ZIMBABWE DEVELOPMENT BANK
versus
ZAMBEZI SAFARI LODGES (PVT) LTD
and
CONSERVATION CORPORATION OF ZIMBABWE
and
RAINBOW TOURISM GROUP (PVT) LTD

HIGH COURT OF ZIMBABWE
PATEL J
HARARE, 23 November 2005 and 5 June & 24 August 2006

Stated Case

Adv. Fitches, for the plaintiff
Adv. Matinenga, for the defendants

PATEL J: On the 27th of January 2003, the plaintiff filed summons claiming payment in the sum of US$ 715,185.66, together with interest and costs on the higher scale. The defences proffered by the defendants are that the plaintiff is not entitled to judgement in United States dollars (US$) and that, in any event, they have already tendered payment in the Zimbabwe dollar ((ZW$) equivalent.

The parties have agreed to refer the matter to the Court for determination by way of a stated case.

The Facts

In January 1996, the plaintiff and the 1st defendant entered into a finance agreement (as per Annexure "A") whereunder the plaintiff provided the 1st defendant a credit facility enabling the latter to withdraw a maximum of US$1 million. Interest was to accrue on any withdrawn amount at the rate of 12.5% per annum, with additional penalty interest being levied on arrears at the rate of 4% per annum compounded monthly. The capital sum together with interest was repayable in 20 equal instalments with effect from the 31st of August 1997, the balance being repayable in equal quarterly

instalments, with the final instalment being due on the 31st of December 2001.

On the 8th of January 1996, the 2nd and 3rd defendants bound themselves jointly and severally with the 1st defendant as sureties and co-principal debtors under the agreement. The 1st defendant also executed two general notarial bonds in favour of the plaintiff.

The amounts advanced to the 1st defendant under the facility were sourced by the plaintiff offshore, from the Finnish Fund for Industrial Co-operation Ltd (the Fund), and on-lent to the 1st defendant. This was in terms of a special facility for the local tourism sector designed to benefit operators who generated foreign currency earnings. The plaintiff borrowed the requisite funds from the Fund in US$, in terms of a finance agreement concluded in November 1994, at an interest rate of 9% per annum. It has repaid the bulk of its principal loan but remains under an obligation to repay the balance outstanding to the Fund in foreign currency.

The 1st defendant withdrew a total of $1 million under the facility (as reflected in Annexure "B"). The withdrawals were disbursed by the plaintiff in various currencies, viz. in US$ or its equivalent, at the 1st defendant's special instance and request. The amounts disbursed were denominated in US Dollars, SA Rands and ZW Dollars.

The 1st defendant has so far repaid a total sum of US$1,078,088.79 in liquidation of its debt. All of its payments were made in US$. Full repayment of the debt was not effected as agreed by the 31st of December 2001. The balance outstanding, inclusive of bank charges, constitutes the amount claimed by the plaintiff. The quantum of the debt as calculated in US$ is not in issue.

On the 25th of November 2003, the defendants tendered the sum of ZW$40,501,749.00 in full settlement of their debt. This tender was rejected by the plaintiff as not constituting proper discharge of the defendants' obligation under the agreement.

The Issues

The issues for determination by the Court are as follows:

(1) Whether the credit facility agreement provides for repayment in foreign currency, i.e. $US, as per the plaintiff's claim and whether the plaintiff is entitled to judgement in the said foreign currency denomination.

(2) Whether the tender of settlement made in the sum of $40 million was and is sufficient compliance with the 1st defendant's indebtedness in terms of the agreement.

(3) Whether the agreement provides for costs to be borne on a legal practitioner and client scale.

The Arguments

Adv. Fitches, appearing for the plaintiff, submits that the finance agreement describes the amount lent as being "up to US$1 million" and does not refer to any ZW$ equivalent. Moreover, the repayment clause obligates the borrower to repay the amounts due in specified instalments. Thus, both the money of account as well as the money of payment *in casu* are denominated in $US. The fact that all the repayments effected thus far have been in US$ is a clear indication that the parties understood the currency of payment to be US$. The disbursements to the 1st defendant in other currencies were only made at the 1st defendant's special request and instance.

