RESERVE BANK OF ZIMBABWE
versus
HOLBUD LIMITED
and
THE SHERIFF OF ZIMBABWE N.O.

HIGH COURT OF ZIMBABWE
CHINAMORA J
HARARE 6 May 2021 & 18 October 2021

Court application for a declarater

Mr ABC Chinake, for the applicant
Adv S Hashiti, for the 1st respondent
No appearance for the 2nd respondent

CHINAMORA J:

Introduction:

The applicant approached this court on 20 September 2020 seeking the following declaratory relief:

> "1. It is hereby declared that the assets of the Reserve Bank of Zimbabwe are subject to the provisions of the State Liabilities Act [Chapter 8:14] and therefore cannot be attached in execution.
> 2. The amount claimed by the 1st respondent under the Arbitral Award registered before this Honourable Court under HC 3207/19 is the subject of the Reserve Bank (Debt Assumption) Act No 2 of 2015, and consequently is not subject to further execution.

3. The issuance of the Treasury Bills by the State to the 1st Respondent satisfied its claim as assumed by the State under the Reserve Bank of Zimbabwe (Debt Assumption) Act, and therefore the writ issued under HC 3207/19 is null and void and is hereby set aside.

4. As a consequence of the declaration made in paragraphs 1, 2 and 3 above, the writ of execution issued and the purported attachment of the assets of the applicant by the 2nd respondent, acting for and on behalf of the 1st respondent is unlawful and a legal nullity and be and is hereby set aside.

5. The 1st respondent shall pay the applicant's costs on a legal practitioner and client scale".

Further to the application for a declarater, the applicant field an urgent chamber application for stay of execution of the writ of execution which had been issued under HC 3207/20. Both applications were filed on the same date, namely, 1 September 2021. It was agreed by the parties that I would hear the applications at the same time.

Facts and positions of the parties

The facts giving rise to the dispute before me are not entirely common cause. What I can say is that, the attachment of the applicant's assets, resulted from a *debt* between the applicant and the 1st respondent. My choice of the word *"debt"* without qualifying the nature of such *debt* is deliberate. The parties disagree, firstly, on the date the debt arose with the applicant stating that it was incurred in 2007, while the 1st respondent contends that the debt arose on 21 September 2017. In addition, the parties differ on the cause of debt. According to the applicant, the debt was procured consequent to a supply of a quantity of grain by the 1st respondent to the Republic of Zimbabwe. On the other hand, the 1st respondent asserts that the debt was as a result of funds in foreign currency loaned by the 1st respondent to the applicant. Finally, the applicant submits that the debt was assumed by the Republic of Zimbabwe through the Reserve Bank of Zimbabwe (Debt Assumption) Act, and that it was fully paid by the issuance of Treasury Bills to the 1st respondent. Additionally, the applicant argues that the 1st respondent either utilized or repatriated some of the proceeds of the Treasury Bills, leaving US$26 million as the outstanding amount to be repatriated. The applicant adds that the parties entered into a payment plan for the foreign currency repatriation. Further, the applicant concludes that, owing to foreign currency shortages, it defaulted on the

payment plan, leading to the application to register an arbitral award and order obtained under HC 3207/19.

The applicant argued that the debt, being a liability incurred by the applicant prior to 31 December 2008, was assumed by the State in terms of section 3 and 4 the Reserve Bank of Zimbabwe (Debt Assumption) Act. The additional submission advanced by the applicant was that, in terms of the State Liabilities Act, no execution or attachment was to be issued against the property of the State. In this respect, it forcefully argued that section 63B of the Reserve Bank of Zimbabwe Act made the applicant subject to the protection afforded by the State Liabilities Act. As a result of these provisions, the applicant submitted that the writ issued by the 1st respondent was a nullity. I will return to deal the aforesaid provisions in greater depth.

