REPORTABLE (ZLR) 10

Judgment No. SC 18/11
Civil Appeal No. 106/10

RIO TINTO (AFRICA) PENSION FUND v (1) AFARAS MTAUSI GWARADZIMBA N.O. (2) AFARAS MTAUSI GWARADZIMBA

SUPREME COURT OF ZIMBABWE
MALABA DCJ, SANDURA JA & GARWE JA
HARARE, JULY 20, 2010 & SEPTEMBER 15, 2011

E W W Morris, for the appellant

H Zhou, for the first respondent

S J Chihambakwe, for the second respondent

GARWE JA: The appellant in this case, Rio Tinto (Africa) Pension Fund ("the appellant"), sought an order in the High Court compelling the respondents to deliver to itself certain shares and to pay the costs of the application. The High Court dismissed the application with costs. Against that order, the appellant has now appealed to this Court.

The background to this matter is as follows: The appellant is a self-administered Pension Fund registered in terms of the law for the benefit of employees of Rio Zim Ltd, a company registered according to the laws of Zimbabwe. In 1992 the trustees of the appellant decided to employ Sagit Stockbrokers (Pvt) Ltd ("Sagit") to manage its share portfolio. Pursuant to this decision, the appellant delivered the portfolio to Sagit whose mandate was to manage the portfolio. Such management entailed the

purchase and sale of share which when purchased, would be held in a Sagit nominee company, Trust Nominees or in the appellant's name. Following further deliberations, the appellant resolved to administer its own scrip and requested Sagit to surrender all the shares it was holding on its behalf. Sagit delivered most of the scrip but a dispute arose regarding the quantity of the shares due to appellant from Trust Nominees. After further investigations a new reconciliation of the outstanding shares was agreed between the appellant and Sagit. Sagit proposed to settle the matter by offering other shares. Sagit was, however, placed under liquidation by order of the High Court dated 15 October 2008 and the first respondent Arafas Mtausi Gwaradzimba appointed liquidator. In further correspondence between the appellant and the first respondent, the latter acknowledged that the shares were due to the former and undertook to deliver them against delivery of other shares that the appellant was holding.

In the meantime, following the liquidation of Sagit the appellant submitted its claim at the second meeting of creditors. The claim was provisionally accepted by the Master. After verification of the facts, the first respondent accepted the appellant's claim for payment at a value of $25,706,94. The first respondent arrived at that figure using the price per share from the Zimbabwe Stock Exchange.

The first respondent then prepared the first interim and distribution account which he submitted to the Master in terms of s 279 of the Companies Act, [*Cap. 24:03*] ("the Act"). Acting in terms of s 281 of the Act, the first respondent proceeded to advertise the account in the Government Gazette of 10 April 2009 as lying open for

inspection at the Master's Office. It is not in dispute that no creditor, including the appellant, filed any objection against the contents, the form or amount awarded to each of the creditors. There being no objections, the Master proceeded to confirm the account on 13 May 2009. The first respondent then gave notice of such confirmation in the Government Gazette of 22 May 2009 and further advised in the same gazette that he would start paying the proved creditors. No objections were received. The first respondent proceeded with the distribution of the assets and made payments to all proved creditors. In the case of the appellant, the first respondent paid $25,706,94 and by letter dated 2 July 2009 advised the former of such payment by electronic transfer to its Barclays Bank account. It is common cause the appellant rejected the payment and transferred the same back to the first respondent. The appellant then instituted proceedings for the delivery to itself of the shares.

In the court *a quo* the appellant argued that the first respondent had undertaken to deliver the shares and not the value thereof. The appellant further submitted that any shares that had been administered by Sagit had remained its property and did not fall to be regarded as part of the estate of Sagit in liquidation. The appellant also argued that by paying cash under an interim account the first respondent had not acted in good faith and that the appellant is not bound by the terms of any interim distribution account.

