BAISHUN MINING COMPANY (PVT) LTD

Versus

CHINDA RESOURCES (PVT) LTD

HIGH COURT OF ZIMBABWE
CHILIMBE J
HARARE 7 March 2023 and 30 August 2023

**Trial cause as a stated case**

*C.P. Mafongoya* for plaintiff
*T. Runganga* for defendant

CHILIMBE J

BACKGROUND

[1] Before the court is a mining dispute. The parties herein elected to progress their trial cause as a special case in terms of r 52 of the High Court Rules 2021.The agreed statement of facts recorded the following events; -

[ 2] The defendant sold to plaintiff, by agreement dated 11 October 2021, its rights and interest in a set of mining blocks for a total consideration of US$ 2,050,000. The blocks were registered under number 41356BM, 41357B, 41358BM and 41359M and located at a place described as Berryl-Rose in the Mfurudzi Safari Area of Shamva District. I shall refer to them as the “Berryl- Rose Blocks”.

[ 3] The arrangement ran aground. The parties resolved that defendants reimburses plaintiff an amount of US$100,000. The defendant however, insisted on settling this obligation in ZWL rather than the United States Dollars which plaintiff demanded.

THE LEGAL ISSUE

[ 4] The sole issue to be determined was framed in the following terms by the consensus of the parties; -

> "As such the parties shall procced to argue only on whether the compensation of the refund shall be paid as United States Dollars cash or payable at the interbank rate as at the date of payment."

THE SUBMISSIONS PER PLAINTIFF

[ 5] Ms *Mafongoya* for the plaintiff urged the court to look no further than the classical contract law principles. She adverted to the operative part of the contract being clause 3 thereof providing as follows; -

> *"Payment, refund, compensation, etc shall be paid in USD cash."*

[ 6] Counsel submitted that (a) the parties had concluded a contract whose terms were set out with clarity. As such (b)[1] there was no need to consider any extraneous evidence in interpreting the agreement. Indisputably, (c)[2] the defendant had appended its signature to the contract and was bound to the terms therein. In particular, (d)[3] ,the operative phrase "*Payment, refund, compensation, etc shall be paid in USD cash*", carried the peremptory word "*shall"*. This placed the inescapable obligation on defendant to pay the US$100,000 in the exact currency and amount stated. It was therefore (e)[4] the court`s duty to uphold the will of the parties, and (f) in doing so, ensure that the innocent party was not prejudiced by the other`s default.

THE SUBMISSIONS BY DEFENDANT

[ 7] Mr. *Runganga* for the defendant dismissed the contract as one *in fraudem legis*. As such, the agreement carried no legal effect. He raised the following arguments in support of this contention; -

i. Courts cannot enforce any rights pursued under an illegal contract. Such contract was void *ab initio*[5].

ii. Section 3 of the Exchange Control (Exclusive Use of Zimbabwe Dollar for Domestic Transactions) Regulations, 2019 [Chapter 22:05] prohibited the use of a currency

[1] *Johnstone v Leal* 1980 (3) SA 927 (A).
[2] *Muchabaiwa v Grab Enterprises (Pvt) Ltd* 1996 (2) ZLR 691 (SC).
[3] *Messenger of Magistrates Court Durban v Pillay* 1952 (3) SA 678 (A).
[4] Innocent Maja-The Law of Contract in Zimbabwe (2015) pages 24-25.
[5] *Munyikwa v Mapenzauswa & Anor* SS 91-05.

other than the Zimbabwean Dollar, in domestic transactions. The Berryl-Rose Blocks agreement qualified as a domestic transaction. Clause 3 thereof provided for payment in United States Dollars. It violated section 3 of SI 212 of 2019.

iii. The agreement was not exempted in that regard by the exceptions set out in sections 4 and 5 of the same statutory instruments.

iv. Additionally, s 23(1) and (2) of the Finance No. 2 Act of 2019 barred the use, in domestic transactions, of foreign currencies previously forming part of the "multi-currency basket".

v. Notwithstanding his argument that the transaction was void for violation of the law, counsel however extended a concession to settle the obligation in Zimbabwe Dollar at the prescribed exchange rate. Counsel sought support from the Supreme Court decision of *Church of The Province of Central Africa v Kunonga & Anor* 2008 (1) ZLR 413 (S).

