IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NUMBER OF 2001

BETWEEN

NICOLAAS ALBERTUS HEYNS PLAINTIFF

AND

JOHN DEMETRIOU DEFENDANT

CORAM: D F MWAUNGULU (JUDGE)

Mbendera, a legal practitioner, for the applicant/defendant

Msisha, S.C., legal practitioner, for the respondent/plaintiff

Kaundama, the official court interpreter

Mwaungulu, J

ORDER

Mr. Demetriou applies under rule 14 of the British and Commonwealth Judgements Rules, to set aside a foreign judgement of the Magistrate Court of the District of Belleville in Cape Town Mr. Heyns registered in this Court on 11th October, 2000. Mr. Heyns applied and this Court granted the order on an ex parte originating summons. Mr. Mbendera, Mr. Demetriou's legal practitioner, makes, correctly in my view, two points for his client. First, the President has not, under the British and Commonwealth Judgements Act, 1922, and I add the Judgement Extension Act, 1922, extended the Act to South Africa. The second point, not applicable to the Judgement Extension Act, 1922, is that here, assuming the British and Commonwealth Judgements Act applies to South Africa, the judgement was not from a superior court.

Mr. Msisha, Mr. Heyn's legal practitioner, concedes the foreign judgement, for the reasons Mr. Mbendera gives, should not have been registered. He submits the mode of commencing proceedings was irregular for which the registration should be set aside. He contends the proceedings should not be set aside because the irregularity never nullified

the proceedings. He therefore urges this Court, rather than set aside the proceedings wholly, to make any order appropriate to justice.

The affidavits show that Mr. Heyns, a South African, and Mr. Demetriou, a Greek national staying in Malawi, were long in business till now. Mr. Heyns lent Mr. Demetriou money. Mr. Demetriou has not paid. Mr. Heyns obtained a judgement in a South African Court and came here to enforce it. His lawyers registered the judgement under the British and Commonwealth Judgement Act

This Court's jurisdiction over foreign judgements is statutory and common law. Three statutes cover the matter, the British and Commonwealth Judgements Act, 1922, the Judgement Extension Ordinance, 1922 and the Service of Process and Enforcement of Judgements Act. The statutes do not cover South Africa. The Judgement Extension Ordinance 1922 replaced the 1912 Ordinance which itself repealed the 1903 Ordinance and covered Kenya, Uganda, Tanganyika (now Tanzania), Northern Rhodesia (now Zambia) and Zanzibar. It certainly never covered South Africa. Section 6 (1) provides for extension to other countries. There has been no extension to South Africa. The Service of Process and Execution of Judgements Act, 1957 covered Zambia and Southern Rhodesia (now Zimbabwe). These statutes recognise judgements of all levels of courts in countries they apply. They differ from the British and Commonwealth Judgements Act in this respect.

The British and Commonwealth Judgements Act only covers foreign superior court judgements. It applies to judgements of superior courts in the United Kingdom. Section 10 allows extension to Commonwealth countries. Mr. Mbendera submits that this judgement could not be registered because the Act does not cover South Africa. Even if the Act covered South Africa, Mr. Mbendera contends, it cannot cover a judgement admittedly not of a superior court.

Rule 14 of the British and Commonwealth Judgements Rules provides for setting aside of registration and this Court's powers on such an application:

“ The judgement debtor may at any time within the time limited by the order giving leave to register after service on him of the notice of the registration of the judgment apply by summons to a judge to set aside the registration or to suspend execution on the judgement and the judge on such application if satisfied that the case comes within one of the cases in which under section 4 of the Ordinance no judgement can be ordered to be registered or that it is not just or convenient or for some other sufficient reason may order that the registration be set aside or execution on the judgement suspended either unconditionally or on such terms as he shall direct:

Provided that the judge may allow the application to be made at any time after the expiration of the time herein mentioned.”

