ADMIRE ZHAKATA
and
SANDRA MUSARURWA
versus
HOMELINK PRIVATE LIMITED
and
SHERIFF OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
BACHI MZAWAZI J
HARARE, 6 December, 21 December 2021 and 26 January 2022

Opposed Application

T Shadreck with *G, Nyangwa* for the Applicant
Mr Maunze for the 1st Respondent
No appearance for the 2nd Respondent

BACHI-MZAWAZI J The applicants have approached this court seeking a declaratory order that, in terms of s 22 (1) (d) and 4 of finance No. 2 Act of 2019, a Canadian dollar or any other foreign currency denominated judgment debt is capable of being lawfully discharged at the parity rate of one is to one with the Zimbabwean dollar. The application is opposed.

Against this backdrop applicants want the court to confirm that the payment they made in the sum of ZWL 210 000.00 towards the judgment debt in case number HC 9076/14, is legal tender discharging their obligation thereof.

The undisputed factual narrative of the matter is that, on the 21st of April 2005 the Applicants, a husband and wife team resident in Canada entered into a mortgage loan agreement with the first Respondent, Homelink (Private) Limited, a duly incorporated Company. In terms of that agreement , the first Respondent advanced the sum of 82 418.50 Canadian dollars (CAD) to the applicants against the registration of a mortgage bond, Number 4687/2005, as security , over a certain piece of land situate in the District of Salisbury called Lot 1, of Lot 339 of Greendale held under Deed of Transfer 3377/2005.

Along their contractual journey, the applicants defaulted in payment of the instalments from the 6th of July 2011, accumulating arrears on the capital loan to the tune CAD 114 581.97 (Canadian dollars), thereby breaching their mortgage bond agreement. This prompted the 1st Respondent to institute legal proceedings, before this court in case number HC 9076/14.

Consequently, on the 2nd of July 2018, MUNANGATI -MANONGWA J, who presided over the matter ordered the applicants to pay first Respondent a total sum of CAD 114 581.97 with ancillary relief in terms of the summons issued on the 14th of October 2014.

Somehow applicants again failed to honour the judgment of the 2nd of July 2018 resulting in first respondent launching enforcement proceedings on the 26th of November 2018 by the issuance of a writ of execution against the applicants' property. Subsequently, instructing the second respondent to attach the immovable property specified both in the mortgage bond agreement and the court order. This was after a failed attempt to realise sufficient funds to settle the judgment from the Applicant's movable property.

A subsequent sale by public auction was challenged by the applicants on the grounds that the property had been sold at an unreasonably low price. The decision by the second respondent, the Sheriff, confirming applicant's objection was pronounced close to two years later by way of a letter dated the 10th of February 2020. Ironically, at the time of the decision a new financial Monetary policy encapsulated into law, s 22 (1) (d) and 4 of 2019, had come into operation with drastic legal implications.

Section 22 (1) (d) and 4 of Finance No.2 ,Act of 2019 altered the face of all judgment debts denominated in the United States dollar to the effect that from the effective date (the 22nd of February 2019) they were to be discharged at the parity rate of 1:1 with the Zimbabwean dollar (ZWL).

Applicants, hastily capitalised on the provisions of this new game changer, by offering to settle the judgment debt in case number HC 9076/14 and proceeding to deposit the sum of ZWL 210 000.00 at the rate of one is to one ,with the Canadian dollar as a legal tender through a numerous exchange of correspondence with the first respondent.

Unamused by the turn of events, the first Respondent rejected the deposit made as a legal tender insisting that, the judgment by this court of the 2nd of July 2018, explicitly stipulated that payment was to be paid in Canadian dollars. Hence, they were not accepting or recognising any other form of payment.

Riled with the stance taken by the first Respondent, the applicants filed this application persuading the court to declare that the payment they made was legal tender discharging their judgment debt in terms of s 22 (1) (d) and 4 of the finance No.2 Act 2019.

Clearly, the central issue in this dispute is, whether or not Section 22 (1) (d) and 4 of the finance No.2 Act, applies to judgment debts denominated in Canadian dollars or any other foreign currency other that the United States dollar?

