SHAMINA HOLDINGS (PRIVATE) LIMITED
versus
TRIBAC TOBACCO (PRIVATE) LIMITED
and
KENNETH BUTCHART
and
FIONA BUTCHART

HIGH COURT OF ZIMBABWE
DEME J
HARARE, 20 October & 9 November 2022

Opposed Application

Mr *GRJ Sithole*, for the applicant
Ms *J Wood*, for the 1st, 2nd and 3rd respondents

DEME J: The applicant approached this court seeking an order for specific performance. More particularly, the relief sought by the applicant is couched in the following way:

> "1. Judgment be and is hereby entered in favour of applicant as against 1st, 2nd and 3rd Respondents, jointly and severally, the one paying and the other to be absolved.
> (a) That Respondents be and are hereby ordered to surrender the Applicant's title deeds held in the name of the Applicant under deed of transfer 4373/2012 to the Applicant.
> (b) that any encumbrance placed on the said property, be and is hereby set aside.
> (c) 1st, 2nd and 3rd Respondents be and are hereby ordered to pay Applicant's costs on an attorney and client scale."

Facts in this matter appear to be common cause save as may be highlighted. The applicant and the first respondents are companies duly registered in terms of the laws of Zimbabwe. The second respondent is the Director of the first respondent while the third respondent is an employee of the first respondent.

The first respondent lent and advanced, through bank transfer, to the applicant the loan in the sum of US$50 000 sometime in May 2017. According to the agreement, the loan would attract the interest of 12 percent per annum. The initial tenure of the loan agreement was twelve months which was subsequently extended by a further period of one year. Pursuant to the loan agreement, the applicant surrendered, to the first respondent, the title deeds to the Megawatt Court apartment held under deed of transfer number 4373/2012. In

terms of the agreement, the applicant was to sign a power of attorney entitling the first respondent to pass a mortgage on the property as security for the loan.

The applicant made part payment in United States Dollars and cleared the balance through Zimbabwean Dollars after 22 February 2019. The applicant claimed that it did clear the capital and interest for the loan. It is the applicant's case that the outstanding loan, on or after 22 February 2019, was now rated the scale of one as to one. Hence, according to the applicant, the repayment of the loan was made in that context after 22 February 2019.

The applicant averred that upon clearing the loan, it wrote to the respondents demanding its title deeds. According to the applicant, the respondents set a condition for the return of the title deeds that the applicant had to accept a novated debt sounding in United States Dollars. After making further demands for the return of the title deeds, the applicant approached this court for relief.

On the other hand, the respondents claimed the applicant did not clear the debt. According to the respondents, the applicant was supposed to, after 22 February 2019, repay the loan at the interbank rate and not at the rate of one as to one. The respondents relied on the provisions of s 22(1)(d) and (e) of the Finance No. 2 Act of 2019. According to the respondents, the outstanding loan, to date, is US$56 859. Pursuant to this, the respondents filed their counter application where they seek the following relief:

> "1. The Respondent shall pay to the Applicant the sum of US$ 56 859.00 or alternatively the equivalent of US$ 56 859.00 in Zimbabwe Dollars calculated at the interbank rate of exchange obtaining on the date of payment in full.
> 2. Interest on the said sum calculated at the rate of 12% per annum from 1st June 2020 to the date of payment in full.
> 3. Costs of suit calculated on the legal practitioner and client scale."

The respondents further submitted that the second and third respondents ought not to have been made a party to these proceedings as the second respondent is the director of the first respondent while the third respondent is the employee of the first respondent. They further averred that the second and third respondents only acted as the agents of the first respondent and for that reason they were not supposed to be dragged before the court for the acts of the first respondent which is a separate legal person. Responding to this assertion, the applicant argued that the second respondent is the one who had the custody of the title deeds of property in question and the same also acted as the principal for the first respondent according to the applicant. It is the applicant's contention that the third respondent was made a party to the proceedings as she witnessed the signing of the agreement.

The following are critical issues for determination:

(a) Whether or not the second and third respondents ought to have been made parties to these proceedings.

(b) Whether the applicant discharged its contractual obligations.

(c) At what rate should the loan be repaid after 22 February 2019?

(d) Whether or not the applicant is entitled to specific performance.

