SOUTHEND CARGO AIRLINES (PVT) LTD
and
STEPHEN JACKSON CHITUKU
and
PATIENCE FADZAI CHITUKU
versus
INFRASTRUCTURE DEVELOPMENT BANK
OF ZIMBABWE
and
THE SHERIFF OF ZIMBABWE
and
THE DEPUTY SHERIFF

HIGH COURT OF ZIMBABWE
MTSHIYA J
HARARE, 8 September 2010 & 13 October 2010

Mr *Phiri*, for applicant
Advocate *Morris*, for respondent

MTSHIYA J: The delay in the determination of this matter requires explanation.

This application was first heard on 28 September 2009. At that time Advocate *Mandizha* and Mr *Mahlangu* represented the applicants and first respondent respectively. The matter was then postponed to 30 September 2009 for continued hearing. However, the matter was only heard again on 21 October 2009 whereupon the applicant's legal practitioner indicated the intention to apply for leave to file a supplementary affidavit. The respondent clearly indicated its intention to oppose the application. I then postponed the matter *sine die* in order to allow the applicants to file a formal application which could then be served on the respondents. A chamber application was then placed before me on 9 November 2009. I directed that the matter be placed on the opposed roll and on 25 March 2010 my sister CHATUKUTA J. granted the applicants leave to file supplementary affidavit(s). The record reveals that different supplementary affidavits were in fact filed on 22 September 2009 and 1 October 2009. The first respondent filed its response to the supplementary affidavit(s) on 14 May 2010.

The record also shows that initially the applicants were represented by Messrs Musamirapamwe and Associates. There is no notice of renunciation of urgency by the said law firm but on 9 November 2009 Messrs Muvingi Mugadza & Mukome filed a notice of assumption of agency on behalf of the applicants.

The matter was, at the request of the respondent's legal practitioners finally set down on 8 July 2010. This was after the applicants had obtained leave to file supplementary affidavits. I must also mention that when the matter was first set down on 28 September 2009, it was at the instance of the first respondent's legal practitioners who wanted finality in the matter. I, however, take full responsibility for the delay in preparing judgment for the period commencing 8 July 2010 to the date of delivery of this judgment. The delay is sincerely regretted.

This application was filed on 2 March 2009 for the following relief:-

"(a) The writ of execution issued under HC 11569/98 be and is hereby set aside.

(b) The judgment of this court granted under HC 11569/98 is hereby held to have been fully paid and settled by the applicants".

Going through the papers, I also found the following document:

" AMENDED DRAFT ORDER

Before the Honourable Mr/Mrs Justice ……..

Mr Musamirepamwe For the Applicant

Mr/Mrs/Ms For the Respondent

WHEREUPON, after reading documents filed of record and hearing Counsel:

IT IS ORDERED THAT:-

(a) The Writ of Execution issued under HC 11569/98 be and is hereby set aside

(b) The judgment of this Court granted under HC 11569/98 is hereby held to have been fully paid and settled by the Applicants.

(c) Within seven (7) working days of service of this Order, the Respondent shall release the Title Deeds.

(d) In the event of failure to comply with (c) above, The Registrar of Deeds is hereby Ordered to replace the Title Deeds.

DATE: …… ……

JUDGE/DEPUTY REGISTRAR"

There was no reference to the above document in the relevant papers and in the submissions by the applicants' legal practitioners. I shall therefore ignore the document.

This matter has a long history dating back from 1997. The relevant brief background, which I deem necessary for the purposes of the determination required in this judgment, is as follows;

On 5 June 1997 applicants were granted a loan facility by the first respondent (then operating as the Zimbabwe Development Bank) in the sum of ZWD 6200000 in foreign currency. The salient parts of the Finance Agreement read as:

