ROBSON MAKONI
versus
THE COLD CHAIN PRIVATE LIMITED t/a SEA HARVEST

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 9 February 2015, 25 February 2015

Opposed Application

A Debourbon, for the applicant
L Uriri for the respondent

CHIGUMBA J: Should our courts be courts of law or courts of justice? One would presuppose that the law is justice and that justice is the law. To the ordinary man, i.e. one who is untutored in the practice of the law and the pursuit of justice, it would appear that law and justice have a symbiotic relationship; one is nothing without the other. Yet, those who practice the law, will know that, often times than not, the rigid application of the law may lead to a palpable injustice. That is why the law is fluid, meaning that its application depends on the circumstances before the court. The law must be applied to avoid perpetrating an injustice, especially where the extent of the injustice would be the non suiting of a litigant, leaving the litigant with nowhere else to turn, as it were. That is not to say that non deserving litigants should be shielded from the inevitable consequences that flow from a correct application of the law. On the contrary, it is my view that, our courts should be courts of law that derive their authority and legitimacy from a fair and impartial application of the law, in the pursuit of justice, and fairness.

The applicant filed a court application before this court on 8 May 2011 seeking an order for the amendment of the judgment handed down by this court on 23 January 2008, under case number HC 4252/2001. The order of January 2008 reads as follows:

Judgment is entered in favor of the plaintiff as follows: That Defendant pays;

(a) BP63 750 as replacement value for his damaged vehicle.

(b) &83 717-09 for medical expenses.

(c) BP 1800 000 for loss of income.

(d) $3.50 for towing charges.

(e) BP 12 000 000 for car hire charges.

(f) $ 2000 000 for pain and suffering.

(g) $850 000 for disability.

(h) $1 000 000 for future medical expenses.

(i) Costs of suit.

The order sought by the applicant in this matter relates to the Zimbabwe dollar component of that order. The applicant seeks an order that the judgment of this honorable court in case number HC 4252/2001, dated 23 January 2008 be amended as follows: - That the Defendant pays to the Plaintiff:

1. USD$ 2, 790-60 for medical expenses.
2. USD$ 116-66 for towing charges.
3. USD$66 666-67 for pain and suffering.
4. USD$28 333-30 for disability.
5. USD$66 666-67 for future medical expenses.
6. Interest at the prescribed rate of 5 % per annum calculated from the date of judgment to the date of payment.
7. Costs of suit.

It is common cause that the respondent has paid in full for the component of the 2008 judgment which provides for payment in Botswana Pula, in terms of the order of the Supreme Court dated 28 February 2012. It is common cause that payment of the Zimbabwe dollar component of the 2008 judgment remains outstanding, although respondent has tendered this payment to the applicant. It is common cause that the applicant did not attempt to execute in respect of the Zimbabwe dollar component at the date of the judgment in 2008, and that, in 2009, Zimbabwe adopted a multicurrency regime. It is also common cause, that

after the accident the applicant was disabled. The applicant has come before this court and avers that he requires urgent medical attention. He has attached a quotation from a medical specialist Mr. Bijay B. Garach, dated 23 March 2012, to show that he requires an estimated USD$279 400-00 for surgery in Durban South Africa. The purpose of the surgery is to correct a condition of stiffness in the right knee which is possibly related to a fracture and muscle tightness, and to an associated knee joint injury. Mr. B.A.V. Ncube, a specialist orthopedic surgeon, certified that the applicant is in pain and gross discomfort in his right foot, on 4 June 2012, and that he needs further surgery to remove the implants and to fuse his mid-foot and correct his mal-aligned toes.

The applicant is currently unemployed and has urgent need for funds in order to access the medical assistance he requires. On 24 October 2012, the applicant's Legal Practitioners addressed a letter to the respondent, to which they attached the judgment of 23 January 2008. In the letter, respondent was reminded that the Zimbabwe dollar component of the judgment remained unpaid, in a total of ZWD$ 4 937 217-09. It is common cause that the Zimbabwean dollar has fallen into disuse. Respondent was advised that the applicant had approached the Reserve Bank of Zimbabwe which had confirmed that as at 23 January 2008, one United States dollar was equivalent to ZWD$30 000-00. Converting ZWD$3 937 212-10 to USD translates into USD$164 573-90. Interest at the prescribed sum translates to USD$41 143-47. The total demanded from the respondent is USD$205 717-38.

