NATIONAL MERCHANT BANK LIMITED
versus
THE COLD CHAIN (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MTSHIYA J
HARARE, 16 September 2008

Advocate *Fitches*, for the plaintiff
Advocate *Morris*, for the defendant

MTSHIYA J: The cause of action *in casu* is one of unjust enrichment and arises from the following facts:

The defendant, who is an importer of goods for sale in Zimbabwe, depends on authorised dealers for the requisite foreign currency in his business. On 21 March 2001 the defendant instructed the plaintiff, an authorised dealer, to effect payment of ZAR372 062-80 to its supplier, namely Kimberley Clark of South Africa (Pty) Limited (Kimberley). The plaintiff, through a telegraphic transfer, effected the said payment on 4 April 2001.

On 11 May 2001, believing that the telegraphic transfer had not gone through, the plaintiff, on the advice of the defendant, paid Kimberley yet another sum of ZAR372 062-80 through a bank draft - thus duplicating payment. The defendant's supplier who was credited with the duplicated payment supplied further goods to the defendant utilizing the said duplicated funds. Upon becoming aware of the duplicated payment the defendant offered to pay back in Zimbabwe currency. The defendant would make payment using the official exchange rate for the Rand. Having so accepted liability for the duplicated payment, on 6 August 2001 the defendant tendered to the plaintiff a cheque in the sum of Z$2,664,341-71. That amount represented the sum of ZAR 372 062-80 converted to Zimbabwe dollars at the official exchange rate, inclusive of interest' thereon to the date of tender'. The plaintiff rejected the payment tendered and returned the cheque to the defendant.

Prior to the tender of payment the parties had exchanged the following important correspondence, which correspondence serves to confirm the above factual background to the case before me.

(a) 9 July 2001- Facsmile Transmission from plaintiff to defendant

"As telephonically advised, there was a duplication of payment to your named

supplier. Our Correspondent bank debited our account with ZAR372,062-50 on 4 June 2001 and 10 April 2001. On 19 April 2001, one of the debit entries was reversed crediting our account as returned funds. Upon informing you of the retuned funds you confirmed your supplier's banking details that we had applied as correct. However, you then asked for a different mode of payment in which case we issued a draft which has since been paid.

Please assist us to recover the funds as soon as possible. May you urgently advise your actions as we would want to know what course of action to take".

(b) 11 July 2001 – Facsmile Transmission from defendant to plaintiff

"Having received your fax and confirming with my supplier that indeed 2 credits for the same value, R372,067-80 were received in their account. We acknowledge the fact that we owe you the Zimbabwe Dollar equivalent for the second transaction paid by draft.

We propose to settle the outstanding amount by means of a Zimbabwe Dollar cheque for the Rand equivalent at the selling rate ruling at the time the transaction was effected by yourselves on our behalf.

Please confirm this rate to enable us to effect the payment swiftly to resolve this issue".

(c) July 2001 – Facsmile Transmission from plaintiff to defendant

"DUPLICATION OF ZAR372,062-80
IN FAVOUR OF KIMBERLY CLARK OF SOUTH AFRICA

We acknowledge receipt of your facsimile transmission of even date in which you propose to settle the outstanding amount in Zimbabwe dollars calculated at the ruling rate at the time the duplication occurred.

Please note that we need to source forex from the market at ruling market rates to cover our account. This implies that the Zimbabwe dollar equivalent should be calculated at current market rates.

If the issue cannot be resolved by way of a Zimbabwe dollar at current market rates, then we will have to ask for the return of funds from your supplier.

Your urgent response will be greatly appreciated".

(d) 12 July 2001 – Facsmile Transmission from plaintiff to defendant

"DUPLICATION OF PAYMENT IN FAVOUR OF KIMBERLY CLARK OF S.A. (PTY) LTD

Kindly forward a cheque for ZWD8,185,381-60 being the local currency equivalent of the outstanding amount.

Your urgent response to this matter is greatly appreciated".

(e) 20 July 2001 – Facsmile Transmission from defendant to plaintiff

"As you were informed in my previous fax we are only prepared to forward a cheque to you for the exchange rate ruling at the time the transaction was effected.

The draft was issued on the 11th May 2001 for the value of ZAR372,062-80. I would appreciate you check with your dealing room and confirm the rate applicable for transactions on that date. The first payment you effected on 4th April at a rate of ZWD8,0558ZAR1.

Please advised soonest".

