ECONET WIRELESS (PRIVATE) LIMITED

versus

RENAISSANCE FINANCIAL HOLDINGS LIMITED

and

REGGIE FRANCIS SARUCHERA (in his Capacity

as the Curator of RENNAISSANCE MERCHANT BANK LIMITED

HIGH COURT OF ZIMBABWE

MAVANGIRA J

HARARE, 22 and 24 June and 15 July 2011

**Urgent Chamber Application**

*H. Nkomo*, for the applicant

*A.B.C. Chinake*, for the first respondent

*A. Mugandiwa*, for the second respondent

MAVANGIRA J: The applicant filed this urgent chamber application seeking a Provisional Order in the following terms as amended.

TERMS OF FINAL ORDER SOUGHT

“1. In the event of the respondents failing to discharge all of their obligations towards the applicant, including the payment of all capital amounts due and owing to the applicant together with all interest accrued, by 30th October 2011, the first respondent’s shareholding in Africa First Renaissance Corporation Limited, be transferred to the applicant.

2. The respondents pays costs of this application at an attorney and client scale with the one paying the other to be absolved.

INTERIM RELIEF GRANTED

1. The second respondent be and is hereby directed to forthwith deposit with the Registrar or Master of the High Court, Harare Share Certificate of the first respondent in Africa First Renaissance Corporation Limited.
2. The first respondent be and is hereby interdicted from transferring, disposing of or encumbering in any other way, their shareholding in Africa First Renaissance Corporation Limited, pending the finalisation of this application.

The application was set down for hearing on 6 June 2011. During the hearing on that

date the applicant withdrew its claim against Renaissance Merchant Bank Limited which had been cited as the second respondent. On 7 June the applicant filed its formal Notice of withdrawal.

During the hearing of 6 June, the respondents raised certain preliminary points. This court ruled against the respondent and ruled that the matter ought to be heard on an urgent basis. It was then set down for hearing on the merits on 22 June 2011.

Before the hearing of the matter on the merits could commence, an application was filed on 22 June 2011 by Mr *Mugandiwa* for the joinder, as a respondent in this matter, of Reggie Francis Saruchera in his capacity as the curator of Renaissance Merchant Bank Limited. With the consent of the other parties, the application was granted on 24 June 2011 and Reggie Francis Saruchera in his capacity as curator of Renaissance Merchant Bank Limited was joined as second respondent. Mr *Nkomo* thereafter applied to amend the Provisional Order sought by the applicant. The amendment was granted with the consent of the other parties. The matter was the heard on the merits and the court reserved its ruling.

On 29 June the court granted the Provisional Order sought by the applicant, as amended. It thereafter came to the court’s attention that the Provisional Order which was then availed to the parties by the Registrar had two patent errors. The first related to the identity of the second respondent which was cited as Renaissance Financial Holdings Limited instead of Reggie Saruchera in his capacity as Curator of Renaissance Merchant Bank Limited. This error emanated from the applicant’s draft of the Provisional Order. After the application for joinder had been granted, it became common cause that Reggie Saruchera in his capacity as Curator of Renaissance Merchant Bank Limited became the second respondent while the Renaissance Financial Holdings Limited remained as the first respondent. This was thus clearly an error.

The second error which was a typing error and which the Registrar of this Court did not detect before proceeding to sign and issue the Provisional Order was that the terms of the interim relief sought had been interchanged with the terms of the final order sought. With the intention of proceeding in terms of r 449 to rectify these errors, the court instructed that the parties be called to attend in chambers on a mutually convenient date and time. As the judge’s clerk failed to get a clear response from counsel he was then instructed to call the parties to attend chambers on 6 July 2011 at 8.30 a.m. Mr *Nkomo*, Mr *Mugandiwa* and Mr Tandi standing in for Mr Chinake, attended in chambers as directed. It was explained that even before the letter written by Mr *Nkomo* highlighting the said errors had been received, the court had already observed the same and that it was the intention of the court to rectify the Provisional Order in terms of r 449. Furthermore, that the rule required that the parties be given notice of the proposed correction before it could proceed to effect the correction.

The parties had no contrary submissions to make on this aspect. The Provisional Order has thus since been accordingly amended and issued in the terms as reflected in the Provisional Order quoted earlier in this judgment.

The first respondent’s legal practitioner has since requested, *inter alia,* for the court’s written judgment as the first respondent intends to appeal against the granting of the Provisional Order which was granted by this court. The reasons follow hereunder.

