

REPORTABLE (3)

ZAMBEZI GAS ZIMBABWE (PRIVATE) LIMITED

v

(1) N.R. BARBER (PRIVATE) LIMITED

(2) THE SHERIFF FOR ZIMBABWE

**SUPREME COURT OF ZIMBABWE
MALABA CJ, MAVANGIRA JA & MATHONSI JA
HARARE, OCTOBER 7, 2019 & JANUARY 20, 2020**

T Magwaliba, with him *T Jera*, for the appellant

T Zhuwarara, with him *L Matapura*, for the first respondent

No appearance for the second respondent

MALABA CJ: This is an appeal against the decision of the High Court (“the court *a quo*”) dismissing an urgent chamber application for an order declaring that the payment made to the first respondent in terms of a court order was a full and final settlement of the liability owed by the appellant.

The appeal succeeds. The Court holds that the Presidential Powers (Temporary Measures) (Amendment of Reserve Bank of Zimbabwe Act & Issue of Real Time Gross Settlement Electronic Dollars (RTGS Dollars)) (“S.I. 33/19”) expressly provides 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 the aforementioned date be valued in RTGS dollars on a one-to-one rate.

The order in terms of which the appellant was obliged to pay the judgment debt owed to the first respondent, denominated in United States dollars, was made before the effective date. The judgment debt and its evaluation fell within the ambit of the provisions of s 4(1)(d) of S.I. 33/19. The payment made by the appellant in fulfilment of the judgment debt is a full and final settlement of the liability owed by the appellant. The reasons for the decision now follow.

BACKGROUND FACTS

The facts are largely common cause.

The first respondent instituted proceedings against the appellant for payment of USD\$3 885 000.00. The payment was for services which had been rendered by the first respondent to the appellant. On 25 June 2018 the appellant was ordered by the High Court to pay the first respondent the amount claimed, together with interest at the prescribed rate and costs of suit on an attorney client scale. The appellant noted an appeal against the judgment. The appeal was dismissed on 13 May 2019.

On 21 May 2019 the appellant deposited an amount of RTGS\$4 136 806.54 into the first respondent's account as settlement of the judgment debt plus interest and costs of suit.

The first respondent, through its legal practitioners, wrote to the appellant on the day of receipt of the funds, complaining that the amount deposited was less than the amount ordered by the court. The first respondent said that the amount deposited was equivalent to US\$144 788.23. It used the Interbank rate as at 21 May 2019. The contention was that the appellant still owed an amount of US\$3 992 018.31. The first respondent advised the appellant that it was instructing the second respondent to proceed with the attachment of its property for sale in execution.

The appellant responded by a letter dated 24 May 2019, stating that the payment of RTGS\$4 136 806.54 satisfied the judgment debt. It referred to the provisions of s 4(1)(d) of S.I. 33/19 for authority that the payment was a full and final settlement of the judgment debt.

On 4 July 2019 the first respondent instructed the second respondent to attach the appellant's properties in Hwange to recover an amount of US\$3 992 018.31. The appellant filed an urgent chamber application in the court *a quo* seeking an order for stay of execution and a declaratory order to the effect that the judgment debt had been fully discharged in terms of S.I. 33/19. The matter of the dispute between the parties was the correct interpretation of s 4(1)(d) of S.I. 33/19.

The court *a quo* dismissed the application with costs on a legal practitioner and client scale. The holding was that, had the Legislature intended to alter all court orders and writs that had been made prior to the promulgation of S.I. 33/19, it should have expressly said so. The court *a quo* held further that the payment made by the applicant did not discharge the judgment debt, as the payment ought to have been made at the Interbank rate prevailing on 21 May 2019. The court *a quo* accepted the evidence that the Interbank rate was 1 United States dollar to 3.5 RTGS dollars. The court *a quo* interpreted the provisions of s (4)(1)(d) of S.I. 33/19 in a way that excluded judgment debts from the application of S.I. 33/19.

Aggrieved by the decision of the court *a quo*, the appellant appealed. The grounds of appeal were as follows:

- “1. The High Court erred in failing to find that the judgment debt for the sum of USD3 885 000.00 together with costs of suit and interest in case number HC 7882/17 was a liability to the applicant valued in United States dollars before the effective date as specified in Statutory Instrument 33/19.
2. The High Court further erred in failing to find that the United States dollar denominated debt was capable of being discharged at the rate of One United States dollar to One RTGS dollar as specified in Section 4(1)(d) of Statutory Instrument 33/19 and therefore failing to find that the appellant fully discharged the debt on 21 May 2019.

