

LUCKY KAWARA

Versus

SHERIFF OF ZIMBABWE

And

THEMBINKOSI NCUBE

And

ZIMBABWE UNITED PASSENGERS COMPANY

IN THE HIGH COURT OF ZIMBABWE

TAKUVA J

BULAWAYO 23 JUNE 2021 & 6 JANUARY 2022

Opposed Application

T. Ndlovu for the applicant

No appearance for 1st and 2nd respondents

P. Mukunu for the 3rd respondent

TAKUVA J: This is an opposed application in which the applicant seeks the following order:

- “1. The 1st respondent be and is hereby ordered to enforce and execute the judgment given under HC 573/04 within two days from the date of the order.
2. The 1st respondent be and is hereby ordered to execute on the writ and recover the amount outstanding regard being had to the prevailing bank rate at the time of execution.
3. The 2nd and 3rd respondents be and are hereby ordered to pay costs on attorney and client scale if they oppose the application.”

Background facts

The facts of this matter are simple and straight forward. On the 25h of July 2019 the applicant obtained judgment against 2nd and 3rd respondents for

US\$20 000,00. There had been a long running dispute over damages sustained by the applicant and caused by the respondents.

Thereafter, the applicant instructed the 1st respondent to execute the judgment at the interbank rate prevailing at the time of the execution of the judgment. Instead of simply executing an extant judgment which had not been appealed against, 1st respondent vigorously joined the fray in 2nd and 3rd respondents' corner. The 1st respondent quite gratuitously wrote:

“... We acknowledge receipt of your writ of execution on the 30th of September 2019. Please be advised that according to the Statutory Instrument 23 of 19 section 4 we cannot use the interbank from the US\$ to RTGS as the two are considered to be at par.”

This letter was signed by one S. M. Geyser – The Additional Sheriff in Charge – Southern Region on 2 October 2019.

On 4 October 2019, applicant's legal practitioner wrote to the Sheriff arguing that the amount should be paid at interbank rate since the judgment was passed on 25 July 2019 well after the effective date namely 22nd February 2019. Gleefully, 3rd respondent adopted the Sheriff's argument and paid RTGS\$20 000,00 to the applicant as full and final settlement of the indebtedness. Aggrieved, applicant filed this application.

Third respondent opposed the application on the grounds that it was fatally defective because applicant's application is not in form 29 in compliance with r241 (1) of the High Court Rules 1971. During the hearing, the applicant's legal practitioner made an oral application for condonation in terms of r4c. The non-compliance was condoned and the matter proceeded on the merits.

The sole issue for determination *in casu* is whether or not the 3rd respondent's judgment debt is payable in ZWL at the rate of one is to one to United States Dollar or at the interbank rate? It is 3rd respondent's argument that since the cause of action arose in 2004 before the effective date of 22 February 2019, the liability and financial obligation to pay the applicant was incurred before that date. Further, 3rd respondent contends that section 22 (1) (e) of the Finance Act 2019 does not apply to the matter *in casu*. It was 3rd respondent's argument that the judgment granted to the applicant on 25 July

2019 was in error as it should have sounded in RTGS. It was his contention that this judgment be set aside in terms of r449 of this court's rules.

In order to answer the above issue, it is necessary to interpret section 4 of SI 33/19. *The meaning of this provision was settled by MALABA CJ in Zambezi Gas Ltd v N. T. Barber (Pvt) Ltd & Anor SC-3-20.*

Section 4 of SI 33/19 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 RTGS Dollar;
 - (b) The Real Time Gross Settlement System balances expressed in the United States dollar other than those referred to in section 44c (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 section 44c (2) of the principal Act) shall on and after the effective date be deemed to be valued 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 parity 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 ...” (my emphasis)

Commenting on the meaning of s4 (1) (d) of SI 33/19 and employing its grammatical and ordinary meaning the learned Chief Justice said;

“A reading of s4 (1) (d) of SI 33/19 does not reveal any ambiguity in the language used by the legislature in the expression of its intention in enacting SI 33/19. The purpose and object of the statute can easily be

ascertained from the ordinary and grammatical meaning of the language used.

