

DISTRIBUTABLE (105)

VALENTINE T. MUSHAYAKURARA

v

ZIMBABWE LEAF TOBACCO COMPANY (PRIVATE) LIMITED

**SUPREME COURT OF ZIMBABWE
MALABA CJ, UCHENA JA & CHIWESHE AJA
HARARE, NOVEMBER 16, 2020**

E. Ochambera, for the appellant

K. Kachambwa, for the respondent

MALABA CJ: At the hearing of the appeal, the Court found that the appeal was devoid of merit, as the funds advanced to the appellant by the respondent to finance the production of his 2016–2017 tobacco crop were from offshore funding.

The decision of the Court was based on the interpretation of the agreement for tobacco growing and financing entered into by the parties on 19 July 2016, the acknowledgement of debt dated 19 September 2017, and the Deed of Settlement dated 18 September 2018. The three documents show that the parties agreed on three important matters. These were –

- (1) The respondent advanced to the appellant funds to finance tobacco production for the 2016/2017 growing season;
- (2) The money advanced to the appellant by the respondent was part of funds it raised from offshore lines of credit for the specific purpose of financing tobacco production. The currency to be utilised in light of the underlying source of the funds in the denomination of the obligations of the parties was the United States dollar; and
- (3) The respondent had to recover the money from the appellant in the currency that would enable it to repay its foreign obligations.

In the result, the Court dismissed the appeal with costs and indicated that reasons for the decision would follow in due course. These are they.

The appeal is against a decision of the High Court (“the court *a quo*”) handed down on 18 March 2020. The issue in the court *a quo* was whether the respondent advanced United States dollars in cash and in the form of inputs to the appellant as crop financing for the June 2016 to April 2017 tobacco farming season. It was the appellant’s position that the funds advanced to him by the respondent were in the form of Real Time Gross Settlement cash (hereinafter referred to as “RTGS dollars”) transferred into his local bank account and inputs procured using RTGS dollars. The court *a quo* found that there was overwhelming documentary evidence proving that offshore funds were employed by the respondent to finance the appellant’s 2016/2017 tobacco crop. It further found that the amount in question could not be repaid in RTGS dollars, as s 44C(2)(b) of the Reserve Bank of Zimbabwe Act [Chapter 22:15] (hereinafter referred to as “the Reserve Bank Act”) explicitly excludes

foreign obligations valued and expressed in United States dollars from the deemed parity valuation in RTGS dollars. As a result, it found in favour of the respondent and ordered that the appellant should repay the advanced funds in United States dollars.

The respondent is a company duly incorporated in terms of the laws of Zimbabwe. Its business includes accessing offshore funds and using them to finance tobacco farming. The appellant is a tobacco farmer.

In 2016 the respondent accessed offshore funding to lend to tobacco growers for the 2016/2017 tobacco season. On 19 July 2016 the appellant and the respondent entered into a tobacco growers' agreement, in terms of which the former accessed crop financing from the latter in the form of cash as working capital as well as inputs.

On 19 September 2017 the appellant signed an acknowledgement of debt in favour of the respondent. In that document, the appellant acknowledged being indebted to the respondent in the sum of US\$101 089.46. The appellant failed to repay the debt. This prompted the respondent to issue a summons for provisional sentence in the sum of US\$101 089.46 and interest at the agreed rate.

The appellant did not defend the action. The parties signed a Deed of Settlement, in terms of which the sum of US\$101 089.46, plus interest at the agreed rate, and costs in the sum of US\$3 000.00 together with 15% Value Added Tax on the costs, had to be paid in annual instalments of US\$30 000.00. Each instalment was payable on or before 31 August of each year, commencing 31 August 2019.

On 31 August 2019 the appellant tendered an initial instalment payment of RTGS\$30 000.00. The respondent rejected the tender. It insisted that the correct currency was United States dollars and consequently demanded payment in that currency.

The respondent invoked clause 5 of the Deed of Settlement. The clause reads:

“5. In the event that the defendant fails to pay any of the amounts due in terms of this deed of settlement on the due date, the plaintiff shall be entitled to apply for default judgment for payment of the outstanding amount from the defendant without notice to the defendant. In that regard, the plaintiff shall be entitled to seek any further costs incurred by it from the defendant on a legal practitioner and client scale.”

