TIAN ZE TOBACCO COMPANY (PVT) LTD
versus
ADTANDEM VIMBAYI GOTORA

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 20 September 2021 & 28 September 2022

Opposed Application – Summary Judgment

N B Munyuru and B Mahuni, for the applicant
M Ndlovu, for the respondent

MUSITHU J:

The applicant seeks relief by way of summary judgment. The draft order accompanying the application reads as follows:

"**IT IS HEREBY ORDERED THAT:**

a) Application for Summary Judgment be and is hereby granted.
b) The Respondent be and is hereby ordered to pay the Applicant the sum of US$33 624.34 (Thirty three thousand six hundred and twenty one United States of America dollars and thirty four cents) being the outstanding capital loan amount together with interest at the rate of 5% per annum, calculated from 1st October 2015 to date of full and final payment;
c) Respondent be and is hereby ordered to pay costs of suit on a legal practitioner and client scale together with collection commission calculated in accordance with by-law 70 of the Law Society of Zimbabwe By laws 1982 together with to the extent that such costs are permitted."

The application was opposed.

The Applicant's Case

On 8 July 2014, the applicant and the respondent entered into what they termed a Tobacco Farming Contract (the contract) for the 2014-2015 farming season. In terms of that contract, the applicant provided the respondent with a loan facility in the form of inputs and cash flow for the farming of tobacco. The contract was a novation of past similar contracts between the parties for outstanding amounts in the form of inputs and cash advanced to the respondent during the 2014-15 farming season and previous tobacco farming seasons.

In terms of clause 7(v) of the contract, the total loan amount was due and payable on or before 30 September 2015, failing which interest at the rate of 5% per annum would be levied

on the outstanding capital amount. On 24 August 2015, the respondent signed an acknowledgement of debt in terms of which she acknowledged her indebtedness to the applicant in the sum of US$33, 621.34.

On 27 June 2016, the applicant, as plaintiff, issued summons out of this court demanding payment of the outstanding loan amount. The respondent herein as the defendant, entered appearance to defend the matter. The applicant believes that the respondent does not have a *bona fide* defence to its claim and the appearance was entered solely for purposes of delaying judgment.

The Respondent's Case

In opposition, the respondent denied that the acknowledgment of debt relied upon by the applicant was a liquid document. The document did not even indicate the final date of payment. For that reason, the respondent could not be in *mora* because the date of final payment was not stated. The respondent further averred that paragraph 1(d) of the acknowledgment of debt did not show the amount being claimed in respect of the 2014-2015 tobacco season. That made the acknowledgment of debt void as it was silent on the total amount being claimed by the applicant. It was therefore not a liquid document.

The respondent challenged paragraphs 5 and 8 of the acknowledgment of debt as being manifestly oppressive as they contravened s 4(2) of the Contractual Penalties Act[1]. The respondent argued that the impugned paragraphs gave the applicant an unfair advantage against the respondent as the penalty had the potential of being disproportionate to the actual prejudice suffered. They were consequently void.

The respondent further averred that in terms of paragraph 6(a) of the acknowledgment of debt, the dispute was supposed to be referred to arbitration. That was not done and for that reason, the matter was prematurely before the court. The respondent further contended that paragraph 9 of the acknowledgment of debt required that a certificate of indebtedness be issued against the debtor as *prima facie* proof of the indebtedness. That certificate would be used in an application of this nature. The absence of the certificate made the application premature.

By copy of a letter dated 6 July 2021, the respondent's legal practitioners advised the applicant's legal practitioners that they had deposed a sum of ZWL$40,000.00, into their trust account in full and final settlement of the outstanding amount including interest. The respondent's legal practitioners considered it needless for the parties to appear before the court

[1] [*Chapter 8:04*]

to argue the matter as the debt had been settled. The applicant's legal practitioners responded to the letter on the same day acknowledging receipt of the said payment, but denied that it expunged the respondent's indebtedness. They argued that all tobacco loans were in United States dollars, and as such they had to be recovered in the same currency.

The applicant's legal practitioners further contended that the position remained unaffected by the new monetary regime that came into effect following the gazetting 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). At the commencement of the oral submissions, counsel agreed that the sole issue for determination was whether the payment of the ZWL$ amount completely extinguished the respondent's indebtedness to the applicant. Put differently, the issue before the court was narrowed to the currency in which the respondent's liability to the applicant must be discharged.

