REPORTABLE **(56)**

BREASTPLATE SERVICE (PRIVATE) LIMITED
v
CAMBRIA AFRICA PLC

SUPREME COURT OF ZIMBABWE
GWAUNZA DCJ, PATEL JA & MAKONI JA
HARARE, FEBRUARY 15 & JULY 14, 2020

C. Mutandwa and *T.L. Machinga*, for the appellant

D. Tivadar, for the respondent

PATEL JA: This is an appeal against the judgment of the High Court ordering the appellant to pay the outstanding amount due to the respondent in United States dollars (USD) as opposed to its Real Time Gross Settlement (RTGS) equivalent. The relevant background to this matter is as follows.

On 25 February 2016, the parties entered into an agreement for the sale by the respondent to the appellant of its entire issued share capital in a company named Milchem Zambia Limited (Milchem) for the sum of USD 46,347.00, payable on or before

31 March 2016. The appellant then paid USD 6,347.00 on an unspecified date and a further USD 8,600.00 on 19 January 2018, leaving an outstanding balance of USD 31,400.00. The appellant contended that the balance remaining as at 19 January 2018 was USD 15,400.00 and not USD 31,400.00 as claimed by the respondent.

On 15 July 2019, the parties concluded a statement of agreed facts in which the appellant admitted that the sum of USD 31,400.00 was still to be paid. However, it now argued that the sum was payable in RTGS and not in United States dollars. The sole issue for determination by the High Court was whether the balance due was payable in United States dollars, following the promulgation of the Presidential Powers (Temporary Measures) (Amendment of Reserve Bank of Zimbabwe Act and Issue of Real Time Gross Settlement Electronic Dollars (RTGS Dollars)) Regulations 2019 (S.I. 33/2019) and the Reserve Bank of Zimbabwe (Legal Tender) Regulations 2019 (S.I. 142/2019).

Judgment of the High Court

The court *a quo* found that the sum of USD 31,400.00 payable by the appellant to the respondent did not fall under the auspices of s 4(1)(d) but s 2(b) of S.I. 33 of 2019. This was the appellant's obligation as denominated and payable in foreign currency to the respondent. The court noted that in 2016 and 2017 the respondent had written to the appellant providing the details of its bank account and the relevant IBAN and SWIFT codes. These codes applied to the payments in foreign currency into Nostro FCA accounts.

Given that the two payments already made by the appellant were by way of cash in United States dollars, the conduct of the parties and that of the appellant in particular showed that it was obliged to pay in United States dollars, and in fact proceeded to do just that. Additionally, the appellant's plea *a quo*, which was filed after it became aware of S.I. 33 of 2019, stated that it would pay the sum of USD 15,400.00 to the respondent. Thus, the obligation to settle the debt in United States dollars was both explicit and implied by conduct. The currency governing the terms sheet (the written agreement) was United States dollars and this was confirmed by paragraph 5 of the statement of agreed facts drawn up by the parties on 15 July 2019.

The court also found that payment in foreign currency would not contravene S.I. 142 of 2019 and would therefore not constitute a *brutum fulmen*. In the event, the appellant was ordered to pay the respondent the sum of USD 31,400.00 together with interest at the prescribed rate from 19 January 2018 and costs of suit on the ordinary scale.

<u>Grounds of Appeal</u>

At the commencement of the hearing, the Court pointed out the miscitation of a statutory provision referred to in the first ground of appeal. The provision in question was incorrectly cited as s 3(2)(b) of S.I. 33 of 2019, instead of s 44C(2)(b) of the Reserve Bank of Zimbabwe Act [*Chapter 22:15*]. This error is understandable given the convoluted fashion in which S.I. 33 of 2019 is structured and formulated. In any event, the error was corrected by the Court by allowing the first ground to be appropriately amended, with the consent of counsel for the respondent.

The first and second grounds of appeal take issue with the finding of the court *a quo* that the outstanding debt of USD 31,400.00 fell under the auspices of s 44C(2)(b) of the Reserve Bank Act, and was therefore a foreign obligation payable in foreign currency, rather than being a local obligation, governed by s 4(1)(d) of S.I. 33 of 2019, that was payable in RTGS dollars. The third ground of appeal impugns the court *a quo* for having failed to appreciate that S.I. 142 of 2019 made it impossible for the appellant to pay the sum of USD 31,400.00 to the respondent in foreign currency.