> "Whereas Southend Cargo Airlines (Private) Limited has applied to the Bank for loan finance and the Bank has approved of said application. It is hereby agreed by the parties as follows:
>
> Amount: Up to ZWD6 200 000 in foreign currency (Six Million Two hundred thousand Zimbabwe dollars) to be spent as follows:
>
> Down payment to secure the plane Z$6 200 000
>
> TERM AND INTEREST: Over a period of 60 months including up to 12 months Grace in respect of principal and payable monthly at an interest rate of 10.5% per annum at a variable rate for Risk Class C. Any amount past due attracts said interest rate plus an additional interest charge of 4% per annum and capitalised monthly until cleared:
>
> FEES: A commission of 1% flat to be paid on or before loan signature and a commitment fee of 2%. Any additional fees and charges which may become payable as provided for in the General Conditions of the Finance Agreement will be advised when the event occurs.
>
> REPAYMENT: Instalments of principal amount to be repaid in 48 equal monthly instalments beginning from 30 May 1998. Interest to be billed and paid monthly as from the beginning of 30 June 1997. The Bank may at its sole discretion levy a penalty to be advised on application for voluntary early repayment of the loan amount. The entire outstanding loan amount to be repaid in the event of the cancellation of lease. Stop order to be established through the client's commercial Bank
>
> SECURITIES: The loan amount shall be secured as follows:
>
> At all times and for the validity of this loan, a First Mortgage Bond valued at Z$1 700 000 over lot 2 of lot 381, Highlands and a Notarial General Covering Bond valued at Z$5 200 000 (Five Million Two hundred thousand Zimbabwe dollars) over the company's moveable assets, together with shareholders sureties of Stephen Jackson Chituku and Patience Fadzai Chituku.

DISBURSEMENT:

Delivery to the Bank of signed original of this agreement, payment of the commission, delivery of signed resolutions of the company granting specific authority to raise this loan and authorising the signatory to enter into this agreement, signed surety and signed power of attorney shall be satisfied before the first disbursement of this loan.

REPORTING: The Bank shall from time to time seek financial and operational information from the company and in order to assist in this process, the following standard reports shall be prepared and submitted:

During implementation, a monthly report of progress and problems encountered and implanted as per the attached implementation schedule.

Within 30 days of each calendar quarter, income statement and balance sheet and cashflow of the company.

Within 60 days of the company's financial year end, an income statement and balance sheet in draft to be followed by a final set thereafter. Audited accounts may be requested if the need arises.

No future borrowings by the Borrower shall be entered into without the prior written consent of the Bank which consent shall not be unreasonably withheld.

SPECIAL CONDITIONS: Client to clear all the Mortgage Bonds on the property before disbursement of the funds.

GENERAL CONDITIONS: The conditions attaching to this loan are more fully explained in clauses 1 through to 36 of the attached".

In pursuance of the above agreement the applicants, who are husband and wife, registered a mortgage bond valued at Z$1 700 000 over their property known as Lot 2 of Lot 381 Highlands and an NGCB valued at Z$5 200 000 on all their movable assets.

The purpose of the loan that was granted to the applicants was to enable them to lease a plane from an American company known as Interject Leasing Corporation. However, the American company went into liquidation and the applicant(s)' project collapsed. The collapse came after the first respondent had already paid the proceeds of the loan directly to the American company as per arrangements.

It is common cause that the applicants defaulted in servicing the loan. The first respondent then resorted to litigation which resulted in the following consent order from this court.

"1. That judgment be entered for the plaintiff against the defendants jointly and severally the one paying the others to be absolved as follows:-

1.1. In the sum of United States Dollars 590 470,68

1.2. Interest on the sum of US$506 200-00 at the rate of 14.5% per annum from the 1st June 1988 to the date of payment.

1.3. In the sum of $54 917-68

1.4. Interest on the sum of $49 688-99 at the rate of 14.5% per annum from 31st March 1999

1.5. Costs of suit including the wasted costs of two days.

1.6. Defendants' claims are dismissed with costs".

It is important to note that the relief granted in the above order was in foreign currency (i.e. United States Dollars). The relief prayed for in this application is in actual fact a stay of execution of the above court order. This is so because the first respondent has since proceeded to execute against the consent order.

