

REF CASE NO SC 306/21  
REF CASE NO HC 355/18  
REF CASE NO HC 8829/15  
REF CASE NO HC 191/14  
REF CASE NO HC 8358/11  
REF CASE NO HC 11293/11

JASON CORBETT N.O.  
versus  
ZECO HOLDINGS (PRIVATE) LIMITED  
and  
HALGOR ESTATE (PRIVATE) LIMITED  
and  
THE SHERIFF OF ZIMBABWE N.O.  
and  
THE MASTER OF THE HIGH COURT N.O.

HIGH COURT OF ZIMBABWE  
COMMERCIAL DIVISION  
MANZUNZU J  
HARARE, 23 October 2023, 5 June, 9 July 2024 & 4 March 2025

CIVIL TRIAL

*F Chinwawadzimba*, for the plaintiff  
*T Tanyanyiwa*, for the 1<sup>st</sup> & 2<sup>nd</sup> defendants  
*A B Chinake*, for the 3<sup>rd</sup> defendant

MANZUNZU J:

INTRODUCTION :

The Plaintiff issued summons seeking relief against the 1<sup>st</sup> and 3<sup>rd</sup> defendants (the defendants), for confirmation of cancellation of agreement of sale, restitution of purchase price and damages for unjust enrichment. The defendants denied liability.

## **BACKGROUND**

- (1) The plaintiff and his late father (the deceased) were employees and shareholders of the 1<sup>st</sup> defendant (Zeco). They had a labour dispute with Zeco which spilt into arbitration. The plaintiff and the deceased were successful.
- (2) The plaintiff is the executor of the estate late Ronald Sylvester Hugh Corbett.

- (3) The plaintiff and the deceased registered an arbitral award with this court on 8 October 2014 in case number HC 1991/14.
- (4) Consequently, a writ of execution was issued on 18 November 2014 against Zeco for US\$243 334.00.
- (5) In the execution of the writ, an immovable property (the property), belonging to Zeco, held by the 2<sup>nd</sup> defendant (Halgor), was attached by the 3<sup>rd</sup> defendant (the Sheriff).
- (6) The property was sold through a Sheriff's auction sale on 24 July 2015 and on 28 July 2015 the Sheriff declared the deceased the highest bidder at US\$350 000.00.
- (7) On 10 September 2015 the Sheriff confirmed the sale.
- (8) An agreement of sale was signed between the Sheriff and the executor to the deceased estate on 12 November 2019.
- (9) The Sheriff paid out, from the purchase price, Zeco's creditors to the tune of US\$314 960.00 and other ancillary payments incidental to the auction, which includes the Sheriff's commission per plan of distribution dated 13 October 2015.
- (10) Zeco unsuccessfully challenged the Sheriff's sale with the High Court but succeeded on appeal at the Supreme court on 7 July 2022 when the sale was set aside.
- (11) The plaintiff has sued Zeco and the Sheriff for unjust enrichment in the sums of US\$318 347.00 and US\$35 040.00 respectively.
- (12) Zeco denies that it was unjustly enriched as it claimed it had no knowledge of any of its creditors being paid from the proceeds of the sale. It challenged the plaintiff to prove that fact.

- (13) The Sheriff contests the claim and has pleaded that at all times he acted lawfully in the execution of his duties. At the time he earned his commission and disbursed the money to creditors, he said, there was no legal impediment because Zeco's initial appeal had been struck off the roll on 24 September 2019. Unjust enrichment is denied. He said the successful appeal was only lodged after the lawful completion of the sale.

### **ISSUES FOR TRIAL**

At the case management conference, the parties agreed that the following were the issues for trial with the onus resting on the plaintiff;

1. whether or not the Plaintiff made payment of the purchase price to the Sheriff?
2. whether or not the Sheriff acted recklessly and negligently in paying out the creditors before transfer of the property to the plaintiff?
3. whether or not the Sheriff due to its unlawful actions has caused the plaintiff to suffer loss in the sum of USD\$ 350 000.00 and therefore must pay the plaintiff damages in the said sum.
4. whether or not the Sheriff has been unjustly enriched by receiving a commission for a sale that was set aside?
5. whether or not Zeco has been unjustly enriched by having its creditors paid in full with proceeds from the sale of the property? If so, what is the quantum of damages the Plaintiff is entitled to receive from ZECO.
6. whether or not Zeco has been enriched by having rates at Ruwa Local Board cleared by the plaintiff? If so, whether the plaintiff is entitled to reimbursement of all the payments made in respect of rates paid to Ruwa Local Board.

