REPORTABLE (150)

ZIMBABWE LEAF TOBACCO (PRIVATE) LIMITED
v
(1) PATRICIA VENGESAYI (2) SHERIFF OF ZIMBABWE N.O

SUPREME COURT OF ZIMBABWE
UCHENA JA, KUDYA JA, CHATUKUTA JA
HARARE, 5 JULY 2021 & 25 NOVEMBER 2021

K Kachambwa, for the appellant,

N Mugandiwa, for the first respondent

CHATUKUTA JA: This is an appeal against the whole judgment of the High Court wherein it made an order confirming that the first respondent had fully settled her judgment debt denominated in United States Dollars to the appellant by paying the balance in RTGS dollars.

BACKGROUND FACTS

In August 2014, the appellant and the first respondent entered into a Tobacco Grower Contract Agreement to finance the first respondent's tobacco farming for the 2014-2015 season. The appellant obtained funding from an offshore source, Standard Finance, Isle of Man Limited after having received authority to do so from the Reserve Bank of Zimbabwe. It is from these funds that it availed crop finance to the first respondent.

The first respondent defaulted on her obligations. In 2015 the appellant issued summons against the first respondent in the High Court under HC 9809/15 demanding payment

of an amount of US$103 515.12 with interest thereon at the rate of 9% per annum from 31 August 2014 and costs of suit at an attorney-client scale. The first respondent did not defend the claim. The parties however entered into a Deed of Settlement on 24 February 2016. The first respondent undertook to pay the amount by way of instalments with the final instalment payable by 1 August 2018. She however defaulted yet again. Thereafter the appellant filed a chamber application for default judgment based on the Deed of Settlement.

On 17 September 2018, the appellant obtained judgment against the first respondent for repayment of the sum of US $98,515.12 plus interest. Between September 2018 and February 2019, the first respondent paid a total of US$60 000.00 towards the acquittal of the judgment debt. A Writ of execution was issued on 31 January 2019. The first respondent's property was placed under judicial attachment on 28 February 2019. On 17 June 2019, the first respondent paid a sum of RTGS$80 118.09. By letter dated 30 July 2019, the appellant acknowledged the payment and indicated to the first respondent that the amount paid was not adequate to extinguish the debt. It stated that since the payment was in RTGS dollars, it only represented a sum of $12 919.56 based on the then prevailing exchange rate of 1:6.2. The first respondent, by letter dated 7 August 2019, responded that the payment in RTGS dollars was in compliance with s 22 of the Presidential Powers (Temporary Measures)(Amendment of Reserve Bank of Zimbabwe Act and Issue of Real Time Gross Settlement Electronic Dollars) Regulations, 2019 (S.I 33 of 2019)which provided for the conversion of obligations and liabilities denominated in United States dollars into RTGS dollars at a rate of 1:1. It stated that the judgment debt had been extinguished. The appellant indicated to the first respondent that it was proceeding with execution to recover the balance.

The first respondent filed an urgent chamber application in the High Court seeking an order interdicting the second respondent from removing the property and disposing the same in execution. The application was held not to be urgent. The matter thereafter proceeded on the ordinary roll with the first respondent seeking a declaratur to the effect that she had fully discharged the judgment debt under HC 9809/15.

PROCEEDINGS IN THE COURT *A QUO*

Mr *Mugandiwa*, for the first respondent, whilst conceding that the loan advanced to the first respondent and the judgment debt were denominated in United States dollars, submitted that there was an automatic conversion of the judgment debt from United States dollars to RTGS dollars by operation of law with the promulgation of SI 33 of 2019. He argued that the first respondent had discharged the judgment debt in full when it paid the appellant in RTGS dollars.

Mr *Kachambwa*, for the appellant, argued that the loan advanced to the first respondent was a foreign loan or obligation which was ring fenced in terms of s 4 (1) (d) of S.I 33 of 2019. He further submitted that the judgment debt was therefore exempted from the provisions of SI 33 of 2019 and would not be converted at a rate of 1:1 with the RTGS dollar. He further submitted that the loan it advanced to the first respondent fell under s 44 (C) (2) of the Reserve Bank Act [*Chapter 22:15*].

Mr *Kachambwa* further argued that the Exchange Control (Tobacco Finance) Order, 2004 (Statutory Instrument 61 of 2004) ("the Order") and the Exchange Control Circular 7 of 2019 to Authorised Dealers (the Circular) issued by the Reserve Bank of Zimbabwe on 29 July 2019 were relevant to the determination of whether or not the loan and consequently the

judgment debt constituted a foreign obligation. He also submitted that the first respondent had acknowledged by letters addressed to it post the promulgation of SI 33 of 2019 that the loan was payable in United States dollars.

