REPORTABLE ZLR (63)

Judgment No. SC. 78/05
Civil Appeal No. 315/04

WATERGATE (PRIVATE) LIMITED v

COMMERCIAL BANK OF ZIMBABWE

SUPREME COURT OF ZIMBABWE
SANDURA JA, ZIYAMBI JA & GWAUNZA JA
HARARE, NOVEMBER 29, 2005 & JANUARY 12, 2006

R Y Phillips, for the appellant

J B Colegrave, for the respondent

SANDURA JA: This is an appeal against a judgment of the High Court in terms of which the appellant was ordered to pay to the respondent the sum of US$817 522.99, together with interest at the rate of 8.21% per annum. Alternative relief was granted in the event that the respondent was unable to recover payment in United States dollars.

The background facts in the matter are as follows. The appellant ("Watergate") had three accounts with the respondent ("the Bank"), two being loan accounts and one being a foreign currency account. At the relevant time Watergate was a farming company, which carried on farming operations at Checkers Farm ("the farm") in Chipinge District, and grew tobacco and coffee that generated foreign currency.

In 1998 the Bank provided Watergate with a short-term loan to finance its crop expenditure on the farm. The loan, which was in local currency, was repayable from the proceeds of the crops, and was secured by mortgage bonds registered over the farm. In addition, the loan was renewable on an annual basis.

On 14 February 2000 Watergate wrote to the Bank expressing some concern about the viability of its farming operations, in view of the rising interest rate on its overdraft with the Bank. Its total indebtedness to the Bank was then $31 500 000.00. In the circumstances, Watergate asked for a loan with a rate of interest lower than the rate that the Bank was then charging, which exceeded 80% per annum.

Subsequently, in March 2000 Mr Mark Muilder ("Muilder"), the Bank's agricultural finance planner, visited the farm in order to discuss Watergate's request. Muilder suggested to Watergate that one solution to its problems could be to convert its existing loan into a foreign currency denominated loan, which would be repaid from the foreign currency earned by Watergate from the sale of its coffee and tobacco.

When Muilder was reminded that it was the Government's policy that although the tobacco and coffee were sold in United States dollars the farmer was paid in local currency, he said that the Reserve Bank of Zimbabwe ("the RBZ") had a discretion in the matter and could waive the general rule. He added that once the loan was converted into foreign currency the interest rate charged by the Bank would be much less.

Thereafter, on 4 October 2000 Watergate wrote to the Bank requesting the Bank to convert its loan into a foreign currency loan. Following that request and the exchange of further correspondence, the Bank finally agreed to have Watergate's loan converted into a foreign currency loan.

On 9 January 2001 Watergate's loan, which was then about $56 000 000.00, was converted into United States dollars. Shortly thereafter, the sum of US$55 000.00, which was in Watergate's foreign currency account, was set off against the foreign currency loan, leaving a balance of US$817 522.99, with interest at 8.21% per annum.

Subsequently, on 10 July 2001 the agreement to convert Watergate's loan into a foreign currency loan was reduced to writing. Clause 6.2 of the agreement provided that the loan was to be repaid in five monthly instalments of US$200 000.00, with the last instalment being paid on 31 December 2001.

The parties later agreed to add an addendum ("the addendum") to clause 6.2 in longhand, which reads as follows:

> "Depending on the Reserve Bank allowing 100% of coffee revenue being paid in US dollars to this loan. If not, to be extended to 31/12/2002 as agreed."

Following the above agreement, the Bank made an application to the RBZ on behalf of Watergate, requesting the RBZ to permit Watergate to use the foreign currency earned from the sale of its coffee to repay the foreign currency loan

to the Bank. That application was unsuccessful. In terms of the addendum, the loan repayment period was then automatically extended to 31 December 2002.

Subsequently, on 10 July 2002 Watergate's lawyers wrote to the Bank acknowledging that the balance of the loan due and outstanding was US$817 522.99, but tendering payment in local currency in the sum of $44 963 764.45 in full and final settlement of Watergate's indebtedness to the Bank. That sum was alleged to be the local currency equivalent of US$817 522.99 at the then prevailing exchange rate of one United States dollar to fifty-five Zimbabwe dollars.

