

THE ATTORNEY-GENERAL v D.G. MPUNDU (1984) Z.R. 6 (S.C.)

SUPREME COURT
SILUNGWE, C.J., NGULUBE, D.C.J., AND MUWO, J.S.
17TH NOVEMBER, 1982 AND 15TH JUNE, 1984
(S.C.Z. JUDGMENT NO. 7 OF 1984)

Flynote

Civil Procedure - Damages - Special damages- Necessity to plead.

Damages - Mental distress and inconvenience - Power of court to award damages for.

p7

Headnote

In an action for an unlawful suspension, the plaintiff was awarded K14,000 for physical inconvenience and discomfort, K5,100 for loss of promotion, and K22,000 damages arising out of the purchase of a tractor which he bought to enable him farm during the period of his suspension. The heads of loss of promotion and the purchase of a tractor were not specifically pleaded. The Attorney-General appealed.

Held:

- (i) If a plaintiff has suffered damage of a kind which is not the necessary and immediate consequence of a wrongful act, he must warn the defendant in the pleadings that the compensation claimed would extend to this special damage, thereby showing the defendant the case he has to meet.
- (ii) Damages for mental distress and inconvenience may be recovered in an action for breach of contract.

Addis v Gramophone Company Limited (11) distinguished.

Cases cited:

- (1) Perestrello E Companhia Limitada v United Paint Co., Ltd. [1969] 1 W.L.R. 570
- (2) Philipps v Philipps [1878] 4 Q.B.D. 127, 139.
- (3) Bulk Carriers of Zambia Limited v Malawo, 1975/HN/43.
- (4) Ratcliff v Evans, [1892] 2 Q.B. 528.
- (5) The Susquehanna, [1926] A.C. 655, 661.
- (6) Stroms Bruks Aktie Bolag v Hutchinson, [1905] A.C. 515.
- (7) Domsalla and Another v Barr (Trading as A B. Construction) and Others, [1969] 1 W.L.R. 630.
- (8) Ilkiw v Samuels and Others, [1963] 1 W.L.R. 991.
- (9) Hayward and another v Pullinger and Partners Limited, [1950] 1 All E.R. 581.
- (10) Livingstone v Rawyards Company [1880] 5 App. Cas. 2539.
- (11) Addis v Gramophone Company Limited, [1909] A.C. 488.

- (12) McCall v Abelesz and Another, [1976] 1 All E.R. 727.
- (13) Jarvis v Swans Tours Limited, [1973] 1 All E.R. 71 (1973) Q.B. 233.
- (14) Jackson v Horizon Holidays Limited, [1975] 3 All E.R. 92, [1975] 1 W.L.R. 1468.

Other Works referred to:

- (1) McGregor on Damages, 13th Edn, Paras. 16, 17, 18 and 19.
- (2) Odger's Principles of Pleading and Practice, 21st Edn p. 164.
p8
- (3) Solicitors' Journal of February 12, 1982, Vol. 126 pp. 94 and 95.

For the appellant: A-G Kinariwala, Senior State Advocate.
For the respondent: F. M. Jere, Fred and Company.

Judgment

SILUNGWE, C.J.: delivered the Judgment of the court.

This is an appeal against a decision of the learned Deputy Registrar of the High Court (hereinafter referred to as Deputy Registrar) wherein he awarded the respondent (then plaintiff) damages totalling K41,000.

At the material time, the respondent was, and still is a Deputy Commissioner of Police in the Zambia Police Force. On May 15th, 1980, he was suspended on half salary by his Permanent Secretary. He was, however, reinstated on July 17th, 1981. Prior to his reinstatement, the respondent brought (on October 10th, 1980) an action, by a generally endorsed writ, against the appellant (then defendant) for:

- "(1) Damages for the wrongful suspension of the plaintiff on 15th May, 1980.
- (2) A declaration that the plaintiff's suspension under Regulation 32 (1) (a) of the Police and Prison Service Commission Regulations, 1976, was unlawful and without proper justification."

