

MANICA ZIMBABWE LTD
versus
WINDMILL (PVT) LTD

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 21 September 2020 and 11 November 2020

Special Case

H. Mutasa, for applicant
E.T Moyo, for the defendant

DUBE J

[1] The parties have come to court on a stated case in terms of Order 29 rule 199.

[2] The plaintiff is Manica Zimbabwe Ltd, a freight company and the defendant, Windmill (Pvt) Ltd. Sometime in April 2018, the parties entered into a road freight agreement wherein the defendant hired the plaintiff to transport for reward a consignment of ammonium nitrate fertiliser which the defendant was importing into Zimbabwe. The consignment was transported from Beira, Mozambique to Harare, Zimbabwe. It is common cause that the defendant failed to pay the agreed freight charges in the sum off \$ 256. 085.00. Two trucks carrying 30 tons of fertiliser went missing and were not delivered to the defendant.

[3] The plaintiff issued summons against the defendants claiming payment of transportation charges arising from carriage of the defendant's consignment of fertiliser from Beira to Harare. The defendant counterclaimed in the sum of US\$ 36 000.00 being compensation for loss of its goods in two of the trucks used by the plaintiff.

[4] At the pre-trial conference, the defendant's claim was reduced to US\$29 100.00. The parties agreed to separate the plaintiff and defendant's claims and reached settlement on the plaintiff's claim in accordance with a deed of settlement in terms of which the defendant agreed to settle the plaintiff's claim. The parties agreed that there were no real dispute of facts regarding the defendant's claim or the plaintiff's liability for it. The only dispute was on the question of law regarding the currency in which the defendant's claim is payable. The parties resolved to refer the defendant's counterclaim as a stated case in terms of Order 29 rule 199.

[5] The court was asked to decide the following issue;

- “1. In what currency is the amount claimed by the Defendant for the loss of its goods due and payable?
2. Costs of suit”

[6] The issue is whether the defendant can claim for its loss in United States dollars. For the purposes of this judgment, and for convenience, the plaintiff in reconvention and the defendant in reconvention shall be referred to as the plaintiff and defendant respectively.

[7] Section 4 (1) (d) of S.I 33 of 2019 as ratified by s 22 of the Finance Act No2 of 2019 governs the legal issue at hand. Section 22 stipulates as follows;

“22 Issuance and legal tender of RTGS dollars, savings, transitional matters and validation.

- (1) Subject to section 5, for the purposes of section 44C (2) of the principal Act, the Minister shall be deemed to have prescribed the following with effect from the first effective date-
 - a) that the Reserve Bank has, with effect from the first effective date issued an electronic currency called RTGS dollar, and
 - b) that Real Time Gross Settlement system balances expressed in United States dollar(other than those referred to in section 44C (2) of the principal act) immediately before the first effective date, shall from the first effective date be deemed to be opening balances in RTGS dollars at par with the United States dollar, and
 - c) that such currency shall be legal tender within Zimbabwe from the first effective date, and
 - d) that, for accounting and other purposes(including the discharge of financial or contractual obligations), all assets and liabilities that were, immediately before the first effective date, valued and expressed in United States dollars(other than those referred to in section 44C (2) of the principal act) shall on the first 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 first effective date any variance from the opening parity rate shall be determined from time to time by the rate or rates at which authorised dealers exchange the RTGS dollar for the United States dollar on a willing buyer willing seller basis, and
 - f) every enactment in which an amount is expressed in United States dollars shall, on the first effective date(but subject to subsection (4), be construed as reference to the RTGS dollar, at parity with the RTGS dollar at parity with the United States dollar, that is to say, at one to one rate.”

[8] The implications of s 22 (1) (d) were considered and dealt with in *Zambezi Gas (Pvt) Ltd v N.R Barker* SC 3/20 where on p 9 the court stated as follows;

“In interpreting s 4 (1) (d), regard should be had to assets and liabilities which existed immediately before the effective date of the promulgation of S.I. 33/19. The value of the assets and liabilities should have been expressed in United States dollars immediately before 22 February 2019 for the provisions of s 4(1) (d) of S.I. 33/19 to apply to them. Section 4(1) (d) of S.I. 33/19 would not apply to assets and liabilities, the values of which were expressed in any foreign currency other than the United States dollar immediately before the effective date. If, for example, the value of the assets and liabilities was, immediately before the effective date, still to be assessed by application of an agreed formula, s 4(1)(d) of S.I. 33/19 would not apply to such a transaction even if the payment would thereafter be in United

States dollars. It is the assessment and expression of the value of assets and liabilities in United States dollars that matters”.

[9] On p 11 the court went on define the meaning of the words, “immediately before the effective date” as follows;

“... the words “immediately before the effective date” refer to the state in which the assets and liabilities, to which the provisions of s4(1)(d) of S.I.33/19 apply, should be in relation to the effective date, irrespective of how far back in time the asset or liability valued and expressed in United States dollars came into existence. The phrase “immediately before” means that the liability should have existed at a date before the effective date and that such liability should have been valued and expressed in United States dollars. The issue of the time-frame within which the liability arose in relation to the effective date of 22February 2019 does not matter. What is of importance is the fact that the liability should have been valued before the effective date in United States dollars and was still so valued and expressed. The judgment debt was ordered against the appellant on 25 June 2018. It was valued and expressed in United States dollars and was still so valued and expressed immediately before 22 February 2019.”

