CHAWASARIRA TRANSPORT (PVT) LTD
versus
THE RESERVE BANK OF ZIMBABWE

HIGH COURT OF ZIMBABWE
BHUNU J
Harare 18 March 2009 and 19 August 2009.

Mr *T Mambara, for the applicant.*
Mr *E Manikai, for the respondent.*

Opposed Application

BHUNU J: The respondent, that is to say the Reserve bank of Zimbabwe is a body corporate established in terms of the Reserve Bank Act [*Cap 22:15*]. Its function among others include acting as the Exchange control Authority in terms of the Exchange Control Act [*Cap 22:05*] as read with the Exchange Control Regulations Statutory Instrument 109/09.

On the other hand the applicant is a duly registered company which is in the business of exporting commodities In terms of s 7 of the *Exchange Control Regulations (currency Exchange) 0rder S.I. 9 of 2004* the applicant is required to acquit its export documentation that is to say, repay or settle its debts or obligations to the respondent arising from export receipts commonly known as CD3 forms. The section reads:

> "7 (1) With effect from the 1st January, 2004, every business organisation engaging in the export of goods and services shall be required to acquit the export documentation in respect of those exports"

Failure to acquit CD3 forms in terms of the Regulations amounts to a criminal offence punishable by the courts. Sometime in 2000 the applicant fell into arrears with the acquittal of some of its CD3 forms. As a result it was prosecuted, convicted and fined in the Magistrates Court. In sentencing the applicant the trial magistrate found special circumstances for not ordering repatriation. As a result he sentenced the applicant to a fine of $2 000 000.00 but declined to order repatriation as requested by the state

Repatriation in terms of the Regulations means to pay back.

Following the conviction and sentencing of the applicant the respondent demanded the acquittal of the outstanding CD3 forms in terms of the Regulations.

The applicant refused to repay or settle its debts to the respondent arising from the outstanding CD3 forms arguing that it had been absolved by the magistrate from paying its debts to the respondent whereupon the respondent allegedly invoked the sanction provided by s 7 of the Exchange Control regulations S.I. 9 of 2009. The effect of which was to freeze the applicant's foreign currency account number 9440031502000.

The applicant then filed this application seeking a declarator to the effect that it has been absolved from regularizing or acquitting its CD3 forms by the Magistrates Court. It also sought an order overriding the sanction imposed by the respondent.

The respondent has objected to the applicant's application on the basis that it has not exhausted its domestic remedies and that the magistrate's refusal to order acquittal of the CD3 forms did not amount to absolving the applicant from regularizing or acquitting its CD3 forms according to law.

The issues which arise from the undisputed facts is whether or not the magistrate in sentencing the applicant absolved it from regularizing or acquitting its CD3 forms according to law and whether or not the applicant is properly before this Court.

While it is desirable that parties should be encouraged to exhaust their domestic remedies before approaching the courts, the mere existence of domestic remedies does not oust the unlimited jurisdiction of this Court. The Court has therefore discretion whether or not to entertain the application. Having regard to the fact that the regularization or acquittal of CD3 forms has a direct bearing on the fiscus, the country's economy and the applicant's business operations, it is in the national interest that the matter be determined as soon as possible. That being the case, I have decided to determine the matter on the merits so as to avoid unnecessary delays which may have the effect of prejudicing both parties and the nation at large.

I now proceed to determine the application on the merits.

In sentencing the applicant the trial magistrate declined to make a repatriation order on the basis that he had found special circumstances. In his reasons for sentence at page 9 of the record of proceedings the Magistrate remarked that:

> "For all the forgoing reasons it is this court's finding that special reasons or circumstances exist in relation to both the offence(s) and the offender. See: *S v Chisiwa* 1981 ZLR 666 (H), *S v Mbano* 1990 (1) ZLR 270 (SC).
>
> It will be considered favourable that the Accused Company is a first offender.

> Of course the message must be distinctly conveyed to the Accused Company and would be offenders, that CD3 Forms must be acquitted within stipulated times as directed.
>
> It will be noted also that quite substantial amounts of monies were not accounted for to the Reserve bank and that this is to be discouraged by the meting out of a fairly stiff penalty for the conviction today, but not necessarily repatriation of the monies as urged by State Counsel.
>
> The following is the Accused Company's sentence:-
>
> **Fined $2 000 000, 00** (new currency**)** or, in default of payment, Warrant of execution against property."

