Zgambo v Kasungu Flue Cured Tobacco Authority (Civil Cause Number 105 of 1988) [1987-89] 12 MLR 311

Judgment

Court:	High Court of Malawi
Registry:	Civil Division
Bench:	His Honour DF Mwaungulu, Registrar
Cause Number:	(Civil Cause Number 105 of 1988) 12 MLR 311
Date of Judgment:	July 17, 1989
Bar:	For the Plaintiff: Mr. Mhango For the Defendant: Mr. Jussab

On February 14th, 1989, Kalaile, J. gave judgment against the defendant, Kasungu Flue-Cured Tobacco Authority (KFCTA for short) but reserved the issue of interest to the Registrar. Mr. Bazuka Mhango, appearing for the plaintiff, Mr. Zgambo, and Mr. Jussab, appearing for the defendant, addressed me at length on the time from which the interest should run and the rate at which it should run. I reserved ruling and I now deliver it.

The defendant is a body corporate created by statute. It was created, inter alia, to further the tobacco industry in a designated area. It runs a Growers' Scheme whereby prospective growers train in its various estates. The plaintiff joined the scheme as a trainee tobacco grower in 1964. Ten years later, after acquiring the necessary skills, he was eligible to buy and actually bought the assets of one of the defendant's independent farms.

It appears as if in 1974, when Lisasadzi 4 Farm was being acquired by the plaintiff, there was an agreement that the defendant would invest K10,000 in the farm, that K9,000 would be deposited to purchase the 1975-76 crop, that the plaintiff would be entitled to the profit made on the sale of the tobacco at the end of the season and that the defendant should repay the plaintiff on demand all moneys of the plaintiff then in the defendant's hands. The defendant was supposed, when requested, to give an account of the sum of K19,000. In 1975, the plaintiff paid K10,000 and K9,000 as a share of the capital and financial help for the 1975-76 crop. By April 22nd, 1987 and after numerous requests, the defendant had still not rendered account or paid any profits. The plaintiff's lawyers' similar request of August 20th, 1987 did not produce an account either but prompted payment to the Income Tax Department of provisional tax for the plaintiff. All this is in the plaintiff's statement of claim. On March 2nd, 1987, the plaintiff commenced proceedings demanding an account and the return of all moneys accruing to him after the account.

It is not necessary to set out the defendant's pleadings, the plaintiff having obtained judgment because the defendants did not appear on the day of trial. Kalaile, J. found that in all, K7,044.17 was owed to the plaintiff and allowed the

plaintiff to enter judgment. Ultimately then, my order on interest will turn on the pleadings and what is on the record, all proceeding from the plaintiff.

Three issues have been raised before me: the rate of interest, whether the rate should be compounded and the date from which the interest should run. The first can be disposed of without much ado because of the concessions from counsel. Both Mr. Mhango and Mr. Jussab accept that this was a commercial transaction. Both concede, therefore that the rate to adopt is the minimum lending rate plus 1%. This is well supported by authority, the best formulation of which is by Bristow, J. (as he then was) in Miliangos v George Frank (Textiles) Ltd. (No. 2) (4) where he said ([1977] Q.B. at 496):

"The court fixes a rate applicable for plaintiffs in general and has done so ... by applying its judicial knowledge of what is from time to time the bank rate or minimum lending rate, and its judicial knowledge of the fact that in practice, by and large, it costs about 1 per cent, more than that to borrow the money."

The second point requires more than a passing comment. Mr. Mhango prevaricated on whether his client is entitled to interest at a compound or a simple rate. In the end, he thought his client should be awarded interest at a compound rate. Mr. Jussab thinks the rate can only be simple. At common law, interest could only be awarded at a simple rate. This court, which has to apply principles of equity, has jurisdiction to award compound interest, though not in all cases. Interest is awarded generally in cases where there is a fiduciary relationship, as was stated by Lord Herschell in Bray v Ford (1) ([1896] A.C. at

51):

"It is an inflexible rule of a Court of Equity that a person in a fiduciary position ... is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict."

In a wider sense, this principle has been applied to people who are accountable to others for moneys. In Wallersteiner v Moir (No. 2) (8) Buckley, L.J. said ([1975] 1 All E.R. at 863-864):

"This is an application of the doctrine that the court will not allow a trustee to make any profit from his trust. The defaulting trustee is normally charged with simple interest only, but if it is established that he has used the money in trade he may be charged compound interest. . . . Precisely similar equitable principles apply to an agent who has retained monies of his principal in his hands and used them for his own purposes. . . .

The application of the rule is not confined to cases in which a trustee or agent has misapplied trust funds or a principal's property, nor is it confined to trustees and agents. . . . The rule has also been applied in many instances to directors of companies who have obtained benefits for themselves by abuse of their position as directors."

