator could not seriously challenge the fact that the bank had properties one of which it sold to the trust.

The trust stated, and correctly so that, in the absence of a balance sheet, the liquidator could not state as a fact that the liabilities of the bank exceeded the value of its assets. It challenged the manner in which the liquidator handled the issue which related to its contract with the bank.

It was the court's considered view that the attitude which the liquidator took of the sale was difficult, if not impossible, to countenance. He was made aware of the existence of the contract of sale as soon as he came onto the scene. He gave the impression of a person who was genuinely investigating the matter which the trust had presented to him. He spent more than six months before his decision was made known to the trust. He did not even have the courtesy of cancelling the contract which the bank and the trust concluded before he took over management and control of the bank. He proceeded to sell the property which he knew the trust had a vested interest in. He sold the property to some purchaser whom he did not disclose to the court or to the trust. He was very much aware that the double sale which he involved himself into would chew a substantial portion of the bank's assets in such unnecessary litigation as the present one. He did all that in the name of protecting creditors of the bank. He, if anything, worked to the total prejudice of the bank's creditors.

It certainly did not make good economic sense for the liquidator to have settled for a price which was \$35 000-00 lower than what the trust had offered for the same property. That decision worked to the disadvantage of the bank's creditors whom he said he was protecting.

A liquidator is answerable to the Master who, in turn, is answerable to the court. Both the liquidator and the master are officers of the court. They are, as such, enjoined to be always clear and transparent in the manner that they deal with cases which parties bring before them for determination. Anything which they do without transparency and/or accountability does, at the end of the day, impact negatively on the country's system of justice delivery. The current is a case where no court properly constituted would condone let alone accept what the liquidator did. He failed dismally to handle the issue which related to the property which is the subject of this counter-application in an impartial manner.

The court has considered all the circumstances of the counter-application. It is satisfied that the trust proved its case on a balance of probabilities. The trust's counter-application is, accordingly, granted with costs.

Ushewokunze Law Chambers, applicant's legal practitioners
Wintertons, 1st respondent's legal practitioners