MITZI CARRUTHERS
(in her capacity as Executrix Dative and sole beneficiary of the
Estate Late Martha Elizabeth Van Der Linde)
versus
THE COMBINED SERVICE ORGANISATIONS' TRUST
(Registered as Athol Evans Hospital Home under Reg No. 31/60)
and
MASTER OF THE HIGH COURT N.O.

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 5 October & 30 December 2022

Opposed Matter

Mr G Nyengedza, for the applicant
Mr F Mahere with *B Ziwa,* for the 1st respondent

MANGOTA J: On 5 August 2014 one Gert Willem Van Der Linde ("Gert") and his wife, Martha Elizabeth Van Der Linden ("Martha"), entered into a contract with the first respondent ("the respondent"), a charitable and not-for-profit trust, which is set up in accordance with the laws of Zimbabwe. The contract entitled Gert and Martha the right to occupy the respondent's cottage number 28 which is at Athol Evans Complex, along Chiremba Road, in Cranborne area, Harare.

In consideration of their occupation rights to the cottage, Gert and Martha made an advance payment of US$ 75 000 to the respondent. The respondent and them agreed that, upon termination of the contract, the respondent would make every effort to find another occupant for the cottage and the occupant would advance to the respondent an amount which, in the latter's view, equated to the reasonable market value of the cottage.

Gert and Martha agreed with the respondent that, upon the latter's receipt of the advance payment from the cottage's new occupant, the respondent would pay to Gert and Martha or to one of them, their executor or beneficiary who is named in their will(s) the percentage of the advance which they made to the respondent. The percentage, it was agreed, would be at the formula which

was set out in the schedule which was incorporated into the contract less costs which the respondent would have incurred to bring the cottage to the condition that it was when the contract commenced.

Martha and Gert passed on within four years of each other. Gert died on 23 August 2016 leaving Martha with whom he had a joint estate in the cottage. Martha died on 23 November 2020. But before her demise, the applicant who, in terms of the will of the two deceased persons, was/is the beneficiary of their estate had, in January 2020, moved Martha from the cottage to Flame Lily Lodge. Martha had, according to her, remained in the cottage at Athlon Evans Complex for five years and 6 months.

In terms of the schedule which Martha and Gert, on the one hand, and the respondent, on the other, incorporated into the contract, the percentage which was payable to the deceased persons by the respondent is 65% less any costs which the respondent would have incurred to bring the cottage to the condition which it was at the commencement of the agreement.

At the death of Martha who survived Gert, the second respondent who is Master of the High Court appointed the applicant as the executrix dative of the estate of the late Martha Elizabeth Van Der Linde. She assumed her office in the mentioned regard on 28 April 2021. She is therefore suing the respondent in her capacity as such and as sole beneficiary of the estate of late Martha Elizabeth Van Der Linde.

The applicant is applying for a declarataur. She couched her amended draft order in the following terms:

> "**IT IS ORDERED THAT**:
> 1. The application for a declaratory (*sic*) is hereby granted.
> 2. It is hereby declared that the residual value of cottage number 28 at Athol Evans Complex located on Chiremba Road, Cranborne, Harare is US$48 750 (Forty-Eight Thousand Seven Hundred and Fifty United States Dollars) which should be paid to the applicant in ZWL/RTGS at the Reserve Bank of Zimbabwe exchange rate ruling on the date of payment.
> 3. The 1st respondent shall keep cottage number 28 at Athol Evans Complex in a good state of repair and shall not use the same for any purpose whatsoever whilst pending occupation by a new tenant/occupant.
> 4. The 1st respondent shall pay out to the applicant the sums stated in paragraph 2 above within 90 days of the granting of the order."

This is an application for a declaratur. It is premised on s 14 of the High Court Act. The section confers a discretion upon me to inquire into, and determine, at the instance of any interested person, an existing, future or contingent right or obligation which is of interest to the applicant.

An applicant for a declaratur must have a direct and substantial interest in the subject-matter of the application. He should have a right or an obligation. The right or obligation must be existing, future or contingent: *Munn Publishing (Pvt) Ltd* v *ZBC*, 1994 (1) ZLR 337 at 343 E – 344 E. *RK Footwear Manufacturing (Pvt) Ltd* v *Boka Book Sales (Pvt) Ltd*, 1986 (2) ZLR 209 lays down two requirements which an applicant for a declaratur must satisfy for him to be granted the relief. These are whether or not:

i) the applicant has an interest in an existing, future or contingent right or obligation –and

ii) the case is a proper one for the court to exercise its discretion.

Benefit Friendly Society v *Commissioner for Inland Revenue and Anor*, 1955 (4) SA 120 (T) is more comprehensive than the first-cited two case authorities. It sets out five principles which the plaintiff or the applicant for a declaratory order must meet for him to succeed. These are that:

a) he should be an interested person;

b) there should be a right or an obligation which becomes the object of the inquiry;

c) he should not invite the court to give him a legal opinion which amounts to an abstract or academic matter;

d) there must be interested parties upon which the declaration will be binding-and

e) considerations of public policy must favour the issuance of the declaratur.

