

ZIMBABWE FOOTBALL ASSOCIATION
versus
CUSTEN PICKWELI AND 15 OTHERS
and
THE SHERIFF OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MUSHORE J
HARARE, 28 January 2020 and 14 January 2021

Opposed motion: *declaratur*; the ‘deeming provision’ in SI 33/2019; currency nominalism

T. Zhuwarara, for the applicant
L. Ziro, for the respondents

MUSHORE J: The Applicant, the Zimbabwe Football Association, is suing out for an order cancelling the attachment of the applicant’s Nostro Account at Ecobank; which attachment was caused by the first to sixteenth respondents, who believe that the applicant is lawfully required to pay their judgment debt in United States dollars. The applicant believes that the respondents are overreaching, in that they are expecting their award monies in amount larger than that which the applicant believes to be due to them. The applicant insists that according to the law, it is indebted to the respondents in local currency in full and final payment. Thus I am seized with determining whether the amount of \$195, 818-72 owed to the respondents by the applicant by virtue of an Order of this Court is payable in Zimbabwe dollars or United States dollars.

Let me highlight procedural events which occurred prior to hearing the application to it end. On the initial day when the matter was enrolled on my opposed roll, both sides applied that the matter be held in abeyance pending the decision of the Supreme Court in *Zambezi Gas Zimbabwe (Private) Limited v N.R Barber and Anor* SC 437/19 [“the *Zambezi Gas* case”], because both counsel required to obtain the pending opinion of the Supreme Court in the *Zambezi Gas* matter could affect the parties’ legal approaches to the present matter. I afforded the parties the right to file supplementary Heads of Argument if they required to regenerate or dissipate their initial arguments (dependent upon the outcome in the *Zambezi Gas* case before re-appearing before me. It turned out that the parties’ respective counsel had more to say after

the 20th January 2020, when the Supreme Court made its determination under SC 3/20; because both sides did file supplementary Heads of Argument. In addition counsel for the applicant favoured me with a document containing a *précis* of the facts and issues which were up for debate. Respondents confirmed that the applicant's *précis* was accurate. Thereafter both parties filed supplementary Heads of Argument with the court; and it was after receiving both sets of Heads, that I instructed the Registrar to set the matter down for a re-convened hearing. The matter was set-down before me on the 28th January 2020. After hearing both sides' counsel, I reserved judgment. This is my determination.

Previous to the set down of this matter, on the 11th November 2019, the parties presented a Consent Order for the Consolidation of other cases under Case Number HC 8812/19. The Consent Order was granted by this Court on the 11th November 2109 and had the effect of eliminating the unprocedural and tedious repetition of the same facts and issues being heard by other Judges of this Court. The Consent Order for the consolidation of both matters read as follows:

“IT IS ORDERED BY CONSENT THAT:

1. The Ecobank Account Numbers *{stated}* have been attached by the applicants.
2. Pending determination and finalisation of HC 8804/19 the first respondent shall maintain and not transfer the attached funds amounting to US\$188 055-06 held in Ecobank Account Numbers *{stated}* attached by the 3rd respondent *{Ecobank}*
3. The court application filed by the applicants in HC8804/19 and the court application for a declaratory order HC8804/19 and the court application for a declaratory order HC8137/19 by the 2nd Respondent are urgent in nature and are hereby consolidated and shall be set down on an urgent basis.
4. The respondents shall file their notices of opposition and opposing affidavits, if any, within 7 days of granting of this Order,
5. The applicants may file answering affidavits, if any, within 7 days following the receipt of opposition of the respondents.
6. The respondents shall file their heads of argument within 7 days of receipt of the applicants Heads of Argument.
7. Thereafter the Registrar of this court shall cause the court applications HC 8804/19 and HC 8137/19 to be set down for urgent hearing within 10 days of filing of the respondents' Heads of Argument.

