REPORTABLE (73)

BARMLO CONSTRUCTION PRIVATE LIMITED
v
PATRICIA CHIVAVAYA

SUPREME COURT OF ZIMBABWE
UCHENA JA, MATHONSI JA & CHITAKUNYE JA
HARARE: 9 SEPTEMBER 2022 & 28 JULY 2023

R. G. Zhuwarara, for the appellant

A. Masango, for the respondent

CHITAKUNYE JA: This is an appeal against the whole judgment of the High Court ("the court *a quo*"), sitting at Harare. In its judgment, the court *a quo* upheld the respondent's appeal against a magistrates' court judgment granting the appellant's claim in the sum of US$ 8538.45 payable at the obtaining interbank rate on the date of payment. The court *a quo* held that the claim had been affected by s 22(4) (a) of the Finance (No. 2) Act, 2019 with the result that the respondent had overpaid the appellant and extinguished her debt.

FACTUAL BACKGROUND

The appellant and the respondent executed a written contract on 12 May 2018, in terms of which the appellant was required to perform construction work for the respondent at a total cost of US$36 962.00. The contract stipulated that the respondent was required to pay a deposit of US$10 000 and thereafter pay the balance in instalments of US$ 900.00 per month

over 31 months. The respondent duly made her payments in terms of the contract until February 2020 when she advised that she could not pay the money due to ill health.

In July 2020, the respondent communicated that she was not satisfied with some of the work done by the appellant. She then made an undertaking to remedy her breach of payment after gathering receipts of expenses she incurred in rectifying the defects she alleged had occurred during the construction work done by the appellant. Thereafter she would pay the balance, if any, after taking into account costs incurred in rectifying the defects. The respondent did not thereafter effect any further payment.

This prompted the appellant to issue summons in the Magistrates' Court in October 2020, claiming, *inter alia*: -

(a) A sum of US$ 8 538.45 for non-payment for services rendered;

(b) Interest at the rate of 10% per month from May 2020 to the date of full and final settlement; and

(c) A cancellation fee of US$ 2 850.00.

These amounts were to be paid in United States dollars or its equivalent in Zimbabwe dollars at the prevailing market rate as at the date of payment.

In the particulars of claim the appellant alleged that the 12 May 2018 written contract had been cancelled and replaced by a new verbal contract in February 2019 hence the claim in United States dollars.

The respondent, on the other hand, contended that there was never a new contract, instead the 2018 contract subsisted. In that respect therefore, she averred that the claim was affected by s 22(4) (a) of the Finance (No. 2) Act of 2019 (Act 7 of 2019) [the Finance (No.2) Act].

After a full trial the magistrate's court held that the May 2018 contract was never cancelled and that the parties did not enter into a new verbal contract in February 2019 as was being alleged by the appellant. It also held that the respondent's failure to pay the monthly instalments in terms of the May 2018 contract culminated in a material breach which went to the root of the contract thus warranting cancellation of the contract by the appellant, payment of cancellation fee and interest in terms of that contract.

The magistrates' court further held that as the appellant had continued to accept payment in United States dollars ("US dollars"), despite the promulgation of Statutory Instrument 33 of 2019 ("S.I 33 of 2019"), the parties' conduct resulted in a *tacit* agreement that payment was to be made in US dollars in terms of their 2018 contract. The court therefore gave judgment in favour of the appellant for the sums prayed for to be paid either in United States dollars or its equivalent in Zimbabwean dollars at the interbank rate as at the date of payment.

Dissatisfied, the respondent appealed against the judgment of the Magistrates' Court to the court *a quo* on seven grounds of appeal. The grounds of appeal pertained mostly to the finding that the contract was not affected by s 22 of the Finance (No.2) Act. It is apposite to note

that there was no appeal against the magistrate court's finding that the contract of May 2018 subsisted and that there was no new contract entered by the parties in February 2019.

SUBMISSIONS BEFORE THE COURT *A QUO*

At the hearing of the appeal *a quo*, Counsel for the respondent submitted in *limine* that the appellant sought specific performance in the magistrates' court and that in terms of s 14(1)(d) of the Magistrates Court Act [*Chapter 7:10*], the Magistrate's Court had no jurisdiction to entertain a claim for specific performance without an alternative claim for damages. Counsel also submitted that the appellant's claim had to be paid at the rate of 1:1 on the basis that the contract between the parties was executed on 12 May 2018, and thus, the provisions of *s* 22(4)(a) of the Finance (No.2) Act applied. In this regard Counsel relied on the case of *Zambezi Gas (Pvt) Ltd v N.R. Barber (Private) Ltd & Another* SC3/20. Counsel further submitted that as the respondent had continued to make payments in US dollars after S.I. 33 of 2019 came into force, she had extinguished the debt. Hence, he maintained that the appellant had no valid claim against her.

