ZAMBIA ELECTRICITY SUPPLY CORPORATION LIMITED v MEKA (Z) LTD (1994) S.J. 49 (S.C.)

SUPREME COURT
GARDNER, SAKALA AND CHIRWA, JJ.S.
22ND FEBRUARY 1994 AND 29TH JUNE 1994
S.C.Z JUDGMENT NO. 7 OF 1994

Flynote

Appeal - Interest on debt - Discretion of the court to order interest

Headnote

The respondent tendered for the supply of fifteen vehicles in reply to an advertisement by the appellant. Twelve days after the date of for opening the tenders the appellant notified the respondent that its tender has been successful. By this time, thinking that its tender had been unsuccessful, the respondent had sold five of the vehicles with which it had been prepared to fulfil the order. With the apparent consent of the appellant, the respondent supplied ten vehicles and arranged to import a further five vehicles to supply to the appellant. It was alleged by the respondent that at this time it informed the appellant of what it was doing and had indicated that there would be an increase in the cost of the

p50

vehicles because of the devaluation of the kwacha. When the vehicles arrived, the respondent attempted to increase the price but the appellant rejected this and demanded repayment of the money it had paid the respondent for the five vehicles that were not supplied. The appellant also demanded interest.

Held:

(i) The discretion as to whether or not to award interest cannot be exercised without considering the experience relating to the conduct of the parties

For the appellant: G.M Zulu of ZESCO
For the respondent: M.G Mwenda of Mwenda and Co.

Judgement

GARDNER, J.S.: delivered the judgement of the court.

This is an appeal against a High Court judgement giving unconditional leave to defend to the respondent.

The facts of the case were that the respondent tendered for the supply of fifteen vehicles in reply to an advertisement by the appellant. Twelve days after the date of for opening the tenders the appellant notified the respondent that its tender has been successful. By this time, thinking that its tender had been unsuccessful, the respondent had sold five of the vehicles with which it had been prepared to fulfil the order. With the apparent consent of the appellant, the respondent supplied ten vehicles and arranged to import a further five vehicles to supply to the appellant. It was alleged by the respondent that at this time it informed the appellant of what it was doing and had indicated that there would be an increase in the cost of the vehicles

because of the devaluation of the kwacha. When the vehicles arrived, the respondent notified the appellant that it was able to supply the vehicles at a cost of K6.35 million per vehicle for which it required the payment of an additional eight million five hundred kwacha if the appellant accepted the new price. The appellant replied to the effect that it did not wish to accept the five vehicles at the new price and demanded immediate repayment of twenty three and half million kwacha being the original purchase price which it had paid for the vehicles which were not supplied.

The respondent replied offering again to supply the vehicles at the new price, and, when it received no reply, a letter was written to the appellant indicating that the respondent was taking steps to sell the vehicles on the open market after which arrangements would be made to repay the twenty three and half million kwacha due to the appellant.

The appellant then issued a writ, after which the respondent, having sold the five vehicles, paid to the respondent on the 11th of January, 1993 the sum of twenty three million kwacha followed shortly afterwards by the balance of five hundred thousand kwacha. The appellant applied for summary judgement under Order XIII for interest on the unpaid debt and claimed that there was no defence to the action.

The respondent opposed the application and in an affidavit in opposition set out the facts relating to the tender and the late response to the tender resulting in the

p51

unnecessary sale of the five vehicles. The affidavit further averred that the Managing Director of the Plaintiff company had raised no objection to the purchase of another five vehicles to replace those not supplied and had stated that the issue of the price of those motor vehicles would be discussed when they arrived in Zambia. Finally the affidavit averred that, after the respondent had sold the five vehicles to a company called Alfa Investments Limited, the appellant purchased the same vehicles from Alfa Investments Limited at a price which was for each one hundred and fifty thousand kwacha more than the price at which the respondent had offered those same vehicles to the appellant. The affidavit indicated that there was a counter claim against the appellant for ten million kwacha for loss of business caused by the loss of the use of the respondent's money in the purchase of the five vehicles.

The learned Deputy Registrar held that as it was clear that the sum of twenty three and half million kwacha was owed by the respondent to the appellant it was clear that the appellant was entitled to interest on the money. He accordingly awarded interest of sixty per cent per annum from the date of demand of the money. The respondent appealed to a judge in chambers who held that there were triable issues and allowed the appeal. It is against that judgement that the appellant now appeals.

Mr Zulu argued that interest was correctly awarded by the Deputy Registrar and that the learned trial judge wrongly set aside the order for interest without considering the argument that interest should be awarded on any debt in order to compensate the aggrieved party for having been kept out of his money. Mrs Mwenda said that on the facts of the case the money was not owed until the vehicles had been disposed of.

Under the provisions of the Law Reform (Miscellaneous Provisions)Act, Cap 74, Section 4, in any proceedings tried in any court of record for the recovery of any debt or manages the court may, if it thinks fit, order the payment of interest on a debt. This provision still applies in Zambia despite the change in the law of procedure in England by the Supreme Court Act 1981, section 35A, which provides that interest may be included in any judgement without the necessity for the case to be tried.

In this case it was sought to obtain judgement under Order 13, in which event the case would not have been tried within the meaning of the Law Reform (Miscellaneous Provisions) Act. However, the note to Order 6 Rule 2 of the Supreme Court Practice (The White Book), 1976 edition points out, in sub note 7A, that in such cases a plaintiff may ask for final judgement for the principal sum and for interlocutory judgement for the interest to be assessed, by analogy with assessment of damages. In such cases it seems to us that a separate hearing would be unnecessary and that at the time of granting judgement on the principal sum the damages could be assessed there and then by the Deputy Registrar. The award of such damages or interest is of course at the discretion of the court and in the exercise of that discretion the court is bound to take into consideration the conduct of the parties. Having regard to the order which we propose to make it would not be appropriate for this court to comment on the conduct which we feel should be taken into consideration.

However, we do agree with the learned judge that the discretion as to whether or not to award interest cannot be exercised without considering the experience

relating to the conduct of the parties and for this reason we agree that there are triable issues.

The appeal is dismissed with costs to the respondent.