RIOZIM LIMITED
versus
AFRASIA BANK ZIMBABWE LIMITED
(In the liquidation duly represented by the
Deposit Protection Corporation its Liquidator)

HIGH COURT OF ZIMBABWE
MUNANGATI-MANONGWA J
HARARE, 17 May 2018 & 30 May 2018

Opposed Matter

D. Ochieng, for the applicant
F. Siyakurima, for the respondent

MUNANGATI-MANONGWA J: The applicant seeks leave to sue the respondent a company under liquidation and costs thereof. The application is opposed. The leave sought if granted will facilitate the issuance of summons wherein the applicant seeks the following relief:

a) A declarator to the effect that the agreement signed by the parties on the 23rd of July 2013 is void.
b) An order that defendant repays the sum of US$532 800.04 to the plaintiff.
c) Costs of suit

The background facts to this case are as follows: On the 23rd July 2013 the parties entered into a deed of settlement wherein the applicant agreed to pay respondent the sum of US$4 556 777.78. This figure was a compromise as the claim instituted far exceeded this amount. Applicant defaulted in making payments (although applicant indicates it purposely ceased payments) and the respondent sought to enforce the deed of settlement through an application in the High Court seeking payment of $3 629 586.57, the balance thereof.

MAKONI J (as she then was) dismissed the application pronouncing the deed of settlement or compromise as voidable. The respondent lodged an appeal with the Supreme Court and the matter is set to be heard on the 5th June 2018.

Suffice to say whilst the applicant seeks the leave to pursue payment of US$532 800.04 the amount it believes it overpaid the respondent, applicant has long since proved its claim at a meeting of creditors on 31 July 2015. The claim was duly accepted by the liquidator.

Mr *Ochieng* for the applicant submitted that seeking leave to sue for the aforementioned amount has been necessitated by the attitude of the liquidator. Whilst admitting that the claim was accepted, Mr *Ochieng* argued, it can be depicted from the opposing affidavit that the liquidator will reject the claim as it pleads in its affidavit that the amount is not due. He submitted that there is a dispute as regards liability which only this court can resolve. Further, the applicant has good prospects of success as this court has already pronounced that the deed of settlement is voidable. On the question of the possibility of conflicting judgments arising, Mr *Ochieng* submitted that the initial matter having been an application, the proposed suit is an action hence respondent / defendant can defend the action. Further there is nothing vexatious about the application as more than US$500 000 is at stake and there are good prospects of success.

The respondent, through its counsel Mr *Siyakurima* submitted that this application was not necessary as the applicant had proved its claim in terms of s 220 of the Companies Act and the same having been provisionally accepted, until the claim is rejected the applicant has no cause of action. He argued further that, whilst the applicant is seeking leave to sue for the amount, on the 29th January 2018 it filed a counter claim seeking the payment of the same amount US$532 800.04. This conduct of seeking leave to sue when the applicants have (whilst this matter is pending) placed before the court a counter-claim amounts to abuse of court process and calls for an order of punitive costs.

Further, it was argued for the respondent that the relief sought is premature as the appeal to be heard on the 5th June 2018 will deal with all aspects of this matter. In fact, the appeal before the Supreme Court will be decisive as regards the status of the deed of settlement upon which the applicant relies. Even if the appeal is upheld and respondent gets an order for $3 000 000 (three million dollars), since the liquidator has accepted the claim for $500 000.00 there will be a set-off.

It is common cause that the applicant's claim has been provisionally accepted by the liquidator. The claim has thus not been rejected. Liquidation is a process or the legal mechanism specifically tailored to ensure an equitable distribution of available assets of the company among its various creditors in order of preference. The applicant has already taken part in or engaged this process. No compelling reasons have in my view been furnished why

the applicant wants to abandon the court sanctioned process of liquidation and obtain a court order. Section 220 of the Companies Act [*Chapter 20:03*] provides how claims have to be handled in stating;

> "all claims against a company being wound up by the court shall be proved at a meeting of creditors called as nearly as possible in the manner provided by the law relating to insolvent estates for the proof of claims against an insolvent estate subject to section two hundred and eighty nine."

The Companies Act through s 213 provides for the preservation of the assets of a company under liquidation by staying all actions or proceedings against a company in the process of winding up without leave of court, and preventing dispositions of assets.

This is to ensure that an action that then ensues is under the scrutinising eye of the court. Provision is then made to cater for the interests of the creditors through s 220. Hockly's *Insolvency Law* 8th ed at p 4 is instructive

> "A creditor's right to recover his claim in full by judicial proceedings is replaced by the right, on proving a claim against the insolvent estate to share with all other proved creditors in the proceeds of the estate assets."

Thus having proved its claim the applicant has or had to wait for the final determination of the claim. Mr *Ochieng* argued that the attitude of the liquidator in the opposing affidavit is such that the claim is likely to be rejected. I have difficulty in appreciating this argument. The claim was accepted by the liquidator as the applicant duly proved same, the notice of opposition is coming after the application. It is not the liquidator's actions that prompted the application, but his affidavit is a response to the application.

It is important to note that there is an upcoming appeal challenging the judgment of MAKONI J (as she then was). The judge found that the compromise (deed of settlement) was voidable at the instance of the aggrieved party and dismissed the now respondent's application. To then seek leave to sue to have the agreement signed by the parties declared "void" is untenable. The question of the status of the agreement between the parties is still to be decided by the appellate court. It is that court that will decide whether the conclusion by this court that the agreement is voidable was correct. To grant leave to the applicant to proceed to seek relief along those lines would be procedurally improper in light of the appeal, thus the application is ill-conceived and premature. It is only upon the appellate court upholding MAKONI J's decision that the agreement is voidable that the applicant can seek to have the agreement declared void.

That the application is ill conceived is further borne by the following facts: the respondent noted its appeal on 28 May 2017 and this present application was filed on 30 October 2017, 5 (five) months later.

Thus the applicant fully aware that an appeal was pending which deals with the status of the compromise which is at the centre of this dispute, decided to institute these proceedings. This being against the background of a claim previously accepted by the liquidator, proceeding to file a counter-claim for the amount they seek leave to pursue is abhorrable conduct. This amounts to throwing nets wide and far in the hope of a catch. This can never be allowed in courts of law where litigation has to be paid for and the chance to be heard is so priced due to the number of cases awaiting to be heard. Cognisant of the requirements to be satisfied by applicant in such a case being the impact on the company of the granting of leave, whether other creditors would be prejudiced, the need to balance the interests of justice and the objectives of judicial processes and prospects of success, I find that this is not a case which the court finds proper to exercise its discretion by granting leave.

Given the circumstances pertaining to this case which have been canvassed above and most important the issue of the pending appeal the court finds that this application was pre-maturely made, is vexatious and an abuse of court process.

Accordingly the application cannot succeed and an order for costs on a higher scale is called for.

It is thus ordered:

Application is dismissed with costs on an attorney client scale.

Wintertons, Applicant's legal practitioners.
Sawyer and Mkushi Respondent's legal practitioners.