RESERVE BANK OF ZIMBABWE v CAFCA LTD

SUPREME COURT OF ZIMBABWE
MALABA DCJ, ZIYAMBI JA & OMERJEE AJA
HARARE, OCTOBER 7, 2011 & OCTOBER 2, 2012

L Mazonde, for the appellant
E W W Morris, for the respondent

OMERJEE AJA: This is an appeal against the judgment of the High Court granting with costs a claim by the respondent for:

(i) Payment of the sum of US$750 000.00

(ii) Interest *tempore morae* at the London Interbank rate for United States dollars at 3.5 % per annum from 1 September 2005 to the date of payment

(iii) Costs of suit.

The factual background to this dispute which is largely common cause may be summarised as follows.

The appellant is a financial institution. The respondent is a manufacturer and supplier of an exclusive range of cables for the transmission of communication and distribution of energy used by such entities like the Zimbabwe Electricity Supply Authority, the Rural Electrification Agency and Tel-One. The respondent's business caters for both

domestic and export markets. As at end of 2003, 50% of its sales volumes were largely in exports.

In 2004 the respondent's business experienced slow growth due to inflation and the scarcity of foreign currency. During that year the respondent's representatives met with the appellant's Governor Dr Gideon Gono with a view of securing foreign currency to purchase imported inputs in order to sustain its business.

Dr Gono gave an oral undertaking to avail US$150.000.00 per week to the respondent, from the foreign currency auction system. In January, 2005 the respondent began to receive the said sums of foreign currency against payment of a Zimbabwean dollar equivalent to the appellant via a commercial bank. The special arrangement was extended to 35 other companies selected as the recipients of foreign currency.

This allocation of US$150 000.00 was, with effect from 16 June 2005, increased to US$250 000.00. Weekly allocations at that new level were made to the respondent until the end of July 2005. In August 2005 the respondent made three transfers of money in Zimbabwe dollars, to the appellant for the equivalent of the amount of US$750 000. The payments were accompanied by details of external creditors to be paid by the defendant.

The appellant did not pay the foreign currency. Its position at the trial was that foreign currency could not be paid because it was not available. The respondent's

witness Turina confirmed in evidence that the appellant indicated that it did not have foreign currency for disbursement.

On 2, 11 and 19 August respectively the respondent made payments in Zimbabwe dollars equivalent to US$750 000.00. In respect of these three payments the respondent would receive a phone call from the appellant before making payment. On 1 August it received a call from the appellant before depositing a sum of Z$4,438,294,052.45 with the appellant the following day.

With regard to the second transaction, the respondent received a phone call on 5 August. In response thereto, it deposited the sum of Z$4,511,254,26l4.47 with the appellant on 11 August.

On the third occasion the telephone call was made on 17 August. The respondent deposited an amount of Z$4,587,562, 920.90 with the appellant on 19 August.

Bigboy Masoso who was the Division Chief Treasury officer testified on behalf of the appellant to the effect that the disbursement of foreign currency could only be made if the front office of the appellant made the funds available. He also stated that the telephone calls made to the respondent and other companies were meant to provide quotations to secure constance of the exchange rate.

In the affidavit filed of record Dr Gono stated as follows at para four thereof as follows:

"I advised them that the Bank would endeavour to source foreign currency for the plaintiff to the tune of USD$150 000 per week in recognition of the plaintiff company's strategic role in the national economy. No formal binding agreement was concluded in this regard and it was never the common understanding of the parties that we were concluding a formal agreement."

At para six of the affidavit, he stated as follows:

"As a result of further representations made by the plaintiff, the defendant increased the weekly allocation of foreign currency to the plaintiff to USD250 000 from or about the 8th June 2005. Again it was never the common understanding and contemplation of the parties that they were entering into a formal binding transaction, hence no formal contractual documentation was executed."

Again at para seven of his affidavit he stated as follows:

"I am advised that during the month of August 2005, plaintiff made payments totalling Z$13 535 110 being the quoted equivalent at the auction rate of USD750 000 which the defendant had hoped to pay to the plaintiff. Due to many other competing and pressing national requirements, the defendant was unable to avail the foreign currency, not only to plaintiff but to many other companies in a similar situation who then accepted an offer for immediate refund. Plaintiff declined the refund."

