MUTSA DENHERE
and
DEMMUSK ENTERPRISES (PVT) LIMITED
versus
FAENSA FRISCO LIMITED

HIGH COURT OF ZIMBABWE
CHIRAWU-MUGOMBA J
HARARE, 22, 28, 29, 30 & 31 March 2022

Opposed Application

B.M Maunze with *G.M Nyangwa*, for the applicants
N. Madya, for the respondent

CHIRAWU-MUGOMBA J: The genesis of this matter lies in proceedings held under case number HC 8844/12. In that matter, the respondent in *casu,* obtained an order against the applicants as follows.

1. Judgement be and is hereby entered in favour of the plaintiff against defendants jointly and severally the one paying the other to be absolved in the sum of US$43 065.00

2. Defendants pay jointly and severally the one paying the other to be absolved penalty interest at the rate of 4% per month on the sum of US$41 800 from the 24th of August 2021 to date of payment in full.

3. Costs of suit on an attorney and client scale.

The applicants' case is as follows. The second applicant entered into a loan facility with the respondent for a total sum of US$45 000 constituting US$15 000 roll over and a new sum of US$30 000. This money was disbursed to the applicants. It was a material term of the loan agreement that since the respondent is a foreign entity, it had to obtain exchange control approval from the Reserve Bank and this was also in terms of Clause 7:10. Such proof was never furnished despite the payment supposedly coming from Mauritius. In pursuance of a writ of execution in case no. HC 8844/12, the Sheriff of the High Court visited the first applicant's place of residence armed with a notice of seizure and attachment. This writ was in

Zimbabwean dollars and her legal practitioners paid on her behalf the sum of ZW$50 878. The respondent's legal practitioners however insisted that the payment had to be in United States Dollars. This was ostensibly on the basis that the amount owed was a foreign debt. The circumstances of the loan however point out to the fact that it was not a foreign obligation as claimed. It was actually a fraud based on the fact that no exchange control authority was sought and obtained. The loan agreement was executed in Harare, the funds were to be used in Zimbabwe, the laws of Zimbabwe apply and the respondent's representative ordinarily resided in Zimbabwe.

The applicants therefore sought an order declaring the loan agreement entered into by the parties on the 18th of November 2010 as null and void and the discharging of the sureties. In addition they sought an order of costs on a higher scale. Alternatively, they sought a declaratur that the ZW$50 878.00 is in full and final settlement of the respondents judgment debt.

In responding to the application, the respondent raised points in *limine.* They contended that the applicants and respondents entered into the loan agreement in 2010 and the applicants defaulted in 2012 leading to institution of proceedings. They were aware of the existence of the agreement but did not challenge it. They entered into a deed of settlement which resulted in the default judgment against them when they failed to honour the agreement. They should have challenged the validity of the agreement within 3 years but they did not do so. They cannot seek to enforce an agreement nearly nine years after. Their claim for a declaratur has prescribed. Additionally the relief they seek has been overtaken by events. The deed of settlement settled the obligations between the parties which deed became the cause of action resulting in the obtaining of the default judgment. The judgment remains extant and they have not challenged its validity. The applicants are estopped from challenging the validity of the loan agreement. In any event the applicants are seeking an opinion and not a declaratur.

On the merits, the respondent averred as follows. It is a duly registered company located in Mauritius. A copy of a certificate of incorporation was attached. The second applicant and the respondent entered into a loan agreement as stated in the founding affidavit. The advance was made from Mauritius where the respondent is incorporated. Inserted into the loan agreement were warranties to ensure compliance with the laws of Zimbabwe. The loan agreement did not require exchange control authority as contended by the applicants. The loan amount was credited into the second applicant's Standard Chartered bank account held in Zimbabwe. The applicants made some payments specifically a payment of US$2.000 (Two thousand) via telegraphic transfer on the 15th of June 2012 to the respondent's bank account held in Mauritius but subsequently defaulted which resulted in the institution of legal proceedings on the 8th of August 2012. Thereafter the respondent obtained judgment against the applicants based on a deed of settlement. Further that the debt is owed to a foreign entity and should be paid in United States Dollars. The fact that the writ and notice of removal by the Sheriff was in Zimbabwe dollars does not make it less so. The court order upon which the debt is based is expressed in United States dollars. The fact that the loan agreement was executed in Zimbabwe, by a borrower in Zimbabwe, for use in Zimbabwe is irrelevant as is the fact that the respondent's representative was based in Zimbabwe. What defines whether or not a loan is a foreign obligation is the source of the funds. The applicants cannot deny that the respondent is registered in Mauritius and funds were transferred from a bank in Mauritius.