8 Each party to pay its own costs”

The summarised facts are that on the 26th April 2017, the respondents, who are current employees of the applicant, obtained an arbitral award for their combined arrear and current (then) salaries which entitled them to the payment of \$195,818-72. The Labour Court confirmed the award in the amount of \$195,818-72 on the 8th September 2017. This Court registered the award on the 6th March 2019; thus rendering the award executable. The first time that a distinct denominated currency for the award is mentioned (or rather added in) was on the writ of execution instructing the Deputy Sheriff to attach the Nostro Account which held US\$195,818-72. The respondents caused the attachment to be done in order to ensure that if they were successful in persuading the court that the award was payable in USD; then payment to them in foreign currency was assured to be available. Accordingly the Deputy Sheriff attached the applicant’s Nostro Account held with Ecobank (Pvt) Ltd for the collection of US\$ 195,818-72. The dispute as to the denomination arose when the applicant instructed the Sheriff to pay out the amount of ZW\$ 195,818-72. To be specific, the applicant complains that the writ of execution was specifically denominated in USD by the Office of the Sherriff; in circumstances where the court order itself was not specific on the currency denomination, and therefore creates the impression that the Sheriff having made “*a court order on itself*”.

Refer Page 8, founding affidavit Para 9.2.

The opinion handed down by the Supreme Court in the *Zambezi Gas* matter has made a short shift of the work required to resolve denomination issue by efficaciously (a) categorising the types of assets and liabilities which require a conversion; and (b) provided a demarcation by the way of a specific time frame by which such an asset or liability either assumes a particular denominated value. Put simply an effective date was set by the Supreme Court whereby one could translate the value of a debt or obligation to be in either the full United States Dollars value or RTGS dollar’s value dependent on whether the debt or obligation arose before or after the 22nd February 2019. The Supreme Court held that:-

“..the Presidential Powers (Temporary Measures) (Amendment of Reserve Bank of Zimbabwe Act & Issue of Real Time Gross Settlement Electronic Dollars (RTGS Dollars)) (S.I 33/19) expressly provides that assets and liabilities, including judgment debts, denominated in United States dollars immediately before the effective date of 22nd February 2019 shall on or after the aforementioned date be valued in RTGS dollars on a one to one rate”

Thus what the Supreme Court made clear is that is if immediately before the effective date:-

- (a) a debt is expressed in United States Dollars,
- (b) And it can be classified as being an actual legal obligation, against which payment is due;

then section 4C (1) (d) of SI33/2019 would deem to be a debt payable RTGS dollars on a one to one rate.

I shall now discuss and resolve the issue of the value of the obligation in the present matter, as I see it.

The value of the obligation.

In the *Zambezi Gas* case, the judgment debt was expressly denominated in United States dollars prior to the effective date. In the present matter the judgment debt was not denominated in United States dollars, but was simply expressed in dollars. To that extent, the issue of determining the value of the judgment debt here is resolvable on what it actually was before the effective date; and not on what it could be had it been expressed in USD before such date. In the matter at hand, after this court registered the award in “*dollars*”, the Sheriff’s writ was then issued out, with the USD currency inserted before the figures which represented the sum of the award. In my view, that insertion effectively became an alteration of an order of this court from RTGS dollars to United States dollars. And it is an alteration which is superficial and cosmetic; in that the insertion of US currency is ineffectual and cannot rescind an extant order of this Court.

I also note that when the respondents began receiving part payment of the money owed to them by way of small monthly instalments; they were being paid in the smaller amounts in RTGS dollars without an objection. The RTGS dollars were being paid off in accordance with a Deed of Settlement. The Deed of settlement was properly executed in terms of the value of the currency of RTGS dollars reflected on the High Court order. Annexure “E1-4” to the applicant’s founding affidavit proves the payments to have been made and received in RTGS dollars. Furthermore, the covering letters wherein the applicant instructed Ecobank, Steward Bank etc to pay the sums due to the respondents in local currency when applicant wrote to these banks instructing them to:

“Please process the following transfers debiting our RTGS (account number given) and crediting the listed account numbers attached”

Letter dated 10th May 2019 from the applicant to Ecobank

Neither the documents filed off record, or the pleadings shew that the respondents were implacable regarding the scheme prior to the Sheriff’s writ being issued in US dollars. Thus by my reading of the conduct displayed by the respondents at that time, they understood that the sums due to be paid to them was denominated in RTGS dollars

Whether or not the issues raised in the notice of opposition are legally sound?

