BANK OF ZAMBIA v. ATTORNEY-GENERAL AND A. A. YOUSUF AND COMPANY

SUPREME COURT
NGULUBE, C.J.
8TH AUGUST AND 1ST DECEMBER 2000
APPEAL NO. 125/2000

Flynote

Commercial Law - foreign exchange - debt servicing.
Paris club - question of recovery of equivalent value of currency.

Headnote

One of the main issues in this appeal was whether the respondent could get full value for the local money that had been paid many years ago for the purchase of foreign exchange which was stuck in what was called a pipeline, that is, foreign exchange actually treated as bought and sold but unremitted due to an acute shortage of such foreign funds. Another question was whether the respondent must join the scheme of debt servicing arrangements entered into on behalf of the Republic with international institutions and the creditors popularly known as the paris club.

Held:

(1) There was no transaction wholly sounding and designated in kwacha terms, there was foreign currency purchased and acknowledged as owing as such.

(2) The debt was in fact not disputed and the arguments raised go to the enforcement of the judgment and can not affect the entitlement of the respondent to a judgment for the acknowledged debt in the foreign sums specified in the correspondence from the central bank.

Appeal dismissed.

Cases referred to:

1. Appolo Enterprises Ltd. v Enock Percy Kavindele Appeal No. 98 of 1995.
2. Zimco v Muuka S.C.Z. Judgment No. 1 of 1998.
3. Camdex International Ltd. v Bank of Zambia (1996) 3 All ER 431.

For the Appellants M.M. Mundashi, Mulenga, Mundashi and Company.
For the Respondents Musa A.A. Yusuf, Adam and Company,
M. Mutemwa, Mutemwa and Company.

Judgment

NGULUBE, C.J., delivered the judgment of the court.

One question in this appeal was whether the respondent could get full value for the local money that had been paid many years ago for the purchase of foreign exchange which was stuck in what was called a pipeline, that is to say, foreign exchange actually treated as bought and sold but unremitted due to an acute shortage of such foreign funds. Another question was whether the respondent must join the scheme of debt servicing arrangements entered into on behalf of the Republic with international institutions and the creditors and donors popularly known as the Paris Club. There were two plaintiffs in the action, the first Ebrahim Yousuf was acting under powers of Attorney of the beneficiaries named in the originating summons. The second plaintiff, A. A. Yousuf and Company Ltd, purchased the foreign currency in the period 7th January 1982 to 3rd March 1984 which should have been remitted to the beneficiaries . To date, this has not happened and the learned trial judge found as a fact that the first appellant had admitted owing all the money claimed save for a sum of G.B.P. 181,474.90 for which no satisfactory proof had been tendered. The Bank had in February 1996 tried to persuade the claimants to participate in a debt buy-back scheme under which they would have been paid eleven cents to the dollar in full and final settlement but the latter were not interested. Finally, proceedings were launched to recover the present day kwacha equivalent of the foreign currency still unremitted and unpaid.

The defences advanced - which were rejected - included one that the central bank was under no obligation to persons owing foreign creditors any unremitted funds still blocked in the pipeline which then became part of the Republic's sovereign debt stock. In the circumstances, the defence contended that the debt became liable to treatment under the economic and financial restructuring programmes put in place with the assistance of the International Monetary Fund, the World Bank and the country's donor community. In default of agreement on the debt buy-back proposal, the plaintiffs' claims could only be paid within the internationally agreed strategies for settling the Republic's obligations. Another line of defence relied upon S.I. number 44 of 1994 which was the Bank of Zambia (Foreign Currency) Regulations. Regulation 4(1) and (2) of that Statutory Instrument read-

"4. (1) Payments for the servicing of any foreign currency debt contracted by any person before 29th January, 1994 shall be made only in accordance with arrangements approved by the Bank.

(2) A person who makes a payment in contravention of this regulation shall be guilty of an offence."

