GEORGINA CHANDA MUTALE AND ZAMBIA NATIONAL BUILDING SOCIETY

SUPREME COURT
NGULUBE, CJ, SAKALA, JS AND MAMBILIMA, AJS.
6TH NOVEMBER, 2001 AND 20TH FEBRUARY, 2002
(SCZ JUDGMENT No. 5 OF 2002)

Flynote:

Business Premises – Landlord and Tenant

Headnote:

The tenancy of business premises was entered into between the appellant and the respondent. The appellant was a protected tenant under the Landlord and Tenant (Business Premises) Act. The appellant fell into arrears of rent whereupon, the respondent without sanction of any court locked up the premises. The rent was eventually settled. The appellant claimed that some goods were lost or damaged but the respondent maintained the appellants goods were available and ready for collection. The trial judge found the respondents assertion unreasonable. The court below awarded K15 million plus interest at 40% per annum. It also awarded the plaintiff only 25% costs.

Held:

(i) If proof of damage at trial is inadequate, the learned trial judge should refer matter to deputy Registrar to assess damages.

(ii) The discretion to deprive a successful party of his costs be exercised judicially on grounds which are blameworthy in the conduct of the case.

Appeal allowed.

Cases referred to:-

1. Chibesakunda –v- Mahtani SCZ Judgment No. 11 of 1998.
2. Development Bank of Zambia –v- Mangele Farms Limited (1995-97) ZR 65.
3. Mary Musambo Kunda –v- The Attorney-General (1993-94) ZR 1.

For the Appellant: Dr. J. Mulwila, of Ituna Partners
For the Respondent: Mr. C.C. Chonta, of Ellis and Company

Judgment

Ngulube, C.J. delivered the judgment of the Court.

For convenience, we will refer to the appellant as the plaintiff and the respondent as the defendant, which is what they were in the action. As originally endorsed on the writ, the plaintiff was Georgina Mutale (trading as G.M. Manufacturers). The tenancy of business premises entered into was stated to be between Georgina Mutale (t/a G.M. Manufacturers) and the defendant. During the trial, it transpired that the company was incorporated as a limited liability company and the Court ordered that the substituted plaintiff be G.M. Manufacturers Limited.

The plaintiff was a protected tenant under the Landlord and Tenant (Business Premises) Act. The plaintiff fell into arrears of rent whereupon, without the sanction of any Court order, the defendant locked up the premises with all the tailoring machinery and materials inside. The

rent arrears were eventually settled. In the action, the plaintiff claimed that the goods were lost and/or damaged whereas the defendant maintained that the plaintiff's impounded goods were available and ready for collection. The learned trial Judge found the defendant's assertion to have been plainly unreasonable. The Court found that the dispute demanded no sophisticated legal brains, but to do the only reasonable thing, namely to visit the premises. The learned trail Judge described what was found there to have been just so much rubbish with nothing valuable to talk about, directing that the defendant could keep it and salvage whatever they could so that the plaintiff had to be compensated on a total loss basis. The plaintiff had lost, among other things, several industrial sewing machines; hemming machines and other tailoring machines; office furniture such as desks, cupboards, chairs, filing cabinets; besides cloth material, already tailored uniforms and several other items as set out in the list attached to the writ. There was no dispute that the items listed were the items lost. The plaintiff also claimed loss of business at K3 million per month during the period the defendant kept the goods or pretended to be still keeping the goods prior to the discovery that they were in fact either no longer there or they were in ruins.

In respect of some of the goods lost, the plaintiff presented quotations from the suppliers of new items. In respect of the loss of business, the Court observed that no proof was rendered, effectively rejecting the plea that the records were destroyed whilst locked up by the defendant. The Court was not satisfied that any acceptable proof had been offered both in respect of the value of the lost goods as at the time of the loss in 1997 as well as the loss of business. In the event, the Court decided to do the best it could by awarding a global figure of K15 million plus interest at 40% per annum. With regard to the costs of the action, the Court awarded the plaintiff only 25% of the costs, saying the pleadings had suggested that each party took a position which was grossly unrealistic.

The appeal before us is against the quantum awarded and the basis used for doing so as well as the deprivation of 75% of the costs from the successful plaintiff. On behalf of the plaintiff, Dr. Mulwila argued that it was wrong to award a global figure in respect of pecuniary and non-pecuniary losses and to do so at K15 million when the goods lost were worth over K120 million as pleaded. He submitted that the 1998 new prices given by the plaintiff could have assisted the Court to arrive at the probable value of the property in 1997 when the loss was suffered. He pointed out that the normal measure of the damages for the conversion should be the market value at the time of such conversion as affirmed by cases like **CHIBESAKUNDA –v- MAHTANI (1).** To such value may be added as a consequential loss any market increase in value between the time of the conversion and the earliest time that the action should reasonable have been brought to judgment: See the **CHIBESAKUNDA** case. Dr. Mulwila further referred us to our decision in **DEVELOPMENT BANK OF ZAMBIA –v- MANGELE FARMS LIMITED (2)** which affirmed that the value should be assessed at the time of the judgment. In sum, it was submitted that it was wrong to pluck a small global award of K15 million from the blue and which figure included the pecuniary as well as the non-pecuniary losses, contrary to the practice approved in such cases as **MARY MUSAMBO KUND A-v-ATORNEY-GENERAL (3).**

While the points made by Dr. Mulwila were basically correct, the real problem as found by the learned trial Judge was the question of proof. It was inadequate. The problem was not, as Mr. Chonta tried to suggest, to place a legal label on the cause of action such as between negligence and conversion and detinue. Indeed in England, the civil wrong of detinue has since been assimilated into conversion. Dr. Mulwila finally asked that if the proof was inadequate, the learned trial Judge should have referred the matter to the Deputy Registrar to assess the damages and to receive the detailed evidence and quotations as well as the receipts and other proof of the claims made. Mr. Chonta finally conceded that this would be the best way forward, provided the costs of reassessing are borne by the plaintiff whose initial failure to discharge the burden of proof has necessitated the fresh assessment. We agree that, in the absence of specific evidence of the value of the loss, the justice of the case would have been better served by referring the matter to the Deputy Registrar for assessment instead of giving a figure which bears no relationship to anything in particular in the case. We doubt very much that the K15 million could have been the product of, say, taking the price of new sewing machines, furniture and new clothes and depreciating it to an extent reasonably necessary to reflect the value of the new and the used goods which were actually lost. In the result, we allow this part of the appeal and set aside the assessment by the learned Judge. We remit the matter to the High Court for reassessment by the Deputy Registrar.

With regard to the appeal against the deprivation of costs, we agree with Dr. Mulwila that the discretion to deprive a successful party of his costs must be exercised judicially, on grounds which are explicable or evident and which disclose something blameworthy in the conduct of the case. No good reasons will have all the costs of the trial in the High Court save for any individual items if any that may have been ordered to be borne by the plaintiff in any event.

In sum, the appeal succeeds with costs to be taxed if not agreed. However in relation to the costs of the reassessment before the Deputy Registrar, these will be borne by the plaintiff whose failure and laxity at the original hearing has necessitated the reassessment.