In reply, Mr *Mugandiwa* submitted that the source of the funds advanced to the first respondent, the Order and the Circular were irrelevant to the determination of the dispute between the parties. He submitted that the first respondent was not privy to the agreement between the appellant and the offshore source. He submitted that the first respondent was therefore not obliged to repay the loan in foreign currency.

FINDINGS OF THE COURT *A QUO*

The court *a quo* found that the issue for determination was the impact of S.I 33/19 on the judgement debt in question. The court *a quo* held that the loan in issue involved two local persons and therefore was not a foreign loan or foreign obligation. It further held that the judgment debt in issue was not a foreign obligation as the first respondent was not privy to the relationship between the appellant and the source from which the appellant obtained the money.

It further held that the payment by the first respondent in RTGS dollars was in accordance with the decision in *Zambezi Gas (Pvt) Ltd v N.R Barber (Pvt) Ltd & Anor* SC 3/20. It found that it was irrelevant that the appellant had obtained the money advanced to the first respondent from a foreign source. It further held that the first respondent had extinguished the judgment debt.

PROCEEDINGS BEFORE THIS COURT

Aggrieved by the decision of the court *a quo*, the appellant noted the present appeal on the following grounds:

1. The court *a quo* erred at law in that it failed to determine two points that were raised and argued in relation to the effect of:
   1.1) The Exchange Control (Tobacco Finance) Order, 2004 on the obligation of the first Respondent to pay back the loan in foreign currency post 22 February 2019 and
   1.2) The first respondent's conduct post 22 February 2019 in her acceptance to repay in United States Dollars, her partial payment in United States Dollars and further undertaking to pay in United States Dollars.
2. The court *a quo* erred at law in failing to find that the effect of the Exchange Control (Tobacco Finance), Order 2004 was to allow the collection in foreign currency by the appellant of the repayment of loans advanced to tobacco farmers, which loans were funded from offshore funding at a time when the Zimbabwean Dollar was the sole legal tender.
3. The court *a quo* erred at law and misdirected itself on the facts in failing to determine that post 22 February 2019, the first respondent accepted her obligation to pay the loan in United States Dollars and tendered further payment in United States Dollars.
4. The court *a quo* erred at law in failing to determine that the first respondent's obligation to repay the financing it received for tobacco farming was part of offshore funding which foreign funding was exempt from being deemed to be values in RTGS dollars at a rate of one to one to the United States dollar and continued to be payable in such foreign currency in terms of s 44C(2)(b) of the Reserve Bank Act [*Chapter 22:15*].

The appellant sought the following relief:

"1. That the instant appeal succeeds with costs.
2. That the order of the court *a quo* be set aside and the matter be remitted to the High Court for determination before a different Judge on the two points that were raised and argued but not determined by the court *a quo* relating to the effect of the Exchange (Control Finance) Order, 2004 and the effect of the first

respondent's conduct post 22 February 2019 on her obligation to repay the loan in United States Dollars.

In the Alternative:

That the order of the Court *a quo* be set aside and substituted with the following: "It is ordered that:

a. The application is dismissed with costs."

ISSUES FOR DETERMINATION

The following issues arise from the grounds of appeal:

1. whether the court *a quo* misdirected itself when it failed to determine all the issues placed before it; and
2. whether the obligations and liabilities of the first respondent to the appellant are foreign obligations which fall under section 44(C) (2) of the Reserve Bank of Zimbabwe Act [*Chapter 22:15*].

APPELLANT'S SUBMISSIONS

Mr *Kachambwa,* submitted that the parties made submissions before the court *a quo* on the relevance or otherwise of the Order and the Circular to the determination of whether or not the loan was repayable in foreign currency. He submitted that the court *a quo* did not refer to the submissions in its determination. It was argued that the failure to determine the issue was a gross misdirection warranting vacation of the judgment *a quo*. He submitted that instead of remitting the matter to the court *a quo* the Court should deal with the issues not determined as all the material necessary to determine the question was extensively ventilated before the court *a quo*. He submitted that, this Court must consider the underlying source of funds to determine whether or not the funding was offshore.

He further argued that since the funding that was availed to the first respondent was from an offshore loan the judgment debt falls under s 44C (2) of the Reserve Bank Act [*Chapter 22:15*]. He submitted that the contract between the parties is not a mere private arrangement but is governed by law and the parties involved are bound to follow the law when entering such agreements.

