BLESSING KACHERE
versus
STANBIC BANK ZIMBABWE LIMITED
and
OLD MUTUAL INVESTMENTS GROUP ZIMBABWE (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
KABASA J
HARARE, 29 October 2019 & 6 November 2019

Opposed Application

T J Mupangwa, for the applicant
T Chagonda, for the 1st respondent
S M Nyangwa, for the 2nd respondent

KABASA J: This is an application for an interdict. The applicant sought an order to the following effect:

1. The 1st respondent be and is hereby interdicted and directed to classify the applicant investment funds held by 2nd respondent as United States Dollars forthwith.
2. The 2nd respondent be and is hereby interdicted and directed to transfer applicant's investment funds in the sum of USD91 427.92 to applicant's Nostro FCA account number 9140001325166 held by the 1st respondent.

The first and second respondents opposed the application. I propose to give the background to the matter. It is this:

The applicant was employed by the UNDP based in South Sudan. His salary was credited into his account with the first respondent. For the period December 2014 to February 2016 his salary was credited into the second respondent's Unit Trusts Scheme at his instruction, following his decision to invest into that Scheme. The first respondent would transfer the money from his account into the second respondent's account, which was also held with the first respondent. The applicant invested a total of USD103 000.

In January 2019 he decided to de-invest and duly notified the second respondent. He was then informed that the funds would be paid into his RTGS FCA account. Aggrieved by the decision to classify his investment funds as RTGS, he lodged this application. His contention is that the first respondent transferred USD from his account into the second respondent's and that currency could not have mutated into RTGS. He therefore ought to receive his investment proceeds in the same currency, i.e. USD denominated. His investment stood at USD91 427.92 as at 24 April 2019, which amount would translate to less than USD30 000 should it be classified as RTGS. He would therefore lose out whilst the second respondent would be unjustly enriched.

In opposing the application the first respondent argued that the applicant failed to satisfy the requirements for the relief he seeks. He has not proven a clear right in that:

(i) when his salary was credited into his account with the first respondent the source could be classified as diaspora remittances or off shore funds, but

(ii) per his instruction the first respondent then transferred that money into the second respondent's investment account, an account divorced from the one into which his diaspora salary was credited.

(iii) The Reserve Bank of Zimbabwe (RBZ) issued out a directive, i.e. RT 120/2018 directing that bank accounts be separated into FCANostro and FCA RTGS depending on the source of funds. The second respondent's account was classified FCA RTGS and it was that account into which the applicant's investment funds were credited, an account held within Zimbabwe from a source within Zimbabwe. The applicant had therefore utilised his USD salary by investing into the second respondent's investment scheme whose funds were in an account classified as RTGS FCA per the RT 120/18 RBZ directive. His funds were therefore designated as RTGS per the designation of the account in which they were held.

(iv) The Presidential Powers (Temporary Measures)(Amendment of Reserve Bank of Zimbabwe Act and Issue of Real Time Gross Settlement Electronic Dollars (RTGS Dollars) Regulations, 2019 (SI 33 of 2019) deems the applicant's investment with the second respondent an asset and so by operation of the law the RTGS balance is at par value with the USD. It follows therefore that the 1st respondent's conduct was

dictated by the law. The applicant can therefore not claim to have established a clear right which is contrary to the dictates of the law.

(v) The applicant's acknowledgment that the legal designation of a bond note/RTGS as equivalent to the USD is "a legal fiction that is unconstitutional" shows that he has other remedies but chose the interdict avenue. He therefore failed to satisfy the requirement that there is no other remedy available to him save for an interdict.

(vi) The applicant also cannot argue that the first respondent has been unjustly enriched when all the first respondent did was comply with the law.

The applicant has therefore not met the requirements for an interdict and is accordingly not entitled to the relief he seeks, so counsel for the first respondent argued.

The second respondent's contention in opposing the applicant's application took the same tenor as regards the applicant's failure to meet the requirements of an interdict.

