

# A Statutory Analysis of the Role of the Courts in Protecting Financial Consumers' Rights in the Zimbabwean Banking Sector: The *Penelope* Case in Context

HT Chitimira,\* E Torerai\*\* and O Tsaura\*\*\*

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## Authors

Howard Chitimira  
Elfas Torerai  
Oscar Tsaura

## Affiliation

North-West University,  
South Africa

## Email

Howard.chitimira@nwu.ac.za  
elfas.torerai@gmail.com  
mrtsaura1@gmail.com

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## Abstract

The Zimbabwean banking sector has experienced several tumultuous challenges since 2000. This is owing chiefly to the political and economic challenges the country has experienced. Poorly conceived and ill-timed policies have also wreaked havoc in the Zimbabwean banking sector. Financial consumers have sometimes lost their savings to hyper-inflation or overnight policy changes in Zimbabwe. The change in currencies is a good example of how financial consumers have seen their deposits and savings at banks and other related financial institutions eroded to nothing. In 2018, the Reserve Bank of Zimbabwe (RBZ) issued a directive for all banks to convert all deposits made prior to October 2018 from the United States (US) dollar denomination to the Zimbabwean dollar (bond notes and coins). This was done on an exchange rate of one US dollar as to one Zimbabwean dollar, yet in reality, the local currency had been devalued. The RBZ directive left individuals and corporates reeling from exchange losses. The directive was akin to a heist and many people lost trust and confidence in the Zimbabwean banking sector. While many financial consumers suffered in silence, some decided to take their banks to court, demanding a reimbursement of their deposits in the currency in which they deposited or alternatively, the equivalent of the original deposit using the correct exchange rate. This article examines the role of the courts in upholding the rights of financial consumers in the Zimbabwean banking sector in the light of the *Penelope* case. It also discusses how the Zimbabwean courts could assist in preserving the sanctity of the bank-client relationship among banks and financial customers. In addition, the article explores the role of the courts in challenging unjust laws that affect financial consumers' investments in banks. The strengths and weaknesses of the Zimbabwean banking regulatory framework are further discussed to assess if it is robust enough to protect financial consumers. The article recommends that the courts should objectively set aside unjust laws in the interest of justice to enable banks and other financial institutions to honour their contractual obligations. Policymakers should not adopt poor policies that infringe upon financial consumers' rights.

## Keywords

Banking sector; consumer protection; financial consumer; deposits; exchange rate; courts.

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## 1 Introductory remarks

Consumer protection has its roots in the industrial revolution which happened in the 18<sup>th</sup> and 19<sup>th</sup> centuries, and in the 1960s when consumerism and consumer rights became topical in the United States of America (USA).<sup>1</sup> Consumer protection is a broad term that denotes safeguarding the rights and interests of consumers against exploitation by service providers.<sup>2</sup> This article discusses the role of the courts in protecting financial consumers in the Zimbabwean banking sector in the light of the recent *Penelope* case.<sup>3</sup> It provides an overview of the challenges affecting financial consumers from 2000 to date. This is a period which is arguably one of the most difficult in Zimbabwe's recent economic history. Hyper-inflation eroded financial consumers' savings in around 2003-2004 and it worsened in the 2007-2008 crisis.<sup>4</sup> This culminated in the adoption of the multi-currency regime that replaced the Zimbabwean dollar in 2009.<sup>5</sup> However, the Zimbabwean dollar was reintroduced through a surrogate currency comprising bond notes and coins between 2014 and 2016 until it was officially confirmed in 2019.<sup>6</sup> The reintroduction of the Zimbabwean

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\* Howard Chitimira. LLB (*Cum Laude*), LLM (UFH), LLD (NMMU). Research Professor, Research Director and Professor of Securities and Financial Markets Law, Faculty of Law, North-West University, South Africa. E-mail: Howard.Chitimira@nwu.ac.za. ORCID: <https://orcid.org/0000-0003-1881-1242>.

\*\* Elfas Torerai. BSc (MSU), LLB (Unisa), LLM (NWU), LLD (NWU). Postdoctoral Research Fellow, Faculty of Law, North-West University, South Africa. Email: elfas.torerai@gmail.com. ORCID: <https://orcid.org/0000-0002-9680-5430>.

\*\*\* Oscar Tsaura. Bachelor of Commerce in Law and LLB (UNISA), LLM (NWU), LLD Candidate, Faculty of Law, North-West University, South Africa. Email: mrtsaura1@gmail.com. ORCID: <https://orcid.org/0000-0002-8451-2278>.

<sup>1</sup> Waller *et al* 2011 *European Journal of Consumer Law* 2; Makanyeza, Svotwa and Wealth "Consumer Protection and Financial Literacy" 154-156.

<sup>2</sup> Waller *et al* 2011 *European Journal of Consumer Law* 2; Makanyeza, Svotwa and Wealth "Consumer Protection and Financial Literacy" 155-156.

<sup>3</sup> *Stone v Central Africa Building Society* (118 of 2023) [2023] ZWHHC 118 (15 February 2023); *Penelope Douglas Stone v Central African Building Society, the Reserve Bank of Zimbabwe and the Minister of Finance and Economic Development* HH118-23 (*Penelope* case) para 42.

<sup>4</sup> Tsaurai 2018 *Journal of Developing Areas* 87; see related comments by Munangagwa 2009 *Gettysburg Economic Review* 121-122; Dzomira 2014 *Journal of Governance and Regulation* 77-79; Nyamunda 2021 *Journal of Asian and African Studies* 207-208.

<sup>5</sup> Dzomira 2014 *Journal of Governance and Regulation* 78; see related comments by Tsaurai 2018 *Journal of Developing Areas* 87; Nyamunda 2021 *Journal of Asian and African Studies* 208-209; Munangagwa 2009 *Gettysburg Economic Review* 123.

