ROBSON CHAPFIKA
versus
RESERVE BANK OF ZIMBABWE

HIGH COURT OF ZIMBABWE
PATEL J

Civil Trial

HARARE, 18 to 26 June 2007 and 26 November 2007

Mr. Mandizha, for the plaintiff
Ms. Maphosa, for the defendant

PATEL J: The plaintiff in this matter, Robson Chapfika, is a businessman and finance consultant. He claims from the defendant, the Reserve Bank of Zimbabwe, specific sums of money sounding in various convertible currencies and equating to *circa* US$450,000.00, being 10% of the illegally exported amounts that he avers were identified or recovered by dint of his intervention as a so-called whistleblower. The defendant denies the plaintiff's role in the identification or recovery of these amounts and, in any event, it disputes the legal basis of his claim.

Evidence for the Plaintiff

The plaintiff testified as follows. In December 2003 the Governor of the Reserve Bank delivered the Bank's monetary policy statement through which it offered to any person who provided information on any improperly processed moneys the equivalent of 10% of such moneys. He consequently gathered various documents proving certain illegal activities on the part of the National Merchant Bank (the NMB Bank). He obtained these documents in strict confidence from a senior official at the bank. On the 2nd of March 2004 he wrote to the defendant [Exhibit F] and forwarded copies of the papers to one Kahuni who was the head of the defendant's investigation office. Kahuni then invited him to a meeting with the police investigation team in March or April 2004 after which he rendered full assistance in the investigation process over a period of two months. The documents that he furnished showed the illegal externalisation of funds by the NMB Bank over a specific period. After he provided the original documents to the investigating team in July 2004 a docket was prepared and the trial date for the prosecution of the NMB Bank was set for the 13th of

September 2004. He subsequently went to the defendant's offices with members of the team to claim his payment but encountered difficulties. After several meetings and correspondences he belatedly received a letter in June 2005 stating that the information he had provided was of no value as the defendant already had it in its possession from another source. He then wrote to the defendant in August 2005 threatening legal action but received no positive response and eventually referred the matter to his present legal practitioners.

According to the plaintiff, the information that he had supplied identified the perpetrators as well as the value of the moneys that were externalised. The information was contained in various internal memoranda of the NMB Bank [Exhibits H to N] which were not previously availed to the defendant or the investigation team from any other source. The exchange control violations by the NMB Bank referred to in the defendant's internal memorandum dated the 27th of February 2004 [Exhibit 20] were different from the offences divulged by the information provided by the plaintiff. It was on the basis of this information that the NMB Bank and its directors were duly convicted on the 30th of September 2005. Moreover, as is reflected in a letter from the defendant to the NMB Bank dated the 30th of December 2004 [Exhibit 13], the defendant recovered an amount of US$1,700,000.00 from the NMB Bank. This amount was forfeited to the State at the end of the NMB Bank's criminal trial. In any event, according to the defendant's Monetary Policy Statement of December 2003 [Exhibit E], the plaintiff was entitled to claim his 10% either upon recovery of the funds in question or upon furnishing proof of a prosecutable offence. Once the offenders identified were convicted, the question of recovery was a matter for the defendant to initiate and implement.

When questioned by the Court, the plaintiff explained that the NMB Bank was charged and convicted of 105 counts as set out in the charge sheet [Exhibit 17] and the schedules attached thereto [Exhibits 2-4]. Counts 1-98 and 104-105 related to unauthorised sales of foreign currency, while counts 99-103 dealt with the illegal exportation of foreign currency. The information provided by the plaintiff, in particular, the NMB Bank's internal memoranda [Exhibits H to N], resulted in the conviction of the bank in respect of counts 99-105. The plaintiff's claim was founded on the amounts involved in counts 99-105. All of this was confirmed in a letter to the defendant dated the 13th of July 2004 [Exhibit O] from the head of the Special

Investigations Unit, Chief Superintendent Mhene, which clearly identified the plaintiff as the whistleblower concerned.

