

(1) AUGUR INVESTMENTS (2) DOOREST PROPERTIES
v
(1) FAIRCLOT INVESTMENT (2) THE SHERIFF (3) THE
REGISTRAR OF DEEDS

SUPREME COURT OF ZIMBABWE
BHUNU JA, CHIWESHE JA & MWAYERA JA
HARARE: 24 JULY 2023 & 15 SEPTEMBER 2023

T. Zhuwarara with W. Nyamakura, for the first appellant

T. Mpfu with J. Chinyoka, for the first respondent

A.B.C Chinake, for the second respondent

CHIWESHE JA: This is an appeal against the whole judgment of the High Court (the court *a quo*) sitting at Harare, handed down on 9 May 2019, dismissing the first appellant's application for a declaration under case HC 5989/19 and granting the first respondent's application to set aside the second respondent's decision to uplift judicial attachment on stand 654 Pomona Township, under case HC 10315/19. **Judgment No. SC 93/23** **Civil Appeal No. SC 271/23**

Aggrieved by the decision of the court *a quo*, the appellants have noted the present appeal.

The facts

The first respondent obtained an arbitral award against the first appellant in the sum of US\$ 4 800 000-00, excluding interest. The award was granted on 19 March 2015. The first appellant appealed the arbitral award which appeal was dismissed on 11 February 2019. The award was ultimately registered as an order of the court *a quo* on 26 June 2019. A writ of

execution was issued by the first respondent leading to the attachment of stand No 654 Pomona Township held under Deed of Grant No 2884/10 (“the property”). Thereafter the first appellant paid the sum of RTGS \$ 4 800 000 as the judgment debt and RTGS \$ 1 078 040-21 as interest thereon. Following these payments, the second respondent advised the judgment creditors (ie the first respondent) that the debt had been discharged and he was thus proceeding to remove the property from judicial attachment. He did so through letters to the first respondent dated 21 and 25 November 2019, respectively. The first respondent protested this move arguing that the property should not be removed from attachment as the judgment debt had not been extinguished because the amount should be paid at the prevailing inter-bank rate between the US\$ and the RTGS, and not at the rate of 1US\$ to 1RTGS \$. The second respondent did not heed that advice. It was then that the first respondent approached the court *a quo* under HC 10315/19 for an order setting aside the second respondent’s decision to remove the property from attachment. It also sought consequential relief.

Judgment No. SC 93/23
Civil Appeal No. SC 271/23

2

At the close of submissions, the court *a quo* found in favour of the first respondent who had sued under HC 10315/19 for the setting aside of the second respondent’s decision to remove the property from attachment. Under HC 5989/19 the court *a quo* dismissed the first appellant’s application for a declaration that the judgment debt be extinguished at the rate of 1:1 between the US\$ and the RTGS\$. For convenience the two applications were heard together.

The appellants appeal the decisions of the court *a quo* on the following grounds.

“GROUNDS OF APPEAL

1. The court *a quo* erred in failing to hold that the Arbitral Award dated 19 August 2015, granted in favour of the first respondent, constituted a liability affected by the

provisions of s 4(1)(d) of Statutory Instrument 33 of 2019 (subsequently s 22 of the Finance Act No2 of 2019).

2. Concomitantly, the court *a quo* also erred in determining that the Arbitral Award issued on the 19th of March 2015 only became effectual upon its registration on the 26th of June 2019. At law an arbitral award constitutes a binding obligation as at the date of its grant and not its registration.
3. With respect, the court *a quo* also grossly misdirected itself in holding that the first appellant's RTGS payments did not fully discharge its indebtedness to the first respondent in respect of the registered arbitral award dated 19th March 2015. Such payments fully discharged what was lawfully due
4. The court *a quo* also erred in determining that the second respondent had acted unlawfully in uplifting the judicial attachment on stand 654 Pomona held under Deed of Grant 2884/10. The voiding of such uplifting was anomalous at law given that the first appellant had discharged its indebtedness thereby obviating the continuation of execution.
5. Additionally, the court *a quo* erred in cancelling "any and all" transfers effected on stand 654 Pomona Township in circumstances where the second appellant had received title by operation of an extant Deed of settlement and court order handed down by the court *a quo* under HC 4528/19
6. The court *a quo* also erred in ordering the advertisement and sale in execution of stand 652 Pomona Township held under Deed of Grant No 2884/10 after the cancellation of all subsequent transfers. Such determination is anomalous in that after the aforesaid cancellation of subsequent transfers the land reverts to being state land, incapable of being sold in execution."

