TOWNSEND ENTERPRISES (PRIVATE) LIMITED HC1978/24
versus
KARIBA FERRIES (PRIVATE) LIMITED

KARIBA FERRIES (PRIVATE) LIMITED HCH 1754/24
versus
TOWNSEND ENTERPRISES (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MUNANGATI-MANONGWA J
HARARE, 30 October 2024 & 8 January 2025

Opposed Matter

Adv S M Hashiti, for the applicant
S Evans, for the respondents

MUNANGATI-MANONGWA J: This matter pertains to two matters being case numbers HCH1754/24 and case number HC1978/24 which cases were consolidated under case number HC4083/24. The consolidation was proper as the two cases share common facts whence forth each litigant seeks relief upon. Apparently, the legal issues are so intertwined such that the resolution of one of them likely settles the other.

For clarity the following is the relief sought by each litigant.

TOWNSEND ENTERPRISES (PRIVATE) LIMITED HC1978/24
versus
KARIBA FERRIES (PRIVATE) LIMITED

1. The judgment debt of US$33 014 recorded in the consent order granted on 11 October 2028 under case number HC7686/17 was converted to ZW$33 014 by operation of law with effect from 22 February 2019.
2. The payment of ZW$43 726 made by the applicant to the respondent on 25 November 2021 be and is hereby declared to be in full and final settlement of the judgment debt, interest and costs under HC7686/17.
3. Respondent to pay costs on an attorney -client scale.

In the other matter:

KARIBA FERRIES (PRIVATE) LIMITED HCH 1754/24
versus
TOWNSEND ENTERPRISES (PRIVATE) LIMITED

1. The application be and is hereby granted.
2. The order by MANGOTA J dated 11 October 2018 be and is hereby revived.
3. There is no order as to costs

Regard being made to the relief sought, a finding that the RTGS payment by Townsend Enterprises (Private) Limited satisfied the United States denominated debt owed to Kariba Ferries on a 1:1 ratio by reason of the provisions of S.I.33/19, the need to revive the judgment as prayed for by Kariba Ferries falls away. If, however the finding is that the debt has not been extinguished there would be need to revive the judgment.

The background facts of the case are common cause. The respondent instituted action proceedings against the applicant under case number HC7686/17 claiming payment for transport services provided to the applicant. Upon the parties negotiating a settlement at pre-trial conference stage, the applicant proposed that it will effect payment to the respondent upon receiving proceeds from Sinohydro Zimbabwe, a company which had subcontracted the applicant. The respondent rejected the applicant's proposal through a letter dated 22 May 2018.It insisted that the applicant had to settle the debt it owed with or without receiving Sinohydro Zimbabwe's payment.

Subsequently the parties thereon executed a Deed of Settlement which culminated in an Order by Consent on 11 October 2018. The Order by Consent placed an obligation on the applicant to pay the judgment debt, interest and legal costs on or before 31 January 2019. Before the debt

was satisfied, S.I 133/2019 was promulgated which changed the law relating to currency and payment of certain obligations.

In July 2020, the applicant requested banking details from the respondent in order to effect payment. On 9 November 2021 the respondent furnished a breakdown of the debt expressed in United States Dollars, supplied a bank account number for its RTGS account and requested for payment of the outstanding amount using the prevailing bank rate. It is not in dispute that the applicant remitted RTGS ZW$43 726 on 25 November 2021 and supplied proof of payment to the respondent. That amount has not been paid back to the applicant. . In July 2023 or sometime thereof, the respondent got wind that applicant had received payment from Sinohydro Zimbabwe and had paid some of its credotors in United States Dollars. It started claiming that it had not been paid demanding payment in United States Dollars

It is the applicant's case that with effect from 22 February 2019, the debt it owed the respondent expressed in United States Dollars as specified in the Deed of Settlement and court order was by operation of law converted to RTGS at the rate of 1:1. It is the applicant's stance that the debt was paid in full and it does not owe the respondent any money, conversely there is no need to revive the judgment in view of the fact that the debt has been extinguished. The applicant contends that respondent mistakenly purports that Clause 2 of the Deed of Settlement provides that applicant shall pay the respondent "*in the same currency and exchange rate it was paid*" by Sinohydro Zimbabwe. The applicant states that respondent is mistaken in that;

1. When applicant paid the respondent, it had not received any payment from Sinohydro Zimbabwe.
2. Parties had not agreed that respondent will be paid from proceeds of Sinohydro because respondent had rejected that proposal.
3. Clause 2 of the Deed of Settlement shows that it relates to interest calculations not currency or payment.