### **THE LAW**

The law on unjust enrichment is settled. The requirements are stated in *Industrial Equity v Walker* 1996 (1) ZLR 269 (H) at 270 C-F that:

- the defendant must be enriched.
- the plaintiff must have been impoverished by the enrichment of the defendant.

- the enrichment must be unjustified.
- the enrichment must not come within the scope of one of the classical enrichment actions.
- there must be no positive rule of law that refuses an action to the impoverished person.also

See also *Silonda v Nkomo* SC-6-22, and *Gamanje (Private) Limited v City of Bulawayo* SC-94-04

## PLAINTIFF'S CASE

The plaintiff relied on the evidence of one witness being the plaintiff. His evidence was a simple narration of events (part of which is common cause) which can be summarized as follows;

1. the property was sold through a Sheriff's auction sale for the sum of USD\$ 350 000.00 (an agreement of sale was referred to).
2. the purchase price was paid in full by the plaintiff to the Sheriff (documentary proof was referred to)
3. the purchase price was disbursed to the creditors of Zeco before transfer of the property to the deceased, (the distribution plan by the Sheriff was referred to)
4. the sale was set aside by Supreme Court on the 7th July 2022.
5. the plaintiff has not been refunded the purchase price and the property remains with Zeco.
6. the plaintiff paid rates at Ruwa Local Board on behalf of Zeco which had an obligation to do so in terms of the agreement.
7. The cause of action arose upon the sale being set aside by the judgment of the Supreme Court on 7 July 2022.
8. He said he is entitled to damages in the United States dollar currency the currency in which he paid the money.

In other words, the plaintiff is simply saying, “while I fully paid the purchase price for the property as per agreement, I neither got a transfer of the property nor refund of the purchase price, yet Zeco and the Sheriff unjustly benefitted from the money, so refund me my money”

#### ZECO’S CASE

Zeco, despite the several opportunities afforded by the court to secure the attendance of its intended witness, Zeco failed to do so and finally gave up. There was therefore no evidence led to controvert the plaintiff’s evidence.

#### SHERIFF’S CASE

The evidence of the Sheriff more or less confirmed that of the plaintiff. He stated that;

- a) A Sheriff’s sale took place on 24 July 2015 in which the deceased, who happen to be the judgment creditor, was the highest bidder at a purchase price of US\$350 000.00 which was duly paid and received by his office.
- b) He explained the process of the Sheriff’s sale.
- c) Following the acceptance of the sale by the Sheriff, some objections were raised against the confirmation of the sale, but were dismissed.
- d) The sale was confirmed declaring the deceased the highest bidder.
- e) The title deed of the property was then send to the judgment creditor’s lawyers to do transfer of title to the purchaser.
- f) Zeco challenged the sale in a court application which was dismissed on 21 August 2016. The Sheriff suspended the administration of the sale during the period of its challenge.
- g) Zeco appealed the decision of the High Court to the Supreme Court but the appeal was struck off the roll on 24 September 2019.
- h) An agreement of sale was then prepared and signed on 12 November 2019, the time when there were no pending legal proceedings challenging the sale.
- i) In order to facilitate transfer of the property to the deceased, the Sheriff had to transfer US\$17 500.00 to ZIMRA as capital gains tax.
- j) The Sheriff deducted his commission of US\$17 500.00 for the work done by his office.

- k) The balance of the money was paid to Zeco's creditors in December 2015. When such payments were made no transfer of the property had taken place.
- l) The Sheriff was indemnified through a Bond of Indemnity issued by Sinyoro and Associates legal practitioners.
- m) The sale was subsequently set aside by the Supreme court but after the disbursement of the purchase price.

I now turn to the resolution of this matter based on the evidence adduced before the court. How is each issue determined?

*(a) whether or not the Plaintiff made payment of the purchase price to the Sheriff?*

While this was drawn as an issue, at trial it turns out to be common cause. The Sheriff confirmed receipt of the payment of US\$350 000.00 by the deceased, more so as shown in the plan of distribution. The plaintiff in his evidence proved the payment.