[ 8] Ms *Mafongoya* responded to the above arguments through two points. Firstly, she submitted that the said restrictions had been ameliorated by exemptions introduced through the Presidential Powers (Temporary Measures) (Amendment of Exchange Control Act) Regulations,2022, SI 118A of 2022. Secondly, she argued that if the defendant were to be allowed to settle the refund in the Zimbabwe Dollar, plaintiff would suffer a severe exchange loss. On the contrary, defendant would be unjustly enriched. Such position was untenable at law.

THE LAW AND BACKGROUND THERETO

[ 9] The question of whether contractual (and delictual) obligations should be settled in local or foreign currency continues to characterise disputes appearing before the courts. This notwithstanding the various decisions in this, and the Supreme Court setting out guidelines to consider in dealing with such debts or transactions[6].These authorities address both contractual and delictual claims.

[6] See the locus classicus *Zambezi Gas Zimbabwe (Pvt) Ltd v N.R. Barber (Pvt) Ltd & Anor* SC 3-20 in addition to decisions such as *Breastplate Services (Pvt) Ltd v Cambria Africa PLC* SC 66-20; *Barmlo Construction (Pvt) Ltd v Patricia Chivavaya* SC 73-23; *Ingalulu Investments (Pvt) Ltd & Anor v NRZ &Anor* SC 42-22; *Manica Zimbabwe Ltd v Windmill (Pvt) Ltd* HH 705-20; *Joyce T. Mujuru & Anor v Peddy Motors (Pvt) Ltd & Ors* HH 436-21; *Manojkumar Jivan v Salzman Et Sie SA & Anor* HH 242-22;*Mulhwa v Alpha Media Holdings (Pvt) Ltd & 2 Ors* HB 117-22 and *UZ-UCSF Collaborative Research Programme v Isdore Husaihwevhu & 2 Ors* HH 703-22 among others.

[10] In essence, the position at law is that the default currency for settlement of local transactions should be the Zimbabwe Dollar. Other currencies, especially the United States Dollar, have restricted application. Those exempted situations are stipulated by law. There is a history to all this. And it traces, (for convenience) to the year 2009.During that year, the nation adopted various currencies as legal tender for use in local transactions. Why and how the nation took that measure, are matters that have been traversed, to various extents, in the decisions cited above. A comprehensive account is borne out in *Stone and Beattie* (*t/a Stone/Beattie Studio Partnership) v Central Africa Building Society and Reserve Bank of Zimbabwe and Minister of Finance & Economic Development* HH 118-23[7].

[11] For purposes of resolving this dispute I will package the historical background into two categories. Firstly, there is what one might term the "SI 33-19 "transition prescription". This prescription was described in the following terms by MAFUSIRE J in *Manojkumar Jivan v Salzman* (supra) at [ 24]; -

> *"[24]* In summary, s 4[1][d] of SI 33/19 provided that for accounting and other purposes, all assets and liabilities that were valued and expressed in United States dollars immediately before the effective date, would be deemed to be values in RTGS dollars at a rate of one-to-one to the United States dollar, on and after the effective date. However, certain assets and liabilities were made exempt from this valuation rate. Such assets and liabilities would be those listed in s 44C (2) of the Reserve Bank of Zimbabwe Act [*Chapter 22:15*], a provision that was contemporaneously enacted together with, and simultaneously inserted by, S.I. 33/19