Mr *Nyangwa* for the second respondent amplified the argument by referring to the fact that the provisions of SI 33/2019 proscribes the settlement of obligations in USD and when on 3rd and 12th February 2019 the applicant sought to redeem his units the prevailing law stipulated that such redemption was to conform to the dictates of the legal instruments, i.e. the settlement was to be in RTGS. The applicant could therefore not claim the infringement of a clear right under the circumstances.

Turning to the investment in question, counsel argued that applicant became a participant in the unit trust scheme, a collective investment scheme governed by the Collective Investment Scheme Act, [*Chapter 24:19]*. The second respondent is the management company and participants get shares proportionate to their level of investment. A Trust Deed governs the responsibilities of the parties and contrary to the applicant's assertion, the second respondent as the management company is not mandated to ring fence investments for participants. Further, so he argued, the Unit Trust Scheme has a portfolio of investments and applicant is but one of many participants, making it impossible to treat him differently from other participants. Whilst the source of his money was from his employer and qualified as a foreign source, in terms of RT 120/18 upon utilisation of that money, i.e. upon its transfer from his account to the second respondent's investment vehicle it went into an RTGS FCA basket from whence it will come for channelling into the applicant's RTGS FCA.

Mr *Nyangwa* went further to argue that the terms on the application form completed by the applicant on joining the Investment Scheme specifically exempted the second respondent from liability for the loss of value of investment as a result of market conditions or currency changes. The applicant can therefore not seek to hold the second respondent liable in the circumstances.

In the face of these submissions Mr *Mupangwa*, who appeared for the applicant, appeared to have had a Damascene moment. I say so because whilst he had earlier on abided by the papers filed of record, when afforded an opportunity to exercise the right to reply, counsel submitted that the applicant could not seek to punish the actors who were merely observing the law, the actors being the 1st and 2nd respondents. No matter how oppressive that law is it was unfortunately the law. Mr *Mupangwa*therefore essentially agreed with the arguments advanced by counsel for the first and second respondent.

I must therefore state that l would not have written this judgment in the face of counsel for the applicant's concession. However Mr *Nyangwa* for the second respondent was of the view that the court's pronouncements on investment schemes' liability in circumstances where currency changes erode participants' investments would be important.

Before l deal with the issue of liability of investment schemes, I believe it is important to consider the concession made by counsel for the applicant. I am of the considered view that the concession was properly made. I say so because in an application for a final interdict, as in *casu*, the applicant must establish three requirements.

These requirements have been set out in a plethora of cases. In *Zesa Staff Pension Fund* v *Clifford Mushambadzi* SC 57/2002, ZIYAMBI JA put it thus:-

> "It is trite that the requirements for a final interdict are:-
> 1. A clear right which must be established on a balance of probabilities.
> 2. Irreparable injury actually committed or reasonably apprehended; and
> 3. The absence of a similar protection by any other remedy."

The learned JA also referred to *Setlogelo* v *Setlogelo* 1914 AD 221 at 227, *Flame Lily Investment Company (Private) Limited* v *Zimbabwe Salvage (Private) Limited and Another* 1980 ZLR 378, *Sanachem (Pty) Ltd* v *Farmers Agricare (Pty) Ltd* 1995 (2) SA 781A at 789B.

CLEAR RIGHT

Has the applicant shown that he has a clear legal right? I think not. Whilst his salary from UNDP was diaspora remittances, such funds did not remain in that account but were invested into

the second respondent's Unit trusts. By purchasing such units he utilized the diaspora funds. When the RBZ issued the directive, RT 120/2018 those funds were no longer capable of being classified as diaspora remittances as the account into which they had been transferred was designated as an RTGS FCA account.

Further, as Mr *Chagonda* for the first respondent argued, which argument found favour with the court, with the promulgation of SI 33 of 2019, Presidential Powers (Temporary Measures) (Amendment of Reserve Bank of Zimbabwe Act and Issue of Real Time Gross Settlement Electronic Dollars (RTGS Dollars), the applicant's asset in the form of the Investment with the second respondent was deemed to be valued in RTGS dollars at a rate of one-to-one to the United States Dollar.

