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Judgment No. SC-24-09
Civil Appeal No. 81/08

(1) ZIMBABWE DEVELOPMENT BANK (2) INTERNATIONAL FINANCE CORPORATION v (1) DAVID SCOTT (2) PRICEWATERHOUSE COOPERS BUSINESS SERVICES (PVT) LTD (3) MASTER OF THE HIGH COURT (4) COMMERCIAL BANK OF ZIMBABWE (5) INTRACHEM (PVT) LTD (6) TUDOR HOUSE CONSULTANTS (7) INDUSTRIAL STANDS (PVT) LTD

SUPREME COURT OF ZIMBABWE
SANDURA JA, ZIYAMBI JA & GARWE JA
HARARE, MARCH 24 & JUNE 8, 2009

*J R Tsivama*, for the appellants

*A Mugandiwa*, for the respondents

ZIYAMBI JA: This is an appeal from a judgment of the High Court which dismissed an application by the appellants seeking, *inter alia*, an order setting aside the confirmation of the liquidation and distribution account by the Master (the third respondent) in respect of Shagelok Chemicals (Private) Limited (in liquidation) and a re-opening of the said account for inspection for 14 days from the date of judgment.

The background of the matter as set out in the judgment of the court *a quo* is as follows.

> "On 23 August 2003 the applicants jointly petitioned (the High Court) that a company called Shagelok Chemicals (Pvt) Ltd 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 applicants 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 ought."

The application was opposed by the respondents who also raised certain points *in limine.* The two which are relevant to this appeal are, firstly, whether the second appellant was properly before the court and secondly, whether, if what was being sought was a review, the appellants had complied with the requirements laid down in the High Court Rules for review applications. The learned Judge found against the appellants on both issues.

With regard to the first issue the learned Judge found that the second appellant was not properly before her for the following reasons:

> "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 "authority 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."

I find no fault with the reasoning of the learned Judge. Although each case must depend on its merits, there must be some evidence placed before the court which would satisfy it that the company has resolved to institute proceedings. (See *Mall (Cape) (Pty) Ltd* v *Merino Ko-operasie Bpk* 1957 (2) SA 347 (C) at p 351-2). Here, there was no evidence by which the court *a quo* could be satisfied that the deponent was authorized by the second appellant to institute proceedings on its behalf.

In determining the second issue it is necessary to refer to subss (1) and (3) of s 296 of the Companies Act [*Chapter 24:03]* ("the Act") which provide 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) …
>
> (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 is provided in section two hundred and eighty-three."

Thus the Act has specified the procedure to be adopted where one is aggrieved by any decision, ruling or order of the Master in respect of the exercise of his powers under the Act. It is by way of review and, since the review procedure has not been specified in the Act, the procedure outlined in the High Court Rules is to be followed. As it was put by the learned Judge at p 4 of the cyclostyled judgment:

> "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 the Rules of Court which govern its procedures.

It stands to reason therefore that the proceedings for review have to be done in accordance with those Rules as the Act does not 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 remedy sought: the reopening of the account:**

The finding on the two issues set out above should dispose of the matter. However the learned Judge considered the merits of the application. The setting aside of the confirmation of the liquidation and distribution account was sought in order to pave the way for the re-opening of the account. Section 283 of the Act provides:

"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)

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."

It was common cause that the account was confirmed some fourteen months or more before the appellants filed their application and that dividends were paid to all

creditors. That being so, the appellants are precluded by s 283 from obtaining the relief sought. See *Wispeco (Pty Ltd v Herrigel NO & Anor* 1983 (2) SA 20 (CPD).

The learned Judge put it this way:

> "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 & Anor*, 1983 (2) SA 20 CPD) 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 section 283 of the Companies Act. After reviewing a number of authorities, the court found (see p 26E-F) that once a dividend had been paid under an account the court was precluded from re-opening the account. In so far as the payment of the divided is concerned, it matters not whether payment has been made to one or more creditors; once a payment (has) 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 3ed. 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:
>
> > '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 section 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 section 111(2) (a) read with section 112.'"

It follows then that once an account has been confirmed by the Master, and dividends paid in terms thereof, it cannot be re-opened by the court. The learned Judge was therefore correct in dismissing the application.

Accordingly the appeal is dismissed with costs.

SANDURA JA: I agree

GARWE JA: I agree

*Sawyer & Mkushi*, appellants' legal practitioners

*Wintertons*, respondents' legal practitioners