UZ-UCSF COLLABORATIVE RESEARCH PROGRAMME
versus
ISDORE HUSAIHWEVHU
and
WALTER MUTOWO
and
FUNGAI ZINYAMA

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 27 September & 12 October 2022

Opposed Matter

T Zhuwarara, for the applicant
1st respondent in person
2nd respondent in person
3rd respondent in person but asked to be excused

TAGU J: The applicant seeks a declaratur to the effect that the amount of US$ 788 296.21 which is stated in the respondents' Writ of Execution which was issued out of this Honourable Court on 8 May 2014 was converted to RTGS at the rate of 1:1 by operation of the law.

The brief facts of the matter are that the respondents are former employees of the applicant. The applicant is a non-profit making organization. On 28 April 2006 each of the three respondents executed a Fixed Term Contract of Employment with the applicant. Each of those contracts was for a period of 12 months commencing 1 July 2006 and terminating on 30 June 2007. The contracts were not renewed after they expired on 30 June 2007. Respondents complained of unlawful dismissal. The parties were embroiled in protracted litigation over the issue. The dispute culminated in an Arbitral Award which was issued by Arbitrator Mutongoreni

on 31 August 2007. Though applicant was not satisfied with "Mutongoreni Award" and in a bid to comply with the Award, applicant submitted itself to quantification proceedings which were conducted by Arbitrator Matsikidze. Again applicant was not satisfied with the quantification done by Matsikidze. It then appealed to the Labour Court of Zimbabwe. While the appeal was pending the Respondents obtained a Writ of Execution on 8 May 2014 indicating the Matsikidze award as US$ 788 296.21. In the process to challenge the Matsikidze award and in light of the advent of S.I. 33 of 2019 which was re-enacted under the Finance Act No. 2 of 2020 it was apparent to the applicant that costs would exceed the amount at the centre of the dispute, applicant decided to pay in RTGS at the rate of 1:1. Hence on 8 March 2022 the applicant deposited an amount of ZW$ 837 710.21 inclusive of interests and the Sheriff's commission, bearing in mind the aforesaid amount had then been converted to RTGS$ at the rate of 1:1, in full and final satisfaction of the amount that was being sought to be recovered from it as per the aforesaid Writ. Notwithstanding the payment of ZW$837 710.21 the respondents instructed the Sheriff to proceed with the attachment and removal of assets to seek the payment of the aforesaid amount either in US$ cash or in RTGS at the bank rate. The applicant avers that the debt having been arisen under an Arbitral Award which was issued in 2010 was converted by operation of law to RTGS Dollars at the rate of 1:1 as at 22 February 2019.

Apart from opposing the application the respondents took five points *in limine*. These are:

(1) **The application is not properly before the court**

The respondents submitted that this matter is not properly before the court because the applicant filed a similar application in HC 3658/22 before MAXWELL J on 7 June 2022 who determined that the matter was not urgent and that this matter was to be set down under ordinary roll, but the applicant went on to set this matter again now under HC 4183/22. Reference was made to the provisions of r 60(18) and (19). They submitted that this matter be struck of the roll as there is a double enrolment of cases.

Advocate T. *Zhuwarara* submitted that this is an application for a declarator. He further said Case HC 3658/22 was an application for stay of execution and before me is an application for declaration of rights. A *lis alibi* is not a basis for which the court can strike off a matter from

the roll where no consequential relief is being sought. So *lis alibi* raised by the second respondent cannot be a basis for striking off the matter from the roll. According to him Practice Direction 1 of 2013 shows what kind of cases can be struck off/removed from the roll. So no rule has been violated as the present case has been filed in terms of s 14 of the High Court Act. Besides the judge in HC 3658/22 did not deal with the merits and did not say the matter should be referred to the ordinary roll.

Rule 60(18) provides that:

> "Where upon hearing an application which is supported by a certificate from a legal practitioner in terms of subrule (6) the Judge is of the view that the application is not urgent within the meaning of this rule; the Judge shall strike the application from the roll of urgent applications.
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> (19) An application that has been struck off the roll by reason that it is not urgent shall be transferred to the roll of ordinary court applications and it shall not be necessary for the applicant to file a fresh court application:
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> Provided that rule 59 shall apply to the prosecution of the application after it is deemed not to be urgent."

The matter in HC 3658/22 was an urgent chamber application filed by the applicant in which the applicant was seeking a stay of execution and for a declatatur. The present application is an application for a delaratur filed in terms of s 14 of the High Court Act. In my view this is not double enrolment of cases. This point *in limine* is dismissed.

(2) **The applicant is not a legal person and has no rights**

The contention by the respondents is that applicant is neither a non-profit making organization nor a fictional legal person hence cannot sue or be sued in its name. They said applicant is just a Programme or a Clinical Trials Unit (CTU) of the University of California, San Francisco (UCSF), which is a foreign institution conducting health research locally.