[ 12] This is the scenario addressed by the Supreme Court in *Zambezi Gas v Barber*. It dealt with obligations or liabilities spanning the first transition date (the "effective date" of 22 February 2019). Herein, we are concerned with the "post transition" period where (a) use of the Zimbabwe Dollar in domestic transactions was made mandatory against (b) the prohibition of the United States Dollar and other currencies. This is the argument proffered by Mr. *Runganga* that the law prohibited use of a currency other than the Zimbabwe Dollar. Defendant cited two key provisions being; -

[7] Whilst the historical analysis and monetary principles expounded by the court in that matter may be considered worthy of reference, it must be noted that the decision was set aside by the Constitutional Court. Accordingly, the *ratio decidendi* must be appropriately regarded.

i. Sections (1) and (2) of the Reserve Bank of Zimbabwe (Legal Tender) Regulations 2019 (S.I. 142/2019); -

"(1) Subject to section 3, with effect from the 24th June 2019, the British pound, United States dollar, South African rand, Botswana pula and any other foreign currency whatsoever shall no longer be legal tender alongside the Zimbabwe dollar in any transactions in Zimbabwe.

(2) Accordingly, the Zimbabwe dollar shall, with effect from the 24th June 2019, but subject to section 3, be the sole legal tender in Zimbabwe in all transactions.

ii. Section (3) of the Exchange Control (Exclusive Use of Zimbabwe Dollar for Domestic Transactions) Regulations, 2019 which came into effect on 29 September 2019

3. (1) Subject to section 4, no person who is a party to a domestic transaction shall pay or receive as the price or the value of any consideration payable or receivable in respect of such transaction any currency other than the Zimbabwean dollar.

(2) In particular (without limiting the scope of subsection (1)) no person shall—

(a) quote, display, label, charge, solicit for the payment of, receive or pay the price of any goods, services, fee or commission in any currency other than the Zimbabwe dollar; or

(b) settle any obligation by barter or otherwise for a consideration that is not denominated by, or is not valued in, the Zimbabwean dollar; or

(c) receive, demand, pay or solicit for payment by means of any token, voucher, coupon, chit, instrument, unit of account or other means or unit of payment (whether material or digital) that is pegged to, referable to or used in substitution for any foreign currency or unit of a foreign currency.

*Transactions excluded from scope of* "*domestic transactions*"

4. The following transactions are not within the scope of the definition of "domestic transaction" in subsection (1) for the purposes of these regulations—
(a) to (f) and section 5 as well as the subsequent amendments.

[ 13] In my view, Mr. *Runganga* ought to have, for completeness, also adverted to the following further statutory instruments whose effect was to amend the above. These being; -

i. Insertion of section 6 (1) and (2) dealing with *"Payment for goods and services using free funds"* into the Exchange Control (Exclusive Use of Zimbabwe Dollar for Domestic Transactions) (Amendment) Regulations, 2020 (No. 2) gazetted on 29 March 2020

> 6. (1) In this section— "free funds" bears the meaning given to that term in Statutory Instrument 109 of 1996, and includes funds lawfully held or earned in foreign currency by any person.
>
> (2) Notwithstanding these regulations, any person may pay for goods and services chargeable in Zimbabwe dollars, in foreign currency using his or her free funds at the ruling rate on the date of payment.

ii. Insertion of a further section 7 (1) and (2) into the same SI permitting *"Dual pricing and displaying, quoting and offering of prices for goods and services"* published on 24 July 2020 stating that; -

> 7. (1) Any person who provides goods or services in Zimbabwe shall display, quote or offer the price for such goods or services in both Zimbabwe dollar and foreign currency at the ruling exchange rate.
>
> (2) Any person who contravenes subsection (1) shall be liable to— (a) a category 1 civil penalty if the contravention is completed but irremediable; or (b) a category 4 civil penalty if the contravention is a continuing one."