As I have said, while the existence of the debt was not disputed, how it came about was the bone of contention. Be that as it may, the parties did not put in issue the payment plan. Quite vehemently, the 1st respondent further submits that the debt has nothing to do with the State, and is not protected by the State Liabilities Act. It argued that the Government of the Republic of Zimbabwe was not part of the agreement between the applicant and the 1st respondent. In addition, it submits that section 63B of the Reserve Bank Act does not apply. The basis of this contention is that the agreement in question was an entirely private one between the parties, and had nothing to do with the State. The 1st respondent also disagrees that the Reserve Bank (Debt Assumption) Act is applicable to the circumstances of this case. Finally, the 1st respondent contends that the applicant waived all rights and benefits accruing its statutory status, because it created a mode of payment unknown to both the Consolidated Revenue Fund and the State Liabilities Act. This submission was based on clauses in the agreement which referred to payment into *"offshore accounts"* and payments derived from the *"Reserve Bank's other sources".* The 1st respondent, particularly, relied on Clauses 6.1 and 6.3 of the agreement between the parties. The court's attention was also directed to clause 9.7 which allows either party to approach this court to obtain interim relief or enforce specific performance of the agreement.

After the attachment of the applicant's assets by way of a Notice of Seizure, the applicant filed the present application. It was an application for a declarater brought in terms of section 14 of the High Court Act. To the extent that this provision allows the High Court to enquire and determine any existing, future or contingent right or obligation, this court can determine whether

or not assets of the Reserve Bank of Zimbabwe are attachable in execution. The 1st respondent opposed the application and prayed for its dismissal with costs on an attorney and client scale. Subsequently, the application was placed before me and argued on 6 May 202. Both Counsel made submissions after which I reserved judgment. The following are the reasons for my judgment.

The applicable law

This application has been brought for a declaratory order and consequential relief. The declaratory relief sought by the applicants is based on section 14 of the High Court Act [Chapter 7:06], which provides:

> "The High Court may, in its discretion, at the instance of any interested person, inquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon such determination".

The import of section 14 was dealt with in *Munn Publishing (Pvt) Ltd* v *Zimbabwe Broadcasting Corporation* 1994 (1) ZLR 337 (S), where the Supreme Court held that there are two requirements that must be satisfied before a declarater can be awarded by the court. It is clear from the architecture of Section 14 that an essential condition precedent to the grant of a declaratory order is that the applicant must be an interested person. Additionally, such an interest should be in the sense of having a direct and substantial interest in the subject matter of the suit that could be prejudicially affected by the judgment of the court. (See *United Watch & Diamond Co (Pty) Ltd & Ors* v *Disa Hotels Ltd & Anor* 1972 (4) SA 409 (C) at 415; *Milani & Anor* v *South African Medical & Dental Council & Anor* 1990 (1) SA 899 (T) at 902G-H).

Once the court is satisfied on the aspect of interest, it must consider the second rung of the test for the grant of declaratory relief. At this stage, the inquiry is whether or not the case which is before it is a proper one for the exercise of its discretion under s 14 of the High Court Act. In addressing second leg of the test, I make reference to *Adbro Investment Co Ltd* v *Minister of the Interior* 1961 (3) SA 283 (T) at 285B-C, where Williamson J instructively noted:

> "I think a proper case for a purely declaratory order is not made if the result is merely a decision on a matter which is really of mere academic interest to the applicant. I feel that some tangible and justifiable advantage in relation to the applicant's position with reference to an existing, future or

> contingent legal right or obligation must appear to flow from the grant of the declaratory order sought".

In relation to the resolution of the dispute itself, it invariably hinges on whether the provisions of the State Liabilities Act, Reserve Bank of Zimbabwe Act and Reserve Bank (Debt Assumption) Act No 2 of 2015 apply in *casu*. In my view, the starting point is the State Liabilities Act. Necessarily, I must examine if at all it affords any protection against execution in respect of the assets of the Reserve Bank of Zimbabwe. Indeed, the State Liabilities Act clearly provides that protection, Section 5 (2) of the Act, among other things, expresses states that no execution or attachment shall be issued against the property of the State. In this regard, it is also pertinent to look at the Reserve Bank of Zimbabwe Act, whose section 63B deals with legal proceedings against the bank and reads:

> "The State Liabilities Act applies, with necessary changes to legal proceedings against the Bank, including the substitution of references therein to a Minister by to the Governor".

