SCZ NO. 30 OF 1999

IN THE SUPREME COURT OF ZAMBIA SCZ APPEAL NO. 127 /98
HOLDEN AT LUSAKA.
(Civil Jurisdiction)

STICKROSE (PTY) LIMITED APPELLANT
AND
THE PERMANENT SECRETARY
MINISTRY OF FINANCE RESPONDENT

Coram: Sakala, Lewanika and Chibesakunda.
20th July and 2nd September, 1999.

For the Appellant Mr. J.P. Sangwa of Simeza Sangwa Associates.
For the Respondent, Mr. D.K. Kasote, Principal State Advocate.

JUDGMENT

Sakala JS delivered the Judgment of the Court.

Case referred to:

1. M V Home Office (1993) ALL ER. 567.

The history of the facts leading to this appeal have never been in dispute. On 2nd August 1996, the appellant obtained a judgment against the respondent in the sum of US$ 530,577. 78 and interest thereon at 10 percent per annum from 10th February 1987 date of the writ of summons up to 2nd August 1996 and if paid in Kwacha, the Kwacha equivalent at the exchange rate ruling on the date of payment.

In terms of Section 21(1) of the State Proceeding Act, a certificate of judgment against the Government of the Republic of Zambia was prepared certifying the debt to be in the sum of US$ 1,330,548.56 excluding post judgment interest. Sometime in June 1997 the Court was moved pursuant to Section 24 of the Debtor's Act to commit the Permanent Secretary Ministry of Finance to jail for failing to pay the judgment debt.

At the hearing of the matter on 26th June, 1997 the court was informed that the State was prepared to start liquidating of the judgment debt by way of monthly instalments

of K200 million. The first such instalment, however, was never made until sometime in August 1997 which was equivalent to US$ 149,812.73 at the exchange rate ruling on 5th August 1997. The next instalment was paid in December 1997 in the sum of K100 million equivalent to US$ 67,340.07. The third instalment was of K140 million, paid on 13th May 1998. Despite what appeared to be a straightforward history on the undisputed facts, the appellant, through his advocate, decided to enforce execution of the balance of the judgment debt by commencing a fresh action by way of judicial review for an order of mandamus to oblige the respondent to pay the balance of the judgment debt within 14 days from the date of the order. The court granted the appellant leave to apply for judicial review directing that the application be made by originating summons to a judge in chambers. As expected, on the facts not indispute, the respondent had no defence but pleaded that they be given 30 days within which to pay the balance of the judgment debt and thereafter to be given three months within which to pay the post judgment interest. Thus, by what was said to be by consent, an order for mandamus was drawn up by the appellants advocate in the following terms:-

> "BY CONSENT, IT IS ORDERED that this motion be allowed and that the PERMANENT SECRETARY MINISTRY OF FINANCE do and is hereby commanded to pay:
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> 1. by 15th day of August, 1998, the sum of US$750,148.94 being the balance of the judgment debt as per the judgment of Mr. Justice Chitengi dated 2 August, 1996 under cause 1987/HP/273, and
>
> 2. by 15 November, 1998, the post judgment interest.
>
> And it is further ordered that the said PERMANENT SECRETARY MINISTRY OF FINANCE do pay to the Applicants advocates the Applicant's costs of and occasioned by this motion such costs to be taxed in default of agreement."

Subject to what we shall say later, Mr. Sangwa would like this court to accept that the process of judicial review in the instant scenario was not used as a back door means of enforcing execution of a judgment debt, which execution would not have been

possible through the front door. As it turned out, the above back door move did not help the appellant. Consequently the appellant commenced the committal proceedings against the respondent. Paragraphs 1 and 2 of the motion read:-

> "1. That James Mtonga the Permanent Secretary Ministry of Finance herein be committed to Prison for his contempt of court for failing, in breach of the Order of Mandamus by Consent dated 22 July, 1998, to pay by the 15th day of August, 1998, the sum of US$750,148.94 being the balance of the judgment debt as per the judgment of Mr. Justice Chitengi dated 2 August, 1996 under cause 1987/HP/273, and
>
> 2. That the said James Mtonga do pay to Stickrose (PTY) Limited their costs of and incidental to this application and the order to be made thereon."

