REPORTABLE (31)

AFRASIA BANK LIMITED
v
(1) K. S. TRUST (2) MASTER OF THE HIGH COURT

SUPREME COURT OF ZIMBABWE
GUVAVA JA, UCHENA JA & ZIYAMBI AJA
HARARE, OCTOBER 2, 2017

T. Magwaliba, for the appellant

T. Mpofu, for the first respondent

REASONS FOR JUDGMENT

ZIYAMBI AJA:

[1] At the conclusion of the hearing in this matter the appeal was dismissed with costs. It was indicated that the reasons would follow in due course. I now set them out hereunder.

[2] The appellant is Afrasia Bank Zimbabwe Limited ("the bank"), a company now in liquidation. The first respondent is KS Trust ("the trust"), a trust duly constituted in terms of the laws of Zimbabwe. In terms of an agreement of sale dated 18 February 2015, the bank sold to the trust a certain piece of land situate in the district of Salisbury being Lot 2 of Lot 19 Block C of Avondale measuring 1982 square metres (hereinafter referred to as "the property"). The selling price was US$176 000.

[3] In terms of the agreement, the parties acknowledged payment by the trust of a deposit of US$35 901.00 while the balance of the purchase price was deposited into its conveyancers' account, by the trust, pending transfer to it of the property. The bank tendered transfer on 24 February 2015, its general manager having signed the necessary documents for effecting transfer. The trust's conveyancers on 23 March 2015, obtained the rates assessment from the City of Harare and on 26 March, 2015, a tax assessment from the Zimbabwe Revenue Authority. All appeared set for the lodgement of documents for effecting the transfer.

[4] Meanwhile, unbeknown to the conveyancers, the bank was, on 18 March 2015, placed under provisional liquidation at the instance of the Reserve Bank of Zimbabwe (as the applicant) and the Deposit Protection Corporation ("DPC") appointed provisional liquidator. The DPC then, by agreement dated 31 March 2015, appointed Reggie Francis Saruchera ("the LA") to be his agent in terms of s 38(1) of the Deposit Protection Corporation Act.[1]

When these facts became known to the conveyancers, they wrote to the LA on 7 April 2015, seeking his opinion as to whether they should proceed to pay the tax assessed by Zimra in anticipation of the transfer. The LA advised the conveyancers to wait as he wished to verify certain facts before they could make payment. No communication was received from the LA for close to three months and, in June 2015, a further query elicited the response that the trust should await the first creditors' meeting. On 23 October 2015, in answer to a further query, the LA advised that the matter was under review. Thereafter, the trust's conveyancers were referred, by the LA, to one Alex Dera ("Dera") who declared himself to be acting on behalf of the LA and with whom they exchanged further correspondence on the matter. It was not until the 24 November 2015 that Dera wrote to the conveyancers advising that the sale was

[1] [Chapter 24:29]

not sanctioned by the liquidator and that in any event the property had been sold to a third party.

APPLICATION FOR LEAVE TO SUE

[5] The trust was aggrieved by what it considered to be a breach of contract by the LA. It filed an application with the High Court in terms of s 213(a) of the Companies Act[2] ("the Act") seeking leave to sue the bank for specific performance of the contract. It alleged that the LA and Dera, had misled it into believing that its concerns were receiving active attention when in fact the property was being sold to a third party notwithstanding that the agreement concluded with the trust on 18 February 2015 had not been cancelled. Further, the property had been sold to the second purchaser at a price of $140 000 which was lower than the price offered by the trust.

[6] The application was opposed by the bank. The LA deposed to the opposing affidavit. He averred that he was duly authorized to depose to the affidavit on behalf of the bank. He asserted as follows:

i. the non-joinder of the liquidator or his agent, the second purchaser and the creditors of the bank was fatal to the application since they all had an interest in the outcome of the application;
ii. the respondent had failed to exhaust its domestic remedies afforded by ss 223 and 296 of the Companies Act;
iii. the contract in question was a disposition in terms of s 2 of the Insolvency Act[3] and was therefore void by virtue of s 213(a) of the Companies Act.

[2] [*Chapter 24:03*]
[3] [Chapter 6:04]

iv. the transaction sought to be enforced by the trust is an impeachable transaction in terms of the provisions of the Insolvency Act. Honouring the agreement would prejudice the other creditors of the bank. The body of creditors of the bank therefore had an interest in the relief sought by the Applicant.

v. the relief sought was incompetent and amounted to a voidable preference in that it was entered into not more than six months before the liquidation of the bank and at a time when the bank's liabilities exceeded the value of its assets; alternatively, an undue preference in that the contract was concluded with the intention of preferring the trust above other creditors.

THE COUNTER APPLICATION BY THE BANK

[7] In addition to its opposing affidavit the bank filed a counter application. It sought therein an order setting aside the agreement of sale and requiring the trust to return the title deeds to the property.