Accordingly, the respondent filed a chamber application for default judgment. In the court *a quo* the respondent contended that it advanced United States dollars denominated inputs and cash to the appellant as crop financing for the June 2016 to April 2017 growing season. On the other hand, the appellant argued that the cash he received was in the form of RTGS dollars transferred into his local bank account and inputs procured using RTGS dollars.

The court *a quo* found that offshore funds were employed by the respondent to finance the appellant's 2016/2017 tobacco crop. It also noted that the appellant failed to substantiate his averment that the funding that he obtained was in RTGS dollars. The court *a quo* found in favour of the respondent and granted the application with costs.

THE APPELLANT'S SUBMISSIONS

At the hearing, the Court requested the parties to address it on the question whether the contract arrangement entered into between the appellant and the respondent gave rise to the performance by the respondent of the obligation under the offshore loan agreement.

In his heads of argument and oral submissions, the appellant submitted that Clause 3 of the loan agreement relating to the grower's obligations did not specify the denomination of the currency in which the funds would be advanced to a tobacco grower. The appellant submitted that the agreement between the parties was silent with regards to the currency to be used to repay the loan. He argued that the court *a quo* was not entitled to go behind the Deed of Settlement entered into between the parties in resolving the matter. He submitted that the Deed of Settlement constituted a compromise or a *transactio*. He argued that the Deed of Settlement made no mention of offshore funding. It was further submitted that by tendering RTGS\$30 000.00 the appellant lawfully discharged his liability to the respondent in terms of Statutory Instrument 33 of 2019, (hereinafter referred to as "SI 33/19"). This was on the basis that s 4(1)(d) of SI 33/19 provided that liabilities that were valued and expressed in United States dollars immediately before the effective date were deemed to be valued in RTGS dollars, at a rate of one-to-one to the United States dollar.

THE RESPONDENT'S SUBMISSIONS

Counsel for the respondent submitted that the funds advanced to the appellant were from offshore funding and the amount in question had to be repaid in United States dollars. It was further submitted that the argument that the Deed of Settlement constituted a compromise was of no legal consequence, as the issue of the currency in which the debt was to be repaid was never in issue. The issue of the currency was never compromised.

APPLICATION OF THE LAW TO THE FACTS

In the case of *Zambezi Gas (Pvt) Ltd v N.R. Barber & Anor* SC 3/20, in interpreting s 4(1)(d) of SI 33/19 the Court held that contractual obligations valued in United States

dollars immediately before the effective date were to be paid in RTGS dollars at parity or at a one-to-one rate. The court stated the following at p 13 of the cyclostyled judgment:

“Section 4(1)(d) of SI 33/19 states that for such *sui generis* liabilities, including judgment debts, a rate of one-to-one between the United States dollar and the RTGS dollar will apply. The transactions entered into after the effective date would fall under the provisions of s 4(1)(e) of SI 33/19.”

However, s 44C of the Reserve Bank Act reads as follows:

“44C Issuance and legal tender of electronic currency

(1) ...

(2) for the avoidance of doubt it is declared that the issuance of any electronic currency shall not affect or apply in respect of –

(a) ...

(b) foreign loans and foreign obligations denominated in any foreign currency, which shall continue to be payable in such foreign currency. (the underlining is for emphasis)

Section 44C of the Reserve Bank Act is an exception to the parity rate. In *Breastplate Service (Pvt) Ltd v Cambria Africa Plc* SC 66/20 the Court stated as follows at p 5 of the judgement:

“What emerges clearly and unequivocally from s 44C(2)(b) of the Reserve Bank Act, as read with s 4(1)(d) of SI 33 of 2019, is that foreign loans and obligations denominated in any foreign currency are excluded from the broad remit of SI 33 of 2019. Thus, foreign loans and obligations continue to be valued and payable in the foreign currency in which they are denominated.”

The term “foreign loans and obligations denominated in any foreign currency”, as it appears in s 44C(2) of the Reserve Bank Act, is not defined in SI 33 of 2019. As stated in the *Breastplate* case *supra*, its meaning in any given case must be ascertained from the factual circumstances of the parties involved and the material substance of the transaction that they

have entered into. Section 44C(2)(b) of the Reserve Bank Act makes it clear that the issuance of any electronic currency, that is RTGS dollars, shall not affect or apply to any foreign obligation, as the provision explicitly excludes foreign obligations valued and expressed in United States dollars from the deemed parity valuation in RTGS dollars.

