ZAMBIA EXPORT AND IMPORT BANK LIMITED v MKUYU FARMS LIMITED AND ELLIAS ANDREW SPYRON AND MARY ANN LANGLEY SPYRON (1993 - 1994) Z.R. 36 (S.C.)

SUPREME COURT
GARDNER, CHAILA AND MUZYAMBA, JJ.S.
24TH JUNE AND 30TH JULY, 1993.
(S.C.Z. JUDGMENT NO. 9 OF 1993)

Flynote

Contract - Foreign exchange loan - Undue influence - When proven.
Contract - Foreign exchange loan - Conversion from kwacha - Legality of.

Headnote

The appellant's action arose from a decision of the High Court ordering that sum of money owed by the respondents be repaid in kwacha although such sum had been converted into a dollar loan. The respondents cross appealed against the finding that the amount owed was a dollar loan.

Held:

(i) An agreement is signed freely if it is signed in the course of business practice and the respondent had a choice to not sign.

p37

(ii) The offer of an additional loan is consideration for the conversion of an existing one and a valid enforceable agreement is created.
(iii) Where the same loan is converted from a kwacha to a forex loan, there is no need to obtain fresh exchange control approval in order to create a valid contract.
(iv) In a forex judgment, the rate of exchange applicable is the one ruling at the time of enforcing the judgment.
(v) The Court may order that a judgment debt be satisfied by instalments upon sufficient cause being shown by the judgment debtor.

Case referred to:

(1) Miliangos v George Frank (Textiles) Ltd [1975] 3 All E.R. 801.

Legislation referred to:

Order 42 rule 1 subrule 5 R.S.C., 1988 ed.
Order XXXVI rule 9, cap. 50, Laws of Zambia.

For the appellant: A. M. Wood of D. H. Kemp & Co.
For the respondent: E. J. Shamwana S.C. of Shamwana & Co.

Judgment

MUZYAMBA, J.S.: delivered judgment of the Court.

This is an appeal against a judgment of the High Court ordering that the loan of US $412, 500 be repaid in local currency at the ruling exchange rate on 30th March, 1991, and that both

loans, the dollar and kwacha loans, be repaid over a period of two years and not later than 15th April, 1995. There is also a cross-appeal by the respondents.

The brief and undisputed facts of this case are that on the 29th day of March, 1989, the appellant and the first respondent signed a loan agreement of K4,3 million to enable the first respondent import from Roeloff's Roses, South Africa, 30, 000 rose shrubs. It would appear from documents 14 and 18 in volume two of the record of appeal that an application for exchange control approval was made on 3rd April, 1989, and the approval obtained on 10th May, 1989, and import licence, document 23, obtained on either 29th May, 1989, or 12th June, 1989. The loan was disbursed and subsequent to that the appellant and first respondent, on 23rd October, 1989, signed a supplementary agreement which converted the original loan of K4,3 million into dollars and stated that the original loan which was to be repaid in kwacha would now be repaid in US dollars at the interest rate of 12% per annum instead of 23%.

Both agreements were guaranteed by the second and third respondents. The prelude to the supplementary agreement was that the first respondent wanted a second loan from the appellant for refrigeration and according to the first respondent the appellant could not approve the second loan without the first respondent first agreeing to repay the first loan in dollars and signing the supplementary agreement to that effect. After the signing of the supplementary agreement, the first respondent obtained the second loan of K2, 912, 013.67, which loan is not the subject of the cross-appeal.

At pages J 10-11 and 12 this is what the learned trial judge said:

> ''I agree with the argument presented by Mr Wood that parties to an agreement, whether written or oral, are entitled to vary any of its terms. In this matter I subscribe to the argument that Mr Spyron was a man of full mental capacity to enter into business agreements in 1989. He signed a loan agreement with the plaintiff for US $412, 500 on 30th March, 1989, on behalf of the first defendant.

