EXODUS AND COMPANY (PRIVATE) LIMITED
versus
SICILIA VIRGINIA SHAVI

HIGH COURT OF ZIMBABWE
MUREMBA & MANZUNZU JJ
HARARE, 12 November 2020 & 22 September 2021

CIVIL APPEAL

A Majachani for appellant
R Magundani for respondent

MANZUNZU J This is an appeal against the decision of the Magistrate Court sitting at Harare in which the court dismissed the appellant's claim and upheld the counter-claim by the respondent.

The facts of the case are that on 11 June 2014 the appellant and the respondent entered into an agreement of sale of land. This was during the multi-currency era. The property was sold in United States dollars. The agreed purchase price was US$60 000.00. The agreed terms of payment were that the respondent was to pay the appellant a deposit of US$18 000.00 followed by monthly instalments of US$691.00 for 120 months with effect from 31 July 2014.

On 9 October 2019 the appellant issued summons against the respondent claiming arrears of US$9 619.13. As a result of the alleged breach the appellant prayed that the arrears of US$9 619.13 payable in Zimbabwean dollars at prevailing interbank rate, be paid within 7 days of the order, failing which, that the agreement be cancelled.

The respondent defended the action and raised a defence that the balance of the debt in United States dollars was converted to Zimbabwe dollars by operation of the law at the rate of 1:1. She claimed having paid in full the balance in Zimbabwean dollars.

The respondent raised a counter-claim seeking an order to compel the appellant to pass transfer to her of the property on the basis that the full purchase price was paid as per her plea.

Realizing that the facts of the case were largely common cause the parties agreed to and filed a statement of agreed facts for the matter to proceed as a stated case. In the process the parties agreed before the court *a quo* that the following were issues for trial;

> "1. Whether the principle of sanctity of contract should be observed.
> 2. Whether or not plaintiff can lawfully apply the interbank rate to enforce payment of instalments.
> 3. Whether or not defendant has paid for the purchase price in full.
> 4. Whether or not defendant is entitled to transfer of the property.
> 5. What is the appropriate scale of costs?"

It is clear from the record of proceedings that the appellant's case rested on clause 3.5 of the agreement of sale in its pursuit for payment at interbank rate while respondent's defence rested on the provisions of statutory instruments 33/2019, 212/2019 and 213/2019 together with the Finance Act (No.2) of 2019. In other words appellant's case is based on sanctity of contract and the respondent's defence is based on the provisions of the law. So it is sanctity of contract versus the law.

In dismissing appellant's claim and upholding the respondent's counter-claim the court *a quo* upheld the supremacy of the law over sanctity of contract. This is the bone of contention in this appeal.

The appellant relies on three grounds of appeal in its attempt to dislodge the judgment of the court *a quo*. These are;

> " 1. The court *a quo* erred at law and facts by finding that there exist no multiple exchange rates when in fact multiple exchange rates exist within the contemplation of clause 3.5 (b).
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> 2. The court *a quo* erred and seriously misdirected itself at law and facts in its interpretation and application of clause 3.5 of the agreement by finding that the law in Zimbabwe does not give multiple rates failing to find that clause 3.5 (c) allows the appellant to cancel the agreement when the respondent could not agree with options 3.5 (a) and (b).
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> 3. Further, the court *a quo* erred and misdirected itself at law and facts by failing to uphold the principle of sanctity of contract in circumstances where it should have done so."

We recite hereunder clause 3.5 of the agreement of sale between the parties;

> "3.5 In the event that the currency in use in Zimbabwe changes from multi-currency system, hence this contract is quoted in United States dollars, to any other currency before payment of full purchase price, the Seller shall;
>
> a) Where the law offers a choice of currencies to transact it, have the option to choose the currency to use for the outstanding amount.
> b) Where multiple exchange rates exist, convert the currency at an exchange rate determined by the Seller, or
> c) Where the buyer is not in agreement with either of the above selected by the Seller, the seller shall have the right to terminate the agreement, in which case he shall pay back the Purchaser his deposit using the same currency of the selected option."

