HAMILTON INSURANCE (PRIVATE) LIMITED
versus
NOMATTER MAKIWA
and
INSURANCE COUNCIL OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE: 20 October 2021 & 31 January 2023

**Opposed Application – Declaratory Order**

Mr *T Zhuwarara,* for the applicant
Mr *B T Mudhara,* for the 1st respondent
Ms *A Manuel,* for the 2nd respondent

**MUSITHU J:** The applicant seeks a *declaratur*. The relief sought is set out in the draft order as follows:

> "IT IS ORDERED THAT:
> 1. That the application for Declaratur be and is hereby granted.
> 2. That the garnishee order issued on 8 May 2019 against the Applicant for payment in United States dollars is invalid and is hereby set aside.
> 3. It is specifically declared that:
>  3.1 the debt of US$ 29 115.12 in terms of order dated 25th October 2017 by Honourable Justice Charewa is deemed to be valued in RTGS dollars at a rate of one-to-one to the United States dollar in terms of **S.I. 33/2019**,
>  3.2 the 1st Respondent acted *ultra vires* S.I. 33/2019 by enforcing a garnishee order against monies owing to Applicant in United States dollars for payment of an amount valued in RTGS in terms of **S.I. 33/2019.**
> 4. The 1st Respondent is ordered to pay Applicant US$ 9 756.76 *(Nine Thousand Seven Hundred and Fifty-Six United States dollars and Seventy-Six cents)* and any other monies paid by the 2nd Respondent in United States dollars.
> 5. The 1st Respondent shall pay costs at attorney-client scale."

**The Applicant's Case**

The first respondent was employed by the applicant as its financé manager and company secretary. He was dismissed from employment for disciplinary reasons. He challenged his dismissal by referring the dispute to the Ministry of Public Service, Labour & Social Welfare for conciliation and arbitration. His dismissal was set aside and he was also

awarded damages. The award was registered as an order of this court per CHAREWA J on 25 October 2017. The award reads as follows:

> "IT IS ORDERED THAT:
> 1. The award dated 2 December 2015 be and is hereby registered as an order of this court.
> 2. Respondent shall pay applicant the sum of US$29 115.12.
> 3. Respondent shall applicant's costs of suit."

On 16 April 2019, the first respondent filed an application for garnishee order under HC895/16. The parties engaged through their legal practitioners with a view to reach an out of court settlement. By way of a letter dated 24 April 2019 addressed to the first respondent's legal practitioners, the applicant's legal practitioners proposed to settle the sum of $29 115.12 as follows: a lump sum payment of $14 557.56 by 31 May 2019; the remaining $14 557.56 to be paid as a lump sum on or before 30 June 2019. The letter elicited an email response from the first respondent's legal practitioners. The email dated 25 April 2019 reads in part as follows:

> "We refer to the above matter and to your letter dated 24th April 2019 which we received today the 25th of April 2019.
> Thank you for your client's offer. We have sought our client's instructions and he is also of the view that an amicable settlement is necessary. He however instructed us that since the judgment is sounding in US dollars if your client wishes to pay in RTGS then it has to be at the prevailing official rate and paid in two equal instalments with the first one being paid immediately after signing the deed of settlement and the second one must be paid by 31st May 2019…."

The applicant's legal practitioners responded to the email from the first respondent's legal practitioners through a letter dated 26 April 2019. The letter reads in part as follows:

> **"NOMATTER MAKIWA v HAMILTON INSURANCE (PRIVATE) LIMITED CASE NUMBER HC 895/16**
>
> We refer to the above matter and your email dated 25 April 2019.
>
> We advise that whilst the judgment denominates the outstanding amount in United States Dollars, our client is not obliged to pay same in United States Dollars. This is because section 4 (1)(d) of Statutory Instrument 33 of 2019 namely the Presidential Powers (Temporary Measures) (Amendment of Reserve Bank of Zimbabwe Act [and Issue of Real Time Gross Settlement Electronic Dollars (RTGS Dollar), Regulations 2019 states that, for accounting and other purposes, all assets and liabilities that were, immediately before the effective date, valued and expressed in United States dollars 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. This consequently means that the sum of US$29 115.12 is RTGS $29 115.12. As you are aware all transactions at the time you were awarded judgment were denominated in United States Dollars save for foreign obligations. The statute therefore regulates all local payments as stated above.

