PARKS AND WILDLIFE MANAGEMENT AUTHORITY
and
SHEARWATER ADVENTURES (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
NDLOVU J
HARARE, 07 FEBRUARY & 01 MARCH 2023

Mr. W.P Zhangazha with Ms,E. Mandaza, for the Plaintiff.
Adv, D. Ochieng, with Mr. M. Ncube, for the Defendant.

INTRODUCTION

NDLOVU J. This matter came before me as a Stated Case in terms of Rule 52 of the High Court Rules 2021.

FACTS OF THE MATTER

Parks and Wildlife Management Authority is a Statutory Body empowered to control, manage and possess Victoria Falls National Park in terms of the Parks and Wildlife Management Act [Chapter 20:14]. Its relationship with Defendant is that of Lessor and Lessee over a restaurant and Curio Shop situated in the Rainforest at Victoria Falls National Park. The Lease Agreement between the parties was signed on the 2nd of March 2018. The lease period is extant, running from 01 January 2018 to 31 December 2027. From 01 January 2018 to 31 December 2022, Defendant was to pay an annual lease fee/rent of US$141 120.00. The lease fees were to be paid in equal, monthly instalments of US$11 760.00 on or before the 1st of each month.

Defendant made the following payments into Plaintiff's Bank account as rent on the indicated dates and in the indicated amounts.

09/01/2020	*ZWL$198 960.38*
05/02/2020	*ZWL$205 157.90*
18/02/2020	*ZWL$202 015.63*
09/03/2020	*ZWL$161 199.95*
TOTAL	***ZWL$773 333.86***

On 22 February 2019, [the first effective date] *Statutory Instrument 33 of 2019* was enacted. It later became part of the *Finance (No. 2) Act, 2019* [the Act]. The relevant parts of the Act for the purposes of this matter are *s22 (1) (d)* and *(e)* as read with *s22 (4) (a)* thereof.

ISSUES

1. Whether or not Defendant fully discharged its contractual obligations towards Plaintiff for the period April 2020 to the 1st of January 2022.

2. Whether or not Defendant paid Plaintiff in excess of its rent obligations and if so, whether it is entitled to a *declaratur* that it had paid for an additional 46 months.

PLAINTIFF'S ARGUMENT.

Plaintiff's argument is that Defendant should be ordered to pay US$258 400.00 because in Plaintiff's interpretation of the relevant statute all contractual obligations *inter partes* sounding in United States of America Dollars [US$] and due and payable post 22 February 2019 are payable in US$ or in its equivalent amount in Zimbabwean dollars [ZWL$] at the applicable interbank exchange rate at the time of settlement.

Plaintiff further argued that the US$ obligations in its contract with Defendant were not amended by *Section 22(1) (d)* as read with *s22 (4) (a)* of the *Finance (No. 2) Act, 2019* and remained to be reckoned in US$ currency save that Defendant was now obliged to pay the US$ equivalent in ZWL$ at the official prevailing exchange rate in terms of the *Exchange Control Act [Chapter 22:05]* at the time of settlement. US$258 400.00 was neither an asset nor a liability as contemplated by *s22 (1) (d)* of the *Act* as of 22 February 2019 because that amount was not due for payment then. It was a future rental and had not been incurred by 22 February 2019. To be an asset or liability it must be capable of being recorded in a party's statement of accounts and no one records future rentals as an asset in their Books of Accounts, particularly where the lease in question is capable of premature termination as is the case with the lease agreement between the parties in this case. Liability arises after use, so emphasized Mr Zhangazha for Plaintiff.

According to Plaintiff, the date of the existence of the liability is critical in this case. In this case the date of the liability is after the effective date, therefore the use of the interbank is applicable. Liability arises when the rent is due and it becomes an asset in the Lessor's Books

of Accounts. The Act did not amend private contracts or lease agreements in particular. It only crafted a mode of payment of existing liabilities prior to the effective date which is the cut-off date. *Section 22(1) (d)* and *(e),* and *s22 (4) (a)* must be read together and not in a piecemeal fashion. In this case *Section 22(1) (e)* talks of the after-the-effective date transactions as opposed to *s22 (1) (d)* which deals with obligation pre-dating the effective date.