Following a trial the learned Judge found as follows at p 8 of the judgment:

"However, the main issue, in my view, is whether by allocating to the plaintiff US$150 000 ad later US$250 000 from the auction system, the defendant then became obligated to release the money to the plaintiff upon payment by the plaintiff within twenty four hours of the Zimbabwe dollar equivalent at the defendant's instruction."

At p 9 of the judgement, the court *a quo* stated as follows:

"It becomes crucial for the defendant to explain the reasons for Patience Aisam to set in motion the process, if foreign currency was unavailable. My view is simply that the allocation was only made against funds that were already available from the auction.

It is important to note that Patience Aisam spoke of an approved allocation and not successful bid." This was so because the plaintiff was on a special list that was not required to bid. There could, in my view, be no approval or allocation of what was not already available. Given the condition that the completion of each transaction was totally dependant upon the availability of foreign currency, the possibility of Aisam confirming allocation and asking for payment of the Zimbabwe dollar equivalent within 24 hours when there was no foreign currency already earmarked for the plaintiff is, in my view, very remote."

The learned Judge at p 9 made the following finding:

"I am therefore unable to accept that the above scenario did not create binding obligations on the part of the defendant. To that end, I am of the view that upon compliance by the plaintiff, a binding contract was concluded and what remained was the release of the foreign currency purchased by the plaintiff. The case of *F.C. Hume (Pvt) Ltd v Minister of Natural Resources & Tourism* 1989(3) ZLR 55 indeed supports this view. With the plaintiff having complied with all the requirements, the contract was already in place and the defendant was obliged to meet its obligation."

The gist of the court *a quo's* reasoning was that at the time the phone calls were made to the respondent the foreign currency to which the call related was available and the call was an offer which the respondent accepted by depositing the money in Zimbabwean dollars with the appellant thereby giving rise to a binding contract.

The court *a quo* gave judgment in favour of the respondent as sought in the summons. It is against this judgment that the appellant now appealed to this Court. In the ground of appeal the appellant contends that:

1. The court *a quo* erred in law and fact in not making a finding that the payment by the respondent of the Zimbabwe dollars as directed by the appellant did not create a binding contract which was an end itself but that performance was always subject to foreign currency being available.

2. The court *a quo* erred in law and fact in making a finding that the communications made by Patience Aisam on behalf of the appellant calling upon the defendant to pay the Zimbabwe dollars meant or was evidence that the foreign currency being allocated was available for disbursement to the respondent.

3. The court *a quo* erred in fact and law in not making a finding that non availability of foreign currency made performance impossible and that the appellant was entitled to refund the respondent the money it had paid as the suspensive condition, viz, the availability of foreign currency had failed to be met.

4. The court erred in law in allowing the claim for interest and in ordering the interest to run from 1 September 2005.

The primary question to be decided by this Court is, whether or not there existed a binding contract for the disbursement of a sum of foreign currency to the respondent's creditors, upon payment by the respondent of an equivalent sum in Zimbabwean currency.

The following are undisputed facts: As a result of an approach to the appellant's Governor, Dr Gono, on 27 October 2004 for assistance in obtaining foreign currency, the respondent was granted the status of a successful bidder at the weekly foreign currency auction. Several other companies were on this special list. The respondent was not required to place bids at the auction but was merely telephonically advised of the agreed weekly allocations. The practice had been successfully operational from January 2005 to

July 2005. Payment requirements were availed to the respondent who complied by effecting payment of the equivalent amount of the foreign currency in Zimbabwe dollars.

There was no formal contract between appellant and respondent. The respondent was amongst a list of 35 companies on this special list who had been identified as preferential recipients of foreign currency under the arrangement.

The court *a quo* correctly found that the arrangement between the parties was premised on the availability of foreign currency. As such no allocation could be made without the availability of foreign currency. Indeed both parties were aware that the arrangement for the disbursement of foreign currency was subject always to a condition that foreign currency had to be available in the first instance.