The appellants seek the following relief:

- “1. That the instant appeal succeeds with costs.
2. That the order of the court *a quo* be set aside and be substituted with:
 - Case No HC 5989/19**
 - (i) The application for a declaration order be and is hereby granted.
 - (ii) The liability arising from the Arbitral Award dated 19th March 2015 in favour of the first respondent be and is hereby declared executable in RTGS dollars at the rate of one to one to the United States dollars in accordance with s 4(1) (d) of statutory instrument 22 of 2019.
 - (iii) The first respondent to pay costs of suit.
- Case No HC 10315/19**
- (iv) The application is dismissed with costs”

The grounds of appeal raise only one issue, that is, whether the arbitral award in issue, is subject to the provisions of SI 33/19 in terms of which all assets and obligations denominated in United States dollars immediately before the effective date of 22 February 2019 shall be redeemed at the rate of 1 US\$ to 1RTGS \$. If that question is answered in the affirmative, then the appeal should succeed. If not, then the appeal stands to be dismissed.

Judgment No. SC 95/23
Civil Appeal No. SC 271/23

4

PRELIMINARY OBJECTIONS

The first respondent raised a number of preliminary objections. The objections have no merit.

Firstly, it is contended that the second respondent (the sheriff) has not paid security for costs and therefore the appeal is accordingly deemed to have been dismissed by operation of law.

Secondly, it is averred that the second respondent (the sheriff) should have filed an appeal against the judgment granted against him and not a cross appeal as the cross appeal does not seek the alteration or variation of any judgment made in favour of the first and the

second appellants. The cross appeal, it is argued, is consequently a nullity that ought to be struck off the roll.

Thirdly, it is contended that the second respondent (the sheriff) cannot purport to appeal against the whole judgment of the court *a quo* as some parts of that judgment were not made against him and therefore, he has no right to appeal the whole judgment. Thus it is argued the sheriff had no interest in the dismissal of the application for a declaration under HC5989/19 and cannot appeal or seek relief against the judgment of the court. Only the first and second appellant can seek relief against that judgment.

Fourthly, it is contended that the second respondent (the sheriff) did not file opposing papers in the court *a quo* and consequently did not participate in the proceedings before that court. The judgment against him was given in default and for that reason, such judgment is not appealable.

Judgment No. SC 93/23
Civil Appeal No. SC 271/23

5

Fifthly, it is alleged that the first and second appellants did not serve the notice of appeal upon the second respondent (the sheriff) at all or timeously. That irregularity renders the appeal invalid, so argues the first respondent.

Sixthly, it is averred that the second appellant did not pay security for costs. In the same breath it is conceded that the first appellant paid such costs on behalf of the second appellant. Once that concession is made, the preliminary issue falls by the way side for it matters not who actually deposits the required sums. It could be the party concerned, a fellow litigant, a friend or even a well-wisher. Such costs would have been paid.

With regards the first to the fifth preliminary issues raised by the first respondent we make the following observation. The sheriff is not a litigant. He is an officer of the High Court. Section 55 (1) of the High Court Act [*Chapter 7:06*] establishes the offices of the registrar of the High Court and the Sheriff. It reads:

“55 Officers of High Court

- (i) There shall be-
 - (a) a registrar of the High Court and such deputy registrars and other officers of the High Court as may be required; and
 - (b) for Zimbabwe, a sheriff and such additional sheriffs and assistant sheriffs as may be required;
whose offices shall be public offices and shall form part of the judicial service”