It is settled that the effect of SI 33/19 was to render all assets and liabilities except those referred to in s 44C(2)(b) of the Reserve Bank Act as values in RTGS dollars at the exchange rates prescribed.

It was the appellant's position that, since the parties had concluded a Deed of Settlement, the court *a quo* was not entitled to take into consideration agreements that preceded the Deed of Settlement. The appellant argued that the Deed of Settlement constituted a compromise. It was the appellant's further submission that it did not matter that the debt had been expressed in United States dollars. The argument was that the issue was whether the appellant could discharge his liability in RTGS dollars at the rate of one-to-one in terms of SI 33/19.

The Deed of Settlement and the preceding contracts have to be read together for a proper understanding of the arrangement the parties entered into. The source of the funds had to be established first for the Court to be able to make a determination of the issue of the currency in which the debt admittedly due had to be repaid.

The court *a quo* stated as follows in relation to its findings on the source of funding at p 4 of its judgment:

“In proving its source of funding for the 2016–2017 tobacco cropping season, the applicant had attached a letter dated 28 May 2015 by Standard Chartered Bank addressed to the Export Finance Manager of the applicant.

In that letter, the bank confirmed that the Reserve Bank of Zimbabwe had authorised the applicant to draw down US\$25 494,506 from their offshore lines of credit to finance the 2015–2016 tobacco growing season.”

It is on record that the appellant accepted that if evidence was presented establishing that the loan he received was from offshore funding, the debt would have to be settled in United States dollars.

The court was seized with a *sui generis* contract. The tobacco grower agreement cannot be examined without reference to the source of funding. This is so because the nature of the funds advanced to tobacco growers under offshore funding contract arrangements must be preserved, as the funds are sourced solely for the purposes of tobacco growing. The term “Crop Finance”, as provided for in the Tobacco Grower Contract Agreement, clearly links the money involved to offshore funds. If the respondent is an authorised dealer, the understanding is that funds obtained and advanced in United States dollars are repayable in the denominated currency.

Tobacco is a crop that is sold in the market in foreign currency to enable beneficiaries of offshore funding arrangements to repay their creditors in foreign currency so that the latter are able to service their offshore funding contractual obligations. A party enters into a tobacco growers’ contract, knowing that he or she or it is to be funded by an offshore loan denominated in United States dollars. He or she or it undertakes the obligation to repay the loan in that currency. As a consequence, the contract arrangements entered into by the individual tobacco growers and the respondent are an execution of the obligation to perform the offshore funding contracts entered into by the respondent and its creditors.

If payment were to be made in RTGS dollars contrary to the clear and unambiguous language of s 44C(2)(b) of the Reserve Bank Act, the purpose of the provision of ensuring that tobacco farmers benefit from offshore funding lines of credit accessible to the respondent and others in similar business would be defeated to the detriment of the national interest in the protection and promotion of the development of the tobacco industry.

The court *a quo* cannot be faulted for holding that the funds advanced to the appellant had to be repaid in United States dollars. The *Zambezi Gas* case *supra* is distinguishable from the present matter. The present case relates to offshore funding. The obligation incurred by the respondent was a foreign obligation denominated in foreign currency within the contemplation of s 44C of the Reserve Bank Act.

The Deed of Settlement was entered into for the purpose of allowing the appellant to repay the debt he acknowledged to be owing in instalments in United States dollars. The Deed of Settlement was for the benefit of the appellant. The appellant cannot escape the obligation he voluntarily undertook to repay the funds advanced to him in United States dollars for the specific purpose of financing the production of the tobacco crop by calling the Deed of Settlement a compromise. There was no dispute between the parties over the currency in which the offshore funds received by the appellant from the respondent had to be repaid. The respondent was entitled to invoke the provisions of s 44C(2)(b) of the Reserve Bank Act to protect its rights to the repayment of the offshore funds advanced to the appellant in United States dollars under the Deed of Settlement.

UCHENA JA: I agree

CHIWESHE AJA: I agree

Atherstone & Cook, appellant's legal practitioners

Gill, Godlonton & Gerrans, respondent's legal practitioners