ARNOLD MUTAVIRI

Versus

VOTE MUZA

ROPA ROBERT NYAPADI

ALECS MAWERE

IN THE HIGH COURT OF ZIMBABWE

NDLOVU J

BULAWAYO

SPECIAL CASE

NDLOVU J: The Plaintiff issued Summons and Declaration against the Defendants on 01 September 2017 claiming a refund of the total amount of US$28 087.76 being the total amount of money Plaintiff paid to the Defendants in pursuance of an agreement of sale between the Plaintiff and 3rd Defendant which agreement could not be implemented as the property subject of the sale had not been subdivided at the time of sale and at the time of cancellation of the agreement and which in any event turned out not to be of the size or acreage agreed upon. The Defendants defended the Claim and filed their respective Pleas.

After the Pre-Trial Conference, the Defendants admitted that they were obliged to refund the amount that Plaintiff had paid to them and they proceeded to pay into the Trust account of Plaintiff's legal practitioners RTGS$28 087.76.

At the commencement of trial before Mabhikwa J *[as he then was]* the parties agreed to proceed by way of a stated case or special case in terms of Order 29 Rule 199 of the then High Court of

Zimbabwe Rules, 1971. The matter could not be finalised as the Judge vacated office soon after that. It was later placed before Makonese J *[as he then was]*. The Judge also left the office of a Judge before concluding the matter.

THE AGREED FACTS

On 21 July 2015, in Harare and through Knight Frank, Plaintiff and 3rd Defendant entered into a written agreement of sale of an immovable property described in the agreement as being registered in the name of the 3rd Defendant and as ***"being Stand 905 measuring 2000 square metres, being a subdivided portion of Lot 15 of Goodhope of parent deed measuring 2000 square metres, held under Deed of Transfer No. 6363/83 dated the 28th day of October 1983"*** [the property].

In terms of the written agreement of sale, the total purchase price for the property was US$28 000.00 payable as follows:

a) US$14 000.00 (Fourteen Thousand United States dollars) payable within five (5) days of signature of the agreement;
b) The balance of US$14 000.00 (Fourteen Thousand United States dollars) in seven (7) equal instalments of US$2 000.00 the first of which was to be paid commencing August 2015.

On 20 July 2015 the Plaintiff, who works and resides in the United Kingdom, duly paid the deposit of US$14 000.00 (Fourteen Thousand United States dollars) by way of a direct telegraphic money transfer from his United Kingdom bank account into the trust Account of Messrs. Muza and Nyapadi Legal Practitioners, the designated conveyancers in terms of the written agreement of sale. Between 27 July 2015 and February 2016, Plaintiff transferred by telegraphic transfer amounts totalling US$8 292.53 into the Trust Account of Messrs. Muza and Nyapadi and amounts totalling US$5 792.23 into 3rd Defendant's accounts and various other accounts designated by the 3rd Defendant. Consequently, Plaintiff paid to the Defendants the total of US$28 084.76 from his United Kingdom bank account.

Notwithstanding the statement in the Agreement of Sale, the 3rd Defendant was not the registered owner of the property nor was the property of the acreage described in the Agreement of Sale. The property did not exist as a subdivision described in the Agreement of Sale and at the time of the sale, it had not been subdivided to create the property described in the written agreement. In March 2016 Plaintiff cancelled the agreement of sale and demanded from the Defendants a refund of the total amount of US$28 084.76 he had paid towards the purchase price.

By their refund of the said amount but in RTGS$ Defendants have by their conduct admitted Plaintiff's entitlement from them to a refund of the total amount he paid towards the purchase price.

INTEREST

The parties agree that Defendants are liable for interest at the prescribed rate on the amount and currency found applicable by the Court from the 1st March 2016 to the date of payment.

COSTS

The parties agree that Plaintiff is entitled to costs up to and including the hearing of 21st January 2020 and that the Court has to determine whether those costs will be on an ordinary or an attorney and client scale.

ISSUES FOR DETERMINATION

The parties have agreed that the issues for determination in this matter are the following:

1. ***Whether or not the debt of US$28 084.76 owed by Defendants to Plaintiff is a foreign debt to which the provisions of Section 4 (1) (d) of SI 33 of 2019 do not apply and hence can only be discharged by the payment of the equivalent in RTGS dollars of US$28 084.76 at the bank rate of exchange of the United States dollar to the RTGS dollar operative on the date of payment.***

2. ***Whether or not therefore Plaintiff is entitled to judgment in the amount of US$28 084-76 payable either in US dollars or in equivalent RTGS on the rate as on the date of payment.***

ALTERNATIVELY.

