INDEPENDENT PETROLEUM GROUP LIMITED
versus
CHAPARREL TRADIND (PRIVATE) LIMITED
and
DEAN LE ROUX

HIGH COURT OF ZIMBABWE
TAGU J
HARARE; 16 January & 1 February 2023

Opposed Application

D Ochieng, for the applicant
R Mabwe, for the respondents

TAGU J: This is a court application for revival of a court order in Case number HC 8256/16. The court order was granted on 28 December 2016 in favour of the Applicant against both first and second Respondents as surety and guarantor respectively, wherein the respondents were ordered to pay a sum of US$ 773 904.52 plus interest on the said capital sum of US$651 332.00 at the agreed rate of 7% per annum. Both respondents made arrangements to settle the debt owed to the Applicant through a Non-Resident Transitional Account held by CBZ Bank Limited for onward transmission to Applicant's foreign held bank account. As a result a writ of execution was not issued out then. Consequently, the principal sum and part payment towards accrued interest was duly settled by way of instalments albeit with some delays from agreed timelines leaving a balance of US$99 493.79. Several meetings were held and emails exchanged, but regrettably no action was taken by respondents to settle the outstanding amount, leaving the Applicant with no option but to file the present application to enable it to issue a writ of execution.

In their Notice of Opposition the respondents denied that the Order granted by the Court dated 28 December 2016 is expressed in the currency of the United States of America because the simple (US) followed by ($) was not used. However, the Respondent acknowledged that at all material times prior 22 February 2019, Zimbabwe operated a multi-currency system in terms

of which a basket of currencies like the United States Dollar, the British Pound, the South African Rand and the Botswana Pula among other currencies. The first Respondent submitted that the judgment debt in HC 8256/16 constituted an outstanding obligation on 22 February 2019, and was therefore subject to the provisions of the law in that it was payable in local currency at the rate of one –to-one. The Respondent therefore denied that there is a balance of US$99 493.79 because the first Respondent has since made a payment in the sum of R.T.G.S $99 493.79 in full and final settlement of this matter. The court order in question reads as follows:

"IT IS ORDERED THAT:

1. Judgment be entered in favour of the applicant against the first respondent in the sum of $773 904.52.
2. Interest thereon on the said capital sum of $651 332.00 at the agreed rate of 7% per annum from the 5th August 2016 to date of payment.
3. Costs of suit on the scale as between legal practitioner and client, namely at the recommended tariff by the Law Society of Zimbabwe."

It is common cause that on the 28 December 2016 a Court Order for summary judgment was granted in favour of the Applicant. It is further common cause that both Respondents made arrangements to settle the debt owed to the Applicant through a Non-Resident Transitional Account held by CBZ Bank Limited for onward transmission to Applicant's foreign held bank account. It is further common cause that because of the arrangements by the Respondents to settle the debt, a writ of execution was not issued out. Finally, it is not in dispute that Respondents failed to honour their arrangements. When negotiations failed to yield any results, the Applicant filed the present court application for revival of the court order that had superannuated after the lapse of three (3) years for purposes of issuing out a writ of execution.

The law is very clear on this subject. The High Court Rules, 2021 provides as follows:

"69. (1) The process for the execution of any judgment for the payment of money, for the delivery of money, for the delivery up of goods or premises, or ejectment, shall be by writ of execution signed by the registrar and addressed to the Sheriff, in accordance with one or other of Forms Nos. 32 to 39.

(2) ……..

(3) No writ of execution shall be issued after the judgment has become superannuated, unless the said judgment has first been revived, but a writ of execution once issued shall remain in force until such time as the judgment has been satisfied."

According to the case of *Nzara & Ors* v *KASHUMBA N.O. & Ors* HH 151/16 at p 19-20 cited by the Applicant, the common law position on the superannuation of judgments prevails in Zimbabwe, that is, a judgment superannuates after three year. The court said as follows,

> "The Roman-Dutch law provided for the superannuation of judgments. In South Africa, when the case of *Segai &Anor v Segil* 1992 (3) SA 136 (C) was determined, the Rules of Court still provided for the superannuation of judgments. The period was 3 years. The court noted that the superannuation rule, as incorporated in the uniform Rules, was a restatement of the Common Law. The rule had been received in South Africa and had constantly been applied."

On papers it is clear that the judgment had superannuated. It is not in dispute that the principal amount was paid by the Respondents. What remains outstanding according to the Applicant is the interest on the capital amount owed to the Applicant. The application is therefore a proper one.

