ELISHA TONDERAI KAFESU
versus
AFRASIA BANK ZIMBABWE
(Under financial liquidation)
and
MASTER OF THE HIGH COURT N.O
and
MAMBOSASA LEGAL PRACTITIONERS

HIGH COURT OF ZIMBABWE
CHATUKUTA J
HARARE, 24 August 2018, 14 September 2019 & 8 May 2019

Court Application

K. Munyeka, for the applicant,
A. Mugandiwa, for the 1st respondent

CHATUKUTA J: The applicant was in occupation of a certain piece of land situate in the district of Umtali called stand 3535 Umtali Township of Umtali Lands (the property) as condition of his employment with the then owner of the property, Redstar Wholesalers. The property was sold to the first respondent in 2012 then not under liquidation. The first respondent allowed the applicant to remain on the property on condition he paid rent. The first respondent expressed an intention to sell the property. The applicant offered to purchase the property for a sum USD40 000.00. The offer was that he would pay a deposit of USD20 000.00 by 31 March 2013 and the balance by monthly instalments. It appears there was no response to the offer. On 22 May 2014, he made another offer and this time to pay USD35 000.00 for the property on credit terms with a deposit of USD20 000.00 and the balance by monthly instalments of USD1 000.00. This offer was followed by yet another offer on 7 January 2015 to pay a purchase price of USD45 000. 00 and again on credit terms. The first respondent declined the offer indicating that it could only accept a cash offer of US$50 000. The applicant thereafter made another offer on 22 January 2015 for a purchase price of USD50 000 and still on credit terms.

On 5 February 2015, the applicant paid an amount of USD40 000.00 to Mambosasa Legal Practitioners as a deposit for the purchase price for the property. On 24 February 2015, the first respondent surrendered its licence to the Reserve Bank of Zimbabwe. It was placed under liquidation on 29 April 2015 under case number HC 1749/15. On 12 May 2015 the applicant wrote to Grant Thornton inquiring on the way forward to enable him to resume payments. Various meetings were held between the applicant and Grant Thornton leading to a letter from the latter that the amount of USD40 000.000 was paid to Mambosasa Legal Practitioners after the first respondent had been placed under liquidation. The amount would be recovered through the liquidation process. Grant Thornton indicated that it was willing to refer the applicant to a list of estate agents if he was still interested in purchasing. On 25 February 2016 the applicant wrote to the Deposit Protection Corporation seeking its intervention. The Corporation responded on 3 May 2016 indicating that it had referred the matter to the Master of the High Court.

On 1 March 2017 the applicant was granted leave by this court to institute the current proceedings.

The above background is common cause. What is in dispute between the parties are the circumstances leading to the payment by the applicant of the amount of USD 40 000.00 to Mambosasa Legal Practitioners, the bank's legal practitioners, as a deposit for the purchase price for the property.

The applicant contends that the bank accepted his last offer of 22 January 2015 and an oral agreement was reached by the parties and the parties were to reduce the agreement into writing. He was furnished with a written purchase agreement reflecting the agreement reached by the parties. He signed the agreement on 5 February 2015. He was required in terms of the agreement to pay a deposit of USD40 000 and the balance on terms. He received instructions to pay the amount into the trust account for Mambosasa Legal Practitioners and he duly made the payment. Aggrieved by the decision by Grant Thornton not to recognise this agreement, the applicant now seeks a confirmation of the agreement and a transfer of the property into his name.

In support of his contention that an agreement was concluded between the parties as reflected in the written agreement, the applicant filed an affidavit by *Philip Pfungwa Nyakuedzwa*. *Philip Nyakuedzwa* attested that he was practising under Mambosasa Legal

Practitioners and had assignments on behalf of the bank before its liquidation. One of the assignments was to review the written agreement between the applicant and the bank and the agreement reflected the terms as alluded to by the applicant.

The application is opposed. The first respondent contents that the parties did not conclude an agreement as the bank wanted the purchase price paid in cash. The bank therefore did not accept the credit terms offered by the applicant. It further disowns the written agreement.

