

CBZ BANK LTD  
**versus**  
PHILLIP NDLOVU N.O  
and  
THE REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE  
MAKONESE J  
2 MARCH AND 9 JULY 2015

### **Opposed Application**

*Advocate H. Moyo* for applicant  
*Advocate R. Fitches* for respondent

**MAKONESE J:** This is an application brought in terms of section 222(3) of the Companies Act [Chapter 24:03], which seeks to set aside certain decisions made by the Provisional Liquidator (1<sup>st</sup> respondent). The issue for determination by the court is whether the mortgage bond registered in favour of applicant is valid or could be validated and consequently whether applicant is a secured creditor. The application is opposed by first respondent whose main contention is that the application militates against the precepts of the *concursum creditorium* imposed by the operation of law in respect of the two companies being liquidated by first respondent, in that it seeks to give a single creditor undue advantage over other creditors. It was argued on behalf of first respondent that his decision to treat applicant as a concurrent creditor was, on the facts *bona fide* and reasonable.

### Background

The factual background to this application is as follows: First respondent is the Provisional Liquidator of Archer Clothing Manufactures (Pvt) Ltd (Archer) and Lasker Brothers (Pvt) Ltd (Lasker). Before both companies were placed under liquidation, applicant advanced certain sums of money to Archer in terms of a banking facility. Under that facility, Archer was required to register a mortgage bond to secure applicant's exposure. Under cover of a letter dated 10 July

2009, Archer's managing director, forwarded title deeds in respect of a certain piece of land known as stand 5231C, Bulawayo Township, situate in the district of Bulawayo, to applicant for the purposes of registration of the mortgage bond. A power of attorney to pass a mortgage bond was given under the hand of David Joel Lasker, who is also a director and shareholder in Archer. Without doubt, the intention of the parties was to register the bond as security for the monies advanced to by applicant. This was a deliberate and conscious act on the part of Archer and Lasker who constitute the same economic entity. The two companies share the same shareholders as well as executive structure. Consistent with the terms of the agreement between the parties, the mortgage bond was registered which clearly states that its object is to secure applicant's financial exposure. The parties thereafter proceeded on the basis that a mortgage bond had been registered. Archer received monies under the banking facility. Both Archer and Lasker have never put in issue the validity of the bond. The bond was however, not registered as a surety bond. A mortgage bond was instead registered, not against Archer, but Lasker. When Archer and Lasker were both placed under provisional liquidation, first respondent was appointed as provisional liquidator for both entities. In the execution of his function he properly dealt with the entities as one and the same company. Applicant duly complied with the law in terms of notifying the liquidator of its claims. By letter dated 29 January 2014, first respondent addressed a letter to applicant's legal practitioners in the following terms:

“On the issue of CBZ's status: they are, as pointed out to yourself; a concurrent creditor. They have no security as against Archer Clothing Manufacturers. You will note from the papers, copies of which you have, that a credit facility was extended to Archer Clothing Manufacturers (Pvt) Ltd on the 23<sup>rd</sup> December 2010. The same document clearly states that a Mortgage Bond against 43 Plumtree Road, Belmont in the name of Archer Clothing Manufacturers (Pvt) Ltd will be registered.”

On 1 March 2011, a mortgage bond was then registered, not against Archer Clothing Manufactures (Pvt) Ltd, as the recipients of the money, but Lasker Brothers (Pvt) Ltd. This clearly was not valid as Lasker Brothers (Pvt) Ltd never got any money from CBZ, your clients. In fact the mortgage bond states that the appearer declared that Lasker Brothers (Pvt) Ltd had been granted certain loan, credit and/or facilities by CBZ. This is not true. It goes on to state that the said facility was and is for US\$3 375 000.00. We all know that this is not true. Lasker Brothers (Pvt) Ltd, as a company, never got any money from CBZ and there is no credit facility that was extended to it.

It needs be admitted (*sic*) and accepted by your client that what ought to have been registered against Lasker Brothers (Pvt) Ltd's property, if it did offer its property as security for Archer Clothing's indebtedness, is a Surety Bond. This is not the case here. The mortgage Bond, as it stands, testifies of what does not and never obtained on the ground and deserves, rightly so, to be cancelled forthwith. In fact; action in this regard is being contemplated on. Lasker Brothers (Pvt) Ltd's property has to be free from this encumbrance."