<sup>6</sup> *Presidential Powers (Temporary Measures) (Amendment of Reserve Bank of Zimbabwe Act and Issue of Real Time Gross Settlement Electronic Dollars (RTGS Dollars)) Regulations*, 2019 issued through Statutory Instrument 33 of 2019 (hereafter SI 33/19) s 4(1)(d); Vasantkumar 2022 *Economy and Society* 75; Nyamunda 2021 *Journal of Asian and African Studies* 212-214.

dollar triggered financial losses that occasioned the *Penelope* case and other cases.<sup>7</sup>

Financial consumer protection can be achieved through the provision of sound legal and regulatory measures that promote consumer rights and adequate grievance management mechanisms.<sup>8</sup> Put differently, financial consumer protection is realised in a particular jurisdiction where there are robust laws, rules and regulations that provide for fair interaction between individuals and financial institutions such as banks. For the purposes of this article, financial consumer protection can be defined as the laws, regulations and other measures designed to promote the fair and responsible treatment of financial consumers in their use of financial services and products and their interaction with financial service providers such as banks.<sup>9</sup> In this regard, financial consumer protection is necessary to shield consumers from abusive, unfair, deceptive and exploitative conduct of financial service providers.<sup>10</sup> Accordingly, financial consumer protection can be realised through the provision of relevant information, dispute resolution mechanisms and financial education to all financial consumers.<sup>11</sup> Thus, financial consumers should have access to adequate, accurate and timely information about financial products in order to be able to make informed choices.<sup>12</sup> Moreover, banking institutions and financial authorities should avoid making hasty decisions that catch consumers by surprise, such as changing the currency of consumers' savings. Additionally, there should be expedient, efficient and affordable dispute resolution mechanisms where aggrieved financial consumers can seek recourse for infractions occasioned by financial service providers such as banks.<sup>13</sup>

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<sup>7</sup> See *Penelope* case para 42; also see *Zambezi Gas Zimbabwe (Pvt) Ltd v NR Barber (Pvt) Ltd* (Civil Appeal SC 437 of 2019; SC 3 of 2020) [2020] ZWSC 3 (20 January 2020) (*Barber* case), para unknown; Nyamunda 2021 *Journal of Asian and African Studies* 213-214.

<sup>8</sup> OECD 2012 <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0394>; see related comments by Chitimira and Torerai 2022 *Speculum Juris* 372.

<sup>9</sup> OECD 2012 <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0394>. The OECD developed twelve principles on financial consumer protection that should be observed and implemented at government, oversight body and financial services provider level.

<sup>10</sup> OECD 2012 <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0394>; Makanyeza, Svotwa and Wealth "Consumer Protection and Financial Literacy" 156.

<sup>11</sup> OECD 2012 <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0394>; Makanyeza, Svotwa and Wealth "Consumer Protection and Financial Literacy" 156-157.

<sup>12</sup> OECD 2012 <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0394>; Makanyeza, Svotwa and Wealth "Consumer Protection and Financial Literacy" 157.

<sup>13</sup> OECD 2012 <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0394>. See related comments by Makanyeza, Svotwa and Wealth "Consumer Protection and Financial Literacy" 157.

Financial consumer protection involves financial education which entails the provision of instruction, information and objective advice to equip financial consumers with the skills and the necessary confidence to make informed choices and to know where to go for help.<sup>14</sup> Financial education is a strong pillar of financial consumer protection and it can be achieved through various initiatives and platforms such as workshops, seminars, interactive radio and television programmes.<sup>15</sup> Financial education empowers financial consumers to make informed financial and investment decisions, to evaluate financial risks and returns and to assert their rights.<sup>16</sup> In this regard, financial education equips financial consumers to know their rights. The failure by financial consumers to file cases demanding reimbursements for the value of their monetary investments in the Zimbabwean 2004 banking crisis and currency change debacle of 2018 could have been caused by the lack of adequate consumer education. Uninformed financial consumers will suffer in silence and could ignorantly accept negative decisions made by financial institutions such as banks and regulatory authorities.<sup>17</sup>

In light of the above, this article seeks to share insights into the role of the courts in promoting the rights of financial consumers in Zimbabwe. It also provides a brief background on financial consumer protection in the Zimbabwean banking sector. The article discusses the protection of consumer rights under the current Zimbabwean financial regulatory framework. The *Constitution of Zimbabwe*,<sup>18</sup> the *Banking Act*,<sup>19</sup> the *Exchange Control Act*,<sup>20</sup> and the *Consumer Protection Act*<sup>21</sup> are discussed to examine their adequacy in relation to financial consumer protection. The *Penelope* case and related case law are explored to unpack how the courts settle disputes between financial consumers, policymakers and financial service providers. Thereafter, some recommendations and concluding remarks are provided.

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<sup>14</sup> OECD 2012 <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0394>; see related comments by Magau 2022 *De Jure* 221; Makanyeza, Svatwa and Wealth "Consumer Protection and Financial Literacy" 175-177.

<sup>15</sup> OECD 2012 <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0394>; Makanyeza, Svatwa and Wealth "Consumer Protection and Financial Literacy" 173-174.

<sup>16</sup> OECD 2012 <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0394>; Makanyeza, Svatwa and Wealth "Consumer Protection and Financial Literacy" 175-176; see related comments by Magau 2022 *De Jure* 233-234.

<sup>17</sup> See related comments by Chitimira and Torerai 2022 *Speculum Juris* 373-374.

<sup>18</sup> *Constitution of Zimbabwe Amendment Act* 20 of 2013 (the *Constitution*) ss 71, 85 and 162-164.

