REPORTABLE (ZLR) 27

RESERVE BANK OF ZIMBABWE
v
ZIMBABWE REVENUE AUTHORITY

SUPREME COURT OF ZIMBABWE
MALABA DCJ, ZIYAMBI JA & OMEERJEE AJA
HARARE, SEPTEMBER 17, 2012 & SEPTEMBER 20, 2013

L Mazonde, for the appellant
U Sakhe, for the respondent

MALABA DCJ: This is an appeal against the judgment of the High court granting an order for payment to the respondent of USD4 960 305-70 which the appellant received into its own account from Standard Chartered Bank, and Commercial Bank of Zimbabwe, pursuant to a directive issued to the banks to transfer the money from accounts held with them by the respondent.

After hearing argument from counsel for both parties the appeal was dismissed with costs. It was indicated that reasons for the decision would follow in due course. These are they.

The appellant and the respondent are bodies established in terms of the respective statutes for the achievement of specific purposes. They are legal entities with a right to sue and be sued. The respondent is established in terms of the Revenue Authority Act [*Cap. 23:11*]("the RA Act"]. The purpose for which the respondent was established is to act as an agent of the State in assessing, collecting and enforcing the payment of all revenues due to the state and the transfer of that revenue to the Consolidated Revenue Fund for appropriation by Government.

The RA Act confers upon the respondent, the relevant powers, the exercise of which is to ensure the achievement of the purposes for which it is established. In this regard the respondent is authorised to open accounts with banks to receive deposits by individuals of the revenue due to the State. The respondent is under an obligation as an agent to account for all the money deposited into the accounts and generally collected by it, by transferring the money into the Consolidated Revenue Fund. Under s 101 of the Constitution of Zimbabwe, the respondent is under an obligation not to transfer that money to any body, other than the Consolidated Revenue Fund. Section 101 of the Constitution provides that:

> **"101 Consolidated Revenue Fund**
> All fees, taxes and other revenues of Zimbabwe from whatever source arising, not being moneys 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 the purpose of defraying the expenses of that authority;
> shall be paid into and form one Consolidated Revenue Fund."

Section 101 of the Constitution is given effect to by s 28(2) of the RA Act which requires that revenue collected by the respondent in terms of any enactment shall be paid into the Consolidated Revenue Fund. Section 102(3) of the RA Act provides that it is trite that no money can be withdrawn from the Consolidated Revenue Fund unless an act of Parliament authorizes such withdrawal and prescribes the exact manner and form of such withdrawal. Section 102 (3) provides that:

> "(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…".

Section 103 lays down the procedure by which authority may be sought from Parliament through the Minister of Finance for withdrawal of money from the Consolidated Revenue Fund:

> **"103 Authorization of expenditure from Consolidated Revenue Fund**
> (1) The Minister for the time being responsible for finance shall cause to be prepared and laid before the House of Assembly, on a day on which the House sits, before or not later than thirty days after the start of each financial year estimates of the revenue and expenditure of Zimbabwe for that financial year:
>
> Provided that if, by reason of the prorogation or dissolution of Parliament, the provisions of this subsection cannot be complied with, the estimates of the revenue and expenditure shall be laid before the House of Assembly, on a day on which the House sits not later than thirty days after the date on which the House first meets after that prorogation or dissolution.
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> (2) When the estimates of expenditure, other than expenditure charged upon the Consolidated Revenue Fund by this Constitution or an Act of Parliament, have been approved by the House of Assembly, a Bill, to be known as an Appropriation Bill, shall be introduced into the House providing for the issue from the Consolidated Revenue Fund of the sums necessary to meet that expenditure and the appropriation of those sums,

under separate votes for the several heads of expenditure approved, to the purposes specified therein…"

The appellant is established under the Reserve Bank of Zimbabwe Act [*Cap. 22:15*]("the RBZ Act") for the purposes of managing the financial affairs of private banking institutions and those of the State in terms of the law. The powers which appellant exercises in the execution of its functions are set out in s 45 of the Banking Act which provides:

> **"45 Responsibilities of Reserve Bank**
> (1) Subject to this Act, the Reserve Bank shall be responsible for
> (*a*) continuously monitoring and supervising banking institutions and associates of banking institutions to ensure that they comply with this Act; and
> (*b*) conducting investigations into any particular banking institution or class of such institutions, where the Reserve Bank considers such an investigation necessary for the purpose of preventing, investigating or detecting a contravention of this Act or any other law."

Section 6 (1) (d) of the RBZ Act imposed a duty on the appellant to discharge its functions with the view of advancing the general economic policies of the Government. It was repealed by Act 1 of 2010. The appellant argued that the directive to the banks issued in 2009 was in terms of s 6(1)(d) of the RBZ Act. Section 6 provides:

> **"6 Functions of Bank**
> (1) The functions of the Bank shall be—
> (*a*) to regulate Zimbabwe's monetary system; and
> (*b*) to achieve and maintain the stability of the Zimbabwe dollar; and
> (*c*) to foster the liquidity, solvency, stability and proper functioning of Zimbabwe's financial system; and
> (*d*).....
> [Paragraph repealed by Act 1 of 2010]
> (*e*) to supervise banking institutions and to promote the smooth operation of the payment system; and
> (*f*) subject to Part VII, to formulate and execute the monetary policy of Zimbabwe; and

> (*g*) to act as banker and financial adviser to, and fiscal agent of, the State; and
> (*h*) whenever appropriate and subject to any written directions given to it by the Minister, to represent the interests of Zimbabwe in international or intergovernmental meetings, multilateral agencies and other organizations in matters concerning monetary policy; and…"

The import of s 6(1)(d) was that the appellant was under a duty to advance the general economic policies of the Government of Zimbabwe by doing those things which are permitted by the law. That would be out of monies of the State held with the appellant as s 8(1) requires it to act as the banker to the State.

