**REPORTABLE (70)**

**SALZMAN ET CIE SA**
**v**
**(1) MANOJKUMAR JIVAN (2) THE SHERIFF OF ZIMBABWE**

**SUPREME COURT OF ZIMBABWE**
**BHUNU JA, MATHONSI JA, & CHATUKUTA JA**
**HARARE, 5 JULY 2022 & 24 JULY 2023**

*G. W. Nyamakaura*, for the appellant

*E.M. Mubaiwa*, for the first respondent

**CHATUKUTA JA**: This is an appeal against the whole judgment of the High Court wherein it made an order confirming that the first respondent had fully settled his judgment debt denominated in United States Dollars to the appellant by paying the balance in RTGS dollars.

**FACTUAL BACKGROUND**

The appellant is a limited liability company registered and incorporated in terms of the laws of the Republic of Panama. It has its head office or principal place of business in Switzerland. The first respondent was one of the directors of Myramar Farming (Pvt) Ltd (Myramar), a limited liability company, registered in terms of the laws of Zimbabwe. On 3 April and 31 July 2012, the appellant extended loans to Myramar in the sums of US$ 845.000.00 and US$ 400.000.00 respectively. As security for these loans, the first

respondent, together with six others, bound themselves as sureties and co-principal debtors for the due performance and repayment of the loans. The amounts were transferred from Switzerland into Myramar's account in Zimbabwe.

Myramar was required to have paid the debt in full by August 2012. It failed to do so. In 2014, the appellant sued against the first respondent and six others in case number HC 7916/14 for payment of an amount in the sum of US$ 845 000.00, together with interest thereon, a certain facility funding fee and costs of suit. The first respondent was sued as a surety and co-principal debtor. A compromise was reached by way of a Deed of Settlement by the appellant, the first respondent and two other sureties. The High Court subsequently issued an order by consent (consent judgment) on 22 June 2016 whereupon the first respondent and the other sureties were to pay, jointly and severally, a sum of US$ 440 000 with interest thereon at 10 per cent per annum. Payment was to be by instalments commencing on or before 25 July 2016 with the last payment being due on or before 25 July 2019. The court order had an acceleration clause which entailed that a default in the payment of any one instalment would result in the entire outstanding balance at the time of the default becoming immediately due and payable.

The last payment towards extinguishing the judgment debt was in March 2017. The balance due and owing by the first respondent to the appellant, including interest, was US$ 540 000.00 as at 31 March 2021. On 31 March 2021, the appellant sued out a writ of execution against the first respondent for the recovery of the outstanding amount. The second respondent attached the first respondent's property, a certain piece of land situate in the District

of Salisbury being Stand no 5 of Strathaven of Strathaven A measuring 4 381 square meters, held under Deed of Transfer Number 11079/97, in the execution of the judgment debt.

On 6 April 2021, upon being served with the writ and notice of attachment of his immovable property, the first respondent paid through the second respondent an amount of RTGS $ 540 000.00 supposedly in full discharge of the judgment debt and interest. He also paid RTGS $ 60 000.00 towards the appellant's costs. The appellant rejected the payment contending that the judgment debt could not be paid in local currency, let alone at a ratio of one-to-one with the United States dollar.

**PROCEEDINGS IN THE COURT *A QUO***

The appeal comes against the background of two applications in the High Court (the court *a quo*) that were consolidated. The appellant's attempt to execute the consent judgment prompted the first respondent to approach the court *a quo* with an application under case number HC 1693/21 seeking a declarator that he was not indebted to the appellant. He asserted that he was no longer indebted to the appellant as the consent judgment had superannuated on 21 June 2019, having been granted on 22 June 2016 and could not be enforced without being revived. He submitted that the writ of execution issued on the strength of the said order without the revival of the superannuated consent judgment was a nullity

The first respondent further asserted that he had, in any event, settled the debt with the payment of RTGS $540 000. He argued that the judgment debt in HC 7916/14 constituted an

'outstanding obligation' on 22 February 2019. It was therefore subject to the provisions of SI 33/19 and was payable in local currency at the rate of one-as-to-one.