The argument before us by Mr. Sangwa was that the committal proceedings were not intended for Mr. James Mtonga as a person but as the holder of the office of Permanent Secretary. Again we shall revert to this argument later. To complete the sequence of events leading to the appeal, the motion for an order of committal was supported by an affidavit sworn by counsel which after stating the facts not in dispute, paragraph 7 reads:-

> "7. In the circumstance, I respectfully submit that the said James Mtonga Permanent Secretary Ministry of Finance by his acts and conduct has been and still is guilty of contempt of court, and I respectfully pray that James Mtonga may be committed to prison for his said contempt."

We are satisfied that given the manner in which the pleadings for committal proceedings were couched, it was James Mtonga, as a person, who was targeted for committal to prison. The arguments that the committal proceedings were not intended for Mr. Mtonga as a person, beg the question.

The affidavit in opposition was not sworn by Mr. Mtonga but by the Director of Budget who also desposed to the facts not indispute and explained the reasons for not making the payment stipulated in the order for mandamus. Paragraph 16 of the Director's affidavit reads:-

"16. That with the current efforts in place, an undertaking can be made to settle the whole debt by December, 1998."

The learned trial judge considered the affidavit evidence and the submissions from both learned counsel. He found that the respondent did not dispute its indebtness to the appellant nor did the respondent refuse to pay the judgment sum as by consent order. According to the learned judge the crux of the matter was whether the government had the money to liquidate the debt. He noted that a Permanent Secretary is only an agent who executed his duties within the confines of the budgetary allocation and if government had no money the Permanent Secretary can not be expected to mint the money. The learned judge found that it is too far fetched to hold the Permanent Secretary responsible personally for the Government's failure to comply with the consent order. The learned judge refused to grant the order of committal but varied the consent order by ordering that the outstanding judgment debt be paid by end of December 1998. The appellant appealed against the entire ruling.

The memorandum of appeal contained two grounds that the learned Judge misdirected himself on a point of law by varying the Consent Order for Mandamus made between the parties, to the effect that the debt be paid by end of December, 1998, and that the learned judge misdirected himself on a point of law by refusing to commit to prison James Mtonga, Permanent Secretary, Ministry of Finance for disobeying the Consent Order for Mandamus.

Mr. Sangwa filed written heads of argument based only on the ground of the trial court refusing to commit to prison Mr. James Mtonga, Permanent Secretary Ministry of Finance for disobeying the consent order for mandamus.

Before Mr. Sangwa could argue the appeal based on this one ground, we drew his attention to Section 21(4) of the State Proceedings Act, Chapter 71 which in part states that 'no person shall be individually liable' for orders against the State. Counsel's submission on section 21(4) was that the Permanent Secretary was merely being asked to comply with Section 21(3) of the State Proceedings Act which makes '

it mandatory for him to pay the amount appearing in a certificate. According to Mr. Sangwa section 21(4) could have been relevant if a writ of execution or attachment or process had been issued against Mr. Mtonga. In his written heads of argument Mr. Sangwa contended that the trial court misdirected itself on a point of law by considering issues which were beyond its concern or competence. He pointed out that matters of the Government's budgetary allocations or its financial capacity were not the concern of the court. He argued that the issue that was before the trial court was whether the respondent was indeed in contempt of court. He submitted that on the facts not indispute, the respondent was in contempt of court and liable to committal to prison. The case of **M V Home Office(1)** in which a Minister was found guilty of contempt and punished accordingly for disobeying an undertaking given to the court was quoted extensively in support of the submissions on this one ground of appeal.

Mr. Kasote on behalf of the State did not file heads of arguments. He informed the court that the State was not refusing to pay the judgment debt; explaining that the problem was merely the availability of funds. He pointed out that while the State was looking for money, the appellant decided to lodge this appeal. In the circumstances the State took up the position of wait and see the outcome of the appeal. He insisted that the State was ready to pay and that it was for this reason that it had already paid a total sum of K440 Million.

