PETER MTOKO
versus
STAR AFRICA CORPORATION LTD

HIGH COURT OF ZIMBABWE
DUBE JP
HARARE, 10 February 2022, and 25 March 2022 and 20 July 2022

Opposed application

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

DUBE JP:

Introduction

1. The applicant brought an application to register a foreign judgment in terms of Order 37 r 305 as read with s 5 of the Civil Matters (Mutual Assistance) Act [*Chapter 8:02*], the Act.

Background facts

2. The respondent, Star Africa Corporation Limited, a Zimbabwean registered company is the parent company of Red Star Holdings Limited. The applicant was first employed by Red Star Holdings Limited in Harare as its regional development executive in May 2007 and was later transferred to Red Star Holdings Limited Distributors Zambia Ltd, a subsidiary of Red Star Holdings Limited in Zambia in October 2007 in the same position. In December 2007, he was appointed its managing director. In 2010, his contract of employment terminated when the Zambian company was placed under receivership (insolvency) and he was asked to relocate to Zimbabwe on varied employment terms causing him to resign. He sued Red Star Holdings Ltd (Red Star) in the Zambian High Court and obtained judgment against it. Subsequent to this, he changed focus and obtained an order substituting Red Star for the respondent at judgment stage . The applicant seeks an order to register the foreign judgment.
3. The respondent's submitted that the foreign judgment is not registrable as it does not sound in money, is not final and definitive, and that the Zambian High Court had no jurisdiction to deal

with the dispute in the first place. In addition, it submitted that the judgment sought to be enforced was handed down without reasonable notice to the respondent and without it being afforded an opportunity to be heard in breach of the *audi altram partem* rule and is therefore contrary to the public policy of Zimbabwe which guarantees basic tenets of natural justice. It submitted that in the event that the court is inclined to register the judgment, the court ought to consider that the foreign judgment can only be registered in terms of S.I. 33 of 2019 and that the monies due are payable in RTGS. The challenge regarding failure of the applicant to bring the application within 6 years of the judgment in terms of s 5 (2) was raised earlier on and has already been resolved.

4. According to the applicant, the judgment in its original state was made against Red Star which was based in Zambia and participated in both the summons action and substitution proceedings with the respondent only being involved in the substitution proceedings. It submitted that both Red Star and the respondent submitted to the jurisdiction of the Zambian court by defending the summons initiating the proceedings and participating in the substitution proceedings and thereafter noting an appeal against the substitution.
5. What this court is required to resolve is whether the applicant has met the requirements for registration of a foreign judgment. In our jurisdiction, a judgment of a foreign court constitutes a cause of action and is not directly enforceable unless certain criteria as set in s6 of the Act are met. For a foreign judgment to be registrable, it must be a judgment handed down in a designated country in terms of s 3 of the Act. Enforcement of foreign judgments is governed by statute as well as the common law. The requirements for granting or refusing an application for registration of a foreign judgment are provided for in s6 (2) of the Act and were summarized in *Gramara (Pvt) Ltd and Anor* v *Government of Zimbabwe and Ors* 2010 (1) ZLR 59 (H) at p 67 C – D, where the court cited remarks by CORBETT CJ in *Jones v Krok* 1995 (1) SA 677 (A) at 685 B – E as follows:

> "As is explained in Jourbert ……the present position in South Africa is that a foreign judgment is not directly enforceable, but constitutes a cause of action and will be enforced by our courts provided (i) that the court which pronounced the judgment had jurisdiction to entertain the case according to the principles recognized by our law with reference on the jurisdiction of foreign courts sometimes referred to as 'international jurisdiction or competence'; (ii) that the judgment is final and conclusive in its effect and has not become superannuated; (iii) that the recognition and enforcement of the judgment by our courts would not be contrary to public policy; (iv) that the judgment was not obtained by

> fraudulent means; (v) that the judgment does not involved the enforcement of a penal or revenue law of the foreign State; and (vi) that enforcement of the judgment is not precluded by the provisions of the protection of Business Act 99 of 1978 as amended."