THE EFFECT OF STATUTORY INSTRUMENT 118 A OF 2022

[14] I will revert to the import of these inroads into the restrictions on use of foreign currency in concluding this judgment below. I now address the argument by Ms Mafongoya of the effect of SI 118A.This SI was published on 27 June 2022. It therefore came into being well after the Berryl-Rose Blocks agreement was concluded [ on 11 October 2021]. For that reason alone, counsel` argument must fall.

[ 15] I will venture further to explain why the argument around SI 118A would still not sustain. This purpose of SI 118A was to amend the Exchange Control Act [Chapter 22:05]

("the principal Act"). The amendment was effected to section 11 ("Civil penalty orders") by the insertion therein of section 2a. This is the section of SI 118 which plaintiff relies on. I will come shortly to this section 2a.] Before doing so, it is necessary to emphasise that SI 118A did not amend the Exchange Control (Exclusive Use of Zimbabwe Dollar for Domestic Transactions) (Amendment) Regulations SI 142 of 2019. These regulations remained largely unaffected by SI 118A. As such, SI 142 of 2019 retains its restrictions (and exemptions) on use of foreign currency in domestic transactions.

[ 16] What SI 118A did was, as stated, to amend section 11 of the Exchange Control Act. The purpose of the Exchange Control Act is indicated as follows by the Act`s short title; -

> AN ACT to confer powers and impose duties and restrictions in relation to gold, currency, securities, exchange transactions, payments and debts, and the import, export, transfer and settlement of property, and for purposes connected with the matters aforesaid.

[17] Section 11 of the Exchange Control Act is sub-headed; - "*Civil penalty orders and amendment or substitution of Schedule"*. The Schedule is, simply put, a wide-ranging protocol dealing with infringements and penalties to exchange control violations. It governs importers, exporters, authorised dealers and individuals and entities involved in the handling, receipt and repatriation of foreign currency. It is not aimed, in the primary sense, at regulating domestic transactions in the same manner that SI 142 of 2019 does. The specific insertion in the Exchange Control Act by SI 118A per section 2a seeks to enhance that infringement protocol in the Schedule. It provides that; -

> (2a) The provisions of the Schedule, insofar as they expressly or impliedly permit the settlement of any transaction or payment for goods and services in foreign currency, shall be valid for the period of the National Development Strategy 1 (the national economic plan for the period from January 2021 to December 2025, published on the 16th November, 2021).

[ 18] To my mind, three main conclusions derive from this statutory instrument. Firstly, SI 118A also dealt, apart from amendment of the Schedule, with foreign loans and foreign currency loans. Secondly and more apposite to the present dispute, SI 118A focussed on the Schedule. It therefore becomes incumbent upon that party who wishes to rely on SI 118A (as an exemption to utilise foreign currency in domestic transactions) to specify the applicable

part of the Schedule outlining that exemption. Ms Mafongoya was unable to do so. Possibly because there was no supportive provision in the Schedule to rely on.

[ 19] Thirdly, SI 118A did not add to the list of transactions are exempted from the Zimbabwe Dollar restriction by section 4 of SI 142-19. These may be repeated here for ease of reference;

> 4. The following transactions are not within the scope of the definition of "domestic transaction" in subsection (1) for the purposes of these regulations—
>
> (a) the making of the payments referred to in section 23 ("Zimbabwe dollar to be the sole currency for legal tender purposes from second effective date") (4) and (5) of the Finance (No. 2) Act, 2019;
>
> (b) any of the following transactions in respect of which a foreign currency is required to be paid— (i) carbon tax payments for foreign registered vehicles; (ii) third party insurance payments for foreign registered vehicles; (iii) road access fees for foreign registered vehicles; (iv) electronic sealing fees and fines charged by or to transborder logistics enterprises or transborder electronic tracking or tagging enterprises; (v) payments to local insurance companies for bond guarantees or bonds for designated goods; (vi) the payment by foreigners in transit of deposits in terms of any law;
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> (c) payments of duty at ports of entry by individual travellers who opt to pay such duties in foreign currency, despite the fact that the dutiable goods in question are not designated goods; Exchange Control (Exclusive Use of Zimbabwe Dollar for Domestic Transactions) Regulations, 2019 1358
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> (d) transactions conducted through authorised dealers for which payments are permitted to be made in any foreign currency in terms of any directive issued in terms of section 35 of the Exchange Control Regulations;
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> (e) transactions in respect of which any other law expressly mandates or allows for payment to be made in any or a specific foreign currency.
>
> (f) transactions referred to in section
>
> 5. Guest of State fuel outlets

