

HOLDEN AT LUSAKA

(Civil Jurisdiction)

ZAMBIA NATIONAL WHOLESALE & MARKETING CO. LTD Appellant

Vs

ZAMBIA SUGAR COMPANY LTD Respondent

Coram: Bweupe, DCJ, Sakala and Chaila, JJS.

24th May and 23rd June, 1994.

For the appellant, Mr. Nyembele of Ellis and Company.

For the respondent, Mr. Kawanambulu of Nosiku Kawanambulu & Company.

J U D G M E N T

Sakala JS delivered the judgment of the court.

Cases referred to:

1. Bank of Zambia Vs Caroline Anderson and Audrew Anderson
SCZ Judgment No. 13 of 1993.

This is an appeal by the Zambia National Wholesale and Marketing Company Limited against part of the High Court Judgment holding that there was no waiver of interest by the respondent to the appellant to pay on the judgment debt and awarding interest at Commercial Bank lending rate at the time of the order by the Deputy Registrar. The Zambia Sugar Company, the respondent, also cross appealed against that part of the High Court judgment ordering the appellant to settle the judgment debt in instalments.

The brief history leading to the appeal is that the respondent having issued especially endorsed writ successfully applied before the Deputy Registrar for summary judgment and subsequently obtained final judgment to recover from the appellant the sum of K32,922,104 at once with interest calculated on the said amount at the Commercial Bank lending rate ruling between the 1st of April 1992 and the date of the final payment. The appellant unsuccessfully appealed to a Commissioner in chambers.

The fact that the appellant owed the respondent the amount claimed was not in dispute either before the Deputy Registrar or the appellate

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Commissioner and indeed in this court. Before the appellate Commissioner the appellant's major complaints were that the Deputy Registrar erred in refusing to order the payment of the judgment debt by monthly instalments; and that the Deputy Registrar erred by ordering interest at Commercial Bank lending rate from the date of judgment until payment. The learned appellate Commissioner considered the affidavit evidence before him and ordered that the appellant settle the judgment debt in instalments of K5,000,000.00 per month; the first being from 10th October 1993 and that the subsequent instalments be paid on the last business date of each successive month. He also found that there was no waiver of interest by the respondent to the appellant to pay on the judgment debt from the date when the action arose; and that the rate of interest on the judgment debt be the Commercial Bank lending rate in force at the time of the Deputy Registrar's Order. It is these findings by the appellate Commissioner that led to this appeal and the cross appeal.

According to the memorandum of appeal the appellant based its case on three grounds. First that there was waiver of interest as the agreement for sale of Sugar was a credit sale agreement and interest only became due upon demand of all the amounts. Second, that the award of interest at current Bank lending rate was erroneous as the debt due should have been treated on the same basis as an amount on special damages at half the current lending rate to the date of judgment and after judgment at six percent. Third, that the award of interest should have been at average of the current lending rate prevailing from date of demand to date of judgment instead of the rate prevailing at date of judgment or from cause of action to date of judgment.

According to the memorandum of the cross appeal, the respondent cross appealed on four grounds the gist of which is that the learned trial Commissioner misdirected himself in evidence for allowing the appellant to settle the judgment debt by instalments in total disregard of the evidence that the appellant had defaulted the previous offer; that the appellant had sold all the sugar it bought from the respondent on credit but pocketed both the purchase price at which it bought the sugar and the profit it had earned from the sales of the said sugar; that the value of the judgment debt would be considerably eroded or

reduced by inflation before the total judgment debt had been settled in full and in the alternative that the court disregarded the appellant's own offer to commence payment on the 6th May, 1993.

The summary of Mr. Nyembele's arguments and submissions on behalf of the appellant on the first ground was that interest was not due whilst the credit sale agreement was being performed by the parties. He pointed out that the sale agreement was one contract and not several despite the fact that at one time the respondent had stopped supplying sugar to the appellant. He further argued that the resumption of the credit sale agreement was one continuous transaction and therefore interest could only have become due upon demand of payment on the sum accrued. He submitted that the issue on interest did not arise when the credit sale agreement as to payment was suspended until such a time as the credit expired or the period of payment was due. He further submitted that the learned trial Commissioner erred in holding that interest should run from 1992 since the demand for payment of the due sums was made in January 1993. According to Mr. Nyembele, that was the date when interest started to run.

In reply Mr. Kawanambulu on behalf of the respondent argued that the appellant counsel's arguments that the credit sale agreement was a continuous agreement even if the respondent had stopped to supply the appellant with the sugar was not only misleading but contrary to the evidence on record which showed that the respondent had made a demand and the supply of sugar had stopped because the appellant had failed to pay after the demand was made and; that the appellant had agreed to settle the outstanding amount by monthly payment and that the appellant had remained in debt since April, 1992. Mr. Kawanambulu submitted that on the foregoing evidence on record the appellant is estopped from relying on the terms of the credit sale agreement and deny the respondent the right to claim interest. He also pointed out in the written heads of argument that there was no evidence on record to support the argument that the respondent had waived the payment of interest by accepting the settlement of the debt in instalments.

