MOSES MAX KUDZANAI CHIKIWA
Versus
RAGIN KASSIM

HIGH COURT OF ZIMBABWE
MAWADZE DJP & ZISENGWE J
MASVINGO, 27 June 2024

Written reasons provided on 8 July 2024

Appellant; In person
C. Ndlovu; for the respondent

CIVIL APPEAL

ZISENGWE J: The aftershocks of the implications of s4 of Statutory Instrument 33 of 1999 (which provisions were subsequently incorporated in s22 (1) of the Finance No. 2 Act of 1999) continue to reverberate long after its initial impact was felt. The said provision reads:

> **22. Issuance and legal tender of RTGS, savings, transitional matters and validation.**
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> (1) Subject to section 5, for purposes of Section 44C of the principal Act, the Minister shall be deemed to have prescribed the following with effect from the first effective date-
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> a) [not relevant]
> b) [not relevant]
> c) [not relevant]
> d) that for accounting and other purposes (including the discharge of financial or contractual obligations), all assets and liabilities that were, immediately before the first effective date, valued and expressed in United States dollars (other than assets and liabilities referred to in Section 44 C (2) of the principal Act) shall on the first effective date be deemed to be values in RTGS dollars at a rate of one to one to the United States dollars, and
> e) that after the first effective date any variance from the opening parity rate shall be determined from time to time by the rate or rates at which authorised dealers exchange the RTGS dollar from the United States dollar on a willing-seller willing buyer basis, and

f) [not relevant]

The first effective date in terms of Section 2 of the Finance No. 2 Act of 1999 ("the Act") was 22 February 2019.

In a nutshell, the dispute revolved around the interpretation of this provision in relation to a contractual dispute which arose prior to the effective date but was only resolved by the courts post that date. More particularly, the question which we were called upon to determine in this appeal was whether the obligation to pay arose contemporaneously with the commission of the breach or only arose when the court which was subsequently seized with the dispute pronounced itself (in appellant's favour).

Whereas the respondent expressed the view that such an obligation arose the moment the breach was committed, the appellant expressed a contrary view and argued that it only arose when the court (after a prolonged legal tussle) pronounced itself (in his favour).

The implications of this determination could not have been starker for the parties - if the obligation was found to have arisen contemporaneously with commission of the breach (or at any rate, at any time thereafter but prior to the first effective date), it meant that the amount payable was to be in Zimbabwe dollars calculated at the rate of 1.1 with the United States dollar (i.e., paragraph (d) above was applicable). On the other hand, however, a finding that paragraph (e) was applicable, i.e. that the obligation only arose when the court only pronounced itself (which was well after the effective date), then the amount payable in local currency consequent to that judgment was calculable at the prevailing official bank rate as against the United States dollar.

In the brief *ex tempore* judgment which we delivered immediately after hearing arguments in the appeal, we ruled that the obligation only arose when the court *a quo* delivered its judgment on 19 February 2024. We therefore found that the amount payable was to be in United States dollars or its equivalent in value in Zimbabwe dollars calculated at the official bank rate on the day of payment.

Evidently dissatisfied with outcome, the respondent immediately requested us to provide written reasons informing that decision, which we now do.

The Background

The dispute has its genesis in a joint chrome mining venture which the parties entered into in 2017. Pursuant to that agreement the appellant deposited the sum of $10 000 into the respondents Banc ABC Account. This was in January 2017. The agreement did not turn out as anticipated prompting the appellant to sue out summons from the Magistrates Court sitting at Masvingo (the court a quo) seeking to recover the amount so deposited into the respondent's bank account. The claim was couched in the following terms;

> *"USD 10 000 (ten thousand dollars) this was money deposited into your account for the purposes of producing 400 tonnes of chrome ore at your claim. The plaintiff has not received anything. The agreed time to produce the 400 tonnes has long since expired".*

A holistic reading of the pleadings and the evidence reveals that the claim was undoubtedly predicated on breach of contract. The breach being the failure on the part of the respondent to honour the terms upon which the agreement was entered into, namely the production of 400 tonnes of chrome ore.

