COTTON COMPANY OF ZIMBABWE LIMITED
versus
BARCLAYS BANK OF ZIMBABWE LIMITED

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 12 September & 23 November 2016

Opposed Application

D. Tivadar, for the applicant
F. Girach, for the respondent

CHIGUMBA J: This is an application for the refund of a million United States dollars, less five dollars, for the return to the applicant, by the respondent, of a sum of USD$999,995-00, plus costs of suit on a higher scale. The applicant's case is that the respondent has no right to hold security in the sum of one million United States dollars (USD$) for a debt of ZW$ (Zimbabwean dollars) 57,966,260,087, which amount equates to no more that 5$USD at the exchange rate applicable to the liability of the respondent to any of its account holders. The issue that we must determine is that of whether the applicant is entitled to a refund of a sum of money which it deposited as security for a loan, when its indebtedness to the respondent had not been discharged.

The applicant is a company which is duly registered in accordance with the laws of this country. Its head of Finance, Mr. Mavudiro Mubaiwa, deposed to the founding affidavit in which he averred that; - the applicant is indebted to the respondent in the sum of ZWD$57,966,260,087 pursuant to a loan agreement. In 2009 applicant requested for a release of the security which it had given to the respondent to secure the loan. Respondent requested that applicant provide alternative security being a sum of one million USD$. The applicant acceded to this request at a time when there was no determined exchange rate to use for calculating its indebtedness to the respondent. On 15 October 2015 respondent advised applicant that it required one million USD$ as security for the ZWD loan, calculated at an exchange rate of 1$USD to 57,966-26$ZWD. The

applicant was advised that 'the amount due will be subject to any future conversion rate that may be announced in due course and the Bank will recalculate the amount due in the event of a different rate being stipulated...should the rate be higher the Bank will reimburse you out of the proportionate figure'.

It is the applicant's case that the respondent cannot have a liability to its account holders calculated at a rate of 1USD$ to 35 quadrillion ZW$ and yet not apply the same rate to monies owed to it by its customers. It is the applicant's case that respondent cannot seek to benefit from the application of the aforestated exchange rate in determining its residual liabilities for ZWD denominated accounts and yet seek to apply another exchange rate in determining the liability of its customers to itself. The respondent opposed the application on 14 October 2015. Its acting head of the Legal department, Mr. Joseph Chilimbe, deposed to the opposing affidavit in which he averred that; - the application is devoid of merit and is abuse of court process. Applicant has no cause of action and is acting in bad faith, and punitive costs should be awarded against it. During August 2009 the parties agreed on the sum of ZWD$57 966 260 087 as the full extent of the monies loaned and advanced to the applicant. This figure has been acknowledged by the applicant and is not disputed.

A sum of one million USD$ was deposited with the respondent in October 2009 as security for the loan. The terms and conditions of the security deposit are set out in a letter dated 15 October 2009 (Rp7). It is common cause that the applicant has not settled its indebtedness to the respondent since October 2009 to date. It is common cause that on 8 October 2014 applicant issued summons against the respondent under case number HC8914-14 in which it sought the refund of the security deposit of one million USD$. Respondent defended this action and filed a counter-claim in which it sought payment of the outstanding debt as well as interest and costs. It is common cause that although the applicant has withdrawn its claim in that matter, the respondent has not withdrawn its counter-claim. During the course of that litigation, in a letter dated 22 January 2015 applicant indicated that it would pay the outstanding sum sought in the counterclaim by way of a cash payment.

In a letter dated 4 February 2015, applicant's legal practitioners sent a one trillion ZWD$ banknote dated 2008 to respondent's legal practitioners in settlement of the counterclaim. The respondent refused to accept that banknote. The provisions of Statutory Instrument (SI) 70-2015 are not relevant to the dispute between the parties. S6 of that SI is invalid because it is beyond

the terms of the enabling legislation. Applicant was not one of those of respondent's customers who had a credit balance denominated in ZWD$ as at 31 December 2008. SI 70-2015 does not provide a basis in law for the relief sought by the applicant. Efforts to settle the matter out of court have been unsuccessful. Respondent is owed more than the security which it is currently holding.

On 15 March 2016 applicant filed an answering affidavit in which it made averments regarding the application of the *in duplum* rule, that its application limits its liability to the respondent to the sum of ZWD$28,788,493,151x2, which works out to less than ZWD$57,966,260,087.00. Applicant insists that the respondent should accept the tender of ZWD$ and address the issue of the appropriate exchange rate to be applied. The one million USD$ security held by the respondents is out of proportion to the ZWD$ indebtedness of the applicant to the respondent. SI 70-2015 provides a uniform conversion rate between the Zimbabwe dollar and the United States dollar. Respondent is not entitled to distort its balance sheet by using its own exchange rate to calculate its client's indebtedness to it. Applicant filed its heads of argument on 20 May 2016, and respondent on 26 May 2016.