This clause is very clear. It was agreed to in anticipation of any changes in the monetary policies. Such changes were inevitable. Indeed in 2019 changes came about.

Mr *Majachani* who appeared for the appellant correctly spelt out the doctrine of sanctity of contract. A contract represents the will of the contracting parties and the court only need to enforce that which the parties agreed. Reference was made to the case of *Book* v *Davidson* 1988 (1) ZLR 365 (S) where the court had this to say;

> "If there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice. Therefore you have this paramount public policy to consider that you are not lightly to interfere with this freedom of contract."

The appellant cited several authorities in the heads of argument to demonstrate the principle of sanctity of contract. See *First Mutual Inv. (Pvt) Ltd* v *Jonsput Trading (Pvt) Ltd* HH 15//13; *Roffey* v *Catterall, Edwards and Gouder (Pvt) Ltd* 1977 (4) SA 49 (N), *E Underwood and Son Ltd* v *Barke (1899) 1 CH 300 (CA)*; *Alliance Insurance* v *Imperial Plastics (Pvt) Ltd & Ano*r SC 30/17.

It is also correct that courts should not rewrite contracts for the parties. In *Magodora and Others* v *Care International Zimbabwe* 2014 (1)ZLR 397 (S) the court underscored the position thus;

> "In principle it is not open to the courts to rewrite a contract entered into between the parties or to excuse any of them from the consequences of the contract that they have freely and voluntarily accepted, even if they are shown to be onerous or oppressive. This is so as a matter of public policy…Nor is it generally permissible to read into the contract some implied or tacit term that is in direct conflict with its express terms."

Clause 3.5 was agreed to by the parties in anticipation the currency in use in Zimbabwe changes from a multi-currency system. In the event of such a change and the law provides choice of currency the seller will chose one through which the buyer will pay the remaining balance. Where multi exchange rate exists the seller will determine the exchange rate.

Did the anticipated position in the law occur as contemplated by the parties. The appellant says the event which the parties contemplated happened in that the multi-currency system was banned and the appellant had proceeded to choose the option available that the respondent liquidates the outstanding amount in United States dollars at interbank rate. If the respondent was in disagreement then the contract was to be cancelled in terms of clause 3.5 (c).

First on the legislation on monetary policy was Statutory Instrument 33 of 2019 whose s 4 (1) (d) reads; "4. (1) For the purposes of section 44C of the principal Act as inserted by these regulations, the Minister shall be deemed to have prescribed the following with effect from the date of promulgation of these regulations ("the effective date")

(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 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;" (own emphasis).

The effective date is the 22nd of February 2019.

In *Zambezi Gas Zimbabwe (Private) Limited* v *N R Barber (Private) Limited & another* SC 3/20 the Supreme Court was called upon to interpret SI 33 of 2019. The court had this to say;

> ".. that the Presidential Powers (Temporary Measures) (Amendment of Reserve Bank of Zimbabwe Act & Issue of Real Time Gross Settlement Electronic Dollars (RTGS Dollars)) ("S.I. 33/19") expressly provides that assets and liabilities, including judgment debts, denominated in United States dollars immediately before the effective date of 22 February 2019 shall on or after the aforementioned date be valued in RTGS dollars on a one-to-one rate."

In regard to the interpretation and applicability of s 4 (1) (d) of S.I. 33/19 the court had this to say;

> "A reading of s 4(1)(d) of S.I. 33/19 does not reveal any ambiguity in the language used by the Legislature in the expression of its intention in enacting S.I. 33/19. The purpose and object of the statute can easily be ascertained from the ordinary and grammatical meaning of the language used.
> The liabilities referred to in s 4(1) (d) of S.I. 33/19 can be in the form of judgment debts and such liabilities amount to obligations which should be settled by the judgment debtor. In interpreting s 4(1) (d), regard should be had to assets and liabilities which existed immediately before the effective date of the promulgation of S.I. 33/19. The value of the assets and liabilities should have been expressed in United States dollars immediately before 22 February 2019 for the provisions of s 4(1) (d) of S.I. 33/19 to apply to them.
> Section 4(1) (d) of S.I. 33/19 would not apply to assets and liabilities, the values of which were expressed in any foreign currency other than the United States dollar immediately before the effective date… It is the assessment and expression of the value of assets and liabilities in United States dollars that matters…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")." (our emphasis).

