

DISTRIBUTABLE (17)

RYDALE RIDGE PARK (PRIVATE) LIMITED
v
RUTH MURIDZO N.O.

SUPREME COURT OF ZIMBABWE
GUVAVA JA, MAVANGIRA JA & KUDYA JA
HARARE: 6 SEPTEMBER 2022 & 3 MARCH 2023

K. Gama, for the appellant

D. Halimani, for the respondent

MAVANGIRA JA:

1. This is an appeal against the decision of the High Court (the court *a quo*) wherein the court dismissed the appellant's application for the rescission of a default judgment.

BACKGROUND FACTS

2. The appellant is a company duly registered in terms of the laws of Zimbabwe. The respondent is the executrix dative of the estate of the late Tererai Terance Muridzo (the deceased). The appellant and the respondent entered into an instalment sale agreement of sale of a residential stand situated at Rydale Park, called Stand No. 3047, measuring 300 square metres (the stand). In terms of the agreement, the purchase price was the sum of US\$18 500, payable by way of an initial deposit of US\$5000 and the balance of US\$13 500 payable in 24 monthly instalments of US\$563 on or before the first day of each month, effective from 1 October 2018.

3. In August 2019, February 2020 and March 2020, the deceased transferred various amounts of money totalling the sum of RTGS\$ 8 996 to the appellant's bank account. The appellant refused to accept the payments and refused to issue receipts for them. Following the above incident, the deceased issued summons against the appellant for a declarator to the effect that he had paid the full purchase price as agreed between the parties; that the appellant's refusal to accept his payment was unjustified; for transfer of the stand to his name and for costs on a legal practitioner and client scale. In his declaration to the summons, the respondent averred that the reason why the appellant refused the payment was because it was made in RTGS dollars and not United States Dollars. The respondent further averred that the agreement of sale between the parties was subject to the provisions of s 22 (1) (d) of the Finance (No. 2) Act, 2019, which incorporated the provisions of S.I. 33/2019 in terms of which contractual obligations that existed immediately before the effective date and were valued and expressed in United States dollars, are deemed to be values in RTGS dollars at a rate of one is to one to the United States dollar.
4. The summons was duly served on the appellant who failed to enter appearance to defend. The respondent applied for default judgment, which application was granted on 19 November 2020. Upon realizing that default judgment had been entered against it, the appellant filed an application for rescission of judgment. In making the application the appellant averred that it was not in wilful default as the summons was never brought to the attention of its managers and directors. It further averred that the summons had been served on its receptionist who had since passed away. Furthermore, that had its management been informed of the summons, an appearance to defend would have been filed timeously.

5. The appellant further averred that it had prospects of success in defending the matter as the respondent had breached the agreement by failing to tender the full purchase price. It submitted that the respondent failed to rectify its breach even when demand for such was made. Furthermore, that for the month of December 2018, January 2019, February 2019, March 2019, April 2019 and June to October 2019 the respondent had failed to pay the instalments resulting in the appellant incurring losses due to the breach.
6. The respondent opposed the application and averred that the appellant had failed to give a good explanation for its default. He averred that he had tendered, by way of bank transfers and cash, the full purchase price of the stand. The respondent further claimed that the appellant had refused to accept the payments made in RTGS dollars insisting on payment in United States dollars. The respondent maintained that in terms of s 22 of the Finance (No. 2) Act, 2019 (the Finance Act) the RTGS amount that he paid was on a one is to one value with the United States dollar.
7. In determining the application for rescission the court *a quo* found that the appellant's explanation for the default was reasonable. As to the prospects of success the court found that the *applicable* law was s 22 (1) (d) of the Finance Act. The court found that the agreement between the parties was a domestic transaction expressed in United States dollars before the effective date.
8. The court further noted that the outstanding balance of US\$8 996 was a legal obligation or liability whose payment was due and that the said outstanding balance was an asset in the appellant's accounting books and a liability in the respondent's

statements of account. The court also found that the purported notice of breach and demand to rectify the alleged breach was not given in terms of the provisions of s 8 of the Contractual Penalties Act [*Chapter 8:04*] (the Contractual Penalties Act) which governs the termination of instalment sales. The court concluded that the appellant was not *bona fide* and had no *bona fide* defence to the respondent's claim and proceeded to dismiss, with costs, the application for rescission of judgment.