However, there are certain requirements that the Applicant had to satisfy-

1. That the judgment debt must remain outstanding –*Mafoko* v *Alcatel Lucent South Africa (Pvt) Ltd and Another* 2015 ZALCTHB 240,
2. The judgement to be revived must specify the amount; *CBZ Bank* v *Business Environment Svcs (Pvt) Ltd*
3. There must be a reasonable explanation for the delay in enforcing the judgment- *Evengeline Eveline Takawira* v *Issac George Takawira* HH 182/20.
4. That an order must be of some benefit to the Applicant. *Nzara & Ors* v *Kashumba supra and Cooper* v *van Ryn Gold Mines Estate Ltd & Mining Commissioner of Boksburg* 1908 TS 698.

All the above requirements have been satisfied in this case.

Most of the facts in this case are common cause as stated above. Only two issues remain for resolution. The first one being whether or not the order being relied upon by the Applicant is executable in the currency of the United States of America Dollars or not? The second one being whether or not the debt has been fully paid?

WHETHER OR NOT THE DEBT IS EXECUTABLE IN UNITED STATES DOLLARS?

The position of the Applicant I that the debt is executable in United States Dollars since the debt was in United States Dollars. The position of the Respondents is that the debt is not in United States Dollars and that the Order in HC 8256/16 is not expressed in United States Dollars.

Indeed the Order in HC 8256 is not expressly stated in United States Dollars. Paragraphs 1 and 2 of the order read in parts as follows-

> "1. Judgment be entered in favour of the applicant against the first respondent in the sum of $773 904.52.
>
> 2. Interest thereon on the said capital sum of $651 332.00 at the agreed rate of ……"

The figures in this Order are prefixed with "$" sign and not "US$" sign hence the argument by the Respondent that the order is not executable in United States Dollars. But sight must not be lost to the fact that at the material time Zimbabwe was using a basket of currencies.

The Applicant referred the court to the pointers that the Order granted by this Honourable Court was expressed in United States Dollars.

1. Attached to the application for summary judgment are the summons which commenced action. It is revealed that Applicant had a contract with first Respondent to sell and deliver petroleum products at first Respondent's instance. Further, the price of the petroleum products was valued in United States Dollars. This was not disputed by Respondent.
2. Applicant and first Respondent entered into a settlement agreement which was recorded in the form of Annexure 1 to the application for summary judgment. It will be seen from Clause 1.1. in the preamble of the settlement agreement that the amount owing to the applicant by the 1st Respondent as the principle debtor and jointly by second Respondent, as surety and co-principal debtor, which was termed the agreed debt was valued in United States Dollars. This was not disputed.
3. Annexure 2 to the application for summary judgment is a letter of 21 June 2016, which set out in detail the amount owing valued in United States Dollars which amounts were not disputed by the Respondents.

4. First Respondent made payment of a sum of USD$1 502 930.00 per Annexure 3 to the application for summary judgment. Having deducted this amount Applicant issued another invoice showing the amount owing in United States Dollars (USD$773 904.52 as per Annexure 4 to the application for summary judgment, whilst Respondents failed to pay this amount, they never at any one point disputed that the amount was due and payable.
5. Clause 2.4 of the Settlement Agreement shows that payments were to be made in terms thereof where to be effected into Applicant's bank account operated in Switzerland or as further amended by Annexure "AB" into a Non-Resident Transitory Account held by the Commercial Bank of Zimbabwe. This clearly indicates that Respondents had entered into a foreign loan and obligated to remit payments outside the country which excludes the Respondents obligations to be discharged in local currency.
6. Applicant later by letter dated 23 March 2021 compromised to receiving the outstanding balance in Zimbabwean dollars at the prevailing official exchange rate on the date of payment.
7. Second Respondent promised to honor this compromise per annexure "G" to this application. Regrettably, the compromise was not honored resulting in Applicant withdrawing the compromise and is calling upon full execution.

In view of the above, it is clear that the debt was in United States Dollars. The Respondents settled the principal debt in United States Dollars. What complicated the whole matter is that in its application for Summary judgment the Applicant used "$" sign and not "US$" sign although the annexures to that application expressed the figures in United States Dollars. The Order also expressed the figures in ($) sign and not in "US$" sign. Be that as it may the Respondents never at any point disputed that the debt was in United States Dollars. If the debt was not in United States Dollars, there was no need for the Applicant to compromise and accept to be paid in Zimbabwean Dollars. The second Respondent promised to honor the compromise per annexure "G". If the debt was in Zimbabwean Dollars, one wonders why the second Respondent offered to honour the compromise. For avoidance of doubt this is what the second Respondent said in Annexure "G":

"Ref: Independent *Petroleum Group* vs *Trek Petroleum*

We refer to the above matter and advise that after receiving your letter dated 23 March 2021 to Messrs Mushoriwa Pasi and also following our telephone conversation.

We are grateful that IPG has compromised to receive the payment in Zimbabwean dollars at the prevailing official exchange rate on the date of payment. (my emphasis)

As a commitment to this we are busy harvesting our maize and waiting from GMB which we are expecting to be paid early next month and once we receive those payments we will then pay IPG in the meantime would mind sending us the bank details."