The applicant satisfies the abovementioned five requirements. As the *executrix dative* of the estate of the late Martha and her late husband, Gert the applicant cannot be said to have no interest in the joint estate of the two deceased persons. The estate of the late Martha and Gert to which she is the sole beneficiary constitutes her right and it is that right which is the subject of the application which she filed. She is not inviting me to give her a legal opinion. The respondent is the interested person upon which the declaration, if granted, will be binding. That the grant of the declaratur is of paramount importance to her requires little, if any, debate.

The respondent does not quarrel with the applicant's application for a declaratur. All it does is to assert, *in limine*, that the same has been prematurely filed. Prematurely filed in the sense that the applicant is not, as at the time of her application, entitled to receive any payment from it. Nothing, it claims, is presently payable to her. It insists that the application can only be made by the applicant when its liability to her, if any, arises. It disputes, in substance, that the applicant should be refunded in the currency of United States dollars as is claimed by her. It places reliance

on SI 33 of 2019 and it insists that, because the obligation which relates to this application arose in 2014 and therefore before the coming into existence of SI 33 of 2019, the refund of the loan which was advanced to it by Martha and Gert should be payable to her, at the appropriate time, in Zimbabwe dollars at the rate of one United States dollar to one Zimbabwe dollar.

The preliminary point which the respondent raised is without merit. As the applicant correctly states, I can inquire into as well as determine her future right to receive payment which is contingent upon the admission of a new tenant into the cottage. Her right, as she submits, arises from an obligation which the agreement of the deceased persons and the respondent imposed on the latter to pay to their joint estate a refund following Martha's leaving of the cottage within ten (10) years from the date of occupation of the same. Further, the fact that the respondent wrote, on 7 July 2021, offering to pay to the applicant, on a without prejudice basis, the refund which is due to her from the estate of the late Martha and her late husband, Gert makes the *in limine* matter nugatory. Annexure I which the applicant attached to her papers confirms the respondent's offer to her. The annexure appears at p 34 of the record.

The applicant and the respondent, it is observed, are in agreement on the point that, because Martha vacated the cottage before the expiration of ten years of her occupation of the same, the respondent has an obligation to refund to her estate of which the applicant is the sole beneficiary a certain sum of money which is part of what Martha and Gert advanced to it. The parties are agreed on the *quantum* which constitutes the refund. Their point of departure relates to the currency which is applicable to the refund.

The respondent's position is that, because the consideration to it was advanced before 22 February 2019 which is the effective date for the application of SI 33 of 2019, the refund which is payable to the applicant should be at the rate of one United States dollar to one Zimbabwe dollar.

The applicant's statement on the matter at hand is to the contrary. She asserts that, because the contract of Martha and Gert, on the one hand, and the respondent, on the other, was/is subject to a condition precedent, the provisions of SI 33 of 2019 do not apply to the issue of the refund until the suspensive condition which the parties inserted into the contract has been fulfilled. She insists that, because the advance which Martha and Gert made to the respondent was in United States dollars, the refund which the respondent should pay to her should, when it falls due, be in the same currency.

Whether or not the refund which the respondent must pay to the applicant, when it falls due, should be in United States dollars or in the local currency does, in a large measure, depend on the interpretation which must be placed on SI 33 of 2019 as incorporated into the Finance (No.2) Act of 2019. Before that is delved into, however, the history of the Statutory Instrument must be placed into context. The context dates back to the period when the currency of Zimbabwe had, due to circumstances which are not relevant to this application, become moribund.

Judicial notice is taken of the fact that, in 2008, the bearer cheque which the country's Central Bank introduced as a system of payment lost its meaning and import in a manner which was irredeemable. It is at that stage more than at any other that the Legislature crafted a law which introduced into the country multiple currencies of other countries in transactions which the business community and the transacting public had to, and did actually, employ in meeting their payment obligations. The period was, in short, referred to as the multiple currency system of payment for goods and services as well as for other activities where payment was required to be made. It extended from February 2009 to February 2019 when the Legislature introduced the Statutory Instrument which is at the center of this application. During the ten years that the multiple currency system of payment remained in existence, the United States dollar assumed center stage. It became the currency for many transactions which were conducted within, and without, Zimbabwe.

By introducing SI 33 of 2019, the intention of the Legislature become loud and clear. The intention was to do away with the United States dollar as a means of exchange or of settling obligations in Zimbabwe. The effective date of the Statutory Instrument, namely 22 February 2019, signifies the cut-off date in respect of transactions which occurred before or after the mentioned date. Those which occurred before the effective date do, as the respondent correctly submits, fall under s 4(1)(d) of the instrument and those which occurred after the effective date are considered under s 4(1)(e) of the same instrument. The first lot of obligations are payable in Zimbabwe dollars at the rate of one United States dollar to one Zimbabwe dollar as per s 4(1)(d) of the instrument. The second lot of obligations, which are considered under s 4(1)(e) of the instrument are also payable in the local currency but not at the rate of US$1: ZWL$1 but at the Reserve Bank of Zimbabwe exchange rate ruling on the date of payment. The net effect is that, where an obligation sounds in the United States dollar currency, payment of the same is no longer

in the mentioned currency. It is made in the local currency which is assessed on whether the obligation arose before or after the effective date.

