RIO TINTO (AFRICA) PENSION FUND
versus
AFARAS MTAUSI GWARADZIMBA in his capacity as Liquidator
of Sagit Stockbrokers (Pvt) Ltd (In Liquidation)
and
AFARAS MTAUSI GWARADZIMBA in his personal capacity

HIGH COURT OF ZIMBABWE
MTSHIYA J
HARARE, 23 February 2010 & 14 April 2010

Adv. *Morris*, for the applicant
Adv. *Zhou*, for the 1st respondent
S. Chihambakwe, for the 2nd respondent

MTSHIYA J: In this application the applicant prays for the following order:-

"IT IS ORDERED against both respondents jointly and severally the one paying and the other to be absolved:

1. That respondents forthwith deliver to applicant 913 253 shares in OK Zimbabwe Limited 370 356 in Pelhams Limited and 46 025 in Old Mutual PLC;

2. Costs of the Court Application".

The background to this case and the facts of same are well captured in the applicant's founding affidavit. I shall therefore, for the sake of clarity, reproduce the relevant paragraphs of the applicant's founding affidavit. In the relevant paragraphs the applicant states as follows:-

> "In or about 1992 the Trustees of the applicant decided to employee Sagit Stockbrokers (Pvt) Ltd (Sagit) to manage its share portfolio. Accordingly the portfolio was delivered to Sagit and some of the shares were registered in the applicant's name and others in the name of Sagit's nominee company called Trust Nominees. The mandate given by the applicant to Sagit was to manage applicant's portfolio on applicant's behalf. This entailed the purchase and sale of appropriate shares which, when purchased, were either held in the name of Trust Nominees or in Applicant's name. At no time did any of these shares become the property of Sagit but were held in Trust for applicant.
>
> Communications from Sagit stopped at the end of 2002 and enquiries led applicant to discover that Sagit had been sold to new shareholders and there had been management changes. Applicant's trustees resolved to administer its own scrip and Sagit was formally asked to surrender all shares it was holding on behalf of applicant. Sagit managed to deliver most of the shares which were initially registered in the name of the applicant and part of the scrip held through nominees. A dispute arose regarding the

> actual quantity of the shares which were due to the applicant from Trust Nominees prompting the applicant to approach the Zimbabwe Stock Exchange for arbitration.
> A Sub-committee comprising officials from the Stock Exchange, the applicant and Sagit was formed to resolve the dispute but it failed to achieve any results. Applicant went on to appoint Mr Rodwell Mujumi, a former employee of Sagit, as consultant in an attempt to resolve the problem. Mr Mujumi produced a report which tracked share movements between the two institutions. It was only after this report and further reconciliations that Sagit agreed to settle most of the initial claims with the exception of Old Mutual PLC……
>
> When no scrip was received after some considerable time, a follow up was made with the Zimbabwe Stock Exchange and it was only then that the applicant learnt that Sagit had filed for voluntary liquidation and that a second creditors meeting was about to beheld. Applicant managed to lodge its claim using the last reconciled position which both parties had agreed to.
>
> Applicant submitted its claim to first respondent after which Mr Tondori, a Manager of the applicant was advised by first respondent that he had doubts about the validity of the applicant's claim because of a letter written to the Chief Executive Office of the Stock Exchange dated the 19th of July.
>
> As a result of that letter the first respondent's legal practitioners wrote to the applicant's legal practitioners in a 'without prejudice' letter dated the 16th of April 2009 in which the first respondent acknowledged that the Old Mutual shares were due to the applicant and agreed to release them to the applicant……"

The record shows that in subsequent correspondence the first respondent actually undertook to deliver the shares it was holding against delivery of the Old Mutual shares'. However, on 2 July 2009 the first respondent's legal practitioners advised the applicant's legal practitioners that a sum of US$ 25 706.94 had been paid to the applicant in respect of the shares held by first respondent. The applicant had rejected the payment preferring instead to receive the actual shares.

The above background facts indeed reveal that at the end of it all the first respondent ended up offering to pay the applicant US$25 706-94 in respect of the shares in question contrary to the applicant's expectation of receiving the actual shares. This is confirmed by the respondent in the following document.