3. The High Court further erred in finding that section 4(1)(d) of the Statutory Instrument 33/19 was not applicable to assets and liabilities arising from court orders.
4. The High Court further grossly erred in awarding costs of suit against the appellant on attorney and client scale having decided to dismiss the application.”

SUBMISSIONS BEFORE THE COURT

PRELIMINARY POINT

The preliminary point raised by the first respondent need not detain the Court. It was to the effect that the appellant did not seek leave of the court *a quo* before instituting action against the first respondent, which was a company under judicial management.

The contention was that, as the proceedings in the court *a quo* were instituted without the appellant having first sought and obtained the leave of the court *a quo* to institute proceedings against the first respondent, which was under judicial management, the subsequent proceedings were a nullity. The contention was based on the interpretation of the order of the High Court in case number HC 11194/18 (“the order”), placing the first respondent under judicial management. Paragraph 3 of the order reads as follows:

- “3. All actions and applications and the execution of all writs, summons and other processes against the applicant Company shall be stayed and not proceeded with without the leave of this Honourable Court.”

The appellant’s argument was that the application for a *declaratur* had no adverse effect on the rights of the first respondent. The contention was that, upon a proper interpretation, para 3 of the order placing the first respondent under judicial management did not mean that any application, even one not against the first respondent, cannot be made without leave of the court having first been sought and obtained.

The Court finds that there are two ways of interpreting the provisions of para 3 of the court order. Firstly, leave should be sought where the company under judicial management is actively involved in the proceedings, that is, where the relief sought affects the rights of the company under judicial management. Secondly, the purpose of seeking leave should be seen as a means for the protection of the company under judicial management. Litigation involving monetary claims would have an adverse effect on the status of the company in relation to its shareholders and creditors.

The court order placing the first respondent under judicial management was granted on 12 December 2018. The application for the relief sought by the appellant was made on 5 June 2019, almost six months after the granting of the court order.

Paragraph 3 of the order placing the first respondent under judicial management operated against proceedings pending before any court at the time the order was made. The order prohibited the issuance or execution of any process against the first respondent in respect of the institution of proceedings or the giving effect to relief granted in those proceedings. The determining factor is that the proceedings or processes concerned must be against the first respondent in the sense of making its financial position worse.

The application made by the appellant was for a declaratory order declaring that the money it had paid in fulfilment of the judgment debt was a full and final settlement of the liability owed to the first respondent. The order sought was for a declaration of rights in relation to the appellant's property, which had been attached by the second respondent. The application made by the appellant before the court *a quo* was not prohibited by the provisions of para 3 of the order placing the first respondent under judicial management, as it was not against the first respondent. The application was, in any case, not a proceeding to be stayed

and not proceeded with as a result of the order, because it was made six months after the order placing the first respondent under judicial management was granted.

In seeking the declaratory order, the appellant sought an authoritative statement on the discharge of the financial obligations it owed to the first respondent in terms of the order of the court *a quo* following payment of the amount of money it considered was at an exchange rate statutorily prescribed for the kind of debt in question.

As the application by the appellant did not fall within the provisions of para 3 of the order, there was no obligation on the appellant to first seek and obtain the leave of the court to involve the first respondent in the proceedings.

VALIDITY OF STATUTORY INSTRUMENT 33 OF 2019

Section 4 of S.I. 33/19 provides as follows:

“4. (1) For the purposes of section 44C of the principal Act as inserted by these regulations, the Minister shall be deemed to have prescribed the following with effect from the date of promulgation of these regulations (‘the effective date’) -

- (a) that the Reserve Bank has, with effect from the effective date, issued an electronic currency called the RTGS Dollar;
- (b) that Real Time Gross Settlement system balances expressed in the United States dollar (other than those referred to in section 44C(2) of the principal Act), immediately before the effective date, shall from the effective date be deemed to be opening balances in RTGS dollars at par with the United States dollar; and
- (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; and
- (e) that after the effective date any variance from the opening parity rate shall be determined from time to time by the rate at which authorised dealers under the Exchange Control Act exchange the RTGS Dollar for the United States Dollar on a willing seller-buyer-basis”

In interpreting s 4(1)(d) of S.I. 33/19 the court *a quo* said:

“In my view while the debt to the first respondent may be treated as a liability as against the applicant and an asset as against the first respondent for accounting purposes, this debt was not valued immediately before the effective date. The effective date is the 22nd of February 2019. The debt was due on the 25th of June 2018 despite that it was appealed against. Even if I may be wrong I am not convinced that the legislature intended to alter all court orders made by the court. If the court had not made any pronouncement as to what denomination the debt should be paid in on 25 June 2018, then the applicant’s argument may make sense. It was not made immediately before, on or after the effective date. If the legislature wanted it to include court orders and writs, then it should have expressly said so.”

