

DISTRIBUTABLE (4)

**HOMELINK (PRIVATE) LIMITED
v
CLEVER MAPUTSENI**

**SUPREME COURT OF ZIMBABWE
MAVANGIRA JA, UCHENA JA AND CHITAKUNYE JA
HARARE: 18 JUNE 2021 & 18 JANUARY 2022**

S. Banda, for the appellant

R. Dembure, for the respondent

MAVANGIRA JA:

- Judgment No. SC 4/22
Civil Appeal No. SC 393/20
1. This is an appeal against the whole judgment of the High Court handed down on 8 September 2020, declaring “that payment by the applicant (respondent) of the sum of RTGS\$235 620,99 together with interest at the prescribed lending rate calculated from 19 February, 2020 to the date of final payment shall be the full and final settlement of the respondent’s (appellant’s) debt.”

1

PRELIMINARY

2. At the commencement of proceedings Mr *Dembure*, for the respondent, submitted that the matter was now moot as the respondent had since paid off what was due to the appellant.

3. This was disputed by Mr *Banda*, for the appellant, who submitted that there is no merit in the preliminary point taken by the respondent and that this would become evident when facts which occurred outside of the record are taken into perspective.
4. He highlighted that the judgment being appealed against was handed down on 8 September 2020 and the parties uplifted it on 11 September 2020. On 15 September 2020, the respondent paid into the appellant's account the sum of ZWL\$251 059, 29. On 17 September 2020, the appellant filed a notice of appeal. This was done well within the *dies induciae* within which to appeal which was to expire on 29 September 2020.
5. On 22 September 2020, the respondent requested the appellant to pay security for its costs of appeal. The parties failed to agree on the quantum and the matter was, in terms of the rules, referred to the registrar. Before the registrar set the matter down on 13 October 2020 the appellant repaid the sum of \$251 059, 29 into the respondent's legal practitioners' account. On the following day, 14 October 2020, the respondent returned the money to the appellant and also threatened litigation should the appellant make further attempts to return the funds. On 22 October 2020, the parties appeared before the registrar for quantification of security of costs.
6. A determination was issued on the same day for payment of \$100 000 to be made within
30 days of 22 October 2020. The said amount was paid on 12 November 2020 as security for costs of this appeal.

7. It was Mr *Banda*'s submission that, the above facts amply demonstrate that the contention

of mootness cannot by any stretch of argument, be supported. It cannot therefore hold.

He submitted that the issue of whether the loan is to be settled on a one-to-one rate in Zimbabwe dollars or it is to be settled in United States dollars remains a live matter between the parties.

THE APPLICABLE LAW AND ANALYSIS

8. In *Movement for Democratic Change & 2 Ors v Elias Mashavira & 3 Ors* SC 56/20

PATEL JA (as he then was) stated as follows:

“The principles governing mootness are relatively well established. The first is that a court may decline to exercise its jurisdiction over a matter because of the occurrence of events outside the record which terminate the controversy between the parties. Thus, if the dispute becomes academic by reason of changed circumstances, the case becomes moot and the jurisdiction of the court is no longer sustainable – *Khupe & Anor v Parliament of Zimbabwe & Ors* CCZ 20/19 at p. 7. To put it differently, the controversy must be existing or live and not purely hypothetical – *Koko v Escom Holdings Soc Limited* [2018] ZALCJHB 76, at para 21; *National Coalition for Gay and Lesbian Equality & Ors v Minister of Home Affairs* 2000 (2) SA 1 (CC), at para 21 (footnote 18).

The second principle is that mootness does not constitute an absolute bar to the justiciability of the matter. The court retains its discretion to hear a moot case where it is in the interests of justice to do so – *Khupe's case, supra*, at p. 13; *J.T. Publishing (Pty) Ltd v Minister of Safety and Security* 1997 (3) SA 514 (CC), at 525A-B. This may arise where the court's determination will have some practical effect, either on the parties concerned or on others, and the nature and extent of such practical effect, or because of the importance or complexity of the issues involved – *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC), at para 11. In short, the court may exercise its discretion to hear a moot issue by reason of its significance, practical or otherwise, and the need for an authoritative determination on that issue in the interests of justice.”

9. *In casu*, it seems to me to be beyond doubt that the alleged to and fro movement of money

in payment and refund between the parties is a manifestation of their opposing interpretations of the law as will appear later in this judgment. There is no agreed position between them. The alleged payment in settlement of the respondent's indebtedness has not been accepted because the appellant is of the view that the repayments by the respondent must be in United States dollars and not in RTGS dollars.