> 5. Despite these regulations it is permissible to tender foreign currency in payment for petrol, diesel or other petroleum product dispensed to Guests of State at a specified Guest of State fuel outlet, that is to say, any fuel outlet licensed by the Zimbabwe Energy Regulatory Authority established by section 3 of the Energy Regulatory Act Authority Act [Chapter 13:23] to sell petrol or diesel or other petroleum product in United States dollars to Guests of State.

[ 20]. Quite clearly, the Berryl-Rose Blocks agreement qualifies as a domestic transaction. The Supreme Court had this to say [ at page 14] about such transactions per PATEL JA (as he then was); - in *Breastplate Services (Private) Limited v Cambria Africa PLC* SC 66-20; -

> "I have earlier alluded to the wide impact of S.I. 212 of 2019, to wit, the Exchange Control (Exclusive Use of Zimbabwe Dollar for Domestic Transactions) Regulations 2019, promulgated on 27 September 2019. The term "domestic transaction" is very broadly defined in s 2(1) of the Regulations, subject to s 4, to encompass virtually every conceivable commercial transaction within Zimbabwe. Section 3(1), which is also subject to s 4, expressly prohibits the payment or receipt of any currency other than the Zimbabwe dollar, as the price or consideration payable or receivable in respect of any domestic transaction. Section 4 enumerates those transactions which are excluded from the scope of the definition of "domestic transaction". Of particular relevance for present purposes is s 4(e), which excludes "transactions in respect of which any other law expressly mandates or allows for payment to be made in any or a specific foreign currency".

[21] In the same decision, the Learned Judge of Appeal (as he then was) cautioned on the need to avoid "*commercially incongruous*" situations in interpreting or applying currency instruments. As stated, the position is that the Zimbabwe Dollar ought to be the default currency in domestic transactions. I may also opine in passing, again based on the matters coming before the courts that the market does not appear to be fully aligned to the legal position.

[ 22] There is indisputably, a huge appetite in this country for the United States Dollar (in notes or "nostro") in non-section 4 (of SI 142-19) transactions. The United States Dollar is

still greatly preferred either as a transactional currency or store of value. That appetite is contrasted by a marked reluctance (and indeed resistance), in certain instances, to accept the Zimbabwe Dollar. That situation becomes, for many reasons, quite unfortunate. Whatever the cause or justification. One hopes that market drivers and the regulatory authorities sustain efforts to strike the desired harmony between legal prescription favouring usage of the Zimbabwe Dollar, and necessity for the residual application of the United States Dollar.

DOES THE BERRYL-ROSE AGREEMENT AMOUNT TO AN ILLEGALITY?

[23] I drew the attention of both counsel to the fact that neither side had specifically pleaded the matters subsequently raised in argument on (a) illegality and (b) unjust enrichment. Further, the agreed facts did not specifically advert to these two legal principles. I must also note that Mr. *Runganga*` s arguments on illegality did not address the effect of the two further inroads into SI 142-19 [ See [20] above].

