

**NOT REPORTABLE**

**SOUTH GAUTENG HIGH COURT, JOHANNESBURG**

**CASE NO: 2009/34015**

**DATE: 22/11/2010**

In the matter between:

**THE REPUBLIC OF ZIMBABWE**

Applicant

and

**SHERIFF WYNBERG NORTH**

First Respondent

**KFW BANKENGRUPPE (formerly  
KREDITANSTALT FUR WIERDERAUFBAU)**

Second Respondent

**LOUIS KAREL FICK**

Third Respondent

**RICHARD THOMAS ETHEREDGE**

Fourth Respondent

**WILLIAM MICHAEL CAMPBELL**

Fifth Respondent

**THE PRESIDENT OF THE REPUBLIC OF  
SOUTH AFRICA**

Sixth Respondent

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**J U D G M E N T**

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**LAMONT, J:**

[1] The applicant is the owner of four immovable properties in the Western Cape and two properties in Gauteng.

[2] The second respondent caused writs to be issued seeking to attach the properties with a view to selling them to reduce the indebtedness of the applicant to it. It is common cause that the procedure adopted in the attachment was irregular and that the attachments fall to be set aside.

[3] The applicant also sought relief in the form of a declaration that the writs issued could not be executed against immovable property belonging to the applicant on the basis of the provisions of the Foreign States Immunities Act No. 87 of 1981 (*“the Act”*). Under and in terms of section 14 of that Act:

*“14. Other procedural privileges.— (1) Subject to the provisions of subsections (2) and (3) —*

- (a) relief shall not be given against a foreign state by way of interdict or order for specific performance or for the recovery of any movable or immovable property; and*
- (b) the property of a foreign state shall not be subject to any process —*
  - (i) for its attachment in order to found jurisdiction;*
  - (ii) for the enforcement of a judgment or an arbitration award; or*
  - (iii) in an action in rem, for its attachment or sale.*

*(2) Subsection (1) shall not prevent the giving of any relief or the issue of any process with the written consent of the foreign state concerned, and any such consent, which may be contained in a prior agreement, may be expressed so as to apply to a limited extent or generally, but a mere waiver of a foreign state’s immunity from the jurisdiction of the courts of the Republic shall not be regarded as a consent for the purposes of this subsection.*

*(3) Subsection (1)(b) shall not prevent the issue of any process in respect of property which is for the time being in use or intended for use for commercial purposes.”*

Under and in terms of Section 4 of the Act a commercial transaction is defined:

*“4. Commercial transactions.— (1) A foreign state shall not be immune from the jurisdiction of the courts of the Republic in proceedings relating to —*

- (a) a commercial transaction entered into by the foreign state; or*
- (b) an obligation of the foreign state which by virtue of a contract (whether a commercial transaction or not) falls to be performed wholly or partly in the Republic.*

*(2) Subsection (1) shall not apply if the parties to the dispute are foreign states or have agreed in writing that the dispute shall be justiciable by the courts of a foreign state.*

*(3) In subsection (1) ‘commercial transaction’ means —*

- (a) any contract for the supply of services or goods;*
- (b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such loan or other transaction or of any other financial obligation; and*
- (c) any other transaction or activity or a commercial, industrial, financial, professional or other similar character into which a foreign state enters or in which it engages otherwise than in the exercise of sovereign authority,*

*but does not include a contract of employment between a foreign state and an individual.”*

[4] Accordingly if the property was for the time being in use or was intended for use for commercial purposes it could be attached otherwise it could not.

[5] It was common cause that the Gauteng property was immune.

[6] The dispute hinged on whether or not the property situate in the Western Cape was attachable.

[7] Those properties consist of 53 and 55 Kuyper Street, Zonneblom, 46A Tenant Road, Kenilworth and 28 Salisbury Road, Wynberg. The Wynberg property is occupied by a South African citizen who has resided on the property since 1 July 2002 pursuant to an agreement of lease concluded during June 2002. The Kenilworth property is vacant. It was occupied by the Zimbabwe Consulate in Cape Town until that Consulate ceased operations. The properties in Zonneblom previously housed the Zimbabwe Consulate in Cape Town. The properties are currently occupied by vagrants and appear to be abandoned. From time to time in the past the house on one of the properties was let as an office and a former tenant who left the house some two years ago said it was “alright but it was not great either”.