10. The matter, the subject of this appeal cannot, in the circumstances, be said to be moot because of the existence of a live, dispute between the parties that needs to be resolved by the court.

FACTUAL BACKGROUND

11. The appellant is Homelink (Private) Limited, a registered money lender in terms of the law. The respondent is a Zimbabwean national living in the diaspora.
Judgment No. SC 4/22
Civil Appeal No. SC 393/20

4

12. On 17 August 2018 the parties entered into a loan agreement which came into effect on 30 October 2018. In terms of the agreement the respondent was granted a loan in the sum of US\$450 000 to purchase an immovable property being a certain piece of land situate in the district of Salisbury called the remainder of stand 251 Helensvale Township measuring 8242 square metres in extent also known as 2 Denys Close, Helensvale Harare. The same stand was also to be used as security for the loan. A mortgage bond was accordingly registered in favour of the appellant in the sum of US\$450 000.

13. The parties also agreed that the interest applicable to the loan “shall be at a variable rate currently pegged at 10 percent *per annum* or at such rate as shall be determined by the Lender from time to time.” Furthermore, that the interest “shall be calculated on the

outstanding balance (at all times expressed in United States Dollars) at the prevailing interest rate.” It was also agreed that repayments would commence on 30 October 2018 and that “the principal balance, interest and charges accruing thereon shall have been paid in full by 30 September 2033.”

14. The parties also agreed in clause 10 as follows:

“10 **CHANGES IN CIRCUMSTANCES**

10.1 If by reason of:

10.1.1 The introduction of, any change in any applicable law or regulation, or any change in the interpretation or application thereof; or

10.1.2 Compliance by the Lender with any directive, request or requirement (whether or not having the force of law) of any central bank, government, fiscal or other authority,

10.1.3 It becomes unlawful or it is prohibited or it is contrary to such directive, request or requirement for the Lender to maintain the Loan or to give effect to any of its obligations as contemplated by this Agreement, then the Lender may notify the Borrower and the Borrower shall promptly prepay the Loan, together with all interest costs and expenses accrued thereon.”

Judgment No. SC 4/22
Civil Appeal No. SC 393/20

5

15. At the time that the loan agreement was concluded the United States dollar was the dominant legal tender along with other multi currencies.

16. Although the loan was expressed in United States dollars, it was disbursed in two parts or tranches. US\$5 685, 85 was disbursed on 13 September 2018. The greater part of the loan in the amount of US\$ 444 341,15 was disbursed on 16 November 2018 after the separation of the RTGS dollars and nostro foreign currency bank accounts and it was disbursed in RTGS dollars or local currency at the rate of one-to-one to the United States dollar. The reason for disbursement of the greater part of the loan in RTGS dollars is unexplained in the papers. In its opposing affidavit *a quo* the respondent merely states as follows:

“The correct position is that S.I.33 of 2019 came into force on 22 February 2019. The sum of US\$444 341, 15..... was disbursed on 16 November 2018 as stated above.”

17. In his application in the court *a quo* the respondent stated the crisp issue before the court as follows:

“The legal issue is whether or not the loan agreement or the liability arising therefrom falls within the ambit of s 4

(1)(d) of S.I. 33/2019 now incorporated in terms of s 22

(1)(d) the Finance (No. 2) Act, 2019 and is therefore deemed to be in RTGS dollars at a rate of one-to-one to the United States dollar.”

18. As stated at the commencement of this judgment, the court *a quo* found in the respondent’s favour. The court stated at p 8 of its judgment:

“The difficulty of the dispute of the parties is exacerbated by the fact that neither the Principal Act nor the Finance (No.2) Act of 2019 appears to have defined the phrase *foreign loan and/or obligation*. However, insights into the same can be gleaned from what the *Cambridge Dictionary* states on that issue. *dictionary.cambridge.org* defines a foreign loan as a loan to, or from, a government or an organisation in another country. Judgment No. SC 4/22, Civil Appeal No. SC 393/20 The *Longman Business Dictionary* defines foreign loan as a loan to a country or organisation made by a foreign government or financial institution.

It is evident, from the definitions which have been examined, that the loan which the respondent advanced to the applicant does not fall under the definition of a foreign loan. Nor can the obligation which arises from the contract of the parties be classified/defined as a foreign obligation to the applicant. The loan has all the characteristics of a domestic loan which falls under the ambit of the provisions of the Act.”

