TANGANDA TEA COMPANY LIMITED
versus
DARLINGTON MATSITUKWA

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 27 March & 15 June 2023

Opposed Matter

Ms *G Ganda***,** for the applicant
T Gombiro, for the respondent

MANGOTA J: I heard this case on 26 May, 2021. I dismissed it with costs. I premised my decision on the point that there were material disputes of facts which I could not resolve on the papers which the parties placed before me.

The applicant appealed my decision. It did so in November, 2021. During the appeal, the Supreme Court observed an irregularilty which was inherent in the decision which I made. It invoked its review powers which are contained in s 25 (1) and (2) of the Supreme Court Act [*Chapter 7:13*]. It reviewed my decision as a result of which it:

i) set my decision aside–and

ii) remitted the case to this court for it to determine, at its own discretion, whether to:
   a) dismiss the application with costs;
   b) direct that oral evidence on the disputed facts be adduced before the court; or
   c) refer the matter to trial.

The irregularity which the Supreme Court observed was that, having found as I had done that there were material disputes of fact in the case, I could not proceed to hear and determine the merits of the application.

Following the decision of the Supreme Court, HC 1513/20 which had been remitted to this court, once again, landed on my desk for my attention. I set it down for hearing at 12 noon of 27 March, 2023. The application is one for a declaratur and consequential relief. The requirements

for a declaratur which the applicant makes mention of in para 6 of its founding affidavit apply in an equal measure to the applicant as they do to the respondent. That is so because the evidence of the applicant conflicts with that of the respondent in a material manner.

The narrative of the applicant is that, prior to January 2018, the respondent and it entered into a credit agreement in terms of which it sold to the respondent tea products which were valued at USD 47 943.17 for resale in Malawi. It alleges that it delivered such tea in Malawi and the respondent failed to pay the sum of USD 47 943.17 prompting it to sue him under case number HC 9854/18. It later obtained summary judgment against him on 15 December, 2018 under HC 10306/18. It claims that it issued a writ of execution against the respondent from which it realized the sum of ZWLs 5876.38. The respondent, it avers, made payments of the remaining amounts in Zimbabwe dollars which it does not accept. It insists that the respondent's liability to pay is predicated upon a foreign obligation which compels him to liquidate his indebtedness to it in United States dollars. It moves me to grant the application as prayed in its draft order which it couched in the following terms:

"IT IS ORDERED THAT:

1. The judgment debt of USD 47 493.17 against the respondent be and is hereby declared to be a foreign obligation and payable in United States Dollars in terms of s 44 C (2) (b) as read with Section 44 (C) (10) (d) of the Reserve Bank of Zimbabwe Act [*Chapter 22:15*].
2. Respondent be and is hereby directed to liquidate the judgment debt of USD 47 493.17 in *forma specifica.*
3. Respondent shall pay costs of suit on a legal practitioner and client scale.
4. The Applicant be and is hereby granted leave to levy its costs of suit on the amount deposited by the Respondent's Legal Practitioner's (*sic*) into the Applicant's Legal Practitioner's (*sic*) Trust account upon agreement on the *quantum* with Respondent or failing that on the award given by the taxing officer."

In his notice of opposition to the application, the respondent denies that he should liquidate the debt in foreign currency. He insists that his agreement with the applicant is not a foreign obligation. He premises his statement on the allegation that his agreement with the applicant was concluded in Zimbabwe. He states that the applicant accepted ZWLs 5876.36 from the proceeds of sale by the Sheriff and issued summons for civil imprisonment for the balance of ZWLs 41716.81. He claims that he liquidated the debt at the official 1 USD: 1 ZWL rate which, according to him, the applicant accepted. The applicant, he avers, cannot demand payment in United States

dollars when it accepted a tender of Zimbabwe dollars in August, 2019. He insists that the applicant's conduct of accepting Zimbabwe dollars as part-payment for the debt, amounts to a waiver of the rights it may have had at the time. The applicant, he states, cannot revisit such rights which it explicitly waived. He moves me to dismiss the application with costs which are at attorney and client scale.

The application which is fraught with material disputes of fact cannot succeed. Hebstein and Van Winsen define the concept which relates to material disputes of fact. The learned authors state in *The Civil Practice of the High Court of South Africa, Volume 1*. 5th edition, p 296 that:

> "….the respondent denies material allegations made by the deponent on the applicant's behalf and produces positive evidence to the contrary".