The first respondent on the other hand submitted that he had no difficulties with the suggestion that he should deliver the shares to the applicant provided the value

thereof was equivalent to the value of the appellant's claim as reflected in the distribution plan. He submitted that the appellant was aware that he did not have the actual share certificates in his possession. He further submitted that the appellant had been aware of the fact that the interim account was lying open for inspection but had not objected. At no time did he agree to deliver the shares outside the scope of the distribution plan as such agreement would supercede the confirmed account and constitute an undue preference over other creditors.

The court *a quo* was of the view that once the interim account was confirmed, this had the effect of a final judgment. The court was of the further view that whilst there may have been some merit in the argument that the shares had never become the assets of Sagit, that submission was irrelevant as long as there was no order authorizing the re-opening or setting aside of the account and that unless this happened any attempt to deal with the shares in a manner contrary to the confirmed final account would be unlawful. On that basis the court dismissed the application with costs.

In its notice of appeal, the appellant has attacked the decision of the court *a quo* on the following grounds:

1. That the court *a quo* erred in holding that the shares in question had already been dealt with in terms of a final sentence without addressing the question whether those shares were part of the estate of Sagit.
2. The court *a quo* erred in holding that it could not grant the relief sought in the absence of an order re-opening or setting aside the account. The court should

have found that the shares in question were never part of the estate and that the confirmation of the account could not affect the appellant's claim.

3. The court *a quo* misdirected itself in finding that the account that lay open for inspection was a final account. It should instead have found that the accounts were interim accounts which could be corrected without the necessity of setting aside the account.

4. The court *a quo* misdirected itself in failing to appreciate that the irrevocable undertaking to deliver the shares was made after the confirmation of the interim accounts.

5. In the circumstances, the court *a quo* should have found that the respondents were equitably estopped from denying the appellant its right to the said shares.

6. Alternatively, the court *a quo* should have found that the first respondent had compromised the claim with an offer of delivery of the shares and should have been held to such compromise.

7. In as far as the second respondent is concerned the court *a quo* should have found that it would be iniquitous to allow the second respondent to shield behind his official capacity.

From the above grounds, it seems to me that the first issue that falls for determination is whether the account in question was final, as the court held, or whether it was merely interim, as argued by the appellant.

Section 279 of the Act is the starting point. That section provides:

"**279 Liquidator to lodge with Master Accounts in winding up**

(1) Every liquidator shall, unless he receive an extension of time as hereinafter provided, frame and lay before the Master, not later than six months after his appointment, an account of his receipts and payments and a plan of distribution or, if there is a liability among creditors to contribute towards the cost in the winding up, a plan of contribution apportioning their liability. If the account is not the final account, the liquidator shall from time to time, and as the Master may direct, but at least once in every six months, unless he receives an extension of time, frame and lay before the Master a further account and plan of distribution."

Once the account has been lodged with the Master in terms of the above section, the account must lie open for inspection and the liquidator is required to give due notice thereof by advertisement in the Gazette. Section 281 of the Act provides:

"**281 Inspection of accounts**

(1) Every liquidator's account shall lie open for inspection by creditors, contributories or other persons interested for a period of not less than fourteen days in the following manner -

(a) …

(b) …

(c) …

(2) The liquidator shall give due notice thereof, by advertisement in the Gazette, and shall state in that notice the period during which and the place or places at which the account will lie open for inspection and shall post or deliver a similar notice to every creditor who has proved a claim against the company.

(3) …".

Following the advertisement referred to above, interested parties are permitted to lodge objections at any time before the confirmation of the account – in this regard see *s* 282 of the Act.

For purposes of the present appeal it is ss 283 and 284 that are particularly pertinent. Those sections provide as follows:

"**283 Confirmation of Account**

When an account has been open to inspection as hereinbefore prescribed and –

(a) no objection has been lodged; or

(b) …

(c) …

the Master shall confirm the account and his confirmation shall have the effect of a final sentence, save as against such persons as may be permitted by the court to re-open the account before any dividend has been paid thereunder.