In Miliangos v George Frank (Textiles) Ltd. (No. 2) (4), Bristow, J. used wider words. Reiterating that an examination of the authorities showed that such interest was only awarded where it was necessary in order to achieve restitutio in integrum, which is the basis of the award of interest at all, he said ([1976] 3 All E.R. at 601):

"An accountable party (e.g. an agent, a trustee or a company director) is required to account not only for the principal money he has wrongfully used for his own purpose, but also for the fruit of its commercial exploitation which he has or should have gathered, and this is taken to be compound interest on the principal..."

There is no doubt that the relationship between the defendant and the plaintiff was an accountable one. The defendant had not only to invest the money in Lisasadzi Farm, but also had to make purchases and at the end of the day, account for the profit to the plaintiff. Not only did it fail to account for any profit, but it also failed to hand over the moneys which the judge found to be owing to the plaintiff. The money it held was held in trust or as an agent on behalf of the plaintiff. It is possible that it did not make any profit, but that is not important. The sober truth is that the defendant is a commercial concern and the transaction between itself and the plaintiff was commercial. In such circumstances, the court will presume that the money was put to profitable use, as stated by Buckley, L.J. in Wallersteiner v Moir (No. 2) (ibid., at 864):

"The transaction was, however, clearly one of a commercial character, and in the absence of evidence to the contrary the court should assume that it has been profitable to him."

In that case, a director had diverted funds and the court awarded compound interest. Lord Denning, M.R., justifying a compound rate award, said (ibid., at 856):

"But the question arises: should it be simple interest or compound interest? On general principles I think it should be presumed that the company (had it not been deprived of the money) would have made the most beneficial use open to it .... It may be that the company would have used it in its own trading operations; or that it would have used it to help its subsidiaries. Alternatively, it should be presumed that the wrongdoer made the most beneficial use of it. But, whichever it is, in order to give adequate compensation, the money should be replaced at interest with yearly rates, i.e. compound interest."

In this case, it can be said that had the money been delivered to the plaintiff, he could have invested it in another farm or expanded the one he had. At the other end, it should be presumed that the defendant made good use of the money. It is easier to infer this in the present case, where the defendant is a business concern charged with the growing and sale of tobacco. The right award is a compound rate.

Finally, there is a question of the time from which interest should be paid. Mr. Mhango says it should be from 1976; Mr. Jussab says it should be from 1987, the time when the demand was raised with the defendant. It is not disputed that such interest is paid from the date when the cause of action accrued or arose. The authority for this is General Tire & Rubber Co. v Firestone Tyre & Rubber Co. Ltd. (3). The precise time when this happens can be found in the words of Lord Guest in Central Elec. Generating Bd. v Halifax Corp. (2) ([1962] 3 All E.R. at 923):

"The date when a cause of action accrues may be said to be the date on which the plaintiff would be able to issue a statement of claim capable of stating every existing fact which, if traversed, it would be necessary for the plaintiff to prove in order to support his right to judgment."

The question to be determined, then, is when did the cause of action accrue? Mr. Mhango says that it was in 1975 or 1976, when the money should have been paid out to his client. I do not agree with this. In his own pleadings, the plaintiff says that an account of profit had to be given and paid on demand. It is quite clear to me from the pleadings that a demand was a condition precedent to an account of profit being proffered. The authorities are clear that where there is a condition precedent, the cause of action accrues on the happening of the event. In Central Elec. Generating Board v Halifax Corp., Lord Reid said (ibid at 920):

"I do not think that the giving of a decision by the minister was a condition precedent. Let me contrast this case with a case such as that dealt with in this

House in Board of Trade v Cayzer, Irvine & Co., Ltd.

...There it was held that the form of the arbitration clause was such that there was no cause of action until an award was made. The reason clearly appears from the speech of Viscount Dunedin.

'If a ship were sunk by a collision occasioned by the fault of another ship there is an immediate liability which springs into existence when the collision occurs. But here there was not any liability arising from the collision as against the government, except the liability that sprung from contract. One goes, therefore, to the contract, and then one finds that there is not undertaken by the government any liability unless there has been found to be such a liability by the award of an arbitrator.'

Then he quotes well-known passages from Scott v Avery . . . and Caledonian Insurance Co. v Gilmour . . . , which makes it clear that there cannot be a cause of action until a liability exists and that in such cases the effect of the award was not to declare that a liability had existed but to create for the first time a right and a liability which only came into existence at the date of the award.

In the present case that was not the effect of the minister's decision. No new right or liability came into existence at its date. It is quite clear and it is now admitted by the appellants that the effect of the minister's decision was merely to prove that this sum had belonged to the appellants ever since the vesting date. It created no new right of property or chose in action: it merely enabled a

pre-existing right to be enforced."

