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Judgment No. SC. 20/07
Civil Appeal No. 322/06

RESERVE BANK OF ZIMBABWE v (1) WESLEY SIMBA SIBANDA (2) THE MASTER OF THE HIGH COURT

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, MALABA JA & GARWE JA
HARARE, JUNE 19 & OCTOBER 8, 2007

D S Mehta, for the appellant

S J Chihambakwe, for the first respondent

No appearance for the second respondent

ZIYAMBI JA: For the purposes of this appeal the relevant facts are that on 24 March 2004 the First National Building Society ("FNBS") was placed under provisional liquidation and Mr David John Scott appointed provisional liquidator. Thereafter, on 25 January 2006, at a meeting of the creditors of FNBS it was decided that Scott should be appointed final liquidator. On 13 September 2006 there was a further meeting of creditors and contributories at which Scott was dismissed as liquidator and the first respondent appointed as final liquidator of FNBS. Some of the creditors, dissatisfied with that decision, lodged an appeal to a Judge in Chambers in terms of s 219 of the Companies Act [*Chapter 24:03*]. That appeal is yet to be heard.

On 24 October 2006, the appellant wrote to the Master, drawing his attention to the peremptory provisions of s 57(1)(b) of the Banking Act [*Chapter 24:20*] ("the Act") and pointing out that the appointment of the first respondent as liquidator was irregular. *S* 57(1) provides as follows:

"57 Special provisions relating to winding up or judicial management of banking institution

(1) Notwithstanding anything to the contrary in the Insolvency Act [*Chapter 6:04*] or the Companies Act [*Chapter 24:03*] –

(a) The Reserve Bank shall have the right to apply to the High Court for –

(i) the winding up of any banking institution; or

(ii) an order placing any banking institution under judicial management or provisional judicial management in terms of the Companies Act [*Chapter 24:03*];

and the Reserve Bank shall have the right to oppose any such application made by any other person;

(b) no person other than a person recommended by the Reserve Bank shall be appointed as provisional liquidator, provisional judicial manager, liquidator or judicial manager of a banking institution." (My emphasis)

(It was not disputed that FNBS was a banking institution by virtue of General Notice 101 of 2005 published in the Government Gazette of 11 March 2005). Paragraphs 4.7 - 5.2 of the letter under mention read as follows:

"4.7 The consequences of the irregular appointment are as follows:

(a) The purported convening of the Second Creditors Meeting schedule (d) for the 2006 is null and void as Mr Sibanda had no capacity at law to so convene this meeting.

(b) All acts done in his purported capacity as Liquidator of FNBS are null and void on the same account;

(c) There is therefore no Liquidator at law and it is necessary that steps be taken to make an appropriate appointment, and

(d) In the circumstances it follows that Mr Davis (*sic*) Scott maintains his status as Provisional Liquidator of FNBS until such a time as a Liquidator is properly appointed.

5.1. In the present case it is our respectful submission that the recommendations of the Reserve Bank of Zimbabwe recommend the appointment of the liquidator as required by law;

5.2. In conclusion we urge the speed(y) regularization of the current situation and wish to advise that in the event that the position remains unresolved it is the intention of the Reserve Bank to enforce its rights of the law (*sic*)."

On 25 October 2006 the first respondent convened a second meeting of creditors at the High Court and the Master, notwithstanding the contents of the letter and a verbal objection raised by the appellant at the meeting, overruled the objection and allowed creditors to prove their claims to the first respondent.

Thereafter, on the same date, the registration of FNBS as a building society in terms of the Building Societies Act was cancelled by the Registrar of Building Societies. The first respondent nevertheless continued to act as liquidator and the appellant filed an "urgent" Court application to the High Court on 3 November 2006, seeking the following order:

"TERMS OF FINAL ORDER SOUGHT

That you show cause to this Honourable Court sitting at Harare why a final order should not be made on the following terms –

1. The appointment of Mr Wesley Simba Sibanda a Liquidator of First National Building Society (in liquidation) and the first and second meetings of creditors held on 13 September 2006 and 25 October 2006 is hereby declared null and void;

2. The Master of the High Court is directed to properly appoint a Liquidator for First National Building Society (in liquidation) and to give effect to the provisions of *s* 57(1)(b) of the Banking Act (*Cap* 24:20).

3. The costs of this application shall be costs of the liquidation.

INTERIM RELIEF GRANTED

That pending confirmation or discharge of this provisional order:

1. The First respondent be and is hereby interdicted from conducting any further duties as liquidator of First National Building Society;

2. The second respondent is directed not to sanction any further actions by the first respondent, as liquidator, pending a proper appointment of such liquidator;

3. Mr David Scott of Price Waterhouse Coopers is reinstated as Provisional Liquidator of First National Building Society (in liquidation) pending a proper appointment of the Liquidator."

The learned Judge in the court *a quo* dismissed the application with costs. He considered that it was not urgent, that the appointment of the first respondent as liquidator was not unlawful and that the appellant was *mala fide* in bringing the application, piqued by the fact that it had failed to bring about the removal of the first respondent as liquidator.