The counterclaim must fail.

DEFENDANT'S ARGUMENT

Defendant asserted that it had paid more than what was due for the period in question by 46 months using the 1; 1 exchange rate hence it counter-claiming seeking a Declaratory Order to that effect. It is Defendant's argument that the *Act* amended all financial obligation clauses in contracts to be at a rate of 1; 1 after the effective date. It contends that the effect of *s22 (1) (d)* as read with *s22 (4) (a)* of the Act was to change the contractual obligation it had towards Plaintiff in respect of the lease from US$11 760.00 to ZWL$11 760.00 per month. Defendant further argued that the matter ends with the proper interpretation of *s22 (4) (a)* of the *Act.* Defendant argued that *s22 (1) (d)* talks of assets and liabilities whereas *s22 (4) (a)* talks of financial or contractual obligations. When Parliament changes terminology in a statute, that deliberate departure in words should be taken to mean that Parliament intended to mean something different. That is so because every word in a statute means something and, in this case, the key words are "contractual obligations" which means "a legal duty imposed on a party by a consensual agreement". There is no need to determine when a contractual obligation arose. A future rental ordinarily would not be entered in the books of accounts. It is only entered as a contractual obligation.

Paragraph 4 of the counterclaim has been overtaken by events as the 39 months in question end in April 2023 but the principle behind the counterclaim is not affected.

THE LAW

22 Issuance and legal tender of rtgs dollars, savings, transitional matters and validation.

1(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 ,

1(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 Unites States dollar on a willing-seller willing-buyer basis; and,

…

(4)(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; and,"

The interpretation of the above provisions of the Act and the understanding of their interpretation so far given by the Supreme Court in *Zambezi Gas Zimbabwe (Pvt) Ltd -v- N. R Barber (Pvt) Ltd & Anor SC3/20*, and *Ingalulu Investments (Pvt) Ltd & Anor -v- National Railways of Zimbabwe & Anor. SC42/22* lies at the heart of the resolution of the dispute between the parties in this matter.

APPLICATION OF THE LAW TO THE FACTS

The period in issue is April 2020 to 1st January 2022. This period is post the first effective date, [22 February 2019] commonly referred to as the cut-off date in various judgments. It is common cause that the rent was structured in such a manner that it was payable by the Lessee periodically and regularly on a monthly basis at a figure of US$11 760.00 per month. The lease agreement was negotiated and concluded prior to the first effective date.

In summary, the Plaintiff's argument is that the payment of the rentals in question fall under the purview of *s22 (1) (e)* of the *Act* wherein the amount payable in ZWL$ must be equivalent to US$11 760.00 per month at the interbank rate prevailing at the time of payment because that rent had not become due on the first effective date and was therefore neither an asset nor a liability contemplated in *s22 (1) (d).* On the other hand, Defendant argues that a contractual obligation is different from an asset and/or a liability, in that the liability arising out of a contractual obligation is due at the time of voluntarily signing a consensual agreement with the other party even if settling the same is to be done later. In the context of this matter, because the agreement was concluded in 2018, its liability to pay US$11 670.00 rent per month

predates the cut-off date and therefore falls under the purview of *s22 (4) (a)* of the *Act.* In Defendant's view, through *s22 (4) (a)* the Legislature amended private contracts.

In the Ingalulu case [*supra*] the Supreme Court stated as follows;

> *"It is trite that regard must be had to the text, context and purpose of the provisions and the broader architectural design of the Act. The relevant provisions must, perforce be construed as a whole and not in a piecemeal fashion."*

In this matter, it would be wrong and unbeneficial to interpret *s22 (1) (d)* or *s 22(4) (a)* without regard to *s22 (1) (e)* and *s20* of the *Act.* An attempt to avoid a holistic interpretation of these relevant provisions of the *Act* will lead to unnecessary confusion and doubt. The lawmaker has in *s20* and *s22 (4) (a)* expressly said it wants to eliminate doubt. What is clear from the reading of the provisions and the authorities on this subject matter is that all in all words, debt, obligation, and liability mean one and the same thing. *S22 (4) (a)* does not, contrary to Defendant's interpretation talk to the future. It is clear on when the one to one rate will apply to those contractual obligations that were concluded or incurred before the first effective date and were valued and expressed in US$. The one-to-one rate was applicable on the first effective date. Had the lawmaker intended that the one-to-one rate be applicable in the future on those contractual obligations (rent payment for the purposes of this case) it would have inserted the words "***and after"*** in the provision to read.