Thomas Kahuni was employed as the Chief Investigations Officer in the defendant's Exchange Control Department until the end of March 2004 when he left to join Barclays Africa. He testified that the plaintiff first telephoned him in March 2004. He later arrived with an envelope containing certain documents relating to the NMB Bank's foreign currency dealings [Exhibits H to N] and a covering letter [Exhibit F]. The witness considered these papers to be critical and referred them to another official, Henry Mkurazhizha, who was to take over from him at the end of March 2004. Mkurazhizha indicated that the papers contained new and vital information relating to the NMB Bank. He in turn referred the witness to Chief Superintendent Mhene who was heading the relevant police investigation team. The witness then arranged a meeting which included himself, the plaintiff, Mhene and two others. At that meeting it was agreed that the plaintiff should interact directly with the police in providing information and assistance in the matter. At that time the witness was not aware of any specific Reserve Bank structures having been set up to deal with whistleblowers in particular. There was a communications centre but this was in its infancy at that stage.

Nicholas Mhene was formerly a Chief Superintendent with the police until April 2005. In February 2004 he was assigned together with three other police officers to investigate the externalisation of foreign currency by the NMB Bank. The witness was the head of this team and liaised with officials from the Reserve Bank and the Attorney-General's Office. In March 2004 Mkurazhizha provided further information of exchange control violations by the NMB Bank involving the London Trust Bank in the United Kingdom. Soon thereafter, Kahuni arranged a meeting attended by the new informant, who was the plaintiff. In the ensuing investigations from March to June 2004, the plaintiff met with the team two or three times a week and provided useful assistance. He also furnished the originals of the copied documents that he had provided earlier. After the trial date was fixed for September 2004, the witness was requested by the plaintiff to accompany him to the defendant's offices regarding the plaintiff's 10% reward. The relevant official, Mirirai Chiremba, asked for written confirmation and this was duly provided by the witness on the 13th of July 2004 [Exhibit O]. Several months later, the plaintiff wrote to the witness enquiring about his position and the latter then wrote again to Chiremba on the 22nd of March 2005

[Exhibit Q]. According to this witness, the memoranda supplied by the plaintiff [Exhibits H to N] were later authenticated by two NMB Bank officials. Of the 105 counts preferred against the NMB Bank, counts 99-105 were framed solely on the basis of the memoranda and information supplied by the plaintiff. This information was attributed exclusively to the plaintiff and no other source or informant. It was not contained in any of the 18 files that had been previously seized from the NMB Bank in February 2004. The outcome of the NMB Bank prosecution was summarised in an internal police memorandum dated the 5th of October 2005 [Exhibit V]. As shown therein, the bank was fined $405 million for counts 1-98 and $1.34 billion in respect of counts 99-105. However, the witness was not aware of any forfeiture order forming part of the sentence imposed upon the bank.

Evidence for the Defendant

Henry Mkurazhizha was formerly the Commisioner of Police from 1985 to 1991. He joined the Reserve Bank on the 1st of February 2004 as head of the Investigations and Laundering Unit which fell within the Financial Intelligence Inspectorate Evaluation and Security Division. At that time, it was possible that a whistleblower in an exchange control matter might have contacted or been referred to the Exchange Control Division. On the 20th of February 2004 he and another official were assigned to assist Mhene's police investigation team in connection with information provided by a whistleblower called Magejo. Within the next five days the team seized 18 files from the NMB Bank. However, on the 26th of February he was instructed by the Governor of the Reserve Bank to withdraw from any further investigations with the police team. This instruction was probably triggered by a letter written by the NMB Bank to the Governor on the 25th of February. On the following day, he wrote a memorandum [Exhibit 20] to the Governor as a brief on what the investigations had divulged up to that stage. Thereafter, he was not aware of any other whistleblower pertaining to the NMB Bank. In particular, during March 2004 he never received nor had sight of any letter or memoranda furnished by the plaintiff through Kahuni. According to this witness, if the information supplied by a whistleblower establishes a prosecutable offence but no funds are consequently recovered, the matter would be referred to the Governor to decide what payment should be given to the whistleblower. Generally speaking, almost every whistleblower processed by the defendant has been paid some reward.

