**ZAMBIA REVENUE AUTHORITY AND JAYESH SHAH**

SUPREME COURT
NGULUBE, CJ, CHAILA AND LEWANIKA, JJS
7TH MARCH AND 26TH JUNE, 2001
SCZ JUDGMENT No. 10/2001

**Flynote**

Civil procedure – preliminary objection

**Headnote**

When appeal was held counsel for the Respondent raised a preliminary objection to the appeal on the ground that the notice of appeal was filed out of time on and there was no order granting leave to appeal out of time on the record. The thrust of this appeal was that the appellants were required by the judgment of the High Court to refund the respondent the sum of US dollars 488,867.67 balance after tax assessed on money held in a dollar denominated bank account which was initially seized by the DEC and later taken by the appellants. The appeal hinged on the interest rates applicable.

**Held:**

(i) Cases should be decided on their substance and merit where there has been only a very technical omission or oversight not affecting the validity of process.

(ii) That the rate could only have been applicable to kwacha amounts and to apply it to dollars was clearly not acceptable.

*Case referred to:*

1. Zambia Export and Import Bank Limited –v- Mukuyu Farms Limited and spyron and Spyron (1993-94) ZR 36.

For the Appellant: A.M. Wood, of A.M Wood and Company

For the Respondent: C.K, SC, of Chifumu Banda and Associates.

---

**Judgment**

**Ngulube, CJ, delivered the judgment of the court.**

When we heard this appeal on 7th March, 2001, Mr. Banda raised a preliminary objection to the appeal on the ground that the notice of appeal was filed out of time and there was no order granting leave to appeal out of time on the record. The order granting leave is in fact there on the records of the court except that a copy was not included in the record of appeal filed by the appellants. Learned Counsel suggested that the record of appeal ought not to have been accepted in the absence from the record of appeal rendered the appeal invalid. We said then that our ruling would be reserved to the main judgment. We rule that the objection was not well taken. Cases should be decided on their substance and merit where there has been only a very technical omission or oversight not affecting the validity of process. This is not to suggest that the rules of Court can be ignored when they specify what should be included in the record of appeal; the rules must be followed but the effect of a breach will not always be fatal if the rule is merely regulatory or directory. Here, the order exists in fact and the failure to include it in the record cannot be fatal; it is not as if no leave had been altogether when the appeal might have been incompetent. The objection is overruled.

In this case, the appellants were required by the judgment of the High Court to refund to the respondent a sum of US dollars 488,867.67 balance after tax assessed on money held in a dollar denominated bank account which was initially seized by the Drug enforcement Commission and later taken by the appellants. The costs in that case were also agreed at US dollars 12,221.69. In his judgment, the learned trial judge also awarded interest "at the dollar deposit rate" from the 21st January, 1998, when the appellants appropriated the respondent's account through Union Bank to 18th October, 1999, when the judgment was delivered. Thereafter, the judgment should attract "Statutory Interest." The absence of a stipulated figure of interest rate left each side contending for its own figure. Thus the respondent issued a writ of fieri facias endorsed with the interest at 18 % per annum as the interest "at dollar deposit rate." The appellants who thought the rate should have been 3% or 2.5% decided to pay K1,587,667,956.50 into court (apart from paying the sheriff's fees). This was intended to cover the judgment debt of US dollars 488,867.68 and agreed costs of US dollars 12,221.69, totaling US dollars 501,089.37 with a figure to be computed to represent 18% interest per annum from 21st January, 1998 to 18th October, 1999, plus post judgment interest at the Bank of Zambia current leading rate. The reason for paying into this court was given by Mr. Muuka, then Counsel for the appellant, when he applied on 8th November, 1999 for a stay of execution pending a review of the entire judgment on the ground that the plaintiff may have already obtained a similar judgment before another Court in respect of the same money. He informed the Court that " we have paid into Court the amount of K1,587,667,956.50 as security should the Court decide otherwise." The appellants expressed fears that the plaintiff or his associates may have been re-litigating the same amounts in various causes leading to double or over recovery. Thus, it was correct as Mr. Banda submitted that they did not want to pay the respondent directly and the payment in was without the support of any order.