The court *a quo* went on to say:

“As I have said above, section 4(1)(d) of S.I. 33 of 2019 cannot be construed as giving the legislature power to alter court orders. To allow that would be a violation of the separation of powers that is enshrined in the Constitution.”

Neither party questioned the validity of S.I. 33/19. The question for determination on appeal was whether the court *a quo* correctly interpreted and applied the provisions of s 4(1)(d) of S.I. 33/19 in the light of the facts of the case. The constitutionality of s 4(1)(d) of S.I. 33/19 was not in dispute. It was not an issue before the court *a quo*. There was no basis on which the court *a quo* found it necessary to allude to the suggested violation by the Legislature of the fundamental constitutional principle of separation of powers in the enactment of S.I. 33/19.

The argument raised by the first respondent in its heads of argument that the Legislature could not enact law which had an effect on the manner in which judgments are executed is devoid of merit.

INTERPRETATION OF SECTION 4(1)(d) OF STATUTORY INSTRUMENT 33 OF 2019

It is the duty of a court to interpret statutes. Where the language used in a statute is clear and unambiguous, the words ought to be given the ordinary grammatical meaning.

However, where the language used is ambiguous and lacks clarity, the court will need to interpret it and give it meaning. There is enough authority for this rule of interpretation.

In *Endeavour Foundation and Anor v Commissioner of Taxes* 1995 (1) ZLR 339 (S)

at p 356F-G the Supreme Court stated:

“The general principle of interpretation is that the ordinary, plain, literal meaning of the word or expression, that is, as popularly understood, is to be adopted, unless that meaning is at variance with the intention of the Legislature as shown by the context or such other indicia as the court is justified in taking into account, or creates an anomaly or otherwise produces an irrational result.”

In *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593

(SCA) the Supreme Court of Appeal of South Africa noted the following at para 18:

“Interpretation is the process of attributing meaning to the words in a document be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed; and the material known to those responsible for its production.” (the underlining is for emphasis)

In *Chihava and Others v The Provincial Magistrate Francis Mapfumo N.O and*

Another 2015 (2) ZLR 31 (CC) at pp 35H-37B the Constitutional Court said:

“The starting point in relation to the interpretation of statutes generally would be what is termed ‘the golden rule’ of statutory interpretation. This rule is authoritatively stated thus in the case of *Coopers and Lybrand & Others v Bryant* 1995 (3) SA 761 (A) at 767:

‘According to the “golden rule” of interpretation, the language in the document is to be given its grammatical and ordinary meaning, unless this would result in some absurdity, or some repugnancy or inconsistency with the rest of the instrument.’ (the underlining is for emphasis)

A reading of s 4(1)(d) of S.I. 33/19 does not reveal any ambiguity in the language used by the Legislature in the expression of its intention in enacting S.I. 33/19. The purpose

and object of the statute can easily be ascertained from the ordinary and grammatical meaning of the language used.

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.

Section 4(1)(d) of S.I. 33/19 is specific as to the type of assets and liabilities that are excluded from the reach of its provisions. The origin of the liabilities is not a criterion for exclusion. In other words, the fact that the liability is based on a court order does not exempt the liability from the application of the provisions of s 4(1)(d) of S.I. 33/19. 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 [*Chapter 22:15*] (“the principal Act”).

Section 44C(2) of the principal Act provides as follows:

“(2) 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; and
- (b) foreign loans and obligations denominated in any foreign currency, which shall continue to be payable in such foreign currency.”

As a matter of correct interpretation of s 4(1)(d) of S.I. 33/19, it would not be possible to exclude a judgment debt expressed in United States dollars immediately before the effective date from the application of its provisions. The fact that the source of the liability, the value of which was expressed in United States dollars, was a judgment of a court was immaterial for the purposes of the Statutory Instrument.

The Legislature put the matter beyond any doubt when it enacted the Finance (No. 2) Act, 2019. In s 20, under Part V of the Act, “financial or contractual obligations” were defined to include judgment debts. Section 20 provides:

“‘financial or contractual obligations’ includes (for the avoidance of doubt) judgment debts; ...

