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

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 19 January and 3 February 2016 and 2 June 2017

CIVIL TRIAL – SPECIAL CASE

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

TAGU J: After delivering my judgment relating to this case under HH 87/16, an appeal was lodged at the Supreme Court. The Appellate Court in its judgement under SC 47/2016 Ordered that:

(1) The appeals herein be and are hereby partially allowed
(2) The judgement of the court *a quo* be and is hereby set aside.
(3) The matter be and is hereby remitted to the court a quo for a proper determination of the special case before it.
(4) Each party shall bear its own costs.

What has taxed this court's mind is the third order above visa vis the reasons cited by the appellate court in allowing the appeal that was before it. Page 3 of the said Appeals Court's Order cited two reasons which for the avoidance of doubt I will set out below:

(1) The court a quo did not clearly and definitively determine the specific legal issue that was referred to it for determination.

(2) It proceeded to grant relief that was not specifically sought in the special case referred to it.

This court also appreciates the comment appearing on the third paragraph on p 2 of the cyclostyled Supreme court judgment relating to the need to ensure that joint pre-trial conference minutes should be part of the record for the sole reason that it is from the said minute that the trial judge is guided in relation to the issue(s) for trial and other ancillary issues. It is with utmost regret that such an important procedure was not religiously complied with. The reason being that the court was misled to believe that the purported Combined Pre-Trial Minute made by Judge MANGOTA on 30 October 2014 which is at p 206 A of the bound record in long hand wherein the judge said "Case referred to trial on the basis of the jointly signed P.T.C. minute dated 11 March 2015 and filed of record" sufficed.

Be that as it may, this court will go by the sentiments of GWAUNZA JA at p 21 of the Supreme Court transcript of proceedings where the Learned Judge pinpointed that:

> "….this record we have and even the judgment of the court below tells us that the parties signed a document which said before the matter of trial could proceed this issues of s 24 of the Banking Act had to be resolved or the question related to that. This issue is stated at p 203 and all parties signed like we can all see…"

I hasten to correct that where it reads s 24 above it should in actual fact read s 54. The Appellants contend on the other hand that they intended to proceed in terms of Order 29 Rule 199 departing from the clear reading of the document that was signed by the parties on 11 March 2015 and issued by the Registrar on 19 October 2015. Whether one proceeds in terms of rule 199 or 200 of the High Court Rules is now at this juncture immaterial. The issue that this court is called to answer relates to <u>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.</u>

The Section which this court need to clearly and definitively answer as called for by the Supreme Court is derived from the following section.

"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."

Applying the literal interpretation to statutory instruments, in my humble view, s 54 is quite clear in that 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. This definitively implies that from the moment RMB was placed under curatorship by the Reserve Bank of Zimbabwe and the resultant appointment of Reggie Saruchera as the curator on 2 June 2011, the powers of the directors, officers and shareholders was limited to the extent that the curator would permit. Put simply, the curator would be seized with the mandate of removing the causes of financial difficulties experienced by the Bank so that the Bank can function normally or rather become or improve to become a successful concern.

The position above finds favour in the cases of *Jeffery Mzwimbi 7 Others* v *Reserve* **Bank of Zimbabwe 7 Others** SC 35/05.In this case the appellants' appeal against the Respondents was dismissed on the basis that in filling an urgent chamber application challenging the sale of property of the bank placed under curatorship pursuant to the application of s 53 had been done without the blessings of the curator. It therefore turns out that one of the salient effects of s 54 of the Banking Act is that once a banking institution has been placed under curatorship, the curator has the power to run the affairs of the institution serve for cases or situations whereby with his consent he or she allows the director(s), officer(s) or shareholder(s) of such an institution to carry out any specific tasks. To that end, any purported actions without the curator's approval will be a nullity. The same position is also echoed in the case of *Trust Bank & Ors* v *Reserve Bank of Zimbabwe & Ors* SC 36/05.

Turning to subs 2(a) of s 54 of the Banking Act, the statute clearly in peremptory manner stays all legal proceedings as against the Bank placed under curatorship. Of critical importance is the fact that litigation processes by any party as against the bank placed under curatorship have to be blessed with the leave of the High Court. Put simply, no party would then commence any litigation or continue with litigation that had already started without the granting of the leave by the High Court. Without such leave by the High Court all the purported proceedings would be a legal nullity.

Lastly, the principle in business of set off is also peremptorily suspended. The foregone paragraphs clarify the legal effect of the section which this court was called upon to determine. The long and short of it is that once a banking institution has been placed under curatorship by the RBZ, the curator oversees the affairs of the bank to the extent that only with his consent directors, officials and shareholders who would have been absolved of their duties would be permitted by the curator. Secondly, no litigation would commence or continue as against the bank without the leave of the High court. In other words the consent of the High Court is a prerequisite without which any litigation would be baseless for non-compliance with the said provision. Finally the business principle of set off of debts by any creditor as against the bank placed under curatorship would be suspended. This is as far as the literal interpretation of the said section would allow and I wouldn't think any attempt to further stretch the legal effect of this section would be of no sound measure.

The above standpoint therefore operates against any institution so placed under curatorship as what occurred to RMB as at 21 June 2015. Needless to mention that such curator as appointed has sole powers to execute all the duties outlined under s 55.

In the result

IT IS ORDERED THAT

1.1 Once a Banking institution has been placed under curatorship, the shareholder(s), director(s) and officer(s)' powers in relation to the management of the said institution are duly limited to the extent that the appointed curator would by his or her consent permit.

1.2 Proceeding with and or commencing any litigation as against the bank placed under curatorship by any party would be or is a legal nullity without the granting of leave by the High Court.

1.3 The operation of the doctrine of set off by any creditor as against the bank placed under curatorship is peremptorily suspended.

1.4 There is no order as to costs.

Mambosasa, plaintiffs' legal practitioners
Kantor & Immerman, 1st and 3rd defendants' legal practitioners
Wintertons, 2nd defendant's legal practitioners