APEX HOLDINGS (PRIVATE) LIMITED
v
VENETIAN BLINDS SPECIALISTS LIMITED

SUPREME COURT OF ZIMBABWE
GWAUNZA JA, GOWORA JA & GUVAVA JA
HARARE, MARCH 23 & JUNE 25, 2015

R H Goba, for the appellant

J R Tsivama, for the respondent

GOWORA JA: On 24 June 2010, the High Court dismissed an application by the respondent for the recognition by that court of a judgment obtained in Malawi against the appellant. The respondent appealed to this court. On 22 February 2012, this Honourable Court upheld the appeal and remitted the matter to the High Court to hear evidence and make a determination on the exchange rate applicable to the Malawi Kwacha as against the United States Dollar, and further whether any interest was due and the rate thereof.

After hearing evidence from the respondent on those specific issues the High Court issued out an order in which it recognized the judgment from Malawi and ordered the appellant to pay the sum of USD 840 958.11 together with interest thereon at the prescribed rate with effect from the date of its judgment to date of payment. Both parties are aggrieved by the judgment and have appealed to this Court.

Mr *Goba*, on behalf of the appellant, moved an oral application for a postponement of the appeal. He intimated that he had been instructed that the appellant wished to make a direct application to the Constitutional Court for appropriate relief. He was unable to provide details of the intended application, when it was to be filed or the substance of the relief being sought.

Mr *Tsivama*, in turn, vehemently opposed the application. He argued that the respondent had not been given any notice of the application for a postponement nor had it been warned of the possibility of a Constitutional application being mooted by the appellant.

An application for the postponement of a matter which has been set down for hearing is in the nature of an indulgence sought, the grant of which is in the discretion of the judge or court before which it is made. The applicant must therefore show that there is good cause for the postponement or that there is a likelihood of prejudice if the court refuses the indulgence being sought. In *McCarthy Retail Ltd v Shortdistance Carriers* CC 2001 (3) SA 482 (SCA), SCHULTZ JA remarked:

> "A party opposing an application to postpone has a procedural right that the appeal should proceed on the appointed day. It is also in the public interest that there should be an end to litigation. Accordingly, in order for an application for a postponement to succeed he must show a 'good and strong reason' for the grant of such relief: Centirugo AG v Firestone SA (Pty) Ltd 1969 (3) SA 318 (T) at 320C-321B. The more detailed principles governing the grant and refusal of postponements have recently been summarised by the Constitutional Court in National Police Service Union v Minister of Safety and Security 2000 (4) SA 1110 (CC) at 1112C-F as follows:
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> > 'The postponement of a matter set down for hearing on a particular date cannot be claimed as of right. An applicant for a postponement seeks an indulgence from the court. Such postponement will not be granted unless this court is satisfied that it is in the interests of justice to do so. In this respect the applicant must show that there is good cause for the postponement. In order to satisfy the court that good cause does exist, it will be necessary to furnish a full and satisfactory explanation of the circumstances that gave rise to the application. Whether a postponement will be granted is therefore in the discretion of the court and cannot be secured by mere agreement between the parties. In exercising that discretion, this court will take into account a number of factors, including (but not limited to) whether the application has been

> timeously made, whether the explanation given by the applicant for postponement is full and satisfactory, whether there is prejudice to any of the parties and whether the application is opposed.'

The learned judge continued at 495

> "The application for postponement falls short on all counts. There is not even a serious attempt to provide a 'full and satisfactory explanation' for the owner's unpreparedness or the lateness of the application. Nor is such explanation as there is on oath, notwithstanding counsel's advice to the new attorney.
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> The interests of the other litigants and the convenience of the court are also important. The record and heads have been read by five judges, variously months or weeks before the appeal date. The fact that this case was placed on the roll meant that another case had to wait for the following term and if a postponement is granted this consequence will extend into succeeding terms".

It seems to me that the application moved before us for the postponement was, to say the least, half hearted. There was no attempt made to establish 'good cause' which would have persuaded the court to grant the indulgence being sought.

There was no explanation *in casu* why the postponement was being sought other than a reference to a desire to mount a constitutional application. The submission from counsel suggested to us that the constitutional issues, if any, were yet to be formulated. Counsel did not address the issue of the prejudice, if any, the appellant was likely to suffer if the application for postponement was not granted. In any event, it was not suggested that the hearing of the appeal would be a bar to the appellant's right to mount a direct constitutional application.

Such indulgence as this court would afford the applicant would involve the court exercising discretion in favour of the applicant. Any such discretion must be exercised judicially and a court should be slow to refuse an application for postponement where the reasons for the applicant's inability to proceed have been fully explained. The absence of an

explanation by the appellant to justify the application for a postponement was in itself indicative to the court of the fact that there was no 'good cause' for the grant of the indulgence sought. See *Persadh v General Motors South Africa (PTY) Ltd* 2006 (1) SA 455 at 459.

It was for the above reasons that the court refused the application and ordered that the appeal be heard on the merits.