Being an officer of the court, the immunity extended to judicial officers and other officers of the court extends to the office of the sheriff. The accepted practice is that where a complaint is raised against the sheriff or proceedings issued against him, the sheriff, not being a litigant, is required to issue a report informing the court and the parties to the dispute of the facts as known to him, the actions he took and the reasons therefor. The sheriff is not expected to file opposing papers and heads of arguments since he is not a party to the dispute and has no interest in the outcome of the case. Once he has submitted his report, he will do no more than abide by the decision of the court. As an officer of the court, no order of costs should be issued against him. Nor is he required to pay security for costs in the event that he wishes to place his report before any court, notwithstanding promises to that effect in any notice of appeal. The sheriff is there to assist the court. It matters not what label he may give to his papers-“appeal”, “cross-appeal” or “report” –the purpose of his intervention remains the same –to appraise the appeal court of the contents of his report in the court *a quo* and to engage counsel to articulate the implications thereof.

For these reasons we would dismiss, as we hereby do, the first to fifth preliminary points raised by the first respondent.

APPELLANTS' SUBMISSIONS IN THIS COURT

It is now trite that all assets and liabilities that were denominated in United States dollars immediately before 22 February 2019, must, on or after that date, be valued in RTGS dollars on a one to one rate. This is the effect of s 4(1) (d) of SI 33 of 2019 and subsequently, section 22 of the Finance Act No 2 of 2019. This position was confirmed by Malaba CJ in the seminal case of *Zambezi Gas Zimbabwe P/L v N.R Barber P/L and Anor* SC 3/20.

The appellants submit that the court *a quo* erred in interpreting the above provisions in that it treated a judgment debt as if it was separate from the definition of “debt”. It also erred in taking the date of registration of the arbitral award as if it was the date on which the debt came into existence. It failed to appreciate that prior to the registration of the award, a debt already existed as confirmed by the arbitration award of 2015, paving the way for enforcement. This debt arose before 22 February 2019, the effective date under SI 33/2019. The court *a quo* also erred in treating an arbitration award as of no force or effect as long as it was not registered. It misunderstood the existence of an award embodying a debt and its enforcement.

The appellants further submitted that the law is clear that the registration of an award in the court *a quo* is purely for purposes of execution through the sheriff. To that end the registration of an award as an order of the court *a quo* does not create a new debt nor does it at law change the status of the debt. The appellant relied in this regard on the words of

Bhunu JA in the case of *Gwanda Rural District Council v Botha* SC 174/20 wherein he had this to say:

“Before delving into the merits or otherwise of the grounds of appeal, I pause to observe that when presiding over the registration of an arbitral award, the court *a quo* had very limited jurisdiction. This is mainly because its function was merely to register the arbitral award for purposes of enforcement. To that end, it did not in the main exercise its appellate or review jurisdiction.”

Accordingly, argue the appellants, the High Court does not enquire into anything when registering an award. It is merely permitting the applicant access to its enforcement mechanism.

The court *a quo* was thus in error when it held that an arbitral award dated 19 March 2015, only became effective when it was registered by the court *a quo* on 26 June 2019, well after the effective date fixed under SI 33/2019. The appellants reiterate that such registration by the court *a quo* was for purposes of execution only. It was because of that error that the court *a quo* determined that the arbitral award was not affected by the provisions of s 4(1)(d) of SI 33/2019, a finding contrary to law. The appellants further relied on the case of *Air Zimbabwe Holdings v Chiweshe and Others* 2019 (1) ZLR 311 (S) where GOWORA JA I had this to say by way of dicta-

“Once rendered an arbitral award is binding upon everyone to whom it pertains until set aside.”

In other words, the first appellant’s liability to pay arose on the date of issue of the award, that is on the 19th March 2015 and not on the date of registration in the court *a quo*. Reliance was placed on the case of *Dudka & Ors v Cheni Investments (Pvt) Ltd* 2011 (1) ZLR I where MAKONI J, as she then was, remarked that:

“an award takes effect upon its grant. Its execution has no effect on whether it is binding or not. A party can choose to obey an award such that there would not be need for the award to be registered”.

The court *a quo*, according to the appellants, was wrong when it held that the first appellant was only obligated to pay the respondent after the arbitral award was registered. Further under our law the registration of an arbitral award does not turn such an award into an order of the High Court. Arbitral awards are registered and enforced as is without being transformed into court judgments. See *Thornton v McKenzie* 2006 (2) ZLR 91 (H) at 94G.