The application was opposed. The appellant argued that the judgment debt was a foreign debt arising from a loan advanced from Switzerland. It argued that the amounts due to it by the first respondent form a 'foreign loan and obligation' denominated in foreign currency which remains payable in foreign currency within the meaning of s 44C (2) of the Act. It further argued that, on the authority of the Supreme Court case in *Breastplate Services (Pvt) Ltd* v *Cambria Africa PLC* SC 66/20, once it is shown that the underlying obligation is owed to a foreign entity then it must be discharged in the foreign currency involved. The appellant argued that SI 33/19 does not therefore apply to the case and the judgment debt was therefore exempted from being discharged in local currency. It was submitted that the payment to the second respondent of the sum of RTGS $ 540 000 did not extinguish the judgment debt. Consequently, the execution of the writ was lawful.

As regards the superannuation of the consent judgment, it was argued that where a court would have ordered payment of a sum of money, superannuation only begins to run after the payment becomes due. It was argued that the consent judgment had therefore not superannuated. On 10 May 2021, the appellant however, filed a counter-application under case number HC 2127/21 seeking an order to revive the consent judgment and a declaration that the writ of execution issued against the first respondent in HC 7916/14 remains in force.

The first respondent argued in opposition to the application in HC 2127/21, by stating that he had fully discharged his indebtedness to the appellant by paying in local currency. There was therefore nothing to enforce. He further argued that the debt was not saved by s 44C [2] of the Reserve Bank Act [*Chapter 22:15*] (the Act). He denied that the debt was a foreign loan or obligation. He also asserted that the dispute between the parties was compromised by the Deed of Settlement which extinguished all the preexisting rights and obligations in favour of new ones. He further argued that the Deed of Settlement, let alone the order by consent, did not characterise the debt as a foreign loan or obligation and the *Breastplate* case was inapplicable. He relied on the remarks in *Zambezi Gas Zimbabwe (Pvt) Ltd* v *N.R. Barber (Pvt) Limited & Anor* SC 3/20 that the origin of the obligations is not necessarily a criterion for the exclusion of the application of S.I 33/19.

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

The court *a quo* found in favour of the first respondent's argument. It made the following findings: The fact that the appellant is a foreign company does not place it outside the ambit of S.I. 33/19. The consent order in case number HC 7916/14 constituted a compromise between the parties and precluded any reliance on the original debt. It held that the court order of 22 June 2016 constituted an asset or liability that was valued and expressed in United States dollars and which on and after the effective date, 22 February 2019, was deemed to be valued in RTGS dollars at the rate of one-to-one to the United States dollar. The appellant did not show that the exemption from that parity ratio by s 44C (2) of the Act was applicable. The judgment debt constituted an outstanding obligation on 22 February 2019 and was therefore subject to the provisions of s 4 (1) (d) of S.I 33 of 2019. The payment by first respondent of

RTGS $540 000-00 to the second respondent on 5 April 2021 to the credit of the appellant fully settled and extinguished the judgment debt.

**PROCEEDINGS BEFORE THIS COURT**

Aggrieved by the court *a quo*'s decision, the appellant noted the present appeal on the following grounds of appeal:

**GROUNDS OF APPEAL**

1. It being a fact that the appellant, a peregrine company had wired the loan funds to the first respondent from Switzerland, the High Court erred in failing to find as it should have, that the source of the funds on its own, meant that the debt could not be discharged in local currency.
2. The High Court erred in failing to find that the consent order dated 22 June 2016 did not have the legal effect of transforming the foreign debt owed by the first respondent into a local debt in terms of section 44C of the Reserve Bank of Zimbabwe Act [*Chapter 22.15*] as amended by Statutory Instrument 33 of 2019.
3. Having found that the deed of settlement dated 22 June 2016 constituted a compromise of the original debt between the parties, the High Court erred in failing to find that the instrument of the debt was immaterial, as the currency of settlement is determined by the source of funds and domicile of lender.
4. The High Court further erred in failing to give a commercially sensible interpretation to the consent order of 22 June 2016 and in doing so failed to take into account the peregrine

appellant's interest in securing settlement of its loan in a currency capable of extinguishing the debt in the source country.

5. To the extent that the High Court had before it the application for revival in HC 2127/21, it grossly erred in failing to render a final determination on it.

**ISSUES FOR DETERMINATION**

The following issues arise from the grounds of appeal:

1. Whether or not the first respondent's obligation and liability to the appellant under the consent judgment are foreign obligations which fall under s 44 (C) (2) of the Reserve Bank Act [*Chapter 22:15*].
2. Whether or not the court *a quo* erred in not making a final determination on the application for revival.