Per contra, the appellant's counsel submitted that it had not sought specific performance in the magistrates' court, thus, s 14 (1) (d) of the Magistrates Court Act did not apply. Counsel insisted that both parties had consented to the jurisdiction of the Magistrates' Court in their contract executed in 2018. Counsel further submitted that at the time that S.I. 33 of 2019 (later re-enacted as Finance (No.2) Act of 2019 with some modifications), was promulgated, there was no asset or liability expressed in United States dollars in favour of or against either of the parties. Due to this, Counsel argued that the appellant's claim in the

magistrates' court was not affected by *s* 22(4) (a) of the Finance (No.2) Act. He maintained that the parties' conduct clearly established that they had *tacitly* agreed to use the US dollar as a mode of payment.

FINDINGS OF THE COURT *A QUO*

The court *a quo* held that the appellant's claim in the magistrates' court was not one for specific performance. The court also held that the parties had consented to the magistrates' court's jurisdiction. It was the court's view that the provisions of *s*22(4) (a) of the Finance (No.2) Act applied to the appellant's claim. The court *a quo* further held that the liability for the amount of US$36 962.00 came into existence in May 2018 when the contract was signed, and that the balance of this amount was converted to RTGS dollars upon the promulgation of S.I. 33 of 2019. The court held that, in the circumstances, the respondent had overpaid the appellant regard being had to the provisions of s 22(4) (a) of the Finance (No.2) Act. In the result, the court *a quo* allowed the appeal and set aside the decision of the Magistrates' Court and substituted the same with an order dismissing the appellant's claim.

Aggrieved by the decision of the court *a quo*, the appellant noted this appeal on three grounds.

THE GROUNDS OF APPEAL

1. The court *a quo* grossly erred at law in that it failed to appreciate that all futuristic claims denominated in United States Dollar currency are not in any way affected by provisions of *s* 22(4) (a) of the Finance (No. 2) Act of 2019. In this regard, appellant's claim having arisen in 2020, it was futuristic and could not have been affected.

2. The lower court erred at law in that it failed to appreciate that provisions of s 22(4) (a) of the Finance (No. 2) Act of 2019 only apply to assets or liabilities that were already in existence as at 22 February 2019 insofar as the issue of applicable United States dollar/Zimbabwean dollar currency rate is concerned. In this regard, the court erred by reaching a conclusion that respondent discharged her obligation fully at the rate of one (1) USD = one (1) ZWL.

3. The lower court made gross misdirections of fact by holding that the liability which was in issue arose in 2018. This factual finding by the court *a quo* is so gross to the extent that it constitutes an appealable legal ground. In this regard, the court *a quo* simply failed to realise that the claim in issue arose in 2020.

The appellant prayed that the appeal be allowed with costs and that the decision of the court *a quo* be set aside and be substituted with an order dismissing the appeal against the Magistrates' Court judgment.

SUBMISSIONS BEFORE THIS COURT

Although three grounds of appeal were raised by the appellant, the court holds the view that only one issue commends itself for determination. This is also evident from the thrust of submissions by both Counsel. The issue that resolves the appeal is whether or not the court *a quo* erred and misdirected itself in holding that the appellant's claim was affected by s 22(4)(a) of the Finance (No.2) Act such that the claim had to be paid at a rate of one to one.

Mr *Zhuwarara*, for the appellant, submitted, *inter alia*, that the appellant's claim was not affected by s 22(4) (a) of the Finance (No.2) Act. This was because the parties expressly agreed that the debt be denominated in US dollars. He also submitted that the parties conducted themselves in a manner which showed that the debt was to be discharged in US dollars in spite of the provisions of the Finance (No.2) Act. Counsel, therefore, urged the court to take into account the parties' conduct and make a finding that the debt had to be discharged at the interbank rate. Further, Counsel submitted that it had not been proved in the court *a quo* that the respondent had fully discharged her debt in Zimbabwe dollars.

On the contrary, Mr *Masango*, for the respondent, argued that in terms of s 22(4)(a) of the Finance (No.2) Act, the financial or contractual obligations between the parties were converted to Zimbabwe dollars on the first effective date of 22 February 2019 at a rate of USD 1:1 ZWL. He submitted that the conduct of the parties was not relevant as the parties had acted in contravention of the law. He therefore contended that the court *a quo* did not err in holding that the respondent's debt had been converted to Zimbabwe dollars at the rate of 1:1 on 22 February 2019.