The funds did not fall under the exemption in s 44C (2) which provides that:

"(2) The issuance of any electronic currency shall not affect or apply in respect of –

(a) funds held in foreign currency designated accounts, otherwise known as "Nostro FCA accounts, which shall continue to be designated in such foreign currencies, and

(b) foreign loans and obligations denominated in any foreign currency, which shall continue to be payable in such foreign currency."

It is clear funds held in the second respondent's RTGS FCA account do not fit into the above exemption and therein lies the applicant's challenge.

Further in terms of s 44C (1) (d) and (e) which provides;

"(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 44 C (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."

(e) that, after the effective date any variance from the opening parity rate shall be determined from time to time by the rate at which authorised dealers under the Exchange Control Act exchange the RTGS Dollar for the United States dollar on a willing-seller willing-buyer basis", the odds are heavily stacked against the applicant.

The provision puts paid to the argument that since USDs were credited from the applicant's account into the second respondent's, the nature of the currency ought to remain as USD and not RTGS. The law has deemed such funds RTGS equivalent.

This was the import of a Ms Memory Feresu's (head of Executive Banking of the first respondent) 12 February 2019 letter addressed to the applicant after he had queried the classification of his investment proceeds. She put it thus:-

> "Kindly note that the investment proceeds deposited by Old Mutual in your RTGS FCA account do not qualify as Nostro FCA funds. Whilst you indeed received offshore funds in your account held with us, your investment with Old Mutual constituted a utilization of your offshore receipts."

This interpretation of the law cannot, in my view, be faulted.

Any right has to be grounded in law; otherwise it ceases to be a right. If l were to put the applicant's cause in my own words, I would say:-

> "I know the law is saying my investment proceeds are now regarded as RTGS dollars, payable at the rate of 1.1 with the USD, but l invested USD and it is only fair that I get back USD as it is a fallacy to equate USD to RTGS dollar. The law is therefore being unfair to me"

This is very understandable and one cannot help but sympathise with this reasoning which is grounded in equity and fairness. Unfortunately as all 3 counsel observed, the fact that the law has not been fair does not mean it ceases to be the law.

The applicant cannot therefore seek to claim a real right which is at variance with the provisions of the law. It is a contradiction and unfortunately not legally sustainable.

In failing to satisfy the first requirement, the applicant has also inevitably failed to satisfy the second requirement as the second requirement can only stand upon the foundation of the first requirement. Without that foundation, just like a house built on sand, the applicant cannot sustain the second requirement. Irreparable injury actually committed or reasonably apprehended would stem from an infringement of a real right and not a perceived one.

These proceedings are not premised on a challenge of the validity of the law that has brought about the unfortunate consequences which prompted the filing of this application. I will therefore shy away from making any pronouncement on this issue.

This brings me to the third requirement:

The absence of a similar protection by any other remedy

> "This requires that there be no other legal remedy available that would be as effective in protecting the applicant against the apprehended harm. (*per* Janice Bleazard*et a*l in "*Administrative Justice* in South Africa: An Introduction, at p 269 thereof)."

Mr *Nyangwa* for the second respondent submitted that for as long as a particular piece

of legislation is in force, it has to be complied with no matter how oppressive it may be.

To that end he referred to the constitutional case In Re: *Prosecutor-General of Zimbabwe on His Constitutional Independence and Protection from Direction and Control* CCZ 8/15. Whilst that case did not speak to the oppressiveness of a law, I find the remarks by PATEL JCCinstructive, more so in light of the applicant's sentiments as expressed in his answering affidavit, where he said:

> "In any event, I strongly believe that the legal designation of a bond note/RTGS as equivalent to the USA is a legal fiction that is unconstitutional."

PATEL JCC in In Re: Prosecutor-General(supra)had this to say:

> "The applicant does not want to comply with the law and he has not even challenged its validity…"

The learned JCC went on to cite the case of *Econet Wireless (Pvt) Ltd* v *The Minister of Public Service Labour & Social Welfare and Others* SC 31-16 where BHUNU JA held that:

> "It is a basic principle of our law which needs no authority that all subsisting laws are lawful and binding until such time as they have been lawfully abrogated.
> ……
> Every act of the legislature is presumed to be valid and constitutional until the contrary is shown…"

Herein lies the remedy for the applicant. Unfair and unconstitutional as he deems the law introduced by S.I 33/2019 and SI 142/2019 is, for as long as it has not been successfully challenged it remains the law and has to be followed.