At the hearing, after Mr *Madya* had made submissions on the points in *limine,* Mr *Maunze* in response abandoned the main relief sought and submitted that the applicants were now only seeking the alternative relief. The alternative relief is couched as follows.

Alternatively

a. It is declared that the applicants payment of ZW$50 878 is a full and final settlement of the respondent's judgment debt.
b. The respondent shall pay costs of suit on the higher scale of legal practitioner and client scale.

As rightly contended by Mr *Maunze,* the legal issue that arises is whether or not the debt is a foreign obligation. In his submissions he contends that the court must declare that the ZW$50 878 discharged the obligations of the applicants owed to the respondent. This is due to the effects of S1 33/19 as subsequently provided for in the Finance Act, No 2 of 2019. By operation of the law, the debt became a Zimbabwe dollar one. The loan agreement must be viewed in a holistic manner based on the factual circumstances upon which the loan was extended. The laws to be applied must be those of Zimbabwe including the exchange control regulations.

Mr *Madya* on the other hand submitted as follows. It is not in dispute that the respondent is a foreign entity operating out of Mauritius as evidenced by the certificate of incorporation. The loan agreement itself shows the domicile of the parties as being Zimbabwe and Mauritius respectively. The capital sum of US$45000 advanced to the applicants came out of Mauritius. The loan agreement sets out the bank to which the loan is to be repaid as being in Mauritius. Partial settlement was made by the applicants into that bank. They cannot now be heard to suggest that the loan should be paid in Zimbabwe dollars.

In Zimbabwe, the issue of debts owed and indeed the currency in which they have to be paid has found its way into the courts after the promulgation of S.1 33/19. The Supreme Court dealt with these issue in the oft cited cases of *Zambezi Gas Zimbabwe (pvt) Ltd* vs *N.R Barber and Another,* SC-3-20 and *Breastplate Services (pvt) Ltd* vs *Cambria Africa PLC*- SC-66-20. See also *Central Africa Building Society* vs *Stone and ors*, SC-15-21.

In, *Mushayakura* vs *Zimbabwe Leaf Tobacco Company (pvt) Ltd,* SC-108-21, the court dealt with a matter involving a growing and financing agreement, an acknowledgment of debt and a deed of settlement involving the appellant and respondent.

MALABA C.J had this to say regarding the definition of a foreign loan and obligation.

> "The term "foreign loans and obligations denominated in any foreign currency", as it appears in s 44C (2) of the Reserve Bank Act, is not defined in SI 33 of 2019. As stated in the *Breastplate* case *supra*, its meaning in any given case must be ascertained from the factual circumstances of the parties involved and the material substance of the transaction that they have entered into. Section 44C(2)(b) of the Reserve Bank Act makes it clear that the issuance of any electronic currency, that is RTGS dollars, shall not affect or apply to any foreign obligation, as the provision explicitly excludes foreign obligations valued and expressed in United States dollars from the deemed parity valuation in RTGS dollars.
>
> It is settled that the effect of SI 33/19 was to render all assets and liabilities except those referred to in s 44C(2)(b) of the Reserve Bank Act as values in RTGS dollars at the exchange rates prescribed.
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> It was the appellant's position that, since the parties had concluded a Deed of Settlement, the court *a quo* was not entitled to take into consideration agreements that preceded the Deed of Settlement. The appellant argued that the Deed of Settlement constituted a compromise. It was the appellant's further submission that it did not matter that the debt had been expressed in United States dollars. The argument was that the issue was whether the appellant could discharge his liability in RTGS dollars at the rate of one-to-one in terms of SI 33/19.
>
> The Deed of Settlement and the preceding contracts have to be read together for a proper understanding of the arrangement the parties entered into. The source of the funds had to be established first for the Court to be able to make a determination of the issue of the currency in which the debt admittedly due had to be repaid."

