

IN THE COURT OF APPEAL OF ZAMBIA

APPEAL NO. 098 OF 2021

HOLDEN AT LUSAKA

(Civil Jurisdiction)

B E T W E E N:

NDUNGU CHINYAMA (T/a *Nampundwe Bakery*)

APPELLANT

AND

ZESCO LIMITED

RESPONDENT



CORAM: Siavwapa JP, Chashi, and Sichinga JJA

ON: 21st March and 26th April 2023

For the Appellant: Mutemwa Mwangala, Messrs Mutemwa Chambers

For the Respondent: N.S Phiri (Mrs) and A.Sike - In House Counsel

J U D G M E N T

CHASHI JA, delivered the Judgment of the Court.

Cases referred to:

- 1. Midlands Breweries (PVT) Limited v David Munyenyembe (2012) Vol 1 ZR, 133**
- 2. Mhango v Ngulube and Others (1983) ZR, 61**
- 3. Industrial Gases Limited v Waraf Transport Limited and Mussa Mogeehaid – SCZ Selected Judgment No. 6 of 1997**
- 4. Victor Koni v The Attorney General – SCZ Appeal No. 7 of 1990 (1990 -1992) ZR, 20**

5. *Vincent Hang'andu and Others v Lynda Mataka (suing as Administrator for the late Misozi Mataka (deceased) and Others - CAZ Appeal No. 144 of 2019*

6. *Mary Musambo Kunda v The Attorney General (1993 - 1994)*

1.0 INTRODUCTION

1.1 This is an appeal against the award by the learned Deputy Registrar, Honourable A.M Chulu on assessment of damages as per Judgment on assessment dated 18th March 2021.

1.2 In the said Judgment, the Deputy Registrar awarded damages as follows:

1. Purchase of overhead line – K10,864.84

2. Loss of business – K 20,000.00

***3. Rental claim for the overhead line –
K1,084,444.22***

2.0 BACKGROUND

2.1 The Appellant who was the plaintiff in the court below had been carrying on the business of a bakery and hammermill operation in Nampundwe Township since 1984. According to the Appellant, the business was disrupted by the Respondent who connected other

customers to the Appellant's line which resulted into low voltage electricity supply to the business premises.

2.2 On 5th February 2009, the Appellant commenced an action by way of writ of summons claiming damages for loss of business, rental income and compensation. The action culminated into execution of a consent Judgment dated 9th April 2019 couched as follows:

**“CONSENT JUDGEMENT PURSUANT TO COURT
ORDER GRANTED ON 22.02.2019**

2.3 Pursuant to the court Order granted on 27th February 2019, consent Judgment by both parties is hereby entered in favour of the plaintiff that the defendant compensates or pays the plaintiff as follows:

- (i) The agreed sum of K10,864.84 being the purchase price for the electricity overheadline between the water engine pump known as WB9 to the plaintiff's premises where the bakery and hammermill are situate in Nampundwe township;
- (ii) Damages to be assessed by the Honourable Deputy Registrar as loss of business in

- relation to the plaintiff's bakery business and hammermill business as from 1st January 2003 to 31st January 2011, the date of normalization of power supply to the plaintiff's premises in Nampundwe Township;
- (iii) Damages to be assessed by the honourable Deputy Registrar as rental claim for the plaintiffs own constructed overhead electricity line stretching from the point known as WB9 to the plaintiff's premises to which overhead line the defendant connected several of its customers in the period 1996 to 31st January 2011;
- (iv) Interest at the Bank of Zambia short term deposit rate on claims (ii) and (iii) above, from the date of the writ of summons herein, 8th February 2009 to the date of Judgment and thereafter at Bank of Zambia lending rate to date of full settlement; and
- (v) Costs of this action to be agreed or in default of agreement to be taxed.

3.0 JUDGMENT ON ASSESSMENT

3.1 In respect to damages for loss of business in relation to the plaintiff's bakery and hammermill from 1st January 2003 to 31st January 2011, which is the subject of this appeal the Deputy Registrar noted that the Appellant was claiming the sum of K4,281,075.60. In considering the damages under this head, the Deputy Registrar acknowledged that the burden to prove any allegation is on the one who alleges.

