NHIMBE FRESH EXPORT (PVT) LTD
versus
PRISMA PACKAGING
and
MESSENGER OF COURT, MARONDERA

HIGH COURT OF ZIMBABWE
MANZUNZU J
HARARE, 17 June & 6 August 2021

Court application

W. P. Mandinde, for the applicant
P Murove with *K Takundwa*, for 1st respondent
Z Ndebele, for 2nd respondent

MANZUNZU J: This is a court application seeking an order in the following terms;

"IT IS HEREBY ORDERED THAT:
1. The judgment debt, costs and interest obtained by the 1st respondent to the amount of ZAR252 356.38 in case No. 420B/18 has been paid in full and final by the applicant's deposit of ZWL23 000-00.
2. The applicant's property attached for execution of judgment debt by the 2nd respondent be released immediately.
3. 1st and 2nd respondent pay applicant's costs on a higher scale the one paying and the other to be absolved."

This application is premised on very simple and undisputed facts. The 1st respondent (Prisma) obtained judgment in its favour against the applicant (Nhimbe) at Marondera Magistrate's court under case number MC 420B/18. It was a default judgment granted on 19 February 2019. The parties varied as to when judgment was granted. I called the original record from Marondera Magistrate's Court which shows that judgment was granted on 19 February 2019 and the 28th February 2019 is when the order was signed. The order against Nhimbe reads;

"IT IS ORDERED THAT:
1. The defendant shall pay the plaintiff the sum of ZAR252 356.38 and interest thereon at the rate of 5% per annum calculated from 9 November 2015 up to the date of payment in full.
2. The defendant shall pay the plaintiff costs of suit on an attorney – client scale."

When Nhimbe failed to settle the judgment debt, Prisma obtained a warrant of execution against property. On the strength of that writ the 2nd respondent (the Messenger of Court) attached certain goods of Nhimbe. In response Nhimbe proceeded to pay ZWL23 000

in what it considered to be a full settlement of the judgment debt, interest and costs. Prisma denied that the payment settled the judgment debt.

The single issue to determine is whether the payment of ZWL23 000 settled the debt. Nhimbe says in conformity with the monetary regime legislation it converted ZAR252 356.38 to United States Dollars using the interbank rate on the day of the judgment. The amount in South African rands would equal to US$17 000. Nhimbe then calculated interest and costs to the tune of US6000 to make a total of US$23 000. Using the rate of 1:1 with the Zimbabwean dollar Nhimbe then paid ZWL23 000.

Prisma in opposition denies that the payment of ZWL23 000 has extinguished the debt. It said it was erroneous for Nhimbe to convert the judgment debt as it did because no statute authorizes such an act. Secondly it pointed out that the debt arose in respect of a foreign loan and obligation. Prisma prays that the application be dismissed with costs on a higher scale.

Mr *Mandinde* argued for the applicant that the conversion of currency had a legal basis. In a ten page written heads the applicant raised and argued a number of legal points. Section 4 (1) (d) of SI 33/19 provides that;

> "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")
> (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;" (own emphasis).

The interpretation of this very provision has created a point of departure between the parties. The cardinal principle in the interpretation of statutes is to give effect to the intention of the law maker. The lawmaker has made a written enactment in which it has expressed an intention to which the courts must give effect to. The various rules and guides of construction are aids to achieve the cardinal principle.

The applicant while live to the maxim *expressio unius est exclusio alterius*, (meaning the express mention of one or more things is to exclude the others of the same class that are mentioned) said it is imperative for the court to consider the surrounding circumstances existing at the time of the enactment. This, it was argued will give effect to the intention of the legislature. The United Sates dollar was said to dominate other currencies to the extent that it had become the sole tender throughout the nation. While I agree that the United States dollar became a prominent currency, I do not think it graduated to a sole currency in use. The court

will take judicial notice that other currencies also remained in the market the frequency use of which depended on one's geographical location.

Can one read into section 4 (1) (d) that ".. all assets and liabilities …, valued and expressed in United States dollars…" includes all foreign currencies in use in Zimbabwe at the time? If this was the intention of the legislature why would its pen dry up after mentioning United States dollars. Comparably when Statutory Instrument 142/2019 introduced Zimbabwe dollar to be the sole currency for legal tender purposes in 2. (1) it states that, "Subject to section 3, with effect from the 24th June, 2019, the British pound, United States dollar, South African rand, Botswana pula and any other foreign currency whatsoever shall no longer be legal tender alongside the Zimbabwe dollar in any transactions in Zimbabwe." (emphasis is mine).

In *Zambezi Gas Zimbabwe (Private) Limited* v *N R Barber (Private) Limited & Another* SC 3/20 the court held that; ".. that the Presidential Powers (Temporary Measures) (Amendment of Reserve Bank of Zimbabwe Act & Issue of Real Time Gross Settlement Electronic Dollars (RTGS Dollars)) ("S.I. 33/19") expressly provides that assets and liabilities, including judgment debts, denominated in United States dollars immediately before the effective date of 22 February 2019 shall on or after the aforementioned date be valued in RTGS dollars on a one-to-one rate."

In regard to the interpretation and applicability of section 4 (1) (d) of S.I. 33/19 the court had this to say; "A reading of s 4(1)(d) of S.I. 33/19 does not reveal any ambiguity in the language used by the Legislature in the expression of its intention in enacting S.I. 33/19. The purpose and object of the statute can easily be ascertained from the ordinary and grammatical meaning of the language used.

The liabilities referred to in s 4(1)(d) of S.I. 33/19 can be in the form of judgment debts and such liabilities amount to obligations which should be settled by the judgment debtor. In interpreting s 4(1)(d), regard should be had to assets and liabilities which existed immediately before the effective date of the promulgation of S.I. 33/19. The value of the assets and liabilities should have been expressed in United States dollars immediately before 22 February 2019 for the provisions of s 4(1)(d) of S.I. 33/19 to apply to them.

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… It is the assessment and expression of the value of assets and liabilities in United States dollars that matters…What brings the asset or liability within the provisions of the statute is the fact that its value was expressed in United States dollars immediately before the effective date and did not fall within the class of assets and liabilities referred to in s 44C(2) of the Reserve Bank of Zimbabwe Act [*Chapter 22:15*] ("the principal Act")."

Two key issues arise from the above for section 4 (1) (d) of S.I. 33/19 to apply; firstly, the asset or liability must be expressed in United States dollars and secondly it must have been before the effective date which is 22 February 2019.

In casu, the applicant fails to meet this test. The judgment debt is expressed in South African rands and not United States dollars despite its existence before the effective date.

The respondent has asked for costs at a higher scale which I do not think are justified given the jurisprudential avenues created by the new monetary legislation whose ground must be tested. The applicant unusually asked for costs against the 2nd respondent who ordinarily is cited in his official capacity. This prompted 2nd respondent to oppose the application thereby incurring costs. At the hearing the 2nd respondent took a neutral position but must recover his wasted costs from the applicant.

Disposition:

The application be and is hereby dismissed.

The applicant is to pay 1st and 2nd respondents' costs of suit.

Laita and Partners, applicant's legal practitioners
Scanlen and Holderness, 1st respondent's legal practitioners
Coghlan, Welsh and Guest, 2nd respondent's legal practitioners