The claim was resisted by the respondent. In terms of his plea, the respondent confirmed that the appellant deposited the sum of $10 000 pursuant to an "arrangement" wherein the appellant undertook to inject the sum of $14 000 for a joint mining venture. According to him the purpose of the amount was for costs of mining operations on the understanding that proceeds from sale of the product would be shared as between them.

Further, he averred that the appellant reneged on his undertaking to pay the remaining US$4 000. He specifically stated in that plea that there was never any agreement to produce 4000 tonnes of chrome ore.

The matter subsequently proceeded to trial wherein several witnesses testified. At the conclusion of the trial the court *a quo* found for the appellant and found that the probabilities favoured the appellant's case. It concluded that it was unlikely that an injection of $10 000 would not yield any profit whatsoever. It also accepted appellant's evidence that respondent acted dishonestly and misused the funds. Ultimately the court *a quo* found that the appellant was entitled to the amount it sought.

The court a quo however agonised over the implications of the provisions of the finance No. 2 Act of 2019 referred to earlier. In so doing it referred to the High Court decisions in *Zambezi*

Gas (Pvt) Ltd v *NR Barber (Pvt) Ltd* HH 428/19 and *Cambria Africa PLC* v *Breast plate* HMT 55/19. It is not immediately apparent whether the court *a quo* was alive to the fact that these two cases were appealed against and that there are Supreme Court decisions thereto namely *Zambezi Gas (Pvt) Ltd* v *N.R. Barber (Pvt) Ltd & Anor* SC- 3-20 & *Breast Plate (Pvt) Ltd* v *Cambria Africa PLC* SC-66-20. Be that as it may, the court *a quo* concluded that the $10 000 was payable in Zimbabwe dollars at the rate of 1:1.

Aggrieved by that outcome the appellant noted the current appeal. The grounds of appeal were couched in the following terms:

> **GROUNDS OF APPEAL**
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> 1. The learned Magistrate erred in law by determining that the claim before him, although expressed in USD who was also valued in USD before the effective date of Statutory Unit 33 of 2019, despite the fact that the claimed interest could only be valued on the date of the court declaration.
> 2. The court *a quo* erred by not ordering the defendant to pay interest as per the plaintiff's claim.
> 3. The learned Magistrate erred in law by ordering the respondent to pay ZWL 10 000 instead of US$10 000 despite evidence being adduced that the money invested by plaintiff was for gold and chrome production and that the chrome produced by the chrome joint mining venture was for export purposes.
> 4. The court *a quo* erred and misdirected itself in applying the parity rate. Yet on the 20th of February 2019 gold and chrome exporters enjoyed an interbank rate of USD 2.5 RTGS dollars.
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> **Relief Sought**
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> Wherefore, the appellant prays for an order that:
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> 1. The appeal is hereby allowed with costs.
> 2. Paragraph 2 of the judgment of the court *a quo* is set aside and substituted with the following;
>   i) The defendant is ordered to pay US 10 000 or its equivalent in ZWL at auction rate.
>   ii) The defendant is also ordered to pay the plaintiff interest at the prescribed rate from the 17th of January 2017 to the date of payment.

The appellant subsequently filed a notice of amendment wherein it sought to amend the first ground of appeal to read:

> "The court a quo erred and misdirected itself in failing to find that a judgment of the court after 22 February 2019 in respect of a claim expressed in United States dollars before 22 February 2019, in a debt the evaluation of which does not fail with the ambit of Section 22 (1) (d) of the finance Act No. 2, Act 7/2019 or the predecessor Section 4 (1) (d) of Statutory Instrument 33/2019".

Although the grounds of appeal were rather inelegantly couched, the nub of the first ground of appeal was to the effect that the court *a quo* had erred in ordering that the amount of US$10 000 was payable in Zimbabwe dollars at the rate of 1:1 purportedly in accordance with the provisions of s22 (1) (d) of the finance No. 2 Act of 2019 when the applicable provision was paragraph (e) of section 22(1).

The second ground of appeal was ostensibly based on the argument that the chrome ore which was the subject matter of the joint mining venture was destined for export thereby rendering it outside the reach of the aforementioned provision.