In May 2003 an attempt was made by the applicant(s) to have the consent order set aside. In her judgment, HH 123/2004, delivered on 16 June 2004, MAKARAU J, as she then was, dismissed the application for rescission. The papers before me indicate that an appeal against that judgment, filed in 2004, still awaits prosecution – leading to the argument that the said appeal was filed merely for purposes of delay.

In its opposing affidavit to this application the respondent states the following:

> "The suggestion that the **first respondent** (*sic*) overpaid its liability to the **first respondent** is not accepted. It is interesting to note that in its papers in case number HC 5054/04 it was claimed on its behalf that as early as April 2004 the first applicant had settled its liability to the first respondent in full. This was a false claim. The letter from the Sheriff of Zimbabwe in this connection annexure "E" is incorrect. In fact I would point out that the Sheriff of Zimbabwe has been most unhelpful in dealing with this matter. Pursuant to a Writ of Execution against movable and immovable property issued in this matter and based on the judgment of this court granted by consent, the Deputy Sheriff auctioned the immovable property of the second and third applicants. Because the prices offered at the time were unreasonably low and the immovable property was in any event mortgaged to the first respondent, the first respondent made what in considered a reasonable offer for the purchase of the property at the auction. This offer was accepted and all the requirements of both the auctioneer and the Sheriff were satisfied. This notwithstanding the Sheriff refused to transfer the property to the first respondent. In this connection I point out that the sale of the immovable property of the second and third applicants was in fact effected by public auction on 30 April 2004 and the first respondent's bid at the time was $110 000 000-00, which was quite

reasonable. The first respondent was required to pay the auctioneer's commission of $5 500 000-00, and paid this but the Sheriff simply refused to confirm the sale and instruct, as is normal practice, the transfer of the property to the auction-purchaser which in this case was the first respondent. Accordingly therefore annexure "E" does not come as a surprise to the first respondent because it is consistent with the very unhelpful attitude exhibited for a long time by the Sheriff".

It is the execution referred to above that the applicant(s) seek to have set aside … (**see page 2 of this judgment where the relief sought is captured in full).**

How do the applicants' founding affidavit justify the relief sought? The main founding affidavit deposed to by the second applicant gives a background of the loan facility. Among other things, the founding affidavit then makes the following conclusions on the dispute:

"9.1

Against the background of this unpleasant history and what would properly qualify as a case for judgment entered in error, the applicants took steps to settle in full the judgment debt of US$590 470-68 plus interest by paying the equivalent of the said amount to the first respondent. The payment of the equivalent amount in Zimbabwe dollars was purely on the basis of the trite position of our law as set out in the *Makwindi Oil Procurement* case *supra*. Further the clear history of this matter shows that the Zimbabwe dollar equivalent is what was due to the first respondent in any event.

9.2

Attached marked "D" is a copy if the schedule showing the copy of the various amounts paid in Zimbabwe and how there were appropriated against the judgment debt in United States dollars at the official exchange rate.

9.3

In fact annexure "D" shows that the first respondent has been overpaid to the extent of US$2431219-62. Even clearer is annexure "E" a letter from the Sheriff of Zimbabwe advising the first respondent that the judgment debt had been fully settled according to the records available to the Sheriff.

9.4

The first respondent is however adamant and has not accepted the full payment as advised by the Sheriff. Consequently it is important that an order be made upholding the position taken by the Sheriff and setting aside the writ of execution issued by the first respondent on the clear basis that the same has been satisfied.

It is clear that the first respondent has received more than what is due to it. What is also clear is this debt has since long been paid.

> In the circumstances, the position taken by the Sheriff should be upheld and consequently the writ of execution issued pursuant to the judgment under case number 11569/98".