[8] The applicant filed a Protocol Note No. 0910/2010. In that note it indicates that the Western Cape properties were currently not used as Consular functions in the following terms:

*“The Zimbabwe Consular functions in Cape Town were only temporarily suspended, and the Consulate and Diplomatic residences are currently under the administration of the Embassy in Pretoria.”*

[9] In its affidavit the applicant stated:

*“63. These immovable properties ... are utilised purely to support functions of the Government of Zimbabwe and are utilised by the applicant for purely Government purposes.*

*64. In particular the properties are used as residential properties and in fact house their Consular Offices in support of the applicant's Consular posts. They are not used or intended to be used for commercial purposes.”*

None of the properties is registered as a property which qualifies for diplomatic immunity under the Diplomatic Immunities and Privileges Act 37 of 2001. The statement in paragraph 64 supra appears to be a generalisation which must be read in conjunction with the facts set out in the Protocol Note. Although the statement is strictly speaking inaccurate in relation to the Western Cape properties there was no attempt by the applicant to mislead. The applicant in its replying affidavit stated as follows:

*“25.4 I submit that it is the intention and has always been the intention of the applicant to utilise the relevant properties for executing its Government functions.*

*25.5 To the extent that one of the properties is being leased, I submit that this was done not for commercial purposes but rather to preserve the property against vandalism pending the resumption of the applicant's consular functions in Cape Town.”*

It was further stated:

*“32. These properties were leased out simply to preserve the property and prevent it from falling into neglect as has happened with the properties situate at 53 and 55 Kuyper Street, Zonneblom which has been unfortunately illegally occupied by vagrants. The properties were for the above reasons, leased out below market price.”*

The reference made in that paragraph is to the let property referred to above.

The applicant further stated:

*“The applicant intends to use these properties [with reference to the Western Cape properties] for Government functions as soon as the resource constraints are abated and consular functions in Cape Town are resumed.”*

It appears to me that the motive for the letting of the property is irrelevant to the consideration of whether or not the property is for the time being used for commercial purposes. Commercial purposes include letting of property and receiving an income from that property. In my view accordingly the property situate at 46A Tenant Road, Kenilworth is for the time being in use for commercial purposes. It was submitted that the clause “*or intended for use*” governed the usage of the property and that no matter the current usage if it was intended for use in the future for Government purposes that the property is immune. This construction of the subsection in my view is flawed. It is apparent that the property can change its character depending upon the usage from time to time. At the current time the usage of the property is commercial and hence the property is attachable.

[10] Insofar as the remaining properties are concerned it appears to me that there is no cogent factual basis before me to disbelieve the stated intention of the applicant namely to resume use of the property itself otherwise than for commercial purposes. The second respondent has no factual basis than to gainsay the stated factual intention of the applicant. It was submitted that I

should draw an inference from the fact that the properties were vacant; that the applicant was holding the property with a view to obtaining a commercial benefit and hence that the property are being used for commercial purposes and/or that the intention expressed by the applicant gives an opinion.

[11] In my view there is an equally plausible contrary reason for the applicant to hold the property namely that suggested by it.

[12] In my view there is no dispute of fact. The factual evidence before me establishes that the remaining properties in the Western Cape are not attachable.

[13] The applicant has been substantially successful in that all the attachments are procedurally invalid and in that the bulk of the property are immune from attachment. In these circumstances I propose to award the applicant the costs of the application.

[14] I would make the following order:

- “1. *The writ of execution extends to the attachment of the immovable property owned by the applicant situate at 46A Tenant Road, Kenilworth.*
2. *The writ of execution does not extend to the authorisation of the attachment of the immovable properties of the applicant situate at 53 and 55 Kuyper Street, Zonneblom, 28 Salisbury Road, Wynberg, 179 Beryl Street, Bruma, Johannesburg, Gauteng and 48 Klip Street, Observatory, Johannesburg, Gauteng.*
3. *The attachment of all the said properties are set aside.*

4. *The second respondent is to pay the costs of the application including the costs of senior and junior counsel where employed."*

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**C G LAMONT  
JUDGE OF THE SOUTH GAUTENG  
HIGH COURT, JOHANNESBURG**

<b>Counsel for Applicant</b>	<b>:</b>	<b>Adv. P. Mtshaulana SC</b>
<b>Attorneys for Applicant</b>	<b>:</b>	<b>Mathopo Moshimane Mulangaphuma Inc</b>
<b>Counsel for Second Respondent</b>	<b>:</b>	<b>Adv. H. Epstein SC Adv. N P G Redman</b>
<b>Attorneys for Second Respondent</b>	<b>:</b>	<b>Wertheim Becker Inc.</b>
<b>Date of hearing</b>	<b>:</b>	<b>10 November 2010</b>
<b>Date of Judgment</b>	<b>:</b>	<b>22 November 2010</b>