The first issue that arises for determination in this matter is whether the right of the applicant to the return of its security is the subject of pending litigation. Put differently, does the special plea of *lis alibi pendens* apply to the present proceedings? The principles which govern the determination of whether there is pending litigation are settled. See *O'Shea* v *Chiunda* [1] *Shapiro v South African Recording Rights* Association *Ltd (Galeta Intervening)*[2]. A court always has a discretion in such a matter, and the issue then becomes one of which litigant that discretion should favor. See *Mhungu* v *Mtindi*[3]. It is common cause that in August 2009 the parties agreed that the applicant was indebted to the respondent in the sum of ZWD$57 966 260 087, in respect of monies loaned and advanced prior to dollarization. The court accepts that this sum was fixed long after the revaluation of the Zimbabwe dollar took place in terms of the (*Presidential Powers (Temporary Measures) Currency Revaluation and Issue of New Currency)* Regulations 2009, published in *SI 6-2009,* on 2 February 2009. The court also finds merit in the submissions made on behalf of the respondent that;-Those Regulations were saved and actions taken thereunder deemed to be valid by virtue of s 58 of the *Finance Act 2009 (Act 3-2009).* So the new currency

[1] 1999 (1) ZLR 333 (SC) @ 335G-H
[2] 2008 (4) SA 145 (W) @ 148-149
[3] 1986 (2) ZLR 171 (SC)

issued in terms of s3 of the Regulations was legal tender in terms of s 40 of the *Reserve Bank of Zimbabwe Act* [*Chapter 22:15*]. The new currency resulted in twelve zeros being deleted from the old currency.

It is not in dispute that the admitted indebtedness of the applicant to the respondent in the sum of ZWD$57 966 260 087, was in the new currency system introduced on 2 February 2009. It is not in dispute that the deposit of USD$1 million made by the applicant, to the respondent, was to secure this indebtedness. The respondent contends that until this indebtedness is discharged in full, the applicant is not entitled to a refund of this security deposit. It is common cause that not only had the debt not been discharged, applicant's attempt to do so using a single currency note that ceased to be valid on 2 February 2009, was rejected by the respondent. The court accepts the submission made on behalf of the respondent that the applicant may not properly rely on the Reserve Bank Demonetisation of Notes and Coins Notice 2015, published in SI 70-2015, on the basis that this notice affords an exchange rate applicable to its outstanding indebtedness. I find merit in the submission that the Demonetisation Notice applies only to certain notes and coins, and has no application to outstanding debts (other than debts owed by a bank to a customer as at 31 December 2008).

It is my considered view that notes and coins issued before 2008 were demonetized without compensation, whereas those issued after 2008, as listed in the schedule to that notice, were the subject of compensation. The notice includes the new currency regime issued in terms of SI 9-2009, in part II of the schedule. In terms of that part of the schedule, a ZWD$500-00 note would be compensated by USD$2-00. I agree with the respondent's submission that, had the applicant discharged its indebtedness in the new currency system in bank notes, the respondent could have exchanged the bank notes at that rate. S6 of the Demonetisation notice obligated the Reserve Bank to pay any person who had a Zimbabwe dollar denominated account at least USD$5-00 where there was a credit balance as at 31 December 2008. The court takes note of the fact that the applicant did not have, and has not averred that it did have, a credit balance as at 31 December 2008 in its account with the respondent.

There is no doubt whatsoever that what was being offered by the Reserve Bank was compensation for credits held under the old currency system, as opposed to fixing an exchange rate between the United States dollar and the new Zimbabwe currency which came into being on 2 February 2009. The court accepts that the USD$5-00 compensation was on balances up to

ZWD$175 quadrillion. The court accepts the example given, on behalf of the respondents, that a customer having a balance of ZW$100-00 would get the same compensation as one with a balance of ZW$175 quadrillion., with further compensation of USD$1-00 for every ZW$35 quadrillion thereafter. No exchange rate was fixed as against specific amounts in the old currency system. It is common cause that the applicant was indebted to the respondent prior to dollarization and that it did not have a credit balance as at 31 December 2008. The court finds that s6 of the notice does not apply to the circumstances of this case, and that, it does not entitle the applicant to deduct USD$5-00 as though that satisfies its total indebtedness to the respondent, which is expressed in the new currency system. We also accept the respondent's contention that the case of *GC Private Limited* v *Zimbabwe Revenue Authority* HH759-15 does not support the applicant's case. We hold the view, in any event that being a High Court case, its authority is merely persuasive and not binding on us.

It is common cause that the respondent tendered a single ZWD$1 trillion banknote, issued in 2008, purporting to settle its indebtedness. We accept the contention that, by February 2015, and by virtue of s3 (6) of the Presidential Powers Regulations mentioned above, the ZWD$1 trillion tendered was equivalent to ZWD$1-00 under the new currency system. It was inappropriate tender to settle the outstanding indebtedness. The correspondence between the parties establishes that in October 2009 the respondent considered that security could be given on the basis of USD$1-00 for each outstanding amount of ZWD$57 996-26. That is why security was pegged at a million United States dollars. Applicant's suggestion that it should have given security of USD$5-00 is not supported by the law, of by the facts.

The court finds that there is a matter pending, between these same parties, in a different court, on the same cause of action, namely the applicant's indebtedness to the respondent for monies loaned and advanced, which has not been discharged, and the respondent's security which it is holding to ensure payment of that debt, and whether the applicant is entitled to a refund of the security if it has not repaid the loan in full, or at all. This matter is not only *lis alibi pendens,* the respondent is not entitled to the relief that it seeks, and has indulged itself in an exercise of futility, giving rise to the need to reprimand its conduct with an appropriate order as to costs.

The application be and is hereby dismissed with costs on a legal practitioner-client scale.

Messrs Gill, Godlonton & Gerrans, applicant's legal practitioners
Messrs Costa & Madzonga, respondent's legal practitioners