Mr *Kachambwa* submitted that the Order was relevant as it sets out the obligations of tobacco merchants who use offshore funding to fund the growing of tobacco under contract and to purchase auction and contract tobacco. He submitted that because of this requirement, the merchants were expected to repay the offshore funds in foreign currency. He further submitted that repayment of the loans advanced to the first respondent from an offshore source was therefore expected to be in foreign currency to enable the appellant to also meet its obligations to the source of the offshore funds.

With regards the Circular, he submitted that the Circular was predicated on the need to clarify that tobacco merchants are entitled to repayments of loans they will have advanced in foreign currency in the denominated currency. He further submitted that the Circular was intended to also clarify the extent to which the tobacco industry was excluded from the ambit of the 1:1 conversion rate.

THE FIRST RESPONDENT'S SUBMISSIONS

Mr *Mugandiwa*, for the respondent, submitted that the Circular which was issued in July 2019 had no bearing on the Finance Act or SI 33 of 2019 as it did not have retrospective effect. He further submitted that both the Order and the Circular could not be given effect even if held to be applicable as they are in direct conflict with the law requiring

payment in RTGS dollars of all obligations previously denominated in foreign currency. In relation to the argument that the first respondent agreed to pay the amount in foreign currency through letters, Mr *Mugandiwa* argued that the letters have no bearing on a position that stems from the law. He submitted that the judgment of the court *a quo* ought to be upheld and the appeal must be dismissed.

APPLICATION OF THE LAW TO THE FACTS

Whether the court *a quo* misdirected itself when it failed to determine all the issues placed before it.

It is trite that it is a misdirection by a court to fail to consider issues raised before it by the parties. In *Gwaradzimba No* v *CJ Petron & Co (Pty) Ltd* 2016 (1) ZLR 28 (S) GARWE JA (as he then was) remarked at p 32C that:

> "The position is also settled that where there is a dispute on some question of law or fact, there must be a judicial decision or determination on the issue in dispute. Indeed, the failure to resolve the dispute or give reasons for a determination is a misdirection, one that vitiates the order given at the end of the trial – *Charles Kazingizi v Revesai Dzinoruma* HH 106/2006; *Muchapondwa v Madake & Ors* 2006 (1) ZLR 196 D-G, 201 A (H); *GMB v Muchero* 2008 (1) ZLR 216, 221 C-D (S)."

See also *Halwick Investments* v *Nyamwanza* 2009 (2) ZLR 400 (S) at 404 C-E.

Notwithstanding extensive arguments by the parties on the applicability or otherwise of the Order and the Circular to the dispute before it and the relevance of acceptance by the first respondent to repay the judgment debt in United States Dollars post S.I. 33 of 2019, the court *a quo* proceeded to determine the application without any regard or reference whatsoever to those submissions. The court *a quo* therefore grossly misdirected itself. The judgment by the court *a quo* must be vacated.

The question which arises from the above finding that the judgment by the court *a quo* should be vacated is whether the matter should be remitted to the court *a quo* or whether this court can determine the matter afresh as requested by the appellant.

This court clarified the circumstances under which a matter can be remitted to a trial court in *Halwick Investments* v *Nyamwanza* (*supra*) GARWE JA (as he then was)stated at 406 F-407 B that:

> "There was a failure by the court *a quo* to determine an issue that had been properly raised by the appellant. The Court completely ignored the issue of waiver raised and proceeded to determine the matter on the basis of procedural impropriety. There was a failure by the court *a quo* to appreciate that the question of waiver could finally determine the issues between the parties, depending on the interpretation that would be given to the agreement reached between the two sides. The contents of the agreement are not in dispute. In these circumstances, I am satisfied that no purpose would be served by remitting this matter to the court *a quo* for it to place an interpretation on the contents of the agreement entered into between the two parties. Since the contents of the agreement are common cause, the only issue that arises is whether the facts establish waiver. It has never been suggested that the document was the result of duress, mistake or undue influence. I hold the view therefore that this Court can properly determine the issue without the need to remit the matter to the court *a quo*."

I am of the view that it serves no purpose to remit the matter to the court *a quo* for two reasons. Firstly, and most importantly, the main issue for determination raised by the other grounds of appeal has recently been aptly dealt with and resolved by this court in *Valentine Mushayakurara* v *Zimbabwe Leaf Tobacco Company (Pvt)* Ltd SC 118/21 (the *Mushayakurara* case). The law is now settled. No purpose would be served to remit the matter to the court *a quo* to determine issues that have already been pronounced on by this Court.