Mr Turina stated that due to the scarcity of foreign currency the respondent had reached an agreement with the appellant whereby bids from the respondent would be given preferential treatment. He confirmed that the information on the allocations was done telephonically and that once an allocation (i.e. the initial US$150.000.00 rising to US$250 000.00) was made, the respondent was required to pay the equivalent in Zimbabwean dollars. The arrangement had worked well from January 2005 until July 2005. In August 2005 the appellant failed to disburse US$750 000.00 to the respondent's customers and suppliers after the respondent had deposited with the appellant an equivalent sum in Zimbabwe dollars in three separate tranches.

In this regard the import of the affidavit of Patience Aisam was that a telephone call would be made to advise of an approved application and not allocation. In effect the approval and the actual allocation of foreign currency were distinct processes, premised on the availability of foreign currency. It was the evidence of Aisam's superior Masoso that payments in foreign currency would only occur if the front office availed such funds. This testimony accords with logic and probability. Patience Aisam was not employed in the front office which was responsible for the allocation of foreign currency.

The court *a quo* found that there existed a binding contract between the parties. When regard is had to Dr Gono's affidavit, it is clear that he advised the respondent that the appellant would "endeavour" to source foreign currency for the respondent. Such assertion does not suggest that the appellant was binding itself to provide the respondent with foreign currency on an ongoing or permanent basis. It is not in dispute that no allocation of foreign currency was made in August 2005. According to Masoso the system was discontinued because there was no foreign currency.

The 24 hours notice of payment of Zimbabwe dollars was not in fact adhered to by the respondent in August 2005. The finding by the court *a quo* that upon payment by the respondent a binding contract was concluded is not borne out by the evidence with regard to the payments made following telephone calls of 5 and 17 August 2005.

It is to be noted that there was no formal contract between the parties. Dr Gono offered to prioritise the respondent and other companies in the allocation and disbursement of foreign currency.

The Court finds that when Dr Gono put in place the special arrangement, there was no intention to create a binding contract to avail foreign currency to the respondent and the other companies on the special list. The facility was put in place at the time because of the acute shortage of foreign currency. It is highly unlikely that given that state of affairs, Dr Gono would seek to bind the appellant to avail foreign currency to the respondent upon payment of the local currency, when the volume of inflows of foreign currency were unpredictable. In the circumstances, it would not be logical for Dr Gono to enter into a binding contract to supply foreign currency to the respondent on the terms suggested.

It is not without significance that 35 other companies on the special list subsequently accepted refunds of Zimbabwe dollars deposited with the appellant in August 2005. This fact is consistent with the position that the allocation of foreign currency was conditional upon its availability at any given time.

The effect of the evidence is that the agreement for the disbursement of foreign currency was predicated upon availability of foreign currency. It was the respondent's testimony that the condition that foreign currency would be availed to the respondent, subject to availability, was expressed orally by the appellant's Governor when he entertained the respondent's request to be allocated foreign currency.

The agreement to accord the respondent preferential treatment in the disbursement of foreign currency, together with 35 other companies, did not create a binding and enforceable contract between the parties. The performance of the appellant's obligation to provide foreign currency was always qualified or conditional upon its availability.

Reliance by the respondent on previous dealings did not in the circumstances, give rise to binding contractual obligations between the parties.

The parties understood that in the absence of foreign currency there was no contract between them. The Court is satisfied that the evidence does not establish that a binding contract existed between the parties regarding the disbursement of foreign currency, either formally or on past practice upon payment by the respondent of the local currency equivalent.

It was found by the court *a quo* that the Deputy Governor Mr Ncube, gave an undertaking to make available the US$750 000.00 to the respondent as and when foreign currency became available. The Deputy Governor's position was not part of the respondent's case on the pleadings in the court *a quo*. The finding by the trial court that Mr Ncube's testimony that he had promised the respondent that it would be paid the sum of US$750 000.00 was binding upon the appellant is a misdirection.

The fulfilment of the promise would still have depended upon availability of foreign currency. By the time that promise was made, the appellant had made it clear to the respondent that it was terminating the special arrangement for all companies concerned and offered to refund the Zimbabwe dollars paid by them.

The appeal is accordingly allowed with costs.

The decision of the court *a quo* is set aside and is substituted with the following:

"The plaintiff's claim be and is hereby dismissed with costs."

MALABA DCJ: I agree

ZIYAMBI JA: I agree

T H Chitapi & Associates, appellant's legal practitioners

Coghlan, Welsh & Guest, respondent's legal practitioners