

BANDA v ZAMBIA NEWSPAPERS LIMITED (1968) ZR 1 (HC)

HIGH COURT
BLAGDEN CJ
8th JANUARY 1968

Flynote and Headnote

- [1] **Evidence - High Court Rules, Order VI, rules 25 to 30 - Deputy Registrar of High Court's Jurisdiction - Issuance of commission for examination or letters of request.**

High Court Deputy Registrar has jurisdiction to issue commission for examination or letter of request for taking evidence under High Court Rules.

- [2] **Evidence - High Court Rules, Order VI, rule 29 - Application for issue of commission for examination or letters of request - Evidence necessary.**

In High Court Rules, Order VI, rule 29, which requires court or judge to be satisfied that evidence sought is necessary before issuance of commission or letters, word "necessary" interpreted as meaning "necessary for the purposes of justice".

- [3] **Evidence - Witnesses - Issuance of letter of request for taking evidence directed to foreign court - Administrative or political difficulties.**

If there is a competent foreign court to receive a letter of request for taking evidence, administrative and political difficulties are not sufficient grounds to refuse application.

- [4] **Evidence - Witnesses - Application to take evidence of witness in foreign country - Requirements for grant of application.**

The applicant who desires to take evidence of witness in a foreign country must satisfy the court before the application will be granted that the witness is unable to be present, that the application is bona fide and prompt, and that the evidence is substantial and material to issue.

- [5] **Civil procedure - Evidence of witness in foreign country - Requirements.**

See [4] above.

Rules construed:

- (1) High Court Rules, Order VI, rules 25 to 30.
- (2) Rules of the Supreme Court (England) (1965), Order 39, rules 1 to 3.
- (3) 1967 Supreme Court Practice (England), pages 508 - 511.

A O R Mitchley, for the appellant

Hadden, for the respondent

Judgment

Blagden CJ: This is an appeal from a decision of the learned deputy registrar. The appellant is the plaintiff in an action for damages for libel, and for convenience I shall refer in this judgment to the appellant as the plaintiff and to the respondent as the defendant. Pleadings in the libel action have already been delivered up to and including the plaintiff's reply, which was delivered sometime in July, 1967.

On 5th December, 1967, the defendant made application to the learned deputy registrar by summons "for an order that the defendant be at liberty to issue a commission for an examination of witnesses on his behalf at Salisbury in Rhodesia," and that the trial of the action be stayed until the return of such commission upon the usual terms. The witnesses in question are Messrs Colin Cunningham and Carlo Ottino. That summons was contested by the plaintiff but the learned deputy registrar, in the exercise of his discretion, granted it. It is that decision from which the plaintiff now appeals.

The procedure for the taking of evidence on commission is regulated in Zambia by the High Court Rules, Order VI, rules 25 to 30.

Rule 25 deals with the taking of evidence by examination before any person and at any place where this is necessary for the purpose of justice, but this rule must be read as limited in its scope to the taking of evidence within the jurisdiction.

Rule 26 requires that evidence on commission shall be taken as nearly as possible as it would be at the hearing of the suit unless it is directed to be taken upon interrogatories.

Rule 27 deals with the taking of evidence before suit instituted on the application of the defendant when that evidence is unlikely otherwise to be available at the hearing.

Rule 28 provides facilities for proving deeds and other instruments.

Rule 29 is in the following terms:

"29. Where the court or a Judge to which or to whom application is made for the issue of a commission for the examination of a person presiding at a place not within the Territory, is satisfied that the evidence of such a person is necessary, the court may issue such commission or a letter of request."

Rule 30 prescribes that the court shall not issue any commission or letter of request unless and until the applicant shall have furnished security, either by payment into court or otherwise, sufficient to cover the expenses likely to be incurred.

[1] [2] It will be apparent from the foregoing that the learned deputy registrar had jurisdiction to issue either a commission or a letter of request provided he was satisfied that the evidence of the person was "necessary" - and one may interpret that as meaning "necessary for the purpose of Justice".

