

REPORTABLE (58)

STAR AFRICA CORPORATION LIMITED
v
PETER MTOKO

SUPREME COURT OF ZIMBABWE
UCHENA JA, KUDYA JA, MWAYERA JA
HARARE: 31 OCTOBER 2022 AND 16 JUNE 2023

F. Mahere, for the appellant

J. Mambara, for the respondent

MWAYERA JA: This is an appeal against the whole judgment of the High Court (“court *a quo*”) dated 22 July 2022, in which it registered a foreign judgment in terms of Order 37 r 305 of the High Court Rules, 1971, as read with s 5 of the Civil Matters (Mutual Assistance) Act [*Chapter 8:02*] (“The Act”).

FACTUAL BACKGROUND

The appellant is a duly registered company in terms of the laws of Zimbabwe. It is also the parent company of Red Star Holdings Limited.

The respondent entered into a contract of employment with Red Star Holdings Limited in Harare, as its Regional Development Executive, in May 2007. He was later transferred to Zambia to the Red Star Distributors Zambia Limited, a subsidiary of Red Star Holdings Limited. He was transferred on the same terms and conditions that he had in

Zimbabwe. In December 2007, the respondent was appointed as the Managing Director of Red Star Distributors Zambia Limited on the same conditions as before.

In 2010, Red Star Distributors Zambia went into insolvency. The respondent was offered a transfer back to Red Star Holdings Limited in Zimbabwe. The transfer was on varied terms of employment being a lower grade than his position then. The respondent declined the offer and opted to remain in Zambia. He thus resigned from employment.

On 4 August 2010, the respondent sued Red Star Holdings Limited for damages arising out of termination of his contract of employment. On 17 May 2013, the High Court of Zambia handed down a judgment under case number 2010/HP/779 (“The foreign judgment”) in favour of the respondent. On 15 September 2015, after a period of two years the respondent changed focus and sought an order substituting Red Star Holdings Limited Distributors for the appellant at judgement stage. The order for substitution was granted by the High Court of Zambia.

Thereafter on 19 October 2021, the respondent approached the court *a quo* seeking to register the foreign judgment. The appellant sought to have the Zambian Judgment 2010/HP/779 handed down on 17 May 2013 registered as an order of the court *a quo* for purposes of enforcement. The respondent made an application for registration of the foreign judgment was made in terms of order 37 r 305 of the High court rules as read with s 5 of the Civil Matters (Mutual Assistance) Act.

SUBMISSIONS BEFORE THE COURT A QUO

It was submitted on behalf of the respondent that the foreign judgment was registrable for purposes of enforcement. The respondent submitted that the judgment, in its original state, was made against Red Star Distributors Zambia Limited which was based in Zambia and had participated in both the summons action and substitution proceedings. The appellant was only cited in the substitution proceedings. It was further submitted on behalf of the respondent, that both Red Star Distributors Zambia Limited and the appellant submitted to the jurisdiction of the Zambian Court by defending the summons initiating the proceedings and participating in the substitution proceedings and thereafter noting an appeal against substitution, which appeal was however, dismissed for want of prosecution. The respondent motivated that the foreign judgment be registered.

The appellant in opposition of the registration of the foreign judgment submitted that the foreign judgment was not registrable because it did not sound in money and thus was not final and definitive.

It further submitted that the Zambian High Court had no jurisdiction to deal with the dispute because the appellant was a Zimbabwean company with no presence in Zambia. It also contended that the judgment sought to be registered was against the appellant despite the fact that it was not the employer of the respondent. It was further submitted that the judgment sought to be registered was handed down without reasonable notice to the appellant and without it being afforded an opportunity to be heard in breach of the *audi alteram partem* rule and was therefore contrary to the public policy of Zimbabwe.

FINDINGS OF THE COURT A QUO

The issue for determination before the court *a quo* was whether or not the respondent had met the requirements for registration of a foreign judgment.

On the first requirement the court *a quo* found that for a judgment to be sounding in money it must be one in which the relief sought and granted is for an ascertainable sum of money. It found that the Zambian court made a finding that the claim sought was for an ascertainable sum of money before granting the respondent the award sounding in money.

