ZIMBABWE REVENUE AUTHORITY
versus
RESERVE BANK OF ZIMBABWE
and
DR GIDEON GONO N.O.

HIGH COURT OF ZIMBABWE
GOWORA J
HARARE 30 July and 1 September 2010, 11 March and June 2011

Opposed Court Application

U Sakhe, for the applicant
L Mazonde, for the respondents

GOWORA J: The applicant is a statutory body, established as such in terms of s 3 of the Revenue Authority Act [*Cap 23:11*]. It is established as a body corporate, capable of suing and being sued in its own name and, subject to the Act, of performing all acts that bodies corporate may by law perform. Section 4 of the same Act defines its powers as being:

a) to act for the state in assessing, collecting, and enforcing the payment of all revenues;
b) to advise the Minister on matters relating to the raising and collection of revenues; and
c) to perform any other function that may be conferred or imposed on the Authority in terms of this Act or any other enactment.

It is common cause that in the pursuance of its obligations in terms of this Act, the applicant collected certain sums of money which were deposited in its accounts with Standard Chartered Bank and CBZ Bank. It is also common cause that pursuant to a directive issued through a monetary statement from the Governor of the Reserve Bank in 2009 certain of the sums of monies thus collected were swept into accounts held by the

Reserve Bank with those commercial banks. The monies affected under this directive are set out in a letter dated 12 March 2009 addressed to the second respondent herein. The amounts are reflected as follows:

CBZ Bank

USD	1 857 044-00
ZAR	2 807 759-00
Total in United States Dollars	2 130 000-00

Standard Chartered Bank

USD	2 466 735-15
ZAR	2 473 417-57
BWP	139 527-61
GBP	55 900-82
EURO	3 061-00
Total in United States Dollars	2 830 305-79

Grand Total	**4 960 305-70**

It is common cause between the parties that the applicant, ZIMRA has consistently called upon the Reserve Bank (RBZ) to remit to it the monies thus "swept" through the monetary policy statement. The RBZ has not complied. It has consistently stated that the money was utilised by the Government and thus it is unable to return the money, which is the reason why ZIMRA has now approached this court for an order directing that the monies be paid to it.

The RBZ is a body corporate which is capable of suing and being sued in its own name. It is governed by the Reserve Bank of Zimbabwe Act [*Cap 22:15*]. For purposes of this dispute the relevant functions of the RBZ as set out in s 6 of the Act are the following:

a) to regulate Zimbabwe's monetary system
b) …
c) To foster the liquidity, solvency, stability and proper functioning of Zimbabwe's financial system
d) …
e) …

f) …
g) to act as banker and financial adviser to, and fiscal agent of the State.

When the matter was called Mr *Mazonde*, counsel for both respondents, raised a point in *limine* relating to the citation of Dr Gono as the second respondent in this dispute. He argued that the second respondent was appointed in terms of s 14 of the Act, and that the responsibility of the Governor under that section is for the day to day management control and administration of the bank. Such control and management is however subject to the general direction and policy given by the Minister and the board.

He further argued that in terms of s 19 of the Act the Board is responsible for the formulation of policy of the Bank, supervision of the bank and administration of its general operations.

In terms of s 4 of the Act the RBZ is a body corporate capable of suing and being sued in its own name. As such any actions by the RBZ are performed by itself and should not attract personal liability from its officers. He cited *Tregers Industries* (*Pvt*) *Ltd* v *Zimbabwe Revenue Authority* 2006 (2) 62 for this proposition. Mr *Sakhe* on behalf of the applicant indicated that in the light of the authorities cited by Mr *Mazonde* he found himself unable to pursue the claim against the second respondent. I therefore uphold the point in *limine*.

On the merits, Mr *Sakhe* argued that ZIMRA had not denied that it had directed the two banks to transfer funds to itself and further that it received the funds. He submitted further that the applicant did not know or consent to such transfer. He submitted further that the applicant could not legally have consented to such transfer even if it had been aware or been requested.

Section 101 of the Constitution of Zimbabwe provides:

Consolidated Revenue Fund

All fees, taxes and other revenues of Zimbabwe from whatever source arising, not being monies that-
(a) are payable by or under an Act of Parliament into some other fund established for a specific purpose; or
(b) may, by or under an Act of Parliament, be retained by the authority that received them for purposes of defraying expenses of that authority

shall be paid into and form one Consolidated Revenue Fund.