The first Respondent initially raised five preliminary points. Commendably, they abandoned one, in view of the changes made by the new High Court rules S.I 202 of 2021, in regards to the address of service radius. Inevitably the mootness of the issues had been superseded by events, r 15 of S.I 202 of 2021 has, replaced the original requirements of a distance of 5 km with that of 10km.

In no chronological order, the first issue raised by the first Respondent is that, of the dirty hands principle. It is their contention that the order of this court of the 2nd of July 2018, in case number HC 9076/14, is extant and has to date not been complied with by the applicants. They contend that the judgment clearly and succinctly stipulated payment in Canadian dollars. Hence, the payment made by the applicants in Zimbabwean dollars is contrary to the terms of the said order and is non-compliance. In support of their argument they cited the case of **In re: Prosecutor General of Zimbabwe on His Constitutional Independence & Protection from Direction & Control CC2 13/17 at 13-14** which highlights that the court can only grant relief to a litigant with dirty hands only on two grounds, that is where there is good cause shown and when the default is purged.

Applicants countermanded, that they did make a payment a*lbeit* in the local currency and that in their opinion is compliance. In addition they propagate that it is the bone of contention before this court. Further asserting that the key issue to be determined by the court is whether their payment in that form or manner was appropriate or inappropriate. As such they should not be denied audience.

The doctrine of "unclean hands" or dirty hands is well defined in the case of *Naval Phase Farming (Pvt) and others* v *Minister of Lands & Rural Resettlement and others* HH-768-15 at 9, wherein it is enunciated that,

> "the dirty hands principle is a principle that people are not allowed to come to court seeking the court's assistance if they are guilty of a lack of probity or honesty in respect of the circumstances which cause them to seek relief from the court."

I would agree with the applicants' perception that they did make a payment in respect of the judgment debt being guided by their own interpretation of s 22 (1) (d) and 4 of the Finance No, 2 Act of 2019,whether it is legal tender or not is now subject to determination by the court. I am therefore, satisfied that their explanation is reasonable and they have a good cause. For this reason they are absolved from the dirty hands doctrine. I find support in the case of Associated Newspapers of *Zimbabwe (Pvt) Ltd* v *Minister of State for Information and Publicity in the President's Office and Others*, SC 20/2003, where CHIDYAUSIKU J noted that,

> "the court will not readily grant relief to a litigant with dirty hands in the absence of an explanation of good cause….. ...an explanation why this course was not followed."

In their second focal point, the first Respondent contends that, from the record, it is an irrefutable fact, that applicants are resident in Canada and therefore peregrines. Citing several cases among them, *Arthur Fernando Dereira Dias* v *David Johannes Erasmus & Others* HH 144-10 at 5, the first Respondent asserts that, before being granted the right of audience, the *peregrinus* should firstly pay security of costs to safeguard the interests of the *incola* and that is settled law. Whilst acknowledging the existence of a property within the jurisdiction of this court the first respondents argued that, the mortgaged property may not realise enough to cater for both the capital debt and litigation costs judging by the evaluation report filed by the applicants years back when stopping the sale by public auction.

In countering, the aspect of security of costs, the applicants submitted that this is a non-issue and not a new phenomenon as they have, from the onset been residents in Canada. They reiterated that, the mortgaged property has already been made executable by an order of this court and is capable of realising enough funds to satisfy the judgment debt and any ancillary costs given the current real estate market, despite the previously evaluated figures on record.

Whilst the court is cognisant of the need to protect the i*ncola* against the *peregrinu*s as stated in the case of *Santum Insurance Co Limited* v *Korsah* 196 (4) 53 at (52) and placing reliance in the case of *SA Television Manufacturing Company (Pty) Ltd* v *Subati and others* 1983 (2) SA 14(E), I am persuaded that this is one of the exceptional cases were the court rules in favour of the *peregrinus*, In the current scenario, the applicants though resident in Canada, have a property within the jurisdiction. In juxtaposition, it is executable in terms of an order of this court. Given the steep rise in land and property sales in the current real estate market the sale of this property will in my view, meet the issue of security of costs satisfactorily. Accordingly this point fails.

