FAIRCLOT INVESTMENTS (PRIVATE) LIMITED t/a TRUCKING AND CONSTRUCTION (PRIVATE) LIMITED
and
AUGUR INVESTMENTS OU
SHERRIFF OF THE HIGH COURT OF ZIMBABWE (NO)
DOOREX PROPERTIES (PRIVATE) LIMITED
REGISTRAR OF DEEDS

AUGUR INVESTMENTS (PVT) LTD CASE NO. HC 5989/19
versus
FAIRCLOT INVESTMENTS (PVT) LTD t/a TRUCKING AND CONSTRUCTION (PVT) LTD

HIGH COURT OF ZIMBABWE
MUNANGATI- MANONGWA J
HARARE, 25 October & 12 April & 9 May 2023

Opposed Matter

Mr *T Zhuwarara* for the Applicant
Mr *T Mpofu* for the 1st and 3rd respondents
1st and 4th respondents in default

MUNANGATI – MANONGWA J: The financial policies adopted by the Zimbabwean government in 2019 leading to promulgation of Statutory instruments that affected mode of payments and even the currency to be used in Zimbabwe continue to dodge these courts. Despite a pronouncement by the Supreme court particularly in the Zambezi Gas case and several other cases litigants continue haggling on the manner in which debts have to be paid and the currency to be used. In this matter the Sheriff of the High Court has become embroiled in a dispute between the warring parties regarding the execution of a writ, whether the writ in United States Dollars had been satisfied and the rate at which an amount on the writ stated in United States Dollars had to be paid in RTGS. Unfortunately, the Sheriff did not find it necessary to defend despite a claim for costs against him on a higher scale in one of the applications. An undesirable situation to say the least!

At the center of the dispute between the two parties whose cases have been consolidated is payment of an arbitral award to the tune of USD$4 800 000. The parties herein are at loggerheads as to whether the second respondent's decision to release from attachment the first respondent's property on the pretext that the judgment debt had been paid in full was proper. The applicant in the first instance Fairclot Investments seeks a review of the decision of the second respondent of 21 November 2019 to uplift the judicial attachment on Stand 654 Pomona Township held under Deed of Grant No 2884/10 (hereinafter referred to as "the property." Additionally, applicant seeks a declaratory order as well as a writ of *mandamus*. More particularly the applicant seeks the following relief:

IT IS ORDERED THAT:

1. The decision of the second respondent to uplift judicial attachment on Stand 654 Pomona Township held under Deed of Grant No. 2884/10 be and is hereby set aside.
2. The upliftment of the judicial attachment on Stand 654 Pomona Township be declared void.
3. Stand No 654 Pomona Township be and is hereby placed under judicial attachment.
4. Any and all transfers of title effected between the date of upliftment of judicial attachment by second respondent to the date of this order are hereby cancelled.
5. The Registrar of Deeds be and is hereby directed to cancel the transfer of title effected on stand No. 654 Pomona Township held under Deed of Grant No. 2884/10 after 5 days of the granting of this order.
6. The second respondent is hereby directed to advertise for sale Stand 654 Pomona Township, held under Deed of Grant No. 2884/10 within ten days of this order.
7. Second respondent shall pay the Applicant's costs of suit on a legal practitioner and client scale.

In the second application Case No HC5989/19 the applicant Augur Investments seeks a declaratur that the arbitral award at the centre of the two cases which is dated 19 March 2015 be declared executable in RTGS Dollars at the rate one-to- one in accordance with s 4(1)(d) of Statutory Instrument 33 of 2019. Incidentally that would mean that the debt was paid in full as RTGS$4800 000 was paid.

Factual Background.

