

TEMPRAC INVESTMENTS (PRIVATE) LIMITED
versus
NU AERO (PRIVATE) LIMITED
and
CASSIDY MUGWAGWA

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 10th & 23rd October 2019

Provisional sentence

Ms F. Chinwanwa with her *Ms S. Dizwanwe*, for the plaintiff
M. Chidemo, for the defendant

ZHOU J: This is a claim for provisional sentence. The claim is based on an acknowledgement of debt signed on behalf of the first defendant and a deed of suretyship executed by the second defendant. The claim is opposed by the defendants whose case is that the amount stated in the acknowledgement of debt though not paid into the account of the plaintiff which is denominated in the United States dollars can now be paid in the RTGS currency. Defendants accordingly tender payment in the RTGS currency.

The only issue for determination is whether by tendering a sum of RTGS 50 000 the defendants have acquitted their obligation in terms of the acknowledgement of debt and the deed of suretyship. Plaintiff's contention is that since the debt was acknowledged in the currency of the United States which was legal tender in Zimbabwe then, payment in the RTGS currency was not performance of the contract. The plaintiff relies on Clause 1 (b) of the acknowledgment of debt in terms of which the defendants agreed to pay "by way of a single full sum of US50 000 payable on or before 30 November 2018 and paid into the creditor's preferred FCA of choice." It is common cause that the defendants did not pay the money on or before 30 November 2018.

In tendering payment in the RTGS currency the defendants cite the legal developments which took place after 30 November 2018. These developments are as follows. On 22 February 2019 the Presidential Powers (Temporary Measures) (Amendment of Reserve Bank of Zimbabwe Act and the issue of Real Time Gross Settlement Electronic Dollars) Regulations

2019, Statutory Instrument 33 of 2019 were enacted. These Regulations introduced the RTGS currency and further prescribed that balances expressed in the United States dollar immediately before the effective date be deemed to be opening balances in RTGS dollars at par with the United States dollars. The RTGS dollar was decreed to be legal tender in Zimbabwe from the effective date of the Regulations. The Regulations further provided the following:

“That for accounting and other purposes, all assets and liabilities that were, immediately before the effective date, valued and expressed in United States dollars (other than assets and liabilities referred to in section 44C (2) of the principal Act) shall on and after the effective date be deemed to be values in RTGS dollars at a rate of one-to-one to the United States dollar.”

The above provisions have been re-enacted into s 22 (1) (d) of the Finance Act, 2019.

The clear wording of the above provision is to convert into the RTGS dollar the US\$50 000 which the defendants owed to the plaintiff with effect from 22 February 2019. The fact that the parties had in their agreement prescribed that payment would be made into the creditors preferred FCA does not alter the effect of the law on all obligations which were expressed in the United States dollar. That portion of the agreement must be read in the light of and in compliance with the requirements of the law. To the extent that the RTGS dollar cannot be paid into an FCA that portion of the acknowledgement of debt must be deemed to be of no legal effect. Any contract or term thereof must be read subject to the express provisions of a law which affects its performance.

In the result, IT IS ORDERED THAT:

1. Provisional sentence be and is hereby refused.
2. The case is ordered to stand over for trial.

Hove Legal Practice, plaintiff's legal practitioners
Kantor & Immerman, defendants' legal practitioner