The third preliminary point is that, the non- joinder of the relevant Ministerial departments and other statutory bodies governing all the relevant statutes related to the dispute at hand. It is the first Respondent's argument that the said parties have a direct and substantial interest in the matter as well as the outcome therefore their exclusion affects their right to be heard and is a fatal non joinder. However, in the same breadth they concede that r 87(1) of the 1971 rules now r 32 (11) averts the need to join some parties and is not fatal to the proceedings.

In response, the applicants relied on Rule 87 (1) and prayed for the dismissal of the point *in limine* in this regard. Rule 87 of the High Court Rules of 1971 now r 32 (11) of High Court rules 2021 states;

> "No cause or matter shall be defeated by reason at the misjoinder or non-joinder of any party and the court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of who are parties to the cause."

It is my view that this point is 'Much ado about nothing", needs no further elaboration as the rules are very clear and should be adhered to. The position would have been different had applicants persisted on the Constitutional invalidity complexion of their argument then the non-joinder issue would have applied by virtue of r 33 (1) of the S.I 202 of 2021. This point does not succeed.

First respondent's final point *in limine,* is that the draft order is defective, stressing that, the relief sought is different from what is being garnered for in the founding affidavit. They argue that the draft order speaks to Statutory interpretation, whilst the founding affidavit makes in depth reference to Constitutional invalidity. It is their further contention that, this court lacks jurisdiction, to interpret, firstly, the statutory provisions impugned , in the manner being asked for by the applicants, and secondly, the Constitutionality element raised as it is not properly before the court as is dictated (so they claim), by s 175 of the Constitution of Zimbabwe Amendment Act No. 20 of 2013. This argument was not developed any further by the first respondent.

It is noteworthy, that at the commencement of the hearing, applicants relinquished their constitutional argument based on the principle of equal treatment before and by the law in terms of s 56 (1) of the Constitutional Amendment Act No. 20 of 2013, in the strict sense as it called for Constitutional Interpretation. However, they advance that the mention of a constitutional argument to support their claim does not necessarily alter the face of their prayer or relief sought in the draft order. They therefore, maintain that their draft order is not defective, as

such the relief sought is competent. Applicants' further submit that this court does have jurisdiction to construe both statutes and the Constitution but zeroed in the fact that the Constitutional argument needs no elaboration since it is not in contention.

A reading of the applicant's draft order against the prayer as stated in the founding affidavit leads to the conclusion that all that the applicants are seeking from the court is the interpretation of s 22 (1) (d) and 4 of Finance No. 2 Act of 2019 in the manner they are proposing. This is no question, the core dispute or source of conflict. Interpretation of statutes and the law is a judicial function as stated by, MALABA CJ in, *Zambezi Gas Zimbabwe (Private) Limited* SC 3/20 p 7 para 6 that**,** **"***it is the duty of the court to interpret statutes."*

Further, in my view interpretation of Statutes and the Constitution are functions of the judiciary as highlighted in **the Zambezi Gas** case **above. Section 171 (d) 175 of Amendment Act No.20 of 2013 address**es this aspect. Whilst s 171 (d) provides this court with concurrent jurisdiction to decide on constitutional invalidity outside the scope of those where the Constitutional court has exclusive jurisdiction, section 175 outlines the manner in which such matters are handled with emphasis on referral for confirmation to the Apex court which has a final say in all Constitutional matters. See *Chiokoyo* v *Ndlovu and Others* **HH-321-14**. *Gurta AG* v *Gwaradzimba NO* 2013 (2) ZLR 399

In this light, the first Respondent's final preliminary point has no merit and suffers the same fate as the rest and is accordingly dismissed.

Central to this dispute is the construction of s 22 (1) (d) and 4 of the Finance Act No. 2 of 2019 in relation to the judgment by MUNANGATI-MANONGWA J in case HC 9076/14. As such the ultimate question for determination is, Whether or not a judgment debt denominated in Canadian dollars or any other foreign currency is capable of discharge under the provisions of s 22 (1) (d) and 4 of the Finance No. 2 Act of 2019?

The second issue emanating from the first, which is the main source of conflict in this matter is, whether or not the payment made by the applicants in the local currency is legal tender discharging their obligation towards the first respondent in terms of the Court order in HC 9076/14?

Inescapably the determination of the first issue disposes off the second either way. In that regard there is need to visit the actual provisions of the contentious part of the legislature to see what it denotes.