The appellants tried to claim that because the plaintiffs had not applied for such approval, they could not claim for settlement of the debt. The learned trial judge would have none of such argument, especially after the Exchange Control Act had already ceased to apply. In relation to the two unsuccessful defences, the learned trial judge in effect found that the arguments did not amount to a defence on the question of liability. Respectfully, we agree with the learned trial judge since quite clearly the arguments went to the mode of payment rather than to the issue of liability on the acknowledged debt. The argument based on the Statutory Instrument was largely a red herring since the acknowledged debt could not become irrecoverable in the manner suggested when the same lawful authority had sold the foreign currency which was blocked in the pipeline and which the central bank had originally undertaken to remit as and when foreign funds became available.

Mr. Mundashi relied on two grounds of appeal. The first ground touching upon the extent of liability alleged error on the part of the learned trial judge in not considering that the second plaintiff had lodged local currency in kwacha for the purchase of foreign exchange which in turn got blocked in the pipeline and whether the refund should not have been only the amount lodged. The upshot of the submissions and arguments was that there was in this case a transaction solely in local currency so that any refund should not be for the equivalent of the unremitted foreign currency but the sum that had been lodged in kwacha. Mr. Yusuf countered these submissions by pointing out that the central bank had at the time undertaken to remit the foreign exchange required; they had acknowledged the debt and they had tried to persuade the claimants to accept eleven cents to the dollar. We agree that the sum to be paid has to be decided according to whether the transaction was one sounding entirely in kwacha or not. The acknowledgement of debt was for the foreign amount, obviously because the foreign exchange was treated as purchased and sold. The offer to pay eleven cents to the dollar was inconsistent with the debt being simply a kwacha one as now claimed. As Mr. Yusuf observed, much absurdily would result and gross injustice would be visited upon those that had relied upon the undertakings by the central bank at the time of the transaction. Indeed, the claim that this should have been treated as a kwacha transaction flew in the teeth of the defendants' own valiant arguments that the money now formed part of the Sovereign Republic's foreign debt stock. A party can not blow hot or cold in this fashion. Of course, we are alive to our own authorities that have disallowed attempts by litigants who had entered into a purely local currency transaction to store the value of the kwacha in dollars or other hard currency and then to try and reconvert the same into kwacha: see for instance *Appolo Enterprises LTD. v Enock Percy Kavindele* Appeal No. 98 of 1995 and *Zimco v Muuka S.C.Z. Judgment No.* 1 OF 1998. But then, those were cases where the whole transaction was in kwacha terms and no question of any foreign currency arose. In the case at hand, there was no transaction wholly sounding and designated in kwacha terms; there was foreign currency purchased and acknowledged as owing as such.

In truth, the first ground of appeal cannot succeed in either extinguishing or diminishing the first appellant's liability and the claimant's entitlement. We uphold the learned trial judge.

The second ground of appeal alleged error when the court below did not consider the Republic's Sovereign status when it entered (through the agency of the first appellant) into an international agreement with multilateral institutions which impacts on how the first appellant as an agent for the second appellant deals with foreign currency debt or pipeline. It was argued that the case of *Camdex Inernational LTD. v Bank of Zambia (1996) 3 All E.R.* 431 where similar submissions received short shrift from the English Court of Appeal should have been found to be distinguishable. It was said the distinguishing feature was that in that other case, the bank was the primary obligor while in this case the Republic is a party. Again, the submissions were repeated that the debt buy back schemes and the international arrangements had to govern this debt as well. On the issues considered, the *Camdex* case is not distinguishable. The debt was in fact not disputed and the arguments raised go to the enforcement of the judgment and can not affect the entitlement of the respondents to a judgment for the acknowledged debt in the foreign sums specified in the correspondence from the central bank. As the court below observed, there was nothing in any law to compel the claimants to accept eleven cents to the dollar and certainly nothing to disentitle them to the judgment awarded below. The second ground of appeal was equally ill-fated. As for the cross-appeal, the proof of the disallowed sum was found to be lacking or inadequate. The learned judge had the same documents before him to which we are being referred. Having looked at them and at the figures listed, we do not see that the learned trial judge can be faulted.

In sum the appeal and the cross appeal are unsuccessful. In the event, there will be no order as to costs.