

**REPORTABLE ZLR(..)**

**AFRICAN BANKING CORPORATION LIMITED**  
v  
**ENVIRO-SOLUTIONS (PRIVATE) LIMITED**

**SUPREME COURT OF ZIMBABWE**  
**MALABA DCJ, HLATSHWAYO JA & GUVAVA JA**  
**HARARE, NOVEMBER 7, 2013**

*A Hashiti*, for the appellant

*A Demo*, for the respondent

**MALABA DCJ:** After hearing submissions from both counsels, the Court dismissed the appeal with costs and indicated that reasons for the decision would follow in due course. These are they:

**FACTUAL BACKGROUND**

The appellant is a limited liability company duly incorporated in accordance with the laws of Botswana, with subsidiaries in Southern African countries including Zimbabwe. The subsidiary with business operations in Zimbabwe is known as ABC HOLDINGS LIMITED. The respondent is a limited liability company duly incorporated in accordance with the laws of Botswana. It also has business operations in Zimbabwe.

The appellant carries on the business of banking and financial services whereas the respondent specialises in computer data and network security. On 31 October 2002 the appellant and the respondent entered into an agreement, in terms of which the respondent provided the appellant with software necessary to secure its computerised banking

and financial systems against viruses. The respondent was to provide the support and maintenance services to ensure the smooth functioning of the software. The appellant undertook to pay the software licence and maintenance fees calculated in terms of the agreement.

A dispute arose between the parties relating to the performance of the contract which the parties submitted to an independent arbitrator for determination. The appellant had ceased payment of the fees alleging that the respondent was trying to defraud it by claiming an inflated and unexplained licence fee. The respondent claimed payment by the appellant of an outstanding debt of US\$187 948.05. The arbitrator found that the appellant had unlawfully terminated the agreement between the parties. He granted an award to the respondent which it sought to register with the High Court for enforcement in Botswana on the basis of the arrangement for reciprocal enforcement of judgments existing between the two countries.

The arbitral award was in the following terms:

- “(a) The respondent is ordered to pay to the claimant the sum of US\$187 948.05 or in the absence of lawful authority for such payment, the equivalent in Zimbabwe Dollars at the date of payment.
- (b) The respondent is ordered to pay interest on the said sum a *tempore morae* from 14 April 2004 to date of payment at the rate prevailing at the time with the Reserve Bank of the US dollar.
- (c) The respondent is ordered to pay the costs of suit, but the costs of the Arbitrator are to be paid in equal shares by the parties.”

The appellant opposed the application for registration of the arbitral award on the ground that it was against public policy.

The court *a quo* decided that the arbitral award was registrable on the grounds that the appellant was a foreign company incorporated in Botswana; the award ordered the payment of the debt which sounded in United States dollars in foreign currency and the indication by the respondent's legal practitioner that they were receiving the payment tendered in local currency at the time without prejudice to their clients meant that the respondent had not accepted payment in local currency.

The arbitrator had acted on the principle of law to the effect that a "creditor must receive his award in the appropriate currency with a rate of interest appropriate to the currency in the circumstances" *AMI Zimbabwe (Pvt) Ltd v Casalee Holdings (SUCCESSORS) (PVT) LTD* 1977(2) ZLR 75(S) at p 87D. The arbitrator had gone on to hold that the money of account which is the currency in which the obligation is measured was the US dollars. That was the money that told the debtor (the appellant) how much it had to pay. He also held that the money of payment which is the currency in which the obligation has to be discharged was the US dollars. It told the debtor (the appellant) by what means it had to pay the debt. The rate of interest should depend on the money of account. See *Wood House AC Israel Cocoa Ltd SA v Nigerian Produce Co. Ltd* [1971] All ER 665; *Mawere v Mukuna* 1997(2) ZLR361(H) at 366B.

On 25 October 2007 an order of registration of the arbitral award as a judgment of the High Court was granted.