Finance Act No. 2 of 2019, s 22 (1) (d) and 4 Issuance and Legal Tender of RTGS dollars, savings transactional matter and liquidation.

(1) Subject to s 5, for purposes of s 44 C of the principal Act the Minister shall be deemed to have prescribed the following with effect from the first effective date.
   a) That the Reserve Bank has, with effect from the first effective date issued an electronic currency called the RTGS dollar and
   b) The Real Time Gross Settlement system balances, expressed in the United States Dollars (other than those referred to in s 44C (2) of the principal Act), immediately before the first effective date, shall from the first effective date be deemed to be opening balances in RTGS dollars at Par with the United States dollar.
   c) That such currency shall be legal tender within Zimbabwe from the first effective date, and
   d) That for accounting and other purposes (including the discharge of financial or contractual obligations, all assets and liabilities that were, immediately before the first effective date, valued assets and liabilities referred to in s 44 C (2) of the principal Act) shall on the first effective date to be deemed to be values in RTGS dollars at a rate of one to one to the United State dollar and
   e) That after the first effective date any variance from the opening parity rate shall be determined from time to time by the rate or rates at which authorised dealers exchange the RTGS dollar, at parity with the United States dollar on a willing seller willing-buyer basis.
   f) Every enactment in which an amount is expressed in United State dollars shall, on the first effective date but subject to sub (s) (4), be construed as reference to the RTGS dollar, at parity with the United State dollar that is to say, at a one to one rate.

(2) From the first effective date, the bond noted and coins referred to in the Reserve Bank of Zimbabwe Amendment Act, 2017 (N0.1 of 2017) shall continue to be legal tender within Zimbabwe, exchangeable with the RTGS dollar at parity with each bond note nit, that is to say, at a one-to –rate.

(3) The use of the RTGS currency with effect from the first effective date is hereby validated.

(4) For the purposes of this Section

a) It is declared for the avoidance of doubt that financial or contractual obligations concluded or incurred before the first effective date be deemed to be valued in RTGS dollar.

b) Where a person was adjudged to be liable for the payment of any statutory monetary penalty or Statutory fine before the first effective date, and –

(i) The payment of that penalty or fine is expressed in any statute to be payable in United States dollars; and

(ii) The person liable has not paid the penalty or fine on the first effective date, or has paid it partially;

Such person is liable after the first effective date, to pay the penalty or the fine or the unpaid portion of it in RTGS dollars at a rate of one-to- one to the United State dollar;

c) Where a person became liable for the payment of any statutory fee before the first effective date; and-

(i) The payment of that fee is expressed in any statute to be payable in United States dollars and

(ii) The person liable has not paid the fee on the first effective date, or has paid it partially; such person is liable after the first effective date (subject to Section 6) to pay the fee or the unpaid portion of it in RTGS dollars at a rate of one-to-one to the United States dollar.

In view of the above cited sections, the applicants advocate for a purposive approach to interpretation so as to accommodate their claim that provisions in issue apply *mutatis mutandis* to their situation. On the other hand the first respondent advances that the literal meaning rule is the most appropriate as the language used in that piece of legislation is clear and unambiguous and should carry the order of the day.

The applicant commences their argument on the merits by justifying their application for a declaratory order. It is the applicant's case that they have satisfied the requirements for an application for a declaratory order as stipulated in s 14 of the High Court Act [*Chapter 7.06*], in that they are an interested party, with a direct and substantial interest in the subject in this suit and inadvertently the judgment will affect their interest. They further submit that the matter is one that the court can exercise its discretion as it is not merely of an academic interest. In support of their argument applicants relied on the cases of *Environmental Law Association and*

Others v *Anjin Investments (Pvt) Ltd &Ors* HH23/15 and *Adbro Investments Co* v *Minister of Interior & Others* 1961 (3) SA 283 (G) at 285 B-C**.**

First Respondent counters by stating that an application for a declaratory order is not ideal since the relief sought if granted has adverse impact on both the public and Parliament. They further, argue that if granted, the relief in a way amends the legislation in question. As such this court has no power to rewrite statutes as it is the domain of Parliament. Moreso, when the legislature has not been made part to the suit. So in that respect a declaratory order on a statutory provision places the judiciary function in direct conflict with the legislative function. They also state that the purposive approach is restricted to s 46 fails as that section is only in ….. to Chapter 4 and the constitution.