A quotation of the relevant portions of the Statutory Instrument does, in my view, render clarity to the position which I am taking of this application. Section 4(1)(d) of the Statutory Instrument reads:

> "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 44 C (2) of the Principal Act) shall on or after the effective date be deemed to be values in RTGS$ at a rate of 1:1 to the US$."

Section 4(1)(d) of the SI, it is evident, makes reference to assets and liabilities which were valued and expressed in United States dollars immediately before the effective date. The refund which is the subject of this application is an asset to the applicant and a liability to the respondent. That asset and/or liability was not valued before the effective date of 22 February 2019. It was not because its operation was/is subject to a condition precedent. It shall only be valued upon fulfillment of the suspensive condition which Martha and Gert, on the one hand, and the respondent, on the other, inserted into their contract.

A suspensive condition, it is trite, postpones the operation of a contract or obligation until the condition is fulfilled or it is certain that the condition fails: *Okeke* v *Duro & Co (Pvt) Ltd*, 2006 (1) ZLR 506 (H). Before fulfillment of the condition, there is a valid contract but its operation is postponed until the condition is fulfilled: *Innocent Maja*, Law of Contract in Zimbabwe, p 88.

What Martha and Gert agreed with the respondent is that the condition precedent which relates to their contract should be fulfilled in *forma specifica*. It should, as expressed in their intention, be fulfilled in the exact manner which they stated in their agreement. Because the condition is yet to be fulfilled, s 4(1)(d) of SI 33 of 2019 which relates to assets which were valued before the effective date does not apply to the refund which is the subject of these proceedings. It does not apply because it makes reference to assets upon which a value was made before 22 February 2019. The value which relates to the refund is yet to be made. It was not made when the effective date came and went by.

It follows, from the above-analysed set of matters, that p (e) of ss (1) of s 4 of the SI remains applicable to the case of the parties. It is applicable in the sense that it deals with assets and liabilities which come into existence after the effective date. It reads:

> " 4 (1) (e) after the effective date, any variation from the opening parity rate shall be determined from time to time by the rate at which authorised dealers under the Exchange Control Act exchange the RTGS Dollar for the United States Dollar on a willing – seller willing-buyer basis; and…." .

The *quantum* of the refund remained unknown to the parties from the time that they concluded the contract to 7 January, 2021. This was well after the effective date of 22 February 2019. The respondent mentions the *quantum* in the letter, Annexure G, which it wrote to the applicant on 7 June 2021. The letter appears at p 32 of the record. It is in the annexure that it acknowledges what it owes to the applicant. It claimed that it owes her an amount of ZWL 48 750. It bases its calculations on s 4(1)(d) of SI 33 of 2019.

The parties, as has already been observed, are agreed on the *quantum*. Their dispute centers on the currency which the one must pay to the other when the condition precedent which they incorporated into the contract has been fulfilled. The applicant places reliance on the deposit which Martha and Gert advanced to the respondent. They, she insists, paid US$ 75 000. The refund must therefore be in the currency of the United States dollars, according to her. The respondent, she asserts, must pay a refund of US$ 48 750 to her.

The finding which has been made is that no United States dollars are payable to the applicant as refund which the respondent owes to her. The other finding which has also been made is that the refund which is due to the applicant cannot be calculated at the rate of one United States dollar to one Zimbabwe dollar as the respondent is claiming. The respondent would be obliged to pay to the applicant, when payment falls due, the equivalent in Zimbabwe dollars of US$ 48 750 which is calculated at the interbank rate of the date of payment. The stated matter resonates well with s 4 (1)(e) of SI 33 of 2019.

The above-observed matter compelled the applicant to abandon her draft order which sounded in United States dollars as well as to file an amended draft order which, to all intents and purposes, was/is *in sync* with s 4(1)(e) of SI 33 of 2019.

The observation which I make is that the late Martha Elizabeth Van Der Linde left cottage number 28 in January 2020. The respondent, it would appear, did not make any meaningful effort to find a tenant who would occupy the cottage from the time that Martha left it todate. It is, in terms of the agreement, only after the respondent has secured a tenant for the cottage and the latter has advanced to the former a sum of money for occupation of the same that the applicant will be entitled to receive a percentage of what Martha and Gert advanced to the respondent. The

respondent cannot claim that it failed to secure a tenant who would occupy the cottage for close to three consecutive years.

It is on the strength of the above-observed matters that the complaints of the applicant cannot be said to be without justification. She complains that the respondent has not been making any effort to find a new tenant for the cottage and that it has been using the same as a store-room making it to depreciate in value with the adverse effects vising upon her when a tenant is eventually found to take occupation of the cottage.

The unchallenged complaints of the applicant necessitated the inclusion into the amended draft order of paragraphs 3 and 4. The paragraphs compel the respondent to live within the four corners of its contract with the applicant's predecessors.

The applicant proved her case on a preponderance of probabilities. The application is, in the result, granted as prayed in the amended draft order.

Hogwe Nyengedza, applicant's legal practitioners
Gill, Godlonton & Gerrans Legal Practitioners, first respondent's legal practitioners