The respondent by notice took out the money paid into Court but issued a second writ of fi.fa. allegedly for the unsatisfied balance of the judgment in an amount of US dollars 48,211.96 plus the agreed costs of US dollars 12,221.69. The appellants immediately applied to the Court to set aside the second fi.fa as well as the first in respect of the 18% rate of interest unilaterally applied by the plaintiff. They also claimed that the payment into Court had already included the agreed costs and that at an exchange rate of K1,430.00 to the dollar, the amount paid into Court exceed what was required to satisfy the judgment. The overpayment was said to amount to K307,825,094.00 or US dollars 125,642.90 if interest was worked out at 2.5% as suggested by the Bank of Zambia for savings accounts and at the exchange rate proposed by the appellants. Union Bank also suggested 2.5%. The plaintiff resisted the application, pointing out that the exchange rate to be used should be that applicable at the date of payment. The plaintiff relied on a suggestion from First Alliance Bank as to what the deposits and lending rates in US dollars for the year 1988/1999 should be, suggesting 12% per annum on de[posits in excess of US dollars 250,000. Thereafter, the plaintiff disclosed in his affidavit in opposition that he had used a post judgment interest rate of 36% which was then the Bank of Zambia lending rate. This was applied to the dollars and one of the complaints in this case was that rates applicable to Kwacha were applied to dollars.

The learned trial Judge after considering the arguments and documents submitted saw nothing wrong with a rate of interest of 18% which one bank had indicated they could pay and he further agreed that since the judgment was in a convertible hard currency but the debtors chose to pay in Kwacha, they were liable for the exchange rate fluctuations on the Kwacha.

The appeal is against the allowance of a rate of interest of 18% on dollars. The appellants have conceded on the issue of fluctuations of the exchange rate that they are liable in terms of this court's decision in **Zambia Export and Import Bank Limited –V- Mukuyu Farms Limited and Spyron and Spyron (1).** However, they argued that this should have ceased to be their responsibility after the payment into Court on 10th November, 1999, when the rate was K2,450.00 to a dollar. The submission was that the volatility of the exchange rate after the payment in was a risk the respondent took so that he should not have converted the amount at an exchange rate of 2,675.00 to the dollar on 30th November, 1999, when he took out the money.

We take the two issues in turn. With regard to the interest, this case illustrates the desirability of trial Courts ascertaining and awarding specific rates of interest instead of leaving it to the judgment creditor to do so, and perhaps to do so on disputable advice of some of the financial institutions in the country. In this case, the bank from whom the money was taken and the central bank suggested very modest figures of 2.5% to 3.1% while another bank which was called upon to advise the respondent suggested 12% or more for the amount of dollars involved in this case. What is certain is that in the absence of prior agreement by the parties as to the rate to be applied, it was highly undesirable for one party to pluck a figure

which, as it turns out was unusually high for dollar debts. We have not forgotten Mr. Banda's submissions based on the advice of First Alliance Bank and the computation of interest on a dollar account with Credit Africa Bank. Some of the submissions, which we cannot accept, were based on the rate of interest which the appellants used to calculate tax which, as Mr. Wood correctly pointed out related to Kwacha amounts, not dollar amounts. This is the criticism applicable to the post judgment rate of interest at 30% which was then the Bank of Zambia lending rate. That rate could only have been applicable to Kwacha amounts and to apply it to dollars was clearly not acceptable.

It seems to us that an inquiry could easily have been held below to ascertain what could be considered to be a fair average rate of interest on dollar deposits in an interest bearing account. From the figures tendered by the parties, ranging from a low saving rate of 2.5% to 3.1% obtained by the appellant to the rather higher rate of 12% to 18% in First Alliance Bank and even 21% suggested from Credit Africa Bank, an average rate of interest could have been selected. We also take into account the rates in Order 42 of the White Book. Rather than remit the case below for such an exercise to be conducted, as Mr. Banda suggested, we are in a position to do so on the material on record and in keeping with the requirement for finality to litigation whenever possible. It seems to us that a fair rate is to be found half way between the two extremes and this we consider to be 10%. Accordingly, we allow the appeal against a rate of interest of 18% and substitute one of 10%. The same should also apply as the post judgment rate.

With regard to the argument that the respondent should be liable for any shortfall caused by fluctuation after the payment into Court, we accept Mr. Banda's argument that the payment into Court was not intended as a payment to the judgment creditor. The obligation of the judgment debtor was to put the sum of dollars awarded into the hands of the judgment creditor. Because the payment was in Kwacha, it had to be the Kwacha equivalent of the judgment debt as at the time of payment to the judgment creditor, which was the date the money was taken out. Whether there is to be any refund by way of overpayment in favour of the appellants or a balance still to be paid by them to the respondent will be ascertained when the interest will have been recalculated as directed herein. In sum, the money paid in is to be converted into dollars as at the time of payment out, that is, at K2,675.05 per dollar. The sum (which is about $ 593,509.64 if our arithmetic is correct) should be set against the judgment debt, the agreed costs and the interest at 10%.

The appeal succeeds to the extent indicated, with costs to be taxed if not agreed.

---