

CAMBRIA AFRICA PLC
versus
BREASTPLATE SERVICES (PRIVATE) LIMITED
T/A NEMCHEM INTERNATIONAL

HIGH COURT OF ZIMBABWE
MUZENDA J
MUTARE, 15 July 2019

Civil Trial

P Nyakureba, for the Plaintiff
C Mutandwa, for the Defendant

MUZENDA J: On 24 December 2018 plaintiff issued summons against the defendant claiming the following:

1. Payment of US\$31 400-00.
2. Interest thereon at the prescribed rate of interest per annum from 19 January 2018 to the date of payment in full and final settlement.
3. Interest at the prescribed rate from 1 March 2016 to 18 January 2018 on the sum of US\$40 000-00.
4. Costs of suit on attorney-client scale.

From the plaintiff's declaration on or about 25 February 2016 at Harare, the parties entered into an agreement in terms of which the plaintiff sold to the defendant its entire issued share capital of an entity known as Milchem Zambia Limited for US\$46 347-00 which amount was payable to the plaintiff on or before 31 March 2016. Defendant paid US\$6 347-00 on an unspecified date and a further US\$8 600-00 on 19 January 2018 leaving a balance of US\$31 400-00 which amount defendant rejects or refuses to pay.

The defendant on the other hand admits the contents of the 2016 sale agreement but goes on to add that a new agreement was later concluded more particularly in that it paid both amounts of \$6 347-00 and \$8 600-00 but on 2 September 2017 defendant was using Leopard Rock Hotel for an amount of \$23 285-48 being claimed under case No. HC 5580/17. Incidentally plaintiff owners or directors or shareholders had interests in Leopard Rock Hotel, the \$23 285-48 that was owed to defendant by Leopard Rock Hotel as US\$16 000-00 for the purpose of offsetting and settling. Hence the balance outstanding would be US\$24 000-00.

After the payment of \$8 600-00, defendant contends that the balance outstanding as at 19 January 2018 was \$15 400-00 not \$31 400-00 as pleaded by the plaintiff.

After payment of the \$8 600-00 a misunderstanding pertaining to interest arose as well as the 10% discount which defendant thought applied to the \$40 000-00 agreed as owing on 2 September 2017. Plaintiff argued that the discount applied to the time prior to 2 September 2017 when the debt was about \$45 000-00 that was owed originally and was dependant on immediate payment which was not affected. The defendant tendered to refund the amount paid to it by Leopard Rock Hotel so as to revert to 2 September 2017 agreement. The defendant refutes being in breach of the 2016 sale agreement.

On 22 March 2019, the plaintiff filed its replication where it disputed any novation to the original sale agreement. It insisted that the balance being the capital on the summons denominated in US dollars should be paid by the defendant. There was never a set off agreed by the parties relating to Leopard Rock Hotel debt. In fact defendant was fully paid by Leopard Rock Hotel and accepted payment and lastly it rejects the tendered amount for not being made in accordance with any agreement.

At the joint pre-trial conference held on 13 and 29 May 2019 the following issues were spelt out for trial:

- (a) Whether or not the defendant is liable to pay to the plaintiff the sum of \$31 400-00 and interest?
- (b) Whether or not the defendant is liable to pay interest on the sum of \$40 000-00 from 1 March 2016 to 18 January 2019?
- (c) Whether or not the defendant is liable for the payment of costs at attorney-client scale?
- (d) Whether or not there is a new contract between the parties supplanting the terms and conditions of the contract signed on 25 February 2016?

On 15 July 2019 the date of trial, the parties filed a statement of agreed facts to the following effect:

1. The plaintiff is a foreign company registered in terms of the British Laws with a registered office in Zimbabwe and the Defendant is a company registered in Zimbabwe.
2. On 25 February 2016, the plaintiff sold to the defendant the entire of its issued shares in Milchem Zambia with effective date of sale being 1 September 2015.