The following facts are common cause. Fairclot Investments (Pvt) Ltd t/a Trucking & Construction (Pvt) Ltd (hereinafter referred to as "Fairclot Investments") got an arbitral award against the first respondent to the tune of USD$4 800 000 excluding interest on 19 March 2015. Certain court processes

followed with an appeal first respondent Augur Investments OU (hereinafter referred to as "Äugur Investments") being dismissed on 11 February 2019. The award was ultimately registered as an order of this court on 26 June 2019. A writ of execution was issued on 10 July 2019 resulting in the attachment of the immovable property referred to above. Subsequently the first respondent paid the sum of RTGS$4 800 00 as the judgment debt and the sum of RTGS $1 078 040.21 as interest. By virtue of letters dated 21 and 25 November 2019 the Sheriff (2nd respondent) advised the applicants being the judgment creditors that the debt had been discharged and it was proceeding to remove the property from judicial attachment. The applicant's legal practitioners protested that the property should not be removed from attachment as the judgment debt had not been extinguished given that the amount had to be paid at the prevailing interbank rate of the day and not at the rate of $1 United States dollar being equivalent to ZW$1. The applicant indicated to the Sheriff that what he was doing was contrary to the given instructions. This led to the applicant approaching this court seeking to protect its interests for the full payment of the debt by seeking to prevent the release of the executable asset herein being the immovable property.

The issue that the court has to exercise its mind on is whether there was full discharge of the debt. If there was, then the release of the property from attachment by the Sheriff of the High Court was proper. The application by Fairclot Investments the judgment creditor will thus fail. If however Augur Investments did not discharge the debt then the upliftment of the judicial attachment has to be declared void and the property remains under attachment until the debt is liquidated and the application by Fairclot Investments succeeds.

Mr *Mpofu* for the judgment creditor Fairclot Investments raised a point *in limine* that there is no valid application before the court as a resolution for the institution of proceedings must be signed by directors. That the directors who signed the resolution authorizing the institution of the proceedings are indicated as signing "for and on behalf of Advento Corporate Services Limited." He further submitted that there is no proof that the parties are in Harare. Further Fairclot Investments had in its opposing affidavit challenged the propriety of the deponent to the founding affidavit Simbarashe Kadye on the basis that the deponent had claimed that he is the local representative of the company yet he had not specified whether he holds any position in the company as applicant's representatives had never dealt with him having been dealing with other representatives.

The court finds the points *in limine* to be without merit. The issue is whether the deponent is on a frolic of his own. A resolution has been placed before the court purporting to authorize the deponent to institute

the proceedings. As submitted by Mr *Zhuwarara* there is clear demonstration of which party is before the court. The founding affidavit clearly states that it is the applicant who is before the court. Correspondence between the parties shows how the issue of payment and the upliftment of the caveat has been brewing up until the parties have decided to institute proceedings to have the issue dealt with by the courts. Augur Investments has been maintaining it has paid up. Thus this is not a new issue which it can be said the deponent has decided to just bring up without authority. The parties have been involved in several cases and the issue of the award has been central to their legal battles. That the Applicant has chosen a different person to aver to an affidavit apart from the usual persons the applicant dealt with is neither here nor there especially where the deponent avers that he has knowledge of the facts. Fairclot Investments does not deny that it is Augur Investments which is before the court. Sight must not be lost that the issue here centres on the legal point of payment whether the debt has been discharged reference being made to the payments made.

This, in the court's view is the last leg towards the finalization of the disputes between the parties as regard the arbitral award. The raising of the points *in limine* is nothing but a ploy to sidetrack the court from deciding the real issue. Suffice that even if the court where to say there is no application before the court by Augur Investment that would not change the colour of the dispute because the issue remains whether there was discharge of the debt entitling the upliftment of the judicial attachment. The facts remain basically common cause.

Mr *Zhuwarara* for Augur Investments submitted that the obligation to pay Fairclot Investments arose in March 2015 when the arbitral award was made. He refers to the writ which seeks payment and interest as calculated from 4 June 2015. He submitted that the registration of the award does no magic to the award as no new obligations arise., As per his reasoning, the debt gets affected by the provisions of s 4(1)(d) of S.I.33/19 [and subsequently Finance Act (No 2) of 2019. This statutory instrument has the effect of converting all liabilities and assets denominated in United States Dollars before the effective date into RTGS dollars. He submitted that the pronouncement in the *Zambezi Gas Zimbabawe Pvt Ltd* v *NR Barber* SC3/20 case applies and incidentally the United States Dollars debt is by operation of law rendered RTGS values regardless of the fact that the debt was denominated in United States Dollars. He further argued that it being so the Sherriff was correct in terminating execution once the first respondent paid the judgment debt and interest in Zimbabwean Dollars at the rate of 1:1 with the United States Dollar. In that regard the application to have the debt declared paid up on a 1:1 basis ought to succeed.

