ALEC AVACALOS
versus
DAVID RILEY

HIGH COURT OF ZIMBABWE
MAKARAU JP
Harare 17 September 23 and 31 October 2007.

Stated Case

Mrs *J Wood,* for plaintiff
Mr *R Fitches*, for defendant.

MAKARAU JP: The issue that falls for determination in this matter is relatively easy to formulate. The matter however took a long and rather tortuous road from the issuance of summons to presentation of argument before me by counsel as a stated case.

The plaintiff issued summons against the defendant on 7 April 2006, claiming the sum of US$ 64 000-00 or its equivalent in Zimbabwean Dollars at the market rate prevailing on the date of payment. The prayer also sought interest a *temporae morae* and costs of suit.

On 12 May 2006, the plaintiff filed a declaration in which he set out his cause of action against the defendant as an agreement of sale of shares in a company registered in Zimbabwe, which agreement the defendant is alleged to have breached.

The action was defendant and after a request for further particulars which were duly furnished, the defendant filed a plea in which a number of legal points were raised in addition to a denial of the alleged indebtedness. In addition, the defendant filed a counterclaim in which he prayed for the removal from attachment of his shares, which attachment had been made by the Sheriff to found jurisdiction in the matter. The plea was filed in December 2006.

A replication was filed in the matter in May 2007 and an application for a pre-trial conference made. A conference was scheduled for 8 June 2007. Two days before the conference was held, the defendant consented to judgment in the alternative prayer as set out in the plaintiff's declaration. In the consent to judgment filed of record, the defendant specifically consented to judgment in the sum of $16 000 000 representing the sum of US$64 000 000-00 at the official exchange rate as at the date of the consent. The defendant also consented to judgment for interest and costs as prayed for in the summons.

At the pre-trial conference of the matter, the plaintiff refused to accept the defendant's consent to judgment and requested that the matter be referred to trial on the sole issue of whether the "market" rate of exchange referred to in the summons is the same as the official rate upon which the defendant made payment or is some other higher rate, known in common parlance as the parallel or black market rate.

At the hearing of the matter, in view of the fact that the facts of the matter are not in dispute, I directed that counsel file heads of argument on the matter and allowed the matter to be argued on the opposed motion roll.

Mrs *Wood* for the plaintiff raised three main arguments on behalf of the plaintiff. Firstly, she argued that I should grant judgment to the plaintiff in the sum of US$64 000-00 and not in the sum of the local currency equivalent in which the defendant has consented to judgment. Secondly, she argued that in the event that I am not inclined to give judgment in the sum of US$64 000-00, then I should order that the sum of US$64 000-00 be converted to local currency at the parallel market rate. Finally, she argued that if I am to hold that the local currency equivalent of the amount due to the plaintiff is to be converted at the official rate, then I should order that the official rate applicable is not the one that obtained on the date the consent to judgment was filed, but the one that will be obtaining when the plaintiff seeks to enforce the judgment.

I will deal with each of these arguments in turn.

JUDGMENT EXPRESSED IN FOREIGN CURRENCY

It has been held by the Supreme Court that a judgment may be given in foreign currency where the obligation to pay is in that currency. (See *Makwindi Oil Procurement Company (Pvt) Ltd v NOCZIM* 1988 (2) ZLR 482 (SC).

The position established in Makwindi was followed in *Ami Zimbabwe (Pvt) Ltd v Casalee Hldgs (Successors) (Pvt) Ltd* 1997 (2) ZLR 77 (SC) A and more recently in *Development Bank v Zambezi Safari Lodges (Pvt) Ltd* HH 95/06 and was averted to as *dicta* in *Intercontinental Trading (Pvt) Ltd v Nestlé Zimbabwe (Pvt) Ltd* 1993 (1) ZLR 21 (HC).

In my view, while it is competent for this court to order that judgment be expressed in foreign currency in appropriate cases, it is not competent for me to do so in the matter before me.

As stated elsewhere above, the defendant filed a consent to judgment. The consent was properly filed in terms of the High Court Rules 1972. Had the plaintiff been inclined to do so, he would have been perfectly within his rights to apply through the chamber book to the registrar for judgment to be entered in his favour. This he did not do as he was of the view, erroneously held as I will show below, that he was entitled to convert the original debt at the elusive parallel market rate.

