CAMEL MINING (PRIVATE) LIMITED
versus
METBANK LIMITED
and
REGISTRAR OF DEED
and
THE SHERIFF OF THE HIGH COURT OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 17 November 2020 & 12 March 2021

**Opposed Application**

*T E Gumbo*, for the applicant
*E Musendekwa*, for the respondent

MANGOTA J: Law is not a static discipline. It moves and changes in accordance with a given society's stage of development. It changes in such a way that what society regarded as lawful yesterday may not be lawful on the following day and *vice versa*. Its movement and changes are not without reason. They assist people in whose society the changes and movements occur to resolve disputes which arise between, and amongst, them with a certain degree of clarity. They are, therefore, a dispute-resolving mechanism which society puts into place from time to time for the good of its own members.

Where the law is clear and unambiguous, it must be taken as it is. It should not be overstretched to suit the circumstances of any litigant to a dispute. It should, in other words, neither be expanded nor contracted. It should be allowed to assume and retain its ordinary, grammatical meaning or the meaning by which its words, as they appear in a statute or document, are popularly known or understood to mean in every day parlance.

It is only where the words which appear in a document are either unclear or ambiguous or are devoid of meaning that the onerous task of giving a possible meaning to them arises. Where

they are clear, they are taken to mean what they say. That will be so despite the difficulty or unpalatability which is occasioned to a litigant when the law is applied to his case as it is.

No amount of argument will persuade an interpreter of the law which is in itself clear and unambiguous to tilt the scales of the law in a litigant's favour. The consequences which visit the litigant under the stated set of circumstances will not detain the mind of the interpreter. All he is called upon to do is to apply the law as it is and nothing more. The consequences which flow from his application of the clear law to a given set of facts which are placed before him do not become a matter for the moment. It is a matter for another day.

The remarks which I made in the foregoing paragraphs are apposite to the case of the applicant and the first respondent ("the parties"). They deal not only with the changed law but also with the consequences which flow from that law. Unpalatable as the law is, it still remains the law of the day until the authority which made it changes it to address another challenge which arises out of it.

To appreciate the meaning and impart of the remarks which I made, it is pertinent for me to state briefly hereunder the circumstances of the applicant, a legal entity, which is into mining and the first respondent, a financial institution. Both parties, it is common cause, are *incolae*. They are resident in Zimbabwe. They, therefore, submit to the jurisdiction of the court. The circumstances of the parties are these:

On 8 March, 2019 the applicant, Camel Mining (Private) limited ("Camel") and the first respondent, Metbank Limited ("Metbank") concluded a bank loan facility agreement between them. Metbank advanced to Camel a maximum loan of USD200 000. Camel required the loan to purchase mining equipment for its operations.

As security for the loan so advanced to it, Camel registered:

(a) registered a surety mortgage bond of US$126 000 in favour of Metbank against an immovable property which is known as certain piece of land situate in the district of Salisbury called stand 317 Good Hope Township of Subdivision B of Good Hope. It is 2528 square metres in extent. The property is registered in the names of one Elijah Chiwota and one Sheila Jaure both of whom stood as sureties in the parties' transaction – and

(b) a Notarial General Covering Bond, also in favour of Metbank, for the sum of USD 274 000 over Camel's plant and equipment.

In pursuance of the parties' agreement, Metbank availed to Camel the sum of US$92 000. On 29 May, 2020 it demanded that Camel settles the loan which, as at the mentioned date, amounted to USD130 388.33. It stated that Camel was at liberty to repay the loan in the United States dollar currency or its local currency equivalent at the applicable interbank rate on the date of payment.

On 10 June, 2020 Camel paid to Metbank the equivalent of US$130 388.33 in the local currency. It paid ZWL3 470 550 stating that the same was in full and final settlement of its indebtedness to Metbank. It demanded cancellation of the surety and release of its mortgaged property.

Metbank accepted the sum of ZWL3 470 550 on a without prejudice basis. It insisted that Camel should repay the sum it advanced to it in the currency that it was granted namely in United States dollars and not in the local currency. It, accordingly, refused to cancel the surety and/or release the mortgaged property until Camel repaid the loan in the currency of its preference.

