

ZIMBABWE LEAF TOBACCO
versus
KEVIN GRAHAM COOKE

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 31 March 2021 & 6 August 2021

Opposed Application

B.S. Ziwa, for the plaintiff
R Stewart, for the respondent

DUBE JP:

1. The plaintiff issued summons for civil imprisonment against the defendant for failure to pay a debt in terms of an order granted against him.
2. On 29 November 2017, the plaintiff obtained judgment against the defendant for payment of US\$360 000 together with interest at the rate of 12 % per annum plus US\$8 625 together with VAT thereon. Upon execution, the Sheriff returned a *nulla bona* return prompting the plaintiff to file for civil imprisonment. The plaintiff's case is that the tobacco growing loan giving rise to this debt was financed using offshore funding and is payable in United States dollars in terms of applicable legal instruments. The plaintiff insists that the defendant ought to pay the outstanding debt in United States dollars and refutes that the defendant has paid back the loan in full.
3. The defendant has refused to pay the debt in United States dollars and insists that the loan ought to be paid in RTGS dollars. The defendant resists civil imprisonment on the basis that he paid the debt in full. According to the defendant, he has paid a sum of \$426 325.69 and an additional \$50 0000. He submitted that the plaintiff has sought to apply a rate of exchange to repayments made on 18 September 2019 and 18 June 2020 respectively in violation of the law which is that all debts that existed prior to 22 February 2019 are payable at the rate of 1:1 to the RTGS dollar and this includes judgment debts. He contended that the claim for civil imprisonment is misguided as the plaintiff has no

cause of action against him and urged the court ought to dismiss the summons for civil imprisonment.

The nature of civil imprisonment

4. A summons for civil imprisonment calls upon a debtor to show cause why he should not be imprisoned for failure to pay a debt. The new High Court Rules 2021, published under Statutory Instrument 202 of 2021, make provision for imprisonment for a debt in r73. In terms of r73 (4), before a court makes an order for civil imprisonment, it should satisfy itself that the judgment debt has not been paid. In most civil imprisonment proceedings, liability is not an issue in which case the court's enquiry is limited to the debtor's ability to service the debt and the appropriateness of civil imprisonment. Where a debtor challenges civil imprisonment proceedings on the basis that he does not owe a contractual obligation or has cleared it, it is incumbent upon the court to resolve the dispute regarding liability first before delving into of appropriateness of civil imprisonment.
5. In these proceedings, the issue is whether the balance due and outstanding by the defendant as at 22 February 2019 was due in RTGS dollars at the rate of 1:1 and whether the respondent has discharged his liability for the debt. The court must resolve first the question of the applicable currency and decide whether the defendant has cleared the debt. If this question is answered in the affirmative, that is the end of the matter. If the court finds that the defendant owes in terms of the court order granted against him and has neglected and failed to pay in terms of the order, the court will be required to enquire into the respondent's ability and willingness to pay the debt in compliance with s 49(2) of the Constitution of Zimbabwe.
6. The new rules make specific reference to s49 (2) in r73 (1) unlike r 370, its predecessor thereby giving guidance on the subject. Section 49(2) of the Constitution stipulates as follows:

“(2) No person may be imprisoned merely on the grounds of inability to fulfil a contractual obligation.”

The Constitution bars imprisonment of a person simply on the basis of a failure to fulfil a contractual obligation. Section 49(2) protects the right to personal liberty and enjoins a court dealing with a summons for civil imprisonment where it is satisfied that the debtor has not paid the amount due, to enquire into the question of the judgment debtor's failure to pay the amount due.

7. What this entails is that an indigent person will not be imprisoned for a debt simply because she owes. In terms of r 73, it must be shown that the debtor has the means to pay, earn the amount due and that his failure or refusal to pay the amount due is wilful. The fact that a debtor owes a contractual obligation does not necessarily call for his civil imprisonment. Civil imprisonment is a drastic measure which should be resorted to only as a last resort and only in instances where a debtor is able to service the debt but has shown an unwillingness to discharge the obligation. It is for this reason that the court is enjoined to carry out an enquiry to establish the financial position of the debtor and attitude to payment of the debt. The manner in which the debt will be cleared is considered in a case where the debtor is able to service the debt and shows a willingness to settle it.

