Judgment No. HB 24/06
Case No. HC 137/06

GODFREY NYONI

Versus

SIMONE RITA CATHRINE WILLIAMS
T/a/ BULAWAYO FABRIC WHOLESALE

IN THE HIGH COURT OF ZIMBABWE
BERE J
BULAWAYO 13 AND 16 MARCH 2006

G Nyoni for plaintiff
No appearance for defendant

Chamber application for default judgment

BERE J:

The history of the case

On 23 January 2006 the plaintiff, a legal practitioner in Bulawayo issued summons commencing action against the defendant. The plaintiff's claim was summarised as follows:

"The plaintiff's claim is for: -

a) Payment in the sum of Botswana Pula 1000 (one thousand pula) which defendant borrowed from plaintiff on 5 November 2005 to pay part of excise duty charged on her goods. The said money was due on 8 November 2005 but defendant has failed to pay despite demand.
b) Payment in the sum of BP1000 (one thousand pula) which defendant, though her finance and agent Khalid agreed on 24 November 2005 to pay as interest seeing they had failed to
pay on time. Despite demand, the defendant has hitherto failed to pay.
c) Interest on BP 2000 at 10% per month from 24 November 2005 to date of full payment.
d) Cost of suit at an attorney client scale …"

The defendant was given 10 days within which to respond to the plaintiff's claim failing which the matter would be dealt with without further notice to the defendant.

As fate would have it, the defendant did not enter appearance to defend despite the summons having personally been served on her.

Upon the expiry of the *dies inducia* the plaintiff made a chamber application for default judgment.

When the application was placed before me on 15 February 2006, despite the several grammatical errors in part (b) of the claim I was able to decipher the nature of the claim and I commented as follows,

> "It would appear the whole transaction was done in complete violation of the Exchange Control Regulations and or Act. If not furnish the relevant requisite authority to demonstrate the contrary. Let me hear from applicant."

The plaintiff responded to the concerns that I raised by filing his heads of argument and it is imperative that I capture the response in is elaborate form:

"<u>Heads of Argument</u>

1. The Exchange Control Act Chapter 22:05 illegalises dealing in forex. This includes exchanging foreign currency with local currency which is a prerogative of the Reserve Bank of Zimbabwe or authorised dealer. It then deals with issues of payments of debts outside

Zimbabwe, gold etc.

2. The Act then controls the issues of import or exportation of money in or outside Zimbabwe.

   Statutory Instrument 110/96 which is the regulations at hand does not illegalise the borrowing or lending of forex.

3. The Act does not prohibit people possessing foreign currency or borrowing each other same. Lending or borrowing of foreign currency is not prohibited by the Act. It is within the law thus to borrow or lend money in any currency so long as the said foreign currency is in the legal possession of the lender. In Zimbabwe there is no law banning possession of foreign currency.
4. The courts declare as illegal if plaintiff had sold items or goods to defendant within Zimbabwe and for BP2000. That will be illegal in terms of the Exchange Control Act as read with the Decimal Currency Act Chapter 22:04.
5. The courts in Zimbabwe have always and do enforce judgment expressed in foreign currency so long as it is shown that the loss was sustained in that currency – see *Industrial Equity Ltd* v *Walker* HH-30-56, *Macs Maritime Carrier A.G.* v *Keeley Forwarding & Sterebring* P/L 1995(3) SA 377D and *Standard Chartered Bank of Canada* v *Nedpern Bank Ltd* 1994(4) SA 747A
6. In the *Standard Chartered Bank* case *(supra)* the court held that appellant was entitled to its damages expressed in US dollars. "This was the currency in which appellant's loss was felt."
7. In the *Macs Maritime Carrier* case *(supra)* the court stated that the whole idea was aimed at *restitutio in integrum* to the extent that the payment of money is capable of restoring plaintiff's estate to its condition before the occurrence of the loss or borrowing transaction. In that matter the loss was "felt", as the court put it, in US dollars and the court stated that plaintiff should be given the award per and according to his or her loss. *In casu*, plaintiff's loss was felt in Pulas and so should the judgment ordinarily stand.
8. In the circumstances it is submitted plaintiff's claim is wholly within the parameters of the law. However, the plaintiff will stand guided by the court's view."

