

ZAMBIA REVENUE AUTHORITY AND HITECH TRADING COMPANY LIMITED

SUPREME COURT
SAKALA, CHIRWA AND CHIBESAKUNDA JJS
17TH APRIL AND 24TH SEPTEMBER, 2001
(SCZ JUDGMENT No. 13/2001)

Flynote

Agency.

Headnote

In 1998 on 22nd January the appellant appointed First Merchant Bank as agent to collect payment of Income Tax from the respondent's accounts totalling K948,301,741.71 which the appellant did receive as evidenced by an unpaid Manager's cheque drawn on the agent Bank. Subsequently the Bank became insolvent and was liquidated.

According to the transactions evidenced by documentary evidence the Bank was liquid when it was appointed agent by the appellant. Since the Bank was solvent at the time the cheque was unpaid the appellant cannot succeed on thye arguments of insolvency and none receipt of the money.

Since the cheque was still unpaid when the respondent's accounts were debited, only the Bnak as agent can explain where the money was taken to as balances in both respondent's accounts read zero.

Held:

(i) The Bank while insolvent and operational debited the respondent's accounts at the instructions of the appellant. What happened thereafter is an issue to be sorted out between the appellant and agent Bank.

Appeal dismissed.

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

For the Respondent: Mr. C. Banda of Chifumu Banda and Associates.

Judgment

The original appeal in this matter was against a judgment of the High Court awarding the respondent the sums of USD441,410.85 and USD553,930.69 and K2,808,813.05. In that judgment, the High Court had also ordered that a sum of K497,885.06, being money already paid, be deducted from the total judgment debt. In making these awards, the court accepted that the case, as pleaded by the respondent, was not in dispute. The court further accepted the admissions by the appellant's witnesses of owing the respondent a substantial sum of money in unpaid Tax Refunds. The court also accepted the evidence of the appellant's witnesses that the refund to the respondent had infact been processed and passed for payment.

It must also be mentioned on the December, 2000, we granted an application by the appellant to adduce fresh evidence and refused the appellant's other application to reverse a single judge's order directing that the sum of K948,301,742.71 be paid into court. Following upon

that ruling, the respondent's advocates also applied for leave to adduce fresh evidence which application was granted without objection. Before the appeal itself was argued, the parties, by arguments and submissions centred on the unpaid cheque in the sum of K948,301,741.71 made payable to the appellant by the First merchant Bank Zambia Limited as reflected in the fresh evidence. Although the memorandum of appeal contained ten grounds of appeal, the same were not argued because in the words of counsel for the appellant, "this appeal was concerned with the unpaid cheque of K948,301,714.71"

In arguing the appeal, Mr. Wood submitted that the appeal should be viewed in the context of an agent who had been appointed to carry out an act on behalf of a principal but which agent has been prevented from carrying out its agency by a supervening act of insolvency on the part of the agent. He pointed out that it could not be denied that there a statutory appointment of the First Merchant Bank Zambia Limited, now in liquidation, as agent by the appellant pursuant to Section 84 of the Income Tax Act, and that the Bank then undertook certain acts towards carrying out its agency. According to Mr. Wood, there were three issues to be addressed. First, how sufficient must the acts of an agent be to commit its principal to legal liability? Second, what is the effect of the agent's insolvency on the liability of the principal, if any? Third, does the authority given to an agent to receive money from a third party absorb the agent of its obligations to the third party, in this case the respondent?

We heard arguments and submissions on behalf of the appellant that the mere appointment of an agent is not sufficient to commit the principal to liability; that it is trite law that agency is based on the rule that the acts of an agent must be reasonably performed or sufficient to the benefits of the principal before the principal can be called upon to answer for the acts of his agent. We also heard arguments and submissions that, even if First Merchant Bank was appointed agent, in view of the new evidence it was quite clear that the appellant never received the sum of K948,301,741.71 as reflected by the unpaid Manager's cheque. It was contended and submitted that the fact that the appellant did not receive the money was confirmed and supported by the correspondence from the Liquidation Manager. Mr. Wood pointed out that, although book entries were made crediting the respondent's account with the sum of K948,301,741.71, these were merely book entries unsupported by cash. Mr. Wood further submitted that even if there was need to indemnify the agent, the First Merchant Bank Zambia Limited, by the Zambia Revenue Authority in terms of Section 84(2) of the Income Tax as amended, the respondent could not benefit from the indemnity because no money was paid. He finally submitted that the appellant seeks the protection of Section 84(2) of the Income Tax Act.

