

**PACIFIC SAVINGS BANK, LTD.,**

**Appellant,**

**v.**

**NOBUKO ICHIKAWA,**

**Appellee.**

CIVIL APPEAL NO. 08-016

Civil Action No. 04-266

Supreme Court, Appellate Division  
Republic of Palau

Decided: October 2, 2008<sup>1</sup>

Counsel for Appellant: David F. Shadel

Counsel for Appellee: Clara Kalscheur

BEFORE: Arthur Ngiraklsong, Chief Justice; KATHLEEN M. SALII, Associate Justice;  
ALEXANDRA F. FOSTER, Associate Justice.

Appeal from the Trial Division, the Honorable LOURDES F. MATERNE, Associate Justice,  
presiding.

FOSTER, Justice:

Appellant Pacific Savings Bank, Ltd. (“PSB”) appeals from the trial court’s order of dismissal issued on January 9, 2008. The trial court dismissed the matter after finding that under 26 PNC § 1113, Appellant/Plaintiff lacked standing to pursue its claims in court. Specifically, the trial court found that PSB “has no capacity to sue or be sued on its own.” On appeal, Appellant argues that the trial court erred in issuing its *sua sponte* order of dismissal because the order is wrong on the facts and the law, is not based on any evidence, equates to an abuse of discretion, and violates Civil Rules 7, 17(a) and due process. We affirm the trial court’s decision. The trial court did not err in dismissing the case *sua sponte* without offering Appellant an opportunity to be heard, because the court lacked jurisdiction to hear the matter.

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<sup>1</sup> The panel finds this case appropriate for submission without oral argument pursuant to ROP R. App. P. 34(a).

## BACKGROUND

On August 30, 2004, Appellant filed a complaint in the trial division to enforce payment from Appellee on a debt. A default judgment was entered against Appellee on November 30, 2004. Thereafter, on May 2, 2006, an order was entered providing that Appellee pay \$10 every 7<sup>th</sup> and 22<sup>nd</sup> day of each month, beginning on May 7, 2006.

In November 2006, PSB closed its doors and a series of civil and criminal p.2 proceedings were instituted regarding alleged mismanagement and other issues. On November 7, 2006, Mr. Kaleb Udui, Jr. was appointed Receiver of the defunct bank. Over two months later, on January 30, 2007, PSB filed a Motion for Contempt against Appellee in this matter. PSB, however, did not file a motion to substitute, as it did in other matters, requesting that the Court substitute “Pacific Savings Bank, by and through its Receiver, Kaleb Udui” as the plaintiff in the matter.<sup>2</sup> A number of hearings were scheduled and rescheduled until on January 9, 2008, the trial court issued an order dismissing the case with prejudice on the basis that it lacked subject matter jurisdiction. The trial court found that Appellant/Plaintiff lacked standing to pursue its claims in court.

Under 26 PNC § 1113(e), the powers of the officers and administrators of the bank are suspended during receivership. Moreover, the shareholders’ rights are extinguished with the exception of receiving dividends. 26 PNC § 1113(l). The statute gives power to the receiver to act on the bank’s behalf, including initiating and defending litigation. 26 PNC § 1113(b)(6) provides that the “receiver may execute any instrument in the name of the bank, and initiate or defend and conduct in its name any action or legal proceeding.” The bank, therefore, has no capacity to sue or be sued on its own. As such, the “bank” lacks standing to sustain this action.

(January 9, 2008 Order 2.)

On January 29, 2008, PSB filed a motion asking the trial court to reconsider its order. Construing this document as a Rule 60 motion, the trial court denied Appellant’s requested relief on January 29, 2008. Appellant filed a timely appeal.

## STANDARD OF REVIEW

This Court reviews the trial court’s findings of fact for clear error. *Ongidobel v. ROP*, 9 ROP 63, 65 (2002). The trial court’s conclusions of law are reviewed *de novo*. *Roman Tmetuchl Family Trust v. Whipps*, 8 ROP Intrm. 317, 318 (2001).

