

JUDITH SENIOR MASWELA N.O
(In her capacity as Executrix Dative for the Estate Late Owen Wini Maswela)
versus
THE MASTER OF THE HIGH COURT
and
CECIL HONDO MADONDO (In his capacity as Liquidator of Kunganda Farm (Private)
Limited
and
MWAMI M. SIAMSIPA NO

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 18 November 2020 & 3 March 2022

Opposed Application

R G Zhuwarara, for the applicant
Miss F Mahere, with her *T Kafesu*, for the second respondent
R C Muguti, for the third respondent

ZHOU: This is an application for the setting aside of the decision of the first respondent, the Master of the High Court (hereinafter referred to as “the Master”), in terms of which the first respondent dismissed an objection to the Second Interim Liquidation and Distribution Account prepared by the second respondent in respect of the company known as Kunganda Farm (Private) Limited. The application is opposed by the second respondent. The third respondent has not opposed the application but has filed a brief affidavit in which she essentially supports the granting of the relief sought. At the hearing before the Master the third respondent also objected to the Second Interim Liquidation and Distribution Account on the same grounds relied upon by the applicant herein.

In this application the dispute has been narrowed down to the issue of the US\$70 000.00 which the second respondent received as part of the purchase price of the property belonging to the company under liquidation. The complaint is that the second respondent irregularly dealt with that amount. The Master found otherwise, and concluded that the amount had been properly dealt

with and properly accounted for. Having found that the US\$70 000.00 had been properly accounted for, the Master then dismissed the applicant's objection.

Background Facts

The material facts which underpin the dispute can be summarised as follows: The applicant and the third respondent represent the shareholders of the company known as Kanganda Farm (Private) Limited. For the purposes of this application they shall thus be referred to as the shareholders of that company. Kanganda Farm (Private) Limited was placed under liquidation. The second respondent was appointed as its liquidator. The company had only one asset, a farm. The second respondent was authorized by the Master to sell the farm. The farm was subdivided into two portions. The first portion was sold. The second respondent also got the necessary authority to sell the remaining portion of the farm. He received specific instructions from the shareholders to sell the farm in the currency of the United States of America in order to preserve value as a mitigation measure against the fluctuations in the value of the local currency. On 19 June 2019 the second respondent duly concluded an agreement of sale in respect of the second and remaining portion of the farm. The agreed purchase price was US\$180 000.00. The second respondent received US\$70 000.00 in cash from the purchaser. The balance of the purchase price was to be paid in monthly instalments of US\$10 000.00. Some five days later, on 24 June 2019, Statutory Instrument 142 of 2019 was promulgated. Its effect was that all local transactions should be entered into in the local currency. In other words, the use of the United States dollar in local transactions was prohibited by that instrument.

When the second respondent prepared his Second Interim Liquidation and Distribution Account it did not show the US\$70 000.00. The applicant and third respondent queried this which they perceived as exclusion of that amount from the statement. The second respondent's explanation, which he persists with, is that when he received the US\$70 000.00 he deposited it into a local account at the interbank rate. The applicant's case is that the amount should have been deposited into a Nostro Foreign Currency account in order to preserve its value. After hearing submissions from the shareholders and the second respondent, the Master dismissed the objection. His reasoning was that since the applicant and her co-shareholder had complained that the US\$70 000.00 was missing from the Second Interim Liquidation and Distribution Account, their objection was not sustainable because the money was included in the total figure reflected in the

statement. The Master also held that it was up to the liquidator to decide how to deal with the US\$70 000.00 and that the manner in which he had dealt with it could not be impeached. This is the decision of the Master which the applicant wants to be set aside.