**APPELLANT'S SUBMISSIONS**

Mr *Nyamakura*, for the appellant, submitted that a determination of the matter could not be made without establishing the source of the funds first as stated in the *Zambezi Gas* case which the first respondent sought to rely on. He submitted that the debt instrument stipulated that repayment of the loan was to be done in United States Dollars. He relied heavily on the *Breastplate* case, *supra*, for the proposition that once it is shown that the underlying obligation is owed to a foreign entity then it must be discharged in the foreign currency involved. He submitted that a judgment debt remains a debt whose nature or character is not altered by the fact that it is a judgment debt.

He further argued that since the funding that was availed to the first respondent was from an offshore loan, the judgment debt falls under s 44C (2) of the Act. He submitted that the source of the funds remained foreign making it a foreign obligation. He further submitted that any repayment of the loan in local currency could not offset the loan in Switzerland where the loan had been secured and disbursed from.

With regards the application for revival, he submitted that the court *a quo* was enjoined to make a definitive order in the operative part of its decision after making findings on the same. He submitted further that there was no need to remit the matter for a pronouncement on the application as this Court has the power in terms of s 22 (1) (b) (ix) of the Supreme Court Act to correct the error if it finds in favour of the appellant because the revival of a court order is a matter of procedure and not substance.

**FIRST RESPONDENT'S SUBMISSIONS**

Mr *Mubaiwa*, for the first respondent, submitted that the consent order was a result of a compromise between the parties and had the effect of novating the original cause of action. He argued that what is enforced is not the original cause of action but the judgment. He submitted that the judgment debt was a debt within the contemplation of SI 33/2019 as it was denominated in United States Dollars immediately before the effective date of SI 33/2019. It was therefore payable at a rate of 1:1. It was his argument that the source and nature of the debt may have been originally foreign, but by choosing to enter into a compromise, the appellant converted its foreign debt into a local debt, albeit still sounding in foreign currency. He argued further that once novation has taken place in terms of a court order or judgment, the debt changes its

character. The debtor's obligation to pay, therefore, arises out of the court order or judgment. The creditor derives its rights to enforce the judgment in terms of the new novated debt. He submitted that the court *a quo* was therefore not required to go beyond the consent order. He further submitted that the first respondent's obligation does not fall into the exception of s 44 (C)(2) of the Act. Counsel submitted that the court *a quo* was correct and its findings were consistent with the *Zambezi Gas* case.

**APPLICATION OF THE LAW AND ANALYSIS**

**Whether or not the judgment debt in HC 7916/14 is a foreign obligation which falls under section 44 (C) (2) of the Act**

The appeal turns on a consideration of the question whether or not the judgment debt that was owed to the appellant can be classified as a foreign loan and obligation in terms of s 44C (2) of the Act. Section 44C (2) provides as follows:

> "The issuance of any electronic currency 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 and obligations denominated in any foreign currency, which shall continue to be payable in such foreign currency." (My emphasis)

The appellant argues that it is a peregrine Swiss company hence the payment made by the first respondent in Zimbabwe dollars could not discharge the loan amount advanced in United States dollars from Switzerland. It contends that s 44C (2) (b) of the Act as amended by S.I 33/19 created provisions that specifically placed foreign loans or obligations out of reach of the conversion of all local debts and obligations sounding in United States dollars at par with the local currency.

The above issue has been traversed by this Court in a number of cases. It has consistently held, as it does in this case, that foreign loans or obligations are exempted under s 44C (2) (a) of the Act from the conversion of all local debts and obligations sounding in United States dollars at par with the local currency. In *Breastplate Service (Private) Limited* v *Cambria Africa PLC* SC 66/20 it was remarked that:

> "By the same token, I take the view that s 2 of S.I 142/2019 does not extend to the discharge of foreign loans and obligations denominated in any foreign currency. This is for two fairly obvious reasons. Firstly, it would be commercially incongruous and internationally unacceptable to attempt to settle any foreign loan or obligation in local currency, unless it is mutually agreed between the parties involved. **Secondly, and more importantly, the exemption from the scope of currency in respect of foreign loans and obligations is explicitly preserved and embodied in s 44C (2) (b) of the Reserve Bank Act itself.**" (my emphasis)

It was further held at p 5 that:

> "What emerges clearly and unequivocally from s 44C(2)(b) of the Reserve Bank Act, as read with s 4(1)(d) of SI 33 of 2019, is that foreign loans and obligations denominated in any foreign currency are excluded from the broad remit of SI 33 of 2019. Thus, foreign loans and obligations continue to be valued and payable in the foreign currency in which they are denominated."

(See also *Valentine Mushayakurara* v *Zimbabwe Leaf Tobacco Company (Pvt)* Ltd SC 118/21, *Zimbabwe Leaf Tobacco (Private) Limited* v *Patricia Vengesayi & Anor* SC 149/21.)