On the question of the unlawfulness of the appointment of the first respondent as liquidator, the learned Judge said:

> "The applicant was clearly correct in that s 57(1)(b) of the Banking Act as read with s 3(3)of the Banking Act and General Notice 101 of 2005 provided that no person other than a person recommended by the applicant shall be appointed as provisional liquidator or liquidator of a banking institution or a building society. It

> seems to me, however, that the particular circumstances of this case limit the application of these provisions of the law. The first limitation pertains to the fact that FNBS is no longer a banking institution or building society. Its licence was revoked by the applicant. It means therefore that the appointment of the liquidator in this case, is not governed by the provisions of the Banking Act. It seems to me that the appointment of a liquidator in this case would be subject to the provisions of the Insolvency Act and the Companies Act only."

It seems to me that in arriving at this conclusion, the learned Judge misdirected himself. The unlawful act of the Master in appointing the first respondent as liquidator took place on 13 September 2006, more than a month before the licence was revoked. Thus, at the time of the revocation of the licence, FNBS was a building society in terms of the Act, albeit in liquidation. Accordingly, the appointment of the liquidator was governed by the provisions of the Act and not the Companies Act and the Insolvency Act as found by the learned Judge.

The second error made by the learned Judge was to swallow the emotional bait laid in the first respondent's papers. A very emotional and moral case was presented for the retention of the first respondent as liquidator. However, even assuming that there is merit in the averments made against the appointment of Mr Scott as liquidator (and I make no judgment on this issue) one would still be left with the question how does one get around the peremptory provisions of s 57(1)(b) of the Banking Act? In this regard, the learned Judge said:

> "It also seems to me that the application of the provisions of the Banking (Act) in this matter would be limited by the unique nature of this case in that the applicant is wearing three hats. It is an umpire, regulator and creditor. From the history of this case, it is fairly obvious that the applicant has assumed the position of what is commonly referred to as big brother and it appears to me, with due respect, that the applicant has literally assumed that approach throughout this case. As an example, my mind was boggled when one takes into account the huge expense the applicant had incurred in pursuance (of) a principle. The principle being that it had to be approached for a recommendation of the appointment of a liquidator. One wonders whether in pursuit of that principle, the applicant is exercising the three functions of

> creditor, umpire and regulator in a judicious manner. It seems to me that the applicant's *bona fides* would be put to doubt, more particularly if one considers its rushed decision to cancel FNBS's licence soon after its objection to the appointment of the first respondent was overruled. One can understand why in his opposing affidavit, the first respondent submitted that the totality of the applicant's conduct clearly shows vindictiveness, bias, unreasonableness, *mala fides,* improper motive, abuse of authority and a clear disregard of what the legislature intended section 57 of the Banking Act to be used."

Here again the learned Judge misdirected himself. The provisions of s 57 of the Act apply notwithstanding anything to the contrary contained in the Insolvency Act or the Companies Act. Thus whether or not the appellant was wearing three hats or one was not the issue. The issue was whether the appointment of the first respondent was in compliance with the provisions of s 57 of the Act and the obvious answer is that the first respondent not being a person recommended by the Reserve Bank ("RBZ"), his appointment was in contravention of the Act and, consequently, void.

As it was put to counsel for the first respondent at the hearing of the appeal, although it is the Master to whom the Act entrusts the power to appoint a liquidator, that power to appoint is limited by the requirement of recommendation by the RBZ. Thus there may be ten people recommended or merely one. If there are ten recommendations by the RBZ, the Master may appoint one of the ten. If only one person has been recommended he may only appoint that person. And if no recommendation has been made (by the RBZ) he may not appoint a person of his choice or one recommended by some person or body other than the RBZ. The wording of the Act is clear.

This Court can, therefore, come to no other conclusion than that the appointment of the first respondent as liquidator of FNBS was made in contravention of s 57(1)b) of the Banking Act and is therefore null and void.

I turn now to consider the remedy sought by the appellant. This appeal was against the failure by the court a *quo* to grant a provisional order. Normally the grant of a provisional order pending confirmation on the return day would be regarded as an interlocutory matter but in this case the effect of the dismissal of the application was to grant a final order. In the absence of an interdict, so we are informed, the first respondent continues to act as liquidator of FNBS.

It seems to me that a declaration of the nullity of the appointment of the first respondent would point the parties in the right direction. It would mean that a liquidator would have to be appointed, bearing in mind the provisions of s 57 (1)(b) of the Act.

There is one other matter deserving some mention. The court *a quo* alluded to the fact that the appellant had an alternative remedy, in that he could apply to be joined as a party to the appeal lodged by the creditors in case No. HC 417/06, which appeal was still pending at the time of the hearing of the application. The implication is that the issue of the unlawfulness of the appointment was *sub judice,* as a decision on that issue was pending before the High Court. However, a perusal of the notice of appeal filed reveals that the issue of the unlawfulness of the appointment by reason of its contravention of s 57 of the Act is not raised in the grounds of appeal. Thus the matter is not *sub judice.* Further, the Act does not provide an avenue for appeal by the RBZ in the event of an occurrence such as in this case. It therefore seems to me that the appellant's approach to the High Court for redress cannot be impugned.

Accordingly, the appeal is allowed with costs to be the costs of liquidation.

It is declared that the appointment of the first respondent as liquidator of FNBS was unlawful and the appointment is therefore null and void.

MALABA JA: I agree

GARWE JA: I agree

Costa & Madzonga, appellant's legal practitioners

Chihambakwe, Mutizwa & Partners, first respondent's legal practitioners