

(1) INGALULU INVESTMENTS (PRIVATE) LIMITED
(2) MARK MASINYAZANA MBAYIWA
v
(1) NATIONAL RAILWAYS OF ZIMBABWE
(2) MOFFAT BANDA

SUPREME COURT OF ZIMBABWE
GWAUNZA DCJ, KUDYA JA & MWAYERA JA
BULAWAYO: MARCH 24, 2022

J. Tshuma, for the appellant

N. Mazibuko, for the respondent

Judgment No. SC 42/22
Civil Appeal No. SCB 56/21

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KUDYA JA: The appellant appeals against part of the judgment of the High Court sitting at Bulawayo that was handed down on 20 May 2021. The court *a quo* ordered the respondent to pay to the appellant delictual damages in the sum of US\$ 66 789.80 in local currency converted at the parity rate of one-on-one as between the two currencies.

On 18 September 2009, the first respondent's locomotive hit and damaged the first appellant's horse and trailer, which were stuck at a railroad level crossing in Somabula. The appellants issued summons on 29 June 2010, claiming damages in the sum of US\$ 66 768.80. The respondents contested the claim and counterclaimed for delictual damages in the sum of US\$148 919.48.

On 20 May 2021, the court *a quo* granted the appellants' claim and dismissed the respondents counterclaim. It ordered the respondents to pay the amount at the parity rate of 1:1 between the RTGS\$ and the United States dollar, ostensibly on the basis of the relevant provisions of the Reserve Bank of Zimbabwe Act [*Chapter 22:15*] and the case of *Zimbabwe Gas (Pvt) Ltd v NR Barber (Pvt) Ltd* SC 3/20.

Aggrieved by the parity rate at which the delictual damages were to be paid, the appellant appealed to this Court. The sole ground of appeal is that the court *a quo* misdirected itself at law by misconstruing the rate at which the delictual damages denominated in United States dollars were convertible to local currency in terms of ss 22 (1) (d) and (e) as read with ss 20 and 22 (4) (a) of the Reserve Bank Act [*Chapter 22:15*] (the Act).

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The sole issue that arises on appeal is whether or not the court *a quo* was correct to apply the one-to-one parity rate between the RTGS\$ and the US\$ in respect of the award of delictual damages it awarded to the appellant.

Before us, Mr *Tshuma* for the appellant made the following contentions. He argued that s 22 (1) (d) of the Act prescribed the nature and scope of the obligations and the cut-off date on which the RTGS dollar was to be exchanged for the United States dollar at the rate of one-on-one for delictual awards granted before the effective date while para (e) of the same subsection provided the subsequent period in which the interbank rate was to be applied. He further argued that s 20 as read with s 22 (4) (a) of the Act regarded extant and executable judgment debts, local (and not foreign) financial and contractual obligations as assets and liabilities to which all these

provisions applied. He strongly argued that as a delictual claim denominated in United States dollars could not fall under the aegis of either an asset or liability for accounting and other purposes or be executable as a judgment debt, it could not be categorized as a delictual obligation that would be payable at the one-on-one parity rate. He contended that it would only do so once a competent court made a determination on liability and assessed the value of the liability.

The appellant, therefore, submitted that the relevant provisions of the Act did not apply to a delictual claim assessed or expressed by a litigant but to a judgment debt assessed or expressed by a competent court of law in United States dollars before and not after the cut-off date.

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Per *contra*, Mr *Mazibuko* for the respondent argued that the court *a quo* correctly determined that the relevant provisions of the Act incorporated delictual claims assessed or expressed in United States dollars by the victim of the delict, on or before the effective date, into assets and liabilities. He argued that the definition of and reference to executable court decisions in s 20 of the Act was additional to the value of assets and liabilities “for accounting and other purposes” enshrined in s 22 (1) (d) of the Act. He maintained that delictual claims were included in the phrase “other purposes”. He argued that once these claims were assessed or expressed in United States dollars by the victim, they would fall under the aegis of assets and liabilities that were payable at the one-on-one parity rate provided the claims were made before the cut-off date. He submitted that the determination of the court *a quo* that the delictual award was payable at the one-on-one parity rate was correct. He premised his submission on the common cause facts

that the delictual claims in question were valued in United States dollars and sought before the cut-off date.

