Georgina Mutale (T/A G.M. Manufacturers Limited v Zambia National Building Society.

Supreme Court
Ngulube, C.J., Sakala J.S. and Mambilima, A.J.S.
6th November, and 20th February, 2002.
(SCZ Judgment No. 5 of 2002).

Flynote

Damages – Pecuniary damages – Necessity to prove loss.

Headnote

The appellant was trading as G.M. Manufacturers. However, 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 appellant entered into a tenancy of business premises with the defendant. Thus, the appellant was a protected tenant under the Landlord and Tenant (Business Premises) Act.

The appellant fell into arrears of rent whereupon, without the sanction of any court order the respondent locked up the premises with all the tailoring machinery and materials inside.The rent arrears were eventually settled. In the action, the appellant claimed that the goods were lost and/or damaged. Whereas the defendant maintained that the appellant's impounded goods were available and ready for collection.The learned trial judge visited the premises.The learned trial judge described what was found there to have been just so much rubbish and directed that the respondent could keep it and salvage whatever they could so that the appellant had to be compensated on a total loss basis. In the event, the court decided to award a global figure of K15 million plus interest at 40% per annum. With regard to the costs of action, the court awarded the appellant 25% of the costs of action saying the pleadings had suggested that each party took a position, which was grossly unrealistic. The appeal was against the quantum awarded and the basis for doing so, as well as the deprivation of 75% of the costs from the successful party.

Held:

(i) In the absence of specific evidence of the value of the loss, justice would have been better served by referring the matter to the Deputy Registrar for assessment of damages instead of giving a figure which bears no relationship to any thing in particular in the case.

(ii) 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.

Legislation referred to:

Landlord and Tenant (Business Premises) Act Cap. 193, of the Laws of Zambia

Cases referred to:

(1) *Chibesakunda v Mahtani* SCZ Judgment No. 11 of 1998.
(2) *Development Bank of Zambia v Mangolo Farms Limited* (1995-97) Z.R. 65
(3) *Kunda v The Attorney-General* (1993-1994) Z.R. 1

Dr. Mulwila of Ituna Partners for the appellant.
C.C. Chonta of Ellis and Company for the respondent.

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, the defendant locked up the premises with all the tailoring machinery 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 trial 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 materials, 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 suppliers of new items. In respect of the loss of business, the court observed that no proof was tendered, 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 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 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 reasonably have been brought to judgment: see the *Chibesakunda* case. Dr. Mulwila further referred us to our decision in *Development Bank Of Zambia v Mangolo Farms Limited (2)* which affirmed that the value should be assessed at the time of 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 *Kunda v The Attorney-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 had 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 had 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 decision 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 were advanced below and we allow this part of the appeal also. The plaintiff 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.

Appeal allowed.