> Therefore, our client is only willing to continue negotiations in respect of the sum of RTGS $29 115.12 and not US$29 115.12. Our instructions are that should your client persist with payment in United States Dollars or RTGS$ at the prevailing official rate, we will be opposing the application for the garnishee order and filing an application for a declaratur indicating that the judgment is affected by the statutory intervention 33 of 2019…."

The parties disagreed on the interpretation of the law, with the applicant's legal practitioners arguing that the amount to be paid was to be denominated in the ZW$ at the rate of one is to one with the United States dollar, while the first respondent insisted that it had to be paid in the United States dollars currency or in RTGS but converted from the United States dollar at the official exchange rate. The garnishee order was granted in favour of the first respondent by NDEWERE J on 8 May 2019. The order is couched as follows:

> **"IT IS ORDERED THAT:**
> 1. All debts by the garnishee to the judgment debtor to an amount not exceeding US$29 115.12 be attached to answer a judgment recovered against the Judgment Debtor by the judgment creditor in the High Court on the 25th October 2017, for the sum of US$29 115.12, on which judgment the sum of US$29 115.12 remains due and unpaid.
> 2. The garnishee do pay the Sheriff of this court the said sum of US$29 115.12 together with US$TBA, the costs hereof (but not exceeding in all the sum of US$29 115.12, out of his said debts to the judgment debtor, at a rate of US$29 115.12 deduction per quarter or, failing such payment, that the garnishee appear before this court on the 5th day of June 2019 at 10:00 o'clock in the morning, then and there to show cause why he should not pay the same."

Following the granting of the garnishee order, the first respondent effected it on the second respondent's foreign currency account as against the applicant's portion of quarterly insurance pool allocations. On 31 May 2019, the second respondent released the sum of US$9 756.76, and it undertook to more payments by way of instalments up to the sum of US$29 115.12.

It is these sequence of events that culminated in the institution of the present proceedings.

**The First Respondent's Case**

The first respondent averred at the outset that the application was incompetent as it sought to declare an order of the High Court ineffectual. It was further averred that at law there was no scope for such a relief. Orders of the High Court could only be set aside by way of rescission, on the basis of an error or by the consent of the parties. The applicant was therefore seeking the rescission of the High Court order through the back door.

The first respondent further averred that despite being served with an application for a garnishee, the applicant did not oppose the application or the relief sought. Instead, the

applicant went on to make payment proposals that were rejected by the first respondent. The garnishee order was granted in default of appearance by the applicant. The present application effectively sought to rescind the garnishee order under the guise of a *declaratur*.

The first respondent further contended that a garnishee order was used to enforce a judgment in circumstances where a third party held money due to the judgment debtor. The currency of the money was not an issue. The applicant had failed to voluntarily discharge its indebtedness hence the order. There was nothing illegal about the order.

As regards the effect of S.I. 33 of 2019, the first respondent averred that the law does not have the effect of amending the court's judgment. At any rate the garnishee order was granted on 8 May 2019, and it referred to a US$ amount. The applicant could not therefore claim that the debt was transformed to $ZW amount at the rate of one is to one with the $US. The applicant ought to have opposed the garnishee instead of filing what he referred to as a frivolous application. The court was urged to dismiss the application with costs on the legal practitioner and client scale.

**Second Respondent's Case**

In its opposing affidavit, the second respondent indicated that it would be abiding by the decision of the court seeing as no substantive relief was sought against it. It however undertook to continue acting in terms of the garnishee order since it had not been set aside. The payments would still be remitted in batches since funds were distributed to members quarterly in each year. The second respondent reiterated that it had no interest in the case, and prayed that its costs be borne by both parties in equal shares on the legal practitioner and client scale or as an alternative, by the losing party on the legal practitioner and client scale.