*(b) whether or not the Sheriff acted recklessly and negligently in paying out the creditors before transfer of the property to the plaintiff?*

In terms of clause 3 and 6 of the agreement of sale, the plaintiff's obligation was to pay the purchase price and the Sheriff's obligation was to transfer property to the plaintiff. The purchase price was paid in United States dollars in two installments through a bank transfer of USD35 000.00 on 24 July 2015 and USD315 000.00 on 15 September 2015.

The plaintiff led evidence which proved that the purchase price was paid in full but the Sheriff failed to transfer the property. Notwithstanding that the property was not transferred into the plaintiff's name, the Sheriff proceeded to distribute the purchase price. The Sheriff distributed the proceeds of the sale to Zeco's creditors before the property was transferred. A distribution plan was produced which proved that funds were distributed on the 13th October 2015.

It is trite that the purchase price must not be paid out to the creditors until transfer has been given to the purchaser. This is more of common sense because in the event the sale is set aside, the purchase price must be refunded to the purchaser.

Contrary to his duty to safe guard the purchase price, the Sheriff proceeded to distribute funds before transfer and such act constitute reckless conduct.

*(c) whether or not the Sheriff due to its unlawful actions has caused the plaintiff to suffer loss in the sum of USD\$ 350 000.00 and therefore must pay the plaintiff damages in the said amount.*

The plaintiff's claim is one premised on unjust enrichment. While the Sheriff was careless in disbursing the purchase price before transfer, he cannot be said to have benefited from such disbursement. The plaintiff's evidence fell short to prove in what way the Sheriff benefited. Realizing this pitfall in his evidence the plaintiff instead said was claiming damages. That did not assist his case. The unchallenged evidence shows that it was Zeco which benefitted when its debts were settled.

The instructing attorneys who played the role of conveyancers allowed the irregular process by the Sheriff to happen under their watchful eye. They even received the judgment debt due to their client, the deceased, without raising issue with the Sheriff as to why that was the case before transfer of the property.

*(d) whether or not the Sheriff has been unjustly enriched by receiving a commission for a sale that was set aside?*

The Sheriff performed his statutory and contractual duties, albeit, the disbursement of the purchase price to the creditors of Zeco. Once the Sheriff has conducted a sale, he is entitled to his commission whether or not the sale is subsequently overturned. In order to facilitate transfer, the Sheriff had a duty to pay capital gains tax with ZIMRA. The issue of unjust enrichment on those two items does not arise. ZIMRA is not a party to these proceedings.

*(e) whether or not Zeco has been unjustly enriched by having its creditors paid in full with proceeds from the sale of the property? If so, what is the quantum of damages the Plaintiff is entitled to receive from ZECO.*

The requirements of unjust enrichment are all present in the case of Zeco. In any event, the plaintiff's evidence stands unchallenged. The plaintiff's evidence proved that the debts of Zeco were settled from the purchase price. To that end, Zeco has been unjustly enriched at the expense of the plaintiff. The plan of distribution shows that a total of US\$314 960.00 was paid to Zeco's creditors. Zeco benefited from this settlement of its debts. It has a duty to refund the money to the plaintiff.

In fact as per the letter from Zeco dated 3 August 2017 they accepted liability and made an offer to settle the amounts stated therein.

*(f) whether or not Zeco has been enriched by having rates at Ruwa Local Board cleared by the plaintiff? If so, whether the plaintiff is entitled to reimbursement of all the payments made in respect of rates paid to Ruwa Local Board.*

The plaintiff in anticipation of transfer paid rates with Ruwa Local Board to the tune of \$3 387.00 which the plaintiff admitted was in RTGS. Zeco which had a duty to pay this amount was unjustly enriched and has the duty to refund the money to the plaintiff.

## CURRENCY

The plaintiff's claim is founded on United States dollars. However, Zeco and the Sheriff argue that the purchase price is valued in Zimbabwean dollars at the rate of 1:1 to the United States dollars by application of the provisions of the Presidential Powers (Temporary Measures) (Amendment of Reserve Bank Act & Issue of Real Time Gross Settlement Electronic Dollars (RTGS Dollars)) Regulations, Statutory Instrument 33 of 2019, (the Regulations) sec. 4(1)(d) of which reads: *"that, for accounting and other purposes, all assets and liabilities that were, immediately before the effective date, valued and expressed in United States dollars (other than assets and liabilities referred to in section 44C(2) of the principal Act) shall on and after the effective date be deemed to be values in RTGS dollars at a rate of one-to-one to the United States Dollar."*



This means an outstanding obligation as at 22 February 2019 is subject to the provisions of section 4 (1)(d) of the Regulations in that it is payable at the rate of 1:1; see *Jivan v Salzman ET Cie SA* HH 242/22.