Onias Masiiwa was the deputy head of the defendant's Exchange Control Division in March 2004. He is presently the head of that Division. His evidence was that Kahuni and the plaintiff knew each other very well as they had worked together in 2001 to 2002 when the plaintiff was engaged by the defendant as a consultant to investigate and monitor exchange control violations by authorised dealers. In March 2004 Kahuni was his subordinate and would have reported any information that he might have received to him. As regards the present case, Kahuni did not bring any report to him concerning the plaintiff as a whistleblower. It would have been unprocedural for him to have referred the case either to Mkurazhizha or directly to the police without going through the Division Chief. The witness himself has never seen the plaintiff's letter to Kahuni [Exhibit F] or the NMB Bank memoranda [Exhibits H to N]. If these memoranda had been furnished by the plaintiff, he would have been asked to produce the originals and divulge their source in order to test their authenticity. According to this witness, a member of the public cannot access or obtain original bank documents not relating to himself. If he were to be found in possession of such documents without the requisite authority, he would be in violation of the law and would not be recommended for any reward as a whistleblower.

As regards the letter from the defendant to the NMB Bank dated the 30th December 2004 [Exhibit 13], this was written by Masiiwa to authorise the NMB Bank, pursuant to its written request on the 24th of December 2004, to liquidate certain diaspora funds that had been mobilised through the London Trust Bank for distribution to local beneficiaries in local currency. The sum of US$1.7 million which is referred to in that letter had nothing to do with the prosecution of the NMB Bank for its illegal exportation of foreign currency or its dealings on the parallel market. The bank needed the Zimbabwean Dollar equivalent in order to address its own liquidity crisis and to recapitalise. When the US$1.7 million was remitted to the defendant, the latter reimbursed the NMB Bank with its equivalent in local currency. After the bank was convicted on the 105 counts levelled against it, the court did not order any forfeiture in relation to any of those counts. In any event, there was no forfeiture order with respect to the sum of US$1.7 million.

In Masiiwa's opinion, the plaintiff's claim was insupportable for two reasons: firstly, because the inference to be drawn from the circumstances was that the plaintiff obtained the NMB Bank memoranda illegally and paying him would be to incentivise illegality; secondly, because no recovery of any funds was effected in relation to

counts 99-105 which arose from those memoranda. In general, recovery might be effected either by the violator volunteering to repatriate or where the convicting court orders repatriation or indirectly by the Reserve Bank imposing administrative sanctions, such as suspension of banking operations. Once the offender is convicted, the Reserve Bank cannot intervene to effect recovery as the matter has been finalised by the courts. If the courts do not order recovery, the Reserve Bank cannot effect the payment of any reward to the whistleblower concerned. As for civil recovery, any attempted set-off against funds destined for the offending bank would be improper as those funds are not owned by the bank itself but by its customers. In the case of the NMB Bank, the convicting court's reasons for sentence [Exhibit 31] reveal that in relation to counts 99-103 the bank was found to have had the requisite authority to export foreign currency but had failed to comply with the conditions stipulated by the Reserve Bank, i.e. to record the transfer of funds in the relevant "nostro" account. There was thus no prejudice to the country and, presumably because of this, the court did not order any forfeiture or repatriation of funds as there was nothing that could or should have been recovered or repatriated.