9. Aggrieved by the decision of the court *a quo*, the appellants noted an appeal on the following grounds:

GROUND OF APPEAL

1. The court *a quo* erred in finding that the appellant had no *bona fide* defence to the respondent's claim for specific performance when it was common cause that the respondent had committed a fundamental breach of the parties' contract.
2. The court *a quo* further erred in finding that the purchase price was an asset in the books of the appellant before transfer of the stand to the respondent.
3. Further, the court *a quo* erred in reaching a definite position on the issue of failure to rectify breach which was a triable issue whose resolution required oral evidence to be adduced.
4. The court *a quo* also erred in finding, without the benefit of argument that the appellant's notice to rectify breach did not accord with the Contractual Penalties Act [*Chapter 8:04*].

ISSUE FOR DETERMINATION

10. One issue arises from the grounds of appeal and submissions made by counsel before this Court. The issue for determination is as follows: Whether or not the court *a quo* erred in dismissing the appellant's application for rescission of judgment.

SUBMISSIONS BEFORE THE COURT

11. Mr *Gama*, for the appellant, argued that the court *a quo*'s assessment of the appellant's *bona fides* was contrary to established authorities. He also submitted that the court *a quo* ought not to have played the role of a trial court. It ought to only have asked itself whether a valid *prima facie* defence has been established. If the allegations placed before the court have a chance of succeeding at trial, then rescission must be granted, so he argued. He also argued that in *casu*, the court *a quo* assumed the role of a trial court and went too far. Once it found, as allegedly reflected at p 130 of the record, that the respondent had not adhered to the agreed terms of payment and had thus breached the agreement, it meant that a *prima facie* defence had been established. Counsel also submitted that because the appellant had taken issue with the averment that the \$8699 was tendered in cash, the court *a quo* ought not to have made factual findings based on the papers but ought to have allowed the matter to proceed to trial where witnesses would give evidence and the trial court would determine the matter on a proper ventilation based on evidence. The court *a quo* ought to have realised that the appellant had prospects of success at trial. Counsel maintained that once the court found that the respondent had not religiously paid the instalments for the stand it ought to have arrived at the finding that the appellant had a

bona fide defence to the respondent's claim. He further submitted that the record showed that the respondent had breached the sale agreement.

12. It was also counsel's argument that the court *a quo* erred in finding that the purchase price was an asset in the books of the appellant, before the transfer of the stand to the respondent. He submitted that the stand, which remained in the possession of the appellant before the purchase price was paid in full, could not amount to an asset as envisaged by the pertinent legal provision in the Finance (No 2) Act. He argued that at the time that S.I. 133/19 became law, the appellant's asset was its stand. The respondent's asset was the money that was in the respondent's pocket. He argued that the stand in question was registered in the name of the appellant at the time the application for rescission of judgment was determined by the court *a quo*. Consequently, the stand was still owned by the appellant, hence it appeared in its books as its asset. Counsel stated that the purchase price would only become the appellant's asset upon transfer of the stand to the respondent.
13. Counsel thus urged the court to find that as the respondent neither owned nor controlled the stand which was, therefore, not its asset, there was thus no need to look at the change in value or currency in dealing with the matter. The matter ought to be resolved on the basis that the respondent breached the agreement of sale and that he could not sustain a claim for specific performance against the appellant. It was counsel's submission that the stand therefore did not fall within the ambit of S.I. 133/19 which later became s 22 of the Finance (No 2) Act.
14. *Per contra*, Mr Halimani, for the respondent, argued that the court *a quo* did not err in dismissing the appellant's application for rescission of judgment. He submitted that

the appellant failed to wholesomely address the requirements to be met in such an application and that the appeal was therefore without merit. He also submitted that it was not common cause that the respondent breached the agreement of sale, as the respondent tendered the full purchase price which payment the appellant rejected.

15. It was counsel's argument that the issue that arose in the matter was centred on the appellant's refusal to accept payment in RTGS dollars when such tender of payment was lawful as provided by law.
16. Counsel further argued that the applicant's purported first ground of appeal was flawed as it was premised on non-facts. This was so, he submitted, because contrary to the applicant's stance, it was not common cause that the respondent had committed a breach of the contract and neither did the court make such a finding. Furthermore, the appellant's counsel not having motivated its first and second grounds of appeal, he must, on the authority of *Equity Properties (Pvt) Ltd v Al Shams Global BVI Ltd & Anor* SC 101/21, be taken to have abandoned the said grounds.
17. Mr *Halimani* also submitted that as the contract between the parties was entered into before 22 February, 2019, it was clear that it was affected by the law, viz S.I. 33/19 as subsequently embodied in s 2 of the Finance (No 2) Act. The law in this regard, he further submitted, was in favour of the respondent as settled in *Zambezi Gas Zimbabwe (Private) Limited v N. R. Barber (Pvt) Ltd & Anor* SC 3/20. He maintained that on a perusal of the papers it became clear that the real issue was that the only currency that the appellant was prepared to accept was the United States dollar and not the RTGS dollar, despite the indicated statutory provisions.