In opposing the application before the learned deputy registrar, Mr. Mitchley, for the plaintiff, argued that there were procedural difficulties in view of the present relationships or lack of relationships between Zambia and Rhodesia and the uncertain legal status of Rhodesia. Mr Hadden contended, however, that the relations between Zambia and Rhodesia were irrelevant to the consideration of the application.

The learned deputy registrar accepted a submission of Mr Hadden's that the problem of whether or not "letters for appointment of commissioner" would be transmitted to Rhodesia was purely an administrative one. He then went on to say in his judgment:

"Therefore all I am concerned with here is whether the evidence of the proposed witnesses has any materiality to case at issue. Mr Hadden has submitted there is and has given his reasons, which seem valid."

He thereupon granted the defendant's application for a commission to issue, upon terms that defendant furnished security in the sum of £1,000.

Mr Mitchley has founded his appeal against this decision on two main grounds. In the first place, he says that the application should not have been granted because there is no procedural machinery whereby the application, if granted, could be implemented. In the second place, he says that as regards the merits of the application, the defendant has not shown any necessity for receipt of the evidence which it seeks and consequently the application should not have been granted. I will deal with these two points in turn.

High Court Rules, Order VI, rule 29 does not detail the steps which should be taken after the application has been granted. It simply indicates that the application may be made and, subject to certain conditions, granted. Nothing is said about the availability of reciprocal procedure in any other country. But I agree that some attention must be paid to this because, if it is apparent that it is useless to issue a commission or letters of request to a foreign country because that country has no procedural facilities for compliance, then I do not think that the application should be granted. I do not agree, however, that administrative difficulties or anticipated objections, or even a likely refusal to any request, constitute valid grounds for refusing the application.

Assistance is derived from a consideration of the corresponding procedure in England. This is governed by the Rules of the Supreme Court (1965), Order 39, rules 1 to 3. The relevant portions of rule 1 read:

"1. (1) The court may, in any cause or matter where it appears necessary for the purposes of justice, make an order . . . for the examination on oath before a judge, an officer or examiner of the court or some other person, at any place, of any person."

It will be observed that the criterion of necessity for the purposes of justice is the same under both English and Zambia law.

Rule 2 deals with the situation where the person to be examined is out of the jurisdiction. In these circumstances the rule enables an application to be made for an order for the issue of a letter of request to the judicial authorities of the country in which the evidence is to be taken; or alternatively, if that country allows a person in that country to be

examined before a person appointed by the court then an application may be made for an order appointing a special examiner to take such evidence.

Rule 3 prescribes the steps to be taken where an order is made under rule 1 for the issue of a letter of request to the judicial authorities of a country to take the evidence of a person in that country. The reference to rule 1 would appear to be an error since it is rule 2 which refers to the issue of a letter of request; rule 1 deals with an order for examination on oath.

The effect of rules 2 and 3 are summarised in notes thereto appearing on pages 508 - 511 of 1967 Supreme Court Practice. So far as the procedural machinery is concerned, these notes deal with where evidence is sought from non-convention countries, convention countries, dominions and colonies, and also certain other countries. They are naturally drafted from the point of view of the United Kingdom and in adapting them for application in this country it is necessary to substitute Zambia for the United Kingdom. It follows that the notes regarding dominions and colonies are of no application or assistance. For the purposes of this application Rhodesia must be treated as a foreign country. It also must be treated as a non-convention country since, so far as I am aware, no convention has been made between Zambia and Rhodesia regarding the taking of evidence on commission or otherwise, abroad.

The summons in the instant case asks for the issue of "a Commission for an examination of witnesses . . . at Salisbury in Rhodesia". As I have already related, High Court Rules, Order 6, rule 29, enables the court or a Judge upon such an application to "issue such Commission or a letter of request".

As regards obtaining the evidence by examination the notes to Rules of the Supreme Court (1965), Order 39, rules 2 and 3, under the rubric "Methods of Obtaining Evidence Abroad - Non - Convention Countries" (1967 Supreme Court Practice page 508) state:

"If it is desired to obtain the taking of evidence under rule 2 (i.e. before a special examiner) in a country with which no convention has been made enquiry should be made of the Master's Secretary's Department . . . as to whether the local law permits it."