Whether or not Section 4 (1) (d) of S1 33 of 2019 and Section 22 (c) and (f) of the Finance Act No. 7 of 2017 are unconstitutional as being in breach of Section 56 (1) and 71 of the Constitution of Zimbabwe.

PLAINTIFF'S CASE.

Plaintiff contends that the debt has not been fully discharged because the debt owed is a foreign obligation within the meaning of the term as used in ***Section 44 C (2) (b) of the Reserve Bank of Zimbabwe Act, Chapter 22:15 as introduced by Section 3(1) of SI 33 of 2019***. He contends that a debt owed to a person resident outside Zimbabwe by a person resident in Zimbabwe which was created by way of a person resident outside Zimbabwe paying into Zimbabwe the amount constituting the indebtedness is a foreign obligation declared to be not affected by ***Section 4 (1) (d) of SI 33 of 2019*** as read with ***Section 21, 22 and 23 of the Finance Act No. 2 of 2019 (Act No 7 of 2019*** which adopted and incorporated the above referred to provisions of ***SI 33 of 2019 and 142 of 2019*** into the country's ordinary legislation.

Plaintiff further contends that the Supreme Court ruling in ***Zambezi Gas Zimbabwe (Pvt) Ltd vs. N. R. Barber (Pvt) Ltd and Another SC 3/20*** has no application to this case as it did not decide the currency of payment of a foreign debt or a debt owed because of it having been paid into Zimbabwe by a foreign resident to residents in United States dollars.

ALTERNATIVELY.

The plaintiff contends that the provisions of ***Section 4 (1) (d) of SI 33 of 2019*** and those of ***Section 22 (c) and (f) of the Finance Act No. 7 of 2019*** are unconstitutional because of are inconsistent with ***Sections 56 (1) and 71 of the Constitution of Zimbabwe.***

Plaintiff submitted that a debt owed to a person resident outside Zimbabwe which was created by way of the non-resident person paying into Zimbabwe the amount constituting the debt is a foreign

obligation not affected by the provisions of ***Section 4 (1) (d) of SI 33 of 2019 as reads with sections 21,22 and 23 of the Finance Act.***

DEFENDANTS' CASE

The Defendants contend that by paying the sum of RTGS$28 084.76 they have fully refunded Plaintiff the amount of money he paid them towards the purchase price of the property because, on 24 June 2019, the use of the United States dollar as legal tender in Zimbabwe was discontinued through ***Statutory Instrument 142 of 2019 as read with Section 4 (1) (d) of the Presidential Powers (Temporary Measures) Amendment of Reserve Bank Act and Issue of Real Time Gross Settlement Electronic Dollars (RTGS Dollars) Regulations, Statutory Instrument 33 of 2019 [SI 33 of 2019]*** which declared that all liabilities existing on the 22nd February 2019 shall be deemed to be values in RTGS$ at a rate of one is to one to the United States dollar with effect from that date.

Defendants further contend that their liability to Plaintiff as a debt existing on the 22nd February 2019 falls squarely within the ambit of the provisions of ***Section 4 (1) (d) of SI 33 of 2019*** and is covered by the Supreme Court judgment in ***Zambezi Gas Zimbabwe (Pvt) Ltd vs. N. R. Barber (Pvt) Ltd and Another*** *[supra]* and consequently has been fully discharged by way of the payment of RTGS$28 084.76 into Plaintiff's Legal Practitioners' Trust account.

Foreign obligations originate from foreign institutions such as the World Bank, the IMF etc or from foreign governments. They are usually denominated in either the currency of the lender or the United States dollar as the currency of international trade. They are usually incurred by the Government of Zimbabwe or by financial institutions and in very limited circumstances by individuals or corporates. They involve a clear obligation for repayment to the foreign lender in a foreign country in foreign currency. Even if foreign obligations were to originate from individuals or corporations abroad, they must originate as loans or obligations. The settlement of such loans or obligations will invariably be in a foreign country or a foreign bank.