18. Counsel prayed for the dismissal of the appeal with costs on the legal practitioner and client scale.

APPLICATION OF THE LAW TO THE FACTS

19. In determining the application for rescission made by the appellant, the court *a quo* found that the explanation given by the appellant for the default was reasonable and that the appellant was not in wilful default. The court however concluded that the appellant did not enjoy prospects of success. It found that the appellant had no *bona fide* defence to the respondent's claim. The appellant made the application for rescission in terms of r 63 of the High Court Rules, 1971. Rule 63 provides that:

“63. Court may set aside judgment given in default

- (1) A party against whom judgment has been given in default, whether under these rules or under any other law, may make a court application, not later than one month after he has had knowledge of the judgment, for the judgment to be set aside.
- (2) If the court is satisfied on an application in terms of subrule (1) **that there is good and sufficient cause to do so**, the court may set aside the judgment concerned and give leave to the defendant to defend or to the plaintiff to prosecute his action, on such terms as to costs and otherwise as the court considers just.” (the emphasis is added.)

20. The requirements for the setting aside of a judgment granted in default have been enunciated in numerous case authorities including *Zinondo v CAFCA Limited SC 64/17* where at p 4 of the judgment, the Court stated:

“In an application for rescission of a default judgment the court must be satisfied that there is good and sufficient cause to rescind the order. In *Makoni v CBZ Bank Limited HH-357-16*, CHITAKUNYE J quoted the case of *Stockil v Griffiths 1992 (1) ZLR 172 (S)* at 173D-F wherein GUBBAY CJ aptly noted that: -

“The factors which a court will take into account in determining whether an applicant for rescission has discharged the onus of proving “good and sufficient cause”, as required to be shown by Rule 63 of the

High Court of Zimbabwe Rules 1971, are well established. They have been discussed and applied in many decided cases in this country. See for instance, *Barclays Bank of Zimbabwe Ltd v CC International (Pvt) Ltd S-16-86* (not reported); *Roland and Another v McDonnell* 1986 (2) ZLR 216(S) at 226E-H; *Songore v Olivine Industries (Pvt) Ltd* 1988(2) ZLR 210(S) at 211C-F. They are: (i) the reasonableness of the applicant's explanation for the default; (ii) the *bona fides* of the application to rescind the judgement; and (iii) the *bona fides* of the defence on the merits of the case which carries some prospect of success. These factors must be considered not only individually but in conjunction with one another and with the application as a whole.”

21. The court *a quo*, having found that the explanation for the default was reasonable, was left with the task of assessing whether or not the appellant had prospects of success against the respondent's claim. The court concluded that in terms of s 22 of the Finance (No 2) Act the amount of ZWL\$ 8 699 which had been tendered to the appellant by the respondent was legal currency which liquidated the balance owed for the purchase of the stand. In its heads of argument, the appellant argued as follows:

“[28] Whether or not the unpaid instalments were an asset in the books of the appellant is an accounting matter whose resolution requires the opinion of a qualified person.

(a) The land in question was registered in the name of the appellant at the time the application was determined by his lordship and remains so registered. The owner of it is therefore the appellant.

...

(f) An instalment that is not yet due is not a debt. The **Oxford Dictionaries** defines (sic) “debt” as “a sum of money that is owed or due”. Therefore all the instalments which had not become due when S.I 33 of 2019 became law were not a debt. Neither were they an asset in the books of the appellant.”

22. Essentially the appellant's argument is that the court *a quo* erred in finding that the US\$8 699 was a legal obligation or liability whose payment was due and that the payment was an asset in the appellant's accounting books and a liability in the respondent's statements of account. In *Ingalulu Investments (Pvt) Ltd and Anor v National Railways of Zimbabwe and Anor SC 42/22* the Court stated the following:

“In accounting terms, an asset or liability has an ascertainable monetary value, which is recorded in the relevant books or statements of account. This is the position that pertains to a judgment debt. It constitutes an asset in the books of the judgment creditor and conversely, a liability in the hands of a judgment debtor.”