The obvious conclusion is that these provisions place the applicant in the same position as the State or Government of Zimbabwe. Effectively, it is apparent that execution cannot be levied on the assets of the Reserve Bank of Zimbabwe. In this regard, it is pertinent to recall the judgment of MUSHORE J in *Mangwiro v Minister of Justice Legal and Parliamentary Affairs & Ors* HH 172-17. The learned judge concluded that section 5 (2) of the State Liabilities was not justifiable in a democratic society and went to declare it constitutionally invalid. However, when the matter was referred to the Constitutional Court, under Constitutional Court Application CCZ No 23 of 18, the High Court was set aside by consent of all parties. Although no judgment has been rendered by the apex court yet, the State Liabilities Act remains part of the law of Zimbabwe.

Also relevant to the disposal of the application before me is section 4 of the Reserve Bank (Debt Assumption) Act. Of particular significance is section 4 (4) which is in the following terms:

> "No action or proceedings shall be commenced or continued against the Reserve Bank of Zimbabwe or any other banking institution in respect of a prior debt assumed by the Minister on behalf of the State, or any other obligation or claim in connection therewith or arising therefrom".

For the avoidance, in relation to what constitutes "prior debts", the Reserve Bank (Debt Assumption) Act came into effect in August 2015.

Insofar as the 1st respondent alleges a waiver of rights by the applicant, it is imperative to set out the law on this subject. The position in this jurisdiction was set out in *Chidziva & Ors v Zimbabwe Iron & Steel Co Ltd* 1997 (2) ZLR 368 (S), where the Supreme Court (per KORSAH JA) pronounced that:

> "The effect of a waiver of a legal right is to extinguish that right and any concomitant obligation: Laws v Rutherford 1924 AD 261. In order to establish a waiver, all that one must show is that the party has taken some step which is only necessary, or only useful, if the objection to irregularities has been actually waived or has never been entertained. However, the intention or conduct of the party waiving the right must be conveyed to the other party…" **[My own emphasis]**

That the intention to waive a right must be unambiguous was illuminated in *Lallemand v Lallemand* & Ors HH 130-03, where Mavangira J (as she then was) when giving a seal of approval to the remarks of STEYN CJ in *Hepker*v *Roodepoort-Maraisburg Town Council*1962 (4) SA 771 (A) stated as follows:

> "There is authority for the view that in the case of waiver by conduct, the conduct must leave no reasonable doubt as to the intention of surrendering the right in issue (*Smith*v *Momberg*(1895) 12 SC 295 at p 304; *Victoria Falls and Transvaal Power Co Ltd*v *Consolidated Langlaagte Mines Ltd*1915 AD l at p 62). But in *Martin de Kock*1948 (2) SA 719 (AD) at p 733 this Court indicated that that view may possibly require reconsideration. It sets, I think, a higher standard than that adopted in *Laws* v *Rutherfurd*1924 AD 261 at p 263, where INNES CJ says:
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> > 'The onus is strictly on the appellant. He must show that the respondent, with full knowledge of her right, decided to abandon it, whether expressly or by conduct plainly inconsistent with an intention to enforce it'.

The law in England was captured by DUMBUTSENA CJ in *Barclays Bank of Zimbabwe Ltd v Binga Products (Pvt) Ltd* 1985 (3) SA 1041 (ZS) at 1049 B-E, when he stated:

> "I seek however, to highlight the principle of waiver set out by Lord DENNING MR at 104 a-c where he said:
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> > "The principle of waiver is simply this, if one party, by his conduct leads another to believe that the strict rights arising under the contract will not be insisted on, intending that the other should act on that belief, and he does act on it. Then the first party will not afterwards be allowed to insist on the strict legal when it would be inequitable for him to do so; See

> *Plasticmoda Societa Per Azioni v Davidsons (Manchester) Ltd* [1952] 1 Lloyds Rep 527…His strict rights are at any rate suspended so long as the waiver lasts".

