

TILSIT STATIONERIES (PRIVATE) LIMITED

And

BLESSING NCUBE

Versus

DRIVE CONTROL CORPORATION (PROPRIETY) LIMITED

IN THE HIGH COURT OF ZIMBABWE
TAKUVA AND DUBE-BANDA JJ
BULAWAYO 28 September 2020 and 5 November 2020

Civil appeal

K. Phulu, for the appellants
Ms.C. Malaba, for the respondent

DUBE-BANDA J: This is an appeal against the entire judgment of the magistrate's court sitting at Tredgold Bulawayo, dated 18 September 2019. The court *a quo* ordered appellants to pay respondent, jointly and severally, the one paying the other to be absolved, the sum of US\$ 53 969.85; interest at the prescribed rate calculated from the date of summons to the date of final payment; and costs of suit on a legal practitioner and client scale. Appellant was aggrieved by the judgment and noted an appeal in this court. In the main, the appeal is about whether the court *a quo* was correct in ordering that payment be in foreign currency and not in local Zimbabwean dollars.

Background facts

Respondent is a company registered in the Republic of South Africa. It has no trading office in Zimbabwe. First appellant is a company registered in Zimbabwe, and second appellant is a Zimbabwean and a director of the former. First appellant and respondent entered into a credit agreement in terms of which the former supplied goods, namely computer software and hardware to the latter. A credit agreement was signed. Second appellant bound himself as surety and co-principal debtor to the respondent. On the 3rd December 2013, the appellants signed an acknowledgment of debt, in the sum of US\$53 969,

85 in favour of the respondent. Appellants defaulted in payment, and a dispute arose leading to litigation amongst the parties.

On 16 November 2016, respondent sued out a summons against the two appellants, claiming payment in the sum of US\$53 969.85; interest at the prescribed rate calculated from the 3rd December 2013 to the date of full and final payment; collection commission and costs of suit. Appellants defended the case, raising a number of defences along the way, until such time that the only issue that remained in dispute was the currency of payment. The court *a quo* heard argument on this issue, and found in favour of the respondent. The court found that the debt was a foreign obligation and payable in foreign currency. It then ordered that appellants pay US\$53 969.85; interest at the prescribed rate and costs on a legal practitioner client scale. Aggrieved by the decision of the court *a quo* the appellants launched the present appeal.

Grounds of appeal

The appellants take issue with the judgment of the court *a quo* on the grounds that the court *erred* in two respects. The grounds of appeal are these:

1. The court *a quo* *erred* in law in finding that the debt owed to respondent was a foreign loan and obligation which was payable in United States dollars.
2. The learned Magistrate *erred* in law in ordering payment of the judgment sum in foreign currency not in Zimbabwean dollars.

Issues for determination

There is one issue for determination, i.e. whether appellants' debt to respondent is a foreign obligation in terms of the section 44C of the Reserve Bank Act (as inserted by s 3(1) of S.I. 33 of 2019). The answer to this question, will invariably determine the currency of payment. If the debt is a foreign obligation, the currency of payment will be in foreign currency, i.e. United States dollars, if it is a local obligation, the currency of payment would be RTGS dollars. This is the issue that this court will have to determine.

Foreign or local obligation

The issue is whether the debt is excluded from the protection of section 44C of the Reserve Bank Act (as inserted by s 3(1) of S.I. 33 of 2019). Section 44C (2) provides as follows:

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.
(My emphasis)

Section 4(1)(a) of S.I. 33 of 2019 provides for the issuance and operation of an electronic currency, dubbed “the RTGS Dollar”, with effect from the effective date, being the date of promulgation of S.I. 33 of 2019, *i.e.* 22 February 2019. Paragraphs (c), (d) and (e) of s 4(1) stipulate as follows:

- (c) that such currency shall be legal tender within Zimbabwe from the effective date; 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) 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.