On the same date, i.e. 10 July 2002, the Bank wrote to Watergate and rejected the offer to repay the loan in local currency. It insisted that the loan should be repaid in terms of the agreement, and threatened to institute legal proceedings against Watergate if Watergate did not repay the loan as agreed.

Thereafter, after the exchange of further correspondence by the parties, it was clear that the institution of legal proceedings in order to resolve the dispute was inevitable. Accordingly, on 17 July 2003 the Bank filed a court application in the High Court seeking an order compelling Watergate to pay the sum of US$817 522.99 together with interest at the rate of 8.21% per annum.

On 6 October 2004 the Bank's application was successful, and the High Court granted the following order:

"In the result it is ordered –

1. (i) that judgment be and is hereby granted in favour of the applicant in the sum of US$817 522.99 together with interest thereon at the rate of 8.21% per annum to the date of final payment.

(ii) that in the event that for any reason whatsoever the applicant is unable to recover payment in United States dollars it shall be entitled to recover the full amount or part thereof in Zimbabwean dollars at the prevailing foreign exchange auction rate as at the date of repayment or enforcement."

Aggrieved by that order, Watergate appealed to this Court.

Two issues arise for determination by this Court. The first is whether the Bank was entitled to payment in United States dollars; and the second is whether Watergate was prevented from repaying the loan in United States dollars by a supervening impossibility that Watergate had not foreseen, or in respect of which it was not at fault. I shall deal with the two issues in turn.

Dealing with the first issue, the legal position is that a party is entitled to payment in a foreign currency if he can show that a judgment in that currency would most truly express his loss and, therefore, most fully compensate him for that loss. That is what this Court decided in *Makwindi Oil Procurement (Pvt) Ltd v National Oil Company of Zimbabwe* 1988 (2) ZLR 482 (SC).

In the present case, I am satisfied that the Bank proved its entitlement to payment in United States dollars. The agreement between the parties provided that the Bank would be paid in United States dollars, and did not provide for payment in local currency.

Both parties stood to benefit from that agreement. The Bank legitimately expected that the loan would be repaid in United States dollars, which it needed and was entitled to hold in the ordinary course of its business. On the other hand, Watergate stood to benefit, in that the period within which the loan was to be repaid was extended to 31 December 2001, or 31 December 2002 if the RBZ did not allow Watergate to pay the Bank all the foreign currency it earned from the sale of its coffee. There was also the added advantage that the rate of interest charged by the Bank was low.

However, as far as the Bank was concerned, it was the repayment of the loan in foreign currency that was at the heart of the agreement. Without that, there would have been no reason for the Bank to enter into the agreement. The loss sustained by the Bank as a result of the breach of contract by Watergate must, therefore, be in United States dollars.

Consequently, it is a judgment in foreign currency, i.e. United States dollars, which would most fully compensate the Bank for that loss. The learned Judge in the court *a quo*, therefore, correctly granted the application.

The learned judge was fully aware of the possibility that the Bank might not be able to recover payment in United States dollars. He accordingly ordered that in that event the Bank would be entitled to recover the full amount or part thereof in Zimbabwe dollars, applying the prevailing foreign exchange auction rate at the date of repayment or enforcement.

The reasons for making such an order were set out by this Court in *Makwindi's* case *supra*. At 492 E-F GUBBAY JA (as he then was) said:

> "Fluctuations in world currencies justify the acceptance of the rule not only that a court order may be expressed in units of foreign currency, but also that the amount of the foreign currency is to be converted into local currency at the date when leave is given to enforce the judgment. Justice requires that a plaintiff should not suffer by reason of a devaluation in the value of currency between the due date on which the defendant should have met his obligation and the date of actual payment or the date of enforcement of the judgment. Since execution cannot be levied in foreign currency, there must be a conversion into the local currency for this limited purpose and the rate to be applied is that obtaining at the date of enforcement."