In a letter dated 8 November 2012, respondent, through its legal practitioners, tendered the ZWD$ to the applicant, on the basis that the Zimbabwean dollar was still valid currency, and that, it being the currency of the judgment which the applicant was seeking to enforce, that is the currency in which applicant should be paid. The computation of the interest was brought into question. In a letter dated 19 November 2012, applicant's legal practitioners explained that interest had been calculated at the prescribed rate of interest from February 2008. In par 12.1-14 of the founding affidavit applicant avers that:

> "I need to execute against the respondent. I need to have the judgment in my favor sounding in Zimbabwe dollars **amended** to reflect United States dollars so that I am paid in a currency that I will be able to use. I submit that the Zimbabwe Dollar is now moribund and has fallen into disuse. It is no longer the currency in use at the moment.

> There is no point in giving me, as Respondent contends, the Zimbabwe dollars as I will not be able to use them to access the medical attention that I so badly and urgently require. I submit that I am entitled to effective remedies and giving me Zimbabwean dollars is hardly such effective remedies". (my emphasis)

The notice of opposition was filed of record on 30 May 2013. Mr. Charles Stewart Gardiner deposed to the opposing affidavit on behalf of the respondent. He is a son of the managing director of the respondent, and himself a director of the respondent company. He averred that the applicant should apply to the court which granted the judgment in question for the judgment to be corrected in accordance with the rules of this court. Mr. Gardiner denied that applicant had a right to correct the judgment in terms of the rules of this court. He denied that the applicant was permanently disabled, although he accepted that the applicant was injured in the accident. He emphatically declared that the applicant was dishonest and that he had fraudulently exaggerated his injuries and allegations of disability. He denied that the applicant is in urgent need of medical attention. He reiterated that applicant has already received a sum of USD$90 332-24 from the respondent and averred that this amount ought to have been more than sufficient to fund whatever medical attention applicant allegedly requires.

It was admitted that the respondent is bound by the terms of the Supreme Court Order. The respondent expressed certainty that the applicant's awards which emanated from this court were based on fraud, fraudulent documents and perjured evidence, and referred the court to its application for leave to adduce further evidence which it filed before the Supreme Court simultaneously with its appeal under case number SC19-2008. Mr. Gardiner averred that the court should have regard to the independent expert evidence that was filed before the Supreme Court to prove the allegations of fraud against the applicant. He reiterated that the Respondent believed that it was obliged to effect payment in the amount claimed by the applicant and awarded to him by the court. It was denied on behalf of the respondent, that it was to blame for the applicant's hardship because the basis of the liability of the respondent arises entirely from a finding of vicarious liability for the negligence of its former employee.

Three issues fall for determination by this court. The first one is whether this court has jurisdiction to entertain this matter. The second issue for determination is whether it is

competent for this court to award payment in United States dollars, in respect of a judgment sounding in Zimbabwean dollars. Finally, we must determine whether it is competent to determine the rate of exchange by which the conversion may be made.

Jurisdiction

It was submitted on behalf of the applicants that the High Court has jurisdiction to deal with any matter that is placed before it and that, there is nothing amiss in this court dealing with a matter arising out of a judgment of this court. The court was referred to the case of *Fleximail (Pvt) Ltd* v *Gift Bob David Samanyau & 3 Ors* [1] as authority for this proposition. The court perused the judgment of the court *a quo*[2]. The issue for determination, as it was understood by that court was that the applicants had approached that court since it was the only court with inherent jurisdiction seeking a *declaratur* that the principle of currency nominalism has no place in Labour law (i.e. a common law principle) as it would be at variance with the Labour Act's aim of achieving social justice. The applicants sought a further *declaratur* that to the effect that damages in lieu of reinstatement have to be paid in an effective manner, that is, in an amount, currency and quantity that achieves fairness as required by the Labour Act. A further order compelling the respondent to pay damages in USD was sought. The principle relied on by the applicants was that a successful appellant ought to have the discretion to choose payment of damages in the currency that will redress the injury suffered and adequately compensate him for the loss as well as fulfill the objectives of the Labour Act.

