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MUCHANETA THEODORA CHIMBANDI
v
MABEL CANVAS (PRIVATE) LIMITED

THE SUPREME COURT OF ZIMBABWE
MALABA CJ, BHUNU JA & CHIWESHE JA
HARARE: 21 JULY 2020 & 21 JUNE 2022

A Masango, for the appellant.

O Mushuma, for the respondent.

BHUNU JA:

INTRODUCTION

[1] This is an appeal against the judgment of the High Court (the court *a quo*) delivered at Harare on 15 January 2020 under judgment number HH 26/20. At the conclusion of argument on 21 July 2020 the court issued the following order with reasons to follow:

"**IT IS ORDERED THAT:**

1) The appeal succeeds to the extent that the relief granted by the court *a quo* is set aside and substituted with the following:

   (a) Judgment is granted in the sum equivalent to US$58 500 in RTGS calculated at the prevailing interbank rate.

   (b) Interest on the said amount in paragraph (a) at the prescribed rate from 31 December 2013 to date of payment in full.

   (c) Costs of suit on a legal practitioner and client scale."

[2] I now proceed to proffer the reasons for the order.

BRIEF BACKGROUND FACTS

[3] The respondent sued the appellant in the court *a quo* for payment of the sum of US$58 500 being the balance for 1 500 army rucksack bags sold and delivered to the appellant for the total price of US$64 000 inclusive of value added tax. The delivery was done in three batches on 3 May 2013, 6 May 2013 and 21 May 2013.

[4] On 21 May 2013 the appellant made part payment in the sum of US$5 500 and in the process signed an acknowledgment of debt for the balance of US$58 500.

[5] The respondent produced in evidence the alleged acknowledgment of debt written in long hand and signed by the appellant. It reads:

> "I MUCHANETA THEODORA CHIMBANDI residing at 227 SHERWOOD DRIVE AVONDALE WEST HARARE do hereby solemnly aver/declare the following: That I shall pay Mabel Canvas, the sum of US58 500 for the 1 500 rucksack bags, delivered to army. I shall be able to pay the whole amount by mid-June 2013.
>
> The funds will be transferred from Farrlly Trading account with C.B.Z Westgate. Account number 03020705540037, corporate account.
>
> Definitely I shall pay the whole amount without fail. Next of kin Virginia Munzeiwa Midzi. 0712794224 / 0772336277 / 0772690318 / 0712211257. Landline 04 – 335018.
>
> I make the above statement conscientiously believing the same to be true.
>
> Signed"

[6] The respondent produced in evidence a further acknowledgment of debt by the appellant dated 10 September 2013 in which she undertook to pay the outstanding balance by 30 September 2013.

[7] The appellant initially denied liability arguing that the respondent merely used her company as a conduit to sell her wares to the army. When the army defaulted in payment, the respondent turned to her for payment. She alleged without substance that the written acknowledgments of debt had been forged.

[8] Owing to overwhelming evidence against her the appellant however eventually abandoned her plea denying liability. She then admitted liability in the sum claimed but pleaded prescription. Thus the sole preliminary issue for determination at the trial was, "Whether the appellant's claim had prescribed,"

[9] The respondent through its managing director one Mabel Machere testified that the appellant upon demand made various requests for extension of time to pay which she did not honour. She finally gave the appellant up to 31 December 2013 to pay but the appellant again defaulted hence the suit for payment in the court *a quo.*

[10] It was the respondent's witness' evidence that she continued to phone the appellant through to 2016 demanding payment to no avail. Each time she phoned the appellant's response was that she had not yet been paid by the army. She would pay up the amount owing once she had been paid by the army.

[11] From around August and September the appellant stopped answering the managing director's phone calls. It is then that the respondent decided to hand over the matter to its lawyers for debt collection.

[12] The appellant denied that the respondent had granted her an extension of time to pay up to 31 December 2013 through to 2016 as alleged by its managing director.

