CHRISTOPHER JOHN MAKASI SHAVA
versus
BERGUS INVESTMENTS (PRIVATE) LIMITED
and
MESSENGER OF COURT

HIGH COURT OF ZIMBABWE
CHIWESHE JP & MUTEMA J
HARARE, 9 June, 2011 and 26 October, 2011

Civil Appeal

D. Gapare, for appellant
Advocate *J. Wood,* for respondent

MUTEMA J: The bare bones of the dispute in this appeal are these: The appellant and the first respondent entered into a lease agreement for premises situate at 26 East Road, Belgravia, Harare on 16 May, 2003. On 14 March, 2008, the first respondent, following its cancellation of the lease agreement, obtained an order in the Magistrates' court under case number MC 1701/07. The contentious order was couched in these words:

> "claim granted, defendant to vacate the premises of the plaintiff by 30 June 2008. Defendant ordered to pay holding over damages as claimed by the plaintiff from February 2007."

The first respondent did not enforce the order from 14 March, 2008 until February, 2009 when it proceeded to have the appellant evicted from the premises and also caused the appellant's property to be attached by the second respondent to satisfy the judgment debt. There is a dispute as to why the first respondent sat on its laurels for almost a year without executing the judgment. The appellant avers that subsequent to the 14 March, 2008 order he concluded a verbal lease agreement with the first respondent in terms of which the appellant would have continued use of the premises provided he paid rentals in foreign currency. While the first respondent disputed the existence of such a verbal lease agreement the odds are against it for it could not proffer any plausible explanation for the delay in enforcing the judgment.

Be that as it may, following the eviction of the appellant and attachment of his property alluded to above, the appellant successfully filed an urgent chamber application in this court under case number HC 1116/09 to stay execution of the writ. The terms of the final order sought were that the first respondent stay execution of the warrant pending finalisation of this appeal in terms of which a determination would be made with regard to whether it was proper that the warrant should be sounding in foreign currency when the judgment sounded in Zimbabwe dollars and whether the fact that the warrant was signed by a representative of the second respondent and not a legal practitioner was fatal to the execution thereof.

The crisp issues for our determination are three, viz:

1. Whether the judgment of the magistrate in case number MC 1701/07 met the requirements for the issue of a warrant;
2. Whether the first respondent was entitled to revalorise its claim on execution; and
3. Whether the warrant was fatally/totally defective.

Here under we proceed to deal with those issues seriatim.

1. REQUIREMENTS FOR THE ISSUE OF A WARRANT

It is trite that a writ of execution will be set aside on application if the judgment upon which it is premised was not definite and certain. The test to apply was propounded by CLAYDEN J (as he then was) in *McNutt* v *Mostert* 1949 (3) SA 253 (T) and cited with approval in *Hartley* v *Hartley* 1999 (1) ZLR 431 (SC) at 435. It is that:

> "… the judgment upon which execution is issued must be a judgment from which there can be gathered what money or thing the judgment debtor must deliver".

In the instant case the magistrate's judgment was worded in the following language:

> "claim granted, defendant to vacate the premises of the plaintiff by 30 June 2008. Defendant ordered to pay holding over damages as claimed by the plaintiff from February 2007" (my underlining).

While the magistrate's order was inelegantly drafted it is, however, clear that the claim that was granted is the claim as stated in the summons. That claim includes the following:

a) An order cancelling the lease;

b) That defendant pays holding over damages at the rate of Z$1 137 000-00 per month with effect from 21 February 2007 for the duration that the defendant remained in occupation of the premises;
c) Specific performance that the defendant replaces the damaged kitchen door alternatively pays as damages replacement value of the damaged door at the time judgment is entered i.e. 14 March 2008; and
d) Specific performance that the defendant redecorates interior of premises alternatively he pays for cost of paint, materials and labour costs at the time judgment is entered i.e. 14 March, 2008 (my underlining).

While the judgment is definite and certain in that it can be gathered what money or thing the judgment debtor must deliver, the first respondent only executed it some eleven months later and wrongly included amounts sounding in United States dollars for a maximum of only one quotation obtained long after judgment had been entered contrary to the time prayed for in the claim. In terms of the judgment that was granted, the value of the damaged door and the costs for materials and labour was to be pegged at the time judgment was entered namely, 14 March, 2008 and not at the time of execution eleven months later! At the time judgment was entered the currency in use was the Zimbabwe dollar and not US dollar.