**The Submissions**

Mr *Zhuwarara* for the applicant submitted that a garnishee order was a species of execution. It was not a judgment or an order of court *per se* that required rescission. An enforcement mechanism did not create rights akin to that of the order or judgment on which such enforcement mechanism was founded. It was for that reason that the applicant had approached the court for a *declaratur* so that the correct legal position was propounded.

Counsel further submitted that by operation of the deeming provisions in the law, the order granted by this court on 25 October 2017, though denominated in US$, was effectively

transformed into a ZW$ obligation. There was therefore no need for the rescission or review of the order of 25 October 2017 or that which granted the garnishee order on 8 May 2019.[1]

Mr *Mudhara* for the first respondent submitted that a judgment or order of the court could not be rescinded by a *declaratur*. He argued that the garnishee order was a judgment which remained extant. The garnishee order had the effect of creating obligations for the respondent which was not a party to the original dispute. A garnishee order had to be distinguished from a writ of execution. A garnishee order was a court order. In any case, the second respondent had already complied with the garnishee order by paying the amount at the centre of the dispute. Mr *Mudhara* further submitted that under the old High Court Rules, 1971, this court could only review its earlier decisions under r 63 and r 449. This was not the case herein. The court was urged to dismiss the application with costs on the higher scale of attorney and client.

Ms *Manuel* for the second respondent advised that the second respondent would abide by the decision of the court. She confirmed that the amount due had been settled in three batches in 2019. She also prayed that costs of suit be borne by the applicant and the first respondent since they had unnecessarily dragged the second respondent into these proceedings.

**The Analysis**

Two issues arise for determination herein. The first is whether the relief of a *declaratur* is competent in light of the order by CHAREWA J and the garnishee order granted by NDEWERE J, which orders were both granted in default. The second issue is on the effect of the new monetary regime that followed the promulgation of S.I. 33 of 2019. I now turn to consider these seriatim.

**The Propriety of Seeking relief by way of a *Declaratur***

Authors *Herbstein & Van Winsen:*[2] explained the legal remedy of a declaratory order in the following terms:

> "A declaratory order is an order by which a dispute over the existence of some legal right or obligation is resolved. The right or obligation can be existing, prospective or contingent and no specific performance need be claimed".

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[1] Mr *Zhuwarara* referred the court to the following judgments that dealt with that point: *Zimbabwe Football Association v Pickwell & 15 Others* HH 12/21; *Muhammad Akram v Mukwindidza & Ano* HH 522/21 and *Manica Zimbabwe Ltd v Windmill (Pvt) Ltd* HH 705/20

[2] *The Civil Practice of the High Courts of South Africa*, 5th Edition, Vol 2 at p 1428

In very simple terms, a *declaratur* seeks to clarify the position of the law where there is doubt or uncertainty, as to the position of the law in respect of any given set of facts or circumstances. In my respectful view, it matters not that those circumstances arose as an offshoot of court proceedings in which the issue never arose for determination. Section 14 of the High Court Act[3], bestows on this court the power to determine future or contingents rights of parties. It states as follows:

> "**14 High Court may determine future or contingent rights**
> The High Court may, in its discretion, at the instance of any interested person, inquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon such determination." (Underlying for emphasis)

What is also implied from a reading of s 14 above is that a party may also claim consequential relief pursuant to a determination of their existing, future or contingent right or obligation. That section is also not just limited to a determination of rights, but also obligations. The order by CHAREWA J and the garnishee order by NDEWERE J created certain obligations on the part of the applicant and the second respondent respectively. The applicant is not contesting the judgment debt. It is contesting the currency in which the debt is supposed to be paid. It has approached the court for a declaration that it should discharge its liability in local currency as opposed to the United States dollar, being the currency in which the judgment debt was denominated. The order by CHAREWA J was granted before the effective date of S.I. 33 of 2019. The garnishee order by NDEWERE J was granted after the effective date.

