

REPORTABLE (07)

NHIMBE FRESH EXPORT (PRIVATE) LIMITED
v
(1) PRISMA PACKAGING (2) MESSENGER OF COURT,
MARONDERA

**SUPREME COURT OF ZIMBABWE
GUVAVA JA, CHATUKUTA JA & MWAYERA JA
HARARE, 27 JANUARY 2022**

A. Y. Saunyama, for the appellant

F. Chinowadzimba, for the first respondent

No appearance for the second respondent

GUVAVA JA:

1. This is an appeal against the decision of the High Court (the ‘court *a quo*’) dated 6 August, 2021 in which it dismissed the appellant’s application for a declaratory order. Dissatisfied, the appellant appealed to this court for relief. After hearing submissions from counsel, this court allowed the appeal with costs, set aside the judgment of the court *a quo* and remitted the matter for a hearing *de novo* before a different judge. It was indicated that the reasons for this order would follow in due course. I now proffer the reasons hereunder.

BACKGROUND FACTS

2. The appellant is a company registered in accordance with the laws of Zimbabwe. The first respondent is a foreign company registered in terms of the laws of South Africa and carrying on business in that country. The second respondent is the Messenger of Court

based in Marondera. The appellant and first respondent are involved in a long-standing dispute over a judgment debt obtained in favor of the first respondent. The first respondent obtained the said judgment at the Marondera Magistrates' Court under case number MC 420B/18. The judgment was a default judgment granted on 19 February 2019 in which the appellant was ordered to pay the first respondent the sum of ZAR 252 356.38 together with interest.

3. The appellant failed to satisfy the judgment debt and the first respondent obtained a warrant of execution against its property. The first respondent subsequently instructed the second respondent to attach certain goods belonging to the appellant on 2 January 2020. Following the attachment of the property, and on 8 January 2020, the appellant proceeded to pay ZWL 23 000 into the second respondent's bank account. It stated that the said sum was in full and final settlement of the judgment debt, costs and interest as at the date of the judgment.
4. The payment of ZWL 23 000 was rejected by the first respondent and this prompted the appellant to make an application for a declaratory order before the court *a quo*. The order sought was to declare that the judgment debt owed to the first respondent had been paid in full upon payment of the ZWL23 000. The appellant further sought the release of its property which had been attached in execution.
5. It was the appellant's case that the payment was made after the conversion of ZAR 252 356.88 to United States Dollars and thereafter to Zimbabwean dollars at the rate of 1 as to 1. The appellant averred that this conversion was based on an interpretation and application of the provisions of s 4 (1) (b-f) of Statutory Instrument 33/19 (now s 22 of the Finance Act (No 2) of 2019) as read with para 2 (1) of Statutory Instrument 142/19 of the Reserve Bank of Zimbabwe (Legal Tender) Regulations 2019 and para 3 (1) and 2 (a-c) of Statutory

Instrument 212/19 Exchange Control (Exclusive Use of Zimbabwe Dollar for Domestic Transactions) Regulations, 2019 (now s23 of the Finance Act (No 2) 7 of 2019)

6. The first respondent opposed the application and denied that the payment of ZWL 23 000 settled the judgment debt. It argued that it was erroneous for the appellant to convert the debt as it did because there was no legal basis for doing so. The first respondent further argued that Statutory Instrument 33/19 only applied to assets and liabilities that were denominated in United States Dollars and in *casu*, the judgment debt was denominated in South African Rand. It was the first respondent's case that even if the appellant was correct in converting the debt from South African Rand to United States Dollars, the appellant should have applied the current market rates in determining the value of the amount due and not the rate of 1 to 1. The first respondent conceded that the payment could be made in Zimbabwean dollar. It however contended that the amount had to be converted to the Zimbabwean Dollar at the interbank rate at the date of payment. It therefore submitted that the judgment debt remained due and owing and prayed for the dismissal of the application.

