BRIAN RODNEY BROM
Versus
VERDURE INVESTMENTS (PRIVATE) LIMITED
and
ICENTA INVESTMENTS (PRIVATE) LIMITED
and
DAVID CAPSOPOLOUS

HIGH COURT OF ZIMBABWE
MANZUNZU J
HARARE, 13 July 2022 & 31 January 2023

COURT APPLICATION

Adv T Zhuwarara, for the applicant
Adv D Tivadar, for the 1st to 3rd respondents

MANZUNZU J: The applicant seeks a declarator and consequential relief in the following terms:

"IT IS ORDERED THAT:

1. *It is hereby declared that the debts due to the applicant from the first and third respondents in terms of the loan agreements dated 29 January 2016 and 27 July 2016, together with all subsequent amendments, are payable in United States of America Dollars.*
2. *Consequently, first and third respondents be and are hereby ordered to pay, jointly and severally liable, the one paying, the other to be absolved, to applicant the sums of USD1, 070, 534.78 and USD876, 534.78 together with compound interest calculated at rates of 3% and 5% per month respectively, running from 13 December 2019 to date of full and final payment.*
3. *An immovable property known as a certain piece of land situate in the district of Salisbury, called the remaining extent of lot 183 Highlands Estate of Welmoed, measuring 6 877 square meters, held under deed of transfer 5465/2010 dated 24th November 2010 be and is hereby held specially executable.*

4. *First and third respondents be and are hereby ordered to pay, jointly and severally liable, the one paying, the other to be absolved, collection commission in terms of the Law Society of Zimbabwe By-Laws.*
5. *First and third respondents be and are hereby ordered to pay, jointly and severally liable, the one paying, the other to be absolved, costs of suit on an attorney and client scale."*

THE BACKGROUND FACTS

On 29 January 2016 the applicant signed a loan agreement with the 1st respondent to the tune of USD600,000.00 repayable in 36 months on agreed interest rates. The money was deposited into 2nd respondent's account with CABS. The 3rd respondent signed as a surety and co-principal debtor. On 27 July 2016 the applicant extended another loan facility to the 1st respondent to the tune of USD300 000.00 payable in 6 months. The loans were paid through transfer at the same bank from the applicant' s non-resident account.

As security for the two loans, two mortgage bonds were registered in favour of the applicant over a certain piece of land situated in the district of Salisbury called the remaining extent of lot 183 Highlands Estate of Welmoed, measuring 6 877 square meters (the property).

On 27 July 2016 the parties signed an addendum to the agreements in which they agreed that repayment of the loans and interest shall be in United States Dollars regardless of any change in currency in Zimbabwe.

The loans were not serviced within the agreed period to the extent that on the 13 December 2019 the 1st and 3rd respondents (the respondents) acknowledged the outstanding balances of the two loans as at 22 February 2019 to be USD1 070 084.84 and USD876 534.78 respectively. The respondents then requested CABS, an authorized dealer, to consider the registration of the two loans as a legacy debt with the Reserve Bank of Zimbabwe. This, the respondents said was to assist the applicant who wanted the debts to be registered as such.

The fact that the two loans were advanced to the respondents is not in dispute. The dispute lies with whether the balance of the loan should be paid in US dollars or RTGS. The applicant insists on United States dollars while the respondents argue it must be in RTGS. Changes in the monetary policy in Zimbabwe has brought about this dispute.

THE LAW

What does the law say on the payment of debts such as the one the respondents are liable to pay?

Section 4 (1) (d) of the Presidential Powers (Temporary Measures) (Amendment of Reserve Bank of Zimbabwe Act & Issue of Real Time Gross Settlement Electronic Dollars (RTGS Dollars) Regulations, 2019 (S.I. 33/19) provides that;

"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")

(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;" (own emphasis).

The effective date referred to in section 4 supra is the 22nd February 2019.