The issue which I must determine is whether or not Camel settled its indebtedness to Metbank when it paid ZWL3 470 550. If it did, Metbank would have no justification to continue to hold onto Camel's property. If it did not, Metbank's case holds.

The application, it is evident, rests on Statutory Instrument number 33 of 2019 ("the instrument"). The provisions of the instrument were incorporated into the Finance (No. 2) Act of 2019. Those are clear and straight forward. They should be taken as the legislature crafted them. They require no interpretation at all.

The application which is anchored on clear provisions of the instrument cannot be said to be without merit. A *fortiori* when the case of the parties is considered in the context of the provisions of the instrument which are relevant to this case .

Of relevance to the case is s 4 of the instrument. I shall speak to it later in this judgment. What is of importance, at this stage, is to examine the genesis of the instrument so as to appreciate the mischief which the law-maker was addressing when it hatched the instrument.

It is common cause that Zimbabwe introduced the multi- currency system of payment in 2009. The system remained in place for close to a decade, if not slightly more than ten years. A

variety of currencies came into play in a number of transactions which took place between February 2009 and February, 2019. Many transactions favoured the United States dollar as the medium of exchange between, and amongst, persons who transacted one with the other. The reasons for the preference of that currency, as legal tender, were many and varied. They should, however, not detain my mind, save to simply state that many Zimbabweans and practically all *peregrini* who transacted in Zimbabwe during the stated period were very much in search of the coveted United States dollar. So much was this form of currency coveted to a point where many contractual obligations of the time were pegged by the parties in no currency other than in the United States dollar.

Due to circumstances which are not relevant to this judgment but which judicial notice is taken of, Zimbabwe became alive to its inability to print the United States dollar let alone making it available to the transacting people who occupied the length and breadth of the country. The challenge which came about with the unavailability of the United States dollar in the country's money market system presented Zimbabwe with a formidable challenge which the legislature was called upon to address with some sense of urgency. The challenge gave birth to the instrument which the legislature incorporated into the Finance (No. 2) Act of 2019.

The instrument, therefore, marks a defining point in the form of the currency which Zimbabwe introduced from 22 February, 2019 which is the effective date of the instrument. The stated date marked the country's migration from the multiple currency system of payment to the local currency as the only medium of exchange in practically all transactions which took place in Zimbabwe and by Zimbabweans and/or *peregrini* who reside in the country.

As it is often observed and stated that there is, by and large, no law which does not have an exception, the introduction of the Zimbabwe dollar, as the medium of exchange, had its exception provided for under section 44 C (2) of the Reserve Bank Act. It is only under that section that the legislature allowed the continued use of foreign curreny as a medium of exchange. It reads:

> "The issuance of any electronic currency shall not affect or apply in respect of-
> (a) funds held in foreign currency designated accounts, otherwise known as NOSTRO FCA accounts which shall continue to be designated in such foreign currencies; and
> (b) foreign loans and obligations denominated in any foreign currency, which shall continue to be payable in such foreign currency." (emphasis added)

The instrument under whose context the application falls divides obligations into two segments. It refers to obligations which were created before the effective date of 22 February 2019

as well as to obligations which are created after the effective date. It states, in a clear language, that the former type of obligations are settled in Zimbabwe dollars at the rate of 1:1 to the United States dollars. It, in short, places the Zimbabwe dollar at par with the United States dollar.

It states that all obligations which parties create after the effective date of 22 February, 2019 should be settled in the local currency at the inter- bank rate or at the rate that the creditor can purchase, from the money market, the equivalent in United States Dollars, of the local currency which the debtor pays to him. The rider which the instrument imposes for the operation of the provision is that the obligations must have been denominated in the United States Dollar currency when the parties created them. Obligations which fall outside the United States Dollar currency component are excluded from the purview of the instrument and so are obligations which fall under s 44 C (2) of the Reserve Bank Act which, as has already been observed, constitutes an exception to provisions of the instrument.

