DISTRIBUTABLE (64)

Judgment No. SC 78/02
Civil Appeal No. 348/00

BUSINESS EQUIPMENT CORPORATION v

BAINES IMAGING GROUP

SUPREME COURT OF ZIMBABWE
HARARE, JUNE 12 & SEPTEMBER 19, 2002

J C Andersen SC, for the applicant

P Nherere, for the respondent

MALABA JA: An application in Chambers, in terms of s 31 of the Rules of the Supreme Court of Zimbabwe

This application is for an extension of time in which to appeal against a judgment of the High Court delivered on 27 October 2000. The applicant ("BEC") is a company incorporated in terms of the laws of Zimbabwe. It was sued in the High Court by the respondent ("BIG"), an association of doctors and radiologists carrying on business in partnership, for the refund of an amount of $122 474 with interest thereon at the prescribed rate from 1 December 1998 to the date of final payment and costs of suit.

What had happened is this. On 5 February 1997 BIG ordered from BEC an X-ray tube for its Shimadzu X-ray machine. The purchase price in the amount of $122 474 was paid in two instalments of $64 600 on 5 February and

$57 874 on delivery of the tube on 16 April 1997. It was one of the terms of the contract that BEC would instal the X-ray tube. When BEC's technician attempted to fit the tube into the X-ray machine it broke. A second tube was ordered but it also broke when the same technician attempted to fit it into the machine.

On 30 July 1998 BIG wrote to BEC suggesting that it should refund the purchase price with interest. It would appear that BEC responded by a letter dated 11 September 1998 (not filed of record) in which it agreed to refund the purchase price to BIG but without interest. BIG responded by demanding that BEC should refund the purchase price with interest on 1 December 1998.

On 18 January 1999 BEC forwarded to BIG two cheques with a total amount of $122 474 under cover of a letter in which it said:

> "… we wish to state that we stand by our letter of 11 September 1998 in which we agreed to pay you the full amount owing but would not be paying any interest. We enclose our cheques for $122 474 in full and final settlement."

BIG was also claiming from BEC damages for loss of income and interest thereon. It did not accept the tender of the purchase price by BEC in full and final settlement of its claim for interest thereon and damages. The cheques were not deposited for payment.

On 22 January 1999 BIG issued summons out of the High Court claiming against BEC the refund of the purchase price with interest thereon at the prescribed rate from 1 December 1998 to the date of payment. It also claimed damages in the amount of $1 900 502.96 for loss of income with interest thereon at

the prescribed rate from 16 April 1997 and costs of suit. Following entry of appearance to defend, BIG made an application for summary judgment on 21 June 1999 in respect of the claim for the refund of the purchase price with interest and costs.

On 7 July 1999 BEC again confirmed that BIG was entitled to the refund of the purchase price which it paid on 9 July 1999. It withdrew the condition that the payment was in full and final settlement. BIG agreed to withdraw the application for summary judgment and have the case go to trial on the issues of interest on the purchase price, costs and damages. BEC said it agreed to refund the purchase price because it knew that the X-ray tube had got damaged and intended to protect its good name. It, however, denied responsibility for the damage to the tube, alleging that the damage was a result of a faulty X-ray machine which had been tampered with by unnamed third parties BIG had asked to fit a Siemens X-ray tube.

When the matter finally came up for trial, BIG withdrew the claim for damages but persisted with the claim for payment of *mora* interest on the purchase price and costs. It is not clear from the record whether oral evidence was led, but the court *a quo* held that BEC was liable for the payment of interest on the purchase price at the prescribed rate from 1 December 1998 to the date of final payment. BEC was also ordered to pay costs of suit.

On 16 November 2000 BEC purported to note an appeal against the whole judgment of the court *a quo*. The notice of appeal did not have all the matters required by s 29 of the Rules of the Supreme Court ("the Rules"). It was fatally

defective because it omitted to include the address of service of the Registrar of the High Court and did not state the date on which the judgment appealed against was given.