The first respondent raises three preliminary points. The first point is that the applicant did not first exhaust domestic remedies provided for under the Companies Act [*Chapter 24:20*]. The second point is that the application is fatally defective for want of joinder of the liquidator who is an interested party to the proceedings. The last point is that there is no agreement between the parties. The relief sought is not competent in that the applicant is seeking to persuade the court to conclude an agreement for the parties.

Before I proceed to deal with the preliminary points, it is necessary to put into perspective the liquidation process that the bank was placed under. This has been necessitated by the contention by the applicant that the deponent to the first respondent's opposing affidavit is not the liquidator and therefore does not have any *locus standi* before this court.

The circumstances under which it surrendered its license are dealt with in *KS Trust* v *Afrasia Bank Zimbabwe & Anor* HH 572/16. MANGOTA J referred in that case to minutes of the meeting of the bank's board of directors. He observed as follows:

> "The meeting took place on 24 February, 2015. Some portions of the minutes read:
> "4.1 Meeting with Dr Mahtani and the RBZ
>
> The Board chairman, CLW, HN and LM held meetings with Dr Mahtani as well as the RBZ Governor to map the way forward in the face of recommendations by the major shareholder for ABZL to handover the banking licence.
>
> The RBZ was of the counsel that handing over of the banking licence would be the best solution in the current circumstances where the major shareholder has abandoned its investment. The RBZ was of the view that the Afrasia Zimbabwe directors may not have a basis for holding on to the licence. Once the decision to surrender the licence has been made, the RBZ would immediately take control of the Bank and appoint a provisional liquidator.
> ……..
> …….
> At the meeting held at the RBZ, the Governor, the Deputy Governor, the Registrar of Banks expressed appreciation to the directors present,……., for the remaining directors outside the shareholder appointees' integrity, diligence and fiduciary responsibility to strive to keep the bank afloat until the major shareholder decided to hand over the

licence. They further assured the directors that by handing over the licence, all the directors would not be black listed as a result of their tenure and would not be liable for any claims.

….

4.2 Resolution to surrender the banking licence

Following the decision by Afrasia Bank Limited (Mauritus) (ABL), the single major shareholder for Afrasia Zimbabwe Holding Limited to surrender the Afrasia Bank Zimbabwe Limited (ABZL) banking licence, it was resolved that the licence be surrendered to the Reserve Bank of Zimbabwe as of close of business on 24 February, 2015."

The board of directors were clear that they were surrendering the banking license to the Reserve Bank. The Reserve Bank would thereafter take control of the bank and place the bank under provisional liquidation. As rightly submitted by the applicant, the above liquidation process envisaged in the above extract of the minutes of the board of directors is provided for in the Banking Act [*Chapter 24:20*]. Section 57 (1) of the Banking Act provides:

"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*) the Reserve Bank shall appoint the Deposit Protection Corporation as the provisional liquidator, provisional judicial manager, liquidator or judicial manager of a banking institution;

……..."

It is peremptory that the Deposit Protection Corporation be appointed as the liquidator. This is apparent in the application by the Resrve Bank of Zimbabwe in *Reserve Bank of Zimbabwe* v *Afrasia Bank Zimbabwe Limited* HC 1749/17. The order by the court placed the 1st respondent under liquidation and further confirmed the Deposit Protection Corporation as the liquidator.

The Deposit Protection Corporation is in turn empowered in terms of s 38 (1) of the Deposit Protection Corporation [*Chapter 24:29*]. The section reads:

"38 Corporation as curator or liquidator and power to appoint agents

(1) Where the Corporation acts as a curator or liquidator of a failed contributory in terms of section 37, it may appoint an agent or agents to assist it in the performance of its functions as

curator or liquidator, and all fees, compensation and expenses of the liquidation and administration of the failed contributory shall be fixed and paid by the corporation from the free residue of the failed contributory."

This explains how Grant Thornton comes into the picture as a liquidator agent. This explains why applicant was communicating with Grant Thornton.

