BT (PVT) LTD
versus
ZIMBABWE REVENUE AUTHORITY

HIGH COURT OF ZIMBABWE
KUDYA J
HARARE, 22 July and 12 November 2014

Appeal Hearing

Adv. *AP De Bourbon*, for the appellant
Adv. *T. Magwaliba*, for the respondent

KUDYA J: This is an appeal brought in the High Court in terms of s 65(1) of the Income Tax Act [*Cap 23:06*] against the decision of the Commissioner-General disallowing claims by the appellant for the deduction of doubtful debts for the tax year ending 31 December 2009 and bad debts for the year ending 31 December 2010.

The appellant company is a producer of gold bullion from its underground mining operations in Zimbabwe. The respondent is the Zimbabwe Revenue Authority, a corporate body created in terms of s 3 of the Revenue Authority Act [*Cap 23:11*] charged with the responsibility of collecting revenue for the general good and wellbeing of the Republic of Zimbabwe.

It is important at the outset to emphasize that all appeals in tax matters brought in the High Court or Special Court against the decisions of the Commissioner, whether on substantive issues or against penalties are in the broad rather than in the narrow sense. This principle is unaffected by the choice of forum exercised in terms of s 65 (1) of the Income Tax Act. After all, these two courts hold concurrent jurisdiction in income tax appeal cases. The nature of appeals to these courts was restated in a judgment delivered in the Supreme Court of Appeal of South Africa on 12 June 2014 by PONNAN JA in *Commissioner for the South African Revenue Services* v *Pretoria East Motors (Pty) Ltd* [2014] ZASCA 91 at para [2]. He said:

> "It is important at the outset to emphasise, as Curlewis JA did in *Bailey* v *Commissioner for Inland Revenue* 1933 AD 204 at 220, that the Tax Court is not a court of appeal in the ordinary sense: it is a court of revision. That means, as

Centlivres JA observed in *Rand Ropes (Pty) Ltd v Commissioner for Inland Revenue* 1944 AD 142 at 150:

> 'That the Legislature intended that there should be a rehearing of the whole matter by the Special Court and that that Court could substitute its own decision for that of the Commissioner'."

These sentiments apply with equal force and are part of our law in Zimbabwe. In *Sommer Ranching (Pvt) Ltd* v *Commissioner of Taxes* 1999 (1) ZLR 438 (SC) at 443A-B GUBBAY CJ emphasised that:

> "Presently, it is well settled that in an appeal against a decision where the Commissioner exercised a discretion, the Special Court is called upon to exercise its own original discretion. Nor is it restricted to the evidence which the Commissioner had before him. The appeal to the Special Court is not only a rehearing but can involve the leading of evidence and the submission of facts and arguments of which the Commissioner was unaware. See *Commissioner for Inland Revenue* v *da Costa* 47 SATC 87 (A) at 95; 1985 (3) SA 768 (A) at 775B-G; *K v CoT* 1993 (1) ZLR 142 (S) at 147B-F; 55 SATC 276 (ZS) at 281."

The appeal before me therefore constitutes a rehearing of the matter and not a mere review of the correctness of the Commissioner's determination. I am required to exercise my own independent and unfettered discretion unaffected by imputed wrong motives or errors of fact and law of the Commissioner.

The appellant called the evidence of one of its directors, a chartered accountant based in South Africa, who is the chairman of its audit committee and a vice-president finance and administration and chief financial officer of its international holding company that is registered in Canada and listed on the Toronto Stock Exchange. In addition it produced a 109 page bundle of documents, exh 1. The respondent did not call any evidence. It relied on the documents produced by the parties during their interactions.

I must at the outset state that the chartered accountant gave his evidence very well. His testimony was not seriously challenged in cross examination. It dovetailed with the contents of the correspondence and documents exchanged between the parties that were filed of record. I found him a credible and truthful witness in all material respects.

The facts are basically common cause. What is in dispute is the import of those facts. The production of and trading in gold in Zimbabwe is strictly controlled by and regulated under the Gold Trade Act [*Cap 21:03*]. The appellant burst onto the local mining scene in 2006 through an offshore transaction involving two Toronto listed companies. It became one of the largest three producers of gold in the country and had invested between US$ 12-15 million by 31 December 2008. In 2008 the appellant produced between 1 000 and 15 000 ounces of gold monthly. At various dates during the 2008 calendar year, the appellant sold gold bullion to Fidelity Printers and Refiners (Pvt) Ltd a subsidiary wholly owned by the Reserve Bank of Zimbabwe[the central bank]. The law, contract and practice obliged the central bank to pay appellant for all the gold bullion delivered to Fidelity.

The chartered accountant detailed the two tier system for payment of gold deliveries in existence before the onset of the multi-currency monetary regime in the country. One component of the payment was in local currency while the other was in United States dollars. Payment in local currency was on delivery and through bank transfer based on an implied exchange rate set unilaterally by the central bank. Payment in foreign currency was slow and lethargic and was done through transfer into foreign currency denominated bank accounts of the appellant usually after a monetary policy statement. The foreign currency component was set against the price of gold on the London afternoon fix. The central bank always unilaterally fixed the gold support price from time to time in local currency. The appellant was not paid the foreign currency component for all the deliveries it made in 2008. It closed the mining operations in October 2008 and resumed in April 2009 after it was issued with a gold licence that allowed it to control the sale of bullion and collection of the proceeds.

