

LOU YUESHENG
versus
WEBBER CHINYADZA

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 29 November 2022 & 16 January 2023

Opposed application

T H Gunje, for the applicant
S Mushonga, for the respondent

MUSITHU J: The applicant approached the court for a declaratory order in terms of s 14 of the High Court Act [*Chapter 7:06*]. The relief sought is aptly captured in the draft order as follows:

**“IT IS ORDERED AND DECLARED THAT: -
IN THE MAIN**

1. That the payment made by the Applicant into the bank account of the Sheriff for Zimbabwe on the 15th of December 2021 in the sum of ZWL51 750 is in full and final settlement of the Applicant’s obligation to the Respondent in terms of a deed of settlement signed on the 27th of November 2018 and the consequent order in HC 1722/2013.
2. That the Warrant for Civil imprisonment issued in HC 7068/2021 (ref case HC 1722) be and is hereby discharged.
3. The Respondent shall bear the costs of this matter on the scale of attorney and client.

IN THE ALTERNATIVE

4. The Applicant be and is hereby ordered to pay the judgment debt in HC 1722/2013 (ref case HC 7068/2021) in United States Dollars or alternatively in ZWL (Zimbabwean Dollars) at the prevailing bank rate at date of payment.
5. The Respondent shall bear the costs of this matter on the ordinary scale.”

Applicant’s Case

The applicant and the respondent were involved in a road traffic accident on 8 November 2012. Following the accident, the respondent caused summons to be issued against the applicant in HC 1722/13. In that matter, the respondent claimed the following against the applicant:

- a) \$30 000 being the replacement value of the respondent's ISUZU Twin Cab Registration Number ABK 2668 which was allegedly damaged beyond repair owing to the applicant's negligent driving on the date of the accident. It was alleged that the applicant herein drove a Mercedes Benz Registration Number ACG 5866, which was owned by one L Murungamise, negligently. The applicant was apparently the Murungamise's authorised driver.
- b) \$ 15 000, being damages for pain and suffering, loss of amenities of life, disfigurement, hospitalisation, and hospital bills incurred by the respondent.
- c) \$18 000 being damages suffered by the respondent for hiring a replacement vehicle for use in his constituency following the damages to his vehicle because of the applicant's negligent driving.
- d) Interest at the prescribed rate calculated from the date of issue of summons to date of full payment, collection commission and costs of suit.

According to the applicant, the above amounts were denominated in the United States dollars currency. The matter proceeded to pre-trial conference. The parties reached agreement and proceeded to sign a Deed of Settlement on 27 November 2018. The Deed of Settlement was filed with the court on 2 April 2019. According to the applicant, in the intervening period, 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, (hereinafter referred to as "S.I. 33/19" or the instrument) was promulgated. The effect of the instrument was that all liabilities due immediately before 22 February 2019 were payable in RTGS at the rate of one is to one with the United States dollar.

The applicant contends that the respondent's claim in HC 1722/13, which was settled by way of a Deed of Settlement dated 27 November 2018 was therefore redenominated to RTGS dollars by operation of law. The order by consent read in paragraph 1 as follows:

"The plaintiff's claim be and is hereby granted in terms of the Deed of Settlement entered into by the plaintiff and the 1st defendant."

The parties wrangled about the currency in which the payment was to be made. The respondents were adamant that the judgment debt ought to be satisfied in the United States dollar currency, while the applicant was insisting on the discharge of the debt in local

currency. The respondent attempted to make execution on the assets of the applicant, but no assets of value were found. The respondent caused summons for civil imprisonment to be issued under HC 7068/21 on 8 December 2021 and these were duly served on the applicant. On receipt of the summons for civil imprisonment, the applicant filed a sworn affidavit which accompanied his notice of opposition. In his affidavit, the applicant indicated that he paid the sum of ZWL 51, 750 into the Sheriff's account, and he was issued with a receipt confirming the payment.

On 16 December 2021, the applicant's legal practitioners wrote to the respondent's legal practitioners informing them of the said payment that was made into the Sheriff's account. In their response, which was addressed to the Sheriff and copied to the applicant's legal practitioners, the respondent's legal practitioners insisted on a payment in the United States dollar currency. On 23 March 2022, the respondent's legal practitioners once again wrote to the Sheriff directing the Sheriff's office to arrest the applicant in compliance with the summons for civil imprisonment. The matter was set down for 13 April 2022, but on attending court, it turned out that the matter had not been enrolled by the Registrar. The matter was again set down for 12 May 2022. The applicant claims not to have been served with the notice of set down for 12 May 2022.