In *Zambezi Gas Zimbabwe (Private) Limited* v *N R Barber (Private) Limited & Another SC 3/20* the court held that;

"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… It is the assessment and expression of the value of assets and liabilities in United States dollars that matters…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*** *[*Chapter 22:15*] ("the principal Act").*

The respondents argued that by virtue of SI 33 of 2019 the judgment debt automatically became denominated in RTGS dollars on 22 February 2019 as the same does not fall within the exemption provided for in section 44 C (2) of the Reserve Bank of Zimbabwe Act Chapter 22:15. Section 44 C (2) (b) provides that;

"(2) The issuance of any electronic currency shall not affect or apply in respect of-

(a) ……

(b) foreign loans and obligations denominated in any foreign currency, which shall continue to be payable in such foreign currency."

It is correct to say the mandatory conversion from United States dollar to RTGS at the rate of 1:1 apply to domestic transactions and not foreign loans and foreign obligations. What

then is a foreign loan or foreign obligation? In *Breastplate Service (Private) Limited* v *Cabria Africa PLC, SC 66/20* the Supreme Court remarked that;

"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… 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." (emphasis is mine).

Mr Zhuwarara for the applicant argued that foreign loans are unaffected by the parity of 1: 1 rate. Indeed, that is the correct legal position. The question is, is the respondents' liability a foreign obligation to enjoy the treasure of section 44 C (2) (b) of the Reserve Bank Act. Mr Zhuwarara said the factual circumstances of the parties and the material substance of the transaction falls within the term "foreign loans and obligations denominated in foreign currency." One may want to look at the reasons why this is so. It is argued because of the following factors:

a) The United States dollar is the currency agreed to by the parties.
b) There is an addendum to the agreement dated 27 July 2016 which says repayments shall be in United States dollars.
c) On 23 December 2019 the respondents admitted that the balance of the loan as at 22 February 2019 was in US dollar.
d) An acknowledgement of debt on 23 December 2019 creates a fresh obligation.
e) The loans were paid from a non-resident account held with CABS
f) There was admission by respondents to CABS that the amounts they owed were in respect of an off shore loan.
g) There is correspondence from the Reserve Bank to CABS on the loan regularization.

In the founding affidavit the applicant does not reveal the source of the funds apart from saying the payment was from his non-resident account held with CABS. The only time he says the funds were from an off shore source is in the answering affidavit. If anything, the applicant pins down the respondents on their admission of the source of funds and their participation in the registration of a legacy debt.

However, the respondents deny making any application for a legacy debt. The participation of the 2nd respondent is said to be of no consequence because it did not receive

any loan from the applicant. In any event it was impossible to meet any of the conditions set by Reserve bank.

Mr Tivadar correctly stated the position of the law brought about by the Finance (No 2) Act (which position is not disputed by Mr Zhuwarara) in that:

a) All USD amounts that applicant and respondents held in their respective Zimbabwean account used in the loan agreements converted to RTGS dollar
b) 1st respondent's obligation to pay the applicant converted into RTGS at 1:1 unless it is shown that it fell within the statutory exception per section 44C
c) Currency conversion is mandatory.

It must be noted that at no point in the founding affidavit does the applicant say the loan agreements constituted a "foreign loan". I agree with Mr Tivadar that the point was improperly taken in the heads of argument. In fact, applicant's written and oral argument was a departure from the basis of the application which was that; the loans were in USD and were acknowledged as such and the court must exercise a discretion in favour of the applicant. The truth is that it is not a question of exercising a discretion but rather compliance with the law. In other words, once it is established that one is a foreign loan then there is no discretion on the part of the court.

The applicant did not say he has to pay a foreign loan. The circumstances of the case are that these are transactions within Zimbabwe. Repayment of the loan was through applicant's Zimbabwean account with CABS. Statutory changes are mandatory and cannot be overridden by parties prospectively contracting outside the law. The acknowledgement of the debt on 23 December 2019 did not create any new obligation.

An application succeeds or fails on its founding affidavit. The applicant failed to take the court into his confidence by establishing the origins of his funds and whether he has any off shore obligations. The applicant has not made a case for the order he seeks and the application is bound to fail.

DISPOSITION:

It is ordered that:

The application be and is hereby dismissed with costs.

Mambosasa, applicant's legal practitioners
Whatman and Stewart, 1st, 2nd and 3rd respondents' legal practitioners