[13] Undoubtedly the alleged extensions bring the respondent's claim outside the prescription period pleaded by the appellant. The trial judge *a quo* was therefore faced with the simple task of determining who was telling the truth between the respondent's managing director and the appellant.

DETERMINATION BY THE COURT *A QUO*

[14] The court *a quo* chose to believe the respondent's witness and disbelieved the appellant. It thus found as a matter of fact that the extensions granted by the respondent interrupted the running of prescription thereby bringing the respondent's claim outside the prescription period. Placing reliance on s 18 of the Prescription Act [*Chapter 8:11*] the learned Judge *a quo* held that the express or tacit acknowledgment of debt by the appellant in seeking extensions as alleged by the respondent interrupted the running of prescription.

[15] The above findings of fact and law prompted the court *a quo* to issue an order in the following terms:

"Wherefore it is hereby ordered that defendant pays:

(a) Judgment in the sum of US$58 500 or its equivalent at the interbank rate

(b) Interest on the said sum of US$58 500 or its equivalent at the prescribed rate from 31 December, 2021to the date of payment in full, and

(c) Costs of suit on a legal practitioner and client scale."

GROUNDS OF APPEAL

Aggrieved by the above verdict and order of the court *a quo*, the appellant approached this Court on 5 grounds of appeal couched as follows:

"1. The court *a quo* misdirected itself which misdirection is so gross in its defiance of logic that Appellant had failed to disprove the aspect of interruption of prescription yet Respondent itself had failed to prove that it had extended the debt to December 20 13 hence the claim had prescribed.

2. The court *a quo* erred in relying on the common law principle that what is not denied in the affidavit must be taken to be admitted yet Appellant has specifically denied the averment that the Respondent had extended the due date to December 2013 in her pleadings and could not be taken as having admitted such averment.

3. The court *a quo* erred in ordering that Appellant pays the sum of US$58 500 00 (Fifty-Eight Thousand Five Hundred) or its equivalent at the interbank rate yet in terms of **Section 22** of the **Finance (No. 2) Act 20 19** the amount was converted into RTGS dollars at a rate of one as to one with the United States Dollars and the court could not legally order payment of United States Dollars or its equivalent.

4. The court *a quo* erred at law in not giving reasons as to why it found in favour of the Respondent and yet it was obliged to give such reasons with reference to specific evidence.

5. The court *a quo* exercised its discretion irrationally in awarding costs against the Appellant on a punitive scale of legal practitioner and client scale yet there was no justification for such an award of costs and no reasons were given by the court *a quo* as to why it was ordering such costs."

DETERMINATION OF THE APPEAL

[16] Having carefully considered the facts and the law, the court took the stance that the appeal fell to be determined on the primary aspect as to whether the appellant asked for and was granted by the respondent an extension of time to pay up to 31 December 2013. The extensions of time to pay and order of the court *a quo* had the effect of creating new obligations which fell outside the ambit of s 4 (1) (d) of the Presidential Powers (temporary Measures) Amendment of Reserve Bank Act & Issue of Real Time Gross Settlement Electronic Dollars (RTGS Dollars) S.I. 33/19.

[17] At the onset of argument counsel for the appellant made the inescapable fatal admission that appellant was in fact dishonest to the court *a quo* when she denied liability to the respondent. What this means is that the appellant's entire pleadings are prone to being founded on lies and deceit.

[18] Given the appellant's admitted devious and unworthy demeanour counsel for the appellant was unable to give any coherent answer as to why the court *a quo* should have believed her on any other aspect of her defence. It is trite that a litigant who is shown to have told a lie in court may also be considered unworthy of belief on any other contentious issues. The court *a quo's* finding in this respect is beyond reproach.

[19] In view of the appellant's unmitigated dishonesty, the court *a quo* cannot be faulted for believing the respondent that the contract was extended to 31 December 2013 at the appellant's instance and request. That finding effectively disposed of the appellant's defence of prescription on account that it interrupted the running of prescription in terms of s 18 (1) of the Prescription Act [*Chapter 8:11*].

