

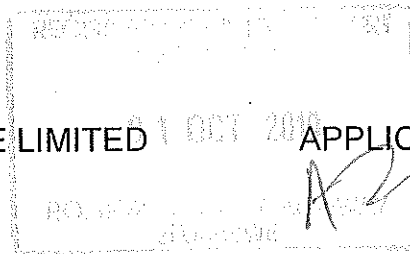
IN THE HIGH COURT OF ZIMBABWE

CASE NUMBER HC 799/H /19

HELD AT HARARE

In the matter between:

CASSAVA SMARTECH ZIMBABWE LIMITED APPLICANT



And

RESERVE BANK OF ZIMBABWE

RESPONDENT

URGENT CHAMBER APPLICATION FOR A TEMPORARY INTERDICT

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RESERVE BANK OF ZIMBABWE LEGAL DEPARTMENT

DATE RECEIVED 01/10/19

TIME 09:36 am

RECEIVED BY DUTELA K

SIGNATURE [Signature]

IN THE HIGH COURT OF ZIMBABWE

CASE NO.

/19

HELD AT HARARE

In the matter between:

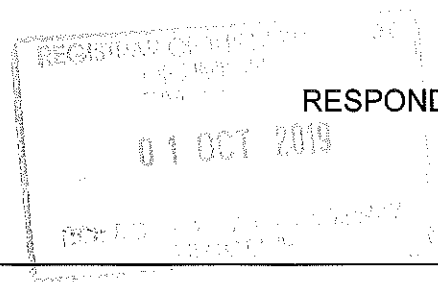
CASSAVA SMARTECH ZIMBABWE LIMITED

APPLICANT

AND

RESERVE BANK OF ZIMBABWE

RESPONDENT



URGENT CHAMBER APPLICATION FOR A TEMPORARY INTERDICT

TAKE NOTICE THAT the applicant intends to apply to the High Court at **HARARE** for an Order in terms of the Draft Order annexed to this notice and that the accompanying affidavit/s and documents will be used in support of the application. The application is made on the grounds that:

- 1 The Applicant is responsible for the management of a mobile money transfer platform that has 10,562,070 users of which 6,400,000 have been active during the last 90 days. Of the total registered users, 6,337,242 are Rural customers while 4,224,828 are urban customers.
- 2 From September 2011 when the Cash In facility was introduced, 227,519,851 Cash In transactions worth US\$10,195,546,216.00 plus ZW\$7,542,785,610.00 have been conducted. On the other hand, 387,308,926 Cash Out transactions worth US\$8,657,704,182.00 plus ZW\$4,142,862,274.00 have also been conducted.
- 3 The Respondent has directed the Applicant to shut down the Cash In and Cash Out facilities of its system purporting to act under Section 10 of the National Payments

Systems Act [Chapter 24:23]. The Applicant is already in the process of implementing the Directive with the possibility of a complete shutdown of the Ecocash platform as a whole to enable completion of the process.

- 4 This Application is intended to temporarily stop the continued implementation of the Respondent's Directive pending the determination of the legality or otherwise of the directive on the return day on the grounds that Applicant meets all the requirements for the grant of a temporary interdict.

If you intend to oppose this application you will have to file a Notice of Opposition in Form No. 29A, together with one or more opposing affidavits, with the Registrar of the High Court at HARARE within 3 hours unless otherwise directed by the Court after the time at which this Application was served upon you. You will also have to serve a copy of the Notice of Opposition and affidavit/s on the Applicant at the address for service specified below. Your affidavits may have annexed thereto the documents verifying the facts set out in the affidavits.

If you do not file an opposing affidavit within the period specified above, this application will be set down for hearing in the High Court at HARARE without further notice to you and will be dealt with as an unopposed application.

Further, Take Notice that the Applicant's Address for Service is the Address of its undermentioned Legal Practitioners.

DATED AT HARARE THIS 1st DAY OF October 2019


.....
MTEJWA & NYAMBIRAI
LEGAL PRACTITIONERS
Applicants' Legal Practitioners

30 14

No. 2 Meredith Drive, Eastlea
Harare, Zimbabwe
(MR TAWANDA NYAMBIRAI)

TO: THE REGISTRAR
HIGH COURT OF ZIMBABWE
HARARE

AND TO:

The Reserve Bank of Zimbabwe
80 Samora Machel Avenue
Harare

(H) 4

IN THE HIGH COURT OF ZIMBABWE

CASE NO.