Adv. Fitches further submits that the defendant's unilateral tender of $ZW40 million at the official exchange rate ignores the fact that the money was borrowed in $US and that the official exchange rate operates unfairly to the prejudice of the plaintiff. In this respect, it is argued that the Court cannot ignore the disparity between the official and parallel exchange rates. The plaintiff has suffered loss in US$ terms and must be fully compensated for its expenditure in sourcing the foreign currency that it provided to the 1st defendant. The latter's inability to source foreign currency at the

time of repayment cannot be a valid ground for exonerating it from its obligation under the agreement.

As regards costs, *Adv Fitches* submits that the agreement itself provides for the reimbursement of all legal costs incurred by the plaintiff in the event that it institutes legal proceedings to recover any moneys due. In any event, the 1st defendant's obligation to repay in US$ was clear *ab initio*. Litigation in this matter was unnecessary and, therefore, an award of costs on the higher scale is warranted.

For the defendants, *Adv Matinenga* submits that the parties in this matter did not specifically address the moneys of account and payment and the finance agreement is silent on these issues. The amount lent under the agreement, i.e. "up to US$1 million", reflects the value of the loan amount and not the currency of payment. Similarly, the repayment clause simply indicates the time and manner in which capital and interest are to be repaid. It does not stipulate the currency of payment and does not clearly and expressly require repayments in US$. The moneys withdrawn under the credit facility were disbursed in three currencies and the money of account under the agreement was any one of these currencies, including $ZW. The fact that all repayments hitherto were effected in US$ is irrelevant as the plaintiff has not specifically pleaded estoppel *in casu*. Furthermore, the plaintiff has failed to establish that it sustained any loss in US$ terms. Conversely, the securities pledged by the defendants in respect of their obligations can only be realised in local currency.

As regards the defendant's tender of ZW$40 million, *Adv. Matinenga* submits that this was a formal offer of settlement in terms of the High Court Rules. In the event that the Court finds for the defendants on the first and principal issue, the plaintiff is only entitled to the amount tendered in November 2003 at the official exchange rate, i.e. ZW$40 million. The plaintiff is not entitled to any

higher amount by virtue of subsequent fluctuations in exchange rates or the devaluation of the local currency.

On the question of costs, *Adv Matinenga* submits that the agreement itself does not provide for the payment of legal costs on the higher scale. In any case, the agreement is unclear as to the currency of payment and the defence *in casu* is obviously not frivolous or vexatious. There is therefore no basis for awarding costs on the higher scale.

Judgements in Foreign Currency

It is now settled law in Zimbabwe, consequent upon the decision of the Supreme Court in *Makwindi Oil Procurement (Pvt) Ltd v National Oil Company of Zimbabwe (Pvt) Ltd* 1988 (2) ZLR 482 (SC), that our courts are at liberty to give judgements sounding in foreign currency. This follows the radical approach adopted in England by the House of Lords in 1975. As was observed by GUBBAY CJ, at 488A-B:

> "…. in *Miliangos v George Frank (Textiles) Ltd* [1975] 3 All ER 801 (HL), the majority of the members of the House of Lords (Lord Simon of Glaisdale dissenting) took the unusual step, termed by some as "revolutionary", of reversing their earlier decision. Their Lordships laid down a new rule that where the justice of the case so required the court could give judgment in favour of the plaintiff for the amount of the foreign currency due to him or its sterling equivalent at the time of payment. With regard to the proper conversion date, Lord Wilberforce noted that changes in the value of currency between the breach date and the date of judgment or payment were the rule rather than the exception."

The rationale for this novel approach is explained, at 492B-C, as follows:

> "That the majority of the Law Lords succeeded in surmounting such an obstacle and opted for a more realistic approach to modern economic conditions, is strongly illustrative of the concept, never to be overlooked, that the law is a living system that adapts to the necessities of present times and is to be given new direction where on principle and in reason it appears right to do so."

