

**DISTRIBUTABLE (4)**

VENETIAN BLINDS SPECIALISTS LTD v APEX HOLDINGS (PVT)  
LTD

SUPREME COURT OF ZIMBABWE  
GARWE JA, OMERJEE AJA & GOWORA AJA  
HARARE, FEBRUARY 22, 2012

*H Zhou*, for the appellant

*A Chinake*, for the respondent

GARWE JA: This is an appeal against the judgment of the High Court of Zimbabwe in which the court dismissed with costs a claim by the appellant for an order recognizing as legally binding and enforceable a judgment of the Supreme Court of appeal of Malawi. The latter judgment had ordered the respondent to pay to the appellant the sum of US\$848,662,50 as special damages, a further sum of Malawi Kwacha 120 928,50 with interest thereon at 1% above the bank rate and costs of suit.

It was common cause before the court *a quo* that the respondent had paid the sum of Mk 4, 819, 512 to the appellant pursuant to the judgment of the High Court of Malawi which judgment was subsequently set aside on appeal.

In determining the extent of liability of the respondent, the court *a quo* took into account the payment of Mk 4, 819, 512 and converted the amount to US dollars using a rate of MK4, 4788 to one United States Dollar. The court came to the conclusion that the respondent had in fact paid well over \$ US 1 million dollars and that the respondent had fully discharged its indebtedness to the appellant.

It is evident from the record that none of the parties had led any evidence on the rate of exchange prevailing at the time of payment. In its judgment the court *a quo* accepted that the plaintiff had not led any evidence on the rate of exchange applicable. The court however went on to accept the unsubstantiated testimony of the respondent's witness as to the value in US dollars of the MK 4, 819,512 and on that basis came to the conclusion that the debt had been more than discharged.

Having considered the evidence placed before the court *a quo*, it is clear that the court did not have sufficient evidence before it to determine the correct rate of exchange applicable at the time of payment. In coming to the conclusion that the respondent had paid the equivalent of more than a million US dollar the court *a quo* therefore misdirected itself. Indeed the respondent must have appreciated the fact that it had not fully discharged its indebtedness to the appellant and for that reason paid over Z\$50 billion into court following the institution of proceedings in Zimbabwe.

Both counsel accept that evidence should have been placed before the court *a quo* to enable the court to make a correct determination of the rate of exchange applicable at the time of payment.

In the circumstances, the suggestion by Mr *Zhou* that the matter be remitted to the court *a quo* appears appropriate. Indeed Mr *Chinake* accepted that such a course would meet the justice of the case.

It seems to me that the issue of the rate of interest, if any, applicable to the sum of US \$848,662-00 similarly requires to be determined after evidence has been led.

The judgment of the court *a quo* should therefore be set aside and the matter remitted so that these two issues can be properly determined.

On the question of the costs on appeal, I am of the view that since both parties were at fault in failing to place the issues correctly in the pleadings, each party should be made to meet its own costs.

Accordingly it is ordered as follows:

1. The judgment of the High Court be and is hereby set aside.
2. The matter is remitted to the court *a quo* to make a determination after hearing evidence on the rate of exchange applicable at the time of payment of the MK 4, 819, 512 and the rate of interest applicable, if any, to the sum of US\$848,662,50 awarded by the Supreme Court of Malawi.
3. Each party is to pay its own costs.

OMERJEE AJA: I agree

GOWORA AJA: I agree

*Sawyer & Mkushi*, appellant's legal practitioners

*Messrs Kantor & Immerman*, respondent's legal practitioners