ARTWELL MARADHA

versus

BIG VALLEY (PVT) LTD

HIGH COURT OF ZIMBABWE
ZISENGWE J
MASVINGO 24 SEPTEMBER 2020 & 18 NOVEMBER, 2020

Opposed Application

V. Kwande, for the applicant
T. Militao, for the respondent

ZISENGWE J: When the parties initially squared off the dispute was whether or not to grant an application for the cancellation of the agreement of the sale of a motor vehicle entered into by the parties (and other related relief sought by the applicant). However, the matter soon assumed a different complexion in the wake of the about turn made by the respondent company which, after initially resisting the applicant's prayer for the said cancellation, subsequently acceded to the same. The dispute then narrowed down to the question of the determination of the refund of that part of the purchase price which the respondent had paid to the applicant.

This is because whereas respondent insisted that the amount in question be denominated in United States dollars (i.e. the same currency in which it paid to the applicant) or its equivalent in Zimbabwe dollars at the official rate, counsel for the applicant argued contrariwise and implored the court to denominate that refund in RTGS Dollars at the rate of one to one with the United States Dollar. Reliance for the latter position was placed on section 22 of the Finance (No.2) Act of 2019 ("the Act")

The following is a synopsis of the events leading up to this dispute. On 1 November 2018, the parties entered into an agreement of sale wherein the applicant sold to the Respondent a Ford Ranger “Wild Track” motor vehicle ("the motor vehicle"). The agreed purchase price was US$ 40 000. Pursuant to that agreement, the respondent paid the sum of US$ 5 000 as initial deposit and took possession of the motor vehicle. Over the next few months it would make further payments which brought the total sum paid to US$20 500 leaving a balance of US$19 500.

In the papers filed in support of their respective positions, the parties initially haggled over the exact amounts paid (and outstanding) as well as whether or not there was a subsequent verbal agreement to defer payment of the balance to August 2019. In light of the position ultimately adopted by the respondent most of those factual disputes (save perhaps the one regarding deferment of payment of purchase price) were rendered water under the bridge, so to speak.

Although the applicant neglected to disclose as much in his founding affidavit, it soon became apparent that on 21 July 2019, he (i.e. applicant) seized the motor vehicle from the respondent. This prompted the latter to file an application for spoliation in the Magistrates Court. In a classical “chicken and egg” scenario, the parties sparred over the order or sequence of events. Whereas the Applicant claims that the reason for his repossession of the motor vehicle was the failure by the respondent to pay off the outstanding balance of the purchase price, respondent on the other hand insisted that it discontinued with the payment of the instalments due because the appellant despoiled it of the motor vehicle. Be that as it may, it is common cause that since July 2019 the applicant has been in possession of the motor vehicle.

In the wake of the above developments, the applicant approached this court seeking an order on the following terms:

IT IS ORDERED THAT:

1. The agreement of sale for the sale of the Ford Ranger Wild Track, registration Number ADL 7497 entered into between applicant and respondent be and is hereby cancelled.
2. The Ford Ranger Wild Track motor vehicle be returned to the applicant with immediate effect.

3. The applicant to repay the amount paid by the respondent towards the purchase price in full within 14 days.
4. Respondent to bear costs of suit on a legal practitioner and client scale.

The crisp issue for determination, therefore, is what the exact wording of paragraph 3 of the applicant's prayer should assume. More pertinently, the question is whether the applicant should be ordered to repay the amount of US$20 500 paid to it by respondent in RTGS dollars at the rate of one to one with the United States Dollar as suggested by the applicant or whether that amount should be at the current official rate as suggested by the respondent.

This necessarily calls for the interpretation and application of paragraphs (d) and (e) of subsection 1 of section 22 of the Act Finance (No. 2) Act, 2019. The said provisions read as follows:

22. ***Issuance and Legal tender of RTGS dollars, savings, transitional matters and validation***

1. Subject to section 5, for the purposes of section 44C of the principal Act, the Minister shall be deemed to have prescribed the following with effect from the 1st effective date-

(a) ……

(b) ……

(c) ……

(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 and expressed in United States Dollars (other than assets and liabilities referred to in section 44 C (2) of the Principal Act) shall on the 1st 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 first effective date any variance from the opening parity rate shall be determined from time to time by the rate or rates at which authorized dealers exchange the RGTS dollar for the United States Dollar on a willing-seller willing buyer basis, and

(f) …….