<sup>19</sup> *Banking Act* [Chapter 24:20] 9 of 1999 as amended (the *Banking Act*) ss 28D-28G.

<sup>20</sup> *Exchange Control Act* [Chapter 22:05] 1 of 1965, as amended (the *Exchange Control Act*) s 2.

<sup>21</sup> *Consumer Protection Act* [Chapter 14:44] 5 of 2019 (the *CPA*) ss 4, 6, 9 and 45.

## 2 Overview of financial consumer protection in the Zimbabwean banking sector

Zimbabwe has experienced an unstable banking sector which has caused financial losses and violated consumer rights since the year 2000.<sup>22</sup> In the past two decades financial consumers have frequently lost their monetary investments and savings without recourse from banks and related financial institutions in Zimbabwe. The first loss came during the banking crisis of 2004.<sup>23</sup> Several banks were placed under curatorship and were ultimately liquidated.<sup>24</sup> They were liquidated with all the accounts and deposits they held for their clients.<sup>25</sup> Consequently, the harsh economic conditions forced many individuals out of the formal banking sector and pushed them into financial exclusion.<sup>26</sup> The other financial loss was a result of hyper-inflation that eroded the value of the Zimbabwean dollar from the period between 2007 to 2008. At the height of the hyper-inflation period in July 2008, inflation hit a record 231 000 000% in Zimbabwe.<sup>27</sup> As a result, financial consumers who held their savings or pensions in the Zimbabwean dollar currency lost all their savings. Some financial consumers refrained from using banks and opted to keep their money in foreign currency outside the banks in order to safeguard it from the sky-rocketing inflation.<sup>28</sup>

From 2009 to 2017, Zimbabwe abandoned its dollar and adopted a multi-currency regime where a basket of currencies such as the United States (US) dollar, the Chinese Yuan, the British Pound, the Botswana Pula and the South African Rand became legal tender.<sup>29</sup> The US dollar emerged as the currency of preference and became the default legal tender during this period in Zimbabwe. However, the Government of Zimbabwe made efforts

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<sup>22</sup> Muranda 2006 *International Journal of Business in Society* 644; Santu, Mawanza and Muredzi 2019 *Journal of Finance and Bank Management* 58-59; Foya and Changunda 2019 *International Journal of Research and Innovation in Social Science* 101.

<sup>23</sup> Ntini *et al* 2022 *Indian Journal of Humanities and Social Sciences* 32-34.

<sup>24</sup> Sakarombe 2018 *International Journal of Academic Research in Economics and Management Sciences* 125; Ntini *et al* 2022 *Indian Journal of Humanities and Social Sciences* 32-33.

<sup>25</sup> Ntini *et al* 2022 *Indian Journal of Humanities and Social Sciences* 33; see related comments by Sakarombe 2018 *International Journal of Academic Research in Economics and Management Sciences* 125.

<sup>26</sup> Ntini *et al* 2022 *Indian Journal of Humanities and Social Sciences* 33.

<sup>27</sup> Sanderson and Le Roux 2016 *International Journal of Economics and Financial Issues* 846; also see Ntini *et al* 2022 *Indian Journal of Humanities and Social Sciences* 33.

<sup>28</sup> Sanderson and Le Roux 2016 *International Journal of Economics and Financial Issues* 846.

<sup>29</sup> *Finance Act* [Chapter 23:04] 5 of 2009 s 17 which amended the *Reserve Bank of Zimbabwe Act* [Chapter 22:15] 5 of 1999; also see Vasantkumar 2022 *Economy and Society* 75; Abel and Le Roux 2016 *International Journal of Economics and Financial Issues* 845-846.

to reintroduce a surrogate Zimbabwean dollar in the form of bond notes and coins between 2014 and 2016.<sup>30</sup> In 2018, the Reserve Bank of Zimbabwe (RBZ) issued a directive for all banks to convert all deposits, except those made from offshore accounts, from the US dollar to the Zimbabwean dollar on a 1:1 exchange rate.<sup>31</sup> This triggered another loss of financial consumers' savings without due recourse being available to the majority of the affected individuals.

The Zimbabwean government has admitted that pegging the exchange rate was an error and acknowledged the losses incurred by financial consumers. However, it failed to restore the lost value of the bank deposits.<sup>32</sup> In a statement issued by the President of Zimbabwe, Emmerson Mnangagwa, on 7 May 2022 titled: "Measures to Restore Confidence, Preserve Value and Restore Macroeconomic Stability", the government promised to compensate financial consumers who had US\$1 000 or less first, before doing the same for those who had up to US\$100 000.<sup>33</sup> It is not clear whether there would be compensation for financial consumers who had more than US\$100 000 in their bank accounts. It is also not clear how long it will take the government to complete this compensation exercise. The admission that there had been a loss of value of financial consumers' savings, investments and pensions could have been triggered by the fact that some individuals decided to challenge the exchange control directive of 2018 in the courts. The *Penelope* case is a landmark case in the protection of Zimbabwean financial consumers, especially against arbitrary government actions.<sup>34</sup>

This article discusses the role of the courts in administering justice for financial consumers in Zimbabwe. It provides some recommendations that could assist in protecting financial consumer rights against illegal and irrational decisions of banks and policymakers.

### **3 The role of the courts in financial consumer protection under the current regulatory framework**

#### **3.1 The Constitution**

The right to property is a fundamental right in Zimbabwe.<sup>35</sup> In this context "property" could be monetary savings, pension benefits or investments held

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<sup>30</sup> Vasantkumar 2022 *Economy and Society* 75; also see Nyamunda 2021 *Journal of Asian and African Studies* 212-214.