A concise definition of the concept appears in the *dictum* which the court was pleased to pronounce in *Supa Plant Investments (Pvt) Ltd* v *Edgar Chidavaenzi*, HH 92/2009. It stated in the same that:

> "A material dispute of fact arises when such material facts put by the applicant are disputed and traversed by the respondent in such a manner as to leave the court with no ready answer to the dispute between the parties in the absence of further evidence".

The net effect of the views of the learned authors as read with the case authority *of Supa Plant* (*supra*) is that the dispute of fact which exercises the mind of the court at any given point in time that it is hearing a matter must be a real, and not an imaginary or illusory, dispute. It is for the mentioned reason, if for no other, that the court discourages judicial officers who have reason to entertain the view that the matter which is before them contains material disputes of fact from taking an over-fastidious approach but a robust and common-sense one subject to the conviction on their part that there is no real possibility of any resolution doing an injustice to the other party.

The law places a heavy *onus* upon an applicant who seeks relief in motion proceedings without the calling of evidence where, as *in casu*, there is a *bona fide* and not merely an illusory dispute of fact: (see *Zimbabwe Bruded Fireglass (Pvt) Ltd* v *Peech*, 1987 (2) ZLR, 338 (S) at 339 C-D).

In dealing with the subject which is under consideration, the court put into place some guidelines which assist it to determine the existence or otherwise of material disputes of facts. It, for instance, stated in *da Mata* v *Otto N.O*, 1972 (3) SA 858 (A) at 882 F-H that the crucial question is whether there is a real dispute of fact which requires determination in order to decide whether the relief claimed should be granted or not. If such a dispute does arise, it is ordinarily undesirable to settle the issue solely on probabilities which are disclosed in contradictory affidavits in disregard of additional advantages of *viva voce* evidence. As the court aptly stated in *Room Hire Co. (Pvt) Ltd* v *Jeppe Street Mansions (Pvt) Ltd*, 1949 (3) SA 1155 (T) the respondent's affidavits must, at least, disclose that there are material issues in which there is a *bona fide* dispute of fact capable of being properly decided after *viva voce* evidence has been heard.

Applying the above-stated principles of the concept to the circumstances of the present case, it goes without saying that the case which the parties placed before me cannot be resolved on the papers which are filed of record. Counsel for the applicant, for instance, made every effort to convince me, as she walked me through a set of CD1 forms which are filed of record, that the debt which was/is due to the applicant from the respondent is a foreign, and not a local, one. She submitted that the same was/is payable to the applicant in United States dollars and not in the local currency.

Counsel for the respondent, on the other hand, states to the contrary. He insists that the debt is not a foreign, but a local, one. It is, according to him, payable in Zimbabwe dollars. He, in the mentioned regard, places reliance on CD1 forms which appear at pp 16 and 28 of the record as read with the sum of ZWL5876.38 which the applicant realized from the sale in execution of the respondent's goods.

Both sides of the legal divide filed documentary evidence which supports their respective positions on the matter. The finding that there are material disputes of fact in the case is therefore not a far-fetched matter. The colourless figure which appears in para 2 of HC 10306/18, Annexure D p 34 of the record, adds more confusion to the case than resolves the same. The dollar sign which is prefixed to the figure of 47 593.17 does not tell if these are United States, or Zimbabwe, dollars. That fact is left to conjecture. This leaves the applicant to argue that the dollar sign relates to United States dollars and the respondent to insist that the same relates to Zimbabwe dollars. It is therefore a mis-statement for the one or the other or both of the parties to suggest that there are no material

dispute of fact in the case. The argument of the parties becomes more formidable than otherwise when the following factors are taken account of:

1. The birth of Statutory Instrument 33 of 2019 which did away with payment of debts in United States dollars save in certain exceptional circumstances which are provided for in s 44 of the Reserve Bank of Zimbabwe Act.
2. The fact that the debt came into existence before the effective date of 22 February, 2019 as read with
3. The conduct of the applicant which accepted part –payment of the debt in Zimbabwe dollars giving the impression that it waived its right to insist on being paid in United States dollars.

Because the debt which is the subject of this application preceded the birth of Statutory Instrument 33 of 2019, the respondent may not be out of line when he places reliance on section 4(1) (d) of Statutory Instrument 33 of 2019 which states that:

> "for accounting and other purpose, 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".

Some CD1 Forms which the applicant attached to its application do, in some way or other, support the view which the respondent holds of the case. Reference is made in the mentioned regard to CD1 Forms which appear at p 16 and the one which appears at p 28 of the record. These quote the amount to be received in both United States dollars as well as in Zimbabwe dollars at the rate of 1 USD: 1 ZWL dollar. Such circumstances as these are matters of evidence which leave the court which is dealing with the case of the parties without a ready answer in the absence of additional *viva voce* evidence being adduced.

