

THE RESERVE BANK OF ZIMBABWE
versus
FARMTEC SPARES & IMPLEMENTS (PVT) LTD
and
THE SHERIFF
and
THE REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
UCHENA J
HARARE 6, 27 February, 27, 30 June, 7 July and 5 August 2015

Opposed Application

L. Uriri, for the applicant
D. Kanokanga, for the respondent.

UCHENA J: The applicant is the Reserve Bank of Zimbabwe. It applied to this court, for the cancellation of caveats registered against its properties by the respondent Farmtec Spares & Implements at the instance of the Sheriff the second respondent in the process of executing a writ of execution against the applicant. A judgment had been granted against the applicant by this court. The existence of a debt by the applicant to the first respondent is therefore not in dispute. The third respondent is the Registrar of Deeds who is being sued in his official Capacity as the officer responsible for the registration of title and caveats. The second and third respondents did not file any papers in these proceedings leaving the contest between the applicant and the 1st respondent.

The following facts are common cause;

1. The parties first appeared before me on 6 February 2015 during which appearance Mr *Uriri* made oral submissions for condonation and the upliftment of the bar for applicant's failure to file heads of arguments within the time prescribed by the rules. Mr Kaniokanga in response submitted that a written application was necessary. Mr *Uriri* agreed leading to the postponement of the hearing of the application pending the written application for condonation.
2. A written application for condonation and upliftment of the bar was filed under HC 1597/15, and was placed before me for determination. I heard that application on 30

June and postponed it, for my decision to the 7th of July 2015, when I granted the application for condonation and indicated that my reasons for judgment will follow. The reasons for judgment in HC 1597/15 will be delivered in a separate judgment.

3. The Respondent sued the applicant under HC4787/09, and obtained an order in its favour, on 9 December 2009. It thereafter caused a writ to be issued against the applicant.
4. During the execution of the writ, the Sheriff who is the 2nd respondent registered caveats against the applicant's properties on 21 January 2010.
5. The President through his Presidential Powers (Temporary Measures), gazetted S. I 115/10, which amended the Reserve Bank Act (Chapter22;15), and provided as follows;

“These regulations apply to **proceedings** against the Reserve Bank of Zimbabwe that are pending on the date of commencement of these regulations”.

The date of commencement was 18 June 2010. Statutory Instrument 115/10 lapsed on the expiration of 6 months from the date it was gazetted.”

6. Thereafter the Reserve Bank Act was amended by the General Laws Amendment Act 5/2011 by the insertion of section 63B.
7. The applicant then made this application seeking an order for upliftment of the caveats.
8. The first respondent has not to this date, despite the caveats pursued the execution of its writ of execution.

The issue which calls for determination is the interpretation of section 63B of the Reserve Bank Act as read with provisions of the State Liabilities Act [*Chapter 22;13*] which provides for the execution of judgments against the State which are now applicable to the applicant.

Section 63B provides as follows;

“The State Liabilities Act [*Chapter 22:13*] applies with necessary changes to legal proceedings against the Bank, including the substitution of references therein to a Minister by references to the Governor.

(2) The amendment made by subsection (1) shall apply to proceedings against the Reserve Bank of Zimbabwe that were pending on the 18th June, 2010”

It should be read together with ss 5 and 6 of the State Liabilities Act which provides as follows;

5 (1) In subsection (3)—

“judgment debtor” means a person who, under any order of any court, is liable to pay any money to any other person, and “judgment creditor” shall be construed accordingly.

- (2) Subject to this section, no execution or attachment or process in the nature thereof shall be issued against the defendant or respondent in any action or proceedings referred to in section *two* or against any property of the State, but the nominal defendant or respondent may cause to be paid out of the Consolidated Revenue Fund such sum of money as may, by a judgment or order of the court, be awarded to the plaintiff, the applicant or the petitioner, as the case may be.
- (3) Where any money is payable by the State to a judgment debtor and the judgment creditor would, if the money so payable were money payable by a private person, be entitled to obtain from any court an order, known as a garnishee order, for the attachment of the money, such court may, subject to any other enactment and in accordance with any rules of court, make a garnishee order restraining the judgment debtor from receiving the money and directing payment thereof to the judgment creditor or any other person specified in the order.

