

IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA

2016/HP/FJ/002

(Civil Jurisdiction)

IN THE MATTER OF:

**THE FOREIGN JUDGMENT (RECIPROCAL
 ENFORCEMENT) ACT CHAPTER 76 OF THE
 LAWS OF ZAMBIA**

AND

IN THE MATTER OF:

**AN ORDER AND JUDGMENT OF THE UNITED
 STATES DISTRICT COURT FOR THE EASTERN
 DISTRICT OF VIRGINIA – ALEXANDRIA
 DIVISION DATED 2ND JULY 2015 OBTAINED IN
 THE MATTER INVOLVING BEZA CONSULTING
 INC, A VIRGINIA CORPORATION; BEZA
 CONSULTING ENGINEERS PLC, AN
 INDIVIDUAL AND BEZA CONSULTING, INC, A
 MARYLAND CORPORATION (CIVIL ACTION
 NO. 1:14CV881 (AJT/TCB))**

BETWEEN:

BEZA CONSULTING, INC (VIRGINIA, USA)

1ST APPLICANT

BEZA CONSULTING ENGINEERS PLC (ETHIOPIA)

2ND APPLICANT

AND

MIKE MULUNEH MIHIRATE YAETA

1ST RESPONDENT

BEZA CONSULTING INC LIMITED

2ND RESPONDENT

Before the Hon. Mr. Justice E. M. Sikazwe in Chambers

For the Applicants : *No Appearance*

For the Respondents : *Mr. L. Mwamba & Ms.s. Chungu – Messrs Simeza Sangwa
& Associates*

R U L I N G

Cases referred to:

- 1. Attorney General Vs Fredrick Chiluba and Others (2007 HP/FJ/004)*
- 2. General Nursing Council of Zambia Vs Mbangweta (2008) ZR 105*
- 3. Attorney General Vs Roy Clarke (2008) (1) ZR38*

Legislation referred to:

Section 3 of the Foreign Judgments (Reciprocal Enforcement) Act Chapter 76 of the Laws of Zambia.

Other works referred to:

Intellectual Property Rights Article 1

This is an application by the Respondent to set aside an Ex parte Order for the registration of Foreign Judgment in the High Court of Zambia granted on 7th October, 2016. This was to do with the Order and Judgment dated 2nd July, 2015 of the United States District Court for the Eastern District of Virginia – Alexandria Division obtained in the matter involving Beza Consulting inc, (a Virginia Corporation) and Beza Consulting Engineers PLC, (an Ethiopian entity) Versus Muluneh Mihirate Yadeta (an Individual) and Beza Consulting,

Inc (a Maryland Corporation) (Civil Action No. 1:14CV881 (AJT/TCB) whereby it was adjudged that the above named Applicants do recover against the above named Respondents the sum of US\$3,949,619.75 which as per the Bank of Zambia as at 2nd July, 2015 was equivalent in Kwacha to ZMW 29,644,266.00. It was further ordered by this Court that the above named Respondents be at liberty to apply to set aside the registration within 45 days after service upon them of notice of such registration pursuant to Rule 9 of the Foreign Judgments (Reciprocal Enforcement) Act Chapter 76 of the Laws of Zambia if they have grounds for so doing and execution upon the said Judgment will not issue until after the expiration of that period or any extension of that period granted by the Court; or if an application be made to set aside such registration until such application has been disposed of.

The Applicants Advocates after Registering this Ex-parte Order on 17th October, 2016 filed in an Affidavit of Service which showed that they were unable to serve on the Respondents at the known physical address as they had relocated to another place. The Applicants Advocates further made a search at the Patents and Companies Registration Agency did not show the Respondents latest address nor did they know of any other alternative address for the 1st Respondent. Finally the Applicants Advocates forwarded a scanned copy of the Notice of Registration of a Foreign Judgment to the 1st Respondent's email address namely mike@besacounsult.com. The 1st and 2nd Respondents Advocates filed on 5th December, 2016 a Summons for an Order to set aside Registration of a Foreign Judgment pursuant to Rule 11 of the Foreign Judgment (Reciprocal Enforcement) Rules, Chapter 76 of the Laws of Zambia. This Court set 6th March, 2017 at 12:00 hours as a date of hearing this application. On the day of the hearing this matter the Applicants

Advocates absented themselves without leave of the Court as they were very much aware of the date of Hearing.

The Courts heard the Respondents viva voce evidence and the Ruling was promised to be delivered in the shortest possible time. However, this Court regrets very much in not delivering the Ruling after a long time.

In the first place, it should be noted that this was an Ex-parte Order granted by this Court and an Inter-parte Hearing to be heard after 45 days to give the Respondents time to receive the Notice and be prepared to be heard by this Court if there was any objection. The Applicants' endeavoured to serve the Respondents the copy of the Ex-parte Order until finally managed to send them a copy of the Order through an email and filed an Affidavit of Service on 28th October, 2016 and the Respondents filed for an Order to set aside on 5th December, 2016. This was within the days given to the Respondents to apply to set aside the said registration of the Foreign Judgement.

