LYNETTE MUCHANETA SHUMBA
versus
THE TRUSTEES OF THE GEOFFREY JEKYLL TRUST
and
THE SHERIFF OF THE HIGH COURT OF ZIMBABWE
and
THE REGISTRAR OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
MUZOFA J
HARARE, 23 June & 30 July 2021

Opposed Court Application

N Mugiya for the applicant
K Ncube for the 1st respondent
No appearance for the 2nd and 3rd respondents

MUZOFA J: In June 2020 judgement was entered in favour of the 1st respondent in the sum of US $ 70 000 and 134 977.92 pounds under case number HC 8500/19 (hereinafter referred to as the court order). The applicant has not appealed the decision. When the amounts were not paid and the 1st respondent desired to have the debt satisfied it sued out a writ of execution. The 2nd respondent attached and sold the applicant's property to give effect to the writ in foreign currency. The applicant objected to the execution to recover the foreign currency equivalent to the 2nd respondent to no avail. The applicant's interpretation was that the amounts must be recovered on a 1:1 rate. When parties could not agree, the applicant filed this application for a declaratory order in the following terms:-

1. "The writ issued by the 3rd respondent on the 8th of July 2020 under HC8500/19 be and is hereby held to be unlawful and wrongful and accordingly set aside.
2. The payment of the amounts stated in the order HC 8500/19 be held to be subject to the rate of 1:1 with the Zimbabwean dollar.
3. The respondents are to pay costs of suit on a client-attorney scale"

The applicant submitted that in granting the court order the Court did not deal with the currency issue. The court can therefore give effect to its order by guiding the 2nd respondent in the execution of the writ in this case. The judgment debt must be executed on a 1:1 basis. In terms of section 4(1)(d) of Statutory instrument 33 of 2019 as interpreted in *Zambezi Gas*

Zimbabwe (Pvt) Ltd v *N R Barber (Pvt Ltd & Anor*[1] all debts incurred before 19 February 2019 are payable in local currency at the rate of 1:1. In this case the debt was incurred before February 2019. Accordingly the writ of execution cannot collect more than the money expressed.

When I queried the wisdom in seeking a variation of the writ were the court order is not challenged. *Mr Mugiya* insisted that the court order has no issues. The issue is the execution to guide the 2nd respondent in executing court judgements expressed in United States dollars. The Court is being asked to give effect to its order and not to revisit its order.

The application was opposed. It was submitted that the applicant's reliance on section 14 of the High Court Act is misplaced. The applicant has no existing, future, contingent right or obligation to relate to since there is an extant order against her. The applicant has not appealed against the court order. The writ of execution is valid to the extent that it derives its mandate from a valid court order. In addition, it was averred that the court is *functus officio*. The court has granted the order, this is a disguised appeal against the order. The writ was issued pursuant to a court order which remains extant, it has not been challenged. Further to that it was submitted that the claim was for the payment of United States Dollars and pound sterling the applicant did not raise the currency issue during the proceedings. The parties understood that the money stolen was in foreign currency and must be paid as such. The applicant's obligation arose from a foreign debt as contemplated in section 44 of the Finance Act. In any event both Statutory Instrument 33 of 2019 and The Finance Act deals with United States Dollars and not any other currency. The applicant's obligation in this case is also in pounds sterling. It should therefore be paid in that currency.

Before addressing the issues placed before me. I must consider whether the court is *functus officio*. The law that underlies the principle was summarised in *Firestone South Africa (Pty) Ltd v Genticuro*[2] as follows,

> 'The general principle , now well established in our law is that, once a court has duly pronounced a final judgment or order, it has itself no authority to correct, alter or supplement it the reason is that it thereupon becomes *functus officio,* its jurisdiction in the case having been fully and finally exercised, its authority over the subject matter has ceased….There are however a few exceptions to the rule which are mentioned in the old authorities and have been authoritatively accepted by this court …it may correct, alter or supplement it in one or more of the following cases:

[1] SC 3/20
[2] 1977 (4) SA 298 @ 306 – 307

> (i) The principal judgment or order may be supplemented in respect of accessory or consequential matters for example costs or interest on the judgment debt, which the court overlooked or inadvertently omitted to grant…
> (ii) The court may clarify its judgment or order if on a proper interpretation, the meaning thereof remains obscure, ambiguous or otherwise uncertain, so as to give effect to its true intention, provided it does not thereby alter "the sense and substance" of the judgment or order…
> (iii) The court may correct a clerical, arithmetical or other error in its judgment in order to give effect to its true intention…
> (iv) Where counsel has argued the merits and not the costs of a case…but the court makes an order granting costs…it may thereafter correct, supplement or alter the order…"