Mr. Banda, on behalf of the respondent, reacted to the submissions on behalf of the appellant under four heads. The first head was whether there was an agency relationship between the appellant and the First Merchant Bank in Liquidation and if there was, when was it created? We heard arguments and submissions on this first head that the agency relationship between the appellant and the First Merchant Bank Zambia Limited, as per documentary evidence, was created on the 22nd of January, 1998, that the documentary evidence stated the amounts for which the agent Bank was asked to collect from the two accounts of the respondent which two accounts were at the agent Bank. Mr. Banda argued that at the time the Bank was appointed agent, it was liquid and therefore operating normally. He submitted that the agency relationship between the appellant and the First Merchant Bank Zambia Limited commenced on 22nd January, 1998 when the Bank was solvent.

The second head argued by Mr. Banda was the question of when exactly did the First Merchant Bank Zambia Limited receive the money from the respondent in settlement of the tax due? The arguments and submissions on this head were that from the documentary evidence, as at 6th January, 1998 the agent Bank had K896,700,000 in the respondent's account to which instructions to transfer related. This money was already with the agent Bank. Thus, according to counsel, by 6th January, 1998, the Bank was solvent. The kwacha amounts from the two accounts when converted to dollars at the time amounted to KUS\$ 610,000. This was the money sent by telegraphic transfer to Gift Investments PVT Limited at the instructions of the

respondent. Mr. Banda again pointed to the documentary evidence on record showing that as at 16th January, 1998, one account of the respondent at the agent Bank had an amount of K51,566,741.06 and that on 21st January, 1998, the Bank made reverse entries in the sums of K642,876,390 and K253,858,610.65. Mr. Banda submitted that in short, the sum of US\$ 610,000.00 had been recalled on 21st January, 1998. Mr. Banda asked the question: at whose instructions did the First merchant Bank Zambia Limited recall the sum of US\$610,000 which had been sent to Gift Investments PVT Limited at the instructions of the respondent? He submitted that since the respondent had no control of its accounts, the recall of money in Dollars must have been at the instructions of the appellant. According to Mr. Banda, as if the recall was not enough, on 22nd January, 1998, the appellant appointed the bank, when the money was with the Bank, as agent to collect the respondent's money which was at that time with the Bank. Mr Banda submitted that if these were not remarkable coincidences, one does not know what they could be, because the letters of appointing the Bank as agent indicate the amounts in the respondent's accounts which meant that the appellant knew the amount money in the respondent's accounts with the Bank before the Bank was appointed agent. Mr. Banda contended that one does not otherwise appoint an agent Bank with a zero account in the Bank.

Mr. Banda's third head was whether the First Merchant Bank Zambia Limited acted to instructions given to them by their principal, the appellant? He submitted that the answer to the question was in the affirmative as supported by the documentary evidence on record showing the respondent's accounts with the agent Bank reflecting sums of K694,448,181.06 and K253,858,610. Mr. Banda pointed out that on 28th January, 1998 both respondent's two accounts were debited with the sums of K694,448,181.06 and K253,858,610 respectively, leaving zero balances in both accounts. He submitted that the agent Bank acted on the principal's instructions to collect the tax from respondent's account. Mr Banda further submitted that from the scenario, the appellant was aware that the agent Bank had acted on the instructions as given by it. To support this submission, Mr. Banda referred the court to the refund claims on record filed by the respondent's accounts on 28th January are indicated and accepted by the appellant. Mr. Banda submitted that the appellant can not claim not to be aware of the agent Bank on their instructions; contending that it was clear that it was an after thought by the liquidation Manager to claim that he was not aware of the cheque which had an original date of 27th January, 1998 but altered to 30th January, 1998. Mr. Banda vehemently submitted that, on the evidence on record, is it strange and incoinceveable for the appellant to deny that they are not bound by the acts of their agent Bank. He also submitted that assuming that money was not transferred to the principal by the agent bank, the remedy available to the principal could not be against the respondent; but against the agent Bank for breach of duty to its principal. Mr. Banda further submitted that assuming the appellant was to argue that the agent Bank did not remit the money until it went into receivership, the agent Bank should have kept the money for the principal. Mr. Banda contended that the appellant had no basis to involve the respondent for the failure of its agent Bank to comply with its principal's obligations; contending that the most plausible thing for the appellant was to claim money from its agent Bank as failure by an agent to pay the principal renders the agent liable in a money action for money had and received. Mr. Banda also submitted that the principal, in the instant case, is liable for the actions of the agent Bank as they cannot escape as they failed to persuade the court that the unpaid cheque was issued on Friday 30th January, 1998 when the truth is that the cheque was issued on 27th January, 1998. It was Mr. Banda's final contention that the collection of a cheque by an agent is as good as collecting the money by the principal. In the instant case, Mr. Banda submitted that the respondent's two accounts showed zero balances showing that transactions were conducted by the agent Bank.

In his short reply to Mr. Banda's detailed arguments and submissions, Mr. Wood urged the court to look beyond mere documentary evidence of entries in the transaction. According to Mr. Wood, the case revolved around the issue of insolvency.

