RAMECK MUSINA
versus
STANFORD MAKASI

HIGH COURT OF ZIMBABWE
WAMAMBO J & ZISENGWE J
MASVINGO, 3 November 2021 & 8 December 2021

Civil Appeal

P C Ganyani, for the applicant
G T Ndava, for the respondent

ZISENGWE J: This is an appeal against the decision of the Magistrates court sitting at Chiredzi granting the respondent's claim for the payment of the sum of US$220. The said amount constitutes the outstanding balance for the purchase price of a beast which the respondent insists to date he sold to the appellant.

The parties are both residents of the lowveld town of Chiredzi. Whereas the appellant runs a butchery in that town, the respondent is a headmaster at a school in or close to it.

The following is a synopsis of the events leading up to the dispute which surprisingly found its way to this court. Surprising given the relatively low value of what is at stake when juxtaposed against the inevitable legal costs that usually accompany ligation of this nature.

In the Magistrates Court the respondent instituted a claim for the recovery of US $ 220 (or its equivalent value in local currency) being the balance of the purchase price of a bovine beast sold and delivered to the defendant. Respondent (then as Plaintiff) averred in his particulars of claim that he sold the said beast to appellant for US $300 and the latter only paid the equivalent of

US $80 in local currency and that despite persistent demands to extinguish the outstanding balance, the appellant has remained belligerent and refused to pay.

The appellant's plea in the proceedings *a quo* was a total denial of liability. He completely denied ever having purchased the bovine beast in question from the Respondent insisting as he did that the arrangement was for him to sell meat derived from the carcass on the Respondent's behalf and to remit the proceeds thereof to the latter less the transport costs thereby incurred.

He also insisted that what he received from Respondent was the carcass of bovine beast as opposed to a live one. He further indicated that pursuant to the aforementioned arrangement, he proceeded to sell the meat from the carcass in the course of which he realised that most of what he described as "delicate" portions and offals had gone bad (hence unfit for human consumption and therefore unsellable) a position he communicated to the Respondent. According to him the latter instructed him to do the best he could in the circumstances to salvage whatever he could from the meat.

Most significantly, however it was the Respondent's position that the agreement was never for the sale of the meat in United states dollars nor could the Respondent claim to the recovery of any sum denominated in United states dollars not least because trading in United State dollars was at the material time statutorily prohibited.

In the ensuing trial, the Respondent and one Sifelani Masunga testified for the Plaintiff's case and the Appellant and one Simbarashe Hove gave evidence constituting the Defendant's case.

In his evidence the Respondent insisted that the appellant purchased a live bovine beast from him which beast had unfortunately sustained a leg fracture and therefore had to be put down. This was on the 28th of January 2020. According to him, the two of them specifically agreed that the purchase price was thirty-five RTGS dollars per kilogramme. After using some rudimentary method of estimating the weight of the beast (which method involved the use of a rope), they found that the beast weighed 212kg translating to a value of approximately RGTS $7000.

According to the respondent, the appellant did not have ready cash on him at that moment and therefore understock to make part payment by 1 February 2020 and the rest some two days later.

He claimed to have recorded the transaction in his diary. He further testified that he only received RTGS $2000 sometime in February 2020. He specifically refuted appellants version that

some of the meat and offals got bad and therefore unsellable. According to him the RTGS $ 2000 he received from appellant translated to US $80 using the official bank rate at the time.

The evidence of his witness Sifelani Masunga was that he not only facilitated the transaction between the parties but was also present throughout out the deliberations that ensued. He indicated that it was him who connected the parties when he learnt that of the beast belonging to the Respondent had suffered a leg fracture. He testified that he contacted the appellant whom he knew as a local butchery operator who then expressed interest in purchasing the beast.

He would deny during cross examination assertions to the effect that when appellant arrived the beast was already dead. Most significant however, was his evidence to the effect that the agreed purchase price was US$ 300 which apparently the appellant did not have at that moment. According to him the injured beast was slaughtered and skinned following which an agreement was reached to have the carcass ferried to Chiredzi to be weighed. He indicated that he subsequently learnt from the Respondent that the Appellant had reneged on his undertaking to pay part of the purchase price.

He, as with the respondent, denied assertions put to him to the effect that the beast had succumbed to yet unknown reasons and that by the time of Appellant's arrival its head had been severed post its death. He similarly refuted suggestions that the carcass of the dead beast had begun to swell.

