SOUTHEND CARGO AIRLINES (PVT) LIMITED
and
STEPHEN JACKSON CHITUKU
and
PATIENCE FADZAI CHITUKU
versus
ZIMBABWE DEVELOPMENT BANK

HIGH COURT OF ZIMBABWE
MAKARAU J
HARARE 28 May and 16 June 2004

Opposed Application

Mr *Kara*, for the applicants
Mr *Morris*, for the respondent

MAKARAU J: This is an application to set aside a consent judgment of this court, entered against the applicants on 26 November 2002 in the sum of US$590 470,68 and interest and in the sum of $54 917,68 and interest.

It is a recognised procedure of this court that a judgement granted with the consent of the parties may be set aside on good and sufficient cause shown. Rule 56 of the High Court of Zimbabwe Rules 1971 provides:

> "A judgment given by consent under these rules may be set aside by the court and leave may be given to the defendant to defend, or to the plaintiff to prosecute his action. Such leave shall only be given on good and sufficient cause and upon such terms as to costs and otherwise as the court deems fit."

While in *Washaya v Washaya* 1989 (2) ZLR 195 (H), GREENLAND J went to some length in drawing a distinction between a consent judgement granted in terms of the rules and one granted at common law, the distinction is no longer relevant when considering the setting aside of a consent judgment. The distinction was swept away by GUBBAY C J (as he then was), in *Georgias & Another v Standard Chartered Finance Zimbabwe Ltd*1998 (2) ZLR 488 (SC). In that case, the learned judge proceeded on the undisputed basis that this court has inherent power to set aside a consent judgement granted at common law. In exercising this inherent power, the court must be satisfied that the applicant has shown good and sufficient cause as if it was proceeding under r56. The procedure of this court is thus settled that in

considering an application to set aside a consent judgement, the only test applicable is the existence of good and sufficient cause regardless of the provenance of that consent judgment.

What constitutes good and sufficient cause for setting aside a consent judgement is the same as for setting aside a default judgement under r63. (See *Roland v Mcdonnel* 1986 (2) ZLR 216 (SC) and *Georgias & Another v Standard Chartered Finance Zimbabwe Ltd (supra)*). In considering the setting aside of a consent judgment, the court must have regard to:

(a) "the reasonableness of the explanation proffered by the applicant of the circumstances in which the consent judgment was entered;
(b) the *bona fides* of the application for rescission;
(c) the *bona fides* of the defence to the merits of the case which *prima facie* carries some prospect of success; a balance of probability need not be established."

(Per GUBBAY CJ in *Georgias & Another v Standard Chartered Finance Zimbabwe Limited (supra).*

I now turn to consider the explanation given by the applicants of how the consent judgement was entered against them. In considering this factor, I am of that view that, like an applicant in an application for rescission of a default judgment must explain that he did not default, the applicants' explanation must tend to show that they did not consent to the judgment. I base my view in this regard on the remarks by GUBBAY C J in the *Georgias* case at page 492E that lack of consent is undoubtedly the predominant factor in the decision of whether or not to set aside a judgment purported to have been given by consent, although regard must also be had to the other factors that he proceeded to mention and which I cite above.

The second respondent avers that senior counsel of the applicants' choice was not available to argue the matter. Substitute counsel, being of the view that the matter lacked merit, declined the brief. The instructing legal practitioner, after seeing merit in the viewpoint of substitute counsel, felt constrained not to proceed to represent the applicants. On the day of the hearing, he, with prior consultation with the applicants, stood up in court to renounce agency and inform the court that the applicants would represent themselves in the matter. Before the legal practitioner could say anything to the court, the second applicant pulled him by his gown from behind and whispered to him that the applicants were now prepared to have the matter settled. The legal practitioner sought an adjournment after which a consent to judgement was drafted and made into an order of the court. The second applicant explains his conduct thus as being overwhelmed by fear of having to stand up and argue the matter before the presiding judge on behalf of the applicants.

The suggestion that the second applicant's will in consenting to the judgement was overborne by fear is denied by the respondent whose counsel suggests that the judge who entered the consent judgment is one of the most kindly and avuncular judges to grace this bench!

The issue I have to determine is not the mien of the learned judge who entered the consent judgment but whether or not the explanation by the applicants is reasonable. In considering the reasonableness or otherwise of the explanation, I do not loose sight of the caveat sounded in the *Georgias* case that too much emphasis should not be placed on any one of the factors as an unsatisfactory explanation may be strengthened by a very strong defence on the merits.

I find the explanation by the applicants to be very weak on its merits.

