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IN THE SUPREME COURT OF ZAMBIA

APPEAL NO. 67/2005

HOLDEN AT LUSAKA

SCZ JUDGMENT NO. 9/2007

(Civil Jurisdiction)

BETWEEN:

THE ATTORNEY GENERAL

Appellant

And

FRANK MOYO

Respondent

Coram: Chibesakunda and Chitengi, JJS. Kabalata, AJS

On 20th July, 2006 and 23rd February, 2007.

For the Appellant: Mrs. D. N. Tembo - Senior State Advocate

For the Respondents: Mr. J. Kalokoni of Messrs Kalokoni & Company

JUDGMENT

Chitengi, JS, delivered the judgment of the court.

Cases referred to: -

- 1. *Mac Naughton V Pleasure Pools Limited (1975) ZR 237***
- 2. *Ridgeway Hotel Limited V Ocaya and Another (1987) ZR 53***
- 3. *Mortimer V Cotton and Co. Kemp & Kemp the Quantum of Damages Volume 3 at Page 58663***
- 4. *Rogers V H.C. Troida Ltd Ibid at Page 58664***

In this judgment, we shall refer to the Appellant as the Respondent and the Respondent as the Applicant, which is what they were in the Court below.

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The facts of this case can be briefly stated. At the material time the Applicant was employed by the Government of the Republic of Zambia as District Administrator for Lundazi District. Clause(1) of the Applicant's terms and conditions of service provided for insurance of the Applicant while traveling on duty. The sum insured was equal to five times the Applicant's annual salary. On 12th November 2001, the Applicant was involved in a road traffic accident while traveling on duty to Chief Chitungulu's Palace. As a result of this road traffic accident the Applicant lost his right hand middle finger. At first the question arose whether the Applicant should be compensated under the Pensions Act as read with General Order 259. But later the Permanent Secretary - FMA Ministry of Finance and National Planning wrote the Permanent Secretary Eastern Province advising that Clause(1) of the Applicant's terms and conditions of service with regard to compensation should apply. Using the formula in Clause (1) of the amount of compensation worked out to K111,470,020.00. The Government of the Republic of Zambia did not pay this amount or any sum to the Applicant, hence this action.

The Applicant took out an Originating Summons for the Court to interpret Clause (1). The interpretation canvassed for by

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the Applicant is that he is entitled to compensation equal to five times his annual salary, which is K111,470,000.00.

In an Affidavit sworn by the Permanent Secretary, PSMD, the Respondent opposed the interpretation put on Clause (1) by the Applicant saying that the Applicant should be compensated in accordance with the Pensions Act and the General Orders. The other matters contained in the Affidavit in Opposition are in fact arguments which should not be contained in an Affidavit.

In a somewhat lengthy judgment the learned trial Judge held that the Applicant was entitled to compensation equal to five times his annual salary for any injury suffered while on government duty. Consequently, the learned trial Judge awarded the Applicant K111,470,020.00 damages which is the equivalent of the Applicant's salary times five. In arriving at this holding the learned trial Judge said that Clause (1) did not set the maximum or minimum amount the Applicant was to receive as compensation.

The Respondent now appeals to this Court against the judgment of the Court below. The Respondent advanced one ground of appeal. Rephrased, the ground of appeal is that the learned trial Judge erred in law and fact when he held that

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because Clause (1) of the Applicant's terms and conditions of services did not set the maximum or minimum amount the Applicant was entitled to receive as compensation for injury while on duty, the Applicant was entitled to receive as compensation for any injury suffered while on duty, an amount calculated using the formula in Clause (1).

Counsel filed written heads of argument which they augmented with brief oral submissions.

In her written submissions, Mrs. Tembo, the learned Senior State Advocate, submitted that the Respondent does not dispute the contract of service and Clause (1) of the Contract of Service which the Applicant relies upon. Mrs. Tembo then took us through definitions of insurance policy the extent of liability and indemnity, matters which in our view are not of much relevance to the determination of this appeal. The determination of this appeal turns on the interpretation of Clause (1).

With reference to this particular case, Mrs. Tembo submitted that the payment of a sum five times the annual salary of the Applicant was meant as compensation for death of the Applicant. It was Mrs. Tembo's submission that Clause (1) envisages the payment other sums varying in amount and

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depending on the nature and extent of the Applicant's injury. Finally, Mrs. Tembo submitted that having regard to the injury the Applicant suffered, he is entitled to a smaller lump sum. She pointed out that the Applicant's disability is partial and does not incapacitate the Applicant from performing any duties.

Mr. Tembo's oral submissions are a repeat of her written arguments and it is not, therefore, necessary to reproduce them.

Mr. Kalokoni, learned counsel for the Applicant, submitted that the learned trial Judge was on firm ground when he awarded the Applicant K111,470,020.00 as compensation for loss of the right middle finger in line with Clause (1) of the terms and conditions of service because the conditions of service did not set the maximum and minimum amount payable under Clause (1).