Further that,

> "The Deed of Settlement was entered into for the purpose of allowing the appellant to repay the debt he acknowledged to be owing in instalments in United States dollars. The Deed of Settlement was for the benefit of the appellant. The appellant cannot escape the obligation he voluntarily undertook to repay the funds advanced to him in United States dollars for the specific purpose of financing the production of the tobacco crop by calling the Deed of Settlement a compromise. There was no dispute between the parties over the currency in which the offshore funds received by the appellant from the respondent had to be repaid. The

> respondent was entitled to invoke the provisions of s 44C(2)(b) of the Reserve Bank Act to protect its rights to the repayment of the offshore funds advanced to the appellant in United States dollars under the Deed of Settlement."

In *casu*, it is common cause that the source of funds was from a bank in Mauritius. The applicants never denied this fact. They instead after benefiting from the loan sought to cast aspersions on the juristic person of the respondent and went on to place irrelevant facts of money laundering before the court. It is also common cause that the respondent is a registered entity in Mauritius. Clause 5.7 of the loan agreement makes it clear that the repayments were to be done through a bank in Mauritius. The applicants did in fact pay a sum of US$2,000 via that account.

The loan agreement itself was cognisant of the fact that the currency in Zimbabwe could change and hence clause 9.3 which states as follows:

> The borrower acknowledges that in the event of the government of Zimbabwe announcing plans for or implementing plans for the re-introduction of the Zimbabwe dollar as the primary currency of transactions with or without the withdrawal of the use of other currencies in use as at the date of this agreement, the lender shall be entitled, at its election to call up the entire amount then due from the borrower and the borrower shall be obliged to repay back the amount due as provided for in clause 11.2 of this agreement.

This clearly and unequivocally supports the fact that the loan itself was a foreign obligation otherwise there would not have been need for such a clause.

Clause 16 of the agreement shows the domicile of the respondent as being at an address in Mauritius. The deed of settlement signed by the parties shows the amount owing as being US$51800.

The totality of the circumstances of the matter and on the authority of the *Mushayakurara* matter, the inescapable conclusion is that the debt owed to the respondent can only be discharged in United States Dollars. The fact that the Sheriff expressed the amount in Zimbabwe currency in the writ and notice of removal is neither here nor there. I find no merit in the applicant's contention that there was no exchange control approval obtained. Once the applicants abandoned the main claim in favour of the alternative, the only issue is whether or not payment of the amount owed in Zimbabwean dollars discharged the debt.

In the *Mushayakura* matter, the court made a very pertinent observation that,

> "If payment were to be made in RTGS dollars contrary to the clear and unambiguous language of s 44C (2) (b) of the Reserve Bank Act, the purpose of the provision of ensuring that tobacco farmers benefit from offshore funding lines of credit accessible to the respondent and others in similar business would be defeated to the detriment of the national interest in the protection and promotion of the development of the tobacco industry.

> The court *a quo* cannot be faulted for holding that the funds advanced to the appellant had to be repaid in United States dollars. The *Zambezi Gas* case *supra* is distinguishable from the present matter. The present case relates to offshore funding. The obligation incurred by the respondent was a foreign obligation denominated in foreign currency within the contemplation of s 44C of the Reserve Bank Act."

In *casu,* the agreement between the parties constitutes offshore funding. The respondent stated clearly in its opposing affidavit that the applicants sought funding after they had been denied such by local banking institutions. This was not denied. Offshore funding presents a lifeline for most businesses in Zimbabwe that cannot obtain any or adequate funding on the domestic market. Surprisingly after receiving the money, the applicants turned around and accused the respondent of not being an authorised dealer yet happily received US$45000. Clearly payment in RTGS dollars will have a negative impact on businesses and would not be in the national interest.

The requirements of a declaratur have been set out in a plethora of cases. See *Streamsleigh Investments (pvt) Ltd vs Autoband Investments (pvt) Ltd*, 2014(1) ZLR 736. In my view, and for reasons stated above, the applicants have not established any basis for the granting of a declaratory order.

Costs should follow the cause. I do not perceive of any factors that support an award of costs on a higher scale.

DISPOSITION

1. The application be and is hereby dismissed with costs

Mawere Sibanda Commercial Lawyers, applicants' legal practitioners
Wintertons, respondent's legal practitioners