This letter was written by the second Respondent on the 22 April 2022. In the same letter the second Respondent was asking for Applicant's bank details into which the money was to be deposited. Surely if the debt was to be paid in Zimbabwean Dollars then the Respondents were supposed to have been supplied with the Applicant's Zimbabwean bank details as early as at the time the agreement was entered into. The account into which the Respondent agreed to deposit the money into is a foreign account and only foreign currency was to be deposited. For these reasons I am satisfied that the debt was in United States Dollars though ex facie "$" sign was only used in the Court Order, otherwise there was no need to compromise. Clearly there was an apparent error in the Order, but the Applicant did not take corrective action since 28th December 2016.

WHETHER OR NOT DEBT HAS BEEN FULLY PAID?

Only the principal debt was fully paid in United States Dollars. An amount of US$ 99 493.79 remained outstanding in respect of interests. This is the amount the Applicant seeks to recover through a writ once the Court Order is revived. The first Respondent submitted that it has since made a payment in the sum of R.T.G.S. $99 493.79 in full and final settlement of this matter in terms of S.I. 33/2019 on 26 August 2022. The provision that the Respondents refer to is, Section 4 (1) (a) of **Presidential Powers (Temporary Measures) Act and Issue of Bond Real Time Gross Settlement Electronic Dollars (RTGS Dollars) Regulations, 2019 (SI 33 OF 2019)** which provides for the issuance and operation of an electronic currency dubbed "the RTGS Dollar", with effect from the effective date, being the date of promulgation of SI 33 of 2019, ie. February 2019 which states as follows:

"(c) that such currency shall be legal tender within Zimbabwe from the effective date, and

(d) that, 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 44C (2) of the principal Act) shall on and after the effective date be deemed to be values in RTGS dollars at a rate of one-to-one to the United States dollar,"

The contention by the Respondents is therefore that they have since paid the outstanding amount in full and final settlement of the debt, hence no need to revive the Court Order.

However, the amount deposited by first Respondent into Applicant's bank account was returned to the first Respondent as it was improperly transferred by the Respondents on 7 September 2022 as per Annexure "AC" on p 79 of the record.

The contention by the Applicant is that the debt in issue, which is the amount still owed by the Respondents to the Applicant therefore fits squarely within the ambit of s 44C (b) as it is a foreign obligation which remains payable in foreign currency. That there is clearly an exception to the operation of s 4 (1) (a) of SI 33/19, by reference to Section 44C (2) of the Reserve Bank Act [*Chapter 22.15*] which provides that:

"For the avoidance of doubt, the issuance of any electronic currency shall not affect or apply in respect of:-

(a) funds held in foreign currency designated accounts, otherwise known as "Nostro FCA Accounts", which shall continue to be designated in such foreign currencies, ands
(b) foreign loans and obligations denominated in any foreign currency, which shall continue to be payable in such foreign currency."

What is clear in this case is that after the Respondents settled the principal debt in "US$" an amount of US$99 493.79 remained outstanding. The Applicant compromised and accepted to be paid in Zimbabwean Dollars at the prevailing bank rate. The Respondents accepted the compromise but failed to settle the debt then. The Applicant withdrew the compromise. The Respondents then paid the full amount of RTGS99N 493.79 on 26 August 2022. The Applicant rejected the payment and returned the funds on 7 September 2022. Effectively, the debt is still owing. Applicant was entitled to reject payment in ZWL. In *Breastplate Services (Pvt) Ltd* v *Cambria Africa PLC* SC 66/20 the court held as follows:

"On the other hand, unless explicitly proscribed by statute…..there is nothing under the common law to preclude the debtor from discharging his debt in any currency or medium of exchange other

than the officially designated legal tender, including any foreign currency, so long as the creditor is prepared to accept such payment in settlement of the debt. This arises by virtue of the time-honoured doctrine of freedom of contract which, in my view, remains intact and unimpaired by the provisions of SI 142 of 2019. In any event, as I have already emphasized, these provisions do not operate to override or detract from the explicit import of s 44C (2)(b) of the Reserve Bank Act in relation to the repayment or resettlement of foreign loans and obligations in foreign currency."

In this case the payment in ZWL was rejected leaving the parties at the position that they were before the payment. In short the debt is still outstanding and not settled. The application to revive the superannuated court order is granted.

IT IS ORDERED THAT

1. The Court Order granted by this Honourable Court on 28 December 2016, under case number HC 8256/16 be and is hereby revived as an executable order of this court.
2. First and Second Respondents be and are hereby ordered to pay the costs of this application jointly and severalty one paying the other to be absolved.

Atherstone and Cook, applicant's legal practitioners
M S Musemburi legal practice, respondents' legal practitioners.