The applicant was not aware how the respondent got an order under HC 7068/21 on 6 July 2021 since he was not aware of the set down date. That order cited the applicant herein as the first defendant, L Murunganise as the second defendant and Hamilton Insurance Company as the third defendant. The order was one for the civil imprisonment of the applicant and Murunganise for ninety days or twelve weeks and six days. The order for civil imprisonment was to remain in operation until the two defendants paid the sum of US\$53, 896.

The applicant alleges that upon learning of the order of civil imprisonment, he approached the respondent's legal practitioners offering to pay off the debt in Zimbabwean dollars at the prevailing interbank rate. The respondent's legal practitioners responded insisting on a payment in the United States dollar currency. Their argument was that the deed of settlement, the High Court order and the writ of execution were all in that currency. On his part, the applicant avers that he had since discharged his liability in full by paying the sum of ZWL\$51, 750 into the Sheriff's account. The applicant further avers that once a finding is

made that the judgment debt was discharged through the said payment, it followed that the warrant for his civil imprisonment also fell away. It was in view of the foregoing that the court was urged to exercise its discretion and grant the *declaratur* sought.

Respondent's Case

In his opposing affidavit the respondent raised a point *in limine*. He averred that at law, a party could only sue once on a cause of action. The applicant had made several applications before the court in connection with the cause of action of the warrant of arrest. The respondent also averred that a *declaratur* was not competent where the legal position was clearly laid out in a statute or by superior courts. The fate of S.I. 33 of 2019 had been settled in the case of *Zambezi Gas Zimbabwe (Private) Limited v N. R. Barber (Private) Limited*¹. According to the respondent, that judgment had resolved that assets and liabilities including judgment debts denominated in United States dollars immediately before the effective date of 22 February 2019 shall on or after that date be valued in RTGS dollars on a one-to-one rate. The judgment herein was only granted on 2 April 2019 long after the effective date of 22 February 2019.

As regards the merits, the respondent argued that a deed of settlement was not an order of court, and no one could execute upon it. Only a judgment debt created a contractual obligation which could be an asset to the party in whose favour it was made or a liability on the party against whom it was made. The respondent argued that the issue of the time frame within which the liability or claim arose in relation to the effective date of 22 February 2019 did not matter. What was of importance was the fact that the liability, in this case the judgment, should have been valued before the effective date in the United States dollar and was still so valued and expressed. It was averred that the judgment debt must have been ordered against the applicant on 22 February 2019.

Respondent further averred that any payment in local currency had to consider the provisions of the Reserve Bank of Zimbabwe (Legal Tender) Regulations, 2019 (SI 142/2019), which provided for payment at the prevailing interbank rate. The amount only became due on the granting of the High Court order on 2 April 2019, and not on the date of

¹ SC 3/20

issue of summons since the amount had to be confirmed through a court order. The applicant's liability was only assessed after the granting of the court order. It was also argued that the High Court order of 2 April 2019, made it clear that the amount to be paid was intended to be a replacement of the respondent's vehicle. The sum of ZWL \$51,750 which was tendered could not replace the motor vehicle in question. It was further submitted that the fact that the High Court order referred to the Deed of Settlement did not change the effective date when judgment came into effect, which was on 2 April 2019.

The respondent also argued that the payment made by the applicant was of no consequence since it did not consider the provisions of S.I. 142 of 2019. The payment did not comply with the wording and spirit of the High Court order. The applicant did not allege that the High Court order and the warrant for civil imprisonment were wrongfully issued. He therefore deliberately failed to comply with High Court orders.

The respondent averred that the application was *mala fide*, and it surely ought to be dismissed with costs on the punitive scale.

The Submissions

At the commencement of the oral submissions, Mr *Mushonga* for the respondent abandoned the respondent's preliminary point. Mr *Gunje* for the applicant submitted that the payment made by the applicant in December 2021 discharged the applicant's liability to the respondent. The debt had arisen prior to the promulgation of S.I. 133/19. The parties entered a compromise arrangement which gave birth to a Deed of Settlement. That compromise arrangement was binding upon the parties, but it was subject to registration into an order of court. The Deed of Settlement was registered into an order of court for enforcement purposes. The effect of S.I. 33/19, was that all financial obligations that arose before that law came into effect became obligations that were liable to discharge in the Zimbabwe dollar currency.