The position was reiterated in *Mushayakurara* v *Zimbabwe Leaf Tobacco (Private) Limited* SC 108/2021 where MALABA CJ remarked as follows:

> "The term "foreign loans and obligations denominated in any foreign currency", as it appears in s 44C (2) of the Reserve Bank Act, is not defined in SI 33 of 2019. As stated in the *Breastplate* case supra, its meaning in any given case must be ascertained from the factual circumstances of the parties involved and the material substance of the transaction that they have entered into. Section 44C (2) (b) of the Reserve Bank Act makes it clear that the issuance of any electronic currency, that is RTGS dollars, shall not affect or apply to any foreign obligation, as the provision explicitly excludes foreign obligations valued and expressed in United States dollars from the deemed parity valuation in RTGS dollars."

The following facts are common cause and constitute the actual circumstances of the parties involved and the material substance of the transaction referred to in *Mushayakurara* (*supra*). The appellant is a foreign company incorporated in Panama and whose office for business is in Switzerland. The loan advanced to Myramar was a foreign loan. Sometime in 2020, the appellant successfully applied to the RBZ for exchange control approval for the regularization of the external loan after realizing that Myramar had not sought exchange control approval when it secured the loan from the appellant. The approval was intended to facilitate the repatriation of the foreign currency payments made to the appellant by Myramar. After the issuance of the summons, the first respondent and two others concluded a deed of settlement undertaking to pay the compromised amount in United States dollars. They further consented to the judgment which ordered them to pay the compromised amount in United States dollars. It is no doubt that the parties intended to create a foreign obligation and for Myramar and the sureties including the first respondent to discharge that foreign obligation in foreign currency.

In *Zimbabwe Leaf Tobacco (Private) Limited* v *Vengesai* (*supra*), it was affirmed that where the source of the funds is an offshore source, it makes no sense to expect that the payment of local currency should discharge the foreign debt. Foreign loans should not be subject to payment by way of local currency as that payment will never discharge the obligation in the source country.

It is pertinent to note that, this Court has already held that the *Zambezi Gas* case relied on by the court *a quo* is distinguishable from cases where a party incurs a foreign obligation. It was remarked in the *Mashayakurara* case (supra) that:

> "The court *a quo* cannot be faulted for holding that the funds advanced to the appellant had to be repaid in United States dollars. The *Zambezi Gas* case supra is distinguishable from the present matter. The present case relates to offshore funding. The obligation incurred by the respondent was a foreign obligation denominated in foreign currency within the contemplation of s 44C of the Reserve Bank Act. The Deed of Settlement was entered into for the purpose of allowing the appellant to repay the debt he acknowledged to be owing in instalments in United States dollars. The Deed of Settlement was for the benefit of the appellant. The appellant cannot escape the obligation he voluntarily undertook to repay the funds advanced to him in United States dollars for the specific purpose of financing the production of the tobacco crop by calling the Deed of Settlement a compromise. There was no dispute between the parties over the currency in which the offshore funds received by the appellant from the respondent had to be repaid. The respondent was entitled to invoke the provisions of s 44C (2) (b) of the Reserve Bank Act to protect its rights to the repayment of the offshore funds advanced to the appellant in United States dollars under the Deed of Settlement."

It was remiss of the court *a quo* to rely on the *Zambezi Gas* case in the face of the distinction that was made by this Court in the *Mushayakurara* case. The judgment debt constituted a foreign obligation. The first respondent did not discharge his obligation.

**Whether or not the court *a quo* erred in not making a final determination on the application for revival.**

The appellant contends that its application seeking to revive the consent judgment was not seriously contested by the first respondent and the court *a quo* erred by not making a final determination on the same. The court *a quo* did not determine it, dismiss it or in any way relate to it in the operative part of its order.

In *Gwaradzimba No* v *CJ Petron & Co (Pty) Ltd* 2016 (1) ZLR 28 (S) GARWE JA (as he then was) remarked at p 32C that:

> "The position is also settled that where there is a dispute on some question of law or fact, there must be a judicial decision or determination on the issue in dispute. Indeed, the failure to resolve the dispute or give reasons for a determination is a misdirection, one that

vitiates the order given at the end of the trial – *Charles Kazingizi* v *Revesai Dzinoruma* HH 106/2006; *Muchapondwa* v *Madake & Ors* 2006 (1) ZLR 196 D-G, 201 A (H); *GMB* v *Muchero* 2008 (1) ZLR 216, 221 C-D (S)."