"SAGIT STOCKBROKERS (PRIVATE) LIMITED (IN LIQUIDATION)
LIQUIDATOR'S OFFER IN FULL AND FINAL SETTLEMENT TO RIOZIM CLAIM PROVISIONALLY ACCEPTED BY THE LIQUIDATOR ON 4 FEBRUARY 2009

	No of shares	Value as at 17/03/09 US$
Counter owed to RioZim		
OK Zimbabwe	913 253	9 132.55
Pelhams	370 356	15 648.50
Old Mutual	46 025	925.89
	A	25 706.94
Less:		
Shares already held by Riozim		
Dawn Properties Limited	68 884	(2410.94)
Zimbabwe Sun Limited	68 884	(3444.20)
	B	(5855.14)
Balance due to RioZim per Liquidation & Distribution Account	(C=A-B)	19851.80
Counters offered to RioZim in full and final settlement of claim		
Medtech Holdings Limited	1 318 417	13184.17
Zimplow Limited	153 718	2305.77
Mashonaland Holdings Limited	116 223	4646.92
	D	20138.86
Balance due to Sagit from RioZim (See note 2)	(E=D-C)	(287.06)

Notes

1. As stated in the Liquidation and Distribution Account, creditors will be awarded shares at their market price as at 17 March 2009. The Liquidator hereby offers RioZim the above counters to liquidate its claim based on figures as at 17 March 2009 as per the Liquidation and Distribution Account.

2. By reason of the fact that the shares could not be divisible, RioZim owes Sagit US$287.06, which is the excess of the share values of the counters offered to RioZim over the RioZim claim. This amount is payable to the Liquidator on collection of the shares listed above.

3. Regarding the value of a creditor's claim creditors are directed to the provision of s 63 of the Insolvency Act [*Cap 6:04*]".

The election by the first respondent to pay US$25 706.94 instead of delivering shares is what led to the filing of this application on 20 July 2009 wherein the applicant seeks the relief indicated on the first page of this judgement.

Notwithstanding the detailed background to this matter the issues for determination can briefly be stated as whether or not, given the under taking by the first respondent to deliver actual shares, it was proper for the first respondent to elect instead to pay cash to the applicant and whether or not the second respondent, in his personal capacity, acted in bad faith and can therefore be held personally liable.

I heard this matter on 23 February 2010 and reserved judgment. On 2 March 2010, without leave of court, the applicant filed further and final submissions. The first respondent responded to same by filing further submissions on 15 March 2010. On March 2010, through my clerk, I caused an enquiry as to whether or not the applicant's further and final submissions had been served on the second respondent. Thereafter the second respondent filed its further submissions on 19 March 2010.

The second respondent, in his submissions, correctly pointed out that he filing of further and final submissions by the applicant without leave of court was wrong and improper. Upon reserving judgment I had indeed not given any further directives and as such I fully agree with the second respondent that leave of the court was required for any further action in the matter. On that basis I shall, accordingly, ignore the applicant's further and final submissions.

In seeking the relief referred to at page one of this judgment, the applicant's thrust of argument is that the shares in question were at all material times its property as a pension fund and the shares were being held in trust by the first respondent. The applicant submits that the shares never became part of the entity in liquidation. Furthermore, it was argued, as a pension fund, the applicant's mandate was severely curtailed in that it could not enter into a

compromise agreement without the authority of the beneficiaries of the fund i.e the members of the fund.

The applicant went further to submit that the fact that the Estate accounts lay open for inspection for the requisite period provided for in law was irrelevant because the shares were never assets of the Estate. That position, it was argued, had been accepted by the respondent through its legal practitioners and a promise had been made 'to release the shares to your client' or indeed to 'deliver the said shares without prevarication subject to yours having delivered first as the law prescribes'. Given that position, it was submitted, it was up to the respondent to decide in what capacity to act in satisfying the relief sought by the applicant.

