ZAMBIA INDUSTRIAL AND MINING CORPORATION LIMITED v MUUKA (1998) S.J. 1 (S.C.)

SUPREME COURT
NGULUBE, C.J., MUZYAMBA, AND LEWANIKA, JJ.S.
2ND OCTOBER, 1997 AND 10TH FEBRUARY, 1998.
(S.C.Z. JUDGMENT NO. 1 OF 1998)

Flynote

Appeal - When there are two conflicting Judgments

Headnote

The respondent and the MINDECO agreed that the MINDECO would sell a house to the respondent. When MINDECO was liquidated, the appellant took over all MINDECO's assets and liabilities. However, the appellant refused to proceed with the sale of the house to the respondent. Later the respondent's employment was wrongfully terminated and he successfully sued the appellant for damages for wrongful termination of employment.The appellants also counter-claimed for rent and mesne profits and for vacant possession, counterclaims which were not upheld. Meanwhile, there was already before the courts a parallel action in Cause number 1988/HP/2017 in which the plaintiffs claim was for specific performance of the agreement for the sale of the house. This is the action which was tried by Mutale, J., who granted the decree by his judgment delivered on 6th June, 1995. This appeal was against Judge Mutale's judgment.

Held:

(i) Where the loss is a money loss, the award to the plaintiff should be based on the value of
the money at the time of breach in the case of contract rather than at the time that the loss was determined

(ii) In cases of defective title, the damages would be calculated as the market value of the property at the time set for completion less the contract price

For the appellant: Ms L. Sameta, of Makala and Company.
For the respondent: Mr C. Ngenda, of Solly Patel Hamir and Lawrence.

Judgment

NGULUBE,C.J.: delivered the Judgment of the Court.

For convenience, we shall refer to the respondent as the Plaintiff and the appellants as the defendants, which is what they were in the action. The plaintiff used to work in very senior positions in the parastatal companies under the defendants. In April,1975, there was an agreement between the plaintiff and his employers then Mindeco Limited whereby, in keeping with what was said to be company policy obtaining at that time, it was agreed that the plaintiff would buy and Mindeco Limited would sell to the plaintiff, the house he was occupying being

property at S/D 'A' of Sub 32 of Farm 448a Kabulonga, Lusaka. the agreed price K60,000 which was more or less what it had cost the company to construct the house. The learned trial judge found that the transaction was not concluded due to the default of the defendants and their predecessors in title when they failed to respond appropriately to the many urgings by the plaintiff. Thus, when MINDECO Limited was liquidated and ZIMCO took over, the then Director General declined, in 1984, to proceed with the sale. In 1986, a new Director General agreed to proceed with the sale. Meanwhile, at a press Conference held on 16th April, 1987, the first President of the Republic announced the retirement of the plaintiff in the public interest. The plaintiff successfully sued the defendants for damages for wrongful termination of employment and the payment of full pension and terminal benefits. The defendants counterclaimed for rent or mesne profits and for vacant possession, counterclaims which were not upheld. This was in consolidated actions numbered 1987/HP.5001 and 1991/HP/386 whose judgment was delivered by Bwalya, J., on 29th March, 1995. In the consolidated action, Bwalya, J., left the question of the sale of the house unresolved in the following terms: At page 34 of the transcript of his judgment, he had this to say:

> "Further-more there is undisputed evidence that the plaintiff was offered the house for sale although the details had not been fully communicated and further because of the premature relief from his employment by retirement as I have already found the sale has not been completed at all. Since this Court has found that he was retired by the Defendant Company, the plaintiff is at liberty to reopen the question of sale of the house to him by the Defendant Company, who should consider his case as a retiree from the Defendant Company and treat him like they have treated other employees.
>
> This is a question of contract between the parties:
>
> I shall leave it to the parties, but as regards the counterclaim it is dismissed accordingly. Should the parties not reach any agreement as to the sale of the house the plaintiff should be given 30 days within which to vacate the house and give vacant possession to the Defendant Company.''

Again at page 35 of the transcript of the judgment in the part summarising the decisions made Bwalya, J., said:

> "The question of sale of the house to the plaintiff be considered by the Defendant Company as was suggested before he was retired by the President and should there be no agreement between the parties the plaintiff should be given 10 days notice to give vacant possession to the Defendant Company.''

(In passing, we note the contradiction even in the number of days' notice proposed). That there was already in existence an agreement for sale was in fact not debatable.The result of the terms used by Bwalya, J., in relation to the defendants' counterclaim for possession which was in fact dismissed and on the question of the sale which was not the subject of the action before him was that the defendants thought they had won possession of the house.

In the consolidated action, the plaintiff had pleaded the sale agreement solely to resist the defendants' counterclaim for rent and possession. Meanwhile, there was already before the courts a parallel action in Cause number 1988/HP/2017 in which the plaintiffs claim was for specific performance of the agreement for the sale of the house. This is the action which was tried by Mutale, J., who granted the decree by his judgment delivered on 6th June, 1995. The appeal before us is against this latter judgment.