The final ground of appeal related to the failure by the court to award interest on the $10 000 calculated from 2017 which is the year when that amount was deposited into the respondent's bank account.

We made short shift of the second ground of appeal which was supposedly anchored on the premise that the chrome that was intended to be mined was destined for export. Not only is there a dearth of evidence suggesting that the chrome was in fact intended for export, let alone that it was actually exported, rendering the amount in question exempt from the reach of Section 22 (1) (d), but also that argument is farfetched. The supposed link between it and the substance of the dispute is tenuous and remote to say the least. The amount deposited by appellant into the respondent's bank account constituted neither a foreign loan nor a foreign obligation as contemplated by the exception to s22 (1) (d).

The main bone of contention, as stated earlier, was whether the obligation to pay arose contemporaneously with the commission of the breach or only arose when the court *a quo* pronounced itself (in appellant's favour).

The respondent's position was a defence of the court *a quo's* interpretation of the provision in question and its application to the facts. This much is clear from paragraph 3 of his heads of argument where the following was stated:

> "Having stated the above it is submitted that the appellant's submissions to the effect that his matter is not covered by the Act because the word "claim" does not appear in the Act is clearly specious. This is so because appellant does not dispute that the transaction took place before the effective date and that it was expressed in United States dollars.

> It appears the appellant is oblivious of the glaring fact that the Act clearly provides that the financial or contractual obligation includes (for the avoidance of doubt) judgment debts (my underlining) it is submitted that ordinary debts are part of financial or contractual obligation".

Reliance was placed *inter alia* in the case of *Falcon Gold Zimbabwe Ltd* v *Taxing Officer NO &Anor* SC 25/24 where the following was said:

> "The Finance Act (No 2), Act 7 of 2019 (the Finance Act), came into effect on 21 August 2019, which was the date on which S.I. 33/19 lapsed. It re-enacted the provisions of SI 33/19 and applied them retrospectively to 22 February 2019, the date on which S.I. 33/19 took effect. The practical effect was therefore that the Finance Act introduced the RTGS dollar at par with the United States dollar on or before 22 February 2019. It also provided that after that date the value of the RTGS dollar would be determined at the prevailing interbank rate between the local currency and the United States dollar. Section 23 (1) of the Finance Act also subsumed the RTGS dollar as the sole legal tender in Zimbabwe, with effect from 24 June 2019, as prescribed in S.I. 142/2019. See Breastplate Service (Pvt) Ltd v Cambria Africa PLC SC 66/20 at p 14."

Similarly, the respondent relied on the case of *Mushayakavara* v *Zimbabwe Leaf Tobacco (Pvt) Ltd* SC 108/2021 where the court said the following:

> In the case of Zambezi Gas (Pvt) Ltd v N.R. Barber & Anor SC 3/20, in interpreting s 4(1)(d) of SI 33/19 the Court held that contractual obligations valued in United States dollars immediately before the effective date were to be paid in RTGS dollars at parity or at a one-to one rate. The court stated the following at p 13 of the cyclostyled judgment:
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> > "Section 4(1)(d) of SI 33/19 states that for such sui generis liabilities, including judgment debts, a rate of one-to-one between the United States dollar and the RTGS dollar will apply. The transactions entered into after the effective date would fall under the provisions of s 4(1)(e) of SI 33/19."

Further reliance was placed on a passage from *Breastplate Service (Pvt) Ltd* v *Cambria Africa Plc* (*supra*) where the Court stated as follows at p 5 of the judgement:

> "What emerges clearly and unequivocally from s 44C(2)(b) of the Reserve Bank Act, as read with s 4(1)(d) of SI 33 of 2019, is that foreign loans and obligations denominated in any foreign currency are excluded from the broad remit of SI 33 of 2019. Thus, foreign loans and obligations continue to be valued and payable in the foreign currency in which they are denominated."

The obvious point which eluded the respondent was that the obligation by the respondent to pay the appellant did not arise contemporaneously with the transaction in question. It is farcical to suggest that as soon as the appellant made the US$10 000 payment into the Respondent's Banc ABC account, the respondent instantly had the obligation to pay it back.