The court found, at p 9:

“The loan cannot by any stretch of imagination, be defined as a foreign loan. It is, to all intents and purposes, a local loan which is classified as such because of the characteristics which are apparent on its face. It is, accordingly, properly covered under the provisions of the Act.”

THIS APPEAL

19. The appellant was aggrieved by the court *a quo*'s decision granting the declaratur sought by the respondent and it filed this appeal on the following grounds:

- “1. The court *a quo* erred and misdirected itself in not giving effect to the parties’ agreement, namely that all repayments would be made in United States Dollars. Consequently. The court *a quo* made a contract on the parties’ behalf;
2. The court *a quo* erred and misdirected itself in not finding that the parties’ loan agreement was a foreign obligation within the contemplation of section 21 (2) (b) of the Finance (No. 2) Act, 2019 and therefore continued to be payable in foreign currency.”

The appellant prayed for the success of his appeal and for the setting aside of the decision of the court *a quo* and the substitution thereof with an order dismissing the application with costs.

Judgment No. SC 4/22
Civil Appeal No. SC 39/20

20. Mr *Banda* submitted that the issue arising from the appellant's second ground of appeal is dispositive of this matter; the narrow issue being whether the court *a quo* was correct in finding that the loan agreement was not a foreign loan, within the contemplation of s 21(2)(b) of the Finance (No. 2) Act of 2019, that continued to be payable in foreign currency. It was his submission that the first ground of appeal will either be upheld or fall away depending on the finding thus made regarding the nature of the loan agreement. If it is a foreign loan, the first ground of appeal must succeed, but if not, then the first ground falls away, so he contended.

21. Counsel sought to buttress the appellant’s stance that the loan is a foreign obligation by submitting that the loan *in casu* was issued on the strength of exchange control approval given by the Reserve Bank of Zimbabwe. He referred the court to a document at p 65 of the record. It is a letter dated 2 August, 2019 authored by the Deputy

Director, Foreign Investment, at the Reserve Bank of Zimbabwe and addressed to the Managing Director of the appellant. The body of the letter reads:

“Thank you for your letter dated 09 July 2019 regarding the request to continue issuing diaspora mortgages in foreign currency. We wish to advise that Homelink (Pvt) Ltd can continue to issue mortgages denominated in foreign currency to diaspora clients as authorised under Exchange Control authority GR4268 dated 26 October 2016.” (the underlining is added)

To his credit, counsel readily conceded that the appellant’s failure to attach to its papers the authority referred to as GR4268, placed the court *a quo*, and, by extension, this Court, in an invidious position as its contents are and remain unknown.

22. Counsel argued that the court *a quo* ought to have accepted and adopted a wider and more generous definition of a foreign loan or foreign obligation and that if it had done so, it would have found that the loan agreement *in casu* was a foreign obligation on the part of the respondent and that it therefore continued to be payable in United States dollars.

Judgment No: SC 4/22
Civil Appeal No. SC 393/20

8

23. It was also counsel’s submission that the disbursement of the loan in local currency was immaterial to the determination of the dispute as that was in accordance with the dictates of the agreement which clearly stipulated that repayments were to be made in United States dollars. He placed reliance for this submission on the case of *Magodora & Ors v Care International Zimbabwe* 2014 (1) ZLR 397 at 403C - D 24/14 where this Court held that:

“In principle, it is not open to the courts to rewrite a contract entered into between the parties or to excuse any of them from the consequences of the contract that they have freely and voluntarily accepted, even if they are shown to be onerous or oppressive. This is so as a matter of policy.”

24. Mr *Dembure*, on the other hand, submitted that the appellant's second ground of appeal relates to findings of fact and the conclusion made by the court *a quo* that the loan was a domestic loan. That being so, the principle relating to appellate courts not lightly upsetting findings of fact by lower courts, applies.
25. Counsel submitted that the factual findings made by the court *a quo* were based on and supported by the evidence that was placed before the court. He further submitted that on an application of the definitions that the court *a quo* had regard to and applied to the facts, one of the parties to the contract had to be a foreigner and *in casu*, neither of the parties was a foreigner. Although the respondent was working in Ethiopia, the mere fact of him coming home to enter into the contract showed that it was a domestic loan. Furthermore, the respondent's *domicilium citandi et executandi* did not change his Zimbabwean domicile. He further submitted that the agreement having been signed in Harare, Zimbabwe, by a Zimbabwean national and a Zimbabwean moneylender, for the sole purpose of the purchase of an immovable property in Zimbabwe, the loan was undoubtedly not a foreign loan.
26. Counsel argued that the disbursement of the greater part of the loan in RTGS dollars was another telling factor, further justifying and fortifying the court *a quo*'s findings. He submitted that there was thus nothing to warrant a finding by this Court that the court *a quo*'s findings were irrational and therefore called for interference.
27. Regarding the appellant's first ground of appeal relating to sanctity of contract, counsel

submitted that by enacting s 22(1)(d) of the Finance (No. 2) Act, Parliament abrogated the said common law principle. For convenience, the provision is reproduced hereunder:

