

IN THE SUPREME COURT FOR ZAMBIA
HOLDEN AT KABWE AND LUSAKA
(CIVIL JURISDICTION)

APPEAL NO. 51/2000

B E T W E E N:

APEX INDUSTRIAL DISTRIBUTORS
(Suing as a Firm)

APPELLANT

and

THE ATTORNEY-GENERAL

RESPONDENT

CORAM: LATE CHAILA, LEWANIKA, CHIBESAKUNDA, JJS
On 7th November, 2000 and 9th September, 2003

For the Appellant: J.P. SANGWA of Simeza, Sangwa & Associates
For the Respondent: S.L. CHISULO, Solicitor-General

JUDGMENT

LEWANIKA, JS delivered the judgment of the court.

Cases referred to:

1. APOLLO ENTERPRISES LTD VS E.P. KAVINDELE, SCZ NO. 847 OF 1995
2. L.P. CHIBESAKUNDA VS R.L. MAHTANI APPEAL NO. 138 OF 1997
3. ZCCM LTD VS LISHOMWA MUUKA, SCZ NO. 1 OF 1998

When we heard this appeal, we had sat with our late brother the Hon. Mr. Justice M.S. CHAILA and following his untimely demise, this judgment is to be regarded as by the majority. We also wish to apologize for the delay in the delivery of the judgment.

On 3rd September, 1998 we had made a consent order in the following

terms:-

- 1. The loss suffered by the Plaintiff due to the devaluation of the currency and due to fluctuations in the exchange rate between the Zambian Kwacha and the British Pound be assessed and determined by the Deputy Registrar.*
- 2. Any other issues which the parties may not agree on arising from the judgment of 8th January 1997 be heard and determined by the Deputy Registrar.*

This appeal is against the assessment made by the Deputy Registrar.

Counsel for the Appellant has filed four grounds of appeal namely:

1. That the court below misdirected itself on a point of law by ignoring the instructions to it by the Supreme Court which are embodied in the Consent Order dated 9th October, 1998 ;
2. That the learned Deputy Registrar misdirected himself on a point of law by awarding the Plaintiff the sum of K12,199,999.84 as loss due to the devaluation of the currency as opposed to the sum of K1,501,801,364.02 as at 6th January, 1999;
3. That the learned Deputy Registrar misdirected himself on a point of law by refusing or ignoring the Plaintiff's claim for the sum of K1,805,601,619.81 as interest due to the Plaintiff at the market rate as at 6th January, 1999;
4. That the learned Deputy Registrar misdirected himself on a point of law by failing to award the Plaintiff a total of K3,307,165,483.82 as the total loss suffered as at 6th January, 1999 due to the Respondent's breach of the contract and converting the said amount into a stable currency at the exchange rate ruling as at 6th January, 1999 and directing that the amount found due in the stable currency do attract interest at the libor rate until full payment of the same.

In arguing the appeal Counsel for the Appellant said that the instructions to the Deputy Registrar are contained in the Consent Order signed by the Court and the parties. He said that what was required of the Deputy Registrar was for him to assess the loss suffered by the Appellant as a result of the exchange loss caused by the devaluation of the Kwacha. He said that the cases cited by the Deputy Registrar in his Ruling have no bearing on this case as those cases deal with Kwacha transactions which was not the case here and referred us to the contract signed by parties which is on page 45 of the record. He said that it was agreed that any exchange loss was to be borne by the Respondent, and that this was what the Deputy Registrar was supposed to assess. He referred us to the documents on pages 60 and 61 of the record showing the exchange loss and the interest. He submitted that the Deputy Registrar ignored all these issues and did not do his job. He said that there was evidence on record which was not controverted and also referred us to the evidence of the expert agreed upon by the parties which is on pages 64 to 68 of the record and in particular on page 68. He urged us to allow the appeal and make a finding that the Appellant was due to the sum of K3,307,402,983 as exchange loss and interest as at 6th January, 1999 converted into a stable currency and interest at the London Inter Bank offered rate.

In reply the Solicitor-General said that the history of this matter is that it was initially handled by the late MUTALE, J and on appeal to the Supreme Court a retrial was ordered. There was a retrial by CHANDA, J which was subject of an appeal by the Appellant to the Supreme Court. He said that the Court made an order that this was a Kwacha transaction and that this is the Order which was made in Court on 3rd September, 1998. He said that the Ruling or assessment by the Deputy Registrar was on firm ground as this was a Kwacha transaction. He urged us to dismiss the appeal.

We have considered the submissions of Counsel for the Appellant and the learned Solicitor General, as well as the evidence on record. The Consent Order signed by the parties and the Court which formed the basis of the proceedings before the Deputy Registrar appears on pages 10 and 11 of the record of appeal. An examination of this Order will show without any doubt that this was not a Kwacha transaction and this was agreed to by both parties. The cases referred to by the Deputy Registrar and on which he relied all dealt with Kwacha transactions. In this case an expert was called who gave evidence and quantified the exchange loss suffered by the Appellant and the interest due, and the evidence of this witness was not controverted. This witness gave the exchange loss plus interest as at 6th January, 1999 as K3,307,402,983.83 to which should be added the sum of

K762,499.99 being the original claim which was not paid, bringing the total to K3,308,165,483.82. We allow the appeal and set aside the award of K12,199,999.84 assessed by the Deputy Registrar and in its place we award the Appellant K3,308,165,483.82 as the exchange loss suffered and interest due to him as at 6th January, 1999. This amount is to be converted to British Pounds Sterling at the rate prevailing on 6th January, 1999 and the amount found to be due will attract interest at the London Inter Bank offered rate from 6th January, 1999 till payment. We also award costs to the Appellant, to be taxed in default of agreement.

D.M. Lewanika
DEPUTY CHIEF JUSTICE

L.P. Chibesakunda
SUPREME COURT JUDGE