ZIMBABWE DEVELOPMENT BANK
and
INTERNATIONAL FINANCE CORPORATION
versus
DAVID JOHN SCOTT
and
PRICEWATERHOUSE COOPERS BUSINESS
SERVICES (PRIVATE) LIMITED
and
THE MASTER OF THE HIGH COURT
and
COMMERCIAL BANK OF ZIMBABWE
and
INTRACHEM (PRIVATE) LIMITED
and
TUDOR HOUSE CONSULTANTS
and
INDUSTRIAL SANDS (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
GOWORA J
HARARE 27 January 2007 and 23 January 2008

Court Application

Advocate *E Morris,* for the applicants
A *Mugandiwa,* for the first and second respondents

GOWORA J: The applicants have jointly approached this court for an order in the following terms:

1. That the confirmation of the liquidation and distribution account by the third respondent in respect of Shagelok Chemicals (Private) Limited (in liquidation) be and is hereby set aside.

2. That the third respondent be and is hereby directed to re-open the account referred to above for inspection for a period of 14 days with effect from the date of judgment in this matter.

3. It is hereby declared that the exchange rate to be applied regarding any conversion of foreign currency on Applicants' claim regarding Shagelok Chemicals (Private) Limited (in liquidation) is the going rate on the date of payment.

4. That the first and second respondents jointly pay the costs of suit on a legal practitioner client scale.

The background to this application is based on the following facts. On 23 August 2003 the applicants jointly petitioned with this court that a company called Shagelok Chemicals (Private) Limited be placed under liquidation. The first respondent was appointed liquidator for the process of liquidation of Shagelok. At a creditors' meeting held before the third respondent (the Master) the applicants proved claims as follows-US$ 1 600 000 for the first applicant and US $1 944 757.70 for the second applicant. In the execution of his duties the first respondent disposed of assets belonging to Shagelok and from the proceeds paid out the creditors' proven claims. The second respondent dispatched cheques in the sums of Z$ 35 789 794.20 for the first applicant and Z$ 36 338 172.05. The applicants returned the payments on the grounds that the second respondent had erred by using a conversion rate against the US Dollar which was prevailing at the time of liquidation instead of the rate prevailing when payment was actually effected. To this end, the applicant were therefore seeking that the court grant the order to have the distribution account re-opened and for the recalculation of the Zimbabwe dollar equivalent of their claims. The fourth to seventh respondents were concurrent creditors in the liquidation process. They have not responded to the application. The Master has not filed any papers in response to the order being sought.

The respondents have, in addition to opposing the matter on its merits, raised preliminary issues which I must dispose of before I delve into the merits of the application. The first issue relates to whether or not the second applicant is properly before me. In the founding affidavit deposed to by one Dumisani Sibanda, a credit controller in the employ of the first applicant, the second applicant is described as a division of the World Bank. The deponent, it is common cause, is not an employee of the second applicant and there has been no document filed which authorizes the deponent to depose to an affidavit on behalf of the second applicant. Attached to the papers filed by the applicants is a document titled 'Affirmation of Affidavit', signed by one Michael Tiller at Johannesburg. He describes

himself as an authorized signatory and in the document he confirms that Dumisani Sibanda is authorized to depose to an affidavit on behalf of the second applicant. There is no indication in the affirmation as what position the 'authorized signatory' holds in the second applicant and whether or not he has the capacity to give authority to Sibanda to represent the applicant. I have not been appraised as to the exact nature of the 'affirmation' which does not pretend to be a resolution by the second applicant. In the premises I must uphold the objection of the respondents as to the capacity of Sibanda to represent the second applicant in these proceedings and I accordingly find that the second applicant is not properly before me.

The respondents have also raised the question of the citation of the second respondent as a party and have contended that the first respondent was appointed as a liquidator in his personal capacity and therefore should be the only party cited in connection with the liquidation process. They argue that there is no substantive relief sought against the second respondent and that accordingly its inclusion in this suit is irregular if the contention is that the second respondent was acting as an agent for the first respondent. It is not pertinent in my view that I determine this point as nothing turns on it. Whether or not the second respondent has been incorrectly cited, the fact of the matter is that it is before me and in the event that I grant the relief sought by the applicants, such relief would only be effective against the first and third respondents. In the event an order for costs would then follow for the benefit of the second respondent if incorrectly cited.

The respondents have questioned the nature of the relief sought by the applicants and, whether if what is sought is a review, the applicants have complied with the High Court Rules in so far as time limits relating to reviews are concerned and the requirements of the rules in so far as the form of the application is concerned. The applicants are of the view that what they seek is not a review but an order setting aside the confirmation of the liquidation and distribution account.