I shall now revert to the preliminary points raised by the respondent. The first preliminary point is that the applicant's remedy lies under s 223 of the Companies Act. The point is premised on the undisputed fact that the applicant is aggrieved by the decision of the liquidator agent not to accept the existence of an agreement with the first respondent for the sale of the property. The respondent's contention is that the applicant ought to have raised a complaint against the liquidator with the Master of the High Court in terms of s 223. If he was not satisfied with any decision taken by the Master after the complaint, he would take the decision on review in terms of s 296 of the Companies Act.

The applicant submitted that he is seeking declaratory relief and he is therefore entitled to proceed as he has.

Section 223 of the Companies Act provides:

"**223 Control by Master over liquidator**

(1) The Master shall take cognizance of the conduct of liquidators of companies which are being wound up by the court and **if a liquidator does not faithfully perform his duties and duly observe all the requirements imposed on him by law or otherwise with respect to the performance of his duties**, or if any complaint is made to the Master by any creditor or contributory in regard thereto, the Master shall inquire into the matter and take such action thereon as he may think expedient." (own emphasis)

It appears that s 223 is not concerned with the correctness of a decision taken by the liquidator. The "conduct" envisaged in that section is in my view the manner in which a liquidator exercises his/her/its responsibilities which conduct would be a cause for concern requiring the intervention of the Master.

Since the applicant is challenging the correctness of the decision of the liquidator agent not to recognise the alleged agreement he would not be expected to file a complaint with the Master. He therefore cannot be said not to have exhausted the domestic remedy under s 223.

The section that permits a person aggrieved by the correctness of the liquidator 's decision during the exercise of his/her/its powers to approach this court is s 222 (3). Section 222(3) provides-

> "222 (3) Any person aggrieved by any act or decision of the liquidator may apply to the court after notice of motion to the liquidator and therein the court may make such order as it thinks"

The section however requires an aggrieved person to proceed by notice of motion to the liquidator and not the company under liquidation. This means that the liquidator must be cited as the party to the proceedings. Failure to join the liquidator to the application would in my view be fatal to the application as the liquidator is the one who made the decision. In any event, and as rightly submitted by the 1st respondent, the applicant is seeking in the draft order confirmation of the alleged agreement of sale. This is despite the fact that the application of face of it suggests that the applicant is seeking declaratory relief. The 1st respondent was therefore in my view misjoined.

It appears this disposes of the second preliminary point raised by the first respondent regarding the non-joinder of the liquidator. In any event, assuming that I am wrong, it would still be necessary to cite the liquidator as an interested party to the proceedings. The rationale for this is obvious. Upon commencement of the winding up of a company, the powers of the directors of a company cease and are vested in the liquidator. In the case of *AMS Marketing Co. (Pty) Ltd* v *Holzman* 1983 (3) SA 263 (W) at 269-70, LEVESON AJ said:

> "… the liquidator enjoys a dual capacity. In one sense he is a primary organ of the company in whom the powers formerly residing in the directors are vested. In the other his position is similar to that of a trustee of an insolvent estate, having the power to recover assets, realise them and distribute the proceeds to the person entitled thereto."

See also *Letsitele Stores (Pvt) Ltd* v *Roes and Ors* 1958 (2) SA 224 T s 221 of the Companies Act)

Consequently, the enforcement of this order if it were to be granted lies squarely on the shoulders of the liquidator hence the need to cite it as a party to this application. The applicant was mindful of the importance of the liquidator in resolving this dispute as evidenced by his letter on 12 May 2015 to Grant Thornton. On 25 February 2016, he wrote directly to the Deposit Protection Corporation. The applicant's letter of 25 February 2015 and a letter by Grant Thornton to the applicant dated 15 December 2015 confirm that the applicant held meetings with both the liquidator and the liquidator agent. Despite these engagements he still does not consider it fatal not to have cited any of the two.

