

DISTRIBUTABLE: (115)

CAMPION MUGWENI
V
TIAN ZE TOBACCO (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
MATHONSI JA, CHIWESHE JA & CHITAKUNYE JA
HARARE: 9 JULY 2021

K. Musimwa, for the appellant

T. Mudemashani, for the respondent

MATHONSI JA: This is an appeal against the whole judgment of the High Court handed down on 23 September 2020 granting summary judgment in favour of the respondent. After hearing submissions from counsel we delivered an *ex tempore* judgment dismissing the appeal with costs. The respondent has requested the reasons for judgment. These are they.

BACKGROUND

The respondent instituted a claim against the appellant in the court *a quo* for payment of the sum of US \$120 253, 50 being the balance due in terms of an acknowledgment of debt signed by the appellant on 12 December 2018. The debt arose from a Tobacco Farming Contract entered into by the parties in June 2016.

The respondent supplied the appellant with farming implements on credit to the value of US\$127 253, 50 but he only paid a sum of US\$7 000.00 leaving a balance of US\$120 253,50. When the appellant entered appearance to defend the action the respondent filed an application for summary judgment. The respondent asserted that appearance to defend had been entered solely for purposes of delay as the appellant did not have a *bona fide* defence to the claim. In saying so, the respondent relied on the acknowledgement of debt executed by the appellant.

In opposing the application the appellant maintained that the respondent's claim was "not clear and is arguable." While admitting having signed the acknowledgement of debt, the appellant stated that the repayment of the debt was predicated on a third party, namely Allied Insurance (Private) Limited, paying the first instalment on his behalf. The third party failed to pay and as such "it was irregular" for the respondent to sue him alone without joining the insurance company as a party to the proceedings.

The appellant also stated that he had failed to pay the second instalment because his tobacco crop had been poor. He failed to achieve a good yield. Further, so the appellant argued, the third instalment was not yet due. He also challenged the respondent's claim on the ground that Statutory Instrument 33/2019 proscribed a claim in foreign currency. According to the appellant, the claim should have been in the local currency and not in United States dollars.

The court *a quo* found that the parties had indeed signed the acknowledgment of debt in terms of which the appellant acknowledged his indebtedness to the respondent in the amount claimed. In the court *a quo*'s view, the terms of the acknowledgement of debt

were not in issue and were unambiguous. It was an express term of the agreement that the appellant would pay the first instalment and the insurer was not part of the agreement.

The court *a quo* found that the appellant was not absolved from paying the first instalment because the mere fact that a creditor may agree to receive payment from a third party on behalf of a debtor does not absolve the debtor from its liability to perform in terms of the agreement.

Regarding the other instalments the court *a quo* found that the acknowledgement of debt was the exclusive memorial of the agreement of the parties given that it was in writing. As such, so the court *a quo* found, the parole evidence rule barred the appellant from adding or modifying the contract by referring to extrinsic evidence tending to redefine the terms of the contract.

In the court *a quo*'s view the appellant made himself liable to pay the debt. He could not rely on his misfortunes as a farmer to avoid liability and the acceleration provision in the acknowledgement of debt meant that, by defaulting, the appellant made the entire debt due and payable.

On the issue of currency the court *a quo* admitted and accepted the evidence of a circular issued by the Reserve Bank of Zimbabwe in terms of s 35(1) of the Exchange Control Regulations S.I. 109 of 1996. In terms of para 2 of the Exchange Control Circular No. 7 of 2019:

“2: Treatment of USD Denomination Inputs Advanced to Growers

- 2.1 Tobacco merchants have the option to use foreign currency sourced from local banks (through global facilities) or offshore financing to procure inputs for distribution to tobacco growers under contract arrangements.
- 2.2. Where tobacco growers receive USD denominated input loans, repayment to the tobacco merchant shall be in foreign currency in order to protect the tobacco merchant's investment. (The underlining is for emphasis).

Relying on the authority of *Zimbabwe Leaf Tobacco Co. (Pvt) Ltd v Valentine* HH 220/20 the court *a quo* concluded that the respondent was entitled to recover the debt in United States Dollars. As already stated, it granted summary judgment in foreign currency.

The appellant was aggrieved. He filed this appeal initially on seven grounds which included a challenge on the validity and application of the acknowledgment of debt. He also challenged the court *a quo*'s finding that the debt was due in United States dollars instead of the Zimbabwe Dollars at the rate of 1:1.

At the hearing of the appeal Mr. *Musimwa* who appeared for the appellant, abandoned the challenge of the acknowledgment of debt itself and motivated the appeal solely on the basis of the currency in which the debt was recoverable. In counsel's view, following the introduction of Statutory Instrument 33 of 2019 and this Court's judgment in *Zambezi Gas (Private) Limited v NR Barber & Anor* SC 3/20, the judgment of the court *a quo* should have been denominated in the local currency. I do not agree.

To begin with, it is common cause that generally the tobacco industry has always transacted in foreign currency. That custom has received Exchange Control approval for the good reason that the industry is the country's major foreign currency earner. It should be supported in its endeavours. Indeed, the issuance of the Exchange Control Circular No. 7 of

2019 merely confirmed that position and reminded stakeholders of the existence of the policy. It is for this reason that even s 44C (2) of the Reserve Bank Act excludes foreign loans and foreign obligations denominated in foreign currency from the remit of SI 33/19. See *Breast plate Services (Pvt Ltd v Cambria Africa P/C SC 66/20*.

In my view, the court *a quo* cannot be faulted for finding that the debt was payable in the United States Dollars. The fact that the circular was issued on 29 July 2019 after the signing of the acknowledgment of debt is of no moment at all. The appellant acknowledged liability in foreign currency because he was indeed aware that the industry was allowed to, and does transact in foreign currency.

It is accepted that a tobacco grower agreement is examined with the source of its funding in mind. What is advanced to tobacco growers is sourced from off-shore funding and this must be protected. Therefore it is understood that funds or inputs advanced in United States dollars are repayable in that currency.

There is no merit in the appeal. Regarding the question of costs, there is no reason for departing from the norm that costs follow the result.

In the result, it be and is hereby ordered as follows:

The appeal is dismissed with costs.

CHIWESHE JA:

I AGREE

CHITAKUNYE JA:

I AGREE

Musimwa & Associates, appellant's legal practitioners

FB. David, respondent's legal practitioners