The respondent had opposed the relief sought by the applicants before the High court, on the basis that the matters raised had been canvassed and dismissed by the Labour Court and were therefore *res judicata,* that this matter was purely a labour issue by virtue of s 89(6) of the *Labour Act [Chapter 28;01],* that the court was being asked to usurp the role of Parliament by repealing the common law principle of currency nominalism and that the court was being asked to 'overrule" those decisions of the Supreme Court which had already made

[1] SC21-2014

[2] HH 108-11 HC5710-09

the point that in quantifying damages in labour disputes, the rates that are applicable are those that applied at the time of dismissal or suspension. The High Court took the view that it was the only court with power to issue declaratory orders. On the issue of usurping the role of Parliament, the High Court took the view that 'it is not impermissible for the judiciary to make law by way of decided cases if an opportunity presents itself to plug a legislative gap especially where not to do so will leave many an unlawfully dismissed employee languishing in an asylum of financial misery'.

On p 5 of the judgment the High Court postulated the question of whether, in the circumstances of the case before it, it ought to declare that ***'in the realm of employment relations', the principle of nominalism has for now, no place until economic normalcy has been restored'***. (my underlining for emphasis. Clearly the High Court limited the application and scope of its judgment, to the realm of employment relations, and to the period during which there was lack of economic normalcy. It applied the principles of equity, and enjoined itself to 'tread a path that will avoid iniquity and injustice where legislative intervention is not forthcoming'. The High Court ordered the respondent to pay damages in USD using the official exchange rate obtaining as at 5 July 2007. The respondent appealed. The appeal and cross appeal came before a five member bench of the Supreme Court on 11 September 2013. The judgment of the Supreme Court was to allow the appeal to the extent of setting aside the judgment of the High Court for lack of jurisdiction. It was held, with the consent of both parties, that the matter should have been determined by the Labour Court.

It is this court's view that it would not be proper to rely on principles which were enunciated in the context of labour disputes, which differ materially from the matter under consideration, and in respect of which certain principles underline their conduct, which are not applicable here, such as social justice and equity. The court is bolstered in its view by the recent judgment of the Supreme Court *Madhatter Mining Company* v *Marvelous Tapfuma*[3]**,** where the court stated that the ***Samanyau*** judgment had been overturned on appeal and could no longer be cited as authority or as a basis on which a court can convert damages awarded in

[3] SC 51-14

Zimbabwe dollars to United States dollars. The vexing question of whether the USD amount would give true value to the damages that the respondent would be entitled to was posed by the court. True value was defined as a value that would 'neither overcompensate the respondent nor inadequately do so'. Other pertinent considerations for a court faced with the question of converting Zimbabwe currency to USD$ were the issue the two main Zimbabwe dollar to USD$ exchange rates which obtained prior to 2009, i.e. the official and the unofficial rates. (See page 14 of the cyclostyled judgment) Finally the Supreme Court emphasized that it is the Labour Court-and not the Supreme Court- which in endowed with jurisdiction to apply principles of equity in its determination of labour disputes, based on the provisions of section 2A of the Labour Act. See *Horace Nzuma & 2 Ors* v *Hunyani Paper & Packaging*[4]**.** I accepted the submission made on behalf of the respondent that this court has no similar jurisdiction to that of the Labour Court, to determine disputes on the basis of social justice, or principles of equity.

