JEFFREY MUGAURI
versus
DOESMATTER KADIRA

HIGH COURT OF ZIMBABWE
MHURI & MAXWELL JJ
HARARE, 18 July 2024 and 25 September 2024

Civil Appeal

J Mapuranga, for the appellant
Respondent in person

MAXWELL J

Factual Background

The brief factual background to this case is as follows;

In May 2017 the Plaintiff and Defendant entered into a verbal agreement of sale where the Defendant paid the Plaintiff US$3000.00 for the delivery of a motor vehicle. The Defendant having received the US$3000.00 then failed to deliver the agreed motor vehicle. The motor vehicle was supposed to have been delivered within a week of the payment and the Plaintiff failed to perform this contractual obligation and subsequently became unreachable to the Defendant. The Defendant only managed to make contact with the Plaintiff after the Defendant reported the matter to Southerton Police Station. The Plaintiff eventually paid the Defendant ZWL$3000.00 in August 2022. The Defendant refused to accept this payment as according to him the Zimbabwe dollar payment only represented a very insignificant fraction of the value of the United States dollars he had given to the Plaintiff in May 2017. Aggrieved by the turn of events, Defendant then approached the Small Claims Court seeking to recover his money from the Plaintiff. The Small Claims Court referred the matter to the Magistrates (Civil) Court. The Defendant raised a special plea of prescription and that the claim is tainted with illegality as it contravened statutory pronouncements that regulated the currencies of Zimbabwe. On the merits, Defendant indicated that he had repaid the money as it was deemed to be valued in RTGS at the rate of one to one on the effective date.

JUDGMENT OF THE COURT *A QUO*

The learned Magistrate analysed the evidence of the witnesses. He dismissed the issue of prescription and held that prescription was interrupted when Defendant paid back the amount owed in local currency. On the issue of the currency, after analysing the relevant statutory instruments and court cases, he concluded that the debt cannot be considered as an asset or liability. He held that there would be prejudice and unjust enrichment as the Defendant decided to refund knowing that there is a prevailing bank rate equivalent. He concluded that the Plaintiff had successfully proved his claim on a balance of probabilities and is entitled to the relief claimed. He ordered

> "Defendant is hereby ordered to pay USD$3000.00 or the prevailing bank rate plus costs of suit on an ordinary scale".

The Plaintiff was aggrieved by the decision of the Magistrate and decided to approach the High Court on appeal seeking the dismissal of the decision of the court *a quo.*

The grounds of Appeal

The grounds of appeal are set in the Notice of Appeal as;

1. The court *a quo* erred at law in failing to find that the amount of US$3000 which was paid by Respondent to Appellant in 2017 was deemed to be valued in RTGS at the rate of one to one by operation of law.

2. The Court *a quo* grossly erred at law by treating the Plaintiff's claim as a delict when in actual fact it was a debt emanating from a contractual transaction which transaction had a contract price.

3. The court *a quo* grossly misdirected itself by applying the principles of unjust enrichment where the requirements were not established.

4. The court *a quo* erred at law by applying the principles of unjust enrichment in the face of statutory pronouncements which deemed any assets denominated in United States Dollars to be valued in RTGS at the rate of one to one.

5. The court *a quo* erred at law by failing to find that repayments made on a prescribed debt do not revive the debt.

The Appellant prayed for the setting aside of the Magistrate's decision and the dismissal of the Plaintiff's claim with costs.

SUBMISSIONS BY THE PARTIES

Appellant submitted that the order of the court *a quo* openly defies the position which was settled by the Supreme Court that all debts and liabilities which arose before 22 February 2019 were deemed to be valued in RTGS at the rate of one to one. He referred to the cases of *Zambezi Gas Zimbabwe (Pvt) Ltd* v *N.R Barber (Pvt) Ltd* SC 3/20 and *Augur Investments & Another* v *Fairclot Investments & 2 Others* SC 37/23. Appellant submitted that in the face of the Supreme Court judgments, the court *a quo* made an error at law by ordering him to pay US$3000.00. The appellant further submitted that the court *a quo* made a finding that he had been unjustly enriched which principle was inapplicable in the face of his payment of ZW$3000.00 in accordance with the law which had denominated the US$3000.00 in RTGS at the rate of one to one. Further that unjust enrichment had neither been pleaded nor was evidence led to establish its requirements. Appellant further argued that the court *a quo* made an error of law by disregarding the point of prescription. He argued that Plaintiff's claim was extinguished by prescription as far back as 2020 and the payment of RTGS 3000.00 he made in August 2022 did not resuscitate the claim. He relied on *Lipschitz* v *Deschamps* 1978 (4) SA 586 and *Steward Bank Ltd* v *Calendfab Services* HH-142-17.

