

MOHAMED ZAKARIYA PATEL

Versus

ISMAIL MOOSA LUNAT

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 19 MAY & 13 JUNE 2022 AND 10 AUGUST 2023

Motion Proceedings

E.R. Samkange for the plaintiff
Advocate P. Dube for the defendant

TAKUVA J: Plaintiff instituted the current proceedings for civil imprisonment against the defendant.

Background

Defendant signed an acknowledgement of debt showing an allegedly standing indebtedness to the plaintiff in the sum of US\$384 177,00. When defendant failed to pay this debt, plaintiff sued him and after a contested summary judgment application, summary judgment was granted in favour of the plaintiff. It is not in dispute that at the time of granting this judgment the court had not been addressed on SI 33/2019 and on the ensuing amendments to the Reserve Bank of Zimbabwe Act and the Finance Act. Consequently, summary judgment was granted in favour of the plaintiff for US\$387 177,00.

Defendant noted an appeal against summary judgment but later abandoned it in favour of an application for a declaration that payment of ZWLRTGS\$384 177,00 made by his legal practitioners to the legal practitioner of the plaintiff had discharged the debt, in light of the judgment in the *Zambezi Gas Zimbabwe (Pvt) Ltd v N. R. Barber (Pvt) Ltd & Anor* (SC 3/20; Civil Appeal No. SC 437/19) [2020] ZWSC 03 [20 Jan 2020).

This application was refused by this court and attempts to appeal the declaratur and the summary judgment were still born in that condonation and leave to appeal out of time could not be obtained. Accordingly, execution of the judgment proceeded and defendant's assets at the following addresses were attached;

- (a) Shop 20 and 22 Ascot Shopping Centre; his wife's premises

- (b) 9 Hall Road, Khumalo, Bulawayo, the defendant's residential property; and
- (c) 85 R. Mugabe, defendant's business premises.

The Sheriff proceeded to sell off the attached assets and issued a return of service which read as follows;

“Public auction was conducted and realized negative sale RTGS1 391 230,00. Sale proceeds insufficient to cover the capital debt.”

The nature of civil imprisonment under the 2021 High Court Rules was explained in *Zimbabwe Leaf Tobacco v Cooks* (HH-412-21) [2021] ZWHHC 412/06 (06 August 2021) as follows;

“The Nature of Civil Imprisonment

A summons for civil imprisonment calls upon a debtor to show cause why he should not be imprisoned for failure to pay a debt. The new High Court Rules 2021, published under SI 202/21 make provision for imprisonment for a debt in r73. In terms of r73 (46) before a court makes an order for civil imprisonment, it should satisfy itself that the judgment debt has not been paid. In most civil imprisonment it should satisfy itself that the judgment debt has not been paid. In most civil imprisonment proceedings, liability is not an issue in which case the court's enquiry is limited to the debtor's ability to service the debt and the appropriateness of civil imprisonment. Where a debtor challenges civil imprisonment proceedings on the basis that he does not owe a contractual obligation or has cleared it, it is incumbent upon the court to resolve the dispute regarding liability first before delving into the issue of appropriateness of civil imprisonment.

In these proceedings the issue is whether the balance due and outstanding by the defendant as at 22 February 2019 was due in RTS dollars at the rate of (1:1) and whether the respondent has discharged his liability for the debt. The court must resolve first the question of the applicable currency – and decide whether the defendant has cleared these debt. If this question is answered in the affirmative, that is the end of the matter. If the court finds that the defendant owes in terms of the court order granted against him and has neglected and failed to pay in terms of the order, the court will be required to enquire into the respondent's ability and willingness to pay the debt in compliance with s49 (2) of the Constitution of Zimbabwe. The new rules make specific reference to s49 (2) in r73 (1) unlike r370, its predecessor thereby giving guidance on the subject. The section stipulates as follows; “(2) No person maybe imprisoned merely on the grounds of inability to fulfil a contractual obligation ...”

The fact that a debtor owes a contractual obligation does not necessarily call for his civil imprisonment. Civil imprisonment is a drastic measure which should be resorted to only

as a last resort and only in instances where a debtor is able to service the debt but has shown an unwillingness to discharge the obligation. It is for this reason that the court is enjoined to carry out an inquiry to establish the financial position of the debtor and attitude to payment of the debt. The manner in which the debt will be cleared is considered in a case where the debtor is able to service the debt and shows a willingness to settle it.”