The Labour Court in the ***Madhatter*** case was then given guidance by the Supreme Court, and the matter was remitted back to it for the determination of the following issues:

(a) What is the effect of the change of currency effected in February 2009 on debts occurring before the effective date?
(b) Does the Labour Court have power to order payment in the operational currency (the United States dollar) of debts incurred under the Zimbabwe Dollar currency which, though not demonetized, is no longer in use?
(c) Has the principle of currency nominalism any application to the circumstances of this case?
(d) The method of calculating the quantum of the debt in current realizable currency if the conclusion of the above issues is in favor of payment in United States dollars.

These questions given for the guidance of the Labour Court are regurgitated here, in the realization that these are the same questions that this court may have to determine if the question of jurisdiction in this matter before it is resolved in favor of the applicant.

[4] SC 137-11.

In defence of this claim, the respondent raised the main point of the absence of jurisdictional basis on which the court can 'change' or 'convert' a judgment that was given by it, in January 2008. I am grateful to counsel for the respondent for the extensive heads of argument filed of record, which appeared to have been tailored to respond to the questions for guidance which were issued by the Supreme Court as listed above, for the guidance of the Labour Court. It was submitted on behalf of the respondent, that if there is such a jurisdiction, there is a dispute as to whether it can be exercised five years after the original judgment and one year after the judgment of the Supreme court in which the matter was not raised, whether the conversion is to take place on the date of the judgment or on the date on which payment is made, what the proper rate of exchange would be, whether the conversion can be made in respect of those heads of damages which were incurred and paid for in Zimbabwe dollar currency and awarded as special damages at trial, and finally the *bona fides* of the applicant.

The respondent submitted that medical expenses and towing charges are special damages which were incurred in Zimbabwe dollars, not United States dollars. The loss was incurred 15 years ago in Zimbabwe dollars, the damages were alleged and proved seven years ago in Zimbabwe dollars, the respondent disputed the applicant's entitled to interest at the prescribed rate, or at any rate, on the basis that the prescribed rate of interest sought to be relied on was only introduced on 23 October 2009 by **S.I. 164-2009**, and backdated to 23 October 2008. Finally, respondent submitted that, in respect of the three heads of general damages that applicant now seeks payment for in foreign currency, which was not available to him, and which he did not seek, at the time of the trial, those damages are not due to him in any other currency other than the currency that he claimed them in.

It is trite that the cause of action for the relief being sought must be found in the founding affidavit. See *Poseidon Ships Agencies (Pty) Ltd* v *African Coaling and Exporting Co (Durban) (Pty) Ltd* [5], *Director of Hospital Services* v *Mistry*[6], *Dajen (Pvt) Ltd* v *Durco*

[5] 1980 (1) SA 313 (D)

[6] 1979 (1) SA 626 (A) @ 635 H-636B

(Pvt) Ltd [7], *Mangwiza* v *Ziumbe NO & Anor* .[8] It was submitted on behalf of the respondent that the founding affidavit does not disclose the cause of action to support the relief sought. It was submitted, correctly in my view, that applicant's need for urgent medical attention is not a jurisdictional basis for the relief sought. It was contended that the fact that the Zimbabwe dollar is now moribund and has fallen into disuse, and that, there is no point making payment in it, again affords the applicant no jurisdictional basis for the relief sought. Finally, it was submitted that to plead a*d misericordiam* that he is entitled to an effective remedy does not assist the applicant at all.

It is common cause that upon the introduction of the multi-currency basket in January 2009, Parliament did not see fit to introduce any legislation to enable this court to look at judgments given before January 2009. It was contended that, in the absence of legislative authority that enables this court to look at judgments given in Zimbabwe dollars before dollarization in January 2009, we must be guided by the usual common law Rules. I find myself in full agreement with these statements of the law as it currently stands. However, in case I am wrong in my view that there is no jurisdictional basis on which this court may grant the relief sought by the applicant, I will proceed to deal with the merits of the matter.