Respondent submitted that he insisted on payment in foreign currency as the refund in local currency could only buy a bundle of vegetables. He indicated that at the time the appeal was noted he was in the process of executing the judgment and that the appellant cited government laws.

THE LAW

Statutory Instrument (S.I) 33 of 2019 was published on 22 February 2019. The Statutory Instrument introduced the RTGS dollar as a currency and legal tender, and placed it on par with the bond note and the United States dollar. S.I.33 of 2019 also decreed that all assets and liabilities denominated in United States dollars prior to the publication date were to be deemed to be in RTGS dollars at a rate of one-to one with the United States dollar. It also declared that every enactment in which an amount was stated in United States dollars was to be construed as stating the amount in RTGS dollars, at parity with the United States dollar.

S.I. 142 of 2019 was published on 24 June 2019. Whilst S.I 33 of 2019 introduced the RTGS dollar as legal tender alongside the bond note and other currencies, S.I 142/19 made the local currency as set out in S.I. 33 of 2019 the sole legal tender in all transactions in Zimbabwe.

The Finance Act (No 2), Act 7 of 2019 (the Finance Act), came into effect on 21 August 2019, which was the date on which S.I. 33/19 lapsed. It re-enacted the provisions of S.I 33/19 and applied them retrospectively to 22 February 2019, the date on which S.I. 33/19 took effect. The Finance Act introduced the RTGS dollar at par with the United States dollar on or before 22 February 2019. It also provided that after that date the value of the RTGS dollar would be determined at the prevailing interbank rate between the local currency and the United States dollar. Section 23 (1) of the Finance Act also subsumed the RTGS dollar as the sole legal tender in Zimbabwe, with effect from 24 June 2019, as prescribed in S.I. 142/2019. See *Breastplate Service (Pvt) Ltd* v *Cambria Africa PLC* SC 66/20 at p 14.

ANALYSIS

Prescription

Appellant submitted that the court *a quo* made an error in disregarding the point of prescription. He argued that the debt *in casu* was extinguished by prescription as far back as 2020 as it arose in 2017 and the payment of RTGS3000.00 he made in August 2022 did not resuscitate Respondent's claim. Even though the court *a quo* made a finding that the point raised had no merit, we are of the view that the issue of prescription was raised improperly in the proceedings. The issue had been raised as a special plea which was filed on 6 June 2023. Pages 47 to 49 of the record of proceedings are part of the judgment in which the special plea was dismissed. The judgment is stamped 20th July 2023. The present appeal is against the judgment handed down on 23 November 2023. It is improper to revisit the issue of prescription where there is an extant judgment on the issue. The fifth ground of appeal is therefore improperly before the court.

The First Ground of Appeal

The appellant criticised the court *a quo* for failing to find that the amount of US$3000.00 which was paid by the Respondent to him in 2017 was deemed to be valued in RTGS at the rate of one to one by operation of law. Such a finding would have been proper if Appellant had counterclaimed to that effect. He simply stated that in response to the claim by Respondent. We are of the view that this ground of appeal is improper as that issue was not properly raised before the court *a quo*.

Whether the claim was a debt or delict

Appellant criticised the court *a quo* for relying on the case of *Ngalulu Investments (Pvt) Ltd and Another v N.R.Z & Another* SC 42/22 in which it was held that a delict cannot be treated as an asset or a liability. The court *a quo* stated that the debt cannot be considered as an asset or liability, but it is what it is! A debt can be both an asset and a liability, depending on the perspective. It is an asset to the person owed but a liability to the one owing. The court was clearly trying to find justification for finding in Respondent's favour, and ended up making a meaningless pronouncement. The second ground of appeal has merit.