I turn now to consider the main appeal. The substance of the appellant's criticism was that the court *a quo* erred in proceeding to recognise the judgment granted in Malawi and have the same registered in Zimbabwe as a competent judgment. It was contended further that the court misdirected itself by applying an incorrect exchange rate in coming to the conclusion that the amount due was USD 840 958.11 at the time when the payment of MK 4 814 512 was made by the appellant.

When the matter was heard for the second time as ordered by this Court, the appellant chose not to lead evidence on the two issues on which the matter had been specifically remitted by this honourable court to the High Court for its determination. At the close of the respondent's case (plaintiff in the lower court), appellant's counsel informed the trial judge that the appellant did not intend to call any witnesses for two reasons. The first was that the appellant did not believe that it could adduce any evidence materially different to what had been placed before the court by the respondent. Secondly, it was suggested by counsel that there were legal issues falling for determination on the evidence already before the court which the appellant would address in its closing submissions and that the calling of evidence would not add to the resolution of those legal issues.

In essence the evidence adduced on behalf of the respondent as to the applicable rate of exchange which prevailed as at 2004 in Malawi on the United States Dollar was not controverted by the appellant. Those were issues of fact which were in the domain of the trial court. This Court on appeal could not sit to revisit those factual disputes between the parties unless the court a quo was guilty of a misdirection on the facts. Without placing an alternative position before the High Court the appellant could not allege a misdirection.

As regards the issue of interest, the appellant argued that the court *a quo* erred in awarding interest on the judgment amount. It was further contended that the Courts' Act Malawi Chapter 302, in terms of which provision is made for interest to be levied on Malawi judgments does not apply to amounts denominated in foreign currency. The respondent in its cross-appeal also challenged the manner in which the order addressed the question of interest. It was the respondent's contention that the court *a quo* erred in ordering that interest accrues from the date of judgment instead of the date when the respondent instituted proceedings for recognition of the judgment as a judgment of this country.

The court *a quo* addressed the issue of interest in the following manner:

> "In addition to the foregoing reservations, my disinclination against applying statutory interest *in casu* is fortified by the reasons that I expounded in my earlier judgment in this matter. For the sake of completeness, it is necessary to repeat them.
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> Firstly, in the absence of any clear indication to the contrary, it must be assumed that s 65 of the Courts Act is confined to claims sounding in the official currency of Malawi. As I have already noted, there is nothing in that provision to suggest that it extends equally to claims sounding in all foreign currencies. As a matter of rational financial principle, the permissible rate of interest applicable to civil claims in foreign currency will vary according to the currency concerned.
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> Secondly, and more importantly, what is sought herein is the recognition of a foreign judgment. If our courts are to accord such recognition, they must do so on the judgment ex-facie, as duly certified by an authorized official of the foreign court in question. To accept the plaintiff's claim involves having to materially modify the expressly stated terms of the foreign judgment on the basis of a point of foreign law that has not duly been proven in terms of s 25 of our Civil Evidence Act [*Chapter*

> *8:01*]. Neither the expert evidence adduced on behalf of the plaintiff nor the reported judgments from Malawi produced by that expert conclusively support the construction that the plaintiff seeks to impose upon section 65 of the Malawi Courts Act.
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> In the premises, I take the view that the plaintiff has failed to prove, in accordance with section 25 of the Civil Evidence Act, that it is entitled to any interest on the United States Dollar award as from 12 September 2007. This claim cannot be allowed upon the proper recognition of the judgment of the Supreme Court of Malawi. However what can be claimed and allowed is interest at the rate prescribed in Zimbabwe, either as from the date of summons in this matter or as from the date of judgment herein. Although the plaintiff has not specifically made this claim, it seems to me just and equitable that it be granted in the circumstances of this case as from the date of this judgment."

Clearly, contrary to suggestion by the appellant, the court *a quo* did not order interest based on s 65 of the Malawi Courts Act. The award was made in accordance with the law of Zimbabwe on the understanding that the judgment upon its recognition was now a judgment of the courts of Zimbabwe.

The reasoning of the learned Judge is clear and needs no further comment from this court. As regards the contention in the cross-appeal that the court *a quo* erred in not ordering interest to run from 8 November 2012, the judgment makes it clear that the respondent did not pray for interest at the rate prescribed in terms of our law. What the respondent prayed for was for interest to run from 11 September 2011, which was the date of the Malawi Supreme Court judgment. The reason why that claim failed is easily discernible from the judgment of the learned trial judge and I need not repeat those reasons. The judgment is clear and does not require paraphrasing. The learned judge also discussed the principle that applies to the award of interest at the prescribed rate. The respondent did not pray for such interest and the award was then made on the basis that it would be just and equitable for interest to be awarded. In awarding interest the learned judge as he did, the judge obviously exercised his discretion, and this cannot be impugned.

In my view both the appeal and the cross appeal are devoid of any merit. As neither party succeeded there will be no order for costs.

In the result it is ordered as follows:

1. The appeal be and is hereby dismissed.
2. The cross-appeal be and is hereby dismissed.
3. Each of the parties is ordered to pay his or her own costs.

GWAUNZA JA: I agree

GUVAVA JA: I agree

Messrs Venturas & Samukange, appellant's legal practitioner

Sawyer & Mkushi, respondent's legal practitioners