<sup>31</sup> Vasantkumar 2022 *Economy and Society* 75; also see related comments by Nyamunda 2021 *Journal of Asian and African Studies* 212-214.

<sup>32</sup> *Penelope* case para 42.

<sup>33</sup> *Penelope* case para 42.

<sup>34</sup> *Penelope* case para 54.

<sup>35</sup> Section 71 of the *Constitution*.

at banks.<sup>36</sup> The *Constitution* provides that no persons can be compulsorily deprived of their property for no justifiable reason or in terms of a law of general application.<sup>37</sup> In cases where there is justification to deprive an individual of his or her property, there should be reasonable notice of the intention to acquire the relevant property as well as adequate compensation to acquire it.<sup>38</sup> Although there is a limitation of fundamental rights such as the right to property, the *Constitution* requires the courts to limit property rights only if such a limitation is fair, reasonable, necessary and justifiable in line with democratic principles such as openness, justice, human dignity, equality and freedom.<sup>39</sup> The courts should also consider other factors such as the nature of the right to be limited, the nature and extent of the limitation, the purpose of the limitation and the relationship between the limitation and its purpose.<sup>40</sup> Thus, any arbitrary acquisition of people's property is unlawful in Zimbabwe. In this regard, the courts should prevent impermissible grounds of acquiring property or the deprivation of financial consumers' monetary pensions, savings and investments due to bank failures or overnight policy changes in Zimbabwe.<sup>41</sup>

In addition, the *Constitution* provides that any person whose property has been summarily acquired can approach a court to demand the immediate return of such property or fair compensation for the same property.<sup>42</sup> Thus, the courts are the final arbiters in cases of dispute and they should exercise their judicial functions impartially, expeditiously and without fear, favour or prejudice.<sup>43</sup> Accordingly, financial consumers have an obligation to assert their constitutional right to property whenever their monetary investments and savings held by banks are threatened or unlawfully acquired. The fact that many financial consumers did not approach the courts to challenge the RBZ 2018 exchange control directive is a clear indication of the ineffectiveness of financial consumer protection mechanisms in Zimbabwe.

### 3.2 *The Banking Act*

The *Banking Act* regulates the establishment, operation, supervision and cancellation of banking activities in Zimbabwe.<sup>44</sup> This Act provides for consumer protection and the courts are obliged to uphold the rights of financial consumers in Zimbabwe.<sup>45</sup> Banking institutions are required to

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<sup>36</sup> Section 71(1) of the *Constitution*.

<sup>37</sup> Section 71(3)(a) of the *Constitution*.

<sup>38</sup> Section 71(3)(c)(i)-(iii) of the *Constitution*.

<sup>39</sup> Section 86(1) of the *Constitution*.

<sup>40</sup> Section 86(2)(a)-(f) of the *Constitution*.

<sup>41</sup> See s 72(1)(b)(i)-(ii) read with s 72 of the *Constitution*.

<sup>42</sup> See s 72(3)(c)(i)-(iii) read together with s 85(1) of the *Constitution*.

<sup>43</sup> Sections 162 and 164 of the *Constitution*.

<sup>44</sup> Sections 3-15 of the *Banking Act*, see related comments by Chitimira and Ncube 2021 *PELJ* 4.

<sup>45</sup> See Part IVA (ss 28D-28G) of the *Banking Act*.

openly display information such as interest rates on deposits and loans as well as the terms and conditions under which they accept deposits and provide loans.<sup>46</sup> Such information should be readily visible to consumers as they get into banking halls so that they can make informed financial decisions. Furthermore, the *Banking Act* requires banks to furnish new customers with information pertaining *inter alia* to the maintenance of accounts, access to accounts, interest payable on money in the account and interest payable on overdrafts.<sup>47</sup> Such information should be timeously provided by banks free of charge to all financial customers.<sup>48</sup>

Moreover, banks should have complaints handling mechanisms to adequately address all consumer grievances.<sup>49</sup> Information about such complaints handling mechanisms should be displayed in areas where consumers can easily see it, and it should be written in plain and clear language.<sup>50</sup> Banks are required to appoint relevant persons to handle complaints at every branch and keep a record of all complaints received and the way they were dealt with. This record should be kept for a minimum period of two years.<sup>51</sup> Banks that fail to adhere to the aforementioned requirements are liable to civil penalties upon conviction.<sup>52</sup>

The *Banking Act* provides that it is undesirable for the RBZ to cancel operating licences of problem banking institutions in order to: (a) protect and enhance the stability of the financial sector; (b) enhance public confidence in the banking system; (c) protect depositors; and (d) where applicable, to protect public funds.<sup>53</sup> This provision could have saved millions of financial consumers' savings had it been part of the *Act* earlier. Many people lost their savings and deposits when several banks collapsed in the period around 2004 and 2005 and in the period around 2012, since there was little recourse for those affected. Thus, amendments done to the *Banking Act* provide a glimmer of hope that depositors' funds will not again vanish with the closure of banks as was the case during the banking crisis of 2004 in Zimbabwe. In this regard, the courts are supposed to enforce the aforementioned requirements and hold banks and other relevant financial service providers accountable whenever disputes arise.

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<sup>46</sup> Section 28D(1)(c) of the *Banking Act*.

<sup>47</sup> Section 28E(1)-(4) of the *Banking Act*.

<sup>48</sup> Section 28E(6) of the *Banking Act*.

<sup>49</sup> Section 28F(1) of the *Banking Act*.

<sup>50</sup> Section 28(1)(a) of the *Banking Act*.

<sup>51</sup> Section 28F(1)(b)-(2) of the *Banking Act*.

<sup>52</sup> Section 28G read together with s 73 of the *Banking Act*.

<sup>53</sup> Section 52A(1) of the *Banking Act*.