p38

> Later, on 23rd October the same year, Mr Spyron again agreed to the alteration of the terms of the original agreement. He agreed to pay back the loan in foreign currency instead of in kwacha. He is therefore stopped from repudiating the supplementary agreement by trying unilaterally to revert to the terms of the original agreement.
>
> My finding on this issue therefore is that the defendant company, Mkuyu Farms, and its two guarantors, Mr and Mrs Spyron, are bound by the terms of the supplementary agreement signed on 23rd October, 1989, in which the first defendant consciously agreed to repay the loan in US dollars. I find for the plaintiff, that the three defendants must pay the loan of $528, 328.76, which is made up of the $402, 663.27 outstanding principal, and the interest thereon at the rate of 23% per annum.
> But I have also cited the case of *Mobil Oil v Loto Petroleum* (1977) Z.R. 336 (HC) where the Court said that where it is impracticable for a party to comply with a specific performance order, the Court may instead order damages. In this case I find that the three defendants are not able to repay the first loan in US dollars. Mr Spyron complained in Court that he had stopped servicing the loan because he was no longer able to find such huge amounts of dollars to repay the loan. I believe him and agree with him that he is unable to repay the loan in dollars.
>
> In the light of the predicament in which the three defendants find themselves, I hereby

order that they pay back the two loans in the Zambia local currency of kwacha. The plaintiff shall convert the dollars loan into kwacha using the ruling exchange rate on 30th March, 1991. Not the 1989 rate and not the 1993 rate. Let a midway rate be employed in the conversion.

Unless otherwise agreed upon by the parties, both loans must be repaid in two years from today, that is to say, the two loans should be settled by 15th April, 1995. If that is not done the plaintiff shall be at liberty to execute this judgment.''

This is the aspect of the judgment which is the subject of appeal and cross-appeal. The grounds for cross-appeal are:

(1) That there was no consideration for relying on the supplementary agreement which was not under seal.
(2) In the alternative, that the consideration was illegal as no exchange control approval was obtained to vary the original agreement.

In support of the cross-appeal Mr Shamwana argued that the learned trial judge was wrong in entering judgment for the appellant in the sum of $412, 500 because the loan was for K4,3 million and it was disbursed long before the supplementary agreement was signed. That the supplementary agreement had neither new consideration nor was it under seal and therefore unenforceable. In the alternative, he argued that undue influence was exerted on the second respondent which induced him into signing the supplementary agreement. Further, that this agreement was illegal as no exchange control approval, as is required by law, was obtained and therefore that it was unenforceable. He also argued that since some of the loan repayment which was made in pula and guilders was converted into kwacha, the loan should through and through be I treated as a kwacha loan and therefore to be repaid in kwacha. He cited some authorities in support of his arguments.

In reply to Mr Shamwana's arguments and in support of the appellant's appeal that the learned trial judge erred in law by ordering the repayment of the loan at the ruling exchange rate on 30th March, 1991, and a stay of

execution of the judgment, Mr Wood submitted that there was no need for a second exchange control approval since it was the same loan involved in both agreements and that the reduction of the rate of interest from 23% to 12% per annum amounted to consideration for the supplementary agreement and therefore that the supplementary agreement was not illegal. That it was enforceable at law. He further submitted that the exchange rate applicable in a foreign currency judgment is one ruling at the time the judgment is enforced. That an order for payment of any judgment debt by instalments should be made only where the judgment debtor has been examined as to his means and proved that he had no sufficient means to meet the judgment debt in one lump payment. He also cited a number of authorities in support of his submissions.

We will first deal with the questions of consideration and the need for exchange control approval. At page 95 vol.1 of the record the second respondent said:

''In October I signed a supplementary agreement where the kwacha was converted to dollars. This conversion was because the EXIM BANK (the branch manager) came to me and said they did not want the payment to be made in kwacha anymore. I had no

choice to refuse to pay in dollars. Furthermore I discussed with the bank to assist us with money for refrigeration. This Exim Bank would not have given me the loan for refrigeration if I refuse to accept the proposal to repay in forex. I had not choice but to sign.''

Mr Shamwana submitted that what the witness said was not a statement of fact but what he had in his mind i.e. he thought that if he did not sign the supplementary agreement the appellant would not approve the first respondent's application for a refrigerator loan and that, in any case, the witness was induced to sign the agreement. We do not accept this argument because it is a matter of business practice and the witness was free to either sign or not sign the agreement. Instead he chose to sign it. This was therefore a statement of fact made on oath and not what was merely in the witness's mind.

Clauses 3 and 4(a) of the supplementary agreement at pages 50 and 51 of vol 1 of the record provide:

3 ''The rate of interest in clause 2(b) should read twelve per cent per annum of the amount withdrawn and outstanding and not 23% per annum on the principal amount.