Thus, the position in our law as in other jurisdictions is that waiver arises when a party's conduct is inconsistent with the pursuit of its rights. If there is doubt there can be no waiver. It is necessary to add, however, that the 1st respondent has not even established tacit waiver. The 1st respondent has not shown any conduct on the part of the Reserve Bank of Zimbabwe which evinces a desire to abandon the protection it derives from the State Liabilities Act.

Preliminary point

The applicant raised the point *in limine* that in HC 4763/20, the 1st respondent's opposing affidavit having been signed by its legal practitioner (Mr Samukange) without attaching a resolution authorizing him to so, it was not properly before the court. The law relating to deposing to affidavits is settled in this jurisdiction. An affidavit can be signed by a person who has knowledge of the facts and can swear to their accuracy. In this connection, it is pertinent to refer to the case of *African Banking Corporation of Zimbabwe Limited t/a BancABC* v *PWC Motors (Pvt) Ltd & 3 others* HH-123-13. In that case MATHONSI J held as follows:

> "I am aware that there is authority for demanding that a company official must produce proof of authority to represent the company in the form of a company resolution. However, it occurs to me that that form of proof is not necessary in every case as each case must be considered on its merits: *Mall (Cape) (Pvt) Ltd* v *Merino Ko-Opraisie* BPK 1957 (2) SA 345 (C). All the court is required to do is satisfy itself that enough evidence has been placed before it to show that it is indeed the applicant which is litigating and not the unauthorized person …. To my mind the attachment of a resolution has been blown out of proportion and taken to ridiculous levels. Where the deponent of an affidavit states that he has the authority of the company to represent it, there is no reason for the court to disbelieve him unless it is shown evidence to the contrary [but] where no such contrary evidence is produced the omission of a company resolution cannot be fatal to the application …"
> **[My own emphasis]**

The applicant did not produce any evidence to show that Mr Samukange was acting without authority. In fact, correspondent in the dispute between the parties confirms that he has always acted for the 1st respondent. I have no reason to disbelieve him. As such, the objection is without merit and I dismiss this preliminary point. I now proceed to delve into the merits of the case.

Analysis of the case

The applicant moves this court for the relief set out in the draft, which relief is opposed by the 1st respondent. In order for the application to succeed, the court must be satisfied that the requirements for a declaratory relief have been met. Firstly, the applicant has to demonstrate an interest in the question for determination. It is not in dispute that the applicant's assets have been attached following an order of this court which registered the Arbitral Award in HC 3207/19. The interest of the applicant in protecting its assets from execution is obvious. To this end, the applicant approached this court under HC 4763/20, *inter alia,* for stay of execution of the judgment granted under HC 3207/20. In light of this, I am satisfied that the applicant has shown a sufficient interest to make the present application for a declarater declaring the assets of the Reserve Bank of Zimbabwe subject to the protection accorded by the State Liabilities Act. Additionally, the applicant has established that the consequential relief of nullifying the writ of execution which attached its property is merited.

Secondly, the applicant must show that the matter for determination is not abstract, hypothetical or academic. I observe, and it is not in dispute, that the writ which attached the applicant's assets has not been set aside, and can be effected if the relief sought is not granted. Indeed, the writ and the threat or possibility of execution are not abstract or fanciful issues. This application can, therefore, not be an academic exercise. My view is that having satisfied the court that the applicant's assets have indeed been attached, the question which requires an answer is whether or not such assets are covered by the State Liabilities Act. It is evident that in terms of section 5 (2) of the State Liabilities Act as read with section 63B of the Reserve Bank of Zimbabwe Act, the applicant's assets cannot be the subject of execution. That being the case, I believe that the applicant has satisfied both rungs of the test in *Munn Publishing (Pvt) Ltd v Zimbabwe Broadcasting Corporation supra*.

