

JL ROBINSON AGENCIES (PVT) LTD t/a
AMALGATED MOTOR CORPORATION
versus
DANFORD CHAMWARUKA

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 15 March 2023 & 27 February 2024

Opposed Application-Declaratur

TL Mapuranga, for the applicant
M Chipetiwa, for the respondent

MUSITHU J: The applicant approached this Court seeking relief by way of a *declaratur*. The draft order captures the relief sought as follows:

“It is ordered as follows:

1. The application be and is hereby granted.
2. It is declared that the order of this Honourable Court under HC 1255/13 registering the order of the Labour Court dated 30 January 2013 sounding in money (USD 28,530.00) was converted to RTGS \$28,530.00 by the operation of the provisions of S.I. 33 of 2019 at the rate of 1:1;
3. It is further declared that the Applicant is liable to pay the Respondent the sum of RTGS \$28,530.00 in accordance with the provisions of paragraph 2 of this order; and
4. Each part shall bear its own costs.”

The application was opposed.

Background to the Applicant’s Case

The parties herein once enjoyed an employer-employee relationship which turned sour leading to the termination of the respondent’s contract of employment for misconduct in November 2010. The respondent was aggrieved by the decision and challenged it on appeal. An arbitrator found in favour of the respondent. Despite having the arbitral award in his favour, the respondent further appealed to the Labour Court wherein an order in his favour was granted in default of appearance by the applicant herein.

The Labour Court per NDEWERE J ordered the applicant to pay the respondent the sum of US\$ 28,530.00 as damages in lieu of reinstatement. The order by NDEWERE J was granted in default on 18 January 2013. The Labour Court order was registered as an order of this Court by MUSAKWA J (as he was then) on 20 January 2014. The respondent sought to execute the

High Court order prompting the applicant to approach this court for stay of execution of the order. Stay of execution was granted by MUREMBA J in HC 2595/14 (judgment HH 322/14).

The default judgment by NDEWERE J was rescinded by KUDYA J of the Labour Court. The respondent was not satisfied with the way the default judgment was rescinded. He sought and obtained leave to appeal against the judgment by KUDYA J to the Supreme Court. On 15 July 2022, the Supreme Court set aside the proceedings before KUDYA J having found them to be a nullity. The order by the Supreme Court effectively reinstated the order by NDEWERE J.

The contentious issue is the currency in which the applicant's liability to the respondent must be discharged. The dispute revolves around the interpretation of the Presidential Powers (Temporary Measures) (Amendment of Reserve Bank of Zimbabwe Act and Issue of Real Time Gross Settlement Electronic Dollars (RTGS Dollars)) Regulations, 2019, (hereinafter referred to as "S.I. 33 of 2019" or the instrument). The provisions of S.I. 33 of 2019 were incorporated into the Finance Act (No.2) Act, No.7 of 2019 (the Finance Act).

The Applicant's Case

The applicant contends that the currency regime was modified by S.I. 33 of 2019, and it could legally discharge its obligation in local currency. S.I. 33 of 2019 provides in section 4(1)(d) that all assets and liabilities that were valued in United States Dollars before the effective date were to be deemed to be values in the RTGS dollar currency.

According to the applicant, the amount stated in the court order as US\$ 28,530.00 was converted to RTGS \$ 28,530.00 by operation of the law. The applicant argued that the wording of the law put an end to the debate. The applicant was no longer required to discharge its obligations in United States Dollars but in RTGS at the rate of 1.1. The debt fell squarely within the ambit of liabilities that were converted from the United States Dollars to RTGS at the rate of 1.1.

In his oral submissions, Mr *Mapuranga* for the applicant submitted that the order by NDEWERE J was the source of the debt herein. The registration of that order and the issuance of a writ were all actions meant to enforce the obligation, but they did not embody that obligation. Counsel further submitted that the Supreme Court order confirmed that the judgment by NDEWERE J was never set aside. The words used in para 2 of the Supreme Court order were instructive. That order did not create a new obligation. Mr *Mapuranga* further submitted that the scenario would have been different if the appellate court had interfered with the Labour Court order by NDEWERE J.

Mr *Mapuranga* dismissed the respondent's claim that the judgment which registered the order by NDEWERE J had superannuated. Relying on r 69(3) of the High Court rules, 2021, counsel submitted that the judgment would have superannuated had a writ not been issued. A writ did not superannuate once issued, and that was the case herein. Mr *Mapuranga* further submitted that the judgment by MUREMBA J only stayed execution pending the conclusion of the labour dispute. It did not set aside the writ. The writ was now executable following the termination of the labour dispute.