/19

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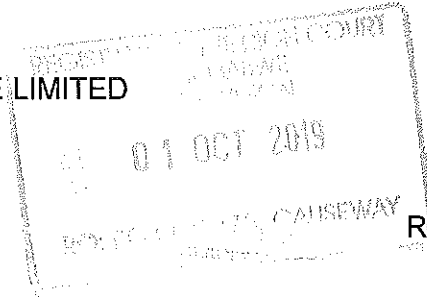
CASSAVA SMARTECH ZIMBABWE LIMITED

APPLICANT

AND

RESERVE BANK OF ZIMBABWE

RESPONDENT



CERTIFICATE OF URGENCY

I, the undersigned **Mzokuthula Mbuyisa**, do hereby certify as follows:

1. I am a duly registered legal practitioner and officer of this Honorable Court practicing as such with the firm of Mtetwa & Nyambirai Legal Practitioners at Harare. I confirm that I have read and understood the founding affidavit of **Edmore Chibi** in this matter. I certify that the matter is urgent and move the Court to hear it and dispose of it on an urgent basis. My reasons for saying so are as follows:

- 1.1 The Respondent has directed the Applicant to disable the Cash- In and Cash Out Facilities on its Ecocash Platform which has 10,562,070 registered users of which 6,337,242 are rural and 4,224,828 are urban. Although the Respondent is targeting the users who abuse the system, the scope of the Directive is indiscriminate and will affect millions of innocent people.

S



- 1.2 The Applicant has already started to implement the Directive with the result that there will be a total shutdown of the entire Ecocash System in the process. The directive was only communicated to the Applicant in the afternoon of 30 September 2019.

- 1.3 My view is that the directive is ultra- vires Section 10 of the National Payments Systems Act [Chapter 24: 23] in that that section empowers the Reserve Bank of Zimbabwe to only act against the acts or omissions of a system or of the management board of the system, yet, in the present case, the abuse complained about is attributable to some customers of the Applicant, and not to the system of the Applicant or the management Board of the Applicant. In any event, the Respondent's decision is irrational in that it seeks to penalize even the innocent users of the Applicant's system instead of identifying the abusers and dealing with them on a case by case basis as Respondent has done before. I further agree with the Applicant's contention that the termination of the Applicant's facilities would constitute a compulsory deprivation of property in violation of the Constitution of Zimbabwe.

- 1.4 The shutdown of the Applicant's facilities will cause financial loss to the Applicant and to millions of innocent users in amounts not capable of quantification. Applicant would be exposed to the risk of damages claims in significant amounts and the confidence that the members of the public have in Applicant's system would be damaged resulting in significant financial loss to the Applicant.

- 1.5 In the circumstances, I submit that the requirements for the grant of a temporary interdict have been established by the Applicant and further that this matter cannot wait to be dealt with as an ordinary application as the implications of the implementation of Respondent's Directive are devastating.
- 1.6 The Applicant has prepared the present application within hours of being directed by the Respondent thereby treating the issue at hand with the urgency that it deserves.

WHEREFORE, I hereby certify the matter as urgent in terms of the Rules of this Court.

SIGNED at HARARE on this the 1st October, 2019

Mzokuthula Mbuyisa

IN THE HIGH COURT OF ZIMBABWE

CASE NO.

/19

HELD AT HARARE

In the matter between:

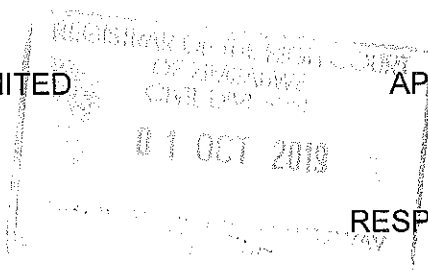
CASSAVA SMARTECH ZIMBABWE LIMITED

APPLICANT

AND

RESERVE BANK OF ZIMBABWE

RESPONDENT



FOUNDING AFFIDAVIT OF EDMORE CHIBI

I, **Edmore Chibi**, do hereby make oath and say that:

- 1 I am the Chief Executive Officer of the Applicant. The facts to which I swear are within my personal knowledge, correct and true.

- 2 The Applicant is Cassava SmarTech Zimbabwe Limited, a public company that is listed on the Zimbabwe Stock Exchange. The Applicant's shareholders include pension funds, meaning that most employees and retirees in Zimbabwe are beneficially interested in the equity of the Applicant. The Applicant operates a money transfer platform called Ecocash that is recognized by the Reserve Bank of Zimbabwe in accordance with the provisions of the National Payments Systems Act [Chapter 24:23].

