

MUNATSI SHOKO
versus
OLD MUTUAL ZIMBABWE LIMITED

HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 11, 12 FEBRUARY AND 16 JUNE 2016

Civil Trial

J. Sibanda for the plaintiff
V Majoko for the respondent

MOYO J: Plaintiff in this matter issued summons claiming:

- a) Payment of the sum of \$13123-00 (United States dollars) being the face value of pension annuity that defendant undertook to pay to plaintiff upon maturity of such policy.
- b) Interest thereon from the date of issue of summons to date of payment.
- c) Costs of suit.

The facts of the matter are largely common cause. They being that:

On 1 October 1993, by written agreement the parties entered into a retirement annuity policy agreement whereby, plaintiff invested the sum of \$19704-31 with Old Mutual Retirement Annuity Fund. The policy was to mature in October 2014 at the value of \$86 485-00 plus profit. At some stage at around 2004 due to economic hurdles, the defendant offered plaintiff the sum of \$207 000 in Zimbabwean dollars which plaintiff says was equivalent to 36 United States dollars at the material time. He refused to accept it on the basis that he could not be paid out an equivalent of \$36 after investing about \$2990-00 United States dollars which he expected to be grown by the defendant as defendant was an investment expert.

In 2011, plaintiff was again offered \$167-16 by the defendant who blamed the hyperinflationary environment that prevailed between 2003- 2009. There is not much factual dispute and where factual disputes are present I hold the view that they are not so material to the issues for determination. Plaintiff's case is simply that he invested on equivalent of about

\$2990-00 USD in 1993, which was to be paid out in about 21 years at a rate equivalent to about \$13000-00 USD now that the Zimbabwean dollar is no longer in existence.

Defendant's case is that indeed, plaintiff invested about \$19704-31 ZWD in 1993 which was to mature at about \$86 485-00 Zimbabwean dollars in 2014. Defendant disputes the United States dollars equivalent as claimed by plaintiff and in fact challenged the admissibility of the Reserve Bank of Zimbabwe Currency Evaluation Report over the years.

All this court has to determine is what plaintiff should be entitled to in the current multicurrency regime. Defendant offered plaintiff \$167-16 in 2011.

Plaintiff insists that he is entitled to the full performance of the contract by the defendant and puts the equivalent of the maturity at about \$13000-00 USD. The plaintiff avers that defendant should be compelled to perform its obligations in terms of the contract as they failed in their duty to warn him about the effects of hyperinflation as well as their inability to remedy the situation due to regulatory constraints. He insists the defendant was negligent in not advising him of the erosion of his savings on time. He argues that had he been advised on time he could have removed his funds and invested in sectors that would not dwindle his returns as that was still possible despite the hyperinflationary environment.

Defendant on the other hand pleads supervening impossibility that they are a regulated industry and could not just act as they wished. Also that they did try in 2004, after the regulator granted them the permission to do so, to pay back plaintiff's dues in terms of the contract.

This court has to assess the following pertinent issues.

- 1) The parties entered into a Retirement annuity contract which would mature in 2014 with a sum of about \$19 704-31 having multiplied about four times to \$86 485-00 over 20 years that is, defendant would grow plaintiff's investment to about four times its value.

Plaintiff argues that he should be entitled to \$13123-67 USD as that was the value of \$86485-00 in 1993 in relation to the USD.

Defendant pleads a supervening impossibility in terms of the hyperinflationary environment that eroded investments and savings thereafter. I need to assess if the plaintiff is entitled to anything in terms of the contract. In other words the first issue to ascertain is whether *vis major* as raised by defendant in its plea rendered the contract impossible to perform. I will hasten to point out that defendant's own conduct between the period 2004 and 2011, does not

show that they believed that the hyperinflationary environment relinquished their obligations in terms of the contract, but rather, that the sums due had to be recalculated. I say so because, in 2004, they offered to pay plaintiff \$207 000-00 Zimbabwean dollar, they did not say to him that it was no longer possible to meet their obligation. Again in 2011, they offered plaintiff \$167-00, meaning right up to 2011, they still knew they had a duty to meet their part of the deal. By defendant's own conduct, it cannot be held that the contract was no longer possible to perform but rather that they sought to alter the terms of the contract, which alterations were not accepted by the plaintiff.

In other words the defendant pleads supervening impossibility to the extent that the original terms of the contract are no longer possible to perform and now they want to pay out a sum that deviates from the original contractual terms due to hyperinflation. The question before this court is therefore how much should be paid to the plaintiff, not that plaintiff should not be paid at all, as per defendant's own conduct prior to the proceedings. This is so even from the defendant's own witness' testimony. Her evidence was not that defendant could not pay anything at all but that because of hyperinflation they recalculated values of all policy holders upon dollarization of the economy.

We have now settled the issue of whether or not plaintiff must be paid some money by the defendant.

We now move on to assess how much then should the plaintiff be paid. Defendant offered \$167-00 as at 2011, plaintiff wants \$13000-00 as at 2014.

Firstly, a look at the Retirement Annuity Contract annexed in the schedule of documents, shows that there is nothing to show that plaintiff was advised or that he agreed that he would bear the risk in the event that the economy does not perform as expected. Neither did any of the parties point towards such a clause.

Again, there is no clause in the agreement that gives the defendant the right of cancellation of the contract for any reason. Neither have the parties pointed at such a clause. This means that defendant could not in terms of the Retirement Annuity Contract, cancel it either on notice or mutually. The contract only provides for the lapsing of the policy if certain conditions are not met by the insured, but not cancellation. The defendant, from the facts, attempted to cancel the contract in 2004, due to the hyperinflationary environment, plaintiff

refused, as he was of the view that he would not get value for his money and that defendant had left it until too late, to notify him of the erosion on his policy. According to his own understanding he expected them to invest in assets in order to protect his savings in property form despite the hyperinflationary environment.