The Legal framework

8. The plaintiff is in the business of financing tobacco growing projects. Sometime in May 2013 and July 2014, the defendant was advanced money and crop inputs in terms of a tobacco grower contract agreement. It obtained exchange control approval for the 2013-2014 and 2014-2015 tobacco growing seasons and was able to source foreign currency and purchase inputs to advance to tobacco growers, see Annexure C1 and C2. The defendant failed to pay back the grower debt. The loan advanced to the respondent was offshore funds advanced in United States dollars and is a foreign obligation denominated in foreign currency.
9. There are a number of instruments that permit tobacco merchants to recover tobacco growing loans advanced in United States dollars. Financing and repayment of tobacco production is regulated by s 4(1)(a) of the Exchange Control (Tobacco Finance) Order, 2004, S.I 61 of 2004 which states that all auction and contract tobacco shall be paid for in United States Dollars. Section 5(3) provides that where a contractor has financed a tobacco grower by accessing offshore funds for that purpose, the amount used to finance the grower may be set off against the price of tobacco sold to the contractor by the grower. The purpose of the Exchange Control Order is to ensure that where offshore funds are used to finance tobacco production, the contractor is able to recover the money from growers in foreign currency to enable the contractor to repay the foreign loan. A repayment in United States dollars or set off against the price of tobacco sold to the contractor enables the tobacco merchant to recoup his United States dollar investment.

10. The Zimbabwean dollar was reintroduced on 24 June 2019 in terms of S.I 142 of 2019. On 29 July 2019 the Reserve Bank issued the Clarification to the Tobacco Industry, Circular no 7 of 2019, states in s 2 as follows:
 - “2. Treatment of US\$ Denominated Inputs Advanced to Growers:
 - 2.1 Tobacco merchants have the option to use foreign currency sourced from local banks (through global facilities) or offshore financing to procure inputs for distribution to tobacco growers under contract arrangements.
 - 2.2 Where tobacco growers receive US \$ input loans, repayment to the tobacco merchant shall be in foreign currency in order to protect the tobacco merchant’s investment.”
11. Circular number 7 was issued in terms of s 35(1) of the Exchange Control Regulations S.I 106 of 1996. Section 2 of Circular no 7 states that a tobacco grower who obtains USD denominated input loans from a tobacco merchant is obligated to pay back in foreign currency. The purpose of the section is to provide clarification on payment to tobacco merchants by growers where a tobacco merchant has accessed offshore funding to finance the tobacco growing. The rationale of section 2 is to protect a tobacco merchant’s investment. It would be absurd to expect that the merchant recovers the loan in RTGS when he obtained a USD denominated input loan himself to finance the tobacco growing. The legal framework available entitles a tobacco merchant who has advanced United States dollars denominated input loans to a tobacco grower to recover the loan in foreign currency.
12. Section 4(1)(d) of the Statutory Instrument 33 of 2019 deems all assets and liabilities, including judgment debts denominated in United States dollars immediately before 22 February 2019 to be valued in RTGS dollars at a rate of 1:1, see *Zambezi Gas Zimbabwe (Pvt) Ltd. v N. R Barber (Pvt) Ltd* SC3/ 20. There was agreement over the import of this section. The parties disagreed over the applicability of this section to this case. The defendant ‘s contention that upon the introduction of the RTGS dollar on 22 February 2019, all assets and liabilities that were expressed in Zimbabwean dollars were converted to RTGS at the rate of 1:1 and therefore that this particular loan is payable in RTGS lacks merit. The defendant lost sight of the fact that there are instances when this section does not apply.
13. Finance Act No 2 amended the Reserve Bank of Zimbabwe Act [*Chapter 22:15*] and introduced S 21(1) as s 44 C. Section 21(1) of Finance Act, No 2 of 2019 makes it clear that the conversion at the rate of 1:1 does not does not apply in the case of foreign loans and foreign obligations denominated in any foreign currency and stipulates as follows:

- a. “Foreign loans and foreign obligations denominated in any foreign currency, which shall continue to be payable in such currency.”

All these instruments ought to be read in harmony with the Finance Act.

14. The defendant submitted that Exchange Control (Tobacco Finance) Order, S.I 61 of 2004 being subsidiary legislation, has the undesirable effect of overriding the provisions of Finance Act No 2 of 2019, being the enabling legislation. It is a fundamental rule of law that the purpose of subsidiary legislation is to supplement primary legislation. Subsidiary legislation must not be *ultra vires* the enabling Act. Subsidiary legislation must not conflict with, run counter to or replace enabling legislation.
15. Whilst debts pre-existing 22 February 2019 are payable at the rate of 1; 1 in RTGS, foreign obligations are ring fenced under s21 of Finance Act No2. Foreign loans and obligations are an exception. The Exchange Control (Tobacco Finance) Order makes provision for foreign loans and foreign obligations denominated in any foreign currency and provides that these shall continue to be payable in the currency involved. This setup is contemplated under the Finance Act. Consequently, the Exchange Control (Tobacco Finance) Order, S.I 61 supplements Finance Act No 2 of 2019 and has no effect of breaching its provisions or replacing it. The two pieces of legislation are not in conflict with each other and ought to be read in harmony.
16. In *Zimbabwe Leaf Tobacco (Pvt) Ltd v Valentine T. Mushakarara* HH 220/20 the court dealt with a matter with similar facts to this case. The court considered the implications of S4 (1) (d) of S.I 33 of 2019, Finance Act no 2 of 2019, the Exchange Control (Tobacco Finance) Order of 2004, and Exchange Control Circular no 7 of 2019 and held that where a tobacco contractor has utilised offshore funds to finance tobacco growers, he is entitled to recover the loan in United States dollars. The decision of the court was upheld on appeal.
17. *In casu*, the plaintiff does not dispute that the plaintiff sourced offshore funds in United States dollars and advanced United States dollar denominated inputs to the defendant. The respondent did not refute that the money advanced to the defendant was part of a foreign loan obtained by the plaintiff in accordance with the 2013-2014 and 2014-2015 tobacco farming season with exchange control approvals.
18. In *Breastplate Service (Pvt) Ltd v Cabria Africa PLC* SC 66 /20, the court zeroed in on issues regarding the intention of the parties in a contract and held that where the parties