With respect to whether or not the second and third respondents ought to have been made parties to the present proceedings, it is not disputed that the second respondent is the director of the first respondent. It is also common cause that the third respondent is an employee of the first respondent. Having established this, I find no justification why the second and third respondents were joined to the present application. Our law is clear that directors and officers of the juristic person should not be held liable for the acts of the juristic person concerned. The first respondent is a separate legal person with capacity to sue or be sued. Reference is made to s 19 of the Companies and Other Business Entities Act [*Chapter 24:31*] which provides as follows:

> "A company or a private business corporation shall be incorporated from the date of issue by the Registrar of its certificate of incorporation and the company or the private business corporation shall thereupon become a body corporate, with the capacity and powers of a natural person of full legal capacity in so far as a body corporate is capable of having such capacity and exercise such powers, until it is struck off or dissolved in terms of the Insolvency Act [*Chapter 6:07]*."

In casu, the first respondent is still operational. No evidence has been advanced that it has been struck off the register. Neither has the first respondent been dissolved in terms of the insolvency law. Thus, the first respondent still enjoys the capacity and powers of a natural person. Hence, there is no need of suing the first respondent's director and officer. Accordingly, no relief should be sought against the second and third respondents as they were improperly made parties to the present proceedings.

Having dealt with the first issue, I will now proceed to address the remaining issues cumulatively due to the interrelated nature of such issues. It is the applicant's contention that the applicable rate of the local currency against the United States Dollar at the time it cleared its debt was one to one in accordance with the provisions of s 4 of Statutory Instrument 33 of 2019 which provides as follows:

> "Issuance and legal tender of RTGS Dollars and savings

> 4. (1) For the purposes of section 44C of the principal Act as inserted by these regulations, the Minister shall be deemed to have prescribed the following with effect from the date of promulgation of these regulations ("the effective date") –
> (a) That the Reserve Bank has, with effect from the effective date, issued an electronic currency called the RTGS Dollar;
> (b) that Real Time Gross Settlement system balances expressed in the United States dollar (other than those referred to in section 44C(2) of the principal Act), immediately before the effective date, shall from the effective date be deemed to be opening balances in RTGS dollars at par with the United States dollar; and
> (c) That such currency shall be legal tender within Zimbabwe from the effective date; and
> (d) that, 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 44C (2) of the principal Act) shall on and after the effective date be deemed to be values in RTGS dollars at a rate of one-to-one to the United States dollar; and
> (e) that after the effective date any variance 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
> (f) that every enactment in which an amount is expressed in United States dollars shall, on the and after effective date, be construed as reference to the RTGS dollar, at parity with the United States dollar, that is to say, at a one-to-one rate."

For purposes of the interpretation of s 4 of Statutory Instrument 33 of 2019, the applicant relied upon the case of *Zambezi Gas (Private) Limited* v *N.R. Barber (Private) Limited and Anor*[1], where the Supreme Court made the following pertinent remarks:

> "Once a conversion of the value of an asset or liability denominated in United States dollars is made to the value of RTGS dollars, the converted value remains the same, as the two different currency denominations both carry value. No exchange rate can be applied as the judgment debt remains a judgment debt with a value after it is converted to the local currency. The RTGS dollar has the value given under the one-to-one rate and it remains on that value even after the effective date. The first respondent and likewise the court a *quo* were wrong at law in trying to find parity by adding value on the RTGS dollar through the interbank rate. Section 4(1) (d) of S.I. 33/19 states that for such *sui generis* liabilities, including judgment debts, a rate of one-to-one between the United States dollar and the RTGS dollar will apply. The transactions entered into after the effective date would fall under the provisions of section 4(1) (e) of S.I. 33/19."

According to the applicant, a total sum of $63 500 was paid to the first respondent. The applicant carefully chose the use of the word "Dollar" without specifying whether the amount is sounding in United States Dollars or RTGS Dollars probably because by 22 February 2019, the two currencies were rated at the scale of one to one. What is clear from annexure L attached to the opposing affidavit is that on 31 July 2019, the applicant paid

[1] SC3/20.

ZW$8 967.74 and ZW$ 14 000. Reference is made to p 87 of the record. On 1 August 2019, the applicant paid ZW$ 32 500. This payment appears on p 87 of the record. The total payments for these two days is ZW$ 55 467.74. On 28 May 2020, the applicant made a payment of ZW$2 000. Reference is made to annexure E to the applicant's founding affidavit which is on p 55 of the record. This is also substantiated by annexure L attached to the opposing affidavit on p 88 of the record. Thus the total amount paid in Zimbabwe Dollars is ZW$57 467.74. Thus, this amount is common cause to all parties.