Section 4 of the instrument is relevant to the determination of the parties' dispute. It reads:

> "4. For purposes of s 44 C 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)-
>
> that the Reserve Bank has, with effect from the effective date, issued an electronic currency called the RTGS Dollar;
>
> (b) that Real Time Gross Settlement System balances 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 United States dollars; 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 44C (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 parity rate shall be determined from time to time by the rate at which authorised dealers under the Exchange Control Act exchange the RTGS Dollar for the United States Dollar on a willing seller, willing buyer basis" (emphasis added)

It is evident, from a reading of para (c) of subs (1) of s (4) of the Instrument, that the RTGS Dollar became Zimbabwe's legal tender with effect from 22 February, 2019. It is also clear, from a reading of para (e) of subs (1) of s (4) of the Instrument, that all obligations which arose or arise, after the effective date would be settled at the interbank rate.

The provisions of the instrument which the legislature incorporated into the Finance (No. 2) Act of 2019 are not discretionary or directive. They do not permit of any meaning which is other than the one which the legislature accorded to them. They should, therefore, be taken as the legislature couched them. The stated matter is the unvarnished reality of this case.

The parties were alive to the existence of the instrument and its peremptory provisions when they concluded their contract. They concluded it on 8 March, 2019. The instrument came into force on 22 February, 2019. They were, therefore, aware of it. They went into the contract with full knowledge of the fact that their respective obligations would be governed by no law other than by paragraph (e) of subs (1) of s (4) of the instrument.

It is for the abovementioned reason, if for no other, that Metbank demanded, in its letter of 29 May 2020, that Camel settles its debt to it of US$130 388.33 at the applicable interbank rate as at the date of payment. It realized that it could not insist on being paid in United States dollars as that form of payment would have been in violation of the law which was/is as clear as night follows day. Metbank's attempt to insist on being paid in United States dollars after it had obtained authorization from the Reserve Bank of Zimbabwe to be paid in that currency is of no moment. It is akin to an act of a person who closes the stables when the horses have already bolted.

The authorization was not in existence when the contract was concluded by the parties. It came into existence on 3 February, 2020. Reference is made in the mentioned regard to Annexure O which Metbank attached to its notice of opposition. The annexure appears at p 58 of the record.

Metbank's attempt to change the goal-posts was/is an after-thought. That the attempt was an after-thought is evident from a reading of the date that it demanded payment as compared with that of the date that the authorization was accorded to it on 29 May, 2020. Reference is made to Annexure D of the applicant's founding papers. The annexure appears at p 25 of the record. Metbank had already received the Reserve Bank of Zimbabwe's authorization to be paid in United States dollars when it demanded payment from the applicant at the interbank rate.

It received the authorization of the Reserve Bank on 3 February, 2020. It did not demand to be paid in United States dollars on 29 May, 2020. It gave an option to Camel to pay in United States dollars or in Zimbabwe dollars at the interbank rate. It did not insist on being paid in United States dollars only.

Metbank did not, and could not, insist on being paid in United States dollars because it knew that such insistence would land it into serious challenges *vis-à-vis* the law. Its statement which is to the effect that the Reserve Bank of Zimbabwe's authorization to be paid in United States dollars extends to its contract with Camel does not hold. If it did, it would have applied it to the demand for payment which it made after the authorization had come into operation. It did not take advantage of it because it knew that the authorization remained inapplicable to its case with Camel. It knew, further, that the authorization covered its future transactions with such entities as Camel and anyone - natural or fictitious- who/which would enter into transactions with it which are of a similar nature to the one it concluded with Camel. These are transactions which it would conclude with the stated persons after, and not before, 3 February, 2020. It knew as much as anyone does that no law or document operates in retrospect unless and until its contents expressly state so: *Bater & Anor* v *Muchengeti*, 1995 (1) ZLR 80 (SC), *Walls* v *Walls*, 1996 (2) ZLR 117 (HC) *Mutendi* v *Muramba & Anor*, 1994 (2) ZLR 41 (HC), *Honda Sales (Pvt) Ltd* v *Commissioner of Taxes*, 2000 (1) ZLR 468 (HC).