6. The requirements for registration of a foreign judgment as laid out in s6 conform to the common law requirements for registration of a foreign judgment. What the *Gramara* case shows is that, a foreign court does not have automatic jurisdiction over a defendant see also *Tempo* v *PCJ Motorways* HH 224-17. Central to registration of a foreign judgment is the question of jurisdiction of the foreign court. The foreign court granting the judgment must have had jurisdiction to deal with the matter in terms of the common law and as codified in s6(2)(a) of the Act. The question of jurisdiction of a court is a question of law and ought to be determined at the commencement of the suit. The onus is on an applicant for registration and enforcement of a foreign judgment to prove that a foreign court that rendered a judgment sought to be registered had the jurisdiction to entertain the matter. Where a court is requested to recognize and enforce a foreign judgment and is not satisfied that the foreign court had jurisdiction to deal with a matter, it will decline to register and enforce the foreign judgment
7. The question of jurisdiction of foreign courts is determined in accordance with 'international jurisdiction or competence' which is determined in accordance with principles of private international law. The fact that the Zambian High Court had jurisdiction in terms of its own laws does not entitle its judgment to be recognised and enforced in this country. That is not the enquiry. There is no need to establish what Zambian law says about the jurisdiction of a court registering a foreign judgment and call expert evidence as to the law of any foreign country or territory where a party seeks to register a foreign judgment. Section 25 of the Civil Evidence Act [*Chapter 8:01*] stipulates that a court shall not take judicial notice of the law of any foreign country or territory or presume that the law is the same as the law of Zimbabwe. Section 25 applies to cases where there is a need to establish the law of a foreign country. In *Mokbel v Mokbel* HH 192-15, the court held that a court may not take judicial notice of foreign law or presume the law of another country necessitating the need to call expert evidence on foreign law. . This is a case in which s 25 of the Civil Evidence Act was applied and is distinguishable from this case as it did not deal with registration of a foreign judgment where principles of private international law apply.
8. Judgments or orders sounding in money can be enforced and carried into effect anywhere. The common law position is that in claims sounding in money, a court in whose jurisdiction

a matter is brought is required to have power over a defendant. *David Pistorius in Pollack on Jurisdiction, Second Edition* at p 41, states:

> "From the nature of claims sounding in money it follows that in an action in which such a judgment is claimed it is a sufficient basis for jurisdiction that the State in whose court the action is brought has power over a defendant. If the State has power over a defendant, it is normally possible to make a judgment sounding in money effective against the defendant. If at the time of the commencement of the action the defendant is physically present in the State, the State has power over him and its courts accordingly vested with jurisdiction to entertain an action against him for a judgment sounding in money… if the defendant is either domiciled or resident within the State, then the power of the State over the defendant is strong. If at the time of the commencement of the action the defendant is not physically present within the State, the State has no power over him."

9. For a foreign judgment to be enforceable in this jurisdiction, it must sound in money. In claims sounding in money, it must be shown that the court which pronounced the judgment had jurisdiction to entertain the case according to the principles recognized by private international law with reference to jurisdiction of foreign courts. A foreign court is said to have international competence to deal with a matter in cases sounding in money in two situations. The first instance is where at the time that the proceedings in issue commenced the defendant was domiciled or resident in the area of the foreign court's jurisdiction, see *Bisonbord Ltd* v *K Braun Woodworking Machinery (Pty) Ltd* 1991(1)SA 482(AD): *De Naamloze Vennootschap Alintex* v *Von Gerlach* 1958(1)SA 13 (T). Secondly, where the defendant submitted to the jurisdiction of the foreign court.

Does the claim sound in money

10. The phrase 'claim sounding in money' is wide and encompasses any claim for money, no matter what the cause of action may be. Thus, cause of action or nature of claim has no bearing on whether the claim sounds in money. A judgment sounding in money is one where the relief sought and granted sounds in money. The applicant's claim as summarized in the judgment is a claim for sums of money. Part of the claim was granted. The fact that the relief sought is not stated categorically as part of an order at the conclusion of the judgment is of no consequence. Judgment is a question of style. Different jurisdictions and jurists have a different way of writing judgment and presenting and expressing their findings and orders. In this case, the Zambian court did not summaries its findings in an order at the end of the judgment as we would ordinarily do in this jurisdiction. What matters is that the court dealt with a claim

sounding in money, made findings with regards the claim for sums of money claimed and made an award sounding in money. I am satisfied that the judgment sought to be registered sounds in money.