Whilst the applicant submitted that the court has the discretion in terms of r 87 of the High Court Rules to the issues before it and as between the parties before it without joining an interested party to a suit, I am of the view that this is a case where the non-joinder of the

liquidator is fatal having regard of s 222 (3) of the Companies Act. I am therefore unable to exercise my discretion in favour of the applicant.

The last preliminary issue regarding the competence of the relief sought by the applicant would in essence require the court to delve into the merits of the application since the applicant is seeking confirmation of an agreement that the first respondent believes in non- existent. Despite having determined that the non-joinder of the liquidator is fatal, it would be remiss of the court not to consider the point more particularly as I am inclined to determine the issue in favour of the first respondent.

The applicant alleges that the parties reached an agreement whose terms are reflected in the written agreement that he alleges he was furnished by the first respondent and which he duly signed. The parties were clear as to the identity of the property being sold, the purchase price and the payment terms. Despite the fact that the agreement was never signed by the first respondent, there exists a tacit agreement which is binding on the first respondent.

The first respondent contends that the parties never reached an agreement on the purchase price and disowns the written agreement. It alleges that the applicant is seeking to persuade the court to conclude an agreement for the parties. It is this attempt that renders the relief sought incompetent.

It is common cause that the first respondent spurned the offers by the applicant to pay the purchase price on credit preferring payment of the full purchase price in cash. The applicant alleges that the first respondent ultimately had a change of heart and accepted the last offer. It is also common cause that the first respondent did not sign the written agreement produced by the applicant as proof of the agreement between the parties. The explanation given why the first respondent did not sign the agreement appears in para 7 of the supporting affidavit by *Phillip Nyakuedzwa* and it is that no one had yet been authorised by the bank to sign the agreement.

It is trite that a company, being an artificial person, can only perform through natural persons acting as its agents. In Cilliers & Benade *Corporate Law,* 3 ed (referred to by the first respondent), the learned authors stated at p 179 that:

> "The ordinary rules of agency provide the foundation for representation in company law. Therefore it is required that:
> (a) the company (principal) must have the necessary capacity and power to perform the particular juristic act.; and

(b) the company representative must have the necessary authority to bind the company in respect of the particular circumstances, complement the representative's deficient authority by ratification (expressly or tacitly) of his acts."

In M*all (Cape) Pty Ltd* v *Merino Ko-operaisie Bpk* 1957 (2) SA 347 (CPD), WATERMEYER J observed at 351 D-E that:

> "In such a case there is judicial precedent for holding that objection may be taken if there is nothing before the court to show that the applicant has duly authorised the institution of notice in motion proceedings. Unlike an individual an artificial person can only function through its agents and it can only take decisions by the passing of resolutions in the manner provided by its constitution."

It is therefore clear that in order for the bank to have been bound by the alleged acts of its officers, a resolution should have been passed by the board of directors. In the alternative the bank should have ratified either expressly or tacitly the agreement of the parties. The applicant concedes that the agreement could not be signed as no resolution had been passed. There was no express or tacit ratification of the alleged oral agreement. No such agreement therefore existed between the parties.

This view is bolstered by the terms of the written agreement. Clause 15 of the agreement provides:

> "**Whole Agreement**
> This agreement constitutes the entire contract between the parties thereto otherwise than as may be recorded therein and:
> No warranty, representations, promise or undertaking has been given or made by either party to the other except as recorded in this agreement."

As submitted by the first respondent, this clause demonstrates that the parties intended that the agreement between them was to be in writing and it was that written agreement that would then govern the relationship between the parties. But the agreement was still in its formative stages. That is the reason why *Phillip Pfungwa Nyakuedzwa* attested in his affidavit that he was asked by the bank to "review a draft agreement". He does not state that he was involved in the negotiations between the parties and therefore had first-hand information of the oral agreement between the parties. He stated in his affidavit that:

> "2. I was representing AFRASIA BANK LIMITED (formerly Kingdom Bank Limited) in various matters up until the bank went into liquidation in February 2015.
> 3. I can confirm that sometime in early February 2015, I was instructed by the bank's legal department to **review a draft agreement** of sale between itself and the Elisha Tonderai Kafesu pursuant to which the bank was disposing by sale to the former a property known as a certain piece of land situate in the district of Umtali called stand

> 3535 Umtali Township of Umtali lands measering 1132 square metres held under deed of transfer number 334/2002 dated 30 April 2002."