Mr *Zhuwarara* submitted that for the declaratory by Augur Investments to be defeated Fairclot Investments need to succeed in its application for the setting aside of the decision by the Sheriff to uplift the attachment. He indicated that such success is elusive as the applicant points to no procedural irregularity. He submitted further that there is no *causa* for the review as the writ was discharged. In his argument he relied on the heads of argument filed on behalf of Augur Investment where reference was made to the findings by GWAUNZA A JA (as she then was) in *Bobby Maparanyanga* v *The Sheriff of High Court & Ors* SC132/02 that proof of payment of a judgment debt goes as far as to confirm that the purpose of execution has been rendered defeated. In that regard all process reliant on the attended execution cannot subsist.

In response Mr *Mpofu* for Fairclot Investments submitted that on the issue pertaining to the appropriateness of the application for review the circumstances under which the Sheriff determined the judgment debt to have been extinguished and removing the property from attachment was not in terms of the law. He stated that the duties of the Sheriff are to execute a court order and he does not have adjudicating powers. The Sheriff's decision to levy the debt on a 1 US$:1 $RTGS and determine that the debt had been discharged and remove the property from attachment was irrational in the circumstances. He further submitted that the failure by the Sheriff to heed lawful instructions to continue to execute as the debt was not paid up bordered on abuse of authority. It being so, he prayed that the decision be declared a nullity. The setting aside of the Sheriff's decision would as a consequence spell the revival of the attachment of the property which had been uplifted.

Mr *Mpofu* for Fairclot Investments submitted that when the arbitral award was registered with this court the Applicant Fairclot prayed that the award be registered in United States Dollars. Hence the order that was granted sounds in United States dollars. Mr *Mpofu* contended that the court has jurisdiction to grant an order in United States Dollars however upon execution the amount is converted to RTGS at the prevailing interbank rate where the judgment is post the effective date of 22 February 2019.He thus argued that Augur Investments cannot seek a declaratory that the debt be paid in RTGS at the rate of 1:1. Mr *Mpofu* further argued that the arbitral award of 2015 was not a judgment debt or a decision of a court of law. He submitted that an arbitral award only becomes enforceable after registration with the High Court and it is only at that juncture that it becomes a judgment debt. Thus a judgment debt only came into existence when the arbitral award was registered as an order of the High Court of Zimbabwe on the 26 June 2019. Mr *Mpofu* contended that the declaratur sought would be contrary to the law as the award was a novated debt which took effect form 26 June 2019 hence payment thereof should be in terms of the law prevailing at that juncture which

would be in United States Dollars duly converted to RTGS at the prevailing interbank rate. In that regard Augur Investments would not have discharged the debt hence the attached property cannot and should not have been released.

The court finds that the application by Fairclot Investments for the review of the Sheriff's decision is proper. Fairclot Investments is raising issue with the manner the decision was made that it is irrational. This emanates from the decision of the Sheriff to stop execution when the amount due was not paid in full. The Sheriff was indeed aware that Augur Investments was seeking a declaratur to the effect that the amount due was payable in RTGS at the rate of 1: 1 United States Dollars which application had been lodged on 19 February 2019. No judgment to effect such confirmation had been gotten. Equally a letter of 23 September 2019 from Fairclot's legal practitioners had intimated that the payment made of RTGS$4 800 000 was not sufficient as payment ought to be at the bank rate obtaining on the date of payment. Yet two months down the line on 21 November 2019 by way of a letter the Sheriff declared that the judgment debt had been paid in full. A letter of protest dated 22 November 2019 was equaly ignored by the Sherriff. Instead the Sheriff proceeded to advise on the 25th November 2019 that "…the Sheriff is proceeding to remove the property from Judicial attachment and to uplift the caveat placed on the property." There is no evidence that the Sheriff finding himself in such a situation had sought any legal advice neither did he justify his decision. The upliftment of the caveat on the property was unreasonable and irrational given the law and the fact that the Sheriff did not address the issue of the applicable rate that had been raised by Fairclot's legal practitioners.