Mr *Gunje* further submitted that if the court determined that the applicant's payment in December 2021 did not discharge his liability, then it would pursue the alternative relief set out in the draft order herein. The applicant's position had been communicated by his legal practitioners in their letter to the respondent's legal practitioners dated 16 August 2022. In that letter, the applicant had offered to pay off the judgment debt in instalments of US\$5,000 or the equivalent thereof in Zimbabwean dollars at the prevailing Reserve Bank of Zimbabwe exchange rate on each day of payment.

In response, Mr *Mushonga* submitted that a party could not issue a warrant of execution based on a Deed of Settlement. A Deed of Settlement was not an order of court upon which execution could be made. A party could only issue a writ of execution based on a judgment which incorporated a Deed of Settlement. Counsel further submitted that a party could not compromise that which was not in existence. Mr *Mushonga* further argued that contrary to the applicant's submission, a Deed of Settlement could not become *res judicata*, as would be the case with a High Court judgment. He argued that the deed made it clear that the settlement had to be recorded into an order by consent which captured the agreed terms. The Deed of Settlement was therefore conditional to the granting of the order by consent.

In his brief reply, Mr *Gunje* submitted that a Deed of Settlement can become *res judicata*. Its effect was the same as *res judicata* on a judgment debt given by consent. He further submitted that a compromise agreement had the effect of extinguishing the original cause of action which became *res judicata* thereby creating new obligations. Citing the case of *Kempen v Kempen*², counsel argued that at law parties had the latitude to vary a court order by way of a Deed of Settlement. Once they achieved that they would be taken to have compromised the court order and were bound by the terms of the Deed of Settlement, even if the Deed of Settlement was not reduced into a court order. It followed that once a Deed of Settlement was entered into, the creditor could not recover the debt based on the court order. The court order ceased to regulate the relationship between the parties and fell away.

In the heads of argument, the applicant also averred that the Deed of Settlement had the effect of novating the cause of action in the summons. It created a new debt whose effect was the same as *res judicata* on a judgment given by consent. Counsel argued that the 27th of November 2018 was the date when the judgment by consent ought to be read as having been entered. This was so because of the wording of the preamble to the Deed of Settlement and paragraph 1 of the order by consent. Counsel further argued that in view of the above, the Deed of Settlement therefore fell within the ambit of s 4(1)(d) of S.I. 33/19, and the debt had to be discharged in the Zimbabwean dollar currency.

Analysis

The central issue which arises for determination is whether the Deed of Settlement had the effect of creating a compromise agreement, and if it did so, whether the consent order

² SC 14/16

fell away. The applicant's contention is that if the court determines that the Deed of Settlement created a compromise agreement, then it effectively ousted the order by consent. The Deed of Settlement would thus be affected by the new currency regime which came with the promulgation of S.I. 33 of 2019. The Deed of Settlement was signed before that law came into existence. The order by consent was granted after that law became operational. It is instructive to analyse the implications of the new law.

On 22 February 2019, the Government of Zimbabwe introduced a new currency called the Real Time Gross Settlement Electronic dollar (RTGS), through 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, (hereinafter referred to as "S.I. 33/19" or the instrument). The instrument was gazetted on 22 February 2019. That date became the first effective date as defined in the Finance Act (No.2) Act, No.7 of 2019 (the Finance Act). The new currency ran parallel with other currencies that were accepted as legal tender, under what was known then as the multi-currency basket.

On 24 June 2019, the Minister of Finance and Economic Development gazetted Statutory Instrument 142 of 2019 (Reserve Bank of Zimbabwe (Legal Tender) Regulations, 2019) (SI 142/2019). The 24th of June 2019 became the second effective date as defined in the Finance Act. This instrument abolished the multi currencies and declared the ZWL to be the sole legal tender in Zimbabwe. The two instruments were later incorporated into the Finance Act, which was gazetted on 21 August 2019. The key parts of the Finance Act are ss 22 and 23, which state in part as follows:

"22 Issuance and legal tender of RTGS dollars, savings, transitional matters and validation

1) Subject to section 5, for the purposes of section 44C of the principal Act, the Minister shall be deemed to have prescribed the following with effect from the first effective date—

(a) that the Reserve Bank has, with effect from the first effective date, issued an electronic currency called the RTGS dollar; and

(b); and

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

(d).....

(3)....