I am aware that the 1st respondent has argued that the applicant waived its right to the protection emanating from the State Liabilities Act. I have to address the issue of the claimed waiver and determine whether such waiver has been proved. As I have said, the court was specifically referred to clauses 6.1, 6.3 and 9.7 as forming the basis of the claim for waiver of the protection provided by the State Liabilities Act. Having closely examined the clauses in question,

I see nothing in them that founds a claim for waiver. The commitment by the applicant to pay funds into the 1st respondent's offshore accounts does not amount to either an express or tacit waiver of rights accorded to it by the aforesaid statutes. Even the undertaking to pay the debt using exports proceeds or the applicant's other resources is not tantamount to a waiver. Still less is the clause that enables the respective parties to approach the High Court for specific performance or other relief.

The clauses relied on by the 1st respondent does not mention the right that they suggest has been waived. It is important to add that the protection given is against execution of the applicant's assets. Nothing in clauses 6.1, 6.2 and 9.7 shows that the applicant waived any right at all or, specifically, waived the right not to have its assets subject to execution. In this context, the law places the onus on the 1st respondent to show that the applicant, with full knowledge of its right, consciously abandoned it, whether expressly or by conduct plainly inconsistent with an intention to enforce it. Consequently, the 1st respondent has not shown that can rely on waiver to make the provisions of the State Liabilities Act inapplicable.

At any rate, the 1st respondent's argument is really that the parties contracted to exclude the application of the law. This begs the question: Can they competently do so? The answer, in my view, is in the negative for a number of reasons. Firstly, the State Liabilities Act itself *via* section 5 (2), *inter alia*, provides that, no execution or attachment or like process shall be issued against the defendant or respondent in any action or proceedings against any property of the State. It follows that contracting to exclude the application of this provision would be in breach of the statute concerned. The same logic applies to any contention that suggests that the parties contracted to exclude the application of section 63B of the Reserve Bank of Zimbabwe Act.

Secondly, it is worth acknowledging that in the case of *Morrison* **v** *Angelo Deep Gold Mines Limited* 1905 TS 775 at 779, INNES CJ appositely observed:

> "… it is a general principle that a man contracting without duress, without fraud, and understanding what he does, may freely waive any of his rights. <u>There are certain exceptions to that rule and certainly the law will not recognize any arrangement which is contrary to public policy"</u>.
> **[My own emphasis]**

Back home, in *Redriver Development (Pvt) Ltd v Provenance Support Company* HH 183-03, PARADZA J endorsed the above proposition thus:

> "It is clear therefore, that contracts that are *contra bonos mores* will not be enforced once they are found to be such. If any element of fraud or cheating in whatever degree is found to exist and the litigant concerned is trying to hide behind an exemption clause so as to avoid an obvious liability the courts will not enforce such a clause. To treat the situation in a manner that results in enforcing such a clause would clearly be protecting and encouraging dubious and fraudulent ways of doing business among parties to the contract. Put clearly, it would be against public policy".

In light of the legal position, it cannot be argued with conviction that the applicant deliberately waived all rights and benefits accruing from the protection derived from the State Liabilities Act. As no waiver has been shown to exist, the applicant has established the basis for the declaratory relief it seeks. Therefore, 1st respondent cannot levy execution on the assets of the Reserve Bank of Zimbabwe placing reliance on waiver.

I will now deal with a point raised by the 1st respondent, namely, that the Arbitral Award is not an award arising from legal proceedings. There can be no serious argument that the amount awarded is a judgment debt. I do not think that the 1st respondent can suggest otherwise. The pleadings in HC 3207/19 and in *casu* speak for themselves. From the papers filed by the respective parties, there is no dispute that the Arbitral Award of Justice (Retired) George Smith was registered as an order of this court under HC 3207/19. In this context, the applicant is a judgment debtor within the definition provided in section 5 (1) of the State Liabilities Act, which provides that a "judgment debtor" is a person who is liable under a court order to pay any money to any other person. Then, section 5 (2) states as follows:

> "Subject to this section, no execution or attachment or process in the nature thereof shall be issued against the defendant or respondent in any action or proceedings referred to in section two or against any property of the State, but the nominal defendant or respondent may cause to be paid out of the Consolidated Revenue Fund such sum of money as may, by a judgment or order of the court, be awarded to the plaintiff, the applicant or the petitioner, as the case may be".