It is my view that all the issues raised in the founding affidavit were dealt with in MAKARAU J's judgment (HH 123/2004). That judgment remains extant. It will therefore be unnecessary to revisit the same issues in this judgment. That judgment, in part, reads as follows:-

> "In or about June 1997, the applicants intended to lease a jet airliner from a company in the United States. A deposit was required for the lease. The deposit was to be paid in foreign currency. The applicants approached the respondent for a loan of the foreign currency. The respondent did not have the foreign currency that the respondent required. It purchased the foreign currency from the bank, which in turn made the payment directly to the applicants' creditor in the United States of America. The respondent utilised the sum of $6 200 000-00 to purchase the sum of foreign currency that the applicants needed. The loan agreement was reduced to writing and it indicated that the capital amount borrowed was the sum of "$6 200 000-00 in foreign currency". When the applicants defaulted, the respondent sued for with interest, the sum of US$590 470-68 as representing the capital debt.
>
> It is trite that this court, in an appropriate case, may grant a judgment expressed in foreign currency, provided the amount of the judgment debt is converted to local currency on the date of execution of the judgment. The position has been settled since 1988 when the Supreme Court established it for the first time in *Makwindi Oil Procurement* (*Pvt*) *Ltd* v *National Oil Co of Zimbabwe* 1988 (2) ZLR 482 (S). See also *AMI Zimbabwe* (*Pvt) Ltd* v *Casalee Holdings* (*Successors*) (*Pvt*) *Ltd* 1997 (2) ZLR 77 (S)
>
> The applicants argue that this was not a proper case in which to grant a judgment expressed in foreign currency. In support of this argument, the applicants raise three main arguments. Firstly, it is argued that the loan agreement expressed the amount borrowed in local currency. Secondly, it is argued that the repayments, to be deducted from the applicants' account by way of a stop order, were to be made in local currency. Thirdly, it has been argued that the surety bond executed as security for the loan was denominated in local currency.
>
> In raising these three arguments, it is my view that the applicants are playing on form and not relying on the substance of the agreement between the parties. The substance of the agreement between the parties is to be ascertained from the common intention of the parties as embodied in the agreement. It appears to me that the common intention of the parties was to enter into a loan agreement for the sum of the foreign currency that the applicant required to pay a deposit to its creditor in the United States of America. The respondent purchased this money for the applicant, using the sum of $6 200 000-00. There is no doubt in my mind that the amount of the foreign currency is what the applicants borrowed from the respondent. The loan agreement was inelegantly drafted and referred to the capital debt as "$6 200 000-00 in foreign currency". The

> intention of the parties was however quite clear as to what had been borrowed and was to be repaid. That this was the common intention of the parties is further shown in the statement of account that was sent to the applicants, showing the reduced balance of both the local currency and its equivalent in foreign currency. What was being paid was the local currency bur what was being reduced was the debt in foreign currency.
>
> On the basis of the foregoing, the applicants do not have a defence to the respondent's claim. This court did not err in granting the judgment in foreign currency as the applicants' obligation to the respondent was to be measured in foreign currency while the discharge of the obligation was to be through payment in local currency. See *Mawere* v *Mukuna* 1997 (2) ZLR 361 (HC)".

I have deliberately quoted the above at length from MAKARAU J's judgment in order to demonstrate the fact that the judgment indeed settles the issue of whether or not foreign currency should be paid to clear the debt. I found it strange that the applicants could use the same arguments in *casu* for the relief they seek.

In order to decide whether or not the relief sought should be granted, all I need to do is to determine whether or not the debt was satisfied as reported by the Deputy Sheriff. The applicants' argument, in my view, is anchored on that report.

The Deputy Sheriff's letter dated 13 February 2009 reads as follows:

> "1. The judgment debtor paid the debt in full (see copy of confirmation to the Sheriff's Office dated 20th January 2009 attached hereto).
>
> Since payment was done in full I am not in a position to re-auction the property in execution by private treaty.
>
> On the Sheriff's side it appears there is no cause of action now.
>
> R. Matore
> for: MASTER/REGISTRAR/SHERIFF FOR ZIMBABWE"

On 18 February 2009, the first respondent, through its legal practitioners, reacted to the above in the following terms:-

> "Our records indicate that the judgment debt has not been paid at all. As you would have seen from the Sheriff's file the judgment was expressed in the currency of the United States and payable in that currency. We have no record of any payment and a matter of fact as recently as October 2008 the judgment debtors were still attempting to effect payment unfortunately this was in the incorrect currency.