Firstly, the applicants did not communicate their alleged fear to the legal practitioner who may have suggested other avenues of dealing with the matter rather than consenting to judgment. There is no mention in the legal practitioner's affidavit that the applicants acted out of fear. Rather, the impression created is that the applicants acted out of resignation, having been reassured by the legal practitioner that he would not change his position regarding the merits of the matter or lack thereof.

Secondly, the applicants were not caught unaware by the position that the legal practitioner took. The matter had been to counsel who had made known his views and had refused the brief. The applicants and their legal practitioners had discussed the matter before coming to court for the purposes of the legal practitioner withdrawing. The second applicant was aware of the need to represent the other applicants when the matter was called up. In my view, having been prepared for this eventuality, the most probable fear the second respondent nursed was of persuading the court to see the applicants' case when two legal practitioners had already told him there was none. The resultant consent to judgement appears to me to have been in realisation of the futility of continuing to deny liability for the debt in light of advice from counsel. I base my view on the fact that the applicants are not denying liability to the respondent even in the application before me.

Thirdly, the applicants did not blurt out the consent to the court in circumstances were the second respondent was overwhelmed by fear of addressing the court in the absence of a legal representative. The consent was discussed with the applicants' legal practitioners during an adjournment and away from the "fearsome" court. The consent was then drafted

(presumably into a draft order), during which period the second applicant requested the legal practitioner to confirm on various occasions that the applicants had no case on the merits and were best advised to consent to judgement. It is my further view that if the will of the second applicant to fight the case was overcame, it was overcame by the perceived hopelessness of the applicants' case as advised by the legal practitioner.

Fourthly, the applicants are not denying their liability to the respondents. They are challenging the correctness of the consent judgment as expressed in foreign currency. It is however, common cause that at the time the consent judgment was entered, the currency of the judgment debt was not in issue. It had not been specifically pleaded then that the applicants were not liable to repay the amount of the foreign currency that had been sourced on their behalf. The applicants admit that they did not consider the currency of the judgement then. They only realized, to their horror, the correct implications of the judgment after the judgment had been entered. On the basis of this admission, it appears to me unsustainable that the applicants' consent to judgment as expressed in foreign currency was overborne by fear. The currency of the judgment was not in dispute at the time the matter was settled. The liability of the applicants was. The applicants had not thought of the currency of the judgment and it implications at that stage. This only hit them when the respondent attempted to execute on the judgment.

I find that the consent to judgement in this matter was duly authorized. The legal practitioner who drafted the consent and presented it to court for endorsement had the mandate of his principals to do so. (Contrast with the facts in *Washaya v Washaya* (*supra*)). There was no ambiguity as to the term of the order that the legal practitioner was mandated to consent to or when the consent order had to be presented to court for endorsement in the sense that the applicants had to consult some other party for its approval of the consent. (Again, compare with the facts in *Georgias case,* which in any event were not accepted by the court as constituting a reasonable explanation). No averment has been made that the legal practitioner had no authority to consent to a judgement denominated in foreign currency. The averment made is that the court could not have been correct in entering a judgement denominated in foreign currency in the circumstances of the matter.

In light of the above, I do not see any basis upon which the applicants can escape liability for the actions of their agent in settling the matter on their behalf and on their express instructions. In this regard, I am of the firm view that the principle that there must be finality to

litigation must take precedence. The applicants have not made out a case why they should be allowed to fight the same battle twice. Simply because they may have come across a new weapon they did not deploy in the lost battle is not sufficient a ground upon to gain the indulgence they seek. In my view, for the applicants to be allowed to re-engage in the lost battle, they must show that their surrender on the battlefield was no surrender at all and not merely that it was an uninformed surrender. The courts would be inundated with reopened cases were litigants allowed to rethink their defenses to cases where they would have consented to judgment.

I now turn to consider whether the application to set aside the judgment has been filed in good faith.

The applicants concede that there was delay between the date of the consent judgment and the date of this application. The applicants delayed for four months in this regard. There was further delay in prosecuting this application. This is also conceded by the applicants. The impression created by this delay is that the applicants intend to postpone for as long as is possible, the day of reckoning.

When a warrant of execution was issued in respect of the judgment, the applicants approached this court, without success, for leave to stay the execution. The application for stay of execution was not accompanied by an application to set aside the judgment on the basis that the applicants did not consent to the judgment.

Prior to the filing of the application, the applicants aver that they tried on a number of occasions to engage the respondent in an effort to solve the matter. This was in vain. This application was only filed as a last resort when all other avenues had failed to yield the desired result. It therefore appears to me that this application was filed, not to reverse the judgment because it was not consented to, but, because this appears to be the only other avenue open to the applicants to delay or avoid execution of the judgment. In these circumstances, it cannot therefore be argued that the application is *bona fide*.