Whilst the court is aware of the nature of the order sought, in its discretion it is of the view that the issues raised by the first respondent are a construction issue subject for determination but it cannot be refuted that the applicants are an interested party, who have direct and substantial interest in the resolution of this dispute. As it where, they have satisfied the requirements of an application for a declaratory order as stipulated in Section 14 of the High Court Act [*Chapter 7.06*] and as outlined in, *MUNN PUBLISHING (PVT) LTD* v *ZBC* 1994 (1) ZLR 337 (S) at 343-344 wherein GUBBAY CJ (as it then) pronounced that,

> "The condition precedent to the grant of a declaratory order is that the applicant must be an interested person, in the sense of having a direct and substantial interest in the subject matter of the suit which could be prejudicially affected by the judgment of the court…."

As indicated earlier, the applicant in their written submissions launched a two pronged interpretation argument. On one hand, the mere construction of s 22(1)(d) and 4 of the Finance No.2 Act of 2019 as a statutory provision whilst on the other they sought constitutional invalidity interpretation. From this perspective in the first leg of their contention applicants postulated that if s 22 (1) (d) is to be given a literal interpretation meaning the outcome infringes their right as enshrined in s 56 (1) of Amendment Act number 20 of 2013, s 56 (1) of the Constitution reads:

> "All persons are equal before the law and have the right to equal protection and benefit of the law."

The thrust of their Constitutional argument is that s 22 (1) (d) and 4 of the Finance Act is a Law and if its provisions are left as they are, benefits and protects only those with judgment

debts denominated in the United States dollar at the exclusion of others with debts denominated in other foreign currencies. They allege that the Canadian dollar is a foreign currency, so is the United States dollar. Therefore, this act of singling out the judgement debts in one foreign currency at the expense of other foreign debts similarly circumstanced is unequal treatment by the law and resultantly violates the constitutional provision as outlined in s 56 (1). Therefore judgment debt in Canadian dollars should be placed on the same footing with those in the United States dollar and be capable of being liquidated at the parity rate of one is to one with the Zimbabwean dollar. In other words they are alleging that their constitutional right to equal treatment and protection by the law has been impinged.

Accordingly, they urge the court to employ the all-inclusive embracing purposive canon of construction that will address the context and purpose of the statutory provision to arrive at the intention or mischief behind the legislation. They further assert that this must be done within the context of s 46 of the Constitution, Amendment Act, No. 20 of 2013, which enjoins the court to employ its provisions in the construction of laws. In addition they state that the application of the Literal rule will be defeatist as the current meaning of the provision in question obtains.

First Respondent reiterated that, the court lacks jurisdiction to deal with the applicants' Constitutional aspect as it has not been properly placed before it. They contend that a constitutional invalidity argument should be brought in terms of s 175 of the Constitution. However, counsel for the first respondent did not develop this point further. They further submitted that there is no violation of any rights as, the choice of a preferred currency is not unequal treatment.

It is pertinent to note that the above point has been adequately addressed in the preliminary points section and need no further comment. In my view the applicants' Constitutional argument, inevitably is a constitutional invalidity challenge on the said piece of legislation. It follows that their application in that regard faces two impediments. Firstly, it is in contradiction with the relief they had sought in their draft order. Secondly, this line of argument is stopped in its tracks by a procedural irregularity. In terms of the adjectival law, any constitutional issue raised and brought before the court must comply with r 107 of the new rules of the High Court S.I 202/21. Commendably in the face of these hiccups and a potential warzone the applicants made a good decision to retract that line of their argument at the commencement of the hearing.