THE LAW

Section 4(1) (d) of SI 33 of 2019 provides that:

(a) … …

(b) … …

(c) … …

(d) That for accounting and other purposes, all assets and liabilities that were immediately before the effective date, valued and expressed in United dollars (other than assets and referred to in Section 44C(2) of the Principal Act) shall on and after United States dollar,

(e) … …

(f) … …

The provisions of Section 4 (1) (c) and (d) of SI 33 of 2019 have been incorporated as permanent law by section 22 of the Finance Act (No.2), Act No. 7 of 2019 [The Finance Act 2019].

Section 44 C (2) of the Reserve Bank Act provides that:

"(2) The issuance of any electronic currency shall not affect or apply in respect of

(a) funds held in foreign currency designated accounts, otherwise known as "Nostro FCA accounts which shall continue to be designated in such foreign currencies, and

(b) Foreign loans and obligation denominated in any foreign currency, which shall continue to be payable in such foreign currency."

In ***Penelope Douglas Stone and Anor v Central Africa Building Society and Otrs HH 118/23, Mafusire J*** stated the following: *[which I quote hereunder for context purposes given the history of currency reforms that have taken place in this country in the past dozen years or so]*

[6]*"Before this court, the third respondent* ***[Minister of Finance and Economic Development]*** *has provided some further insights into the thought process behind the……split of people's bank*

balances into Nostro FCAs and RTGS FCAs……[The] multi-currency regime had come with its problems……[It] became imperative to initiate currency reforms. Key amongst such reforms would be the adoption of a domestic currency. As of 1 October 2018 the currencies in use in the economy were both the USD and another which had been created by the State……The latter currency was at first nameless even though it continued to pass off as USD……It was a currency that could only be transacted through the RTGS system. It was not a genuine USD currency.

[7]*……So, to achieve the intended reforms, particularly the currency reforms, it became necessary to separate the two types of currencies in use……, and through the second respondent* ***[Reserve Bank of Zimbabwe]****'s monetary statement of 1 October 2018 financial institutions had been directed to separate their customers' bank accounts into two categories: those holding actual dollars of the United States, and those holding this other nameless currency still passing off as USD.* ***Banks would open Nostro FCAs into which genuine dollars of the United States would be deposited.*** *That other non-United States dollar currency would remain as the existing customers' accounts…… They would……determine the source of the deposits in their individual customers' accounts.* ***Henceforth deposits or remittances from sources outside the country would be channeled into the Nostro FCAs which would automatically be created by the banks at no cost to their customers……***

[8] *The separation of the FCAs in terms of the Exchange Control Directive RT120/2018 entailed that foreign currency realized from offshore or foreign currency cash deposits would be credited into individual or corporate Nostro FCAs. The sources specifically listed in these regards included export proceeds, offshore loan proceeds, offshore funds from foreign investors,* ***diaspora remittances****, and so on……[All] RTGS or mobile transfers and deposits in bond notes or coins would be credited into individual or corporate RTGS FCAs. The third respondent eventually gave the nameless currency a name. This was through SI 33 of 2019……That currency would be called the RTGS dollar…….The RTGS balances, expressed in USD immediately before the effective date, would be, deemed to be opening balances in RTGS dollars at par with the USD at a rate of one-to-one……"*

In ***Kachere v Stanbic Bank Zimbabwe Limited and Anor. HH 714/19,*** faced with a matter almost like this one, this Court reasoned as follows:

"…… Whilst his salary from UNDP was diaspora remittances, such funds did not remain in that account but were invested into the second respondent's Unit trusts. By purchasing such units, he utilized the diaspora funds. When the RBZ issued the directive RT120/2018 those funds were no longer capable of being classified as diaspora remittances as the account into which they had been transferred was designated as an RTGs FCA account."

After repeating the provisions of the Reserve Bank Act the Court went on to say.

"***It is clear funds held in the second respondent's RTGS FCA account do not fit into the above exemption and therein lies the applicant's challenge."***

The plaintiff contends that a debt owed to a person resident outside Zimbabwe by a Zimbabwean resident created when the foreign resident paid money into Zimbabwe from a foreign source is a foreign debt/obligation which can only be discharged by the payment of the debt in the currency it was denominated in at the time it was paid into Zimbabwe. On the other hand, the Defendants argue that the money which Plaintiff is claiming did not come to Zimbabwe as a loan to any of the Defendants. It was a diaspora remittance by a diaspora citizen who intended to invest in property. It is not a foreign obligation by any stretch of the imagination.