Respondent's Case

The respondent argued that the application was academic. He further argued that the order in HC 1225/13 which registered the Labour Court award had since superannuated and as such, the applicant could not obtain declaratory relief in respect of an order that had superannuated. The respondent also argued that the obligation to pay did not arise with the registration of the Labour Court order into an order of the High Court in 2014. The obligation to pay arose on 15 July 2022 and therefore the applicant's liability did not fall within the ambit of S.I. 33 of 2019.

In his oral submissions, Mr *Chipetiwa* for the respondent submitted that the order by NDEWERE J was set aside by KUDYA J. Once a judgment was rescinded, it was no longer enforceable. Counsel further submitted that the order by NDEWERE J was only resuscitated in July 2022 following the order of the Supreme Court. The order by NDEWERE J was therefore not affected by S.I. 33 of 2019. Mr *Chipetiwa* further submitted that as at the effective date of S.I. 33 of 2019, the applicant did not have any obligation to make payment. The applicant did not have an obligation to make payment from 2014 to 2022. No debtor creditor relationship existed for as long as the obligation to pay remained suspended by litigation pending before the courts.

The analysis

At the commencement of oral submissions, Mr *Chipetiwa* did not pursue the point on whether the order issued by MUSAKWA J had superannuated. I thus considered the point abandoned. I would still have found against the respondent on that point by reason of r 69(3) of the rules. The order by MUSAKWA J gave birth to a writ whose operation was stayed by MUREMBA J in HC 2595/14. Rule 69(3) states as follows:

“No writ of execution shall be issued after the judgment has become superannuated, unless the said judgment has first been revived, but a writ of execution once issued shall remain in force until such time as the judgment has been satisfied.”

It is the judgment that superannuates and must be revived first, before a writ can be issued pursuant to that judgment. The circumstances are different herein. The writ was issued before the judgment superannuated and therefore it remains extant until the judgment debt has been discharged.

The central issue for determination is when exactly the obligation to pay the judgment debt in HC 1225/13 arose. The applicant contends that the obligation arose when the order by NDEWERE J was granted in 2013, while the respondent alleges that the obligation only arose after the Supreme Court order of 15 July 2022. The enquiry entails an evaluation of the effect of the changes to the monetary regime brought about by S.I. 33 of 2019 to the case at hand.

S.I. 33 of 2019 was gazetted on 22 February 2019. That date became the first effective date as defined in the Finance Act (No.2) Act, No.7 of 2019 (the Finance Act). The new currency that the law introduced ran parallel with other currencies that were accepted as legal tender, under what was known then as the multi-currency basket.

On 24 June 2019, the Minister of Finance and Economic Development gazetted Statutory Instrument 142 of 2019 (Reserve Bank of Zimbabwe (Legal Tender) Regulations, 2019) (S.I. 142 of 2019). The 24th of June 2019 became the second effective date as defined in the Finance Act. This instrument abolished the multi currencies and declared the ZWL to be the sole legal tender in Zimbabwe. S.I. 142 of 2019 was also incorporated into the Finance Act, which was gazetted on 21 August 2019. The key parts of the Finance Act which are relevant to this analysis are ss 22 and 23, which state in part 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); and

(c) that such currency shall be legal tender within Zimbabwe from the first effective date; and

(d).....

(3).....

(4) For the purposes of this section—

(a) it is declared for the avoidance of doubt that financial or contractual obligations concluded or incurred before the first effective date, that were 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;

(b); (Underlining for emphasis)

23 Zimbabwe dollar to be the sole currency for legal tender purposes from second effective date

(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 22(1)(d) of the Finance Act states 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 s 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...*”. The words “financial or contractual obligations” are defined in s 20 of the Finance Act to include (for the avoidance of doubt) judgment debts. A judgment debt is defined in the same section to mean:

“..... a decision of a court of law upon relief claimed in an action or application which, in the case of money, refers to the amount in respect of which execution can be levied by the judgment creditor; and, in the case of any other debt, refers to any other steps that can be taken by the judgment creditor to obtain satisfaction of the debt (but does not include a judgment that has prescribed, been abandoned or compromised)” (underlining for emphasis).

The words “*assets and liabilities*” are not defined in the Finance Act or in S.I. 33 of 2019. The Supreme Court considered the issue of assets and liabilities in *Zambezi Gas Zimbabwe (Private) Limited v N.R. Barber (Private) Limited & Anor*¹. The court said:

“The liabilities referred to in s 4(1)(d) of S.I. 33/19 can be in the form of judgment debts and such liabilities amount to obligations which should be settled by the judgment debtor. In interpreting s 4(1)(d), regard should be had to assets and liabilities which existed immediately before the effective date of the promulgation of S.I. 33/19. The value of the assets and liabilities should have been expressed in United States dollars immediately before 22 February 2019 for the provisions of s 4(1)(d) of S.I. 33/19 to apply to them.