I have carefully gone through the trial magistrate's reasons for sentence and I have found nowhere he stated or suggested that the applicant was excused or absolved from acquitting its CD3 forms. It is clear from a proper reading of the trial magistrate's reasons for sentence that he was alive to the applicant's statutory obligation to acquit its CD3 forms hence his remarks to the effect that the message must be driven home to the applicant and others that CD3 forms must be acquitted within the prescribed time limits. Check the use of the compulsive word "must" and not "should"

The acquittal of CD3 forms is a statutory obligation imposed by law. That being the case, it is not the function of the courts to excuse or absolve anyone from complying with the law. The mere fact that in punishing the applicant during criminal proceedings the trial magistrate declined to order repatriation did not absolve or excuse the applicant from complying with the law.

By the same token the refusal to order repatriation was no bar to the respondent from compelling the applicant to discharge its statutory obligations failure of which it was entitled to invoke any statutory penalties according to law.

Counsel for the applicant placing reliance on the case of *Flood v Taylor* 1978 RLR 230 further argued that the matter is now *res judicata* in the sense that the rights of the parties have already been determined by the magistrate's judgment. It was his argument that:

> "All rights and obligations of the Applicant and Respondent were concluded by the judgment delivered by the learned Magistrate and does not require the Applicant to exhaust domestic remedies.
>
> Since the matter is now *res judicata* it's apparent that the respondent failed to comply with the judgment granted by the magistrate. Contrary to the judgment they are forcing

> the applicant to repatriate the monies or acquit CD3 forms and as they prohibit the applicant from carrying out transactions on his foreign account number 9440031502000. Strictly speaking this is a clear violation of a court order hence it amounts to contempt of court."

It is needless to say that counsel's reliance on the case of *Flood (supra.)* is grossly misplaced. That case held at page 232 C that:

> "When *res judicata* is pleaded by way of estoppel it amounts to an allegation that the whole of the legal rights and obligations of the parties are concluded by the earlier judgment and that the plaintiff is estopped by the findings of fact involved in that earlier judgment (see Halsbury's *Laws of England,* 4th Edition, volume 16, paragraph 1527). The central issue then is what the judgment prayed in aid should be treated as concluding and for what conclusion it is to stand."

The applicant's plea of *res judicata* falters at the very first hurdle in that the respondent in this case was not a party to the criminal proceedings in the magistrates' court. It is common cause that the parties to that case were the State and the applicant.

In any case the magistrate's judgment did not order or prohibit the respondent from compelling the applicant to discharge its statutory obligations of repatriating or acquitting its CD3 forms. That being the case, the respondent cannot be bound by a judgment to which it was not a party and which made no specific order binding on it.

It is instructive to always bear in mind that in our law criminal proceedings are separate and distinct from civil proceedings such that criminal proceedings are not a bar to civil proceedings. Section 4 of the Criminal Procedure and Evidence Act [*Cap 9:07*] provides that:

> "**4 Neither acquittal nor conviction a bar to civil action for damages**
> Neither a conviction nor an acquittal following on any prosecution shall be a bar to a civil action for damages at the instance of any person who may have suffered any injury from the commission of any alleged offence."

It is common cause that despite not being a party to the proceedings in the magistrates court the respondent suffered financial loss, damage or injury arising from the commission of the crime. In fact the trial magistrate made a specific finding of fact that the respondent suffered huge losses arising from the commission of the crime.

It must be borne in mind that the object of criminal proceedings is to punish the offender whereas the object of civil proceedings is to compensate or provide redress to the injured party. The standard of proof in criminal proceedings is ordinarily proof beyond reasonable doubt whereas that for civil wrongs is proof on a balance of probabilities. It is

therefore, not surprising that based on the same facts or evidence a criminal court may arrive at a different decision from that of the civil court.

For instance, it is unthinkable that a person negligently injured in a road accident could be denied redress in the civil courts purely on the basis of findings made in the criminal courts. It therefore, stands to reason that criminal proceedings should not be a bar to civil proceedings.

For that reason the respondent falls within the class of persons who are not barred from seeking redress in the civil courts not withstanding the applicant's conviction in the criminal court arising from the same facts. It makes good sense that what is not prohibited is allowed by law. The respondent is therefore, entitled to resort to all civil remedies at its disposal including statutory remedies provided by law.

That being the case, the application cannot succeed. It is accordingly ordered that the application be and is hereby dismissed with costs.

J Mambara & Partners, applicant's legal practitioners
Dube Manikai & Hwacha, respondent's legal practitioners