<u>Foreign or Local Obligation</u>

The critical provision to be interpreted *in casu* is s 44C of the Reserve Bank Act (as inserted by s 3(1) of S.I. 33 of 2019). Section 44C(1) empowers the Reserve Bank to issue or cause to be issued electronic currency in Zimbabwe. Section 44C(2) provides as follows:

> "<u>The issuance of any electronic currency shall not affect or apply in respect of</u> –
> (a) <u>funds held in foreign currency designated accounts</u>, otherwise known as "Nostro FCA Accounts", which shall continue to be designated in such foreign currencies; and
> (b) <u>foreign loans and obligations denominated in any foreign currency, which shall continue to be payable in such foreign currency</u>."
> (My emphasis)

Section 4(1)(a) of S.I. 33 of 2019 provides for the issuance and operation of an electronic currency, dubbed "the RTGS Dollar", with effect from the effective date, being the date of promulgation of S.I. 33 of 2019, *i.e.* 22 February 2019. Paragraphs (c), (d) and (e) of s 4(1) stipulate as follows:

> "(c) that such currency shall be legal tender within Zimbabwe <u>from the effective date</u>; 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 willing-buyer basis; and …….. .” (My emphasis)

What emerges clearly and unequivocally from s 44C(2)(b) of the Reserve Bank Act, as read with s 4(1)(d) of S.I. 33 of 2019, is that foreign loans and obligations denominated in any foreign currency are excluded from the broad remit of S.I. 33 0f 2019. Thus, foreign loans and obligations continue to be valued and payable in the foreign currency in which they are denominated.

Mr *Mutandwa*, for the appellant, submits that the debt *in casu* was a local obligation and not a foreign obligation within the meaning of s 44C(2)(b) of the Reserve Bank Act. For a debt to be a foreign obligation the creditor must be resident outside Zimbabwe. The nationality of the creditor is irrelevant and it is his residence that matters. The respondent’s declaration in the court below admits that it is a resident of this country. It also has a registered office in Zimbabwe as its place of business, as accepted in its further particulars. Again, in terms of the written agreement between the parties, payment by the appellant was to be made “in Zimbabwean US Dollar bank account to be nominated” by the respondent. At the relevant time, all bank accounts in Zimbabwe were designated in United States dollars. The United Kingdom bank account details that were furnished by the respondent were provided on 6 December 2016, well after the effective date of the agreement, *i.e.* 25 February 2016.

Mr *Tivadar*, for the respondent, observes that in the appellant's plea, which was filed on 28 February 2019, after the promulgation of S.I. 33 of 2019, the appellant prayed for an order requiring it to pay the lesser "sum of US$ 15,400.00". The court *a quo* found that the appellant was fully aware of the existence of S.I. 33 of 2019. The plea was not amended and, so submits Mr *Tivadar*, it constitutes a firm irrevocable admission of the appellant's liability to pay the outstanding debt in United States dollars. Additionally, the two initial payments that were made by the appellant, totalling USD 14,947.00, were made in cash in United States dollars. The respondent initially supplied the details of a United Kingdom bank account, together with IBAN and SWIFT codes, which were recognised by the court *a quo* as pertaining to FCA accounts. At a later stage, in its further particulars, the respondent furnished the details of its local Nostro FCA account. Such accounts are specifically referred to and excluded from the scope of electronic RTGS transactions by s 44C(2)(a) of the Reserve Bank Act. As regards the respondent's declaration *a quo*, Mr *Tivadar* argues that the respondent's statement that it is "a company duly [incorporated] according to the laws of the United Kingdom with an office in Zimbabwe where it is resident" is somewhat ambiguous. The statement of agreed facts before the court *a quo* makes it clear that the respondent is "a foreign company registered in terms of the British laws with a registered office in Zimbabwe". All that the respondent has is a business presence in Zimbabwe.

Having regard to the factual circumstances preceding the institution of proceedings *a quo* coupled with the conduct of the parties, it is abundantly clear that it was the intention of both parties from the onset of their transaction that the appellant's contractual obligation to pay the respondent would be discharged in United States dollars. Indeed Mr *Mutandwa*, in his replying submissions, quite properly conceded that until the promulgation of S.I. 33 of 2019 the parties were fully agreed that payment would be made in foreign currency.

What is more contentious *in casu* is the status of the respondent in this country and the nature of the transaction between the parties. These two issues are obviously interrelated and need to be considered together in the context of this appeal. 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 S.I. 33 of 2019 or in any other relevant legislation that I am aware of. 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.