The central bank would without fail always analyse the gold sector in its bi-annual monetary policy statements. In one such statement in January 2009 (pp 1-2 of the appellant's bundle of documents) the governor of the central bank unilaterally converted all outstanding amounts to the gold sector into "Special Goldbacked Foreign Exchange Bonds" with a tenor of 12 months. The other terms attaching to the bonds were interest of 8 % per annum on maturity applied in retrospect from the date each amount fell due, tradable to any interested counterparty locally, regionally and internationally at the agreed time-to-maturity discounts. The central bank unequivocally undertook to honour the full principal plus interest on maturity to the holders of the bonds.

The appellant saw the conversion for the first time in the monetary policy statement. As at 31 January 2009 the central bank owed the appellant US$2 794 318.18 for bullion deliveries. In a letter, annexure C1 to the respondent's case, dated 23 February 2009, the central bank sought written confirmation of the total debt inclusive of interest, owing to the appellant in the sum of US$ 2 945 388.32, "before the Reserve Bank issues you with one-year bonds for the amount due" and indication of the preferred denomination of the gold bonds. The appellant responded to the letter on 24 June 2009, annexure C2. It confirmed the amount inclusive of interest owed and indicated its preferred denominations for the gold bonds being twenty-five US$ 100 000, twenty-one US$ 20 000 and one US$ 25 388.32 bonds.

The gold bonds were duly issued in the preferred denominations (p 48 of the appellant's bundle). Each was depicted as a Reserve Bank of Zimbabwe Gold Backed Tradable Bond. On the face of it was an issue and redemption date, the denomination, the tenor, annual interest, the promise to honour on presentation and the signatures of the governor and deputy governor. Each stated that "the Reserve Bank of Zimbabwe promises to pay bearer of this bond the sum of (amount in United States dollars) plus interest at the Reserve Bank of Zimbabwe Harare on the (date) against presentation of this Bond." Each bond bore the date of issue of 1 February 2009 and due date of 1 February 2010.

The appellant investigated the marketability of the bonds on the local market. It discovered that one member of the gold sector that attempted to trade the gold bonds did so at a whooping discount of between 40% and 50% of their face value. The gold bonds were received with scepticism and perceived to be high-risk paper susceptible to non-payment. The local market was highly illiquid and inactive. The appellant took the conscious decision that it was not in the best interest of the company to trade the gold bonds at such huge discounts based on its status and responsibilities as a foreign listed company. There was no appetite for the gold bonds in the local, regional and international markets. There were no liquid and serious buyers. Under cross examination he clarified that the appellant was not prepared to sell good gold for a song and was happy to wait for the payment of the face value.

The central bank did not redeem the gold bonds on due date. In yet another monetary policy statement dated 29 January 2010 (p.3 to 4 of the appellant's bundle) made without consultation with or agreement of the appellant, the central bank unilaterally rolled over the bonds ostensibly for six months but did not issue out replacement bonds. The sole witness who testified signed the financial statement ending 31 December 2009 on p 81 of the appellant's bundle. Note 22 in that financial statement recorded the source and purpose of the sixth month rollover. The monetary policy statement revealed that the debt owed to gold producers was actually a central government debt and that the rollover was necessitated by the need for the central bank and central government to agree on best initiatives to redeem the outstanding debts. The central bank only issued out replacement bonds on 1 August 2010 due on 1 August 2011 (p 49 of appellant's bundle and C3 of the respondent's case). The gold bonds have never been redeemed and as at the date of appeal were still outstanding.

The chartered accountant testified that these rollovers were replaced without any further announcements as each period of bonds passed without payment. Pages 50 to 52 of the appellant's bundle highlights a sample of further unilateral roll overs from 1 August 2011 to 1 August 2012, and then 1 August 2012 to 2 August 2013 and the last roll over before the commencement of the appeal hearing from 2 August 2013 to 4 August 2014.

The appellant averred and respondent sought to dispute that the capital debt denominated in United States dollars was brought to account as income in local currency in the financial statement ending 31 December 2008. The 2008 financial statements were not produced. The sole witness for the appellant testified that the gold sales were reflected as income even though payment had not yet been received. At the time, the appellant's accounts were required by law to be reflected in Zimbabwe dollars and not in United States dollars. Local currency was the transactional currency of account. In his case the respondent at first challenged the inclusion of the income into the 2008 accounts and then conceded that it was included. I accepted the chartered accountant's testimony in that respect.

