

TRUST HOLDINGS LIMITED
versus
PETER BAILEY
and
ZIMBABWE ALLIED BANKING GROUP

HIGH COURT OF ZIMBABWE
KAMOCHA J
HARARE, 3, 8 and 10 February and 9 March 2005

Urgent Chamber Application

Mr *M.P. Mahlangu*, for the applicant
Mr *L.H. Cook*, for all respondents

KAMOCHA J: This is an urgent chamber application wherein the applicant sought relief in these terms:

"Interim Relief Granted

First, second and third respondents are:-

- (i) restrained and interdicted from seeking to transfer the assets and/or business of Trust Bank corporation Limited;
- (ii) ordered to vacate all the premises of Trust Bank Corporation Limited occupied by third respondent and to restore the Bank's signage which they have caused to be removed."

In its final relief the order sought was as follows:-

"Terms of final order

1. It is declared that the purported acquisition by first and third respondents of the assets and banking business of Trust Bank Corporation Limited is unlawful.
2. First, second and third respondents are restrained from seeking to transfer the assets and business of Trust Bank Corporation Limited to third respondent or to occupy any of the premises of Trust Bank Corporation Limited.
3. Second and third respondents are ordered to forthwith restore the signage of Trust Bank Corporation Limited wheresoever such has been removed and to forthwith vacate any of the premises of Trust Bank Corporation Limited they presently occupy.

4. First, second and third respondents, jointly and severally, the one paying the others to be absolved shall pay the costs of this application."

On 23 September 2004, the Governor of the Reserve Bank of Zimbabwe placed Trust Bank Corporation Limited - "Trust Bank" under curatorship in terms of section 53(1) of the Banking Act [*Chapter 24:20*] "the Act" for a period of six months. Mr Peter Bailey the 2nd respondent was appointed a curator of Trust Bank which was one of the 6 troubled banking institutions.

Section 54(1) of the Act provides for the effect of placing a banking institution under curatorship as follows:

"54(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."

Section 55 of the Act endows a curator with very wide ranging duties and powers. In terms of section 55(1) a curator has a duty and power to take over and assume the management of the banking institution concerned. It is also his duty and he has the power to 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. This is provided for in section 55(1)(a) and (b). Section 55(2)(h) enjoins him with the following powers:-

"55(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)
- (h) to dispose, by public auction, tender or individual negotiation, of any asset of the banking institution concerned.....;"

The curator alleged that when he took over the curatoship of Trust Bank he discovered that the applicant which is the sole shareholder of Trust Bank owed it in excess of \$23 billion and that that loan had been interest free for a considerable period. As part of his duties as a curator, he tried to collect that debt for Trust Bank. He claimed that it had been extremely difficult and he allegedly had to accept assets from the applicant as part settlement of the debt. The debt was then reduced down to some \$8 billion. It seemed to him doubtful if any more money would be collected. That, in his view, would cause considerable prejudice to the depositors of the bank.

The amount of \$8 billion was an agreed liability by the applicant and it would have made a considerable difference to the depositors if it had been paid.

Instead his investigations appeared to reveal that the applicant had in effect used depositors funds for the personal benefit of its shareholders.

In January 2004 the Reserve Bank sent a corrective order to the chairman of the bank yet its liquidity was certainly not improved to any extent at all thereafter.

In fact the curator's investigation revealed that, though the directors of the applicant and the Trust Bank were quite aware of the illiquidity of the bank and the problems that it faced, they seemed to do nothing about reducing the spending of the bank. Instead, spending increased and loans to the holding and associated companies continued, when normally reasonable and responsible management in the situation of illiquidity would cut spending and do everything to increase the cash flow.

The curator held a view that the applicant could not have genuinely understood or believed that the bank could be rehabilitated. The assets only covered 25% of the liabilities and the applicant had not paid \$8 billion of its debt. It was therefore unrealistic to consider a possible capitalisation of the bank by the applicant since it could not even repay its debt of \$8 billion.

The curator averred that he and the Reserve Bank of Zimbabwe endeavoured as far as possible to take into account the interest of creditors and depositors. He concluded that the alternative of a liquidation of the bank would have been considerably worse for the creditors and depositors given the extent to which the liabilities exceeded the assets. Consequently he held the view that the applicant had disregarded the interests of the creditors and depositors of the bank by remaining indebted to it in the sum of \$8 billion which it had allegedly failed to pay despite demand.