3.2 the DR cited the case of **Midlands Breweries (Pvt) Limited v David Munyenembe¹** which had been referred to by both parties in their submissions wherein the Supreme Court held as follows:

“Being a claim for special damages the Respondent should have produced receipts or some other documentary proof to show that the sum of K6,500.00 was paid as towing charges and that although a receipt was not produced to support the claim for the cost of towing, the sum of K6,500.00 which was awarded was not excessive or extravagant”

3.3 According to the Deputy Registrar, the Appellant belaboured to produce volumes of journals and some invoices for purchase of flour and other ingredients. The Deputy Registrar observed that none of the documents were receipts. The Deputy Registrar then made reference to the case of **Mhango v Ngulube and Others**² where it was stated that:

“It is of course, for any party claiming special loss to do so with evidence which makes it possible for the court to determine the value of that loss with a fair amount of certainty. As a general rule, therefore any shortcoming in the proof of a special loss should react against the claimant. However, we are aware that in Order to do justice, notwithstanding the indifference and laxity of most litigants, the courts have frequently been driven into making intelligent and inspired guesses as to the value of special losses on meager evidence. In this case it would have been easiest thing to call an expert witness, but the first plaintiff chose not to do so. The result is that, the evidence presented

to the court was unsatisfactory and in our opinion, the learned trial Judge would have been entitled either to refuse to make any award or to award a much smaller sum, if not a token amount in order to remind litigants that it is not part of the Judge's duty to establish for them what their loss is."

3.4 According to the Deputy Registrar, the journals were not authentic, due to non-existent dates which cast a doubt in her mind as to their authenticity. The Deputy Registrar opined that in order to be awarded damages for loss of business, the Appellant was required to provide unquestionable evidence to that effect. That the failure to authentically quantify the net loss must react against the Appellant. Consequently the Deputy Registrar awarded the sum of K20,000.00 taking into consideration the inflation rate.

4.0 THE APPEAL

4.1 Dissatisfied with the assessment under this head, the Appellant has appealed to this Court advancing the sole ground of appeal as follows:

“The learned Deputy Registrar misdirected herself on points of fact and law by holding that the Appellant’s sales journals were not authentic in Order to be awarded damages for loss of business”

5.0 ARGUMENTS IN SUPPORT OF THE APPEAL

5.1 In arguing the sole ground of appeal, Counsel for the Appellants drew our attention to the case of **Victor Koni v The Attorney General**³ where the Supreme Court stated as follows:

“An appellate court will not reverse the court *a quo* on award of damages unless it is shown that the latter court applied a wrong principle or misapprehend the facts or that the award was so high or so low as to be utterly unreasonable or that the estimate was so erroneous as not to reflect the damages to which the plaintiff is entitled.”

5.2 According to the Appellant, in dismissing the prayer for award of damages the Deputy Registrar took the view that the sales journals which were produced by the Appellant were not authentic and that the same were not receipts. That this was on account of two entries for

the months of April and June, which showed dates of 31/04/2001 and 31/06/2001, as a consequence proceeded to award a paltry sum of K20,000.00 as damages for loss of business for the entire period from 1st January 2003 to 31st January 2011

5.3 Counsel for the Appellant submitted that the record shows that the sales journals produced before the Deputy Registrar were for the months of February, March, April, May and June 2001. That out of these, only the months of April and June were impugned because they showed incorrect dates of 31st. It was contended that the rest of the months were correctly entered and were not in issue.

5.4 It was submitted that there was also evidence of contracts which the Appellant had entered into with Konkola Copper Mines Limited (KCM), which was not challenged at all. According to the Appellant the Deputy Registrar did not delve into the facts and give due regard to the evidence and submissions. It was submitted that the Deputy Registrar misdirected herself in rejecting the journals entirely, based on the two wrong dates. Relying on the case of **Midlands Breweries (PVT) Limited v**

David Munyenyebe², it was the Appellants submission that had the Deputy Registrar applied her mind correctly she would have found that the claim for K1,471.00 per day as loss of business was reasonable

5.5 Further relying on the **Midlands Breweries** case, the Appellant submitted that the Deputy Registrar made findings of fact and correctly so, that the Appellant was in the business of bakery and hammermill operations since 1984 and that it experienced low voltage in January 2003 as a result of the Respondent's act of connecting to the Appellant's line.

5.6 In concluding, the Appellant cited the case of **Industrial Gases Limited V Waraf Transport Limited and Mussa Mogeehaid⁴** where the Supreme Court had this to say:

"We have considered the arguments. We are aware that in Mhango (3) we propounded the general rule regarding the sufficiency of proof to support an award in respect of special losses. At the same time, we accepted that in an effort to do justice, trial Judges have been driven into making intelligent and inspired guesses on very meagre evidence. We also upheld the principles

of not interfering unless the result was so high or utterly unreasonable.”

5.7 The Appellant invited us to be at large and assess the claim for loss of business for the period from 1st January 2003 to 31st January 2011 against the backdrop of the evidence which was laid before the Deputy Registrar.

6.0 ARGUMENT IN RESPONSE TO THE APPEAL

6.1 In response to the sole ground, the Respondent submitted that the Deputy Registrar was on firm ground in awarding the Appellant the sum of K20,000.00. That it is clear from all the cases the Deputy Registrar relied upon, that the general principle espoused is to the effect that any party claiming a special loss must prove that loss with evidence to enable the court arrive at a fair amount of certainty

6.2 According to the Respondent, the Deputy Registrar critically analyzed the claim for loss of business and cannot therefore be faulted. It was submitted that the journals were produced by the Operations Manager who had not prepared them and he admitted in cross examination that there were errors. Further that apart from producing journals, there were no receipts

produced and the entries were in ink and the Respondent challenged the authenticity during trial.