The respondent received payment of and never returned it to the applicant. The applicant states that the respondent's inaction upon receiving the amount of ZW$43 726 and continued acceptance of payment in Zimbabwean dollars constituted an implied representation that it accepted the arrangement the parties had entered into in settlement of the dispute. Applicant's

position is that respondent cannot claim that the debt be satisfied in United States Dollars or RTGS equivalent in view of the provisions of the law which converted all obligations to RTGS.

Mr *S M Hashiti* for the applicant submitted that the claim was satisfied in that s 22(1)(d) of the Finance Act [*Chapter 23:04*] covers scenarios as the present one that have to do with judgment debts. He interpreted S.I 33 of 2019 as well as S.I 142 of 2019. He argued that in view of S.1 33/19 the applicant's claim cannot be paid as claimed since the judgment debt arose before the effective debt. It being so, the amount of the debt which was denominated in United States Dollars is deemed to be at par with the Zimbabwean Dollar. He contended that the position of law is clear and was well articulated in *Zambezi Gas* v *N.R Barber & Anor* SC3/20 and *Augur Investments* v *Fairclot Investments Pvt Ltd t/a T&C Construction & Anor* SC8/19.

Mrs *Evans* for the respondent argued that on 2 February 2022 the respondent wrote a letter requesting the applicant's banking details in order to return the funds wherein the respondent declined the request. Mrs *Evans* contended that a subcontracted company in the same position as the respondent had been paid in United States Dollars and so the respondent ought to have been paid in United States Dollars given that the applicant had received its payment from Synohydro in United States Dollars. She urged the court that the debt be treated as a foreign debt since purchase of materials utilized during the contract was done in United States Dollars. She drew the court's attention to the case of *Unifreight Africa Ltd* v *Emily Mashinya* SC11/24. She overally contended that the debt has not been satisfied.

In terms of s 14 of the High Court Act, in an application for a declarator, the applicant should prove that;

1. He or she is an interested party.
2. Has an existing future or contingent right or obligation (see also *Johnson* v *AFC* 1995 (1) ZLR 65 (H).

It is imperative to note that upon the applicant proving the following, granting of this application is at the discretion of the court. The applicant as a judgment debtor has an interest in the matter and has right to seek confirmation of whether a payment of ZW$43 726 it advanced to the applicant discharged the debt it owed.

Arguments by the respondent that the parties agreed for payment in United States Dollars hence the debt should be paid in that currency is ill conceived. No agreement supersedes the law. The law on the conversion of outstanding debts and obligations denominated in United States Dollar before the effective date is settled. Once it is established that the outstanding debt was expressed in United States Dollars prior 22 February 2019 and does not fall within the exceptions in s 4(1)(e) of Presidential Powers (Temporary Measures) Amendment of Reserve Bank of Zimbabwe Act and Issue of Real Time Gross Settlement Electronic Dollars (RTGS) Regulations, 2019 ("S.I 33/19"), automatically the debt will be converted at par with RTGS dollar on a 1:1 basis. In this case, the judgment debt accumulated on 11 October 2018 well before the effective date hence it has to be paid at the rate of 1:1.

Equally the argument that the debt be treated as a foreign debt has no merit. The respondent is misguided by contending that the judgment debt in question is a foreign debt as it falls outside the exception in s4 (1) (e) of S.I 33/19. The fact that the materials used during the performance of the contract were purchased in United States Dollars does not convert the debt to a foreign debt. The capital debt of US$33 014 is by operation of law converted to be ZW$33 014. The facts of the cited case of *Unifreight Africa Ltd* v *Emily Mashinya* are different from what obtains herein and in any case the court did not order payment in United States Dollars as respondent would prefer. Equally the fact that the applicant paid its other creditors in a certain currency does not advance the respondent's case any further as the court is not privy to the third party's circumstances and will not consider what happened outside the purview of this case.