On his part, the first respondent argued that Sagit Stockbrokers (Pvt) Ltd (Sagit) had been liquidated in terms of law and therefore its assets fell to be distributed in terms of the final liquidation and distribution account which had already been confirmed by the Master of the High Court. The confirmed account included the shares which form the subject of this application. It was argued that any payment made outside the confirmed final liquidation and distribution account would be unlawful and impeachable. The respondent had not rejected the applicant's claim to the shares. That was confirmed by the inclusion of the shares in the final liquidation and distribution account and indeed the subsequent tender of payment of what was due to the applicant (ie in respect of the value of the shares). This was so, it was argued, because like all other creditors, the applicant had proved its claim and was therefore entitled to payment in accordance with the law relating to the payment of creditors from the assets of a company in liquidation.

The first respondent further submitted that, in law, the confirmation of the final liquidation and distribution account had the effect of a final judgment unless lawfully re-opened. The account had not been re-opened or set aside. There had been no attempt on the part of the applicant to have the confirmed account re-opened or set aside.

This application is anchored on the way the first respondent dealt with the shares being claimed by the applicant. It is common cause that Sagit was placed under liquidation by order of this court on 15 October 2008 (HG 4292/08). That being the case, it follows therefore that at this stage any relief sought by the applicant ought to be in terms of or regulated by the Companies Act [*Cap 24:03*] (the Act). Section 296 of that Act provides 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. Any person aggrieved by any decision, ruling or order of the officer presiding at any meeting of creditors or contributories may bring the same under review by the court in the same manner, *mutatis mutandis*, as is prescribed in subsection (1).

4. 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".

In line with the above provision s 283 of the same Act provides as follows:-

"When an account has been open to inspection as hereinbefore prescribed and-

(a) no objection has been lodged; or
(b) an objection has been lodged and the account has been amended n accordance with the direction of the Master and has again been open for inspection, if necessary, as in subsection (5) of section two hundred and eighty-two prescribed, and no application has been made to the court within the prescribed time to set aside the Master's decision; or
(c) an objection has been lodged but withdrawn or not sustained and the objector has not applied to the court within the time prescribed in section two hundred and eighty-two;

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 there-under".

As has already been stated, the relief sought in this application is not that of re-opening the account or setting aside the account. Whilst there could be merit in advancing the argument that the shares were never the assets of Sagit, and should not have been part of the Estate account, that argument comes to nought when there is no court order to re-open or set aside the account. (See *Zimbabwe Development Bank/International Finance Corporation v David John Scott & 6 Ors* HH 25/2008). There is in place already a 'judgment' which deals with the shares in question.

Indeed as I write this judgment, there is, in law, a final judgment (i.e. the confirmed final liquidation and distribution account) which the applicant has not sought to have re-opened or set aside. That 'final sentence' deals with the shares that form the subject matter of this application. I therefore take the view that unless re-opened or set aside, any attempt to deal

with the shares in a manner that is contrary to the confirmed final liquidation and distribution account would be against the law.

In *casu,* I am not dealing with an application for setting aside or re-opening the account. However, the applicant can only proceed to ventilate on the relief it seeks once the account is re-opened, or set aside. The applicant was alive to the liquidation process before the confirmation stage and does not dispute that the confirmation of the account was in terms of the law. The law has since taken its course without any challenge. The applicant's attempt to mount a challenge in the form of this application is futile. The shares have already been dealt with in terms of a 'final sentence' which is still in force.

The foregoing conclusions dispose of this matter. In the absence of any fraudulent act relating to the manner in which the account was confirmed by the Master of the High Court, I see no need to dwell at length with the issue of whether or not the first respondent should have been sued in his personal capacity as well. There is nothing in the record to suggest that after 8 April 2008 when the applicant learnt that Sagit had filed for voluntary liquidation, the second respondent then secretly or fraudulently proceeded to procure confirmation of the account. The record shows that the account was procedurally confirmed on the basis of the reconciled position agreed to by both parties.

My finding is therefore that the relief sought cannot be granted outside the existing confirmed, final liquidation and distribution account.

The application is accordingly dismissed with costs.

Gill, Godlonton & Gerrans, applicant's legal practitioners
Wintertons, 1st respondent's legal practitioners
Chihambakwe, Mutizwa & Partners, 2nd respondent's legal practitioners