MUHAMMAD AKRAM
versus
OLGA MUKWINDIDZA
and
THE SHERIFF FOR ZIMBABWE

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 15 September 2021

Opposed application

Date of written judgment: 22 September 2021

Adv E. Mubaiwa, with him Mr *T. Thomas*, for the applicant
Mr *O. Zimbodza*, for the first respondent
No appearance for the second respondent

MAFUSIRE J

[1] On 12 February 2018 the applicant obtained from this court a default judgment against the first respondent in proceedings under case no HC 206/18. The default judgment directed the first respondent to pay the applicant an amount in the sum of USD175 720-00, together with interest at the prescribed rate and costs of suit. On 19 February 2018 the applicant issued a writ of execution. The second respondent attached certain assets belonging to the first respondent, including three immovable properties. The attachment sparked further litigation between the parties.

[2] At all relevant times prior to 22 February 2019, the country was in a multicurrency system. In terms of it, a basket of currencies, largely predominated by the United States dollar, was legal tender. But by statutory instrument 33 of 2019 ("S.I. 33/19") [Presidential Powers (Temporary Measures) (Amendment of Reserve Bank of Zimbabwe Act and Issue of Real Time Gross Settlement Electronic Dollars (RTGS Dollars)] Regulations, 2019, central government, through the Reserve Bank, among other things, introduced an electronic currency called the RTGS Dollar with effect from 22 February 2019 ("the effective date").

[3] In summary, s 4(1)(d) of S.I. 33/19 provided that for accounting and other purposes, all assets and liabilities that were valued and expressed in United States dollars immediately before the effective date, would be deemed to be values in RTGS dollars at a rate of one-to-one to the United States dollar, on and after the effective date. However, certain assets and liabilities were made exempt from this valuation rate. Such assets and liabilities would be those listed in s 44C(2) of the Reserve Bank of Zimbabwe Act [*Chapter 22:15*], a provision that was contemporaneously enacted together with, and simultaneously inserted by, S.I. 33/19. The exempt assets and liabilities were:

- funds held in foreign currency designated accounts, described as "Nostro FCA accounts" which would continue to be designated in such foreign currencies; and
- foreign loans and obligations denominated in any foreign currency, which would continue to be payable in such foreign currency.

[4] Subsequently, s 4 of S.I. 33/99 was incorporated, almost verbatim, as s 22 of the Finance (No 2) Act, 2019 (No 7 of 2019) ("the Finance Act") which was published on 21 August 2019. Following all these developments, and evidently interpreting the new monetary regime as giving an advantage to her, on 29 November 2019, the first respondent caused an amount of ZW RTGS190 000-00 to be transferred to the second respondent, the Sheriff, purportedly in full discharge of the judgment debt, interest and costs. The applicant did not agree that the payment extinguished the debt or that it could be extinguished in local currency, let alone on a ratio of one to one. His argument was that the default judgment was one expressed in foreign currency and that the RTGS dollar value was lower than that of the United States dollar. He then instructed the second respondent to proceed with execution. However, the second respondent declined to do so, expressing the view that the first respondent's approach was the correct one. This prompted the applicant to institute the present proceedings.

[5] So in this application, the applicant moves the court for a declaration that the default judgment amount in the sum of USD175 720 was not affected by the provisions of s 4(1)(b) or (d) of S.I. 33/19, or the equivalent provisions inserted as s 22 of the Finance Act, allegedly because it fell within the exception provided for in s 44C(2)(a) and (b) of the Reserve Bank Act. He also seeks an order declaring that the judgment debt aforesaid remains payable in United States dollars or, at the option of himself, in local currency at the rate of exchange

prevailing on the date of payment. Costs are sought against either of the respondents who may oppose the application (evidently unsuccessfully).

[6] The applicant argues that the court must consider the context in which the default judgment was granted. As I understand his argument, and in my own words, the court must remember that a monetary instrument antecedent to S.I. 33/19 and all those simultaneous amendments to the Reserve Bank Act, and the subsequent promulgation of the Finance Act, was the Exchange Control Directive No RT120/2018. This had been issued by the Reserve Bank on 4 October 2018. This instrument, among other things, separated pre-existing Foreign Currency Accounts (FCAs) based on the source of funds. In a nutshell, Nostro FCAs funded from offshore export proceeds or from foreign currency cash deposits would be eligible for crediting into the individual or corporate Nostro FCAs. On the other hand, RTGS or mobile money transfers, bond notes and coins would be credited into the individual or corporate RTGS FCAs. The instrument went on to tabulate eight types of FACs. The applicant argues that if the court went behind the default judgment, it would notice that his situation deserves to be treated as a category 6 FCA, namely the individual Nostro FCA which was an FAC funded with, *inter alia*, foreign currency cash deposits.