### 3.3 *The Exchange Control Act*

The *Exchange Control Act*<sup>54</sup> accords the President with regulatory powers that are directly or indirectly related to gold, currency or securities transactions in Zimbabwe. Additionally, the President has powers to make regulations that directly or indirectly affect exchange transactions in Zimbabwe.<sup>55</sup> The *Exchange Control Act* also provides that the President has the discretion to directly or indirectly enforce the exclusive use of the Zimbabwe dollar for domestic transactions.<sup>56</sup> The 2018 RBZ directive compelled all banks in Zimbabwe to convert all US dollar non-offshore deposits in their consumers' bank accounts to the Zimbabwe dollar on an exchange rate of 1:1.<sup>57</sup> Furthermore, the 2018 RBZ directive required financial consumers to have separate accounts, one for foreign currency usually deposited from outside Zimbabwe and the other for local transactions in Real Time Gross Settlement (RTGS), better known as bond notes and coins.<sup>58</sup> The 2018 RBZ directive caused a lot of damage to the integrity of Zimbabwean financial markets. Financial consumers lost their savings, pensions and investments as their value severely depreciated owing to the unsustainable and arbitrary exchange rate. Although the President has discretionary powers on deciding the currency, the courts have a duty to review and adjudicate on the rationality of the exercise of such powers. This is essential in ensuring that the President acts in a reasonable, impartial and rational manner that does not unduly impede the rights of financial consumers in Zimbabwe. More on this is discussed with reference to the *Penelope* case.

### 3.4 *The CPA*

The *CPA* provides for the establishment of the Consumer Protection Commission (CPC) as an independent juristic body that is able to sue or to be sued in its name.<sup>59</sup> The CPC has several responsibilities which include, *inter alia*, protecting consumers against unconscionable, unreasonable, unjust or otherwise improper trade practices as well as deceptive, misleading, unfair and fraudulent conduct.<sup>60</sup> The CPC also promotes consumer confidence, awareness and empowerment in order to promote consumer rights and responsibilities in Zimbabwe.<sup>61</sup> To achieve this goal,

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<sup>54</sup> *Exchange Control Act* s 2(2)(a) and (h).

<sup>55</sup> Section 2(1)(b) of the *Exchange Control Act*.

<sup>56</sup> Section 2(1)(d) of the *Exchange Control Act*; RBZ 2018 <https://www.idbz.co.zw/sites/default/files/Exchange%20Control%20Directive%20RT120%20of%20October%202018%20pdf.pdf> (hereafter *Exchange Control Directive RT120/2018*).

<sup>57</sup> Paragraph 2 of the *Exchange Control Directive RT120/2018*.

<sup>58</sup> See para 2 of the *Exchange Control Directive RT120/2018*.

<sup>59</sup> Section 4 of the *CPA*.

<sup>60</sup> Section 6(a) of the *CPA*.

<sup>61</sup> Section 6(e) of the *CPA*.

the CPC should conduct, where possible, individual or group consumer education, vigilance, advocacy and activism programmes.<sup>62</sup> The CPC is responsible for various sectors of the economy, including the financial services sector.<sup>63</sup> For instance, the *CPA*'s key provisions on the banking sector include the right to fair treatment and honesty in transactions by service providers and the protection of financial consumers from unconscionable conduct by financial institutions.<sup>64</sup> In this regard, unconscionable conduct refers to behaviour that seeks to take advantage of financial consumers owing to, amongst other factors, their illiteracy, ignorance or inability to understand the terms and conditions of an agreement.<sup>65</sup> Accordingly, consumer education is a critical pillar in financial consumer protection as it equips individuals to make informed decisions not only concerning the services they receive but in seeking recourse in cases of disputes as well.<sup>66</sup>

The *CPA* further requires that if a court of law reaches a conclusion that a transaction was in whole or in part, unconscionable, unjust, unreasonable and unfair, such a court should pronounce so in its verdict.<sup>67</sup> Infringing consumer rights is a punishable offence in Zimbabwe.<sup>68</sup> Therefore, the *CPA* requires courts to be fair when they preside over cases concerning violations of consumer rights in Zimbabwe.<sup>69</sup> Furthermore, the *CPA* provides that courts may consider international law, international conventions, declarations and protocols relevant to consumer protection when interpreting and applying the *Act*.<sup>70</sup> The courts should actively protect consumer rights to inspire confidence in the general public while deterring corporates and business from abusing their consumers. The credibility of any banking sector depends on the trust and confidence of stakeholders such as consumers and investors. Some of the key elements of consumer protection for financial customers as set out in the *CPA* are briefly discussed below:

#### 3.4.1 Information disclosure and consumer education

The bank-customer relationship should be a fairly transparent one in order to guard against, *inter alia*, deceptive advertisements, abusive collection practices, predatory lending and a lack of understanding of complex

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<sup>62</sup> Section 6(e) read with s 9 of the *CPA*.

<sup>63</sup> Section 6 read with s 3 of the *CPA* sets out the general consumer protection provisions which include fundamental consumer rights, which are the right to obtain redress, consumer education, contracts in clear, simple and plain language.

<sup>64</sup> Section 35(1) of the *CPA*.

<sup>65</sup> See s 35(3) of the *CPA*.

<sup>66</sup> Section 9(1) of the *CPA*.

<sup>67</sup> Section 45(3)(a) of the *CPA*.

<sup>68</sup> Section 67(1) of the *CPA*.

<sup>69</sup> Section 67 of the *CPA*.