The second requirement which the court *a quo* considered was whether or not the appellant had presence in the Zambian court's jurisdiction. The court *a quo* found that there was no connection between the appellant and the Zambian court. The Zambian court had no jurisdiction by virtue of the appellant being resident, *domiciled* or incorporated in Zimbabwe. However, the court *a quo* found that the appellant had voluntarily submitted to the jurisdiction of the Zambian High Court during the substitution proceedings notwithstanding that it had done so under protest. The court *a quo* thus found that the Zambian High court had jurisdiction to deal with the matter because the parties had submitted to its jurisdiction.

The Court *a quo* further held that the enforcement of the Zambian Court's judgment was not contrary to the Zimbabwean public policy in the circumstances. In the result the court *a quo* ordered that the judgement of the High Court of Zambia No 2010/HP/779 as read with the order of substitution of the appellant be registered as a judgment of the court *a quo*.

Irrked by the determination of the court *a quo* the appellant noted the present appeal on the following grounds of appeal.

GROUND OF APPEAL

1. “The court *a quo* erred in finding the judgment sought to be registered namely the judgment of the High Court of Zambia No. 2010/HP/779 sounds in money.
2. The court *a quo* having found that appellant had no presence in Zambia, erred in finding that the Zambian Court had jurisdiction over the appellant
3. The court *a quo* erred in finding that the appellant had submitted to the jurisdiction of the Zambian Court in circumstances where the issue of submission to jurisdiction was never placed nor proven by the respondent and the substitution judgment of the High Court of No. 2010/HP/779 expressly states that the appellant “came under protest”.
4. The court *a quo* erred in failing to find that the judgment of the High Court of Zambia No 2010/HP/779 is contrary to public policy of Zimbabwe, notwithstanding that the appellant was never heard in respect of the claim in which the Zambian judgment relates.
5. The court *a quo* erred in failing to find that the judgment of the High Court of Zambia No 2010/HP/779 is contrary to the public policy of Zimbabwe. Notwithstanding that the Zambian Court substituted the appellant as a party to the proceedings after judgment had been handed down to the appellant prejudice.
6. The court *a quo* erred in failing to find that the judgment of the High Court of Zambia No. 2010/HP/779 is contrary to public policy of Zimbabwe notwithstanding that the judgment made the appellant a separate and distinct company from its subsidiary, the judgment debtor, responsible for the debt.
7. The Court *a quo* erred in finding that the judgment of the High Court of Zambia No.2010/HP/779 is “final and conclusive” notwithstanding that the Zambia court’s judgment was never fairly quantified nor complete (sic)”

SUBMISSIONS BEFORE THIS COURT

Ms *Mahere*, for the appellant submitted that the court *a quo* erred in finding that the judgement of the Zambian High Court No. 2010/HP/779 sounded in money. She averred that the failure of the judgment to sound in money resulted in an incomplete order because what was payable to the respondent had not been determined. She submitted that without the essential quantification the Zambian judgment was incapable of registration. She further contended that the court *a quo* erred in finding that the judgment in issue was “final and conclusive” notwithstanding that the Zambian Court judgment was neither fully quantified nor complete as required by law. She submitted that the judgment could not be enforced as the Sheriff could not issue a writ for a claim that was not quantified and no interest rate was stipulated.

She further submitted that the foreign judgment in question was not registrable because the Zambian Court had no jurisdiction to deal with the matter. In motivating this point, counsel submitted that the appellant had no presence in Zambia and neither was the appellant *domiciled* in Zambia. She submitted that the finding by the court *a quo* that the Zambian Court had jurisdiction over the appellant was incorrect. It was contended that the Zambian Court had no jurisdiction over a Zimbabwean company. Additionally, she argued that the appellant had not submitted to the jurisdiction of the Zambian court. She submitted that the conduct of the appellant was not consistent with conduct of acquiescence as evidenced even in the Zambian judgment that the appellant “came under protest”.

She submitted further that the court *a quo* erred in registering the Zambian judgment which was contrary to the public policy of Zimbabwe. She contended that the appellant was never heard before the Zambian Court as it was not given reasonable notice of the respondent’s claim. She averred that there was a fundamental breach of the *audi alteram partem* rule. She further submitted that by substituting the appellant as a party to the proceedings after judgment

had already been handed down, the appellant had been prejudiced. She further submitted that the judgment had the effect of holding the appellant, a Holding Company separate and distinct from its subsidiary liable for the latter's debt. She contended that in the given circumstances the court *a quo* erred in registering the foreign judgment.

