IN THE SUPREME COURT OF ZAMBIA SCZ APPEAL No.58 OF 1995

HOLDEN AT LUSAKA

(Civil Jurisdiction)

B E T W E E N:

BARCLAYS BANK OF ZAMBIA LIMITED — APPELLANT

AND

JAMES BRIAN DOUGHTY — 1ST RESPONDENT

COSMAS NYENDWA — 2ND RESPONDENT

SONIA DORAS — 3RD RESPONDENT

Coram: Bweupe, D.C.J., Sakala and Muzyamba, JJS

4th April 1996 and 22nd May 1996

For the Appellant: J. Makala, Makala & Co.

For the Respondents: N/A

J U D G M E N T

Muzyamba, J.S. delivered the judgment of the court.

This is an appeal against a decision of the High Court entering a judgment in favour of the respondents against the appellant for the refund of the sum of U.S. $79,985 which the appellant received from outside Zambia on account of the respondents and converted by the appellant into kwacha Contrary to the respondents' wish.

Briefly the facts of the case were that the respondents owned a school called Namalundu School and had an account with the appellant at Kafue Branch. In August 1992 the respondents sold the school to Centre Orientaments Education, an Institution based in America for U.S.$ 100,000. This was paid in two instalments. The first instalment of U.S.$ 20,015 was received by the appellant in August/September 1992 and converted by the appellant into kwacha. This prompted the respondents to approach the appellant and on 15th September 1992 they had a meeting with the appellant's Branch Manager Mr. Phiri, D.W.2 at which it was agreed, according to the respondents, that the balance of U.S. $79,985 should, when received by the appellant, be retained in a retention account. At the trial the appellant denied that this is what was agreed upon. They said what was discussed at that meeting, also attended by D.W.3 Mr. Moonga, were the types of accounts available and which one was the highest interest/earning. The second last instalment of U.S. $79,985 was received by the appellant on or about 24th September 1992 and again this was converted into kwacha. This displeased the respondents. Some correspondence then past between the parties on the same issue and on 20th April 1993 the appellant applied to the Bank of Zambia on behalf of the respondents for retention of the dollars. There are

two comments on the application by the Bank of Zambia. One, that 'kindly be advised that Bank of Zambia no longer administers retention facilities. This scheme is now administered by Commercial Banks. We are therefore unable to assist' and two, that 'we may not as there appears to have been no prior authority from ourselves for this purchase agreement. You may guide.' On the basis of these comments the appellant refused to pay the respondents or credit their account with U.S.$ 79,985. The respondents then brought an action against the appellant. The learned trial Judge found as a fact that at the meeting of 15th September 1992 the appellant agreed to retain the U.S. $79,985 in the retention account and that by converting this money into kwacha the appellant acted contrary to what was agreed upon between the parties and to the detriment of the respondents and entered judgment for the respondents.

There are 6 grounds of appeal.

1. That the Learned Trial Judge misdirected himself in Law in failing to take into account the provisions as they existed then of the Exchange Control Regulations made under the Exchange Control Act which forbade any one to enter into any transaction involving foreign exchange without obtaining prior approval of the Bank of Zambia which was vested with the powers of the Minister of Finance under the said legislation.

2. That the Learned Trial Judge misdirected himself in failing to construe the fact that even if the Respondents had given instructions to the Appellants to retain the sale proceeds in foreign exchange, which is denied, the Appellant could not have complied with the said request in the absence of exchange control authority as in (1) above.

3. That the Learned Trial Judge misdirected himself by completely disregarding the undisputable testimony of D.W.1 a Mr. Stephen Zulu (a Bank of Zambia employee) that for the Respondents to hold funds then in a foreign exchange account they needed to have procured Bank of Zambia approval prior to the sale of the property.

J3/...