It is the above letter which triggered this present application. The Applicant argues that the mortgage bond is valid and that applicant ought to be regarded as a secured creditor, at least in relation to Lasker. Applicant further argues that the manner in which Lasker and Archer have been operating and the manner in which they dealt with the question of security in this matter justifies a rejection of the façade of separate personality. The two are in essence a single economic entity, so it is argued.

In paragraph 7 (f) of the opposing affidavit the first respondent states the broad position in opposing this application as follows:

"Lasker Bros is a separate company from Archer Clothing. It has, to a large extent, enjoyed a close relationship with Archer Clothing insofar as Archer Clothing has always operated out of the Lasker Bros, immovable property and has paid Lasker Bros rentals. However, during the course of business the two companies have always maintained their own legal personas and operated as separate entities. In liquidation certain of the creditors of Archer Clothing are the same as those of Lasker Bros, which in fact arises out of the fact that Lasker Bros provided MBCA Bank and Kingdom Bank with guarantees for the debts of Archer Clothing. However, to the best of my knowledge, no such guarantee was ever extended to the applicant nor was a Surety Mortgage Bond registered over Lasker Bros property for monies advanced to Archer Clothing."

I note that what first respondent does not address is why Lasker Bros handed the title deed for the registration of the mortgage bond in the first instance. It has not been argued by first respondent that Lasker Bros erroneously handed the title deed for registration of a bond, to secure the debt owed to the applicant. At all materials times it seems, Lasker Bros were well aware that its property was being used as security and that monies were indeed advanced to Archer, by applicant on that understanding.

### Analysis of the Legal Position

It is beyond doubt that a mortgage bond evidences a debtor and creditor relationship. It goes without saying, then that the principles applicable in the construction of a contract also apply to a mortgage bond. Also beyond dispute is the fact that in the generation of the mortgage bond in issue in this matter, the parties were involved in a commercial transaction. In the case of *Chikona v Mukweza* 1998 (1) ZLR 541 (SC), the Supreme Court approved the following:

“Not to be overlooked, as well, are the wise words of Lord Wright in *Hillas and Co Ltd Acros Ltd* [1932] ALL ER Rep 494 (HL) at 5031 (1932) 147 LT 503 (HL) at 514:

“Businessmen often record the most important agreements in crude and summary fashion, modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is accordingly, the duty of the court to construe such documents fairly and broadly, without being too astute or subtle or subtle in finding defects; but, on the contrary, the court should seek to apply the old maxim of English Law, *verba ita sunt intelligenda ut res magis valeat quam pereat.*”

The proper approach to adopt, it would seem was laid down in *Hoffmann and Carvalho v Minister of Agriculture* 1947 (2) SA 855 (T) at 860 where it was stated as follows:

“Where parties intend to conclude a contract, think they have concluded a contract, and proceed to act as if the contract were binding and complete, I think the court ought rather to try to help the parties towards what they both intended rather than obstruct them by legal subtleties and assist one of the parties to escape the consequences of all that he has done and all that he has intended ----.”

There can be no doubt that on this approach the parties intended the validity of the mortgage bond as providing real security for the debt. The following factors lead to such a conclusion:

- (a) Clause 9.2 of the facility agreement shows that real security in the form of a mortgage bond was to be registered.
- (b) Thereafter Archer forwarded the Lasker title deed on 10 July 2009 with an understanding that;

“*These title deeds are to be held as security by CBZ in respect of facilities afforded Archer ---.*”

- (c) A power of attorney to pass a mortgage bond was duly extended by David Joel Lasker who is a shareholder and director of both Lasker and Archer.
- (d) A resolution of the Board of Lasker for the registration of the bond was duly made.