In terms of payment in United States Dollars, the applicant paid by way of twelve equal instalments of US$ 500. Six monthly payments were made from July to December 2017. Four monthly payments were further effected in January to April 2018. The last two monthly payments were generated in October and November 2018. Reference is made to annexure L to the opposing affidavit and annexure D to the applicant's founding affidavit. The total amount paid in United States Dollars is US$6 000. Thus, this amount is also not disputed.

Mr *Sithole* argued that the currencies were rated at the scale of one to one. Using this argument, one would reach to the sum of $63 467.74 after computing the Zimbabwe Dollars and United States Dollars. The applicant argued that it had paid the total amount of $63 500. If $63 467.74 is rounded off to the nearest 100, one would reach to $63 500. Thus, the amount of $63 467.74 is not disputed. The loan payable including the capital and interest amounts to $63 000. This has not been directly disputed by the respondents. Given the style of the opposition outlined in the opposing affidavit filed on behalf of the respondents, it is difficult to ascertain whether or not they are specifically denying that the applicant could have cleared the loan at the rate of one to one. The opposing affidavit filed on behalf of the respondents does respond to issues raised in the applicant's founding affidavit in a general fashion. The respondents did not respond in a normal way of replying through a paragraph by paragraph approach. For this reason, the court will make a finding that what has not been specifically denied is deemed to be admitted. Thus, the issue of whether or not the applicant cleared the loan at the rate of one to one has not been distinctively and unambiguously denied by the respondents in their opposing affidavit. In the premises, the court will be left with no other option except to arrive at an inescapable conclusion that the respondents are admitting this fact.

However, it can be established from the opposing affidavit that the respondents are disputing the rate of Zimbabwe Dollars against United States Dollars. Unlike the applicant, the respondents argued that the loan continued to sound in United States Dollars even after 22 February 2019 and the applicant was supposed to clear the loan using local currency equivalent to the United States Dollars at the interbank rate prevailing on the date of payment. According to the view of the respondents, the rate applicable to the loan agreement should be regulated by s 22(1) of the Finance No. 2 Act of 2019 which is worded differently from s 4(1) (d) of Statutory Instrument 33 of 2019. More particularly, s 22(1) of the Finance No. 2 Act of 2019 provides 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) that Real Time Gross Settlement system balances expressed in the United States dollar (other than those referred to in section 44C(2) of the principal Act), immediately before the first effective date, shall from the first effective date be deemed to be opening balances in RTGS dollars at par with the United States dollar; 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) that after the first effective date any variance from the opening parity rate shall be determined from time to time by the rate or rates at which authorised dealers exchange the RTGS dollar for the United States dollar on a willing-seller willing-buyer basis; and
> (f) every enactment in which an amount is expressed in United States dollars shall, on the first effective date (but subject to subsection (4)), be construed as reference to the RTGS dollar, at parity with the United States dollar, that is to say, at a one-to-one rate."

Ms *Wood*, in advancing the argument for the interpretation of s 22(1) of the Finance No. 2 Act of 2019, relied on the case of *Breastplate Service (Private) Limited* v *Cambria Africa PLC*[2], where the Supreme Court made the following observations:

> "As regards the issuance and legal tender of RTGS dollars, s 22 of the 2019 Act re- enacts the provisions of S.I. 33 of 2019, but with certain critical changes which are not relevant for present purposes, with retrospective effect from the first effective date, *i.e.* 22 February 2019."

[2] SC66/20.

Ms *Wood* further argued that s 22 of the Finance No. 2 Act of 2019 re-enacted the Statutory Instrument 33 of 2019 with retrospective effect. In describing the retrospective effect of Statutory Instrument, the Supreme Court, in the case of *Breastplate Service (Private) Limited* (*supra*) propounded the following comments:

> "For the sake of completeness, it is necessary to address and clarify the present status of the two statutory instruments under scrutiny *in casu*. S.I. 33 of 2019 was enacted in terms of s 2 of the Presidential Powers (Temporary Measures) Act [*Chapter 10:20]*. In terms of s 6(1) of that Act, S.I. 33 of 2019 lapsed after the expiry of a period of 180 days. However, its provisions have been re-enacted, with some crucial modifications, through s 22 of the Finance (No. 2) Act 2019 (Act No. 7 of 2019). As for S.I. 142 of 2019, its provisions have also been substantially reproduced, in virtually identical terms, in s 23 of Act No. 7 of 2019. This Act was promulgated on 21 August 2019 and came into operation and effect on the same date."