(f) 6 August 2001 Facsmile from defendant to plaintiff

"Further to your fax to us of 9th July 2001 signed by Ms V. Mujuru, we now enclose our cheque in your favour made up as follows:-

Amount of payment To Kimberly Clark	ZAR	372062,80
NMB Selling Rate for ZAR on 11,5,01		7,1610
Therefore amount in Z$		266,4341-71
Interest thereon for 88 days at 16,5%		
Being cost of money to Cold Chain in May 2001		105989-70
TOTAL	Z$	2770331-41

In our view this satisfies in full all our indebtedness to you in respect of this payment".

In rejecting the above payment, on 11 September 2001 the plaintiff wrote to the defendant in the following terms:-

"DUPLICATED PAYMENT OF ZAR372,062-87

We make reference to the various discussions we have had regarding the above reference matter. We also acknowledge receipt and thank you for your cheque in the sum of ZW$2,770,331-41 as the refund on the duplicated payment.

As previously indicated we fully acknowledge the error in duplicating payment to Kimberly Clark of South Africa (Pty) Ltd. The duplicated payment was in the sum of ZAR372,062-87, which amount was sourced by our Treasury

department in the market at different rates. Consequently our Treasury department quoted for you a break-even rate of ZW$22 to ZAR1 to enable us to recover our position. Your cheque indicates that you have calculated the Zimbabwe dollar equivalent of the duplicated payment at the official rate. The bank will incur a significant loss in the event that the conversions are done at the official rate. In the absence of a compromise on the applicable rate, we retain a clear legal right to seek a refund of the money in the currency in which it was paid being the full extent to which you have been unjustly enriched. We are aware that you have committed the duplicated payment for the settlement of your own obligations.

We therefore advise that we are unfortunately unable to accept your cheque and return it to you together with this letter. We must now insist that in the absence of an agreement on an acceptable rate, we receive a refund payment from you in the sum of ZAR372,076-87 being the extent of our exposure.

Should you need to discuss this matter any further please do not hesitate to contact the undersigned.

Yours faithfully

Alisto A. Mawuta
Senior Manager International Banking
For NMB Bank Limited"

As a result of the defendant's refusal to accept the plaintiff's proposal, on 3 July 2002 the plaintiff issued summons against the defendant for:

"(a) Payment in the sum of $8 185 383-00 being a refund due in respect of the amount of which defendant has unjustly been enriched at plaintiff's expense which defendant has unjustly been enriched at plaintiff's expense which amount, despite demand, defendants have failed and/or neglected to pay;

(b) Interest thereon at the prescribed rate with effect from 11 May 2001 to date of payment in full, and

(c) Costs of suit".

On 9 September 2003 the plaintiff filed a notice to amend its declaration and prayer. Correspondence in exhibit 1, produced by the plaintiff, indicates that amendments were effected by consent.

I shall therefore assume that the joint pre-trial conference minute filed on 20 June 2006 was based on the amended prayer as agreed at the pre-trial conference held on 13 June 2006. The amended prayer reads as follows:-

(a) Payment in the sum of R372 062-80 together with interest thereon at the rate of 15.5% per annum with effect from the date of summons to date of payment in full; or

(b) Alternatively payment in the sum of $8 185 383-00 together with interest thereon at the prescribed rate with effect from 11 May 2001 to date of payment in full; and

(d) Costs of suit".

It is important to note that at the point of issuing the summons the plaintiff did not "seek a refund of the money in currency in which it was paid" - as it had threatened to do in its letter of 11 September 2007.

The joint pre-trial conference minute identifies the following as issues for determination/trial:

"1. Whether or not the defendant is obliged to return the overpayment in Rands

2. If not, what is the applicable rate of exchange to determine the Zimbabwe Dollar equivalent."

Having gone through the pleadings, I formed the impression that the facts of the case were common cause and hence the formulation of the above issues of law at the pre-trial conference.

At the commencement of the hearing of this mater I indicated to both parties that I did not see the desirability of leading evidence since the issues that remained to be determined were clearly matters of law. However, *Advocate Morris* for the defendant insisted on the need for evidence to be led. I then allowed the parties to lead evidence.

The plaintiff led evidence from Mr Matthew Hore, who is its current Assistant Manager, Corporate Banking. Mr Hore told the court that he was, at the material time, the Foreign Payments Clerk in International Banking and was therefore responsible for the execution of foreign payments on behalf of the plaintiff's clients, including the defendant. Apart from giving details of the transactions and admitting that it was illegal to use the parallel market exchange rate, Mr Hore confirmed what had been admitted at the pre-trial conference.