4 (a) The rate of interest should read twelve per cent and not 23%, the payment of interest shall begin from 30th December, 1989, and not 30th April, 1989.''

Quite clearly, the rate of interest on the loan was, in the supplementary agreement, reduced from 23% to twelve per cent per annum and the period of interest reduced by seven months. It might be argued on a strict calculation that the interest on the dollar repayment and the time to pay in that transaction is equivalent to the interest and time to pay in kwacha transaction in which case the consideration would be apparent rather than real. However, we are satisfied that the giving of the refrigerator loan was itself a real consideration for the signing of the amended contract to repay in dollars.

Clause 1 of the supplementary agreement at page 50 of the same vol. 1 of the record provides:

p40

''(1) The principal amount of loan specified in part 1 of the first schedule should read US $443, 900 dollars which sum is made up of US 412, 500 dollars being the principal and US $31, 400 dollars being the capitalised interest.''

The second schedule referred to here is the schedule of the loan agreement of 30th March, 1989, and the amount stated there is K4,3 million for which the Bank of Zambia exchange control approval was obtained on 10th May, 1989. Since it is one and the same amount, in one document expressed in kwacha and in the other in dollars, there was no need to obtain fresh exchange control approval. Mr Shamwana's arguments therefore, must fail and we hold that the supplementary agreement was perfectly legal and that there was consideration for it and therefore enforceable at law. The learned trial judge was therefore right in his findings in this regard.

Turning to the rates of exchange and stay of execution of the judgment we wish to refer to some of the cases and authorities which were cited by Mr Wood. In the case of *Milingo v George Frank (Textiles) Ltd* [1] at page 838, it was held, by Lord Simon of Glaisdale:

''The court has power to give judgment for payment of money in a foreign currency and . . . one case in which such a judgment should be given is where the action is brought to enforce a foreign money obligation. In that case if the defendant fails to deliver the foreign currency the date for its conversion into sterling should be the date when the plaintiff is given leave to levy execution for a sum expressed in sterling.''

The obligation in that case was to pay in Swiss francs and order 42 subrule 5(2) provides, in part:

''The English court has power to give judgment for a sum of money expressed in foreign currency. The judgment will be for payment of the amount of the foreign currency or its sterling equivalent converted for the purposes of the enforcement of judgment at the time of payment i.e. the date on which enforcement process is taken or authorised in terms of sterling.''

What is stated in this order is what was decided in the *Miliango* case and Mr Shamwana conceded that the decision in *Miliango* represented the law on the issue ie that in a foreign currency judgment the rate of exchange applicable is the one ruling at the time of enforcing the judgment. We find therefore that the learned trial judge was wrong to order that the ruling rate of exchange at 30th March, 1991, be applicable in this case.
On stay of execution, order XXXVI (3) provides as follows:

''9. Where any judgment or order directs the payment of money, the Court or judge may, for any sufficient reason, order that the amount shall be paid by instalments, with or without interest. Such order may be made at the time of giving judgment, or at any time afterwards, and may be rescinded, upon sufficient cause, at any time. Such order shall state that, upon the failure of any instalment, the whole amount remaining unpaid shall forthwith become due.''

It is quite clear from this order that a court may order that a judgment debt be satisfied by instalments upon sufficient cause being shown by the judgment debtor. No sufficient cause was shown in this case by the respondent as they were not called upon to do so. The Court, on its own motion, made the order. This was wrong. In the event that we

p41

found for the appellant, Mr Shamwana asked for fourteen (14) days within which the respondents would have to apply to Court for a fresh order of payment by instalments. This would involve examination on oath of the respondents as to their means or liability to liquidate the debt in one lump payment.

For the foregoing reasons we would dismiss the cross-appeal and allow the appeal and set aside the learned trial judge's orders. In their place we substitute the following orders:

(a) The respondents to repay the loan of US $12, 500 or the balance thereof in US dollars with interest at twelve per cent per annum.
(b) If converted into kwacha, then the kwacha equivalent should be at the ruling rate on date of enforcing the judgment.
(c) The respondents do, within fourteen (14) days of this order, apply to the deputy registrar (Chambers) for a fresh order of payment by instalments, failing which the loans or amounts outstanding on the loans shall become due and payable immediately. The appellant will have the costs of the appeal to be taxed in default of agreement.

Appeal allowed, cross-appeal dismissed.
