SABINA ALTAF AHMED
versus
JOINA DEVELOPMENT COMPANY (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE: 21 September 2023 & 26 July 2024

Special Case in Terms of Rule 52 of the High Court Rules, 2021

Mr *G Giya*, for the plaintiff
Mr *T Chagonda,* for the defendant

MUSITHU J**:** This matter started as an action but metamorphosed into a special case in terms of r 52 of the High Court Rules, 2021, at the Pre-Trial Conference stage. The parties agreed to prepare a statement of agreed facts and referred the question of law that arose to the court for determination. I set out hereunder the factual background as discerned from the papers.

Background

Sometime in February 2012, the plaintiff and the defendant entered into a written agreement of sale in terms of which the defendant sold to the plaintiff an undivided share representing shop number F12, which was to be constructed on a property known as Subdivision B and C of Subdivision C of Lot 15 Block C of Avondale, Harare. The negotiations involved an offer of a smaller shop valued at US$35 000 and shares with a value of US$35 000. Both proposals were apparently rejected by the purchaser.

According to the plaintiff, the defendant breached the agreement in that it failed to complete the construction of the shop within the agreed timeframes. As a result of the breach, the plaintiff exercised her right to cancel the agreement of sale and the defendant is alleged to have acceded to the cancellation. Thereafter, on 11 March 2015, the defendant made a written undertaking to reimburse the plaintiff the sum of US$35 000, which was made up of US$30 500 being restitution of the sum paid by the plaintiff towards the purchase price and US$4 500 being accrued interest from the date of the contract to the date of cancellation.

By letter dated 25 July 2019, the defendant confirmed and acknowledged its indebtedness to the plaintiff in the sum of US$35 000. Despite making that undertaking, the

defendant failed to pay the said amount prompting the plaintiff to institute a summons action out of this court.

The agreed issue for determination as captured by the parties is whether the defendant's letter of 25 July 2019 constitutes an acknowledgment of debt to pay the sum of US$35 000, or whether by operation of law the defendant is only liable to pay ZWL 35 000.

The Submissions

Mr *Giya* for the applicant submitted that it was not in dispute that the defendant acknowledged the debt by signing an acknowledgment of debt. That acknowledgment of debt created a separate cause of action herein. Counsel also submitted that it was not in dispute that the debt arose before 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, (hereinafter referred to as "SI 33 of 2019" or the instrument). Any debt that arose before the effective date of SI 33 of 2019 was payable in local currency.

Mr *Giya* further submitted that although the acknowledgment of debt which was only signed after the effective date of SI 33 of 2019, that acknowledgment had the effect of novating the prior arrangements that the parties had. Counsel further submitted that the parties' conduct showed that the parties had reached a compromise on the issue.

In response, Mr *Chagonda* for the defendant submitted that the plaintiff's claim was not solely based on the acknowledgment of debt. The claim had a historical context, and the acknowledgment of debt was arrived at after a process of negotiations. It was not in dispute that the defendant owed the plaintiff some money because of the aborted sale. However, the United States dollar obligation was dischargeable in local currency by operation of law.

Mr *Chagonda* submitted that the alleged compromise agreement did not exist because there was no dispute concerning the amount owed to the plaintiff. Further, for a compromise to exist, there was need for an offer and acceptance. The plaintiff had not accepted the offer communicated through the letter of 25 July 2019. The offer was to discharge the plaintiff's liability in the United States dollars notwithstanding the fact that what was owed was RTGS 35 000 by operation of the law. Mr *Chagonda* further submitted that SI 142 of 2019 (Reserve Bank of Zimbabwe (Legal Tender) Regulations, 2019) (SI 142 of 2019), entrenched the local currency as the sole legal tender. It was further submitted that the SI 142 of 2019

never envisaged the discharge of United States dollar obligations at the prevailing interbank rate because all foreign currency obligations were transformed into local currency obligations.

In his brief response, Mr *Giya* submitted that this court had already rejected the defendant's argument that the plaintiff's claim did not arise from the acknowledgment of debt, when it dismissed the defendant's exception to the summons. Counsel further submitted that while SI 142 of 2019 entrenched the local currency as the sole legal tender, it did not disallow parties to enter into United States dollar contracts in terms of which payment would be made in local currency at the prevailing official rate. In its payment plan, the defendant had acknowledged its United States dollar obligations and offered to pay the debt in the local currency equivalent.

THE ANALYSIS

Statutory Instrument 33 of 2019 was gazetted on 22 February 2019, and its provisions were largely incorporated into the Finance Act (No.2) Act, No.7 of 2019 (the Finance Act). The new currency that the instrument introduced ran parallel with other currencies that were accepted as legal tender, under what was known then as the multi-currency basket.