3. The purchase price was US\$46 347-00 (Forty Six Thousand Three Hundred and Forty Seven United States Dollars) the term sheet agreement is already filed of record as part of plaintiff's bundle of documents.
4. The defendant initially paid an amount of US\$6 347.00 leaving a balance of US\$40 000-00 of which US\$8 600-00 was paid in cash to the plaintiff at Harare on 19 January 2018 leaving the balance of US\$31 400-00 which is the subject of this claim.
5. The defendant admits the amount of US\$31 400-00 has not been paid to the plaintiff but argues that the amount is now payable in RTGS dollars and not in US dollars as denominated in the term sheet agreement.
6. The issues the court is being called upon to determine are:
 - 6.1 ***Whether or not the outstanding balance owing to the plaintiff in terms of the term sheet agreement is payable in United States dollars or not?***
 - 6.2 ***Whether or not the plaintiff is entitled to interest as acclaimed in the summons?***
 - 6.3 ***Whether or not the plaintiff is entitled to costs of suit on attorney-client basis?***

Before the parties addressed the court it was further agreed that issues 6 (2) and 6 (3) on the statement of agreed facts were no longer meant for determination by the court. If plaintiff succeeds, the issue of interest was going to follow the order and would be as acclaimed in the plaintiff's summons. Given the fact that the defendant had admitted owing the plaintiff the amount of US\$31 400-00 and dispensed with the trial proceedings, Mr *Nyakureba* for the plaintiff, properly in the court's view, abandoned his insistence on claiming costs on attorney-client scale. It was agreed that if the plaintiff succeeds, the defendant will pay wasted costs at an ordinary scale. The remaining outstanding issue for determination is *whether or not the outstanding balance owing to the plaintiff in terms of the term sheet agreement is payable in United States dollars or not?*

THE ARGUMENTS

Mr *P. Nyakureba* for the plaintiff submitted that contrary to what the defendant argues, Statutory Instrument 33 of 2019, Presidential Powers (Temporary Measures) (Amendment of Reserve Bank of Zimbabwe Act and Issue of Real Time Gross Settlement Electronic Dollars (RTGS Dollars) *Regulations* 2019, does not affect the parties' agreement.

The Statutory Instrument only introduces Real Time Gross Settlements Electronic Dollars (RTGS) as a currency to operate side by side with the bond note and coin as a form of settlement currency within Zimbabwe. At the time it was introduced, that is the RTGS dollar, it operated side by side with the multicurrency permitted in Zimbabwe.

The nature of agreement between the parties was exclusively to be settled in hard currency that is in United States Dollars but to be deposited into a Nostro Account registered in the plaintiff's name in a Zimbabwean Bank. The recently introduced Statutory Instrument, SI 142 of 2019, Reserve Bank of Zimbabwe (Legal Tender) *Regulations* 2019 does not bar the defendants from depositing the balance into the plaintiff's foreign account. The Statutory Instrument, 142 of 2019 still provides and allows payment into foreign accounts but payment made in Zimbabwe during transactions should be in local or domestic currency. He submitted that it will be in the interests of justice if the balance of US\$31 400-00 should be paid in United States Dollars and cited the matter of *Zimbabwe Development Bank vs Zambezi Safari Lodges (Pvt) Ltd and 2 others*.¹

On the other hand Mr C Mutandwa for the defendant argued that there is a supervening impossibility. He cited Christie, The Law of Contract in South Africa² and insisted on the defence of a *vis major*. The effect of SI 33 of 2019 more particularly s 4 (1) (d) which reads as follows:

“(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 valued in RTGS dollars, at a rate of one-to-one to the United States dollar, and”

To the defendant in terms of paragraph 4 (1) (d) cited above the amount due to the plaintiff in the sum of US\$31 400-00 should now be deemed to be RTGS\$31 400-00 because to the plaintiff in accounting terms, it will appear on the balance sheet as an asset and to the defendant it will appear as a liability.

Statutory Instrument 142 of 2019, defendant argued, makes it specific that the Zimbabwe dollar shall be the sole legal tender for Zimbabwean transactions. It will be illegal for the defendant to settle its obligations in United States dollar denomination. If this court proceeds to grant the judgment in United States dollars, the judgment will be a *brutum fulmen*. Mr Mutandwa submitted and if the court grants the order as per the summons, the judgment will open a flood gate to many entities who would approach the court with similar

¹ HH 95/2006 per PATEL J (as he then was)

² 6th Edition, 2011 p. 490-494

claims denominated in United States dollars. He concluded by urging the court to return the judgment sounding in RTGS dollar and order payment of RTGS \$ 31 400-00.