The Submissions

Mr *Munyuru* for the applicant submitted that the debt arose from a tobacco farming contract as read together with the Exchange Control Tobacco Finance Order of 2004, Statutory Instrument 61 of 2004 (SI 61 of 2004). The applicant advanced a loan denominated in the United States dollar currency to the respondent. It was therefore authorised to recover funds advanced to tobacco growers in the United States dollar currency in order to service its own offshore loans. Counsel further submitted that SI 61 of 2004 was gazetted long before SI 33 of 2019, and for that reason it was not affected by the new monetary regime as it remained extant.

Mr *Munyuru* further submitted that the Exchange Control circular 7 of 2019 clarified the status of tobacco contracts denominated in United States dollars following the promulgation of SI 33 of 2019. That circular provided that debts arising from tobacco contracts were recoverable in foreign currency. Circular number 7 was issued in terms of s 35(1) of the Exchange Control Regulations.[2] Counsel submitted that the courts had determined that loans advanced pursuant to tobacco contracts were considered as foreign obligations, and such amounts were recoverable in foreign currency.[3]

Mr *Ndlovu* for the respondent submitted that the debt in issue was acknowledged in 2015 before SI 33 of 2019 came into force. The payment by the respondent had effectively

[2] S.I 106 of 1996.
[3] See *Tian Ze Tobacco (Pvt) Ltd* v *Mugweni* HH 601/20; *Zimbabwe Leaf Tobacco Company (Pvt) Ltd* v *Mushayakarara* HH 220/20; *Mushayakarara* v *Zimbabwe Leaf Tobacco (Private) Limited* SC 108/21

extinguished that debt in terms of s 4 of that instrument. Mr *Ndlovu* argued that the transaction between the parties did not fall within the exceptions provided in SI 33 of 2019, since the applicant had not proved that the loan it advanced to the respondent was a foreign loan or a foreign obligation. He dismissed the Exchange Control circular as a mere administrative document without the force of law. The Exchange Control Regulations merely conferred powers to issue circulars which could not contradict the clear position of the law.

Mr *Ndlovu* further submitted that SI 61 of 2004 could not be interpreted in a manner that undermined SI 33 of 2019, which was the latter law. He urged the court to dismiss the application as the debt had been discharged.

Analysis

It is common cause that the respondent acknowledged her indebtedness to the applicant in the United States dollar currency. The issue however is whether SI 33 of 2019 had the effect of metamorphosing what was a United States dollar obligation into an obligation that was dischargeable in local currency. SI 33 of 2019 introduced a new currency called the Real Time Gross Settlement Electronic dollar (RTGS). That instrument was gazetted on 22 February 2019, with that date becoming the first effective date as defined in the Finance Act (No.2) Act, No.7 of 2019 (the Finance Act). The new currency ran parallel with other currencies that were accepted as legal tender, under what was then known as the multi-currency basket.

On 24 June 2019, the Minister of Finance and Economic Development caused to be gazetted Statutory Instrument 142 of 2019 (Reserve Bank of Zimbabwe (Legal Tender) Regulations, 2019) (SI 142/2019). The 24th June 2019 became the second effective date as defined in the Finance Act. This instrument abolished the multi currencies and declared the ZWL to be the sole legal tender in Zimbabwe. The two instruments were later incorporated into the Finance Act, which was gazetted on 21 August 2019. The key parts of the Finance Act which assimilated some of the provisions of the two instruments are sections 22 and 23. The two sections state in part 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) 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

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; and

(e) …….
(f) ……...
(2) ……..
(3)The use of the RTGS currency with effect from the first effective date is hereby validated.
(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.
(2) Accordingly, the Zimbabwe dollar shall, with effect from the second effective date, but subject to subsection (4), be the sole legal tender in Zimbabwe in all transactions.
(3) ……"

Mr *Ndlovu* argued that the transaction between the parties did not fall within the exceptions provided under the new law. Section 44C (2) of the Reserve Bank of Zimbabwe Act[4] states as follows:

"44C Issuance and legal tender of electronic currency
(1)……
(2) For the avoidance of doubt it is declared that the issuance of any electronic currency shall not affect or apply in respect of –
(a) funds held in nostro foreign currency accounts, which shall continue to be designated in such foreign currencies; and
(b) foreign loans and foreign obligations denominated in any foreign currency, which shall continue to be payable in such foreign currency."

