TENDAI BLESSING MANGWIRO
versus
CO-MINISTERS OF HOME AFFAIRS
and
COMMISSIONER-GENRAL OF POLICE
and
OFFICER IN CHARGE CID SUSPECTS
HARARE CENTRAL POLICE
and
DETECTIVE INSPECTOR MUKAMBI

HIGH COURT OF ZIMBABWE
MUSAKWA J
HARARE, 9 April 2014 and 18 February 2015

Application for Default Judgment

R. Mahuni, for plaintiff
Defendants in default

MUSAKWA J: In this application for default judgment the plaintiff seeks an order to the effect that-

1. "The respondents jointly and severally pay the applicant the sum of US$78 900.00.
2. The respondents jointly and severally pay the applicant the sum of US$1 537 833.33 being the United States Dollar equivalent of ZW$46 135 000 000.00.
3. Interest at the prescribed rate (from the 25th January, 2013) being the date applicant demanded return of exhibits.
4. Costs of suit on the legal practitioner and client scale."

The claim by the plaintiff arises from his prosecution before the regional court on a charge of theft. He was acquitted on 18 January 2013. He gave notice in terms of the State Liabilities Act [*Chapter 8:14*] on 18 March 2013.

Following the acquittal, it is contended that Police unlawfully and unprocedurally released US$78 900.00 and ZW$46 135 000 000.00 which had been seized from the applicant to one Andre Nsaka Nsaka. It is evident that the cash in question together with some motor vehicles were not exhibits before the regional court.

It is common cause that the plaintiff was arrested on 16th February 2008 on allegations

of theft of US$3 000 000.00 from Andre Nsaka Nsaka. The following items were seized from the plaintiff-

1. US$78 900.00.
2. ZW$46 135 000 000.00.
3. Isuzu double cab LX 300 vehicle, registration number ABD 4926.
4. Toyota Vista vehicle, registration number ABC 0347.

The two motor vehicles were subsequently released. Trial commenced in November 2008 and was finalised on 25 April 2012.

It is also common cause that although the defendants filed a special plea to the claim they were subsequently barred for not pleading over to the merits. It is surprising that those who legally represent the State and those personnel presiding over state institutions are lax when it comes to litigation. A simple act of filing a defence to a claim that has serious financial implications to the fiscus went begging by failure to adhere to court rules.

The money being claimed was booked under entry 09/08 (Exhibit Book 34) with CID Suspects. As stated previously, it was never booked with the trial court. When demand was made for its release, the defendants claimed prescription.

The plaintiff sought confirmation from the Reserve Bank of Zimbabwe to the effect that as at 11 February 2008 the rate of exchange between the US$ and the ZW$ was US$1 to ZW$30 000.00. The ZW$46 135 000 000.00 amounts to US$1 537 833.33.

Although the plaintiff's counsel, in his heads of argument submits this is vindicatory action, this is essentially a claim for damages. This is because in his supporting affidavit the plaintiff claims that the money seized from him was wrongfully released to Andre Nsaka Nsaka, the complainant in the criminal matter. Essentially the plaintiff is seeking to be placed in the same position he would have been had the money not been released. He cannot and is not seeking to recover the exact money seized from him because that money is no longer available. Hence the computation of the US$ equivalent of the ZW$46 135 000 000.00.

The claim for US$78 900.00 poses no problem. That is the loss the plaintiff suffered when the money was seized from him. It is the claim for the US$1 537 833.33 that I find a problem with. In the first place, it does not follow that when an article is seized by Police, it is inevitably going to be used as an exhibit at the intended trial. Even the legality of the seizure, just like an arrest, may be challenged. Therefore, the plaintiff's claim of the seized money was

not dependent on the outcome of a criminal prosecution.

Having made those observations, this does not excuse the Police from conducting themselves in an acceptable manner. Section 59 (1) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] provides that-

> "Subject to subsection (2), if in connection with any article referred to in paragraph (*c*) of section *fifty-eight*—
>
> (*a*) no criminal proceedings are instituted; or
>
> (*b*) it appears that such article is not required at the trial for purposes of evidence or for purposes of an order of court; or
>
> (*c*) criminal proceedings are instituted and the accused admits his guilt in accordance with section *three hundred and fifty-six*; the article shall—
>
> (i) if the person from whom it was seized may lawfully possess the article, be returned to that person; or
>
> (ii) if the person from whom it was seized may not lawfully possess the article, be delivered to the person who may lawfully possess it; or
>
> (iii) if no person may lawfully possess the article or if the police officer concerned does not know of any person who may lawfully possess the article, be forfeited to the State."

There is nothing to show how it was determined who may lawfully possess the seized cash. It looks like an arbitrary decision to release the money to Andre Nsaka Nsaka was made. It is not clear if this was motivated by the fact that the plaintiff acknowledged owing Andre Nsaka Nsaka US$145 000.00. During the criminal proceedings there was an indication that the Police Officer who released the money had criminal charges preferred against him. It was not indicated what the outcome of that process was. It is also not clear why the plaintiff did not join Andre Nsaka Nsaka in the present suit.

It is well established that delictual damages are calculated as the date of the delict. In this respect see *Parish* v *King* 1992 (1) ZLR 216 (S). The plaintiff justifies his second claim on the conversion of the economy to multi-currency due to the diminution in value of the local currency. I have already pointed out that there was no legal impediment to the plaintiff challenging the seizure of his money at the earliest opportunity. It seems the plaintiff chose to await the outcome of the criminal proceedings in order to demand the release of the money. What if he had been convicted?

Commenting on currency nominalism, GROSSKOPF JA in *S.A. Eagle Insurance Co.*

Ltd. v *Hartley* 1990 (4) SA 833 had this to say at 839-

> "This result seems to me to be in conflict with the principle of nominalism of currency which underlies all aspects of South African law, including the law of obligations. Its essence, in the field of obligations, is that a debt sounding in money has to be paid in terms of its nominal value irrespective of any fluctuations in the purchasing power of currency. This places the risk of a depreciation of the currency on the creditor and saddles the debtor with the risk of appreciation. See Farlon and Harthaway Contract: Cases Material and Commentary 3rd ed at 719 note 2; HJ Delport, Inflation and South African Law (1982) 4 Modern Business Law 115 and A Spandau Inflation and the Law 1975 SALJ 31".

Nominalism is the norm in the common law of Western States with similar systems to our own. Thus in Humphrey (1962) 272 US 517 at 519 the United States Supreme Court said:

> "An obligation in terms of the currency of a country takes the risk of currency fluctuations and whether creditor or debtor profits by the change the law takes no account of it. Obviously in fact a dollar or a mark may have different values at different times, but to the law that established it is always the same. If the debt had been due here and the value of dollars had dropped before suit was brought the plaintiff could recover no more dollars on that account."

A person claiming damages in whatever form must prove that they suffered loss in the amount claimed. See *Kwindima* v *Mvundura* 2009 (1) ZLR 168 (H). In so awarding such damages the court exercises its discretion. In deserving cases the courts have made awards in foreign currency notwithstanding the cause of action having arisen during the era of the local currency.

I am therefore satisfied that the plaintiff's claim cannot be granted in its entirety. In the result, it is ordered as follows-

a) That the defendants jointly and severally, the one paying the other to be absolved pay the plaintiff the sum of US$78 900.00.
b) That the defendants jointly and severally, the one paying the other to be absolved pay interest at the prescribed rate from the 25th January, 2013.
c) That the defendants jointly and severally, the one paying the other to be absolved pay the costs of suit.

Mahuni & Matutu, plaintiff's legal practitioners