The law that underlies the legal principle of *Functus Officio* was summarized in the case of *Firestone South Africa (Pty) Ltd* v *Genticuro* [9]as follows:

> "The general principle, now well established in our law, is that, once a court has duly pronounced a final judgment or order, it has itself no authority to correct, alter, or supplement it. The reason is that it thereupon becomes *functus officio*, its jurisdiction in the case having been fully and finally exercised, its authority over the subject matter has ceased. See *West Rand Estates Ltd v New Zealand Insurance Co ltd, 1926 AD 173 @ p176, 178,186-7 and 192; Estate Garlick v Commissioner of Inland Revenue 1934 AD 499 @p 502…*There are however a few exceptions to the rule which are mentioned in the old authorities and have been authoritatively accepted by this court…provided the court is approached within a reasonable time of its pronouncing the judgment or order, it may correct, alter or supplement it in one or more of the following cases:

[7] 1998 (2) ZLR 235 (SC) @ p257

[8] 2000 (2) ZLR 489 (SC) @ 429

[9] 1977 (4) SA 298 (A) @ 306-307

(i) the principal judgment or order may be supplemented in respect of accessory or consequential matters for example costs or interest on the judgment debt, which the court overlooked or inadvertently omitted to grant…

(ii) the court may clarify its judgment or order if on a proper interpretation, the meaning thereof remains obscure, ambiguous or otherwise uncertain, so as to give effect to its true intention, provided it does not thereby alter "the sense and substance" of the judgment or order…

(iii) the court may correct a clerical, arithmetical or other error in its judgment in order to give effect to its true intention…

(iv) where counsel has argued the merits and not the costs of a case…but the court makes an order granting costs…it may thereafter correct, supplement or alter the order…"

The submission that none of these exceptions apply to the applicant was accepted by the court, as well as reference that the principle of finality in litigation. (*interest reipublicae ut sit finis litium)* is a part of our law. See *Matanhire* v *BP Shell Marketing Services (Pvt) Ltd*[10], *Maheya* v *Independent Africa Church*[11]**.** This court also accepted as correct, the submission made on behalf of the respondent, that the present application is not intended to supplement, clarify or correct the judgment of January 2008, but to alter its substance. The alterations are not incidental or consequential corrections, but go to the very heart of the orders made. In respect of towing charges and medical expenses already incurred, the purpose of the application is to change the very basis of the currency in which those special damages were incurred. In respect of the three headings of general damages, the application intends to change the basis on which those damages were sought, when those damages were suffered in Zimbabwe, in the currency of payment then prevailing.

It is common cause that there was a considerable delay by the applicant, in bringing this application, the original judgment having been handed down in January 2008 and the use of the United States dollar having been authorized by January 2009. The appeal was heard in October 2010 and the Supreme Court judgment handed down in February 2012. Nearly 15 years have passed since the accident in question and Four and half years since dollarization. No explanation

[10] 2005 (1) ZLR 140 (SC) @ 146-147

[11] 2007 (2) ZLR 319 (SC) @ 324H-325B

was given by the applicant for the inordinate delay in making this application. Any application to correct or supplement an order, whether in terms of the common law or under r 449 of the ***High Court Rules 1971***, must be brought as soon as possible, or at the very least within a reasonable period. See *West rand Estates Ltd* v *New Zealand Insurance Co Ltd*[12]**,**

The leading cases on currency nominalism in this court merit discussion. In *Shava* v *Bergus Investments (Pvt) Ltd* [13]**,** a full bench of this court, through my brother Mutema J and Chiweshe JP concurring, held that a party cannot revalue a judgment debt for purposes of execution. Citing *Mukorera* v *Ocean Breeze Engine and Cooling Systems*[14] the court held it to be trite that the principle of currency nominalism was part of the law of Zimbabwe. The court held that, to allow a party to change the currency of the judgment was 'not only incompetent for arbitrariness but offended against the time honored principle of currency nominalism'. The court said the following, at 343E:

> "That principle holds 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 the currency".
>
> The court also said at page 344:
>
> "It is beyond argument that the first respondent's debt sounded in money and the judgment was given in March 2008 with the specific directive that the values of whatever was damaged by the appellant were to be as at the time of judgment. The values were in Zimbabwe dollars and not in US dollars. The principle of currency nominalism was therefore still applicable. It was accordingly idle for the first respondent to revalorize its claim on execution. ***It ought to have made a court application for the conversion of the currency".*** (my underlining for emphasis)