[8] The bank's action in filing a counter application confused the trust which, in its opposing affidavit, explained its dilemma. It had made an application seeking leave to sue which application was opposed. The bank had, by filing a counter application, placed before the court the substantive issues which were intended to be brought before the court for determination in the event that leave to sue was granted. The trust felt it was left with no option but to file a counter application (as well as its opposing affidavit) praying for the specific performance of the contract. It incorporated, in its counter application, the allegations made in its founding affidavit to the application for leave. It sought an order compelling the liquidator to transfer the property in terms of the contract.

[9] The matter was placed before MANGOTA J who gave certain procedural directions and thereafter heard argument by the parties. The learned Judge found in favour of the trust and ordered the transfer to it of the property as prayed. It is against this order that the bank now appeals.

THE APPEAL

[10] Two main points were taken by Mr *Magwaliba* on behalf of the bank. They are, firstly, that the proceedings were fatally irregular by reason of the non-citation of the purchaser of the property, the creditors of the bank and the liquidator all of whom had an interest in the outcome of the proceedings; and secondly, that the sale to the trust constituted either a voidable disposition in terms of s 213(c) of the Companies Act, or a voidable, alternatively an undue, preference in terms of ss 42 and 43 of the Insolvency Act.

THE NON-CITATION

[11] It was submitted by Mr *Magwaliba* that the failure to cite the second purchaser, whose rights were affected by the order sought, was fatal to the application and that the court erred in granting a judgment which affected the rights of the second purchaser without hearing him. Mr *Mpofu*, on the other hand, contended that neither the first respondent nor the court was informed of the identity of the second purchaser. He submitted that the main substantive application was made by the bank whose duty it was to provide the court with details of all interested parties and who had failed in that duty. In the premises, the conclusion by the court *a quo* that the existence of the second purchaser was doubtful is unassailable.

[12] The initial application brought by the trust was for leave to sue. A substantive application would only be filed after leave had been granted by the court. It is the liquidator who ignored

the prescribed procedure and prematurely filed a substantive application in the form of a counter application in which it sought the setting aside of the contract with the trust. In such an application, as correctly submitted on behalf of the trust, it was incumbent on the liquidator to cite all interested parties inclusive of the second purchaser whose identity was known only to himself. Not only did the liquidator fail to cite the second purchaser but despite persistent questioning by the court, counsel for the bank did not divulge the identity of the alleged second purchaser leaving the court in grave doubt both as to the existence of that purchaser and the *bona fides* of the LA. As to the alleged 'body of creditors', no evidence of their existence is given in the bank's papers.

In any event, the non-citation is not fatal by reason of r 87 of the High Court Rules which specifically provides that no cause of action shall be defeated by the non-joinder or misjoinder of any party.

VOIDABLE DISPOSITION

[13] Section 213 of the Act provides as follows:

> **213 Action stayed and avoidance of certain attachments, executions and dispositions and alteration of status**
> In a winding up by the court—
> (*a*) no action or proceeding shall be proceeded with or commenced against the company except by leave of
> the court and subject to such terms as the court may impose;
> (*b*) any attachment or execution put in force against the assets of the company after the commencement of the winding up shall be void;
> (*c*) every disposition of the property, including rights of action, of the company and every transfer of shares or alteration in the status of its members, made after the commencement of the winding up, shall, *unless the court otherwise orders*, be void. (The italics are mine)

It is common cause that the contract of sale concluded between the bank and the trust on 18 February 2015 was a disposition of the bank's property in terms of s 213 (c). It appears from the record that the contract of sale was made, and transfer tendered, one month before the winding up order which was made on 18 March 2015. Thus, according to the

evidence filed of record, the disposition was done one month before the winding up of the company commenced and is accordingly not caught by s 213(c). However, even if that were not the case, a reading of s 213 (c) shows that even where a disposition of the company's property occurs after its winding up has commenced, the disposition is at most voidable as the court has the power to sanction the disposition and thus prevent a nullity occurring.

VOIDABLE/UNDUE PREFERENCE IN TERMS OF THE INSOLVENCY ACT.

[14] It was submitted by Mr *Mpofu* that ss 42 and 43 of the Insolvency Act are not applicable to the determination of this case since the bank was not wound up on account of its being unable to pay its debts. For this submission reliance was placed on s 270 of the Act which provides:

> **270 Application of certain provisions of the law relating to insolvent estates**
> In the case of every winding up of a company **unable to pay its debts**—
> (*a*) the law relating to insolvent estates shall, in so far as they are applicable, apply, *mutatis mutandis*, with respect to any matter not specially provided for in this Act;
> (*b*) a secured creditor and the liquidator shall have the same right respectively to take over such creditor's security as a secured creditor and a trustee would have under the law relating to insolvent estates;
> (*c*) the cession of a book debt shall only be valid against a liquidator in the same circumstances in which it would, in terms of the provisions of the law relating to insolvent estates, be valid against a trustee. (the emphasis is mine.)