Accepting the need for adaptation, the learned Chief Justice concluded that it was necessary to depart from the earlier restrictive approach and held, at 492C-F:

> "I am firmly of the opinion that in the absence of any legislative enactments which require our courts to order payment in local currency only, the innovative lead taken both in *Miliangos* and the subsequent extensions to the rule there enunciated, and in the *Murata Machinery* case in South Africa, is to be adopted. This will bring Zimbabwe into line with many foreign legal systems. See Mann *The Legal Aspect of Money* 4th ed. at pp 339-340.
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> 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."

See also *AMI Zimbabwe (Pvt) Ltd v Casalee Holdings (Successors) (Pvt) Ltd* 1997 (2) ZLR 77 (S), at 85-87, where it was held that it was proper not only to give judgement in a foreign currency but also to couple such award with the standard order that interest on the amount be payable *a tempore morae* at the rate applicable to the currency in question.

Repayment in Foreign Currency

In *Leather Products (Pvt) Ltd v International Finance Corporation Ltd & Another* SC 114-2002, the appellant had borrowed the sum of US$ 300,000.00 from the 1st respondent in terms of a loan agreement concluded in March 1997. The latter subsequently obtained a judgement in the High Court for payment of the capital sum and other amounts in US$. Following attachment in execution, the appellant tendered payment of the full judgement debt in ZW$ at the official exchange rate. The 1st respondent rejected the tender and insisted on payment in foreign currency. Consequently, the appellant filed an urgent application in the High Court seeking an interdict to restrain the 1st respondent from proceeding with the sale in execution, pending the determination of an application for an order directing that payment of the judgement debt be made in the ZW$ equivalent of the foreign currency amount at the official exchange rate. The urgent application was dismissed resulting in an appeal to the Supreme Court. In view of the specific obligation assumed by the appellant to repay the loan in US$, it was held that performance had to be effected in US$ as specified in the loan agreement.

In *Commercial Bank of Zimbabwe v Watergate (Pvt) Ltd* HH 166-2004, the respondent entered into a loan agreement in 1998 and undertook to repay the loan in US$. In 2002, after the time for payment had expired, he offered to repay the equivalent of the loan amount in local currency. The applicant refused to accept the offer insisting on payment in US$. It was held that the option to accept repayment in local currency rested with the applicant. Accordingly, the applicant was entitled to repayment and judgement in US$.

Although the facts in the *Lowveld Leather* case and the *Commercial Bank* case are distinguishable in that they involved an express agreement to repay in US$, I do not comprehend the decisions in those cases as excluding the propriety of a judgement in foreign currency in the absence of an express stipulation to that

effect. In other words, the borrower's obligation to repay in foreign currency need not be explicit and may be implied. It is necessary in each case to consider the specific terms of the agreement under review, as well as the conduct of the parties in their performance of the agreement, in order to determine the true intention of the parties vis-à-vis the currency of payment.

The specific terms of the finance agreement *in casu* are as follows. The amount of the credit facility is stated to be "up to USD 1 Million (One Million United States Dollars)". The term of the facility is a period of 84 months at an interest rate of 12.5% per annum, with an additional interest charge of 4% per annum on overdue amounts. The fees chargeable comprise a commission of 1% on the amount of the loan and a commitment fee of 2% per annum on the undrawn amount.

The repayment clause stipulates as follows: "Instalments of principal amount to be repaid in 20 equal instalments beginning from 31 August 1997 and quarterly thereafter. Interest and Commitment fees to be billed and paid at quarterly intervals beginning 31 March 1996".

The loan amount is secured by a first charge over a notarial lease in respect of Unit 7 of Matetsi Safari Area, a notarial bond over the 1st defendant's movable assets "for a value of Z$1 Million (One Million Zimbabwe Dollars)", and a joint and several guarantee provided by its shareholders, namely, the 2nd and 3rd defendants.

