

MUCHANYARA MUKAMURI
versus
ZIMBABWE NATIONAL NETWORK FOR PEOPLE LIVING WITH HIV

HIGH COURT OF ZIMBA BWE
MUNANGATI-MANONGWA J
HARARE, 19 July & 31 August 2022

Opposed Application

R Matsikidze, for the applicant
T Shadreck, for the respondent

MUNANGATI-MANONGWA J: The applicant has approached this court seeking a declaratur to the effect that she be paid what is owed to her by her former employer, the respondent, in United States Dollars. She also seeks that the court declares her employers' conduct of seeking to pay her dues in Zimbabwean dollars unlawful. The application is opposed.

The facts of this matter are clearly straight forward and are not in contention. The applicant herein was formerly employed by the respondent on a contract basis as the Executive Director. Upon the termination of her employment contract she sought payment of her salary arrears and cash *in lieu* of leave. Sensing reluctance on the part of her employer she approached a labour officer who ruled in her favour and awarded her USD 37 180 (thirty seven thousand one hundred and eighty United States dollars). The applicant proceeded to apply for confirmation of the award in the Labour Court and same was confirmed by CHIVIZHE J in January 2021 under LC/H/73/2021. What has prompted the applicant to approach this court is the respondent's intention to pay or honour the judgment in Zimbabwean dollars at the rate of one Zimbabwe dollar to one United States Dollar.

It is the applicant's case that the respondent is a non-governmental organization which is funded by foreign organisations. She further states that the organization receives donations by foreign organisations to execute its mandate and pay its employees. During her tenure of office she was receiving her salary in United States Dollars and when she instituted her claim before the labour officer and the Labour Court her claim has always been in United States Dollars and it has

never been an issue between the parties even 2021 when here claim was confirmed. It is her contention that the refusal to pay her dues in United States Dollars is therefore unlawful hence the relief she seeks.

In opposition, the respondent had raised a point *in limine* that the application was not properly before the court as the award had not been registered in the High Court. The point *in limine* was withdrawn on the date of hearing. On the merits the respondent contends that it has not refused to pay the applicant but has tendered payment in Zimbabwean dollars. In its opposing affidavit the respondent states that the Labour Court allowed arrear salary in the sum of 431 200 and did not make a pronouncement on the currency save to prefix the amount with a dollar sign hence what is due for payment is \$31 200. It further contends that it is in the discretion of the respondent to pay in United States Dollars when funds permit. The respondent further submits in its opposing affidavit that the applicant is not a diplomat, remains a locally recruited member of staff and her salary is regulated in terms of the laws of Zimbabwe. Further that as the claim was made in 2016 and has still been owing it is affected by the change in the law as expressed in the *Zambezi Gas Zimbabwe (Pvt) Ltd v N R Barber & Anor SC 3/20* matter hence it is payable in Zimbabwean dollars. It contends that the judgment debt falls within the ambit of the provisions of s 4(1)(d) of Statutory Instrument 33/19. It being so, it is contended that the respondent's offer to pay in Zimbabwean Dollars at the rate of 1:1 cannot be deemed unlawful. Throughout the opposition the applicant maintained that the applicant's judgment is not yet executable. I hasten to state that the applicant is in the relevant court as the Labour Court is not empowered and cannot grant a declaratur. It was therefore wise for the respondent's counsel to withdraw the point *in limine* to the effect that this court cannot hear the case as the order was not yet registered.

The declaration sought can only be granted in this court. Section 14 of the High Court Act [Chapter 7:06] provides that this court "may, in its discretion at the instance of any interested person inquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon such determination ." Thus to succeed an applicant must be an interested party in an existing, future or contingent right or obligation in the subject matter of the suit which could be prejudicially affected by the judgment of the court. MAKARAU JP as she then was simplified the requirements for the granting of declaratur in the matter of *MDC v The President of the Republic of Zimbabwe & Ors HH 28/07* as

follows: the applicant must show that it is an interested party, that there is a right or obligation which becomes the object of the enquiry and that there must interested parties upon which the declaration will be binding. This resonated with the approach adopted in *Family Benefit Friendly Society v Commissioner for Inland Revenue & Anor* 1995(4) SA 120 which she referred to.