Did the respondent have presence in the Zambian court's jurisdiction

11. Where the defendant is not physically present in the jurisdiction of a court at the commencement of proceedings, the court has jurisdiction over him in a claim sounding in money where he is domiciled or resident within the State, is a national or where he has property present in the State. In *Schlimmer* v *Executrix in Estate of Rising* 1904 TH 108 at 111 the court remarked thus:

> "Now the jurisdiction of the courts of every country is territorial in its extent and character, for it is derived from the sovereign power, which is necessarily limited by boundaries of State over which it holds sway. Within those boundaries the sovereign power is supreme, and all persons, whether citizens , inhabitants , or casual visitors, who are personally present within those boundaries and so long as they are so present , and all property (whether movable or immovable) for the time being within those boundaries , are subject to it and to the laws which it has enacted or recognized".

A company is resident at its place of business, see *TW Beckett & Co ltd* v *H. Kroomer* 1912 AD 324. A foreign company is taken to be in a court's area of business if its principal area of business is in the court's jurisdiction, See *Wallis* v *Gordon Diamond Mining Co Ltd* 1981) 6 H C G 43. The domicile of a company is the place or country in which it is incorporated. A court has jurisdiction over a foreign company where it is present in its jurisdiction or by submission to jurisdiction.

12. There is no connection between the respondent and the Zambian court's jurisdictional area. The respondent was not resident or domiciled in the Zambian Court's area of jurisdiction. It was not shown that it did carry out any business in Zambia nor was it incorporated in Zambia. Consequently, I must find that the respondent had no presence in the Zambian High Court 's area of jurisdiction .

Did the respondent submit to the jurisdiction of the court

13. Submission is a recognized norm for international competence. Where a court would ordinarily have no jurisdiction over a defendant and he voluntarily submits to the jurisdiction of a court, the defendant confers jurisdiction over the court . A respondent cannot subsequent to that, challenge the jurisdiction of the court successfully. Submission to jurisdiction may take many

forms, see *Wenzhou Enterprises* v *Chen Shaoling* HH 61-15. Submission may be expressed in words, agreement of the parties or conduct of a party arraigned before a court which otherwise would not be having jurisdiction over him. In *Tiiso Holdings (Pty) Ltd* v *Zimbabwe Iron and Steel Co Ltd* 2010 (2) ZLR 100 the court stated the following on p 109 B – D:

> "With specific reference to submission as a basis of jurisdiction, the position is reiterated By Pistorius: *Pollak on Jurisdiction*, Juta & Co Ltd (2nd ed. 1993) at pp. 162-163:
>
> > "Submission has been accepted in our law as an acceptable basis for international competence. As in the case of local jurisdiction submission may be by way of agreement or by a defendant acquiescing by his conduct in such jurisdiction after litigation against him has commenced. In the case of agreement, this may be pursuant to a contract between the parties which specifically provides for submission in the event of disputes or by an express or tacit submission after litigation. Submission by conduct may be difficult to prove and as held in Du *Preeze v Phillip King* the conduct must be of such a nature that it is consistent only with acquiescence."

14. To acquiesce can be defined as to assent tacitly, to submit or comply silently or without protest. Submission can be inferred. In *Du Preeze* v *Phillip King* 1963(1) SA 801 (W) the court held that the conduct of the defendant must be consistent only with acquiescence. The only reasonable inference to be drawn from the circumstances must be that the respondent intended to submit to the jurisdiction of the court. A party who fails to object to the jurisdiction of the court is assumed to have submitted to the court's jurisdiction ,see Voet 2.1.18. Gane Vol 1 at 219 where he states as follows:

> "It is undoubted that once *litis* contestation has taken place the jurisdiction of him before whom the proceedings was in his way started can no longer be declined by one of the litigants. Where a suit had its beginning, there also must it have its end? The authority of the laws has decreed that without any distinction being drawn between those with knowledge and those in error even dilatory exceptions , including the very exception to jurisdiction , must be put forward before contestation at the origin and among the very preliminaries of the suit."