have agreed and expressed their intention that payment must be made in foreign currency, a court must give effect to that intention. The defendant entered into an agreement well aware of the nature of the agreement he was binding himself to. The contract defines “grower debt as the value of the crop finance”. It expressly states that payment to the plaintiff would equate to the crop finance. The defendant signed an acknowledgment of debt in June 2015 acknowledging owing sums in United States dollars. The issue of value and recovery has always been within the parties’ minds.

19. The nature of the debt entitles the plaintiff to recover the loan in United States dollars. There is a correlating foreign obligation to repay a foreign loan in United States dollars. The loan advanced being a foreign obligation the defendant is expected to pay the money back in United States dollars. This obligation is payable in United States dollars and is an exception to s 4(1) (d) of S.I 33 of 2019 which is not applicable to the circumstances of this case.
20. I must conclude that based on the *Mushakarara case*, the defendant was required to pay back the loan in United States dollars because the tobacco growing contract was financed from offshore funds. The defendant has an obligation to pay the debt in foreign currency. The plaintiff has an entitlement to insist on payment in United States dollars.
21. The plaintiff denied that the defendant has discharged the judgment debt in full and submitted that what appears on p13 of the record is a repayment plan and that the debt has not been discharged. This assertion was not disputed. The summons for civil imprisonment is for USD\$360 000. The plaintiff’s explanation for claiming the entire debt despite that the defendant has been servicing the debt is that the repayment plan is silent on the issue of interest, which has not been paid and hence claims the entire sum granted in terms of the order.
22. The repayment plan produced shows instalments due, payments made and the balance outstanding. It shows that the plaintiff continued to receive payments after the order was granted. As at 23 July 2018 the balance outstanding was US\$193 844.31. The defendant claims that he had paid a total of UD\$161 355 as at this date. The defendant submitted that entries of Z\$50 000 instalments of 31 December 2018 and 31 December 2019 were made in error. The defendant needed to show that the payments made after this cleared the debt. On 18 September 2019 the defendant paid Z\$25 000 which was converted to US\$ 1804.34. On 18 June 2020, Z\$190 000 (9600) was paid. On 25 June 2020 the defendant paid Z\$50 000 and it is not known how much this amount translated to in

United States dollars as at that date. This amount does not, even if one takes into account the Z\$50 000 paid later on and the Z\$100. 000 purportedly paid in error, clear the debt. The amounts paid, albeit in RTGS dollars reduce the balance but are not sufficient to discharge the debt in full. The appearance is that the defendant still owes the plaintiff part of the debt which he has failed to pay. According to the plaintiff there is a balance of USD\$182 414. The defendant has failed to show that he settled the debt in full. The court has considered that in addition to the capital debt, it has not been shown that the interest, VAT and additional sum of US\$8625 has been paid.

23. The defendant contended that because the plaintiff accepted payment in RTGS, it is estopped from claiming in United States dollars. No authority was advanced for the proposition that because the plaintiff accepted payment in RTGS dollars, it is estopped from claiming payment in United States dollars. The fact remains that the debt is a foreign obligation liable to be paid in foreign currency. The law permits settlement of debts in RTGS dollars for obligations sounding in United States dollars at the interbank rate. In any event, the applicant is amenable to receiving payment in RTGS dollars at the interbank rate.
24. The parties are to set down the matter for an enquiry to be carried out in terms of the rules. It is at this hearing that the court will determine how much has been paid so far, consider how much the interest component of the debt is and determine the exact figure owed.

Accordingly, it is ordered as follows.

1. The parties are to set the matter down for an enquiry to be conducted in terms of r 370 of the High Court Rules, 1971.
2. Costs shall be in the cause.

Gill, Godloton & Gerrans, applicant's legal practitioner
Messers Matizanadzo & Warhurst, respondent's legal practitioners