The applicant argued that if the applicant is a legal nullity, then the Writ is also a nullity. Further, it was submitted that the status of the applicant has already been determined in Case No. HC 762/07.

It is interesting to note that in Case No. HC 762/07 the respondents sued applicant as a respondent under the title- "UZ-UCSF Collaborative Research Programme". The decision in HC 762/07 is extant and the applicant is known as UZ-UCSF Collaborative Research

Programme and is being sued or sued in that name. It is common cause that each of the three respondents concluded employment contracts with the applicant in its name. It is hardly surprising therefore that several years down the line the respondents turn around and seek to argue that the applicant is a non-existent party. The respondents themselves are the ones who initiated proceedings against the applicant in 2007. The Arbitral Award they are seeking to enforce cites the applicant as a Debtor. If the respondent's reasoning was to be followed, then the Arbitral Award itself, and the Writ of Execution would be a nullity for want of an existing party. It is trite position of the law that a party that initiates litigation against another cannot be permitted to challenge the *locus standi* of that other party to defend the very proceedings that it initiated. For these reasons the point *in limine* has no merit and I dismiss it.

(3) **Deponent is not applicant's authorized agent**

The submission by the respondents is that the deponent to the founding affidavit of the applicant in this case is not an authorized agent of the applicant. I found this submission to lack merit for the following reasons. The deponent to the applicant's founding affidavit is PANGISILE MATIKITI. At page 251 of the record there is an extract from the minutes of a meeting of the Senior Management Committee of the UZ-UCSF Collaborative Research Programme dated 15 June 2023 at 16.00 a.m. held at No. 15 Phillips Avenue, Belgravia Offices, Harare where it was resolved that:

> "1. UZ-UCSF shall institute a Court Application for a declaratur concerning the settlement of the sums of money that were awarded to Isdore Tawanda Husaihwevhu, Walter Mutowo and Fungai Zinyama as stated in their Writ of execution under case number HC 3411/10.
> 2. **Pangisile Matikiti** be and is hereby authorized to depose to all affidavits and sign all necessary documents to enable the institution of the Court Application referred to above." (my emphasis)
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> Clearly, the Deponent is authorized to depose to all affidavits and sign all necessary documents in this case on behalf of the Applicant."

(4) **Lack of Jurisdiction**

The argument by the respondents is that in terms of the Labour Act, no Court other than the Labour Court shall have jurisdiction in the first instance to hear and determine any application, appeal or matter. Consequently, this Honourable Court has no jurisdiction to

determine applicant's application and the applicant has approached the wrong forum for assessment of damages *in lieu* of reinstatement.

It is trite that the High Court, though it has unlimited jurisdiction, has no power to deal with labour issues. In this application it is the High Court that has power to issue a declaratur. The Labour Court does not have jurisdiction to issue declaraturs. The court is not being asked to reassess the damages, this was done. The court is being asked to make a declaration. For these reasons I find that the point *in limine* lacks merit and I dismiss it.

(5) **This application is for a review not a declaratur**

Argument was advanced by the respondents that this is an application for review of the quantification of damages disguised as an application for a declaratur. The respondents seem to have missed the point. A look at the draft order reveals that the applicant is seeking a declaratur that the amount of US$ 788 296.21 which is stated in the Writ of Execution filed of this Honourable Court on 8 May 2014 was converted to RTGS Dollars at the rate of 1:1 by virtue of S.I. 33 of 2019 and the Finance Act. No. 2 of 2019. The court is not being asked to review anything but to make a declaration whether or not the sum shown on the Writ of Execution has or has not been converted to RTGS by S.I. 33 of 2019 and the Finance Act No. 2 of 2019. For these reasons I dismiss the point *in limine*."

ON THE MERITS

The submission by the applicant is that the amount of US$ 788 296.21 stated in the Writ of Execution dated 8 May 2014 was converted to RTGS Dollars at the rate of 1:1 by virtue of S.I. 33 of 2019 and the Finance Act No. 2 of 2019 and so it must be declared. On the other hand the respondents submitted that the amount has not been converted as alleged and prayed that the applicant need be made to pay in USD as the amount of their salaries was from offshore. The respondents submitted that the judgment debt MUST be discharged in United States Dollars and NOT in local currency converted at the bank rate. According to them salaries and benefits arrears as well as damages *in lieu* of reinstatement which have always been in United States Dollars make up the judgment debt, part of which forms the writ amount. To them the pieces of

legislation applicant tries to rely on are inapplicable to this judgment debt. So the applicant's payment into the Sheriff's account neither fully discharged the writ amount nor liquidates the judgment debt value. They said the real owner of the attached assets is a foreign entity. The source of the funds is offshore. The 30 March 2010 Arbitral Award was confirmed as a Labour Court Judgment on the 28 March 2014. The 17th June Supreme Court Order is the final judgment upholding the Labour Court quantification judgment. This was down post the 22 February 2019 effective date and the judgment debt was never converted to RTGS Dollars at the rate of 1:1.

