REPORTABLE (7)

Judgment No. SC 9/03
Civil Appeal No. 413/02

(1) PRIVATISATION AGENCY OF ZIMBABWE
(2) THE PRESIDENT OF THE REPUBLIC OF ZIMBABWE v

(1) UKUBAMBANA KUBATANA INVESTMENTS (PRIVATE) LIMITED
(2) FINANCIAL TRUST OF ZIMBABWE

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, CHEDA JA & GWAUNZA JA
HARARE, FEBRUARY 17 & APRIL 3, 2003

A P de Bourbon SC, with him *F Girach*, for the appellants

P Nherere, for the first respondent

C C Seddon, for the second respondent

GWAUNZA JA: This is an appeal against a judgment of the High Court, in terms of which the first appellant ("the PAZ") was ordered to announce to the bidders, of which the first respondent was one, the results of an open tender floated by the PAZ pursuant to a document entitled "Information Memorandum" dated 19 July 2001. The court *a quo* also ordered the second respondent to forthwith allot the shares, subject to the same tender, to the winning bidders.

Mr *Seddon*, who appeared briefly for the second respondent, informed the Court that his client had chosen not to be an active party to these proceedings, preferring instead to abide the Court's judgment. Consequently, there is effectively

only one respondent before the Court, that is, the first respondent. I shall hereinafter refer to the first respondent as just "the respondent".

The tender in question involved some 88 526 968 shares in three demerged companies of the company formerly known as Astra Limited. The shares were held by the second respondent for and on behalf of the Government of Zimbabwe, which was, therefore, the beneficial owner thereof.

It is not in dispute that the PAZ was established by the Government of Zimbabwe in September 1991 with a mandate to spearhead, advise and manage the Government's privatisation programme in a transparent manner. In dispute was the status of the PAZ. In its founding affidavit, the respondent had referred to the PAZ as a "legal entity" established by the Government of Zimbabwe. The PAZ disputed this status, and instructed its legal practitioners to address a letter to the respondent's legal practitioners, stating that the PAZ was not a legal entity but "merely a unit in the Office of the President and Cabinet". Consequently, it was further stated in the letter, the PAZ did not have the necessary *locus standi* to be cited as a respondent in the matter. The letter went on to say that, as the proper respondent should have been the Head of the Office of the President and Cabinet in his official capacity, the respondent was obliged to adhere to the requirements of the State Liabilities Act [*Chapter 8:14*] ("the Act"). These entailed the giving of notice and other requirements specified in the Act.

This letter, which ended by inviting the respondent to withdraw its court application, prompted the deponent to its founding affidavit to file a

supplementary founding affidavit restating, in greater detail, the respondent's position that the PAZ was a legal entity separate from the Government and with the capacity to sue and be sued in its own right.

Thus, apart from the merits of the application, the court *a quo*, as does this Court, had to determine the issue of the PAZ's rightful status. The learned trial judge was satisfied, from a reading of the papers before him, that the PAZ had a "*sui generis*" status, quite different from that of other Government departments or agencies. He stated at pp 236 and 239 of the record:

> "It seems to me that PAZ has, from a reading of the [PAZ] publication, a *sui generis* status quite different from that of other Government departments or agencies. …
>
> Having regard to these terms in the (Information) Memorandum, one is left in no doubt that the bidders and their guarantors were entering into a contract and assumed rights and obligations, not as against the Government of Zimbabwe, but as against an entity established by Government to transact the business concerned. It would, in my view, not have been in the contemplation of the bidders and their guarantors that they were entering into a contract, not with PAZ, but with Government."

He then went on to deal, at length, with the merits of the application and then made the order now being appealed against.

It is correctly averred for the respondent that the matter of the PAZ's status is crucial to both the procedural question of whether the case was properly before the court and the substantive question as to whether or not there was a contract between the respondent and the PAZ.

I agree with the submission by Mr *Nherere*, for the respondent, that a finding to the effect that the PAZ was not a juristic person would effectively dispose of the matter.

I shall, therefore, consider at the outset the question of whether or not the PAZ was a juristic person, capable of being sued in its own right.