Mirirai Chiremba became Director of the defendant's Financial Intelligence Inspectorate Evaluation and Security Division on the 1st of May 2004. Before that he was a Chief Inspector in the same Division heading the Banks Use Promotion Unit. He testified that as a matter of practice information passing between his Division and the Exchange Control Division or between the Reserve Bank and the police could only be transferred through the respective divisional Directors and not laterally through junior officials. The whistleblowers communication centre was established in December 2003 in his Director's office and this was publicised at the earliest opportunity. As regards the present case, he received several telephone calls from the plaintiff and two letters from Mhene [Exhibits O and Q]. He invited both of them to separate meetings and firmly repudiated the plaintiff's claim to be rewarded. He only saw the NMB Bank memoranda [Exhibits H to N] when the plaintiff came to his office in November or December 2004. He later wrote to the plaintiff on the 10th of June 2005 [Exhibit R] stating that the defendant had become aware of the NMB Bank's misdemeanours before the plaintiff came forward and that nothing was recovered on the basis of the information furnished by the plaintiff. The letter also indicated that the Governor could in his discretion prescribe the payment of a reward to a whistleblower who has provided prosecutable proof of an offence but where no

recovery has been effected. The witness accepted that although this might be consistent with the Monetary Policy Statement [Exhibit E] there was no legal basis for such discretionary payment. Nevertheless, in March 2005, Magejo was paid $120 million on an *ex gratia* basis for the time and effort that he had expended on the NMB Bank case.

Under cross-examination, Chiremba conceded that Exhibits H to N formed the basis of the charges against the NMB Bank under counts 99-105 and that the bank's conviction on those counts was secured on that evidence. According to him, this evidence was already available to the defendant from another source. However, he was unable to identify who had brought this information forward or in what form or the official to whom it had been given.

When questioned by the Court, Chiremba accepted that it would not matter which authority or official was supplied with relevant information by a whistleblower. Thus, the plaintiff would be entitled to his 10% reward if his information led to prosecution and recovery, even though he might have provided that information to someone other than the defendant, i.e. the police.

Findings

It is common cause that the NMB Bank was convicted and sentenced in August and September 2005 on 105 counts of contravening the Exchange Control Act [*Chapter 22:05*] as read with the Exchange Control Regulations 1996. Of these 105 counts, counts 1-98 and 104-105 pertained to unauthorised sales of foreign currency, while counts 99-103 dealt with the illegal exportation of foreign currency.

On the evidence and documents adduced *in casu*, it is abundantly clear that the NMB Bank's internal memoranda formed the basis of the charges against the bank in respect of counts 99-105 and that the bank's conviction on those counts eventuated from that evidence. On a balance of probabilities, it is also relatively clear that it was the plaintiff who furnished these memoranda to the relevant authorities for the purposes of prosecution. In this regard, it is immaterial whether he provided this information to the Reserve Bank through the proper channels or how it was relayed and availed to the police investigation team. It is possible that the plaintiff might have obtained the memoranda by improper means. However, this allegation was purely conjectural and not supported by anything other than circumstantial inference. In any event, what matters for present purposes is that it was the plaintiff's information that

led to the prosecution and eventual conviction of the NMB Bank on counts 99-105. It follows that it was the plaintiff who provided the requisite prosecutable proof of these offences by the bank.

Turning to the question of recovery, the position is somewhat less clear. The probabilities strongly favour the defendant's version that the sum of US$1.7 million that was remitted by the NMB Bank towards the end of 2004 was intended to liquidate certain diaspora funds for distribution to local beneficiaries in local currency. This sum appears to have been unconnected to the prosecution and conviction of the bank for its illegal exportation of foreign currency or its dealings on the parallel market. Moreover, there is no evidence whatsoever of any forfeiture order with respect to the sum of US$1.7 million. Indeed, that figure does not in any way tally with the amounts involved in counts 99-103 relative to the illegal exportation of foreign currency by the bank, i.e. *circa* US$3.7 million.

At any rate, what is undisputed is that the convicting court did not order any forfeiture in relation to counts 99-103. The reason for this was that the bank was found to have exported the foreign currency in question with the requisite authority but without having complied with the conditions stipulated in terms of that authority, i.e. by failing to record the transfer of funds in the relevant "nostro" account. In other words, the bank did not export any currency that could not or should not have been exported and, therefore, there was nothing that the bank could be ordered or required to repatriate. In the absence of any prejudice to the State, the court quite correctly did not order any forfeiture or repatriation of the amounts that had been exported by the bank.