15. In *Mediterranean Shipping Co v Speedwell Shipping Co Ltd and Anor* 1986 (4) SA 329 (D) at 333E–G, the court followed *Voet* and said:

> "Submission to the jurisdiction of a court is a wide concept and may be expressed in words or come about by agreement between the parties. *Voet* 2.1.18. It may arise through unilateral conduct following upon citation before a court which would ordinarily not be competent to give judgment against that particular defendant. *Voet* 2.1.20. Thus where a person not otherwise subject to the jurisdiction of a court submits himself by positive act or negatively by not objecting to the [jurisdiction] of that court , he may, in cases such as actions sounding in money, confer jurisdiction on that court . *Herbstein and Van Winsen The Civil Practice of the Superior Courts in South Africa* 3rd ed at 30; Pollak The South

> African Law of Jurisdiction at 84 et seq" (see also *Du Preez* v *Phillip-King* 1963 (1) SA 801 (W) at 803A)."

16. A party over whom a court would not ordinarily have jurisdiction over, submits to the jurisdiction of the court where he pleads to the merits of the matter. Voet, at 2.1.18 states that "once *litis contestatio* has taken place the jurisdiction of him before whom the proceeding was in this way started can no longer be declined by one of the litigants", and that any objection to jurisdiction "must be put forward before *litis contestatio* at the origin and among the very preliminaries of the suit".
17. In *Lubbe v Bosman* 1948 (3) SA 909 (O), the court echoed the same sentiments as follows:

> "It was a general principle of the common law that where a defendant without having excepted to the jurisdiction, joins issue with a plaintiff in a Court which has material jurisdiction, but has no jurisdiction over defendant because he resides outside the jurisdiction of that Court , the defendant is deemed to have waived his objection and so as it were conferred jurisdiction upon the Court".

See also *New York Shipping Co Pty Ltd* v *EMMI Equipment (Pty ltd & Ors* 1968 (1) SA 355 (SWA).

18. The mere fact that a respondent has filed a notice of opposition does not amount to submission. A respondent is entitled to take steps to raise a challenge to the jurisdiction of the court. The fact of filing an appearance to defend or notice of opposition does not amount to submission. It is in the notice of opposition or plea that a defendant is expected to raise an objection to the jurisdiction of the court . A litigant who fails to object to the court's jurisdiction and raises a defense on the merits of the matter thereby asking the court to dismiss a claim on its merits submits to the court's jurisdiction. Having waived his objection, he cannot be heard to challenge the jurisdiction of the court after the cause.
19. *In casu,* the respondent did not object to the jurisdiction of the court in the application for substitution. There is no reference to such a challenge in the court's ruling or the original judgment. What is clear however is that it raised points related to whether the respondent and Red Star Holdings Ltd have merged. It also took issue with the fact that the applicant sought to substitute the respondent after judgment and ought to have joined to the proceedings when the scheme of arrangement occurred and not after judgment had been delivered. Its issue was with the propriety of the actual substitution.
20. The court remarked that the respondent had come under protest. On page 54 of the judgment, the following remarks were made by the Zambian High Court:

> "The parties herein, the plaintiff and the intended defendant relied upon their filed affidavits in support and in opposition of the application respectively. However, the intended defendant filed an affidavit in support of notice to raise preliminary issue on a part of law on 8 December 2014 to which the plaintiff applied that the deponent be cross examined. I must State here that the deponent came under protest as is indicated in his affidavit. The court however made an order that the deponent must attend court for the purposes of clarifying his deposition having signed a consent order to be cross-examined by the plaintiff."

The record of proceedings reveals that the respondent denied being a majority shareholder and holding company of the respondent company. It denied liability arguing that the plaintiff ought to have joined the respondent to the action. That seems to be the reason why the court remarked that the respondent came under protest. The fact that the respondent came under protest with respect to the substitution , does not mean that it challenged the jurisdiction of the court. It is not recorded anywhere in the record that the respondent challenged the jurisdiction of the court. To "protest'' does not necessarily entail a challenge to the jurisdiction of a court. What the record reveals is that the respondent objected to the substitution on the basis that the applicant should have substituted or joined Star Africa when the scheme of arrangement occurred in 2010 and not after judgment had been delivered.