4. That the Learned Trial Judge misdirected himself when he found that the Respondents' matter fell under the ambit of retention accounts referred to in the Appellant's newsletters in complete disregard of the testimony of Messrs. Monga (DW.2) and C.Y. Phiri (DW.3) to the effect that the Appellants did not qualify for those retention accounts as they did not earn the foreign exchange from exports.

5. The Learned Trial Judge erred in fact in misconstruing the import of the Appellant's newsletters to mean that Bank of Zambia approval was no longer required for Bank Customers to hold funds in foreign exchange.

6. That the Learned Trial Judge further misdirected himself by finding that ID 8 being the letter written by the Appellant's Managing Director dated 24th December 1992 amount to an admission of liability.

The arguments on grounds 1 to 5 overlapped. We therefore intend to discuss them as one. In any event they are interelated.

Mr. Makala argued that the learned trial Judge failed to consider the evidence of DW.1, Mr. Zulu, a Bank of Zambia employee who said that the respondents could not maintain a retention account without having first obtained the Bank of Zambia approval to sell the school. That the learned trial Judge did not give reasons for believing the respondents that the appellant had agreed to keep the funds in a retention account and for disbelieving the appellant's evidence that no such agreement was reached. That in any event the learned trial Judge misapprehended the facts of the case in that in his judgment at page 11 of the record of appeal he referred to the appellant's witnesses Mr. Moonga and Mr. Phiri as DW.2 and 1 respectively when infact they were DW.3 and 2 respectively. That we must therefore reverse the lower court's finding of fact that appellant had agreed to retain the U.S. $79,985 in the retention account. That moreover, without the Bank of Zambia prior approval of the sale there was no way the appellant could have agreed to retain the funds in the retention account.

We have considered the evidence on record and the arguments on these grounds. We have also examined the Exchange Control Act, Cap 593 and the Regulations made thereunder and we are unable to find any specific provision that a vendor intending to sell his property should obtain prior approval or sanction of the Bank of Zambia or Minister of Finance and that if no such approval or sanction is obtained then the vendor cannot maintain a retention account. Indeed Mr. Makala could not point to us any such provision. May be the requirement was a matter of practice and it would appear to be so and we intend to demonstrate this. As we said earlier on, one of the comments on the appellant's application for permission to retain the funds was that 'kindly be advised that the Bank of Zambia no longer administers retention facilities. This scheme is now administered by Commercial Banks. We are therefore unable to assist.' In other words the requirement was waved by the Bank of Zambia or Minister of Finance. If the requirement was a matter of law the wave could only be done by either amending the law or modifying the regulations. At the time the comments were made no amendment or modification existed and the Exchange Control Act did not ceaze to exist or have effect until 22nd January 1994 by Statutory Instrument No.18 of 1994 signed by the Minister of Finance. Further, and for this reason we find Mr. Makala's arguments self defeating, on 24th November 1992, at page 70 of the supplementary record of appeal, the appellant wrote to the first respondent as follows:

> "Dear Sir,
>
> FOREX RETENTION USD79,985-00
>
> We refer to your letters dated 28th October, 9th November, and 16th November, 1992 on the above subject and apologize for the delay in replying to them. This was due to the fact that we had to liase with our Foreign Branch as per our telephone conversation Mr. Doughty/C.Y. Phiri of 16th November, 1992.
>
> Our Foreign Branch are agreable to sourcing the above amount and placing it on a retention account for your use. However since the Forex will have to be bought at the rate ruling on the day of purchase, this will mean a difference in the kwacha value between what you were paid and what you will pay for the same dollars.
>
> In view of this please confirm that we may go ahead in placing the above amount on a retention account.