Mr *de Bourbon*, for the appellants, contends that the PAZ does not fall into any of the recognised categories of artificial persons which, broadly, are (i) the State; (ii) bodies specifically incorporated by statute, such as local authorities, statutory corporations, statutory boards or commissions; (iii) corporate bodies registered under more general legislation, such as companies or pension or provident funds; and (iv) corporate bodies under the common law. He contends the PAZ was established by the Office of the President and Cabinet to undertake the functions set out in that Office's Circular Letter No. 1 of 2000, and as such has no different a legal status to the many other separate groupings organised within the Government, such as the Department of Immigration. He also contends that the functioning of the Government in any country requires that it be able to create and, where necessary, disband departments, agencies and other bodies to fulfil its obligations. As an administrative action, Mr *de Bourbon* further contends, the creation or disbandment of such a body creates no legal *persona* nor destroys any legal *persona* different to the Government itself. Finally, Mr *de Bourbon* submits that the PAZ cannot be a *universitas*, since it does not meet the legal requirements of such an entity. In this respect, he contends that the PAZ is not an association of persons for a specific

objective, nor did any group of persons contractually bind themselves to create the PAZ and be bound by any constitution thereof.

While conceding that the PAZ was established by an administrative Act, rather than an Act of Parliament, Mr *Nherere*, for the respondent, contended that that fact alone was not decisive. Rather, the Court should look at the entity that the Government intended to create, and did create – its nature, the purpose of its establishment, its powers and its other attributes. If, in judging these factors, the Court is satisfied that the PAZ, as an entity, has the characteristics of a juristic person, then such it should be adjudged to be.

Mr *Nherere* relies for this contention on the following dictum by WESSELS JA in *Morrison v Standard Building Society* 1932 AD 229 at 238:

> "In order to determine whether an association of individuals is a corporate body which can sue in its own name, the court has to consider the nature and objects of the association as well as its constitution, and if these show that it possesses the characteristics of a corporation or *universitas*, then it can sue in its own name. Nor can I see any valid objection to such a society suing in its own name."

Since the PAZ was, to go by Mr *de Bourbon's* categorisation, neither the State nor a creature of statute, the only possible category it could fall into was that of corporate bodies under the common law, i.e. a *universitas*.

It appears to me there is therefore no better method to determine the status of the PAZ as a juristic person, or *universitas*, than that suggested in the dictum cited above. However, before the test spelt out therein can be effectively applied to the circumstances of the case at hand, it is necessary to set out what are generally

accepted as the characteristics of a *universitas*. The following passage in Herbstein & van Winsen's *The Civil Practice of the Supreme Court of South Africa* 4 ed at p 156 is instructive in that respect:

> "A *universitas* is a legal fiction, an aggregation of individuals forming a *persona* or entity having the capacity of acquiring rights and incurring obligations to as great an extent as a human being. The main characteristics of a *universitas* are the capacity to acquire certain rights as apart from the rights of the individuals forming it, and perpetual succession. The right to hold property in its own name is often given as one of its features. (*Webb & Co Ltd v Northern Rifles, Hobson & Sons v Northern Rifles* (1908 TS 462); *Cassim v Molige* (1908 TS 748); and others). If an association of persons possesses these characteristics it is a *universitas*, but if it lacks any, it is not. Thus a body having perpetual succession but no power to hold property apart from its members has been held not to be a '*universitas*' (*Jeschin v Kopuno Sick Benefit and Benevolent Society* 1936 WLD 9)."

In applying this expanded test to the facts of this case, the first point to consider, in my view, is whether or not the PAZ represented "an association of individuals" who came together to create an entity with a *persona* separate from the association. The definitions of a *universitas* given in the authorities cited start from the premise that a *universitas* is an association of natural rather than artificial persons. This requirement seems to be accepted as a *sine qua non*, an absolute necessity. Indeed counsel for the appellants submitted he had been unable to find any case law or text law authority for the proposition that one or more artificial persons can associate together for the purposes of creating a *universitas*.

On the evidence before the Court, it was the Government, as an artificial person, that established the PAZ. It is not suggested that an aggregation of individuals came together to create the PAZ.

In the light of the foregoing, I find that the PAZ does not meet the most basic of all the requirements of a *universitas*, that is, that it must be a legal fiction representing an association of individuals for stated objectives. On that basis alone, the application should have been dismissed.

There is, in any case, other evidence before the Court to fortify this finding and to support the appellant's assertion that the PAZ did not have an existence independent of the Government.

There is, firstly, the contract of employment entered into between the Government and one Innocent Gadaga, an investment analyst/banker and signed by the parties on 3 September 1999. It was submitted for the appellants that the contract was an example of the contracts signed by all personnel recruited to work for the PAZ. The contract makes it clear that it was between the Government and the employee concerned. The implication of this is that those tasked with the responsibility of running the affairs of the PAZ were contracted to do so as employees of the Government not of the PAZ.