<sup>70</sup> Section 3(6) of the *CPA*.

financial products.<sup>71</sup> Financial consumers should have trust and confidence in the banking sector. Accordingly, banks are required to provide clear and comprehensive information about their products and services, and disclose terms and conditions, fees, interest rates and any other relevant details to customers before they enter into any financial agreements.<sup>72</sup> It is incumbent on banks to ensure that their customers fully understand the terms and conditions of what they sign up for. Consumer education and awareness are considered fundamental consumer rights in Zimbabwe.<sup>73</sup> Accordingly, adequate consumer education programmes should be provided to help customers make informed decisions and choices about their finances.<sup>74</sup> Such programmes should include information on budgeting, savings, investments and grievance management mechanisms. Courts should assess whether the financial service providers are transparently conducting their activities fairly.

### 3.4.2 *Fair and non-deceptive practices*

The *CPA* prohibits unfair, deceptive or misleading practices by financial institutions such as banks.<sup>75</sup> Accordingly, consumers have a right to fair and honest treatment in any transaction or promotional activity and to be protected from any unconscionable conduct of financial service providers.<sup>76</sup> In this regard, financial consumers should be protected from coercion, physical force, undue influence, pressure, duress, harassment or unfair tactics in connection with the negotiation, conclusion, and demand or collection of payment for any services.<sup>77</sup> Banks should not directly or indirectly make a false, misleading or deceptive representation concerning a material fact to a consumer by words or conduct, or fail to disclose a material fact if that failure amounts to a violation of consumer rights.<sup>78</sup> Furthermore, financial consumers should be protected from fraudulent schemes and offers such as fraudulent currency schemes, fraudulent financial transactions, fraudulent transfers of property or legal rights or any other arrangement, agreement, practice or scheme that is declared by the relevant Minister.<sup>79</sup> Consequently, the courts should carefully assess all actions of banks to determine whether they conform to consumer protection standards contained in the *CPA*.<sup>80</sup>

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<sup>71</sup> Gaganis *et al* 2020 *Journal of Business Research* 101-102.

<sup>72</sup> See s 26 of the *CPA*, right to disclosure of information regarding goods or services and disclosure of prices.

<sup>73</sup> See s 9 of the *CPA*.

<sup>74</sup> Section 9(1) of the *CPA*.

<sup>75</sup> Section 35 of the *CPA*.

<sup>76</sup> Section 35 (1) of the *CPA*.

<sup>77</sup> Section 35 (2)(c) and (d) of the *CPA*.

<sup>78</sup> Section 36 of the *CPA*.

<sup>79</sup> Section 37 of the *CPA*.

<sup>80</sup> See s 3(6) of the *CPA*.

### 3.4.3 Consumer contracts, confidentiality and privacy

The CPA requires that consumer contracts and terms should be fair, reasonable and clear.<sup>81</sup> Banks are required to protect the confidentiality of financial consumers' information.<sup>82</sup> Furthermore, financial consumers have the right to refuse, accept, require another person to discontinue or pre-emptively block any approach or communication that is primarily aimed at direct marketing.<sup>83</sup> Above all, the CPA should provide redress mechanisms to resolve disputes that arise between the financial service providers and financial consumers. Thus, financial consumers have a right to be heard and to access justice for their redress through the courts or the CPC.<sup>84</sup>

## 4 Case law on the role of the courts in financial consumer protection in Zimbabwe

Although this article focusses more on the *Penelope* case, consideration is also given to the *Barber* case.<sup>85</sup> The latter was a civil case that was decided on appeal at the Supreme Court of Zimbabwe in 2020. Although the *Barber* case does not directly involve a bank as a party to the proceedings, it is relevant for purposes of financial consumer protection in Zimbabwe.

### 4.1 The *Penelope* case

In the *Penelope* case, the applicants challenged the constitutionality of the Exchange Control Directive of 2018 (2018 directive) on the grounds that it violated section 71 of the *Constitution*.<sup>86</sup> The applicants approached the High Court in Harare to set aside the aforesaid directive and certain monetary policies on the basis of their constitutional invalidity.<sup>87</sup> The applicants in *Penelope* case had a bank account at the first respondent, the Central African Building Society (CABS). They had a balance of US\$142 000 at the time the 2018 directive came into effect. The first respondent, CABS, acted on the 2018 directive and converted the US\$142 000 into RTGS\$142 000, using the parity exchange rate of 1:1.<sup>88</sup> However, the applicants argued that the RTGS\$142 000 was a mere fraction of the original value in their account and they wanted the original value or its equivalent to be restored. Thus, the applicants approached the court to set aside the conversion of their US\$142 000 to RTGS\$142 000 on the grounds that the conversion violated section 71 of the *Constitution*.<sup>89</sup> The applicants

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<sup>81</sup> Section 41 of the CPA.

<sup>82</sup> Section 48 of the CPA.

<sup>83</sup> Section 49 of the CPA.

<sup>84</sup> Section 33 of the CPA.

<sup>85</sup> *Barber* case, para unknown.

<sup>86</sup> See *Penelope* case para 22.

<sup>87</sup> *Penelope* case paras 1 and 21.

<sup>88</sup> *Penelope* case paras 10 and 21.

<sup>89</sup> *Penelope* case para 22.

pointed out to the court that the 2018 directive was akin to the reincarnation of the 2007 and 2008 bearer cheque phenomena that wiped out people's savings and investments when the US dollar was introduced.<sup>90</sup>

Accordingly, the applicants argued that they could not accept the erosion of the original amount they banked.<sup>91</sup> They argued that the 2018 directive was an affront to property rights in Zimbabwe.