The Statement Claim was couched in these terms:

- "1. The plaintiff is and was at material times employed by the Ministry of Home Affairs as a Deputy Commissioner of Police (Administration).
2. On or about 15th day of May, 1980, the Defendant through his servants or agent, namely, the Permanent Secretary, Ministry of Home Affairs, suspended the Plaintiff from his duties under the provisions of Regulation 32 (1) of the Police and Prison Service Commission Regulations, 1976.
3. At the time of the suspension there were no criminal proceedings instituted against the Plaintiff as required by the said Regulations.
4. The Plaintiff now claims:
 - (i) Damages for his wrongful suspension.
 - (ii) A declaration that the Plaintiff's suspension was unlawful.

(iii) Costs."

In his defence, the appellant denied that the respondent's suspension had been "wrongful or unlawful". He went on and averred in the third paragraph of the defences:

"3.... The Defendant, however, states that in suspending the Plaintiff the Permanent Secretary, Ministry of Home Affairs, erroneously and/or inadvertently invoked the provisions of

p9

Regulation 32 (1) (a) of the Police and Prison Service Commission Regulations. The Plaintiff was suspended in public interest with view to stop him from obstructing and/or interfering with the police investigations which were being carried out by the Plaintiff's subordinates against one Yusuf Ibrahim Ismail and Rosemary Mumba."

On July 27th, 1981, and by consent of both parties to the action, a puisne judge entered judgment in favour of the respondent but referred the assessment of damages, "if any", to the Deputy Registrar.

When the case came before the Deputy Registrar, Mr Kinariwala, learned Senior State Advocate, contended on behalf of the appellant that, although liability had been admitted (i.e. that the respondent's suspension had been wrongful), the respondent had in fact suffered no damages. He then raised a preliminary issue, namely, that the respondent could not lead evidence to prove any damages whatsoever because the damages allegedly suffered had not been specifically pleaded in the statement of claim. He cited, in support of his submission, the case of *Perestrello E Companhia Limitada v United Paint Co. Ltd.* (1), wherein it was said at page 579, letters D and E-

"a statement of claim must state specifically the relief or remedy claimed. It follows that the necessity of pleading 'damage' (meaning injury) or 'damage' (meaning the amount claimed to be recoverable), if it arises at all, does so as an example of the general requirement of any statement of claim that it shall 'put the defendants on their guard and tell them what they have to meet when the case comes on for trial' (per Cotton, L.J., in *Philipps v Philipps* (2)). Accordingly, if a plaintiff has suffered damage of a kind which is not the necessary and immediate consequence of the wrongful act, he must warn the defendant in the pleadings that the compensation claimed will extend to this damage, thus showing the defendant the case he has to meet and assisting him in computing payment into court."

In reserved ruling, the Deputy Registrar overruled the appellant's objection and proceeded to hear the respondent's evidence.

The respondent testified that, on being suspended, and having been a part-time former, he obtained loan from Zambia State Insurance Corporation Limited worth K20,000 with which to buy a tractor (let alone a K10,000 loan to spend on cattle) repayable after harvesting his maize crop. He further said that, during the period of his suspension - May 15th, 1980 to July 17th, 1981- he was in receipt of half of his salary and that, as he could not make ends meet on the reduced salary, he was obliged to depend on his relatives and friends for his own support as well as that of his family. Finally, he claimed that, by virtue of his suspension, he had lost an opportunity for promotion to the rank of

Commissioner of Police to which an officer junior to him had since been promoted. Under cross-examination, he agreed that when his suspension was lifted, he was paid all the arrears of his withheld half salary as well as of allowances.

p10

Thereafter, the Deputy Registrar gave judgment for the respondent and awarded him damages as follows:

- K
- (a) Serious physical inconvenience and discomfort 14,000
 - (b) Loss of promotion to the rank of Commissioner of Police 5,100
 - (c) Damages in anticipation of an action against breach of promise to pay back the loan out of that season's crop
(i.e. K20,000.00n plus 10 per cent interest) 22,000
- Total K41,000.00n (which should in fact have been K41,100)

The decision has been attacked on two basic grounds. The first ground is that, the Deputy Registrar erred in law in overruling the appellant's preliminary objection to the effect that the respondent could not lead any evidence to prove any damages allegedly suffered by him as those had not been specifically pleaded in the statement of claim. The second ground is that the Deputy Registrar erred in granting to the respondent what, to all intents and purposes, amounted to special damages to which he was not entitled as the same had not specifically been pleaded in the statement of claim.