Monetary Policy Statement

Paragraph 19 of the Reserve Bank's Monetary Policy Statement of December 2003 (the MPS) provides for the setting up of a Whistle Blower's Fund. The conditions for payment that are stipulated in the MPS are somewhat ambiguous as to whether the information provided by a whistleblower should invariably lead to the recovery of funds (see paragraphs 19.1, 19.3 and 19.7). In any event, on a liberal construction of the MPS, it is arguable that payment of the 10% reward is due after the recovery of funds or upon the provision of prosecutable proof of an offence. If this construction is correct, the plaintiff, having provided the necessary prosecutable proof of offences by the NMB Bank, should be entitled in terms of the MPS to a reward of

10% of the amounts involved, whether or not those amounts were in fact recovered. For the reasons that follow, however, the MPS *per se* cannot constitute a proper legal basis for the payment of any reward either to the plaintiff or to any other whistleblower. To the extent that it purports to do so, the undertakings that are made in it are not binding or enforceable.

Expenditure of Public Funds

One of the fundamental principles of public finance is that any expenditure or disbursement of public moneys, whether under a contract or otherwise, must invariably be authorised or sanctioned by Parliament. This basic principle is derived from English constitutional law. See *Churchward v R* 1865 LR 1 QB 173 at 209-210; *Auckland Harbour Board v R* [1924] AC 318 at 326-327; *Attorney-General v Great Southern & Western Railway Co. of Ireland* [1925] AC 754 at 773. In the *Auckland Harbour Board* case, a decision of the Privy Council, Viscount Haldane expounded the principle as follows:

> "…….. no moneys can be taken out of the consolidated fund into which the revenues of the State have been paid, excepting under a distinct authorisation from Parliament itself. The days have long gone by in which the Crown, or its servants, apart from Parliament, could give such an authorisation or ratify an improper payment. Any payment out of the consolidated fund made without Parliamentary authority is simply illegal and *ultra vires*, and may be recovered by the Government if it can, as here, be traced".

The rigour of the constitutional principle enunciated in the English cases has not in any way been diminished in our law. By virtue of section 102 of the Constitution of Zimbabwe:

> "(1) No moneys shall be withdrawn from the Consolidated Revenue Fund except—
>
> (*a*) to meet expenditure that is charged upon that Fund by this Constitution or by an Act of Parliament; or
>
> (*b*) where the issue of those moneys has been authorized by an Appropriation or other Act made pursuant to the provisions of section 103.
>
> (2) ……
>
> (3) No moneys shall be withdrawn from any public fund, other than the Consolidated Revenue Fund, unless the issue of those moneys has been authorized by or under an Act of Parliament.
>
> (4) An Act of Parliament may prescribe the manner in which withdrawals may be made from the Consolidated Revenue Fund or any other public fund.
>
> (5) ……
>
> (6) ……..."

It follows from the foregoing that the Reserve Bank cannot, whether through its monetary policy statements or otherwise, purport or undertake to expend public moneys without parliamentary authority enabling it to do so. Whatever may be the practical exigencies of the prevailing economic environment, the Reserve Bank, like any other instrumentality of the State, is subject to the strictures of the Constitution and must perform its functions accordingly.

Statutory Authority

The statutory provisions implementing paragraph 19 of the MPS were initially prescribed in the Presidential Powers (Temporary Measures) (Financial Laws Amendment) Regulations 2004 (S.I. 14 of 2004). For this purpose, Part IV of the Regulations, which came into operation on the 30th of January 2004, inserted a new section in the Exchange Control Act [*Chapter 22:05*]. By virtue of section 6 of the Presidential Powers (Temporary Measures) Act [*Chapter 10:20*], the temporary amendment effected by the Regulations would have expired and lapsed 180 days after the date of commencement of the Regulations, viz. at the end of July 2004. Thereafter, Part IV of the Financial Laws Amendment Act 2004 (Act No. 16 of 2004) re-enacted and revived the amendment to the Exchange Control Act by the insertion of a new section 10 in the same terms as was enacted by the Regulations. Although Act No. 16 of 2004 was only promulgated on the 8th of October 2004, section 32 of the Act provides for the saving of everything done under the lapsed Regulations in the following terms:

> "Everything done in the valid exercise of any power in terms of the Presidential Powers (Temporary Measures) (Financial Laws Amendment) Regulations, 2004, published in Statutory Instrument 14 of 2004, shall (notwithstanding any lapsing or defect in the validity of those regulations) be deemed to have been validly done in terms of this Act."