The applicant sought before this court interim relief. The requirements that it had to meet before the court could grant it the said relief were originally stated in *Setlogelo v Setlogelo* 1914 AD 221 and were clearly repeated in *Kenny Karimakwenda v Rumbidzai Bushu & Three Others* HH 156/2004 as follows:

“(a) a *prima facie* right, even if it is open to doubt;

(b) An infringement of such right by the respondent or a well grounded

apprehension of such an infringement;

(c) a well-grounded apprehension of irreparable harm to the applicant, if the interlocutory interdict should not be granted and if he should ultimately succeed in establishing his right finally;

(d) the absence of any other satisfactory remedy; and

(c) that the balance of convenience favours the granting of an interlocutory interdict”

Regarding the first requirement, it is apparent on the papers that the indebtedness of

Renaissance Merchant Bank Limited (the Bank) to the applicant was acknowledged in the letter of 25 April 2011 which I made reference to in my written ruling dated 16 June 2011. Furthermore, the letter, tendered as security for the bank’s debt, the first respondent’s 30% shareholding in Africa First Renaissance Corporation Limited (AFRE) to the applicant. As the applicant had dealt with the author of the letter one P Timba in previous dealings, it had no reason to suspect that he did not have authority as now alleged by the first respondent.

In my assessment, the applicant has established a *prima facie* right to the shares even though such right may be open to doubt in view of the first respondent’s stance that the author of the letter of 25 April 2011 had no authority from the first respondent to act as he did.

With regard to the second requirement, the papers show that the applicant became concerned due to an indication of an intention by the National Social Security Authority (NSSA) to take over the said 30% shareholding. Consequently, the applicant wrote to the first respondent requesting that an undertaking be made that its stake in AFRE (the 30% shareholding) was safe given the emergence of competing interests over the same shares. No undertaking was given. In fact the said letter went unanswered and about ten days later this application was filed. In my view the applicant established, in these circumstances, a well grounded apprehension that the shareholding which was ceded to it may be placed into other parties’ hands by the applicant.

The following pertinent facts appear from the second respondent’s founding affidavit in its application for joinder:

“6. Upon assumption of office as curator and discharging my duties as such I discovered that RFHL and its 2 subsidiaries, Renaissance Securities (Private) Limited and Renaissance Uganda (Private) Limited owed the bank an unsecured debt of $11 694 984-68.

7. As I could not immediately obtain payment of the debt I demanded security from RFHL and its subsidiaries. Acknowledgments of debt were obtained and the debtors ceded and pledged to me shares they add in Africa First Renaissance Corporation Limited (AFRE) as security for the due performance and discharge of their indebtedness to the Bank.

8. I attach hereto marked as Annexures ‘C’ and ‘D’ acknowledgements of debts that were executed by RFHL and one of its subsidiaries Renaissance Securities Limited respectively.

9. I also attach hereto marked Annexure ‘E’ a copy of the deed of cession and pledge that was executed by RFHL and the subsidiaries. An extract of the minutes of the board of RFHL authorising the execution of the acknowledgement of debt and the cession and pledge is also attached hereto as Annexure ‘F’ (*sic*)

10. The pledged shares have also been delivered to me”.

A perusal of the acknowledgment of debt executed by the first respondent on 15 June 2011 shows that it states that if the amount due is not paid in full by due date, 30 June 2011, the entire balance shall become due and payable without notice and in consequences thereof any security held by the creditor, Renaissance Merchant Bank Limited represented by Mr R.F. Saruchera as curator, shall become executable.

It appears, in the circumstances, that in the event that the applicant eventually succeeds in persuading a court to find in its favour that the letter of 28 April 2011 is valid and the 30% shareholding in AFRE is consequently awarded to it, the result would be that if the second respondent has in the meantime sold such shareholding in terms of the terms of the said acknowledgement of debt of 15 June 2011, the applicant would be left holding a judgment in its favour which would be incapable of enforcement; a *brutum fulmen.* For these reasons it is also my view that the applicant established a well grounded apprehension of irreparable harm if the interdict that it seeks is not granted. It has also, in the circumstances, established the absence of any other satisfactory remedy.

If the interim interdict sought is granted, the second respondent will not suffer any prejudice. It appears apposite to also note at this stage that the acknowledgement of debt of 15 June 2011 was executed at a time when both respondents were aware that this court was seized with this urgent chamber application in which the subject matter constitutes the very same shares therein ceded to the second respondent by the first respondent. If the interim interdict sought is not granted, the applicant thus stands to suffer great prejudice. I thus found that the balance of convenience favours the granting of the Provisional Order.

It was for these reasons that the Provisional Order was granted.

*Mtetwa & Nyambirai*, applicant’s legal practitioners

*Kantor & Immerman,* first respondent’s legal practitioners