NATIONAL SOCIAL SECURITY AUTHORITY
versus
CAPITAL BANK CORPORATION LIMITED
and
RENAISSSANCE FINANCIAL HOLDINGS (PVT) LTD
and
EDWIN CHAVORA
and
JENITIAS RODZE
and
MIRIAM MUZA
and
FORD THINDWA
and
RONALD MUDZIMBA
and
BERNARD MUSONZA
and
KUMBULANI MATHEMA
and
SIDMORE MATIKITI
and
ALBERT KABANDE
and
MARLON MATAVIRE
and
OSWARD JONGWE
and
LUCKSON MUTIWEKUZIVA
and
MUCHINERIPI CHIGWENDERE
and
ANDERSON MURONGERWI
and
STEPHEN MASHOZHERA
and
WASHINTON VAMBE
and
LAWRENCE MUSENDEKWA
and
NGONIDZASHE CHIKOWORE
and
SHINGIRAI MAZAMBANI
and
JOSEPH MEDZANO

and
MILLICENT NYATHI

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 14 June 2019 & 22 August 2019

Opposed Application

T Zhuwarara, for the applicant
W Chinamora, for the 2nd respondent
B Kazembe , for the 3rd – 23rd respondent

MUREMBA J: The applicant National Social Security Authority (NSSA) is a statutory body established in terms of the National Social Security Authority Act [*Chapter 17:04*]. The first respondent Capital Bank Corporation limited is a former merchant bank having relinquished its banking licence to the Reserve Bank of Zimbabwe. The third respondent, Renaissance financial Holdings (Pvt) Ltd is the holding company of the first respondent. The 3rd to the 23rd respondent are employees of the first respondent.

The first respondent was incorporated as a merchant bank around 2001. Around 2009 its performance began to dwindle. On 2 June 2011 it was placed under curatorship by the Governor of the Reserve Bank/Central Bank. After hearing of the much publicized ailing of the first respondent, the applicant engaged the relevant authorities who included the Central Bank and the Ministry of Finance to get clearance to rescue the first respondent. The relevant clearance was obtained. The applicant and the third respondent, the holding company agreed that the applicant injects capital in the sum of USD24 million. That was done. Accordingly, the first respondent was removed from curatorship around March 2012. However, despite the capital injection the first respondent’s performance did not improve. Shareholders were advised. Consequently extra ordinary shareholders’ and Board meetings were held. The majority shareholders passed a resolution that the first respondent be wound up. Pursuant to that, the applicant as a contributory brought the present application for the winding up of the first respondent in terms of s 206 and 207 of the companies Act [*Chapter 24:03*] on 12 February 2018. On 16 November 2018 TAGU J

heard the matter and on 30 January 2019 he granted a provisional order for the winding up of the first respondent. He was satisfied that the first respondent was insolvent. The following is the order that he granted.

"It is hereby ordered that:

1. The first respondent, Capital Bank Corporation Limited be and is hereby provisionally wound up, pending the granting of an order in terms of paragraph 3 hereof or the discharge of this order.
2. Mr John Mafungei Chikura of Deposit Protection Corporation Evelyn House 26 Fife Ave/Corner Blackistone Street, Harare, be and is hereby appointed as the first respondent's Provisional Liquidator with the powers set out in paragraph (a) to (h) of subsection 2 of section 221 of the Companies Act [*Chapter 24:03*].
3. Any interested party may appear before this Honourable Court sitting at Harare on 13th March 2019 to show cause why an order should not be made placing the first respondent company in liquidation and why an order should not be made that the costs of these proceedings shall be the cost of the liquidation."

After the provisional order had been granted, the second respondent and the 3rd to 23rd respondent filed their notices of opposition and opposing affidavits opposing confirmation of the provisional order on 7 and 12 March 2019 respectively. Heads of Argument were also filed. The present application is therefore for the confirmation or discharge of the provisional order.

At the hearing of this matter on 14 June 2019 seeing that the return date for the provisional order had been 13 March 2019, I asked the applicant's counsel if the provisional order had been extended because in the file nothing showed. Resultantly, all counsels addressed me on the issue and this judgment relates to that one issue.

Mr *Zhuwarara* submitted that although the return day was 13 March 2019, the matter was not enrolled for that day because the respondents had filed opposing papers. Asked why the applicant did not seek an extension of the provisional order, Mr *Zhuwarara* initially submitted that it was because the matter is set down is by operation of law and that there is no need to seek an extension. What he meant was not clear, but he later conceded that there had been an inadvertence on the part of the applicant by not seeking an extension of the provisional order. He applied for the condonation of the inadvertence in terms of r 4C so that the matter can be heard

on the merits and be brought to finality. He relied on the approach that was taken by Patel J (as he then was) in the case of *Boka Investments (Pvt) Ltd* v *Thirdline (Pvt) Ltd & Ors* 2013 (1) ZLR 321 (H) whose facts fall on all fours with the facts of the present matter. Patel J having considered the circumstances of the case and that it was in the late stages of winding up, he went on to treat the provisional order as having remained operational up to the time of the application for confirmation. Mr *Zhuwarara* submitted that likewise the equities of the present matter should be the primary consideration considering that none of the respondents was prejudiced and that they all filed their opposing papers and heads of argument and were ready to argue the matter.