[24] The parties elected to proceed via a stated case. There are implications which arise from this choice of procedure. Both the litigants on one part, and court on the other are enjoined to observe the factual confines drawn by a stated case. Having strayed quite significantly from the facts as set out, and the legal issue as framed, it becomes difficult for the court to make findings on the issues of illegality and unjust enrichment[8]. It must be remembered that these two concepts represent complex legal principles which must be examined against specific set of factual and evidentiary backgrounds.[9]

[25] GARWE JA (as he then was) shared the following guidance on the nature and effect of a stated case in paragraphs *[17]* and part of [*18]* in *Dr Nobert Kunonga v The Church of The Province of Central Africa* SC 25-17; -

> *[17]* Once the facts are agreed, the court should proceed to determine the particular question of law that arises and not delve into the correctness or otherwise of the facts. It is bound to take those facts as correctly representing the agreed position and to thereafter determine any issues of law that may arise therefrom. It is not open to the parties to the stated case to seek to re-open the

[8] *See Veronica Nyoni v Bernadette Ndoro N.O* SC 79-22 on the need to plead the causa with clarity in order to extract a judgment fully addressing such causa. A court must not grant relief on matters outside the causa pleaded.
[9] See *Agson Mafuta Chioza v Smoking Williams Siziba* SC 4-15

agreed factual position or to contradict such position. Nor can either party seek to ignore existing legal principle or findings of fact made in connection with the same matter by another court. Of course, either party has a remedy at common law, to withdraw any concession made in a stated case owing to *justus error*, fraud, mistake, or any other valid ground.

*[18]* It has become necessary to restate what a stated case is owing to the fact that in some instances, the appellant in this case has made submissions contrary to the stated case brought before the court.

DISPOSITION

[26] The contract between the parties was a domestic transaction. It ought to have been premised on use of the Zimbabwe Dollar. A concession and offer have been made by the defendant to settle the obligation at the ruling exchange rate in local currency. An order will be made to that effect.

[ 27] The argument on unjust enrichment can not avail the plaintiff. That sort of grievance was addressed by the Supreme Court in *Zambezi Gas* and further expressed thus with characteristic candour by MAFUSIRE J in *Akram v Mukwindidza & Anor* HH 522-21 at *[ 13]*; -

> "After hearing argument, I reserved judgment. This was out of an abundance of caution. I feared there could be something I was missing. Now, after careful consideration I find that the applicant is simply flogging a dead horse. He has no case. His case is squarely on all fours with the *Zimbabwe Gas* case. The Chief Justice spoke. The escape hole the applicant wants to take is a *cul de sac*. One may not fault him though for trying to wriggle out of the reach of S.I. 33/19. It had far-reaching consequences. Its effect was profound. On its inception, some people woke up to find that their credit bank balances that had all along been denominated in United States dollars had suddenly transformed into credit balances in some hitherto unknown currency. The conversion ratio of one to one was man-made, not market driven. As a result, some citizens suffered gigantic losses. But others gained enormous advantages. Unfortunately for him, the applicant was one of those that suffered loss. He can only cut down on any further losses, pick himself up and move on. He has no legal leg to stand on."

[ 28] Finally, I address the issue of costs. Each party argued to their strengths in seeking a punitive order of costs against the other. Their respective positions have been fully considered. My conclusion is that neither party should be successful in its prayer. I take the approach that each party has been partially successful/unsuccessful given the matters presented to the court for a decision. In that respect, each must bear its own burden of costs.

Accordingly, it is ordered that; -

1. Defendant pays plaintiff an amount of US$100,000-00 being a refund of the deposit due to plaintiff in respect of payments toward the purchase of rights and interest in mining blocks registered under Number 41356BM;41357BM;41358BM and 41359BM situate in Berry Rose of Mufurudzi Safari Area, Shamva, the amount stated herein being payable in Zimbabwean Currency at the prevailing exchange rate on the date of payment; -
2. Defendant pays interest on the capital sum ordered herein at the rate of 5% per annum from 15 October 2022 to date of payment in full.
3. Each party to bear its own costs.

**CHILIMBE J____30/8/23**

*DLS Attorneys*- plaintiff`s legal practitioners
*Mbano Gasva and Partners*-defendant`s legal practitioners