REPORTABLE (44)

REGIS MAGAUZI
v
(1) FRANCIS JEKERA (2) SHERIFF FOR ZIMBABWE N.O

SUPREME COURT OF ZIMBABWE
MAVANGIRA JA, UCHENA JA & CHIWESHE JA
HARARE: 29 JUNE 2021 & 26 MAY 2022

R.G. Zhuwarara, for the appellant

B. Magogo, for the first respondent

No appearance for the second respondent

UCHENA JA: This is an appeal against the whole judgment of the High Court dated 6 July 2020 in which it ordered that the payment made by the first respondent to the appellant, on 14 November 2019 was in full and final settlement of the appellant's judgment debt against the first respondent.

FACTUAL BACKGROUND

The facts of the case can be summarised as follows:

The dispute between the parties arose from the first respondent's failure to settle his indebtedness to the appellant. On 15 October 2018, the first respondent signed an acknowledgment of debt acknowledging his indebtedness to the appellant in the sum of US$26 100.00. The acknowledgment of debt stated that the debt was due for payment and that in the event of legal proceedings being instituted, the first respondent would pay the costs of suit on a legal practitioner and client scale. The first respondent did not pay the debt. The

appellant issued summons in case number HC 10118/18 for the payment of the sum of US $26 100.00 being monies due in terms of the acknowledgement of debt and costs of suit. On 4 December 2018 the first respondent entered an appearance to defend.

On 12 December 2018 the appellant applied for summary judgment on the basis that he believed that the first respondent had no *bona fide* defence to defend the action. The first respondent initially opposed the application for summary judgment. He on 22 February 2019 agreed to the granting of an order by consent. The application for summary judgment was therefore granted by consent. The order reads as follows:

"**IT IS HEREBY ORDERED BY CONSENT THAT:**

1. The Application is granted.
2. Summary judgment is granted in favour of the Plaintiff against the Defendant in case No. HC 10118/18 for payment of the sum of US$26 100.00 plus costs of suit.
3. The respondent shall bear the costs of this application."

Following a number of subsequent events, the first respondent applied for a declaratory order in case number HC 1295/20. In that application the first respondent averred that he had paid and satisfied the judgment debt granted on 22 February 2019 by paying the sum of Z$88 400.00 to the second respondent. The first respondent further averred that subsequent to his making the payment, the appellant placed a caveat over his property known as certain piece of land situate in the District of Salisbury called Stand 912 Hatfield Township.

The first respondent averred that after he made payment to the second respondent in the sum of Z$88 400.00, the appellant instructed the second respondent to sell the immovable property. This prompted the first respondent to make the application for a declaratory order as he believed that he had by paying the Z$88 400.00 fully paid the judgment debt in terms of the Finance Act (No. 2) of 2019.

The appellant opposed the application for a declaratory order. He averred that the application was devoid of merit and was being made for the purpose of delaying execution. He further averred that the first respondent failed to satisfy the court order in HC 11449/18 since in terms of the Finance Act No.2 of 2019 the first respondent was supposed to pay the debt in RTGS Dollars at the interbank rate prevailing on the date of payment.

In determining the application the court *a quo* found that in terms of the Finance Act and the position established in *Zambezi Gas Zimbabwe (Pvt) Ltd v NR Barber and Another* SC 3/20 the obligation of the first respondent to make the payment to the appellant arose before 22 February 2019, through the acknowledgment of debt which was expressed in United States Dollars and that it therefore followed that liability had to be paid in RTGS dollars. The court thus found that the payment made by the first respondent on 14 November 2019 towards settlement of the judgment debt "settles in full the first respondent's obligation to the appellant except for taxed costs". In the result the court made the following order:

> "Accordingly, I make the following order:
> 1. The payment of 14 November 2019 towards first respondent's judgment debt settles in full the applicant's obligation except taxed costs.
> 2. First respondent to pay costs of the application."

Aggrieved by the court *a quo's* decision, the appellant noted an appeal to this Court on the following grounds:

GROUNDS OF APPEAL

> "1. The court *a quo* erred and misdirected itself in failing to realise that the material date for purposes of section 4 (1) (d) of S.I 33 of 2019 and the Finance Act (No.2) of 2019, was the date of judgment in HC 11449/2018 and not the date when the cause of action had arisen since the first respondent's financial obligation to the Appellant was in the form of a judgment debt.

2. The court *a quo* erred and misdirected itself on a point of law in determining the application on the basis of a different cause of action from the one which was pleaded in the first respondent's Founding Affidavit.
3. The court *a quo* erred and misdirected itself on a point of law in failing to appreciate that Section 4 (1) (d) of S.I 33 of 2019 and Section 22 (1) (d) of the Finance Act (No. 2 of 2019) only apply to judgment debts that were given before 22 February 2019.
4. The court *a quo* erred in granting an order which lacks clarity as to the amount which it held to have been paid in full settlement of the judgment debt granted against the first respondent."