The defendant led evidence from Mr John Stewart Matthew Gardiner who is its Managing Director. Like the plaintiff's witness, he too confirmed what had been admitted at

the pre-trial conference. He agreed that the defendants' supplier, Kimberley had been paid twice and that the defendant had utilised the second payment for further imports. The defendant had, however, accepted its indebtedness to the plaintiff and had tendered payment in Zimbabwe dollars at the official exchange rate. He said the plaintiff had advised the defendant to pay in Zimbabwe dollars but had rejected payment because it wanted payment to be based on the parallel market exchange rate. It was his evidence that the defendant had always paid the plaintiff in Zimbabwe dollars. The defendant had no foreign currency account. The plaintiff had only demanded payment in foreign currency upon defendants' refusal to pay it using the parallel market rate, he testified.

As I have already indicated above, the evidence of both witnesses merely served to confirm what was common cause. Accordingly, apart from what I have already narrated, I see no value in detailing that evidence herein.

At the close of the hearing I asked counsel for both parties to submit written submissions. These were duly filed as requested, with Advocate *Fitches* also taking the opportunity to file a reply to the defendants' submissions. I must say the submissions from both counsel were very helpful in the determination of this matter. I am grateful to both

The fact that the defendant was unjustly enriched is not in dispute. However, having accepted liability, the defendant duly 'tendered payment by sending a cheque in the amount of the Zimbabwe dollar equivalent calculated at the official foreign exchange rate' at that time. That tender was rejected by the plaintiff only because it was not based on the parallel market rate. With the defendant having refused to use the parallel market rate, the plaintiff then decided that it should be paid in foreign currency (Rand) as per its threat in its letter of 11 September 2001. That development explains the two issues for determination/trial as agreed at the pre-trial conference.

Submissions from both parties recognise the power of this court to grant a judgment sounding in foreign currency as determined in *Makwindi Oil Procurement v NOCZIM* 1988(2) ZLR (Makwindi) where in disallowing the plaintiff's claim for damages in foreign currency GUBBAY CJ, had this to say:-

> "In order to meet its contractual obligations in respect of payment, the plaintiff, a Zimbabwean company which conducts its business in the country, was compelled to obtain the permission of the Reserve Bank of Zimbabwe to purchase with local currency the requisite amount of United States dollars. It is not alleged that the plaintiff's normal currency of use is United States dollars, nor that it owns any foreign currency at all. Notwithstanding, therefore, that the currency in which the loss was

> immediately sustained was in United States dollars (the expenditure currency), the currency in which the loss was effectively felt or borne has the closest, if not the only, connection, thus the loss of foreign currency was effectively felt or borne, not by the plaintiff, but by the national foreign currency reserve".
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> The then Chief Justice said the above upon having quoted the following paragraphs from *Despina R* (1979) 1 ALL ER 421 by Lords WILBERFORCE AND RUSSELL respectively:-
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> "It appears to me that the plaintiff, who normally conducts his business through a particular currency, and who, when other currencies are immediately involved, uses his own currency to obtain those currencies, can reasonably say that the loss he sustains is to be measured not by the immediate currencies in which the loss first emerges but by the amount of his own currency, which in the normal course of operation, he uses to obtain those currencies. This is the currency in which his loss is felt, and is the currency which it is reasonably foreseeable he will have to spend".
>
> "In this case the plaintiffs' business was conducted in US dollars, it being managed in New York, The other foreign currency was necessarily acquired in exchange for US dollars. The true loss of the plaintiffs was a loss of US dollars, and in pursuit of the remedy of *restitutio* in *integrum*, or full and proper compensation, I conclude that the claim and judgment should be for the US dollars lost"

Clearly what emerges from the above quotes is that the currency in which the loss is felt is of paramount importance in determining a claim such as this one.

Advocate Fitches for the plaintiff, submitted, correctly in my view, that Makwindi established that 'if one's loss is felt in a foreign currency, then judgment may be entered in that currency'. Makwindi provides for that.

On the issue of the official exchange rate, he referred me to *Echodelta Ltd v Kert & Downey Safaris (Pvt) Ltd* 2002 (1) ZLR632 and submitted that the import of that case is that the conversion referred to in Makwindi at the date of enforcement should be at the official rate.

