

ZAMBIA REVENUE AUTHORITY v HITECH TRADING COMPANY LIMITED

Supreme Court

Sakala, Ag. D.C.J., Chirwa and Chibesakunda, J.J.S.

9th August, 2000 and 29th December, 2000

(SCZ Judgment No. 40 of 2000)

Flynote

Costs - Order of single Judge - Reversal of - Basis for reversal

Evidence - Appeal - New evidence at bar - Admissibility of

Civil Procedure - Payment into court - Interest - Whether accrues

Headnote

This is an application by way of notice of motion by the appellant seeking two reliefs; the reversal of an order made by a single judge ordering the appellant to pay the sum of K948,301,742.71 into court prior to the determination of the main appeal on the ground that the appellant never received the said sum of money from The First Merchant Bank Zambia Limited (In liquidation) as the said bank was insolvent when the payments were purportedly made as evidenced by a letter from the liquidation co-ordinator dated 12th April, 2000 and as evidenced by a cheque in the same sum dated 30th January, 1998, in favour of the appellant, which cheque was never cashed and for an order to grant the appellant leave to introduce new evidence pursuant to section 25 of the Supreme Court Act, on the ground that the evidence of non-payment by the liquidation Co-ordinator, crucial to the appellant's appeal was only made available to the appellant by a letter dated 12th April, 2000, after the High Court judgment had been delivered.

Held:

- (i) The money paid into court does not earn interest.
- (ii) Arguments and submissions at the bar, spirited as they may be cannot be a substitute for sworn evidence.
- (iii) For an application to introduce new evidence to succeed, it must be shown that the evidence could not be obtained with reasonable diligence at trial; that the evidence will have an important influence on the result of the case and

that the evidence will be credible.

- (iv) The appeal court will not reverse an order by a single judge where there is no basis for such reversal.

Cases referred to:

- (1.) *Billingsley v Finance Bank Zambia Limited*, SCZ Judgment No. 12 of 1999;
- (2.) *Hughes v Singh* [1989] *The Times*, April 21;
- (3.) *Ladd v Marshall* [1954] 3 All E.R. 745;

A.M Wood of Messrs A.M Wood and Company for the appellant.
C.K. Banda of Messrs Chifumu Banda and Company with
N. Sharpe Phiri (Mrs) of Messrs Mopani Chambers for the respondent.

Judgment

SAKALA, ACTING D.C.J., delivered the ruling of the court.

This is an application by way of Notice of Motion by the appellant seeking two reliefs namely; the reversal of an order made by a single judge of this court, ordering the appellant to pay the sum of K948,301,742.71 into court prior to the determination of the main appeal on the ground that the appellant never received the said sum of money from the First Merchant Bank (Z) Limited (In Liquidation) as the said bank was insolvent when the payments were purportedly made as evidenced by a letter from the Liquidation Co-ordinator dated 12th April, 2000, and as evidenced by a cheque dated 30th January, 1998, in favour of the appellant, which cheque was never cashed; and for an order to grant the appellant leave to introduce new evidence pursuant to Section 25 of the Supreme Court Act on the ground that the evidence of non payment by the Liquidation Co-ordinator, crucial to the appellant's appeal, was only made available to the appellant by a letter dated 12th April, 2000, after the High Court judgment had been delivered.

The motion was supported by an affidavit sworn by one S.M. Kauti, Deputy Commissioner, in the employ of the appellant. The affidavit shows that the appellant had, on 23rd March, 2000, obtained an Order from a single Judge staying execution of the High Court Judgment. Subsequently, the respondent applied for a variation of the said Order. The Order was varied on 9th May, 2000, by ordering the appellant to pay the sum of money in issue into court prior to the determination of the main appeal. The affidavit exhibited various documents, among them a letter dated 12th April, 2000, from the Liquidation Co-ordinator of the First Merchant Bank (Z) Limited. It also exhibited the Manager's cheque dated 30th January, 1998, in the amount in issue of which payment had been stopped. The affidavit also showed that it was not possible to adduce evidence of payment by the First Merchant Bank (Z) Limited and the Manager's cheque as the appellant had no means of knowing before the trial in the High Court that such crucial evidence in its favour existed. The affidavit further exhibited photocopies of judgments in which the respondent sued the First Merchant Bank (Z) Limited while under receivership and the Attorney-General and the Hitech Trading Company Limited v The Attorney-General and Zambia Revenue Authority and

Union Bank of Zambia. According to the affidavit, these judgments are in respect of the same sum of money arising out of the same facts although the figures had been split. According to the affidavit, the amounts of money in these two judgments are the same as in the judgment in this appeal. The affidavit stated that all these discrepancies only emerged after consultations with other defendants, namely the Attorney-General, the First Merchant Bank (Z) Limited (In Liquidation) and Union Bank of Zambia Limited.