Secondly, the issue disregarded by the court *a quo* in its judgment was extensively argued on before the court *a quo* and this court by both parties. It is a narrow issue which relates to the interpretation of instruments that were not dealt with in the *Mushayakurara*

case. The consideration of the instruments in my view complements the findings of this court in the *Mushayakurara* case. This court can therefore properly determine the issues involved without the need to remit the matter to the court *a quo*.

Whether the obligations and liabilities of the first respondent to the appellant are foreign obligations which fall under section 44(C) (2) of the Reserve Bank Act [*Chapter 22:15*].

The status of tobacco contracts based on offshore funding was put to rest in the *Mushayakurara* case. In that case, this court was faced with the second issue that arises for determination in this appeal. Similar arguments to those made for both parties in this appeal were advanced in that case. The appellant in the present appeal was the respondent in the *Mushayakurara* case. The appellant had secured offshore financing. It entered into a tobacco grower contract with Mushayakurara and advanced the latter a loan from the offshore funds as working capital and for inputs. Mushayakurara defaulted in his repayments of the loan. The appellant issued summons for provisional sentence against Mushayakurara for a sum denominated in United States dollars. The latter did not defend the action but proceeded to enter into a deed of settlement with the appellant in terms of which he agreed to make payments denominated in United States dollars. He then tendered the initial instalment in RTGS dollars arguing that the loan was not denominated in United States dollars. The appellant refused to accept the tender arguing that the loan was denominated and payable in United States dollars.

MALABA CJ elucidated the law on loans advanced to tobacco growers from funds secured offshore at pp 8-9 as follows:

> "The court was seized with a *sui generis* contract. The tobacco grower agreement cannot be examined without reference to the source of funding. This is so because the nature of the funds advanced to tobacco growers under offshore funding contract arrangements must be preserved, as the funds are sourced solely for the purposes of tobacco growing. The term "Crop Finance", as provided for in the Tobacco Grower

Contract Agreement, clearly links the money involved to offshore funds. If the respondent is an authorised dealer, the understanding is that funds obtained and advanced in United States dollars are repayable in the denominated currency.

Tobacco is a crop that is sold in the market in foreign currency to enable beneficiaries of offshore funding arrangements to repay their creditors in foreign currency so that the latter are able to service their offshore funding contractual obligations. A party enters into a tobacco growers' contract, knowing that he or she or it is to be funded by an offshore loan denominated in United States dollars. He or she or it undertakes the obligation to repay the loan in that currency. As a consequence, the contract arrangements entered into by the individual tobacco grower and the respondent are an execution of the obligation to perform the offshore funding contracts entered into by the respondent and its creditors.

If payment were to be made in RTGS dollars contrary to the clear and unambiguous language of s 44C(2)(b) of the Reserve Bank Act, the purpose of the provision of ensuring that tobacco farmers benefit from offshore funding lines of credit accessible to the respondent and others in similar business would be defeated to the detriment of the national interest in the protection and promotion of the development of the tobacco industry."

With regards the applicability of the *Zambezi Gas Pvt)Ltd* v *N.R. Barber & Anor* (*supra*) the learned Chief Justice remarked at p 9 as follows:

"The court *a quo* cannot be faulted for holding that the funds advanced to the appellant had to be repaid in United States dollars. The *Zambezi Gas* case *supra* is distinguishable from the present matter. The present case relates to offshore funding. The obligation incurred by the respondent was a foreign obligation denominated in foreign currency within the contemplation of s 44C of the Reserve Bank Act."

The court also made pertinent remarks on the relevance of the Deed of Settlement entered by the parties. It was remarked that:

"The Deed of Settlement was entered into for the purpose of allowing the appellant to repay the debt he acknowledged to be owing in instalments in United States dollars. The Deed of Settlement was for the benefit of the appellant. The appellant cannot escape the obligation he voluntarily undertook to repay the funds advanced to him in United States dollars for the specific purpose of financing the production of the tobacco crop by calling the Deed of Settlement a compromise. There was no dispute between the parties over the currency in which the offshore funds received by the appellant from the respondent had to be repaid. The respondent was entitled to invoke the provisions of s 44C(2)(b) of the Reserve Bank Act to protect its rights to the

repayment of the offshore funds advanced to the appellant in United States dollars under the Deed of Settlement."