I am therefore being called upon to interpret and determine the applicability of the said statutes to the present matter. Before I do that let me state what appears to be common cause. In *casu*, it is common cause that applicant's principal liability arises from an Arbitral Award which was issued on 31 August 2007 and was quantified on 31 March 2010 as US$ 788 296.21. It is common cause too that the Writ of Execution which the respondents are relying on was issued on 8 May 2014, a clear five (5) years before the first effective date and expressed the judgment debt in United States Dollars. Therefore, it ought to be accepted as common cause that the applicant's liability purely arises from a judgment Debt which existed before the first effective date.

The Presidential Powers (Temporary Measures) (Amendment of Reserve Bank of Zimbabwe Act and Issue of Real Time Gross Settlement Electronic dollars (RTGS Dollars) Regulations 2019-S.I. 33/2019 provides as follows:

> "for accounting and other purposes, all assets and liabilities that were immediately before the effective date valued and expressed in United States Dollars (other than assets and liabilities referred to in Section 44 C (2) of the Principal Act) shall on and after the effective date be deemed to be values in RTGS dollars at a rate of 1:1 to the United States Dollar."

See Section 41 (d).

The provision cited above was re-enacted to the Finance Act No. 2 of 2019 under s 22(1) (d) as follows:

> "for accounting and other purpose (including the discharge of Financial or contractual obligations) all assets and liabilities that were, immediately before the first effective date valued and expressed in United States Dollars (other assets and liabilities referred to in Section 44C (2) of the Principal Act) shall on the first effective date be deemed to be values in RTGS at a rate of 1:1 to the United States Dollar."

The phrase ‘’first effective date’’ is defined in the Finance Act as meaning the ‘’22nd February 2019, being the date from which Statutory Instrument 33 of 2019 (that introduced the RTGS dollar took effect).”

Subsequent to the enactment of the above stated provisions, the Supreme Court of Zimbabwe made the following pronouncement:

> “…the fact that the liability is based on a Court Order does not exempt the liability from the Application of the provisions of Section 4 (1) (d) of S.I. 33/19. What brings the asset or liability within the provision of the statute is the fact that its value was expressed in United States dollars immediately before the effective date and did not fall within the class of assets and liabilities referred to in Section 44C (2) of the Reserve Bank of Zimbabwe Act (Chapter 22.15.) see *Zambezi Gas Zimbabwe (Private) Limited* v *NR Barbor (Private) Limited and Another* SC 3/20 at page 9.
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> Further, in the case of *Allan Charles Patrick Ingram Lock* v *Ellen Olivia Lock and Another* HH 501/20 at page 3, this Honourable Court determined as follows regarding the Application of the above cited provisions to judgment Debts;
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> “it is common cause that as at the effective date, the judgment in question was already in existence and it was expressed in United States Dollars. It does not fall within the exceptions contained in Section 44C (2) of the Reserve Bank of Zimbabwe Act. The debt was not funds held in Nostro FCA Account neither is it a foreign loan and obligation denominated in foreign currency. Thus on the face of it, the obligation was affected by the migration to the RTGS currency.”

Section 44C (2) of the Reserve Bank of Zimbabwe Act says:

> “For the avoidance of doubt it is declared that the issuance of any electronic currency shall not affect or apply in respect of-
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> (a) funds held in nostro foreign currency, which shall continue to be designated in such foreign currency, and
> (b) foreign loans and foreign obligations denominated in any foreign currency, which shall continue to be payable in such foreign currency.”

It is common cause as I said earlier that the applicant’s liability purely arises from a judgment Debt which existed before the first effective date. As clearly appears from the authorities cited above, the debt itself squarely falls within those liabilities that were converted from United States Dollars to RTGS dollars at the rate of 1:1. The liability is not in respect of funds held in nostro foreign currency account, neither is it in respect of foreign loans and or foreign obligations denominated in foreign currency. For these reasons the applicant ought to be granted the declaratur that it seeks.

IT IS ORDERED THAT:

1. The amount of US$ 788 296.21 which is stated in the Writ of Execution filed out of this Honourable Court on 8 May 2014 was converted to RTGS Dollars at the rate of 1:1 by virtue of S.I. 33 of 2019 and the Finance Act No. 2 of 2019.
2. The respondents shall pay the applicant's costs on attorney and client scale.

Gill, Godlonton & Gerrans, applicant's legal practitioners