The liabilities referred to in s4 (1) (d) of SI 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 s4 (1) (d) regard should be had to assets and liabilities which existed immediately before the effective date of the promulgation of SI 33/19. The value of the assets and liabilities should have been expressed in United States dollars immediately before 22nd February 2019 for the provisions of s4 (1) (d) of SI 33/19 to apply to them.

Section 4 (1) (d) of SI 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, s4 (1) (d) of SI 33/19 would not apply to such a transaction even if the payment availed thereafter be in United States dollars. It is the assessment and expression of the value of assets and liabilities in United States dollars that matter.

Section 4 (1) (d) of SI 33/19 is specific to the type of assets and liabilities that are excluded from the reach of its provisions. The origin of the liabilities is not a criterion for exclusion. In other words, the fact that a liability is based on a court order does not exempt the liability from the application of the provisions of s4 (1) (d) of SI 33/19. 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 dates ... Assets and liabilities covered by s4 (1) (d) of SI 33/19 are of a *sui generis* nature. They accrue immediately before the effective date and continue to exist after the effective date.” (my emphasis)

As regards the transactions entered into after the effective date, the court specifically held that those would fall under the provisions of s4 (1) (e) of SI 33/19.

In the *Zambezi Gas* case *supra*, the debt was created by a judgment granted on 25 June 2018 well before the effective date of 22 February 2019. It

was expressed in United States dollars and was still so valued and expressed immediately before the 22 February 2019. It was a judgment debt. Accordingly s4 (1) (d) applied to the “asset or liability”.

On the other hand *in casu*, the order in terms of which the 3rd respondent was obliged to pay the judgment debt owed to the applicant denominated in United States dollars, was made after the effective date of 22 February 2019. It follows therefore that the judgment debt and its execution fell outside the ambit of the provisions of s4 (1) (d) of SI 33/19. In my view it is not a question of when the “cause of action” arose but when the obligation to pay arose. A cause of action *per se* does not create an asset or liability as contemplated by SI 33/19. The order that created an obligation to pay was granted on 25 July 2019. These are the sort of transactions or assets or liabilities covered under s4 (1) (e) of SI 33/19.

The section is clear and unambiguous. It must be given its ordinary meaning unless this would result in some absurdity or some repugnancy or inconsistency with the gist of the instrument. See *Endeavor Foundation and Anor v Commissioner of Taxes* 1995 (1) ZLR 339 (S) where the court stated that;

“The general principle of interpretation is that the ordinary, plain, literal meaning of the word or expression, that is, as popularly understood, is to be adopted, unless that meaning is at variance with the intention of the legislature as shown by the context or such other *inducia* as the court is justified in taking into account or creates an anomaly or otherwise produces an irrational result.” See also *Chihava & Ors v The Provincial Magistrate Francis Mapfumo N.O. and Anor* 2015 (2) ZLR 31 (CC) at 35H – 37B.

Basically, interpretation is the process of attributing meaning to the words in a document, be it legislation, some other statutory instrument or contract, having regard to the context provided by reading the particular provision in the light of the document as a whole and the circumstances upon its coming into existence.

Conclusion

The payment of RTGS\$20 000,00 made by the 3rd respondent to the applicant as settlement of the judgment debt under case number HC 573/04

dated 25 July 2019 was not a full and final settlement of that judgment debt in terms of s4 (1) (e) of SI 33/19.

Disposition

In the result it is ordered as follows:

1. The 1st respondent be and is hereby ordered to enforce and execute the judgment given under HC 573/04 within two weeks from the date of this order.
2. The 1st respondent be and is hereby ordered to execute on the writ and recover the amount outstanding regard being had to the provisions of s4 (1) (e) of SI 33/19.
3. The 3rd respondent be and is hereby ordered to pay costs of suit.

Sansole & Senda, applicant's legal practitioners

Mhishi Nkomo Legal Practice, 3rd respondent's legal practitioners