284 Distribution of estate

(1) Immediately after the confirmation of any account the liquidator shall proceed to distribute the assets in accordance therewith or to collect from the creditors liable to contribute thereunder the amounts for which they may be liable respectively.

(2) The liquidator shall give notice of the confirmation of the account in the Gazette, stating that a dividend is in course of payment or that a contribution is in course of collection and that every creditor liable to contribute is required to pay to the liquidator the amount for which he is so liable, and the address at which the payment of the contribution is to be made, as the case may be."

The facts of this case, which are virtually common cause, show clearly that the above provisions of the Act were complied with. The first respondent lodged his account with the Master as he was required to in terms of s 279. Thereafter, the account lay open for inspection for the required period and the liquidator gave due notice thereof by advertisement in the Gazette. There were no objections lodged with the Master at any time before the confirmation of the account. In terms of s 283, because no objection had been lodged, the Master confirmed the account.

It is clear that when the Master confirmed the account, the account ceased to be an interim account. It became a final account. Nowhere in the Act is there provision for the Master to confirm an interim account. In terms of s 283, such

confirmation shall have the effect of a final sentence save as against such persons as may be permitted to re-open the account before any dividend has been paid thereunder.

The appellant was aware of the fact that the account was lying open for inspection. Neither the appellant nor the other creditors filed any objections with the Master who proceeded to confirm the same. On the facts the court *a quo* cannot be criticized for coming to the conclusion that this was a final account.

The second issue that falls for determination is whether the court *a quo* should have addressed the question whether the shares were part of the estate of Sagit and whether the confirmation did not affect the appellant's claim for delivery of those shares.

It is not in dispute that the shares in question were included in the estate of Sagit. No objection to such inclusion was lodged with the Master. What the appellant did was to file a claim as an ordinary creditor. Once the account was confirmed, the question whether the shares actually belonged to Sagit became irrelevant as those shares, or the value thereof, became the subject of distribution in terms of the confirmed account. It cannot be correct therefore that the confirmation did not have any effect on the appellant's claim for delivery of the shares. The reality is that once the account was confirmed, the shares could no be delivered to the appellant except in terms of the plan of distribution.

In any event, it is clear that the first respondent was not holding share certificates in the name of the appellant. The papers before this Court suggest that the

shares or some of them were held in the name of Trust Nominees, a subsidiary of Sagit. Had the shares been in the name of the appellant then the appellant would have been on firmer ground to claim delivery of the share certificates.

It seems to me that the appellant has only itself to blame. Believing that some of the shares that formed part of the estate of a company in liquidation were its own and aware that the account was lying open for inspection, the appellant should have immediately protected its rights by seeking a declaratur to the effect that these were its shares and that they should not form part of the estate. The appellant did not do so but behaved like an ordinary creditor. Even when the account lay open for inspection, the appellant should have filed an objection and ensured that the shares were not the subject of a plan of distribution in the estate. After all the appellant was at all times legally represented and the implications of the various steps taken by the liquidator should have been obvious. The need to object before confirmation of the account is a legal one. The objection is made to the Master who is obliged to make a decision on the objection. Such decision is even subject to review. It is clear that the purpose of an objection is to enable the Master to arrive at a correct decision before confirming the account.

In all the circumstances the court *a quo* was correct in holding, as it did, that once the account was confirmed, the claim by the appellant was not competent, unless the account was re-opened or set aside in terms of the law. The relief sought by the appellant was therefore wrong. In the circumstances there was no need, on the part of

the court *a quo*, to determine whether the shares were or were not part of the estate of Sagit.

The third issue that falls for determination is whether the court *a quo* should have found that the respondents were equitably estopped from denying the appellant its right to the shares after having undertaken to deliver the same. This submission, in my view, is without merit. As the first respondent has correctly observed in his heads of argument, the appellant's cause of action as set out in its papers was not based upon equitable estoppel but on its alleged ownership of the shares in question. The court *a quo* could not therefore have been expected to make a determination on an issue that was not before it.

