GRAPHICS AFRICA LIMITED v BARCLAYS BANK OF ZAMBIA LIMITED, R.D.S. INVESTMENTS LIMITED AND RONALD DAMSON PENZA (1995) S.J. (S.C.)

SUPREME COURT
GARDNER A.C.J., SAKALA, A.D.C., AND CHAILA, J.S.
11TH MAY 1995 AND 3RD NOVEMBER, 1995
(S.C.Z. JUDGMENT NO. 17 OF 1995)

Flynote
Nominal Damages - Whether adequate in this case - Indemnity

Headnote

The appellant was an agent for Rank Xerox Limited (hereafter referred to as "Xerox") for sale of goods on commission on their behalf. In July, 1985 the appellant had accumulated K142,866.75 due to Xerox and applied to the Bank of Zambia for approval to externalise the equivalent sum of $44,217.25 to Xerox, whose head office is in the United Kingdom. In April, 1986 Xerox purported to terminate the agency agreement with the appellant and a separate action was commenced against Xerox for breach of the agreement. The appellant was then concerned that the amount of damages which he could claim from Xerox for breach of the agreement might exceed the amount of their assets in this country. He therefore instructed his own bank, the first respondent, to suspend payment of the money which was awaiting payment to Xerox, and to hold it as security for any future damages which might be payable to him. By some means the second respondent, acting through the third respondent, one of its directors, persuaded the first respondent to ignore the appellant's request to suspend payment to Xerox and the money was accordingly paid through what was known as the foreign exchange pipeline to Xerox. The appellant issued a writ against all three respondents claiming that the first respondent had contravened his instruction to suspend the payment and that the second and third respondents had interfered with his own private account. The High Court found for the appellant but only awarded him nominal damages against the first respondent. The appellant appealed against the High Court decision.

Held:

(i) The first respondent in this appeal was liable to indemnify the appellant in respect of any damages which the appellant is unable to recover from Xerox as a result of their having insufficient funds in this country to meet the award of damages; Such indemnity should be limited to the Kwacha equivalent of $44,217.25 plus interest at the average short term deposit rate since the date of wrongful payment to the date of this judgment.

(ii) As successful party, the appellant was and is entitled to set-off the amount of such damages against the amount which he originally owed to Xerox

For the appellant: R.M.A. Chongwe SC, R.M.A. Chongwe and Co.,
For the respondents: L. Nyembele of Ellis and Co.,

Judgment

GARDNER.: delivered the judgment of the court.

This is an appeal against a judgment of the High Court awarding only nominal damages against the first respondent.

The facts of the case are that the appellant was an agent for Rank Xerox Limited (hereafter referred to as "Xerox") for sale of goods on commission on their behalf. In July, 1985 the appellant had accumulated K142,866.75 due to Xerox and applied to the Bank of Zambia for

approval to externalise the equivalent sum of $44,217.25 to Xerox, whose head office is in the United Kingdom. In April, 1986 Xerox purported to terminate the agency agreement with the appellant and a separate action was commenced against Xerox for breach of the agreement. The appellant was then concerned that the amount of damages which he could claim from Xerox for breach of the agreement might exceed the amount of their assets in this country. He therefore instructed his own bank, the first respondent, to suspend payment of the money which was awaiting payment to Xerox, and to hold it as security for any future damages which might be payable to him. By some means the second respondent, acting through the third respondent, one of its directors, persuaded the first respondent to ignore the appellant's request to suspend payment to Xerox and the money was accordingly paid through what was known as the foreign exchange pipeline to Xerox.

The appellant issued a writ against all three respondents claiming that the first respondent had contravened his instruction to suspend the payment and that the second and third respondents had interfered with his own private account. there was a further claim for a wrongful debit in respect of the difference in exchange rate, which resulted in the appellant's account going into overdraft, but this was rectified by the first respondent and no order needed to be made thereon.

At the hearing of the appellant's claim and first respondent called the first defence witness, Ngoma, the assistant manger for the first respondent. He gave evidence that, in order to send foreign exchange through the Bank of Zambia, an irrevocable letter of credit had to be opened in which the payee Xerox was both the drawer and the beneficiary, with the result that the appellant had no right to cancel or suspend payment of the moneys, which were the subject of the letter of credit, without the consent of the beneficiary. He was adamant in his evidence that the exchange control regulations made it impossible for the money to be withdrawn by the applicant without the consent of the beneficiary.