Mr. Kalokoni then raised issues relating to payment under the Pensions Act and General Orders. Further, Mr. Kalokoni raised issues relating to use of parole evidence to interpret written contracts. As we understand the ground of appeal, these are non-issues. The ground of appeal is clear. The determination of the appeal as we have already said, turns on

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the interpretation of Clause (1). In other words, does Clause (1) mean that whatever injury the Applicant suffers he is entitled to compensation equal to five times his annual salary?

In his oral submissions, Mr. Kalokoni also repeated his written arguments and emphasized that Clause (1) is very clear. Further, Mr. Kalokoni said that where the terms are ambiguous they should be interpreted against the State.

We have carefully considered the Affidavit evidence that was before the learned trial Judge, the submissions of counsel and the judgment appealed against. As we have repeatedly said the determination of this appeal turns on the interpretation of Clause(i) of the terms and conditions of service under which the Applicant worked: Clause (i) reads: -

“While traveling on duty, the Government will insure you for a sum equal to five(5) times your annual salary.”

Literally interpreted, the learned trial Judge, as Mr. Kalokoni submitted, would be on firm ground to hold that the Applicant was entitled to compensation equal to the five times his annual salary for loss of one finger. But is that what Clause (i) actually means? We are firm in our minds that that is not what Clause (i) actually means. If the maxim of literal

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meaning interpretation is adopted it would lead to an absurdity. We must depart from the literal meaning rule of interpretation. As **Jessel M R** said in the old case of **Wallis V Smith⁽¹⁾**

“You may depart from the literal meaning of words, if reading the words literally leads to an absurdity.”

If we applied the literal meaning to Clause(i), as that learned trial Judge did and as Mr. Kalokoni argued and submitted, it would lead to absurdity. We are told that in the road traffic accident in which the Applicant lost his right middle finger, one person lost his life. If the person who died was also in the position of the Applicant we would have a situation where the estate of the deceased would get compensation for loss of life equal to that got by the Applicant who only lost his right middle finger. That would be extremely absurd and any court interpreting Clause(i) using the literal meaning would be accused of putting no value on the most precious property one has, life. On a complete reading of Clause (I) we have no doubt whatever in our minds that the amount of compensation will depend upon the seriousness of the injury, with death attracting the maximum compensation of five times the Applicant's annual salary.

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For these reasons we reverse the learned trial Judge's judgment which awarded the Applicant compensation equivalent to five times the Applicant's annual salary. We are, therefore, now at large to determine the appropriate compensation due to the Applicant for loss of a right middle finger.

The case before the learned trial Judge was clearly one of personal injuries. We have dealt with many cases of personal injuries involving loss of limbs and parts of the limbs. In **Mac Naughton V Pleasure Pools Limited⁽¹⁾** we awarded the Plaintiff K1,500.00 for injury to his left knee resulting in loss of 10 degrees of flexion of the knee. The date of award was May 1979. In **Ridgeway Hotel Limited V Ocayu and Another⁽²⁾**, we awarded the Plaintiff K6,500.00 for injury to the left index finger resulting in a permanent disability to the finger in that there was restriction of the flexion. The date of the award was April, 1987.

We have also looked at English cases reported in Kemp and Kemp. In the case of **Mortimer V Cotton and Co.⁽³⁾** the Plaintiff was awarded £3,250 for partial amputation of the right middle finger. In **Rogers V.H.C. Troidahl Limited⁽⁴⁾** the Plaintiff was awarded £4,000 general damages for pain and suffering and loss of amenity The date of award in **Mortimer**

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was March 1980 while the date of award in *Rogers* was November 1982. These dates are more or less the same as the date in the *Mac Naughton case*⁽¹⁾.

We have looked to the English cases for guidance. But, as we said in the *Ridgeway case*⁽²⁾, in comparing English awards it is unrealistic to carry out a simple arithmetic calculation concerning the value of the English pound against the Zambian Kwacha at any one time, because the purchasing power of the two currencies is different in the two countries.

We now deal with the injury suffered by the Plaintiff in this case. The Plaintiff lost the right middle finger. In the simplicity approach the Plaintiff took about his case, he did not place before the court below detailed medical evidence as to how the loss of the right middle finger would affect the ability and amenity of his right hand. The emphasis appears to have been only on the loss of the right middle finger. Of course the loss of a finger is a spectacular injury, but it is always helpful to the court to know how the injury will affect the amenity of the injured part of the body.

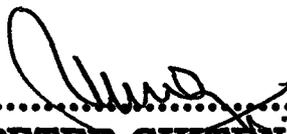
Having considered the Zambian cases we have referred to and the guidance we have sought from English cases and taking into account the inflation rate from the date of the Zambian

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awards we have, we are satisfied that an award of K20,000,000.00 will be adequate damages for loss of right middle finger. Accordingly, we award the Plaintiff K20,000,000.00. The award will carry interest at the average short-term deposit from date of the summons to the date of judgment and thereafter at the average lending rate as determined by the Bank of Zambia.

The appeal, therefore, succeeds. Having regard to the circumstances of this case we make no order as to costs.


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L.P. CHIBESAKUNDA
SUPREME COURT JUDGE


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PETER CHITENGI
SUPREME COURT JUDGE


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T. A. KABALATA
AG/SUPREME COURT JUDGE