DAISY GUEST HOUSE (PRIVATE) LIMITED
versus
ECOBANK ZIMBABWE LIMITED
and
ZIMBABWE FOOTBALL ASSOCIATION
and
PHILLIP CHIYANGWA
and
THE SHERIFF FOR ZIMBABWE

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 28 June and 15 July 2019

Opposed application

R Mahuni, for applicant
S Bhebhe, for 1st respondent
RT Zhuwarara, for 2nd respondent

TAGU J: This is an application for the confirmation of a Provisional Order granted by this court on the 12th February 2019. The order sought to be confirmed reads as follows:

" **TERMS OF THE FINAL ORDER SOUGHT**

That you show cause to this Honourable Court why a final order should not be made in the following terms:

1. The actions of the 4th Respondent in attaching the 2nd Respondent's accounts with the 1st Respondent being incorporeal property was properly attached by the 4th Respondent without the need for a garnishee order;
2. The 1st Respondent is ordered to take all necessary steps to allow the 4th Respondent to sell the 2nd Respondent's rights to the money in the attached account being Ecobank Account numbers 0181197610292101 (US Dollar Account) 0181197610292102 (US Dollar Accounts) held in the name of the 2nd Respondent.

Or alternatively,

The 1st Respondent is ordered to surrender to the 4th Respondent the sum of US$196,049.49.

3. The 1st and 2nd Respondents shall pay costs of the application on a legal practitioner and client scale.

INTERIM RELIEF GRANTED

Pending the determination of the final relief sought herein, the Applicant be and is hereby granted the following interim relief:

1. The 1st Respondent is ordered to stop the access to and use by the 2nd Respondent of the funds in the 2nd Respondent's Bank Accounts being accounts Ecobank Account number 0181197610292101 (US Dollar Account) 0181197610292102 (US Dollar Accounts) held in the name of the 2nd Respondent.
2. The 2nd Respondent or anyone acting on its behalf is ordered to stop forthwith any actions by the funds held by the 1st Respondent on behalf of the 2nd Respondent in accounts number 0181197610292101 (US Dollar Account) and 0181197610292102 (US Dollar Account) may be diminished.

SERVICE OF ORDER

That the service of this order shall be effected by the Applicant's Legal Practitioners or the Deputy Sheriff/Messenger of Court on the Respondent."

FACTUAL BACKGROUND

The brief facts of this case are that the applicant is a holder of a judgment obtained against the second and third respondents on 23 November 2016 under case number HC 6491/16 which judgment remains unsatisfied despite various efforts by the applicant. The first respondent is the second respondent's Banker with whom the first respondent holds bank accounts being Ecobank Account numbers 0181197610292101 (US Dollar) 0181197610292102 (US Dollar) held in the name of the second respondent. The fourth respondent being the Sheriff for Zimbabwe, and acting on instructions from the applicant attached the second respondent's Bank accounts with the first respondent on 22 January 2019 acting in terms of the order for default judgment and writ of execution obtained against the second and third respondents under case number HC 6491/16. The attachment of the second respondent's Bank accounts with the first respondent was done in terms of Rule 343 of the High Court of Zimbabwe Rules, 1971. The attachment is still extant as it has not been challenged in Court or any other lawful forum by any of the respondents. On 22 January 2019 the first respondent indicated to the applicant that it was not going to honour the attachment of the second respondent's Bank accounts. The refusal by the first respondent to recognize and honour the execution process as carried out by the Sheriff created a real likelihood of the second respondent depleting or acting in a manner that may deplete the funds currently held in the attached abovementioned bank accounts by the first respondent on behalf of the second respondent. The applicant's fears became reasonable in that the second respondent had previously had access to

and use of funds from attached bank accounts. There is therefore a real likelihood that the second respondent may repeat such actions particularly given the fact that the first respondent does not respect the attachment process despite the fact that such process are allowed under rule 343 of the High Court Rules, 1971. Hence the granting of the provision order which is now being sought to be confirmed.

At the hearing of the matter *RG Zhuwarara* for the second respondent took a point *in limine* which was supported by the counsel for the first respondent that the outstanding debt has since been paid in full hence causa no longer subsists and the provisional order should be discharged. He referred to a letter dated the 14th of February 2019 wherein it is stated that a total of US$ 180 085.35 had been paid which is broken down as follows-

- US$146 865.86 (the balance between the judgment debt of US$161 762.00 and US$14 896.14, which was recovered through a garnish order at ZIFA Steward Bank Account).
- US$ 11 118.22 (the balance according to the Sheriff after deducting execution costs)
- US$22 101.27 (the interest on the judgment debt).