In the financial statement for the year ended 31 December 2009, approved by its directors on 17 May 2010, the appellant made a provision for a trade receivable of part of the outstanding money from the central bank in the sum of US$2 391 147 (note 7 of the appellant's financial statement of 31 December 2009 on p 76 of appellant's bundle of documents and annexure 4 of respondent's case). The decision was predicated upon the failure by the central bank to redeem the debt over a period of up to two years for the amount and the likelihood of payment ever eventuating. Again, the appellant was obliged to comply with International Financial Reporting Standards that governed the operations of its parent company to report on whether the debt was likely to be paid in that financial year. Failure to provide for the doubtful debt was certain to result in the independent auditors declining to certify the accounts as fair and true.

Again in its financial statements for the year ending 31 December 2010 (p 82-109 of the appellant's bundle), signed by the sole witness and another director on 31 March 2011 (p 90 of the appellant's bundle) the appellant wrote off the remaining portion in the sum of US$1 032 380 as bad debts. It was written off as a bad debt because the amount was potentially uncollectable. At p 101, note 3.5 the debt, amounting to US$ 3 419 22 (2009 US$ 3 162 693) converted to gold bonds was written off. Three reasons were advanced. These were the financial dire straits the central bank was enmeshed in resulting in staff retrenchments; the gloomy outcome of discussions with Treasury (central government) to provide the central bank with sufficient financial support and failure by the central bank to honour the gold bonds to other gold miners despite lobbying through the Zimbabwe Chamber of Mines.

The appellant was impotent to enforce payment. It did not see value in pursuing litigation. The appellant instead always presented the bonds for redemption on the due dates. The witness was not aware of any creditor who had sued the central bank and satisfied the judgment. The governor acknowledged the debt and hoped central government would assume the debt. While the appellant could sue for recovery, it took the practical view that any judgment obtained would be a *brutum fulmen* in the face of s 63B of the Reserve Bank Act [*Cap 22:15*], which precluded the attachment and execution of the central bank's assets to satisfy such judgment. It adopted a purely accounting solution to the debt by making provision for the doubtful debt in terms of s 15 (2) (g) (ii) of the Income Tax Act, before it was repealed, for the year ending 31 December 2009 and writing off the balance as a bad debt in terms of s 15 (2) (g) of the same Act for the year ending 31 December 2010.

The chartered accountant stated that the bonds were considered security for payment and not an investment. The interest that accrued to 31 December 2010 was written off. It still holds the bonds and once honoured will be added back to income and the necessary tax paid.

In the income tax return for year ending 31 December 2009 the appellant claimed an allowance for doubtful debt in terms of s 15 (2) (g) (ii) of the Income Tax Act in the sum of US$ 2 391 147 due but not paid by the Reserve Bank of Zimbabwe and in the return for period to 31 December 2010 it claimed under 15 (2) (g) a deduction for bad debt in the sum of US$ 3 423 527.

The respondent audited the appellant and noted it made a provision for doubtful debts for US$2 391 147 in 2009 that were subsequently written off as bad debts in 2010 (annexure 4 and 5 of the Commissioner's case). In its 2010 financial statements under note 14 the appellant did not add back to income the doubtful debts for 2009. The respondent disallowed the claim for doubtful debt for 2009 of US$2 391 147 and bad debts for 2010 of US$1 032 380. Additional tax in terms of s 46 (1) (c) of the Act of 100% was initially charged on both claims on 16 November 2011 (p 7 of appellant's bundle), which was first reduced on 2 April 2012 to 40% (p 27-28, and 34-35 of appellant's bundle) and finally reduced to 10% on 25 October 2012 (p 42-46 of the bundle). The appellant noted its objection in full against assessments on 20 July 2012. The objections were disallowed but the additional tax was reduced from 40% to 10% on 25 October 2012. The amended assessments for both years were issued on 5 November 2012 (p 44-46 of the bundle). The appellant appealed to this court against the respondent's decision on 21 December 2012. It was common cause that pending the determination of the appeal the appellant paid to the respondent in four equal installments [on 27 December 2012, 31 January, 28 February and 28 March 2013] the additional principal amount of the amended assessments of income tax together with interest thereon in the sum of US$687 106. The respondent, however, suspended the payment of penalties pending the determination of this appeal.

The respondent treated the bonds in the hands of the appellant as investment and not debt. It took the view, firstly, that the debt was converted into an investment by the Special Tradable Gold-backed Foreign Exchange Bonds and secondly that the acceptance of the conversion constituted a full repayment of the debt. It determined that such payment precluded the appellant from invoking the provisions of s 15 (2) (g) of the Act.

The issue for determination is whether or not the debt due to the appellant by the central bank was correctly claimed as a doubtful debt in the 2009 year of assessment and the balance as a bad debt in the 2010 year of assessment in terms of s 15 (2) (g) (ii) and 15 (2) (g), respectively.