Per contra, Mr *Mambara*, for the respondent, contended that the judgment of the Zambian High Court was capable of registration in the court *a quo*. He submitted that the judgment was sounding in money because the amounts payable to the respondent were contained in the papers filed of record and were also referred to in the body of the judgment. He further contended that the Zambian Court had jurisdiction to deal with the matter since the appellant had submitted itself to the jurisdiction of the Court through its conduct. He averred that the appellant participated in substitution proceedings and appealed against the substitution as well as the fact that the appellant's subsidiary, Red Star Holdings Limited had defended the summons in the initial proceedings. He further submitted that the appellant never challenged the jurisdiction of the Zambian Court during proceedings thereby acquiescing to the jurisdiction of the Zambian High Court. He submitted that the judgment was not contrary to the public policy of Zimbabwe and was thus registrable. On the issue of the appellant not having been heard, counsel submitted that the appellant could not argue that it was not heard because the party it substituted had been heard. He contended that the effect of substitution is that a matter proceeds as if the substituted party had been a party from the commencement of the proceedings.

ISSUE FOR DETERMINATION

The issue that commends itself for determination in this case is whether or not in the circumstances the court *a quo* erred in finding that the foreign judgment was registrable in Zimbabwe.

THE LAW

The question of registration of foreign judgments is provided for in the Civil Matters (Mutual Assistance) Act [*Chapter 8:02*] (“the Act”). The Act provides for the enforcement of civil judgments handed down in foreign countries. Section 6 provides for the registration of a foreign judgment. The relevant sections provide as follows:

“(6) Grant or refusal of Application

- (2) An appropriate court shall not direct the registration of a judgment if the Court is satisfied that-
- (a) the court or tribunal that gave the judgment had no jurisdiction to do so; or
 - (b) the judgment is not a final and conclusive judgment of the court or tribunal concerned; or
 - (c) the judgment could not be enforced wholly or partly by execution in the designated country in which it was given or;
 - (d) the judgment has been set aside by a court of competent jurisdiction or;
 - (e) the judgment has been wholly satisfied or;
 - (f) the judgment has been prescribed under the law of the designated country in which it was given or;
 - (g) enforcement of the judgment would be contrary to any law or to public policy in Zimbabwe or;
 - (h) the judgment is for payment of-
 - (i) any tax, duty, rate or similar charge or;
 - (ii) a fine or other penalty or;
 - (iii) maintenance for any person or;
 - (i) the judgment was obtained by fraud or;
 - (j) the applicant is not a judgment creditor vested with a right to seek enforcement of the judgment or;
 - (k) the judgment debtor, as dependent in the proceedings that gave rise to the judgment, was not able to appear and defend the proceedings because he did not receive reasonable notice of them.”

Section 2 of the Act defines “judgment” as follows: “judgment” “means a judgment or order given or made by any court or tribunal requiring the payment of money, and includes an award of compensation or damages to an aggrieved party in criminal proceedings.” (Underlining my emphasis).

(i) WHETHER OR NOT THE JUDGMENT SOUNDS IN MONEY

From the wording of s 2 it can be deduced that the judgment must be sounding in money. The learned scholars *Cillers, Loots and Nel, Herbstein and Van Winsen, The Civil Practice of the High Courts of South Africa 5th ED* (Cape Town; Juta and Co Ltd, 2009 Vol (1) at p 68 define a claim sounding in money as any claim for payment of money by the defendant to the plaintiff. The law requires a foreign judgment sought to be registered and enforced to sound in money. *Bisonboard Ltd vs K Braun Wood Working Machinery (Pty) Ltd* 1991 (1) SA 482 *De Naamloze Vennootschap Alintex vs Von Geeriach* 1958 (1) SA 13 (T) (AD). Although the cases cited above are South African authorities, they reflect the same position obtaining in Zimbabwe.