- 3 The Respondent is the Reserve Bank of Zimbabwe, a statutory body duly constituted in terms of the Reserve Bank of Zimbabwe Act [Chapter 22:15]. The Respondents is

the authority that is empowered to recognize and regulate payment systems in accordance with the provisions of the National Payments Systems Act [Chapter 24:23].

- 4 Ecocash is a pioneering mobile financial services solution that has given access to the Zimbabwean unbanked population in an unprecedented scale in Zimbabwe. Owing to the serial collapse of banking institutions in Zimbabwe, according to media reports, the size of the banked population had reduced to less than 10% of the population when Ecocash was introduced in September 2011. Presently, Ecocash has more than 10.5 million users, that is over 90% of the adult population of Zimbabwe. The growth in Ecocash has given access to financial services to the population that was hitherto unbanked and had lost confidence in the banking system.
- 5 The Ecocash platform has 10,562,070 users of which 6,400,000 have been active during the last 90 days. Of the total registered users, 6,337,242 are Rural customers while 4,224,828 are urban customers.
- 6 From September 2011 when the Cash In facility was introduced, 227,519,851 Cash In transactions worth US\$10,195,546,216.00 plus ZW\$7,542,785,610.00 have been conducted. On the other hand, 387,308,926 Cash Out transactions worth US\$8,657,704,182.00 plus ZW\$4,142,862,274.00 have also been conducted. Thus, Ecocash has played a critical role in facilitating transaction activity between Zimbabweans in circumstances of acute liquidity challenges.
- 7 The most important Ecocash products especially to the unbanked population that do not have ready access to banks are the cash in and cash out facilities. These facilities enable the population that may have cash to deposit their cash with Ecocash agents that number 51,000, more than the number of banking branches of all banks in Zimbabwe combined. In return, the wallet of the cash depositing customer is credited with the value of the cash deposited to enable the depositor to transact with the

deposited cash electronically. There is no incident of money creation as the electronic money credited to the wallet will be equivalent to the amount of cash deposited. In the same manner, a customer can approach an Ecocash Agent for cash in exchange for money in their Ecocash Wallet using the Cash Out facility. This exchange of cash for electronic money has become the lifeblood of commercial activity in Zimbabwe and has been the lifeblood of commercial activity in Zimbabwe since September 2011.

8 Lately, there has been a surge in the demand for cash. People have been buying cash at a premium of approximately 35% using their RTGS Bank balances or Ecocash. The market information I have based on informed investigations by my team indicates that all electronic money balances are being heavily discounted in preference for cash. The exchange of electronic money for cash must actually be higher on the RTGS platform because the platform commands a higher market share by value than Ecocash. The results of our own investigations are corroborated by recent freezing of bank accounts that were announced by the Reserve Bank against some companies. I attach hereto marked "A", an announcement by the Reserve Bank of Zimbabwe in terms of which it instructed banking institutions to freeze RTGS Dollar accounts.

9 The Reserve Bank of Zimbabwe and the Applicant have also been investigating incidences of abuse of the Ecocash Platform by users. Where users have been found to have abused the platform, their accounts have been frozen. Since June 2019, various accounts of agents and individuals have been frozen on allegations of money laundering or abuse of the Ecocash platform. For legal reasons I will not attach the various directives of the Respondent in this regard. I would need the authority of the Respondent and the affected individuals to publicize the communication. However, I offer to produce the various communication in Court should these facts be challenged by the Respondent.

10 I was shocked today when I received communication from the Respondent calling for a total shut down of the cash in and cash out facilities on the Ecocash Platform. I attach hereto marked "B" a copy of the directive. I contend on behalf of the Applicant that the directive is ultra vires the provisions of Section 10 of the National Payments Systems Act [Chapter 24:23] under which it purports to have been made, is irrational, and is a violation of the Applicant's Constitutional Rights and the Constitutional Rights of the Users of Ecocash. I shall demonstrate my contention by reference to the requirements of a temporary interdict that I set out hereunder:

11 **The Applicant and the users of Ecocash have clear rights, alternatively, Prima Facie Rights:**

11.1 I have already indicated that Ecocash, with all its facilities that include Cash In and Cash Out is duly recognized by the Reserve Bank of Zimbabwe in accordance with the National Payments Systems Act [Chapter 24:23]. That recognition gives Applicant and its Ecocash clients a right to use these facilities.