APPLICATION OF THE LAW TO THE FACTS

The appellant's case was predicated on the basis of its assertion that its claim before the Magistrates' Court was futuristic in that it arose from a breach of contract that occurred in March 2020. Due to this, the appellant's counsel submitted that its claim did not fall under the provisions of s 22(4) (a) of the Finance (No.2) Act, because the claim was not due and owing when S.I. 33 of 2019 came into force, that is, on 22 February 2019.

Per contra, respondent's counsel maintained that the contractual obligations were in existence at the time of promulgation of SI 33 of 2019 and so were affected by s 22(4)(a) of the Finance (No.2) Act which re-enacted the relevant provisions of SI 33 of 2019 albeit with some modifications.

Section 22 of the Finance (No. 2) Act which is central to the resolution of this matter in *ss* (1) (d) provides as follows:

> "22 **Issuance and legal tender of RTGS dollars, savings, transitional matters and validation**
>
> (1) Subject to s 5, for the purpose of *s* 44C of the principal Act, the Minister shall be deemed to have prescribed the following with effect from the first effective date –
>
> (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 s 44C (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 dollar;"(my emphasis)

Subsection (4) thereof proceeds to provide that: -

> For the purposes of this section—
>
> (a) it is declared for the avoidance of doubt that financial or contractual obligations concluded or incurred before the first effective date, that were valued and expressed in United States dollars (other than assets and liabilities referred to in s 44C (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 dollar;"(my emphasis)

Section 4(1)(d) of SI 33/19 which was a predecessor to above s 22(1) (d) provided that: -

> (d) 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 s 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; and (my emphasis)

It is clear from the above that as at the first effective date the assets or liabilities, which include financial and contractual obligations, that were valued and expressed in United States dollars were deemed to be in RTGS dollars at a rate of one to one with the United States dollar. That deeming provision effectively converted the outstanding liability to RTGS dollar values on a rate of one to one with the United States dollar from the first effective date.

Evidently the modification in s 22 (1)(d) and (4)(a) of the Act left no doubt on the inclusion of financial or contractual obligations that would have been concluded or incurred before the first effective date.

The import of the above provisions in SI 33 of 2019 was articulated in *Zambezi Gas Zimbabwe (Private) Limited* v *N. R. Barber (Private) Limited & Anor* SC 3-20 wherein it was held that:

> "What brings the asset or liability within the provisions of the statute is the fact that its value was expressed in United States dollars immediately before the effective date and did not fall within the class of assets and liabilities referred to in s 44C (2) of the Reserve Bank of Zimbabwe Act [*Chapter 22:15*] ("the principal Act")."

Further in the *Zambezi Gas* case *supra,* at p. 11, the court aptly stated that:

> "The phrase "immediately before" means that the liability should have existed at a date before the effective date and that such liability should have been valued and expressed in United States dollars. The issue of the time-frame within which the liability arose in relation to the effective date of 22 February 2019 does not matter. What is of importance is the fact that the liability should have been valued before the effective date in United States dollars and was still so valued and expressed**."** (underlining for emphasis)

It is clear from the above that for the liability to fall within the purview of s 22(4)(a) it must be shown that: -

(a) there are liabilities, in this case, financial or contractual obligations, between the parties;
(b) such obligations were concluded or incurred before the first effective date (22 February 2019);
(c) the obligations were and are still valued and expressed in United States dollars and are not covered by section 44C (2) of the principal Act.

If the obligation giving rise to the respondent's liability was concluded or was incurred before the first effective date and is valued in United States dollars, it would obviously fall within the purview of s 22(4) (a) of the Finance (No. 2) Act.

In casu, it is not in dispute that the contract between the two parties was executed in May 2018. That contract created financial and contractual obligations for each party. Those obligations were valued and expressed in United States dollars and remained so valued and expressed as at the first effective date. The appellant in fulfilment of its contractual obligations performed the construction work. The respondent on the other hand paid the deposit as required per the contract and proceeded to make monthly payments in terms of the contract. Those payments were in liquidation of her financial obligations in terms of the contract. As at 22 February 2019, the respondent was still in the process of liquidating the financial obligations. The appellant's counsel's submission that the obligation or liability arose in March 2020 when the respondent failed to pay the remaining balance of $8 538.00 is thus wrong.

It is trite that a contractual obligation is something that parties agree to do or become responsible for when they sign a contract. These are the legal responsibilities of each party involved in a contractual relationship. Such obligations are usually defined at the inception of the contract. In *casu*, the parties defined their respective contractual obligations at the time of

entering into the contract. That contract obligated the respondent to pay for construction services in United States dollars. This remained the position as at the 22 February 2019 when SI 33 of 2019 came into force.