Metbank's effort to classify the obligation of Carmel as falling under s 44 (2) (b) of the Reserve Bank Act is an effort in futility. Once it is accepted, as it should, that Camel and it are *incolae* and not *peregrini*, which submit to the jurisdiction of the Court, the obligation which the parties created between them can never fall into the category of a foreign obligation. That will be so notwithstanding the fact that Metbank used foreign currency to purchase some of the items which it placed at the disposal of Camel. What is important in the determination of the case of the parties is not the sub-contract which Metbank entered into with other entities who are within, or without, Zimbabwe. The main contract, *in casu* that of 8 March, 2019, is the determining factor. All subsequent contracts which the one or the other of the parties conclude with persons who are outside the main contact do not come into the fold. They remain irrelevant to the determination of the parties' issues as they are defined in the main contract.

It should be appreciated that the legislature remained alive to the need to compensate persons-natural or legal-who are in the position of Metbank when it crafted para (e) of subs (1) of s (4) of the instrument. By stating, as it did, that obligations which parties create after the effective date are determined in terms of the interbank rate, it allowed Metbank and all those who are in its position to recover in the local currency the United States dollar equivalent of what is due to them.

It follows, from the stated matter, that Metbank recovered the equivalent of US$130 388.33 when Camel paid to it the sum of ZWL3 470 550. Its insistence on being paid US$130 388.33 is, therefore, without any basis. It received the sum which Camel owed to it in full and final settlement of the same to quote the words of Camel as it expressed the matter in its letter of 11 June, 2020. Reference is made in this regard to Camel's Annexure H which appears at p 32 of the record. Metbank has, therefore, no justification to continuie to hold onto the property which Camel mortgaged to it when it secured the loan facility from it. The same should be released to Camel with the minimum of delay.

The statement which Metbank made in its opposing papers betrays its double-standards. The statement appears in paras 11.2 and 11.3 of its notice of opposition specifically at p 3 wherein it avers as follows:

> " 11.2 I further submit that assuming this Honourable Court does not find favour with 1st respondent's submission of its demand for repayment of the loan in United States Dollars, all the same, the applicant still remains indebted to
> 11.3 the 1st respondent in the sum of USD 148 192.20 payable in Zimbabwean Dollars, at the prevailing interbank rate on the date of payment…" [emphasis added].

It is clear, from the foregoing, that Metbank was but only trying its luck when it sought to argue as it did. It knew that para (e) of subs (1) of s (4) of the instrument was applicable to its case with Camel. It also knew that its case can never fall under s 44 C (2) (b) of the Reserve Bank Act. It, for reasons which were known to it, made every effort to show as existent matters which it knew were not applicable to its case. It even went as far as importing into its argument the case of *Breastplate Service (Private Limited* v *Cambria Africa PLC* 3c 66/20 which, on analysis, was/is totally dis-similar to the circumstances of its case with Camel. It picked on the excerpts of the case which it thought would persuade me to reason with it. It left out all matters which did not resonate well with its own side of the case. It, for instance, refrained from advising me that the creditor in the *Cambira* case was registered outside Zimbabwe and the subject matter of the contract were shares which were for a company which was registered in Zambia. The C*ambria* case which Metbank sought to rely upon was, therefore, distinguishable from the circumstances of the present application wherein:

(i) both Camel and Metbank are *incolae* who/which

(ii) concluded the contract in Zimbabwe-and

(iii) for an operation which is taking place in Zimbabwe.

Litigants who seek the assistance of the Court are encouraged to shy away from the conduct which Metbank displayed in this application. They should put the Court into their confidence by placing before it all matters which relate to the case. They should not hide any information or evidence which is not favourable to their cause. Honesty is the hallmark of all legal proceedings. Parties must, therefore, display that quality if they are to carry with them the favour of the Court at all times.

The applicant, in my considered view, proved its case on a balance of probabilities. Its application is, accordingly, granted as prayed in its amended draft order.

*Chinawa Law Chambers*, applicant's legal practitioners
*Musendekwa-Mtisi,* 1st respondent's legal Practitioners