It is common cause that the appellant is a local entity. On the other hand, the status of the respondent is not self-evident from the papers filed of record. I agree with Mr *Tivadar* that the respondent's pleadings, *i.e.* its declaration and further particulars, are ambivalent in this regard. Its nationality, inasmuch as it is incorporated in the United Kingdom, is obviously foreign. What is less clear is the question of its residence and the nature of its physical presence in Zimbabwe. This is obviously a question of fact. Nevertheless, some guidance on this aspect can be gleaned from relevant statute law.

The commercial operations and transactions of all companies, whether foreign or local, are governed by our company law, both under statute and at common law. At the time when the transaction between the parties *in casu* was concluded, the relevant statutory provisions were contained in the Companies Act [*Chapter 24:03*]. (They are now to be found in the Companies and Other Business Entities Act [*Chapter 24:31*] which came into operation on 13 February 2020, ninety days after its publication on 15 November 2019).

Section 2 of the repealed Act defined a "foreign company" as "a company or other association of persons incorporated outside Zimbabwe which has established a place of business in Zimbabwe". The term "place of business" was defined in s 329 to mean "any place where the company transacts or holds itself out as transacting business ……..". The formalities and requirements for the registration of a foreign company were stipulated in s 330. In essence, these included the submission of certified copies of the company's constituent instruments and the particulars of its directors resident in Zimbabwe. Thereafter, the responsible Minister would issue a certificate, subject to such conditions as he saw fit, authorising the foreign company to establish a place of business in Zimbabwe.

In the instant case, it is common cause that the respondent is a company incorporated in the United Kingdom with a registered office or place of business in Zimbabwe. The prescribed formalities for its registration do not form part of the record and were obviously not in issue in the proceedings *a quo*. In any event, it is undoubtedly a foreign company that was registered and entitled to operate in Zimbabwe.

The related question of residence in the country is indirectly addressed in the Exchange Control Regulations 1996 (S.I. 109 of 1996, as amended). Although these Regulations pertain principally to dealings in foreign currency, they are also relevant to the determination of questions of residence in Zimbabwe. In terms of s 3(1)(c) of the Regulations, a company or other body corporate is to be regarded as a Zimbabwean resident if "it is incorporated in Zimbabwe" or "it has its head office or principal place of business in Zimbabwe".

In casu, it is abundantly clear that the respondent is neither incorporated in Zimbabwe nor does it have its head office or principal place of business in Zimbabwe. By virtue of the Companies Act as read with the Exchange Control Regulations, it is quite evidently a non-resident foreign entity operating in Zimbabwe. As regards the transaction between the parties, it is not in dispute that what was sold by the respondent to the appellant was its entire share capital in a foreign company located in a foreign country, namely Zambia. In short, a foreigner sold a foreign asset to a local company. The asset consisted of shares in a foreign company that could presumably be sold abroad for foreign currency or, at any rate, in any currency other than the currency of Zimbabwe. What the parties intended and what they transacted unquestionably gave rise to a foreign obligation.

In my view, it was not the intention behind S.I. 33 of 2019 to strike at an obligation of the kind involved in this case. Section 44C(2)(b) of the Reserve Bank Act, as inserted by s 3(1) of the 2019 Regulations, makes it clear that the issuance of any electronic currency, *i.e.* RTGS dollars, shall not affect or apply to any foreign obligation. This is reinforced by s 4(1)(d) of the Regulations which explicitly excludes foreign obligations valued and expressed in United States dollars from the deemed parity valuation in RTGS dollars.

To conclude on this aspect, the currency of payment intended by the parties was United States dollars. Moreover, the obligation incurred by the appellant was a foreign obligation denominated in foreign currency within the contemplation of S.I. 33 of 2019. That obligation therefore continued to be payable in foreign currency, even after the effective date, *i.e.* 22 February 2019. It follows that the first and second grounds of appeal are without merit and must accordingly be dismissed.

Legality of Payment in Foreign Currency

Mr *Mutandwa* initially took the stance that S.I. 33 of 2019 constituted a supervening obstacle to the continued payment of the appellant's obligation in United States dollars. He later conceded that, as at 22 February 2019, there was nothing to prevent the appellant from discharging its obligation in foreign currency. However, he persisted with the argument that following the promulgation of S.I. 142 of 2019, on 24 June 2019, the Zimbabwean dollar was the sole legal tender for all local transactions in Zimbabwe.

Mr *Tivadar* submits that there was no supervening impossibility preventing payments in foreign currency at any material time. It was legal for the parties to enter into an agreement for the payment of United States dollars or any other foreign currency.

Neither S.I. 33 of 2019 nor S.I. 142 of 2019 prohibited or precluded any such payment. Subject to the broad impact of later restrictive measures introduced by S.I. 212 of 2019, I fully agree with the position taken by Mr *Tivadar* for the following reasons.

