IN THE SUPREME COURT OF ZAMBIA

SCZ APPEAL NO. 52/1993

HOLDEN AT NDOLA

BETWEEN:

AFFILIATED BUSINESS CONTACTS LIMITED — Appellants

and

CHIMANGA CHANGA LIMITED — Respondents

Coram: Bweupe, D.C.J., Sakala and Chaila, JJs

On 9th September, 1993 and 9th March, 1994

For the Appellant: Mr. B. M. Kangombe of Messrs Kangombe

For the Respondent: Mr. Happy Chama of Messrs Mwanawasa & co

JUDGMENT

Bweupe, D.C.J., delivered judgment of the Court.

CASES REFERRED TO:

1. **THE DESPINA (SERVICE EUROPEAN ANTLANTIQUE SQD (SEAS) OF PARIS V STOCKHOLMS REDERIALTIEBOLAG SUEA OF STOCKHOLM (1979) A.C. 685 (1979) 1.ALL E.R. 421.**

This is an appeal against a decision of the learned High Court Commissioner dismissing the appeal to set aside judgment entered in default of defence. For convenience we will refer to the appellant as the Defendant and to the Respondent as the Plaintiff (the positions they held in Court below).

This case is not without history. Briefly the facts of the case as they appear on the evidence on record were to the effect that on 10th October, 1985 a Writ of Summons was issued against the Defendant in which the Plaintiff's claim was for: Damages for breach of contract for the supply of 200 M/tonnes of meet and bone meat by the Defendant from Swaziland to the Plaintiff in Zambia and refund of the sum

of K66,276-35 or its foreign currency equivalent being consideration advanced to the Defendant under the said contract which has since failed plus interest and costs. The action was styled and given cause No. 1985/HN/765. The Defendant is apparently a foreign company operating from Kenya.

On 31st October, 1965 the advocates for the Plaintiff applied ex-parte for leave to serve the Writ of summons out of jurisdiction pursuant to Order 10 Rule 15 of the High Court Rules. This ex-parte summons did not exhibit the Writ to be served out of jurisdiction and the affidavit in support did not indicate that a Writ had in fact already been issued on cause No. 1985/HN/765. The application was granted as prayed. On 10th December, 1985 the Defendant's advocates filed a memorandum of appearance on Cause No. 1985/HN/765.

On 5th March, 1986 a summons for direction was issued and on 20th March, 1986 an order for direction was subsequently granted. However, the order for direction is neither on the file of Cause No. 1985/HN/765 nor on the file of cause No. 1985/HN/770. Notwithstanding on 16th July, 1986 the Plaintiff's advocates filed summons for leave to enter judgment in default of defence and this application was made in cause No. 1985/HN/770. The application was supported by an affidavit to which was exhibited the applicant's statement of claim which on examination disclosed that it is cause No. 1985/HN/765 and not cause No. 1985/HN/770 the Cause Number on the summons.

The application for leave to enter Judgment in default of defence was heard by the learned Deputy Registrar on 28th August, 1986. At that time no advocate appeared on behalf of the Defendant while Mr. Chali appeared for the Plaintiff. During the hearing of the application the Court indicated to the Plaintiff's advocate that there was no Writ on record. At that stage the Advocate produced a copy of the Writ No. 1985/HN/765. Then judgment was entered in default of defence. However, when the formal order was prepared and signed it ordered the Defendant company to "refund the sum of eighty-one thousand United States Dollars (US$ 81,000) plus interest at 7% from the 7th day of November, 1978 plus the cost of these proceedings." A certificate of Judgment was prepared and signed on 25th august, 1988.

On the 17th January, 1990 Messrs Llyod Jones and Collins, present Defendant's advocates, filed a notice of appointment of advocates and at the same time they applied ex-parte for stay of execution pending the application for

review of the interlocutory judgment. For some unknown reasons the ex-parte order was obtained on 27th March, 1990. At the same time theDefendant's advocates filed an application to set aside the order of interlocutory judgment in default of defence. The application was heard on 3rd May, 1990 and reserved Ruling was delivered on 7th May, 1990 by Deputy Registrar who dismissed the Defendant's application with costs. It is that ruling the Defendant appealed to the High Court Commissioner against.

