

**REPORTABLE** (28)

**BRIAN RODNEY BARON**  
v  
(1) **VERDURE INVESTMENTS** (2) **ICENTA INVESTMENTS**  
**PRIVATE LIMITED** (3) **DAVID CAPSOPOLOUS**

**SUPREME COURT OF ZIMBABWE**  
**MAVANGIRA JA, MATHONSI JA & CHIWESHE JA**  
**HARARE: 15 MAY 2023 & 14 MARCH 2024**

*L Uriri* with *K Kachambwa*, for the appellant

*D Tivadar*, for all the respondents

**CHIWESHE JA:** This is an appeal against the whole judgment of the High Court (the court *a quo*) sitting at Harare handed down on 31 January 2023 wherein the court *a quo* dismissed the appellant's claim that certain loans advanced to the first respondent be repaid in United States dollars.

Aggrieved by the decision of the court *a quo*, the appellant has noted the present appeal for relief.

**THE FACTS**

The facts are common cause. On 29 January 2016, the appellant entered into a loan agreement with the first respondent in terms of which he lent and advanced to the latter the sum of US\$ 600 000.00 payable with interest within 36 months. The amount was deposited into the second respondent's CABS account. The third respondent signed as surety and co-principal debtor. On 27 July 2016 the appellant extended another loan facility to the first

respondent in the sum of US\$ 300 000.00 payable within 6 months. Again this amount was deposited into the second respondent`s CABS account. As security for the loans, two mortgage bonds were registered in the appellant`s favour over a certain piece of land situated in the District of Salisbury, described as the remaining extent of lot 183 Highlands Estate of Welmoed, measuring 6877 square metres, held under deed of transfer 5465/2010, dated 24 November 2010.

On 27 July 2016, the parties amended the loan agreements to read that regardless of any change in the currency in use in Zimbabwe, repayment of the capital and interest would be in United States dollars. The appellant avers that neither of the loans were repaid within the agreed periods or at all and that the respondents repeatedly sought indulgence to service the loans at a later date and in return, the appellant extended the indulgence sought. On 13 December 2019, the respondents acknowledged the outstanding balances as US\$ 1, 070 084.84 and US\$ 876 534.78, respectively. The acknowledgment was made in a letter which the respondents addressed to CABS indicating that the loans were applied to the development of “Highlands House”, a boutique guest lodge which the respondents said had significant foreign currency receipts. The loans were also applied to the development of an agricultural export operation. The respondents also indicated that they had applied for the loans to be included in the “legacy debt” scheme of the Reserve Bank of Zimbabwe, indicating that the underlying source of the loans was offshore, having been borrowed from a non-resident creditor. The Reserve Bank approved the offshore remittance of the loans from the respondent`s retentions in its foreign currency account. On 12 July 2021, the third respondent sent the appellant an e-mail in which he expressed his displeasure with the bank for stipulating that the loans be serviced from the respondents` foreign currency earnings. The respondents had instead opted to pay the appellant the sum of ZW \$ 1, 300 000.00.

It was for that reason that the appellant approached the court *a quo* seeking a declaratory order confirming that the first and third respondents, jointly and severally, owed him capital sums in the amounts of US \$1, 070 084.84 and US\$876, 534 .78, respectively, plus compound interest at the rate of 3% and 5% per month respectively, from 13 December 2019 to date of full payment. The appellant also claimed collection commission calculated in terms of the Law Society of Zimbabwe tariffs and costs of suit on an attorney and client scale. Consequent upon the grant of such declaratory order, the appellant sought an order that the immovable property described above be held especially executable should the respondents not settle the debt within 48 hours of the grant of the declaratory order.

The issue for determination before the court *a quo* was whether the loans should be repaid in United States dollars or in RTGS dollars. The appellant insisted that the repayment ought to be in USD whilst the respondents were adamant that repayment should be in RTGS.

### **FINDINGS OF THE COURT A QUO**

In determining the dispute, the court *a quo* considered the provisions of the relevant legislation, namely s 4 (1) (d) of the Presidential Powers (Amendment of Reserve Bank of Zimbabwe Act) and Issue of Real Time Gross Settlement Electronic Dollars (RTGS Dollars) Regulations, 2019 (S.I. 33/19). It also considered the decision of this Court in *Zambezi Gas Zimbabwe Private Limited vs N.R Barber Private Limited and Anor SC 3/20* wherein this Court interpreted the import of s 4 (1) (d) of S.I. 33/19.