Mr. Mbendera realised the first hurdle is he did not apply timeously. He argues though that the rule allows applications after the time. Mr. Msisha, as far as I remember, never pressed the time argument. That is understandable. This Court's approach is that if one wants more time to apply for an order, the court is ready to hear the substantive application. Invariably, the reasons for extending time are linked to the chances of success of the actual application sought. More importantly, what happened could clearly not be done under the Act. Mr. Msisha's condescendence to the time argument is characteristic of senior counsel. The question then is what should this Court do in the circumstances. Mr. Msisha and Mr. Mbendera differ on this point.

Mr. Mbendera wants either of two orders. First he wants the time extended for Mr. Demetriou to contest the various matters raised in the affidavit and argument. That however can only be possible if the British and Commonwealth Judgements Act covers South Africa. It does not. If it did, under the Act, Mr. Demetriou can challenge these aspects here. Mr. Demetriou's steps are those South African lawyers advised him in the letter Mr. Demetriou exhibited in his affidavit. The South African lawyers advised that, besides that Mr. Demetriou took too long to apply to set aside the judgement, there will be a tough contest. Mr. Demetriou informed the lawyers he could not pay lawyers' fees and, I suppose, Mr. Heyn's lawyers' fees. As we speak, he has not applied to South African courts to rescind the judgement. If the British and Commonwealth Judgements Act applied to South Africa, I would under the provision have allowed that, albeit extremely reluctantly, despite the procrastination the recourse entails.

This recourse would allow Mr. Demetriou to go to South Africa to challenge the proceedings. If he is right, definitely, he is vindicated and justice served. If Mr. Demetriou is proved wrong or Mr. Demetriou, having had this action out of the way, decides not to contest the South African judgement, not an unlikely scenario from what we know now, Mr. Heyns will return to this country's courts to enforce the judgement. On this second journey, Mr. Heyns, because The British and Commonwealth Judgements Act and the Judgement Extension Ordinance do not apply to South Africa, will not proceed under the statute. He will be wiser this time to invoke the common law jurisdiction.

Besides the British and Commonwealth Act and the Judgment Extension Ordinance, courts at common law enforce foreign judgments. The power depends not on comity or reciprocity but on the defendant's duty to the court of the judgment and the contract. In Schibsby v Westernholz [1861 – 73] All E.R. Rep. 988, 991, Blackburn, J., said:

"We think that, for the reasons there given (3) the true principle on which the judgments of foreign tribunals are enforced in England is that stated by PARKE, B., in Russell v Smyth (4), and again repeated by him in Williams v Jones (5), that the judgment of a court of competent jurisdiction over the defendant imposes a duty or obligation on the

defendant to pay the sum for which judgment is given, which the courts in this country are bound to enforce; and, consequently, that anything which negatives that duty, or forms a legal excuse for not performing it, is a defence to the action. We were much pressed on the argument with the fact that the British legislature has, by the Common Law Procedure Act, 1852, s. 19, conferred on our courts a power of summoning foreigners, under certain circumstances, to appear, and, in case they do not, giving judgment against them by default. It was this consideration principally which induced me at the trial to entertain the opinion which I then expressed and have since changed.

We think that if the principle on which foreign judgments were enforced was that which is loosely called "comity," we could hardly decline to enforce a foreign judgment given in France against a resident in Great Britain under circumstances hardly, if at all, distinguishable from those under which we, mutatis mutandis, might give judgment against a resident in France; but it is quite different if the principle be that which we have just laid down."

Our courts recognise foreign judgments because the defendant is bound by the foreign court's jurisdiction over him. If the defendant could have been under no duty to the foreign courts, as where that court had no jurisdiction on the defendant our courts will not enforce the judgment. Justice Blackburn continued at 992:

"On this, we think some things are clear on principle. If the defendants had been, at the time of the judgment, subjects of the country whose judgment is sought to be enforced against them, we think that its laws would have bound them. Again, if the defendants had been at the time when the suit was commenced resident in the country, so as to have the benefit of its laws protecting them, or, as it is sometimes expressed, owing temporary allegiance to that country, we think that its laws would have bound them. If at the time when the obligation was contracted the defendants were within the foreign country, but left it before the suit was instituted, we should be inclined to think that the laws of that country bound them, though, before finally deciding this, we should like to hear the question argued. Every one of those suppositions is, however, negatived in the present case. Again, we think it clear, upon principle, that if a person, as plaintiff, selected the tribunal of a foreign country as the one in which he would sue, he could not afterwards say that the judgment of that tribunal was not binding upon him."