The High Court Commissioner, having considered and analysed the affidavit evidence, the documents produced and submissions made dismissed the appeal holding that in view of the nature of the contract whereby the payment was in United State Dollars, it was in order for the judgment to be expressed in Dollars. In coming to this conclusion the Judge said:-

> **"In the present case the terms of the contract have not been disclosed to the Court, in particular the currency to be paid in case of breach of contract. What is known is that the goods to be imported were to be paid, not in Zambian Kwacha, but in U.S. dollars, since the Kwacha is not a convertible currency. It is in fact the dollars which the plaintiff raised and paid to the Defendant in order to pay for the goods to be imported. The Defendant apparently paid that amount but the goods never arrived in Zambia although they were shipped from Swaziland according to him. A question should be asked in accordance with the principle expressed in the POLIAS case as to what currency i.e. the Zambian Kwacha or the U.S. dollar truelly expresses the Plaintiff's loss and in which currency he should be compensated. In my view since payment for the goods was to be made in dollars and in fact the Defendant was paid in dollars the currency which truly expresses the Plaintiff's loss is the U.S. dollars and he must be compensated in that currency. I, therefore, find that it was proper to express the Judgment in U.S. dollars as the Kwacha was merely used to raise the dollar which was the actual price."**

It is this part of Judgment of the High Court Commissioner that the Defendant, now the appellant, appeals against. The learned Advocate for the appellant, Mr. Kangombe, filed one ground of appeal as appearing in his Memorandum of appeal. It states that the appellant above-named appeals to the Supreme Court against the whole judg-

ment of Mr. Commissioner J.A. Banda in the above-mentioned matter on the following ground namely:-

> **"The learned Judge erred in law and misdirected himself in finding that it was proper to express the judgment in U.S. dollars. The Hon. Judge ought to have held that the judgment should have been expressed in Kwacha."**

The Learned advocate for the appellant, Mr. Kangombe, vividly argued that the judge erred in law by expressing the Judgment sum in U.S. dollars since the contract was expressed in Zambian Kwach. He argued that the law in international sales is that the currency payable in a case where there has been default is the currency in which the loss is felt. He then referred the Court to the case of POLIAS otherwise known as **THE DESPINA (SERVICE EUROPEAN ANTLANTIQUE SQD (SEAS) OF PARIS V STOCKHOLMS REDERIALTIEBOLAG SUEA OF STOCKHOLM (1).** His argument is that since the Respondent paid the Zambian Kwacha to obtain the dollars which were later paid to the appellant to enable him to pay for the imported good, then the loss was felt in Kwacha and the Judgment should be expressed in Kwacha.

On behalf of the Plaintiff, Mr. Chama denied that the contract was expressed in Kwacha as there was no written document to that effect. He submitted that since the Defendant received US$81,000 to pay for the goods to be imported from Swaziland then the learned High Court Commissioner was right to express the Judgment sum in U.S. dollars.

Mr. Chama submitted further that it was in any case going to be illegal to express the Judgment sum in Zambian Kwacha in view of the provision of regulations 8 and 30 of the Exchange Control Regulations Cap. 593.

We have carefully considered the affidavit evidence filed; the documents produced; the submissions and arguments advanced; and the authorities cited by both parties and we are satisfied that one thing that clearly exhibits itself is that there was no written contract in this case; that the Plaintiff used Zambian currency to raise U.S. dollars which enabled the Defendant to purchase goods in Swaziland which were to be exported from Swaziland into Zambia; and that no documents were produced to show that the goods were shipped from Swaziland to Zambia.

There can be no dispute that the Defendants were in breach of the contract for the supply of 200 m/tonnes of meat and bone meat alleged to have been shipped from Swaziland but not delivered in Zambia to the Plaintiffs. The

Defendants admitted liability. What is in dispute is the learned High Court Commissioner's finding that the Plaintiffs truly suffered loss in US dollars. This is the dispute before us. In what currency should the plaintiff be compensated? The learned Counsel for the Defendant argued that as the Plaintiff supplied Kwacha to raise US dollars which was given to the Defendant to enable them to purchase goods from Swaziland the loss was felt in Kwacha and the Judgment sum should have been expressed in Zambian Kwacha.