The sums held in the accounts in question constituted revenue collected by the applicant under s 4 of the Revenue Authority Act. The respondent has not disputed this. It was therefore incumbent upon the applicant to pay such monies into the Consolidated Revenue Fund in accordance with the provisions of s 101 of the Constitution, unless there is authority by an Act of Parliament for the retention of such money by the authority that received the monies. The applicant has no discretion in the manner of dealing with the revenue as the section is imperative. Any expenditure incurred for and on behalf of the government must be authorised in terms of s 102 or s 103 of the Constitution. Such expenditure must however emanate from the Consolidated Revenue Fund as authorised in terms of the Constitution. According to s 102 there are three ways in which monies withdrawn from the Consolidated Revenue Fund.

The respondent has not, in seeking to oppose this application, pointed to any authorisation for the consumption of the monies under the section of the Constitution. It has not pointed to any Act of Parliament that authorised the transfer of funds from the commercial banks to itself. Instead the respondent has sought to argue that as both institutions are government functionaries operating under the aegis of the Minister of Finance, then the government is the ultimate beneficiary of the monies withdrawn from the accounts and the applicant should not seek to recover those sums from the respondent as it cannot be accountable for their consumption.

In its opposing papers the respondent argued that it was the function of the RBZ to advance the general economic policies of the government as provided for in s 6 (i)(d) of the Reserve bank Act. It was contended further that in terms of s 8(1) of the same Act the respondent may be called upon to meet settlement of "government's payment obligations". The respondent contends further that the appropriation of the monies in question was done with the requisite government approval and authorisation and that the then Acting Minister of Finance had been aware of the appropriation. The respondent contends further that it merely acted as agent and that ultimately the government was the beneficiary of the funds in question. The respondent was not able, in view of the

requirements of the Official Secrets Act to produce the documents in respect of which the monies were put to use. The respondent invited the applicant to avail officials to view the documents which invitation I am informed from the bar was turned down by the applicant. It is also noted from the record that the respondent addressed several letters to the applicant and to the Minister of Finance wherein the utilisation of the foreign funds the subject matter of this dispute was also discussed. Indeed the correspondence confirms that the respondent utilised funds as requested by the government. The applicant has accepted in its answering affidavit that indeed the government was the ultimate beneficiary of the revenues collected by the applicant, and avers that it was necessary that any such revenue be accounted for in terms of the clear provisions of the Constitution. The applicant also confirms that it is required to account to the Comptroller and Auditor General for all monies collected by it, and this is the reason for this litigation. The applicant adds that it has not been exempted from its legal obligation to account for all revenues collected.

It is suggested by the applicant that the respondent has failed to proffer a defence to the claim for the repayment by it of the monies appropriated from Standard Chartered Bank and CBZ Bank respectively. I am unable to accept the contention by the respondent that as banker to the State it had the obligation to make payments as directed by the Minister of Finance at the time. The provisions of ss 101, 102 and 103 of the Constitution are clear and admit of no doubt or ambiguity. All revenues collected from whatever source on behalf of government must be deposited into the consolidated revenue fund. All expenditure is equally provided for to be expended through the consolidated revenue fund. Any exceptions to the manner of dealing with the funds must be in terms of an Act of Parliament authorising such departure. I have not been pointed to any by the respondent which authorised it to depart from the provisions of the Constitution and consume funds without statutory approval or authorisation.

The respondent has suggested in its opposing affidavit and heads of argument that as both itself and the applicant are government functionaries, and they compliment one another in their functions. It is averred in the opposing affidavit that the Minister of Finance then, was represented on the board of the applicant by the Secretary of Finance.

Equally the same Secretary for Finance was the conduit used by the respondent for seeking "authorities" from the Minister of Finance to negotiate financing facilities for government and to incur liabilities on its behalf. The respondent averred further that the litigation was superfluous as the ultimate beneficiary was the government which then owes the applicant.