Mr *de Bourbon* prefaced his submissions by contending that the central bank lacked the legal authority to issue bonds. He submitted that in the absence of such power, the bonds issued by the central bank had no legal standing and were unlawful and void. He forcefully argued that such invalid bonds could not and did not preclude the appellant from claiming the debt as a doubtful debt in one year and the balance as a bad debt, in the subsequent year. It is correct that when the monetary policy statement was announced in January 2009, s 4 (2) (a) of the State Loans and Guarantees Act [*Cap 22:13*] reposed the power to issue bonds in the State acting through the Minister of Finance. That Act was repealed on 2 April 2010 by s 93 of the Public Finance Management Act [*Cap 22: 19*]. In terms of s 54(3) of the new Act, the power to issue bonds remained with the Minister of Finance. The two Acts did not clothe the central bank with power to issue bonds.

The central bank is a creature of statute. It is trite that it can only exercise such power and authority conferred by statute. The powers and functions of the central bank are set out in s 6 and 7 of the Reserve Bank Act [*Cap 22:15*]. That Act came into force on 13 August 1999. Mr *de Bourbon* contended, without any opposition from Mr *Magwaliba*, that it was impossible to find any provision in the Act which would entitle the central bank to meet its financial obligations by issuing bonds. I have scoured through the Reserve Bank Act, the

Bills of Exchange Act [*Cap 14:02*] and the Banking Act [*Cap 24:20*] in search of the powers of the central bank. The corporate status of the central bank is set out in s 4 of the Reserve Bank Act which reads:

> "**4 Continuation of former Reserve Bank.**
>
> The Reserve Bank of Zimbabwe established by the repealed Act shall continue in existence as a body corporate capable of suing and being sued in its own name and, subject to this Act, of performing all acts that bodies corporate may by law perform."

The section preserves the continuity of the central bank established under the repealed Reserve Bank Act [*Cap 22:10*]. The wide common law powers the central bank possessed as a corporate body were curtailed and made subject to the provisions of the Act. Indeed, s 7 which together with s 6 sets out the powers and functions of the central bank makes the exercise of its powers subject to the Act. The only reference to "bills and notes and other obligations issued" by the central bank is made in s 7 (1) (d) (iii) of the Act. It reads:

> "**7 Powers of Bank**
> (1) Subject to this Act, in the exercise of its functions the Bank may do all or any of the following—
> (*d*) subject to section *thirteen*, buy, sell, discount or re-discount—
> (iii) bills, notes and other obligations issued by itself;"

The issuance of bills, notes and other obligations by the central bank are subordinated to the provisions of s 13 of the Act and limited to the discounting of bills of exchange and promissory notes for banking institutions that hold an account with the central bank. While s 13 (1) (b) of the Reserve Bank Act allows the central bank to discount bills, notes and other debt securities issued by it, these must again be in respect of a banking institution that holds an account with it. The Bills of Exchange Act deals with the law relating to bills of exchange, cheques and promissory notes. These are defined in s 3(1), 72 and 89(1) of that Act.

In his submissions, Mr *de Bourbon* correctly submitted that that the bonds issued in this matter by the central bank were little different from a bill of exchange or a promissory note or even a post-dated cheque to pay an outstanding debt. I would hold that they fit the mould of these financial instruments. While it appears from the architectural design of the Act that any person is qualified to issue them, it seems to me that the central bank is precluded from doing so by its own constitutive Act. It was common cause that the appellant was not a banking institution. The central bank was not empowered to issue bills, notes or other debt securities to the appellant.

What, then, is the effect of want of authority in these circumstances? Mr *de Bourbon* submitted that lack of authority invalidated the bonds *ab initio* and every transaction founded on them was incurably bad. He relied on a long line of pedigree precedent based on *MacFoy* v *United Africa co Ltd* [1961] 3 All ER 1169 (PC) at 1172 such as *Nicolle* v *Minister of Lands & Anor* 2003 (1) ZLR 280 (HC) at 285; *Bubye Minerals (Pvt) Ltd* v *Minister of Mines &* Ors 2011 (2) ZLR 384 (SC) at 393, *Mudzumwe & Ors* v *MDC & Anor* 2012 (1) ZLR 490 (HC) at 493 and *Dube* v *Maphepha Syndicate & Ors* 2009 (1) ZLR 29 (HC) at 31E.

Mr *Magwaliba* submitted that such an unlawful act had valid legal consequences until set aside by a court of competent jurisdiction. He relied on the Supreme Court of Appeal of South Africa case of *Executive Council for Health Province of the Eastern Cape NO & the Superintendent-General of the Department of Health Eastern Cape Province* v *Kirland Investments (Pty) Ltd t/a Eye and Laser Institute* 2013 ZASCA 58 delivered on 16 May 2013. The reasoning of the Supreme Court of Appeal of South Africa is found in paras 19 to 22 of the judgment of PLASKET AJA, who wrote the unanimous decision for the Court.

The facts were that the respondent applied to the Superintendent-General to set up two private hospitals in the Eastern Cape. The Superintendent-General set up a committee of experts to make a recommendation to him. The committee recommended that the applications be declined. The Superintendent-General wrote a letter to the respondent refusing the application. He was involved in a road traffic accident before he had signed and dispatched the letter. He was hospitalised for 6 weeks. The letter was never dispatched to the respondent. An acting incumbent who took over office had access to all the contents of the respondent's file. He was prevailed upon by the Provincial Minister to whom he reported to consent to the applications in the face of the refusal. He accordingly granted the application. When the substantive incumbent resumed duty, he withdrew the approval. An internal appeal to a new Provincial Minister by the respondent against the withdrawal failed. On appeal, the Provincial Minister and Superintendent–General contended that because the decisions of the acting holder of office were an invalid and unlawful administrative action, they could simply be ignored by the administrative authority that took them.