Statutory Instrument 142 of 2019 was gazetted on 24 June 2019. This instrument abolished the multi currencies and declared the Zimbabwe dollar to be the sole legal tender in Zimbabwe. Statutory Instrument 142 of 2019 was also incorporated into the Finance Act, which was gazetted on 21 August 2019. Sections 22 and 23 of the Finance Act are relevant to the resolution of the issue before the court. They provide 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) ……..; 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
>
> (3)…..
> (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."

Section 22(1)(d) of the Finance Act states 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 s 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.

The words *"assets and liabilities"* are not defined in the Finance Act or in SI 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*[1]. 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 SI 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." (Underlining for emphasis)

Further down in the same judgment the court went on to state that SI 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 stated 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…." (Underlining for emphasis).

[1] SC 3/20 at p 9

As noted, the dispute between the parties boils down to whether the plaintiff's claim should be determined in terms of s 22(1)(d) or (e) of the Finance Act. The plaintiff contends that its cause of action is founded on the defendant's letter of 25 July 2019. That letter was written some months after SI 33 of 2019 came into effect. Its claim had to be determined in terms of s 22(1)(e) of the Finance Act. In other words, while the acknowledgment of debt was in respect of the United States dollar obligation, it would have to be paid in local currency with any variance in the exchange rate being determined in terms of s 22(1)(e) of the Finance Act. The defendant on the other hand argued that the United States dollar debt had been transformed into a local currency debt and therefore fell to be determined in terms of s 22(1)(d) of the Finance Act.

The record of proceedings shows that following the cancellation of the agreement between the parties, on 11 March 2015, the defendant made a written undertaking to refund the plaintiff the sum of US$35 000. According to that letter, payment would only be made in stages as and when funds became available. That undertaking was followed up by yet another one of 30 April 2015. In the latest letter, a similar undertaking as the one before was also made. Payment would be made between September and December 2015 when the defendant received its monies from third parties. That undertaking was followed by yet another one of 28 December 2015. In that letter another undertaking was made to extinguish the debt by March 2016.

Between December 2016 and January 2017, it appears the parties had an arrangement in terms of which an entity called FMI Holdings (Pvt) Ltd assumed the defendant's liability to the plaintiff. This is because on 17 January 2017, FMI Holdings wrote to the plaintiff confirming a meeting held between the parties in early December 2016 where the FMI Holdings undertook to pay the sum of US$35 000 by 28 February 2017. It also agreed to pay interest of 15 percent per annum on the said sum by the same date. That undertaking was not complied with prompting the plaintiff to write to FMI Holdings on 19 June 2019. In that letter she made a final demand for payment of US$48 601.86. That amount was made up of the capital sum of US$35 000 and interest at the rate of 15 percent from February 2017 to June 2019.

Following the letter of 19 June 2019, the record of proceedings showed that several discussions ensued between the parties culminating in the letter of 25 July 2019. Part of that

letter which was signed by one Darlington Masenda in his capacity as director of the defendant reads as follows:

> "**RE: REIMBURSEMENT OF PAYMENT MADE FOR A SHOP AT AVONDALE RIVERSIDE WALK**
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> Following our numerous discussions with you, we would like to confirm our desire to repay the money we owe you. Joina Development Company is no longer operational, which is why you were communicating with FMI Holdings and in particular Tendai Mavera. We regret that this process did not yield any results, but we have decided to resolve it directly. Firstly we would like to confirm that we owe you USD$30 500, which is the Principal plus interest amounting to USD$4, 500, thus making a total of USD$35 000.
>
> Our proposal as outlined in my conversation with you is that, we would like to sell a shop and pay you from the proceeds. We have some people wishing to buy the shop on offer, but we realise it may take some time. We are therefore offering to begin paying you at the end of August, 2019. Our payment plan would be as follows:
> ……." (Underlining for emphasis)

The payment plan was still not complied with prompting the plaintiff to issue summons against the defendant on 4 November 2019. The defendant responded to the claim by filing a special plea of prescription combined with an exception. The exception taken was that the summons and declaration were vague and embarrassing in that they lacked particularity regarding the claim and whether it was founded on a breach of the written agreement or on the acknowledgment of debt.

The special plea and the exception were dismissed by MAFUSIRE J in HH 242/20. In disposing of the special plea and the exception, the court determined that the plaintiff's *causa* was based on subsequent undertakings made by the defendant following the breach of the original agreement. The court also determined that there was nothing in the provisions of the law cited above that precluded parties from stating their claims in the currency of their agreement, or presenting their claim in a currency that properly represented it.