6 (1) Subject to this Act, no legal proceedings in respect of any claim for—

- (a) money, whether arising out of contract, delict or otherwise; or
 - (b) the delivery or release of any goods; and whether or not joined with or made as an alternative to any other claim, shall be instituted against—
 - (i) the State; or
 - (ii) the President, a Vice-President or any Minister or Deputy Minister in his official capacity; or
 - (iii) any officer or employee of the State in his official capacity; unless notice in writing of the intention to bring the claim has been served in accordance with subsection (2) at least sixty days before the institution of the proceedings.
- (2) A notice referred to in subsection (1)—
- (a) shall be given to each person upon whom the process relating to the claim is required to be served; and
 - (b) shall set out the grounds of the claim; and
 - (c) where the claim arises out of goods sold and delivered or services rendered, shall specify the date and place of the sale or rendering of the services and shall have attached copies of any relevant invoice and requisition, where available; and
 - (d) where the claim is against or in respect of an act or omission of any officer or employee of the State, shall specify the name and official post, rank or number and place of employment or station of the officer or employee, if known.
- (3) The court before which any proceedings referred to in subsection (1) are brought may condone any failure to comply with that subsection where the court is satisfied that there has been substantial compliance therewith or that the failure will not unduly prejudice the defendant.

- (4) For the purposes of this section, legal proceedings shall be deemed to be instituted by the service of any process, including a notice of application to court and any other document by which legal proceedings are commenced, in which the claim concerned is made”.

The legal battle was fought over the meaning of the words “legal proceedings” which appear in s 63B (1) of the Reserve Bank Act. Mr *Uriri* for the applicant submitted that the words “legal proceedings” should be given a wide meaning and, not be given a limited meaning, and thus means proceedings from the beginning of litigation to the final execution of the order granted. He submitted that in the case of *Nduna v Absa Bank Ltd & Ors* 2004 (4) SA 453 at 457 it was held that the meaning of the words “legal proceedings” should be given a wide meaning and, not be confined to action proceedings but be extended to applications. In the case of *Assistant Taxing Master v Shenker and Gross* 1953 (4) SA 281 referred to in the case of *Nduna (supra)* the words were held to include, taxation by a legal practitioner of fees, for none litigious work. Mr *Kanokanga* on the other hand submitted that the words “legal proceedings” means proceedings up to the time the court gives its judgment in legal proceedings.

I agree with the dicta in *Nduna (supra)* that the words “legal proceedings” should be given a wide interpretation and not be given a restricted interpretation. While this gives a general view and is helpful I am of the view that a purposive and contextual interpretation guided by the intention of the legislature, will expose the true meaning of these words.

Mr *Kanokanga*, further submitted that the provisions of s 63B should not affect a decision which was made before they came into effect as they do not have retrospective effect. Mr *Uriri* in response submitted that the provisions of s 63B (2) specifically provides that it applies to cases which were pending on 18 June 2010.

Interpretation of Words “Legal Proceedings”

When interpreting a statute a court must ascertain the intention of the legislature and give the words used a meaning which is consistent with the intention of the legislature. The intention of the legislature is revealed through the consideration of, various rules of interpretation, namely the literal rule, mischief rule, purposive and contextual interpretation etc. Once the intention of the legislature is clear a meaning which upholds the intention of the legislature must be given to the words used by the legislature.

In this case the legislature introduced s 63B into the Reserve Bank Act and through it

imported provisions of the State Liabilities Act into the Reserve Bank Act. Therefore the words in issue will be coloured by the provisions of the State Liabilities Act from which they borrow their effect.