*In Cocksedge v CABS & Ors* HH 152/23 the court had this to say; “At this juncture, it is important to realize that the judgment in *Zambezi Gas Zimbabwe (Pvt) Ltd v N R Barber (Pvt) Ltd and Anor SC 3-2020*, settled the law on the one United States dollar to one RTGS dollar conversion. That judgment is extant. Thus, the current position is that Statutory Instruments 33/2019 and 142/2019, and the Finance Act of 2019 govern the monetary regime in this country. That all assets and liabilities denominated in United States Dollars prior 22 February 2019 were valued at one-as-to-one with the RTGS dollar... The Supreme Court has since confirmed that all balances and liabilities which were denominated in united states dollars before February 22, 2019 became balances in Zimbabwean dollars at par with the United States Dollar.”

The defendants then contended that when Statutory Instrument 33 Of 2019 was effected it turned all debts and liabilities into Zimbabwean currency at the rate of 1:1. Accordingly, it was argued, the debt owed is now in Zimbabwean currency.

The issue is whether the debt claimed by the plaintiff one existing on 22 February 2019. The argument by the 1<sup>st</sup> and 2<sup>nd</sup> defendants is that one cannot eliminate the corresponding obligation to tender transfer and separate it from balances held in nominated accounts of the 3<sup>rd</sup> defendant. The 3<sup>rd</sup> defendant argued that the plaintiff made payment to the Sheriff through bank transfers which all were affected by SI 33 of 2019.

On the other hand the plaintiff’s argument is that the claim is not by the creditors, this is a claim by the purchaser of the property and these two must never be confused. The plaintiff as a purchaser is claiming a refund of purchase price and that because the purchase price was used to pay for the creditors of Zeco, they have been unjustly enriched and must reimburse the plaintiff.

The plaintiff further argued that there was no obligation on the part of the Sheriff to refund the purchase price on 22 February 2019. In other words, as at 2019 there was no debt arising from the sale of property.

The plaintiff further argued, I quote; “The obligation to refund the purchase price only arose in July 2022 when the 1st and 2nd defendant appeal was allowed. It is from that date when the obligation

arose.” I can do no more than agree with this statement. The obligation cannot be subjected to the provisions of statutory instrument 33 of 2019.

## CONCLUSION

The plaintiff has proved his case on a balance of probabilities as against Zeco. The same cannot be said as against the Sheriff, though the circumstances, in which the Sheriff has been found to be negligent in the disbursement of the purchase price, will not be entitled to any costs. There is no direct relief sought against Halgor and the Master. The purchase price was paid during the multi-currency regime in which the United States dollar was the dominant currency. Zimbabwe now has its own currency which upon conversion, any foreign currency can be paid through the local currency. Nothing was advanced in the heads by the plaintiff to justify costs on a higher scale

## DISPOSITION

IT IS ORDERED THAT:

1. Following the order of the Supreme Court dated 7 July 2022 in which an appeal was allowed, effectively setting aside the sale, the cancellation of the agreement between the plaintiff and the Sheriff be and is hereby confirmed.
2. The plaintiff’s claim as against the Sheriff be and is hereby dismissed with no order as to costs.
3. The plaintiff’s claim as against Zeco succeeds; Zeco shall pay the plaintiff;
  - (a) the sum of US\$314 960.00 or its equivalent in local currency at the prevailing interbank rate applicable at the time of payment.
  - (b) an amount in ZIG equivalent to ZWL3 387.00.

(c) interest on the above sums at the prescribed rate of interest from the date of summons to date of full and final payment.

(d) Costs of suit.

*Sinyoro and Partners*, legal practitioners for the plaintiff.

*Tanyanyiwa and Associates*, legal practitioners for the 1<sup>st</sup> and 2<sup>nd</sup> defendants.

*Kantor & Immerman*, legal practitioners for the 3<sup>rd</sup> defendant.