It is pertinent to observe that there was no affidavit in opposition and that the main appeal in this matter stands adjourned pending the ruling in this motion. On behalf of the appellant, Mr Wood pointed out that the new evidence, which at the trial was not made available to the appellant, only came to light shortly after the judgment during an attempt to reconcile various judgments as between the appellant and the respondent and Mr Shah and First Merchant Bank (Z) Limited and First Alliance Bank and Union Bank. Mr Wood outlined the background leading to the appeal which was that following the investigations by the Drug Enforcement Commission, the respondent's various bank accounts with three banks were seized on allegations of money laundering and the appellant was given the task, as tax collectors, to find out whether any taxes were due. According to Mr Wood the notice to collect taxes was given to the First Merchant Bank (Z) Limited when the bank was technically insolvent, the bank having been placed under receivership on 2nd February, 1998, when the purported Manager's cheque in the sum in issue was dated 30th January, 1998.

Counsel submitted that the order seizing the appellant's money in the circumstances was unnecessary because there was no money to seize. He further submitted that had this evidence been made available or even the cheque, the judgment would have been different. He also submitted that even if a principal had to be liable for the acts of an agent, that principal cannot be liable in instructing an agent to collect money which was non-existent. He pointed out that, this was a case which cries for justice, as through no fault of the appellant, the evidence to be introduced was not available and only became available when reconciling seventeen cases, a sample of which were the two judgments exhibited by the affidavit in support of the Motion. He submitted that on the basis of the background of the case and the affidavit evidence, this was a proper case in which leave should be granted to introduce new evidence. He referred us to Order 59/10/9 of the White Book and the authorities cited thereunder, as well as the case of *Billingsley v Finance Bank (Z) Limited*, (1). He also submitted that on the basis of the letter exhibited and the cheque not having been cashed, a case for a reversal of the Order requiring the payment of the money into court had been established. He contended that the appellant believed that they had a genuine and meritorious appeal and should therefore not be inflicted with the payment into court of this colossal sum and that if the Order of payment into court stood, it would stifle genuine appeals.

On behalf of the respondent Mr Banda submitted that the relief being sought in ground one should not be granted for the following reasons: that at the time of the seizure of the respondent's money in his account with the First Merchant Bank (Z) Limited, the said bank was solvent, the bank was appointed agent for the appellant for the purpose of collecting taxes from the respondent and that at the hearing of this case in the lower court, documents appointing the First Merchant Bank to be agent of the appellant were exhibited. Mr Banda submitted that the appellant knew where the respondent maintained his accounts and even the money in the accounts. He pointed out that Mr Kauti who swore the affidavit in support of the motion was himself a key witness at trial and therefore if no proper instructions were given, the respondent cannot be faulted. Mr Banda pointed out that the First merchant Bank (Z) Limited issued a cheque, which cheque was not deposited on instructions from Messrs Mwanawasa and Company. Mr Banda questioned the interest of Messrs Mwanawasa in the cheque. Mr Banda contended that the fact that the First Merchant Bank (Z) Limited is now in

liquidation does not mean that they cannot pay the money into court.

Mrs Sharpe-Phiri responded to arguments on the second ground. She pointed out that for the appellants to succeed in their application to introduce new evidence, they must satisfy three conditions. First, that the evidence could not be obtained with reasonable diligence at trial; second, that the evidence will have an important influence on the result of the case and third that the evidence will be credible. She submitted that it was incorrect to contend that the cheque was not paid when it was in the custody of the appellant during the trial. She further submitted that whether the money was paid or not, the bank was an agent of the appellant. She concluded that the letter of 12th April, 2000, was not authored by the Liquidation-Coordinator and therefore not credible. She urged the court not to disturb the principle of finality. In her submission, Mrs Sharpe-Phiri also referred the court to Order 59/10 of the 1993 edition of the White book.

We have considered the arguments and the submissions on ground one seeking for an order to reverse the single judge's ruling when the appellant was ordered to pay the judgment sum of K948,301,742.71 into court. The gist of the arguments on ground one is that on the basis of the letter and the cheque exhibited, the appellant never received the money as the cheque was not cashed. In our view the submissions on ground one overlooked the fact that the respondent had a judgment in its favour and entitled to enjoy the fruits of that judgment. We take note that the appellant is not an ordinary litigant and therefore the question of stifling its appeal or inflicting it with a colossal sum of money by payment into court does not arise. In any event, the money paid into court does not earn interest, which is a point in favour of the appellant in the event they were unsuccessful in their appeal. We, therefore find no basis for reversing the single judge. The application seeking a reversal order is therefore refused.