21. Both the latter and former respondents did not object to the jurisdiction of the Zambian High Court. They submitted to the jurisdiction of the court by defending the summons and application from which the foreign judgment arises. The respondent participated in the substitution proceedings and challenged the application on its merits. There is no evidence on record showing that either of the respondents contested the jurisdiction of the Zambian court. If the respondent was objecting to the jurisdiction of the court, it ought to have done so at the commencement of the proceedings and not deal with the merits of the application. It certainly cannot raise jurisdiction as a defense now. The respondent defended the application for substitution on the merits and cannot be said to have challenged the jurisdiction of the court or protested the court's jurisdiction.
22. Having filed papers before the court , the respondent did not challenge the jurisdiction of the court. The only reasonable inference to be drawn from the circumstances is that both respondents by their conduct intended to submit to the jurisdiction of the court and did in fact submit to the court's jurisdiction. Consequently, the Zambian High Court had jurisdiction to deal with the matters on the basis of the parties' submission.

Is enforcement of the judgment contrary to public policy of Zimbabwe

23. The respondent submitted that the rules of natural justice were breached in that it was not able to appear and defend the applicant's claim because it did not have reasonable notice of the proceedings rendering the proceedings contrary to public policy. It contended that it is no answer to this breach of natural justice that the respondent became part of the proceedings after the substitution as such a procedure is not sanctioned in our jurisdiction.
24. Registration of a foreign judgment obtained in a manner contrary to Zimbabwean public policy may be successfully opposed.. The fact that a judgment is made on a basis not recognized in Zimbabwe does not mean that it is contrary to public policy. In *Jones v Krok 1996 (1)SA 504*(T), the court held that the mere fact that a foreign award is made on a basis not recognized in South African law does not entail that it is contrary to public policy. Each case must be determined on its own facts. A court registering a foreign judgment must consider whether the conduct complained of is unconscionable when one views it against Zimbabwean laws and background and considers that a judgment or award "goes beyond faultiness or correctness and constitutes a palpable inequity that is so far reaching in its defiance of logic or accepted moral standards that a sensible and fair minded person would consider the conception of justice in Zimbabwe would be intolerably hurt by the award'', see *Zimbabwe Electricity Supply Authority* v *Maphosa* 1999 (2) ZLR 452 (S). A foreign judgment for registration and enforcement is contrary to public policy where the foreign court fails to observe minimum standards of justice required by Zimbabwean law.
25. It is a requirement that reasonable notice be given to all affected parties. Where a defendant is deprived his right to natural justice such as a failure to adhere to the *audi alteram partem rule*, the failure gives rise to a bar to recognition and enforcement of the foreign judgment, see *Tiiso Holdings Pty Ltd* v *Zisco Ltd.* In terms of a 6 (2)(k),a court will not register a foreign judgment where a defendant in a matter giving rise to the foreign judgment was not able to appear and defend the proceedings because he did not receive reasonable notice of the proceedings .
26. The proceedings giving rise to the judgment of 17 May 2013 involved the applicant and Red Star Holdings Ltd. The respondent was not cited in these proceedings. The respondent was not an affected party at the commencement of proceedings and this explains why it was not

given any notice of the hearing. There was no obligation on the part of the applicant to give it notice of the proceedings giving rise to the judgment nor the judgment itself to the respondent. The respondent in turn, was not legally obliged to attend the proceedings. A party who is substituted subsequent to the commencement of proceedings cannot argue that it was not given notice of proceeding to which it was not a party. Because of the nature of substitution proceedings, it was not practicable to cite the respondent at the outset because it was not foreseen that the judgment would not be enforceable against Red Star Holdings which ceased operations resulting in the applicant obtaining an order for substitution of the respondent, thereby necessitating the substitution of the respondent . From my reading of the ruling on substitution, there does not seem to be any issue concerning failure to give reasonable notice of the hearing of the application for substitution . The respondent chose to rely on its filed affidavits at the hearing and was in actual fact made to attend court after an order that it do so and was not denied an opportunity to be heard.

