ALAN CHARLES PATRICK INGRAM LOCK
versus
ELEN OLIVIA LOCK (NEE FISCHER)
and
THE SHERIFF OF ZIMBABWE N.O

HIGH COURT OF ZIMBABWE
MUZOFA J
HARARE, 18 March & 11 May 2021

Opposed Court Application

D.Tivadar, for the applicant
T. Mpofu, for the 1st Respondent

MUZOFA J: The applicant obtained the following provisional order:

"TERMS OF THE FINAL ORDER
That you show cause to this Honourable Court why a final order should not be made in the following terms:

1. It is declared that the payment by the applicant in the sum of ZW$495 000.00 on 18 June 2020 and ZW$68 083. 00 on 19 June 2020 fully discharged the judgement debt that is specified under case number HC 979/15
2. The actions of the second respondent in purporting to execute the writ of execution described above is declared unlawful.
3. The first and second respondents be and are hereby ordered to pay the applicant's costs of suit on the scale of legal practitioner jointly and severally the one paying the other to be absolved.

INTERIM RELIEF GRANTED

1. The second respondent be and is hereby directed to suspend the execution of the writ that is issued in favour of the first respondent under case No. 979/15
2. In the event that any property shall have been removed at the time of this order, the second respondent be and is hereby directed to release that property to the applicant.

SERVICE OF THE PROVISIONAL ORDER
The applicant or their legal practitioner or any employee thereof shall be authorised to serve a copy of this provisional order on the respondents"

The applicant now seeks a final order. The applicant is the first respondent's former husband. The marriage was dissolved by decree of divorce under case number HC 979/15. An ancillary order for the division of the matrimonial assets was granted. Of the cash assets the parties had, the first respondent was awarded US$575 000.00. On appeal the amount was varied to US$ 495 000.00. The order that forms the basis of this dispute is couched as follows:

> "The defendant shall pay the plaintiff, into an account nominated by her, the sum of US$495 000.Such payment shall be and subject to any exchange control laws applicable in Zimbabwe. The parties shall agree on a payment plan for this amount within 30 days from the date of this order."

The order was issued by the High Court on 27 September 2017.The parties have interpreted the order differently giving rise to the dispute. The applicant is of the view that this is a judgement debt payable in local currency at a rate of one is to one. The first respondent believes that the order is in United States dollars and therefore if payable in the local currency it must be paid at the prevailing rate on the date of payment.

The applicant subsequently made two payments in satisfaction of the court order. The first respondent accepted the payment as part payment. The applicant insisted that it was in full and final settlement. To recover the purported balance, the first respondent issued out a writ of execution for 'US$495 000 together with interest thereon at the rate of 5% per annum from 27 September 2017 to the date of final payment, both dates inclusive which amount was awarded in United States dollars but payable in RTGS dollars at the Reserve Bank of Zimbabwe prevailing interbank rate of exchange as at the date of execution'.

The writ of execution jostled the applicant into action, he approached the court on an urgent basis and obtained the provisional order as already set out.

The issue for determination by this Court is whether the payment made by the applicant discharges the court order under HC 979/15.

The applicant's case is that the court order created a judgement debt. It does not matter that the order was granted pursuant to division of matrimonial property in the family Court. The court order is subject to the provisions of section 4 (1)(d) of Statutory Instrument 133 of 2019 and s 22 (1)(d) of the Finance Act. In *Zambezi Gas Zimbabwe Pvt Ltd and Anor* SC 3/20 the Supreme Court has interpreted the said provisions and clearly set out its applicability. The two payments made by the applicant discharged the applicant's indebtedness. The application should be granted with costs on a higher scale.

In opposition, the first respondent insisted that the order sounds in foreign currency and on the authority of *Breastplate Services (Pvt) Ltd* v *Cumbria Africa PLC* SC66/20 this court was urged to consider the factual basis of the order, the conduct of the parties and the wording of the order. In other words a consideration of those factors should result in a finding that the court order gave rise to a foreign obligation. To that extent the principles in the *Zambezi Gas* matter (*supra*) are irrelevant in the determination of this case.

In the alternative it was argued, which issue was raised by the court that the order by the family Court does not give rise to a debt or an obligation. The applicant was required to deliver or transfer what already exists therefore the currency changes should not affect the order.

I requested parties to file supplementary heads of argument to address two issues which exercised my mind. Firstly whether an order such as this, from the family Court dealing with division of matrimonial property should give rise to an obligation or judgement debt its strict sense. Secondly whether the currency changes affect such an order.

I am grateful to the parties' timely submissions. The applicant stuck to his guns that the issue on whether the court order is from the family Court relating to division of matrimonial property is irrelevant. A judgment debt is defined in section 20 of the Finance Act of 2019 as a court order granted upon relief claimed in an action and on which execution can be levied by the judgement creditor. In this case there is a court order which the first respondent has tried to execute on. That should be the end of the matter. The factors in *Breastplate Service (Pvt) (Ltd)* v *Cambria Africa PLC* SC 66/ 2020 do not apply in this matter. This court must not reconsider the court order to determine the nature of the obligation. The point is, this is a court order and therefore it is subject to currency changes as interpreted in the *Zambezi Gas* matter.

