

SUPREME COURT OF SEYCHELLES

Reportable

[2019] SCSC 633

Ex parte 27/2008

In the matter between:

IN THE MATTER OF AILEE DEVELOPMENT CORPORATION (In liquidation)

AND

IN THE MATTER OF THE COMPANIES ORDINANCE 1972

EODC

(rep. by Frank Elizabeth)

Petitioner

V

GERARD LINCOLN (the Liquidation)

(rep by Olivier Chang Leng)

Respondent

Neutral Citation: EODC v Gerard Lincoln (the Liquidator) MA 72/2020 arising in CS 27/2008
[2020] SCSC 633 (2021)

Before: Govinden CJ

Summary: Application for release of Liquidator – Official Receivers Report and outstanding matters – Court to sanction additional liquidator fees i.e. R14, 420,500 not previously sanctioned – overpayment of the fee as a result of the incorrect rate of exchange used in the amount of R 5, 979,500 to be refunded to the Court – Legal Fees R 250, 000 & R 65, 000 to be taxed by Registrar. Outstanding: confirmation of taxation from revenue commissioner & confirmation of disbursed amounts received by the secured creditors.

Heard: Submissions

Delivered: 6th of October 2021

RULING

GOVINDEN CJ

- [1] The 16th October 2019 and 18th September 2020 Rulings in this matter denied the Liquidators application to be released until the Official Receiver had satisfactorily accounted for all matters relating to the winding up of Ailee Development Corporation Limited.
- [2] The 16th October 2019 decision, in its paragraph 242 requested the Liquidator to specifically address and give an account of the following issues to the Official Receiver:
- i. *a statement of affairs relating to Ailee on 8 February 2008;*
 - ii. *details of money paid in and out of Account Number 01002001197005 in the name of Plantation Club with Nouvobanq;*
 - iii. *details of Liquidator's fees paid after July 2011 which bill needs to be taxed according to Regulation 2, (Winding Up) (Fees and Costs) Regulations 1975, and/ or approved by the Court;*
 - iv. *details of Liquidator's running expenses paid after July 2011 need to be taxed or approved by the Court;*
 - v. *confirmation from the Seychelles Revenue Commissioner that the Liquidators fees are not subject to taxation in Seychelles under the Double Taxation Agreement existing between Mauritius and Seychelles;*
 - vi. *details of legal and professional expenses after July 2011 which need to be taxed or approved by the Court; and*
 - vii. *confirmation by the secured creditors that they have received the amounts in full disbursed by the Liquidator.*
- [3] In paragraph 244 of the same Ruling, Twomey CJ recommended that the decision be served on the President of Seychelles for the consideration of establishing a Commission of Inquiry pursuant to the Commissions of Inquiry Act Cap 39 to inquire into the unexplained

money received and disbursed by the government through Central Bank in respect of the Plantation Club.

- [4] The Commission of Inquiry (Commission) was established on 31 July 2020 and it finalized its mandate on 16 March 2021.
- [5] The Commission conducted the inquiry by interviewing 18 key witnesses, the EODC and the Liquidator, who were represented by their respective legal counsel. The Commission identified and obtained further information on the unexplained transactions and these findings, which are quite onerous are summarised below. The Commission found that:
- a. the absence of certain documents that should have been retained by several entities involved was not coincidental;
 - b. there was documentary proof of how the sale of Plantation Club was reduced from what the Court ordered and what it was eventually bought for;
 - c. there was no documentation explaining why the sale was rushed through the Registrar General's office for registration within a day of the money being received at Central Bank, even though the sanction letter stated that the sanction processing fee was a legal condition of the sale and transfer of the property;
 - d. conflicts of interest were not declared by senior government officials, and the code of conduct for civil servants was not adhered to;
 - e. there was a lack of follow up by civil servants on sanction money owed to Ministry of National Development;
 - f. there was the 'passing the buck' by government officials who took orders from those in authority. Those who sought permission from their superiors, did so and recorded the process, and this was evident from the Ministry of Finance documents submitted to the inquiry;
- [6] In conclusion the Commission stated that a Code of Conduct is not law and neither are policies, therefore it asks that the government strengthens the Commission of Inquiry Act

in order to hold those in decision making roles into account through a review of the current Public Service Order 2011, the Anti-Corruption Act 2016, and the Public Finance Management Act 2012

- [7] A copy of the report was also provided to the government of the day in the hope that a repetition of the actions can be avoided and lessons can be learnt from the inquiries findings. I take that the conclusion of the Commission of Inquiry effectively put to rest its mandate to inquire into the unexplained money received and disbursed by the government through Central Bank in respect of the Plantation Club as per paragraph 244 of the said Ruling.
- [8] The 18 September 2020 decision, in paragraph 29, outlined that the only matters outstanding are the liquidator fees, legal fees and costs which had not been taxed and or sanctioned by the Court, and called upon the Official Receiver to exercise his powers to tax the same and or ask the Court to authorise their payment if deemed reasonable.
- [9] The Official Receiver's report was provided to this Court on 22 October 2020 and his findings on these outstanding matters are outlined below.