In any event estoppel cannot, in general terms, found a cause of action. In *Spencer Bower and Turner Estoppel* by Representation, second edition by *Sir Alexander Kingcome Turner*, the learned author remarks at p 6:

> "The doctrine of estoppel by representation forms part of the English Law of evidence … Its sole office is either to place an obstacle in the way of a case which might otherwise succeed, or to remove an impediment out of the way of a case which might otherwise fail. It has no other function. Emphatically, it is not a cause of action in itself, nor does it create one … To use the language of naval warfare, estoppel must always be either a mine–layer or a mine–sweeper: it can never be a capital unit."

Whilst it is correct that the English and Australian legal systems have accepted the existence of equitable estoppel and that such estoppel may found a cause of action in cases of acquiescence and election, I am not aware of any decision in this

jurisdiction which has accepted such estoppel to be part of our law. The English law of equity has never been part of the law of this country.

In the alternative, the appellant has argued that the first respondent had compromised the claim by offering to deliver the shares and should therefore be held to such a compromise. It is correct that in terms of s 221 of the Act, a liquidator has power to compromise or admit any claim. This is, however, subject to leave being given by the Court or by a resolution of creditors and contributories. My understanding is that such compromise can be entered into in order to settle disputed amounts or claims. It is the kind of power that a liquidator can use before the final account is presented for confirmation. Once confirmed, a liquidator would have no power to enter into such a compromise. Clearly the powers bestowed upon the liquidator in terms of s 221 of the Act were intended to facilitate the smooth winding up of the affairs of the company. This involves taking custody of all the property of the company, realize the same, pay creditors and if there is a surplus pay each member his share. Once the final account is confirmed a liquidator has no powers to compromise as any payment made pursuant thereto could amount to an undue preference and would not be in accordance with the account confirmed by the Master.

The last ground of appeal is that so far as the second respondent is concerned the court *a quo* should have found that it would be iniquitous to allow the second respondent to shelter behind his official capacity. It is not in dispute that the second respondent, in his official capacity as liquidator of Sagit, accepted that the shares

were due to the appellant and would be returned to the latter. However, this was not done and the first respondent's explanation is that it was the value of the shares rather than the shares themselves that was being referred to. That is not what the first respondent said in correspondence to the appellant. He and his legal practitioners agreed to return the shares. There can be no doubt that, on the facts, the first respondent did not act professionally. He made an undertaking to return the shares but did not do so. What is clear, however, is that so far as the liquidation of the company is concerned, the first respondent cannot be said to have acted improperly. He followed the law although the agreement to return the shares may have lulled the appellant into a false sense of security. I do not believe, however, that on the facts of this case there would be a basis for an order against the second respondent in his personal capacity. In dealing with this aspect the court a quo, remarked at p 7 of the cyclostyled judgment:

> "… In the absence of any fraudulent act relating to the manner in which the account was confirmed by the Master of the High Court, I see no need to dwell at length with the issue of whether or not the first respondent should have been sued in his personal capacity as well. There is nothing in the record to suggest that after 8 April 2008 when the applicant learnt that Sagit had filed for voluntary liquidation, the second respondent then secretly or fraudulently proceeded to procure confirmation of the account. The record shows that the account was procedurally confirmed on the basis of the reconciled position agreed to by both parties."

That conclusion cannot be faulted.

In the result, I find that the appeal is without merit and that the court *a quo* was correct in dismissing the application.

The appeal is accordingly dismissed with costs.

MALABA DCJ: I agree

SANDURA JA: I agree

Gill, Godlonton & Gerrans, appellant's legal practitioners

Messrs Wintertons, first respondent's legal practitioners

Messrs Chihambakwe, Mutizwa & Partners, second respondent's legal practitioners