11.2 The circumstances under which these facilities can be taken away are set out in Section 10 of the National Payment Systems Act [Chapter 24:23] which the Respondent purports to have acted under. I content that section 10 only authorizes the Respondent to act in the event that the system has itself done or omitted to do something, or that the Management Board of the system has itself done or omitted to do something. The Applicant is not punishable where some users of the system are alleged to have themselves committed abuse. The approach in that case is to penalize the defaulting users.

11.3 In the present case, annexure B is very clear. There is no wrong doing that is alleged to have been committed by the Ecocash System or its Management Board. The annexure alleges wrong doing on the part of some agents, not all of them or other innocent users of the system. Therefore the kind of wrong doing alleged by

the Respondent does not fall within the powers that Respondent has under Section 10 of the Act.

11.4 In any event, it would be irrational to take away the clear rights of the Applicant and the users of Ecocash simply because a few users are abusing the Ecocash platform. Such an irrational act is tantamount to punishing the innocent users of the platform. The case of the innocent Ecocash user is much stronger than that of the good wheat crop that was saved from the risk of being uprooted by mistake in Matthew 13:24- 43 where the master, in rejecting the request by his servants to pull up the weeds said, ***“No, if you pull up the weeds you might uproot the wheat along with them. Let them grow together until harvest; then at harvest time I will say to the harvesters, “First collect the weeds and tie them in bundles for burning; but gather the wheat into the barn”.*** I am advised by the Applicant’s legal practitioners, and I believe that the equivalent of this principle in our justice system is the Blackstone ratio which stipulates that it is better that ten guilty persons escape than that one innocent suffer. It is instructive that Government must err on the side of innocence, especially in the present case where the defaulting users can be investigated and identified, something that the Respondent has been doing already with the full cooperation of the Applicant.

11.5 In the further alternative, I contend on behalf of the Applicant that the cash in and cash out facilities constitute rights in property that the Applicant and the users of Ecocash can not be compulsorily deprived of other than in full compliance with the provisions of Section 71 of the Constitution of Zimbabwe. I contend on behalf of the Applicant that the directive is unconstitutional in this regard.

11.6 In the further alternative, I contend on behalf of the Applicant that Ecocash has been discriminated against in preference to the RTGS platform. Regarding the RTGS platform, the Respondent has not banned any functionality that enables

cash withdrawals and cash deposits. To prohibit cash withdrawals and cash deposits through the use of Ecocash only is thus discriminatory.

12 Applicant has a well-grounded apprehension of irreparable harm:

12.1 The cash in and cash out facilities are core to the Ecocash System. In order to pull these facilities down, the whole Ecocash platform has had to be pulled down first. Now, this platform handles 7 million transactions per day by approximately 2 million people. Some of these transactions are done to deal with life saving situations. Pulling down Ecocash could thus mean loss of life, loss of opportunities that could save livelihoods, and financial loss running into hundreds of millions if not billions.

12.2 The shutdown of these facilities will also deprive the Applicant and those of its Agents that are innocent of revenue running into millions of dollars.

12.3 In the event that the Respondent's directive is found to be illegal on the return day, the harm that Applicant and its innocent users of Ecocash will have incurred would have been irreparable. In the circumstances, I pray that the Court makes a ruling to prevent the continuation of this irreparable harm.

13 There is no other ordinary remedy that could protect the Applicant's rights and the rights of its innocent users of Ecocash.

13.1 Applicant has started to implement the shutdown in compliance with the Respondent's directive. The implementation of this directive will cause irreparable harm and will cause the loss of confidence by members of the public in the Ecocash System. The financial harm and the loss of confidence cannot be repaired by an award of damages and in any event, the Respondent will not have the capacity to compensate for the harm to the Applicant and to all its innocent users. Like I have said, the shutdown could cause loss of life, loss of business

opportunities and other unforeseeable harm. Such harm cannot be compensated by an award of damages. Some of the affected people will not be known and may not have the means or the courage to litigate.

14 The balance of convenience favors the granting of the interdict:

14.1 The Applicant has been cooperating with the Respondent and will continue to cooperate with the Respondent in identifying abusers of the Ecocash platform and bringing them to book. The Respondent's objective of curbing the abuse of Ecocash can be met if the Respondent intensifies its investigations with the cooperation of the Applicant within the bounds of the law. While Respondent can still meet its objectives without a shutdown of the cash in and cash out facilities, Applicant and the innocent users of Ecocash will suffer irreparable harm if the shutdown is continued with. Thus, I contend that the balance of convenience favors the granting of the interdict.