It was held in para 20 that the argument ran contrary to authority of the Court found in such cases as *Oudekraal Estates (Pty) Ltd* v *City of Cape Town & Others* 2004 (6) SA 222 (SCA) para 26, *Queenstown Girls High School* v *MEC Department of Education, Eastern Cape & Ors* 2009 (5) SA 183 (Ck) para 20, *Norgold Investments (Pty) Ltd* v *Minister of*

Minerals and Energy, RSA & Ors [2011] 3 All SA 610 paras 46-47]. In the *Oudekraal* case, supra at para 26 HOWIE P and NUGENT JA stated that:

> "Until the Administrator's approval (and thus all the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked. The proper functioning of a modern State would be considerably compromised if all administrative acts could be given effect to or ignored depending on the view the subject takes of the validity of the act in question. No doubt it is for that reason that our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside."

In para 21 PLASKETT AJA confirmed these views thus:

> "[21] There is no suggestion in the above passage that the obviousness of the unlawfulness is a factor of any relevance. Indeed Hoexter understands *Oudekraal* to mean-and she is in my view correct-that 'even an obvious illegality cannot simply be ignored'. One can easily understand why this is so. It would be intolerable and lead to great uncertainty if an administrator could simply ignore a decision he or she had taken because he or she took the subsequent view that the decision was invalid whether rightly or wrongly, whether for noble or ignoble reasons. The detriment that would be caused to the person in whose favour the initial decision had been granted is obvious. Baxter says the following [Administrative Law (1984) at 372-Hoexter note 6 at 277]:
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> "Indeed, effective daily administration is inconceivable without the continuous exercise and re-exercise of statutory powers and the reversal of decisions previously made. On the other hand, where the interests of private individuals are affected we are entitled to rely upon decisions of public authorities and intolerable uncertainty would result if these could be reversed at any moment. Thus when an administrative official has made a decision which bears upon an individual's interests, it is said that the decision-maker has discharged his office or is *functus officio."*

He held in para 22 that the decisions could not be treated as nullities without formal revocation by a court of law on review. He said:

> "I conclude that B could not validly take the view that because the decisions taken by D were invalid, he could treat them as nullities and formally revoke them. For as long as the decisions taken by D had not been set aside on review they existed in fact and had legal consequences."

The ratio of the decisions appears to be that public authorities cannot invoke the doctrine of invalidity of their own actions for their own benefit; to the detriment of private citizens and are deemed to have discharged their duty once the decision made is communicated to the private citizen.

I find the reasoning of the Supreme Court of South Africa highly persuasive. I, however, find myself bound by the decision of the Zimbabwe Supreme Court in *Mugwebie* v *Seed Co Ltd & Anor* 2000 (1) ZLR 93 (S) at 96G-97C where SANDURA JA stated that:

> "The question which now arises is whether the appellant's suspension was valid. There is no doubt in my mind whatsoever that it was null and void. It was a complete nullity. In this respect, I can do no better than quote what LORD DENNING said in *MacFoy* v *United Africa Co Ltd* [1961] 3 All ER 1169 (PC) at 1172I:
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> > 'If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. *There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so.* And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse' (emphasis is mine).
>
> In my view, these comments apply to the facts of the present case with equal force. The suspension of the appellant was a nullity and all the subsequent proceedings were of no force or effect. It is, therefore, unnecessary to consider the effect of the failure to give a decision within fourteen days. As the appellant's suspension was a nullity, there was really no need for a court order to set it aside, though it was convenient to have the court declare it null and void so that the parties knew their respective positions."

Accordingly, I hold that in the absence of statutory authority to issue bonds, the bonds were not lawful tender and cannot discharge a debt. They remain at best acknowledgments of debt. I am satisfied that the appellant has demonstrated on a balance of probabilities that the bonds issued by the Reserve Bank of Zimbabwe were invalid for want of statutory authority and have no legal effect.

It was further contended for the appellant that the claims for the deductions for both doubtful and bad debts in the two respective years were correctly made. The issue for determination is whether the claims conformed to the requirements set out in s 15 (2) (g) (ii) for doubtful debts and s 15 (2) (g) for bad debts. It must be borne in mind that the provision for doubtful debts is no longer part of our law. It was repealed by s 14 (a) of the Finance Act (No 3) (Act 10 of 2009) with effect from 1 January 2010. It was, however, still operational in 2009 and therefore falls for consideration.