In the case of *Mandiringa and Others vs NSSA* 2005 (2) ZLR 329H at 334 B-F the court remarked that:

“The awards did not compute the loss that each employer had to make good even if he chose to reinstate the respective applicant. It is conceded that while such computations are relatively easy by comparing what a similarly placed employee received in emolument over the same period, the issue remains that the quantum thereof is not part of the award made and was not determined as part of the arbitration proceedings in the presence of both parties. It was not agreed upon in any one of the matters. The purpose of submitting arbitral awards to this Court (and to the Magistrates’ Court), is to enable the applicants to execute upon the awards. Arbitrators do not issue writs of execution. This Court does and so does the magistrate court. In terms of r 322 and 323 of the High Court Rules, 1971, a writ may be sued out by any holder of a judgment or order in terms of which has been ordered “the payment of money, the delivery up of goods or premises or for ejection.” A writ may not be sued out in this Court for reinstatement in employment. Aware of this impediment created by the rules of this Court the applicants before me calculated their losses and attached computation of these to the awards ordering their reinstatement. Such computations, no matter how accurate, are not part of the awards made by the arbitrators and have not been before any determining authority for quantification. They remain the claims that the applicants are making against their respective employers. A writ of execution cannot therefore be issued in respect of such claims before they are made part of the arbitral award. On their own, they are not capable of registration as orders of this Court as they fall outside the ambit of the provisions of s 94(14) of the Act.”

Although the *Mandiringa* case relates to registration of an arbitral award the principle laid down there is clear that for a claim sounding in money to be enforceable the amount being claimed must be quantified in the judgment for completeness and finality. Even if the amount claimable can be established by computation such an order which does not sound in money is unenforceable. The finding in *Mandiringa* emphasized that the Arbitrator as the issuer of the order ought to quantify the award and not that the executing officer should calculate the quantum of the award.

In *casu* the claim is for damages and for loss of employment and consequent relief. This speaks to payment of money which means the judgment ought to sound in money.

(ii) WHETHER OR NOT THE ZAMBIAN COURT HAD JURISDICTION

The question of whether or not the court which issued the original judgment sought to be registered has jurisdiction is critical. It is one of the requirements for registration as outlined in s 6 of the Act. For the judgment to be registrable and enforceable it is necessary to consider if the Zambian Court had the requisite jurisdiction to hear the matter. It is common cause that the appellant had no presence in the Zambian Court's area of jurisdiction. The Court *a quo* found that the appellant had submitted to the jurisdiction of the Zambian Court. The doctrine of submission has been described in *Herbstein and Winsen (op cit)* at p 64 to occur when:

“a person who would not otherwise be subject to the jurisdiction of a court submits to that court's jurisdiction either by positive act or negatively, by not objecting to the judgment of the court, such person may, in certain cases, confer jurisdiction on the court.”

In determining whether or not a party has submitted to jurisdiction, each case has to be decided on its own facts *Herbstein and Winsen (op cit)* at p 65 states the following:

“Merely to give notice of intention to defend an action will not constitute a submission because it is a necessary preparatory step to raising an objection to the jurisdiction, nor will

a failure to give such notice. But a defendant who demands security or asks for postponement or pleads to merits, will be held to have submitted.”

(iii) WHETHER OR NOT THE JUDGMENT REGISTERED BY THE COURT A QUO WAS CONTRARY TO PUBLIC POLICY

It is common cause that a foreign judgment cannot be recognized and enforced if it is contrary to the public policy of Zimbabwe. As is succinctly put in Joubert (ed): *The Law of South Africa* (First Reissue, 1993) Vol 2 at p 425:

“... a foreign judgment will not be recognized or enforced if it is in conflict with an overriding statute, if its terms conflict with public policy or if it was obtained without observance of principles of natural justice.”

The principle relating to the *audi alteram partem* rule is relevant in the circumstances. The appellant argued that the principle was violated as it was not given reasonable notice and its right to be heard was violated. In *Zesa Enterprises (Private) Limited v Stevawo SC 29/17* at p 4, the court pronounced as follows on the right to be heard:

“The right to be heard is a fundamental cornerstone of our law. It is a fundamental principle of the rules of natural justice forming the backbone of a fair hearing enshrined in our constitution as read with the Administrative Justice Act [*Chapter 10:28*]. The maxim that no one shall be condemned without being heard holds sway in our law.”

The right to be heard is a fundamental rule of natural justice which requires that each party to a case must be given a clear reasonable and adequate notice of the case he is to face, and be offered reasonable opportunity to prepare and state his case in rebuttal or contradiction of allegations or arguments made against him.