Aggrieved by the judgment of the court *a quo*, the appellant appealed against it on the following grounds:

1. The learned Judge in the court *a quo* erred in finding that the appellant was registered in Botswana and not in Zimbabwe, when the learned Judge acknowledged that the Arbitrator had in his award treated the appellant as a company incorporated in Zimbabwe.
2. The learned Judge in the court *a quo* erred in finding that the appellant had failed to discharge the Arbitral Award by effecting payment in the currency of Zimbabwe at the rate of exchange prevailing on the date of payment and instead “snatched” at payment of the amount of the award to a foreign resident in the lawful currency of Zimbabwe.
3. The learned Judge in the court *a quo* erred in failing to take account of prior payments respondent had received from appellant in Zimbabwe in the currency of Zimbabwe to discharge its obligations in terms of the contract.
4. The learned Judge in the court *a quo* erred in finding that appellant had sought to anticipate the respondent’s preferred method of payment by making payment of the award in the currency of Zimbabwe
5. The learned Judge erred in finding that respondent had received the payment “*without prejudice*” despite the lapse of time and the failure to return those funds to appellant and that respondent had not therefore accepted the currency of payment.

The following are the issues identified as pertinent for determination:

### **ISSUES**

1. Was the appellant incorporated in Botswana and not Zimbabwe?
2. What was the currency of payment and whether the appellant discharged its obligation under the arbitral award.

3. Which party had the obligation to seek approval from the exchange control authority?
4. The legal effect of the words “*without prejudice to our client’s rights*” endorsed on the receipt tendered to the appellant by the respondent’s legal practitioners and whether the respondent accepted the currency tendered by the appellant as the currency of payment of the debt?

## **ISSUES IN DETAIL AND THE APPLICABLE LAW**

### **ISSUE 1**

#### **Whether Applicant was incorporated in Botswana and not Zimbabwe?**

The learned Judge made the correct finding of the fact that the appellant was incorporated in Botswana and had sought to mislead the court by filing a certificate of incorporation belonging to a sister company incorporated in Zimbabwe. A perusal of the record of proceedings shows that the company certificate of incorporation which was produced as evidence of the appellant’s incorporation in Zimbabwe is that of “ABC HOLDINGS (ZIMBABWE) LIMITED” and not “ABC HOLDINGS LIMITED”. The appellant is a holding company which was registered in Botswana with subsidiaries in other countries. What the appellant did was to furnish the court *a quo* with a certificate of incorporation of its Zimbabwean subsidiary and tried to pass it off as proof of its own incorporation in Zimbabwe.

It was established that the respondent had entered into an agreement with the appellant in terms of which the respondent would supply software necessary to secure the former’s banking and financial computer systems against viruses or other forms of IT security threats to the appellant and its various subsidiaries. The appellant was to pay the

respondent licence fees. In terms of the agreement the licence fees payable by the Zimbabwean subsidiary for the software would be paid in Zimbabwean dollars at an exchange rate defined by the greater of the US\$ to Z\$ rate quoted by African Banking Corporation Zimbabwe Limited or the mid – rate determined in the Zimbabwe Independent Business Digest on the date of invoice or payment. In other words, the subsidiary company was to pay for the licence fee as per the agreement entered into by its parent company ABC HOLDINGS (ZIMBABWE) LIMITED is distinct from ABC HOLDINGS LIMITED. It is the former which is incorporated in Zimbabwe and not the latter.

## **ISSUE 2**

**What was the currency of payment? Did the appellant discharge its obligation under the arbitral award by tendering to the respondent’s legal practitioners the Zimbabwe Dollar equivalent the debt sounding in foreign currency?**

Money of payment was defined by LORD DENNING (as he then was) in *WOODHOUSE AC ISRAEL COCOA LTD SA v NIGERIAN PRODUCE MKTG CO LTD* (1971) 1 ALL ER 665 as follows:

“The money of Account is the currency in which the obligation is measured. It tells the debtor how much he has to pay. The money of payment is the currency in which the obligation has to be discharged. It tells the debtor by what, means he has to pay.”

The arbitrator held that both the money of account and the money of payment was the US Dollars. The arbitral award imposed on the appellant had the obligation to pay the money owed to the respondent in designated foreign currency. The appellant was under an obligation to seek the necessary authority from the Reserve Bank of Zimbabwe to pay the money in foreign currency. It could not pay the money in local currency without producing

proof that it had sought and failed to obtain the necessary authority to pay the money in foreign currency.

In attempting to pay the money in local currency without having applied for authority to make payment in the currency of payment stipulated in the arbitral award, the appellant did not discharge its obligation under the award. It was not open to the appellant to choose the currency in which it discharged the debt owed to the respondent.

The payments which are under discussion rose from a foreign debt which needed to be serviced pursuant an arbitral award. In essence payment was now to be done as per the arbitral award and not the contract because there was no longer any contract to talk of. The arbitrator made a finding that the appellant had terminated the contract. It followed that the rights which the respondent sought to enforce accrued during the subsistence of the contract and any payments that were to ensue were to be done as dictated by the arbitral award. There was no need for payment terms to be sanctioned by a non - existent contract.

