

DISTRIBUTABLE (38)

(1) PROFESSOR CHETSANGA
(2) COLLIN KUHUNI
(3) MONICA MUKONOWESHURO
v
(1) PATTERSON TIMBA
(2) RENAISSANCE FINANCIAL HOLDINGS (PRIVATE)
LIMITED

**SUPREME COURT OF ZIMBABWE
GWAUNZA JA, PATEL JA & MAVANGIRA JA
HARARE, OCTOBER 13, 2016**

L. Mazonde, for the 1st and 3rd appellants
A. Mugandiwa, for the 2nd appellant
T. Mpofu, for the 1st and 2nd respondents

PATEL JA: This is a matter in which two separate appeals, involving the same parties and the same judgement appealed against, were consolidated for hearing and disposition. The appeals in question are under Case Nos. SC 66/16 and SC 80/16. After hearing counsel in the matter, the Court delivered a unanimous *ex tempore* judgment disposing of both appeals. That judgment is set out hereunder for the guidance of the court *a quo* when dealing with the matter on remittal.

The relevant background to the appeals herein may be summarised as follows. The dispute between the parties in both appeals commenced in the High Court by way of civil action. After all the parties had filed their pleadings, it was agreed at the pre-trial conference stage that a specific point of law be determined by the High Court by way of

special case procedure. The point of law to be determined was the legal effect of s 54 of the Banking Act [*Chapter 24:20*] on any shareholder of a banking institution placed under curatorship.

According to the judgment of the court *a quo*, it purported to proceed in terms of a joint pre-trial conference minute dated 11 March 2015. More importantly, the learned judge stated that he was dealing with the special case agreed by the parties in a document that was signed by all the parties. The document was dated 11 March 2015 but date-stamped 19 October 2015. The learned judge then set out the specific point of law to be determined and proceeded to expound his interpretation of the import of ss 53, 54 and 55 of the Banking Act. However, it is apparent from the judgment of the court *a quo* that it failed to determine the question stated by the parties in the following respects. Firstly, it did not articulate the answer to the question in the operative part of its judgment. Secondly, it delved into questions that were not properly before it and determined them in its operative order without indicating the procedural or jurisdictional basis upon which it was empowered to do so. In our view, the court *a quo* did not confine itself to the specific issue before it and thereby misdirected itself.

We note in passing that the joint pre-trial conference minute referred to in the judgment of the court *a quo* does not form part of the record before us. None of the counsel who appeared in this matter was able to shed any light on the existence or otherwise of this supposed minute. In our view, the absence of the minute is a fundamental irregularity that should be rectified in due course so as to ensure substantial compliance with the procedure prescribed in civil trials.

In the result, the appeals are partially allowed on the basis that:

- (i) the court *a quo* did not clearly and definitively determine the specific legal issue that was referred to it for determination; and
- (ii) it proceeded to grant relief that was not specifically sought in the special case referred to it.

Accordingly, it is ordered that:

- (1) The appeals herein be and are hereby partially allowed.
- (2) The judgment of the court *a quo* be and is hereby set aside.
- (3) The matter be and is hereby remitted to the court *a quo* for a proper determination of the special case before it.
- (4) Each party shall bear its own costs.

GWAUNZA JA: I agree.

MAVANGIRA JA: I agree.

Kantor & Immerman, 1st and 3rd appellants' legal practitioners
Wintertons, 2nd appellant's legal practitioners
Mambosasa & Associates, 1st and 2nd respondents' legal practitioners