Judgment No. HB 153/04
Case No. HC 3669/04

FARMCOR (PVT) LTD

Versus

PETER BAILEY NO (as curator of Trust Bank)

And

RESERVE BANK OF ZIMBABWE

And

MINISTER OF FINANCE, ECENOMIC PLANNING AND DEVELOPMENT

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 1 NOVEMBER AND 9 DECEMBR 2004

N Mazibuko for applicant
Ms N Ncube with M Ndlovu for first and second respondent

Urgent Application

NDOU J: The applicant seeks a provisional order in the following terms:

"Terms of Final Order sought

That you show cause to this honourable court why a final order should not be made in the following terms:

1. That the 1st respondent, be and is hereby ordered to release the total amount of $541 849 312,22 together with interest due thereon as per the terms of the investment made by the applicant with Trust Bank to the applicant herein within 48 hours of confirmation of this order by this honourable court.

Alternatively:

That the 2nd respondent releases to the applicant the total amount as mentioned above within 48 hours of confirmation of this order;

2. That it be and is hereby declared that the 3rd respondent has failed to act within a reasonable time in dealing with the applicant's appeal and that he be and is hereby bound to respect or comply with an order of this honourable court;

3. That the 1st , 2nd and 3rd respondents pay the costs of the application jointly and severally, the one paying the other to be absolved on a legal practitioner and client scale.

Interim Relief granted

Pending the determination of this matter, the applicant is granted the following relief:

(a) This order shall operate as authority giving leave to proceed as per this order and papers filed herewith against Trust Bank as represented by the curator thereof."

Briefly, the central bank, 2nd respondent, placed Trust Bank under curatorship on 23 September 2004 in terms of section 53(1) of the Banking Act [Chapter 24:20]. The first respondent was appointed the curator. The total liabilities of Trust Bank are $1 786 744 726,00 comprising of 500 creditors. The assets of Trust Bank are $228 358 394,00 which leaves a deficit of $1 558 386 333,00. The deficit would have to be taken care of before any payments are made.

On 24 September 2004 the applicant addressed a minute to the second respondent seeking authority to withdraw $350 000 000,00 in order to enhance its viability. On 28 September 2004 the second respondent responded in the following terms:

> "Thank you for your letter dated 24th September. I regret that all funds with the bank are frozen in terms of the Banking Act. Although your situation is desperate, I am therefore unable to release any funds to you for a minimum of six months.
>
> Yours sincerely
>
> (Signed)
> P L Bailey
> Curator"

Not satisfied with the determination of the second respondent, the applicant appealed to the Minister of Finance, Economic Planning and Development, 3rd respondent, by a minute dated 5 October 2004. No response was received resulting in this application. The respondents have raised two points *in limine*.

Firstly, their position is that the applicant was wrong in combining the preliminary application for leave to sue the curator and the substantive application on the merits. They argue that the applicant should have first applied for leave to sue the curator as required by section 54(2) of the Act and in the event of success in obtaining such leave only then would they institute the application on the merits. They drew analogy with the case of application for leave to appeal – *Oak Holdings Private Ltd* v *Chiadza* SC 136-85.

Section 54(2) provides

> "54 Effect of placing banking institution under curatorship
>
> 1. …
> 2. With effect from the date on which a direction under fifty-three was issued-
>
> (a) all legal proceedings and the execution of all writs, summons 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 …"

I agree with Mr *Mazibuko*, for the applicant that in determining the question of leave in terms of section 54(2) one has to look at the merits. Where on the one hand the case on the merits is weak then leave will not likely be refused. Where, on the other hand, the case is strong on the merits the court will be inclined to grant the leave sought. When looking at the merits, it is , however, not appropriate that I should make a final judgment on the merits. This is for the court in due course in the

event that I grant the leave. In my view, the applicant failed to establish a strong arguable case on the merits. As pointed out by the curator, the funds of Trust Bank were frozen. The applicant has not set out any special or unique circumstances that would oblige the payment of the said sum of money before the expiry of the statutory period. The applicant's situation is similar to a lot of other creditors. The curator said that payment to creditors will be made after the situation has been assessed in total and a way forward agreed upon. He placed it on record that he is in any event unable to pay any of Trust Bank's creditors. It is clear that a holistic picture of Trust Bank has not been established, and as such, this court cannot usurp the authority of the curator by ordering and managing the pay-outs of each depositor. The applicant approached the curator a day after his appointment with the request which is now subject matter of this application. Did the applicant seriously expect the curator to have had a holistic picture of a banking institution of the size of Trust Bank within a few hours of his appointment?

From the affidavit of Norman Mataruka, the Division Chief of the Bank Licensing, Supervision and Surveillance Division of the Reserve Bank it is clear that as far back as December 2003, Trust Bank was listed as one of the troubled bank which were beneficiaries of their Troubled Banks Fund. This fact was highly publicised in the media. The applicant has exhibited in this application that they relies a lot on press statements, so applicant could not have missed this point. As a reasonable depositor applicant should have weighed the risk of leaving such a large sum of money in a troubled bank. He pointed out that it is public knowledge that between December 2003 and September 2004 Trust Bank was offering very high interest rates on deposits. It was, therefore, incumbent on the depositors to weigh the

high interest rates and the risk associated with the gains. The applicant obviously did not assess the risk adequately as evinced by the deposits subject matter of these proceedings. All the deposits were made in September 2004, i.e. between two(2) to nine(9) days prior the placement of Trust Bank under curatorship. For the record the applicant made the following deposits-

(a) $5 393 567,00 invested on 14 September 2004 and due to mature after fourteen (14) days i.e. on 28 September 2004.

(b) $105 864 469,67 invested on 17 September 2004 and due to mature after seven(7) days i.e. 24 September 2004;

(c) $160 854 407,60 invested on 17 September 2004 due to mature after seven(7) days i.e. on 24 September 2004, and

(d) $269 736 867,95 invested o 21 September 2004 due to mature on 28 September 2004.

While I sympathise with applicant, the application does not disclose any exceptional circumstances warranting preferential treatment of its case. It is not out of the ordinary category of prejudiced creditors. The applicant's case is very weak on the merits and I accordingly refuse the applicant leave to institute proceedings against the curator. The applicant will bear the costs of this application.

Calderwood, Bryce Hendrie & Partners, applicant's legal practitioners
Lazarus & Sarif, first and second respondent's legal practitioners