The contractual obligations that each party assumed when the contract was executed in 2018 defined the liabilities that gave rise to the appellant's claim upon respondent's default. The term "liability" is expressed in Black's Law Dictionary as:

> "The quality or state of being legally obligated or accountable; legal responsibility to another or society; …A financial or pecuniary obligation". (underlining for emphasis)

It appears that the above definition of "liability" implies that in terms of the Finance (No.2) Act, liability arises where there is an obligation, which may be financial, on a party whether in terms of a contract or an order of court. It is axiomatic that when the contract between the parties was executed in May 2018, the respondent's liability to the appellant came into existence. This is so because the total value of the respondent's liability for the services that were going to be rendered by the appellant was actually valued and expressed in May 2018 when the contract was consummated. Consequently, when S.I. 33 of 2019 came into force on 22 February 2019, the value of the respondent's liability, which had been expressed in US dollars, was by dint of the deeming provisions, converted to RTGS by operation of law. Corollary, when the Finance (No.2) Act was promulgated, with retrospective effect, on 21 August 2019, that deeming provision affected the liability as from the first effective date. Thus, as at 22 February 2019 the liability was deemed to be in RTGS dollars on a rate of one-to-one.

The appellant's counsel urged the court to consider the fact that in spite of the provisions of s 22(4)(a) of the Finance(No.2) Act, the parties continued to transact in US dollars

from 22 February 2019 up until March 2020, when the respondent defaulted on her payments and was subsequently sued for the outstanding balance. The position of the law, was aptly stated in *Temprac Investments (Pvt) Ltd* v *Nu Aero (Pvt) Ltd & Anor* HH 678-19 at p. 2, as follows:

> "The fact that the parties had in their agreement prescribed that payment would be made into the creditors preferred FCA does not alter the effect of the law on all obligations which were expressed in the United States dollar. That portion of the agreement must be read in the light of and in compliance with the requirements of the law. To the extent that the RTGS dollar cannot be paid into an FCA that portion of the acknowledgement of debt must be deemed to be of no legal effect. Any contract or term thereof must be read subject to the express provisions of a law which affects its performance." (underlining for emphasis) See also *Exodus & Company (Pvt) Ltd* v *Shavi* HH 510-21.

It, therefore, matters not that the parties had continued payments for the construction work in US dollars after the promulgation of S.I. 33 of 2019 and later Finance (No. 2) Act. The moment the parties continued to treat the respondent's liability as being valued and expressed in United States dollars after the first effective date, they were acting contrary to the provisions of the law. Their conduct did not have the effect of reversing or annulling the deeming provision.

It is apposite to point out that after the promulgation of SI 33 of 2019 on 22 February 2019, on 24 June S I 142 of 2019, whose effect was to make the Zimbabwe dollar currency the only legal tender, was enacted. Thereafter on 27 September 2019 Statutory Instrument 212 of 2019, The Exchange Control (Exclusive use of Zimbabwe dollar for Domestic Transactions) Regulations 2019, was promulgated. Statutory Instrument 212 of 2019 expressly prohibited the payment or receipt of any currency other than the Zimbabwe dollar, as price or consideration payable or receivable in respect of any domestic transaction. If, therefore, parties decided to contravene the law it is something this court cannot endorse. It is trite that the courts will not

enforce contracts that are tainted by illegality and performed contrary to the law. See *Silonda* v *Nkomo* SC 6-22.

As the appellant's claim arose from a contractual obligation that arose in May 2018 before the effective date, the court *a quo* cannot be faulted for holding that the liability fell within the purview of s 22 of Finance (No.2) Act. The outstanding balance was deemed to be in RTGS dollars as at the first effective date and had to be extinguished using the parity rate of one-to- one. In the circumstances, the court *a quo* correctly dismissed the appellant's claim for payment of the outstanding balance at the interbank rate. The outstanding balance ought to be paid at the applicable rate as at the date of deeming.

DISPOSITION

In light of the foregoing, we find that the decision of the court *a quo* cannot be faulted. The appeal is devoid of merit and must be dismissed.

As for costs we find no justification to depart from the norm that costs follow the cause.

Accordingly, it is hereby ordered that: -

The appeal be and is hereby dismissed with costs.

UCHENA JA: I agree

MATHONSI JA: I agree

Messrs Saunyama Dondo, appellant's legal practitioners

Mazhande Mazhande Legal Practice, respondent's legal practitioners