

DISTRIBUTABLE (3)

MINISTER OF FOREIGN AFFAIRS
v
MICHAEL JENRICH
STANDARD CHARTERED BANK ZIMBABWE LIMITED
THE SHERIFF FOR ZIMBABWE

SUPREME COURT OF ZIMBABWE

PATEL JA

HARARE, 16 FEBRUARY 2016

IN CHAMBERS

L. Uriri, for the applicant

J. B. Wood, for the 1st respondent

F. Rudolph, for the 2nd respondent

PATEL JA: This is an application for condonation for the late filing of an appeal against a decision of the High Court in Case No. HC 232/15, dismissing an application for the stay of execution of a garnishee order issued in Case No. HC 9895/14 on 31 December 2014. The decision appealed against was handed down on 11 March 2015.

The applicant, the Minister of Home Affairs, filed his initial notice of appeal timeously on 16 March 2015. However, at the hearing of the matter on 24 November 2011, his counsel noted a fatal defect in the notice of appeal relative to the failure to appeal against the whole judgment of the court *a quo*. The appeal was accordingly struck off the roll by consent, with the Court indicating that the matter would be heard by a full panel of five judges as and when the matter was set down for rehearing. Thereafter, for various reasons connected with the administration of the applicant's legal practitioners, the present chamber application was only filed on 22 January 2016.

The first respondent, a former employee of the Food and Agriculture Organisation (the FAO), is opposed to the grant of condonation. The second respondent, the Standard Chartered Bank, has indicated through its counsel that it will abide by the decision of the Court.

The first issue to consider is the explanation proffered by the applicant for the delay in filing this application. The explanation given, as set out in the applicant's founding and answering affidavits, is not entirely satisfactory, particularly as to why the draft chamber application was left pending in the Attorney-General's Office for almost six weeks and then for a further ten days or more after the officer handling the matter returned from vacation leave. Be that as it may, I do not consider the length of the delay to be inordinate in light of the fact that it ran concurrently with the Christmas vacation of approximately six weeks duration.

As regards the first respondent's objection to the applicant's *locus standi* in relation to the relief that he seeks, it is clear that the draft order, insofar as it pertains to the stay of execution of the garnishee order issued by the High Court on 31 December 2014, has been overtaken by events, to wit, by the fact that the second respondent has already paid out the amount payable to the first respondent in terms of the garnishee order. The only viable relief that remains is the *declaratur* affirming the immunity of the FAO from every form of legal process and from execution. While I accept that the FAO is not a party to these proceedings, notwithstanding that it probably enjoys full legal personality and capacity to sue in municipal courts, I cannot discount the right of the host State to take up cudgels on behalf of foreign states and international organisations that are located in the host country in terms of international agreements and domestic statutory arrangements. I accordingly take the view that the applicant has sufficient legal interest and *locus standi* in the present matter.

As regards the merits of the matter, the common law and constitutional position before the advent of the new Constitution in May 2013 was fairly clear. Any treaty, convention or international agreement executed by the Government could only be binding after approval by Parliament and would not form part of the municipal law unless it was domesticated by incorporation or transformation. International custom enjoyed even less cognisance and could only be domestically applied to the extent that it was not inconsistent with statute or judicial precedent. However, the present Constitution has significantly modified this position. In terms of s 326(2) of the Constitution, the courts are enjoined to interpret legislation in a manner that is consistent with international

customary law. In similar vein, s 327(6) requires the adoption of an interpretation that is consistent with any treaty or convention that is binding on Zimbabwe.

It is common cause that the FAO Headquarters Agreement with the Government as well as the Convention on the Privileges and Immunities of Specialised Agencies of the United Nations are both binding on Zimbabwe. Both instruments embody elements of international customary norms on immunity and both confer upon the FAO complete immunity from suit, legal process and execution. This must, in my view, carry significant implications for the scope and application of the immunities that are accorded to the FAO and other similar bodies not only under the Privileges and Immunities Act [*Chapter 3:03*] and other related legislation but also under the common law.

In the final analysis, I am satisfied that the applicant has a strong case to argue on appeal, even if his prospects of success are not entirely unassailable. Moreover, I take heed of the fact that the outcome of the appeal is a matter of significant importance not only for the Specialised Agencies of the United Nations but also from the perspective of developing our jurisprudence on the subject under consideration. I also note that at the aborted hearing of this matter on 24 November 2015 this Court had provisionally agreed to it being ventilated before a full bench of five judges.

As for costs, the applicant has agreed to tender the costs of this application on a party to party scale. The application is accordingly granted in terms of the draft order as amended as follows:

1. The delay by the applicant in filing his notice of appeal in time be and is hereby condoned.
2. The applicant be and is hereby granted an extension of time in which to appeal.
3. The applicant shall file his notice of appeal within 5 days from the date of this order.
4. The applicant shall bear the costs of this application on the ordinary scale.

Civil Division of the Attorney-General's Office, applicant's legal practitioners

Venturas & Samukange, 1st respondent's legal practitioners

Scanlen & Holderness, 2nd respondent's legal practitioners