The respondent, therefore, submitted that the delict having been committed against, and assessed and expressed by, the appellant in United States dollars before the effective date, was covered by these provisions.

The relevant provisions of the Act are ss 22 (1) (d) and (e), s 22 (4) and s 20.

Section 22 (1) (d) and (e) as read with s 22 (4) (a) of the Act prescribe that the values of all assets and liabilities that were expressed or any financial or contractual obligations, other than foreign obligations, that were concluded or incurred in United States dollars on or before 22 February 2019 (the effective date or cut-off date), were deemed to have been expressed, concluded or incurred in RTGS dollars at the rate of one-to-one to the United States dollar. Further, that the value of all assets accrued or liabilities incurred after the cut-off date would be payable at the prevailing interbank rate of the local currency to the United States dollar.

Section 20 of the Act extends the application of the above cited provisions of the Act to judgment debts.

In addition, the *ratio decidendi* in the case of *Zambezi Gas Zimbabwe (Pvt) Ltd v N.R. Barber (Pvt) Ltd & Anor* SC 3/20, was that, in terms of the relevant provisions of the Act, a judgment debt denominated in United States dollars on or before the cut-off date would be liquidated at the parity rate of one-on-one to the RTGS dollar.

It is trite that regard must be had to the text, context and purpose of the provisions and the broader architectural design of the Act. The relevant provisions must, per force, be construed as a whole and not in piecemeal fashion.

It is also axiomatic that a delict, unlike a financial or contractual obligation, cannot be categorized as an asset or liability until it is voluntarily accepted as such by the wrongdoer or until such acceptance is foisted upon the wrongdoer by a court of competent jurisdiction. This is because a delict is committed and does not accrue like an asset nor is it incurred like a liability. In accounting terms, an asset or a liability has an ascertainable monetary value, which is recorded in the relevant books or statements of account. This is the position that pertains to a judgment debt. It constitutes an asset in the books of the judgment creditor and, conversely, a liability in the hands of a judgment debtor. Neither of these parties can treat a delictual claim as an asset or a liability. They can only do so after a competent court of law has made a determination on whether the claim establishes a liability and thereafter assesses the measure of such a liability. In any event, only a judgment debt and not a delictual claim can be executed in the manner contemplated in s 20 of the Act.

It is for these reasons that we agree with Mr *Tshuma* that the text, context and purpose of both the relevant provisions and the broader scheme of the Act incorporates a financial or contractual obligation concluded or incurred before the effective date and a judgment debt made on or before the effective date and not a mere delictual claim lodged on or before that date into the ranks of assets and liabilities. We are not persuaded by the contrary contentions

made by Mr *Mazibuko* that the text of the Act is wide enough to include delictual claims lodged before the effective date into the category of assets and liabilities that are payable at the one-on-one parity rate.

In the circumstances, we are satisfied that the court *a quo* misdirected itself in both its construction and application of the relevant provisions of the Act and in its appreciation of the *ratio decidendi* of the *Zambezi Gas* case, *supra*. The appeal, therefore, ought to succeed.

In our view, the costs of appeal must follow the result.

Accordingly, it is ordered that:

1. The appeal succeeds with costs.
2. The order of the court *a quo* is amended to read as follows:
 - (a) The first and second defendants be and are hereby ordered to pay the plaintiffs, jointly and severally, the one paying the other to be absolved:
 - (i) The sum of US\$ 66 768.80 or its equivalent in RTGS dollars at the applicable inter-bank rate on the date of payment.
 - (ii) Interest thereon at the prescribed rate of 5 per cent per annum calculated from the date of judgment to the date of payment in full.
 - (iii) Costs of suit.

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MWAYERA JA

I agree

Webb, Low & Barry, the appellants' legal practitioners

Calderwood, Bryce Hendrie & Partners, respondents' legal practitioners

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