Relying on *Commercial Bank of Zimbabwe* v *Watergate (Pvt) Ltd* HH 166/2004, *Lowveld Leather Procucts Pvt Ltd v IFC Ltd* 2003(1) ZLR(S) (Commercial Bank) and *Zimbabwe Development Bank v Zambezi Safaris Lodges (Pvt) Ltd* HH 95/2006, (Zimbabwe Development Bank) Advocate *Fitches* submitted that he tender in Zimbabwe dollars could only be allowed 'if repayment in local currency is agreed by contract or otherwise accepted by the creditor'. He said *in casu* the plaintiff was neither accepting or acquiescing to the tender and therefore that being the case, 'the tender in local currency did not constitute sufficient discharge of an obligation sounding in foreign currency'. 'He went further to submit that' 'the

options for recovering a foreign currency debt must be left to the judgment creditor's discretion'.

On the question of the rate of interest; Advocate *Fitches* stated that case authorities indicated that *in casu* the rate of interest should be that prevailing in the superior court of South Africa as at 11th May, 2001 to the date of payment. The rate of interest, he submitted, should be that appropriate to the foreign currency in question. (See *Ami Zimbabwe (Pvt) Ltd v Casalee Holdings* 1997(2) ZLR 77(S) and *PTC v Zhong* 1999(1) ZLR 525(H)).

Advocate *Morris*, for the defendant, submitted that, in a period of continuous dealings between the parties, it was common cause that the defendant had no foreign currency and could only access some through the plaintiff who is an authorised dealer in foreign currency. The practice was that the plaintiff would source foreign currency from the market and credit it to a customer in return for payment in Zimbabwe currency. This is what had happened *in casu* and the duplicated payment was to be corrected by way of tendering Zimbabwe currency using the official exchange rate. That is what the defendant had done but the plaintiff had rejected the tender demanding that the equivalent local currency payable should be calculated on the basis of the parallel market rate. Upon refusal by the defendant to use the parallel market rate the plaintiff had departed from the earlier mode of dealing and demanded to be paid in foreign currency (i.e. in Rand) or the equivalent in local currency calculated at the official exchange rate at the date of payment.

It was Advocate *Morris*' view that as in Makwindi the plaintiff's loss *in casu* was felt, not in foreign currency, but in local currency. That being the case the defendant's obligation was to be met in local currency. He went further to submit that, given the facts of this case, the plaintiff's right to any payment is restricted to the amount of the tender which it rejected. I agree.

As I have already acknowledged, the written submissions were helpful and clearly gave an overview of the law governing the issues identified at the pre-trial conference, which issues are spelt out at page 4 of this judgment.

There is no dispute that following Makwandi, this court has powers to give a judgment sounding in foreign currency. This, in my view, would normally obtain where there is evidence or agreement that the loss suffered by a plaintiff was indeed felt in foreign exchange. *In casu*, it is clear to me that through established conduct in their dealings, the parties were throughout mindful of the fact that the duplicated amount was to be repaid in local currency.

That is the currency that the plaintiff would use in its dealings with the defendant who purchased foreign currency through it or the currency that the defendant would normally use to purchase foreign currency through the plaintiff.

Following the duplicated payment, the plaintiff naturally proceeded to recover the funds. As reflected in correspondence quoted herein, the defendant, who did not hesitate to admit liability, advised the plaintiff that it would refund it by way of 'A Zimbabwe dollar cheque for the Rand equivalent at the selling rate ruling at the time the transaction was effected'. 'The plaintiff responded to that proposal by pointing out that the Zimbabwe dollar equivalent should be calculated at the current market rates, failing which the plaintiff would demand the return of funds (foreign currency) from the defendant's supplier, namely Kimberley.

Apart from 'instructing' the defendant to violate foreign exchange rules by resorting to the illegal parallel market, the plaintiff did not suggest any change in the original mode of operation (i.e plaintiff sourcing forex from the market and being paid for same in Zimbabwe dollars by the defendant). Such a unilateral change would all the same be improper. As confirmation of the currency in which the refund was to be made, on 12 July 2001 the plaintiff actually asked defendant to pay ZWD 8,185,381-60, being the local currency equivalent of the duplicated amount. Unfortunately that amount was calculated on the basis of an illegal exchange rate, a fact that was admitted by the plaintiff through its witness in court. The defendant correctly refused to follow the illegal route.

On 6 August 2001, the defendant, using the official rate of exchange, forwarded to the plaintiff a cheque for $2,770,331-41 being the local currency equivalent of the amount of ZAR372,062-80 that had been duplicated. There is no suggestion that the defendant's calculation was wrong. All the plaintiff wanted was the use of the illegal parallel market rate. The plaintiff's loss had been felt in Zimbabwe currency and hence the calculation in Zimbabwe dollars.

