ZAMBEZI GAS ZIMBABWE (PRIVATE) LIMITED
versus
N.R BARBER (PRIVATE) LIMITED
and
THE SHERIFF FOR ZIMBABWE

HIGH COURT OF ZIMBABWE
TAGU J
HARARE 10 & 19 June 2019

Urgent Chamber Application

E Jera with V. C Chidzanga, for applicant
L Matapura with T.J Mafongoya, for 1st respondent

TAGU J: The applicant is seeking on an urgent basis a stay of execution, declaratory order and interdict against the judgment of the court pending determination of this court. The relief being sought is couched in the following terms:

> **"A. TERMS OF THE FINAL ORDER SOUGHT**
>
> That you show cause, if any, why a final order should not be made in the following terms:-
> 1. It is declared that the payment of RTGS$4 136 806.54 by the applicant to the 1st Respondent has fully satisfied the judgment granted by this honorable court in favour of the 1st Respondent under Case Number HC 7882/17 expressed as USD$3 885000.00 together with the interest thereon in accordance with the provisions of Statutory Instrument 33 of 2019.
> 2. The property that had been attached by the 2nd Respondent pursuant to the aforementioned judgment and the writ of execution be and is hereby released from attachment.
> 3. The 1st Respondent shall pay the costs of suit on an attorney and client scale.
>
> **B. INTERIM RELIEF GRANTED**
> 1. The 2nd Respondent be and is hereby ordered to stay any execution against the applicant's property pursuant to the writ of execution issued by this honorable court in favour of the 1st Respondent under Case No. HC 7882/17 pending finalization of the final relief sought.
> 2. The 2nd Respondent be and is hereby ordered to return any property of the applicant that may have been removed in execution of the order of this court under Case No. HC 7882/17 until this matter is finalized.
>
> **C. SERVICE OF PROVISIONAL ORDER**
> Leave be and is hereby granted for the Applicant's legal practitioners to serve this Provisional Order on the Respondent."

FACTUAL BACKGROUND

On the 25th of June 2018 this court before the Honorable MUZENDA J ordered the applicant to pay the first respondent an amount of USD$3 885000.00 (Three Million Eight and Eighty Five United States Dollars) together with interests on the amount at the prescribed rate and costs of suit on Attorney client scale in HC 7882/17. The applicant appealed against the order in the Supreme Court. The Supreme Court dismissed the appeal and ordered the applicant to pay the first respondent the sum of USD$3 885 000.00 plus interest and costs on the 13th March 2019.

On the 21st May 2019 the applicant in satisfying the order above deposited an amount of RTGS$4 136 806.54 into the first respondent's account. The first respondent through his legal practitioners of record then on the same day wrote a letter of complaint to the applicant's legal practitioners which letter was received by legal practitioners of the applicant on the 24th May 2019 complaining that the amount deposited was less than the amount ordered by the court as the amount was equivalent to USD$144 788.23 at the Interbank rate on the 21st of May 2019 which the first respondent quoted as being 3.5 %. The first respondent indicated in that letter that the applicant still owed an amount of USD$3 992 018.31. The first respondent advised the applicant that it was instructing the second respondent (Sheriff for Zimbabwe) to proceed with the attachment of the applicant's property for sale in execution. The applicant responded by letter dated 24th May 2019 saying among other things that-

> "…our client's payment of RTGS$4 136 806.54, fully satisfied the judgment of the High Court of 25 June 2018 and the order by the Supreme Court of 13th March 2019 at law. With respect we kindly refer you to the provisions of S.I. 33 of 2019 in general and in particular Section 4 (i) (d) thereof."

On the 4th of June 2019 the second respondent then attended to the applicant's premises in Hwange armed with the writ of execution and a Bond of indemnity and attached the applicant's property for a capital debt of USD$3 992 018.31. This jolted the applicant into making the present application on the basis that it had paid the debt in full and that the first respondent had applied a wrong and arbitrary rate of 3.5% of the judgment debt instead of RTGS$ 3.5 as to One United States dollar thereby arriving at grossly unreasonable figures in respect of the payments made by the applicant.

At the hearing of the matter the first respondent took a point in *limine* that the matter is not urgent. It submitted that the need to act arose on the 22nd May 2019 when the applicant received the letter threatening execution. It further submitted that an attachment in execution of a court order is not a ground for urgency.