The issue pertaining to the discharge of the debt in *casu* hinges on what is a debt. In claiming to have discharged its debt Augur Investments relies on the provisions of S.I.33/19. Pertinent is the fact that S20 of the Finance Act No 2/2019 incorporates judgment debts as a form of liability. The section defines a judgment debt as follows:

> "Judgment debt" means a decision of a court of law upon relief claimed in an action or application which, in a case of money, refers to the amount in respect of which execution can be levied by the judgment creditor; and, in the case of any other debt, refers to any other steps"

The court agrees with Mr *Mpofu* that the arbitral award of March 2015 is not a judgment debt, as it was not a decision of a court. Equally an arbitrator or an Arbitration Tribunal is not a court as they are excluded in the definition of a court as provided in the interpretation Act. See *Mettallon Gold Zimbabwe (Pvt) Ltd & Anor* v *Gura* 2016 (1) ZLR 509 (H). Thus as of 22 February 2019 there was no judgment debt. Thus a judgment debt came into existence upon the granting of the order by PHIRI J on 26 June 2019. In

my view PHIRI J gave a judgment which in essence recognizes the award or accepts that the award is not contrary to public policy paving way for the enforcement of the judgment. The fact that an award cannot be enforced without that recognition by the court simply indicates an award's status. The provisions of the Arbitration Act [*Chapter 7:15*] as read with the UNICITRAL Model Law to the Arbitration Act is instructive. Article 35 of the UNICITRAL Model Law refers to "recognition and enforcement" of arbitral awards and provides as follows:

> "An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and upon application in writing to the High Court, shall be enforced subject to the provisions of this article and of article 36"

In that regard the judgment debt arises from the date of the High Court order as the award becomes a decision of the court which is now enforceable by way of different methods of debt recovery.

In purporting to have discharged the debt Augur Investments relies on the provisions of S 4(1)(d) of S.I.33/2019 which relates to liabilities which were in existence prior 22 February 2019 and not the period thereafter. Augur Investments purport to find vindication in the MALABA CJ'S dicta in Zambezi Gas case cited supra that clearly states that all assets and liabilities that existed immediately before the effective date of the promulgation of S.I. 33/19 shall, on and after the said effective date, be deemed to be values in RTGS dollars at the rate of one-to one to the United States Dollar. Having reached the decision that prior 26 June 2019 there was no judgment debt in favour of Fairclot Investments and that same only arose in June 2019 the provisions of S4(1)(d) of S.I.33/2019 or that of the subsequent legislation being the Finance Act No 2/2019 are not applicable herein. Moreso when one considers that s 4(1) (e) of the same statutory instrument provided as follows:

> "that after the effective date any variance from the opening parity rate shall be determined from time to time by the rate at which authorized dealers under the Exchange Control Act exchange the RTGS Dollar for the United States Dollar on a willing –seller willing-buyer basis"

The argument by Mr *Zhuwarara* wherein he cited *the Bobby Maparanyanga* case cited supra that there is no *causa* as the debt was discharged is not tenable. This is because the debt is not satisfied hence it cannot be said the purpose of execution has been rendered defeated.

It will be noted from the relief sought by Fairclot Investments that it includes a mandatory order. The requirements of a mandatory order are that the applicant has to establish

i. A clear right which must be established on a balance of probabilities
ii. Irreparable harm committed or reasonably apprehended and

iii. The absence of any other remedy which renders similar protection

CHINHENGO J in *Oil Blending Enterprises Pvt Ltd* v *Minister of Labour* 2001(2) ZLR 446 (as he then was) aptly described a mandatory interdict as follows:

> "A mandatory interdict is a judicial remedy recognized under our law: see *Tribac 9Pvt) Ltd* v *Tobacco Marketing Board* 1996(2) ZLR 52(S). It is applied against public authorities. It is an order which requires a public authority to comply with a statutory duty imposed upon it or one which requires a public authority to perform some act which remedies a state of affairs brought by its own unlawful administrative action. It is, therefore, a judicial remedy available to enforce the performance of a specific statutory duty or to remedy the effects of an unlawful action already taken…. The remedy will be granted were the public authority is under a clear duty to perform the act ordered"