[10] The effect of the *Zambezi case* is that these provisions affect those assets and liabilities that existed prior to the effective date, were valued and expressed in United States dollars and were still so valued and expressed on the effective date, other than those referred to in section 44C (2) of the Principal Act, which shall be deemed to be values in RTGS dollars at a rate of one to one to the United States dollar. These legislative provisions prevent a court from awarding a judgment sounding in foreign currency unless in the case of the exceptions listed.

[11] The exceptions referred to are listed in s 44C of the Reserve Bank of Zimbabwe Act [*Chapter 22:15*], introduced by s 21 of the Finance Act (No. 2) Act, 2019 and stipulates as follows,

“With effect from the first effective date, the principal Act is amended by the insertion in Part VI (“Banknotes and Coinage”) of the following section after section 44B-

44C Issuance and Legal tender of electronic currency

44C (1) ...

(2) For the avoidance of doubt it is declared that the issuance of any electronic currency shall not affect or apply in respect of-

- (a) Funds held in nostrol foreign currency accounts, which shall continue to be designated in such foreign currencies; and
- (b) Foreign loans and foreign obligations denominated in any foreign currency, which shall continue to be payable in such foreign currency.”

One of the exceptions which is provided for in s 44 C (2) (b) regulates foreign obligations which are payable in United States dollars.

Did the liability arise before the effective date?

[12] The defendant was tasked to carry the consignment in issue on 25 April 2018. The loss occurred around the same month. As soon as the loss occurred, liability for the loss rested on the defendant. The effective date is in February 2019. The invoice is dated 9 January 2018. The claim in reconvention was instituted in March 2019, after the effective date and is based on the invoice. It is of no consequence that the claim was brought after the effective date. The plaintiff was as on this date clear that it had suffered a loss in terms of the invoice and in United States dollars. Clearly, liability arose before the effective date and hence the liability existed prior to the effective date.

Was the liability valued and expressed in United States dollars?

[13] The value of the fertiliser missing was initially given as US \$ 36.000.00 in the plaintiff's counter claim. This figure was revised and reduced to US \$ 29 100.00 by agreement of the parties at the pre-trial conference. The plaintiff argued that its claim was not yet ascertained, was unliquidated, and undetermined at least up to the time that the value was agreed on at the pre-trial conference around August 2019 and that s 22 (1) (d) does not apply .

[14] The valuation suggested, cannot mean anything beyond the process by which the claimant arrived at the quantum of its claim. The valuation was complete by the time the claim was instituted .The plaintiff's claim is a liquid claim which is supported by invoices and requires no further assessment. The figures involved are clear and are agreed to .There is no dispute over the actual figures involved. A pro forma invoice showing the value of the fertiliser was attached to the special case. The plaintiff in its own pleadings valued its claim and expressed it in United States dollars. Each tonne is valued at US \$ 485.00 giving a total of US\$29 100.00 for the 60 tonnes of fertiliser claimed. This explains the plaintiff's climb down on the figures. Liability was valued and expressed in United States dollars at the time the freight agreement was entered into and on the effective date.

[15] This is a stated case and there should be no disputes regarding the actual figures involved. There is no question of assessment of the claim. If there was, the parties would have proceeded by way of trial. All the court was asked to resolve is the question of currency.

[16] Both parties are Zimbabwean companies carrying on business in Zimbabwe. The cause of action arose in Zimbabwe. At the time of the loss, Zimbabwe utilised a basket of currencies and this explains why the claim and transactions are expressed in foreign currency. It was not disputed that the defendant sourced the currency that it used to pay for the consignment from the local market using currencies that were legal tender in Zimbabwe. This is not a foreign debt. This claim falls outside the exceptions referred to in s 44 C (2) of the Principal Act. The

liability arose prior to the effective date, was valued and expressed in United States and was still so valued as at the effective date.

[17] No basis has been shown for the claim to be paid otherwise than in terms of s 22 (1) (d) of the Finance Act. The liability ought to be settled in the currency specified by statute. The claim is payable in Zimbabwean dollars at the rate of 1; 1 in terms of Section 22 (1) (d). The court is prevented by the legislative provisions from awarding a judgment sounding in foreign currency except in situations permitted by the law. The plaintiff has not shown an entitlement to be paid in United States dollars. The fact that the claim arises from a contract which provides for settlement of obligations arising from it expressed in foreign currency does not assist the plaintiff.

[18] I must conclude that the plaintiff's claim falls squarely within the provisions of s 22 (1) (d) of the Finance Act. The costs of this claim follow the event. I see no reason to make a punitive award of costs. Accordingly it is ordered as follows;

1. The defendant in reconvention being Manica Zimbabwe, shall pay to the plaintiff in reconvention, Windmill (Pvt) Ltd, the sum of Z\$29 100.00
2. Costs follow the event

Scanlen and Holderness, plaintiff's legal practitioners
Gill Godlonton and Gerrans, defendant's legal practitioners