I do not know how far, if at all, Mr Hadden has pursued any equivalent inquiry here, but he has not been able to tell me if the local law - that is the Rhodesian law - permits the taking of evidence before an examiner. The point is immaterial, however, since he has conceded that a letter of request would be more appropriate and perfectly acceptable here. Referring again to the Notes to Rules of the Supreme Court (1965), Order 39, rules 2 and 3, the following passage appears under the rubric "Procedure on Letter of Request to Non - Convention Countries" (1967 Supreme Court Practice page 509):

"A Letter of Request is required from the High Court to a foreign court to cause the evidence to be taken, and it may either ask for the interrogatories which accompany it to be put by the examiner (the usual procedure in many foreign courts, where the Court alone puts the questions) or for the witnesses to be examined *viva voce* upon the matters in question. The method by letters of request is now available for all countries, including British Dominions and Mandated Territories, and in some countries (such as the USSR and Egypt) it is the only available method."

[3] Whatever may be the constitutional and legal status of the present Rhodesia government, I do not think it can be seriously suggested that the High Court of Rhodesia is incompetent to receive or act upon a letter of request for evidence to be taken before it. There may, indeed, be administrative and political difficulties but, as I intimated earlier in my judgment, the incidence of such is no ground for refusing the defendant's application. That disposes of the procedural objections raised by Mr Mitchley.

I come now to the consideration of the merits. In regard to these there are some further helpful notes in 1967 Supreme Court Practice under the rubric "Effects of rules 2 and 3" at page 508, where the requirements which have to be satisfied before the court grants an application for the evidence of a witness to be taken in any other country are set out in the following terms:

". . . a party cannot compel a witness in a foreign country to attend a trial, and therefore if the Court is satisfied that -

- (1) he is unwilling or unable to be present,
- (2) the application is made *bona fide* and with such promptness as not to cause unreasonable delay, and
- (3) the witness can give substantial evidence material to the issue, an order is often made."

The note also refers to the fact that many other considerations may be relevant and in particular that "reasonable attempts should first be made, in a proper case, to obtain the evidence in other ways" - e.g. through witness who is within the jurisdiction, by documents, by admissions or an order that the evidence may be given on affidavit.

[4] [5] I have given consideration to the affidavits filed in support of this application and to the pleadings. I do not think it is necessary for me to refer to them in any detail. I need only say that I am amply satisfied that the two witnesses from whom the defendant requires evidence are unable to be present in Zambia; that the application for their evidence is made *bona fide* and has been made with sufficient promptitude; that these witnesses can give substantial evidence material to the issue; and that it is unlikely that their particular evidence can be obtained in other ways.

Under these circumstances I think the learned deputy registrar's decision was correct, but I think he should have granted, not leave to issue a commission to take evidence on examination but leave to issue a letter of request.

There has also been drawn to my attention the security which the learned deputy registrar ordered to be deposited. This was assessed at a figure of £1,000. Mr Hadden says this is too much. Mr Mitchley says that without figures to work on the learned deputy registrar had to make certain it was adequate and that, in terms of a commission, quite a number of persons whose expenses and remuneration would have to be considered, might be involved. I think that, having regard to the order which I am going to make, the sum of £1,000 can be considerably reduced.

This appeal stands dismissed, but I set aside the learned deputy registrar's order in its present form and substitute for it an order in the following terms:

- (1) That the defendant be at liberty to issue a letter of request to the High Court of Rhodesia to cause the evidence to be taken of Messrs Colin Jonathan Irving Cunningham and Carlo Ottino in Rhodesia.
- (2) That the defendant do, furnish security in the sum of £300 (after hearing further argument as to the stay of trial applied for and as to costs).
- (3) That the trial of the action be stayed pending compliance with the said letter of request.
- (4) That the costs of the appeal and of the summons before the learned deputy registrar be costs in the cause.
- (5) Liberty to apply.

Appeal dismissed.