The court *a quo* found that the mandatory conversion from the United States dollars at the rate of 1:1 applied to domestic transactions and not foreign obligations. The appellant had argued that his debt was a foreign obligation for the following reasons. The parties had

agreed that the United States Dollar (USD) was the applicable currency and that repayments be made in that currency. On 23 December 2019, the respondents acknowledged that the balance of the loans was in USD and that this acknowledgment of debt created a fresh obligation to pay in USD. Further, the loans were paid from a non-resident account held with CABS. The respondents had admitted to CABS that the amounts they owed were borrowed from an offshore account. Correspondence from the Reserve Bank of Zimbabwe to CABS confirmed this position.

The court *a quo* found that the appellant had not, in his founding affidavit, stated that the loan agreements constituted a foreign loan. Rather the point was improperly taken through the appellant's heads of argument. It found that the circumstances of the case were such that the transactions took place within Zimbabwe and that repayment of the loan was through the appellant's Zimbabwean account with CABS. It held that the statutory changes brought in by S.I. 33/19 were mandatory and could not be overridden by the parties prospectively contracting outside the law. It also found that the acknowledgement of debt of 23 December 2019 did not create a new obligation. In the result it dismissed the application with costs.

The appellant appeals that decision on the following grounds.

#### **“GROUNDS OF APPEAL**

1. The court *a quo* erred in failing to hold that the respondent's acknowledgement of debt dated 23 December 2019 constituted a lawful basis upon which the said respondents were obliged to repay their indebtedness in United States dollars.
2. Furthermore, the court *a quo* also erred in determining that the loan agreement concluded “*inter partes*” was not a foreign obligation. Such finding was anomalous in circumstances where the respondents had sought and obtained exchange control approval to discharge their indebtedness by making offshore payments.

3. Concomitantly the court *a quo* grossly misdirected itself in determining that the appellant had not proved that the respondent's indebtedness was a foreign obligation, such finding was incongruent with the respondent's written admission to the authorised foreign currency dealer in the form of CABS Bank.
4. Additionally, the court *a quo* also erred in excusing the respondents from the agreement they voluntarily concluded with the appellant wherein the parties expressly covenanted that the loans advanced could only be discharged in United States dollars regardless of any change in currency."

The appellant seeks the following relief:

### **“RELIEF SOUGHT**

1. That the instant appeal succeeds with costs.
2. That the order of the court *a quo* be set aside and substituted with the following:
  1. The application is hereby granted.
  2. It is hereby declared that the debts due to the applicant from the first and third respondents in terms of the loan agreements dated 29 January 2016 and 27 July 2016, together with all subsequent amendments, are payable in United States dollars.
3. Consequently, first and third respondents be and are hereby ordered to pay, jointly and severally, the one paying the other to be absolved, to applicant the sums of USD 1 070 534- 78 and USD 876 534-78 together with compound interest calculated at the rates of 3% and 5% per month respectively, running from 13 December 2019 to date of full and final payment.
4. An immovable property known as a certain piece of land situate in the district of Salisbury, called the remaining extent of lot 183 Highlands Estate Welmoed, measuring 6877 square meters held under deed of transfer 5465/2010 be and is hereby held specially executable.
5. First and third respondent be and are hereby ordered to pay jointly and severally, the one paying the other to be absolved, collection commission in terms of the Law Society of Zimbabwe By-Laws.
6. First and third respondents be and are hereby ordered to pay, jointly and severally, the one paying the other to be absolved, costs of suit on an attorney and client scale."

### **ISSUES FOR DETERMINATION**

Only one issue arises for determination, namely, whether or not the loans advanced to the respondents should be discharged in United States dollars.

**APPLICATION OF THE LAW TO THE FACTS**

The applicable law in resolving the issue between the parties is Statutory Instrument No. 33 of 2019 (S.I. 33/19). Section 4 (1) (d) of that Statutory Instrument provides

- “4. (1)
- (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 s 44 (2) of the principal Act) shall, on and after the effective date, be deemed to be values in RTGS dollars at a rate of one to one to the United States dollar or-”

For purposes of this Statutory Instrument the effective date means 22 February 2019. The language of s 4 (1) (d) of S.I. 33/19 is clear and unambiguous. All assets and liabilities expressed in United States dollars prior to the effective date shall be deemed, as from the effective date, to be assets and liabilities in RTGS dollars at the rate of one to one.

However, s 44 of the Reserve Bank Act specifically exempts foreign obligations from the effect of s 4 (1) (d) of S.I. 33/19. In order to succeed, therefore, the appellant must show that the loans extended to the respondents are foreign loans or obligations and thus not subject to the said provision. In other words, once it is shown that such loans constitute foreign obligations as defined under s 44 of the principal Act, then the respondents become duty bound to discharge the loans in foreign currency, in this case United States dollars. See *Zambezi Gas Zimbabwe (Pvt) Ltd v NR Barber and Another* SC 3/20.

