GEORGE GARAI MURINDA
versus
VUTSA NYARUMBU

HIGH COURT OF ZIMBABWE
TAGU & MUCHAWA JJ
HARARE, 28 October & 30 March 2022

Civil Appeal

Appellant, in person
M Mugomeza, for the respondent

MUCHAWA J: This is an appeal against the judgment rendered by a magistrate. The appellant and the respondent entered into a lease agreement on 1 July 2014 in terms of which the appellant had to pay a security deposit in the amount of US$ 600.00 which was to be refunded at the termination of the lease agreement, conditional upon due performance by the lessee of the terms of the lease. This amount was duly paid. The lease was terminated on 30 September 2020 and appellant demanded payment of the US$600.00 paid or the bank rate equivalent of the amount and interest at the prescribed rate from the date of cause of action to date of final payment. The respondent's defence was that the appellant had not performed in terms of the contract as the deposit had been used to cater for repairs and replacements occasioned by the appellant's stay in the property. US$444.13 was alleged to have been used to effect repairs and replacements to the property and the balance of US$155.87 was tendered at the rate of US$1 as to 1 RTGS in line with S.I 33 of 2019.

The court *a quo* found that the respondent had failed to prove the damage allegedly caused by the appellant. It however found that the respondent was liable to pay a refund of RTGS 600.00 as security deposit plus interest at the prescribed rate from the date of summons to date of final payment, plus costs of suit.

Disgruntled, the appellant has filed this instant appeal on this single ground of appeal;

1. The learned Magistrate erred when she concluded that the United States Dollar security deposit was payable at a rate of 1:1 when the amount only became due and payable well after the promulgation of S I 33 of 2019.

It is prayed that the appeal should succeed, the decision of the court a quo be set aside and be substituted with an order that the respondent pays US$ 600.00 as refund of security deposit payable at the prevailing interbank rate at the date of payment.

The single issue for determination appears to be whether the liability in *casu* became due and payable before the promulgation of Statutory Instrument 33/19 so as to fall under section 4 (1) (d). Section 4 of S.I. 33/2019 provides in the relevant part:

> "4. (1) For the purposes of section 44C of the principal Act as inserted by these regulations, the Minister shall be deemed to have prescribed the following with effect from the date of promulgation of these regulations ("the effective date") –
> (a) ……
> (b) that Real Time Gross Settlement system balances expressed in the United States dollar (other than those referred to in section 44C of the principal Act), immediately before the effective date, shall from the effective date be deemed to be opening balances in RTGS dollar at par with the United States dollar; and
> (c) ……
> (d) 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 provisions in s 4(1)(d) of S.I. 33/2019 (*supra*) were incorporated in the Finance (No. 2) Act, 2019, s 22(1)(d) of which provides:

> "(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 first effective date-
> …….
> (d) that, for accounting and other purposes (<u>including the discharge of financial or **contractual** obligations</u>), 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 44C (2) of the principal Act) shall on the first effective date be deemed to be values in RTGS dollars at a rate of one-to-one to the United States dollar."
> The Act further provides in section 22(4)(a) that:
> "(4) For the purposes of this section-
>
> a. it is declared for the avoidance of doubt that <u>financial or contractual obligations</u> concluded or incurred before the first effective date, that were valued and expressed in United states dollars (other than assets and liabilities referred to in section 44C(2) of the principal Act)

> shall on the first effective date be deemed to be values in RTGS dollars at a rate of one-to-one to the United States dollar."

It appears from the way the ground of appeal is couched that the appellant is agreed that if the liability in terms of the contractual obligation was concluded or incurred before the effective date of 22 February, 2019, then the rate of 1:1 would apply. The contention, however, is that this liability became due and payable after the effective date.

The relevant clause in the lease agreement is clause 4. It provides as follows;

> "The Lessee shall, upon signature hereof deposit with the Lessor a sum equivalent to one month's rental of USD600.00 (six hundred United States Dollars) as security for the due and punctual performance by the Lessee of his obligations in terms of the lease. At the end of this lease period, the liabilities for which the lessee is responsible shall be recovered from the Lessee that is, any amount which may exceed the amount of deposit. Any deposit not claimed within three months of the expiry of the lease shall be forfeited and security deposit does not accrue interest. The deposit shall not be used as monthly rental nor shall it be substituted for the final month's rental payment."

In the case of *Zambezi Gas Zimbabwe (Private) Limited v N.R Barber (Private) Limited & Anor* SC 3/20, it was held as follows;

> "Section 4(1)(d) of S.I. 33/19 would not apply to assets and liabilities, the values of which were expressed in any foreign currency other than the United States dollar immediately before the effective date. If, for example, the value of the assets and liabilities was, immediately before the effective date, still to be assessed by application of an agreed formula, s 4(1)(d) of S.I. 33/19 would not apply to such a transaction even if the payment would thereafter be in United States dollars. It is the assessment and expression of the value of assets and liabilities in United States dollars that matters."

In casu, can it be said that the value of respondent's liabilities to the appellant was, immediately before the effective date, still to be assessed by application of an agreed formula so as to exclude the application of section 4 (1)(d) to this transaction?

A reading of the relevant clause in the lease agreement shows that the parties had agreed on a formula, that it was only at the end of the lease that the lessor would recover whatever liabilities were to be covered by the lessee from the security deposit and could even claim any excess if such liabilities exceeded the amount held as security deposit. The lease terminated on 30 September 2020 and this was only then that the agreed formula would be applied and the amount payable would be assessed. Though the amount payable was in United States dollars, its

assessment happened after 30 September 2020, well after the effective date. This transaction was therefore clearly excluded from the application of section 4(1) (d) of SI 33/19.

In the circumstance, it is my finding that the court *a quo* erred when it held that the security deposit was payable at the rate of 1:1.

I therefore order as follows:

1. The appeal succeeds with costs.
2. The decision of the court *a quo* be and is hereby set aside and, in its stead, the following order is made;

    2.1 "The defendant be and is hereby ordered to pay US$600.00 being a refund of the security deposit payable at the prevailing interbank rate on the date of payment.
    2.2 The defendant is ordered to pay interest at the prescribed rate from the date of summons to date of final payment.
    2.3 The defendant to pay costs of suit."

TAGU J AGREES ----------

Chinawa Law Chambers, respondent's legal practitioners