KAPIRI GLASS PRODUCTS LIMITED v MARUTI OIL INDUSTRY LIMITED (1993 - 1994) Z.R. 73 (H.C.)

HIGH COURT
C.B.N. KABAMBA, J.
9TH JUNE,1993.
(HB/10 of 1993)

Flynote

Damages - Interest - Award of - Whether available in default proceedings.
Civil procedure - Interest - Award of - Principles applicable.

Headnote

The defendants appealed against an award of interest made by the district registrar.

Held:

(i) Interest can be awarded in default proceedings because the matter has undergone judicial consideration and an order made by the Court.

(ii) It is a serious misdirection for the district registrar to make an award of interest without evidence of the basis of her decision or reference to counsels' submissions. It is an intolerable blunder to award interest on the basis of fixed deposit rates.

Cases referred to:

(1) Jacob Mulenga v Rucom Industries (1978) Z.R. 21.
(2) Jefford and Another v Gee [1970] 1 All E.R. 1202.

For the plaintiff: E.M. Mukuka.
For the defendant: B.K. Chishimba.

Judgment

C.B.N. KABAMBA, J.:

This is an appeal by the defendants against the ruling of the district registrar (D.R.). In this case there was an entry of judgment in default of appearance. Thereafter a writ of *fieri facias* was issued. This was followed by summons for stay of execution. This was granted by this Court. This was on 25th February,1993. Then on 8th March, again the counsel for the defendants issued summons to set aside execution under order 47 rule 1/3 of the R.S.C. (White Book) for being improper in that it was contrary to the provisions of the law, namely:

(1) Order 36 rule 8 of the High Court Rules cap.50 of the laws of Zambia;
(2) High Court (Amendment) Rules, 1984 S/No.30 of 1984;
(3) S.I. No.171 of 1990 - The Legal Practitioners (High Court) fixed costs order, 1990. That the interest endorsed on the writ is irregular as well as the period for the charge of interest is improper; that the defendant had reduced the debt by the time the writ of fifa was issued.

The said ruling of the district registrar was made when the defendant's counsel made an application to set aside the execution. During the course of hearing of the application, the D.R. made the following:

> '' I have considered what both counsel have told the Court: the Court has decided to award interest to the plaintiff at the rate based on the bank fixed deposit. From the date the writ was issued to date on the remaining balance.''

The grounds of appeal are as follows:

'' The award of interest was contrary to the following provisions:

(a) Order 6 rule 2 of R.S.C. which provides that 'on the other hand interest under this section can only be awarded in proceedings that are tried and therefore cannot be awarded on a judgment obtained in default of appearance or defence or failure to comply an order or the rules. . . .';
(b) Law Reform (Miscellaneous Provisions) Act cap.74 of the Laws of Zambia s.4 which provided that 'in any debt or damages the court may if it thinks fit order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit. . . .' ;
(c) The award of interest on specified 'bank rate based on the bank fixed deposit' in absence of evidence was irregular.''

In support of the above three grounds, Mr Chishimba argued that the ruling was a serious misdirection in law and was not founded on any law or authority to order 6 rule 2 of Rules of Supreme Court (White Book 1979), as the judgment was entered in default of appearance. He further referred to s.4 cap.74 as in (b) above and stressed ''tried'' as key word, and cited *Jacob Mulenga v Rucom Industries* [1], where the word ''tried'' was emphasised in the judgment by Gardner, J.S. He further submitted that basing the interest on the fixed deposit without any evidence in support was dangerous as it would cause gross injustice to the defendant. Further the amount was not specified on which the unspecified bank rate would be based. And the bank whose fixed deposit rate to be used was not specified as in liberalised economy each bank has its own rate or interest.

He further argued that the D.R., being fully aware from the affidavit that the defendant was making payments thus reducing its indebtedness on the original amount, she did not take that fact into account. He then tabulated the dates and amounts. In this light the ruling was a misdirection.