15 This matter is urgent for the following reasons:

15.1 I received the directive in the afternoon on 30 September 2019. I immediately consulted my management team and my board. After obtaining clearance to talk to the Applicant's lawyers, we had a meeting at 3pm. The lawyers conducted their research and were able to advise the Applicant of its rights, after which, I instructed the Applicant's legal Practitioners to file an urgent Application. The papers were drafted under extreme urgency.


15.2 Therefore, the Applicant did not wait after receiving the directive. It acted immediately and without delay.

15.3 In the circumstances, I pray that this Application be heard on an urgent basis.

16 Whereof I pray for an order in terms of the draft attached hereto.

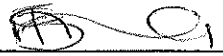
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Thus, signed and sworn to at **HARARE** on this the ^{2nd} day of **September, 2019**



Edmore Chibi

Before me:



COMMISSIONER OF OATHS

ABIGAIL TSHUMA
BA, LLB (RHODES)
LEGAL PRACTITIONER
COMMISSIONER OF OATHS



Reserve Bank of Zimbabwe. 80 Samora Machel Avenue, P.O. Box 1283, Harare, Zimbabwe.
Tel: 263 4 703000, 263 8677000477, Fax: 263 4 707800, Telex: 26033, 26075 RESZIM ZW, Website: www.rbz.co.zw

To ALL BANKS

Attention: MLROs

19 September 2019

Directive to freeze transactions in respect of All Accounts in the Names of Sakunda, Access Finance, Spartan security and Croco Motors and Related Entities

1. The FIU is carrying out analysis on the above named entities and their sister group companies.
2. As we carry out further analysis, you are directed to freeze, with immediate effect, all accounts held in the names of the listed entities until further notice.
3. You shall not process any withdrawals or transfers from the accounts; you should, however, allow deposits or other flows into the accounts.
4. You shall immediately report to the Unit any deposit or other inflow into the account as well as any attempted withdrawal or transfer from the accounts.
5. Please acknowledge receipt of this directive in writing, confirming that you have frozen the accounts and confirming the account balance as at the date of freezing.

Please be guided accordingly.

Yours faithfully

A handwritten signature in black ink, appearing to be 'W Kaofu', written over a horizontal line.

W KAOFU
FOR DIRECTOR GENERAL
FINANCIAL INTELLIGENCE UNIT



16

17

NATIONAL PAYMENT SYSTEMS DIRECTIVE: NPS 01/2019

**RE: DIRECTIVE ISSUED IN TERMS OF SECTION 10 OF THE
NATIONAL PAYMENT SYSTEMS ACT [CHAP: 24:23] ON
CASH-IN, CASH-OUT AND CASH-BACK FACILITIES**

1. It has come to the attention of the Reserve Bank of Zimbabwe that some economic agents are engaging in illegal activities abusing the cash-in, cash-out and cash-back facilities thereby compromising the public interest objectives of national payment systems in the economy.
2. Notable activities include the buying and selling of cash through mobile money agents at high rates above the approved charges for cash-in and cash-out with some economic agents not banking cash sales under the disguise of cash-back services.
3. The charging of commissions outside the approved framework adversely affects the smooth operation of payment systems and have the negative effect of distorting pricing of goods and services.
4. In view of the above, all mobile payment system providers and merchants are hereby directed to discontinue cash-in and cash-out with **immediate effect**.
5. Furthermore, all economic agents are, with **immediate effect**, directed to discontinue cash-back facilities.
6. Banks, mobile payment system providers and other economic agents are reminded of the need to ensure that the entire ecosystem operate within the confines of law and enforce compliance.
7. Please be guided accordingly.

A handwritten signature in black ink, appearing to be 'J. Mutepfa', written over a horizontal line.

**J. Mutepfa (Mr.)
DEPUTY DIRECTOR
FINANCIAL MARKETS, NATIONAL PAYMENT SYSTEMS
30 September 2019**

2. That the National Payments Systems Directive NPS 01/2019 issued by the Respondent on 30 September 2019 be and is hereby declared to be null and void and is consequently hereby set aside.
3. That the Respondent bears the costs of this Application.

INTERIM ORDER GRANTED

Pending determination of this matter, the Applicants are granted the following relief:

- 1 a temporary interdict restraining the Respondent from enforcing the National Payments Systems Directive: NPS 01/2019.

SERVICE OF THE PROVISIONAL ORDER

Service of this Provisional Order shall be effected by the Applicant's Legal Practitioners or by the Sheriff of the High Court of Zimbabwe or his lawful deputy.

BY THE JUDGE

REGISTRAR