> *"… shall on* ***and after*** *the first effective date be deemed to be values in RTGS dollars at a rate of one to one to the United States dollar",*

In my view and understanding the words ***"and after"*** were omitted from *s22 (4) (a)* for the simple reason that *s22 (1) (e)* had already provided for the exchange rate in the future.

Rent is a contractual obligation legally due on a date specified in the particular Lease Agreement between the parties. In this case, *Clause 7* of the Lease Agreement in relevant parts reads as follows;

> ***"7 RENT AND OTHER PAYMENTS***
>
> *7:1 …*
>
> *7:2 For the period starting from 1 January 2018 – 31 December 2022 the Lessee shall pay an Annual lease fee of $141 120 (one hundred and forty-one thousand one hundred and twenty United States dollars) which shall be paid in equally monthly instalments on or before the 1st day of each month.*

7:3 …

7:4 …

7:5 In the event that the Lessee fails to pay any amount payable in terms of this Agreement the Lessor reserves the right to terminate this Agreement …
Any amount which remains unpaid after thirty (30) working days <u>of the due date</u> shall attract interest … This interest <u>shall be payable from the due date</u> to the date of payment" ***(my underlining)***

Clearly rent in terms of the consensual agreement voluntarily entered into and concluded by the parties long before 22 February 2019 would be due on a monthly bases on or before the 1st day of each month. It was not due on the day the parties concluded or signed the lease agreement and definitely the rent for April 2020 to 01 January 2022 was not due on the first effective date (22 February 2019) and therefore was not a liability or asset or contractual obligation covered by the one-to-one exchange rate in terms of the provisions of s*22 (1)(d)* and *s22(4)(a)* of the *Act.*

This interpretation resonates with the interpretation given by the Supreme Court in the Ingalulu case (*supra*). On page 4 of the cyclostyled judgment the Court stated as follows;

> *"Section 22(1)(d) and (e) as read with s22(4)(a) of the Act prescribe that the values of all assets and liabilities that were expressed or any financial or contractual obligations, other than foreign obligations, that were concluded or incurred in United States dollars on or before 22 February 2019 (the effective date or cut-off date), were deemed to have been expressed, concluded or incurred in RTGS dollars at the rate of one-to one to the United States dollar. Further, that the value of all assets accrued or liabilities incurred after the cut-off date would be payable at the prevailing interbank rate of the local currency to the United States dollar."*

The court also said in the Ingalulu case *[supra]*,
"… a financial or contractual obligation can … be categorized as an asset or liability. It accrues like an asset and is incurred like a liability. In accounting terms an asset or a liability has an ascertainable monetary value which is recorded in the relevant books or statement of account."

DISPOSITION

Accordingly, judgment is entered in favour of Plaintiff, and Defendant's Counter-Claim is dismissed and it is ordered as follows; Defendant shall pay Plaintiff,

1. The sum of USD258 400.00 payable in RTGS dollars at the prevailing exchange rate at the time of settlement.
2. Holding over damages calculated at the rate of USD$11 760.00 per month from the date of summons to the date of full payment, payable in RTGS dollars at the prevailing exchange rate at the time of settlement.
3. Interest on the capital sum of US$258 400.00 calculated at the rate of 12% per annum from the date of summons to the date of full payment, payable in RTGS dollars at the prevailing exchange at the time of settlement.
4. Costs of suit.
5. Defendant's counter-claim is dismissed.

Chinogwenya and Zhangazha, Plaintiff's Legal Practitioners
Ncube Attorneys, Defendant's Legal Practitioners