It therefore cannot be said an interdict is the only legal remedy open to the applicant, especially given the circumstances of this case.

From the foregoing it is clear the applicant failed to meet the requirements for the relief he seeks. The matter should end there.

Mr Mupangwa's concession was therefore properly made. I have also not lost sight of the effect of the exemption clause in the Unit Trusts Application Form signed by the applicant.

As alluded to earlier in this judgment, the second respondent is the management company for the unit trust scheme of which the applicant was a participant. A participant is defined in the Collective Investments Schemes Act [*Chapter 24:19*] as 'a person who invests in or otherwise takes part in a collective investments scheme." A manager is defined as "the person who is responsible to participants for the management and control of the scheme and for the issue and redemption of units in the scheme."

This relationship is to be looked at in light of the agreement between the participant and the manager and captured in the declaration signed by the applicant when he made the decision to invest in Old Mutual Unit Trusts. The declaration reads:

> "I am fully aware of the volatility of the stock, property bond and money markets and accept that our units may decrease or increase in value over the life of the investments and that the daily interest rates and unit prices quoted in the press are indicative. I agree not to hold Old Mutual Unit Trusts responsible for any loss in value of our investment arising out of market conditions and/or currency changes. I acknowledge that it may take up to 14 days to withdraw my funds depending on the prevailing market conditions… I know … that there are no guarantees on my capital."

There has been no allegation of any impropriety on the part of the second respondent in so far as managing the unit trust scheme. I may venture to say were it not for the currency changes the applicant would most likely have derived some benefits from his investment.

Investment schemes by their very nature are susceptible to market conditions and the risks attendant thereto. Given the devastating effects of the promulgation of S.I 33/2019 and S.I 142/19 the claim of unjust enrichment has to be substantiated for it to hold water. Without such substantiation I do not intend to unduly exercise my mind on the issue.

Suffice it to say the investment scheme's responsibilities did not include hedging participants' investment from volatility in the market, including currency changes. The period December 2014 – January 2016 had no RTGS dollars, which would mean whatever number of participants the second respondent's scheme had, would have been investing USD. However, given the provisions of s 44 C (1) (d) which has with a stroke of the pen rendered all assets and liabilities immediately before the effective date, valued and expressed in United States dollars, deemed to be valued in RTGS dollars at a rate of one-to-one to the USD, the question is are such investment companies spared? I think not. And if they are not, if every participant de-investing embarks on a reconciliation exercise and demands payment in USD for that period that they invested in USD, would the consequences not be dire for these management companies? I think they would be and therein lies the concern raised by counsel for second respondent. Chaos will most certainly reign. Whatever informed the decision to promulgate S.I 33/2019 and S.I 142/2019 is indicative of some deep seated financial instability which will haunt not only the applicant *in casu* but many others who have decided to cut their losses.

That said, the applicant has unfortunately failed to make a case for the interdict he was seeking against the first and second respondent. Mr Mupangwa can therefore not be blamed for conceding, albeit rather late in the day.

I turn now to the issue of costs. Counsel for the respondents asked for costs on a punitive scale. This they argue, is due to the fact that the applicant was advised that his units were denominated as RTGS dollars but persisted with the litigation.

The courts should be wary of awarding punitive costs unless the circumstances of the case clearly warrant such censure.

I do not think the applicant was acting unreasonably, fraudulently or dishonestly when deciding to bring this application. The applicant's sense of outrage at the unfairness of losing out when he believed he was investing in anticipation of reaping from such investment is understandable.

To punish him with costs in the circumstances is unjustified and tantamount to adding insult to injury.

I am therefore not satisfied I should make such an order under the circumstances.

In the result, I make the following order:

The application for an interdict against the first and second respondent be and is hereby dismissed with costs.

Masawi and Partners, applicant's legal practitioners
Atherstone and Cook, 1st respondent's legal practitioners
Mawere Sibanda, 2nd respondent's legal practitioners