#### **4.2 The significance of the court's findings on financial consumers' rights in the *Penelope* case**

In the *Penelope* case the court found that the conversion of US\$142 000 to RTGS142 000 violated section 71 of the *Constitution*.<sup>92</sup> Consequently, the currency conversion rate was set aside. The court held that the 2018 directive deprived the applicants and other financial consumers of their right to property,<sup>93</sup> which is enshrined in the *Constitution*.<sup>94</sup> Thus, the 2018 currency directive was declared unconstitutional. CABS was ordered to reimburse the applicants the sum of US\$142 000 plus 5 per cent interest per year from November 2016 to the date of payment.<sup>95</sup> Nonetheless, this was not the case in the *Barber* case, where the Supreme Court used a rigid approach in interpreting and applying section 4(1)(d) of the SI 33/19.<sup>96</sup>

The *Penelope* case restored some hope among financial consumers in Zimbabwe. For a very long time the courts had not delivered rulings that appeared to challenge the state's directives and policies.<sup>97</sup> While there were numerous related litigations on the same grounds, the outcome of the *Penelope* case has far-reaching implications for the protection of financial consumers' constitutional rights in Zimbabwe. Accordingly, the applicants should be commended for challenging the constitutionality of the 2018 directive and the subsequent conversion of deposits from US dollars to RTGS dollars on a 1:1 parity rate. The *Constitution* enshrines the right to property, and as such investments, savings and pensions held at banks should be considered as property of the depositors.<sup>98</sup> The government and banks should respect financial consumers' property rights. Although the prime sanctity of the right to property was upheld in the *Penelope* case, a number of other financial consumers lost their savings because of the

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<sup>90</sup> *Penelope* case para 9.

<sup>91</sup> *Penelope* case paras 10 and 22.

<sup>92</sup> See *Penelope* case para 54.

<sup>93</sup> *Penelope* case para 54.

<sup>94</sup> See s 71(2) of the *Constitution*.

<sup>95</sup> *Penelope* case para 54.

<sup>96</sup> See s 4(1)(d) of SI 33/19; *Barber* case, para unknown.

<sup>97</sup> See the *Barber* case. The *Barber* case is an apt example where the court mechanically interpreted s 4(1)(d) of SI 33/19 and paid no regard to the prevailing interbank exchange rate at the time.

<sup>98</sup> See s 71 of the *Constitution*, emphasis added.

enforcement of the 2018 directive by banks. The *Barber* case is a typical example of the gross miscarriage of justice that characterises currency conversion in Zimbabwe.

Additionally, in the *Penelope* case the court played a significant role in striking down certain unjust and badly conceived policies. However, the same cannot be said of the *Barber* case, where the court rigidly upheld the government's policies. The *Penelope* case upheld the sacredness of bank-client contractual rights and obligations over the 2018 directive that disregarded the bank-client relationship.<sup>99</sup> In this regard, it is crucial to note that courts in Zimbabwe can still play a vital role in upholding the rights and interests of financial consumers even in instances when they litigate against the government or big corporates.

### 4.3 *The Barber case*

In the *Barber* case the appellant approached the Supreme Court, seeking to overturn a High Court ruling concerning the settlement of a debt owed to the first respondent.<sup>100</sup> The debt was originally owed in US dollars but had been paid up using RTGS dollars in line with SI 33/19.<sup>101</sup> The SI 33/19 provides that assets and liabilities, including debts owed in US dollars immediately before 22 February 2019, shall on or after the said date be valued in RTGS dollars on a 1:1 exchange rate.<sup>102</sup> The appellant owed the first respondent US\$3 885 000.<sup>103</sup> In 2018, the first respondent successfully sued the appellant to settle the debt. Accordingly, the appellant was ordered to settle the debt plus interest and the cost of the suit on an attorney-client scale.<sup>104</sup> Thereafter, the appellant deposited RTGS\$4 136 806.54 into the first respondent's bank account in settlement of the debt plus interest and the cost of the suit.<sup>105</sup> However, the first respondent calculated the value of the deposited amount using the interbank rate of 21 May 2019 and told the appellant that the deposited amount was equivalent to US\$144 788.23.<sup>106</sup> At the time of the exchange, the interbank rate was US\$1:RTGS\$3.50.<sup>107</sup> It is clear that financial institutions had an exchange rate between US dollars and RTGS dollars different from that pronounced through the SI 33/19. Consequently, the first respondent told the appellant that an amount of

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<sup>99</sup> See *Penelope* case para 54.

<sup>100</sup> *Barber* case, para unknown.

<sup>101</sup> *Presidential Powers (Temporary Measures) (Amendment of Reserve Bank of Zimbabwe Act and Issue of Real Time Gross Settlement Electronic Dollars (RTGS Dollars)) Regulations*, 2019 issued through SI 33/19.

<sup>102</sup> Section 4(1)(d) of SI 33/19.

<sup>103</sup> *Barber* case, para unknown.

<sup>104</sup> *Barber* case, para unknown.

<sup>105</sup> *Barber* case, para unknown.

<sup>106</sup> *Barber* case, para unknown.

<sup>107</sup> See *Barber* case, para unknown.

US\$3 992 018.31 was still owing.<sup>108</sup> The first respondent advised the appellant that failure to settle the said balance would result in an instruction to the sheriff (second respondent) to attach the appellant's property for sale in execution of the debt. The appellant wrote back to the first respondent indicating that in terms of section 4(1)(d) of SI 33/19, the paid amount of RTGS\$4 136 806.54 was full and final in settling the debt.<sup>109</sup> In July 2019, the first respondent instructed the sheriff to attach the appellant's property to recover the US\$3 992 018.31.<sup>110</sup> The appellant filed an urgent chamber application at the High Court seeking an order for stay of execution and a declaratory order that the debt had been fully discharged in terms of section 4(1)(d) of SI 33/19. However, the High Court dismissed the application and accepted the first respondent's interbank rate calculations. Aggrieved by the High Court decision, the appellant approached the Supreme Court in respect thereof.