In casu, it is clear that the case of *Breastplate Service (Private) Limited* (*supra*) did not go to the extent of clarifying the effect of the retrospective effect of Statutory Instrument 33 of 2019 other than the scope highlighted above in order to ensure that the procedures outlined in the Presidential Powers (Temporary Measures) Act [*Chapter 10:20*] are complied with through the ratification of the Statutory Instrument by the Parliament. Put differently, the Finance No. 2 Act of 2019 had to validate Statutory Instrument 33 of 2019 in line with the procedure established in terms of the Presidential Powers (Temporary Measures) Act [*Chapter10:20*]. Without this validation exercise, Statutory Instrument 33 of 2019 would have ceased to be of force or effect after one hundred and eighty days. The validation of Statutory Instrument 33 of 2019 was expressed in Section 22(3) of the Finance No. 2 Act of 2019 which provides as follows:

> "(3) The use of the RTGS currency with effect from the first effective date is hereby validated."

In the absence of any further interpretation of the retroactive effect of Statutory Instrument 33 of 2019, the case of *Zambezi Gas* (*supra*) remains key in determining the dispute between the parties. What is critical to note at this stage is that the subject matter in the case of *Breastplate Service (Private) Limited* (*supra*) revolves around the foreign obligation, unlike the case of *Zambezi Gas* (*supra*) which involves the domestic obligation in the form of the judgment debt. If the Supreme Court's intention in the case of *Breastplate Service (Private) Limited* (*supra*) was to mark a departure from the case of *Zambezi Gas* (supra), definitely it would have explicitly stated this in unequivocal terms. Any attempt to stretch the meaning of retrospective effect other than what is stated in the case of *Breastplate*

Service (Private) Limited (*supra*) would amount to a conjecture. In defining the nature and scope of the case before it, The Supreme Court, in the case of *Breastplate Service (Private) Limited* (*supra*), made the following observations:

> "As I have already concluded, the transaction *in casu* gave rise to a foreign obligation denominated in foreign currency. By virtue of s 44C(2)(b) of the Reserve Bank Act, as read with s 4(1)(d) of S.I. 33 of 2019, that obligation continues to be, and is therefore allowed by another law to be, payable in a specific foreign currency, *i.e.* the United States dollar. It follows that the underlying transaction is excluded, by dint of s 4(e) of S.I. 212 of 2019, from the scope of the prohibition, imposed by s 3(1) of that instrument, against the payment or receipt of any currency other than the Zimbabwe dollar in respect of any domestic transaction.
>
> It follows from all of the foregoing that the third ground of appeal cannot be sustained. Statutory Instrument 142 of 2019, or any other relevant or applicable law, did not make it impossible for the appellant to discharge its outstanding contractual obligation to pay the sum of USD 31,400.00 to the respondent in foreign currency."

According to the case of *Zambezi Gas* (*supra)*, after the effective date, the rate of the United States Dollars against the local currency remained at the rate of one to one for debts incurred before 22 February 2019. For transactions which occurred after 22 February 2019, the exchange rate applicable on the date of payment would apply according to the case of *Zambezi Gas* (*supra*).

The loan in question is a debt that occurred prior to 22 February 2019. Consequently, the provisions of s 4(1) (d) of Statutory Instrument 33 of 2019 as read with Section 22(1)(d) of the Finance No. 2 Act of 2019 apply to the present case with equal force or effect. It is my considered view that the applicant discharged its contractual obligations by paying $63 467.74, being capital plus interest, to the first respondent. The applicable rate is one to one in accordance with s 4(1)(d) of Statutory Instrument 33 of 2019. In the circumstances, I see no reason why the applicant should be denied the relief for specific performance.

Having made a finding that the applicant is entitled to an order for specific performance, conversely, the effect of this is that the counter application for the respondents stands dismissed. In my view, there is no basis for the counter application. The applicant duly discharged its obligation by paying the loan at the rate prescribed by Statutory Instrument 33 of 2019. Costs must consequently follow the outcome.

Accordingly, it is ordered as follows:

(a) The first respondent be and is hereby ordered to surrender the applicant's title deeds held in the name of the applicant under deed of transfer 4373/2012 to the applicant.

(b) That any encumbrance placed on the said property, be and is hereby set aside.

(c) The counter application be and is hereby dismissed.

(d) First respondent be and is hereby ordered to pay applicant's costs.

Manase and Manase Legal Practitioners, applicant's legal practitioners
Messrs Venturas and Samukange, respondents' legal practitioners