7. In determining the matter before it, the court *a quo* correctly identified the issue for determination as whether or not the payment of ZWL 23 000 settled the debt. The court went on to find that the appellant's conversion of the debt from South African Rand to United States Dollars and the subsequent conversion to Zimbabwean Dollars had no legal basis in light of s 4 (1) (d) of Statutory Instrument 33/19. The court *a quo* reasoned that the provision made specific mention to assets and liabilities expressed in United States Dollars and not to the South African Rand. It further noted, correctly in my view, that the provisions relied upon by the appellant would not apply to assets and liabilities, the values of which were expressed in any foreign currency other than that denominated in United

States dollars. As the judgment debt was denominated in SAR the court dismissed the application.

8. Aggrieved by the decision of the court *a quo*, the appellant appealed to this Court on two grounds. The two grounds of appeal raise essentially one issue; that is whether or not the court *a quo* erred in dismissing the appellant's application for a declaratory order.

SUBMISSIONS BEFORE THIS COURT

9. Counsel for the appellant, Ms *Saunyama*, argued that the issue before the court *a quo* was to determine the applicable currency for the settlement of the judgment debt and subsequently whether or not the payment of ZWL 23 000 was sufficient to settle it. She argued that the judgment debt arose from a foreign loan and obligation and that, in terms of the law, could be settled in domestic currency.

Counsel further submitted that the court *a quo* was therefore obliged, having found that S.I. 33/19 did not apply, to have determined how the amount should have been converted and at what rate. By making such a determination the court *a quo* would have ascertained whether or not ZWL 23 000 was sufficient to extinguish the judgment debt. She submitted that by failing to determine this issue, the court *a quo* failed to resolve the question that was before it.

10. Counsel for the first respondent, Ms *Chinowadzimba*, submitted that the court *a quo* correctly considered the provisions of Statutory Instrument 33/2019 and Statutory Instrument 142/2019. Counsel argued that the court could not be faulted for not determining the issue of whether or not the payment of the judgment debt using the Zimbabwean Dollars sufficed to extinguish the foreign currency debt as the appellant had failed to provide a legal basis for it to do so. Counsel stated that while it was conceded

before the court *a quo* that the first respondent would accept payment in local currency, there was no agreement on how it would be calculated. Counsel accepted that the issue before the court *a quo* was a confirmation of whether or not the payment of ZWL 23 000 fully settled the debt. However, Counsel maintained that the court made a proper finding that the legal instrument relied upon did not apply and thus properly resolved the issue. She submitted that the appeal was devoid of merit and must be dismissed.

APPLYING THE LAW TO THE FACTS

11. The starting point in this matter is to ascertain the finding by the court *a quo*. In dealing with the application, it concluded at p 4 of its judgment as follows:

“Two key issues arise from the above for section 4 (1) (d) of S.I. 33/19 to apply; firstly, the asset or liability must be expressed in United States dollars and secondly it must have been before the effective date which is 22 February 2019. In *casu*, the applicant fails to meet this test. The judgment debt is expressed in South African rands and not United States dollars despite its existence before the effective date.”

Thus, the court *a quo* dismissed the application on the basis that the judgment debt was not expressed in United States Dollars. Both parties agree that this was a correct finding made by the court *a quo*. It is quite apparent from the submissions made that it was agreed as between the parties that the first respondent was willing to accept payment of the judgment debt in Zimbabwean Dollars. Indeed, in para 11 and 12 of the first respondents opposing affidavit it stated that the amount ought to have been paid in local currency at the prevailing market rate at the date of payment. In my view it is appropriate to quote in full the response by the first respondent as set out in the opposing affidavit:

“11. It is denied. There is no confusion as to whether or not the judgment has been paid in full. A huge amount still remains due and owing. The applicant made its own calculations and found that the amount that was due was in United States Dollars was US\$23 000. **By the applicants calculations, the amount that remains outstanding would therefore be US\$23 000 or its ZW\$ equivalent payable at the prevailing interbank rate less ZW\$23 000 which has already been paid.**

12. However, more than nine months have lapsed since the applicant converted the judgment debt to United States Dollars. **The prevailing market rates have since changed. Current market rates will be applied by the Messenger of Court in order to determine the amount that is due and owing taking into account the applicant's payment of ZW\$23 000.** (Emphasis is my own)

As may be noted from the excerpts from the first respondent's opposing affidavit, it was quite categorical that it was willing to accept payment in local currency in order to extinguish the debt. Clearly, this puts to rest any issue on the currency of payment as the two parties agreed that the debt could be extinguished in local currency.