(4) For the purposes of this section—

(a) it is declared for the avoidance of doubt that financial or contractual obligations concluded or incurred before the first effective date, that were valued and expressed in United States dollars (other than 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 dollars at a rate of one-to-one to the United States dollar;

(b); (Underlining for emphasis)

23 Zimbabwe dollar to be the sole currency for legal tender purposes from second effective date

(1) For the avoidance of doubt, but subject to subsection (4), it is declared that with effect from the second effective date, the British pound, United States dollar, South African rand, Botswana pula and any other foreign currency whatsoever are no longer legal tender alongside the Zimbabwe dollar in any transactions in Zimbabwe.”

Section 22(1)(d) of the Finance Act states that “.....for accounting and other purposes (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 than assets and liabilities referred to in s 44C (2) of the principal Act) shall on the first effective date be deemed to be values in RTGS dollars at a rate of one-to-one to the United States dollar...”. The words “financial or contractual obligations” are defined in s 20 of the Finance Act to include (for the avoidance of doubt) judgment debts. A judgment debt is defined in the same section to mean:

“.....a decision of a court of law upon relief claimed in an action or application which, in the case of money, refers to the amount in respect of which execution can be levied by the judgment creditor; and, in the case of any other debt, refers to any other steps that can be taken by the judgment creditor to obtain satisfaction of the debt (but does not include a judgment that has prescribed, been abandoned or compromised)” (underlining for emphasis).

The words “*assets and liabilities*” are not defined in the Finance Act or in S.I. 33/19. The Supreme Court considered the issue of assets and liabilities in *Zambezi Gas Zimbabwe (Private) Limited v N.R. Barber (Private) Limited & Ano*³. The court said:

“The liabilities referred to in s 4(1)(d) of S.I. 33/19 can be in the form of judgment debts and such liabilities amount to obligations which should be settled by the judgment debtor. In interpreting s 4(1)(d), regard should be had to assets and liabilities which existed immediately before the effective date of the promulgation of S.I. 33/19. The value of the assets and liabilities should have been expressed in United States dollars immediately before 22 February 2019 for the provisions of s 4(1)(d) of S.I. 33/19 to apply to them.

Section 4(1)(d) of S.I. 33/19 would not apply to assets and liabilities, the values of which were expressed in any foreign currency other than the United States dollar immediately before the effective date. If, for example, the value of the assets and liabilities was, immediately before the effective date, still to be assessed by application of an agreed formula, s 4(1)(d) of S.I. 33/19 would not apply to such a transaction even if the payment would thereafter be in United States dollars. It is the assessment and expression of the value of assets and liabilities in United States dollars that matters.” (Underlining for emphasis)

³ SC 3/20 at p 9

Further down in the same judgment the court went on to state that S.I. 33/19 was specific to the type of assets and liabilities excluded from s 4(1)(d), reasoning that the origin of the liabilities was not a criterion for the exclusion. The court highlighted that:

“What brings the asset or liability within the provisions 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 s 44C(2) of the Reserve Bank of Zimbabwe Act...” (Underlining for emphasis).

What is in issue herein is the applicant’s liability to the respondent which was expressed in United States dollars before S.I. 33/19 came into effect. It was also expressed in that currency at the time the parties signed the Deed of Settlement. It was still so expressed after the judgment by consent was granted. In arguing its point that the Deed of Settlement was effectively a compromise which affected the judgment by consent, the applicant cited the case of *Georgias and Another v Standard Chartered Bank*⁴. In that case the court held that the purpose of compromise is to end doubt and to avoid the inconvenience and risk inherent in resorting to the methods of resolving disputes. Its effect was the same as *res judicata* on a judgment given by consent.

The applicant also referred to the case of *Kempen v Kempen*⁵, where the court held that a court order did not by any means bar parties to agreeing to vary an order of the court without reference to the court which granted the order. The court went on to state as follows:

“While in *Godza v Sibanda* HH – 254-13 the High Court expressed the need for parties to apply to court before departing from a lawful binding court order it was not laying down a hard and fast rule but a general rule subject to alteration or modification depending on the exigencies of each case.”

The above sentiments were expressed in the context of compromise arrangements made after a court order was granted. Parties are at large to vary the court order to suit their circumstances. This happens where for instance it becomes difficult to continue complying with an order of court because of a change in circumstances. That was the situation in the *Kempen* case where a maintenance order was affected by the virtual collapse of the local currency, and the parties resorted to payment in the United States dollars. In such cases, where the parties decide not to go to court to seek a variation, but a dispute subsequently

⁴ SC 183/98

⁵ SC 14/16 at pages 7-8

arises, then they will be bound by the terms of their compromise agreement made without recourse to the courts.