The appellant's version of events was as follows. When he arrived at the Respondent's homestead having been invited by Sifelani to come and view the beast which the former was offering for sale, he observed that the beast was already dead. He further observed that the beast was already swollen and that when its head had been cut it had shed very little blood tell-tale signs of it having succumbed to yet unknown causes. He therefore declined the offer to the purchase it but suggested to the Respondent that he could sell its meat on his behalf a proposal the Respondent accepted. Pursuant to that agreement he proceeded to sell the meat to members of the public. He then proceeded to remit part of the proceeds to the Respondent and the rest he paid for the transportation costs in ferrying the meat to Chiredzi.

During cross examination he disclosed that the agreed price of the carcass was ZW $ 7000. Needless to say that he categorically denied that the purchase price was pegged in United states dollars.

He would call the driver who transported the carcass to Chiredzi, one Simbarashe Hove as his witness. Hove's description of the state of the beast upon their arrival at the Respondent's homestead matched that of the Appellant namely that it was already dead, it was swollen and had its head slit but with a minimal quantity of blood having been shed.

Similarly, his evidence regarding the deliberations and agreement that ensued between the Respondent and the appellant mirrored that of the latter. More specifically he testified that the appellant refused to purchase the carcass but an agreement was soon arrived at wherein the Appellant agreed to sell the Respondent's meat on the latter's behalf.

His cross examination centred on the improbability of Appellant supposedly agreeing to sell bad meat given that such a course of action was potentially ruinous to his business reputation or goodwill as a butchery enterprise.

At the conclusion of the trial, the court *a quo* found that the Respondent had managed to establish on a balance of probabilities not only that the Respondent sold to the Appellant the beast in question whose purchase price was denominated in the local RTGS currency but also that the Appellant was not entitled in the circumstances to deduct the transportation charges he incurred since the beast was his after he so purchased it. Accordingly, any such costs were to be borne by him.

On the critical question of whether the Appellant was entitled to claim the outstanding purchase price in United States dollars, the remarks by the Magistrate make for some interesting reading; he wrote:

> "*The Defendants are right (sic) to State that the agreement to settle the balance in USD was illegal by virtue of section 33 of 2019 which expressly provides that assets and liabilities, including judgement debts, denominated in United states dollars immediately before the first effective date the valued in RTGS dollars on a one-to-one rate the parties concluded their date in January 2020, upon which the rate was no longer one is to one. At that juncture, the rate determined from time to time by the central bank till to this day. The fact that the bovine was worth USD $300 at that time is reasonable and the fact that USD$ 80 was paid leaving USD $220 is clear to the court.*
> *The Defendant therefore owes the Plaintiff the amount of USD $220 which can be paid at the prevailing bank rate. "*

Aggrieved that outcome the Appellant appealed to this court.

He cited six grounds of appeal in total some of which were framed in a rather prolix fashion. They read as follows:

1. The learned magistrate erred in ruling that it was common cause that there was "an agreement between the parties" when the parties' version on that issue were not agreeable.
2. The court aquo erred in ruling that the beast was valued at $300US when all this was disputed by the defendant.
3. The court a quo erred in and confused itself in indicating that the trial was an application wherein the applicant was represented by Ganyani and Chavi. The proper position was that the plaintiff was represented by Ndava and the defendant was represented by Ganyani. This confusion shows that the Honourable court was not clear with the issues it was dealing with.
4. The Honourable court erred in failing to articulate the simple argument that the use of forex was illegal during the time the acts which gave rise to this case occurred in January 2020 and between 22 February 2019 and March 2020, there could not be transactions in Zimbabwe whereby someone could sell a beast in forex. It is surprising that the court a quo specifically indicated that it agreed with the defendant on the issue of SI33 of 2019 but went on to pass a judgment which does not tally with the said law.
5. The court a quo erred in failing to take into account the admitted fact that the plaintiff sold a beast yet agreed that he took the head without necessarily buying it from the defendant.
6. The court a quo erred in ruling that the plaintiff proved his case when there was no written agreement and the two parties gave conflicting versions on what happened

Though circuitously and rather inelegantly framed, the appellant's grounds of appeal can be distilled to the following three contentions:

1. That the court *a quo* erred in believing the version of the respondent over that of the appellant regarding the nature of the agreement between them particularly in the absence of a written memorandum capturing the terms of such agreement.
2. That the court *a quo* erred in accepting that the parties expressly or impliedly agreed that the beast was valued at US $ 300.