He discovered that the mismanagement of the bank had caused it to be hopelessly insolvent to the extent that it could not be rehabilitated. In the result he accepted a proposition that it would be in the best interest of the bank and its creditors and depositors to sell the assets in accordance with the offer that was made by the Zimbabwe Allied Banking Group ZABG, the 3rd respondent. Accordingly the assets were purchased and taken over by the 3rd respondent.

The curator averred that he acted in terms of the provisions of section 55(2)(h) which specifically empowers him to sell assets and he was satisfied that he acted lawfully.

The applicant vehemently disputed the allegations and conclusions drawn by the curator. It asserted that the curator proceeded in terms of the Troubled Financial Institutions Act No. 31/2004 [*Chapter 24:28*] which came into effect on 14 January 2005 to sell the bank's assets. The applicant based its assertions on a letter dated 19 January 2005 written to the Acting Board Chairman of the applicant by the curator which reads in part -

"In terms of the Troubled Financial Institutions (Resolution) Act, Zimbabwe Allied Banking Group Limited (ZABG) will purchase all assets by Trust Bank Corporation (TBC) as at 1 January 2005 at full market value as already assessed by professional valuers. The liability to depositor customers will be settled as follows:-

- (1) Up to the first - \$5 million will be paid next week in cash.
- (2) Any balance above \$5 million will be pro-rated downwards in the ratio of assets to liabilities and ZABG shares issued in exchange.
- (3) Other creditors will be pro-rated as above and issued shares in ZABG.

You will be aware that, even after the revaluation of assets and the modest profits generated during curatorship that the assets in Trust Bank Corporation Limited (TBC) are less than 25% of liabilities.

In the circumstances, whether Trust Bank Corporation Limited (TBC) went into liquidation or went the troubled bank resolution route as above there will be zero recovery for shareholders and the Holding Company should write-off its investment in Trust Bank Corporation limited.

What will be left in the old Trust Bank Corporation Limited will be an adverse balance on equity and a debt to the RBZ and nothing else and it will have to be liquidated.

....."

The applicant alleged that the curator failed to represent the interests of the shareholder, creditors depositors of the bank. But the curator explained that he had taken the interests of the depositors through the payment of \$5 million and below to depositors. They could have realised less if the liquidation route had been taken. Further the depositors and creditors had the option to convert their claims to equity

and that would have had the potential for them to realise more value than they would have received had the institution been liquidated.

The applicant contended that the sale of the assets of the bank to ZABG did not comply with the laws of this country. In the first instance, the Troubled Financial Institutions (Resolution) Act, [*Chapter 24:28*] required that before the various provisions of that Act can be implemented in respect of a financial institution deemed to be troubled, there ought to be a declaration issued in terms of section 6 of the Act. The declaration must be confirmed by a judge in chambers in terms of section 9(1) of that Act. The procedure was that the Reserve Bank of Zimbabwe would apply to a judge in chambers for an order confirming the declaration, giving not less than 14 days written notice to the shareholders, creditors and former members of the Board of the troubled financial institution. Applicant went on to say that, there were other publication requirements set out in section 9. Further section 28 also required that the scheme of resolution be approved by shareholders and creditors and that had not been done *in casu*. In the result, the applicant averred that the actions of RBZ, curator and ZABG violated the provisions of the Troubled Financial Institutions (Resolution) Act.

The view of the applicant was that the curator had failed to exercise the powers conferred upon him by section 55 of the Banking Act [*Chapter 24:20*] by *inter alia* failing to convene meetings of creditors of the bank and consulting with them on decision by him which affected their interests. It seemed to the applicant that RBZ, curator and ZABG had acted with undue haste and with perhaps very little regard for the interest of shareholders, creditors and depositors of the bank.

The applicant consequently felt that the acquisition of the assets of the bank by RBZ, the curator in that fashion was grossly unfair and improper. Applicant claimed to be aware of the fact that RBZ had grossly overstated the liability of the bank to itself and had proceeded to make a determination that the bank was hopelessly insolvent and could not be rehabilitated.

