

GARDINI PROPERTIES (PVT) LTD  
versus  
THERESA GRIMMEL N.O  
*(in her capacity as Liquidator of Shuler Enterprises (Pvt) Ltd)*  
and  
PARDON ERNEST TENDAI MAKUWAZA  
and  
BENJAMIN MAGOGO

HIGH COURT OF ZIMBABWE  
TAGU AND MUREMBA JJ  
HARARE 20 July 2021 and 24 March 2022

### **Civil appeal**

*V. Mukumba*, for the appellant  
*D. Chemhere*, for the 1<sup>st</sup> respondent  
*A. Ingwani*, for the 2<sup>nd</sup> respondent.

TAGU J: On 20 July 2021 we heard this appeal. At the conclusion of the arguments we delivered an *ex tempore* judgment and upheld the appeal and granted the relief sought as amended. We have been requested for written reasons for the same. These are they.

This is an appeal against part of the Magistrate Court judgment handed down on 7 October 2019 wherein the court *a quo* ordered the appellant to pay the first respondent US\$1 435.11 to be paid in Zimbabwean dollar at the prevailing interbank rate at the date of payment, interest on the above sum at the prescribed rate currently 5% per annum with effect from the date of summons to date of full and final payment as well as costs of suit.

The cause of action for which the appellant had issued summons against the appellant and the rest of the respondents was payment of the sum of US\$4 658.00 being money owed to her as the liquidator of Shuler Enterprises (Pvt) Ltd premised on a sale that was void at law.

The sole ground of appeal before us was stated as follows:

1. The court *a quo* erred in law in ordering that appellant pays first respondent the sum of US\$1 435.11 in Zimbabwean Dollars at the prevailing interbank rate at the date of payment. The order contravenes s 4 (1) (d) of the Presidential Powers (Temporary Settlement Electronic Dollars (RTGS Dollars) Regulations, **2019 SI 33 of 2019**.

The appellant prayed that the appeal succeeds. That the decision of the court *a quo* be and is hereby set aside and substituted by the order that the second respondent is hereby ordered to pay the appellant the sum of RTGS \$1 435.11, interest at 5% and costs of suit.

The issue for determination in this appeal was whether or not the court *a quo* erred by *mero motu* ordering that the second respondent pays the appellant US\$1 435.11 to be paid in Zimbabwean dollars at the prevailing interbank rate at the date of payment when the rate of payment was not an issue at the trial.

## **SUBMISSION BY THE PARTIES**

Mr *Mukumba* for the appellant submitted that what is critical is the question when the obligation to pay arose in the court *a quo*. It was submitted that the obligation to pay arose in 2016 when the summons was issued in 2015. It was not when the judgment was issued on 7 of October 2019. The debt had to be settled at 1:1. It was said that the court *a quo* failed to take note of this and ordered payment of US\$1 435.11 at the prevailing bank rate. According to the appellant's counsel the bank rate came into operation in February 2019. It was argued that SI 33/2019 was not an issue before the court *a quo* hence the court *a quo* erred in saying payment should be made at the prevailing bank rate. The counsel then applied to amend the ground of appeal by deleting the words "in Zimbabwean Dollars ..."

Mr *Chemhere*, counsel for the first respondent then submitted that in light of the development they agreed to the amendment by the deletion of "in Zimbabwean dollars ..." It was submitted that it was for the second respondent to challenge the order at execution.

Finally, Mr *Ingwani*, counsel for the second respondent also submitted that in light of the concessions made by the appellant they had no further submissions to make. They would abide by the court's decision.

It is not in dispute that the claim as captured in the summons was denominated in United States Dollars. The rate at which the debt was to be paid was not an issue before the court *a quo*. The court *a quo* just *mero motu* ordered that the debt of US\$1 435.11 was to be paid at the prevailing interbank rate. It was clear that the court *a quo* erred by prescribing the rate of payment when that was not an issue before it. It was for the second respondent to then challenge the rate of payment at execution. In view of the concessions made by the appellant and supported by the respondents we allowed the appeal and granted the relief as amended as follows.

It be and is hereby ordered that

1. The appeal succeeds.
2. The judgment of the court *a quo* is set aside and substituted with the following order
  - i. The 2<sup>nd</sup> defendant is hereby ordered to pay the plaintiff US\$1 435.11.
  - ii. The 2<sup>nd</sup> defendant shall also pay interest on the above sum at the prescribed rate of 5% per annum with effect from the date of summons to date of full and final payment.
  - iii. Costs of suit.

MUREMBA J Agrees.....

*Makuwaza & Mugogo Attorneys*, appellant's legal practitioners  
*Coughlan, Welsh & Guest*, 1<sup>st</sup> respondent's legal practitioners  
*Dube-Banda Nzarayapenga & Partners*, 2<sup>nd</sup> respondent's legal practitioners