The applicant does not dispute that it received ZWLs 5876.38 from the respondent following the writ of execution from which the sum was realized. It, in fact, confirms the stated matter in para 14 of its founding affidavit. It states, in the same, as follows:

> "14. A writ of execution was issued and ZWL $ 5876.38 was realized. Applicant proceeded to lodge Summons for Civil imprisonment under Case No. HC 6686/18 <u>in a bid to recover the remaining amount.</u>"

The applicant does not state that its aim and object were to recover the whole sum of USD 47 493.17 when it lodged the Summons for Civil Imprisonment. It states, in clear and categorical

terms, that it filed the same with a view to recovering the remaining sum of money. By its statement therefore, it is taken to have waived its rights to insist that the remaining sum be paid in United States dollars when it accepted part of the payment of the debt in Zimbabwe dollars. It cannot, in the circumstances of this case, be allowed to approbate and reprobate as it appears to be doing. No person is allowed to take two positions which are inconsistent with one another. No one, in short, is allowed to blow both hot and cold: *Nare* v *Deas*, 1912 AD 242 at 255.

The Supreme Court discussed the principle of waiver which the respondent is insisting upon in *Chidziva & Ors* v *Zimbabwe & Steel Co. Ltd*, 1997 (2) ZLR 368 (SC) wherein it stated that:

> "when a person entitled to a right knows that it is being infringed, and by his acquiescence leads the person infringing it to think that he has abandoned it, then he would under certain circumstances be debarred from asserting it".

The remarks of DUMBUTSHENA CJ makes further clarification of the principle of waiver. The learned Chief Justice stated in *Barclays Bank of Zimbabwe Ltd* v *Binga Products (Pvt) Ltd*, 1985 (3) SA 1041 at 1049 B-E that:

> "The principle of waiver is simply this, if one party, by his conduct, leads another to believe that the strict rights arising under the contract will not be insisted upon, intending that the other should act on that belief, and he does act on it, then the first party will not afterwards be allowed to insist on the strict legal rights when it would be inequitable for him to do so….".

The above-mentioned case authorities find precedent in the celebrated case of Smith v Hughes, (1871) LR 6 QB 597 in which Lord Blackburn had the occasion to remark in the following succinct words on the subject which is under consideration:

> "If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the party's terms".

The respondent insists, in my view correctly, that the applicant's acceptance of ZWL$5876.38 gave to him the distinct impression that the applicant waived its rights to be paid in United States dollars. His belief cannot be said to be a far-fetched matter in the circumstances

of the present case. This is *a fortiori* so when regard is had to the fact that the applicant decided not to comment on this factual position which had been put to it.

Equally cogent on the other side of the divide are some of the CD1 forms which the applicant attached in support of its application. Reference is made in the mentioned regard to CD1 forms which appear at pp 8, 9, 10, 11, 12, 13 and 14 all of which are quoted in United States dollars. The mentioned CD1 forms as read with those which are at pp 16 and 28 together with the applicant's acceptance of part-payment of the debt in the sum of ZWL$5876.38 present to me a set of contradictory pieces of evidence which cannot be resolved on the papers. *Viva voce* evidence is imperative for the resolution of the parties' dispute.

I remain alive to the fact that the application is one for a declarator together with consequential relief. The application cannot be considered in isolation. It cannot stand in a vacuum. Production of evidence by the parties remains a *sine qua non* aspect of its resolution. Because the evidence which the parties filed of record leaves me with no ready answer, I remain with no option but to adopt one of the three options which the Supreme Court was pleased to direct me to adopt. It is, in my view, in the interests of real and substantial justice that I refer the present case to trial. I accordingly, order as follows;

a) The applicant's founding and answering affidavits shall serve as its summons.
b) The applicant shall file its declaration within 10 working days of its receipt of this order and serve the same upon the respondent within a further 10 working days of its filing of the same;
c) The respondent's notice of opposition shall serve as his notice of appearance to defend;
d) He shall file his plea and serve the same upon the applicant within 10 working days of his receipt of the applicant's declaration- and thereafter
e) The case shall proceed in terms of the High Court Rules, 2021
f) Costs shall be in the cause.

Honey & Blanckenberg, applicant's legal practitioners
Chimwamurombe Legal Practice, respondent's legal practitioners