

PETER MTOKO  
versus  
STAR AFRICA CORPORATION LIMITED

HIGH COURT OF ZIMBABWE  
DUBE JP  
HARARE, 31 January 2022 & 14 March 2022

## **Opposed application**

### **Preliminary Point**

*S Banda*, for the applicant  
*F Mahere*, for the respondent

DUBE JP:

#### *Introduction*

1. The preliminary point raised in this matter concerns the delay in registering a foreign judgment. The applicant brought an application for registration of a foreign judgment in terms of Order 37 Rule 305 as read with Section 5(2) (a) (ii) of the Civil Matters (Mutual Assistance) Act [*Chapter 8:02*], the Act. Whilst the respondent challenges the registration of the foreign judgment on a number of grounds, it has requested the court to consider first the point concerning the limitation period for registering a foreign judgment as prescribed in terms of s5 (2) (a) (ii) of the Act.

#### *Factual background*

2. The brief background to this dispute goes thus. The applicant and the respondent entered into a contract of employment whereupon the applicant was employed in Zimbabwe as a Regional Development Executive. He was later transferred to Zambia as managing director of Star Africa Corporation Limited, Red Star Distributors Limited, a subsidiary company. Following a dispute over the terms of his employment, he resigned alleging that his contract had been repudiated. He sued Red Star Holdings Limited for damages for loss of employment in the High Court of Zambia. On 17 May 2013, the High Court of Zambia entered judgment for payment of damages for loss of employment in his favour. Subsequent to this, Red Star Distributors Holdings Limited was put under curatorship

and seized to be a business entity operating in Zambia thereby making it difficult for the applicant to enforce the judgment. He applied for substitution of Red Star Holdings Limited with the respondent.

3. Consequently, the applicant obtained an order substituting Red Star Holding (sic) with Star Africa Corporation Limited (the current respondent) as the defendant on 15 September 2015. Thereafter, the respondent lodged an appeal against the decision substituting it for Red Star Holdings Ltd. The appeal was not successfully pursued resulting in an order dismissing the appeal for want of prosecution being granted by the Zambian High Court on 28 December 2017. On 5 November 2020, the applicant lodged this application for registration of the foreign judgment.
4. The application for registration raises questions challenging the High Court of Zambia's jurisdiction to deal with the employment dispute, the propriety of a substitution of parties after judgment, delays in registering the judgment on public policy grounds and whether the judgment is executable in foreign currency. At the hearing of the application, the respondent did not abandon its other defences but requested the court to deal with the point related to alleged delays by the applicant in applying to register the foreign judgment in terms of s5 (2) (a) (ii) of the Act in this jurisdiction. It submitted that the resolution of this point was capable of resolving the disputes between the parties without the necessity to hear full argument on the merits of the application.

#### *Respondent's submissions*

5. The respondent's position is that the judgment sought to be registered was made 6 years before the date of the application for registration of the foreign judgment and falls foul of the requirements of s 5 (2) (a) (ii) of the Act and contended that the judgment cannot therefore be registered in Zimbabwe. It submitted that as the judgment on which the applicant relies on for registration was handed down on 17 May 2013, the applicant ought to have made the application for registration by 17 May 2019. It stated that the face of the application shows that he made this application on 15 November 2021, more than two years out of time. It argued that even in the face of the substitution of parties that was made after judgment, the propriety of which it challenges, this application has come a little over six years from the ruling of 15 September 2015 dismissing an appeal lodged against the granting of the order for substitution. It distanced itself from the ruling which it argued is not material for the reason that the respondent was not cited in those proceedings.

#### *Applicant's submissions*

6. The applicant did not take issue with the suggested approach to the matter. According to the applicant, s5 (2) (a) (ii) of the Act provides an exception to the 6 year rule. The applicant

submitted that because the application for substitution is in respect of the judgment sought to be registered was appealed, the application for registration of the judgment could only be made once the pending appeal was finalised. It contended that the applicant could only apply to register the judgment after the appeal was out of the way and upon determination of the appeal. He maintained that the 6 years are reckoned from the date of determination of the appeal and therefore the limitation period ought to be calculated from 28 December 2017. It maintained therefore that the six years as envisaged in terms of s5 (2) (a) (ii) had not expired at the time the application registration was filed.

*The Legislative framework*

7. Registration of foreign awards is provided for in Section 5 of the Act which stipulates as follows:

**“5 Application for registration of foreign judgment**

(1) Subject to subsection (2), a judgment creditor under a judgment given in a designated country may apply to an appropriate court for the registration of that judgment in the appropriate court.

(2) An application under subsection (1) for the registration of a judgment—

(a) may be made at any time within six years after—

(i) the date of the judgment; or

(ii) the determination of any proceedings by way of appeal or review, where such proceedings have been instituted in respect of the judgment;”

8. Section 5 makes provision for registration of a foreign judgment by a judgment creditor given in a designated country in this court’s jurisdiction. A foreign judgment that is rendered in a designated country is registrable in this jurisdiction based on the principle of reciprocity. Generally, in cases of registration of foreign judgments the limitation period, being the period within which the foreign judgment must be registered, is dependent upon the law of the country where the judgment is to be registered. The periods of limitation vary from country to country. For a foreign judgment to be registrable in this jurisdiction, it must first meet the criterion set down in s 5(2) of the Act. Section 5 provides two measures for determining when the 6 year limitation period begins to run as provided for in s5(2)(a)(i) and s5(2)(a)(ii) of the Act.
9. In terms of s 5(2) an application for registration of a foreign judgment given in a designated country may be made to an appropriate court. In terms of s 5(2) (a) (i) and s 5 (2) (a) (ii), an application must be made at any time within six years after the date of judgment or the determination of any proceedings by way of appeal or review, where such proceedings have been instituted in respect of the judgment. The approach in matters such as these is to

determine first the date of the judgment in terms of s 5 (2) (a) (i). This is an easy exercise as this is done simply by establishing the date when the court granted the judgment. The date of judgment does not change and remains the same despite that further proceedings in respect of the matter may have been instituted on either appeal or review. Once the date of the judgment is determined, the timeframe within which the foreign judgment is to be registered is defined by simply calculating a period of 6 years from the date of judgment. The limitation period where no appeal or review has been lodged begins to run from the date of the judgment.