Mr *Chinamora* submitted that the applicant was aware that the provisional order had lapsed but did not seek an extension thereof and now it was asking to be condoned yet condonation is not there for the mere asking. It has to be asked for. He referred to the case of *Forestry Commission* v *Moyo* 1997 (1) ZLR 254(S) wherein this court condoned the delay of over two years in bringing an application for review when there had been no application for condonation or explanation for the delay. This court did so because there had been gross procedural irregularities by the disciplinary inquiry in dismissing the respondent from work and it held that as such to dismiss the application for review would constitute a failure to redress an injustice. On appeal the Supreme Court held that although the rules of court are not an end in themselves, there are there to regulate the practice and procedure of the High Court. Strong grounds would have to be advanced to persuade the court or judge to act outside them. It was further held that where an application for review is not brought within the time specified in the Rules, an application for condonation must be sought. It was held that the making of the application is necessary to trigger the discretion of the court to extend the time. Further, it was held that if an application for condonation is not made, the matter is not properly before the court. An explanation is essential before a court can exercise judicial discretion to condone.

Mr *Chinamora* submitted that in *casu* the applicant should have properly sought condonation explaining why it did not comply with the rules and also explaining its prospects of success on the merits. Mr *Chinamora* argued that this would have enabled the respondents to adequately respond to the application for condonation.

Mr *Kazembe* for 3rd to 23rd respondent submitted that the applicant should not be condoned for not seeking an extension of the provisional order because unlike in the *Boka* case in this case there had been no attempt by the applicant to extend the return date. He further submitted that the applicant had not made an application to revive the provisional order. He submitted that the applicant cannot seek to be condoned for an application it had not made.

As already stated above, the facts in the *Boka* case fall on all fours with the facts in the present case. A provisional order for liquidation was not confirmed, discharged or extended on the return day. At the hearing of the application for confirmation of the provisional order, the respondents' counsel raised the point that the provisional order had lapsed on the return date. Patel J (as he then was) held that where a provisional order for sequestration of an estate or the winding up of a company has been granted, the stipulated return day is critical to its confirmation or discharge. If the provisional order is not confirmed, discharged or extended on that day, this ordinarily entails the conclusion that it has lapsed and is no longer extant. He however said that he was loath to endorse that position considering the circumstances of the case and that the applicant was in the late stages of winding up. He said that the general balance of convenience was overwhelmingly in favour of treating the provisional order as having remained operational up to the time of the application for confirmation.

Considering that the applicant in the *Boka* case was exactly in the same circumstances as the applicant in the present case and the court went on to treat the provisional order as having remained operational up to the time of the application for confirmation, I do not see why I should depart from the approach that was taken by Patel J. Just like in the present case, in the *Boka* case the applicant had not sought an extension of the provisional order on the return date. The respondents had not challenged the continued operation of the provisional order on the ground that it had lapsed. They actually filed heads of argument in response to the applicant's heads. Even at that stage they did not take the point that the provisional order had lapsed. They only took the objection at the hearing of the matter, 22 months later. Just like in the present case the applicant had not made an application for revival of the provisional order, but Patel J said that it was in the interests of justice that the matter be finally determined for the parties to know where they stood. He took the view that the failure to extend the return day of the provisional order should not be regarded as being fatal to its continuing validity. He then went on to exercise his

discretion under rule 4C to condone that failure. What is worse about the present case is that none of the respondents even raised the point that the provisional order lapsed. It is a point that the court raised *mero motu*, otherwise the parties had come ready to argue the matter. As was submitted by Mr *Zhuwarara* the respondents did not talk of having suffered any prejudice as a result of the failure to extend the return day. I am therefore persuaded to condone the failure to extend the return day in terms of rule 4C and proceed to hear arguments in the matter and treat the provisional order as having remained operational.

It is my considered view that the circumstances in the case of *Forestry Commission* v *Moyo supra* are different. In that case the applicant had failed to apply for a review of proceedings within the stipulated 8 weeks and had then brought the application for review after 2 years without first seeking condonation. Clearly there was no review before the court. However, in the present case a provisional order was in place and it is only that the return day had not been extended. The respondent did not even take issue with that.

In the result, it be and is hereby ordered that:

1. The matter shall proceed to be heard on the merits.
2. There shall be no order as to costs.

GN Mlotshwa & Company, applicant's legal practitioners
Muza & Nyapadi, 2nd respondent's legal practitioners
Tendai Biti Law, 3rd – 23rd respondent's legal practitioners