That the plaintiff is entitled to judgment in the alternative and at the official rate of exchange is beyond doubt. This he is entitled to not because the matter has been determined on its merits and after a full trial of the issues between the parties but because the defendant has elected to throw in the towel and conceded the claim. It thus appears to me that the judgment I have to enter in this matter is not a judgment on the merits and where I determine the issues between the parties. The resolution of the dispute has been taken out of my hands by the consent filed by the defendant. There is no issue remaining alive for me to determine.

In my view, the situation would have been different had the plaintiff worded his declaration in such a way that he did not give the defendant a choice as to the currency of the judgment. By including the alternative prayer for the local currency equivalent of the foreign currency, the plaintiff created room for the defendant to choose to consent to judgment in the local currency equivalent.

Thus, two legal principles militate against my making an order sounding in foreign currency in this matter. Firstly, I cannot determine the matter on the merits to establish whether or not the plaintiff is entitled to judgment in the sum of the foreign currency claimed. By consenting to judgment in the matter, the defendant had taken away the need on my part to deal with the matter on the merits. Secondly, the defendant has already calculated the amount of the local currency that he is consenting to judgment in. This he has correctly done and no challenge has been mounted against his calculations. He has thus consented to judgment not only in terms of the summons but in a manner where all I have to do is to convert the consent into an order of this court.

THE COURT'S RECOGNITION OF THE PARALLEL MARKET RATE

The facts of the matter before me are similar to the facts that faced SMITH J in *Echodelta Ltd v Kerr & Downey Safaris (Pvt) Ltd* 2002 (1) ZLR 632 (H). In that case, while noting that the official rate of exchange for foreign currencies was far removed from the

exchange used in the informal market, the court endorsed the argument by counsel for the defendant that while there is a shortage of foreign currency in the country, it is illegal to pay at any other rate other than the official rate. While the parallel market is a reality and may be the only viable market at times, the court cannot lend itself to an illegality and validate its operations by giving a judgment that makes reference to it.

THE DATE OF CONVERSION OF THE JUDGMENT DEBT

Finally, Mrs *Wood* argued that if I were to uphold the submissions by Mr *Fitches* that the only rate applicable to convert the mount due to the plaintiff is the official rate, then I must order that the rate applicable be the current official rate and not the rate that obtained at the time the defendant consented to judgment and attempted to pay off the debt.

It appears to me that Mrs *Wood* is seeking reliance from the *dicta* in *Makwindi Oil Procurement (Pvt) Ltd (*supra) where it was laid down that the amount of foreign currency in a judgment is to be converted into local currency at the date when leave is given to enforce the judgment. This is the established position but in my view it only applies where the judgment is expressed in foreign currency. Where the judgment is to be expressed in local currency, then the amount of the judgment it is set and determined on the date that the consent to judgment is filed. It cannot be re-converted on the date that judgment is finally given as to do so will, in my view, be highly prejudicial to the defendant who would have unequivocally elected to have a judgment entered against him in a certain specified amount.

I am aware of the loss that the plaintiff is going to incur in this matter and that this is why Mrs Wood is pressing for the higher rate of exchange. It is however my view that the plaintiff is to some extent to blame for the monumental loss that he will now incur by having the judgment entered in his favour at the much lower rate. He firstly pleaded in the alternative as stated above, opening the doors wide for the defendant to accept the less onerous burden of consenting to judgment in the local currency equivalent. He then wrongfully refused to accept the tender of the local currency at a time when its value was relatively higher than now thereby compounding his loss.

DISPOSITION

The judgment in this matter is harsh upon the plaintiff. It is however not for the courts to make policy and determine what rates should apply between traders and contracting parties.

The differences between the exchange rates or markets obtaining in the country will continue to work hardships on people in the position of the plaintiff and it is hoped that the situation will normalize in the near future so that litigants will not lose faith in the legal system that is compelled by law to recognize only the official rate which is not only unrealistic but is never part of the parties consideration when they enter into transactions involving foreign currency. It is however my view that the law cannot be changed to address the shortage of foreign currency in the country, for it is not the function of the court to address such issues.

In the result, I make the following order:

1. Judgment is entered for the plaintiff in the sum of $16 million together with interest thereon at 30 % per annum from the date of summons to date of payment in full.
2. The defendant shall pay the plaintiff's costs up to the date of the filing of the consent to judgment.

Byron Venturas &Partners, plaintiff's legal practitioners.
Scanlen & Holderness, defendant's legal practitioners.