The application for leave to introduce new evidence gave us some very anxious moments. Although the application is supported by an affidavit, there is no affidavit in opposition. Yet, both counsel representing the respondents attempted to challenge documentary evidence in a sworn affidavit by mere submission at the bar. Thus, an attempt, at the bar, was made to show that at the time of the seizure of the appellant's money, the First Merchant Bank Zambia Limited was solvent; that the Bank issued a cheque not deposited on instruction of Mr. Mwanawasa. An attempt was also made to show that the letter of 12th April, 2002, was not authored by the Liquidation Coordinator. It is trite law that arguments and submissions at the bar, spirited as they may be, cannot be a substitute for sworn evidence.

We have no difficulty, with the law on introducing new evidence. Section 25 of the Supreme Court Act is very clear and so is Order 59/10 of the White Book, 1999 edition. But Order 59/10/18 sets out exceptions to admission of fresh evidence which comes to light after the date of the trials but without disturbing the principle that there be finality in litigation. That Order cites the case of *Hughes v Singh* (2), where among other things, the court held that evidence should be admitted in all cases where it would be an affront to one's sense of fairness not to admit it.

The authors of the White Book make the point that in applying that test, the court takes into account all the circumstances before, during and after trial. In the instant case paragraphs 9 and 10 of the affidavit in support of the motion are instructive. These paragraphs read:-

"9. That there is now produced and shown to me marked "SMK3" and "SMK4" true photocopies of judgments in Hitech Trading Company Limited v First Merchant Bank Zambia Limited (In receivership) and Attorney-General 1998/HP/2119 and Hitech Trading Company Limited v Attorney-General, Zambia Revenue Authority and Union Bank Zambia Limited 1998/HP/2040. The said judgments are in respect of the same sum of money arising out of the same facts although the same figures have been split to show K896,700,000.00 for 1998/HP/2119 and US\$441,410.84 for 1998/HP/2040. When cause 1998/HP/2119 and 1998/HP/2040 are added up, the total sum are the amounts for which judgment was entered in 1998/HP/2047 the subject of this appeal.

"10. That judgment in Hitech Trading Company Limited v First Merchant Bank Zambia Limited (In Liquidation) and Attorney-General 1998/HP/2119 was entered in favour of the Plaintiff for K51,601,741.71 on 10th February, 1999 and a Garnishee Nisi in favour of the plaintiff was obtained on 29th May, 2000. There is now produced and shown to me marked "SMK5" a true photocopy of the said Garnishee Nisi. The said sum of K51,601,741.71 is part of the sum of K948,301,741.71 which is the subject of this appeal."

The appellant contend that the discrepancies only emerged after consultation with the other defendants. Namely, the Attorney-General, the First Merchant Bank Zambia Limited (In Liquidation) and Union Bank Zambia Limited.

We are mindful that there is an appeal pending the outcome of the ruling in this motion. Ground 1, 2, and 3 of the appeal in the memorandum of appeal read as follows:-

Ground 1

The respondent has already obtained judgment before Justice Chulu in Cause No. 1998/HP/2040 dated 14th February 2000, in its favour, wherein the Attorney-General has been adjudged liable to pay the judgment debt.

Ground 2

The appellant is in jeopardy of being made to pay a judgment debt where the respondent has by a cause of action No. 1998/HP/2040 acknowledged that the said debt is also due and owing from the Attorney-General pursuant to its writ and statement of claim before the said Honourable Justice Chulu.

Ground 3

The respondent has through a multiplicity of actions obtained judgments before Justice Chulu in Cause No. 1998/HP/2040 and before Justice G. Phiri on the same debt from different defendants.

While these grounds will be the subject of arguments in the appeal itself, the fresh evidence in issue is a cheque which has not been cashed. We are satisfied that even without resorting to the exceptions, the applicant has satisfied the conditions laid down in *Land v Marshall* (3), in that the evidence sought, could not be obtained with reasonable diligence at trial in the face of a multiplicity of actions by the respondent against different defendants, the evidence sought, a cheque and the Liquidation-Coordinator's letter, will have an important influence on the result of the case and the evidence is in our view credible. In the circumstances, the application for leave to introduce new evidence is granted as prayed.

To sum up, the application to reverse the Order of payment into court is refused. The payment should be made before the main appeal is heard. The application to introduce new evidence is granted. The new evidence must be filed as a supplementary record of appeal to be served with the court and on the respondent within 14 days from today's date. Costs will abide the outcome of the appeal.

Appeal allowed in part