"Section 15 (2) (g) (ii) for that period read:

> (2) The deductions allowed shall be---
>
> (ii) such an allowance as may be made each year by the Commissioner in respect of such debts due to the taxpayer as he considers to be doubtful if such debts are included in the

> current year of assessment or were included in any previous year of assessment in the taxpayer's income, either in terms of this Act or a previous law. Such allowance shall be included in the income of the tax payer in the following year of assessment

S 14 (a) of the Finance Act (No 3) (Act 10 of 2009) repealed the whole of s 15(2) (g) as it existed and replaced it with a new s 15 (2) (g) which reads as follows:

> "The deductions allowed shall be---
>
> (g) The amount of any debts due to the taxpayer to the extent to which they are proved to the satisfaction of the Commissioner to be bad, if such amount is included in the current year of assessment or was included in any previous year of assessment in the taxpayer's income either in terms of this Act or a previous law".

The essential factors for a claim for both doubtful debts and bad debts that the appellant must prove on a balance of probability are that:

a. The amount claimed must be due and payable
b. The commissioner considers (is satisfied that) the amount is unlikely to have been recovered at the end of the financial year
c. The amount must have been included in the taxable income of the taxpayer in the current or any previous year of assessment
d. Once the claim is allowed it will have to be added back to income in the following year of assessment.

Mr *de Bourbon* contended that the debt was due and payable. The phrase due and payable carries the same import as accrual. It also means entitled to. See *Lategan* v *CIR* 1926 CPD 202 at 209 and *Commissioner for Inland Revenue* v *Delfos* 1933 AD 242 at 260 and 262. It was the uncontroverted version of the chartered accountant that the law, contract and practice concerning the delivery of gold was that payment was due immediately on delivery. This certainly was what was happening from 2006 to the dawn of the multicurrency regime in respect of payments in local currency. He testified that during the same period and especially in 2006 and parts of 2007, payment in respect of the foreign currency component was immediate. However, as shortages of foreign currency began to bite, payment was slow and lethargic and normally followed upon the delivery of a monetary police statement. In 2008, the payments completely dried up. The January 2009 monetary policy statement in prescribing that "outstanding amounts to the gold sector have been converted into special Goldbacked Foreign Exchange Bonds," did not seek the active consent of the appellant. It decreed an accomplished deed of dealing with the debt.

Mr *Magwaliba* contended that the monetary policy statement was a statement of intent and not a decree of an accomplished deed. He based his contention on the letter of 23 February 2009 written for the central bank, the appellant's response of 24 June 2009 and the gold bonds issued soon thereafter with a tenor of 12 months from 1 February 2009 to 1 February 2010. I agree with the chartered accountant that the issuance of the gold bonds was an accomplished fact that did not depend on any contrary views of the appellant. The phrase "before the Reserve Bank issues you with one year bonds for the due amount" in the letter of 23 February were in my view, prescriptive and commanding rather than persuasive and compromising. The appellant was expected to cooperate much like it did in its response of 24 June 2009. It confirmed the amount owed and indicated the denominations for the bonds. Its attempt in that letter to turn the gold bonds into prescribed assets was clearly rebuffed and not dignified with a response. When the bonds were eventually issued, they contained issue and due dates unilaterally set by the central bank. In my view, stripped of all technicalities, the creation of the bonds merely constituted a unilateral rescheduling of the debt. I am satisfied that the appellant established that the debt was due for payment on the delivery of the gold bullion to which it related in 2008. The appellant further established that it was coerced by the monetary policy statement of January 2009 to consent to the rescheduling of the debt at the end of December 2009.

The further contention by Mr *Magwaliba* that the appellant did not expect and was therefore not entitled to payment until 1 February 2010 falls away. It cannot stand in the face of my finding that the bonds were invalid. It would also fail on the ground that the permissible final date for inclusion of the doubtful debt into the financial statement of the appellant was the date the accounts were prepared: post the financial year end. The contention for the respondent that the debt was not due and payable in 2009 falls away. I hold that it was due and payable during the course of the 2009 tax year.

The next factor for determination is whether the Commissioner ought to have been satisfied that the central bank was in all probability unlikely to make payment of the amount claimed as a doubtful debt in the course of the 2009 tax year. Mr *Magwaliba* submitted that the present appeal was in the narrow sense. He relied on the South African Tax cases of *ITC 1601* 58 SATC 172 at 180-181, *ITC 93* 3 SATC 239 (a 1927 case) and the Zimbabwean case of *Barrows & Anor* v *Chimpondah* 1999 (1) ZLR 58 (S) at 62F-63A for this proposition. The *Barrows* case is distinguishable from the present case on two grounds. It was not a tax matter. It also concerned an appeal from the High Court to the Supreme Court. The South African cases are not binding on me. They also run contrary to various decisions of the South African Appellate Division. Those cases are conveniently set out in the *Da Costa* case, *supra,* where at 774 G-775A VAN HEERDEN JA disapproved of the penchant for FRIEDMAN J to defy those decisions and confirmed that in an appeal before the Special Court, the appeal was a rehearing in which the Special Court exercised its own discretion for the Commissioner's. See *Bailey* v *CIR* 1933 AD 220, *Rand Ropes (Pty) Ltd* v *CIR* 1944 AD 142 at 150 and *Hicklin* v *Secretary for Inland Revenue* 1980 (1) SA 481 (A) at 485. The Supreme Court of Appeal of South Africa recently confirmed the correctness of these decisions in the *Pretoria East Motors* case, cited at the beginning of this judgment.

