

Penelope Douglas Stone and 1 other v CABS and 2 others HC 3727/18 (Stone Beattie judgment)

The Stone Beattie judgment was handed down on the 14th of May 2020 and it raises important questions on the legitimacy of the present currency regime in Zimbabwe. Given the importance of the case we have prepared an explanatory memorandum setting out its potential impact for our clients.

Background

Stone Beattie had banked with CABS since 2011 and had opened a USD denominated account which as at November 2016 held USD142,000.00. On 4 October 2018, the Reserve Bank issued the Exchange Control Directive No 120/2018 requiring all banks to separate what was referred to as RTGS Foreign Currency Accounts (FCA) from Nostro Foreign Currency Accounts (FCA) based on the source of funds.

The effect of this was to categorise the Stone Beattie account as an RTGS Foreign Currency Account. The further effect of the Directive was that the funds in the Stone Beattie account could only be paid in Bond notes but not in United States dollars which was the currency in which the account had been denominated.

On 17 October 2018 Stone Beattie wrote to CABS demanding that CABS allow them to withdraw the USD 142 000. Alternatively, Stone Beattie requested that CABS transfer their balance of USD142 000 into a Nostro (FCA).

From the judgment it is clear that Stone Beattie's intention was to preserve their funds as foreign currency.

CABS in response to the letter indicated that Stone Beattie could only withdraw the funds in Bond notes as the Reserve Bank had issued a Directive that local accounts had been split into RTGS FCA and Nostro FCA accounts respectively, and amounts held in RTGS FCA accounts could only be withdrawn as Bond notes.

Issues

The central issues in this case were whether CABS, as Stone Beattie's bankers, had an obligation to pay on demand the equivalent of the funds deposited with them; in other words, whether CABS had an obligation to pay USD to Stone Beattie, as opposed to Bond notes.

As CABS argued that they were obliged by the RBZ Directive to pay Bond notes to Stone Beattie as a result of the splitting of accounts, the question of what their obligations were to Stone Beattie was clearly dependent on whether the splitting of

bank accounts between RTGS FCA and Nostro FCA pursuant to a Directive by the Reserve Bank (Exchange Control Directive No. 120/2018) was constitutional?

Findings of the Court

The Court in its judgment found that the Directive by the RBZ to split the accounts was not constitutional. Broadly, the Court found that the Directive to split the accounts was:

1. irrational in that it was not rationally related to a legitimate government purpose, and thus in violation of the rule of law which is a central tenant of our Constitution, and
2. that the effect of splitting the accounts unlawfully deprived Stone Beattie of its property in contravention of section 71 (2) of the Constitution.

Having found that the Directive to split the accounts was unconstitutional, the Court ordered that CABS pay Stone Beattie the amount it initially demanded in its letter of demand, being USD 142 000, or alternatively transfer that amount into a Nostro FCA Account with the amount to be held in foreign currency.

In essence the Court found that Stone Beattie had a right to the USD that it had initially deposited with CABS.

The effect of the judgment

It is noticeable that the judgment does not deal with SI 33 of 2019, which SI converted all Real Time Gross Settlement (RTGS) balances expressed in USD before the 22nd of February 2019 into RTGS, and furthermore converted all domestic debts existing as at February 22 of 2019 from USD to RTGS at a rate of one to one.

While the issues in Stone Beattie arose before the promulgation of SI 33 of 2019, the SI clearly has an impact on the debt owed by CABS to Stone Beattie as the amount Stone Beattie was claiming were clearly covered by SI 33 of 2019.

However, it must be remembered that SI 33 of 2019 is predicated on there being a split of accounts between RTGS and Nostro FCA. SI 33 of 2019 only converted RTGS FCA balances into RTGS. Nostro FCA Accounts were ring fenced and thus continue to be denominated in foreign currency.

If the Stone Beattie judgment is upheld it would potentially put the entire currency regime into question, as it would be unclear as to precisely what SI 33 of 2019 (which we should note again has since been incorporated into primary legislation through Finance Act No 2 of 2019) converted into ZWL?

There is every likelihood that this may render deposit taking institutions insolvent if they have to effectively compensate their depositor clients in USD when they in turn may not have been able to recover on loans and other facilities extended to their clients in USD or for that matter from the Reserve Bank.

However, as there has been indication that the Ministry of Finance intends to appeal the judgment, it is our view that for now the status quo remains; that is all debts and liabilities which existed as at 22 February 2019 remain converted from USD to ZWL at a rate of one to one, and RTGS FCA balances remain converted from USD to ZWL at a rate of one to one.

We will continue to monitor the developments of this matter as they may have a major impact on the currency regime, and to business in general.

This memorandum is intended to be general in nature. Should you require any specific legal advice kindly contact us directly.