There was a ground of appeal to the effect that the action ought not to have proceeded when

the defendants went into voluntary liquidation. This ground was abandoned and quite properly so in our view since with leave of the court a pending action can be proceeded with (*see* Cap.388).

Two grounds of appeal were argued. The first was that it was wrong to order specific performance when such order was at variance with the order of Bwalya,J., in the other proceedings related to a similar cause of action. Miss Sameta submitted that the issue of specific performance was res judicata in view of the conflicting decisions given by the two separate judges in the two sets of proceedings. She relied on the apparent order for possession given by Bwalya, J. Mr Ngenda on the other side argued that these were parallel actions and that Bwalya, J., only dealt with the question of the sale of the house in obiter remarks since the action before him did not concern a claim for specific performance as did the one before Mutale, J. We have considered this ground of appeal and we are satisfied that Mr Ngenda was on firm ground. The issues raised by the plaintiff before Bwalya, J., and those raised by the defendants in the 1991 action which was consolidated with the plaintiffs earlier action for damages and recovery of pension arising out of the termination of employment were clearly not the issues before Mutale,J., in the parallel action. The excerpts that we have quoted from the judgment of Bwalya, J., showed that he was specifically not resolving or attempting to adjudicate upon the sale agreement which he left to the parties. There can be no res judicata if there has been no adjudication and it is quite obvious that in appearing before the two judges, the parties were not litigating the same issues. Neither issue estoppel nor res judicata could have been successfully raised or pleaded by either party in the one action to defeat the claims in the other. We do not uphold the ground of appeal in this regard.

The second ground argued was that it was inequitable to direct the defendants to sell the house for K60,000 as originally agreed between the parties some twenty years ago.

Miss Sameta submitted that, as the relief claimed by the plaintiff is equitable, the principles of equity should be allowed to mitigate the severity of the common law by promoting fairness and justice. She urged us to regard performance at the price fixed so many years ago as unconscionable. While conceding that it was the defendant's fault that performance had been delayed for so long, we were urged to take account of the fact that the defendants have been paying all the outgrowings such as Owners rates while they have received not a single ngwee from the plaintiff who has lived in the house free of charge since 1987. She submitted that the defendants ought to have been excused performance on account of undue hardship, though the nature and form of the hardship the company or the liquidator would suffer were not indicated. In this regard, the case, of *Patel and Another v Ali and Another* (1984) Ch. 283 cited by Counsel and which concerned imminent hardship due to the worsening and altered personal circumstances of a vendor subsequent to the contract (who would become destitute) does not assist.

Miss Sameta invited us to consider the principles of restitution and unjust enrichment and submitted that the contract if enforced in its original form would result in the plaintiff going away with more than he had bargained for. On the other hand, the defendants would feel robbed. She drew attention to the unreported case of *Mijoni v ZPC* Appeal No. 10 of 1986 and other cases which suggest that the court could "vary" the terms so as to bring about fairness such as by ordering the payment of interest or rent and the reimbursement of costs and taxes the defendants have been paying over the years. She suggested that the interest to be charged should being the figure closer to the market value or that the K60,000 should be translated to present day values, less allowance against the defendants for having caused the inordinate delay.

In response, Mr Ngenda submitted that the defendants should not be allowed to benefit from their own wrongs so that the decree of specific performance should be allowed to stand on the

original terms without any adjustments. In the alternative, he urged that damages be assessed on the basis of the current market value less the contract price. At our request a current valuation has been made available which puts todays's market value at K125 million. By coincidence, the Bank of Zambia has also suggested, in a letter to Mr Ngenda, that K60,000 of 1975 is today worth about K125 million. This was arrived at by simply converting the Kwacha into dollars at the ruling rate in 1975 and then reconverting the dollars into Kwacha at today's exchange rate. We intend to say something about both the measure of damages if there were to be no specific performance as well as attempt to store the value of the Kwacha over the years in its dollar equivalent.

However, to continue with the narrative, it was Mr Ngenda's submission in the further alternative that the issue of price after the passage of so much time could be approached as this court did in a similar case in *Denny Mushiko Luywa v Zambia Cold Storage Corporation Limited* Appeal No. 4 of 1992 (unreported). In that case, there was a delay of six or seven years from the contract between the employer and the employee to the decision of this court decreeing specific performance of the sale of a house in circumstances which were virtually on all fours with those in the case at hand. This court ordered the purchaser to reimburse the rates paid or payable over the years; to pay interest on the purchase price and to meet the property transfer tax in equal shares.

We have considered all the submissions and the issues raised. In the view that we take, the submissions on behalf of the defendants did not raise an issue of hardship or the like of a kind to persuade us to consider that the learned trial judge had improperly awarded a decree of specific performance. In any event, if there were to be no specific performance on account of an inexcusable and wilful breach by the vendor, this is one of those cases where the measure of damages would have had to place the plaintiff in the same position as if the contract had been performed and he enjoyed the benefit of his bargain. In this regard, we have visited McGregor on Damages 15th Edition and the very elaborate discussion of the measure of damages in cases of defective title within the rule in *Bain v Fothergile* (1874) LR.. 7.H.L.158 and also in cases outside that rule, of which the instant case would be an example. Paragraph 904 et seq. sets out the legal propositions in a fashion we find persuasive. We have also perused the well reasoned judgment of Megarry, J., in *Wroth and Another v Tyler* (1974) 1 Ch. 30. The damages would be calculated as the market value of the property at the time set for completion less the contract price. Very unfortunately for the defendants, the delay being attributable solely to their own default would being the time for completion todate. It seems to us that there would be very little point and an insignificant saving - in their having to pay damages on the basis of the recent valuation of the house less the contract price. In the circumstances, the lesser "evil" is to affirm the decree of specific performance and not consider awarding the plaintiff damages.

