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 HC 8191/2002
 VEHICLE DELIVERY SERVICES (ZIMBABWE) (PRIVATE) LIMITED
 versus
 GALAUN HOLDINGS LIMITED

HIGH COURT OF ZIMBABWE
 HUNGWE J,
 HARARE, 29 May and 8 October, 2003

Mr E W Morris for plaintiff
Mr Paul for defendant

HUNGWE J: The respondent sued the applicant in the High Court of Zambia for certain damages arising out of a motor vehicle accident. It obtained judgment against applicant in Zambia on 19 June, 2002 in the sum of US\$27 970,00 and ZK6 417 562,00. That judgment remains unsatisfied.

The respondent applied to a judge in Chambers in case no HC 6704/02 for the registration of the Zambia High Court order in terms of the Civil Matters (Mutual Assistance) Act [Chapter 8:02]. On 31 January, 2003 respondent obtained leave to register the order.

In this application the applicant seeks the setting aside of that order which registered the Zambia High Court order.

Respondent opposes the application.
Applicant makes three points; viz,

- (a) that it is not Vehicle Delivery Services (Pvt) Ltd but Vehicle Delivery Services (Zimbabwe) (Private) Limited;
- (b) **Respondent proceeded against the wrong defendant in that as it was only an agent of Vehicle Delivery Services (Pty) Ltd of S.A. a disclosed principal respondent was not entitled to proceed against it but the disclosed principal;**
- (c) In any event the fact that applicant entered an appearance to defend in Zambia on its own was not sufficient to confer jurisdiction upon the Zambia High Court without an unequivocal consent by the applicant to the jurisdiction or an attachment of the applicant's property to confirm or found jurisdiction.

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On that basis applicant contends that, as there was absence of jurisdiction by the Zambian Court, enforcement of such a judgment is against public policy or contrary to law.

In response respondent maintained that applicant was correctly cited as the defendant in the Zambian action where it, through its legal practitioners in Zambia, entered appearance and filed a plea before abandoning the action. The Zambia High Court exercised jurisdiction over the matter.

Mr Paul for the respondent filed comprehensive heads dealing with the points raised by the applicant in its founding affidavit.

So exhaustive were the heads in the dealing with the question of jurisdiction that Mr Morris in his heads conceded that they were unanswerable. Indeed Mr Paul set out the law in that regard. Mr Morris only argued the case for service of summons in Zimbabwe.

The applicant however says that there was no proper service of summons in Zimbabwe hence the Zambian High Court could not have found that the matter was properly before it, if the point was raised. Whilst that argument raised by Mr Morris in his Heads sounds ingenuous, I am not persuaded to hold that the fact that there appears to be some lack of compliance with the provisions of the Civil Matters (Mutual Assistance) Act [Chapter 8:02] is fatal to the application for registration of the Zambian High Court Order.

I understood the point raised by Mr Morris in his heads, it is this. The provisions of the Civil Matters (Mutual Assistance) Act [Chapter 8:02] require that any process issued by a foreign court be endorsed by a magistrate for service in terms of our law, if he is satisfied that such process was lawfully issued by that foreign court. Since the summons issued by the High Court of Zambia was not so endorsed by the magistrate for service or served in terms of section 13 of that Act, then such process was a nullity. Since the judgment was secured in terms of this nullity there is no judgment to speak of. There is therefore nothing to register in this Court' so went the argument.

It seems to me that section 13 of the Act is complementary to other methods available to parties for the service of foreign process. It sets out the procedure which can be adopted by a foreign plaintiff if he wishes to take advantage of its provisions. It does not preclude service in some other manner allowed by law. See *Hickey v Hickey* 1957(2) R & N 504. The fact that respondent did not choose to adopt this available method of service of

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process to my mind is not fatal to its case.

Further in matters of procedure the Court applies, *lex fori*. Thus where a court has jurisdiction over a matter on the basis that the cause of action arose within the jurisdiction, that court applies the *lex fori* to determine any procedural matters as may arise in that particular case. On that basis the Zambia High Court was entitled to look at its law of procedure with regard to service. If it was satisfied that service was effected, assume jurisdiction.

In any event the applicant, from its conduct appears to have consented to jurisdiction of the High Court of Zambia. When served with summons, the applicant filed an appearance to defend through its Zambian attorneys. Pleadings proceeded without any objection to the Court's jurisdiction at all. Somewhere along the line it is not clear whether before or after *litis contestatio*, it defaulted and respondent took out judgment. Clearly it could not be heard to say now that it did not consent to jurisdiction. Consent to jurisdiction, once given cannot be withdrawn.

See *Purser v Sales' Purser and Another v Sales and Another* 2002(3) SA 445. Respondent urged me to find that since applicant had not raised the question of service as an issue in its application and proceeded to seek condonation of its own irregularity, this Court ought to also condone whatever irregularity there might appear to be in the service of the summons by respondent. The papers show that service was effected on the applicant. Applicant reacted to that service. It was acceptable service, so it could seem, according to the laws of Zambia. I am of the view that to uphold that correct service was effected would enhance the efficacy of the Rules of Court. Even if I were wrong in holding that view, it is within the Court's discretion to condone the failure to comply with directory provision of the Act.

I can exercise that discretion in favour of the respondent if I am satisfied that it enhances the efficacy of the Rules of Court. In the present case, the facts show that applicant committed a delict in Zambia. It was sued by respondent. It defended that action in the Zambian Courts. It now resists execution of a judgment obtained against it in Zambia on the various grounds that it has raised. I have found against applicant.

Respondent has a judgment that was registered in this Court on 31st January 2003. Applicant in this application seeks to have the order of this Court registering that that judgment be set aside.

In the premises I am unable to find that applicant has made a case for the setting aside of the order of this Court dated 31 January, 2003. The application is therefore dismissed with costs.

Atherstone & Cook, applicant's legal practitioners
Wintertons, respondent's legal practitioners