

PATTERSON FUNGAYI TIMBA  
and  
RENAISSANCE FINANCIAL HOLDINGS LTD  
versus  
PROFESSOR C.J. CHETSANGA  
and  
COLLIN KUHUNI  
and  
MONICA MAITIRWA MUKONOWESHURO

HIGH COURT OF ZIMBABWE  
TAGU J  
HARARE, 19 January and 3 February 2016

### **CIVIL TRIAL – SPECIAL CASE**

*T Mpofu* with *S Hashiti*, for the plaintiffs  
*T Zhuwarara*, for the 1<sup>st</sup> and 3<sup>rd</sup> defendants  
*A Mugandiwa*, for the 2<sup>nd</sup> defendant

TAGU J: This trial was brought as a special case in terms of Order 29 r 200 of the High Court Rules 1971. The rule in question says-

**“200. Special case by order before trial**

If it appears to the court that there is in any cause or matter a question of law which it would be convenient to have decided before any evidence is given or any question or issue of fact is tried, the court may make an order accordingly, and may direct such question of law to be raised for the opinion of the court, either by special case or in such other manner as the court may deem expedient, and all such further proceedings as the decision of such question of law may render unnecessary may thereupon be stayed.”

In *casu* the parties appeared at the Pre-Trial Conference held before MANGOTA J on 30 October 2014 in chambers and the parties apparently agreed to have the points of law in this case to be determined by way of a Stated Case. The judge made the following comments on the result of the Pre-Trial Conference “Case referred to trial on the basis of the jointly signed P.T.C. minute dated 11 March 2015 and filed of record.” A document dated 11 March 2015 filed of record and signed by defence counsels from Mambosasa, Kantor & Immerman and Wintertons reads as follows-

**“SPECIAL CASE IN TERMS OF ORDER 29, RULE 200**

**WHEREAS** Plaintiff instituted proceedings against Defendants on 15<sup>th</sup> of March 2012  
**AND WHEREAS** all the Defendants have filed their pleas and inter alia raised questions of law in their line of defence;  
**AND WHEREAS** the Plaintiffs have filed their Replications;  
**AND WHEREAS** at the Pre-Trial Conference held before the Honourable Mangota J on the 30<sup>th</sup> October 2014, in chambers, the parties agreed to have the points of law determined by way of a Stated Case

**NOW THEREFORE** the point of law on which the parties seek determination is:

- a) What is the legal effect of Section 54 of the Banking Act [Chapter 24:20] in respect of any shareholder that may be the shareholder of a banking institution that has been placed under Curatorship by the Reserve Bank of Zimbabwe?"

At the hearing of the matter Mr *Mugandiwa* for the second defendant sought to challenge the fact that parties agreed that this matter should be heard as a Stated Case. In view of the signed document I quoted above I do not agree with him. His argument had been that it should have been a Stated Case in terms of r 199 of the High Court rules and that a statement of agreed facts should have been prepared. His argument would have made sense had it been a Stated Case by consent in terms of r 199 of the rules. I will therefore proceed to determine this case as a Stated Case in terms of r 200 as agreed by all the counsels.

The background to this case is that the first plaintiff Mr Patterson Fungayi Timba is a Zimbabwean businessman and a banker. He is also a shareholder in the second plaintiff RENAISSANCE FINANCIAL HOLDINGS (PVT) LTD, hereinafter referred to as (RFHL), a corporate entity in terms of the laws of Zimbabwe. The three defendants who are Professor C.J. Chetsanga, Collin Kuhuni and Monica Maitirwa Mukonoweshuro were directors in the second plaintiff. The second plaintiff held 100% shares in RENAISSANCE MERCHANT BANK, hereinafter referred to as (RMB). RMB was subsequently placed under curatorship by the Reserve Bank of Zimbabwe, hereinafter referred to as (RBZ) on 2 June 2011 and one Mr Reggie Saruchera was appointed as the Curator of RMB. RFHL was never placed under curatorship. On 25 January 2012 the Board members of the second plaintiff held an Extra Ordinary General Meeting well after RMB was placed under curatorship. At that meeting the three defendants were dismissed in absentia from the Board of RFHL and ceased to be directors.