The Law

Section 282 of the Companies Act [*Chapter 24:03*] provides for the right of interested parties to object to an account and to challenge the Master's decision in respect of the objection, as follows:

- “(1) Any person interested in the winding up of the company may, at any time before the confirmation of an account, lay before the Master in writing any objection, with the reasons therefor, to the account.
- (2) If the Master is of the opinion that any such objection ought to be sustained he shall direct the liquidator to amend the account or may give such other directions as he may think fit.
- (3) Notwithstanding that an objection to the account has not been lodged, if the Master is of the opinion that any improper charge has been made against the assets or that the account is in any respect incorrect, he may direct the liquidator to amend the account or may give such other directions as he may think fit.
- (4) The liquidator or any person aggrieved by any such direction of the Master under this section or by the refusal of the Master to sustain an objection lodged thereunder, may apply by motion to the court within fourteen days after the date of the Master's direction, after notice to the liquidator, for an order to set aside the Master's decision, and the court may confirm the account or make such other order as it thinks fit.”

The above provisions are also found in s 127 of the Insolvency Act [*Chapter 6:04*].

In casu the one ground which has been persisted with by the applicant is that the US\$70 000.00 was irregularly dealt with and not properly accounted for by the second respondent and that the Master ought not to have upheld the account.

The objections in limine

The first ground of objection taken by the second respondent is the non-joinder of the company in liquidation. The second respondent's contention is that the company has a legal

interest in the matter and ought to have been cited. While it is desirable that the company should have been cited, its non-joinder does not render the application fatally defective. The decision that was the subject matter of the objection before the Master was that of the second respondent in his capacity as the liquidator. He, and he alone, can competently respond to the complaint raised. He did give his response to the charge. There is therefore no prejudice which is occasioned to any of the parties as well as the company in liquidation, arising out of the non-joinder complained of. In any event, the rules provide in r 32 (11) of the High Court Rules, 2021 that a cause or matter shall not be defeated by the non-joinder or misjoinder of a party. The court can determine the issues in dispute in this matter insofar as they affect the rights and interests of the parties cited. This ground of objection must therefore fail.

The second ground of objection is that the applicant did not seek the leave of the court before instituting proceedings. The second respondent's submission in this respect is that in substance this application is a suit against the company in liquidation which required that leave be sought and obtained before the application was launched. This objection is misplaced, because the company is not a party before this court. It has not been sued. The objection is therefore dismissed.

The third preliminary objection is founded upon the contention that the application is frivolous and vexatious and is designed to prevent or delay the process of winding up the company. The grounds relied upon in this objection pertain to the merits of the application. These should not be raised as grounds of an objection *in limine*. They are the basis upon which the merits of the application should be considered. The raising of this as a preliminary objection is thus meritless.

The Merits of the Application

The dispute on the merits revolves around the manner in which the US\$70 000.00 was dealt with. The applicant raises the complaint that "the overall conduct of the liquidator is one that raises suspicion of misappropriation of trust funds". The second respondent's case is that he deposited the US\$70 000.00 into a local account at the applicable official rate. The Master noted that the local equivalent which ought to have been realized by the second respondent was Z\$441 749.00 and not ZW\$430 164.00 as disclosed by the second respondent. There was thus a shortfall of Z\$11 585 representing the difference between the two figures. However, the Master then turns a blind eye to that patent discrepancy. That was an irregularity which could not be ignored.

Section 282 (3) which is cited above empowers the Master where such an irregularity is noted, to direct the liquidator to re-do the account or to give such other direction to correct the irregularity. On this basis alone the Master could not dismiss the objection thereby upholding an account in respect of which he had noted an anomaly. Without issuing any direction as to how that anomaly should be addressed the account stood as if it was regular. The Master could not simply ignore such an anomaly merely because it was not the ground of objection. The anomaly is connected to the overall complaint regarding the manner in which the US\$70 000.00 was dealt with.

But there are more fundamental irregularities in the reasoning of the first respondent. The respondent did not furnish proof of the deposit of US\$70 000.00 into the account. What amount would have been written on the deposit slip as he deposited foreign currency into what was a local currency account? Why was the US\$70 000.00 not deposited into a Nostro Trust Account, it being hard cash? These are the questions to which the first respondent ought to have applied his mind. It is not enough for the second respondent to merely wave the balance in his account as proof that the US\$70 000.00 was put into that account without furnishing the relevant documentation to show its movement. The United States dollars could not simply be “deposited” into an account denominated in a different currency.