In Emmanuel v Symon [1908] IKB 302, Buckley, L.J., describes the circumstances in which courts enforce foreign court judgment:

"In actions in personam there are five cases in which the court of this country will enforce a foreign judgment, (1) Where the defendant is a subject of the foreign country in which the judgment has been obtained; (ii) where he was resident in the foreign country when the action began; (iii) where the defendant in the character of plaintiff has selected

the forum in which he is afterwards sued, (iv) where he has voluntarily appeared; and (v) where he has contracted to submit himself to the forum in which the judgment was obtained. The question in the present case is whether there is yet another and a sixth case."

Certainly the applicant here contracted to submit to South African courts' jurisdiction:

"The Mortgagor/s consent/s in terms of Section 45 of Act 32 1944 to the Mortgages taking any legal proceedings for enforcing any of its rights under this Bond for recovery of moneys claimable under this Bond or otherwise in the Magistrate's Court of any District having jurisdiction in respect of the Mortgagor/s by virtue of Section 28 (1) of the aforesaid Act."

Mr. Mbendera contends that the action for money is unrelated to the mortgage. Mr. Heyns, having acted on the mortgage, Mr. Mbendera argued, cannot therefore rely on this provision. The disconnection of the loan amount from the mortgage when the mortgaged property is security for the amount lent is a difficult if not strange argument on the facts. It suggests a mortgagee cannot pursue the remainder of the loan when the security is insufficient to satisfy the debt. More importantly, this judgment is final, although a default judgment, for purposes of recognition by this court. This Court cannot, at least at this stage, countenance the arguments Mr. Mbendera now raises about a judgement, on the face of it, valid in a foreign jurisdiction.

Lord Justice Widger in Societe Cooperative etc v Titan, [1965] 3 All E.R. 494, 496 states the common law procedure for enforcing foreign judgements:

"On the other hand, it is equally clear that for many years the common law had recognised in appropriate circumstances that a judgment obtained abroad might be enforced by action in this country. That involved, in the appropriate circumstances, the issue of a writ in this country claiming the amount of the foreign judgment and setting up the foreign judgment either as the cause of action or as a conclusive proof of the existence of the original cause of action. By those means, in the cases which at common law were appropriate, judgment could be obtained in the English action for an amount equivalent to the foreign judgment, and the English judgment was then enforceable in the ordinary way."

The action is by writ of summons. Unlike the statutory procedure, at common law, the judgement creditor cannot enforce a foreign judgement directly by execution or any other process. Between the parties, a foreign judgement creates a debt (Walker v Witter, (1778) 1 Doug K B 1; and Grant v Easton (1883) 13 QBD 302). The debtor's liability stems from an implied promise to pay the amount of the foreign judgement (Grant v Easton).

If Mr. Heyns proceeded on this Court's common law jurisdiction, the difficulties Mr. Demetrious' present application raises would not have been. For only subject to three exceptions, not available here, namely, a judgement obtained by fraud (Ochsenbein v Papelier (1873) 8 Ch App 695; Ellerman Lines Ltd. v Read [1928] 2 K B 144), a judgement contrary to public policy (Re Maccartney, Macfarlane v Maccartney [1921] 1 Ch 522) and a judgement obtained in proceedings contrary to natural justice (Buchanan v Rucker (1808) 9 East 192; and Jacobson v Frachon (1927) 138 L T 386, between the parties, a final and conclusive judgement of a competent foreign court is conclusive in Malawi. In that respect, a default judgement, even if the foreign court may set it aside, may be final and conclusive (Vanquelin v Bouard (1863) 15 CBNS 341).