I finally turn to consider whether the applicants may still be entitled to the relief they seek on the basis of a strong defence to the merits of the matter notwithstanding that they have failed to clear the first two hurdles in their way.

The applicants argue that this court erred in granting the consent judgment expressed in foreign currency.

The facts giving rise to the applicants' liability are quite simple and are common cause. They are as follows: In or about June 1997, the applicants intended to lease a jet airliner form a company in the United States. A deposit was required for the lease. The deposit was to be paid in foreign currency. The applicants approached the respondent for a loan of the foreign currency. The respondent did not have the foreign currency that the respondent required. It purchased the foreign currency from its bank, which in turn made the payment directly to the applicants' creditor in the United States of America. The respondent utilised the sum of $6 200 000-00 to purchase the sum of foreign currency that the applicants needed. The loan agreement was reduced to writing and it indicated that the capital amount borrowed was the sum of "$6 200 000-00 in foreign currency." When the applicants defaulted, the respondent sued for with interest, the sum of US$590 470-68 as representing the capital debt.

It is trite that this court, in an appropriate case, may grant a judgment expressed in foreign currency, provided the amount of the judgment debt is converted to local currency on the date of execution of the judgment. The position has been settled since 1988 when the Supreme court established it for the first time in *Makwindi Oil Procurement (Pvt) Ltd v National Oil Co of Zimbabwe* 1988 (2) ZLR 482 (S). (See also *AMI Zimbabwe (Private) Limited v Casalee Holdings (Successors) (Private) Limited 1997* (2) ZLR 77 (S)).

The applicants argue that this was not a proper case in which to grant a judgment expressed in foreign currency. In support of this argument, the applicants raise three main arguments. Firstly, it is argued that the loan agreement expressed the amount borrowed in local currency. Secondly, it is argued that the repayments, to be deducted from the applicants' account by way of a stop order, were to be made in local currency. Thirdly, it has been argued that the surety bond executed as security for the loan was denominated in local currency.

In raising these three arguments, it is my view that the applicants are playing on form and not relying on the substance of the agreement between the parties. The substance of the agreement between the parties is to be ascertained from the common intention of the parties as embodied in the agreement. It appears to me that the common intention of the parties was to enter into a loan agreement for the sum of the foreign currency that the applicant required to pay a deposit to its creditor in the United States of America. The respondent purchased this money for the applicant, using the sum of $6 200 000-00. There is no doubt in my mind that the amount of the foreign currency is what the applicants borrowed from the respondent. The loan agreement was inelegantly drafted and referred to the capital debt as "$6 200 000-00 in

foreign currency." The intention of the parties was however quite clear as to what had been borrowed and was to be repaid. That this was the common intention of the parties is further shown in the statement of account that was sent to the applicants, showing the reduced balance of both the local currency and its equivalent in foreign currency. What was being paid was the local currency bur what was being reduced was the debt in foreign currency.

On the basis of the foregoing, the applicants do not have a defence to the respondent's claim. This court did not err in granting the judgment in foreign currency as the applicants' obligation to the respondent was to be measured in foreign currency while the discharge of the obligation was to be through payment in local currency. (See *Mawere v Mukuna* 1997 (2) ZLR 361 (HC).

This court has been invited as a matter of policy to view the outlay that the respondent made in securing the foreign currency against the amount that the applicants will eventually pay to discharge their obligations. It has been strenuously argued on behalf of the applicants that for an outlay of $6 200 000-00, the respondent should not be assisted by this court to profiteer and receive the sum of $486 million, (the amount of the judgment at the exchange rate prevailing on the day of the application). Mr *Kara* labeled this ballooning of the debt as bizarre and called upon the court not to lend its support to such a palpably unjust result. The anguish of the applicants is clear for all to understand. I also observe that the debt has mushroomed to unmanageable proportions due to the delays that have been experienced in finalising the dispute between the parties. I am however unaware of a rule of policy of this court that empowers the court to rewrite a contract on behalf of the parties, to make less burdensome the obligations of one party to that contract, where the terms of the contract are clear and express the common intention of the parties. It is self evident that the applicants have been caught out by the downspiralling of the local currency against other currencies. In my view, this is not an issue for the law to address or redress. On the basis of the foregoing, the application cannot succeed.

In the result, I make the following order:

1. The application is dismissed.
2. The applicants shall pay the respondents' costs.

Gula-Ndebele & Partners, the applicant's legal practitioners
Gill Godlonton & Gerrans, the respondents' legal practitioners.