SUBMISSIONS BEFORE THIS COURT.

Mr *Zhuwarara* counsel for the appellant submitted that the order of the court *a quo* dated 22 February 2019 was an order by consent which extinguished any cause of action that existed between the parties. He also argued that the court *a quo* in determining the application for a declaratory order made by the first respondent, had to take into consideration whether or not the obligation arising from the court order dated 22 February 2019 fell within the ambit of s 22 (1)(d) of the Finance Act (No. 2) 2019. He futher submitted that the court *a quo* ought not to have dealt with the obligation as arising from the acknowledgement of debt but should have dealt with the obligation as arising from the judgment debt.

Counsel for the appellant also submitted that once there is a judgment debt, one cannot rely on an obligation arising from an acknowledgment of debt. The court *a quo* ought to have made a determination based on the court order granted long after the acknowledgment of debt. He further submitted that as the judgment debt was granted on 22 February 2019, which is the effective date when S.I 33 of 2019 came into effect, the court *a quo* ought to have made its decision in terms of s 22 (1)(e) of the Finance Act, which provides for an interbank rate being applied to the judgment debt which was denominated in United States Dollars. He further argued that the court *a quo* erred in allowing the application for a declaratory order and on that basis prayed that the appeal be upheld.

Mr *Magogo* counsel for the first respondent submitted that the appeal arose from a judgment in respect of which the appellant never raised the issues of compromise. The application was opposed in terms of s 4 (1) (e) of S.I 33 of 2019. He also submitted that before the court *a quo* the appellant argued on the strength of the *Zambezi Gas* judgment that the obligation was a judgment debt granted on the effective date and therefore did not fall under s 22 (1)(d) of the Finance Act (No. 2) 2019. Counsel for the first respondent further submitted that the change from an acknowledgment of debt to a judgment debt did not affect its being a liability in terms of s 22 (1) (d).

Counsel for the first respondent also argued that the *court a quo* did not err in finding that the obligation of the first respondent arose before 22 February 2019. In support of that position counsel cited s 22 (4)(a) of the Finance Act which provides that the date when the obligation was incurred should be taken into consideration. He argued that s 22 (4) (a) of the Finance Act puts the matter at hand beyond doubt. He also submitted that s 22 (1) (d) allows the taking into consideration of the time when the liability was incurred and therefore the change in form cannot alter the liabilty for purposes of s 22 (1) (d). Thereafter counsel for the first respondent argued that the first respondent correctly paid the debt at the rate of 1:1 as the debt arose before the effective date when the acknowledgment of debt was signed. He further submitted that the decision of the court *a quo* cannot be faulted and prayed that the appeal be dismissed with costs.

The appeal raises one issue for determination being whether or not the court *a quo* erred by relying on the acknowledgment of debt when it ought to have taken into consideration the date of the extant judgment in making its determination.

THE LAW

When a court grants an order all subsequent acts affecting the dispute between the parties rely on the court's order and not the reason or facts the court based its judgment on. Execution of judgment debts is based on court orders and not the reason for which the court order was granted. Therefore a party or the parties cannot disregard a court order as they are bound by it. In the case of *Chiwenga v Chiwenga* SC 2/14, it was stated that:

> "The law is clear that an extant order of this Court must be obeyed or given effect to unless it has been varied or set aside by this Court and not even by consent can parties vary or depart therefrom. See also *CFU v Mhuriro & Ors* 2000 (2) ZLR 405 (S)."

The law on the distinction between section 4 (1)(d) and s 4 (1)(e) of S.I. 33 of 2019 and s 22 (1)(d) and s 22(1)(e) of the Finance Act (No 2) of 2019 on the payment of liabilities and assets valued in United States Dollars immediately before and after the effective date depends on the interpretation of the two sections. The interpretation of s 4(1)(d) was clarified by this Court in the *Zambezi Gas* case, *(supra)* where Malaba CJ in interpreting the effect of s 4(1)(d) at p 11 of the cyclostyled judgment said:

> "The phrase "**immediately before" means that the liability should have existed at a date before the effective date and that such liability should have been valued and expressed in United States dollars**. The issue of the time-frame within which the liability arose in relation to the effective date of 22 February 2019 does not matter. What is of importance is the fact **that the liability should have been valued before the effective date in United States dollars and was still so valued and expressed. The judgment debt was ordered against the appellant on 25 June 2018. It was valued and expressed in United States dollars and was still so valued and expressed immediately before 22 February 2019.** Section 4 (1)(d) of S.I. 33/19 provides that all assets and liabilities that were valued and expressed in United States dollars immediately before the effective date 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." (emphasis added)

Commenting on s 4 (1)(e) the Chief Justice at p 13 said:

> "The transactions entered into after the effective date would fall under the provisions of s 4 (1)(e) of S.I 33/19"

Section 4(1)(e) of S.I. 33/19 and s 22 (1)(e) of the Finance Act (No 2) of 2019 provides as follows:

> "(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-buyer-basis … ."** (emphasis added)

Section 4 (1)(e) clearly means that the rate at which any value in United States dollars established by any means including judgment debts shall after the effective date be based on the rate at which authorised dealers under the Exchange Control Act exchange the RTGS Dollar for the United States Dollar on a willing seller –buyer basis.