What remains of applicant's application is the interpretation of s 22(1) (d) and (4) of the Finance No.2 Act of 2019. Applicants states that Literal meaning rule should not be applied as it limits the scope of the mischief behind the enactment. They further motivate that the purpose of s 22(1) (d) and 4 was to include all foreign currency denominated dates and the mention of the United States dollar should be read to mean all other foreign currencies including the Canadian dollar. Entailing that the payment they made in the sum Zwl 210 000.00 was legal tender which liquidates their judgment debt. In support of their argument they Applicants relied on **E. A kellaway in his book, Principles of Legal Intepretation-Statutes, Contracts and Wills, 1st Ed** at pages. K and the cases cited therein and the following passage,

> "even if a (South African) court comes the conclusion that the language is clear and unambiguous , it is entitled to reject the pure literal meaning if it is apparent from the anomalies which flow there from that the literal meaning could not have been intended by the legislature"

In rejecting the applicant's submissions on the remaining issue before the court, the first respondent submits that, the language of the legislature in s 22(1) (d) and 4 of Finance No.2 Act, of 2019 is clear and unambiguous therefore the Literal rule is the most applicable. They contend that the legislature was aware of the existence of the multi-currency basket but in his wisdom made a conscious choice in electing to use the United States dollar as a benchmark to peg its numerous business transactions. They submitted that the literal rule should be applied as there is no absurdity nor ambiguity.

In addition, the first respondent stated that even if the purposive approach or any other canon of interpretation is to be applied the context, history and purpose of the legislation in question remains the same. To buttress their point they quoted s 44(B) of the Reserve Bank of Zimbabwe Act [*Chapter 22:15*] as just one example, which provides, in this section,
'bond note" means a unit of legal tender whose par value in relation to the United States dollar is backed by a guarantee extended to the Reserve bank by one or more International financial institutions.

They further content that there is no need to assign any other meaning to the section in question as an upper court has already made a determination that the United States dollar was the currency of choice preferred by the legislature from a basket of currencies. Reference was made to the case of *Zambezi Gas Zimbabwe (Private) Limited* SC/3/20 p9, where MALABA CJ , stated that.

> "Section 4 (1) (d) of S.I. 33/19 would not apply to assets and liabilities, the values of which were expressed in any foreign currency other than the United States dollars immediately after the effective date."

Respondent's advanced an argument that this court is bound by the said decision and should go no further.

Lastly the respondent counter argued that any construction to s 22(1)(d) and (4) of the Finance No.2 Act of 2019 other than that of the ordinary meaning rule will be firstly, reading into an Act of parliament what is not there and that is not for the judiciary but the legislature. Secondly, such interpretation will result in equating the values of all foreign currencies, the Yen, the Pula, amongst others, which is an absurdity which the legislature never intended. It is their submission that the contentious provision should be construed through the application of Literal meaning rule and the applicant's argument should.

Turning to the interpretation, this court has been called upon to construe s 22(1) (d) (4) in line with a judgment of this court denominated in Canadian dollars.

It is trite that the first step in the construction of statutes is by giving the words their ordinary grammatical meaning and can only be departed from if there is an absurdity or an ambiguity. MALABA CJ citing the case of *Endeavour foundation and Anor* v *Commissioner of taxes* **19195 (1) ZLR 339,** stated,

> "where the language used in a statute is clear and unambiguous the words ought to be given their ordinary grammatical meaning., however where there is an ambiguity and lacks clarity, the court will need to interpret it and give meaning to it."

From another angle the Purposive approach sanctions a departure from the literal rule in order to find the purpose and the intention of the legislature. The oft quoted passage in Devenish book, Interpretation of statutes (Juta 1992 at page as cited by GOWORA JA (as she **then was) in** *Care International in Zimbabwe* **v** *Zimbabwe Revenue and others* SC 76/17 states,

The purposive approach requires that interpretation should not depend exclusively on the literal meaning of words according to semantics and grammatical analysis. The interpreter must endeavour to infer the design or purpose which lies behind legislation. In order to do this the interpreter should make use unqualified contextual approach which allows an unconditional examination of all internal and external sources .Words should only be given their grammatical meaning if such meaning is compatible with the complete text.

Elmer Driedger in; "The Construction of Statutes 1st ed at 106 Toronto, Butterworths, 1974, articulated that, no single approach is adequate in the construction of statutes therefore interpreters must take into account and attempt to harmonise all aspects of interpretation."

Although there is a worldwide dynamic shift towards the gravitation to the purposive approach as illustrated in the case *Regina* v *Secretary of State for Health exparte Quinta valle* (on behalf of Pro-life Alliance) 2003 ALL ER 20SH. Apparently, *in casu* both parties are in agreement that a reading of s 22 (1) (d) and 4 of Finance No.2 Act of 2019 does not show any ambiguity. What the applicants are advancing in their argument is that the section in question is under-inclusive it should have included the Canadian dollar or any other foreign denominated debts. In essence they are saying there is a gap in the legislation or an omission which should be filled by this court.