However, a day before the board meeting the curator of RMB Mr Reggie Saruchera purported to cancel the meeting since he had not sanctioned it. However, the shareholders of RFHL ignored the cancellation and proceeded with the meeting which resulted in the sacking of the three defendants. The three defendants did not recognise the validity of the meeting that had dismissed them and continued to hold themselves as directors of RFHL. A dispute

then occurred between the other Board members and the three defendants culminating in an order by MUTEMA J in case HC 5999/12 barring, stopping and interdicting the three defendants from convening any meeting of the Board of Directors of RFHL and from acting in any way whatsoever as Directors of RFHL. The order read as follows-

“Pending resolution of HC 3016/12:-

1.1.1. 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents be and are hereby barred, stopped and interdicted from convening any meetings of the 6<sup>th</sup> applicant’s Board of Directors, and from acting in any way whatsoever as Directors of 6<sup>th</sup> Applicant.”

The sixth applicant in case HC 5999/12 is RFHL. The order of MUTEMA J is extant and has not been appealed or rescinded.

The plaintiffs are now seeking a declaratur that defendants were validly dismissed from their directorship with second plaintiff pursuant to the Extra Ordinary General Meeting of 25 January 2012. That any business purportedly undertaken by defendants on behalf of second plaintiff post of 26 January 2012 is null and void and of no force or effect. That defendants are interdicted from continuing to hold themselves out as directors of second plaintiff, and that cost of suit shall be met by defendants jointly and severally, the one paying the other to be absolved.

The defence raised by the three defendants is basically that they are still directors of the second plaintiff. They averred that the meeting of 25 January 2012 purportedly held by the second plaintiff which resulted in their purported dismissal was invalid in that the consent of the Curator of Renaissance Merchant Bank Limited (RMB) and or the Reserve Bank of Zimbabwe (RBZ) was not obtained. In short they are saying the said meeting was invalid for want of compliance with the provisions of section 54 of the Banking Act [*Chapter 24:20*]. Therefore the point of law on which the parties seek determination is the legal effect of s 54 of the Banking Act [*Chapter 24:20*] in respect of any shareholder that may be the shareholder of a banking institution that has been placed under Curatorship by the Reserve Bank of Zimbabwe?

Section 54 of the Banking Act outlines the effect of placing banking institution under curatorship. It read as follows-

**“54 Effect of placing banking institution under curatorship**

- (1) The issue of a direction in terms of section fifty-three shall have the effect of suspending the powers of every director, officer and shareholder of the banking institution concerned, except to the extent that the curator may permit them to exercise their powers.
- (2) With effect from the date on which a direction under section fifty-three was issued-

- (a) all legal proceedings and the execution of all writs, summonses and other legal process against the banking institution concerned shall be stayed and not be instituted or proceeded with unless the High Court has granted leave; and
- (b) the operation of set-off in respect of any amount owing by a creditor to the banking institution concerned shall be suspended.”

In terms of s 53 of the Banking Act it is the Reserve Bank of Zimbabwe that issues a direction that a particular bank be placed under curatorship. Once a curator has been appointed he exercises all or some of the powers given to him in terms of s 55 of the Banking Act in as far as they affect the operations of the bank that has been placed under curatorship. My understanding of the provisions of s- 54 is that the powers of every director, officer and shareholder of a bank placed under curatorship are suspended unless they are told what to do by the curator. What is suspended are the powers to deal with the affairs of the banking institution under curatorship if one is to employ the ordinary grammatical meaning of the words. It must be borne in mind that a shareholder can be an individual or a corporate entity. In the present case we have a situation where the first plaintiff is a shareholder in the second plaintiff. The second plaintiff which is a corporate entity is also a 100% shareholder of a banking institution called RENAISSANCE MERCHANT BANK (RMB). It is RENAISSANCE MERCHANT BANK (RMB) which has been placed under curatorship by the Reserve Bank of Zimbabwe. The affairs which the curator on Reggie Saruchera is to oversee are the affairs of RMB. The first plaintiff and the second plaintiff who are shareholders of RMB are and were never placed under curatorship.

The question that needs to be answered is this- Is the curator mandated to oversee and control the separate affairs of the shareholders that have nothing to do with the bank under curatorship? That question can be answered by closely examining the duties reposed on a curator in terms of s 55 of the Banking Act. For avoidance of doubt I shall quote in extensor what the curator is expected to do because once he has been appointed the curator assumes the powers of the Board or shareholders of the bank placed under curatorship.