In *Breastplate Services (Pvt) Ltd v Cambria Africa PLC* SC 66/20 this Court had this to say regarding the term “foreign obligations”:

“What emerges clearly and unequivocally from s 44 C (2) (b) of the Reserve Bank Act, as read with s 4 (1) (d) of S.I. 33/19, is that foreign loans and obligations denominated in any foreign currency are excluded from the broad remit of S.I. 33/19. Thus foreign loans and obligations continue to be valued and payable in the foreign currency in which they are denominated. The term “foreign loans and obligations denominated in any foreign currency”, as it appears in s 44 C (2) of the Reserve Bank Act, is not defined in S.I. 33/19 or in any other legislation that I am aware of. Its meaning in any given case must be ascertained from the factual circumstances of the parties involved and the material substance of the transactions that they have entered into.”

In several cases involving loans denominated in United States dollars extended to tobacco farmers for purposes of covering the costs of producing that crop within Zimbabwe, this Court has held that such loans are payable in United States dollars as contemplated under s 44 C (2) (b) of the Reserve Bank Act. In other words, such loans are foreign in that sense and for that reason do not fall within the ambit of S.I. 33/19. We see no reason why the same considerations should not apply in the present case.

In our view, the appellant’s case is unassailable. It is common cause that following an application by the respondents, the Reserve Bank, on 12 July 2021, (well after the effective date of 22 February 2019) recognized the loans to be offshore or foreign loans in terms of s 44 c (2) (b) of the Reserve Bank Act. It accordingly granted approval for offshore remittance of the loans. The respondents advised CABS, the authorized foreign currency dealer, of that directive from the Reserve Bank. At no point did the respondents challenge that directive. They could not have done so as it was the respondents who themselves had sought authority from the Reserve Bank to discharge the loans in United States dollars. Further, the appellant has quoted Reserve Bank Exchange Control directive to the effect that cross border payments from

non-resident individuals are to be regarded as funds originating from offshore. Specifically Exchange Control direction R 101/2016 dated 26 May 2016 provides that:

“3. TREATMENT OF TRANSACTIONS FOR DIPLOMATS, EMBASSIES, NGO’S, INTERNATIONAL ORGANISATIONS AND NON RESIDENT INDIVIDUALS (INCLUDING DIASPORANS) AND CORPORATES

3.1 As previously advised under ECOGAD 7/2016 dated 8 February 2016 cross border payments for Diplomats (foreign), embassies, NGOs, international organization and non- resident individuals (including diasporans) and corporates do not require prior Exchange Control approval since their funds originated from offshore.”

The respondents have not denied the existence of this and other similar directives issued by the Reserve Bank from time to time. Neither have they challenged the validity of such directives from the monetary authorities. It is clear that the Reserve Bank of Zimbabwe regards funds such as those held by the appellant in a non-resident account at CABS as offshore or foreign funds. Any loans or obligations deriving from such funds are deemed to be foreign loans or obligations. This position as given by the monetary authorities accords with the provisions of s 44C (2) (b) of the Reserve Bank Act. In our view those provisions must be interpreted accordingly.

Further, such directions by the Reserve Bank have legal effect as they are given in terms of s 35 of the Exchange Control Regulations, 1996 (Statutory Instrument 109 of 1996). By authority of that statutory instrument, the Reserve Bank supplements the provisions of the Exchange Control (General) Order 1996 (S.I 110 of 1996) by issuing directions under the authority of s 35 of S.I. 109/1996. Section 39 (1) provides as follows :-

- “Any direction issued or permission or authority granted under these regulations: -
- (a) may be general or special.
  - (b) may be absolute or conditional.
  - (c) in the case of permission or authority, may be limited so as to expire on a specified date unless renewed.
  - (d) may be revoked or varied.

(e) shall be given to such persons or published in such manner as, in the opinion of the exchange control authority issuing it, will give any person affected by it an adequate opportunity of getting to know of it. As a result, all the directions are circulated to Authorized Dealers for onward dissemination to their customers.”

It is evident that the Reserve Bank is at law bestowed with wide powers to regulate and administer the country’s exchange control regime. It is in this regard that such directions given by it from time to time a direct bearing on the interpretation of s 44 C of the Reserve Bank Act in so far as it relates to foreign loans. This Court has repeatedly and in tandem with directions issued by the Reserve Bank, held that loans obtained from offshore funds must be repaid in foreign currency. See *Mushayakarara v Zimbabwe Leaf Tobacco Company* SC 108/21.

Both Advocates *Uriri* (for the appellant) and *Tivadar* (for the respondents) filed extensive heads of argument in support of their clients’ respective cases. Mr *Uriri* sought to argue that the letter to CABS referred to earlier constitutes an acknowledgment of debt whilst Mr *Tivadar* was of the view that the letter was only an acknowledgment of the balance of the amounts owed as at that date. We find these submissions by both counsel superfluous in the sense that it was not in dispute whether the respondents owed the appellant the amounts claimed. Rather what was in dispute was whether the debt should be discharged in RTGS\$ or in the currency of the United States dollars.