The second respondent was always aware, and he repeated this in his letter of 23 April 2019, that the rationale for selling the property in the currency of the United States was “to preserve the value”. But his conduct of depositing the money into a local currency account did not preserve the value of the money. The first respondent extensively dealt with the implications of S.I. 142 of 2019 in order to justify the conclusion that it was for the liquidator to determine the time for converting the money, thereby authenticating the second respondent’s assertion contained in para. 35 of the opposing affidavit that the timing of when to convert the money was in his discretion. Statutory Instrument 142 of 2019 which came into operation 24 June 2019 and the amendments to the Reserve Bank of Zimbabwe Act [*Chapter 22:15*] which became effective on 1 August 2019, which the respondent cites in his letter of 21 November 2019 and seeks to rely upon, are irrelevant because these came into operation after he had received the US\$70 000.00 in cash. In any event, these would not preclude him from depositing the money into a Nostro Account since the money was already in his custody. The money could still be accounted for in the Liquidation and Distribution Account in the currency in which it was received. The second respondent

conspicuously refrains from stating the exact date on which he deposited the money into the bank account. Whatever time that the second respondent chose to change the money ought to have secured the value of the money as earlier on agreed with the shareholders.

The nature of a liquidator's functions has been considered by the courts. In the case of *A M S Marketing Co (Pty) Ltd v Holzman* 1983 (3) SA 263(W), at 269-270, LEVESON J said:

“ . . . (T)he liquidator enjoys a dual capacity. In one sense he is a primary organ of the company in whom the powers formerly residing in the directors are vested. In the other his position is similar to that of a trustee of an insolvent estate, having the power to recover assets, realize them and distribute the proceeds to the person entitled thereto.”

In both capacities, the liquidator is enjoined to act with due diligence to avoid causing unnecessary loss to the assets of the company under liquidation. He owes a duty of care to the company, its shareholders and its creditors. In this case it is not in doubt that both the second respondent and the applicant and the third respondent were sensitive to the need to preserve the value of the assets of the company, hence the responsive decision to have the property sold in United States dollars. Likewise, in the same spirit, it was incumbent upon the second respondent to properly account for the movement of the money received in United States dollars. In this case the second respondent spectacularly failed to do so. Even on the figures which he presented, the Master found that these did not add up. Nothing further was required to set aside the Interim Account. However, beyond that failure to present accurate figures, the proof of how the money which was hard cash could simply be deposited into a local currency account was not produced. The Master could not simply accept as gospel the figures presented by the second respondent. There was clearly a gross irregularity in the manner that the US\$70 000.00 was dealt with. It does not matter that the applicant presented it as missing money or as misappropriated money. The facts of its movement into the local account not being properly established and the figures relied upon to justify its conversion not tallying justified the upholding of the applicant's objection.

The applicant wants the court to order, *inter alia*, that the second respondent prepares a Second Interim Liquidation and Distribution Account in terms of which the sum of US\$70 000.00 paid on 19 June 2019, is converted to the local currency using the rate applicable on the day that the account is prepared. Applicant further wants payment of the dividend to be in accordance with the amended Second Interim Liquidation and Distribution Account. There is need for the Master to first investigate the movement of the US\$70 000.00. Based on evidence of such movement, the

applicant and third respondent must be given an opportunity to interrogate that movement. The outcome of such an investigation will then inform how the US\$70 000.00 should be dealt with.

In the result, IT IS ORDERED THAT:

1. The first respondent's decision to dismiss the applicant's objection to the Second Interim Liquidation and Distribution Account prepared by the second respondent be and is hereby set aside.
2. The Second Interim Liquidation and Distribution Account filed by the second respondent in October 2019 be and is hereby set aside.
3. The first respondent must investigate and establish how the US\$70 000.00 which was received by the second respondent in cash on 19 June 2019 was dealt with by the second respondent and, consequent upon such investigation, direct the second respondent to amend the account or give such other directions as may be appropriate having regard to the outcome of the investigation.
4. The second respondent shall pay the costs of suit.

MawereSibanda Commercial Lawyers, applicant's legal practitioners
Henning Lock, second respondent's legal practitioners