That was not the scenario herein. The order by consent did not give birth to the Deed of Settlement or a compromise agreement. It is rather the other way round. The Deed of Settlement gave birth to the order by consent. The parties agreed that their compromise agreement be reduced into an order of court. Their process did not just end with the signing of the deed. Part of the preamble to the Deed of Settlement reads as follows:

“NOWTHEREFORE it is recorded as follows that an order by consent be granted as between the plaintiff and the 1st defendant as follows.....”

The parties proceeded to set out the terms of the Deed of Settlement that were to be recorded into the order by consent. The order by consent provided in paragraph one as follows:

“IT IS ORDERED BY CONSENT THAT:

1. The plaintiffs’ claim be and is hereby granted in terms of the Deed of Settlement entered into by the plaintiff and the 1st defendant.”

The order by consent would not have been made inconsequential by the Deed of Settlement because the parties deliberately agreed to subject it to an order by consent. If they wished to have the Deed of Settlement stand as the final expression of their will, then they would not have subjected it to yet another legal process. The process was only completed with the granting of an order by consent. The order by consent superseded the Deed of Settlement. It had to be complied with because the respondent could cause execution to be carried out upon it. He could not do the same with the Deed of Settlement.

It is also critical to note that both parties were represented when the order by consent was granted by this court. Their legal practitioners were aware that it was denominated in the United States dollar currency. They were also aware that it was being granted after the effective date of S.I. 33/19. They did not seek to have it varied to align with the new law if at all the intention of the parties was that the final record of their agreement.

Having determined that the order by consent was not impaired by the Deed of Settlement, the next issue is whether the respondent’s liability must be treated in terms of s 4(1)(d) of S.I. 33/19 (s 22(1)(d) of the Finance Act. If that is the case, then it follows that the respondent fully discharged his liability when he made payment in RTGS dollars on a rate of one is to one with the United States dollar. Mr *Mushonga* argued that one could not seek

execution of a judgment debt based on a Deed of Settlement. That explains why that deed had to be reduced into an order of court. His submission is correct. The Deed of Settlement becomes worthless if one of the parties chooses not to comply with it. It must be given potency through an order of court so that it can be executed upon.

The Deed of Settlement was signed on 27 November 2018. The order by consent was granted on 2 April 2019. The applicant made payment into the Sheriff's account on 15 December 2021. This was after the respondent had attempted to execute on the applicant's assets but the Sheriff found no attachable assets. Summons for civil imprisonment were issued and filed on 8 December 2021. All attempts to enforce payment through execution or civil imprisonment were in vain until the applicant sought refuge in S.I. 33/19 and paid off the debt in local currency. I am not satisfied that the payment fully discharged the applicant's liability herein. The obligation to pay the debt was not tied to the date on the Deed of Settlement since that same deed subjected itself to yet another legal process, which is the granting of the order by consent.

The Deed of Settlement ordinarily delineates the timeframes within which payment must be made and whether such payment is to be made by way of instalments or it's a once off payment. It is clear to me that the applicant sought to exploit that loophole in the construction of the Deed of Settlement in order not to commit himself to any payment. That the payment in local currency was only made some three years after the signing of the Deed of Settlement points to a lack of commitment to discharge the debt.

In the absence of evidence showing that the payment of the debt was tied to the signing of the Deed of Settlement and not the granting of the order by consent, the court determines that the obligation to pay the judgment debt arose after the granting of the order by consent. It did not arise immediately before the effective date of S.I. 33/19. The Deed of Settlement was made subject to the order by consent. Indeed, efforts to enforce payment were only made after the granting of the order by consent.

The parties were agreed that in the event of the court making a finding that the 15 December 2021 payment did not fully discharge the applicant's liability, and that the obligation to pay the judgment debt arose upon the granting of the order by consent, then the alternative relief must be granted. There is merit in that request as it accords with the law in respect of payment obligations that arose after the effective date of S.I. 33/19.

COSTS

In his submissions, Mr *Mushonga* abandoned the respondent's claim for costs on the attorney and client scale. The conduct of the applicant would have justified an order of costs against him, but for the significance of the legal question which arose herein I will refrain from making an order of costs. I find it befitting that each party bears its own costs of suit.

Resultantly it is ordered that:

1. The applicant be and is hereby ordered to pay the judgment debt in HC 1722/2013 (ref case HC 7068/2021) at the prevailing interbank rate on the date of payment.
2. Each party shall bear its own costs of suit.

Gunje Legal Practice, legal practitioners for the applicant
Mushonga & Mutsvairo, legal practitioners for the respondent