In our law, on appeal, the Commissioner's discretion is supplanted by that of the Special Court. I agree with Mr *de Bourbon* that I may substitute my discretion for that of the Commissioner. See *Sommer Ranching (Pvt) Ltd* v *Commissioner of Taxes, supra.*

A doubtful debt was obliquely equated in *G* v *Commissioner of Taxes* 1972 (3) SA 121(R) at 122F (1972) 34 SATC 62 (R) at 64 by GOLDIN J with uncertainty of the likelihood by a creditor of receiving the amount owed. In *Commissioner of Taxes* v *'A' Company* (1979) SATC 59 (RA) at 65; 1979 (2) SA 409 (RA) the taxpayer prepared its financial statement for the year ending 31 March 1976, in accord with ordinary commercial and accounting practice, after the year end. It did not make entries in its books of account writing off the debt owed before the end of that tax year and the decision to write off was not taken during that year. The decision to write off the debt was made by the managing director during the preparation of the financial statement for that year end. In its tax return for that financial year it claimed for a deduction of the bad debt that was written off in its financial statements. At 412A-413A LEWIS JP held that a bad debt could be written off during the preparation of the financial statements for the year end to which it related and claimed as an allowable deduction for that tax year as it was not a necessary prerequisite that it be formally written off in that tax year. See also *Commissioner for Inland Revenue* v *Delfos* 1933 AD 242 at 257 which is to the same effect.

Provision for the doubtful debt was only made on 17 May 2010, the date on which the financial statement for the year ending 31 December 2009 was finalised. Mr *de Bourbon* relied on these cases for the submission that the appellant was not precluded from claiming the provision for a doubtful debt in the sum of US$2 391 147 as an allowable deduction for the 31 December 2009 tax year merely because it was brought to account after the close of that tax year. In any event, the ordinary commercial and accounting practice is that financial statements are prepared after the close of the financial year. I agree that that the principle enunciated in these cases is correct. In fact, *Commissioner of Taxes* v *'A' Company, supra,* is binding on me. The underlying assumption in those cases was that the bad debts remained due and payable. Likewise, in the present case, the uncertainty that existed in 2009 that the debt was unlikely to be paid was confirmed on 17 May 2010 to have been prescient. That uncertainty was predicated on the issuance of the invalid bonds with a maturity date of 1 February 2010, contrary to the 31 December 2009 date promised in the January monetary policy statement. The amount claimed had been outstanding for up to two years. The central bank had demonstrated inability to pay and was in poor standing in the local market. It was also failing to settle re-occurring obligations to its workers. I am satisfied that the appellant established on a balance of probabilities that there was a likelihood that the debt would not be paid by the central bank in the course of 2009. In my view, any reasonable person submitting the return to the respondent would doubt the likelihood of the debt being paid even though he might recognise an outside and remote possibility that such payment might take place. There was no reasonable probability of payment occurring but this did not completely exclude that payment might happen. A likelihood of lack of collectability existed. It was a doubt as opposed to a certainty.

The last essential element for determination is whether the amount provided for was included in the gross income of the appellant for that tax year or any of the previous tax years. The sole witness for the appellant stated that the amount was included in the 2008 tax return. It was, however, in Zimbabwe dollars. It was common cause that at the time the Zimbabwe dollar was the transactional currency and all sales in foreign currency at the time were converted into local currency at the exchange rate ruling on the date of the sale. The respondent first raised the issue in its correspondence of 1 December 2011. It simply took the view that the amount claimed for deduction was not included in 2008 because the tax return for that year was in local currency. On 16 December 2011 the appellant clarified that this was so because the local currency was the transactional currency. It relied on the Commissioner's Provisional General Ruling Conversion of Closing Balances for Tax Purposes in Government Notice 274 of 2010 published in the Government Gazette of 1 October 2010 that set out the way in which tax returns were to be compiled in the post dollarization era. It decreed that sums previously expressed in local currency were to be converted into United States dollars for tax reporting in 2009 onwards in a prescribed manner acceptable to the Commissioner. The Revenue Authority Act was amended. It provided that all reporting in terms of the

Income Tax Act was to be in United States dollars. In subsequent correspondence the respondent appeared to have dispensed with the purported non-inclusion of the debt in the gross income of 2008 contention, preferring to concentrate on whether the bonds constituted an investment rather than a bad debt (letter of 6 January 2012 on p 16, I February 2012 p 19, 15 February 2012 on p 23, 2 April 2012 on p 27, and 13 July 2012). Indeed, in the determination of 25 October 2012 to which this appeal relates the respondent disallowed the provision on two grounds. The first was that the outstanding amount was settled by conversion of the debt into gold backed tradable bonds and the second was that the outstanding amount in each of the years thereafter changed its character by conversion from being a debt to an investment. The contention that the debt was not included in the 2008 tax return was abandoned.