The dispute between the parties is therefore one of a legal nature. This court must determine the currency in which the applicant's liability must be discharged. It is therefore not necessary for the applicant to approach the court for the rescission of the default judgment because it has no qualms with that judgment. Its gripe is with the currency. The applicant is simply saying any payment made towards discharging its liability must comply with the law. For the foregoing reasons, the court determines that the application for a *declaratur* is properly before the court.

**The currency in which liability must be discharged**

In 2019, two instruments that considerably altered the currency regime in Zimbabwe were promulgated. On 22 February 2019, the Government of Zimbabwe introduced a new currency called the Real Time Gross Settlement Electronic dollar (RTGS). The new currency

[3] [*Chapter 7:06*]

was introduced into the monetary system through 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, (hereinafter referred to as "S.I. 33 of 2019" or the instrument). That instrument was gazetted on 22 February 2019. That date became the first effective date as defined in the Finance Act (No.2) Act, No.7 of 2019 (the Finance Act). The new currency ran parallel with other currencies that were then accepted as legal tender, under what was commonly known then as the multi-currency basket.

On 24 June 2019, the Minister of Finance and Economic Development caused to be gazetted Statutory Instrument 142 of 2019 (Reserve Bank of Zimbabwe (Legal Tender) Regulations, 2019) (S.I. 142 of 2019). The 24 of June 2019 became the second effective date as defined in the Finance Act. This instrument abolished the multi currencies and declared the ZWL to be the sole legal tender in Zimbabwe. The two instruments were later incorporated into the Finance Act, which was gazetted on 21 August 2019. The key parts of the Finance Act which assimilated some of the provisions of the two instruments are ss 22 and 23. The two sections state in part 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) that the Reserve Bank has, with effect from the first effective date, issued an electronic currency called the RTGS dollar; and
> (b) ……..; and
> (c) that such currency shall be legal tender within Zimbabwe from the first effective date; and
> (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 44C (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; and
> (e) that after the first effective date any variance from the opening parity rate shall be determined from time to time by the rate or rates at which authorised dealers exchange the RTGS dollar for the United States dollar on a willing-seller willing-buyer basis; and
> (f) ……...
> (4) For the purposes of this section—
> (a) it is declared for the avoidance of doubt that financial or contractual obligations concluded or incurred before the first effective date, that were valued and expressed in United States dollars (other than assets and liabilities referred to in section 44C(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;
> (b) ……..; (Underlining for emphasis)

> **23 Zimbabwe dollar to be the sole currency for legal tender purposes from second effective date**
> (1) For the avoidance of doubt, but subject to subsection (4), it is declared that with effect from the second effective date, the British pound, United States dollar, South African rand, Botswana pula and any other foreign currency whatsoever are no longer legal tender alongside the Zimbabwe dollar in any transactions in Zimbabwe.
> (2) Accordingly, the Zimbabwe dollar shall, with effect from the second effective date, but subject to subsection (4), be the sole legal tender in Zimbabwe in all transactions." (Underlining for emphasis).

The principal Act referred to in sections 22 and 23 above is the Reserve Bank of Zimbabwe Act.[4] Section 22(1)(d) of the Finance Act stipulates 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 44C (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 words *"financial or contractual obligations"* are defined in s 20 of the Finance Act to include (for the avoidance of doubt), judgment debts. A judgment debt is defined in the same section to mean:

> "…….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 that has prescribed, been abandoned or compromised)" (underlining for emphasis).

The words *"assets and liabilities"* are not defined in the Finance Act or in S.I. 33 of 2019. The Supreme Court considered the issue of assets and liabilities in *Zambezi Gas Zimbabwe (Private) Limited v N.R. Barber (Private) Limited & Anor*[5]. The court said:

> "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."

[4] [*Chapter 22:15*] (No. 5 of 1999).
[5] SC 3/20 at p 9

Further down in the same judgment the court went on to state that S.I. 33 of 2019 was specific to the type of assets and liabilities excluded from s 4(1)(d), reasoning that the origin of the liabilities was not a criterion for the exclusion. The court highlighted that:

> "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…."