Notwithstanding that SI 33 of 2019 lapsed by operation of law, the Finance Act (No. 2) of 2019 (the Act) gazetted into law on 21 August 2019 has not only incorporated the provisions of SI 33 of 2019, but has come up with clearer provisions.

Section 22 (1) (d) of the Act reads;

"Subject to s 5, for the 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—

(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 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

Subsection 4 of s 22 also provides that;

"(4) 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 section 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."

The assets and liabilities which are exempt from conversion from United States dollars to RTGS are those expressed in section 44C (2) of the Reserve Bank Act [*Chapter 22:15*] as amended. The section reads;

"(2) The issuance of any electronic currency shall not affect or apply in respect of— (a) funds held in foreign currency designated accounts, otherwise known as "Nostro FCA accounts", which shall continue to be designated in such foreign currencies; and (b) foreign loans and obligations denominated in any foreign currency, which shall continue to be payable in such foreign currency."

Two key issues arise from the provisions of the Finance Act (No. 2) of 2019 for an asset or liability to be converted from a Untied States dollar to RTGS at the rate of 1:1; first, the asset or liability must be expressed in United States dollars and second it must have been there before the effective date which is 22 February 2019.

The respondent's argument is that the contractual debt between the parties is subject to s 22 of the Act in that whatever outstanding amount in United States dollars must be paid in RTGS at the rate of 1:1 which is what she did.

The appellant argued that when the multicurrency system was banned it took the option in Clause 3.5 of the agreement to demand payment of the outstanding debt in United States dollars payable at interbank rate with RTGS.

Firstly the law did not offer a choice of currencies as anticipated in clause 3.5 (a) of the agreement. Clause 3,5 (b) anticipated multiple exchange rates but the law instead presented a fixed exchange rate of 1:1 on all transactions before 22 February 2019. The Supreme court had occasion to deal with the issue of exchange rate in the Zambezi Gas Zimbabwe case (*supra*) thus;

> "The Court finds that the arguments by counsel are devoid of merit. Counsel would like the Court to believe that a conversion of a foreign currency denomination to a local currency denomination amounts to a lesser value in the local currency. This reasoning is wrong at law. There can be no parity to talk about once it is accepted that the RTGS dollar is a currency denomination with a set legal value. It is the legal tender used in Zimbabwe and as such carries a specific value.
> Once a conversion of the value of an asset or liability denominated in United States dollars is made to the value of RTGS dollars, the converted value remains the same, as the two different currency denominations both carry value. No exchange rate can be applied as the judgment debt remains a judgment debt with a value after it is converted to the local currency. The RTGS dollar has the value given under the one-to-one rate and it remains on that value even after the effective date. The first respondent and likewise the court a *quo* were wrong at law in trying to find parity by adding value on the RTGS dollar through the Interbank rate.
> Section 4(1)(d) of S.I. 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."

We agree with the respondent that she acted lawfully when she paid in RTGS using the rate 1:1 as provided for by the law. There is no multiple exchange rates clamoured by the appellant other than that which the law provides. Clause 3.5 of the parties' agreement does not absolve them of the obligations imposed by the law.

In *Temprac Investments* v *Nu aero* HH 678/19 the court had this to say:

> "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."

In *casu*, clause 3.5 of the agreement must be read in light of and in compliance with the requirements of the law. We did not find any fault in the interpretation and application of the law to the facts by the court *a quo*. If anything we find no merit in this appeal. While in the event of the appeal being dismissed the respondent asked for costs at a higher scale, we do not believe such costs are justified. The appeal was not frivolous or vexatious neither was it an abuse of court process. Ordinary costs should follow the event.

Disposition

The appeal be and is hereby dismissed with costs.

Muremba J agrees ……

Alex F and Associates, appellant's legal practitioners
Scanlen and Holderness, respondent's legal practitioners