There was certainly nothing illegal about the arbitral award. It did not order the appellant to ignore the exchange control regulations and pay the foreign currency to the respondent without the requisite authority from the Reserve Bank of Zimbabwe. The argument that registration of the arbitral award would be contrary to public policy because it authorised payment of foreign currency without the necessary authority was ill conceived. A holder of an arbitral award has a right to apply to the High Court to have it registered as a judgment of that court for purposes of enforcement. Registration of such an award cannot be contrary to public policy when it is authorised by law. The purpose of registering the arbitral award with the High Court is to have it enforced as any judgment of that court.

### **ISSUE 3**

#### **Which party had the obligation to seek approval from the exchange control authority?**

The arbitral award shows that the duty to seek authorization lay on the appellant. The obligation was not on the respondent to show that it had the authority to recover the money from the appellant in foreign currency. It had the arbitral award authorising it to receive the money in foreign currency on the assumption that, if necessary, the appellant would obtain the authority to pay the money in foreign currency.

The award reads as follows:

“(a) The respondent is ordered to pay the claimant the sum of US\$187 948.05 or in the absence of lawful authority for such payment, the equivalent in Zimbabwe Dollars at the date of payment.....”

### **ISSUE 4**

#### **The legal implications of the words, “without prejudice to our client’s rights” on the receipt tendered to the applicant by respondent’s legal practitioners and whether the respondent had accepted the tendered currency as currency of payment by the applicant?**

It is common cause that when the respondent’s legal practitioners received the cheque payment which was in local currency from the appellant, they issued the appellant with a receipt marked “without prejudice to our client’s rights”. The respondent’s lawyers proceeded to bank the cheque in their trust account. It is the respondent’s averment that its lawyers did so whilst waiting to hear from it whether it accepted the cheque as full and final settlement of the debt. The respondent said that it could not give the response to its lawyers because at that point in time the person who could give them a proper response was out of the

country. It was only after six weeks that the respondent's lawyers wrote to the appellant's lawyers advising that the respondent was not accepting the payment in Zimbabwe dollars because the money of payment was supposed to be in USD since the money of account was in USD. The respondent further indicated that it was tendering the return of the money to the appellant.

The appellant argued that the respondent accepted the payment of the debt in Zimbabwean dollars. Notwithstanding the fact that the respondent tendered the return of the cheque, it was argued before the court *a quo* that the respondent was seeking to retain the money paid to it in local currency whilst at the same time seeking to recover the same amount in foreign currency. It was said that was contrary to public policy as it amounted to unjust enrichment.

On the meaning of the words "without prejudice to the rights of our client" the learned Judge said:

"It seems to me that the words meant that the receipt of the money and its banking into the legal practitioners trust account (a necessary accounting requirement) was not an acceptance that the correct method of payment had been followed. The letter of 30 August in my view sufficiently registered the protest. Even though the money was not returned, that letter made it clear that failure to pay in US dollars would not mean acceptance of the tendered amount but would trigger the present application".

In tendering payment of the debt in local currency, the appellant was in breach of the arbitral award. It had not sought and failed to obtain the authority of the Reserve Bank

to pay the debt in the currency of payment as required by the arbitral award. The argument the appellant raised in an attempt to persuade the court *a quo* that it had paid the debt in full

was not open to it as it sought to benefit from its own wrong doing. It did not need the respondent to tell it that what it had done was unacceptable.

The appellant knew that the arbitral award forbade the tender of payment of the money of account with the equivalent amount in local currency unless clear proof was produced of authority from the Reserve Bank to pay in the currency of account having been sought and refused. The rights and obligations of the parties were set out in the arbitral award. The respondent's legal practitioners could not waive on its behalf rights under the arbitral award. It was in that context that they endorsed on the receipt of the money tendered by the appellant that they had received the money "without prejudice to the rights" of their client. More importantly the appellant must have known that the tender of payment of the debt in local currency was, in the circumstances unlawful.

Accordingly, the appeal was dismissed with costs.

**HLATSHWAYO JA:** I agree

**GUVAVA JA:** I agree

*Chihambakwe, Mutizwa & Partners*, respondent's legal practitioners

*Messrs Dube, Manikai & Hwacha*, applicant's legal practitioners