Section 55 details the duties and powers of the curator as follows-

**“55 Duties and powers of curator**

- (1) Subject to the direction under which he was appointed and to any subsequent directions given to him by the Reserve Bank, a curator shall 
  - (a) take over and assume the management of the banking institution concerned; and
  - (b) manage the banking institution concerned in such manner as he considers prudent and most likely to promote the interests of the institution and creditors of the institution; and
  - (c) ensure proper compliance by the banking institution concerned with the provisions of this Act; and

- (d) ensure that proper accounting records are kept and proper annual financial statements are prepared in relation to the operations of the banking institution concerned; and
- (e) prepare reports for the Reserve Bank showing the assets and liabilities of the banking institution concerned and its debts and obligations, verified by the auditor of the institution, and all such information as may be necessary to enable the Reserve Bank to become fully acquainted with the institution's financial position; and
- (f) examine the affairs and transactions of the banking institution concerned before it was placed under curatorship in order to ascertain whether any past or present director, officer or employee of the institution
  - (i) has contravened or appears to have contravened any provision of this Act; or
  - (ii) has committed or appears to have committed any offence; or
  - (iii) is or appears to be personally liable to pay damages or compensation to the institution or is personally liable for any of the institution's liabilities; and, within three months after the institution was placed under curatorship, shall submit to the Reserve Bank a report containing full particulars of any such contravention, offence or liability; and
- (g) one year after the banking institution was placed under curatorship and thereafter at six-monthly intervals, report to the Reserve Bank, in writing, as to whether or not, in his opinion, it is in the interests of the institution's creditors and depositors that the institution should remain under curatorship:  
Provided that, if at any time he is of the opinion that continued curatorship will not enable the banking institution to become a successful concern, he shall advise the Reserve Bank accordingly.
- (2) A curator shall have the following powers, to the extent that he is authorized to exercise them in terms of the direction under which he was appointed 
  - (a) to suspend or reduce, as from the date on which the banking institution concerned was placed under curatorship or any subsequent date, the right of the institution's creditors to claim or receive interest on any money owing to them by the institution;
  - (b) to make payments, whether in respect of capital or interest, to any creditor of the banking institution concerned at such time, in such order and in such manner as he thinks fit;
  - (c) to cancel any agreement between the banking institution concerned and any other party to advance moneys due after the date on which the institution was placed under curatorship or to extend any existing credit facility after that date, if in his opinion 
    - (i) such advance or any loan under such facility would not be adequately secured or would not be repayable on satisfactory terms; or
    - (ii) the institution lacks the necessary funds to meet its obligations under any such agreement; or
    - (iii) it would not otherwise be in the interests of the institution to abide by the agreement;
  - (d) to convene from time to time, in such manner as he thinks fit, a meeting of creditors of the banking institution concerned for the purpose of establishing the nature and extent of the institution's indebtedness to them and consulting them on decisions taken by him in the course of managing the institution's affairs, to the extent that the creditors' interests may be affected by those decisions;
  - (e) to negotiate with any individual creditor of the banking institution concerned with a view to a final settlement of the creditor's affairs with the institution;
  - (f) to make and carry out, in the course of his management of the banking institution concerned, any decision which in terms of the Companies Act [*Chapter 24:03*] would have been required to be made by way of a special resolution contemplated in section 135 of that Act;
  - (g) to cancel any lease of movable or immovable property entered into by the banking institution concerned before it was placed under curatorship;

- Provided that, notwithstanding subsection (2) of section *fifty-four*, a claim for damages in respect of such a cancellation may be instituted against the institution after the expiry of one year from the date of the cancellation or after such shorter period as the High Court may permit;
- (h) to dispose, by public auction, tender or individual negotiation, of any asset of the banking institution concerned, including
- (i) any advance or any loan under a facility contemplated in paragraph (c); and
  - (ii) any asset for the disposal of which an approval contemplated in section 228 of the Companies Act [*Chapter 24:03*] would have been a prerequisite;
- (i) to cancel any guarantee issued by the banking institution concerned before the date on which it was placed under curatorship, other than a guarantee that the institution is required to make good within a period of thirty days after that date:
- Provided that, notwithstanding subsection (2) of section *fifty-four*, a claim for damages in respect of such a cancellation may be instituted against the institution after the expiry of one year from the date of the cancellation or after such shorter period as the High Court may permit;
- (j) generally, to take any action necessary for the administration or operation of the banking institution concerned, including the sale or closure of any branch, agency, or other office of the institution and, subject to any other law, the dismissal of any of its officers or employees.
- (3) A curator shall record the nature of, and the reasons for, each act performed by him in the course of his curatorship, and such records shall be examined as part of the normal audit of the records of the banking institution concerned.
- (4) Any person who is aggrieved by any decision or action taken by a curator may appeal against it to the Reserve Bank.
- (5) An appeal in terms of subsection (4) shall be made in such manner and within such period as may be prescribed.”