As regards S.I. 33 of 2019, I have already concluded that this instrument did not operate to prohibit the payment of any foreign obligation denominated in foreign currency in such foreign currency. The *status quo ante* was explicitly saved and preserved by those provisions of S.I. 33 of 2019 that I have alluded to earlier.

Turning to S.I. 142 of 2019, the relevant provisions for present purposes are contained in subss (1) and (2) of s 2, which stipulate as follows:

> "(1) Subject to section 3, with effect from the 24th June 2019, the British pound, United States dollar, South African rand, Botswana pula and any other foreign currency whatsoever shall no longer be legal tender alongside the Zimbabwe dollar in any transactions in Zimbabwe.
> (2) Accordingly, the Zimbabwe dollar shall, with effect from the 24th June 2019, but subject to section 3, be the sole legal tender in Zimbabwe in all transactions." (My emphasis)

Section 3(1) of S.I. 142 of 2019 provides for savings from the ambit of s 2. In particular, it stipulates that nothing in s 2 shall affect the opening or operation of foreign currency designated accounts (Nostro FCA accounts) or the requirement to pay customs duties and import or value added tax in foreign currency in respect of such goods as are specified under the relevant tax legislation. Section 3(2) extends the exemption from the provisions of s 2 to the tender of foreign currency in payment for international airline services.

My reading of s 2 of S.I. 142 of 2019 is that its operation and impact are confined to local transactions. It obviously cannot and does not apply to foreign transactions which ordinarily lie beyond the reach of purely domestic legislation. At any rate, this is clearly evident from the particular wording of the provision which expressly refers and relates to transactions in Zimbabwe.

By the same token, I take the view that s 2 of S.I. 142 of 2019 does not extend to the discharge of foreign loans and obligations denominated in any foreign currency. This is so for two fairly obvious reasons. Firstly, it would be commercially incongruous and internationally unacceptable to attempt to settle any foreign loan or obligation in local currency, unless this is mutually agreed between the parties involved. Secondly, and more importantly, the exemption from the scope of local currency in respect of foreign loans and obligations is explicitly preserved and embodied in s 44C(2)(b) of the Reserve Bank Act itself. The restrictions imposed by S.I. 142 of 2019 are contained in regulations made under the very same Act. It is trite that subsidiary or subordinate legislation cannot override or purport to alter, whether expressly or impliedly, anything contained in its parent or enabling statute, or indeed in any other Act of Parliament. This proposition is so axiomatic that it requires no case law or other learned authority to support it.

There is yet a further reason for taking a restrictive view of the scope and operation of s 2 of S.I. 142 of 2019. This arises from the juridical import of what is meant by “legal tender”. In this context, it is the State, which is generally responsible for regulating its monetary system, that issues its own currency to serve as the universal means of exchange within its own boundaries. See Proctor: *Mann on the Legal Aspect of Money* (7th ed. 2012), at pp. 12 & 15. To similar effect, Goldberg: *Legal Tender* SSRN (2008), at pp. 7–8, observes that it is the government which typically accords the status of legal tender to any currency which it has itself issued. Thus, when the law confers legal tender status only on the government's currency, it implicitly allows the government to reject any other currency as a medium of payment.

Insofar as concerns transactions between private persons and entities, Goldberg (*supra*), at p. 4, points out that the "legal tender" concept originates in contract law and entitles the payer to settle a contractual obligation in whatever currency or medium of payment that has been declared by law as acceptable legal tender. Conversely, a buyer does not enjoy the same leeway in attempting to settle a contractual obligation through any medium of payment that is not recognised as legal tender within the State concerned. The same point is underscored by Proctor (*supra*), at pp. 11-12:

> "If a country's system of trade and commerce is to be based on money as a means of exchange, then the law must buttress that position and allow for the assured discharge of monetary debts by payment in that medium. Thus, the law must require that creditors accept payment through that medium – in other words, the creditor must accept payment in legal tender." (My emphasis)

To conclude on this aspect, the concept of "legal tender", in its ordinary signification, denotes money or currency in official circulation that must be accepted if offered in payment of a debt. In the realm of contractual relations, what this means is that the debtor is entitled to settle his debt through the medium of legal tender and, conversely, the creditor is obliged to accept that tender. The latter has no choice or latitude in the matter. On the other hand, unless explicitly proscribed by statute (as discussed below), there is nothing under the common law to preclude the debtor from discharging his debt in any currency or medium of exchange other than the officially designated legal tender, including any foreign currency, so long as the creditor is prepared to accept such payment in settlement of the debt. This arises by virtue of the time-honoured doctrine of freedom of contract which, in my view, remains intact and unimpaired by the provisions of S.I. 142 of 2019. In any event, as I have already emphasised, these provisions do not operate to override or detract from the explicit import of s 44C(2)(b) of the Reserve Bank Act in relation to the repayment or settlement of foreign loans and obligations in foreign currency.