It remains a fact that the principal debt accumulated on 11 October 2018 thus has been affected by S.I 33/19. As regards interest payable, it will be calculated and discharged on same currency as the principal debt. On the amount of US$1 600 which accrued from legal costs, the *Zizhou* v *Taxing Officer & Anor* SC7/20 case is distinct. In *Zizhou* case *supra*, MAKARAU (J) as she then was applied S.I 142/19 wherein she ruled that tariffs should be dominated in local currency and in line with Reserve Bank of Zimbabwe (Legal tender) Regulations since anything done in conflict with a statute is a nullity. Therefore, it is apparent that by operation of law the amount of US$1 600 being legal costs was also affected by operation of S.I 33/2019,

It is the court's finding that the payment of RTGS$43 726 advanced by the applicant to the respondents' RTGS account on 25 November 2021 is the full and final payment of the judgment debt.

Arguments by the respondent that in rendering services to the applicant, it used United States Dollars and it should be paid in the same currency to avoid financial prejudice was well answered in *Mbundire* v *Buttress* 2011 (1) ZLR 501 (S) at 512E, GARWE JA (as he then was) ruled that:

> "It is now established, certainly in South Africa, that a monetary debt has to be paid according to its nominal value and, to take into account inflation, interest is then added on that debt until payment is made in full."

In this case, provision for interest was already granted in the initial order and was as well paid in full. The judgment debt of US$33 014 highlighted in the Consent Order granted on 11 October 2018 under case number HC 7686/17 was converted to ZWL$33 014 by operation of the law with effect from 22 February 2019.The payment of ZWL$44 073 made by the applicant to the respondent on 25 November 2021 be and is hereby declared to be in full and final settlement of the judgment debt, interest and costs under HC7686/17. The application for a declarator therefore succeeds.

Regarding the application for revival of an order made under case number HC1754/24, the court find no reason to regurgitate the facts. Given the outcome of the counter application in HC1978/24, the application for revival of the order granted on 11 October 2018 cannot be succeed. Suffice to state that the judgment debt has been satisfied and is no longer outstanding, the application for revival of an order granted in HC7686/17 is therefore dismissed (see *Mafoko* v *Alcatel Lucent South Africa (Pvt) Ltd and Another* 2015 ZALCTHB 240 and *Independent Petroleum Group Limited* v *Chaparrel Tradind (Private) Limited and Another* HH67/23).

As regards costs, the court takes note of the fact that the applicant in HCH1754/24 anticipated payment in United States Dollars, however it had pushed for payment before the respondents had received any from Sinohydro Zimbabwe despite pleas from respondent to wait until it had been paid. It then received ZWL$44 073 after supplying its RTGS account details and retained the amount for some time. To then seek to turn around and claim that it had not been paid in full can only be mischievous particularly so in light of the legislation regulating the monetary regime and payment of debts as enunciated in the aforegoing paragraphs. In that regard, the

granting of the declarator against *Kariba Ferries (Private) Limited* (the respondent in the matter for a declarator) calls for the payment of costs by that unsuccessful entity. Equally the dismissal of the application for revival of a judgment entitles the respondent therein *Townsend Enterprises (Private) Limited* to an order for costs in its favour. As the issue of costs lies in the court's discretion an order for costs on a higher scale will overburden the unsuccessful party whose earnings have already been affected by change in legislation. The court will thus order payment on an ordinary scale.

Accordingly, the following order is granted;

HCH 1978/24

1. The judgment debt of US$33 014 recorded in the consent order granted on 11 October 2028 under case number HC7686/17 was converted to ZW$33 014 by operation of law with effect from 22 February 2019.
2. The payment of ZW$43 726 made by the applicant to the respondent on 25 November 2021 be and is hereby declared to be in full and final settlement of the judgment debt, interest and costs under HC7686/17.
3. Respondent to pay costs.

HCH 1754/24

4. The application for revival of a judgment in case number HC1754/24 be and is hereby dismissed.
5. The applicant to pay costs.

MUNANGATI-MANONGWA J…….

Mabuye Zvarevashe Evans Legal Practitioners, applicant's legal practitioners.
Machekano Law Practice, respondent's legal practitioners.