The fact of registration of the arbitral award puts paid to the submission that such award is not a debt for the purposes of the Reserve Bank of Zimbabwe (Debt Assumption) Act. That resolves the 1st respondent's contention. However, before I leave this aspect, I have to examine the 1st

respondent's argument that the court order which registered the Arbitral Award novated the debt. While this submission is ingenious, my view is that the resolution of the dispute still revolves around section 5 (2) of the State Liabilities Act. The focus of this provision is the owner of the assets subject of execution. There is no question that the assets which the 1st respondent seeks to execute upon belong to the Reserve Bank of Zimbabwe. Undoubtedly, section 5 (2) acts to prevent such execution.

An additional argument by the 1st respondent is that Reserve Bank of Zimbabwe (Debt Assumption) Act does not apply to debts before 31 December 2008. Again, I take the view that as long as the property which is subject of the attachment belongs to the Reserve Bank of Zimbabwe, section 5 (2) of the State Liabilities Act comes into play to preclude its attachment and execution. I need not mention, but will do so for the sake of clarity, that what is proscribed by the State Liabilities Act is execution or attachment of property of the State. The 1st respondent has not demonstrated that the attached property does not qualify as property of the State. Accordingly, there is no reason for excluding it from the provisions of the State Liabilities Act. Since I have come to this conclusion, I will not make a pronouncement on whether or not the issuance of Treasury Bills by the State satisfied the 1st respondent's claim. I will confine myself to the existence of the writ of execution which has attached the applicant's property, a fact which is common cause between the parties.

Conclusion

The rules of this court permit the granting of an order as prayed for or as varied. (See *Chiswa v Maxess Markerting (Pvt) Ltd & Ors* HH 116-20). While I am satisfied that the applicant has proven its case for a declarater and consequential relief, I will vary the draft order to delete paragraph 3 declaring that the issuance of Treasury Bills satisfied the 1st respondent's claim. As I have already said, the 1st respondent failed to prove that the applicant waived its rights vis-à-vis the State Liabilities Act. Since I have decided that the declaratory relief is merited, this resolves the issues raised in HC HC4763/20, making it unnecessary to make a further order for stay of execution. The consequential relief of nullification of the writ of execution is decisive of all the issues. In other words, no one can levy execution on property using a writ which has become null and void. I now turn to the question of costs of suit. Generally, costs follow the result. The applicant

has asked for costs on an attorney and client scale. However, in order for a litigant to successfully claim costs as between attorney and client scale, which are punitive, he/she or it must show that the other party deserves to be punished for its behaviour. It must be borne in mind that costs are in the discretion of the court. In the exercise of that discretion, I have decided that there is no need to penalise the 1st respondent for resisting the relief sought, especially given that it has an order granted by the High Court that it sought to execute. Thus, in my view, costs on the ordinary scale will suffice in the circumstances of this case.

Disposition

In the result, I grant the following order:

1. The preliminary point is dismissed.

2. It is hereby declared that the assets of the Reserve Bank of Zimbabwe are subject to the provisions of the State Liabilities Act [Chapter 8:14] and therefore cannot be attached in execution.

3. The amount claimed by the 1st respondent under the Arbitral Award registered before this Honourable Court under HC 3207/19 is the subject of the Reserve Bank (Debt Assumption) Act No 2 of 2015, and consequently is not subject to further execution.

4. As a consequence of the declaration made in paragraphs 1, 2 and 3 above, the writ of execution issued and the purported attachment of the assets of the applicant by the 2nd respondent, acting for and on behalf of the 1st respondent is unlawful and a legal nullity and be and is hereby set aside.

5. The 1st respondent shall pay the applicant's costs on the ordinary scale.

Kantor & Immerman, applicant's legal practitioners
Venturas & Samukange, respondent's legal practitioners