This matter is replete with numerous instances of unfulfilled promises that were made by the defendant to the plaintiff, which culminated in the letter of 25 July 2019. What is also clear from the undertakings is that there was never a dispute that the defendant owed the plaintiff the said amount. In fact, in almost all its communication with the plaintiff, the defendant apologised for not living up to its undertaking. That takes the parties arrangement outside the ambit of a compromise. A compromise was defined in *Karson* v *Minister of Public Works* 1996 (1) SA 887 (E) at 893F-H (*per* Leach J) as follows:

> "It is well settled that the agreement of compromise, also known as *transactio,* is an agreement between the parties to an obligation, the terms of which are in dispute, or between the parties to a lawsuit, the issue of which is uncertain, settling the matter in dispute, each party receding from his previous position and conceding something, either by diminishing his claim or increasing his liability … It is thus the very essence of a compromise that the parties thereto, by mutual assent, agree to the settlement of previously disputed or uncertain obligations …"

A compromise entails the settlement of disputed obligations by agreement. The parties must disagree on some issue but end up re-evaluating their positions in the hope of finding middle ground[2]. I would agree with counsel for the defendant that a compromise would not have arisen in the circumstances of the present case because as already noted, the parties' obligations were never in dispute. What is clear to me is that each of the undertakings made by the defendant was replaced by another in which new commitments were made to pay off the debt within a certain period.

In her heads of argument, the plaintiff submitted that the latest acknowledgment of debt had the effect of novating the original agreement that was not fulfilled. It therefore did not matter that the original debt arose before the effective date of SI 33 of 2019. I find that submission persuasive. In *Chiswa* v *Car Rental Services (Private) Limited & Anor*[3], the court made the following pertinent remarks:

> "In *Mupotola* v *Southern African Development Community* SC 7/06 ZIYAMBI JA made the following pertinent remarks regarding novation on p 5 of the judgment:
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> 'Novation means replacing an existing obligation by a new one, the existing obligation being thereby discharged. See The Law of Contract in South Africa Third Ed by R.H Christie at p498. The above definition presupposes that both the existing obligation and the new one arise out of valid contracts. "When parties novate they intend to replace a valid contract by another valid contract." See Swadif (Pvt) Ltd v Dyke 1978(1) SA 928 (A) at 940 quoted by Christie in the Law of Contract in South Africa, *supra*.
>
> The starting point, therefore, in determining this issue is to consider whether the first agreement constituted a valid contract.
>
> This being so, the first agreement was a non-event and there could be no novation of a contract which did not exist…'" (Own emphasis)

In the case of *Tauber* v *Von Abo* 1984 (4) SA 482 (ECD) at 485C, the court also made the following insightful observations:

> "Novation can be described as the replacing of an existing obligation by a new one, the existing obligation being discharged by the new obligation. Cf. Caney, The *Law of Novation…* Wessels The Law of Contract in South Africa 2nd ed vol 2 paras 2369, 2375, 2379 and 2395; De Wet and Yeats 4th ed at 239."

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[2] See *Georgias and Anor v Standard Chartered Bank* SC 183/98
[3] SC 74/20 at p 8

It is not in dispute that the debt arose before the effective date of SI 33 of 2019. However, the undertaking made in the letter of 25 July 2019, effectively superseded the earlier undertakings that was made through the letter of 17 January 2017. As highlighted earlier in the judgment, the first undertaking was made by way of a letter of 11 March 2015. It was followed by another of 30 April 2015, which was followed by the one on 17 January 2017. The undertaking of 25 July 2019 cannot be vitiated merely on the basis that the debt had arisen prior to the promulgation of SI 33 of 2019. This is because the undertakings made prior to the promulgation of SI 33 of 2019 were effectively discharged by the undertaking made after that law came into force.

Once that finding is made, it follows that the defendant's indebtedness to the plaintiff must be discharged in terms of s 22(1)(e) of the Finance Act. This is because the obligation to pay the debt arose after the effective date of SI 33 of 2019, following the undertaking made through the letter of 25 July 2019. The plaintiff is therefore entitled to the relief that she seeks.

As regards costs of suit, in its original summons claim, the plaintiff had sought these on the attorney and client scale if her claim was successful. The claim for costs on the higher scale was not further motivated during oral submissions. I find no basis on which to grant costs on the punitive scale.

DISPOSITION

Resultantly it is ordered that:

1. The defendant shall pay to the plaintiff US$35 000 (thirty-five thousand United States dollars) or the Zimbabwean dollar equivalent at the prevailing interbank rate on the date of payment.
2. Interest shall be paid on the sum of US$35 000 or on the Zimbabwean dollar equivalent at the rate of 5 percent per annum from 25 July 2019 to the date of payment in full.
3. The defendant shall pay the plaintiff's costs of suit.

Machingura Legal Practitioners, plaintiff's legal practitioners
Atherstone and Cook, defendant's legal practitioners