Nyakuedzwa was given a "draft agreement" to "review". It therefore means that the agreement was not a final document. A review in the present circumstances would have been an examination or assessment of the draft agreement with such examination or assessment resulting in proposals for changes.

Despite, Nyakuedzwa having been instructed to review a draft written agreement, the applicant ended up with the draft agreement. Other than saying that he was furnished the agreement for his signature, the applicant does not indicate who, in the bank, gave him the agreement. Nyakuedzwa does not also state in his affidavit who gave him the draft agreement either. He states that he was given the draft by the bank's legal department. There must have been a natural person or persons who gave both the applicant and Nyakuedzwa the written agreement. It therefore remains a mystery how the two came into possession of the agreement in the absence of an identification of the natural person/s.

The applicant has in my view failed to satisfy the court that a valid agreement exists between the parties. A confirmation of the alleged agreement would amount to the court concluding a contract between the parties. That the court cannot do. The relief sought is therefore incompetent.

It would further be remiss of me not to comment on the propriety of the conduct of Phillip Nyakuedzwa as a legal practitioner. Nyakuedzwa admits that he was the bank's legal practitioner before it was placed under liquidation. Nyakuedzwa clearly acted in breach of the client-attorney privilege. To the extent that the applicant sought to rely on that evidence that there existed a valid agreement, the evidence is not inadmissible as stipulated in s 8 (6) of the Civil Evidence Act [*Chapter 8:0*].

As alluded to, Nyakuedzwa alleges that he was instructed by the bank to review the draft agreement. He was therefore being requested to give legal advice on the agreement. He in fact is alleged in the applicant's letter of 26 February to the liquidator, to have attended a meeting between the parties. He is alleged to have still been practising with Mambosasa Legal Practitioners. He however deposed to an affidavit in support of the applicant. Not only did he depose to the affidavit, he witnessed the applicant's signature on the disputed agreement.

The importance attached to lawyer-client privileges was discussed in *ZFC* v *FURUSA* SC 15/2018. GOWORA JA at p10-11 (cited with approval the observations by the late CHIDYAUSIKU CJ that:

"In *Law Society v Minister of Transport & Communications & Anor* 2004 (1) ZLR 257 (S) at 261F-G, CHIDYAUSIKU CJ, had occasion to comment as follows:

> 'The court was referred to a wide range of authorities that underpinned the importance and significance of the lawyer client privilege. In the case of *Baker v Campbell* (1983) 153 52 (HCA) it was held that the privilege existed not simply in relation to litigation but to advice sought between a client and a lawyer so that the client can regulate his affairs. In another case cited to this court, it was held that the privilege between lawyer and client even overrode the policy consideration that no innocent man should be convicted of a crime –see *S v Safatsa & Ors* 1988 (1) SA 868(A), at pp 878-887. In this regard, see also Mahomed v President of the Republic of *South Africa & Ors* 2001(2) SA 1145(C) at pp 1151-1155. The sanctity of the lawyer-client privilege and the need to minimize inroads into that privilege are emphasized in a number of Canadian cases that were cited by the applicant.'"

Nyakuedzwa did not state in the founding affidavit that he had been authorised to disclose to the applicant the bank's instruction to review the draft agreement. Again, there is no explanation under what circumstances he witnesses the applicant's signature on the disputed agreement. He was therefore, in my view, conflicted and disclosed confidential information. His conduct is a cause for concern. The Registrar of the High Court, is hereby instructed to bring this judgment to the attention of the Law Society of Zimbabwe.

Having found for the first respondent on the last two preliminary points, the application is accordingly dismissed with costs.

Mutamangira & Associates, applicant's legal practitioners
Wintertons, 1st respondent's legal practitioners