The first effective date is defined in section 20 of the Act as:

"First effective date means the 22nd February, 2019 being the date from which Statutory Instrument 33 of 2019 (that introduced the RTGS dollar took effect"

The case of *Zambezi Gas Zimbabwe (Pvt) Ltd* v *N.R Barber (Pvt) Ltd and Another* SC 3/20 shed light on the interpretation to be given to the above section. In particular it illuminated the import of the phrases "the discharge of financial or contractual obligations" and "all assets and liabilities that were immediately before the first effective date…". The following was stated at pages 8-9 of the cyclostyled judgement.

> *"A reading of section 4 (1) (d) of section I 33/19 does not reveal ambiguity in the language used by the legislature in the expression of its intention in enacting S.I 33/19. The purpose and object of the statute can be easily ascertained from the ordinary and grammatical meaning of the language used. The liabilities referred to in section 4 (1) (d) of S.I 33/19 can be in the form of judgement debts and such liabilities which existed immediately before the first effective date of the promulgation of S.I 33/19. The value of the assets and liabilities should have been expressed in United States Dollar immediately before 22 February 2019 for the provision of section 4 (1) (d) of S.I 33/19 to apply to them."*

What distinguishes the Zambezi Gas matter from the present dispute, however, is that whereas in the former, there was no dispute as to when the obligation to discharge the financial obligation arose, there is no such concurrence in the present matter.

What needs to be determined in the present matter is whether the obligation to repay what was paid by respondent towards the purchase price of the motor vehicle should be construed as having arisen or after the first effective date. Put differently, the all-important question is whether the date to be considered is that when the respondent paid the US $20 500 to the applicant (which was before the first effective date) or it is the date when the contract collapsed the latter which in turn gave rise to the obligation to reimburse (which occurred after the first effective date).

Before tackling this question it is perhaps necessary to highlight a few pertinent issues. A perusal of the applicant's founding applicant reveals that the applicant did not fully take the court into his confidence on a number of issues. Firstly, there was a deliberate non-disclosure of the fact that as of the date of the filing of this application he had long since taken possession of the motor vehicle. This only came to light when the respondent filed its opposing affidavit. Surprisingly applicant sought in paragraph 2 of its draft order a "return of the motor vehicle to applicant with immediate effect" emblematic of applicant's lack of candour and forthrightness.

Further, it is evident that Annexure "A" which the applicant so verily relies on does not tell the whole story regarding the payment terms of the purchase price. The purchase price is shown on that document as US $ 40 000 yet after the payment of the initial deposit of US $5000 paid on the date of the conclusion of the agreement of sale, (i.e. 1 November 2018) the Respondent was required to pay *"the balance"* of R75 000 on or before 31 December 2018. Simple calculations reveal that this latter figure would only amount to approximately US$5 000 (exact figure would of course depend on the prevailing exchange rate) and could not have extinguished the entire outstanding balance.

This lends credence to the respondent's assertions that the parties had in fact agreed on a staggered payment plan until 31 August 2019. This is further buttressed by Annexure B attached to applicant's very own founding affidavit indicating monthly payments of varying amounts made by respondent to applicant from November 2018 spilling over to February 2019. If the entire balance of US$35 000 was to be paid on or before 31 December 2018, as applicant wants the court to believe, then the written agreement (Annexure "A") would have undoubtedly stated as much. What was recorded as a balance of R75 000 was undoubtedly merely an instalment. I therefore find on balance, from the available evidence, that the entire outstanding balance of the purchase price was not due and payable as of the 31st of December 2018 as averred by applicant but by 31 August 2019 as contended by the respondent.

I now revert to consider the main issue at hand. In my view applicant's contention that it is only obligated to reimburse the amount paid by respondent towards the purchase price in RTGs dollars at the Rate of one to one with United States Dollar (as opposed to at the official rate) is insupportable for a number of reasons.