12. The point of departure however, appears to be how the conversion should take place. The appellant unilaterally came up with its mode of conversion which the court *a quo* correctly found was not supported by law. It is the appellant's case that the court *a quo* should have gone a step further than it did to ascertain how the conversion should have been made.

13. In light of the acceptance by the first respondent, in the court *a quo* and in this court, that the payment for the debt could be made in local currency, this court is in agreement with the appellant's position that the judgment of the court fell short of answering the critical question that was before it. Paragraph 1 of the draft order, in which the appellant prayed for relief before the court *a quo*, is instructive. It reads as follows:

"The judgment debt, costs and interest obtained by the 1st respondent to the amount of ZAR 252 356.38 in case No 420B/18 has been paid in full and final (sic) by Applicant's deposit of ZWL 23 000.00."

The court *a quo* was being asked to declare whether or not the payment made by the appellant discharged the debt. Clearly, the finding by the court *a quo* did not answer this question. It failed to interrogate the issue before it and make a specific pronouncement on whether or not the amount paid was sufficient. That was the dispute between the parties. This Court has in numerous judgments stated its position in instances where a court fails to

determine an issue that is before it. This Court, in *PG Industries (Zimbabwe) Ltd v Bvekerwa & Ors* 2016 (2) ZLR 14 (S) at 18 H stated the effect of a court's failure to determine an issue placed before it for determination. GOWORA JA (as she then was) stated as follows:

“The position is settled that where there is a dispute on a question, be it on a question of fact or point of law, there must be a judicial decision on the issue in dispute. The failure to resolve the dispute vitiates the order given at the end of the proceedings. Although the learned judge may have considered the question as to whether or not there was an irregularity in the citation of the employer, there was no determination on that issue. In the circumstances, this amounts to an omission to consider and give reasons, which is a gross irregularity.”

(See also *Gwaradzimba N.O. v CJ Petron & Co. (Pty) Ltd.* 2016 (1) ZLR 28 (S) and *Lungu & Ors v RBZ SC 26/21*)

14. A court's determination must resolve the dispute between the parties. Whether it be on a question of fact or law, a court must determine and inform the parties in clear terms how it has resolved the dispute. The need for a determination of all issues placed before a court can never be over emphasised. (see *Fox & Carney P/L v Sibindi* 1989 (2) ZLR 173 at 179 G-H) Failure by a court to make a judicial decision or determination indeed amounts to a misdirection on the part of the court which misdirection would warrant setting aside of the proceedings and a remittal of the matter for a fresh hearing.

DISPOSITION

15. The court *a quo* failed to resolve the issue between the parties. It is apparent from the court *a quo*'s judgment that it correctly identified the issue which was before it but thereafter failed to determine it. The concession by the first respondent meant that the dispute between the parties was no longer just an issue on whether or not SI 33/19 applied. There arose a related issue of whether or not the amount of ZW\$23 000 paid by the appellant was

sufficient to extinguish the debt. Such an investigation would have resolved the dispute between the parties. This issue was not determined.

16. It was for the foregoing reasons that at the close of the argument this court made the following order:

1. The appeal be and is hereby allowed with costs.
2. The judgment of the court *a quo* is hereby set aside.
3. The matter be and is hereby remitted to the court *a quo* for a hearing *de novo*, before a different judge.

CHATUKUTA JA: I agree

MWAYERA JA: I agree

Laita & Partners, appellant's legal practitioners

Scanlen & Holderness, first respondent's legal practitioners