The statement of account prepared by the plaintiff in respect of the 1st defendant is captioned "USD Loan Account". The statement covers the period from the 1st of April 1996 to the 15th of January 2003. The disbursements, repayments and balances reflected on the statement are all denominated in US$.

As regards the currency of account, it is common cause that the disbursements of the loan to the 1st defendant were effected in three different currencies, including ZW$. It is also not disputed that the securities pledged by the defendants are realisable in local currency. However, the disbursements in currencies other than US$ were made at the 1st defendant's special instance and request. Moreover, it is trite and unavoidable that any security consisting of an asset located in this country can only be realised at the stage of enforcement in local currency. What is more relevant *in casu* are the first four clauses of the finance agreement which, in my view, make it abundantly clear that the currency of account governing the loan facility was intended to be the US$. The loan amount of "up to USD 1 Million" is unambiguous and clearly entitled the 1st defendant, if it so wished, to borrow the entire amount in US$. This construction of the parties' intention is fortified by the fact that the statement of account utilised by the parties from the inception of the facility is denominated in US$.

As for the more critical question as to what was intended to be the currency of payment, the repayment clause in the finance agreement does not explicitly state that payments are to be effected in US$. It provides for repayment of the principal amount and interest in specific instalments and at prescribed intervals. The principal amount, as I have stated, is stipulated in US$ and the interest and commitment fees are fixed at rates applicable to the US$. The specified interest rate of 12.5% would be quite incongruous if it were to be applied to a commercial loan sounding in ZW$ at the relevant time. Having regard to these terms and conditions of the loan agreement, I take the view that the currency

of payment contemplated by the parties when the loan facility was agreed upon was the US$ and not any other currency. This is buttressed by the undisputed fact that all the repayments of capital and interest effected by the 1st defendant hitherto have been made in US$.

Apart from the terms of the finance agreement itself, it is necessary to bear in mind that the plaintiff initially sourced the amounts disbursed under the facility off-shore in US$ and was and continues to be obligated to repay its principal loan in US$. Applying the notion of equity endorsed by the Supreme Court in the *Makwindi* case, *supra*, it seems to me just that the plaintiff should be properly compensated for its actual and anticipated expenditure in foreign currency. A judgement sounding in local currency would patently fail to meet the justice of this case. Accordingly, I hold that the plaintiff is entitled to judgement in the agreed foreign currency denomination, viz. in US$.

Tender in Settlement

In the case of *Echodelta Ltd v Kerr & Downey Safaris (Pvt) Ltd* HH 94-2002, evidence was adduced to the effect that the exchange rate on the parallel market was more attractive than the fixed statutory exchange rate. The reality of this situation was recognised by the Supreme Court in the *Lowveld Leather* case, *supra*, where it was argued that the law would fail the parties if the appellant were permitted to pay the judgement debt in ZW$ in accordance with its tender to the 1st respondent. Having regard to the huge disparity between the official exchange rate and the parallel market rate, the appellant stood to make a profit of an amount almost equal to the original loan amount. The Court agreed that such a result would be grossly unfair and unjust and that it should not be sanctioned by it. The appeal was accordingly dismissed.

Similarly, in the *Commercial Bank* case, *supra*, the Court agreed that the respondent's tender of the equivalent amount of the

loan in local currency had been properly rejected and that the applicant was entitled to repayment and judgement in foreign currency. It was further held that, if for any reason the applicant was unable to recover the amount due in US$, it should recover the equivalent in local currency at the official exchange rate prevailing at the date of enforcement.

It is trite that the parallel exchange rate is not cognisable at law and cannot be enforced as a yardstick for payment under any circumstances. The governing rate for the purpose of converting a judgement debt at the date of execution must be the official exchange rate, viz. that which is fixed from time to time by notice, order or direction made in terms of the Exchange Control Regulations 1996 (S.I. 109 of 1996) under the aegis of the Exchange Control Act [*Chapter 22:05*]. On that basis, it is arguable that a tender of the ZW$ equivalent at the prevailing official rate in satisfaction of a judgement sounding in foreign currency must be recognised as fully absolving the judgement debtor. This is so because acceptance of the tender by the judgement creditor would obviate the need to execute on the judgement debt.