The natural and intended consequences of these sequence of events was the provision of real security by Archer. Lasker provided their title deed in full knowledge that a bond would be registered in favour of the applicant for the facilities extended to Archer. The fact that the intentions of the parties were probably not adequately set out is irrelevant and the placing of reliance on the perceived defects borders on dishonesty. This is so because if there is a defect, it would be a defect of the debtor's own making. In *Standard Chartered Bank Zimbabwe Ltd v Matsika* 1997 (2) ZLR 389 (SC) it was held that:

“A cardinal principle of the common law is expressed in the aphorism: “*nemo ex proprio dolo consequitur actionem*”, which translates: no one maintains an action arising out of his own wrong. Complimentary to this principle is another which stipulates: “*nemo ex suo delicto meliorem suam conditionem facere potest*”, which means: no one can make his better by his own misdeed.”

The first respondent has argued that he acted in a *bona fide* manner throughout and that his decision cannot be impugned. Further the first respondent acted as a reasonable man applying his mind to the condition of affairs. See the case of *Concorde Leasing Corporation (Rhodesia) Ltd v Prungle Wood* 1975 (4) SA 231.

First respondent has urged that the court must not lightly interfere with a *bona fide* act taken by a liquidator where there is no lack of *bona fides*. The question is whether in the circumstances the liquidator has acted in a way in which no reasonable liquidator could have acted, having regard to the objects of winding up and the liquidator's duties in general. First respondent further contends that the alternative relief of rectification is not available to the applicant for the reason that rectification will only be granted if it will not adversely affect the rights of innocent third parties. It is argued that in the present matter, the two companies represented by first respondent are in liquidation and consequently, the *concurus creditorium* imposed by the law precludes anything that may be done by any of the creditors to alter the rights of the creditors. It is also averred by first respondent that applicant is essentially asking the court to make a contract for the parties. See the case of *Holmes v Palley* 1975 (2) RLR 98 (A) at page 105.

I must make a determination as to whether the principle of *concursum creditorium* has any application in the instant case. It is not denied that Lasker handed a title deed to applicant as a surety for the advancement of certain credit facilities to Archer. The issue now, is whether the mortgage bond registered against the Lasker title deed has any validity at law. I have already expressed the view that the clear intention of the parties was that a bond be registered against the title deed. No explanation has been forthcoming from first respondent whether the registration of the bond was done in error or not. In my view, the fact that the principal obligation has not been properly expressed, does not detract from the validity of the bond. In *Thienhaus NO v Metje and Ziegler Ltd and Another* 1965 (3) SA 25 (AD), it was stated as follows:

“But where the parties by a slip of the pen fail to express the principal obligation correctly in the bond, this does not prevent the bond from operating as security where there is a genuine principal obligation.”

I conclude therefore that the order sought by the applicants does not militate against the principle of *concursum creditorium* as expounded by first respondent. This court has the power to cause rectification of the bond just like in any other contract. The reason for this is simple. The aim and object of the court is to give effect to the real intentions of the contracting parties. There is no reason why this court may not order rectification of the mortgage bond to indicate that it is in fact a suretyship bond. This is what Lasker intended to do when they handed the title deed to the applicant. This is what Lasker intended to achieve when a power of attorney was passed to facilitate the registration of the bond. In arriving at the conclusion that the bond registered over Lasker property is valid, the decision of first respondent classifying applicant as a concurrent creditor necessarily falls away. The applicant holds real security to the extent that it is a secured creditor. Such an approach accords with the dictates of practical common sense.

I am persuaded that the applicant is entitled to the relief sought, having regard to the provisions of section 222(3) of the Companies Act.

In the circumstances, I would make the following order:

- 1) The mortgage bond passed by Lasker Brothers (Pvt) Ltd in favour of CBZ Bank Limited is valid and constitutes real security for the satisfaction of the obligations owed to CBZ Bank Ltd.

- 2) The second respondent be and is hereby authorized and directed to rectify the bond passed by Lasker Brothers (Pvt) Ltd in favour of CBZ Bank Limited to indicate that it is a surety mortgage bond, within 10 days of this order.
- 3) The decision by first respondent to classify CBZ Bank Limited as a concurrent creditor in the Liquidation of Archer Clothing Manufacturers (Pvt) Ltd and Lasker Brothers (Pvt) Ltd is contrary to law and is set aside.
- 4) Costs of this application shall be borne by first respondent.

*Mawere and Sibanda*, applicant's legal practitioners  
*Webb, Low & Barry*, 1<sup>st</sup> respondent's legal practitioners