With regard to the submission that the price be translated into the present day value of the Kwacha of 1975, we note that the proposal is simply to covert the K60,000 in 1975 into its dollar equivalent at that time and then to reconvert the dollars back into kwacha at today's rate of exchange.

The letter from an Assistant Director at the Bank of Zambia to Mr Ngenda advises that K60,000 in 1975 at US$1 to K0.64 was equivalent to US$93,750; therefore at today's average rate of K1332.27 per US$1, this comes to K124,900,312.50. An attempt was made - and rejected - to store the value of a sum of money in the lawful currency of this country in its dollar equivalent in *Apollo Enterprises Limited v Enock Percy Kavindele* Appeal No. 98 of 1995 (unreported). In that case as in this case the contract expressed the relevant transaction in kwacha terms and this is what we said:

> "We have also given very anxious consideration to the submissions and arguments

> regarding the sudden and dramatic changes in the internal value of the Kwacha. The transaction was in Kwacha terms and no question of any foreign currency damages or debt arises. We can find no authority for departing from the general rule that where the loss is a money loss, the award to the plaintiff should be based on the value of the money at the time of breach in the case of contract rather than at the time that the loss was determined as in the case to tort. We would borrow from the language used by Scrutton, L.J., in *The Baarn* (1933) P. 251 (CA) and Denning L.J., in *Treseder-Griffin v Co-operative Insurance Society* (1956) 2 Q.B. 127 when we point out that a Kwacha in Zambia is a Kwacha whatever its international value; it is the constant unit of value by which we have to measure everything ; price of things may go up or down; other currencies may go up and down, but the Kwacha remains the same."

It was not suggested in the *Apollo* case that the decline in the internal value of the Kwacha cannot be considered in appropriate situations. Indeed, the courts reflect this reality especially whenever general damages for non pecuniary losses are awarded and also when guidance for an award is sought from the old case-precedents. When English precendents are referred to on the question of damages, this court has cautioned against simply converting pounds sterling into Kwacha at the prevailing rate. To illustrate the foregoing, we refer to what was said in two cases: In *Smart Banda v Wales Siame* SCZ Judgment No.30 of 1988, we said:

> "We would like to give guidance to counsel so that claims for damages may be more easily settled between counsels in the future.
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> Since the 5th of October, 1985, there has been a devaluation of the Kwacha, and future awards for paid and suffering must take that devaluation into account. However, as we have emphasised before in this court, this is not a simple matter of multiplying previous awards by the amount to which the Kwacha has been devalued. Courts must take into account the general cost of living in this country and the real value that will be received. In calculating damages in future, therefore, awards should be less than what would result from a simple multiplication of previous awards as compared with the devalued Kwacha."

In *Bank of Zambia v Caroline Anderson and Another* SCZ Judgment No. 13 of 1993 we had this to say about English awards:

> "We confirm that in Zambia a simple multiplication of English awards by the current rate of exchange is not appropriate. The purchasing power of the pound and the Kwacha and the quality of life that each currency is expected to buy is different in the two countries and awards in Zambia will consequently be smaller."

What is said of a pound would apply equally to a dollar and to any other foreign currency. There is in our considered view clearly discernible from the cases ample authority and reason for disallowing attempts in transactions expressed in Kwacha to hedge against the depreciation of the internal value of our currency by notionally storing the same in a foreign currency at an earlier and more favourably rate of exchange and then reconverting the foreign sum at today's rates. It is unrealistic to look at our currency in that fashion. Accordingly, we do not adopt that approach.

In the circumstances of this case and for the reasons given, we find that the approach in the *Luywa* case is appropriate here. We affirm the learned trial judge's award of the decree of specific performance but add variations as follows:

1. The plaintiff - respondent shall be responsible for all rates on the property since 1987

and shall reimburse the defendant - appellant any such rates paid by them. The sum to be reimbursed shall carry simple interest at 60% per annum to the date of the trial court's judgment, being a rate of interest which we consider to be a fair average during the period in question.

2. Similarly, the plaintiff, shall pay simple interest at the rate of 60% on the purchase price of K60,000 from April 1975 until the date of completion.
3. The plaintiff shall pay any tax payable on the transfer of property in excess of the tax payable on the purchase price of K60,000 since the plaintiff alone is the beneficiary of the current value of the property in issue.
4. The defendant shall within 14 days of this judgment make an application for consent to assign the property and thereafter proceed to do the needful in order to specifically perform the contract.

In view of all the circumstances of this case and the result of the appeal which has resulted in very small variations - each party will bear his own costs

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