From a legal stand point the first respondent was not entitled to effect currency conversion on the warrant of execution without an application for the same having been made and granted.

2. WHETHER 1ST RESPONDENT WAS ENTITLED TO REVALORISE ITS CLAIM ON EXECUTION

The claim was in Zimbabwe dollars and the court *a quo*'s judgment was in Zimbabwe dollars. However, the first respondent revalorised the claim in US dollars on execution. This, as alluded to in number (1) above, was not only incompetent for arbitrariness but offended against the time honoured principle of currency nominalism. That principle holds that a debt sounding in money has to be paid in terms of its nominal value irrespective of any fluctuations in the purchasing power of the currency. The appellant relied, for this principle, on *Komichi* v *Tanner and Anor* HH 104-2005. Counsel for the first respondent argued that the principle of currency nominalism is only invoked where there is a specific amount of money. She submitted that case law to that effect abounds but failed to cite even a single such case.

It is trite that the principle of currency nominalism is part of our law. In *Jeofrey Mukorera v Ocean Breeze Engine and Cooling Systems* HH 13-08, MAKARAU JP (as she then was) stated the principle as follows:-

> "The concept of currency nominalism has been held to be applicable in all aspects of South African law …… I hold the view that the distortions caused by inflation in the economy should not lead to the wholesale distortion of legal principles that have withstood the test of time in a bid to find legal solutions to a problem that is not legal in nature and origin and may prove to be transient. I am yet to be persuaded that revalorization is part of our law of debt collection".

We respectfully associate ourselves within those sentiments.

Even in England, the same principle applies. In T*reseder & Anor v Co-operative Insurance Society Ltd* (1956) 2 QB 127 (CA) at 144 DENNING LJ had this to say:-

> "…. In England we have always looked upon a pound as a pound, whatever its international value … In all our dealings we have disregarded alike the debasement of the currency by kings and rulers or the depreciation of it by the march of time or events … A man who stipulates for a pound must take a pound when payment is made, whatever the pound is worth at that time".

The learned judge commented on currency nominalism in the Netherlands and German legal systems which he found to be similar and then went on to consider the reasons commonly given for currency nominalism in these words, "….. it would represent a revolutionary transformation of our legal system if courts were to be called upon to determine the true economic value (in terms of purchasing power) of all obligations sounding in money. I need not, however, labour the point, currency nominalism, for whatever reason, is firmly entrenched in our law"

It is beyond caevil that the first respondent's debt sounded in money and the judgment was given in March, 2008 with the specific directive that the values of whatever was damaged by the appellant were to be as at the time of judgment. Those values were in Zimbabwe dollars and not in US dollars. The principle of currency nominalism was therefore still applicable. It was accordingly idle for the first respondent to revalorise its claim on execution. It ought to have made a court application for the conversion of the currency.

3. WHETHER THE WARRANT WAS FATALLY DEFECTIVE

Order 26 r 1(1) of the Magistrates Court Civil Rules provides that a warrant is issued and signed by the clerk of court and addressed to the messenger of court. Subrule (2)

provides that such process may be sued out by any person in whose favour any such judgment has been given. In *casu* the warrant was sued out by the first respondent as the judgment creditor. Rule 323 of the High Court Rules is the corresponding provision to the Magistrates' Court's Order 26 Rule 1 (2) and it has the addition that suing out a writ of execution is done at the risk of the party who does so. *Hartley*'s case *supra* held that the judgment creditor ran the risk of liability for costs if the writ were set aside.

In *casu* while the warrant was not defective in form, it was fatally defective in content due to the revalorisation. It therefore cannot be allowed to stand.

In the event, it is ordered that:

(i) The appeal succeeds with costs;

(ii) The second respondent is ordered to release the appellant's attached property;

(iii) If the first respondent still wishes to pursue the enforcement of the judgment it must first, on notice to the appellant, make an application before the Magistrate's court for leave to revalorise the claim as well as proof of the damages.

CHIWESHE JP: agrees ……..

Scanlen & Holderness, appellant's legal practitioner
Coghlan, Welsh & Guest, 1st respondent's legal practitioners