In arguing the case the Applicants submitted that this Court should dismiss the Respondents application because the Judgment in casu is one in which, inter alia, the 1st Respondent was not only condemned to pay damages for infringement of the Applicants intellectual property rights relating to the wrongful use of the Applicants trade name, trademark and logo but was also restrained from continuing such infringement whether by himself, his agents or servants and those who are in active concert or participation with any of Respondents. It was therefore clear that the nature of the Judgement which is now being sought to be registered and enforced in Zambia is one which falls squarely in the ambit of the Agreement on Trade-Related Aspects of Intellectual Property Rights because it is a Judgment in which the financial

penalty imposed on the parties concerned is a penalty that stems from the breach of the Applicants intellectual property rights. It was further argued that in construing Section 3 of the Foreign Judgements (Reciprocal Enforcement) Act, the Court ought to have regard to the age of the registration and to the effect of the recent statutory and other Judicial developments that have a bearing on the construction of the said Act. It was further submitted that, just as the Court may be persuaded by the Judgment as in the case of Attorney General Vs Frederick Chiluba and Others ⁽¹⁾ the Court ought to equally be persuaded by International instruments to which Zambia is a signatory and quoted Article 1(3) which stated that:

“Members (states) shall accord the treatment provided for in this Agreement to the nationals of other Members.....”

And further that Article 4 proves that:

“with regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a Member to the nationals of any other Country shall be accorded immediately and unconditionally to the nationals of all the Members....”

In reply the Respondents premised their application on the strength of Section 3 of the Foreign (Judgment Reciprocal Enforcement) Act and argued that the Applicants Foreign Judgment should not be registered because it does not conform to the requirements set out in Section 3. The application before those Court related to the implementations of the provisions of the Act and that the duty of the Court was to give effect to the manifest intentions of parliament under the Act. The rules of statutory interpretation must be considered. In

this regard the Respondents relied by the decision of the Court in the case of General Nursing Council of Zambia V Mbangweta ⁽²⁾ where it was held that:

“The primary rule of construction or interpretation of statutes is that enactments must be considered according to the plain and ordinary meaning of the words used unless to do so would lead to an absurdity”

The Respondents further relied on the case of Attorney General V Frederick Chiluba and Others, where Hamaundu J. by then gave guidance on the requirements for the direct registration of Foreign Judgments in the following terms:

“The position that merges from the cases and the statutes that I have cited is that: whenever a Judgement Creditor seeks to enforce, here in Zambia, a Judgement or order made by a foreign Court, the Creditor should first consider whether Judgments and orders of such foreign Court are enforceable under the Foreign Judgments (Reciprocal Enforcement) Act, or indeed under any other written law. If such Judgments are not enforceable under any of our written laws, then the Creditor should seek to enforce such Judgments at Common law.”

Lastly the Respondent argued that the Applicants could not enforce their foreign Judgment by way of direct registration pursuant to the Act as Part II of the said Act does not apply to the Judgments of the United States District Court for the Eastern District of Virginia.

I do agree with the Respondents arguments that the Applicants have not shown to this Court that the Judgment of the United States District Court for the Eastern District of Virginia can be enforced here in Zambia, or that the

Judgment is enforceable under the Foreign Judgements (Reciprocal Enforcement) Act or indeed, under any other written law. Even if the Applicants wanted to rely on the notion that this Judgment was based on the recognition of Intellectual Property rights of person from member States as alluded to Article 1 of the said Agreement which provides that:

“Members shall give effect to the provisions of this Agreement. Members may but shall not be obliged to, implement in their law more extensive protection than is required in this Agreement, provided that such protection does not contravene the provisions of this Agreement. Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice.”

It is common cause that this Agreement has not been domesticated in Zambia and its provision are therefore not binding on this Court. This has been admitted by the Applicants themselves that the agreement has not been domesticated in Zambia.

On the other hand I agree that in applying and construing our statutes we can take into consideration International instruments to which Zambia is a signatory. However, these International instruments are only of persuasive value unless they are domesticated in our laws, as it was stated in our Supreme Court in the case of *Attorney General V Roy Clarke* ⁽³⁾. Where it was stated that:

“We agree that in applying and construing our statutes we can take into consideration international instruments to which Zambia is a signatory. However, these international instruments are only of persuasive value unless they are domesticated in our laws”

I therefore find that the case in casu cannot be registered in Zambia as the Judgement is not enforceable under the Foreign Judgements (Reciprocal Enforcement) Act or, indeed, under any other written law in Zambia.

The Ex-parte Order granted to the Applicants by this Court has therefore been rescinded with immediate effect.

Costs for this matter are therefore awarded to the Respondents and if not agreed to be taxed.

Appeal to the Higher Court granted.



Delivered in Chambers this ^{4th}..... day of ^{August}.....2020.

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E. M. SIKAZWE
JUDGE