There is, in my view, merit in Mr *Mpofu's* submission. The minutes of the combined board meeting of the bank and Afrasia Zimbabwe Holdings Limited held on 24 February 2015 show that the board of the bank after discussing the counsel given by the Reserve Bank of Zimbabwe ("the RBZ"), resolved to surrender the bank's licence to the RBZ on the same day. An extract from para 4.1 of the minutes reads as follows:

> "The RBZ was of the counsel that handing over of the bank license (sic) 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 onto the license. Once the decision to surrender the license has been made, the RBZ would immediately take control of the Bank and appoint a provisional liquidator. A tentative agreement has been arrived at in terms of which an

asset deal would be done with Dr. Mahtani of Finance Bank of Zambia. Dr. Mahtani would be making a formal offer to the appointed provisional liquidator."

[15] The following averment in the LA's opposing affidavit further confirms the submissions made on behalf of the trust that the winding up was not on account of the bank being unable to pay its debts but in terms of s 206 (a) of the Act:

> "25. The agreement of sale sought to be enforced was entered into a few days *before* the 1st Respondent's board of directors passed a resolution to *surrender the 1st Respondent's banking licence*. I attach hereto marked Annexure C a copy of the relevant minutes. (The italics in this paragraph are mine).
>
> 26. It will be noticed from the minutes that the resolution to surrender the banking licence was captured in the following terms:
>
> > "Following the decision by AfrAsia Bank Limited (Mauritius) (ABL), the single major shareholder for AfrAsia Zimbabwe Holdings Limited to surrender the AfrAsia Bank Zimbabwe Limited (ABZL) banking license, it was resolved that the license be surrendered to the Reserve Bank of Zimbabwe as of close business on 24 February 2015"(Spelling in original text retained).

[16] Section 206 provides:

> **"206 Circumstances in which company may be wound up by court**
> A company may be wound up by the court—
> (*a*) if the company has by special resolution resolved that the company be wound up by the court;
> (*b*) if default is made in lodging the statutory report or in holding the statutory meeting;
> (*c*) if the company does not commence its business within a year from its incorporation or suspends its business for a whole year;
> (*d*) if the company ceases to have any members;
> (*e*) if seventy-five *per centum* of the paid-up share capital of the company has been lost or has become useless for the business of the company;
> (*f*) if the company is unable to pay its debts;
> (*g*) if the court is of opinion that it is just and equitable that the company should be wound up."

No evidence whatsoever was tendered in support of the allegation made in the opposing affidavit that the bank was unable to pay its debts. No balance sheet or list of creditors was produced. The opposing affidavit was deposed to on 11 February 2016, just under eleven months after the provisional order for the winding up of the bank was granted by the High

Court and the liquidator appointed. The LA would have been in possession of a list of the bank's creditors, if any, as well as documentary evidence relating to the financial status of the bank. It ought to have been an easy matter to produce evidence which would establish that the company was unable to pay its debts and was wound up for that reason. The failure to tender any evidence in support of this allegation leaves undischarged, the *onus* on the LA to prove both that the company was at all relevant times unable to pay its debts and that it was wound up in terms of s 206 (f) of the Act.

It follows that the provisions of the Insolvency Act are not applicable to the winding up of the bank.

[17] Even if I had found the Insolvency Act to be applicable, ss 42 or 43 would not have assisted the bank. Not only has it not been proved that at the relevant times the bank's liabilities exceeded its assets, but there is also no evidence that the disposition has the effect of preferring, or was made with intent to prefer, the trust above other creditors[4]. Moreover, the deliberate silence of the LA concerning the identity of the new purchaser, the fact that no agreement of sale or evidence of a sale by auction was tendered, and the failure by the bank to present any evidence that the disposition was made with intent to prefer the trust above the bank's unnamed and unlisted creditors cast doubt on the integrity of the alleged second sale.

In addition, it is pertinent to note firstly, that the purchase price allegedly agreed with the second purchaser was $140 000.00 which is less than the price tendered by the trust of $176 000.00 and secondly, that while the balance of the purchase price tendered to the bank by the trust remains in the conveyancers' account pending performance by the bank and has been said by the trust to be readily available to the bank, no proof has been tendered of any payment, by the anonymous purchaser, of any amount whatsoever. It would, therefore, appear that the

[4] Ss42(2) and 43(2) of the Insolvency Act

interest of the creditors, if any exist, would be better protected by giving effect to the contract of sale.

In any event, the court has a discretion as to whether to set aside any disposition made in terms of ss 42 and 43.

[18] In the circumstances, no basis was found by this Court for interference with the judgment of the court *a quo*.

GUVAVA JA: I agree

UCHENA JA: I agree

Wintertons, appellant's legal practitioners

Ushewokunze Law Chambers, 1st respondent's legal practitioners.