Duties and powers of the curator as outlined under ss 55 refer to the duties and powers *vis- a- vis* the “banking institution concerned”. By banking institution concerned is meant the institution under curatorship. In this case the baking institution is the RMB which is under curatorship and not the RFHL which has not been placed under curatorship. Ordinarily, therefore, the board of the bank must take instructions from the bank’s shareholder(s). To enable the Curator to perform his functions, the legislature takes away the powers of the shareholder over the board and hand them over to the curator. Section 54 in my view suspends the powers of the shareholders over the board of the institution concerned.

I therefore agree with the submission by Mr Mpofu that s 54 does not mean that the curator upon appointment begins to control the banking institution and all other aspects of the shareholder that has nothing to do with the institution concerned. It is not the shareholder who is under curatorship but the institution itself. In *casu*, the plaintiffs, especially RFHL could hold its meetings since it is a separate entity from RMB. RFHL was not under curatorship and hence could transact other business. The curator on the other hand had nothing to do with the transactions of first plaintiff and RFHL as long as they have nothing to do with RMB. RFHL could therefore appoint and or disappoint directors of RFHL at will.

The shareholders of RFHL were at large. What could not be done by the plaintiffs was as directors of RMB under curatorship to exercise power over RMB. In short the board or shareholders of RFHL could not tell the RMB Board what to do. That would be the curator's sole prerogative. The powers that were suspended by section 54 were the powers of shareholders of RMB and not RFHL. On this argument I agree with the submission by Mr Mporofu that Reggie Saruchera as the curator of RMB had no power to stop the meeting that took place on 25 January 2012. The meeting was properly called and constituted. The resolutions made at that meeting are valid and did not require the authority or directive of the curator. The defendants were therefore validly dismissed from their directorship with the second plaintiff pursuant to the Extraordinary General Meeting of 25 January 2012. Consequently any business purportedly undertaken by defendants on behalf of the second plaintiff after 25 January 2012 is null and void and of no force or effect.

The defendants argued that the meeting of 25 January 2012 was invalid for want of clearance from the curator of RMB hence the dismissal of the defendants was invalid. The second defendant sought to produce documents that had not been discovered during the Pre-Trial Conference wherein the second defendant argued that there was a Corrective Order that was issued by the RBZ on the 2 June 2011 that was issued in terms of s 48 of the Banking Act [*Chapter 24:20*]. Though the plaintiffs objected to the production of such documents my simple comment on the bundle of documents is that the Corrective Order of 2 June 2011 sought to be relied upon by the second defendant does not take their case anywhere. Among other remedies prescribed it was directed that the requisitionists be removed from the RMB and RFHL Boards. Other than prescribing what was to be done the Corrective Order did not amount to the placing of RFHL under curatorship and hence the curator was not given the mandate to sanction or not sanction the meetings of RFHL were the discussions had nothing to do with RMB. I was not convinced that the curator had powers over the shareholders of RFHL. He had powers over shareholders of RMB only. In the circumstances I dismissed the arguments by all the defendants and I accordingly make the following order-

**IT IS ORDERED THAT**

- 1.1 The defendants are declared validly dismissed from their directorship with second plaintiff pursuant to the Extraordinary General Meeting of 25 January 2012.
- 1.2 The business purportedly undertaken by defendants on behalf of second plaintiff post 26 January 2012 is null and void and of no force or effect.

1.3 Defendants are interdicted from continuing to hold themselves out as directors of second plaintiff, and

1.4 Costs of suit shall be met by defendants jointly and severally, the one paying the others to be absolved.

*Mambosasa*, plaintiffs' legal practitioners

*Kantor & Immerman*, 1<sup>st</sup> and 3<sup>rd</sup> defendants' legal practitioners

*Wintertons*, 2<sup>nd</sup> defendant's legal practitioners.