Mr *Tivadar* supported the decision of the court *a quo* when it held that the appellant had failed to take the court into its confidence by not disclosing the origins of his funds and not indicating whether he has any offshore obligations. He further argued that this proposition finds support from the decision of this Court in the *Mushayakarara* case *supra*. We disagree. The court in that case was simply adverting to the factual circumstances of that particular case. It did

not say that a party claiming payment in foreign currency must establish the origins of its funds and state whether it has any foreign obligations. We are of the view that such a party is entitled to financial confidentiality and is not obliged by law to make such disclosures save in circumstances where the source of the funds is tainted with impropriety. For purposes of s 44C (2) (b) all that needs to be established is that the loans advanced to the respondents were sourced offshore. That on its own creates a foreign loan or obligation. It is not necessary that the appellant alleges that the funds advanced had been borrowed offshore thereby creating an obligation to pay off a creditor who is outside this jurisdiction. Once the loans are advanced from offshore funds, they are payable in foreign currency. It is common cause that the appellant advanced the loans through the medium of his non-resident account with CABS. It is also common cause that the appellant, a Zimbabwean national, was resident in South Africa and as such qualified to open a non-resident account. As shown above the monetary authorities have directed that funds held in such accounts be regarded as offshore funds.

Much was said of the parties' agreement to the effect that the loans would be repaid in United States dollars regardless of any change in the laws governing currency in Zimbabwe. The court *a quo* and, on his part, Mr *Tivadar*, was correct in stating that no party can, prospectively or retrospectively, contract out of the application of the laws of Zimbabwe. In *casu* however, the parties' contract, wittingly or unwittingly, accords with the laws of Zimbabwe in that s 44C (2) (b) provides that such foreign loans or obligations are payable in foreign currency and exempt from the provisions of S.I. 33/2019. For that reason, the parties' contract reflects the correct position of the law as applied to the facts of this case.

This Court has previously pronounced itself on the question whether S.I. 33/19 is applicable to foreign loans and obligations. In view of the provisions of s 44C (2) (b) of the

principal Act, this Court has answered that question in the negative. For example where tobacco farmers have benefitted from loans advanced to them from offshore or foreign funds, this Court has held that such loans be retired in United States dollars or in the currency of the offshore account concerned. See *Mushayakarara supra*, and *Campion Mugweni v Tian Ze Tobacco (Pvt) Ltd* SC 120/21.

In our view therefore, we find merit in the submissions made on behalf of the appellant that the debt owed to it should be paid in foreign currency. We are unable to agree with the respondents' position that such debt, by virtue of S.I. 33/19, is payable in RTGS\$. We are satisfied that these foreign loans fall into the category of the exemptions granted under s 44C (2) (b) of the Reserve Bank Act.

### **DISPOSITION**

The appeal has merit. The appellant has established a firm legal basis upon which the loans owed to it by the respondents should be paid in United States dollars. The appeal must therefore succeed. Costs shall follow the cause.

In the result, it is ordered as follows:

1. The appeal succeeds with costs.
2. The order of the court *a quo* be and is hereby set aside and in its place, substituted the following:
  - “(a) The application be and is hereby granted.
  - (b) It is hereby declared that the debts due to the applicant from the first and third respondents in terms of the loan agreements dated 29 January 2016 and 27 July 2016, together with all subsequent amendments, are payable in United States dollars.

- (c) Consequently, first and third respondents be and are hereby ordered to pay, jointly and severally, the one paying the other to be absolved, to applicant the sums of USD 1 070 534- 78 and USD 876 534-78 together with compound interest calculated at the rates of 3% and 5% per month respectively, running from 13 December 2019 to date of full and final payment.
- (d) An immovable property known as a certain piece of land situate in the district of Salisbury, called the remaining extent of lot 183 Highlands Estate Welmoed, measuring 6877 square meters held under deed of transfer 5465/2010 be and is hereby held specially executable.
- (e) First and third respondents be and are hereby ordered to pay jointly and severally, the one paying the other to be absolved, collection commission in terms of the Law Society of Zimbabwe By-Laws.
- (f) First and third respondents be and are hereby ordered to pay, jointly and severally, the one paying the other to be absolved, costs of suit on an attorney and client scale.”

**MAVANGIRA JA** : I agree

**MATHONSI JA** : I agree

*Mambosasa Legal Practitioners*, appellant’s legal practitioners

*Whatman & Stewart Legal Practitioners*, respondents’ legal practitioners