This court has had occasion to deal with the discharge of obligations arising from these tobacco farming contracts. In the *Tian Ze Tobacco (Pvt) Ltd* v *Mugweni* (*supra*) DUBE J (as she then was) dealt with the effect of the Exchange Control Circular 7 and the currency in which these obligations must be satisfied. She concluded that the effect of the circular was that tobacco farmers who receive United States dollars input loans were required to repay the loans in foreign currency."[5]

[4] [*Chapter 22:05*]
[5] At p 8 of the judgment

In her conclusion DUBE J also referred to the case of *Zimbabwe Leaf Tobacco Co (Pvt) Ltd* v *Mushayakarara*[6], in which CHIKOWERO J dealt with a claim for the payment of funds advanced to a tobacco farmer in the United States dollar currency. The court also concluded that the lender was authorised to recover funds advanced to tobacco farmers in United States dollars. The judgments by CHIKOWERO J and DUBE J were delivered in the aftermath of the new currency regime. The cases were also heard after SI 33 of 2019 and SI 142 of 2019 became law. In the *Zimbabwe Leaf Tobacco Co (Pvt) Ltd* v *Mushayakarara* judgment, CHIKOWERO J considered the question of the applicable currency in the context of s 44C (2) (b) of the Reserve Bank of Zimbabwe Act.

The court had to determine if the loan advanced to the respondent was a foreign loan or foreign obligation and therefore payable in the United States dollar currency. At p 4 of the judgment, the learned judge observed that in proving the source of funding for the 2016-17 tobacco cropping season, the applicant had attached a letter of 28 May 2015 from Standard Chartered Bank which confirmed that the Reserve Bank of Zimbabwe had authorised the applicant to drawdown US$25, 494,506.00 from its offshore lines of credit to finance the 2016-17 tobacco growing season. In conclusion, the learned judge found that, "there was, at the end of it all, overwhelming documentary evidence proving that offshore funds were employed by applicant to finance respondent's 2016-2017 tobacco crop."

The *Zimbabwe Leaf Tobacco Co (Pvt) Ltd* v *Mushayakarara* judgment was appealed to the Supreme Court. In the appeal judgment *Mushayakarara* v *Zimbabwe Leaf Tobacco Co (Pvt) Ltd*[7], the Supreme Court considered the tobacco grower agreement in the context of s 44C of the Reserve Bank Act as read with SI 33 of 2019. In further interrogating the question of the status of that agreement, the court cited with approval the dictum in *Breastplate Service (Pvt) Ltd* v *Cambria Africa Plc.*[8] MALABA CJ commented as follows on p 6 of the *Mushayakarara* judgment:

> "The term "foreign loans and obligations denominated in any foreign currency", as it appears in s 44 C(2) of the Reserve Bank Act, is not defined in SI 33 of 2019. As stated in the *Breasplate* case *supra*, its meaning in any given case must be ascertained from the factual circumstances of the parties involved and the material substance of the transaction that they have entered into. Section 44 C(2)(b) of the Reserve Bank Act makes it clear that the issuance of any electronic currency, that is RTGS dollars, shall not affect or apply to any foreign obligation, as the

[6] HH 220/20.
[7] supra
[8] SC 66/20 where at p5 of the judgment the court said:
> "What emerges clearly and unequivocally from s 44C(2)(b) of the Reserve Bank Act, as read with s 4(1)(d) of SI 33 of 2019, is that foreign loans and obligations denominated in any foreign currency are excluded from the broad remit of SI 33 of 2019. Thus, foreign loans and obligations continue to be valued and payable in the foreign currency in which they are denominated."

> provision explicitly excludes foreign obligations valued and expressed in United States dollars from the deemed parity valuation in RTGS dollars." (Underlining for emphasis)

The court further highlighted that the source of funds had to be established first for the court to be able to make a determination on the issue of the currency in which the debt admittedly due had to be paid. On p 8 of the judgment, the court further held that:

> "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 purpose of tobacco growing….." (Underlining for emphasis)

The *Mushayakarara* case was cited with approval and followed in the latest judgment of *Zimbabwe Leaf Tobacco (Private) Limited* v *Vengesai & Ano*[9]. The issues before the court were almost on all fours with those in the *Mushayakarara* judgment. In the *Zimbabwe Leaf Tobacco* v *Vengesai* case, there was evidence before the court that the lender had 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.

Whether there was a foreign obligation in the context of s 44C of the Reserve Bank Act.

