

MICHELLE FILLANINO

Versus

AHMED MOOSA ESAT

FERUK MEMENIAT

IN THE HIGH COURT OF ZIMBABWE
CHEDA J
BULAWAYO 22 JUNE 2006 AND 7 DECEMBER 2006

Advocate P Dube for the Plaintiff
Mr Campbell for the Defendant

CHEDA J: In this matter plaintiff claims from defendant a debt being an amount of \$200 000-00 expressed in foreign currency in the sum of United States \$23 560-91 to be converted as such using the parallel market.

Plaintiff and defendants are businessmen based in Bulawayo.

In May 1996 plaintiff advanced to defendants a loan of \$200 000 Zimbabwe dollars. On the 8th day of May 1996, the defendants jointly and severally acknowledged in writing their indebtedness to plaintiff for the said amount which indebtedness was expressed in United States of American dollars. They, therefore, acknowledged their indebtedness to plaintiff in the sum of US\$20154-59. At the time of their indebtedness the conversion of Zimbabwean dollar (ZW) to United States dollars (US\$) was US\$1.00 to ZW\$9923-30.

The agreed interest at the time was 32% per annum from the 8th day of May 1996 to date of full payment. Subsequent to this, the parties agreed to reduce the interest rate in order to be equal to the rate prevailing in the United States at the time since the capital

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amount was now expressed in the United States dollar. It was thus reduced to 4.5% per annum.

On the 2nd day of April 2001, an amount of US\$23 311,38 being the first capital and accrued interest was paid, leaving a balance of US\$ 11 304-05.

In October 1996, Plaintiff further advanced an amount of \$300 000 to defendants which again was expressed in the US\$ and was duly acknowledged by the defendants. At the time one US\$ was equivalent to ZW\$10-32. Therefore at the time defendants were indebted to plaintiff in the sum of US\$ 29 069-77 (which is the second capital). As of the 2nd day of April 2001, the total amount due together with accumulated interest was US\$23 560-91.

Again the parties agreed to reduce the rate of interest to be in line with the prevailing interest in the United States of America at the time, since the capital amount was now expressed in the United States dollar.

On the 13th day of July 2002, the parties agreed that, they, notwithstanding the introduction of a fixed rate of exchange, they would continue to be bound by the original agreement and that repayments would be calculated on the value of the United States Dollar to the Zimbabwean dollar fluctuating according to market forces commonly referred to as the parallel rate.

Defendants have since paid part of the total amount due leaving a balance equivalent to United States \$23 560-91. Infact, the above as gleaned from the amended Declaration is substantially similar to the original Declaration.

Plaintiff, therefore, now claims the Zimbabwean dollar equivalent of United States \$23 560-91 converted at the parallel market exchange rate at the date of payment and interest of the aforesaid amount at the rate of 4.5% per annum calculated from the date of service of summons to the date of full payment. Plaintiff on the other hand argued that it

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had a right to claim payment based on the parallel market rates as they were entitled to do so on the basis of clause 7 of the agreement.

Defendants have defended plaintiff's claim. Their defence is basically on two grounds. Firstly, on exception and secondly on the grounds of illegality. The first exception was argued under case number HB 106/03. In that case, defendants excepted to the summons in that the cause of action as formulated by the plaintiff included a claim for payment of the debt based on the exchange rate obtaining on the parallel market. They further contended that the written agreement signed by the parties did not include such an exchange rate and that the oral amendment to the agreement in terms of clause 7 of the acknowledgement of debt was of no force or effect as it was not reduced in writing by the parties.

The court upheld the exception thereby granting plaintiff leave to file appropriate amendments to his declaration in line with the exception. This he has done.

In the present case defendants still except to the said amendments as they are of the view that there is no distinction between the cause of action pleaded in the amended Declaration and that pleaded in the original Declaration.

On a closer perusal of both the original and amended declarations I find that the particulars are, strictly speaking similar to the present cause of action.

The second objection is that of illegality by plaintiff. Defendants object to the introduction of payment to plaintiff for an amount converted at the "parallel market rate." The question, in my view is, are the parties entitled to seek to enforce an agreement tainted with illegality? The answer is definitely no. The intention of the parties was to use the interest rate commonly referred to as the parallel market.

Such rate is not the official rate as the official rate is that which is set by the Reserve Bank of Zimbabwe.

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The correct legal position as I understand it is that any person can oblige the other to settle a debt in foreign currency equivalent provided that: -

- (1) such payment is paid in Zimbabwean dollars and;
- (2) that such exchange rate, is the official rate prevailing at the date payment is due.

In the event that there is an adventitious profit or loss arising from variations in the exchange rate of exchange the loss lies where it falls, see *Barry Colne and Company (Transval) Ltd v Jackson's Ltd* 1922 CPD 372 at 376-7.

It is clear that Plaintiff sort to be paid in Zimbabwean dollars but at the rate of exchange of the United States Dollar prevailing on the parallel market. This parallel market is infact and in truth a euphemism for what is commonly referred to as the black market which for all intents and purposes is the illegal rate.

It should be made clear to all and sundry that there is no one who is obliged to settle a debt pegged at an illegal rate of exchange. The legal rate of exchange is that which is set by the relevant and legal authority in this instance the Reserve Bank of Zimbabwe.

Therefore an attempt to glorify the illegal rate of exchange by any sweet sounding words will not legalise it. **The old adage that a rose by any other name would smell as sweet** applies. Irrespective of all other arguments about the validity of the exception, the main argument in my view is that plaintiff seeks to enforce an illegal agreement. On that basis alone his claim should be dismissed as the court can not be asked to enforce an illegal contract.

This claim is accordingly dismissed.

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P/s After the judgment had been handed down, Defendant's legal practitioner, Mr Campbell advised me that the question of costs had not been dealt with. This, in fact is correct. In the exercise of my discretion I deal with that question herein under: -

Costs

During the argument, Defendant asked for costs at a higher scale. Costs as between legal practitioner and client scale are punitive and are often awarded where the other party has been unreasonable or abused the other party or the legal system.

In my view this is not the case here and as such I find no justification for the award of such costs and accordingly plaintiff is ordered to pay costs at an ordinary scale.

Ben Baron and partners, applicant's legal practitioners
Calderwood, Bryce Hendrie and partners, defendant's legal practitioners