Section 4(1)(d) of S.I. 33/19 would not apply to assets and liabilities, the values of which were expressed in any foreign currency other than the United States dollar immediately before the effective date. If, for example, the value of the assets and liabilities was, immediately before the effective date, still to be assessed by application of an agreed formula, s 4(1)(d) of S.I. 33/19 would not apply to such a transaction even if the payment would thereafter be in United States dollars. It is the assessment and expression of the value of assets and liabilities in United States dollars that matters.” (Underlining for emphasis)

¹ SC 3/20 at p 9

Further down in the same judgment the court went on to state that S.I. 33 of 2019 was specific to the type of assets and liabilities excluded from s 4(1)(d), reasoning that the origin of the liabilities was not a criterion for the exclusion. The court stated that:

“What brings the asset or liability within the provisions of the statute is the fact that its value was expressed in United States dollars immediately before the effective date and did not fall within the class of assets and liabilities referred to in s 44C(2) of the Reserve Bank of Zimbabwe Act...” (Underlining for emphasis).

The applicant’s liability to the respondent was expressed in United States Dollars in terms of the order granted by NDEWERE J in 2013. That order was registered as an order of this court for enforcement purposes by MUSAKWA J in 2014. Thus, for purposes of S.I. 33 of 2019, the order by NDEWERE J assumed the status of a judgment debt following its registration as an order of this court. The order by NDEWERE J was at some point set aside by KUDYA J of the Labour Court prompting the respondent to approach the Supreme Court on appeal. The Supreme Court order granted on 15 July 2022, reads as follows:

“IT IS ORDERED BY CONSENT THAT:

- 1) The matter be and is hereby struck off the roll.
- 2) The proceedings in the court *a quo* are a nullity.

In the exercise of this Court’s powers in terms of section 25 of the Supreme Court Act [Chapter 7:13].

It is ordered that:

- 1) The proceedings of the court *a quo* be and are hereby set aside.
- 2) Each party shall bear its own costs.”

The labour dispute was put to rest by the Supreme Court in the order above. It is common cause that the applicant’s liability to the respondent was in the form of a judgment debt following the registration of the Labour Court order by MUSAKWA J. The order by MUREMBA J and the appeal to the Supreme Court had the effect of suspending the payment obligation. The Supreme Court order effectively revived the writ of execution. It makes the order by NDEWERE J as registered by this court executable. The Supreme Court order did not therefore interfere with the order by NDEWERE J. The court determined that the proceedings before KUDYA J were a nullity. It is as if no such proceedings ever took place.

I agree with Mr *Mapuranga*’s submission that the Supreme Court order did not create any new obligation. That obligation was established in the order by NDEWERE J, which was then registered for enforcement purposes. The liability was therefore pronounced in the Labour Court order. Mr *Chipetiwa* argued that the order by NDEWERE J was not affected by the S.I. 33

of 2019. I did not find that submission persuasive. As was observed in the *Zambezi Gas Zimbabwe (Private) Limited v N.R. Barber (Private) Limited & Anor* matter, when interpreting s 4(1)(d) of S.I. 33 of 2019, the court must have regard to those liabilities which existed immediately before the promulgation of the said law. The value of the liability must have been expressed in United States dollars before the effective date of the law. Further, the value of the liability did not need to be assessed by the application of some formula.

As already observed, the Supreme Court order did not interfere with the order by NDEWERE J. The value of the liability was established the moment the Labour Court granted the order that was registered as an order of this court. The fact that the discharge of that liability may have been stayed by an order of this court as well as the appeal to the Supreme Court did not alter its character. It remained a judgment debt which was denominated in United States dollars before the first effective date of the law. What was delayed was the execution of the order of the court to satisfy an already existing obligation.

It is for the foregoing reasons that the court determines that there is merit in the application.

Costs of suit

As regards the costs of suit, Mr *Mapuranga* proposed that each party bears its own costs of suit if the court found in the applicant's favour. In view of the legal question that arose, and nature of the relief sought, I find it appropriate to order that each party bears its own costs of suit.

Resultantly it is ordered that:

1. The application be and is hereby granted.
2. It is declared that the order of this Honourable Court under HC 1255/13 registering the order of the Labour Court dated 30 January 2013 sounding in money (US\$ 28,530.00) was converted to RTGS \$28,530.00 by the operation of the provisions of S.I. 33 of 2019 at the rate of 1:1.
3. It is further declared that the applicant is liable to pay the respondent the sum of RTGS \$28,530.00 in accordance with the provisions of para 2 of this order.
4. Each part shall bear its own costs.