The learned trial judge found that in this particular case the witness was wrong about the nature of the letter of credit. She found quite properly that the letter of credit was drawn by the payer, that it the appellant and she found therefore that She also found that the appellant admitted that the money was owing to Xerox, so that, although the first respondent had breached its duty to the appellant, there was nothing to show that the appellant had in fact lost, as a result of the breach of contract case, the equivalent of the money which had been wrongly paid to Xerox. The learned trial judge therefore, awarded only nominal damages against the first respondent of K10,000.00. It is against that order the appellant now appeals.

Mr Chongwe on behalf of the appellant argued that he still suffered loss of damages as a result of the breach of contract by Xerox and he was entitled to set this off against the money wrongly paid out of his by the first respondent.

Mr Nyembele on behalf of the respondents argued that the appellant had admitted that the money was due to Xerox, that his claim against Xerox had not been finalised and that, therefore, the order for nominal damages only was the correct one.

In considering whether or not the award of nominal damages was adequate we take not of the fact that two appeals were argued in consolidated form. That is to say, we heard argument in this appeal and we then heard argument in appeal No. 54 of 1994 in which the appellant is again the appellant and Xerox Limited is the first respondent and RDS Limited the second respondent.

In the second case the appellant had claimed damages for breach of the agency agreement between him and the first respondent, and, in the High Court, has succeeded in obtaining an award of a certain sum of damages. Not being satisfied with that sum, he appealed against the award. Instead of issuing a consolidated judgment on appeal we have written a separate judgment in respect of the other appeal which judgment will be delivered immediately after this one. We are therefore in a position to say that the total sum awarded after the appeal will be in excess of the amount wrongly paid out by Barclays Bank Limited, the first respondent.

We are satisfied that, as successful party, the appellant was and is entitled to set-off the amount of such damages against the amount which he originally owed to Xerox. It has not been shown that Xerox, the first defendant in the second appeal, has assets in this country sufficient to meet the claim for damages awarded in the second appeal, and we fully appreciate that at the time of the first trial the learned judge was unaware even that the appellant had any prospects of success in his action against Xerox. The learned trial judge found that because of the evidence of the first respondent's first witness that, under, the exchange control regulations, the money could not be taken out of the pipeline by anyone

except the beneficiary, the money had to remain in the pipeline, although the order not to pay it to Xerox should have been obeyed by the first respondent. Having regard to the fact that the learned trial judge found that DW1 had not given accurate evidence when he said that the letter of credit in this particular case was drawn by Xerox, who were both the drawer and the beneficiary, we would have thought that there was some doubt as to whether there existed such a strange regulation which provided that, although the appellant could stop payment of the money to Xerox, he could not have access to his own money which was in the pipeline. However, despite diligent cross-examination by Mr Chongwe in the court below, the witness was adamant about this evidence and it would appear that, if it is true, the money could only be released as a result of agreement between parties, and, in default of that, by an order of the court. In the circumstances, had the money not already been paid out to Xerox, it would have been appropriate for the learned trial judge to make an order for its refund to the appellant.

In the event there is no doubt that the appellant should be protected in case Xerox, the first respondent in the second appeal, has insufficient money in Zambia to meet the award of damages in that case.

For that reason and, despite the fact that the learned trial judge in this case was not aware of what would be the result of the appellant's claim, the proper order to have been made was a declaration that the first respondent in this appeal was liable to indemnify the appellant in respect of any damages which the appellant is unable to recover from Xerox as a result of their having insufficient funds in this country to meet the award of damages in appeal No. 71 of 1994. Such indemnity should be limited to the Kwacha equivalent of $44,217.25 plus interest at the average short term deposit rate since the date of wrongful payment to the date of this judgment.

For the reasons we have given the appeal is allowed. the order for payment of nominal damages of K10,000.00 is set aside, and, in its place we make a declaration in favour of the appellant in the above terms, which shall stand as a judgment in favour of the appellant for any sum up to the aforesaid limit which may be required to settle the damages in appeal no.71 of 1994.

Costs of this appeal to the appellant.

Appeal allowed