My view is that the sudden change in demanding the return of funds (in foreign currency) by defendant's supplier was simply a ploy to force the defendant to agree to the use of an illegal exchange rate. The reason was not, because the plaintiff had felt its loss in foreign currency. As established in their usual conduct of business, the plaintiff correctly expected repayment in local currency - the usual currency of their dealings and the currency in which

the loss was felt. The plaintiff knew that the defendant had no foreign currency account. That is why it threatened that it would seek a refund from the defendant's supplier, Kimberley.

While I accept that it might be true that options for recovering a foreign debt must be left to the judgment creditor's discretion, such options should, however, be spelt out at the time of making the transaction and should be in compliance with foreign exchange regulations. To that end I would observe that whereas in Zimbabwe Development Bank and Commercial Bank (supra) the parties proceeded on the basis of promise and contract respectively, which contract and promise the court went on to enforce, the situation *in casu* is different. Accordingly, where there is a promise or contract, it must be clear from inception that the parties have 'promised' or 'contracted' to pay each other in a particular currency. It is only then that a court will proceed to enforce a claim in the agreed currency.

The established dealings between the parties dictated that the plaintiff's payment should be in local currency. The operative practice was for the plaintiff to source foreign currency for the defendant from the market and in return the defendant would pay the plaintiff in Zimbabwe currency. That position did not change because of the duplicated amount. The defendant was still expected to meet his obligation in local currency. Correspondence between the parties, reproduced on pages 2,3 and 4 herein, is testimony to that fact.

The foregoing clearly suggests that, while it is competent for me to grant judgment in foreign currency, I am, *in casu,* disabled from doing so. The plaintiff's rejection of a tender that was sufficient and lawfully made was based on its wish to induce the defendant to commit an offence (i.e. by using the illegal parallel market rate for conversion purposes). That is not acceptable.

It is not arguable that in the current inflationary environment use of the parallel market rate makes a lot of sense. However, that route remains illegal and cannot be endorsed by this court. This court can only recognize the official exchange rate that was used by the defendant (See *Alec Avacalos v David Riley* HH 75/2007 and *Echodelta Ltd v Kerr & Downey Safaris (Pvt) Ltd* 2002 (1) ZLR 632 (H)).

With respect to the date of conversion, I associate myself with the finding of MAKARAU JP in Alec Avacalos (supra) when she reasoned as follows:

> "Finally, Mrs *Wood* argued that if I were to uphold the submissions by Mr *Fitches* that the only rate applicable to convert the amount due to the plaintiff is the official rate, then I must order that the rate applicable be the current official rate and not the rate that obtained at the time the defendant consented to judgment and attempted to pay off the debt.

> It appears to me that Mrs *Wood* is seeking reliance from the *dicta in Makwindi Procurement (Pvt) Ltd* (supra) where it was laid down that the amount of foreign currency in a judgment is to be converted into local currency at the date when leave is given to enforce the judgment. This is the established position but in my view it only applies where the judgment is expressed in foreign currency. Where the judgment is to be expressed in local currency, then the amount of the judgment is set and determined on the date that the consent to judgment is filed. It cannot be re-converted on the date that judgment is finally given as to do so will, in my view, be highly prejudicial to the defendant who would have unequivocally elected to have a judgment entered against him in a certain specified amount.

I admit though that *in casu* there was never any formal consent to judgment. However, the defendant's action on 6 August 2001, can in my view, be regarded as consent to judgment. It is clear to me that, if on 6 August 2001 the plaintiff had tendered ZWD8,185,381-60 instead of ZWD2,770,331-41, it would not have been necessary for me to write this judgment. The plaintiff was prepared to accept the tender as long as it was based on the illegal rate. The Zimbabwe dollar amount demanded by the plaintiff was therefore tainted with illegality and the defendant correctly proceeded to tender an amount that was based on the official exchange rate. Its calculations, based on the official rate, were not questioned. Accordingly the amount the defendant tendered was correct and included the requisite interest. That, in my view, was full settlement.

It is true that due to inflation the amount that was tendered has been rendered *de minimus*. However, that situation would have been avoided if the plaintiff had accepted the tender that was properly and lawfully made on 6 August 2001. The plaintiff is to blame for the loss it has suffered as a result of inflation.

Accordingly I make the following order:

1. Judgment be and is hereby entered for the plaintiff in the sum of $2,770,331-41
2. The defendant shall pay the plaintiff's costs up to 6 August 2001.

Costa & Madzonga, plaintiff's legal practitioners
Atherstone & Cook, defendant's legal practitioners