[7] It is necessary to explain the applicant's argument further. He is a Pakistani national. He is married. He got entangled in an amorous relationship with the first respondent, a local woman. When he eventually tried to break it off, she used all manner of ugly and underhand methods to get even with him. She blackmailed him into paying her large sums of money in order to buy her silence about the illicit affair. She faked a pregnancy. She obtained a fake birth certificate and blackmailed him into paying maintenance for a non-existent child or someone else's child. Nude pictures of himself or in compromising positions would from time to time find themselves displayed at his country's embassy; at his workplace; at his home, and so forth. The first respondent was getting assistance from some people in vantage positions. However, this evil eventually caught up with her. She was arrested, charged in the magistrate's court, convicted and jailed or fined on four counts of forgery, fraud, extortion and contempt of court. The total sum of money she had extorted from him over the period amounted to USD169 720. The magistrate court ordered restitution. She did not pay.

[8] When the first responded did not pay restitution as directed by the magistrate's court, the applicant instituted fresh proceedings in this court for USD175 720. They culminated in the default judgment aforesaid. The applicant says the default judgment was made up of the amount of restitution ordered by the magistrate's court – USD169 720 – plus a further USD6 000 subsequently paid over to the first respondent as maintenance for the phantom child. He argues that the money that he was paying over to the applicant during the period of extortion, was his own funds from abroad. They were United States dollars. He either deposited cash into the first respondent's account with a local bank, or gave it to her directly. He says the default judgment amount was made up of:

- USD144 720 deposited into the first respondents bank account;
- USD25 000 handed over directly to the respondent in cash, and
- USD6 000 also deposited into the first respondent's account as maintenance for the alleged child.

[9] From these facts above, the applicant incepts the argument that the default judgment in his favour, given its background, must be treated as falling within the exceptions set out in s 44C(2) of the Reserve Bank Act, and therefore not liable to the conversion rate of one to one stipulated by s 4(1)(d) of S.I. 33/19, now s 22 of the Finance Act. He argues that the case of *Zambezi Gas Zimbabwe (Pvt) Ltd v N.R. Barber (Pvt) Limited & Anor* SC3/20 (*not yet reported*), which seems on all fours with his case, is distinguishable, allegedly in that the judgment amount in that case was not made up of cash deposits from outside funds as his was.

[10] On her part, the first respondent does not contest the factual conspectus. Her argument is that the default judgment falls squarely within s 4(1)(d) of S.I. 33/19 and that the law on the point has been authoritatively settled by the *Zimbabwe Gas* case above. She argues that her payment of RTGS190 000, which was the default judgment amount, plus interest and costs, converted at the rate of one to one and extinguished her entire obligation towards the applicant in terms of that judgment.

[11] The parties agree that the sole point for determination in this matter is whether or not the default judgment awarded to the applicant in the sum of USD175 720 on 12 February 2018 was affected by the conversion formula in s 4(1)(d) of S.I. 33/19 which became law on 22

February 2019. Flowing from that issue is whether or not the first respondent's payment of RTGS190 000 extinguished her entire obligation to the applicant in terms of that default judgment.

[12] Relevant portions of s 4 of S.I. 33/19 read:

> "4.(1) For the purposes of s 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 …--
>
> (a) ……;
>
> (b) that Real Time Gross Settlement system balances expressed in the United States dollar (other than those referred to in section 44C(2) of the principal Act), immediately before the effective date, shall from the effective date be deemed to be opening balances in RTGS dollars at par with the United States dollar, and
>
> (c) ……; and
>
> (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; and
>
> (e) ……..; and
>
> (f) ……."