10. Section 5 (2) (a) (i) makes provision for the general rule. Where an appeal or review has been filed after the judgment, this is when s 5 (2) (a) (ii) of the Act kicks in. Section 5 (2) (a) (ii) provides that where an appeal or review is filed after the judgment, the appeal or review has the effect of delaying registration of a foreign judgment pending the appeal or review creates an exception to the rule that a judgment must be registered within 6 years after the judgment. In terms of s 5 (2) (a) (ii), the 6 year period is calculated from the date the review or appeal is finalised.
11. A foreign judgment is not registrable if it is subject of an appeal or review in the foreign jurisdiction. It is not capable of enforcement and can only be enforced after the appeal or review has been resolved. The running of the 6 year period is suspended until the appeal or review is finalised, after which the 6 years begin to run. The 6 years are reckoned from the date of determination of the appeal. For a foreign judgment to be registrable, it must be final, conclusive or definitive. Clearly, whether a foreign judgment is final, conclusive or definitive depends on whether or not there are further proceedings still pending in the foreign court.
12. In determining whether the judgment is final and definitive one considers whether there are pending proceedings and whether the judgment is executable in the country of jurisdiction it was delivered. Where the foreign judgment is final and ready to be executed upon in the foreign jurisdiction, it may be registered in terms of s 5 of the Act. The fact that there is a pending review and or appeal helps determine not the date of judgment but the finality of the judgment and comes in handy in determining the date from which the 6 year period is computed where an appeal or review was lodged after the judgment. A request to register a judgment filed out of the time prescribed in s 5 may be turned down by the court for failure to register it within the time frames prescribed.

13. The phrase ‘ *the determination of any proceedings by way of appeal or review, where such proceedings have been instituted in respect of the judgment* ’ in s 5(2)(a)(ii) is wide and covers any proceedings by way of review or appeal for as long as the proceedings are brought in respect of the judgment or issues related thereto. Section 5(2)(a)(ii) speaks to “any proceedings” and does not limit the appeal or review to a direct attack on the actual merits of the judgment. All an applicant has to show is that there were pending proceedings by way of appeal or review instituted challenging the judgement or raising issues connected to the judgment thereby making the registration of the foreign judgment not feasible thereby delaying the registration of the judgment.
14. Where a foreign judgment has been rendered and the judgment or any aspect thereof that has a bearing on the execution of the judgment is challenged by way of review or appeal, that judgment is not final and conclusive until resolution of the challenges. Where a substitution of a party after judgment is challenged by way of appeal, the judgment concerned ceases to be final, definitive or conclusive until the issue of the substitution has been resolved. The appeal against the substitution of a party has a bearing on the enforcement of the judgment and has the effect of delaying enforcement of the foreign judgment as envisaged in s5(2)(a)(ii) of the Act.
15. In coming up with these provisions, the legislature anticipated that there would be instances where after a judgment is delivered, could not immediately be registrable because of subsequent challenges to the actual judgment or other aspects arising therefrom. The pending proceedings would result in registration of a judgment being delayed thereby delaying the running of the limitation period. The intention of the legislature in introducing s 5(2)(a)(ii) was to ensure that there be finality before a foreign judgment can be registered and hence made provision for allowance in cases where a judgment was not immediately registrable. As a result, s 5(2)(a)(ii) was introduced to deal with that mischief.

*Application of the law to the facts*

16. The judgment which is the subject of these proceedings was delivered on 17th May 2013 and involved a different judgment debtor. The argument that the respondent was improperly cited in the Zambian High Court was not fully argued and is for another day, the court having been asked to deal with only one question. Once a judgment has been delivered, that fact cannot be wished away. The date of judgment does not change despite the appeal. The order for substitution of parties granted on 15 September 2015 had the effect of making

the respondent part of the judgment. The substitution of a party was made on the judgment and the judgment remained the same. The appeal that was lodged against the substitution had a bearing on the judgment. The judgment cannot not be separated from the appeal that was pending appeal. The appeal was not immediately dealt with resulting in an application for dismissal of the appeal. The dismissal of the appeal on 28 December 2017 is relevant as before the appeal over the substitution of parties was decided the judgment was not final definitive and not capable of execution in Zambia and hence was and was not capable of registration as a foreign judgment in this jurisdiction.

17. As the appeal against the substitution of parties was pending, the judgment did not become final, conclusive and definitive before the application for substitution was determined to finality. The judgment was not capable of execution in Zambia because of the pending appeal. The effect of the appeal against the substitution of parties as a whole was to delay the running of the six year period in terms of s5 (2) (a) (ii) of the Act. The applicant had 6 years from the date the appeal was thrown out to register the foreign judgment.
18. I must conclude that the applicant could not competently take any action to register the judgment as long as the appeal against the ruling to substitute the respondent as a party had not been finalised. The question of the correct debtor remained in abeyance. The six years are to be reckoned from the date that the appeal was dismissed by the Zambian High Court, being 28 December 2017. The application for registration of the foreign judgment was lodged within the time stipulated in s5 of the Act. The respondent's point fails.

*Mambara and Partners*, applicant's legal practitioners  
*Coghlan Welsh and Guest*, respondent's legal practitioners