The Supreme Court upheld the appeal and held that the appellant's payment of RTGS\$4 136 806.45 was a full and final settlement of the first respondent's judgement debt.<sup>111</sup> The court adopted a mechanical approach in interpreting section 4(1)(d) of SI 33/19. Although counsel for the first respondent argued that the court should utilise the interbank exchange rate in order to create some sense of parity, that argument was dismissed. The court ruled that a literal interpretation of section 4(1)(d) of the SI 33/19 clearly provided that settling liabilities, including judgment debts, followed the stipulated 1:1 exchange rate.<sup>112</sup> Thus, the appellant had fully paid up the debt. This approach was wrong and unfair in our view, since it deprived the first respondent of almost the entire value of the debt owed by the appellant in terms of the interbank bank exchange rate. Owing to this, the *Barber* case stands as an example of a court-aided heist on a financial consumer's property.

## 5 Concluding remarks

The *Barber* case indicates the existing biases that generally affect the role of the courts in Zimbabwe. Nonetheless, the *Penelope* case provides a good example of what courts can do to uphold financial consumers' rights by striking down unjust policies and laws that infringe on the constitutional right to property. Financial consumers should be encouraged to present their cases before the courts to get redress. The applicants in the *Penelope* case faced numerous hurdles but their persistence led to a landmark judgment that was delivered on consumer rights. Thus, it is incumbent upon financial

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<sup>108</sup> *Barber* case, para unknown.

<sup>109</sup> *Barber* case, para unknown; also see s 4(1)(d) of SI 33/19.

<sup>110</sup> *Barber* case, para unknown.

<sup>111</sup> See the Disposition in the *Barber* case, para unknown.

<sup>112</sup> *Barber* case, para unknown.

consumers to assert their rights against financial service providers and state organs that violate their consumer rights.

As indicated in this article, many financial consumers lost their savings, investments and pensions due to bank failures, inflation and currency change policies on several occasions since the early 2000s in Zimbabwe. It is possible that some financial consumers were unaware of their consumer rights or that they simply felt powerless as they could not sue the relevant banks that were unscrupulously enforcing illicit government directives. Without sufficient consumer education, the general public suffers in silence, even when the redress mechanisms are there. In this regard, the aggrieved financial consumers should be empowered with financial education to enable them to sue banks and state institutions that directly or indirectly violate their consumer rights. The *Penelope* case has set a precedent that financial consumers can claim and successfully assert their rights against banks. On the other hand, the *Barber* case is a bad example of how courts can infringe upon consumer rights through the rigid interpretation of statutes.

Litigation is expensive and that is a deterrent for anyone who may want to sue a bank or a state functionary. The persistence shown by the applicants in the *Penelope* case is commendable and courts ought to augment such efforts by expediting the conclusion of cases. Unduly delaying the conclusion of cases in such instances is unsustainable for financial consumers who may not have sufficient litigation costs. The *Penelope* case shows that courts should timeously decide consumer rights cases, especially where delays could give rise to potential loss of value in consumers' monetary savings and investments.

Several banks were closed down in the volatile period of 2003 to 2004 owing to, *inter alia*, poor management accounting practices, weak corporate governance, and general economic instability. As a result the investments, savings and pensions of several financial consumers were wiped out. For this reason many people lost trust in the Zimbabwean banking sector. In light of the aforesaid losses incurred by banking consumers, it is submitted that the Ministry of Finance and Economic Development and the RBZ should adequately compensate all affected persons and work together to create stability and certainty in the Zimbabwean banking sector.<sup>113</sup>

Furthermore, there should be policy certainty on currency in Zimbabwe. Since the introduction of bearer cheques in around 2003, Zimbabwe has not had a stable currency of its own. As a result, banking consumers have experienced difficulties in accessing funds because of the stringent withdrawal limits imposed by the banks from time to time. They find it very

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<sup>113</sup> Mugwati, Nkala and Mukanganiki 2013 *Asian Economic and Financial Review* 484.



difficult to access their funds from banks.<sup>114</sup> The Ministry of Finance and Economic Development, the RBZ and other relevant policy makers should provide clear guidance on the currency challenges in Zimbabwe.

In addition, the RBZ and other role-players should robustly promote financial consumer education to enable financial customers to know and assert their rights. Consumer education should be utilised to promote financial consumer protection in Zimbabwe<sup>115</sup> as was highlighted in the *Penelope* case.

Policymakers and enforcement authorities should adopt a proactive approach to enhance consumer protection in Zimbabwe. This approach could curb the abuse of consumer rights that is caused by bank failures. Policymakers and government organs should avoid overnight policy changes that have negative implications for the economy and affected financial consumers. Such overnight changes have posed several challenges to financial markets stability and market integrity in Zimbabwe.

The courts should be manned by competent persons for them to adjudicate upon consumer rights cases fairly and timeously. There ought to be currency stability and enforcement of the rule of law to effectively protect financial consumers in Zimbabwe. Thus, the *Penelope* case judgement should be cherished and followed in all similar consumer law cases.

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<sup>114</sup> See related comments in Coomer and Gstraunthaler 2011 *Quarterly Journal of Austrian Economics* 320.

<sup>115</sup> See related comments by Chitimira and Torerai 2021 *PELJ* 13.

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## List of Abbreviations

CABS	Central African Building Society
CPA	Consumer Protection Act [Chapter 14:44] 5 of 2019
CPC	Consumer Protection Commission
OECD	Organisation for Economic Co-operation and Development
PELJ	Potchefstroom Electronic Law Journal
RBZ	Reserve Bank of Zimbabwe
RTGS	Real Time Gross Settlement
SI	Statutory Instrument
US/USA	United States of America