What emerges clearly and unequivocally from s 44C(2)(b) of the Reserve Bank Act, as read with s 4(1)(d) of S.I. 33 of 2019, is that foreign loans and obligations denominated in any foreign currency are excluded from the broad remit of S.I. 33 Of 2019. Thus, foreign loans and obligations continue to be valued and payable in the foreign currency in which they are denominated. See *Breastplate Service (Private) Limited v Cambria Africa PLC* SC 66/20,

It is common cause that until the promulgation of S.I. 33 of 2019, the parties fully agreed that payment would be made in United States currency. It is not in dispute that respondent is a foreign company. What is contentious is the nature of the transaction between the parties. *Mr Phulu*, for the appellant, submits that the debt is not a foreign obligation

within the meaning and reach of s 44C (2) (b) of the Reserve Bank Act. It is contended that consent to judgment can only be consent on the basis of the cause of action, which is the subject matter and not any other cause of action. The appellants are said to have consented to judgment with regards to the debt owed to the respondent. It is argued that the court could only deal with the cause of action before it and not one that is not supported by the pleadings. It is contended that in *casu*, there are two different elements which are; the underlying transaction [initial agreement] and the acknowledgment of debt. It is argued that the underlying transaction is not applicable to this appeal. It is said not to be applicable for the reason that it is not the cause of action upon which the respondent sought recourse. It contended that the subject matter in the court *a quo* relates to the acknowledgement of debt between the parties.

Ms Malaba, for the respondent submitted that the debt owed by the appellants to the respondent is a foreign obligation in the reading of 44C (2) (b) of the Reserve Bank Act. It is contended that this is a debt by a Zimbabwean resident and a Zimbabwean registered entity to a non-resident entity. In her heads of argument and oral submissions, *Ms Malaba* argued that the signing of the acknowledgement of debt did not create a new contract independent from the underlying agreement, i.e. the credit agreement.

For a debt to be a foreign obligation, the creditor must be resident outside Zimbabwe. The nationality of the creditor is irrelevant, it is his residence that matters. The respondent is a company registered in South Africa. It has no place of business in Zimbabwe. Its address is 20 Milkyway Avenue, Linbro Business Park, Sandton, South Africa. It is a non-resident foreign entity in Zimbabwe. See *Breastplate Service (Private) Limited v Cambria Africa PLC* SC 66/20.

The appellants are seeking refuge in the contention that the debt is not a foreign obligation. There is an attempt to distinguish the credit agreement and the acknowledgment of debt. It is argued that the cause of action is anchored on the acknowledgment of debt, which then makes the debt a local obligation.

As regards the transaction between the parties, it is not in dispute that what was sold by the respondent to the appellants are computer software and hardware. There is evidence on record, in the form of freight charges, which shows that the goods sold and

delivered to first appellant where brought into Zimbabwe from South Africa. In short, a foreign company sold goods to a local company.

In the particulars of claim, it is pleaded that plaintiff and the 1st defendant entered into a Credit Agreement in terms of which the plaintiff supplied goods namely computer software and hardware at the 1st defendant's special instance and request. The second defendant bound himself as surety and co-principal debtor.

In their plea, appellants' first deny the signature on the acknowledgement of debt, and place in issue the authenticity of the acknowledgment of debt. Further, in *paragraph 10* of the plea, appellants pleaded as follows:

No issues arises save that the 2nd defendant has discharged his obligations in full to the plaintiff in terms of their credit sale agreement and attaches proof of such payment as annexure 'A'. (My emphasis).

Again, the acknowledgement of debt states that the amount has become due arising from goods sold and delivered to the 1st appellant during the period February 2012 to May 2013, at its instance and request.

In its heads of argument, respondent argue that the signing of the acknowledgement of debt did not create a new contract independent from the underlying agreement. It rather confirmed the obligations arising from the initial contract. I agree. I take the view that the cause of action is the credit sale agreement between the parties. The acknowledgement of debt was not the cause of action but merely a second layer of protection given to the respondent. It was nothing more than a continuing protection for the respondent. The acknowledgement of debt does not constitute a novation of the initial credit agreement and the obligations and undertakings of the parties have their origin in the initial undertakings and obligations attributable to them in the credit agreement. The obligations under the credit agreement and those under the acknowledgement of debt were thus interdependent.¹ This can only mean that, in substance, the acknowledgement of debt guarantees appellants' obligations under the initial credit agreement. The attempt to distinguish the credit agreement from the acknowledgement of debt is futile, it is just a distinction without a difference. See *Da Silva v Slip Knot Investments* (661/2009) [2010] ZASCA 174 (2 December 2010).

¹Cf *Adams v SA Motor Industry Employers Association* 1981 (3) SA 1189 (A) 1199G-H.