“that, for accounting and other purposes (including the discharge of financial or contractual obligations), all assets and liabilities that were, immediately before the first effective date, valued and expressed in United States dollars (other than assets and liabilities referred to in section 44C (2) of the principal Act) shall on the first effective date be deemed to be values in RTGS dollars at a rate of one-to-one to the United States dollar.”

ISSUE FOR DETERMINATION

28. The issue for determination by this Court is whether or not the loan agreement entered into by and between the parties is a foreign loan which gave rise to a foreign obligation payable in foreign currency by the respondent. This stated issue is dispositive of the appeal. This is so because, as rightly pointed out by the court in Judgment No. SC-4/20 of its Civil Appeal No. SC 393/20 judgment:

“Where the law speaks in clear and unambiguous terms about the substance of any matter, the intention of the Legislature should be respected as well as given respect to. That intention takes precedence over the parties’ intention as expressed in their contract.”

29. Section 4 of S.I. 33/2019 provides in relevant part:

“4. (1) For the purposes of section 44C of the principal Act as inserted by these regulations, the Minister shall be deemed to have prescribed the following with effect from the date of promulgation of these regulations (“the effective date”) –

- (a)
- (b) that Real Time Gross Settlement system balances expressed in the United States dollar (other than those referred to in section 44C of the principal Act), immediately before the effective date, shall from the effective date be deemed to be opening balances in RTGS dollar at par with the United States dollar; and
- (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 section 44C (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.”

30. The provisions in s 4(1)(d) of S.I. 33/2019 (*supra*) were incorporated in the Finance (No. 2) Act, 2019, s 22(1)(d) of which provides:

“(1) Subject to section 5, for the purposes of section 44C of the principal Act, the Minister shall be deemed to have prescribed the following with effect from the first effective date-

.....

- (d) that, for accounting and other purposes (including the discharge of financial or **contractual** obligations), all assets and liabilities that were, immediately before the first effective date, valued and expressed in United states dollars (other than assets and liabilities referred to in section 44C (2) of the principal Act) shall on the first effective date be deemed to be values in RTGS dollars at a rate of one-to-one to the United States dollar.” (the underlining is added)

Judgment No. SC 4/22
Civil Appeal No. SC 393/20

11

31. The Act further provides in section 22(4)(a) that:

“(4) For the purposes of this section-

- (a) it is declared for the avoidance of doubt that financial or contractual obligations concluded or incurred before the first effective date, that were valued and expressed in United states dollars (other than assets and liabilities referred to in section 44C(2) of the principal Act) shall on the first effective date be deemed to be values in RTGS dollars at a rate of one-to-one to the United States dollar.” (the underlining is added)

32. The appellant contends that by virtue of the provisions of s 44C(2)(b) of the principal Act, the respective assets and liabilities of the parties *in casu* are excluded from the effects of s 4(1)(d) of S.I. 33/19. S 44C(2) of the principal Act provides as follows:

“(2) For the avoidance of doubt it is declared that the issuance of any electronic currency shall not affect or apply in respect of-

- (a) Funds held in Nostro foreign currency accounts, which shall continue to be designated in such foreign currencies; and
(b) Foreign loans and foreign obligations in any foreign currency, which shall continue to be payable in such foreign currency.”

33. In *Zambezi Gas Zimbabwe (Pvt) Ltd v N. R. Barber (Pvt) Ltd & Anor* SC 3/20 at p 9, (*Zambezi Gas*), this Court concluded:

“In interpreting s 4(1)(d), regard should be had to assets and liabilities which existed immediately before the effective date of the promulgation of S.I. 33/19. The value of the assets and liabilities should have been expressed in United States dollars immediately before 22 February 2019 for the provisions of s 4(1)(d) of S.I. 33/19 to apply to them.

Section 4(1)(d) of S.I. 33/19 would not apply to assets and liabilities, the values of which were expressed in any foreign currency other than the United States dollar immediately before the effective date ... It is the assessment and expression of the value of assets and liabilities in United States dollars that matters.