The registration of an arbitral award does not create new obligations, further submitted the appellants. In *Ropa v Reosmart Investments (Pvt) Ltd* 2006 (2) ZLR 283 (S) at 286B the finality of arbitral awards was explained by GWAUNZA JA, as she then was, in the following terms:

“In addition to this, I found to be persuasive the submission made by the respondent, that the effect of the arbitral award is to bring to finality the dispute between the parties”

Judgment No. SC 95/23
Civil Appeal No. SC 271/23

9

At law, therefore, no new rights and entitlements are obtained by the holder of an arbitral award upon recognition and enforcement. Accordingly, submit the appellants, the registration of the 19 March 2015 arbitral award did not create a new liability or circumstances that allowed it to escape the jaws of section 4 (1) (d) of SI 33/19. The appellants further argue that “the novation upon registration” that the first respondent refers to is erroneous at law. It is that submission that led the court *a quo* astray.

Counsel for the sheriff (the second respondent) filed heads of arguments titled
**“SECOND RESPONDENT’S/CROSS APPELLANT’S HEADS OF ARGUMENTS
INCORPORATING SECOND RESPONDENT’S HEADS OF ARGUMENTS IN
RESPECT OF THE MAIN APPEAL.”**

Mr *Chinake*, for the sheriff (second respondent) stated in his heads of arguments that the second respondent had been served with the notice of appeal filed by the appellants on 12 May 2023. The second respondent filed a cross-appeal in terms of r 45 (1) as read with r 45 (2) of the Supreme Court Rules 2018 on 22 May 2023. The cross appeal is on three critical errors of law and fact made by the court *a quo*.

Firstly, the court *a quo* grossly misdirected itself and erred in failing to consider or address in its judgment, the sheriff's report which had been filed of record on 23 June 2020, at pages 373-374 of the record. The report was filed in case No HC 10315/19 and bears the full citation of the case. The second respondent contends that it is a valid sheriff's report compiled and filed in terms of the rules of the court *a quo*. The report is comprehensive in that it sets out the background of the matter, the steps taken by the sheriff and the reasons therefor. It explains how the amount of RTGS 4 800 000 had been paid out and how the property had been transferred to the second appellant. The report is quoted from p 8 as follows:

- “8. We proceeded to uplift the caveat and transferred the property to Doorest properties as per court order by Justice Mushore.
9. Our actions led to Messrs Mutumbwa Mugabe Legal Practitioners filing the current application as they believed we failed to execute our mandate properly.
10. It is our belief that the \$4 800 000-00 paid constitutes the judgment debt in full.
11. Our decision to act in the manner we did was informed by the legal position prevailing with regards to execution of court orders denominated in USD dollars, in light of SI 33/2019 and Finance Act 2 of 2019.

12. If our position was wrong it was because of the lack of clarity with regards to the interpretation of the relevant statutes.
13. The matter was once directed to the Judicial Service as a complaint and the position taken was that the sheriff had not acted improperly.
14. We believe our decision was not irrational. The case arises from different interpretations of available statutory instruments. We are now aware of the Supreme Court Judgment which vindicates the position that we took.
15. We pray that no costs are levied against the sheriff as we believe we acted reasonable in terms of the law.

M. Madhega Sheriff of the High Court of Zimbabwe, Harare.”

Thus, the Sheriff’s report constitutes a full and proper response to the issues raised by the first respondent in the court *a quo*. It does not, argues the second respondent, in any way constitute disrespect of the court proceedings nor a failure to respond nor is it an improper pleading.

The second respondent asserts that the application in the court *a quo* under HC 10315/19 was to all intents and purposes a review of the action taken by the Sheriff. The Sheriff was thus *functus officio*. The rules do not require him to file opposing affidavits. He is only required to file a report informing the court as to what he did and the reasons therefore. In such situations the sheriff is not a litigant but an officer of the court charged with the execution of court orders. The sheriff’s report having been tendered to the court *a quo* in conformity with its rules should have been given due regard before the court *a quo* arrived at its decision. If the court *a quo* had applied its mind to this report it would have arrived at a different decision.