Unjust Enrichment

The Appellant criticised the court *a quo* for deciding the matter using principles of unjust enrichment where the requirements were not satisfied. Indeed, the issue was not addressed by any of the parties. In *Iris Biscuits (Pvt) Ltd v Mudimu & Others* SC 27/16 the Supreme Court stated that;-

> "The position is now settled that a court cannot dispose of a matter on a basis neither raised nor argued by the parties."

It was a misdirection for the court *a quo* to decide the matter on an issue that was not raised or argued before it. The third and fourth grounds of appeal therefore succeed.

The Plaintiff's Prayer

In the Plaintiff's summons dated 4 May 2023 the prayer before the Court *a quo* was set as follows;

"Payment in the sum of US$3000.00 or equivalent current bank rate being refund from the Defendant and interest at the prescribed rate from the day of summons to the day of settlement or delivery of the motor vehicle."

The relief sought is either of two things i.e. the payment by the Defendant of the amount of US$3000.00 or its equivalent in Zimbabwe dollars at current value or specific performance of the contractual obligation which was for Defendant to purchase and deliver to the Plaintiff a motor vehicle valued at US$3000.00.

In terms of s 22(1)(d) of the Finance (No.2) Act of 2019, all debts valued and expressed in United States dollars prior to 22 February 2019 shall be paid at parity (one to one) with the RTGS dollar. In the light of this provision, the court *a quo* erred in ordering payment in USD or the prevailing bank rate.

However, the matter does not end there. The Plaintiff in his summons sought the alternative of delivery of his motor vehicle. The learned Magistrate did not apply his mind to this alternative prayer for specific performance.

In ***Farmers' Co-operative Society (Reg)* v *Berry* 1912 AD 343 at p 350**, INNES JA stated the following;

> "Specific performance is a discretionary remedy vested in the courts. In the exercise of such discretion, the general rule is that, prima facie, every party to a binding agreement who is ready to carry out his own obligation under it has a right to demand the other party, so far as it is possible, to perform its undertaking in terms of the contract. Courts will exercise a discretion in determining whether or not decrees of specific performance will be made. They will not, of course, be issued where it is impossible for the defendant to comply with them. And there are many cases in which justice between the parties can be fully and conveniently done by an award of damages. But that is a different thing from saying that a defendant who has broken his undertaking has the option to purge his default by the payment of money. For in the words of Storey (Equity Jurisprudence, sec 717(a)), 'it is against conscience that a party should have a right to elect whether he would perform his contract or only pay damages for the breach of it.' The election is rather with the injured party, subject to the discretion of the Court." See ***Hativagone & Another* v *CAG Farms (Pvt) Ltd &Others* SC 42-2015 at p. 16.**

Section 31 of the High Court Act (Chapter 7.06) provides as follows;

> " (1) On the hearing of a civil appeal the High Court—
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> (a) shall have power to confirm, vary, amend or set aside the judgment appealed against or give such judgment as the case may require;
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> (b) may, if it thinks it necessary or expedient in the interests of justice—
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> (iv) having set aside the judgment appealed against, remit the case to the court or tribunal of first instance for further hearing, with such instructions as regards the taking of further evidence or otherwise as appear to it necessary;"

While for the reasons already cited above this court is fully persuaded that the judgement of the court *a quo* granting repayment of the US$3000.00 or the equivalent at current bank rate was arrived at in error and should be set aside, the Court is also fully persuaded that the Court *a quo* should be given an opportunity to now address the prayer for specific performance raised in the defendants' summons dated 4 May 2023.

Accordingly, the Plaintiffs Appeal partially succeeds. The following order is made:-

1. The decision of the Magistrates court be and is hereby set aside.
2. The matter be and is remitted to the court *a quo* before the same Magistrate for consideration of the merits of the Defendants alternative prayer for specific performance.
3. There is no order as to costs.

MHURI J:……..AGREES

MD Hungwe Attorneys, appellant's legal practitioners