‘judgment debt’ means 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 debt that has prescribed, been abandoned or compromised);”.

A judgment debt is thus a contractual obligation which can either be an asset to the party in whose favour it is made or a liability on the party against whom it is made.

Section 4(1)(d) of S.I. 33/19 made it clear that it applied to all assets and liabilities that shared the prescribed characteristics, except those referred to in s 44C(2) of the principal Act.

The court *a quo* construed the words “immediately before the effective date” to mean that the expression of the value of the liability in United States dollars ought to have occurred as an event at a time “immediately before the effective date”.

The court *a quo* misdirected itself because the words “immediately before the effective date” refer to the state in which the assets and liabilities, to which the provisions of s 4(1)(d) of S.I. 33/19 apply, should be in relation to the effective date, irrespective of how far back in time the asset or liability valued and expressed in United States dollars came into existence. The phrase “immediately before” means that the liability should have existed at a date before the effective date and that such liability should have been valued and expressed in United States dollars. The issue of the time-frame within which the liability arose in relation to the effective date of 22 February 2019 does not matter. What is of importance is the fact that the liability should have been valued before the effective date in United States dollars and was still so valued and expressed. The judgment debt was ordered against the appellant on 25 June 2018. It was valued and expressed in United States dollars and was still so valued and expressed immediately before 22 February 2019.

Section 4(1)(d) of S.I. 33/19 provides that all assets and liabilities that were valued and expressed in United States dollars immediately before the effective date 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 word used is “values” and not “valued”. “Values” and “valued” are two different concepts. The former presents a notion of a set value which remains even where it is subjected to a certain conversion. The latter, on the other hand, suggests a value which can be changed according to the circumstances under which the value is being applied.

The values referred to in s 4(1)(d) of S.I. 33/19 show that after a one-to-one conversion the RTGS dollar takes the value and character of the United States dollar.

The effect of the phrase “on and after” is that the conversion of the values of “all assets and liabilities” which were valued and expressed in United States dollars immediately before the effective date to values in RTGS dollars at a rate of one United States dollar to one RTGS dollar would apply at the time the value of the asset or liability is liquidated or discharged. Assets and liabilities covered by s 4(1)(d) of S.I. 33/19 are of a *sui generis* nature. They accrue immediately before the effective date and continue to exist after the effective date.

EXCHANGE RATE

Counsel for the first respondent submitted that, in interpreting S.I. 33/19, the Court should have regard to the principle of parity. Counsel further enjoined the Court to have regard to the fact that a judgment is a judicial fact that results from adjudication. The contention was that, in interpreting the statute, the Court ought to place the first respondent in the position it would have been in had S.I. 33/19 not been enacted. Counsel also argued that the Statutory Instrument is a bridge between the United States dollar and the RTGS dollar and that in that regard the Court ought to have regard to the Interbank exchange rate as a means of arriving at parity.

The Court finds that the arguments by counsel are devoid of merit. Counsel would like the Court to believe that a conversion of a foreign currency denomination to a local currency denomination amounts to a lesser value in the local currency. This reasoning is wrong at law. There can be no parity to talk about once it is accepted that the RTGS dollar is a currency denomination with a set legal value. It is the legal tender used in Zimbabwe and as such carries a specific value.

Once a conversion of the value of an asset or liability denominated in United States dollars is made to the value of RTGS dollars, the converted value remains the same, as the

two different currency denominations both carry value. No exchange rate can be applied as the judgment debt remains a judgment debt with a value after it is converted to the local currency. The RTGS dollar has the value given under the one-to-one rate and it remains on that value even after the effective date. The first respondent and likewise the court *a quo* were wrong at law in trying to find parity by adding value on the RTGS dollar through the Interbank rate. Section 4(1)(d) of S.I. 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 section 4(1)(e) of S.I. 33/19.

CONCLUSION

The payment of RTGS\$4 136 806.45 made by the appellant as settlement of the judgment debt was a full and final settlement of the judgment debt in terms of s 4(1)(d) of S.I. 33/19.

DISPOSITION

In the result it is ordered as follows -

1. The appeal is allowed with no order as to costs.
2. The order of the court *a quo* is set aside and substituted with the following -
 - “1. It is declared that the appellant’s payment of RTGS\$4 136 806.45 is a full and final settlement of the first respondent’s judgment debt.
 2. There shall be no order as to costs.”

MAVANGIRA JA: I agree

MATHONSI JA: I agree

Jera & Moyo, appellant's legal practitioners

Mafongoya & Matapura, first respondent's legal practitioners