On the other hand the applicant maintained that the matter was urgent and the need to act arose on the day of attachment. Further it argued that there is urgency on the basis that the order sought to be satisfied is illegal because the first respondent has used the wrong rates in calculating the balance to be paid. As to when to act the counsel for the applicant relied on the case of *Kuvarega* v *Registrar General and Another* 1998 (1) ZLR 188 (H).

Having heard the submissions by both counsels on the issue of urgency the court found that attachment of property pursuant to a writ of execution of a court order is not per se a ground for urgency. However, depending on circumstances of each case it may be a ground for urgency. In this case the first respondent wrote a letter on 21st May 2019 to the applicant threatening to attach applicant's property. The letter was received on the 22nd of May 2019 and counsels for the applicant immediately responded to that letter on the same day. The second respondent only attended at the premises of the applicant with a writ on the 4th of June 2019. It was the presentation of the writ that jolted that applicant into filing this application the following day the 5th of June 2019. It is with respect, not that the applicant did nothing when served with the letter. It immediately on the same day responded to that letter. It can therefore be said the parties were in the middle of negotiations that the writ was issued and served. I therefore find that the need to act arose on the 4th of June 2019 when the applicant was served with the writ. I therefore find that urgency in this matter has been established and I dismiss the point in *limine*.

Coming to the merits of the matter, this clearly turns on the interpretation of section 4(1)(d) of Statutory Instrument 33 of 2019. The section reads as follows-

> "4.(1) For the purposes of section 44C of the principal Act as inserted by these regulations, the Minister shall be deemed to have prescribed the following with effect from the date of promulgation of these regulations ("the effective date") –
>
> ……
>
> (d) that, for accounting and other purposes, all assets and liabilities that were, immediately before the effective date, valued and expressed in United States dollars (other than assets and liabilities referred to in section 44C (2) of the principal Act) shall on and after the effective date be deemed to be values in RTGS dollars at a rate of one-to-one to the United States dollar; and"

The interpretation given by the applicant is that in terms of section 4 (1) (d) of S.I. 33 of 2019 if one is owing someone that is a liability and if one is owed that is an asset hence its liability to the first respondent is covered and must be expressed in RTGS at a rate of one –to-one to the United States dollar. On the other hand the first respondent submitted that this does not apply to court orders given before the effective date. Its argument being that the legislative could not have intended to alter court orders.

In *casu* the High Court order was made on the 25th of June 2018. It was confirmed by the Supreme Court on the 13th of March 2019. In my view while the debt to the first respondent may be treated as a liability as against the applicant and an asset as against the first respondent for accounting purposes, this debt was not valued immediately before the effective date. The effective date is the 22nd of February 2019. The debt was due on the 25th of June 2018 despite that it was appealed against. Even if I may be wrong I am not convinced that the legislature intended to alter all court orders made by the court. If the court had not made any pronouncement as to what denomination the debt should be paid in on 25 June 2018, then the applicant's argument may make sense. It was not made immediately before, on or after the effective date. If the legislature wanted it to include court orders and writs then it should have expressly said so.

In any case the applicant is saying the first respondent calculated the money due using the wrong rate of 3.5% instead of 3.5 to One United States dollar. If the first respondent had used the rate of 3.5 to one States dollar then applicant should have paid more than RTGS$13 597.500.00 at the Interbank rate after factoring in the issue of interest. But in *casu* the applicant only paid RTGS$4 136 806.45 meaning it paid less. Even if the respondent used a wrong rate of 3.5% still this is equivalent to USD$144 788.23 which is less than USD$3 885 000.00. Whichever way one looks at it the applicant did not pay an equivalent amount.

As I said above section 4 (1) (d) of SI. 33 of 2019 cannot be construed as giving the legislature power to alter court orders. To allow that would be a violation of the separation of powers that is enshrined in the Constitution. Having been ordered to pay USD$3885 000.00 by the court several months before the effective date applicant should not have *mero motu* decide to pay in RTGS an amount not equivalent to what the court ordered. When it decided to pay in RTGS$ the applicant ought to have used the prevailing Interbank rate of the 21st May 2019 which was quoted by the first respondent as being 3.5%. The first respondent is therefore entitled to attach

applicant's property to recover the difference. For these reasons the court cannot grant the declarator prayed for nor stay execution. The application will therefore fail.

IT IS ORDERED THAT

1. The application is hereby dismissed.
2. Applicant is ordered to pay costs on a legal practitioner and client scale.

Moyo & Jera, applicant's legal practitioners
Mafongoya and Matapura, 1st respondent's legal practitioners.