A reading of the *Zambezi Gas* judgment clearly establishes that the phrase "immediately before the effective date" means that the assets and liabilities (including judgment debts) must have been valued in United States Dollars before the effective date, which is 22 February 2019. The values are then converted "on or after" the effective date being 22 February 2019 to RTGS Dollar at the rate of 1 to 1. It therefore means that the first day for the conversion was on 22 February 2019 when liabilities valued immediately before the effective date in United States Dollars became RTGS Dollars.

The effective day came into force soon after midnight of 21 February 2022 when 22 February 2019 began. That is what divides the time immideately before the effective day and the time after the effective day. That divide determines how the judgment debt should be executed in terms of the rate to be applied. Section 4 (1)(d) applies to the time before midnight on 21 February 2019, while s 4 (1)(e) applies to the time from 0.01 AM on 22 February 2019.

As regards the granting of an order in United States dollars on 22 February 2019, s 23 (1) of the Finance Act (No 2) of 2019, provides that:

> "(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".

Section 20 of the Finance Act (No 2) of 2019 defines the first effective date as 22 February 2019 and the second effective date as 24 June 2019. This means on 22 February 2019 it was lawful for a court to grant an order in United States dollars.

APPLICATION OF THE LAW TO THE FACTS.

Whether or not the court *a quo* erred by relying on the acknowledgment of debt when it ought to have taken into consideration the date of the extant judgment in making its determination.

It is common cause that the cause of action resulting in the judgment debt under HC 11449/18 arose from the acknowledgment of debt signed by the first respondent acknowledging his indebtedness to the appellant in the sum of US$26 100.00. It is also common cause that the judgment debt in HC 11449/18 was granted on 22 February 2019 the day when S.1 33 of 2019 came into effect at 0.01AM. The judgment debt was granted during working hours of 22 February 2019 several hours after the effective date had come into effect. The respondent therefore incurred the obligation to pay when the consent order was granted by the court on 22 February 2019.

It is apparent that the court *a quo* erred when it relied on the acknowledgment of debt which had resulted in the granting of the consent order, after the effective date had come into effect. The court *a quo* erred in finding that the first respondent ought to have paid the debt arising from the acknowledgement of debt. It should have taken into consideration the fact that when the parties consented to judgment on 22 February 2019 under case number HC 11449/18, the liability became a judgment debt and it ought to have taken into consideration the extant court order in arriving at its determination.

The appellant could therefore only execute the judgment debt for the recovery of the US$26 100.00. Subsequent to the consent order the acknowledgment of debt was no longer the basis of the respondent's legal obligation to the appellant. The obligation was now based on the court order. It is therefore the court order, that the court *a quo* had to relate to in terms of S.I 33 of 2019 to determine the rate at which the sum owed had to be paid.

The dispute between the parties on the meaning of the phrase "immediately before the effective date" has already been pronounced on by this Court in the *Zambezi Gas Zimbabwe (Private) Limited* case (*supra).*

The order granted in case number HC 11449/18 was granted on 22 February 2019 and as such was not granted immediately before the effective date of the promulgation of S.I 33 of 2019. The order was granted on the effective date but after it had come into effect. It can therefore not be valued in RTGS Dollars at the rate of 1 to 1 as it falls under the provisions of section 4 (1) (e) of S.1 33 of 2019.

The court *a quo* therefore erred in finding that the liability by the first respondent to the appellant arose from the acknowledgment of debt when it in fact arose from the consent order of 22 February 2019.

The import of the reasoning of this Court in the *Zambezi Gas* case *(supra)* clearly establishes that s 4 (1)(d) of S.I 33 of 2019 applies if the assets and liabilities were valued in United States Dollars immediately before 22 February 2019 and that s 4 (1)(e) applies therafter. The court *a quo* was bound to follow the reasoning of the Supreme Court in the *Zambezi Gas* case (supra).

It is apparent that the court *a quo* did not correctly apply the law as clarified by this Court's decision in the *Zambezi Gas* case (*supra*). The court *a quo* therefore erred. The appeal has merit and should succeed.

DISPOSITION

It is accordingly ordered as follows:

1. The appeal be and is hereby allowed with costs.
2. That the judgment of the court *a quo* be and is hereby set aside and be substituted with the following:

> "The application for a declaratory order be and is hereby dismissed with costs on the legal practitioner and client scale".

MAVANGIRA JA: I agree

CHIWESHE JA: I agree

Danziger & Partners legal practitioner's, appellant's legal practitioners.

Samukange Hungwe Attorneys, 1st respondent's legal practitioners.