That the application before the court *a quo* was for review of the second respondent's decision is confirmed by the court *a quo* when it states:

“The applicant in the first instance, Fairclot Investments, seeks a review of the decision of the second respondent of 21 November 2019 to uplift the judicial attachment of stand 654 Pomona Township...”

The second respondent further argues that it is common cause that the Sheriff gave notice to all parties that the judgment debt had been discharged in full and for that reason he was removing the attachment. Nothing was done clandestinely or maliciously as all concerned were informed beforehand. In the circumstances there was no basis for the levying of costs against the sheriff (which on its own is unusual on an officer of the court) let alone on the legal practitioner and client scale.

The court *a quo* misdirected itself on the facts when it held **Judgment No. SC 93/23**

Civil Appeal No. SC 271/23

12

“Given the history of the case and the manner in which the sheriff handled the case, refusing to heed the call not to uplift the caveat when advised that the writ had not been satisfied the defiance requires a sanction be imposed upon the sheriff. Most disturbing is the fact that, despite being cited in an application where costs are claimed on the attorney/client scale the sheriff made no effort to defend himself/herself.

Without any submission from the Sheriff as to why costs on a higher scale should not be imposed, the court is left with no option but to accede to the prayer for costs against the Sheriff.”

Clearly the court *a quo*, argues the second respondent, did not take into account the contents of the sheriff's report giving reasons why the court should not levy costs against it. The finding on costs is therefore without basis.

With regards the interpretation of SI 33/2019 as read with the Finance Act 2/2019 the second respondent agreed with the first and second appellants that the award granted in

March 2015 is payable in RTGS\$ at the rate of 1 to 1 with the US\$, and, further that the registration of the award in the court *a quo* was only for purposes of execution. Such registration does not novate or change the status of the arbitral award.

SUBMISSIONS BY THE FIRST RESPONDENT

On the merits, Mr *Mpofu*, for the first respondent, submitted that an arbitral award does not become final as long as it is being challenged. He submitted further that it does not become final if it has not been recognized (ie registered as an order of the court *a quo*) or the party against whom it is made has not paid in accordance with its terms. In other words although in *casu* the arbitral award was granted in 2015, it was not final until the challenges brought against it by the first appellant had been resolved and it had been registered by the court *a quo*. Reliance was placed in this regard on the provisions of article 34(4) of the Model Law which provides:

“The High Court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal’s opinion will eliminate the grounds for setting aside.”

For that reason it is argued that for as long a party has challenged an award, finality cannot be achieved. Matters will remain fluid until the award has been finally recognized. It is further argued that article 36 sets out the grounds upon which the court *a quo* may decline to register an award. This is a clear sign that the arbitral award is not final until it is registered.

The gravamen of the first respondent’s argument is that because of the continued litigation at the instance of the first appellant, there was still a live dispute between the parties such that the debt could not have been affected by the provisions of SI 33 of 2019. For this

proposition the first respondent has relied on the cases of *Lock v Lock and another* SC 127/22 and *Lugalulu Investments and Another v National Railways of Zimbabwe* SC 43/22.

It must be noted that these cases dealt with High Court judgments (therefore judgments debts) as opposed to arbitral awards. The first respondent submits that since the award in *casu* was registered after the effective date in terms of SI 33 of 2019, the award is not affected by the provisions of that statutory instrument. In other words, the debt is payable in United States dollars converted to RTGS at the prevailing bank rate. The first respondent concedes that an arbitral award is not a judgment debt. It submits however that once registered as an order of the court *a quo* it becomes a judgment debt.

ANALYSIS

Both parties have cited authorities tending to show, on behalf of the appellants, that an arbitral award is final upon its grant, and, on behalf of the first respondent, that it is not final until it is registered. We note that there is no legislative provision that says that the filing of a challenge to an arbitral award suspends the operation of the award. That being the case we would agree with Mr *Zhuwarara*, for the first and second appellants, that an arbitral award is effective upon its grant until it is set aside. In any event, it does not matter when the arbitral award may be regarded as being final. The point is, whether at the time of ultimate registration in the court *a quo*, such an award becomes a judgment of the court *a quo*.