The applicant’s case is that payment of the judgment debt is in RTGS. The respondents on the other hand are insisting that they should be paid USD based upon the Sheriff’s writ and the fact that the award proceeds are held in are presently housed in a Nostro account which latter argument I shall deal with under a separate heading.

The writ of execution

In a related matter, filed in this court by the respondents as *domini liti* (HC8804/19), the respondents approached this court to compel transfer of the funds owned by the applicant and held in an ECOBANK Nostro Account in the amount of US188, 053-06 to them. Surely a determination of that *mandamus* application in the respondents favour calling upon the release of USD 188,053 into the respondents’ hands would materially interfere with an order of this court (the registration of the award) which had already been resolved at issuance, and confirmation and registration by this court and valued in RTGS dollars. I have derived authority for this proposition from the leading case of *Shava v Bergus Investments (Pty) Ltd* 2011 (2) ZLR 340 [HC] where a full bench of this Court with MUTEWA J and CHIWESHE JP (concurring) determined that, a party cannot revalue a judgment debt for the purposes of execution. The court found that allowing a party to change the currency of the judgment “*was not only incompetent for arbitrariness but offended against the time honoured principle of currency nominalism*”. This is what the court said by the court at page 344:

“It is beyond argument that the first respondent 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 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*”

The last line of the *dicta* is one which has been taken over by the *Zambezi Gas* case. The Supreme Court has brought about uniformity of all values of assets and liabilities including judgment debts and that all such obligations are to be payable in local currency if they were expressed in US dollars before the effective date of the 22nd February 2019. I am going to be expounding on the Supreme Courts analysis of the deeming provision in section 4C (1) (d) of SI 33/2019 later on in this judgment. For the time being I propose that because of the finding in the *Zambezi Gas* case; any foray by the respondents to attempt to apply to this court for a conversion of the currency would be an exercise in futility. That ship has already sailed.

CHIGUMBA J relied on the views expressed in the *Shava* case and in *Robson Makoni v The Cold Chain Private Limited* HH197-15, (a case wherein she was presented with a similar problem to resolve, such as the one at hand) and commented that:

“The 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 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**”

I thus agree with; and wholly associate myself with the conclusion reached by the learned Justices in the *Shava* and the *Robson Makoni* cases. Indeed it would be improper of this court to recognise the respondents’ position as carrying weight where in fact it is the polar opposite. To prefer the denominated US dollars sum occurring in the writ of execution over and above the Order of the Court; which registered the local currency award and appropriately registered the award in simple dollars (albeit the registration having been done after the effective date) would in effect be a wrongful alteration of the court order. Such alteration and would thus be tantamount to this Court revising its own decision in circumstances where this court is no longer seized with the matter.

I therefore find that the court is effectively *brutum fulmen* and incapacitated to deal with any cause of action which could potentially result in a variation of the value of the judgment debt existing before the effective date; and that in the light of the conclusion reached in *Zambezi Gas*, the uniformity of value seems to be somewhat settled.

The Nostro Account diversion

Counsel for the respondents implored me to find that the fact that the funds are being held in a Nostro Account exempts them from the conclusion reached in *Zambezi Gas* case in that Nostro Accounts are to remain denominated in USD in terms of section 44C(2)(a) of the principle Act which provides as follows:

“(2) The issuance of any electronic money 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.....”*

In effect what the respondents are proposing is that because the applicant’s bank is retaining a USD in a Nostro account, from which the liability in favour of the respondents may be paid in the future; then the applicant’s legal obligation to the respondents must be in USD. I disagree with this proposition because it is the obligation which is categorised and deemed to be what it is. It is not where it is housed which determines its value. What then is one to decide if the applicant decides to make payment from an RTGS account? It is therefore logical to arrive at the conclusion that the liability does not alter in value by being withdrawn from a Nostro Account.

The “balance not paid in full” reroute.