In casu, this is in effect the contention that is made on behalf of the defendants. However, while it is not entirely devoid of merit, the argument ignores the crucial fact that, because of the glaring disparity between the official and parallel rates, acceptance of the tender at the official rate would have operated at the relevant time so as to unjustly enrich the 1st defendant to an exorbitant and unconscionable extent and to the plaintiff's extreme detriment. And this was precisely the reason for rejecting the tenders in local currency in the cases that I have cited. Moreover, as explained in the *Makwindi* case, *supra*, it is because execution cannot be levied in foreign currency that there must be a conversion into the local currency at the prevailing official rate for the limited purpose of enforcement – and for that purpose alone.

It is necessary, in my view, to distinguish a tender in settlement in local currency from the requirement to convert a judgement debt into local currency at the date of execution. Both take place at the official exchange rate, but the former is only allowed if repayment in local currency is agreed by contract or otherwise accepted by the creditor. In the absence of such agreement or acquiescence, a tender in local currency does not constitute sufficient discharge of an obligation sounding in foreign currency.

From a practical standpoint as well as in legal principle, the options for recovering a foreign currency debt must be left to the judgement creditor's discretion. In certain instances, it may be possible for the creditor to recoup the debt specifically in foreign currency from convertible currency assets held by the debtor, either within or outside this jurisdiction. If, however, all other options for recovery fail and it becomes necessary as a last resort to execute against the debtor's local assets, the judgement debt must then be converted into local currency at the official exchange rate prevailing at the date of enforcement.

In the event, I hold that the tender of settlement made by the defendants in the sum ZW$40 million in November 2003 did not and does not constitute sufficient compliance with the 1st defendant's indebtedness in terms of the finance agreement.

Costs

Cilliers: *Law of Costs* (2nd ed.) points out that an agreement to pay attorney and client costs is not prohibited by the common law and that the courts are generally bound to give effect to such an agreement (para. 4.11). However, an award of costs on the higher scale is not lightly granted and the courts will grant such costs only on rare occasions (para. 4.09). The learned author further observes that even the expression "all costs" does not include attorney and client costs (para. 13.50).

Clause 2 of the plaintiff's General Conditions regulates the payment of legal costs attendant upon enforcement. It stipulates that the 1st defendant is liable for, *inter alia*, "costs relating to the enforcement of [the] agreement, recovery of charges incurred or paid by the Bank for legal, accounting, audit, consultancy or monitoring services where applicable". As I read it, although this clause undoubtedly covers the recovery of costs relating to enforcement and charges incurred by the plaintiff for legal services, it is not specific as to the scale of legal costs to which the plaintiff is entitled. In the absence of any such specific stipulation, the clause does not in my view justify or support the plaintiff's claim for costs on the higher scale.

Turning to the general rules governing costs, I am satisfied that the issues raised by the defendants for determination by this Court are not frivolous or vexatious. It cannot be said that the answers to the matters raised in defence are obvious or self-evident and that the litigation *in casu* was therefore unnecessary. Accordingly, I take the view that the plaintiff, although it has succeeded on the two principal issues in dispute, is only entitled to costs on the ordinary scale.

Order

In the result, it is ordered that judgement be entered for the plaintiff against the defendants jointly and severally, the one paying the others to be absolved, for payment of:

(a) the sum of US$ 668,676.27, being capital
(b) the sum of US$ 46,509.35, being interest
(c) interest on the sum of US$ 668,676.27 at the rate of 15% per annum, with effect from the 16th of January 2003 to the date of payment in full
(d) the costs of suit.

Sawyer & Mkushi, plaintiff's legal practitioners
Costa & Madzonga, 1st and 2nd defendants' legal practitioners
Coghlan, Welsh & Guest, 3rd defendant's legal practitioners