For the first respondent it was submitted that the court should consider the nature of the obligation arising from the order of the court. The character of the claim dealt with assets that already existed and had a particular character by virtue of being situate in the "United Kingdom and elsewhere" therefore the currency changes should not affect the court order. The supplementary heads of argument went into detail making reference to the background of the main matter (the divorce proceedings) to demonstrate that the order gave rise to a foreign obligation. I did not find a clear and pointed discourse on whether the court order forming the basis of the dispute is any different from any other court order.

I am persuaded that the court order falls within the ambit of a judgement debt as defined in the Finance Act .The definition speaks to an obligation arising from a court order despite the fact that the subject matter is already in existence or not.

The next issue for consideration is whether the court order gave rise to a local or foreign obligation. I do not agree with the submission made for the applicant that a court order is not subject to a determination whether it gives rise to a foreign or local obligation. A judgement debt gives rise to a contractual obligation. A court must therefore make a determination in appropriate cases the nature of the obligation. I was not referred to any authority that all court

orders give rise to local obligations. In my considered view a court can consider the nature of the obligation arising from a court order. This is necessary especially in matrimonial cases where parties may have properties all over the world. It would surely be an injustice to one of the parties not to do so.

This court therefore should make a determination on the nature of the obligation.
I agree with counsel for the first respondent that the overarching principle confirmed in *Breastplate Services* (*supra*) is that the factual circumstances preceding the institution of the proceedings and the conduct of the parties must be considered in the determination of the nature of the obligation or liability.

In *casu* it is accepted that the cash assets included offshore accounts in the United States of America, the United Kingdom and cash in two local banks. The parties filed a document listing the values in United States Dollars (USD). Of importance is that the figures were expressed in USD including the amounts held in the United Kingdom offshore account. It therefore cannot be a true statement that the cash assets were strictly in different currencies. The parties agreed to convert the money and have it expressed in USD. This means as of 27 September 2017 when the order was handed down the parties were in agreement on the currency. That certainly changed the fact that the monies were sitting in offshore accounts. What the first respondent expected was her share in USD regardless of where they were sitting.

The insurmountable challenge in the first respondent's way is the wording of the order. It does not refer to offshore accounts. It dealt with one pot of monies which parties agreed on. That pot was expressed in USD which included balances in local banks. Had the order specified the amounts in USD and Pound Sterling with identified offshore account numbers in the respective countries l would have no doubt in my mind that the court order gave rise to a foreign obligation.

The writ of execution itself betrays the first respondent's argument. The writ is for an equivalent of US$495 000 in RTGS at an exchange rate as on the date of execution. Her conduct clearly shows that she was prepared to receive a local equivalent instead of the foreign currency which truly sat in the offshore accounts in the United States of America and the United Kingdom.

The first respondent also relied on the parity principle that parties agreed to divide their assets on a 50/50 ratio. It was fervently submitted that the deposit of ZW$495 000.00 was way less than the first respondent's 50% share. In the final, the applicant would obtain more than

50% in value of the parties' cash assets. Some calculations were made to demonstrate the point taken.

I appreciate the difficulty that the first respondent has to grapple with. The only challenge with this reasoning is that the parity principle alone cannot convert a local obligation into a foreign obligation. The parity principle was raised in the *Zambezi Gas* matter (supra) and the court had this to say,

> "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.
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> 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. The transactions entered into after the effective date would fall under the provisions of section 4(1)(e) of S.I. 33/19."

In short, the parity principle does not arise at all.

The obligation does not fall within the class of assets or liabilities envisaged in section 44 C(2) of the Reserve Bank of Zimbabwe Act [*Chapter 22:15*] (The Act).In the final, the Court order gave rise to a local obligation.

The court order in question should therefore be viewed from the provisions of section 4 (1)(d) of Statutory Instrument 33 of 2019.This is what emanates from the Zambezi *Gas* case (*supra*) that brings the asset or liability within the provisions of the statute,

1. The assets or liabilities existed immediately before the effective date.
2. The value of the assets or liabilities should be expressed in United States dollars immediately before the effective date (i.e. February 2019). It is inapplicable where the currency is in any other foreign currency or is yet to be assessed.
3. The assets or liabilities do not fall within the class of assets and liabilities referred to in s 44 (C) 2 of the Act.

The Court order in question is expressed in USD. It was issued on 27 September 2017 a date falling immediately before 22 February 2019 (the effective date) and it does not fall

within the class of assets and liabilities referred to in s 44 C(2) the Act. The application should therefore succeed.

The applicant looks to both respondents for costs on a higher scale. I did not fully appreciate the basis for seeking costs as against the second respondent who is assumed to have been carrying out his lawful duties by executing the judgement. It is not for the second respondent to interpret a court order to determine its validity. Doing so amounts to exceeding its mandate. Costs can be granted against the second respondent where it is shown that the office exceeded its mandate. In this case it was not shown that the second respondent did anything beyond its mandate to attract costs. I shall therefore not grant costs as against the second respondent.

Similarly I did not find reason to grant costs on a higher scale against the first respondent.

Accordingly the following order is made

1. The application is granted with cost against the 1st respondent.
2. It is declared that the payment by the applicant in the sum of ZW$495 000.00 on 18 June 2020 and ZW$68 083. 00 on 19 June 2020 fully discharged the judgement debt that is specified under case number HC 979/15.
3. The actions of the 2nd respondent in purporting to execute the writ of execution described above is declared unlawful.

Gill, Godlonton and Gerrans, applicant's legal practitioners
Atherstone and Cook, first respondent's legal practitioners