It was not the intention behind S.I. 33 of 2019 to strike at an obligation of the kind involved in this case. Section 44C(2)(b) of the Reserve Bank Act, as inserted by s 3(1) of the 2019 Regulations, makes it clear that the issuance of any electronic currency, *i.e.* RTGS dollars, shall not affect or apply to any foreign obligation. This is reinforced by s 4(1)(d) of the Regulations which explicitly excludes foreign obligations valued and expressed in United States dollars from the deemed parity valuation in RTGS dollars. See *Breastplate Service (Private) Limited v Cambria Africa PLC* SC 66/20,

To conclude on this aspect, the currency of payment intended by the parties was United States dollars. Moreover, the obligation incurred by the appellant was a foreign obligation denominated in foreign currency within the contemplation of S.I. 33 of 2019. That obligation therefore continued to be payable in foreign currency, even after the effective date, *i.e.* 22 February 2019. What the parties intended and what they transacted unquestionably gave rise to a foreign obligation. It follows that the first and second grounds of appeal are without merit and must accordingly be dismissed.

Costs

Respondent seeks costs on a legal practitioner and client scale. More than 100 years ago, Innes CJ stated the principle that costs on an attorney and client scale are awarded when a court wishes to mark its disapproval of the conduct of a litigant. See *Orr v Solomon* 1907 TS 281. Since then, this principle has been endorsed and applied in a long line of cases and remains applicable. Over the years, courts have awarded costs on an attorney and client scale to mark their disapproval of fraudulent, dishonest or *mala fides* (bad faith) conduct; vexatious conduct; and conduct that amounts to an abuse of the process of court. See *Public Protector v South African Reserve Bank* [2019] ZACC 29.

The scale of attorney and client is an extraordinary one which should be reserved for cases where it can be found that a litigant conducted itself in a clear and indubitably vexatious and reprehensible manner. Such an award is exceptional and is intended to be very punitive and indicative of extreme opprobrium. It should only be in relation to conduct that is clearly and extremely scandalous or objectionable that these exceptional costs are awarded. See *Plastic Converters Association of South Africa on behalf of Members v National Union of Metalworkers of SA* [2016] ZALAC 39; [2016] 37 ILJ 2815 (LAC).

To mulct a litigant in punitive costs requires a proper explanation grounded in our law. All of the above said, these are costs that are meant to be penal in character and are therefore supposed to be ordered only when it is necessary to inflict some financial pain to deter wholly unacceptable behaviour and instil respect for the court and its processes.

The punitive costs mechanism exists to counteract reprehensible behaviour on the part of a litigant. The question whether a party should bear the full brunt of a costs order on an attorney and client scale must be answered with reference to what would be just and equitable in the circumstances of a particular case. See *De Lacy v South African Post Office* [2011] ZACC 17; 2011 JDR 0504 (CC); 2011 (9) BCLR 905 (CC) at paras 116-7 and 123 A court is bound to secure a just and fair outcome. A punitive costs order is justified where the conduct concerned is “extraordinary” and worthy of a court’s rebuke.

In support for costs on a legal practitioner and client scale, respondent contends as follows:

- i. When summons was issued, the appellants first pleaded prescription, when it was clearly not applicable. They took this all the way to a hearing in 2017 and capitulated.
- ii. Being required to file a plea, they then turned to attack the acknowledgment of debt. Knowing well that this defence was nothing less of fraudulent, the appellants pushed forward to try and do everything possible to avoid payment of the debt.
- iii. At the hearing in 2019, the appellants consented to judgment being entered against them and have now sought to clutch on legislation that they are clearly and expressly excluded.
- iv. Once again in an attempt to defeat justice and prevent payment to the South African creditor of its dues.

I agree.

In its heads of argument, respondent contends that what is before court, is a Zimbabwean entity and resident who have refused to honour their obligations. Instead they have fought for eight years to not pay their obligations to the South African company, and are now regrettably seeking assistance from the court to relieve them of

their foreign currency obligations under the guise of legislative changes which do not apply to their obligations to the respondent. I agree.

I wish to add that that cross border trade is lifeblood of commerce. Zimbabwe trades with its regional neighbours, and it must maintain a reputation of honesty and integrity in such trade. Otherwise, trust in Zimbabwe and its business persons could be irreparably damaged. The conduct of the appellants endanger the reputation of Zimbabwe in regional trade. Such conduct must be rebuked by an order of costs on a legal practitioner and client scale.

Disposition

It is on the basis of the foregoing reasons that this appeal is dismissed in its entirety with costs on an attorney – client scale.

Takuva J I agree

Kantor and Immerman, applicant's legal practitioners
Mashayamombe & Co. Attorneys, respondent's legal practitioners