Counsel for the respondent, Mr *Debourbon*, submitted that, before this court came to above underlined conclusion, it ought to have examined in greater detail, the impact of the 'once and for all rule' and of the submission that the court cannot 'convert' the currency on application because it will be *functus officio.* I found this view persuasive. It was submitted further, that

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[12] 1926 AD 173 @ 179

[13] 2011 (2) ZLR 340 (HC)

[14] HH 13-08 (Unreported)

reliance on the *Mukorera* case should not have led the court to the conclusion that it came to, because in that case, the court was emphatic in its view that:

> "…the distortions caused by inflation in the economy should not lead to the wholesale distortion of legal principles that have withstood the test of time in a bid to find legal solutions to a problem that is not legal in nature and origin and may prove to be transient. I am yet to be persuaded that revalorization is part of our law of debt collection".

In conclusion, this court's opinion on the issue of currency nominalism, in the circumstances of this case, is that, while on the whole this court has inherent jurisdiction to ensure that the process of execution is neither abused nor unfair, it does not have jurisdiction to rewrite an order in the manner sought by the applicant. I hold the considered that, this court cannot revalue an order for the purpose of execution, let alone completely rewrite an order granted nearly seven years ago. Any such power would have to be the consequence of legislation, which currently does not exist in Zimbabwe.

Under the common law, and as a protection against loss of value of a judgment, where a litigant has suffered a loss that can properly be expressed in foreign currency the court can enter judgment in foreign currency, but payment must be made in local currency converted as at the date of payment. See *Makwindi Oil Procurement (Pvt) Ltd* v *National Oil Company of Zimbabwe*[15], where the court said that:

> "Fluctuations in world currencies justify the acceptance of the rule not only that a court order may be expressed in units of foreign currency, but also that the amount of the foreign currency is to be converted into local currency at the date when leave is given to enforce the judgment. Justice requires that a plaintiff should not suffer by reason of devaluation in the value of the currency between the date on which the defendant should have met his obligation and the date of actual payment or the date of enforcement of the judgment. Since execution cannot be levied in foreign currency, there must be a conversion into local currency for this limited purpose and the rate to be applied is that obtaining at the date of enforcement".

See also *Standard Chartered Bank of Canada* v *Nedperm Bank Ltd*[16], where it was stated that;

[15] 1988 (2) ZLR 482 (SC) @ 492

[16] 1994 (4) SA 747 (A) @ 777

> "…the damages to be awarded in this case should be expressed in US dollars. It is implicit in any order to this effect that the judgment debt may be satisfied in South Africa by payment in the foreign currency or by payment of its equivalent in Rand when paid".

This court is persuaded by the contention, which is supported by various decisions by the Supreme Court and the High Court, that, had the judgment in this matter been sought and made after January 2009, even in respect of an accident that occurred before that date, judgment could be granted in foreign currency as being the effective currency to redress the loss. As further authority for this proposition, see *Kwindima* v *Mvundura*[17]**.** However, in this case judgment was sought prior to January 2009, specifically in Zimbabwe dollars, and quite clearly Zimbabwe dollars is the currency in which the losses were sustained. Section 41 of the ***Reserve Bank of Zimbabwe Act* [*Chapter 22; 15]*** reads:

> "**41 Legal tender of banknotes**
> (1) A tender of a banknote which has been issued by the Bank and which has not been demonetised in terms of subsection (2) shall be legal tender in payment within Zimbabwe of the amount expressed in the note.
>
> (2) The President may, by statutory instrument, call in and demonetise any banknotes issued by the Bank, and shall likewise determine the manner in which and the period within which payment for such banknotes shall be made to the holders thereof".