The Respondents are proposing that because the full amount has not been paid to the respondents; then all future amounts occurring for payment after the effective date should fall under s 4C(1)(e) and therefore being payable on a willing buyer-willing seller rate. The suggestion made lacks substance; the point being that it is not the payment agreement which composes the asset or liability. A debt does not assume a different character value or nature arising from when it is paid. The obligation came into being on the 26th April 2017 when the respondents obtained their Labour ruling. It was then confirmed by the Labour Court on the 29th June 2017. Subsequent to that it was registered and thus made executable by this court on the 6th March 2019. Had it been paid before the effective date, it would still have legally been quantified in RTGS dollars because of the determination in *Zambezi Gas*. Simply put it is a judgment debt within the purview of the described value deemed by the Supreme Court in that case.

Not much more needs to be said on this point save to describe that the direction taken by counsel for the respondents is bewildering.

The profundity of the deeming provision.

The subtle potency of the word ‘deemed’ intended to be conveyed in *Zambezi Gas*, was not lost by Mr Zhuwarara for the applicant as was evidenced by his astutely comprehending and conveying in his supplementary heads of argument the force of the meaning of the seemingly innocuous word “deemed” and how this case hinges upon an appreciation of what the legislature intended by the use of that word. The provision in question which lay before the Supreme Court was this one:

“Section 4 of SI 33/19

“4. (1) For the purposes of section 44C of the principal Act as inserted by these regulations, the Minister shall be deemed to have prescribed the following with effect from the date of promulgation of these regulations (‘the effective date’)

(a)

(b).....

(c)

(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 or after the effective date be deemed to be values in RTGS dollars at a rate of one-to-one to the United States dollars;

(e)....

Mr Zhuwarara contended; and I accept his submission to be correct, that the respondents “...failed to appreciate the full significance of the word **deemed**”. The cited passage in the *dicta* by CAVE J in *R v County Council of Norfolk(1891)* 65 LT NS 222 which was brought to my attention by him is well worth being specifically enunciated here:-

“When it is said that a thing is to be deemed to be something, it is not meant to say that it is that which it is deemed to be. It is rather an admission that it is not what it is deemed to be, and that notwithstanding it is not that particular thing, nevertheless, for the purposes of the Act, it is deemed to be that thing”

And then for emphasis counsel for the Applicant went on to refer for my attention to the meaning given of the word “deemed” in *Pereira v Group Five (Pty) Ltd and others* [1996]

4 All SA 686 (SE) where it was held that deemed denoted “*something is a fact regardless of the objective truth of the matter*”

Mr Zhuwarara put this point across neatly and in borrowing from his argument, here is what he contended.

Applicants Supplementary Heads paragraphs 15 and 16

“15. Put plainly, while the Labour Ruling requiring the applicant to pay \$195, 818-72 was in fact and law delimited in RTGS or local currency. Such is the operation of s4 (1) (d) of SI33/19.

16. Deemed means the thing in question is in fact that which it is deemed to be regardless of the truth. The US Dollars the 1st to 16th Respondents see are actually RTGS or local currency: See: *Steel v Shanta Construction (Pty) Ltd and Others* 1973 (2) SA 537(T) COETZEE J opining that the word “*deem*” is an indispensable word in the legal sense of assuming something to be a fact which may or may not be one”

Altogether therefore after deliberating upon all fronts of the exchange between the parties, I am persuaded that the applicant has made out a just cause for a *declaratur* in its favour. Accordingly I rule as follows:-

- “1. *It is hereby declared that the tender by the applicant to the respondent of RTGS\$195,818-72 constitutes full and final settlement of the applicant’s indebtedness to the respondents.*
2. *The writ of execution issued in case number HC 1808/18, together with the subsequent attachment of Applicant’s foreign currency bank account by the 17th Respondent be and is hereby set aside.*
3. *Applicant be ad is hereby ordered to pay to the respondents \$195,818-72 denominated in local currency.(ZWL) determined by a labour ruling on the 26th April 2017.*
4. *The 1st to the 16th Respondents be and are hereby ordered to pay the applicant’s costs of suit.*

Ngarava, Moyo, Chikono, applicant’s legal practitioners
Dzoro & Partners, 1st to 16th respondent’s legal practitioners