The application is predicated on the manner in which the first respondent is alleged to have performed his duties as a liquidator of Shagelok and it is obvious therefore that the applicants can only rely on the provisions of the Companies Act for whatever relief they seek. The effect of placing a company in liquidation is to replace contractual rights that existed prior to liquidation with special rights created and governed by the Companies Act [*Chapter 24:03*]

(the Act). See *Central Africa Building Society v Pierce*[1]. The rights of creditors against a company in liquidation are derived from the provisions of the Act and it follows therefore that the applicants must look to the (the Act) in seeking redress in the event that the first respondent has not performed his duties as is required of him by the Act. Strangely the applicants have not referred to any provision in the Act on which they seek reliance. It has been left to the respondents to point to the pertinent sections of the Act which would be operable in the circumstances.

According to the respondents, the right sought to be exercised by the applicants is derived from s 283 of the Act and further that the procedure for the exercise of those rights has been prescribed in terms of the Act. Therefore, contend the respondents, the applicants should have followed the outlined procedure in seeking to have those rights enforced by this court. Critically, the respondents argue, the applicants ought to have proceeded by way of a review, which they have not done, and further that it is not clear what procedure they have adopted in seeking redress.

The Act, in s 296 provides as follows:

> "(1) Any person aggrieved by any decision, ruling order appointment or taxation of the Master under this Act may bring the same under review by the court and to that end may apply to the court by motion, after due notice has been given to the Master and to any person whose interests are affected:
> Provided that where the general body of creditors or contributors is affected notice to the liquidator shall be notice to them.
>
> (2) …….. not applicable
>
> (3) Nothing in this section shall authorize the court to re-open any duly confirmed account or plan of distribution or of contribution otherwise than as provided for in section two hundred and eighty three."

Apart from providing for the bringing of a review of the decision of the Master under the said section, the Act does not make provision for the manner in which the review proceedings must be launched. The High Court, in the exercise of its functions has made provision for Rules of Court which govern its procedures. It stands to reason therefore that the proceedings for review have to done in accordance with those rules as the Act does not

[1] 1969 (1) SA 445 (R.AD)

provide for the procedure to bring the decision of the Master for scrutiny under a process of review. Accordingly, the applicants were obliged to comply with Order 33 Rule 259, which requires that an application for review be brought within a period of eight weeks from the date on which the suit action or decision being complained of occurred.

In *casu*, the Final Liquidation and Distribution account which is the subject matter of these proceedings was confirmed by the Master on 29 September 2004. The applicants became aware of the decision on 4 October 2004, yet it was not until 18 November 2005 that an application to have the decision to confirm the account set aside was launched. Clearly the applicants are out of time in so far as the review of the confirmation of the account is concerned. They have not, as one would have assumed, sought condonation for the failure to abide by the provisions of Order 33 despite an indication in the opposing papers that the application was out of time in so far as the Rules were concerned. I am inclined to think that in approaching this matter the applicants and their legal practitioners did not have recourse to the Act because if they had they would have noted that the correct way of seeking redress was by filing an application for review. Their failure to do so can only mean they had not read the Act.

The re-opening of an account, in terms of the Act, is provided for in terms of s 283. The relevant portions of the section are in following terms:

> "When an account has been open to inspection as herein-before prescribed and-
>
> (a) no objection has been lodged; or
>
> (b) (not applicable)
>
> (c) (not applicable)
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> 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."

As matters stand in this application, all the creditors have been paid and in fact as pointed out by the respondents, the account was confirmed some fourteen or so months before the applicants thought of launching these proceedings. There is no doubt that the section precludes the re-opening of a final distribution account where there has been payment of a dividend. The court is allowed to open an account where no dividend has been paid. In this

jurisdiction the question has not yet come up for discussion by the court. I am therefore indebted to the respondents for providing the court with an authority from South Africa. In *Wispeco v Herrigel NO and Another*[2], the court therein had to consider an application for the re-opening of an account in an insolvent estate. The applicant, one of the creditors to the estate had submitted an account which had been accepted. The claim was presented as a preferent claim as it had been secured by a general covering cession and pledge but when the claim was submitted to the Master by the trustee it was reflected as a concurrent one. A query was raised with the trustee who gave an explanation to the Master. The account was thereafter advertised for inspection but no objections were lodged and accordingly the Master confirmed the account. An hour after such confirmation it became known to the applicant that the account had been confirmed and that cheques for dividends had been prepared and sent out for posting to the creditors. The applicant filed an application for a rule *nisi* for the respondents to show cause on the return day why the confirmation of the account should not be set aside and for the account to be re-opened. At issue in the application was the meaning to be ascribed to s 112 of the Insolvency Act 24 of 1936 of South Africa which provided that when a trustee account had been open to inspection by creditors and no objection had been made, or having been made the account was amended or an objection, once made, had been withdrawn, then the Master shall confirm such account and that such confirmation shall be final save as against a person who may have been permitted by the court before any dividend has been paid under the account, to re-open it. The provision is almost identical to our s 283 of the Companies Act. After reviewing a number of authorities, the court found that once a dividend had been paid under an account the court was precluded from re-opening the account.[3] In so far as the payment of the dividend is concerned, it matters not whether payment has been made to one or more creditors, once a payment having been made the court is precluded from opening the account. I have not been able to have sight of Mars-The Law of Insolvency on which reliance was sought by the respondents in opposing the application. I have had occasion to peruse The Law of Insolvency by Catherine Smith 3rd Edition. At p 272 of her book, the learned author states that once a dividend has been paid under an account, the court is precluded from re-opening the account. The learned author goes further to state:

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[2] 1983 (2) SA 20 (CPD)
[3] At p 26E-F

> "The intention of the legislature was to ensure that once an account has been confirmed, without objection prior to confirmation, and a dividend has been paid, the trustee should not be put in a position subsequently of having to try to recover that dividend from those to whom he has made distribution as required of him by the Act. There must be actual payment of a dividend and such payment has not taken place where dividend cheques, although posted to creditors were stopped by the trustee; accordingly a creditor was not precluded from applying for an order for the re-opening of an account by the mere posting of cheques by the trustee. One cannot ignore the confirmation of the account and the payment of dividends. The extent of the relief which can be granted in terms of s 111 is limited; it grants an aggrieved party the right to contest the master's decision prior to confirmation of the account and payment of dividends. After confirmation and payment of dividends the court has no power to grant the relief envisaged in s 111(2)(a) read with s 112."

As I have already indicated above the applicants did not attempt to invoke the provisions of the Act in seeking redress herein. They have applied for an order for *restitutio in integrum* on the basis that there is a just cause for the relief being sought. Despite this matter having arisen as a result of the perceived irregularities in the manner in which the liquidator performed his duties, they have completely overlooked the provisions of the Act and whether or not such relief is provided in the Act. The authorities that they seek to rely are not, in my view, apposite to the resolution of this matter. The case of *Uzande v Katsende*[4], concerned an application for rescission of a judgment granted in default and the court had to consider what constituted just cause for the granting of the application for rescission. The case of *R B Ranchers v Estate Mclean*[5] is also of no assistance to the application as the court did not go into the criteria for the re-opening of an account. The court focused on the alleged breach of contract, implied terms in the contract and the payment of cheques under the Bills of Exchange Act [*Chapter 277*]. In *Barclays Bank of Zimbabwe Ltd v Sheriff of Zimbabwe & Anor*[6], the court had to consider an appeal on the issue as to whether it was permissible for a court, and if so in what circumstances, to set aside a plan of distribution prepared by the Sheriff subsequent to a sale in execution, after confirmation by the Sheriff of such account and implementation thereof in terms of the rules. In considering the appeal, GUBBAY CJ had recourse to cases on insolvency and acknowledged that the principles applicable to the confirmation of distribution

[4] 1988 (2) ZLR 47 (H)
[5] 1985 (2) ZLR 24
[6] 2000 (2) ZLR 143 (S)

accounts in the law of insolvency served as guideline. In *Central Africa Building Society v Pierce N.O*[7], his LORDSHIP, BEADLE CJ stated thus:

> "……..There is no doubt that under the provisions of s 250 of the Companies Act [*Chapter 223*], the confirmation of a distribution account has the effect of a final sentence; it has precisely the same effect as a judgment of a court, and, before another court can go behind such a judgment, an application must be made to have it set aside."

Before therefore the distribution account can be set aside it must be re-opened, and the applicants can only have it re-opened in terms of the Act. The court is precluded, in terms of the Act, from re-opening an account once a dividend has been paid. The purpose of the Act is to provide for a speedy liquidation and distribution of monies to creditors, which is why the court is in terms of the Act precluded from re-opening the accounts once there has been confirmation of such by the Master. Before payment a person wishing to have an account has to show that his failure to object to the account was induced by *justus error* or by fraud. Once an account has been confirmed by the Master it has the effect of a final sentence and cannot be re-opened by the court under the provisions of the Act. The question as to whether there could be merit for the re-opening of the account on the grounds of a *restitutio* in *intergrum* do not here arise due to the clear provisions of the Act in prohibiting the re-opening upon the confirmation of the account and payment of any dividend. For purposes of this matter it is not necessary that I determine whether or not those grounds would have assisted the applicants, in view of the finding that the payment of a dividend precludes the court from re-opening the account. The court in fact has no discretion to re-open the account once the dividend has been paid. The application for the re-opening of the account is therefore not properly premised.

The parties have gone into the issue whether or not *concursus creditorum* had been reached. Having determined that the court has no discretion to re-open the account, I do not see how I can go ahead to determine the question of *concursus creditorum*. That issue would in my view arise if I had found that it was necessary to re-open the account. A finding that the account cannot be re-opened is in my view the end of the matter. To go into the question of *concursus creditorum* would in the circumstances be to embark on an exercise for the sake of the same. That is not in my view necessary in this matter.

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[7] 1969 (1) SA 445 at 455 H

The application was not well taken and is hereby dismissed. The applicants are ordered to pay the respondents' costs.

Sawyer & Mkushi, legal practitioners for the applicants
Wintertons, legal practitioners for 1st and 2nd respondents