Section 5 (2) is of cardinal influence to the words in issue. It prohibits execution in respect of cases which were pending on 18 June 2010. It is couched in mandatory terms. It states;

“(2) Subject to this section, no execution or attachment or process in the nature thereof shall be issued against the defendant or respondent in any action or proceedings referred to in section *two* or against any property of the State, but the nominal defendant or respondent may cause to be paid out of the Consolidated Revenue Fund such sum of money as may, by a judgment or order of the court, be awarded to the plaintiff, the applicant or the petitioner, as the case may be.”

Its effect is to from 18 June 2010 bar any form of execution against the property of the applicant leaving a debtor with the option of being paid by the Governor who according to section 63B stands in a position similar to that of a Minister for purposes of satisfying debts owed by the applicant. In view of the absolute prohibition against satisfying the applicant’s debts through execution, the literal interpretation relied on by Mr *Kanokanga* cannot prevail. Consideration must also be given to the mischief which the legislature intended to cure. The legislature obviously intended to equate the applicant to State organs which cannot be executed against because it had accrued debts which left it open to detrimental executions. This in my view is why the provisions had to first be made by way of Presidential Powers (Temporary Measures), and when enacted through the General Law Amendment Act No 5 of 2011 had to be back dated to 18 June 2010. The intention was obviously to keep closed the door that had been closed by S. I. 115 of 2010.

The literal interpretation would therefore offend against the intention of the legislature, and the mischief rule. It would also not be consistent with the purposive and contextual interpretation. It would allow execution through attachment contrary to the clear provisions of s 5 (2) of the State Liabilities Act. It seems to me that the first respondent is aware of this as it agreed to be stopped from executing. It did not pursue its writ which led to the noting of the caveats. Mr *Kanokanga* in submissions specifically said that they were not going to enforce the writ. It seems all the first respondent wants is to hold on to the caveats fully aware that it is no longer possible to sale the applicant’s property in execution.

Mr *Kanokanga* submitted that legislation should not have retrospective effect unless it specifically provides that it shall have retrospective effect. Mr *Uriri*’s response was that the

legislation in question specifically provides the date from which it has retrospective effect. He is correct. Section 63B provides that proceedings which were pending on 18 June 2010 will be affected. As already said the words “legal proceedings” must be given a meaning which does not render s 5 (2) of the State Liabilities Act redundant. A reading of s 63B together with s 5 (2) broadens the meaning of the words “legal proceedings” to include pending writs of execution.

It is common cause that the first respondent’s writ of execution which led to the registration of the caveats was pending on 18 June 2010. It is therefore no longer possible to sale the applicant’s property to satisfy the judgment granted in the first respondent’s favour.

Types of Caveats

Mr *Kanokanga* submitted that the caveats were registered before s 63B came into effect, and that when the prohibition against execution came into being the process of their registration was no longer pending. He thus submitted that the registration of a caveat is a process which stands alone distinct from the writ of execution. Mr *Uriri* in response submitted that there are two types of caveats, those registered by parties without the involvement of the Sheriff and those registered by the Sheriff as part of his execution of a writ. He submitted that caveats registered by the Sheriff are part of an execution and are not a process on their own. The facts of this case establish that the caveats were registered by the Sheriff as part of his execution of the 1st respondent’s writ against the applicant.

Once it is established that the caveats were registered by the Sheriff in the process of executing a writ, it follows that once the writ becomes unenforceable because of s 63B of the Reserve Bank Act as read with s 5 (2) of the State Liabilities Act, the caveats should also fall away.

I therefore order as follows;

1. That the 1st Respondent be and is hereby ordered to perform all acts necessary to cancel caveat 46/2010 registered, with the office of the 3rd Respondent within 7 days of this order.
2. In the event that 1st Respondent does not comply with paragraph (1), the 2nd respondent be and is hereby ordered to perform all acts necessary for the cancellation, of caveat 46/2010 on behalf of the 1st Respondent
3. The 1st Respondent shall pay the applicant’s costs of suit.

GN Mlotshwa & Company, applicant's legal practitioners
Kanokanga & Partners, 1st respondent's legal practitioners