

**ISMAIL MOOSA LUNAT**

**Versus**

**MOHAMED ZAKARIYA PATEL**

**AND**

**THE DEPUTY SHERIFF, BULAWAYO, NO**

IN THE HIGH COURT OF ZIMBABWE  
MAKONESE J  
BULAWAYO 27 MARCH 2020 & 28 MAY 2020

**Urgent Chamber Application**

*N Sithole*, for the applicant  
*E R Samukange with T R Round*, for the 1<sup>st</sup> respondent

**MAKONESE J:** On 24<sup>th</sup> March 2020, the applicant filed a Chamber Application seeking the following relief:-

**“INTERIM RELIEF SOUGHT**

Pending the return date, 2<sup>nd</sup> respondent be and is hereby interdicted from disposing of applicant’s assets taken in execution of the judgment in HC 196/19 by sale or otherwise.

**TERMS OF FINAL ORDER SOUGHT**

1. That it be declared that the debt owned by the applicant to 1<sup>st</sup> respondent denominated in United States dollars being USD 384 177.00 (as represented by the acknowledgment of debt signed by the applicant on 11<sup>th</sup> January 2019) is valued in RTGS\$ on a one to one rate by operation of law as per section 4(1) (d) of Statutory Instrument No. 33 of 2019 and section 22 (1) (d) of the Finance Act No. 2 of 2019.

2. That it be declared that the payment of the sum of RTGS \$384 177 by the applicant through his attorneys of record to 1<sup>st</sup> respondent's attorneys fully settles the applicant's indebtedness to 1<sup>st</sup> respondent in accordance with section 22 (1) (d) of the Finance Act No. 2 of 2019.
3. It be and is hereby declared that the High Court judgment issued under cover of HB 196/19 to the extent that it ordered applicant to pay a sum of USD 384 177 or its equivalent at the interbank rate be considered to have been overturned by the Supreme Court Judgment in *Zambezi Gas Company (Pvt) Ltd v NR Barber (Pvt) Ltd* SC 3/20.
4. As a consequence of (3) above, the judgment of this Honourable Court in the case under cover of HB 196/19 be and is hereby declared incapable of execution by the 2<sup>nd</sup> respondent.
5. The 1<sup>st</sup> respondent's attorney, *Mr E. R Samukange* be and is hereby ordered to pay costs of suit on a punitive scale, *de bonis propriis.*"

Undercover of case number HC 762/19, 1<sup>st</sup> respondent issued summons against the applicant for the payment of USD\$ 384 177. Applicant entered appearance to defend. An application for Summary Judgment was filed against the applicant on the grounds that the applicant had no *bona fide* defence to the 1<sup>st</sup> respondent's claims. On the 12<sup>th</sup> of December 2019 this court granted Summary Judgment in favour of the 1<sup>st</sup> respondent under HB 196/19. A Writ of Execution was subsequently obtained against the applicant. On the 17<sup>th</sup> of March 2020 the applicant through his legal practitioners paid the sum of RTGS \$384 177 for onward transmission to the 1<sup>st</sup> respondent. 1<sup>st</sup> respondent's legal practitioner protested that full payment had not been effected in terms of the judgment under case number HB 196/19. In terms of the judgment this court ordered the applicant to pay the sum of US \$384 177 or its equivalent at the prevailing interbank rate. The argument advanced by applicant's legal practitioners is that the insistence by 1<sup>st</sup> respondent's legal practitioners to enforce the payment of the monies owed by the applicant in United States Dollar or its equivalent was ill-advised, pointing out that by operation of law and by virtue of the provisions of S.I 33/2019 and the Finance Act No. 2 of 2019 all assets and liabilities immediately before the 22<sup>nd</sup> February 2019 were automatically valued in RTGS \$ on a one to one rate. Further applicant

contends that the Supreme Court has pronounced the correct position of the law in the *Zambezi Gas Company (Pvt) Ltd v N.R Barber (Pvt) Ltd* SC 3/20.