We are in a difficulty in this case in that whereas in DESPINA case there was a signed contract which stipulated conditions in event of breach there was none in the instant case - so we can not know what the intention of the parties was in the event of breach and it would be difficult to know what currency truly represented the Plaintiff's loss. Mr. Kangombe argued that the loss in this case was felt in Kwacha currency in which the Plaintiff paid to purchase the dollars, and that the Plaintiff was closely connected with Kwacha and not dollars. As we have already said without written contract it is not easy to find the intention of the parties and it would be difficult to know what currency truly represented the Plaintiff's loss.

We have also considered the Despina case and are of the view that the facts of that case are distinguishable from the facts in the instant case. We are satisfied therefore that the finding of the Commissioner was amply supported by the facts on the record. We have no reason for the Commissioner's Judgment to be faulted and we uphold his finding that the currency which truly expresses the Plaintiff's loss was the U.S. dollar. Accordingly the Defendant should pay to the Plaintiff $81,000 United States Dollars. We should dismiss this appeal with costs here and below.

B. K. Bweupe
DEPUTY CHIEF JUSTICE

E. L. Sakala
SUPREME COURT JUDGE

M. S. Chaila
SUPREME COURT JUDGE

IN THE SUPREME COURT OF ZAMBIA Application No. SCZ/8/12/94

HOLDEN AT LUSAKA

LEONARD SIBOLI Appellant

vs

THE PEOPLE Respondent

CORAM: Chaila, Chirwa and Muzyamba JJ.S.

3rd May, 1994.

For the Appellant : Mr. M. Mundia of Mundia & Co.
For the Respondent : Mr. L. Muuka, Senior State Advocate

R U L I N G

Chaila, J.S. delivered the ruling of the court.

This is an appeal against the refusal of the learned trial Magistrate to grant the appellant bail pending trial.

The appellant was facing charges under the provisions of Act No. 37 of 1993. He appeared before the suborinate court and a plea was taken. After the plea the applicant applied for bail on the ground that the Act under which he was charged had not come into force when he was detained. The learned trial magistrate heard the application and turned down the application and refused bail. The appellant then appealed to the High Court. The High Court heard the appeal and dismissed the matter. The appellant now appeals to this court.

At the beginning of the appeal, we inquired from Mr. Mundia whether or not this court had any jurisdiction to determine the matter since there is no appeal lying either against the decision of the learned trial magistrate or the full case to the High Court. We referred the counsel to the provisions of section 32 (1) of the Criminal Procedure Code which prohibit appeals except in cases of conviction and sentences. The counsel conceded that there was no conviction and no sentence but he argued that judgment included any

/2...order which

order which is made by the Subordinate Court and left the matter to our discretion. We have some difficulty in agreeing with Mr. Mundia's interpretation, Section 32 (1) is very specific. It does not allow appeals in respect of any interlocutory matters. We are of the view that when the learned trial magistrate refused bail the right course for the appellant was to make an application to the High Court and not to appeal. The learned High Court Commissioner did not have the jurisdiction to determine the appeal and the proceedings in that court were null and void for lack of jurisdiction. Equally in this case there is no appeal pending before the High Court and we cannot therefore entertain an appeal from the appellant. The application is therefore refused for lack of jurisdiction.

We would, however, explain or make one point clear about the rights arising out of repealed laws. We are, from facts of this case, of the view that the rights accruing only relate to questions of sentences. There is nothing to stop the new provisions of the law to apply to a person who is alleged to have committed offences before the operation of the new law but prosecuted later. Procedurally he will have a right as to sentence.

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M.S. Chaila
SUPREME COURT JUDGE

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D.K. Chirwa
SUPREME COURT JUDGE

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W.M. Muzyamba
SUPREME COURT JUDGE