THE STATUTORY INSTRUMENTS 33 AND 142 OF 2019

Statutory Instrument 142 of 2019, Reserve Bank of Zimbabwe (Legal Tender) *Regulations*, 2019, was issued in terms of s 64 as read with s 44A of the Reserve Bank of Zimbabwe Act [*Chapter 22:15*]. In principle the statutory instrument effectively ended the multicurrency system and promoted, established and determined the Zimbabwe dollar as the sole legal trading currency in the country (*My own emphasis*).

It was introduced to declare that the sole currency for use within Zimbabwean borders is the Zimbabwean dollar and eliminated the multicurrency. Statutory Instrument 33 of 2019, Presidential Powers (Temporary Measures) (Amendment of Reserve Bank of Zimbabwe Act and Issue of Real Time Gross Settlement Electronic Dollars (RTGS Dollars) *Regulations* 2019 was introduced in terms of s 2 of the Presidential Powers (Temporary Measures) Act [*Chapter 10:20*] and the Statutory Instrument introduced a new baby currency codenamed Real Time Gross Settlement Electronic Dollar (RTGS Dollars) to enjoin Ecocash and other versions of mobile banking services. The bond note, the bond coin and RTGS dollar became three major forms of domestic currency permitted to trade under the banner of the Zimbabwe dollar of great interest to this matter is paragraph 2 (b) of SI 33 of 2019 which provides as follows:

“shall not affect or apply in respect of-
(b) *foreign loans and obligations denominated in any foreign currency which shall continue to be payable in such foreign currency.”* (My own emphasis)

I conclude that, contrary to Mr *Mutandwa*'s submission that US\$31 400-00 falls under the auspices of paragraph 4 (1) (d) of SI 33 of 2019, it falls under paragraph 2 (b) of the same statutory instrument and it is the defendant's obligation denominated in foreign currency and payable to the plaintiff.

WHETHER OR NOT DEFENDANT IS LIABLE TO PAY PLAINTIFF THE SUM OF US\$31 400-00 IN FOREIGN CURRENCY

The caption extracted from the terms sheet dated 25 February 2016 titled “Purchase Consideration” provides as follows:

“US\$46 347-00 (forty six thousand three hundred and forty seven US dollars) being the net asset value (excluding shareholders and intercompany loan accounts) evidenced by the attached signed balance sheet.”

Further, under the following subtitle “Payment” it provides:

“In Zimbabwean US dollar bank account to be nominated by Cambria (the Plaintiff). Payable by 31 March 2016.”

The last extract pertinent for consideration is subtitled “agreement” and provides thus:

“The parties agree that this term sheet is a legally binding document and accurately records the intention of the parties.”

On 6 December 2016 and 23 March 2017, plaintiff wrote to the defendant providing the name of the account holder, the bank, account number and more importantly the IBAN and SWIFT code numbers. The IBAN and SWIFT codes apply to payment into Nostro accounts and payment in foreign currency and the communication relating to that account was for the depositing of the balance of US\$40 000-00. The two payments of \$6 347-00 and \$8 600-00 were made in United States dollars and this court does not write an agreement for the parties. From the clauses extensively cited above herein, the parties’ conduct more particularly that of the defendant clearly shows that it was obliged to meet its obligations in United States dollars and proceeded to do so.

Defendant’s plea contains in its prayer³ that it shall pay to the plaintiff the sum of US\$15 400-00, it being fully aware of the existence of Statutory Instrument 33 of 2019. The debtor’s obligation to settle its indebtedness in foreign currency need not be more explicit than in this case and may also be implied moreso when such conduct is in fulfilment of that party’s performance of the agreement. It is also abundantly clear from the foregoing logic that the currency governing the terms sheet is the United States dollar and I am more satisfied in that conclusion by paragraph 5 of the Statement of agreed facts dated 15 July 2019 filed of record. The defendant, I conclude, is desirous of meeting its obligation in United States dollars but its only concern is whether such payment would not contravene the law obtaining in Zimbabwe. That’s how I interpret the conduct of the defendant.