Accordingly, this court must enquire into (3) issues before reaching a conclusion namely;

1. Liability
2. Ability to service the debt; and
3. The appropriateness of civil imprisonment.

Liability

It is trite that before a court makes an order affecting the personal liberty of a debtor, it must be certain that there is a liability. Put differently, it must be satisfied that as at the date that civil imprisonment is sought, there is a balance due to the judgment creditor still. The issue of liability arises in casu in that the plaintiff has not disclosed to the court what the balance due on the judgment date is. The *nulla bona* return shows that a certain amount was realized from the sale in local currency. Further, a sum of RTGSZWL\$384 177,00 was paid by the defendant. Despite all this, the plaintiff omitted to inform the court of the actual balance due on the judgment debt on account of which balance civil imprisonment is being sought against the defendant.

The question of whether a judgment debt which was expressed in United States dollars could be discharged by a payment in RTGS was decided by this court in *Joice T. R. Mutuku & Ruzirun Investments (Pvt) Ltd vs Peppy Motors (Pvt) Ltd t/a Agritech & Ors* HH-436-21 as follows;

“What must be determined is whether the liability of the applicants to pay the amounts which are reflected in this deed of settlement and order by consent was in existence as at 22 February 2019 or only arose after 20 May 2019 when the Deed of Settlement was executed and the order by consent granted. Put differently, did the respondents’ asset (the outstanding purchase price) come into existence only on 20 May 2019 or it was already in existence as it was already in existence as at 22 February 2019 when Statutory Instrument 33 of 2019 became effective? This issue is decidedly answered

by reference to the plaintiff's declaration as amended in case number HC 2954/18. In paragraph 7 of that declaration the respondents (who are plaintiffs) allege that the agreement of sale with the applicants was entered into on 25 July 2014 and the final payment was due by April 2015. It is further stated that the outstanding capital balance was in the sum of US\$260 000,00 as at the due date. Clearly therefore, the applicant's liability to the 1st to 3rd respondents was expressed in United States dollars well before the effective date. They therefore fall within the ambit of the provisions cited above. It does not matter that the parties continued to express the liabilities in US dollars even after the effective date. The deeming effect of the Regulations means that the expression of those values must be read in light of the express provisions of the law. The deed of settlement and order by consent did not create any new liabilities but merely pronounced on the existing liabilities of the applicants. Any other reading of the law would defeat the very purpose of the law which was meant to convert assets and liabilities which existed at the time of the effective date and were expressed in United States dollars to RTGS at the rate of 1:1.

The respondents are therefore not entitled to recover the judgment debt at the interbank rate. The applicant's obligation is to pay the debt in the local currency at the rate of 1:1 to the United States dollar. Since it has not been disputed by the respondents that what has been paid would discharge the debt if the rate of 1:1 is applied, this court comes to the conclusion that the applicants are entitled to the confirmation of the provisional order."

In casu, it is neither here nor there that the judgment which is sought to be enforced was expressed in US dollars, the defendant remained entitled to settle the judgment in local currency.

According to the defendant's testimony, he paid RTGS \$384 117,00 to the plaintiff. It is common cause that the Sheriff put the amount realized by the sale of defendant's goods at RTGS \$1 391 230,00. As a result, the defendant has paid a total of RTGS\$1 775347,00 towards a judgment debt that ought to have been discharged by a payment of RTGS 384 117,00.

The principle of law enunciated in the *Munyoro* judgment is that despite a settlement agreement or contract reached by the parties after the effective date, in which settlement agreement the debt is expressed in United States dollars and notwithstanding a judgment by consent entered by the court, adopting that settlement agreement and granting judgment in United States dollars, the deciding factor is the underlying obligation, and as long as that obligation stood expressed in United States dollars, as at the effective date then that obligation is liable to be settled in local currency at a rate of 1:1.

Applying this principle to the present case I find as follows;

1. The asset of the plaintiff in this matter was the debt of US\$384 117,00.
2. This asset existed before the effective date. It is evidenced by the acknowledgement of debt on 11th January 2019 before the effective date.
3. Notwithstanding that judgment was entered in respect of the debt in United States dollars, such a judgment has to be read in light of the deeming provisions of the law.
4. Therefore, the plaintiff is not entitled to recover the judgment debt at the interbank rate. The obligation is to pay the debt in the local currency at the rate of 1:1 to the United States dollar.

Accordingly by operation of the law, the defendant's liability has been discharged and civil imprisonment must fail.

In light of this finding on liability, there is no need to consider the rest of the issues.

Disposition

1. The application for a decree of civil imprisonment against the defendant be and is hereby dismissed.
2. Each party to bear its own costs.

Samukange Hungwe Attorneys, plaintiff's legal practitioners
Ncube Attorneys, defendant's legal practitioners