Findings

Section 22 (1) (d) and 4 of Finance No.2 Act of 2019 is by and large SI 33/ 19 and both parties are in agreement that the language is clear and unambiguous. Therefore the court will adopt the Literal meaning rule. The **Zambezi Gas** case cited above has already pronounced that the provisions speak to the legislature's clear and unequivocal intention to restrict its application to judgment debts denominated in the United States dollars. I find support in the case of *Mxumalo & others* v *Guni* 1987 (2) ZLR (1) SC at 8 wherein GUBBAY CJ (as he was then was) stated;

> "The language used is plain and unambiguous and the intention of the law society is to be surmise there from. It is not for the courts to surmise that the law society may have had an intention other than that which clearly emerges from the language used."

Further in support of the above, in my view, the express mention of judgment debts denominated in the United States dollar from a multi- basket of currencies whose creation and existence was known to the legislature is a clear illustration that he intended to exclude any other foreign denominated debt. A Canadian dollar is a genus to the United States dollar and by deliberate choice and not inadvertence it was excluded by the enactment. In essence this is the presumption that is expressed in the maxim "*expressio unis*" succinctly stated in the case of *EAGLE INSURANCE CO. Ltd* v *Grant* 1989 (3) ZLR 278(SC) as cited by HLATSHWAYO JA in *Godfrey Tapedza and Others* v *Zimbabwe Regulatory Authority and Another* SC 160/16, wherein KORSAH J stated that;

> "Is a rule which is variably resorted to in the interpretation of statutes, the expression *uinis* rule is that the express mention of one or more of a particular class may be regarded as silently excluding all others."

In my view the said section was addressing an economic challenge that had emerged. As has been submitted by both parties the legislature was aware of the existence of a basket of currencies, when in its wisdom it expressly elected those debts denominated in United States dollar. Had the legislature wanted to include any other currency under s 22 (1)(d) and (4) of the Finance No.2 Act of 2019 it would have done so. A matter not covered by statute should be treated as intentionally omitted. *Casus omissus*, as clearly enunciated by the Supreme Court in the *Tapedza* case above.

Lastly, it is settled law that this court cannot usurp the legislative function and include words that had been left out by the legislature. There are clear demarcations between the functions of the judiciary and the legislature. Enactments emanate from policies formulated by the Executive arm of government after extensive research and consultations to address social needs, challenges and problems. These are then translated to enactments. Therefore every Statute speaks to something. I am fortified on this position by the case of *Car Rental Services (Pvt) Limited* v *Director of Customs* 1988(1) ZLR 402 (SC) AT 409,

> "It is not for the courts to legislate or attempt to improve, on the situation made by Parliament through its enactment. Effect must be given to what the act says or permits and not what it may be thought it ought to have said or prohibited. If there is a *cassius ommisus* in the act and it is can lead to undesirable consequences the court cannot fill it is a matter for legislation."

In summation the language used is plain and unambiguous and the intention of the legislature is deciphered therefrom. It is not for the court to read into words expressly excluded by parliament.

Guided by the decision in *Zambezi Gas Zimbabwe Zuva (Private) Li*mited v N.*R. barber (Private) Limited and Anor* SC3/20, it was not the intention of the legislature to include any other foreign denominated debt other that it expressly mentioned .I am persuaded by the first respondent's argument in this regard. As a result any payment made in any other currency other than in Canadian dollars is ultra vires s 22(1)(d) and (4) of finance No 2 Act of 2019 and is not legal tender. Therefore it does not discharge a judgment debt denominated in Canadian dollars.

As regards costs. I am swayed by the fist respondent's submissions that the costs should be at a higher scale given the fact that applicants benefited from the first respondent's scheme

and have demonstrated reluctance to pay, in view of the protracted legal wrangle evidenced herein.

Disposition

In the result it is ordered that:

1. The application is dismissed with costs
2. Applicant to pay costs at a higher scale.

Kanoti and Partners, applicants' legal practitioners
Mawere Sibanda Commercial Lawyers, respondents' legal practitioners