The status of tobacco contracts based on offshore funding has been put to rest by the two Supreme Court judgments that I referred to above. What however distinguishes the circumstances of the present case from the authorities cited above is that in both cases there was evidence before the court that the loan advanced to the debtor was from the proceeds of a foreign loan or foreign obligation for purposes of s 44 C(2)(b) of the Reserve Bank of Zimbabwe Act. In my view, the mere fact that the Exchange (Control Finance) Order requires tobacco buyers to source funds offshore is not on its own evidence that in any given circumstances funds that were advanced to a tobacco grower were indeed sourced offshore.

Further, the mere fact that in terms of the tobacco farming contract as read with the acknowledgment of debt, the respondent agreed to repay the loan in the United States dollar currency does not again confirm that the funds were from a foreign source. The contract between the parties did not refer to the source of funds. The acknowledgment of debt did not refer to the source of funds either. The plaintiff's declaration and the affidavit in support of the application for summary judgment are silent on the source of funds. In short, the source of the funds that were advanced to the respondent is obscure.

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[9] SC 149/21

Section 44 C(2)(b) of the Reserve Bank of Zimbabwe Act, being a provision in an Act of Parliament takes precedence over the provisions of the Exchange (Control Finance) Order and Circular No. 7 of 2019. The two instruments are subordinate to an Act of Parliament. It is this court's view that the applicant had to satisfy the provisions of s 44 C(2)(b) of the Reserve Bank of Zimbabwe Act, by placing before the court evidence that showed that the funds advanced to the respondent constituted a foreign loan and a foreign obligation within the context of that law. Indeed in the *Mushayakarara* judgment, the Supreme Court made the point that the court must establish the source of funds first in order to determine the currency in which the loan must be repaid.

While counsel herein agreed that the sole issue for determination was the currency in which the debt ought to be discharged, the court did not lose sight of the fact that what is before the court is an application for summary judgment. The principles applicable to an application of this nature were set out *Tavenhave & Machingauta Legal Practitioners* v *The Messenger of Court,*[10] where ZIYAMBI JA said:

> "Summary judgment is a drastic remedy which will only be granted where it is clear that the defendant has no *bona fide* defence and has entered appearance to defend solely for purposes of delay. Because of the drastic nature of the remedy a court will not grant it if there is any possibility that the defence raised on the papers might succeed. Thus it has been held that a mere possibility of success will suffice to avoid an order for summary judgment and that:
>
> > "all that a defendant has to establish in order to succeed in having an application for summary judgment dismissed is that "there is a mere possibility of his success"; "he has a plausible case"; "there is a triable issue"; or, "there is a reasonable possibility that an injustice may be done if summary judgment is granted". These tests have been laid down in many cases, typical of which in this country are *Davis* v *Terry* 1957 (4) SA 98 (SR); *Rex* v *E Rhodian Investments Trust (Pvt) Ltd* 1957 (4) SA 631 (SR); *Kassim Brothers (Pvt) Ltd* v *Kassim & Anor* 1964 (1) SA 651 (SR); *Shingadia* v *Shingadia* 1966 (3) SA 24 (SR); *Webb v Shell Zimbabwe (PvT) Ltd* 1982 (1) ZLR 102."
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> See *Jena* v *Nechipote* 1986 (1) ZLR 29 (SC). See also *Kingstons Limited* v *L D Ineson (Pvt) Ltd* 2006 (1) ZLR 451 (S) at 458 F-G"[11]

I associate myself with the views of the court in the above case. In my view, the applicant did not set out its claim with sufficient exactitude so as to leave this court in no doubt that the funds were from a foreign source that falls within the scope of s 44C(2)(b) of the Reserve Bank Act. The issue concerning the source of funds is a triable issue that only a trial court can resolve on the basis of evidence placed before it. This court would not have hesitated

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[10] SC 53/14 at pages 4-5

[11] See also *Gilinsky* v *Superb Launderers & Dry Cleaners* 1978 (3) SA 807 (C) at 811, where the court said:

> "Even if a court concludes that such information as is disclosed by defendant inn his affidavit is not a sufficient compliance with the provisions of Rules of Court 32(3), it may nevertheless consider that it is sufficient to raise a doubt as to whether plaintiff's case can be characterised as 'unanswerable'. In that case the court would in the exercise of its discretion refuse summary judgment"

to follow the precedent set by the *Mushayakarara* and *Zimbabwe Leaf Tobacco* cases had there been clarity on this point. The application must fall on that score.

DISPOSITION

Resultantly it is ordered that:

1. The application for summary judgment is hereby dismissed.
2. Costs shall be in the cause.

Muvingi & Mugadza, legal practitioners for the applicant
Mutamangira & Associates, legal practitioners for the respondent