## DISCUSSION

In its appeal, Appellant argues that the trial court erred in issuing its *sua sponte* order of

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<sup>2</sup> As noted in Appellant’s filings in this appeal, PSB filed motions to substitute in PSB v. Ueki, Civil Action No. 07-171, and PSB v. Aguon, Civil Action No. 07-249. The motions in both of these cases were filed before the Court issued orders of dismissal based on lack of subject matter jurisdiction. Consequently, the Court ultimately set aside its orders of dismissal in those cases and granted PSB’s motions to substitute.

dismissal because it “is wrong on the facts and the law; it is not based upon any evidence and is directly contrary to the only evidence in the record; it is an abuse of discretion; and it violates Civil Rules 7<sup>3</sup> and 17(a) and due process.” p.3 Specifically, Appellant asserts that (1) the trial court erred in concluding that the Receiver had to be joined or substituted as the plaintiff in this matter, and (2) that the trial court violated Appellant’s right to due process by not giving it notice or an opportunity to be heard on the issue of whether the Receiver had to be joined or substituted as the plaintiff in this matter. As relief, Appellant requests that this Court issue an “order vacating and reversing the trial court’s *sua sponte* January 9 Order” and acknowledge the “ratification and/or joining [sic] Mr. Udui in his capacity as Receiver as a plaintiff herein and remanding to the trial court to allow ratification and joinder or substitution.”

In her response brief, Appellee argues that, although notice and providing the litigants an opportunity to be heard are usually required before a court dismisses a matter, such acts are not required when dismissal is based on the Court lacking subject matter jurisdiction. We agree with Appellee.

First, Appellant's argument that the law does not require that the Receiver be substituted in this matter is without merit. As noted by the trial court, 26 PNC § 1113 gives power to the receiver to act on the bank’s behalf, including initiating and defending litigation. 26 PNC § 1113 (b)(6) provides that the “receiver may execute any instrument in the name of the bank, and initiate or defend and conduct in its name any action of legal proceeding.” Appellant argues that the trial court’s conclusion that 26 PNC § 1113 requires that the Receiver be substituted or joined as the plaintiff in this matter is contrary to the statutory language of RPPL 6-3, which states that the Receiver acts in the name of the bank. Appellant’s argument, however, seems to favor the trial court’s conclusion. The fact that the Receiver acts in the name of the bank still requires that the Receiver be the one that is acting, not the bank.

Second, Appellant asserts that the trial court violated Rule 17 of the ROP Rules of Civil Procedure. Appellant focuses on the element of the rule stating that “[n]o action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest . . . .” ROP R. Civ. P. 17(a). Appellant’s argument, however, is misplaced as the trial court dismissed this matter because it lacked subject matter jurisdiction, not because the real party in interest was not named as the plaintiff. Undoubtedly, what remains of PSB still maintains an interest in the debts owed to it. Under 26 PNC § 1113, however, PSB holds no capacity to sue or be sued on its own. To rectify this issue, Appellant need only file a new matter in the trial court correctly identifying the Receiver, not the bank, as the Plaintiff. Thus, Rule 17 of the ROP Rules of Civil Procedure is not relevant to this analysis.

Third, Appellant’s argument regarding due process is also misplaced. The lack of subject matter jurisdiction is a defect that cannot be waived. *Andreas v. Masami*, 5 ROP Intrm. 205, 206 n.1 (1996) (citing 5 AM. JUR. 2D *Appellate Review* § 691 (1995)). Standing is “an element of subject matter jurisdiction” and the Court holds “a separate and independent duty to

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<sup>3</sup> Although Appellant cites Rule 7 of the ROP Rules of Civil Procedure as a rule that the trial court violated when issuing its order of dismissal in this matter, it is not clear exactly what element of Rule 7 Appellant alleges the trial court violated. Rule 7 discusses the types of pleadings and motions that may be filed with the court.

assure that the plaintiff has standing to sue.” p.4 *Gibbons v. Seventh Koror State Legislature*, 11 ROP 97, 103 (2004).<sup>4</sup> “[N]ot only is it impossible to waive this defense, but also a defect of subject matter jurisdiction never can be cured or waived by the consent of the parties.” *Id.* (internal quotation marks omitted). “[W]henver it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.” *Id.* (citing ROP R. Civ. P. 12(h)(3)). Accordingly, the trial court’s *sua sponte* dismissal of this matter and denial of Appellant’s post-judgment motion were proper.

## CONCLUSION

In light of the foregoing, we AFFIRM the trial court’s decision.

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<sup>4</sup> Although the *Gibbons* Court reviewed the issue of Constitutional “standing” as opposed to “standing” proscribed under statute, as is the issue in the case at bar, the requirement of standing and its relation to this Court’s subject matter jurisdiction remains the same.