

BRILLIANT MKWANANZI
versus
OLAM MARUFU

HIGH COURT OF ZIMBABWE
WAMAMBO & MUCHAWA JJ
HARARE, 14 June 2022 & 10 Jan 2024

Civil Appeal

M E *Motsi*, for the plaintiff
I *Musiwa*, for the respondent

WAMAMBO J: This is an appeal against the judgment of the Magistrate sitting at Harare.

The appellant was the plaintiff in the court *a quo* while respondent was the defendant.

The issues before the trial court and indeed before us were narrowly defined.

Plaintiff lent the defendant the sum of US\$15 000 in February 2016. An acknowledgement of debt was signed to that effect. The acknowledgement of debt is contained at p 18 of the record. The defendant does not dispute signing the acknowledgement of debt.

The crux of the matter is whether or not the said debt should be paid in United States dollars at the prevailing interbank rate or in Zimbabwean dollars at the rate of one to one with the United States dollar.

The trial court considered provisions of S.I. 33/19 and the case of *Zambezi Gas Zimbabwe (Pvt) Ltd v N.R. Barber (Pvt) Ltd & Anor SC 3/20*.

The trial court found as follows at p 7 of the record:

“In light of the above law referred to it is the court’s view that amount claimed is to be paid as prescribed by the S.I. 33 of 2019 and the Supreme Court judgment 3/2020 that is at the rate of 1:1 with the United States dollars.

Since liability was incurred before the effective date of 20 February 2019. Section 4(1)(d) of S.I. 33 of 2019 is the section that applies in this case for debts incurred prior the effective date of 20 February 2019.”

The order rendered by the court *a quo* appears at p 4 of the record and reads as follows:

“IT IS HEREBY ORDERED THAT:

- I. Accordingly court rules that since defendant is admitting liability judgement be and is hereby entered in favour of plaintiff as follows:
- II. Defendant to pay the plaintiff the outstanding amount claimed in the summons in RTGS/ZWL.
- III. Each party to bear own costs.”

The appellant (who was the defendant in the court *a quo*) was unhappy with the aforementioned judgement and filed a notice of appeal to this court. It is the appeal before us.

Two grounds of appeal essentially attacking the interpretation by the trial court of the *Zambezi Gas Zimbabwe (Pvt) Ltd v N.R. Barber* (supra) (and hereafter referred to as the *Zambezi Gas* case) and s 4(1) of S.I. 33/19 were raised.

The grounds of appeal read as follows:

- “1. The Magistrate *a quo* erred in fact and in law in her interpretation of the *Zambezi Gas Zimbabwe (Pvt) v N.R. Barber (Pvt) Ltd & Anor SC 3/20*.
2. The Magistrate *a quo* erred misdirected herself (sic) in law by not interpreting the provisions of s 4(1) of S.I. 33/19”

Appellant seeks that the order of the court *a quo* be set aside and substituted with an order to the effect that respondent should pay US\$15 000 at the bank rate on the date of payment in terms of s 4(1)(e) of S.I. 33/19.

Although there are two grounds of appeal appearing on the notice of appeal it is essentially one ground. The *Zambezi Gas* case interprets the provisions of S.I. 33/19. To split the grounds into two would appear to me to be unnecessary.

The following appears to be common cause:

In February 2016 appellant lent the respondent money. The money was in US Dollars. The amount lent is US\$15 000. Respondent undertook to pay the said amount by not later than 31 June 2017.

The Zambezi Gas matter interpreted the full meaning of S.I. 33 of 2019. S.I. 33 of 2019 provides as follows:

- “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 the Real Time Gross Settlement system balance expressed in the United States dollar (other than those referred to in section 44 C(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 44 C(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 party rate shall be determined from time to time by the rate at which authorized dealers under the Exchange Control Act exchange the RTGS dollar for the United States Dollar on a willing seller-buyer basis.”

At pp 10 to 11 the Supreme Court in the *Zambezi Gas* case expressed itself as follows per MALABA JA (as he then was):

“The court *a quo* construed the word “immediately before the effective date” to mean that the expression of the value of the liability in United States dollars ought to have occurred as an event at a time immediately before the effective date.”

The court *a quo* misdirected itself because the words “immediately before the effective date” refer to the state in which assets and liabilities to which assets and liabilities to which the provisions of s 4(1)(d) of S.I. 33/19 apply, should in relation to the effective date, irrespective of how far back in time the asset or liability valued and expressed in United States dollars came into existence. The phrase “immediately before” means that the 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 judgement 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.

At page 11 the Supreme Court continued as follows:

“The values referred to in s 4(1)(d) of S.I. 33/19 show that after a one to one conversion the RTGS dollars takes the value and character of the United States dollar.

The effect of the phrase “on and after” is that the conversion of the values of all “assets and liabilities” which were valued and expressed in United States dollars immediately before the effective date to values in RTGS dollars at a rate of one United States dollar to one RTGS dollar would apply at the time the value of the asset or liability is liquidated or discharged.”

The *Zambesi Gas* case was also clear that only transactions which were entered into after the effective date fall under the provisions of s 4(1)(e) of S.I. 33/19.

In the instant case the liability against the appellant fell before the effective date. It was valued in United States dollars and was still so valued and expressed immediately before the effective date of 22 February 2019.

The transaction between the parties was not entered into after the effective date. To that end s 4(1)(e) of S.I. 33/19 is not applicable.

I find in the circumstances on account of the principles as enunciated in the *Zambezi Gas* case that the interpretation placed by the court *a quo* was correct.

The appeal therefore should fail.

It is ordered as follows:

The appeal be and is hereby dismissed with costs.

Wamambo J:.....

Muchawa J: Agrees.....

M E Motsi and Associates, appellant's legal practitioners
Machingura Legal Practitioners, respondent's legal practitioners