> Additionally, confirm too, that the shortfall in kwacha terms arising out of Exchange rate difference will be borne by Malundu shareholders, as the Kwacha realised out of the proceeds on USD 79,985 @ K220.00 per dollar will be less than the equivalent of the same 79,985 per current rate needed to purchase the dollars (79,985).
> Yours faithfully,
>
> MANAGER"

At this date the Exchange Control Act was still in force and there was no approval by the Bank of Zambia. How then was the appellant prepared to place the funds in a retention account if the requirement to seek prior approval before selling the property was a matter of law. It is quite clear from this letter that had the respondents agreed to meet the short fall in the exchange rate the matter would not have ended up in court. We wish also to observe here that before 15th September 1992 when the meeting was held between the parties the appellant had written to its clients saying that the exchange control system had been liberalised, presumably by the Bank of Zambia or Minister of Finance. Again this was before the Exchange Control Act was repealed.

We have no doubt therefore that the requirement for prior approval was a matter of practice and not of law and that the practice was waved or abolished before 23rd June 1992 when the appellant issued the first newsletter to its customers, at page 28 of the supplementary record of appeal, saying that the foreign exchange system had been liberalised otherwise the appellant would not have acted as it did.

As regards the arguments that the learned trial Judge misapprehended the facts of the case and that his finding that the appellant agreed to retain the money in a retention account was perverse, the learned trial Judge said, at page 11 of the record:

> "From the evidence before me, I am of the view that the loss of Dollars - resulted from the Defendant Banks misconception that 'prior approval of the Bank of Zambia was required before they could open a retention account, for the Plaintiffs. We have seen from the cited documents that this was no longer the case.

> There was evidence that the culprit responsible for converting the Plaintiffs funds into kwacha account was their Lusaka Foreign Exchange Department. This was exacerbated by the lies from the Defendant's Kafue Branch Management who claimed falsely that there were no disposal instructions received from the Plaintiffs as to how the money was to be disposed off.
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> I have in this regard rejected the evidence of the second witness for the Defendant Mr. Mwiinga who claimed that Mrs. Doras (PW.2) and Mr. Cosmas Nyendwa (PW.3) were not sure as to the ownership of the money. This is a fabrication which I find unacceptable because it is ably and strongly rebutted by the evidence of the three plaintiffs to the effect that on 15th September, 1992 they met with Mr. Phiri the Manager of the Defendant and gave him instructions to the effect that they wanted to retain the money in foreign exchange for their own use. After all, DW.2 - did not attend such a meeting - if he did he has only pretended that nothing to this effect was said. I find that Mr. Monga had every reason to tell lies to protect his own position for it was his very action that has directly led to the loss suffered by the Plaintiffs in this case i.e. denying that there was any instruction at all from the Plaintiffs to retain the foreign exchange for their own use.
>
> In fact the DW.2 - Mr. Monga, and DW.1 - Yusuf Phiri were persons to blame for the loss suffered by the Plaintiffs in this case - because of their ignorance of procedures as to foreign exchange rules."

We have, as we said earlier on, considered the evidence on record and we are quite satisfied that the learned trial Judge properly evaluated the evidence before him and gave valid reasons for accepting the respondents evidence and for disbelieving the appellant's witnesses. The fact that he referred to Mr. Monga and Mr. Phiri as DW.2 and 1 and not DW.3 and 2 respectively is neither here nor there because what is important is not the

numbering of witnesses but their evidence and the assessment of that evidence. We do not therefore agree with Mr. Makala that the learned trial Judge made a perverse finding. We are therefore equally satisfied that the learned trial Judge came to the right conclusion that the appellant agreed to retain the money in a retention account and it was certainly within their powers to do so as demonstrated by our discussion on the requirement for prior approval to maintain a retention account and the appellant's newsletters to its customers and the letter we have reproduced above.

In view of what we have said above, it would be an academic exercise for us to discuss ground 6 of the appeal.

For the foregoing reasons we would dismiss the appeal with costs to be taxed in default of agreement.

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B.K. BWEUPE

DEPUTY CHIEF JUSTICE

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E.L. SAKALA

SUPREME COURT JUDGE

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W.M. MUZYAMBA

SUPREME COURT JUDGE