The peculiarity of the tobacco grower contract between the parties before us can be found in the Order and the Circular. The question whether the Order has lapsed or not is of no consequence. Its importance is in setting out the special treatment that has been accorded tobacco growing to offshore financing and the sale of such tobacco dating back to 2004. The Order was specifically enacted to proscribe the purchase of tobacco with foreign currency secured from the local financial market. Section 4 provides that auction and contract tobacco shall be purchased in United States dollars. Section 4 of the Order specifically excludes the use of foreign currency secured from the local market. It reads:

"(1) Notwithstanding subsection (1) of section 4 of the Exchange Control Regulations, 1996, but subject to subsection (2) of section 4 of those regulations –

(a) All auction and contract tobacco shall be paid for in United States dollars; and

(b) subject to section (2), every tobacco buyer shall access only offshore funds for the purpose of purchasing tobacco……

(2) ……

(3) For the avoidance of doubt it is declared that no tobacco buyer shall, for the purpose of purchasing any contract tobacco or auction tobacco-

(a) draw on its corporate foreign currency account; or

(b) purchase, borrow or raise foreign currency funds from onshore funds, the interbank market, an authorised dealer or any domestic source whatsoever."

Section 5 (3) further provides as follows:

"Where a contractor financed any A1 and A2 tobacco grower-

(a) By accessing offshore funds for that purpose, the amount used to finance the grower may be off set against the price of the tobacco sold to the contractor by the grower;

(b) By accessing any offshore funds for that purpose, the contractor shall access offshore funds for the purpose of purchasing tobacco from the grower."

It is clear from the above that tobacco purchasers would be required to source foreign currency offshore for the purchase of tobacco. Further, any contractor who would have financed tobacco growing from offshore funds would also be required to purchase the tobacco it/he/she financed with foreign currency secured from offshore source. In other words the contract farmers were required to sell contract tobacco to the persons who would have financed the crop. This requirement was reflected in clause 3.8 of the Tobacco Grower Contract between the parties. Clause 3.8 of the agreement reads:

> "3.8 (a) The Parties agree that the "**ENTIRE TOBACCO CROP PRODUCED**" by the grower shall be marketed **EXCLUSIVELY to ZLT** under such marketing procedures as are legislated or advised for adoption by the Tobacco Industry Marketing Board (TIMB).
>
> (c) The Grower agrees that ZLT shall recover all Grower Debt from the proceeds of his Tobacco sales either by way of **Stop order** or other deduction from such sale proceeds under TIMB and tobacco sales floor arrangements or by way of offset under any direct marketing arrangements. In the event of any shortfall in ZLT's recovery of any Grower Debt and administration charges, and without prejudice to any other rights available to ZLT under law, contract or otherwise the Grower shall contract ZLT and/or commit such future Tobacco production so as to secure full recovery from future Tobacco production."

It would therefore be absurd that a person who would have obtained foreign currency from an offshore source would be paid in RTGS dollars but be expected to repay the offshore loan in foreign currency. "Full recovery" of funds secured offshore in foreign currency can only be in foreign currency and not RTGS dollars.

The Reserve Bank issued Circular No 7 of 2019 on 29 July 2019. The circular specifically states that:

> "2. Treatment of US$ Denominated Inputs Advanced to Grower.
>
> 2.1 Tobacco merchants have the option to use foreign currency sourced from local banks (through global facilities) or offshore financing to

procure inputs for distribution to tobacco grower under contract arrangements.

2.2 **Where tobacco growers receive US$ denominated input loans, repayment to the tobacco merchant shall be in foreign currency in order to protect the tobacco merchant's investment**."
[emphasis added]

The heading of the Circular is particularly important. It reads:

"CLARIFICATION TO THE TOBACCO INDUSTRY".

The Circular was issued five months after the promulgation of SI 33 of 2019. It appears the intention of the Reserve Bank in issuing the Circular was to ensure that there is no confusion with regards to the exclusion of tobacco grower contracts from other contracts that would be affected by SI 33 of 2019.

Both the Order and the Circular illustrate the reason why the tobacco grower contract was referred to in the *Mushayakurara* case as being "*sui generis*". It differentiates tobacco farming from other farming activities by specific provisions on the financing of the growing and purchase of tobacco crop in foreign currency.

The court *a quo* therefore grossly misdirected itself when it held that it is irrelevant that the appellant may have obtained the money which it loaned to the first respondent from a foreign source. The foreign source of the money is recognised by legislation. The investment by tobacco financiers is equally protected.

DISPOSITION

The appeal is therefore merited. It is accordingly ordered as follows:

1. The appeal be and is hereby allowed with costs.

2. The order of the court *a quo* be and is hereby set aside and substituted with the following:

"The application is dismissed with costs."

UCHENA JA : I agree

KUDYA JA : I agree

Gill, Godlonton and Gerrans, appellant's legal practitioners

Kantor and Immerman, 1st respondent's legal practitioners