In reply, Mr Mukuka, the learned counsel for the plaintiff, submitted that in the first place there was sufficient information supplied to Court in the affidavits and that the circumstances in which the interest was endorsed on the writ was fully explained in his affidavit. Unfortunately the ruling was too short to reflect the issues that were in his affidavit. He went on to argue that the payments allegedly made were not revealed to the Court below and this was why his client sued. As to legal requirements cited he, in contrast, referred to order 6 page 7 which allows the Court to consider interest in a case like this. As a result of this authority he indicated his flexibility to negotiate the interest rate but the counsel for defendant adamantly refused to discuss this issue. His interest was prepared in line with the case of *Jacob Mulenga* cited by the learned counsel for the appellant, he concluded.

Before I dare consider the grounds of appeal, I have to make on observation on the application made by the defence i.e. the stay of execution and the setting aside the judgment. The provisions allowing both types of applications are found in order 47 rule 1 and order 47 rule 1/3 of the R.S.C. (White Book) 1979 ed. Order 47 rule 10(b) states in part:

> ''Order 47/1 (1) Where a judgment is given or an order made for the payment by any person of money and the Court is satisfied, on an application made at the time of the judgment or order, or at any time thereafter, by the judgment debtor or other party liable to execution:
>
> > (a) that there are special circumstances which render it inexpedient to enforce the judgment order, or
> > (b) that the applicant is unable from any case to pay the money then . . . the Court may by order stay the execution of the judgment or order by writ of *fieri facias* either absolutely or for such period and subject to such conditions as the Court thinks fit.''

It is clear from this subrule that the application for stay of execution can be made only under the circumstances prevailing in paras.(a) and (b) above. In (a) the special circumstances are of various nature for instance that the defendant was not served with the Court process such as writ of summons or notice of hearing or that the judgment was obtained fraudulently etc. Whereas (b) entirely deals with incapacity on the part of the defendant to pay the debt. This normally ends up in the case being transferred to the subordinance court where the matter may be dealt under judgment summons procedure.

Turning to setting aside execution under order 47/1/73 which provides thus:

> ''Setting aside execution. - This may be done where execution has been improperly issued, even after execution has been levied.''

This comes under the general subtitle ''Orders operating as a stay''. In my view the setting aside execution under this subrule is just one of the orders the Court may make when it is brought to its attention that the execution was improperly issued. For example where the execution may include items of trade or farm implement, beddings, wrong person or defendant,

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the procedure of execution is irregular, the list of circumstances in which this can be applied is inexhaustive. I find that the application by the learned counsel for the defendant under this subparagraph of the said subrule is total misapplication of this order. Assuming that this can be used independently where fifa has been issued and intended for execution, as it were, then it can be used only the alternative to stay of execution where the defendant or debtor has spotted the impropriety in the execution or in the issue of the execution. Therefore the learned counsel for the defendant ought not to have used both the stay of execution and the setting aside execution. To do this was an abuse of court processes. Having so found I now come to what the learned counsel termed impropriety under order 36 rule 8 of the High Court Rules cap.50.

Under rule 8 order 36 of High Court Rules cap.50 it is provided:

> ''Where a judgment or order is for a sum of money, interest at six per cent per annum shall be payable thereon, unless the Court or a judge otherwise orders.''

The provision to this rule, starting with ''Unless . . .'' gives the Court or a judge a wider discretion to apply the six per cent interest or to use any per cent interest or to use any *percentum* that would be appropriate and justifiable. I shall revert to this letter. But, at the moment I have to say that it would not be improper for the Court to apply any higher percentage than six stipulated in that rule if the dictates of justice require the Court or the judge to do so. Again I will come back to this when I consider the grounds relating to interest.

I turn to consider the three grounds of appeal - all relate to the breach of statutory provisions by the Court on the plaintiff's advocate. On the first ground that interest can not be awarded on a judgment obtained in default of appearance or defence unless there was trial.