To this the applicant has given a short answer. The two may indeed be functionaries under the Ministry of Finance but they are totally separate entities. The applicant contends that by raising this defence the respondent is alleging a merger of sorts between it and the respondent, wherein the two merge into the Government of Zimbabwe. Although not specifically pleaded as such, it seems that the respondent is raising the defence of set-off. From my reading of the papers it seems that the respondent there is an implication from the respondent that in view of the fact that the two entities are under the control of the Minister of Finance, then monies can be transferred between them without the need to follow statutory requirements. The further implication on the papers is that a set-off between the two is permissible. This issue has already been decided by our courts, as to whether set-off is possible where two or more government departments are involved. In *COT* v *First Merchant Bank Ltd* 1997 (1) ZLR 350 (S) at 353C-F GUBBAY CJ stated:

> "At common law set-off or compensation is a method by which mutual debts being liquidated and due, may be extinguished. It takes place, *ipso jure*. If the debts are equal, both are extinguished; if unequal, the smaller is discharged and the larger is proportionally reduced. There are, however, two important exceptions to the operation of the rule. A debt owed by one department of the State cannot be set off against a debt owed to another department. A set-off cannot be raised against taxes due to the fiscus or where goods are sold for the benefit of the State. See *Schierhout* v *Union Government* 1926 AD 286 at 291; *Pentecost & Co* v *Cape Meat Supply Co* 1933 CPD 472 at 497; Voet Commentarius ad Pandectus 16.2.16 (Gane's translation Vol 3 at 166); van Leeuwen Censura Forensis 1.4.36.11 and 13 (Barber and Macfayden's translation); Wessels The Law of Contract in South Africa 2 ed vol II at paras 2567 and 2568; Willies' Principles of South African Law 8 ed at 483. Both these exceptions are grounded in public policy and utility. The first is designed to avoid confusion in State accounts and the second to ensure the uninterrupted flow of tax revenue to the Treasury in the interests of good governance. In each instance, it is

for the State to decide whether or not set-off should apply even though the debts co-exist."

In *casu*, the court is not dealing with government departments but two distinct and separate corporate entities whose only common denominator is of being under the control of the Minister of Finance. They are set up under different Acts of Parliament. Each has a Board of Directors who run and control the affairs and management of such entity. Each is capable of suing and being sued in its own name and each performs separate and distinct functions and roles as determined by the Acts under which it has been set up. As each of them maintain different accounts and the respondent has not pointed to any legal instrument authorising the alleged "sweeping" arrangements. The State, as represented by the Minister of Finance does not appear to have condoned the alleged "sweeping arrangements" going by the lack of will to resolve the dispute at the level of government as requested by the respondent in correspondence. If set-off is being pleaded, the State has decided not to allow a set-off of the amounts appropriated by the respondent.

In the premises it is my finding that the respondent did appropriate the monies in question outside the provisions of the Constitution and the applicant is entitled to a refund. I therefore will issue an order in the following terms:

IT IS HEREBY ORDERED

1. The first respondent shall within ten (10) days of the date of service of this order upon it, pay or cause to be paid into the applicant's accounts generally known as the Commissioner General's Accounts held with Standard Chartered Bank of Zimbabwe the sums set out below:

    1.1 the sum of Two Million Four Hundred and Sixty Six Thousand Seven Hundred and Thirty Five United States Dollars and Fifteen Cents (USD 2 466 735-15) into account number 8740507099000; and
    1.2 The sum of Two Million Four Hundred and Seventy Three Thousand Four Hundred and Seventeen South African Rand and Fifty Seven Cents (ZAR 2 473 417-57) into account number 9440507099000; and
    1.3 The sum of Fifty Five Thousand Nine Hundred British Pound Sterling and Eighty Two Pence (GBPS 55 900-82) into account number 2840507099000; and

1.4 The sum of Three Thousand and Sixty One Euros (EUR 3 061) into account no. 9340507099000; and
1.5 The sum of One Hundred and Thirty-Nine Thousand Five Hundred and Twenty-Seven Botswana Pula and Sixty-One Thebe (BWP 139 527.61) into account number 1340507099000.

2. The first respondent shall, within ten (10) days of the date of service of this order upon it, pay or cause to be paid into the applicant's accounts generally referred to as the Commissioner General's Accounts held with CBZ Bank Limited the sums of money set out below:

2.1 The sum of One Million Eight Hundred and Fifty Seven Thousand and Forty Four United States Dollars (USD1 857 044) into account number 0112077259 0020; and
2.2 The sum of Two Million Eight Hundred and Seven Thousand Seven Hundred and Fifty-Nine South African Rand (ZAR 2 807 759) into account number 01120772590040.

3. The first respondent be and is hereby ordered to pay the applicant's costs.

4. The application against the second respondent be and is hereby dismissed with costs.

Kantor & Immerman, applicant's legal practitioners
Chitapi & Associates, first and second respondents' legal practitioners