KWINDIMA FABIOLA
versus
MVUNDURA LOUIS

HIGH COURT OF ZIMBABWE
MAKARAU JP
HARARE 23 February and 4 March 2009.

CIVIL ACTION

Mr O Mutero for applicant
Mr A Nyamupfukudza for defendant.

MAKARAU JP: The plaintiff issued summons against the defendant on 19 May 2007, seeking an order for the payment of damages in the sum of $20 billion. In her declaration, she averred that she had purchased from the defendant, certain immovable property situate in the district of Kariba for the sum of $180 billion which she paid in full. At the time of the agreement of sale, the defendant had already sold the same property to a company going by the name of Woolwork Investments (Pvt) Ltd. On account of this prior sale, the plaintiff further averred that the sale to her was a fraud as the defendant knew he had disposed of his rights in the property and had none to sell to the plaintiff. Thus, she claimed damages from the defendant.

The claim was defended. The matter proceeded to a pre-trial conference where, due to the plea that had been taken by the defendant, the issues for trial were settled as follows:

1. whether the plaintiff and the defendant entered into an agreement of sale in respect of House no 52 Beira, Mahombekombe, Kariba;
2. whether the defendant breached the agreement of sale by failing to transfer the property to the plaintiff;
3. whether as a result of the breach, the plaintiff is entitled to consequential damages and if so, the quantum thereof;
4. Whether the plaintiff is entitled to costs on a legal practitioner and client scale.

At the trial of the matter, the parties advised that the defendant was no longer defending the claim and that the sole issue that fell for determination in this matter is the quantum of damages due to the plaintiff. The parties further narrowed down the issue between them to one of establishing the current market value of the property. Defendant agreed that such would represent the quantum of damages due to the plaintiff.

It is pertinent at this stage to note that prior to the matter being set down for hearing, the plaintiff had applied to amend her declaration to increase the amount of damages sought to US$35 000-00. No objection having been raised against the amendment, I duly granted it with the consent of the defendant.

The plaintiff called the evidence of one Emmanuel Mutambirwa. He is employed by the City of Harare as a Chief Valuations Officer. He holds a diploma in quantity surveying, a bachelor of banking and Commerce degree and an MBA, amongst his qualifications, all of which are set out in the report that he compiled on the value of the property in dispute. In or about October 2008, he visited the property in question and formed the opinion as the value of the property. He revisited his opinion on 12 February and taking into account the trends in the property market, revalued the property at US$35 000-00.

The witness, who in my view is well qualified to give values of properties, gave his evidence well. He was understandably excited in having to be the first to testify in the matter and at times would be unnecessarily argumentative in his responses to questions put to him in cross-examination. All in all, I have little difficulty in accepting that he gave me his honest opinion on the value of the property n dispute.

The defendant also testified as to the value of the property.

He averred that he purchased the property from his employer on a date that he cannot recall for the sum of $150 000-00. In his opinion, if he were to sell the property on the date of the trial, he would no ask for more than US$5 000-00.

Clearly the defendant is not an expert in the field and his opinion as to the value of the property is of marginal probative value.

The issue that has exercised my mind in this matter is not so much the current market value of the property in dispute but rather, whether in the circumstances of this matter, I can award damages sounding in foreign currency. In his address, *Mr Mutero* for the plaintiff was of the view that I can, following the decision in *Makwindi Oil Procurement (Pvt) Ltd v National Oil Company of Zimbabwe* 1988 (2) ZLR 482 (SC). On his part, *Mr Nyamupfukudza* for the defendant confined himself to arguing that the plaintiff had not sufficiently proved her claim.

Makwindi Oil Procurement (Pvt) Ltd v National Oil Company of Zimbabwe was a ground breaking decision, seeking to reconcile two conflicting judgments of this court. In 1985 Mfalila J in *National Food Distributors v Weltman* 1985 (2) ZLR 310 (HC) had held that in

the face of exchange control restrictions, Zimbabwe courts could not freely give judgments in foreign currency even where the proper law of contract is foreign law. Anyone seeking redress in Zimbabwean courts would have to state their claim and have their judgment in Zimbabwean currency. In 1988 Adam J took a different position in the *Makwindi Oil Procurement Company* matter, a decision that was then taken on appeal.

After reviewing the trend in English and South African cases on the issue, GUBBAY CJ was of the view that in the absence of any legislative enactments which require our courts to order payment in local currency only, the innovative approaches taken in England and in South Africa, in making orders in foreign currency had to be adopted. This would bring Zimbabwe into line with many foreign legal systems.