The applicant has demonstrated that it is the holder of a writ wherein it is entitled to recovery by way of execution its full entitlement as per the court order granted to it. It is the duty of the Sheriff to execute upon the order and attach the property of the respondents. Fairclot Investments has proven that the Sheriff failed to execute his duties by failing to execute the judgment debt as stipulated in the writ which duty is imposed upon him by s 20(1) of the High Court Act. Previous requests to execute the writ in full as demonstrated by correspondence which form part of the record have failed. There is thus no other remedy open to Fairclot Investments apart from an order of this court compelling the Sheriff to execute and realise the full value as indicatedon the writ.

In its application Fairclot Investments has moved that if any transfer of title has been effected to date such transfer ought to be set aside. It is argued that such transfer ought to be set aside as any recipient of the title under these circumstances would not be a bona fide purchaser. No indication has been made by the respondents in Case No HC10315/19 (being Augur Investments, the Sheriff, Doorex Properties(Private) Limited and the Registrar of Deeds) that there is a pending transfer or any other interested party at the time of the hearing of the application whose interests the court need be wary of. It also being taken that due diligence would reveal that there is a caveat placed on the property by any interested party is expected to proceed with caution. The court takes further notice of the fact that Augur Investments and Doored Properties had requested the Sheriff that transfer of title into their names be preferred as to execution of Fairclot Investments' writ. Given the two respondents' awareness of the dispute between them and Fairclot such a transfer would not make them bona fide recipients as submitted in Fairclot Investments' heads of argument. It is common cause that the property in issue is *res litigiosa* since the institution of these proceedings.

Given the afore going the court finds that the application by Augur Investments for a declaratur that the amount due to Fairclot Investments be declared to be executable in RTGS Dollars at the rate of one to one dollar to the UNITED States Dollars in accordance with s 4(1)(d) of Statutory Instrument 33 of 2019 is without merit. The application by Fairclot investments succeeds in its entirety given the court's findings on the irrationality of the decision of the Sheriff and the amount payable by Augur Investments cannot be oat the rate of one to the United States Dollar and hence the property has to be placed under judicial attachment. Equally the court's finding that a mandatory interdict is justified in the circumstances. Fairclot Investments requested for costs against the Sheriff on a legal practitioner scale. Given the history of the case and the manner in which the Sheriff handle the case, refusing to heed the call not to uplift the caveat when advised that the writ has not been satisfied the defiant stance requires a sanction be imposed upon the Sheriff. Most disturbing is the fact that despite being cited in an application where costs are claimed on the attorney client scale the Sheriff made no effort to defend himself/herself. Without any submissions from the Sheriff as to why costs on a higher scale should not be imposed, this coupled by the way the Sheriff handled the execution, the court is left with no option but to accede to the prayer for costs against the Sheriff.

In the result it is ordered as follows:

CASE NO HC 5989/19

1. The application be and is hereby dismissed with costs

CASE NO HC 10315/19

IS ORDERED THAT:

1. The decision of the second respondent to uplift judicial attachment on Stand 654 Pomona Township held under Deed of Grant No. 2884/10 be and is hereby set aside.
2. The upliftment of the judicial attachment on Stand 654 Pomona Township be declared void.
3. Stand No 654 Pomona Township be and is hereby placed under judicial attachment.
4. Any and all transfers of title effected between the date of upliftment of judicial attachment by second respondent to the date of this order are hereby cancelled.
5. The Registrar of Deeds be and is hereby directed to cancel the transfer of title effected on stand No. 654 Pomona Township held under Deed of Grant No. 2884/10 after 10 days of the granting of this order.

6. The second respondent is hereby directed to advertise for sale Stand 654 Pomona Township, held under Deed of Grant No. 2884/10 within ten days of this order.
7. Second respondent shall pay the applicant's costs of suit on a legal practitioner and client scale.

Chinawa Law Chambers, applicant's legal practitioners
Mutumbwa Mugabe & partners, respondent's legal practitioners