23. I venture to say that the above legal principle shows that an asset or liability must have an ascertainable monetary value. It also shows that liabilities, being legal obligations that may arise under various causes including under the law of contract, compel one party to make payment to another. In *casu*, the payment of the outstanding balance of \$8 699 owed by the respondent to the appellant arose from an agreement of sale. The said agreement gave rise to a liability that compelled the respondent to make payment to the appellant. The said amount of US8 699 was the outstanding balance after payment of the deposit for the purchase price agreed by the parties. It follows that the sum of US\$8 699 remained an asset in the books of the appellant and a liability in the books of the respondent, flowing from the contract. In this regard I am of the view that the court *a quo* did not err in finding that the provisions of s 22 (1) (d) of the Finance Act resolved the dispute between the parties. Section 22 (1) (d) of the Finance (No. 2) Act, 2019 states 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)
 - (b)
 - (c)
 - (d) 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 section 44 C(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 emphasis is added)

24. The agreement between the parties was signed in 2018. The amount was owed before the promulgation of the S.I. 33 of 2019 which was incorporated into the Finance Act. The purchase price was valued in United States dollars as per the provisions of the agreement between the parties. At the time that S.I. 33 of 2019 became operational, the value of the balance owed by the respondent to the appellant was valued at a rate of one is to one with the United States Dollar. The *Zambezi Gas* case, (*supra*) is instructive in this regard. In that case the Court held that:

“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’

25. The Court further stated that:

“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.... 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 emphasis is added)

26. As interpreted in the *Zambezi Gas* judgment, the phrase “immediately before the effective date” means that the assets and liabilities must have been valued in United States dollars before the effective date, viz 22 February 2019. The values are then converted “on or after” the effective date to RTGS dollars. It follows, therefore, that the first day for the conversion was 22 February 2019, from which date assets and liabilities valued in United States dollars immediately before, stood valued in RTGS dollars.
27. In the present case the money owed by the respondent was valued in United States dollars before the effective date. The value of the debt was therefore properly converted to the RTGS dollar on the effective date at a rate of one United States dollar to one RTGS dollar. The respondent made payment for the debt through electronic transfer to the appellant in July 2020, which payment the appellant refused to accept. The respondent went on to tender ZWL\$8 699 in cash to the appellant. This was refused. The appellant was wrong in refusing to accept the tendered amount as the respondent’s tender was legal.
28. In my view, the appellant has no triable issue warranting the setting aside of the default judgment and the facilitation of the matter proceeding to trial. The main issue which would arise if the appellant were to be allowed to defend the respondent’s claim would be centred on whether or not the payment of ZWL\$8 699 made by the

respondent was legal. The answer to that question is certainly in the affirmative as was rightly found by the court *a quo*. To allow the appellant to enter an appearance to defend would be an exercise in futility as the true position of the law has already been authoritatively stated in the *Zambezi Gas* judgment. The upholding of the respondent's claim is a foregone reality in any such proceedings. In this regard, the court *a quo* did not err in finding that the appellant had no *bona fide* defence to the respondent's claim.

29. The court *a quo* made the pertinent finding that the argument about the respondent having breached the contract was an afterthought. In this regard, it is also significant, as correctly submitted by Mr *Halimani*, that the appellant's first and second grounds of appeal were not motivated. (See paras 9 and 16.) They must therefore be taken to have been abandoned. See *Equity Properties (Pvt) Ltd v Al Shams Global BVI Ltd & Anor (supra)*. It is also significant that the tender of payment meant to liquidate the respondent's indebtedness to the appellant was made in March 2020. It follows that payment was thus made within the prescribed period of 24 months in compliance with the terms of their agreement of sale.

30. The court *a quo* did not err when it pronounced as follows:

"In casu the contract between the parties was a domestic transaction, expressed in United States dollars before the effective date. The US\$8 996.00 was (a) legal obligation or liability whose payment was due. It was in accounting terms an asset in the applicant's books of accounts and a liability in respondent's books or statements of accounts. As such it fell well within the reach and impact of section 22 (1) (d) as read with section 22 (4) (a) of the Finance (No 2) Act, 2019. ...

To conclude, in the matter *in casu* the purported notice of breach and demand to rectify the alleged breach was not given per the provisions of s 8 of the Contractual Penalties Act [*Chapter 8:04*] which govern the termination of instalment sales.

I therefore find that the application for rescission of judgment lacks *bona fides* and so is the defence on the merits. The applicant enjoys no prospects of success.”

31. In the circumstances the court *a quo* cannot be faulted for finding against the appellant as it did. The appeal has no merit.

32. It is accordingly ordered as follows:

The appeal be and is hereby dismissed with costs.

GUVAVA JA : I agree

KUDYA JA : I agree

Gama & Partners, appellant’s legal practitioners

Wintertons, respondent’s legal practitioners