Statement of affairs

- [10] The Official Receiver confirmed that the responsibility to keep proper books of account which show the assets and liabilities of the company lies with the directors, and on liquidation a statement of affairs is required to be submitted and verified by at least 2 directors in terms of the Companies Act, 1972.
- [11] The Official Receiver confirmed that he verified from correspondence between the liquidator and the directors that a request for the statement was made on 8 February 2008 and no such statement was produced by the directors. Under the circumstances the Liquidator should be absolved for non-production of the statement of affairs.
- [12] Accordingly, this court absolves the Liquidator from this obligation.

Liquidators Fees

- [13] The Official Receiver confirmed that the scale of fees laid down in the Companies (Winding up Regulations 1975) applicable to the Official receiver when he acts as Liquidator are the same rate of fees applicable to the Liquidator and that the quantum of the fees payable as remuneration to the liquidator in the sum of R 21, 267,042 are reasonable. He therefore recommends that the Court should sanction the additional fee not previously sanctioned by the Court in the amount of R14,420,500.¹ Accordingly, this Court sanctions the additional fee in the amount of R14, 420, 500.
- [14] The level of fees is calculated on the proceeds of sale which was stated in SCR and claimed in SCR. The Official Receiver recommended that since payment of the fee had not been approved by the Court at the time of payment, that the rate of exchange to be used in converting the payment of US\$ 1,700,000 which had already been drawn should therefore be US\$ 1=SCR 12/00, the rate used by the liquidator on completion of winding up.
- [15] He found that consequently, the overpayment of the fee arising as a result of the incorrect rate of exchange used in the amount of R 5,979,500 should be refunded to the Court and used to defray any further costs, with the remainder to be paid to the secured creditors in their agreed ratio.
- [16] The Liquidator is therefore ordered to pay the amount of R 5,979,500 with the Registry of the Supreme Court.

Legal Fees

- [17] The Official Receiver's Report confirms that the following Legal Fees were paid without regard to the provisions of section 165 (2) Companies (Winding Up) Regulations 1975.²
- (a) US\$ 20, 000- De Commarmond & Koenig – 26 November 2008
 - (b) US \$ 20, 000 – Francis Chang Sam – 26 November 2008
 - (c) R250, 000 – Francis Chang Sam – 30 June 2011

¹ Official Receivers Report dated 22 October 2020 at p5 Annex A

² Section 165 (2) of the Companies (Winding Up) Regulations states that:

"No payments in respect of bills of costs, charges or expenses of attorneys, managers...shall be allowed out of the assets of the company unless they have been duly taxed and allowed by the Taxing Officer

(d) R 725 – De Commarmond & Koenig – 10 April 2012

(e) R 65, 000 – Francis Chang Sam – 23 July 2012

[18] The liquidator in his affidavit dated 24 June 2011 averred that legal fees amounted to R 300,000, but the total fees paid was in fact US \$40 000. The Official Receiver averred that the rate of exchange as at 24th June 2011 would have been US \$ 1=SCR 12, and this would translate the legal fees paid to an equivalent of R 480,000.³

[19] It is his view that the legal fees were approved by the Court on 27 June 2011 but however it would appear that only the equivalent of R 300, 000 in US\$ were actually approved. Accordingly the overpayment in the amount of R 180 000 is to be refunded to the Court for eventual payment of any extra costs or distribution to the secured creditors in their agreed distribution ratio.⁴

[20] The Liquidator also recommends that following legal fees are to be taxed by the Registrar of the Supreme Court.

a) R 250, 000 paid to Francis Chang Sam on 30 June 2011

(b) R 65, 000 paid to Francis Chang Sam on 23 July 2011

[21] In view of the non-materiality of the payment of R 725 paid to De Commarmond & Koenig on 10 April 2012, the Official receiver is of the opinion that this amount should be allowed in full.

[22] The Liquidator is therefore ordered to pay the amount of R 180,000 with the Registry of the Supreme Court, which sum is to be used for the payment of any extra costs or distribution to the secured creditors in their agreed distribution ratio.⁵

[23] The court also order that the following legal fees be taxed by the Registrar of the Supreme Court.

³ Page 6 Annex A

⁴ Page 6 Annex A

⁵ Page 6 Annex A

(a) R 250, 000 paid to Francis Chang Sam on 30 June 2011

(b) R 65, 000 paid to Francis Chang Sam on 23 July 2011

Fees to ACM Consultants

[24] The Receiver confirms that the fees charged by ACM Consultants (Pty) Ltd, are not unreasonable and that these are allowed in full. I agree and I allow them in full.