Firstly, whereas before the first effective date there was a financial obligation on the part of the respondent to extinguish the outstanding balance of the purchase price, (or at least part of it) there was no obligation (contractual or otherwise) that had yet arisen on the part of the applicant to reimburse the part of the purchase price that the respondent had paid. That obligation only arose in the wake of the collapse of the contract. This latter event occurred in July 2019 when the applicant seized the motor vehicle from the respondent. Such seizure of the motor vehicle amounted to an unequivocal act of the repudiation of the contract. As of that date the amount that the Respondent had paid to the applicant stood at $20 500.

The interpretation that the applicant wants to foist on section 22 (1) (d) of the Finance (No.2) Act of 2019 as it applies to the current set of facts would lead to the absurd and untenable position that the duty on the part of the respondent to pay the balance of the purchase price existed concurrently with the duty on the part of the applicant to reimburse to respondent what was paid as part of the purchase price. Clearly the obligation to reimburse was ignited much later with the incidence of the tacit repudiation by the applicant of the contract. Before that the contract was alive and well and no "obligation" as provided for in s 22(1) had yet arisen to reimburse the purchase price.

It was also not lost on me that there was deliberate omission on the part of the applicant to disclose in his prayer the exact amount that he sought the court to declare as refundable to the respondent. As stated earlier, in paragraph 3 of its draft order applicant merely sought an order that *"The applicant [be ordered to repay] the amount paid by the respondent towards the purchase price in full within 14 days."* This then compels one to retrace one's footsteps to applicant's founding affidavit to determine what that amount that he paid to respondent in fact was. This amount in paragraph 6 thereof is given as US$20 500. That, therefore, was the amount that applicant unmistakably undertook to refund respondent. At no point in his papers did the applicant seek to amend that amount as stated in United States dollars to some other currency nor was it suggested that it should be paid in RTGS. His specific reference to the repayment in United States dollars cannot be construed as being merely illusory nor inadvertent. He therefore cannot be allowed to renege from the same. There can be no question that the applicant's implied undertaking to repay the amount in question in United States dollars among other considerations induced the applicant to accede to the application for the cancellation, safe in the knowledge that it could recoup that which it paid as part of the purchase price. Applicant will therefore be held to his undertaking.

In the final analysis, therefore the amount payable by the applicant to the respondent in terms of paragraph 3 of the applicant's draft order will be indicated as US$20 500 (twenty thousand five hundred United States Dollars) or its equivalent in Zimbabwe dollars calculated at the rate at which authorized dealers exchange the RTGs dollar for the United State Dollar on a willing seller willing seller basis (the official rate).

COSTS

Each party sought to recover costs from the other. The general rule is that the successful party is entitled to costs. In Herbstein and Van Winsen, The Civil Practice of the High Courts and Supreme Court of Appeal of South Africa 5th edition at page 966 the following is stated:

"(d) Misconduct of party

> *It is difficult to define misconduct that will justify the court in departing from the general rule regarding costs, but one may say, if the court is satisfied that a party has been guilty of improper, dishonest or discreditable conduct, it will mark its disapproval by making a special order as to costs. The misconduct may have been connected with or may have occurred in the course of the transaction upon which the proceedings are based, or it may have arisen during the course of or in connection with the litigation itself. The following are examples of conduct on the part of a successful party that has been disapproved by the court by means of an adverse order as to costs: the making of a false statement; the production of false evidence; the filing of dishonest pleading; misleading the court…"*

As stated hereinbefore, I am of the view that the applicant in his papers deliberately misrepresented material facts not least his failure to disclose that he seized the motor vehicle from the respondent well before the institution of the current application yet he proceeded to seek an order for its surrender by respondent to him. His conduct in this regard was unconscionable justifying visiting him with costs. Accordingly, the following order be and is hereby made:

IT IS ORDERED THAT:

1. The agreement of sale for the sale of the Ford Ranger Wild Track, registration Number ADL 7497 entered into between applicant and respondent be and is hereby cancelled.
2. The Ford Ranger Wild Track motor vehicle being in the applicant's possession; it is hereby ordered that applicant retains the same.
3. Applicant to repay the amount US$20 500 (twenty thousand five hundred United States Dollars) or its equivalent in Zimbabwe dollars at the official rate, being the amount paid by the respondent towards purchase price of the motor vehicle. Payment to be made in full within 14 days.
4. Applicant to bear costs of suit.

Kwande Legal Practitioners, for the applicant

Militao Law Inc Legal Practitioner, for the respondent