Still on the issue of assets and liabilities, the court in the *Zambezi Gas Zimbabwe* judgment further stated that:

> "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."[6]

It is common cause that the order of this court that gave birth to the garnishee order was granted before the first effective date. It defined the applicant's liability. It constituted, for all intents and purposes, a judgment debt. The first respondent could take all steps to enforce it. It could be enforced through the issuance of a writ of execution of movables or immovables. It could be enforced through a garnishee order, which is what happened in *casu.* Mr *Mudhara'* argued that a garnishee order is equivalent to a court order, and for that reason, the liability must be construed to have arisen after the first effective date when the court granted the garnishee order in May 2019. That argument is clearly without merit. A garnishee order is defined as a species of execution. It is one of the available media through which judgments or orders of court are enforced.

The applicant's liability, and the obligation to pay must therefore be determined on the basis of the order granted by CHAREWA J on 25 October 2017. The value of the liability 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. The *Zambezi Gas Zimbabwe (Private) Limited v N.R. Barber (Private) Limited & Anor*, settled that legal point.

**The Consequential Relief Sought**

[6] At p 11 of the judgment

Apart from the *declaratur* that the debt be deemed to be valued in RTGS dollars at the rate of one to one with the United States dollar, the applicant also wants the court declare the garnishee order invalid and have it set aside. It also wants the court to declare that the first respondent acted ultra vires S.I. 33 of 2019 by enforcing a garnishee that required the applicant to pay an RTGS obligation in the United States dollars. The applicant also wants this court to order that the first respondent refunds the amounts it received in the United States dollar currency. In its heads of argument, the applicant had urged the court to invoke r 449(1)(a) and set aside the garnishee order, once the court was satisfied that the first respondent cannot recover the debt in United States dollars. Mr *Zhuwarara* abandoned that argument in his oral submissions.

The court determines that it cannot grant the aforementioned consequential relief primarily for two reasons. Firstly, the order by CHAREWA J and the garnishee order by NDEWERE J were granted in default. They have not been set aside. The garnishee order being a species of execution just like a writ of execution must mirror what is in the court order. The applicant ought to have challenged it on the basis that it cannot be enforced in that foreign currency. By seeking to have it declared invalid, the applicant is simply asking the court to rescind the garnishee order and by extension the court order through the back door. That is legally unsustainable. Secondly, the applicant abandoned the r 449 (1)(a) route. It cannot therefore expect the court to set aside the two orders granted in default in terms of that provision *ex mero motu*. The applicant must therefore deal with the order by CHAREWA J and the garnishee order by NDEWERE J in the appropriate manner as prescribed by the rules of court.

**COSTS**

The general rule is that the successful party is entitled to costs on a scale which must be determined depending on the nature of the case and the manner in which litigation was conducted. The applicant prayed for costs on the higher scale of legal practitioner and client. The second respondent also prayed for costs on the higher scale. Despite conceding that no substantive relief was sought against it and it would abide by the decision of the court, the second respondent went on to prepare heads of argument. That was not necessary. The second respondent was cited as an interested party. It is not the losing party that decided to cite the second respondent. Rather, it was the successful party. There is no point in saddling the first respondent with an order of costs as against the second respondent.

Regarding the applicant's claim for costs on the higher scale, my considered view is that the nature of the case militates against an award of costs on such a scale. The new currency regime had serious consequences that left many citizens counting their financial losses. Further, the *Zambezi Gas* judgment which clarified the position of the law was only handed down in January 2020, after parties had already filed heads of argument and awaiting set down. I find it befitting that each party be ordered to bear its own costs of suit.

**DISPOSITION**

Resultantly it is ordered that:

1. The application for *declaratur* be and is hereby granted.
2. It is specifically declared that the debt of US$ 29, 115.12 in terms of the order dated 25th October 2017 by Honourable Justice CHAREWA is deemed to be valued in RTGS dollars at a rate of one-to-one to the United States dollar in terms of Statutory Instrument 33 of 2019.
3. Each party shall bear its own costs of suit.

*Mushoriwa Pasi Corporate Attorneys*, legal practitioners for the applicant
*Mundia and Mudhara*, legal practitioners for the first respondent
*Atherstone and Cook*, legal practitioners for the second respondent