The evidence of the sole witness in this matter was not controverted by any witness called by the respondent or by any of the documentary trail exchanged between the parties and filed of record. I am satisfied from the oral evidence of the chartered accountant and the documents filed of record that the amount owed was included in the 2008 tax return as taxable income.

Accordingly, I hold that the appellant established on a balance of probabilities all the three elements necessary to qualify the claim for deduction as a provisional bad debt.

The next issue to decide is whether the claim for the bad debt for 2010 should have been allowed. For the reasons stated above under the provision for the 2009 bad debt, I am satisfied that the amount claimed as a bad debt in 2010 was rendered in the 2008 tax return.

The next essential element to determine is whether the amount was due and payable during that year. I hold that it was. The purported gold bonds were null and void. They were of no force or effect. They, in law, did not exist. They could not therefore constitute a payment for the debt. But even if they were valid, I would have found them, as already stated akin to mere rescheduled acknowledgments of debt. An acknowledgement of debt is a document which confirms the existence of a debt. In my view, it does not constitute payment of the debt. In its monetary policy statement of December 2009 delivered on 29 January 2010 the central bank treated the debt as outstanding. It did not consider it paid. In my view, a debt does not become an investment merely because it also records terms of payment. The debt remained and still remains due and payable. Writing it off as a bad debt does not extinguish it.

The last element for consideration is whether the Commissioner ought to have been satisfied that the claimed amount was bad. The Act does not define a bad debt. It is, however, defined in ordinary commercial and accounting practice as an amount that is unlikely to be paid. The appellant established on a balance of probabilities that by 31 December 2010, the claimed amount had been outstanding for more than 26 months. The accounts for that year end were compiled on 31 March 2011. The purported gold bonds had been issued and rolled over time without number. The swan song from the debtor was now familiar. It was clear that it was unable to pay. It had no funds to pay. The December 2009 monetary policy statement delivered on 29 January 2010 on p 4 of the appellant's bundle dealt with gold bonds in paras 4.70 to 4.72. The import of the message was that the debtor was engaged in discussion with central government over the government's Reserve Bank of Zimbabwe held debt. The purported bonds were rolled over for another 6 months and other undisclosed initiatives were under consideration to meet all outstanding obligations. The central bank did not have the means to settle the debt. The legal route to sue while available had been substantially restricted by legislation. First the Presidential Powers (Temporary Measures) (Amendment of the Reserve Bank of Zimbabwe Act) Regulations 2010 were promulgated on 18 June 2010 to protect the assets of the central bank from the reach of its creditors. It was confirmed by s 14 of the General Laws Amendment Act No 5 of 2011 and given retrospective effect to 18 June 2010. The assets could not be attached in execution to satisfy a court judgment. The appellant correctly recognised that suing a man of straw was an unproductive exercise. The measures taken by central government to place the assets of the central bank on the same footing as State assets satisfies me that the debt was unlikely to be paid in during the tax year ending 31 December 2010. In hindsight, the gazetting of the Reserve Bank of Zimbabwe (Debt Assumption) Bill on 13 June 2014 in which central government will take over gold bond debt of US$ 43 706 489.09 even if Reserve Bank of Zimbabwe had no power or capacity to incur the debt justified writing off the amount in the year ending 31 December 2010. (Section 3 (b) (i) of the Bill).

The requisite elements for a bad debt found in s 15 (2) (g) were in my view satisfied by the appellant. The respondent should have allowed them. The appeal succeeds in respect of both claims.

In consequence, the interest and penalties imposed by the Commissioner cannot stand. They are set aside. The appellant has won the appeal on all aspects and is entitled to the order of costs as contemplated by s 15 (2) (aa) of the Income Tax Act.

Accordingly, it is ordered that:

1. The amended assessment No 00186334 for year ending 31 December 2009 issued on 29 October 2012 is set aside and respondent is directed to issue to the appellant an Amended Assessment for year ending 31 December 2009 allowing the claim for an allowance in respect of the doubtful debt due to appellant by the Reserve Bank of Zimbabwe in the sum of US$ 2 391 147 resulting in the taxable income of the appellant being US$2 303 262 and discharging the penalty imposed on the appellant;

2. The amended assessment No 00186333 for year ending 31 December 2010 issued on 29 October 2012 is set aside and respondent is directed to issue to the appellant an Amended Assessment for year ending 31 December 2010 allowing the claim for a deduction in respect of the bad debt due to the appellant by the Reserve Bank of Zimbabwe in the sum of US$1 032 382.00 and discharging the penalty imposed on the appellant.

3. The respondent shall forthwith reimburse the appellant the additional principal amount and interest of the amended assessments of income tax in the sum of US$ 687 106.

4. The costs incurred by the appellant in respect of the objection and this appeal, as taxed by the Registrar, shall be allowed as a deduction in terms of section 15 (2) (aa) of the Income Tax Act [*Chapter 23:06*].

Gill Godlonton and Gerrans, the appellant's legal practitioners