Other Costs

[25] During the period that the provisional liquidator took charge of the assets of the company, the total costs and expenses came to R 4,682,864 and the Official Receiver states as follows regarding these costs:

“While in my view it would not be expedient to try and verify the propriety of these costs some twelve years after they were incurred, the above breakdown does not appear to be unreasonable bearing in mind that the liquidator did manage to sell the company’s main asset for R 480,000, 000 and recover debts outstanding at the date of his appointment as provisional liquidator in the sum of over R 3, 000,000”⁶

[26] Therefore, he recommends that these costs be allowable in full. This court will approve the recommendation of the Receiver and the costs and expenses in the sum of R4,682.864 is allowed.

Advances from Government

[27] A few loans were taken by the company from the Seychelles Government:

- a. R 1 000 000 on 29 Feb 2008, which was eventually repaid to government.⁷
- b. R 1,041,000 on 27 March 2008, while this loan was not repaid to Government, the former Chief Justice had this to say at para 224 of the 16 October 2019 judgment”

⁶ Page 7 & 8 Annexure A

⁷ 16 October 2019 Judgment at Paragraph 224

“the tranche of R 1, 041,001/62 is satisfactorily explained as it is supported by documentary evidence showing Ailee February payroll of the exact amount”⁸

- [28] On the loan in the amount of R 5,400, 000 dated 13 February 2008 the Official receiver states the following;

“from oral evidence provided to the Court & Commissioner of Enquiry appointed by the President, the sum was paid by Government to an account in Nuovobanq over which liquidator had no control, and was not a cheque signatory. While a detailed analysis of how the sum was eventually disbursed, was provided to me, and since this was not under the control of the Liquidator, I do not consider the transaction as part of the Liquidation process and therefore the non-inclusion of these transactions in the liquidators statement of account is correct.”

- [29] The Receiver concludes that he has not seen any evidence of Government making any claims for reimbursement of the loans, apart from the R 1, 000, 000 advance, which was repaid, therefore any claims made now would be prescribed. I find that the findings of the Official Receiver to be correct, these advances are not actionable and that they are therefore not recoverable.

Taxation

- [30] The Liquidator was required to obtain confirmation from the Seychelles Revenue Commissioner that the Liquidators fees are not subject to taxation in Seychelles under the Double Taxation Agreement existing between Mauritius and Seychelles in accordance with Article 15 of the said agreement.
- [31] The representative of the Liquidator wrote to the Revenue Commissioner on 25 August 2020 requesting confirmation of fact that the liquidators fees are not subject to tax in Seychelles under the Double Taxation Agreement. The Official Receiver also wrote to the Commissioner General a letter dated 22nd of October 2020 requesting a response to this 25 August 2020 letter by the Liquidator, but it appears that there has not been a response to date, and so this is still outstanding.

⁸ 16 October 2019 Judgment at Paragraph 224

- [32] The Court will require this confirmation from the Revenue Commissioner on the taxation in Seychelles before the Liquidator can be released. The Revenue Commissioner is to provide an answer to the above letters to the Official Receiver within 14 days of this Ruling.

Confirmation by secured creditors of amounts disbursed by Liquidator

- [33] The Official Receiver has attached correspondence from the EODC's Attorney Mr. Frank Elizabeth to Mr. Francis Chang-Sam dated 8th March 2012, who was the legal advisor to the Liquidator, confirming that he has received an amount of SCR 125, 818,169.00 and one million dollars from his client. Mr. Elizabeth highlighted that whilst the principal amount was received, the accrued interest had not been received.
- [34] On 10 February 2020 the Liquidator addressed a letter to the Chief Manager at Bank of Baroda asking him to confirm receipt of an amount of SCR 424,285,113, being proceeds received from the disposal of the Company's assets on 10 December 2018, but this confirmation letter does not seem to have been received. It is not clear whether all the disbursed amounts by the liquidator have been received by the secured creditors since there is no proof to that effect. The relevant confirmation will need to be provided before the release of the liquidator.
- [35] The Liquidator is accordingly ordered by this court to provide an answer to Mr Elizabeth's letter within 14 days hereof, a copy of which has to be made available to the Official Receiver. In the said letter the Liquidator is to confirm whether all the disbursed amounts by the Liquidator have been received by the secured creditors.
- [36] The Chief Executive Officer of the Bank of Baroda Liquidator is also accordingly ordered by this court to provide an answer to the letter dated the 10 February 2020 written by the Liquidator, addressed a letter to the Chief Manager of the Bank of Baroda asking him to confirm receipt of an amount of SCR 424,285,113, being proceeds received from the disposal of the Company's assets on 10 December 2018. The letter has to be provided to the Liquidator within 14 days hereof, a copy of which has to be made available to the Official Receiver.

[37] A copy of this Ruling shall be served upon the following persons;

- (1) The Registrar of the Supreme Court.
- (2) The Revenue Commissioner.
- (3) The Official Receiver.
- (4) The Executive Officer of the Bank of Baroda.
- (5)

This case shall be mentioned before the court on the 25th of November at 9 am in order to ascertain compliance to the above orders.

Signed, dated and delivered at Ile du Port on the ^{25th} day of October 2021.



R. Govinden

Chief Justice