The only question which is pertinent is whether the judgment should be in foreign currency. As per the judgment of the Learned Judge Patel⁴ citing the Supreme Court case of *Makwindi Oil Procurement (Pvt) Ltd v National Oil Company of Zimbabwe (Pvt) Ltd*⁵ stated that:

³ Page 15 of the record

⁴ Zimbabwe Development Bank, (supra) at p.5 of the cyclostyled judgment

⁵ 1988 (2) ZLR 482 (SC)

“Our courts are at liberty to give judgments in foreign currency. This follows the radical approach adopted in England by the House of Lords in 1975. As was observed by GUBBAY CJ (as he then was), at 488 A-B.”

In *Miliangos v Geroje Frank (Textiles) Ltd* (1975) 3 All ER 801 (HL), the majority of the members of the House of Lords (Lord Sermon of Celaisdale dissenting) took the unusual steps, termed by some as “revolutionary”, of reversing their earlier decision. Their Lordships laid down a new rule that where the justice of the case so required the court should give judgment in favour of the plaintiff for the amount of the foreign currency due to him or its sterling equivalent at the time of payment. With regard to the proper conversion date, Lord Wilberforce noted that changes in the value of currency between the breach date and the date of judgment or payment were the rule rather than the exception.

The Learned Judge continued:

“The rationale for this novel approach is explained, at 492 B-C as follows:

‘That the majority of the Law Lords succeeded in surmounting such an obstacle and opted for a more realistic approach to modern economic conditions is strongly illustrative of the concept, never to be overlooked, that the law is a living system that adapts to the necessities of [present time and is to be given new direction] where on principle and in reason it appears right to do so.

At 492 C-F the Chief Justice concluded:

‘I am firmly of the opinion that in the absence of any legislative enactments which require our courts to order payment in local currency only the innovative lead taken both in *Miliangos* and the subsequent extensions to the rule there enunciated and in the *Murata Machinery* case in South Africa is to be adopted. This will bring Zimbabwe into line with many foreign legal systems. See Mann *The Aspect of Money* 4th ed at pp 339-40.

Fluctuations in world currencies justify the acceptance of the rule not only that a court order may be expressed in units of foreign currency, but also that the amount of the foreign currency is to be converted into local currency at the date when leave is given to enforce the judgment. Justice requires that a plaintiff should not suffer by reason of a devaluation in the value currency between the due date on which the defendant should have met his obligation and the date of actual payment or the date of enforcement of the judgment. Since execution cannot be levied in foreign currency, there must be a conversion into the local currency for this limited purpose and the rate to be applied is that obtaining at the date of enforcement.” (My emphasis)

I entirely subscribe to both the Learned Judge and the then Chief Justice. The matter of *AMI Zimbabwe (Pvt) Ltd v Casalee Holdings (Successors) (Pvt) Ltd*⁶ is apposite where it was held that it was proper not only to give judgment in a foreign currency but also to couple such award with standard order that interest on the amount be payable *tempore morae* at the rate applicable to the currency in question.

⁶ 1997 (2) ZLR 77 (S) at 85-87

I do not agree with Mr *Mutandwa* that a judgment in foreign currency will be a *brutum fulmen* in light of the cases extensively cited herein above and dismiss that argument. This is an appropriate case which warrants a judgment in foreign currency as clearly reasoned by the Chief Justice in the *Makwindi* case⁷. The plaintiff succeeds in its claim and the following is my order.

DISPOSAL

- (a) Defendant is ordered to pay plaintiff the sum of US\$31 400-00.
- (b) Interest thereon at the prescribed rate of interest per annum from 19 January 2018 to the date of payment in full and final settlement.
- (c) Costs of suit ordinary scale.

Maunga Maanda & Associates, Plaintiff's legal practitioners
Machinga, Mutandwa, Defendant's legal practitioners.

⁷ (supra)