I now wish to deal with the second issue, which is whether Watergate was prevented from repaying the loan in United States dollars by a supervening impossibility that it had not foreseen, or in respect of which it was not at fault. This issue is important because the general rule is that the impossibility of performance is an excuse for the non-performance of an obligation: *impossibilum nulla obligatio est*.

However, whether or not the general rule applies in a particular case would depend upon the circumstances of the case and the nature of the impossibility. In this regard, I can do no better than quote what BOSHOFF JP said in *Bischofberger v Van Eyk* 1981 (2) SA 607 (WLD). At 611 B-D the learned JUDGE PRESIDENT said:

> "… when the Court has to decide on the effect of impossibility of performance on a contract, the Court should first have regard to the general rule that impossibility of performance does in general excuse the performance of a contract, but does not do so in all cases, and must then look to the nature of the contract, the relation of the parties, the circumstances of the case and the nature of the impossibility to see whether the general rule ought, in the particular circumstances of the case, to be applied. In this connection regard must be had not only to the nature of the contract, but also to the causes of the impossibility. If the causes were in the contemplation of the parties, they are generally speaking bound by the contract. If, on the contrary, they were such

> as no human foresight could have foreseen, the obligations under the contract are extinguished."

I respectfully agree with the principles set out by the learned JUDGE PRESIDENT. Those are the principles that ought to be applied once the existence of the impossibility has been established.

With those principles in mind, I now proceed to examine the arguments advanced on behalf of Watergate. They were two.

The first argument was that Watergate failed to repay the loan to the Bank in United States dollars, because the RBZ did not authorise it to pay to the Bank all the foreign currency it earned from the sale of its coffee. In my view, this is not a valid argument, because the parties foresaw the possibility that the RBZ might not grant such authority, and in fact made provision for that eventuality by adding the addendum to clause 6.2 of the agreement.

As already indicated, the addendum provided that the agreement to repay the loan in full by 31 December 2001 was dependent upon the RBZ permitting Watergate to pay to the Bank all the foreign currency it earned from the sale of its coffee, and that if the RBZ did not grant such permission the final date of the repayment of the loan would be extended to 31 December 2002.

There must, therefore, have been another source from which Watergate believed it would raise the foreign currency it had agreed to pay to the Bank, in the event that the RBZ did not permit it to pay to the Bank the foreign currency it

received from the sale of its coffee. Watergate does not say what that source was and why it did not obtain the required foreign currency from that other source and pay it to the Bank. It was common cause that the proceeds from the sale of tobacco were paid to the Bank in Zimbabwe dollars as the Bank held a registered stop order over the tobacco crop.

The second argument advanced on behalf of Watergate was that by the time the RBZ reversed its policy in August 2002 and allowed companies to use the foreign currency they earned to pay their foreign currency loans, Watergate had already pledged the whole of its coffee crop to Zimbabwe Coffee Mill Limited ("the Coffee Mill") in return for financial assistance, because the Bank had frozen its overdraft facilities.

In my view, this is not a valid argument, because it simply indicates that Watergate had only itself to blame for its inability to repay the loan to the Bank in United States dollars. By pledging its coffee crop to the Coffee Mill, Watergate deliberately put it beyond its power to repay the loan in United States dollars.

According to Watergate, the arrangement with the Coffee Mill was that the Coffee Mill advanced working capital to Watergate in return for a pledge of the coffee crop, which was later sold through the Coffee Mill, and Watergate was paid, after the repayment of the initial loan, the net proceeds in local currency. If that averment is correct, it was the Coffee Mill that benefited in foreign currency and Watergate must have been aware of that. The second argument advanced on behalf of Watergate cannot, therefore, succeed.

Watergate was, therefore, not prevented from repaying the loan in United States dollars by a supervening impossibility that it had not foreseen, or in respect of which Watergate was not at fault. The maxim *impossibilium nulla obligatio est* does not, therefore, apply.

In the circumstances, the appeal is devoid of merit and is, therefore, dismissed with costs.

ZIYAMBI JA: I agree.

GWAUNZA JA: I agree.

Henning Lock Donagher & Winter, appellant's legal practitioners

Kantor & Immerman, respondent's legal practitioners