In the case of *Taylor v Minister of Education and Another* 1996 (2) ZLR 772 (S) at 780 A-B the following was stated:

“The maxim *audi alteram partem* expresses a flexible tenet of natural justice that has resounded through the ages. One is reminded that even God sought and heard Adam’s defense before banishing him from the Garden of Eden. Yet the proper limits of the principle are not precisely defined. In traditional formulation it prescribes that when a statute empowers a public official or body to give a decision which prejudicially affects a person in his liberty or property or existing rights, he or she has a right to be heard in the ordinary course before the decision is taken. See the *Metsola v Chairman Public Service Commission and Anor* 1989 (3) ZLR 147(S). (Underlining my emphasis)

See also *Guruva v Traffic Safety Council of Zimbabwe* SC 30/08; *University of Zimbabwe v Mugumbate & Ors* SC 63/17 and *Triangle Limited v Sigauke* SC 52/15.

APPLICATION OF THE LAW TO THE FACTS

It is not in dispute that for a foreign judgment to be registrable and enforceable in compliance with the Act it has to be sounding in money. A close look at the relief sought and granted by the Zambian Court reveals that the order does not at the conclusion categorically sound in money. The manner in which the judgment is set out leaves the enforcing officer to delve into computation so as to give effect to the judgement. In view of the *Mandiringa* case (*supra*), it is not appropriate for the Sheriff or an officer tasked with enforcing the award to go through the entire judgment in order to ascertain what is being claimed. It is also not permissible for the executing officer to compute and determine amounts due and payable and even go further into configuring the applicable exchange rate and interest at the date of judgment. A competent order is one which encompasses all pertinent information. In this case, the order ought to have reflected the nature and quantity of the award since it was for a claim sounding in money. The manner in which the order registered *a quo* was crafted made it incomplete and not final. As such the order was unenforceable and cannot be registered for purposes of enforcement.

A further challenge to registration and enforcement of the Zambian High Court’s order, which was registered in the court *a quo*, relates to the pertinent issue of jurisdiction. In the

present case the court *a quo* made a finding that the appellant submitted to the jurisdiction of the Zambian High Court by defending the summons and application from which the foreign judgment arose. As properly submitted by Ms *Mahere*, the appellant simply took necessary preparatory steps to defend itself. The appellant a Zimbabwean company had no presence in Zambia thus rendering the Zambian Court devoid of jurisdiction. Further the appellant did not submit to the Zambian Court's jurisdiction. The position observed by the Zambian Court in its judgment that the appellant "comes under protest" further fortifies that the appellant did not directly or indirectly submit to the Zambian Court's jurisdiction. This issue of submission to jurisdiction was never pleaded by the respondent. It appears as if the court *a quo* wrongly inferred submission to jurisdiction from the mere fact that the appellant defended the matter. The appellant's conduct of taking necessary steps to raising an objection to the Zambian Court's jurisdiction should not be construed as acquiescence to the Zambian court's jurisdiction. To the extent that the Zambian Court lacked jurisdiction, the judgment which the court *a quo* sought to register was not registrable.

Lastly, this Court has to make a determination on whether or not the foreign judgment registered *a quo* was contrary to public policy. The appellant contended that it was never heard in respect of the claim to which the Zambian Court related and that it was only joined as a party to the proceedings pursuant to the handing down of the foreign judgment, to its prejudice. This scenario offended against the right to be heard before an adverse decision affecting a party is made. The failure to observe the principles of natural justice renders the foreign judgment registered *a quo* contrary to public policy. It is not in dispute that the proceedings before the Zambian High Court which resulted in the judgment in question were never brought to the notice of the appellant thereby depriving it of the opportunity to be heard. Furthermore, at the substitution stage, when the appellant attempted to raise an objection to the

court's jurisdiction by filing a defence to the summons this was misconstrued as submission to jurisdiction. The failure to be given adequate and reasonable notice coupled with the lack of jurisdiction on the part of Zambian Court compromised the appellant's right to a fair hearing. These flaws rendered the foreign judgment contrary to the public policy of Zimbabwe. Such flaws rendered the judgment unregistrable.

The court *a quo* erred in registering a foreign judgment tainted by lack of jurisdiction which flouted the principles of natural justice and was not sounding in money. The appeal in this case must therefore succeed.

As regards costs they ordinarily follow the result.

I find no reason to depart from the normal trend.

DISPOSITION

Accordingly, it is ordered that:

1. The appeal be and is hereby allowed with costs.
2. The judgment of the court *a quo* is set aside and substituted with the following:
“The application be and is hereby dismissed with costs.”

UCHENA J: I agree

KUDYA JA: I agree

Coghlan, Welsh and Guest, appellant's legal practitioners

J. Mambara & Partners, respondents legal and practitioners