Order 6 rule 3 of R.S.C. is already quoted above. Certainly there is distinct difference between commencement of proceedings (*see* order 5 of R.S.C.) and trial proceedings (*see* order 33 and 34 R.S.C. 1979 ed.). But there should be no confusion as to extent or degree of the trial under that order and s.4 or cap.74 already referred to, where the Court may award interest in any proceedings ''tried'' by such court or judge. In the case of *Jacob Mulenga* referred to above in the first holding in that case is as follows:

(1) An award of interest is at the trial judge's discretion and the only ground for varying such an award is if the judge failed to exercise his discretion judicially. My interpretation of ''at the trial judge's discretion'' is meant at the discretion of the judge dealing with the matter. It may be by way of an application of interlocutory or interim nature as was in this case where the D.R. was sitting to hear the application to set aside the execution. In my construction of ''true'' I am supported by the following authorities. I start with our law which is binding on us and takes precedence over the foreign laws that is:

> In any liquidated damage, even if there is no formal trial, the Court has discretion; if interest is prayed for in the writ, the court or judge may award interest. Order 12 r cap.50, which deals with default of appearance as in the present case, the plaintiff is allowed to enter final judgment for the sum endorsed on the writ together with interest. Order 13 rule 1 where plaintiff can apply to the court or a judge for liberty to enter final

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judgment for the amount so endorsed ''together with interest if any''. Thirdly Dodgers On Pleading and Practice 12 ed.at pages 46-48 is quite informative on the claims for interest. From these authorities I am unable to agree with the learned defence counsel's argument that the plaintiff has no right to include the prayer for interest as this was a discretionary power of court 6/2/7 is quite detailed on the claim of interest by the plaintiff . In such a case, the better practice according to modern notions of pleading would be expressly to plead the claim for interest.

It would been seen that the provisions of the law discussed above are not in conflict with s.4 of cap of the laws of Zambia but admitted they are in serious contradiction with order 6 rule 2 of R.S.C. cited above. That can only be binding or in default of any provision under our law. But our laws have expressly stated that even in default of appearance or defence, under such provisions interest may be awarded by the Court. And in other instances the Court has no discretion but to grant such interest as per s.4 cap.74 which is a complete import of s.3(1) of the Law Reform (Miscellaneous Provisions) Act, 1934 of the United Kingdom.

To conclude this issue on the award of interest my discussion would not be complete without referring to the case of *Jefford and Another v Gee* [2] which I consider the foundation authority on the question of the award of interest where Lord Denning propounded and expounded venerable principle to be applied in awarding interest. Although in reference to s.3(1) of the Law Reform (Miscellaneous Provisions) Act of 1934 in relation to personal injuries in particular, he stated at page 1208 and I quote:

> '' Interest should not be awarded as compensation for the damage done. It should only be awarded to a plaintiff for being kept out of money which ought to have been paid to him.''

This statement and proposition of law cannot only be applied to the personal injuries but also to other damages such as debts, as in the present case, where the plaintiff is kept out of money which he ought to have been paid by the defendant.

Order 6/2/7A of R.S.C. cited above talks about the need on the writ to include or show the grounds of the claim for interest although s.3(1) supra does not require the claim for interest to be pleaded, but further states in connection with the construction of the word ''tried''.

On the other hand, interest under this section can only be awarded in proceedings that are ''tried'' but the word ''tried'' in this context should not be given too narrow a construction, and proceedings may for this purpose be said ''tried'' where there is a judicial decision, or where the Court acts upon evidence before it, such as proceedings under order 14 or proceedings to set aside a judgment in which the Court judicially considers the evidence relating to the claim, and in such case the Court has power to award interest under this section. On the other hand where the judgment is obtained almost administratively as in default of appearance or defence or failure to comply with an order or the rules, without any judicial consideration, interest cannot be awarded under this section. This subrule (2) of order 6 of R.S.C. gives wider construction of the words ''tried'' and has left no stone unturned.

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In the present case the matter was taken before the D.R. for the consideration by making the application to set aside the execution. Therefore the defence is stopped from denying that there was a judicial consideration on the matter and the D.R. was right to order the defendant pay interest to the plaintiff on the amount of claim. This concludes the first and second grounds of appeal which have fallen and I dismiss them.

Finally I come to the last ground. Here I have to determine whether the D.R. applied wrong principles in the award of interest.