27. The applicant sought substitution on the premise that Red Star could not be found in Zimbabwe as it had been completely taken over by the respondent . The record reveals that there is an order of this court which authorized a scheme of arrangement of reconstruction and amalgamation of companies wherein the respondent took over or entered into an arrangement to take over or merge with Red Star. The Zambian court proceeded from the premise that Red Star having ceased to exist as a corporate entity merged with the respondent and can be substituted as a party. The Zambian court treated the respondent as a successor in title.

28. Rule 32 (8) of High Court Rules provides for substitution of parties as follows:

> "(8) If, as a result of an event referred to in sub rule (7), it is necessary or desirable to join or substitute a person as a party to any proceedings, any party to the proceedings may, by notice served on that person and all other parties and filed with the registrar, join or substitute that person as a party to the proceedings, and thereupon, subject to subrule (10), the proceedings shall continue with the person so joined or substituted, as the case may be, as if he or she had been a party from their commencement"

29. Rule 32 (8) makes provision for substitution of a successor in title. The nature of substitution is such that a party is substituted after commencement of proceedings because it is necessary and expedient to do so. The effect of a substitution is that the proceedings shall continue with the person so joined or substituted, as the case may be, as if he or she had been a party from

the commencement of proceedings. Rule 32 (8) does not place a cap on the stage at which a substitution of a party may be made.

30. The case of *Gariya Safaris Pvt Ltd* v *Van Wyk* 1996 (2) ZLR 246 (H), gives guidance on considerations in a substitution of a party. The issue was whether courts have power to amend judgments so as to substitute a new party as a judgment debtor when he does not consent to the substitution at judgment stage. The court declined to substitute a new debtor because the summons were null and void for the reason that the proceedings had been brought against a non-existent defendant and held that there could be no question of substitution of a new judgment debtor as there was no old judgment debtor. The court remarked as follows:

> "In exceptional circumstances may a court amend a judgment. In each case the test is whether there is prejudice to any of the parties which cannot be compensated by an order for costs. The court must also be satisfied that the new person is a necessary and proper party to be before it, so that it may effectually and completely determine the cause between the existing parties.''

31. Essentially therefore, it is permissible to substitute a party at judgment stage albeit in special circumstances only. The person sought to be substituted must be a proper party. The view of the Zambian court was that the respondent was a necessary and proper party to be before it. It considered that the two companies had merged with Red Star ceasing to exist , were one economic entity and appeared to have pierced the corporate veil and proceeded to order substitution . These are all approaches followed in Zimbabwe. Were the court to accede to the respondent request to find that the foreign judgment is contrary to public policy, it would be doing so on the basis as argued by the respondent that the Zambian court erred on the merits when it substituted the respondent and not on the basis that it is contrary to public policy to substitute a party after judgment. I have also considered that if the court were to the enquire in detail into whether there were exceptional circumstances justifying the substitution, it would be going into the merits of the Zambian judgment. This court has no entitlement to sit as an appeal court and review the ruling of the Zambian court. See *Doha Bank Dubai Q.P.S.C* v *Muhammed Qaqbool Abdul Rauf & Anor* HH 320-20. I am unable to say that the foreign judgment was made on a basis not recognized in Zimbabwe and is contrary to public policy.

Is the judgment final and conclusive

The respondent sought to appeal and did not pursue its appeal. What makes the judgment final and conclusive in its effect is that the appeal was not pursued. The time for filing an appeal against the ruling can only have expired. The foreign judgment is therefore final and conclusive in its effect.

The fact that the court may not have dealt with some part of the claim is of no consequence and is the applicant's problem. The recognition and enforcement of the judgment by our courts would not be contrary to public policy based on the facts as placed before the Zambian Court . Zimbabwean courts are entitled to register and enforce foreign judgments in the currency in which the foreign court quantified the judgment debt. A court registering a foreign judgment is required to register it as it is. It has no mandate to vary or change the terms of the order granted. The judgment to be registered is the original judgment with the necessary changes made to it.

Consequently, the applicant has shown an entitlement to the order sought. In the result it is ordered as follows:

1. The judgment of the High Court of Zambia No 2010/HP/779 handed down at Lusaka on 17 May 2013 as read with the order for substitution of the respondent be and is hereby registered as a judgment of this court.
2. The respondent to pay costs of suit

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