Secondly, the document produced by the PAZ, which both parties have cited, informs that the PAZ was established by the Government out of the need to create a single "semi-autonomous" institution that would be responsible, on a day to day basis, for the privatisation of State-owned enterprises. The use of the terminology "semi-autonomous" rather than "autonomous" is, in my view, further confirmation that the Government did not mean, in this respect, to establish an entity separate from itself.

Thirdly, there is the question of the PAZ's right (or lack thereof) to own property in its name. One of the accepted characteristics of a *universitas* is that it has the right to own property in its own name. There is no evidence before the Court to suggest that the PAZ had such a right. The Cabinet Memorandum which sets out the functions of the PAZ, significantly, does not make any reference to any such right. The Memorandum officially publicised the existence and mandate of the PAZ, and should have been the one to contain such information, had that been the intention. Cogent proof of the PAZ's inability to own property in its own name is to be found in the fact that the PAZ did not own the disputed shares; nor was it going to receive for itself the sale price. The learned trial judge was alive to this circumstance, as evidenced by his observation at p 32 of the cyclostyled judgment that:

> "… the relief sought is to compel PAZ to announce the results and allot the shares. The relief sought does not mean that after allotment the owner of the shares will automatically transfer the shares to the winning bidder although it would be expected to do so." (my emphasis)

It is not in dispute that the shares in question were held by the second respondent for and on behalf of their beneficial owner, the Government. As submitted for the appellants, the proceeds from the sale of the shares would accrue to the Government, not the PAZ.

It is, in my view, correctly contended for the appellants that this confirms that the PAZ was not autonomous of the Government, and that it was established merely to fulfil administrative responsibilities towards a legitimate Governmental objective. That its rôle was merely facilitative is put beyond doubt

when one considers the PAZ's functions, set out in Cabinet Circular Letter No. 1 of 2001. The emphasis there is on its functions as an advisor to the Government on issues pertinent to the privatisation process, the preparation of detailed work plans for privatisation of designated enterprises, and assistance to line Ministries in the identification of local and/or external consultants. The PAZ also acts as a Secretariat for the Inter- Ministerial Committee on Commercialisation and Privatisation of Parastatals.

The fourth consideration relates to the constitution. In terms of the dictum cited above (per WESSELS JA in *Morrison v Standard Building Society supra*), the constitution of a *universitas* should offer some guidance on the true nature of the association. The assumption, again, is that a *universitas* has a constitution. *In casu*, apart from there being no evidence to suggest that the PAZ had a written constitution, there is also, in fact, no document on file purporting to be the one in terms of which the PAZ was established. There are, instead, documents referring simply to the establishment by the Government of the PAZ "in September 1999" as a "semi-autonomous" privatisation agency. While a supporting affidavit from the Secretary to the President and Cabinet, Dr Utete, might have helped clarify the intention of the Government concerning the status of the PAZ, the absence of such an affidavit, as correctly contended for the appellants, does not carry the respondents' case any further. Thus, the PAZ again fails to meet another important requirement for a *universitas*.

On the authorities cited above, an association must possess <u>all</u> the characteristics of a *universitas* for it to be so regarded. The PAZ, as is evident from

the foregoing and despite its *modus operandi* which persuaded the learned trial judge to a contrary view, lacks several of the characteristics of a *universitas*. It is, therefore, not a *universitas*.

As it also does not fall into any of the other categories of corporate entities that have been mentioned above, the conclusion is inevitable that the respondent has failed to prove that the PAZ is an entity separate from the Government nor, consequently, that it has the *locus standi* to be cited as the respondent in this matter.

It is correctly contended for the appellants that the Government, as the beneficial owner of the shares in question, had a real, direct and substantial interest in the outcome of the litigation. The respondent should therefore have complied with the State Liabilities Act, in terms of giving the requisite notice and, thereafter, joined the additional appellant in this case as a party to the proceedings. This is because the President is the one vested with the executive authority of Zimbabwe by virtue of s 31(H)(1) of the Constitution of Zimbabwe. The respondent's failure to join the Government as a party, in the light of my determination of the status of the PAZ, is fatal to these proceedings.

That being the case, I do not consider it necessary to go into the merits of the respondent's case against the appellants.

The appeal, accordingly, succeeds.

It is, in the premises, ordered as follows –

1. The appeal is allowed with costs.

2. The order of the court *a quo* is set aside and substituted with the following –

"The application is dismissed with costs".

CHIDYAUSIKU CJ: I agree.

CHEDA JA: I agree.

Costa & Madzonga, appellants' legal practitioners

Dube, Manikai & Hwacha, first respondent's legal practitioners

Coghlan, Welsh & Guest, second respondent's legal practitioners