In *Talbert v Yeoman Products (Private) Limited* S-111-99 MUCHECHETERE JA held that a notice of appeal which suffers from these defects is null and void. The learned JUDGE OF APPEAL quoted with approval at p 3 of the cyclostyled judgment from a judgment of KORSAH JA in *Jensen v Acavalos* 1993 ZLR 216 (S) where it was stated at p 220:

> "The reason is that a notice of appeal which does not comply with the Rules (in that case the notice did not have a prayer for relief) is fatally defective and invalid. That is to say, it is a nullity. It is not only bad, but incurably bad, and unless the Court is prepared to grant an application for condonation of the defect and allow a proper notice of appeal to be filed the appeal must be struck off the roll with costs: *De Jager v Diner & Anor* 1957 (3) SA 567 (A) at 574 C-D.
>
> In *Hattingh v Pienaar* 1977 (2) SA 182 (O) at 183, KLOPPER JP held that a fatally defective compliance with the rules regarding the filing of appeals cannot be condoned or amended. What should actually be applied for is an extension of time within which to comply with the relevant rule."

On noticing that the notice of appeal filed on 16 November 2000 was fatally defective, BIG made an application on 28 February 2002 for an order striking out the notice of appeal. NEC's legal practitioners sought to solve the problem by remedying the notice of appeal and thereafter applying for condonation. It was only a day before the hearing of this application that they followed the procedure stated in *Talbert's* case *supra* as a result of advice from Mr *Andersen*.

In *Jensen's* case *supra* at 220 F-G it is stated:

> "The broad principles an appellate court would have regard to in determining whether to condone the late noting of an appeal are: the extent of the delay; the reasonableness of the explanation proffered for the delay; and the prospects of success of the appeal. See *de Kuszaba-Dabrowski ex Uxor v Steel NO* 1966 RLR 60 (A) at 62 and 64, 1966 (2) SA 277 (RA); *HB Farming Estate (Pty) Ltd & Anor v Legal and General Assurance Society Ltd* 1981 (3) SA 129 (T) at 134 A-B; *Kombayi v Berkhout* 1988 (1) ZLR 53 (S) at 57G-58A. And as BEADLE CJ observed in *R v Humanikwa* 1968 (2) RLR 42 (A) at 44B:
>
> > 'The longer the delay in applying for condonation in the late noting of an appeal the more certain the court must be that there is a real chance of the appeal succeeding.'"

The delay in making this application can only be categorised as considerable. BEC has put the blame for the delay on lack of diligence on the part of its legal practitioner who drew up the defective notice of appeal. There has been no explanation from the legal practitioner of his failure to comply with the Rules, nor has there been any explanation as to why the defect in the notice of appeal was not discovered much earlier by BEC's lawyers. The lack of diligence on the part of the legal practitioner, however, relates to the technical aspect of the case. The legal practitioner was, strictly speaking, exclusively responsible for this aspect of the case. BEC as a litigant would ordinarily not be expected to have control over the drafting of the notice of appeal.

Although the delay was considerable and there was no explanation from the legal practitioner as to why he acted in the manner he did, I do not hold BEC culpable. The same conclusion was reached by MUCHECHETERE JA in *Talbert's* case *supra* where he said at p 5:

> "It is clear from the above that the fault in this matter was that of the applicant's counsel and not of the applicant himself. In these circumstances the courts usually take the view that a client ought not to be punished for the 'sins' of his legal representative unless he connived with the legal

> representative in the commission of the sins or sat back and did nothing when he became aware of the impending default. The applicant cannot be accused of that in this case and therefore the default can be excused."

As was observed in *Talbert's* case *supra* the crucial factor is the prospects of success on appeal. Mr *Andersen* argued that as there was no agreement by BEC to pay anything other than the capital amount, evidence had to be led by BIG in the court *a quo* to prove breach of contract in order to lay a foundation for its claim for the payment of interest on the purchase price. He said because no evidence appears to have been adduced in the court *a quo* contractual liability was not established. So there was no legal basis upon which BIG's claim for interest could have been awarded by the learned judge. I disagree.