[13] After hearing argument, I reserved judgment. This was out of an abundance of caution. I feared there could be something I was missing. Now, after careful consideration I find that the applicant is simply flogging a dead horse. He has no case. His case is squarely on all fours with the *Zimbabwe Gas* case. The Chief Justice spoke. The escape hole the applicant wants to take is a *cul de sac*. One may not fault him though for trying to wriggle out of the reach of S.I. 33/19. It had far reaching consequences. Its effect was profound. On its inception, some people woke up to find that their credit bank balances that had all along been denominated in United States dollars had suddenly transformed into credit balances in some hitherto unknown currency. The conversion ratio of one to one was man-made, not market driven. As a result, some citizens suffered gigantic losses. But others gained enormous advantages. Unfortunately for him, the applicant was one of those that suffered loss. He can only cut down on any further losses, pick himself up and move on. He has no legal leg to stand on.

[14] The applicant has no legal leg to stand on because there is no need to go behind the default judgment or beyond S.I. 33/19. As his own heads of argument acknowledge, MALABA CJ said in the *Zimbabwe Gas* case above (at p 9 of the cyclostyled judgment):

> "Section 4(1)(d) of S.I. 33/19 is specific as to the type of assets and liabilities that are excluded from the reach of its provisions. **The origin of the liabilities is not a criterion for exclusion**. In other words, the fact that the liability is based on a court order does not exempt the liability from the application of the provisions of s 4(1)(d) of S.I. 33/19. 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 44(2) of the Reserve Bank of Zimbabwe Act…"(*my emphasis*)

[15] At p 10, the judgments states:

> "The Legislature put the matter beyond any doubt when it enacted the Finance (No. 2) Act, 2019. In s 20, under Part V of the Act, 'financial or contractual obligations' were defined to include judgment debts."

[16] The applicant insists the default judgment falls within the class of liabilities in s 44C(2). But no, it does not. It simply is a judgment debt. The Supreme Court said **the origin of the liabilities is not a criterion for exclusion**. That is the end of the matter. But even if one were to indulge the applicant and go beyond the default judgment and consider its origin, which should not be done, this asset or liability would still not qualify. What was exempt in s 44C(2) of the Reserve Bank Act were, at the risk of repetition:

> "(a) funds held in foreign currency designated accounts, otherwise known as "Nostro FCA accounts", …
>
> (b) foreign loans and obligations denominated in any foreign currency, …"

[17] The judgment debt was none of those. It was not money lying in any foreign currency account anywhere before the effective date. It was not foreign loans and obligations denominated in any foreign currency. It was restitution of moneys extorted from the applicant. It was damages. It was an obligation to be met by the first respondent. It was not in her bank account. Incidentally, the applicant's papers say that she had used the proceeds of extortion to buy properties. Furthermore, at the hearing Mr *Mubaiwa*, for the applicant, conceded that one of the three tranches of the extortion money, USD25 000, had not gone via any banking system, but had been handed over in cash directly to the first respondent. He accepted that it could not

be treated in the same way as the other two sums. However, this is a distinction of no consequence. None of all the three tranches qualified for exemption.

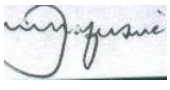
[18] The applicant argues that the same s 44C of the Reserve Bank Act defines (in sub-section (5)) "**nostro foreign currency account**" as any foreign currency account designated in terms of Exchange Control Directive RT120/2018, held with a financial institution in Zimbabwe, **in which money in the form of foreign currency is deposited from offshore or domestic sources**." He points out that Para 2.2 of that Directive provided that "… **foreign currency cash deposits shall be eligible for crediting into the individual or corporate Nostro FCA**, …" (*emphasis by counsel*). But with all due respect, this takes the applicant's case no further. On the effective date, this particular asset or liability was none of those contemplated by that Exchange Control Directive. It was a judgment debt. Even before that judgment, none of the funds were in the applicant's bank account. None of them were in the first respondent's bank account. She had spent them. At best, they had probably been converted into immovable properties. So they were simply not the assets or liabilities contemplated by s 44C(2) of the Reserve Bank Act, nor the Exchange Control Directive RT120/2018.

[19] The application cannot succeed. The first respondent seeks that it be dismissed with costs on the higher scale on the basis that it was an abuse of the court process. However, I do not agree. S.1. 33/19 changed the monetary landscape of this country in a very drastic way. As mentioned earlier, some people suffered enormous losses. The applicant cannot be penalised for his attempts to mitigate the extent of his loss. The application almost qualified as public interest litigation. But because the law on the point had been settled by the *Zimbabwe Gas* case above, it is only fair that the costs follow the event, but on the normal scale.

[20] In the circumstances the following order is hereby made:

The application is hereby dismissed with costs.

22 September 2021



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