Having been confronted by such an intransigent plaintiff I felt obliged to provide an elaborate determination of the matter in the manner I perceive the issues to be.

The legal position

It will be noted from the plaintiff's heads of argument that the plaintiff deliberately made a cursory reference to Statutory Instrument

110/96 which he referred to as the governing regulations on the matter under considerations. There was no specific section of the relevant Statutory Instrument cited which specifically deals with the issue at hand. I can only assume that the plaintiff must have realised that there was no such specific section which could support his claim as summarised in the summons.

It will be noted that Statutory Instrument 110/96, the Exchange Control (General) order was made by the Reserve Bank of Zimbabwe with the approval of the Ministry of Finance in terms of section 40 of the Exchange Control Regulations, 1996 to regulate the operations of authorised dealers in *inter alia* dealing in foreign currency in this country.

The plaintiff in this case, not being one of the specified authorised dealers could therefore not purport to have his foreign currency dealings with the defendant covered by Statutory Instrument 110/96. It was therefore wrong and misleading for the

plaintiff to suggest that the Statutory Instrument in question was the regulation governing his operations.

It will be further appreciated that Statutory Instrument 110/96 is one of several Exchange Control Regulations put in place to among other things deal with foreign currency related maters in this country. Index to legislation in
force in Zimbabwe as at 2003 will clearly show that as at that year there were about 24 (twenty-four) different Exchange Control Regulations in place which impacted on the Exchange Control Act [Chapter 22:05].

After perusing the numerous Exchange Control Regulations in place, it would seem to me that the most relevant Statutory Instrument covering the plaintiff’s situation is Statutory Instrument 109/96 and in particular section 4 thereof.

For the avoidance of doubt the relevant section reads as follows:

> “Dealing in foreign currency
>
> 4.(1) Subject to subsection (3), unless permitted to do so by an exchange control authority -
>
> (a) no person shall, in Zimbabwe –
>
> (i) buy any foreign currency from or sell any foreign currency to any person other than an authorised dealer or a foreign exchange bureau de change; or
>
> (ii) borrow any foreign currency from, lend any foreign currency to or exchange any foreign currency with any person other than an authorised dealer.” (my

emphasis)

The exceptions to subsection 4(1)(a) (ii) of Statutory Instrument 109/96 are clearly spelt out in section 4(3)(a), (b), (c) and (d) and in my view the plaintiff, in the light of the information gleaned from his summons commencing action and his failure to provide the relevant authority authorising him to deal in foreign currency after being invited to do so by my minute of 15 February 2006, would not be covered by such exceptions.

What is clear from the plaintiff's actions is that he has by his own unsolicited admission, admitted to having violated section 4(1)(a)(ii) of Statutory Instrument 109/96 of the Exchange Control Regulations and consequently section 5 of the Exchange Control Act [Chapter 22:05].

From the facts presented it is clear that the plaintiff's hands are tainted with illegality. Authorities are clear that the court can on its own initiative take the point of illegality. In this regard I am inclined to lean on the views of A J Kerr, in his book, *The Principles of the Law of Contract*, fourth edition published by Butterworths, Durban, in 1989, page 153 where the author states:

> "… It is true that it is the duty of the court to take the point of illegality *mero motu*, even if the defendant does not plead or raise it; but it can and will only do so if the illegality appears *ex facie* the transaction or from evidence before it …"

The case before me is clearly one where the plaintiff, with his eyes open chose to act in complete violation of both the Exchange Control Act and the above cited Exchange Control Regulations.

Finally, it is trite that where a piece of legislation is clear, there is no need to go beyond the jurisdiction of this court to seek further guidance. It is in the light of this perception that the authorities cited by plaintiff in his heads of argument, namely *Macs Maritime Carrier A. G.* v *Keeley Forwarding & Sterebring P/L* 1995(3) SA 377D (which authority in any event turned out to be non-existent) and *Standard Chartered Bank of Canada* v *Nedpern Bank Ltd* 1994(4) SA 747A are deemed to have been referred to out of context and were therefore irrelevant. Reference to them was meant to cloud issues.

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The view which the court takes is that the agreement in question was clearly tainted with illegality and as such contrary to law.

Consequently, the application for default judgment is dismissed.

Majoko & Majoko, plaintiff's legal practitioners