Crucially, the respondent conveniently conflated liability in terms of the obligations under the agreement and liability in terms of the claim. The original "*liability"* placed on him under the agreement was to deliver 400 tonnes of chrome ore. It was not for the payment of US$10 000. The latter only arose with the claim. The respondent cannot therefore predicate its defence on the latter liability. The claim was effectively one for *restitutio in integrum*. He sought a restoration of the status *quo ante*, i.e. to be restored to the position he would have been had the contract not been concluded.

Similarly, the breach alleged by the appellant which no doubt occurred sometime in 2018 when it became apparent that the respondent was not prepared to honour his side of the bargain did not necessarily create an obligation. At most it created a potential obligation. At that stage the respondent vehemently denied any breach let alone any obligation to repay the amount paid into his bank account. How then can it be said that, that is when the obligation must be deemed to have arisen? It is plainly illogical.

We pointed out in our *ex tempore* judgment as we emphasize now that the situation would most probably have been different had the respondent admitted his liability, (hence obligation to pay) at that stage. His obligation to pay would arguably have immediately arisen. Similarly, if the original agreement created a liability on the part of the respondent to pay the appellant the sum in question, then the obligation would have been deemed to have arisen at the time of the conclusion of that agreement.

The liability under the contract was therefore different from the liability in terms of the suit in the court *a quo*. The judgment in terms of latter was the one that created the obligation to pay which in turn fell under the spell of Section 44 (1) (e) of the Act.

Liability arising from the breach having been denied, the obligation to pay only arose when the court *a quo* held the respondent liable. That is the moment the amount in question became a "*judgment debt*" and as contemplated in s20 of the Act which defines a judgment debt as:

> "… a decision of a court of law upon relief claimed in an action or application which, in the case of money, refers to the amount in respect of which execution can be levied by the judgment creditor; and, in the case of any other debt, refers to any other steps that can be taken by the judgment creditor to obtain satisfaction of the debt (but does not include a judgment debt that has prescribed, been abandoned or compromised);

At the time of the commission of the breach, all the appellant had was a potential cause of action, which in any event was not complete until the respondent was placed in *mora ex persona* (See *Asharia* v *Patel & Ors* 1991 (2) ZLR 276 (S) *& Nan Brooker* v *Mudhanda Ors, Pierce* v *Mudhanda* SC-5-18.)

The case of *Zambezi Gas (Pvt) Ltd* v *N.R Barber* (*Supra*) could not have come to respondent's aid as it was based on a judgment debt. In other words, a debt as pronounced by the court.

The case of *Regis Magauzi* v *Francis Jekera & Another* SC-54-22 effectively settled the dispute. That case bears some resemblance to the present case. The court had to determine whether the obligation to pay arising as it did from an acknowledgement of debt arose when it was signed or when the court made its determination. The court concluded thus:

> "It is common cause that the cause of action resulting in the judgment debt under HC 11449/18 arose from the acknowledgment of debt signed by the first respondent acknowledging his indebtedness to the appellant in the sum of US$26 100.00. It is also common cause that the judgment debt in HC 11449/18 was granted on 22 February 2019 the day when S.1 33 of 2019 came into effect at 0.01AM. The judgment debt was granted during working hours of 22 February 2019 several hours after the effective date had come into effect. The respondent therefore incurred the obligation to pay when the consent order was granted by the court on 22 February 2019."

Finally, with regards to the question of interest, the appellant not having made a claim for interest in his prayer in the summons, we could not find fault in the court not having granted an order for the same.

It was for the foregoing that we upheld the appeal (albeit in part) and gave the following order.

1. The appeal succeeds with costs.

2. The decision of the court a quo is hereby set aside and substituted with the following:
   a) The defendant is ordered to pay the plaintiff the sum of US$10 000 or its equivalent in local currency at the prevailing bank rate calculated at the date of payment.
   b) The order of costs remains unchanged.

ZISENGWE J.....

MAWADZE DJP Agrees.....