In *Makoni* v *The Cold Chain Limited*[3] the appeal court considered the applicability of the common law principle of *functus officio* .In that case the court *a quo* had declined jurisdiction on the basis of it being *functus officio* in a matter where the applicant applied for his Zimbabwean dollar awards to be converted to United States Dollars, because the Zimbabwean dollar had become moribund. The court had this to say,

> 'The *functus officio* rule does not apply when a litigant applies for the clarification or of a court order because of a subsequent dispute which arises over the clarity or interpretation of the court's award. The new dispute which has never been before the courts and could not have been reasonably expected to arise, cannot, in my view be determined in relation to the general *functus officio* rule which can be departed from when it is in the interest of justice to do so'.

The learned authors *Herbstein & Van Winsen*[4] discussed the departure from the *functus officio* rule and opined that,

> "This list of exceptions is not considered to be exhaustive. **The general rule is departed from when it is in the interests of justice to do so and where there is a need to adapt the common law to changing circumstances to meet modern exigencies.** What is just and equitable will ordinarily be in the interests of justice. In departing from the general rule, the courts invoked their inherent powers to regulate their own processes". (emphasis added).

The above is authority that the general rule is not cast in stone. It can be relaxed in the interest of justice. In this case the court is being asked to give effect to its order in light of the established position of the law. A litigant can approach the court where there is a dispute in the interpretation of a court order. The court has inherent jurisdiction to regulate its process. It can therefore interpret and give effect to its order in appropriate cases.

In my view the circumstances of this case do not require relaxation of the rule. I say this for the following reasons. The application does not fall within any of the exceptions set out

[3] SC 55/16
[4] Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa 5th @ 927

in the *Firestone South Africa Pty* case (supra) .The second exception allows a court to clarify its judgment or order if on a proper interpretation, the meaning thereof remains obscure, ambiguous or otherwise uncertain, provided the substance of the order is not altered. The applicant has not alleged any obscurity, ambiguousness or uncertainty in the court order.

The applicant has alleged that the dispute arose on the interpretation of the court order because the court did not make a pronouncement on the issue of currency. That on its own cannot give rise to uncertainty. The order is clear in its expression. It would seem from the *Makoni* case that a court can give effect to its order where a dispute arises which was not before the court and could not have been reasonably expected to arise. In this case the 1st respondent's claim was very clear, it was alleged that the applicant had unlawfully withdrawn monies from offshore accounts. The amounts claimed were in foreign currency. In her plea she did not raise the currency issue, yet it was so clear from the cause of action that the 1st respondent's claim was in foreign currency. She cannot blame the court for not dealing with the issue. It is trite that a court is required to determine issues placed before it and nothing further[5].

I do not agree with *Mr Mugiya's* submission that since the currency issue was settled in the *Zambezi Gas m Zimbabwe (Pvt) v NR Barber (Pvt) Limited* case *(supra)* there was no need to raise the issue before the court. The submission strikes as a presumptuous and laid back approach to litigation. The Supreme Court addressed the currency issues for obligations and assets expressed in United States dollars. The court did not deal with other currencies. The claim that was before the court also included pounds. It was therefore necessary that the court make a finding on the currency issue. The applicant assumed too much which has turned out to be prejudicial to her interests. Pleadings must raise all the pertinent issues for the court to decide once and for all the dispute between the parties. Where a litigant does not raise an issue and it becomes a basis of dispute later, the litigant cannot be allowed to revisit the case. The court has decided. In this case the dispute on currency was reasonably foreseeable from the nature of the cause of action. By not raising the currency issue it must have been taken that the applicant conceded to the claim in foreign currency. Dealing with this matter would certainly be giving the applicant a second bite of the cherry. The court has spoken in the court order and reconsidering it under the circumstances would certainly alter the substance of the court order.

[5] Central African Building Society v Stone and Others SC 15/21

For those reasons the court is *functus officio* and cannot deal with the application on the merits.

Accordingly the application is dismissed with costs.

Mugiya and Muvhami Law Chambers, applicant's legal practitioners
Gill, Godlonton & Gerrans, 1st respondent's legal practitioners