Specifically regarding the award of damages in foreign currency, the learned judge appears to have fully endorsed the approach taken by the House of Lords in two appeals held concurrently were unanimous that that the approach taken earlier would also apply to claims for damages.

In allowing the appeal that was before them, GUBBAY CJ held on the facts of the matter before the court, that the plaintiff, a company that conducted business in this country and was subject to exchange control regulations, and had to purchase its foreign currency using local currency, had failed to persuade him that its loss was in United States Dollars. He was of the view that the loss of foreign currency was felt or borne by the national foreign currency reserve and not by the plaintiff itself.

From his judgment , it appears to me that GUBBAY CJ was approving the approach by Lord Wilberforce in *Owners of the mv Eleftherotria v Owners of the mv Despina* R{1971]1 All ER 421 (HL) at 427d where he stated:

"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 the same year that the Supreme Court handed down its judgment in the *Makwindi* case, a similar approach was taken in South Africa in *Elgin Brown and Hammer v Dampskibsselskabet Torm LTD* 1988 (4) SA 671 (NPD). After citing the passage I have cited above from the *Despina R* case, the learned judge in that matter proceeded to hold that the

court has a discretion which currency to award the judgment in and with refreshing clarity, had this to say about claims for damages at page674 G:

"Where a loss is in fact suffered in a foreign currency there is, as I see it, no reason not to assess and quantify the damages in that currency-indeed not to do so might be to deny a plaintiff the amount of his actual loss."

In the matter before him, the learned judge observed that the main heads under which the loss suffered by the plaintiff were either in the sense of money actually expended or money not received. These amounts were all in foreign currency and in the opinion of the learned judge, the plaintiff's loss was felt in foreign currency. That being so, the only way the plaintiff could be compensated properly for its loss was to grant judgment in foreign currency.

A review of the authorities on the matter appears to me to indicate that where there is no statutory bar, the courts can award judgments sounding in foreign currency. For damages claims, the plaintiff must prove that his or her loss was suffered in foreign currency or put in the language of Leon J in the *Elgin Brown* case, the plaintiff must prove that he or she felt the loss in a foreign currency.

In *casu*, the plaintiff has approached the court for damages arising out of the failure of the defendant to transfer to her certain immovable property. I am persuaded that the property may command a purchase price of the amount of the claim by the plaintiff. However, it has not been argued before me that the property does not have a value in local currency. I would want to believe that it still has but as implicit in *Mr Mutero's* submissions, the United States Dollar and other foreign currencies from the region have become the *de facto* currencies of Zimbabwe. The local currency has been rendered valueless by inflation.

In my view, the facts of this matter and the challenges posed by the hyperinflationary environment that Zimbabweans find themselves operating under present a *res nova* that was not envisaged by the decisions that I have referred to above. The issue that arises is whether a claim for delictual damages may be redressed in foreign currency where it has been felt in both the local and the foreign currency but the local currency has been ravaged by inflation and is de facto valueless.

The authorities seem to suggest that where the loss has been suffered in a particular currency, there is no good reason why the court should not award damages in that currency. They do not seem to me to proceed further to hold that where a loss has been suffered, the plaintiff may choose that currency in which he or she would like the loss to be redressed.

In my view, the facts of this matter present a situation where a loss has indeed been suffered. The loss so suffered has been calculated in one foreign currency as opposed to the local currency for the reasons given by *Mr Mutero*.

It appears to me that the issue I have to determine is whether to extend the approach that has been taken in the *Makwindi* case and be innovative to enough to suggest that where a loss has been suffered and can be calculated in both the local and in a foreign currency, the court has a discretion to award judgment in that currency that will redress the injury suffered and adequately compensate the plaintiff for the loss. It would then follow that where that currency is the foreign currency as opposed to the local currency, then judgment should be in the foreign currency for to award damages in the local currency, where the local currency has been rendered valueless by inflation might be to deny a plaintiff the redress that he or she seeks.

I must confess that I find this approach attractive. It is not in violation of any statutory provision governing exchange control. It does not render the local currency any less legal tender than do other judgments expressed in foreign currency. It is simply an act of applying the approach to a situation that has arisen due to the ravages of inflation and one that could not have been anticipated when the *Makwindi* case was decided. Like the Law Lords in 1975, I am merely opting for a more realistic approach to the current economic conditions prevailing in the country and as GUBBAY CJ observed in the *Makwindi* case at 492B:

> "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."

In the result, I make the following order:

Judgment with costs is hereby entered for the plaintiff in the sum of US$35 000-00.

Sawyer & Mkushi, plaintiff's legal practitioners.

Phiri & Partners, defendant's legal practitioners.