Lord Hodson said(ibid., at 922):

"No demand had to be made as a condition precedent to the action being maintainable, and the requisite of proof has nothing to do with the existence of the cause of action."

Lord Guest said (ibid., at 923):

"If, of course, an action cannot be raised because it is not possible to quantify the claim, as in Turner v Midland Ry. Co. . . . , or because an arbitrator's award is a condition precedent to the raising of the action, as in the Scott v Avery . . . type of case (Board of Trade v Cayzer, Irvine & Co., Ltd. . . .), then time does not begin to run until these conditions have been satisfied. But if the only impediment to judgment is of a procedural character, as in Monckton v Payne . . . , then time begins to run, the action can be begun and the cause of action accrues."

In the present case, although the money was had in 1975-76, the plaintiff had to make a demand. Demand was not made in 1975 or 76. When was the demand made?

This leads me to the argument of Mr. Jussab. He thinks that the interest should run from some time in April 1987 because, according to the statement of claim, this is when the cause of action arose. This point is made even more perturbing

by the way para. 7 of the statement of claim is worded. I reproduce it:

"In Breach of arrangement and of the terms thereof although requested to do so by letter of 22nd April, 1987, and by numerous requests, the defendant has wrongfully failed. . . ."

The plaintiff, when giving evidence on oath, said:

"I expected the balance to be paid to me and I asked for it and the reply was, 'we shall look into the matter.' The money was due in 1982. I approached them for the money and the tax. In 1981 I rejoined KFCTA but no accounts were presented to me. I only stayed for months and was picked up by the police. I was at Lunja 3 Farm. In 1982 I went back for my money."

The matter that exercised my mind a great deal was whether there was a variance between the pleading and evidence on the date on which the demand was made. In any proceedings, the parties are bound by their pleadings. In Philipps v Philipps (5), Brett, L.J. said (4 Q.B.D. at 133):

"If parties were held strictly to their pleadings under the present system they ought not to be allowed to prove at the trial, as a fact on which they would have to rely in order to support their case, any fact which is not stated in the pleadings."

Where the evidence at the trial established facts different from those pleaded by the plaintiff which are not just a variation, modification or development of what has been alleged but which constitute a radical departure from the case as pleaded, those facts are inadmissible: see Waghorn v George Wimpey & Co. Ltd. (7). In that case, Geoffrey Lane, J. (as he then was) relied on the speech of Lord Guest in John G. Stein & Co. Ltd. v O'Hanlon (6), in which he said ([1965] 1 All E.R. at 553-554):

"The question is whether the case on which the respondent succeeded was covered by the pleadings. I have no doubt that the respondent failed to establish the case of a long-standing overhang some thirty feet from the corner; but in the way in which the evidence came out this became immaterial where the accident was proved to have taken place at about the corner. The facts on which the respondent succeeded before the Second Division were in effect the facts as alleged by the appellants in answer 2. . . . On these facts the Second Division . . . held that there was a breach of s. 48 by the manager. Although this finding was to some extent a variation or modification of the respondent's case on record, it was based on the same ground of fault and it related to the facts as found by the Lord Ordinary on evidence properly before him. There was not, in my view, such a radical departure from the case averred on record as would justify the House in absolving the appellants from liability. The test was well expressed by the Lord Justice—Clerk (Lord Thomson) in words which I should like to adopt, when he said in Burns v Dixons Iron Works, Ltd. . . .

The court is often charitable to records and is slow to overturn verdicts on technical grounds. But where a pursuer fails completely to substantiate the only grounds of fault averred, and seeks to justify his verdict on a ground which is not just a variation, modication or development of what is averred but is something which is new, separate and distinct, we are not in the realm of technicality.'

Counsel for the appellants complained that they had been prejudiced in their conduct of the case. I fail to see how they can have been in any way prejudiced when the facts on which liability was established are those averred in the defences and spoken to by their witnesses in evidence."

In the case before me, in para. 7 of the statement of claim, the plaintiff refers to a demand of April 22nd, 1987. If one goes by this, the court should not have accepted evidence that the demand was in 1982 unless the evidence was just a variation, modification or development of what was already alleged and was not a radical departure from what was pleaded. In para. 7, however, the plaintiff mentioned April 22nd, 1987 and "numerous requests." He did not state whether the requests were after or before. It would be unfair to pin him down to after April 22nd. I hold that the evidence of requests in 1982 is just a variation, modification or development of what was alleged and is not a departure from what was pleaded. I therefore find that interest should run from 1982. The month cannot easily be ascertained, but I think that September would be a reasonable estimate, after certain assumptions are made from what the plaintiff said.

Mr. Jussab agreed with the rates proffered by Mr. Mhango. This gives us a figure of K18,805.08.

Order accordingly.