In his affidavit in opposition the learned counsel has acknowledged that K1,000,000.00 was paid by the plaintiff. This reduced the amount. Despite this reduction the defendant's counsel declined to discuss with him over the acceptable rate of interest. In answer to the defendant's argument he said that they were paying and then tabulated the dates and amount paid. Mr Mukuka said this information was not revealed to them and submitted further that it was not enough for the counsel for the defence only to say the figure of the amounts paid and the date on which they were paid, without giving or making any reference to the numbers. It was indeed insufficient information given by the defence in the affidavit in support of summons to

set aside execution where in para.7 it is stated by the defence counsel that since the commencement of the proceedings the defendant had paid the plaintiff in reduction of the sum claimed. This means there was an unspecified balance because the amount paid in reduction is not specified. The interest starts to count soon after the default or, in Lord Denning's words, when the plaintiff is ''kept out of money''. At the time of fifa interest had already accrued and should be computation of the interest the D.R., must have based it on simple interest as the amount was being reduced every time if of course these facts of payments by installation was available.

In both cases of *Jacob Mulenga* and *Jefford* , I have already referred to the importance of appropriate rate of interest was emphasised. And order 6 rule 2 - the same has been echoed. It has been also pointed out in these authorities that the rate of interest should be based on the evidence. It was incumbent upon the D.R. to obtain evidence which warranted the 50% interest demanded by the plaintiff. Mr Mukuka also put a blame on the D.R. for failure to make a reasonable long ruling to incorporate what he said in his affidavit. This is a sad statement. The affidavits of both parties were before the D.R. and she had considered those or taken them into account when making her order which I have already referred to in this judgment. What the learned counsel should know is that there is no obligation on the part of the D.R. of any court to incorporate the affidavits in the ruling order or judgment. The parties have all those documents in their files. The appellate court equally has these on the record.

Going back to the ruling or order of the D.R., I have already alluded to it that there was no evidence on which she based her decision. What the plaintiff's counsel claims to be the reasons in his and his client's affidavit are not there. A *fortiori* there was serious misdirection on the part of the D.R. to determine and award such interest without any evidence supporting it. Furthermore, she fell into regrettable but intolerable blinder by awarding interest based on fixed deposit.

Where did she get the evidence to that effect? Even if the plaintiff had

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said that his money was supposed to be in fixed account (which for a company I doubt) she was to have used discretion, guided by law we have seen and the decided cases, to award a more reasonable and appropriate interest. In *Jacob Mulenga's* case it was held among other things:

> ''Although the parties in arguments did not assist the trial judge on the question of interest, guidelines existed which he failed to take into account; he failed also to take into account order 36 rule 8 of the High Court Rules. In the event he failed to exercise his discretion judicially.''

This was the same situation in this present matter. This ground must succeed. The end result is that appeal is dismissed as far as the first and second ground; and it is partly won in as far as the third ground is concerned

I have not considered the High Court (Amendment) Rules, 1984 S/No.30 of 1984 and Statutory Instrument No. 171 of 1990 - The Legal Practitioners (High Court) fixed costs order 1990 because they are totally irrelevant, as they are concerned with costs and not interest.

Now I bear in mind the portion of Mr Chishimba's submission that before the writ was issued on the 14th day of January,1993, the defendant had, on 14th May,1992, paid K100,000; on 18th December,1992, he paid K250,000. And after the writ was issued he paid the following amount i.e. on 20th February,1993, he paid K1,000, 000; on 20th February,1993, he paid K1,300,000 and on 23rd February,1993, he paid K2,900,000. The total amount paid, if proved, would be K4,550.000. This would be clearly in excess of the amount claimed for in the writ. Mr Ramesh Parekh in his affidavit deposed that the defendant had paid the sum of K4,550,000 in excess of the sum claimed on the writ (para.6). It seems clear that there is a difference of the total sums paid. Thus, this question can be resolved in the assessment of damages proceedings. I therefore order that the case be sent to the district registrar for the assessment of interest with the direction that the rate of interest be at 15% on simple interest principle. And the principle amount should be the balance at the time of commencement of the proceedings to the date of assessment or, if the whole amount was paid before the assessment, the date will be when the last instalment was paid.

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