6.3 With respect to the arguments that there was evidence of contracts with KCM which were not challenged, it was submitted that the issue was disputed and/or challenged as shown in paragraph (5) of the affidavit in opposition at page 224 of the record of appeal (the record). It was argued that in view of the aforestated the **Koni** case does not apply in this matter.

6.4 It was submitted that the **Midlands Breweries** case is distinguishable, as in that case there was evidence independently from the receipts, which was received evaluated and relied upon. That in the instant case, not only was documentary evidence lacking, the evidence adduced was not substantiated by oral evidence.

6.5 Reliance was placed on the case of **Mhango v Ngulube**² which the Deputy Registrar relied on and submitted that it is quite clear that the Appellant fell short of the standard espoused in that case. It was further submitted that the sum of K20,000.00 granted by the Deputy Registrar was an intelligent and inspired guess which took into consideration inflation and the Deputy

Registrar therefore cannot be faulted. We were referred to our decision in the case of **Vincent Hang'andu and Others v Lynda Mataka (suing as Administrator for the late Misozi Mataka (deceased) and Others⁵** and besieged to stand by the principle in that case

7.0 OUR DECISION

7.1 We have considered the arguments and the Judgment on assessment being impugned. Strictly speaking, the sole ground of appeal attacks the holding by the Deputy Registrar that the Appellant's sales journals were not authentic in order to be awarded damages for the loss of business in the amount they were claiming. The ground neither speaks to the contracts the Appellant had with KCM nor issues of the Deputy Registrar making an intelligent and inspired guess which were ingeniously brought in by the Appellant through its arguments. We will therefore, in our consideration, restrict ourselves to the ground of appeal.

7.2 The sales journals in issue appears at pages 164-200 of the record of appeal, for the period of 5th February 2001 to 31st June 2001 and they basically show daily total sales averaging K10,000,000 (unrebased). The learned

Deputy Registrar rightly observed that it was incumbent upon the Appellant to prove damages for loss of business. The Deputy Registrar noted that the Appellant, apart from the volume of journals produced and some invoices, failed to produce any receipts. She further noted that the Appellant's witness contradicted himself on the dates and admitted that there were errors, which cast doubt on the authenticity of the documents.

7.3 According to the Deputy Registrar, the Appellant was required to provide unquestionable evidence. The Deputy Registrar opined that the failure to authentically quantify the net loss must react against the Appellant. It is in that vain and in line with the case of **Mary Musambo Kunda v The Attorney General**⁶, that the Deputy Registrar awarded a token sum of K20,000.00 as damages for the loss of business

7.4 Since an appeal before us, is a rehearing on record, we have taken time to assess the journals in issue. Apart from the observations noted by the Deputy Registrar which we entirely agree with, we note that the said journals were hand written and in the same

handwriting. We further note that they do not show who authored them and they were not signed off. The sales journals are neither backed by receipts nor bank deposits. It is therefore difficult to preclude the contention that the journals were prepared specifically in aid of and to suit the assessment and not on the dates indicated therein.


7.5 Indeed as stated in the case of **Mhango v Ngulube**², it is for the party claiming special loss to do so with evidence which will assist the court in arriving at the value of the loss with a fair amount of certainty. It was also noted in that case that where the evidence presented is unsatisfactory, the court is entitled to refuse to make any award, or to award a much smaller sum, if not a token amount, in order to remind litigants that it is not part of the courts to establish for them what their loss is.

7.6 In this case, the evidence which was produced by the Appellants was not satisfactory, as in the words of the Deputy Registrar, the sales journals on which the Appellant relied to prove the quantification of damages

for loss of business were not authentic. We see no basis on which to fault the holding by the Deputy Registrar. In the view that we have taken, the sole ground of appeal fails for lack of merit.

8.0 CONCLUSION

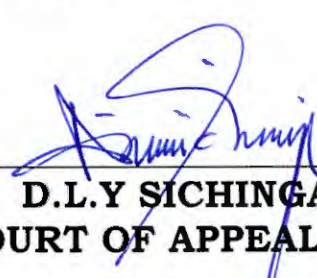
8.1 The Appeal is devoid of merit and is accordingly dismissed with costs to the Respondent same to be taxed in default of agreement and are to be restricted to out of pocket expenses.



J. CHASHI
COURT OF APPEAL JUDGE



M.J. SIAVWAPA
JUDGE PRESIDENT



D.L.Y SICHINGA, SC
COURT OF APPEAL JUDGE