Section 4(1)(d) of S.I. 33/19 is specific as to the type of assets and liabilities that are excluded from the reach of its provisions. The origin of the liabilities is not a criterion for exclusion. ... What brings the asset or liability within the provisions of the statute is the fact that its value was expressed in United States dollars immediately before the effective date and did not fall within the class of assets and liabilities referred to in s 44C (2) of the Reserve Bank of Zimbabwe Act [*Chapter 22:15*] (“the principal Act)(the underlining is added)”

Judgment No. SC 4/22
Civil Appeal No. SC 393/20

12

34. It is without doubt that the *Zambezi Gas* case (*supra*), having interpreted and clarified the law, the appellant can only succeed in this appeal if it can show that the loan agreement *in casu* is a foreign loan and that the court *a quo* therefore erred and misdirected itself in coming to a contrary conclusion.
35. The inescapable facts that the court *a quo* properly paid regard to are that the lender and the borrower in the loan agreement were both Zimbabweans, albeit an institution and an individual; the loan agreement was executed in Zimbabwe; the sole purpose of the loan was the purchase of an immovable property situated in Zimbabwe; the loan was largely disbursed in local currency except for a small portion that was disbursed earlier in United States dollars at a time when the United States dollar was one of the legal tender currencies.

36. Sight is not lost to the fact that the above are factual findings were made by the court *a quo*. No irrationality was alleged or shown in the making of such findings. No specifics were provided as to the nature and source of the “generous” or “wider” definition of “foreign loan” or “foreign obligation” that the court *a quo* is criticised for not having had regard to. The contention that the exchange control approval that was given by the Reserve Bank of Zimbabwe (RBZ) was proof that this was a foreign loan was not supported by documentary evidence. No explanation was proffered as to why the alleged document, which does not form part of the papers, was not relied on and availed by the appellant. In any case it is beyond the scope of the RBZ to convert what is factually a domestic loan into a foreign loan.

37. In view of the strenuous submissions made in urging this Court to consider this aspect favourably for the appellant, this would appear to be an omission by the appellant of a crucial document. It is trite that a court decides a matter on the basis of the evidence that is placed before it. It therefore follows that the court *a quo* cannot be faulted for failing to take into account evidence that was not placed before it. The court *a quo* would face severe criticism if it had done so. The court thus correctly found that the loan agreement was not a foreign loan and did not create a foreign obligation on the respondent’s part.

38. In *Breastplate Service (Private) Limited v Cambria Africa PLC* SC 66/20, at pp 9-10, this Court stated:

“Section 44(C)(2) (b) of the Reserve Bank Act, as inserted by s 3(1) of the 2019 Regulations, makes it clear that the issuance of any electronic currency, *i.e.* RTGS dollars, shall not affect or apply to any foreign obligation. This is reinforced by s 4(1)(d) of the Regulations which explicitly excludes foreign

obligations valued and expressed in United States dollars from the deemed parity valuation in RTGS dollars.”

With the factual finding made *a quo* that the loan agreement was not a foreign loan which created a foreign obligation and the appellant having failed to show the error or misdirection therein, the appellant must accept and submit to the clear dictates of the law.

39. No basis having been established for this Court to upset the court *a quo*'s findings and consequent conclusion, it is our view that this appeal has no merit. The emphasis on motivating the appellant's second ground of appeal and the submission that the first ground would only become relevant if the appellant succeeded on the second ground of appeal effectively translates to the above discourse sealing the appellant's fate.

Judgment No. SC 4/22
Civil Appeal No. SC 393/20

14

40. Notably, it would also be absurd for the appellant to be paid United States dollars for a loan that it largely disbursed in local currency. The argument that it must be so because the loan agreement stipulated that repayments were to be in United States dollars is a roundabout way of surreptitiously resorting to the first ground of appeal which the appellant clearly realised did not stand scrutiny.

41. Costs will follow the cause. We are not satisfied that they should be on the scale of legal practitioner and client as urged by the respondent. In our view, there is no legal basis that has been given that would warrant an award of costs on a higher scale.

42. It is accordingly ordered as follows:

The appeal be and is hereby dismissed with costs.

UCHENA JA: I agree

CHITAKUNYE JA: I agree

Sinyoro & Partners, appellant's legal practitioners.

Mabulala & Dembure, respondent's legal practitioners.

Judgment No. SC 4/22
Civil Appeal No. SC 393/20