We have very carefully considered the affidavit evidence on record in relation to the first ground as well as the arguments and submissions on this ground. We entirely agree with Mr. Kawanambulu that Mr.

Nyembele's arguments and submissions on the ground of waiver of interest is not supported by the evidence on record. The affidavits and exhibits which were the only evidence before court clearly showed that as at 31st March 1992 the account stood at K57,079,105.82. This was common cause and confirmed in writing by the appellant. It was common cause that the respondent suspended the supply of sugar and demanded payment of the outstanding amount but that the appellant failed to settle the account. It was not in dispute and there was documentary evidence before the court that as a result of representations and promises made on behalf of the appellant the respondent resumed the supplies of the sugar. As already noted the only evidence before the court was by way of affidavit. This evidence does not disclose that the respondent had waived his right to interest. Indeed if anything the evidence disclosed that the credit period had expired. Mr. Nyembele concedes in his submissions that if the credit sale agreement had expired then the interest was due for payment on the amount unsettled. We agree with him and this was the position in the present case. On the evidence on record the appellant cannot be allowed to say there was no demand for payment of the amount outstanding as at 31st March 1992. Our understanding of the evidence is that the supplies of sugar by the respondent to the appellant had been suspended because the appellant had failed to settle the account after the demand was made. The learned trial Commissioner therefore did not err in holding that there was no waiver of interest and that the interest started running from April, 1992 when the demand had been made. The first ground of appeal cannot therefore succeed.

The second ground argued by Mr. Nyembele before us related to the award of interest at Commercial Bank lending rate at the time of making the order by the Deputy Registrar. The argument was that this award was wrong in law. The basis of the argument was that the current lending rate had considerably fluctuated since the letter of demand of January 1993 and the date of the Order of 9th July, 1993. He submitted that in view of the fluctuations the proper order would have been an average of the current lending rate. He cited this court's recent judgment in Bank of Zambia Vs Caroline Anderson and Andrew Anderson where we pointed out that it is this court's practice to calculate interest at an average rate over a period from the date of issue of the writ to the date of judgment. Mr. Kawanambulu in reply submitted that the Bank of Zambia

case had no application to the present appeal because that case dealt with interest before judgment on general and special damages. According to Mr. Kawanambulu, the present appeal is one of a debt where the court should award interest to compensate the respondent for being deprived of the use of the money he ought to have been paid.

Both Counsel referred the court to several authorities in their submissions including those considered by this court in the Bank of Zambia case. We agree that interest should be awarded to compensate the plaintiff not only for being deprived of the use of his money but also to take into account the "rising inflation" but with greatest respect to counsel we are unable to follow the distinction Mr. Kawanambulu was making between this case and the Bank of Zambia case on the issue of interest. In the Bank of Zambia case we did point out that the judgment debt carries interest in accordance with the law unless the court otherwise orders. In that case we also said:-

"In cases where interest is awarded it would be appropriate to follow the example of the courts in Birkett (8) and Miller (46) where interest was awarded at approximately quarter of the current Bank short term deposit rate. This latter rate will also take into account the practice of this court to calculate the interest at an average rate over a period from the date of the issue of the writ to the date of judgment."

We propose to follow that practice in this case and order that the interest to be paid will be calculated at an average rate over the period from the date of demand, namely April, 1992 to date of this judgment or the date of payment whichever is the earlier. This ground of appeal therefore succeeds.

The third ground of appeal as set out in the memorandum was not argued but the written heads of argument on behalf of the appellant contained a reply to the cross-appeal to the effect that the respondent is estopped from raising the issue of instalment payments as the parties had agreed after judgment that the debt be settled by instalments. On behalf of the respondent, Mr. Kawanambulu did not also argue the cross-appeal but urged the court not to take into account any agreement made in relation to instalment after judgment. We do not intend to deal with

the issue of whether the court was right to order payment by instalments at great length; but only to point out that payment of a judgment debt by way of instalments is permissible by law on sufficient grounds (see Order 39 (9) Cap 50 of the laws of Zambia). In the present case we find that there were no sufficient reasons for ordering payment of the judgment debt by instalments. We note however that although the cross-appeal was not argued with great enthusiasm the main ground in the cross-appeal was a challenge that the learned trial Commissioner misdirected himself in allowing the appellant to settle the judgment debt by instalments. This ground of the cross-appeal succeeds. The order to pay by instalments is set aside. The net result is that each party has succeeded on one ground. This being the case, we make no order as to costs in this court.

B.K. Bwape,
DEPUTY CHIEF JUSTICE.

E.L. Sakala,
SUPREME COURT JUDGE.

M.S. Challo,
SUPREME COURT JUDGE.