It was not necessary for BIG to prove facts which did not constitute its cause of action. BIG claimed *mora* interest, the liability for the payment of which depended upon proof of *mora* on the part of BEC. Its claim for the payment of *mora* interest on the refunded purchase price was not dependent upon proof of the alleged breach of contract by BEC. The general rule is that interest is not payable unless there is an agreement to pay it or there is default or *mora* on the part of the part of the defendant: *Baliol Investment Co (Pty) Ltd v Jacobs* 1946 TPD 269 at 272. There was, of course, no agreement to pay interest on the purchase price. There was, however, an agreement recorded in the letter of 11 September 1998 to pay the purchase price. In my view, by undertaking to refund the purchase price, for whatever reason, BEC assumed for itself the duty to do so. When BEC failed to pay the money, BIG wrote a letter demanding that it should pay on 1 December 1998.

In the letter dated 18 January 1999 BEC clearly admits that it was under an obligation to pay the money. It could not have tendered the payment of the money as it did under cover of that letter if the money was not due and payable. The money had been made due and payable by the letter of demand, and failure by BEC to refund the money on 1 December 1998 constituted a default or *mora* on its part.

It is clear from the papers that BIG claimed interest on the purchase price at the prescribed rate from 1 December 1998 to the date of final payment. The basis of BEC's liability for the payment of the interest claimed by BIG was default of refund of the money on 1 December 1998. The liability of BEC to pay the interest was based on the fact that it became in *mora* on the day it was obliged to pay the purchase price but failed to do so.

This was a case of a rescission of a contract accepted by BEC when it agreed to repay the purchase price. In the circumstances, contractual liability, in the sense that BIG had to prove that BEC breached the contract in that it did not properly fit the X-ray tube into the machine, was not necessary for the purposes of establishing BEC's liability for the payment of *mora* interest on the purchase price admitted to have been due and payable to it. See *Applebee v Berkovitch* 1951 (3) SA 235 at 244D; *Linton v Corser* 1952 (3) SA 685; *Herbert Davies & Co v Educational Business Suppliers* 1997 (2) ZLR 223 (S) at 227 D-E.

The court *a quo* awarded BIG, as the successful party, costs of suit. There is nothing in the papers to suggest that in the exercise of its discretion the court *a quo* erred. It certainly applied the general rule that costs follow the result. In my

view, BIG was entitled to its costs because it had been compelled by BEC's refusal to pay interest on the purchase price to seek the relief it eventually obtained from the court *a quo*. In prosecuting its claim, it incurred costs and BEC had to reimburse it.

The complaint was also that the court *a quo* did not award BEC costs on the claim for damages which BIG withdrew. It is important to remember that an award of costs is a matter within the discretion of the court hearing the case. An appellate court will not interfere with the exercise of the discretion unless that is done unreasonably: *Van der Merwe v Peebles* 1976 (2) RLR 115.

A large part of the time in this case was spent on the claim for payment of interest on the purchase price. It was not shown by BEC in this application that it applied for judgment on costs following the withdrawal of the claim for damages. The question of costs in respect of that claim would have been an issue before the court *a quo* and it was for BEC to ask the court to resolve that issue in its favour when the claim was withdrawn, particularly if BIG did not offer to pay the costs. In *A v B and Anor* 1976 (1) RLR 397 GOLDIN J (as he then was) said at 400 C-D:

> "When litigation has been commenced or instituted, the question of costs is an issue before the court and both litigants are entitled to have that issue determined by a judgment. This right is not dependent upon a judgment on the merits of the action. The question of costs can be distinct from that of a judgment on the merits of the case. Thus, a notice of withdrawal does not automatically end the litigation, and if a defendant or respondent does not ask the court for an opportunity of establishing the right to judgment on the merits, the court may nevertheless grant a judgment for costs only."

As there was no evidence that BEC asked for judgment on costs following the withdrawal of the claim for damages, there is no basis upon which I can arrive at the conclusion that it has prospects of success on appeal on this point.

The application is dismissed with costs.

Chihambakwe, Mutizwa & Partners, applicant's legal practitioners

Coghlan, Welsh & Guest, respondent's legal practitioners