3. That the court *a quo* erred in accepting of that it was legally permissible to transact in United States dollars at the material time

The nature of the transaction between the parties

The first ground, namely whether the court erred in concluding as it did that it was common cause that the parties did enter into a contract should not detain us. A reading of proceedings reveals that the parties did enter into some form of agreement over the beast, it is however the nature thereof that is contested terrain. Whereas the Respondent insists to date that it was for the sale of the beast to the Appellant at a fixed price, the appellant contends contrariwise, he maintained then as he does now that it was merely for him to act as agent to sell the meat from the carcass on behalf of the Respondent. Therefore, nothing turns on the use by the court *a quo* of the phrase ″common cause‟ in that context. Indeed, the Magistrate proceeded to correctly qualify the use of that expression when he added *"This therefore" means that the only thing left for determination is the actual terms of the agreement by the parties."*

This issue however feeds into the 4th ground of appeal which attacks the court *a quo's* acceptance of the respondent's version at the expenses of that of the appellant. Generally speaking the appeal courts seldom interfere with trial court's findings of fact unless the same is vitiated by some irregularity; *Barros & Anor v Chimponda 1999 (1) ZLR (58) (S)*. This is essentially because matters of credibility are primarily the province of the trial court. Having been steeped in the atmosphere of the trial, the judicial officer would have had the opportunity to note the demeanour of the witnesses and assess their candour and veracity amongst other observations. Barring any discernible misdirection upon a consideration of the facts the appeal court is generally not at large to substitute its own findings for that of the trial court.

Other than making bald and generalised averments attacking the court *a quo's* decision in accepting respondent's version over his, the appellant did precious little to refer this court to any specific misdirection (save for one specific issue which will be addressed shortly) on the part of the trial court in its factual findings. On the whole, however, we are unable to interfere with the court *a quo's* findings regarding the nature of the agreement concluded as between the parties in respect of the beast. Indeed, the probabilities favour the conclusion arrived at by the trial court that the appellant purchased the beast from the respondent in whatever state he found it. In this regard

we find it strange and highly improbable, that the appellant having condemned the beast ostensibly on the basis that its meat had gone bad and therefore unfit for human consumption, would in the next breath suggest to respondent that its meat be sold on the latter's behalf in his own butchery. That to me is a glaring contradiction in terms. If the carcass was in such a sorry state that he summarily rejected the offer to purchase it, as he would want everyone to believe, we cannot fathom why he would, without breaking stride make an offer to have its meat sold in his butchery.

Further in this regard, we find it highly improbable that appellant out of his supposed benevolence would volunteer to take the trouble in selling meat on behalf of the respondent for absolutely no reward, not only incurring electricity and labour costs in the process, but also risking inevitable ruin his reputation on account of the supposed poor state of the meat.

More telling, however is the fact that the parties agreed on a specific price per kilogramme (namely RTGS$35/Kg). Such an arrangement accords more with an out and out sale as opposed to the scenario that the Appellant sought to portray. If the carcass had deteriorated to the extent that he claims and that he only offered to sell it in a bid to salvage something for it, then it was highly unlikely that the parties would have taken the trouble to determine its size and to fix a definite price per kilogramme as they did.

Ultimately, we do not share appellant's fervently held position that the court *a quo* erred in accepting as it did respondent's version that the appellant bought the bovine beast from respondent and undertook pay the purchase price thereof in the few days to come.

Whether the parties expressly or impliedly agreed to contract in US dollar terms

On this question we find that, the court *a quo* clearly fell into error in accepting that the beast in question was sold for the equivalent of US$ 300. We find that such a conclusion was based on conjecture and supposition. The evidence led by the parties was unmistakably that the currency of transaction was the Zimbabwe RTGS dollar and this explains why the respondent was paid in that currency a few days after the appellant took possession of the carcass in question.