What this means in essence is that section 32 of Act No. 16 of 2004 operates with retrospective effect to backdate the provisions of section 10 of the Exchange Control Act to the date of commencement of the lapsed Regulations, i.e. the 30th of January 2004. The new section 10, in its relevant portions, provides for the establishment and operation of the Recovered Foreign Currency Fund as follows:

> "(1) ……
> (2) ……
> (3) The moneys of the Recovered Foreign Currency Fund shall consist of—

(a) all convertible foreign currency that is declared to be forfeited to the State in terms of section *seven*; and

(b) convertible foreign currency purchased by the Reserve Bank for the purposes of the Recovered Foreign Currency Fund.

(4) ……

(5) ……

(6) The Board of the Reserve Bank shall award to any person a monetary reward for information provided or any measure taken—

(a) which results in detection and prosecution of an offence in terms of section *five* and the consequent recovery of convertible foreign currency that is declared to be forfeited to the State in terms of section *seven*; or

(b) which results in the recovery of convertible foreign currency, notwithstanding that no prosecution of an offence in terms of section *five* is instituted.

(7) Any amount to be awarded in terms of subsection (6) shall be at the rate of ten *per centum* of the convertible foreign currency that is—

(a) declared to be forfeited in terms of paragraph (a) of section *seven*; or

(b) recovered in terms of paragraph (b) of section *seven*;

as the case may be.

(8) At the end of the financial year of the Recovered Foreign Currency Fund, the balance of the total amount of convertible foreign currency remaining in the Fund after the payment of the amounts awarded during that financial year in terms of subsection (6) shall form part of the Consolidated Revenue Fund."

Apart from the obviously anomalous and incorrect references in subsection (7) to paragraphs (a) and (b) of section 7, which drafting error appears to have been replicated from the precursor Regulations, the meaning of the above-cited provisions is unmistakably clear. The entitlement of a whistleblower to the prescribed monetary reward is contingent upon the detection and prosecution of an exchange control offence and the consequent recovery and forfeiture of funds or the recovery of funds *per se* notwithstanding that no prosecution of an offence is instituted. In both scenarios the common and essential prerequisite is the recovery of convertible foreign currency. Once such recovery is effected, the informant is entitled to be awarded 10% of the amount recovered. If no recovery is effected, the informant is entitled to nothing.

In this regard, *Mr. Mandizha's* submission that the imposition of a fine is tantamount to recovery is patently untenable. Where an offence is committed, the convicting court is empowered and enjoined by section 7 of the Act both to impose a monetary fine and to order the forfeiture of any moneys recovered, as cumulative and separate penalties. It is quite absurd to equate the imposition of a pecuniary penalty

for the commission of an offence with the recovery and forfeiture of the moneys used or deployed to commit that offence. The two processes are manifestly distinct, both in their objectives and in their consequences. Moreover, there can be no doubt as to the nature of the recovery to be made and the reward to be paid. Both must be effected in convertible foreign currency. The entire provision is predicated and formulated on that premise.

Disposition

Consequent upon the findings made earlier the plaintiff has succeeded in showing that he was the provider of the requisite prosecutable proof of the offences committed by the NMB Bank and that the bank was duly convicted and penalised on the basis of the information that he had furnished. However, he has failed to clear the second hurdle confronting his claim, viz. to establish that any convertible foreign currency was recovered pursuant to that information or the assistance that he had afforded to the relevant authorities. In the result, his claim must be dismissed with costs.

Mandizha & Company, plaintiff's legal practitioners
Sawyer & Mkushi, defendant's legal practitioners