ANALYSIS.

The law therefore is simply this:

1. In terms of the Exchange Control Directive RT120/2018 foreign currency realized from export proceeds, offshore loan proceeds, offshore funds from foreign investors and diaspora remittances were to be credited into individual and corporate Nostro FCAs.
2. All assets and liabilities that were immediately before 22 February 2019 valued and expressed in United States of America Dollars shall be converted on a one-to-one basis against the United States dollar.

3. This one-to-one conversion in the preceding paragraph did not apply in respect of foreign loans and obligations denominated in foreign currency which shall continue to be payable in such foreign currency.
4. In terms of Section 44C[2][a] of the Reserve Bank Act the issuance of any electronic currency/SI 33 of 2019 shall not affect or apply in respect of funds held in Nostro FCA accounts, which were to continue to be designated in foreign currency and foreign loans and obligations denominated in any foreign currency, which were to continue to be payable in foreign currency.

The main issue which falls for determination in this matter is whether or not the funds, in this case, fall under the exemption in Section 44C[2] of the Reserve Bank Act which created the exemption I have referred to in the immediate paragraph above.

FINDINGS

The amount of USD28 084.76 was paid to Defendants by Plaintiff who is a foreign resident from a foreign bank. It came through as a diaspora remittance. The Defendants describe it as such and they are correct in that description. Being a diaspora remittance [a] the Exchange Control Directive RT120/2018 directed that it be credited into a Nostro FCA. In terms of section 44C[2] of the Reserve Bank Act funds held in Nostro FCA accounts were exempted from the one-to-one exchange regime brought about by operation of section 44C[4][1][d] of SI 33 OF 2019. The parties agree that the money is a debt the Defendants owe the Plaintiff. It did not come to Zimbabwe as a loan. It came as a diaspora remittance and was held in trust in a Trust Account awaiting the property transfer and consent to release the funds from the Plaintiff. The money was never utilised in Zimbabwe. The money never ceased to be a diaspora remittance. It became a debt and an obligation of the Defendants' making when they did not return it when Plaintiff cancelled the sale agreement. Notwithstanding that development, the funds remained exempted from the one-to-one regime. These funds were exempted from its inception. The funds therefore did not lose or change their form or nature. They remained diaspora remittances, securely immune from the vagaries of Section 4[1][d] of SI 33/2019.

The Kachere matter [supra] is distinguishable from the matter *in casu,* in that in the Kachere matter the diaspora remittance had been utilised locally by being invested into Unit Trusts. By being so invested in an RTGS FCA Account, those funds lost their diaspora remittance nature unlike in the present matter. In the present matter, the funds were being held in trust awaiting to be invested in purchasing an immovable property. The condition precedent to that investment was transferring the property into the Plaintiff's name. The condition precedent did not materialise and the funds were not invested or released and utilised, unlike in the Kachere case.

According to the First and Second Defendants, the money paid by the Plaintiff was held in United States dollar-denominated Trust Account. Such money was denominated in United States dollars from the date on which each deposit was made until midnight on the 21st of February 2020, after which time the money (by operation of the law of this country) became RTGS dollars at a rate of one as to one. The First and Second Defendants have tendered to the Plaintiff the money which they held on his behalf in their trust account although in a changed form. This statement is legally incorrect and deserves no further comment.

DISPOSITION

The funds remitted by Plaintiff into 1st and 2nd Defendants' Trust Accounts from his Bank Account in the United Kingdom in a total amount of US$28 087.76 are exempt from the one-to-one regime by operation of the law and should be repaid or returned in US$.

The First and Second Defendants are partners in a firm of legal practitioners. The Plaintiff's funds were deposited with them by the Plaintiff pending completion of a purchase of an immovable property. In such circumstances, the funds were held not only for the Plaintiff's interests. There was no need to believe that the Defendants needed 3rd Defendant's permission to return the funds. They knew very well as the Seller's Conveyencers that the transfer had not taken place. When Plaintiff cancelled the agreement they knew what they were supposed to do with the funds. To believe and do otherwise was with respect naïve.

I conclude that having regard to all the circumstances of this case Plaintiff is entitled to costs on the higher scale against the 1st and 2nd Defendants for the proceedings up to the 21st of January 2020.

I accordingly order as follows:

ORDER