For this contention Mr *RG Zhuwarara* for second respondent and *Mr Bhebhe* for the first respondent relied on the case of *Ramwide Investments (Private) Limited* v *Rondebuild Zimbabwe (Private) Limited and Messenger of Court for Matabeleland North Province and William Makusha* HH-444-16 where it was held that once debt has been paid in full causa falls away and there is no need to confirm a provisional order.

The point *in limine* was opposed by Mr *Mahuni* the counsel for the applicant who submitted that the letter referred above is misleading in that the judgment debt to be paid of US$161 762.00 was in United States dollars but the payments made by the respondents were not enough because the respondents paid in Bond notes or RTGS$. He submitted that full amount was not paid. This position is confirmed by letter dated 18th February 2019 which states among other things that-

> *"*We further confirm that the Sheriff has since paid part of the payments made by your client to our account and we anticipate the balance will be remitted in due course.
>
> Our client does not believe that it got value of the debt owed to it by the Zimbabwe Football Association for the following reasons*:*
>
> (i) The debt was incurred before the advent of the bond note and or the obtaining RTGs balances.
>
> (ii) The Sheriff of Zimbabwe was instructed to attach foreign currency accounts balances with Ecobank which had sufficient money to expunge the debt owed to our client in hard currency.

(iii) The collusion between the Ecobank and ZIFA in which the bank allowed ZIFA to access funds that were placed under judicial attachment and in the process obtaining a due court process has consequently caused loss in value to our client.

(iv) Our client is reliably informed that the Ecobank allowed ZIFA access to the foreign currency balance to which they went on the black market and funded the RTGs/Bond account thereby attempting to satisfy the debt.

(v) Our client's position is that the amount paid does not equal the actual value in United States dollars as shall be proved in a court process to be filled soon against Ecobank and ZIFA.

(vi) Our client has since made a police report against the criminal conduct of Echobank and ZIFA under RRB 3890119 and the matter was reported at Borrowdale Police Station.

(vii) Our client will therefore prosecute the final order under case number HC 725/19 so that a determination is made on whether or not there was compliance with the notice of seizure and attachment. If there was no compliance then the bank would have been obliged to transfer the attached funds (in foreign currency) as at the 24th January 2019. Our client would not have therefore suffered prejudice in the circumstances.

In light of the above, it is our instruction that the writ of execution remain in force pending the finalization of this matter. A determination of the value of the funds remitted will naturally be made and the balance if any will be demanded from Ecobank and ZIFA…."

Mr *Mahuni* therefore submitted that though some part payment was made, the debt was not paid in full and the causa remains because the debt was obtained in 2016 in United States Dollars before the advent of the Bond notes. He said the argument proffered by the second respondent is based on Statutory Instrument 33 of 2019. He said this cannot stand because the applicant did not receive the value in United States Dollars as per court order. See S.I. 6 of 2019 and Tinos Muzeya (in his capacity as father and guardian of minor child *Tapiwa Melissa Tasiyana)* v *Donna Jayne Marais and AIG Zimbabwe Limited (formerly Unity Insurance Co. Ltd* HH-80-2004. He said the United States dollar is not equal to the Bond note hence the point *in limine* should be dismissed. For the latest position he relied on the decision by this court in the case of *Zambezi Gas Zimbabwe (Private) Limited* v *N.R Barber (Private) Limited and The Sheriff for Zimbabwe* HH-428-19.

What is clear from the submissions is that indeed the judgment debt was granted in 2016 in United States dollars. A part payment was made either in Bond Notes or the RTGs. The second respondent must have relied either on S .I. 33 of 2019 or before that s 44A of the Reserve Bank Act [*Chapter 22.15*]. It is therefore not clear which rate was used by the second respondent in making the payment. Certainly the second respondent did not pay the debt in United States dollars as per court order. In my view I agree with the counsel for the applicant as amplified in the letter

dated 18th February that the full debt may not have been paid. The cause still stands and I dismiss the point *in limine*.

AD MERITS

The matter before the court relates to the confirmation or discharge of the Provisional order granted by this court on 12 February 2019. The applicant under case number HC 6491/16 obtained an order against the second respondent and third respondent for payment of US$161 762.00. The fourth respondent attached the bank accounts belonging to the second respondent held with the first respondent, the bank. The accounts are specifically mentioned in the notice of seizure dated 22nd January 2019. The fourth respondent indicated that-

> "Bank accounts 0181197102920101 and 018119710292102 (FCA) Ecobank Sam Levy were placed under judicial attachment in the presence of Mr W. Mehlo Corporate Security who refused to furnish us with the balance."