We have considered the facts not indispute, the judgment of the trial court as well as the submissions by both learned counsel. This appeal, as we see it, raises the issue of enforcement and satisfaction of judgments and orders against the State.

In the first place we wish to make the observation that Order 45 of the Whitebook, 1999 edition, groups together the methods for the enforcement of the judgments and orders of the court. In England those methods do not apply against the crown. But the most significant observation is that all those methods listed in Order 45 do not

include judicial review as one of those methods for the enforcement of the judgments and orders of court. The prohibition against using Order 45 as a method of enforcement of the judgments and orders of court is clearly stated in Order 77 which itself provides the method for satisfaction of orders against the crown. It is also most significant to observe that order 77 of the Whitebook, 1999 edition does not include judicial review as a method of enforcing judgments against the crown.

In Zambia, the law governing satisfaction of judgments and orders against the State is specifically provided in Part IV of the State Proceedings Act. Section 21(1) of the State proceedings Act, Cap 71 makes provisions for the issuance on application, of a certificate containing particulars of an order made against the State.

Section 21(3) reads as follows:-

> "(3) If the order provides for the payment of any money by way of damages or otherwise, or of any costs, the certificate shall state the amount so payable, and the Permanent Secretary, Ministry of Finance, shall subject as hereinafter provided, pay to the person entitled or to the legal practitioner acting for such person in the proceedings to which the order relates the amount appearing by the certificate to be due to him together with the interest, if any, allowed under section twenty:"

The appellant in the present appeal correctly followed these provisions. But when the State began to drag their feet in complying with the payments as per particulars in the certificate, the applicant decided to apply for judicial review. They obtained the order of mandamus but this did not help matters either. Subsequently they applied for committal of Mr. James Mtonga. While the appellant was entitled to enforce the Order that was made in their favour, the issue is whether it was competent to do so by way of an application for judicial review. Subsection (4) of Section 21 of the State Proceedings Act states:-

> "(4) Save as aforesaid, no execution or attachment or process in the nature thereof shall be issued out of any court for enforcing payment by the State of any such money or costs as aforesaid, and no person shall be individually liable under any order for the payment by the State, or any public officer as such, of any such money or costs."

In the instant appeal a process of judicial review was issued out of the High

Court to obtain an order of mandamus which was directed at Mr. James Mtonga, a public officer, as a means for enforcing payment by the State. Subsequently committal proceedings were commenced against Mr. James Mtonga as an individual

The use of the process of judicial review was in our view contrary to law and therefore a nullity. The issuance of Judicial review proceedings as a means of enforcing judgment was a complete abuse of the court process.

The case of M. V. Home Office (1) relied upon by the appellant has no application to the facts of this appeal. That was a case under the deportation laws of England. The proceedings in that case were properly commenced by way of judicial review against the Secretary of State refusing the applicant political asylum and directing him to be removed from the united Kingdom. While the application was pending in which the court ordered that the applicant remains in the country until the matter was argued, the applicant, despite the undertaking by counsel, was removed. In proceedings for contempt the Secretary of State was held guilty and unsuccessfully appealed. That case has no relevancy to the present appeal in that it was not a case of enforcing judgment against the State for a judgment debt of any money.

In the circumstances of the present appeal, the trial court had no jurisdiction in the first place to make an order of Mandamus in judicial review proceedings as a means of enforcing a judgment against the State. Equally under the State Proceedings Act, the court was not competent to issue a Committal Order against Mr. James Mtonga as an individual.

We must make the point that public officers need protection of the law. They are not to be individually harassed by way of civil actions as a means of enforcing judgments against the State. Indeed, judicial review has never been a means of enforcing any judgment.

For the foregoing reasons this appeal is dismissed with costs to be taxed in default of agreement. But this conclusion does not in any way absolve the State from its obligations to pay the sum indicated in the Certificate lawfully issued.

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E. L. Sakala,

SUPREME COURT JUDGE.

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D. M. Lewanika,

SUPREME COURT JUDGE.

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L. P. Chibesakunda,

SUPREME COURT JUDGE.