Three related issues stand out in this regard. Firstly, that the Plaintiff's witness Sifelani Masunga clearly sought to mislead the court *a quo* when he testified that the parties agreed on US$ 300 as the purchased price. This piece of evidence was not only at variance with the general tenor

of the evidence led but also directly contradicted that of the Respondent in this regard. As indicated earlier, the Respondent testified that the price was pegged at RTGS $ 35 per kg.

Secondly, and related to the above is the fact that by his own admission under cross examination, the Respondent unilaterally converted the outstanding purchase price to United States dollars when he was confronted with the erosion of the of the local currency due to inflation. The parties therefore having contracted on RTGS terms, it was improper for the Respondent to unilaterally make such conversion of the outstanding purchase price to United States dollars.

Thirdly, the spirited attempts by the Respondent's counsel to convince this court that the parties subsequently amended the terms of their agreement to covert the RTGS dollar price of the beast to United States dollars is untenable. Such a position is not borne out by the evidence and therefore is without foundation if not outright duplicitous.

Whether it was legally permissible to trade in United States dollar terms in Zimbabwe at the material time

We find ourselves constrained to deal with the question of whether or not the parties could legally trade in foreign currency at that point in time. Constrained because having found from the facts that the parties specifically contracted in RTGS dollar terms that should be the end of the matter. The Respondent, as indicated above, could not validly convert the purchase price to a currency of his choice, ostensibly to hedge himself against inflation. The corollary being that from the facts the respondent was not entitled to institute a claim for the outstanding balance of the purchase denominated in United States dollars. In other words, his claim, should in the court below, have been dismissed on that basis alone.

However, because the respondent insists that his conversion of the purchase price from RTGS dollars to the United States dollar was lawful we will briefly advert to the applicable legislation. It is common knowledge that in the sphere of currency usage Zimbabwe has endured tumultuous episodes characterised by the introduction and revocation followed yet by a reintroduction of foreign currency as legal tender in Zimbabwe.

SI 33 of 2019 ushered in the use of an electronic currency namely the Real time Gross Settlement System (RTGS) as legal tender in Zimbabwe alongside the United States dollar (USD).

Its provisions were subsequently assimilated into the Act Finance (No. 2) Act, 2019 which in paragraphs (d) and (e) of subsection 1 of section 22 reads 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"*

These provisions therefore sought to address how obligations that had been incurred or had accrued in the period before 22 February 2019 would be discharged. It also regulated the relationship between the RTGS dollar and the USD from that date going forward. In a word therefore, the said provision paved the way for the use of the USD alongside the RTGS dollar in Zimbabwe. However, that was not be the end of the matter as this was followed shortly thereafter by the SI 142 of 2019 (Reserve Bank of Zimbabwe (legal tender) Regulations, 2019. This SI

decreed that the Zimbabwe dollar was henceforth to be the sole legal tender in Zimbabwe. It provided in section 2 as follows:

> 2. *(1) Subject to section 3, with effect from the **24th June,2019**, the British Pound, United States, South African Rand, Botswana Pula and any other foreign currency whatsoever shall no longer be legal tender alongside the Zimbabwe dollar in any transaction in Zimbabwe, **accordingly, the Zimbabwe dollar shall, with effect the 24th of June 2019, but subject to section 3, be the sole legal tender in Zimbabwe in all transactions.** (Emphasis added)*

Section 3 only exempted the operation of Nostro accounts and the payment of luxury goods in foreign currency from the prohibition of the trade in foreign currency. The provisions of this SI were subsequently incorporated into Section 23 of the Finance (No. 2) ACT, 2019

The Exchange control (exclusive use of Zimbabwe dollar for domestic transactions) Regulations (SI 212 of 2019) which was published on 27 September 2019, went a step further. It specifically prohibited the use of foreign currency (except in a few defined circumstances not relevant to the present dispute) as a medium of exchange. It provided as follows:

> ***Exclusive use of Zimbabwean currency for domestic transactions***
>
> *3. (1) Subject to section 4, no person who is a party to a domestic transaction shall pay or receive as the price or the value of any consideration payable or receivable in respect of such transaction any currency other than the Zimbabwean dollar.*
>
> *(2) In particular (without limiting the scope of subsection (1)) no person shall—*
>
> *(a) quote, display, label, charge, solicit for the payment of, receive or pay the price of any goods, services, fee or commission in any currency other than the Zimbabwe dollar; or*
>
> *(b) settle any obligation by barter or otherwise for a consideration that is not denominated by, or is not valued in, the Zimbabwean dollar; or*
>
> *(c) receive, demand, pay or solicit for payment by means of any token, voucher, coupon, chit, instrument, unit S.I. 212 of 20191357of account or other means or unit of payment (whether material or digital) that is pegged to, referable to or used in substitution for any foreign currency or unit of a foreign currency.*