Of the three, this Court, if it should consider any, can only consider the third. Mr. Demetriou does not suggest Mr. Heyns obtained the judgement fraudulently. The judgement was for a debt, a secured debt. There may be dispute as to the amount. That does not suggest fraud. Equally, a debt action cannot be contrary to public policy. It is the possibility that the judgement was obtained without regard to rules of natural justice that may be considered. On the authorities, that suggestion is untenable to Mr. Demetriou. Many authorities decide that, if the defendant agreed to submit to a foreign court's jurisdiction, he is deemed to agree to submit to a foreign court's procedure rules and bound by the judgement though he may not have had notice of the proceedings (Vallee v Dumergue (1849) 4 Exch 290; Bank of Australia v Harding (1850) 9 C B 661; Bank of Australia v Nias (1851) 16 Q B D 717; Feyerick v Hubbard (1902) 71 LJKB 509; and Jeanot v Fuerst (1909) 100 L T 816). Here, as seen, This Court will recognise the South African court's jurisdiction, as in Feyerick v Hubbard and Jeanot v Fuerst, because Mr. Demetriou agreed to submit to the South African Court's jurisdiction by contracting that disputes about the mortgage are to be referred to the court in the jurisdiction of the property. Absent the excepting circumstances, this Court recognises finality of foreign judgements. Mr. Demetriou bears the burden of impeaching the foreign judgement (Alivon v Furnival (1834) I Cr. M & R 277 and Bank of Australia v Nias). More importantly, a default judgement cannot be impeached for offending rules of natural justice. A foreign default judgement, even if the court can set it aside, is conclusive in this Court between the parties

As seen, Mr. Heyns would have proceeded by action on a writ of summons under the common law jurisdiction. I pay particular attention to Blackburn, J.'s words in Schibsby v Westernholz that "the judgement of a court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which judgment is given, which the courts in this country are bound to enforce; and, consequently, that anything which negatives that duty, or forms a legal excuse for not performing it, is a defence to the action." The latter part of the judgement suggests, in my judgement, that the court should entertain a foreign judgement action and the judgement debtor must raise as defences to that action all matters negating the defendant's obligations under the foreign judgement. This is the same procedure for registration of judgements under

statutes. On this Court's common law jurisdiction, Mr. Heyns had to commence the action by a writ of summons. Mr. Demetriou had to put all the matters he raises against the judgement as defences to the action. Mr. Heyns erroneously proceeded under the British and Commonwealth Judgements Act.

Mr. Msisha contends that whatever happened here was an irregularity and should be treated under Order 2 of the Rules of the Supreme Court. Mr. Mbendera contends otherwise. I had some difficulty appreciating arguments for and against applying the rule in this matter. Mr. Msisha's list of authorities, however, had two pertinent cases he never argued fully. The starting point is probably Order 2 of the Rules of the Supreme Court:

"1.-(1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of any thing done or left undone, been a failure to comply with the requirements of these rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.

(2) Subject to paragraph (3) the Court may, on the ground that there has been such a failure as is mentioned in paragraph (1) and on such terms as to costs or otherwise as it thinks just, set aside either wholly or in part the proceedings in which the failure occurred, any step taken in those proceedings or any document, judgment or order therein or exercise its powers under these rules to allow such amendments (if any) to be made and to make such order (if any) dealing with the proceedings generally as it thinks fit.

(3) The Court shall not wholly set aside any proceedings or the writ or other originating process by which they were begun by an originating process other than the one employed."

There are instances outside the scope of this rule. A statute could expressly or impliedly exclude this rule so that errors or omissions stultify or nullify the proceedings. The British and Commonwealth Judgements Act never expressly or impliedly provides that errors or omissions to comply with it or rules made under it nullify or vitiate the proceedings. Rule 14 of the British and Commonwealth Judgement Rules gives a wide discretion concerning what this Court can do on an application to set aside the registration. This latitude is inconceivable if the legislature intended errors in commencing proceedings under it nullify the proceedings. The British and Commonwealth Judgments Act does not provide that erroneously commenced proceedings are null and void. On the other hand the rules under the Act give a wide discretion to the Court.

In my judgment there are instances where failure to comply with a statute or rules thereunder would be treated as an irregularity in the domain of Order 2 of the Rules of

the Supreme Court. Two decisions suggest this.

