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Judgment No. SC. 50/06
Civil Appeal No. 203/06

ELSIDDIGE OMAR AHMAD v THE AFRICAN MUSLIM AGENCY

SUPREME COURT OF ZIMBABWE
MALABA JA, GWAUNZA JA & GARWE JA
HARARE OCTOBER, 9 & 13 NOVEMBER , 2006

F Mutamangira, for the appellant

C Phiri, for the respondent

GWAUNZA JA: This is an appeal against the judgment of the High Court, in terms of which a writ of execution against the property of the respondent, was set aside.

The facts of the case are not in dispute. The appellant obtained judgment (in the form of an arbitral award) against the respondent, his former employer, for the payment of US$70,491.25. This was on 5 August 2005.

In execution of this judgment the appellant obtained a writ of execution against the property of the respondent. A vehicle belonging to the latter was as a result attached and sold in execution on 1 October 2005 for $1 296 986 349.66. This amount was handed over to the appellant. On 4 October and 7 November 2005, respectively, the appellant accepted from the respondent further amounts of $381 340 502.19 and $361 559 117.48. These payments brought the total paid to the appellant

to $2 039 885 969.22. It is not in dispute that the three payments received by the appellant, when converted to United States dollars at the then prevailing official exchange rates, together came to US $70 491.25, the total judgment debt. It has not been suggested that the appellant at any time refused to accept payments made in Zimbabwe dollars. The evidence before the court, in fact, shows that his preferred currency of payment was Zimbabwe dollars. Firstly, in executing the judgment, the appellant chose a method – writ of execution – that meant that the money realised from the sale of the attached property, and therefore to be paid to him, would be in Zimbabwe currency. Secondly, the appellant accepted the proceeds from the sale of the attached property, and the two subsequent cash payments from the respondent. The amounts were all in Zimbabwe currency.

As further testimony of his preference for payment in Zimbabwean, rather than United States, dollars, the appellant thereafter sought a further payment of $5 195 243 180.60, from the respondent. This followed the issuance, at the appellant's instance, of another writ of execution against the property of the respondent.

The appellant justified this demand on the basis that the total amount paid to him in Zimbabwe dollars should have been converted to US dollars using the inflated unofficial, or parallel, exchange rates. Converted at this rate, the amounts paid would have equated an amount far below the judgment debt of US$70 491.25.

It was the appellant's demand for what he regarded as the balance due under the original writ of execution, that prompted the respondent to seek an order

setting aside the writ of execution in question. At the hearing of the matter in the court *a quo*, the appellant's legal practitioner conceded that the official exchange rates, as presented by the respondent, were the correct rates to be applied in determining the total amount due to the appellant. The learned trial judge found, correctly, that the concession was properly made since no authority was needed for the proposition that the governing rate for the purpose in question was the official rate. This was the rate fixed from time to time by notice, order, or direction made in terms of the Exchange Control Regulations 1996 (SI 109 of 1996).

Having determined correctly that the correct rate to apply was the official exchange rate, the court *a quo* noted as follows:

> "*In casu*, it is not at all clear on what basis the first respondent (now the appellant) and his legal practitioners, with the evidently unabashed complicity of the second respondent (the sheriff) purported to apply the parallel exchange rate of ZW94 000 to US$1 in calculating their claim …. They were clearly entitled to do so and counsel for the first respondent was unable to advert to any reason whatsoever justifying their outrageous claim".

Mr *Phiri*, for the respondent, argues that the concession by the appellant's counsel in the court *a quo,* that the official exchange rate was the correct rate to apply, meant, in fact, that the judgment of the court *a quo* was granted by consent. That being the case, Mr *Phiri* argues further, it was not open to the appellant to appeal against such judgment.

I find there is some merit in this argument.

The concession by the appellant's counsel, if taken to its logical conclusion, amounted to an acknowledgement of receipt, by the appellant, of full payment of what was due to him under the original writ. Consequently his argument before this court, that the payment of a total of $2 039 885 969.22 by the respondent was "improperly made and incompetent in the circumstances" is clearly untenable. It is significant that the appellant does not explain why he received the payment in question if he believed it was "incompetent". Nor, in respect of the property sold in execution, does the appellant explain why he chose to proceed by way of writ of execution when to do so would only have meant payment to him in Zimbabwe dollars.

I have already outlined the circumstances that lead to the inevitable conclusion that the appellant's preferred mode of payment was Zimbabwean rather than US dollars. For him, against the weight of all this evidence, to argue, as he now does, that payment should have been effected in US dollars is quite evidently self-contradictory, mischievous and tantamount to an abuse of the court's process.

It hardly needs mentioning that had the appellant really wished the judgment to be executed in foreign currency, he would have taken care to choose a method of execution that ensured this eventuality. In other words, he is the author of his own perceived misfortune.

I should point out that while the appellant might have had an arguable case had he, right from the beginning, insisted in execution in foreign currency, and had he then met resistance in that quest from the respondent, the same cannot be said of the circumstances of this case, which are quite different.

I find when all is told that the appeal has no merit and cannot succeed.

In the result, it is ordered as follows:

"The appeal be and is hereby dismissed with costs".

MALABA JA: I agree.

GARWE JA: I agree.

Mutamangira & Associates, appellant's legal practitioners

Coghlan, Welsh & Guest, respondent's legal practitioners