In conclusion the applicant submitted that the respondents should be restrained from taking over the assets and business of the bank in the manner that they had done pending full compliance with the law and prayed for an interim order in terms of the draft on page one.

At the hearing the applicant moved that a final order be granted since all the necessary documents had been filed by the time of the hearing.

The curator explained that he proceeded in terms of section 55 of the Banking Act to purchase the assets of the bank and its business. He said when the letter of 19 January 2005 was written it had been contemplated that the sale, would be done in terms of the provisions of the Troubled Financial Institutions (Resolution) but for various reasons that was amended so as to proceed in terms of section 55 of the Banking Act. The curator submitted that the promulgation of the Troubled Financial institutions (Resolution Act did not preclude him from proceeding in terms of the Banking Act. It was not obligatory to proceed in terms of the new Act. There is merit in that submission. It is quite clear that he proceeded in terms of the provisions of the Banking Act.

That is so because if he had proceeded in terms of the new Act he would have had to follow the procedure laid down in that Act. The procedure in the new Act is that the Reserve Bank would, after affording the financial institution an adequate opportunity to make representation in the matter, declare the financial institution to be a troubled institution and place it under the administration of an administrator named in the declaration in terms of section 6(1) of that Act. In the present matter no such declaration was made and no administrator was named. That is why the provisions of section 9 of the new Act were not applicable *in casu*.

In the light of the foregoing the court finds that the respondents proceeded in terms of the Banking Act to sale the assets and business of the bank. There is, therefore, no question of what the respondents did offending any law. The curator is specifically empowered by section 55(2)(h) to sell any assets of the banking institution concerned. I therefore find that the respondents acted lawfully in doing what they did. The suggestion that the acquisition of assets and banking business of Trust Bank Corporation Limited by the first and third respondents be declared unlawful is without merit and cannot be acceded to.

The applicant sought to restrain the respondents from seeking to transfer the assets and business the bank to ZABG or to occupy any of the premises of the bank. What was established from the documents filed of record was that the transfer of the assets had already taken place by the time the matter was heard.

The applicant claimed to be the sole shareholder of the bank. Be that as it may it remains a separate entity. There can be no doubt that the assets of the bank cannot belong to the applicant at the same time unless they are jointly owned. There was no suggestion that that was the case. It seems to me that the applicant does not have a direct and personal interest in the remedy being sought. If it is so advised the applicant can claim damages since it cannot claim that it has a right which is being infringed. As stated *supra* applicant and the bank are two different entities.

I have already mentioned that the correct remedy in this matter was a claim for damages. There is nothing to stop applicant from claiming for such damages even if the assets and premises of the bank have been sold. That remedy is available to the applicant.

Another valid point raised by the respondents is that the bank is not before the court and cannot claim an interdict. Nor can the shareholder. In any event no irreparable harm has been established.

The respondents contended that the balance of convenience favoured them. They argued that if ZABG were to be interdicted from trading, harm and chaos would ensue because staff have been taken on; depositors were anticipating that their interests are about to be served by ZABG; premises had already been occupied and refurbished; new signage is up and the national interest is being served by ZABG in taking over a hopelessly insolvent bank.

In terms of section 55(4) any person who is aggrieved by any decision or action taken by a curator may appeal against it to the Reserve Bank. The applicant should have appealed to the Reserve Bank before filing this application. No acceptable explanation was proffered as to why the applicant chose to ignore the provisions of section 55(4) of the Banking Act. The applicant should have exhausted the domestic remedies before bringing this case to this court unless there were special circumstances why that could not be done.

The respondents moved that the court should not exercise its discretion in favour of the applicant because the shareholders of the applicant through their alleged misbehaviour and negligence landed the bank in the position it finds itself. They allegedly took personal benefits to the prejudice of the depositors and creditors.

They also alleged that the applicant was responsible for the insolvency of the Bank and the severe prejudice suffered by the bank's depositors. I am inclined to agree with the above submissions.

In the light of the findings that I have made in this judgment I would dismiss this application with costs.

Messrs Gill, Godlonton and Gerrans, applicants legal practitioners

Atherstone & Cook, respondent's legal practitioners