Besides, read closely, Order 1, dealing with application of the rules, covers errors and omissions in proceedings under statutes or under Rules of the Supreme Court.

Order 1 rule 2(1) provides that subject to paragraph (2) these rules shall have effect in relation to all the proceedings in the High Court and the Civil Division of the Court of Appeal. In my judgment, whether they be under statutes or common law, if the proceedings are in this Court, the Rules of the Supreme Court apply. In Bauman, Hinde & Co. Ltd. v David Whitehead and Sons Ltd. (Civ. Cas. No. 2109 of 1996, unreported) this court, in relation to order 73, rule 8 and Order 71 of the Rules of the Supreme Court, said that "not only is the order based on the statute before 1902, the British and Colonial Judgment Ordinance created its own rules which, in my judgment, have to be read alongside Order 71 of the Rules of the Supreme Court."

Order 1, rule 2 of the Rules of the Supreme Court mentions the statutes to whose proceedings Rules of the Supreme Court never apply. The table excludes proceedings under the Foreign Judgment (Reciprocal Enforcement) Act 1933 and the Administration of Justice Act 1920, the precursors to the British and Commonwealth Judgment Act and the Judgment Extension Act. The Rules of the Supreme Court therefore cover, with appropriate modification by other rules or statutes, proceedings under statutes other than statutes contained in the table.

Order 2 of the Rules of the Supreme Court, when advanced in 1966, was understood and welcomed as introducing a replete power to this Court and the Supreme Court to do justice to the parties where parties are guilty of procedural errors or omissions. The rule received generous interpretation to cover many procedural mistakes or omissions when commencing and throughout proceedings. In Metroinvest Ansalt and others v. Commercial Union Assurance Co. Ltd. [1985] 1 W L R 513, 521, Cumming- Bruce, L.J., said:

"I would say that in most cases the way in which the court exercises its powers under Ord. 2, r. 1(2) is likely to depend upon whether it appears that the opposite party has suffered prejudice as a direct consequence of the particular irregularity, that is to say, the particular failure to comply with the rules. But I would construe Ord. 2, r. 1(2) as being so framed as to give the court the widest possible power in order to do justice."

Lord Justice Denning, M.R., in Harknes v Bell's Asbestos and Engineering Ltd. 1966, 3 All ER 843, 845 was more exultant.

"This rule should be construed widely and generously to give effect to its manifest intentions. I think that any application to the court, however informal, is a 'proceeding.'"

An application under statute is, therefore, a ‘proceeding’ under the Rules of the Supreme Court. An application for registration of a foreign judgement under the Judgement Extension Act, The British and Commonwealth Judgements Act and the Reciprocity of Judgements Act are therefore proceedings to which Order 2 of the Rules of the Supreme Court applies.

In Harknes v Bell’s Asbestos and Engineering Ltd. counsel submitted there were irregularities according to statute and the rules. On the particular facts and statute, the Master of Rolls concluded there had not been a non-compliance with the statute. The Master of Rolls however said, at page 845:

“Second, it was said that the failure was not merely a failure to comply with the requirements of the rules [which require the application to be made to a judge in chambers in person]. There was a failure, it was said, to comply with the statute, because section 2 (1) says that the application shall be made to the court; and “the court”, it is said, means a judgment in open court. I do not think this is right. In a section dealing with procedure, the “court” includes a judge in chambers; and when it includes a judge in chambers, it includes also a master or district registrar, who are his delegates. The statute was, therefore, complied with. The only requirement which was overlooked was the requirement of the rules, namely, R.S.C., Order 128, rule 1 (1), that the jurisdiction was to be exercised by the judge in chambers in person.”