Under s 8(1) of the Act the respondent may be called upon to meet the settlement by Government of its obligations towards its debtors. In January 2009, the respondent's Governor issued, through a monetary policy statement announcement, a directive to all commercial banks to transfer all foreign currency held by individuals and institutions with them, into appellant's own account.

The appellant contends that it issued the directive in terms of the authority granted to it under ss 6(1) (d) and 8(1) of the RBZ Act. As a result of the directive, Standard Chartered Bank and Commercial Bank of Zimbabwe, transferred into appellant's account, funds totalling USD$4 960 305-70, from the respondent's accounts held with them. The directive was later suspended in respect of monies held in respondent's accounts.

The appellant did not refund the money. On 12 and 26 March and 17 April 2009, the respondent's Commissioner General, who is the accounting officer responsible for the

discharge by the respondent of all of its functions in terms of RA Act wrote to the appellant requesting that the monies be refunded. There was no response. The appellant did not accede to the proposal for a meeting between the parties, which are both Government institutions, to discuss the matter with a view of finding an amicable solution to the problem.

The Commissioner General with the approval of the respondent's Board of Directors was compelled to institute proceedings on 20 July 2009, in the High Court for the respondent to recover the money.

In defending the claim, the appellant argued that it had a right under ss 6(1)(d) and 8(1) of the RBZ Act, to issue the directive in question. The appellant argued further, that the respondent should have sued the commercial banks, as opposed to itself, for the recovery of the money. The reason given was that there was no privity of contract between the two. The third argument raised by the appellant was that s 18 of the RBZ Act granted it immunity from proceedings of this nature.

The court *a quo* dismissed the defence on the grounds of the obligations imposed on both parties by the provisions of ss 101, 102 and 103 of the Constitution. It did not consider the other grounds of opposition to the claim. On appeal, the failure by the court *a quo* to consider the other grounds of opposition has been relied upon to support the contention that there is a misdirection justifying interference with the judgment appealed against.

In *Foroma v Minister of Public Construction and National Housing & Anor 1997(1)* ZLR 447(H) SMITH J held that the Housing and Building Act [*Cap. 22:07*] does not contain any provision authorizing the disbursements of public money for the purpose of funding a (VIP) housing scheme. Withdrawal from the consolidated revenue Fund to support the scheme had therefore been unlawfully effected.

The obligation imposed by the Constitution applies to all concerned including the respondent, the commercial banks, and the appellant. The obligation is clear in that it prohibits, in absolute terms, any transfer of revenue collected by respondent to any other recipient except the Consolidated Revenue Fund. Any act which has the effect of transferring the money to any other recipient prior to it getting into the Consolidated Revenue Fund, would be unlawful under the Constitution, regardless of who authorizes that transfer. It would not be a valid defense to say that the money was used by government or that the directive came from Government because the Constitution is binding on the Government. Zimbabwe is a Constitutional democracy.

The attempt by the appellant to raise privity of contract between the respondent and the commercial banks is of no consequence. In any event it is clear that the appellant overshot the scope of its powers under ss 6(1)(d) and 8(1) of the RBZ Act. The sections placed on the appellant an obligation, limited to the exercise of the powers of monitoring financial systems.

The obligation to advance economic policies of the Government by making funds available to it is limited to the appellant having monies in its own accounts. The obligation does not authorize the appellant to force transfers of money from other people's accounts. The immunity the appellant sought to raise as a shield against the claim by the respondent, is only limited to a situation where the appellant has acted, within the confines of the Statute. If appellant were to be sued for a debt, the defence of immunity would only be available to it if the action complained of, or the debt was incurred in the proper exercise of the powers conferred upon it by the Statute. At the time the directive was issued, the immunity provision had not yet come into force.

It is clear that the unlawful directive issued by the appellant to the commercial banks is the *causa sine qua non* of the respondent's loss. See *International Shipping Company (Pty) Ltd v Bentley* 1990(1) SA 680(A) at p 100. The appellant is therefore liable to make good the loss. Under s 17 of the Banking Act [*Cap. 24:20*] a commercial bank is under an obligation to "comply with the terms and conditions of its registration and with any directions given to it by the Reserve Bank or the Registrar in terms of this Act". Whilst noting that the commercial banks were not obliged to obey the directive because it was unlawful, the fact that they acted in accordance with its demands does not absolve the appellant from liability for the consequences of its unlawful conduct.

ZIYAMBI JA: I agree

OMERJEE AJA: I agree

T. H. Chitapi & Associates, appellant's legal practitioners

Kantor & Immerman, respondent's legal practitioners