> If the Sheriff for Zimbabwe is adamant that payment of the judgment debt has been effected in full we should be grateful if we could be furnished with details of such payment including:
>
> 1. The date or dates when payments were made;
> 2. The place and persons or entities to whom payment was effected including copies of the relevant receipts; and
> 3. The currency in which the payments were made.
>
> Our file and the correspondence in it indicates quite clearly that the Sheriff's office has refused to co-operate in a proper disposal of this matter. In the event that we do not receive a response from your office within the next 14 days and upon instructions from our client we will apply for an appropriate court order. In the event the Sheriff and your office will be cited as parties and orders for costs will be sought against yourselves.
>
> M P Mahlangu
> GILL GODLONTON & GERRANS"

The above sets out the respondents' position and that position remained unchanged up to the date of the hearing of this matter.

A document filed in support of the applicant's supplementary affidavit and alleging that the debt had been paid in full, was abandoned at the hearing of this matter. I therefore need not repeat its contents.

Mr *Phiri*, for the applicant(s) submitted that there were two issues for determination namely:

- whether or not the applicants( )should settle the debt in foreign currency and
- whether or not the applicant(s) had fully paid the loan.

As has already been indicated, I need not deal with the issue relating to the justification of settling the debt in foreign currency. That was fully and adequately covered in MAKARAU J's judgment quoted at length at pp 7 and 8 of this judgment. I totally associate myself with the findings and ruling in that judgment.

On the issue of confirmation by the Deputy Sheriff that the debt was cleared. I make the following observation. As an officer of this court and in executing the judgment, the Deputy Sheriff was primarily doing it for the benefit of the judgment creditor who happens to be the first respondent. It was, in my view, incumbent upon the Deputy Sheriff to verify payment figures with the first respondent before making a pronouncement as he/she did on 13

February 2009. Failure to seek verification resulted in the first respondent's negative but most probably correct response of 18 February 2009.

The first respondent denied knowledge of any payments made after June 1998 when a balance of US$506 200-00 was reflected as outstanding. Furthermore the first respondent stated that if payments had indeed been made the offer of US$1000 000-00 placed before the first respondent on 8 October 2008 could not have been made. I agree with that observation.

Upon Advocate *Morris,* for the first respondent, having queried why the supporting letter to the supplementary affidavit, written on 21 April 2004, was not produced before MAKARAU J in May 2004, the applicant's legal practitioner appeared to admit that the letter was indeed a forgery as alleged by the first respondent. He quickly abandoned relying on same. The attempt to use that letter, in my view, totally discredited the applicant's claim that the loan was fully paid. The desperate move to manufacture evidence clearly proves that the applicants had no case at all.

Given the foregoing, my view is that the first respondent has, on a balance of probabilities, proved that it is still owed money by the applicant(s). The first respondent has advanced a credible story that throws out any possible merit in the applicant's case.

I cannot help but agree with Advocate *Morris* when he says:

> "It is not for this honourable court to entertain a debate as to what payments have been made by the applicants and exactly how much is still owed, this honourable court has been asked to stay execution and it is respectfully submitted that if it is found that money is still due by the applicants, no matter in what sum, then this application has to fail".

It should not generally be this court's duty to embark on a reconciliation exercise of figures for

litigants. However, where the court attempts to do so, it shall be guided by the most probable truth. In *casu* the first respondent's story is credible and offers the most probable truth.

All in all, the application for stay of execution has no merit and cannot succeed. (See also *Lowveld Leather Products* (*Pvt*) *Ltd* v *IFC & Anor* 2003 (1) ZLR 78).

I therefore order as follows:

1. The application be and is hereby dismissed.
2. The applicants shall pay costs of suit.

Muvingi,Mugadza & Mukome, applicants' legal practitioners
Gill, Godlonton & Gerrans, first respondent's legal practitioners