A failure to comply with that rule is under the new rule to be treated as an irregularity and not as a nullity. The ratio decidendi, which does not differentiate between statutory proceedings and proceedings based on the Rules, is at page 845:

“Every omission or mistake in practice or procedure is henceforward to be regarded as an irregularity which the court can and should rectify so long as it can do so without injustice. It can at last be asserted that ‘it is not possible ¼ for an honest litigant in Her Majesty’s Supreme Court to be defeated by any mere technicality, any slip, any mistaken step in his litigation’”

This rule gives wide powers to the court to remedy procedural errors or omissions. Mr. Msisha argues that, even if the rules never gave such power, this Court should resort to its inherent powers to do things this rule suggests. Mr. Mbendera, however, if I understand his argument correctly, submits that the court never invokes its inherent jurisdiction where a rule provides a power. I see nothing in principle and practice why a court cannot invoke one or a combination of inherent power and another rules give. Courts grant orders on both jurisdictions. Parties in fact apply for the Court to invoke either jurisdiction or both.

It is un necessary to invoke the inherent jurisdiction of the court here. Courts have a duty and power, however, to regulate their procedure and provide, where none exist,

procedures to afford substantive justice and full realisation of rights. Courts should, in my judgment, have inherent power to affect errors and omissions affecting realisation of rights and attainment of substantive justice. This Court's rules however provide wide powers for correction of procedural errors and omissions. Apart from Order 2, Order 20, rule 8 provides:

"For the purpose of determining the real question in controversy between the parties to any proceedings, or of correcting any defect or error in any proceeding, the court may at any stage of the proceedings and either of its own motion or on the application of any party to the proceedings or that any document in the proceedings to be amended on such terms as to costs or otherwise as may be just in such manner (if any) as it may direct."

Authors of the Supreme Court Practice, 1999 ed., Sweet & Maxwell, commenting on amendment by the court of its own motion under this rule, state at page 378:

"The rule enables the court, by persuasion, if possible, and, by order, if necessary to raise the real point and issue between the parties and to ensure that its proceedings are free from errors and omissions."

As observed, this magnanimity or beneficence is, besides the Rules of the Supreme Court, the hallmark of the British and Commonwealth judgment Rules.

To appreciate the order made here, one must contemplate the justice Mr. Heyns seeks in our courts of justice. Mr. Demetriou has not paid money Mr. Heyns lent him. Mr. Heyns obtained a judgment in a competent court in the Republic of South Africa. That judgment, as we speak, has not been rescinded and remains valid there. This Court cannot question the efficacy of a judgment of a foreign court with competent jurisdiction. He arrives in Malawi. He seeks legal advice to enforce the judgment he obtained in South Africa. Under our law he has three procedures, if not more, of enforcing that judgment. He can proceed under the general common law jurisdiction where he must commence an action on the judgment by writ of summons. He can also proceed by originating summons under various statutes if they cover his country. The relevant statute or statutes and government notices affecting the statutes, as seen, are obscure and difficult to find. Mr. Heyns has adopted an erroneous procedure to enforce the foreign judgement. Instead of commencing his action under the common law jurisdiction by issuing a writ of summons, Mr. Heyns commences an action by originating summons under an erroneous statute.

First, this court can as it were hold the proceedings null and void. One effect of that would be that these proceedings would end here and Mr. Heyns would the next day, or shortly after now, properly commence the action under the common law procedure.

Second, this court could accept the irregularity, sustain these proceedings and require Mr. Heyns to commence the proceedings properly. Thirdly, the Court could decline to set aside the proceedings and make such order as meet the justice of the case. In my judgement Order 2, rules 1 and 2 deprecate the first two approaches. Under Order 2, rule 3 the Court cannot wholly set aside any proceedings or the writ or other originating process by which they were begun because of an error in the originating process employed. The third option appeals to this Court. It agrees with the spirit of the rules and practice as I have indicated and affords the justice that this court is supposed to uphold. I therefore set aside the registration and order that these proceedings be as if Mr. Heyns proceeded under the common law jurisdiction by issuing a writ. The affidavit in support of the application, subject to amendment, will be Mr. Heyn's statement of the case. Mr. Demetriou can thereafter, assuming, of course, the plaintiff fails to obtain a summary judgement, set up whatever defences to Mr. Heyn's action on the judgement.

Made in open court this 10th Day of September 2001.

D F Mwaungulu

JUDGE