On the other hand, Mr Jere, learned counsel for the respondent, maintained that the Deputy Registrar had not erred in overruling the appellant's objection on the preliminary issue and relied on a number of authorities, including a High Court decision (per Care, J.) in *Bulk Carriers of Zambia Limited v Malawo* (3) in which Order XV of the High Court Rules was cited and in which it was said, inter alia:

"The division of damages into special and general whilst begin too well entrenched to sidestep completely, is a very confusing one (per Bowen, L.J., in *Ratcliff v Evans* (4) since it has different meanings at different times so much that McGregor on Damages (13th Edition) says at p. 16 'since there is so much ambiguity in the use of the terms general and special damage they are not relied upon to any extent in this textbook."

and it was further said:

"As our own Rules indicate, there is a duty to particularise the loss.

If the parties themselves know the manner of calculation and have all along known it and can by telling the Court, allow a precise formulation of damages thus they must do so. (*Perestrello Ltd v United Paint Co. Ltd.* (1) at p. 597H). This is in this sense, of one of the fundamental rules of pleading, that there shall be full disclosure that special damage would be meant in this case, and I would here repeat and accept what Bowen L.J. said at p. 532 (*Ratcliff v Evans* (4) Supra),

"As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts

themselves

by

which

p11

the damage is alone. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry."

If one were to go by what is contained in *Bulk Carriers of Zambia Limited v Malawo*, (3) one might as well forget any distinction between general and special damages. In any event, this court is not bound by decisions of the High Court. McGregor on Damages, 13th Edition, under the heading "Terminology", discusses in paragraph 16, 17, 18 and 19, the terms "general" and "special" damages. He states that the first meaning of general and special damage concerns liability (paragraph 16) that the second meaning of these terms concerns proof (paragraph 17) and that the third meaning concerns pleading (paragraph 19). He says, *inter alia*, under paragraph 19:

"The distinction here is put thus by Lord Dunedin in *The Susquehanna* (5): 'If there be, any special damage which is attributed to the wrongful act, that special damage must be averred and proved, and, if proved, will be awarded. If the damage be general, then it must be averred that such damage has been suffered, but the quantification is jury question.' And in *Stroms Brutes Aktie Bolag v Hutchinson* (6) Lord MacNaghten, after stating that he thought the division into general and special damages was more appropriate to tort than contract, said: 'General damages' . . . are such as the law will presume to be the direct natural or probable consequence of the act complained of. 'Special damages,' on the other hand, are such as the law will not infer from the nature of the act. They do not follow in ordinary course. They are exceptional in their character and therefore, they must be claimed specially and proved strictly.' Here, pleading, general damage is wider than its second meaning, for it includes losses the amount of which the law will not presume since this is capable of calculations, and therefore evidence to assist the court in doing the calculation must be given if the plaintiff wishes to obtain substantial damages on the general head. "

The principles stated in the preceding paragraph are in line with the decisions *Perestrello E Companhia v Limitada United Paint Co. Ltd.* (1) *Domsalla and Another v Barr (Trading As B Construction) and Others* (7); *Ilkiw v Samuels and Others* (8); and *Hayward and Another v Pullinger and Partners Limited* (9). Those principles are reflected in Odgers' Principles of Pleading and Practice, 21st Edition at page 164, as follows:

"As to the allegation of damage, the distinction between special and general damage must be carefully observed. General damage such as the law will presume to be the natural or probable consequence of the defendant's act need not be specifically pleaded. It arises by inference of law and need not, therefore, be proved by evidence, and may be averred generally. In some cases however, part of the general damages which it is sought to recover may have resulted from the wrong complained of in an unexpected though foreseeable way, in which case particulars should be given

p12

so as to avoid surprise at the trial and to enable your opponent to consider making a

payment into court. Where a claim for aggravated damages is made, the facts relied on to support the claim should be pleaded; and where the claim is for exemplary damages, it must be specifically pleaded together with the facts on which the party pleading relies. Special damage, on the other hand, is such loss as the law will not presume to be the consequence of the defendant's act, but which depends in part, at least, on the special circumstances of the case. It must therefore always be explicitly claimed on the pleadings and at the trial it must be proved by evidence both that the loss was incurred and that it was the direct result of the defendant's conduct. A mere expectation or apprehension of loss is not sufficient. And no damages can be recovered for a loss actually sustained, unless it is either the natural or probable consequence of the defendant's act, or such a consequence as he in fact contemplated or could reasonably have foreseen when he so acted. All other damage is held 'remote'."