The stance adopted by the 1<sup>st</sup> respondent's legal practitioners is reflected in a letter addressed to applicant's legal practitioners dated 18<sup>th</sup> March 2020 in the following terms:

*"We refer to our letter of yesterday and your e-mail response in which you indicated that you made some payments into our account. You also furnished our office with electronic proof of payment.*

*This note serves to inform you of the following;*

- (i) That the RTGS \$384 177 has now cleared and reflected in our account*
- (ii) That the RTGS \$384 177 does not constitute satisfaction of the judgment debt by his Lordship Mr Justice Makonese which our client obtained in the High Court to the tune of three Hundred and Eighty Four Thousand One Hundred and Seventy United States Dollars (US\$384 177) or its equivalent at the prevailing interbank rate.*
- (iii) That our instructions to the Sheriff are based on the judgment of the High Court which speaks clearly on the debt.*
- (iv) The indication that you paid to the Sheriff the sum of RTGS \$59 047 is a non-event in the absence of settlement of the judgment debt.*

*On account of the judgment remaining unsatisfied and no funds having been received by us to satisfy it, we concurrently with this letter, instructed the Sheriff to sell in execution the attached goods in a bid to satisfy the judgment debt.*

*May you be guided accordingly."*

This letter received a swift and stinging response from applicant's attorneys in an e-mail dated 18 March 2020 in the following terms:-

*"We are worried that you know that you got an erroneous judgment and appear to be clinging to it and advising your client wrongly. We are taking instructions from client in the light of your instructions and should seek costs de bonis propriis against you as the law on the matter has been adverted to and you seem not interested in it which is worrisome. You will know that the High Court decision is binding on the lower courts. What you did is to mislead the High Court when you sought judgment and as such a wrong judgment against us."*

At the hearing of this Urgent Chamber application the 1<sup>st</sup> respondent raised certain preliminary points. It was argued on behalf of the 1<sup>st</sup> respondent that the application before the court was fatally defective in that it is not in Form No. 29. It was further argued that the application did not pass the test of urgency. An extension of this argument was that the applicant's application sought to set aside the judgment of this court by way of an urgent

chamber application. It was contended by 1<sup>st</sup> respondent's attorney that the argument relating to currency settlement was not before the court.

The question that arises is whether this court can stay execution on the basis of the averments before it. In my view this court can regulate its own processes. It is a notorious fact the effect of the *Zambezi Gas (Pvt)* case was to settle the law regarding the fate of judgment debts arising before the 22<sup>nd</sup> of February 2019. The judgment of the Supreme Court is binding on this court and all the courts in the jurisdiction. The effect of Statutory Instrument No. 33 of 2019 is to set out two fundamental principles:

- (i) It issued a new currency known as the Real Gross. The Electronic Dollars (RTGS \$) monetary system for Zimbabwe.
- (ii) It provided that all assets and liabilities immediately before the effective date of 22<sup>nd</sup> February 2019 denominated in United States Dollars be valued in RTGS \$ on a one to one rate.

This Statutory Instrument affected all liabilities (debts) owing immediately before the promulgation of Statutory Instrument 33/2019.

The application before me seeks to stay execution on the grounds that full payment of the judgment has been effected in terms of the law. This court has the power and discretion to regulate its orders and judgments. It is erroneous, in my view to argue that this application seeks to set aside the judgment under case number HB 196/19. It would be a travesty of justice to allow execution to continue when the law has been clearly set out by the Supreme Court. This court is bound by the judgment in the *Zambezi Gas (Pvt)* case. It has been brought to my attention that on the 17<sup>th</sup> December 2019, a Notice of Appeal was filed by the applicant against the whole judgment under case number HB 196/19. It is not the intention of this court to review its own judgment. The inescapable conclusion however, is that in the interests of justice and fairness the matter ought to be heard on the merits.

In the result, the following order is made:

1. The points *in limine* are hereby dismissed.

2. The matter is to be heard on the merits.

3. Costs in the cause.

*Ncube Attorneys*, applicant's legal practitioners  
*Samukange Hungwe Attorneys c/o Gula Ndebele and Partners*, 1<sup>st</sup> respondent's legal practitioners