

LACK OF JURISPRUDENTIAL CONSENSUS ON THE QUESTION OF CURRENCY IN ZIMBABWE: AN OVERVIEW OF *STONE & ANOR v CENTRAL AFRICAN BUILDING SOCIETY & ORS* HH-287-19

A. INTRODUCTION

The High Court of Zimbabwe sitting at Harare has again had an occasion to determine the contentious issue of Real Time Gross Settlement (hereinafter after 'RTGS') viz-a vis United States Dollars in the case of **Penelope Douglas Stone and Anor v CABS, RBZ and Min of Finance and Economic Development** under case number **HC 3727/18**.

This is not the first time when the Zimbabwean courts have dealt with a case of this nature. One can recall the ***Zambezi Gas Zimbabwe (Pvt) Ltd v N.R. Barber (Pvt) Ltd & Anor* SC-03-20** when the courts had to decide on the proper interpretation of **S.I 33/2019**.

It therefore indicates that our Courts have been preoccupied with cases on the challenge posed by inconsistent monetary policies, central bank directives and legislation on the country's multicurrency situation. It is therefore encumbered upon the writer in this case to analyse the judgement herein and give an indication on the import of the judgement on an ordinary Zimbabwean to the jurisprudence on cases of this nature and recommendations where possible.

B. BACKGROUND

The Applicants in this matter were Penelope Stone and Harold Beattie, trading as The Stone/Beattie Studio. The Respondents were Central African Building Society cited as the 1st Respondent, the Reserve Bank of Zimbabwe cited as 2nd Respondent and the Minister of Finance and Economic Development cited in his official capacity as the 3rd Respondent.

This was an application put before the Court with the Applicants seeking the Court to order Central African Building Society (hereinafter 'CABS') to pay a sum of USD142 000.00 together with interest. The Applicants sought an alternative relief for the court to declare **Exchange Control Directive No. R120/2018** a nullity, or in further alternative declare **secs. 33B(3) and (4) of the Reserve Bank of Zimbabwe Act [CAP 22:15]** as being unconstitutional.

The Applicants had opened a savings account with CABS after the introduction of multicurrency regime in February 2009. In May 2016, the Reserve Bank of Zimbabwe (hereinafter 'RBZ') issued a statement in which Bond notes were introduced to the multicurrency system in a bid to deal with cash shortages. In October 2018, the RBZ again issued **Exchange Control Directive R120/2018** which separated what was referred to as RTGS Foreign Currency Accounts from Nostro Foreign currency accounts.

At that point, the Applicants' account with CABS had a credit balance of USD142 000.00. The effect of the Directive was to categorize the applicant's account as an RTGS Foreign currency account, hence the Applicants could only make withdrawal in Bond notes or coins and not United States Dollars, even though applicants had deposited United States Dollars in their account.

It was this situation which moved the Applicants to approach the High Court for the relief that has been indicated above.

C. THE COURT'S DECISION

The matter was held before former Advocate of the Advocate's Chambers in Harare and now judge Honourable Justice HAPPIUS ZHOU. The learned judge ruled thus:

1. The Exchange Directive No. R120/2018 is invalid and had to be set aside.
2. The CABS has to pay the Applicants the sum of USD142 000.00 in hard currency or transfer the amount into a Nostro account as per the directives of the Applicants with the prescribed interest of 5% per annum from 17 October 2018 which was the date when demand for payment was first made to CABS by the Applicants.

The Court founded its decision on the basis that the Exchange Control Directive violates one's constitutional right to property enshrined in **sec. 71(2)** of the Constitution of Zimbabwe as it was tantamount to unlawfully depriving one of their property.

The Court noted that the Exchange Control Directive unreasonably had a retrospective effect, arbitrarily converting an already existing amount in United States Dollars to RTGS. Thus, the Directive ought to have affected future transactions and not already existing account balances. The Court found the Exchange Control arbitrary and irrational as its enforcement meant loss on the part of the Applicants as they were to receive a less amount in form of RTGS.

The court noted that if the Applicants were to be given ZWL 142 000.00 or “equivalent” they will still be prejudiced and will not recover even 4% of the credit balance that was in the account. Essentially the effect would be the ripping off the Applicants of their invested money/property.

The court also ruled based on the banker-customer relationship (creditor/debtor relationship) which is contractual. If the banker was contracted and ensured the safe keeping of the creditor’s money, as the debtor the banker is obliged to give back the amount in the same currency. Thus, if United States dollars were deposited in the account, the creditor must withdraw the money in the same currency.

D. CONCLUSION

In concluding it is noteworthy that this judgement comes at a time when Zimbabwe is grappling with multi currencies and there are a lot of citizens and companies who feel shortchanged by the situation at hand. The judgement as stands gives a sigh of relief to individuals and companies who have been victims of the Exchange Control Directive and potentially opens a can of worms for the financial sector.

Furthermore, it should be noted that the judgment also shows lack of consistence from the government in terms of the monetary policies. To some extent it can be argued that the judgement challenges the jurisprudence of previous cases that have been handed down previously.

The Zambezi gas case which was handed down by the Supreme court of Zimbabwe as per Chief Justice Malaba practically meant that any amount claimed in United States Dollars could be granted in RTGS, and will be calculated at the prevailing rate of the day and at the time the rate was 1:1.

Thus, the Stone judgement has opened flood gates of related cases, with several investors, individuals and companies seeking to be paid by banks in United States Dollars from their now categorized RTGS foreign currency accounts.

The judgment has opened a space for more statutory instruments and directives to be equally put to the test on their constitutionality, violation of property rights and an assessment of whether they are reasonable and rational. It has opened a room for the financial legislation upon which these Exchange Control Directives are premised to be challenged and declared unconstitutional. Provisions such as **S.I 33/19, sec. 22(1) (d) of the Finance Act of 2019** and **sec. 44B (3) and (4) of the RBZ Act** which directs payment in RTGS even though original transactions

were made in United States Dollars come to mind as being endangered pieces of legislation as a result of this landmark judgement.

However, the government has since indicated its desire to appeal the decision and it will be interesting to find out what position the Supreme Court will take considering its ruling in the Zambezi Gas Case.

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