The court *a quo* was mindful of the need to determine not only the main application but also the counter application. Its reasoning was that a determination of one would dispose of the other. It remarked that:

"[7] Although the outstanding issues aforesaid are fragmented into three separate statements, they are so inexorably intertwined that a resolution of any one of them likely settles the rest. For example, if it is resolved that by reason of S.I. 33/19 an RTGS payment satisfied a US dollar debt on a one-to-one ratio, then Jivan's payment of RTGS $540 000-00, which it is agreed was the outstanding balance at the time the writ of execution was issued, should free him from the bondage of that debt. Concomitantly, there would be no need to revive the judgment of this court in HC 7916/14. Conversely, if it should be resolved that this judgment should not be revived, then that should be the end of the matter because Salzman would not be able to execute it in any way."

Having made a finding that the consent judgment fell squarely under s 44C (2) of the Act, it failed to pronounce itself in the judgment what the fate of the application under case number HC 1217/21 would be. This is an oversight which translates to mean that there was no determination on that aspect as far as the order of the court *a quo* is concerned. This was a misdirection on the part of the court *a quo* which would have justified interfering with the decision of the court *a quo* had this Court found that the court *a quo* was correct in its determination of the main matter.

The court *a quo* was correct in holding that a finding on the main matter had a bearing on the success of the counter application, particularly on the revival of the consent judgment. This is a question that this Court can determine without remitting the matter to the

court *a quo* to determine the issue. (See also *Halwick Investments* v *Nyamwanza* 2009 (2) ZLR 400 (S) at 404 C-E.)

The first respondent did not meaningfully resist the application for revival. He argued that there was no judgment to revive as he had discharged his indebtedness by paying the outstanding amount in local currency.

This Court has held that the consent judgment was not discharged with the payment by the first respondent in local currency. Therefore, there is no basis for not granting the appellant an order reviving the consent judgment. The parties agreed before the court *a quo* that the consent judgment had become superannuated by the time the appellant sued out its writ of execution on 31 March 2021. It was further agreed that the writ of execution and the subsequent attachment of first respondent's house was a nullity and therefore had to be set aside.

**DISPOSITION**

The amount payable by the first respondent to the appellant did not fall under the auspices of s 4 (1) (d) but s 2 (b) of S.I. 33 of 2019 because the facts of the case show that the debt constituted a foreign loan and obligation in terms of s 44C (2) (b) of the Act. The fact that the appellant had obtained an order for the payment of the foreign loan, did not have the effect of changing the foreign loan into a local one. Such an interpretation would be an affront to common sense, and would be economically impracticable.

Foreign loans and obligations continue to be valued and payable in the foreign currency in which they are denominated. When courts interpret the provisions of Statutory

Instrument 33 of 2019, they are obliged to give an interpretation that is commercially practicable. A commercially sensible interpretation is one that accepts that a Zimbabwean will still need to trade internationally, borrow money and lend money to foreigners. The Zimbabwe dollar cannot settle a loan denominated in United States dollars in Switzerland. Even if the court proceeded on the basis that the deed of settlement between the appellant and the first respondent constituted a compromise, this could not possibly extend to changing the source of the funds and the nature of the debt. It remained a foreign debt payable in the currency of the contract and not the local currency of Zimbabwe.

Full recovery of funds secured offshore in foreign currency can only be in foreign currency and not RTGS dollars. The court *a quo* therefore grossly misdirected itself in characterising the loan as a local obligation that could be settled in RTGS dollars and that it was irrelevant that the funds extended to Myramar came from a foreign source.

There being no meaningful opposition in the court *a quo* to the application in case number HC 1217/21 and in view of our finding that the consent judgment is a foreign obligation, the application ought to be granted. The appellant did not seek costs in that application. The application shall be granted with no order as to costs.

The appeal therefore succeeds. Costs follow the cause. There is no basis for deviating from the standard rule.

It is accordingly ordered as follows: -

1. The appeal be and is hereby allowed with costs.

2. The judgment of the court *a quo* be and is hereby set aside and substituted with:

   "1. The application in case number HC1693/21 be and is hereby dismissed with costs."

   2. The application in case number HC 2127/21 be and is hereby granted with no order as to costs.

**BHUNU JA** I agree

**MATHONSI JA** I agree

*Wilmot and Bennet*, appellant's legal practitioners

*Makiya and Partners*, 1st respondent's legal practitioners