The sole issue for determination is the validity of the attachment of the second respondent's bank accounts held with the first respondent bank.

The first and second respondent's views are that the Sheriff cannot validly attach money in the bank account of its customer without a garnishee order. They submitted that once the money is deposited in the customer's account the money ceases to be the customer's money but it becomes' the bank's money. The relationship between the bank and the customer is that of Debtor and Creditor. It places bank as a debtor and the customer has a right to be paid on demand. See *Deputy Sheriff Harare* v *Metbank Zimbabwe and Ecobank Zimbabwe Limited* HH-230-13 at pages 6-7 of the cyclostyled judgment and *Standard Chartered Bank Zimbabwe Limited* v *China Shougang* SC 49/2013 at page 3.

The applicant's view is that the Sheriff as the officer of the court is responsible for execution of all court orders subject to the applicable rules. Hence the Sheriff is empowered to attach funds in the account of a customer. The applicant further asserted that a debtor's right to bank accounts held with a bank are liable to be attached, the reason being that such rights constitute incorporeal property. Incorporeal property is property that is intangible. The rights of a banking customer to banking accounts are incorporeal property.

For the above proposition in *Meikles Limited* v *Widefree (Private) Limited Investments t/a Core Solutions and 3 Ors* HH-517-18 the Court accepted that rights to money in bank accounts to

constitute incorporeal property liable to be attached without the need for a garnishee order. It was stated in that matter that:

> "There is no need for the judgment creditor to apply for a garnishee order prior to attachment of rights to money in a bank account. The rights to money in a banking account constitutes incorporeal property. See *Omerod* v *Deputy Sheriff, Durban* 1965 (4) SA 670 (D); *Simpson* v *Standard Bank of South Africa Ltd* 1966 (1) SA 590 (W) at 591G-H. That being the case, no prior application to court is necessary to validate the attachment of such rights. The notice of seizure and attachment shows that what has been placed under attachment is the bank account. The account number is stated in the notice of attachment. The challenge to the attachment of the bank account must therefore fail."

In the present case the attachment of the accounts was done in terms of r 343 of the High Court Rules, 1971 which allows attachment of incorporeal rights without the need for a garnish order.

The rule says-

"**343. Attachment of incorporeal property**

(1) If incorporeal property, whether movable or immovable, is available for attachment, it may be attached in the manner hereunder provided without the necessity of a prior application to court:

Provided that a debt due or accruing due for salary or wages shall not be so attached."

In my view there is no argument that the procedure for attachment as per rule 343 was not followed. Judicial attachment has not been set aside and is still extant. If indeed the attached accounts and or the money in the said accounts did not belong to ZIFA but to the bank, then ordinarily and in terms of the law then interpleader Summons should have been issued. What we have is that the first and second respondents are working in cahoots to defeat the law. The actions of the fourth respondent are therefore legal and the first respondent must simply comply with the court order. The provisional order therefore ought to be confirmed.

However, I have observed that indeed some money has been paid albeit not in United States dollars. The receipt of that money has been acknowledged and not returned and probably has been used. I further observed that in HC 8249/17 and HC 6491/16 ZIFA is a party. What ought to be done simply is to work out the balance of the money payable using the interbank rate of exchange and the fourth respondent must then execute the amounts in the two attached accounts to the tune of the amount found to be still outstanding if any?

IT IS ORDERED THAT

1. The actions of the 4th Respondent in attaching the 2nd Respondent's accounts with the 1st Respondent being incorporeal property was properly attached by the 4th Respondent without the need for a garnishee order.
2. The 1st Respondent is ordered to take all necessary steps to allow the 4th Respondent to sell the 2nd Respondent's rights to the money in the attached account being Ecobank Account numbers 0181197610292101 (US Dollar Account) 0181197610292102 (US Dollar Accounts) held in the name of the 2nd Respondent.
3. The 4th Respondent in selling the 2nd Respondent's rights to the money in the attached account being Ecobank Account numbers 0181197610292101 (US Dollar Account) 0181197610292102 (US Dollar Account) must use the prevailing interbank rate of exchange.
4. The 1st and 2nd Respondents shall pay costs of the application on a legal practitioner and client scale.

Mahuni Gidiri Law Chamber, applicant's legal practitioners
Kantor & Immerman, 1st respondent's legal practitioners
Wintertons, 2nd respondent's legal practitioners
Sheriff for Zimbabwe, 4th respondent