It would appear, from the correspondence led between the parties and the evidence of defendant's witness, there was no specific explanation to the plaintiff as to how his monies would be invested and the risks attendant thereto. In fact defendant's witness shrugs that responsibility off saying plaintiff's personal financial advisor should have been the one to do that.

The bottom line is that that was never done by the defendant as per plaintiff's evidence.

Now, it is trite law that once a contract has been entered into it can either be cancelled on notice as per the provisions of the agreement, or mutually by the parties, or through an order of the court, where mutual agreement cannot be reached.

This is not what happened in this case. Plaintiff's contract with the defendant therefore still subsists.

In the case of *Unibank Savings and Loans Ltd v ABSA Bank Ltd* 2000(4) SL 191 (W) Fleming DJP remarked as follows:

"Impossibility is furthermore not implicit in a change of financial strength or in commercial circumstances which cause compliance with contractual obligations to be difficult, expensive or unaffordable. Deterioration of that nature can be foreseen in the business world at the time when the contract is concluded."

The approach of the courts is therefore that the commercial circumstances that make compliance with contractual obligations impossible, are factors which should be regarded as being foreseeable in the business world. It would therefore be very difficult to raise a defence of inability to perform in terms of the agreement, that the circumstances caused by an economic recession. It would thus be prudent for the contracting parties to explicitly include *vis major* in their agreement and specifically provide for an economic recession as a ground for inability to perform in a contract. It is my considered view that between 1993 and 2004, the Zimbabwean dollar was gradually losing its value and it would either have been prudent for defendant to seek cancellation of the contract at that stage than to wait until the plaintiff's funds were valueless.

Again, the country dollarized in 2009. Defendant does not explain why between 2009 and 2014, it would still be impossible to perform as per Mrs Vera defendant's witness, she says in 2009 they recalculated plaintiff's entitlement, but since plaintiff was not paid the recalculated sum, as he did not accept it, it is not clear as to what defendant then did in the 5 years to save the situation. It would have been better if defendant's case had been that mathematically we can only pay plaintiff so much as at 2014, because after the dollarization of the economy, we reinvested what we had salvaged at dollarization and here are the figures, this is what plaintiff should now be entitled to.

Plaintiff claims judgment in the United States dollars, United States dollars are the functional currency at this material time. There is ample authority to show that plaintiff is indeed entitled to payment in the currency that is functional at the material time. The Supreme Court in the case of *Watergate Pvt Ltd v Commercial bank of Zimbabwe* SC 70/06 held that:

“--- the legal position is that a party is entitled to payment in foreign currency if he can show that a judgment in that currency would most truly express his loss, and, therefore most fully compensate him for that loss. That was the rationale in the case of *Makwindi Oil Procurement Pvt Ltd v National Oil Company of Zimbabwe* 1998 (2) ZLR 482 (SC) where it has held that
‘justice requires that a plaintiff should not suffer by reason of a devaluation of a currency---.’“

NDOU J in the case of *Joseph Marshall Stuart v NRZ* HB 7/14, also held the same view. It is therefore an accepted view that contracts that were entered into during the Zimbabwean dollar era and sounding therein, can be paid out in the functional currency which is the United States dollar.

In fact plaintiff's claim in this case does not even sound in foreign currency, it sounds in the functional currency of the country as the Zimbabwean dollar is no longer applicable. Even the defendant sought to pay plaintiff \$167-00 USD in 2011 as that is the operational currency in the multicurrency regime.

We then move on to decide how much then is due to plaintiff by defendant? Plaintiff invested \$19704-31 ZWD an equivalent of \$2990-00 USD in 1993 which was to mature at \$86485-00 ZWD in 2014. Whilst plaintiff argues that the value of \$86485-00 ZWD in 1993, would be \$13123-67 USD, therefore, that should be the payment amount, I doubt if this court

can be in a position to hold that the maturity value in 2014, should be equated to a rate of foreign exchange that was applicable in 1993, this would in my view not make any logical conclusion on the amount due to the plaintiff in 2014. I however, hold the view that plaintiff invested on equivalent of \$2990-00 USD in 1993, which was \$19704-31 ZWD, and then maturity value in 2014 would be \$86485-00 Zimbabwean dollar. A logical assessment of the same due to the plaintiff in 2014 in my view would be to hold that the sum of \$19704-31 Zimbabwean dollar would be multiplied about 4, 4 times in the 21 years to amount to \$86485-00 ZWD. Therefore a fair assessment of what is due to plaintiff would be to multiply \$2990-00 USD which is the proven equivalent of \$19704-31 ZWD as at 1993 by the 4, 4 times, this would give us about \$13156-00 USD. This would mean that plaintiff has on a balance of probabilities indeed shown that he is entitled to the sum as claimed in the summons. That should be the maturity value of his investment in 2014.

I have accepted the rate of the United States dollar to the Zimbabwean dollar in 1993 and the subsequent years, as contained in the annexure from the Reserve Bank of Zimbabwe as while the defendant's Counsel had objected to its production, I advised both parties to address that in their closing submissions whereupon I would then deal with it in the final judgment, that was not the case. Again, the witness for the defendant advised the court that she would not challenge the Reserve Bank of Zimbabwe ratings on the relationship between the USD and the ZWD in 1993 as contained in that annexure.

I accordingly, grant plaintiff the prayer he seeks in the summons that is:

- a) that defendant pays to plaintiff the sum of \$13123-67 (United Stated dollars) , together with interest at the prescribed rate from the date the summons were issued to the date of payment.
- b) Costs of suit.

Job Sibanda and Associates, plaintiff's legal practitioners
Majoko and Majoko, defendant's legal practitioners