It must be pointed out at this stage that both learned counsel cited useful authorities on the law of agency. In our view, we find that there was no dispute on the principles governing the law agency. We have very anxiously examined the pleadings, the detailed documentary and oral evidence on record. We have also considered the judgement of the learned trial Judge as well as the submissions by both counsel. From the documentary evidence it appears to us to have been common cause that on 22nd January, 1998, First Merchant Bank was appointed an agent for the appellant for payment of Income Tax. The trial court found this to be a fact which was not denied in the defence as pleaded. Indeed, even in this court, we do not understand the submissions on behalf of the appellant to be suggesting that there was no agency relationship between the appellant and the First Merchant Bank.

Our understanding of the arguments and submissions on behalf of the appellant is that the First Merchant Bank, though appointed agent, it was prevented to carry out its agency by a supervening act of insolvency on the part of the agent. We also understand the arguments and the submissions on behalf of the appellant to be the effect that the appellant did not receive the sum of K948,301,741.71 as disclosed by the fresh evidence of the unpaid Manager's cheque payable to the appellant drawn by the agent Bank dated initially 27th January, 1998 deleted and substituted with 30th January, 1998.

In our considered view, the appellant wants, by these arguments, to "have one's cake and eat it" that is to say, they want to enjoy both of the two mutually exclusive positions. An examination of the record, the pleadings in particular, clearly shows that at no time was the defence of insolvency raised. However, both arguments of insolvency and that no money was paid or received by the appellant fly in the teeth of the pleadings, the documentary evidence and the facts not in dispute. Above all, these arguments beg the question and overlook the sequence of events and the transactions between the appellant and the agent Bank on one hand and the respondent and the agent Bank on the other hand. As we see it, the agency relationship between the appellant and the bank was created long before 2nd February, 1998 when the bank is purported to have been placed under receivership as per the fresh evidence of a letter dated 12th April, 2000 from the Liquidation co-ordinator.

According to the transactions as evidenced by the documentary evidence on record, it is quite clear to us and we agree with the submissions by Mr. Banda that at the time the Bank was appointed agent by the appellant on 22nd January, 1998, the Bank was liquid, operating normally and solvent. This is confirmed by several transactions involving the respondent's accounts at the agent Bank. We also agree with Mr. Banda that as a matter of prudence one does not appoint an agent for an account which has zero balance. Indeed, if the money debited to the account of the agent Bank was not transferred to the appellant by the agent Bank, the remedy available to the appellant cannot be against the respondent; but against the agent Bank for breach of duty to its principal. In addition, if the agent Bank did not remit the money until placed under receivership, the agent Bank had a duty to have kept that money for the appellant. Indeed, the unpaid Manager's cheque, payable to the appellant, was issued by the agent Bank. This cheque was unpaid and is still unpaid. In our view, there is more to the conduct of the appellant and their agent Bank than meets the eye. Be that as it may, the appellant cannot succeed on the arguments of insolvency and non receipt of the money. The glaring truth was that the Bank was insolvent at the time the unpaid cheque was issued. Since the cheque is still unpaid when the respondent accounts were debited, obviously at the instructions of the appellant, only the agent Bank can explain where the money was taken to as the balances in both respondent's accounts read zero.

A half hearted argument was advanced attacking the documentary evidence as mere book entries unsupported by cash. If these were mere book entries and there was no cash, it was not for the respondent to explain why these transactions were mere entries unsupported by cash. But on our part we do not accept the arguments that there were only book entries

unsupported by cash. The appellant seeks protection of Section 84(2) of the Income Tax Act Cap 323.

Section 84(2) reads:-

“(2) Any person or partnership declared to be an agent in pursuance of subsection (1) shall apply to the payment of the tax due so much of any kind of property whatsoever held by him or coming into his hands on behalf of the person or partnership from whom the tax is due as is sufficient to pay such tax; any such agent is hereby indemnified against any person or partnership whatsoever in respect of all payments so made by him.”

The argument in relation to this subsection was that an agent can only be indemnified in respect of payments made to the appellant. In the instant case, the submission was that since the agent Bank did not pay any money to the appellant, it is the appellant who should be indemnified. From what we have already said, this submission is untenable. We are satisfied that the agent Bank, while still solvent and operational debited the respondent's accounts at the instructions of the appellant. Thereafter the respondent's accounts reflected zero balances. Whatever happened to the money, is an issue to be sorted out between the appellant and the agent Bank.

On the facts found and held, this appeal must fail. It is dismissed with costs to be taxed in default of agreement.

On the question of interest, we take note that there was an order of a single judge upheld by the full court to pay the amount in issue into court. This being the case, that money did not earn any interest from the time it was paid into court. However, from the time of the writ to the date it was paid into court it earned interest. Accordingly, we order that interest at the average short term bank deposit rate be paid on the sum of K948,301,742.71 from the date of the writ to the date the same was paid into court.

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