SI 213 of 219 on the other hand amended the Exchange Control Act regarding the imposition of civil penalties on persons who continued to transact in foreign currency and provided as follows:

> *2. The Exchange Control Act [Chapter 22:05] ("the principal Act") is amended in section 2 ("Regulatory powers of President") (1)) by the insertion of the following paragraph after paragraph (c)— "and (d) the enforcement of the exclusive use of Zimbabwe dollar for domestic transactions;".*
>
> *New section inserted in Cap. 22:15 3. Section 5 ("Offences and penalties") of the principal Act is amended by the insertion of the following subsection after subsection (4d)— "(4e) A contravention of any regulations made under section 2(1)(d) prohibiting the sale, offering for sale, quoting, displaying, charging, receipt or payment in any currency other than the Zimbabwe dollar for goods and services whose purchase, sale or disposal are or are deemed to be a domestic transaction, is a civil default for which the defaulter or alleged defaulter is liable to a civil penalty…*

This prohibition of the use of foreign currency for domestic transactions was only changed on 29 March 2020 following the promulgation of the Exchange control (exclusive use of Zimbabwe dollar for domestic tractions (Amendment) Regulations,2020 (No.2) i.e., SI 85 of 2020. The said Statutory Instrument relaxed the stringent prohibition against trading in foreign currency for domestic transactions. It provided in section 2 as follows:

> *2. The Exchange Control (Exclusive Use of Zimbabwe Dollar for Domestic Transactions) Regulations, 2019, published in Statutory Instrument 212 of 2019, is amended by the insertion of the following section after section 5.*
>
> ***"Payment for goods and services using free funds***
>
> *6. (1) ….*
>
> *(2) Notwithstanding these regulations, any person may pay for goods and services chargeable in Zimbabwe dollars, in foreign currency using his or her free funds at the ruling rate on the date of payment.*

(3) The payment envisaged in subsection (2) may be done electronically through a foreign currency account or in cash or through any electronic payment platform."

Pertinent for current purposes, therefore, is the fact that the sale which forms the subject matter of this dispute was concluded in January 2020. During this period, the use of the USD (among other foreign currencies) was prohibited.

As alluded to earlier, during this appeal, counsel for the Respondent bravely attempted to suggest that the parties in the interim agreed to convert the outstanding balance to United States dollars and that that was post the promulgation of SI 85 of 2020. However, that argument came unstuck given that this was not backed by the evidence appearing *ex facie* the record of proceedings. At no stage did parties (or any of their witnesses) ever refer to any such subsequent agreement. Further counsel was at pains to refer (from the record of proceedings) to the date, place and circumstances of such supposed agreement. That suggestion cannot therefore not be sustained.

Reference by the court *a quo* to the provisions of section 33 of 2019 to the exclusion of the aforementioned statutory instruments was clearly erroneous. The latter pieces of legislation, as we have seen, altered in significant ways Zimbabwe's financial landscape. What then behoved the Magistrate was to zone in on the precise period in question to determine which currency regulations were applicable then.

Ultimately, however, we find that during the period in question in January 2020, the parties at law could not and from the facts did not transact in United States dollars. Respondents claim for the payment of the outstanding balance of the purchase price of the best, denominated as it was in United States dollars could not succeed.

In summation therefore, the claim instituted by the respondent in the court *a quo* was fatally flawed in that it did not accord by the parties as far as the currency of the transaction was concerned. It ought not to have succeeded.

Accordingly, following order is hereby given.

ORDER

IT IS HEREBY ORDERED THAT:

1. The appeal be and is hereby upheld.
2. The decision of the court *a quo* be and is hereby set aside and substituted with the following:

   "The claim is hereby dismissed with costs."
3. The Respondent to meet the costs of this appeal.

ZISENGWE J

WAMAMBO J

agrees……...

P C Ganyani legal practitioners, Appellants' legal practitioners
Mangwana & Partners, Respondent legal practitioners