I have earlier alluded to the wide impact of S.I. 212 of 2019, to wit, the Exchange Control (Exclusive Use of Zimbabwe Dollar for Domestic Transactions) Regulations 2019, promulgated on 27 September 2019. The term "domestic transaction" is very broadly defined in s 2(1) of the Regulations, subject to s 4, to encompass virtually every conceivable commercial transaction within Zimbabwe. Section 3(1), which is also subject to s 4, expressly prohibits the payment or receipt of any currency other than the Zimbabwe dollar, as the price or consideration payable or receivable in respect of any domestic transaction. Section 4 enumerates those transactions which are excluded from the scope of the definition of "domestic transaction". Of particular relevance for present purposes is s 4(e), which excludes "transactions in respect of which any other law expressly mandates or allows for payment to be made in any or a specific foreign currency".

As I have already concluded, the transaction *in casu* gave rise to a foreign obligation denominated in foreign currency. By virtue of s 44C(2)(b) of the Reserve Bank

Act, as read with s 4(1)(d) of S.I. 33 of 2019, that obligation continues to be, and is therefore allowed by another law to be, payable in a specific foreign currency, *i.e.* the United States dollar. It follows that the underlying transaction is excluded, by dint of s 4(e) of S.I. 212 of 2019, from the scope of the prohibition, imposed by s 3(1) of that instrument, against the payment or receipt of any currency other than the Zimbabwe dollar in respect of any domestic transaction.

It follows from all of the foregoing that the third ground of appeal cannot be sustained. Statutory Instrument 142 of 2019, or any other relevant or applicable law, did not make it impossible for the appellant to discharge its outstanding contractual obligation to pay the sum of USD 31,400.00 to the respondent in foreign currency.

Present Status of S.I. 33 of 2019 and S.I. 142 of 2019

For the sake of completeness, it is necessary to address and clarify the present status of the two statutory instruments under scrutiny *in casu*. S.I. 33 of 2019 was enacted in terms of s 2 of the Presidential Powers (Temporary Measures) Act [*Chapter 10:20]*. In terms of s 6(1) of that Act, S.I. 33 of 2019 lapsed after the expiry of a period of 180 days. However, its provisions have been re-enacted, with some crucial modifications, through s 22 of the Finance (No. 2) Act 2019 (Act No. 7 of 2019). As for S.I. 142 of 2019, its provisions have also been substantially reproduced, in virtually identical terms, in s 23 of Act No. 7 of 2019. This Act was promulgated on 21 August 2019 and came into operation and effect on the same date.

Section 21 of the 2019 Act inserts and re-enacts, with effect from the "first effective date", *i.e.* 22 February 2019, the entirety of s 44C of the Reserve Bank Act as was contained in s 3 of S.I. 33 of 2019. Section 44C(2) preserves the position of funds held in foreign currency designated accounts as well as the continued acquittal of foreign loans and foreign obligations denominated in any foreign currency in such foreign currency.

As regards the issuance and legal tender of RTGS dollars, s 22 of the 2019 Act re-enacts the provisions of S.I. 33 of 2019, but with certain critical changes which are not relevant for present purposes, with retrospective effect from the first effective date, *i.e.* 22 February 2019. Section 23 of the 2019 Act reproduces and re-enacts the provisions of S.I. 142 of 2019, to declare in essence that any foreign currency whatsoever is no longer legal tender in any local transactions and that the Zimbabwe dollar shall, with effect from the "second effective date", *i.e.* 24 June 2019, be the sole legal tender in all such transactions, subject to the original savings in respect of the opening and operation of foreign currency designated accounts, the payment of customs duties and import or value added tax and payments for international airline services.

<u>Disposition</u>

As I have concluded earlier, all the grounds of appeal in this matter are devoid of merit. They cannot be sustained and must therefore be dismissed. As for costs, there is no reason to depart from the norm that costs should follow the cause.

It is accordingly ordered that the appeal be and is hereby dismissed with costs.

GWAUNZA DCJ : I agree

MAKONI JA : I agree

Machinga Mutandwa, appellant's legal practitioners

Maunga Maanda & Associates, respondent's legal practitioners