It is common cause that the applicant was an employee of the respondent and she was being remunerated by the respondent. She is owed money which is not disputed, and she claims she was being paid in United States dollars which has not been disputed and she will be prejudiced if she were to be paid in Zimbabwean dollars. It is clear that the applicant is an interested party and has a right to payment of her dues as she rendered service to the respondent her employer and should the declaration be made it will be binding upon the respondent. Her case entitles her to a declaration. However the court has to decide in the course of issuing the declaratur which currency the debt should be paid in. It is not in dispute that the applicant in all her claims stated that she was receiving United States dollars and she got her initial award in United States dollars which the Labour Court confirmed. For the respondent to say there was no mention of United States Dollars save pre-fixing the amount with a dollar sign would not only be mischievous but patent dishonesty. A reading of the judgment clearly shows that the monies being discussed pertained to United States dollars with the court at times categorically mentioning United States dollars although in other instances it would be just the dollar sign. In any case the respondent has never at any point pointed to the fact that the applicant received Zimbabwean dollars. The question is can the court exercise its discretion in the light of the provisions of s 4(1)(d) of SI 33/19.

The facts of the case are such that the court can grant the declaration that the applicant be paid in United States dollars. The applicant was employed by a foreign funded organization which continues to pay its employees in United States dollars. In essence the organization or the respondent is excluded from the operation of s 4(1)(d) of SI 33/19. Of note is the fact that the Reserve Bank Act [*Chapter 22:15*] was amended by the insertion of s 44C wherein ss 2 states as follows:

44C Issuance and legal tender of electronic currency

(1) In addition to its powers to issue banknotes and coins in terms of this Act and subject to subsection (3), the Bank shall have the sole power to issue or cause to be issued electronic currency in Zimbabwe.

(2) For the avoidance of doubt it is declared that the issuance of any electronic currency shall not affect or apply in respect of—

(a) funds held in nostro foreign currency accounts, which shall continue to be designated in such foreign currencies; and

(b) foreign loans and foreign obligations denominated in any foreign currency, which shall continue to be payable in such foreign currency.

It is given that the respondent operates a foreign currency account from which the applicant and the rest of the employees continue to be paid from. That account was not affected by the issuance of the electronic currency given its exclusion. The documents on record show that applicant's contract clearly had a clause on remuneration that stated that the "salary shall vary either on monthly or periodical basis depending on finance accessibility by donors and your own effort." The foreign currency aspect has always existed and has never been denied and the funds to respondent are availed by donors. The respondent's salary can be said to be a foreign obligation *v-a-vis* the employer.

This court thus agrees with Mr *Matsikidze* for the applicant that this case is not comparable to the other cases that this court and indeed the Supreme Court ruled that payment had to be in RTGS due to the provisions of SI 33/19 see *Temprac Investments (Pvt) Ltd v Nu Aero (Pvt) Ltd & Mugwagwa* HH 678/20, *The Minister of Finance and Economic Development v Central Africa Building Society & 3 Ors* SC 15/21, and the *Zambezi Gas* case cited (*supra*). Apart from the facts of this case the Zimbabwean courts have long since held that where a party has made a clear case that she or he is entitled to relief in foreign currency the courts will not hesitate to grant such relief. See *Delta Beverages (Pvt) Ltd v Murandu* SC 349/13, *Makwindi Oil Procurement (Pvt) Ltd v National Oil Company of Zimbabwe (Pvt) Ltd* 1988 (20) ZLR 482 (SC). In *casu* the applicant was awarded her dues in United States dollars and she has made a case that the payment can legally be made without running contrary to the provisions of the law. The court finds that the applicant has made her case justifying this court to proceed and employ its discretion to grant the declaratur.

The applicant sought costs on a higher scale. No justification nor compelling reasons have been rendered as to why there should be punitive costs. Thus the court will award ordinary costs. This is so given that the issue of payments where debts are concerned continues to come in various forms rendering a challenge to parties as to how to settle debts given the mutative nature of the facts. This is due to the changes arising from amendments to the Reserve Bank Act, the Finance Act and monetary policies introduced through various statutory instruments since 2019 as alluded to in the foregoing paragraphs. Given the nature of the disputes that the courts are handling, it is clear that both creditors and debtors still have difficulty in determining which debts can still be paid in foreign currency as opposed to local currency especially when initially denominated in United States Dollars. Due to that confusion, the courts cannot rush to penalize litigants by ordering costs on a higher scale hence the respondent will pay ordinary costs. **Accordingly it is ordered as follows:**

1. The offer by the respondent to pay the applicant the amount ordered by the court under LC/LRA/325/17 in Zimbabwean dollars be and is hereby declared unlawful and invalid.
2. The respondent must pay the applicant the amount of USD31 200 (Thirty One Thousand Two Hundred United States Dollars) granted by the Labour Court under L/H/LRA235/17 in United States Dollars.
3. The respondent to pay costs.

Matsikidze Attorneys-At-Law, applicant's legal practitioners
Mambara & Partners, respondent's legal practitioners