It is common cause that the President has not demonetized the Zimbabwe currency in terms of the ***Presidential Powers (Temporary Measures) (Currency Revaluation and Issue of New Currency) Regulations 2009, as confirmed by the Finance Act 2009,*** and that, he had not done so at the time that this application was filed, on 8 May 2013

Section 44 of the ***Reserve Bank of Zimbabwe Act*** provides that:

> **"44A Legal tender of foreign currencies**
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> The Minister may, in regulations made under section 64, prescribe that, subject to such conditions as may be specified in the regulations, a tender of payment in any currency other than Zimbabwean currency shall be legal tender in all transactions or in such transactions as may be specified in the regulations."

[17] 2009 (1) ZLR 168(H)

It is submitted on behalf of the respondent, quite correctly in my view, that this provision does not render the Zimbabwe currency to be moribund, but that, it allows foreign currencies to be treated as legal tender, in addition to the Zimbabwe currency. It was correctly submitted in my view, that there is no statute or other legal instrument that has abolished or suspended the existence of the Zimbabwe currency. Accordingly, as a matter of law, if not practice, the Zimbabwe currency still exists. See *Stuart* v *National Railways of Zimbabwe*[18]**.** If any conversion is to take place for the purposes of allowing the enforcement of a judgment granted before February 2009 In Zimbabwe currency, it must be done at the rate prevailing on the ***date of payment,*** not the date of judgment. (My underlining for emphasis). The Legislature in its wisdom only enacted s 44A of the ***Reserve Bank Act***, and did see fit to provide a further framework to guide us on how to dispose of these matters. If the applicant's judgment has been rendered incapable of being satisfied through lack of a Legislative framework that regulates its execution, then applicant's remedies must lie with the Legislature.

The applicant seeks to use the date of judgment as the date on which conversion into US dollars is to be made, and seeks to use the rate of exchange allegedly applicable on that date. However, it is pertinent to note that, at the date of the judgment, January 2008, the use of United States dollars in Zimbabwe was not permitted, and any judgment given in United States dollars as being the currency in which the loss was sustained could only be satisfied by the payment of Zimbabwe currency as at that date. This court lacks that jurisdictional basis to make any conversion as at the date of judgment because such conversion would at that time have been contrary to exchange control legislation. Any attempt to do a conversion as at the date of the judgment would in effect be to render a completely new judgment, in breach of the once and for all rule.

The 'once and for all rule' is a common law rule that stipulates that a plaintiff must claim in a single action compensation for the damage he has already suffered and the prospective

[18] HB 7-2012-Unreported

loss which he reasonably expects to suffer in future. See *Oslo Land Co Ltd* v *Union Government*[19]**,** *and Custom Credit Corporation (Pty) Ltd* v *Shembe*[20]**.**

In his book *The Law of Delict Professor Boberg* sums up the common law position as follows:

> "A single wrongful act gives rise to a cause of action for all damage-past and future-that it causes. This means that a plaintiff cannot claim compensation piecemeal for his various losses as they occur: he must sue "once and for all" for the whole of his damage, seeking redress not only for the harm he has already suffered (actual or accrued loss) but also for the harm he expects to suffer in the future (prospective loss). And if he succeeds he will generally be awarded damages in a lump sum, payable immediately, in respect of both past and future losses".

See also *Elvins* v *Shield Insurance Co Ltd* [21] where the court said:

> "The 'once and for all' rule applies especially to common law actions for damages in delict, though it has also been applied to claims for damages for breach of contract…Expressed in relation to delictual claims, the rule is to the effect that in general a plaintiff must claim in one action all damages…This rule appears to have been introduced into our practice from English law. Its introduction and the manner of its application by our courts have been subject to criticism…but it is a well entrenched rule. Its purpose is to prevent a multiplicity of actions based upon a single cause of action to ensure that there is an end to litigation".

In *Dube* v *Banana* [22]The law in Zimbabwe was stated in the following terms:

> "Our law recognizes the 'once and for all rule' which states that a plaintiff, when suing for damages, must sue for all his damages in a single action, both for loss suffered and for prospective loss…In my opinion the once and for all rule should be modified. I consider this can best be done by an act of parliament rather than by 'judge made law', which is, by its very nature haphazard and piecemeal. The law Development Commission of Zimbabwe issued a report entitled report No. 43: 'Once and for all rule in claims for damages', in which, as the title suggests, it examined the rule and in which it made recommendations for its reform".