We agree with Mr *Zhuwawara* that registration of an award in the court *a quo* does not change the status of the award. The award is registered simply for the purpose of execution. The court *a quo*, at registration, does not determine the rights and obligations of the parties. These have already been determined by the arbitrator. The court *a quo* does not

and cannot determine the matter on the merits. For that reason, the order for registration does not become a judgment debt because it is not a judgment of the court *a quo*. The fact that the court *a quo* may refuse to register an award on any of the grounds set out under Article 36 of the model law is irrelevant to the issue at hand, namely whether the registration of an arbitral award transforms it into a judgment debt.

The rights and obligations of the parties were determined by the arbitrator in 2015. The award/debt is fully covered by the provisions of SI 33 of 2019 notwithstanding its registration after 22 February 2019 (the effective date). The position would have been different if proceedings in a court of law had been instituted in 2015 but concluded after the effective date. The order given would be a judgment debt. In such a scenario the rights and obligations of the parties would have been determined by a court after the effective date and therefore the judgment debt so arising would be payable in Unites States dollars converted to RTGS at the prevailing bank rate. An arbitral award granted in 2015 cannot assume a similar status merely because it was registered by the court *a quo* after the effective date.

Judgment No. SC 95/23
Civil Appeal No. SC 271/23

15

The court *a quo* therefore misdirected itself in treating the order for registration of the award as a novation of the arbitral award giving rise to a judgment debt. Having so misdirected itself, it wrongly concluded that the debt was not covered by SI 33 of 2019 and disregarded the payment in full in RTGS dollars made by the first appellant.

There is no evidence in the judgment of the court *a quo* that it took into account or noted the Sheriff's report filed of record. There is absolutely no reference to it. If it had had regard to the sheriff report, it would not have issued an order for costs against him on the higher scale or indeed any costs at all. As already indicated, the sheriff is an officer of the

court, not a litigant. He is not required to file opposing papers. His report is sufficient to inform the court and the parties as to his actions and the reasons therefor.

We agree that the Sheriff, when in doubt, should seek directions from the court. He should have done so. As it turns out however, he was right in his assertion that the debt had been fully discharged in RTGS at the prescribed rate of one is to one to the United States dollar. For that reason the order granted against him cannot stand. In any event the sheriff acted in terms of an order granted by MUSHORE J.

DISPOSITION

The appeal has merit. The registration of an arbitral award does not create a judgment debt. Registration is a vehicle through which parties may access the services of the sheriff to execute arbitral awards. It is a procedure designed solely for purposes of execution. In that regard, the court *a quo* does not inquire into or determine the merits of the matter as it is a mere vehicle for enforcement. Thus, the arbitral award, granted in 2015, is subject to the provisions of SI 33 of 2019, notwithstanding its late registration after the effective date. The debt is therefore payable at the prescribed rate of 1 US\$ to 1 RTG\$\$\$. The first appellant has thus fully discharged its debt.

The order for costs against the sheriff is not justifiable. It must be set aside. Costs will follow the cause.

In the result it is ordered as follows:

1. That the appeal succeeds with costs.

2. That the order of the court *a quo* in case No HC 5989/19 and case No HC10315/19 be set aside and be substituted with the following:

“Case No HC 5989/19

- (i) The application for a declaratory order be and is hereby granted.
- (ii) The liability arising from the arbitral award dated 19th March 2015 in favour of the first respondent be and is hereby declared executable in RTGS dollars at the rate of one to one to the United States dollar in accordance with s 4 (1) (d) of Statutory Instrument 33 of 2019.
- (iii) The first respondent to pay costs of suit.

Case No HC 10315/19

The application is dismissed with costs.”

**Judgment No. SC 93/23
Civil Appeal No. SC 271/23**

17

BHUNU JA : I agree

MWAYERA JA : I agree

Chinawa Law Chambers, appellant’s legal practitioners

Mutumbwa Mugabe & Partners, for the 1st respondent’s legal practitioners

Kantor & Immerman, for the 2nd respondent