[20] In terms of s 18 (2) of the Act, when prescription is interrupted by acknowledgment of debt as happened in this case, it begins to run afresh. The interruption was on 31 December 2013. The renewed 3 year prescription period was supposed to run its course by 31 December 2016. The respondent issued summons on 17 November 2016 which was more than a month before the expiry of the prescription period. Thus we again find no fault with the court *a quo'*s finding in this respect.

[21] In developing his argument counsel for the appellant placed reliance on the leading case of *Zambezi Gas Zimbabwe (Private) Limited v N.R. Barber (Private) Limited & Anor*[1]. That case is authority for the proposition that all assets and liabilities, including judgment debts denominated in United States dollars immediately before the effective date of 22 February 2019 shall on or after the aforementioned date be valued in RTGS on a one-to-one rate.

[22] Fastening onto the dictum in the *Zambezi Gas case (supra)*, counsel for the appellant submitted that the court *a quo* erred in not granting the order on a rate

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of one United States dollar to one RTGS dollar. That argument is fatally flawed and defective. The argument stems from a total misunderstanding of the *ratio decidendi* in the *Zambezi Gas* case. That case relates only to assets, liabilities and judgment debts incurred before 22 February 2019. The Court makes this clear at p 2 of its cyclostyled judgment where it says:

> "The order in terms of which the appellant was obliged to pay the judgment debt owed to the first respondent, denominated in United States dollars, was made before the effective date (22 February 2019). The judgment debt and its evaluation fell within the ambit of the provisions of s 4(1) (d) of S.I. 33/19. The payment of the judgment debt is a full and final settlement of the liability owed by the appellant."

[23] The *Zambezi Gas* case (*supra)* can be distinguished from the instant case on more grounds than one. To begin with in the *Zambezi Gas* case liability was not in issue it having been admitted. The sole issue for determination was the rate at which the debt denominated in United States dollars was payable in RTGS dollars. There was no extension of time to pay whereas in this case there was an extension beyond the effective date.

[24] In this case the appellant initially denied liability but later on changed her mind and admitted liability in court. She kept on novating the date of payment until the court had to make a judgment on 15 January 2020. By her vacillation the appellant pushed the obligation to pay the debt beyond the effective date, that is to say 22 February 2019. At p 20 of the record of proceedings at para 12 of its summary of evidence the respondent had this to say:

> "31st of December 2013 came and went by and the defendant had not paid the debt. The plaintiff continued to phone the defendant demanding

payment to no avail. From 2014 to 2015 and to 2016, the Defendant's story remained the same, i.e., the army had not paid her."

[25] It is plain that at the time of the court order the obligation to pay was no longer the same as that created before the effective date. Thus in the circumstances of this case the court order created a new obligation to pay after the effective date on 15 January 2020.

[26] The above findings of fact and law dispose of the appellant's grounds of appeal 1, 2, 4 and 5.

[27] There is some merit in the appeal against payment of the balance of US$58 500.00 in United States dollars as this will be in contravention of s 22 of the Finance (No. 2) Act 20 19.

DISPOSAL

[28] In light of the fact that the respondent's claim has not prescribed and that the court *a quo*'s order created a new obligation to pay the respondent the outstanding balance of US$58 500.00 after the effective date, the appeal can only fail.

[29] At the instance of the appellant we ordered payment of the equivalent amount in RTGS in compliance with the current legal position hence the partial success of the appeal. We however ordered payment of the balance in RTGS at the prevailing interbank rate to cushion the respondent from the vagaries of

inflation and to prevent the appellant benefitting from her own delay in paying the judgment debt.

COSTS

[30] Having regard to the appellant's unbecoming dishonest conduct as expounded elsewhere in this judgment costs at the punitive scale were well deserved.

CONCLUSION

[31] It is for the foregoing reasons that we issued the above order dated 21 July 2020.

MALABA CJ : I AGREE

CHIWESHE JA : 1 AGREE

Muronda Malinga Legal Practice, the appellant's legal practitioners.

Mushuma Law Chambers, the respondent's legal practitioners.