It is thus trite law that, if a plaintiff has suffered damage of a kind which is not necessary and immediate consequence of a wrongful act, he must warn the defendant in the pleadings that the compensation claimed would extend to this damage, thereby showing the defendant the case he has to meet and assisting him in computing a payment into court. The obligation to particularise his claim arises not so much because the nature of the loss is necessarily unusual but because a plaintiff who had the advantage of being able to base his claim upon a precise calculation must give the defendant access to the facts which make such calculation possible. Consequently, a mere statement that the plaintiff claims "damages" is not sufficient to let in evidence of a particular kind of loss which is not a necessary consequence of the wrongful act and of which the defendant is entitled to a fair warning. In other words, usual, ordinary or general damages may be generally pleaded; whereas, unusual or special damages may not, as these must be specifically pleaded in a statement of claim (or where necessary, in a counter-claim) and must be proved.

It follows from what we have said above that the Deputy Registrar erred in overruling the appellant's preliminary objection but only to the extent that the respondent was allowed to lead evidence to prove special damages which had not been specifically pleaded in the statement of claim. Indeed, certain heads of the special damages, especially (c) which relates to the purchase of tractor, apart from not having been specifically pleaded, was too remote as it had nothing whatsoever to do with the respondent's contract of service.

In his own evidence, the respondent testified that since his reinstatement, he had received all the arrears of his withheld half salary, as well as those relating to allowances - arrears which one would say directly flowed from his wrongful suspension and to which he was clearly entitled. The basis of awarding damages is to bring the wronged party, as far as

p13

money can do, to a position he would otherwise have been in had the wrongful act not been occasioned by the other party. In *Livingstone v Rawyard Company* (10), Lord Blackburn defined the measure of damages as:

"That sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is

now getting his compensation or reparation."

Where there are, for instance, special damages claimed, those, as we have earlier pointed out, should be specifically pleaded and proved. They were not so pleaded in the instant case and, consequently, the Deputy Registrar's award was a misdirection in law as the respondent was not entitled to them in the absence of specific pleadings to that effect. In the circumstances, the appeal succeeds and the lower court's judgment in favour of the respondent is set aside.

We are at large to consider whether the respondent is entitled to compensation under general damages for mental distress and inconvenience. *Addis v Gramophone Company Limited*, (11) was for many years authority to bar, for instance, a servant wrongfully dismissed from his employment, for recovering damages for injured feelings or loss sustained from the fact that the dismissal itself makes it more difficult for him to obtain fresh employment. This case has since been qualified and there is now a chain of authorities to support the recovery of damages for mental distress or inconvenience, for example, damages for frustration annoyance and disappointment could be recovered in an action for breach of contract. In *McCall v Abelesz and Another*, (12), it was held (per Lord Denning, M.R.) at page 731 that:

"It is now settled that the court can give damages for the mental upset and distress caused by the defendant's conduct in breach of contract. "

Jarvis v Swans Tours Limited, (13) and *Jackson v Horizon Holidays Limited*, (14) are to the same effect. There is an interesting article on the subject published in the Solicitors' Journal of February 12, 1982, Vol. 126 at page 94 and 95.)

In this case, it is quite clear that the respondent did suffer some mental distress and inconvenience as or result of the wrongful suspension for a prolonged period of time brought about by the appellant. In our opinion, the correct measure of damages to which the respondent was entitled, taking into account the fact that the breach of contract in his case did not amount to termination of contract, is K2,000.00n.

There shall be no order as to costs in this court.

Appeal allowed in part