Parliament has not intervened to change the law.

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[19] 1938 AD 584 @ 589

[20] 1972 (3) SA 462 (A) @472

[21] 1980 (2) SA 814 (A) @ 835A-E

[22] 1998 (2) ZLR 92 (HC) @ 94, @ 105

This court accepts as a correct application of the law to the circumstances of this case that the applicant has had his once and for all right to claim damages for the injuries which he sustained in the accident. He elected to litigate for those damages in 2008. He claimed those damages partly in Zimbabwe currency and partly in Botswana Pula. He received the awards he sought. He had a further opportunity to recast his case before the Supreme Court in October 2010 when the appeal was heard, which was after dollarization. He chose not to do so, or to seek the leave of the Supreme Court, to have the Zimbabwe dollar component of the judgment 'converted' to a currency that he could use. The Supreme Court, on application for its leave, would have had an opportunity for 'judge made law' to decide whether to remit the matter back to this court for evidence to be adduced, on the question of the 'conversion' of the Zimbabwe dollar component of the judgment, to a currency of the applicant's choice. The applicant cannot now come back to this court seeking to change the judgment given to him. The applicant has already had his day in court he cannot now come for a second judgment arising out of the same circumstances as the first.

Res Judicata is a rule that matters which have already been adjudicated upon between the same parties cannot be adjudicated again. It is a consequence of the 'once and for all rule'. In *Union Wine Ltd* v *Snell and Co Ltd* [23] the Judge said:

> "Although it is not clear from the cases whether the 'once and for all' rule is just a manifestation of the *exception rei judicatae* or whether it has a wider range than the latter, it is settled practice in South Africa that where a cause of action gives rise to more than one remedy a plaintiff who pursues one of those remedies and has obtained a judgment thereupon can be met with a plea of *res judicata* if he should institute a second action to pursue one of the other remedies".

It is common cause that the parties before this court are the same as those before the court in 2008. It is common cause that the cause of action is the same, and that damages are being sought pursuant to that cause of action. In the January 2008 judgment this court decided that the applicant had suffered damages which required to be redressed by the payment of Zimbabwe currency. This court accepts that all those issues are now *res judicata* and cannot be re-opened.

[23] 1990 (2) SA 189 © @ 196

In the result, this court finds that it has no jurisdiction to grant the relief sought by the applicant, and that, no factual basis has been laid in the founding affidavit to justify granting the relief sought. The court is *functus officio,* the damages which the applicant seeks to be 'converted' to another currency now, were assessed and awarded in 2008. Any attempt to re-assess the award made in 2008 now, even if such assessment involves the calculation of the value of the damages in a different currency, would amount to changing the nature of the judgment given in 2008, a power which is only available to a superior court, on appeal. The matter cannot properly be determined by the improper use of this court's inherent jurisdiction. This court's inherent jurisdiction does not cloak it with power to re-determine issues between the same parties, which have already been conclusively determined. It may only do so on limited grounds, where it is directed to do so by a higher court, the Supreme Court, and on very specific directions. There being no such direction from the Supreme Court, to this court, it is trite that the issues between the parties are *res judicata.*

This court has no jurisdiction to exercise the same principles of social justice and equity as the Labour Court, and any attempt to rely on labour matters, as the basis for inviting this court to exercise powers that are specific to and pertinent to the Labour Court, will find no truck with this court. In the circumstances of this case, where 'accident damages' were assessed and awarded as special damages and general damages, under the law of delict, it is my view that, there is no factual or legal basis in the papers filed of record, on which this court can 'convert' a 2008 judgment made in Zimbabwe currency, to United States dollars. Despite this finding, this court respectfully declines to exercise its discretion and grant punitive costs against the applicant, as advocated for by counsel for the respondent.

Accordingly, the application is dismissed with costs on an ordinary scale.

Mbidzo, Muchadehama & Makoni, applicant's legal practitioners
Atherstone & Cook, respondent's legal practitioners