IN THE SUPREME COURT OF ZAMBIA

HOLDEN AT LUSAKA

(CIVIL JURISDICTION)

B E T W E E N :

PAUL ROLAND HARRISON — APPELLANT

AND

THE ATTORNEY-GENERAL — RESPONDENT

Coram: Sakala, Chirwa and Muzyamba, J.J.J.S.

26th October and 2nd December, 1993

For the Appellant : N. Kawanambulu, Nosiku Kawanambulu and Co.

For the Respondent : A.G. Kinariwala, Principal State Advocate

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J U D G M E N T

Muzyamba, J.S. delivered the judgment of the court

Cases referred to:

1. PATON V ATTORNEY-GENERAL 1968 Z.R. 185
2. TIMES NEWSPAPERS ZAMBIA LIMITED V LEE CHISULO 1984 Z.R. 83
3. TIMES NEWSPAPERS ZAMBIA LIMITED Vs S. KAPWEPWE 1973 Z.R. 292
4. ELIYA MWANZA Vs. ZAMBIA PUBLISHING COMPANY LIMITED 1979 Z.R. 76
5. ATTORNEY-GENERAL Vs. D.G. MPUNDU 1984 Z.R. 6
6. KAPWEPWE Vs. ZAMBIA PUBLISHING CO. LTD 1978 Z.R. 15
7. THE ATTORNEY-GENERAL Vs MARTHA MWIINDE SCZ JUDGMENT No.5 OF 1987 (1986)

This is an appeal against the award by the Deputy Registrar to the appellant of K150,000 general damages and K60,000 exemplary damages for false imprisonment. There is also a cross appeal against the award of exemplary damages.

The facts of this case were that the appellant has lived in Zambia since 1951 and is an established resident with business concerns in Lusaka. On 21st May, 1990 some Immigration Officials visited his office and left a message that he was wanted at the Immigration Headquarters. He went there at 15.00 hours on the same day and saw Mr. Mulumba who served him with a deportation order signed by the Minister of Home Affairs. He was later detained at Lusaka Central Prison.

while in prison he filed a habeas corpus application, which was to be heard on 13th June, 1990, but, before then, he was, on 11th June, 1990 at 18.00 hours, released from prison. No reasons were given for his release. On 15th May, 1991 he commenced an action against the Attorney-General for damages for unlawful deportation, false imprisonment and wrongful blocking of his bank accounts. The state did not appear to the writ of summons and by leave of the court the appellant, on 26th June, 1991 entered judgment in default of appearance for damages to be assessed. Then a notice of assessment of damages returnable on 17th September, 1991 was filed on 8th July, 1991. Before the return day, the appellant, on 23rd July, 1991 served upon the respondent a statement of claim claiming, inter alia, exemplary damages.

Mr. Kawanambulu, has filed three grounds of appeal.

1. That the award of general and exemplary damages was, in law, erroneous in that no reason or reasons were given in the judgment to show why and how the Deputy Registrar arrived at the figures he awarded.

2. That the award of general damages was grossly inadequate having regard to the circumstances of the appellant's arrest, detention, the anxiety suffered and above all the inflation in Zambia today.

3. That the Deputy Registrar's award of exemplary damages was also inadequate and wrong in principle.

On the first and second grounds, in so far as they both relate to general damages, Mr. Kawanambulu submitted that the Deputy Registrar gave no reasons for awarding the appellant K150,000 general damages. That taking into account all the circumstances of the detention the figure of K150,000 was an erroneous estimate of what the appellant ought to have been awarded. That considering the award of K5,000 in 1968 in the Paton Case (1) whose facts are almost on all fours with the present case, and taking into account the racing inflation and devaluation of the kwacha since then, an award of K14 million in the circumstances of this case would not have been unreasonable.

In response, Mr. Kinariwala submitted that the fact that the Deputy Registrar did not give reasons for arriving at K150,000 did not mean that he did not take into account all the relevant circumstances surrounding the detention. While conceding that inflation should be taken into account when assessing damages, he submitted that the court should also bear in mind that the value of the kwacha was now unrealistic. That it was artificial. That even if the court was to find that the circumstances of this case were more serious than those found in the Paton Case (1) the award of K150,000 was still adequate.

In the Chisulo Case (2) at page 84 this court said:-

> "An appellate court will not interfere with an assessment of damages unless the lower court had misapprehended the facts or misapplied the law or thwere the damages are so high or so low as to be an entirely erroneous estimate of the damages to which the plaintiff is properly entitled".

Our attention has been drawn to the similarilty in facts of this case and those of the Paton case (1) in which damages of K5,000 were awarded. Paton, who was then ordinarily resident in Zambia was on 4th November, 1966 served with a deportation order to leave Zambia via Livingstone. He left the following day at 3 p.m. for Salisbury now Harare. Then, following the court of appeal decision on 10th January, 1967 in the THIXTON case, whose facts we do not intend to recite, his lawyer contacted Paton and told him that he was not a prohibited immigrant and that he was free to return to Zambia if he wished. On 9th March, 1967 at about 09.30 hours he arrived in Lusaka. He was however told by an Immigration Officer that he was still a pronibited Immigrant and inspite of protests he was driven to Chirundu and given a notice to cross the bridge into the then Southern Rhodesia, which he did. At the trial of his action the State conceded that Paton had acquired a right not to be deported and the only question that remained to be decided was whether or not he was falsely imprisoned in the course of his deportation and the court found that he had been falsely imprisoned during the period between the service of the notice and the time when the temporary permit was issued and also for the period he was removed from Lusaka Airport and driven to Chirundu, a period of no more than a day. In the present case the appellant was detained for twenty-one days and the conditions of his detention have been neatly summed up by Mr. Kawanambulu at page 4 of the appellant's heads of argument as follows:-

"The facts in this case related to being arrested and detained without affording him an opportunity to see his wife, living in an over crowded place and sleeping near a toilet with the stench coming from the toilet, sleeping on the floor with light on throughout the night, depression and gout resulting from stress".

There can be no doubt that the circumstances of this case are more serious than those found in the Paton case and that had the learned Deputy Registrar taken into acount all the various and singular ugly features of this case he would have awarded the appellant a higher figure than he did. We would therefore agree with Mr. Kawanambulu that the award of K150,000 was an erroneous estimate and inadequate. We set it aside.

We have considered all the circumstances surrounding the detention of the appellant and all the cases cited before us and we bear in mind that damages cannot be assessed on a per diem basis. We also note, from the evidence of David Shinamwole Diagoma of Central Statistical Office, that, due to inflation, what, could have been purchased for K5,000 in 1968, when the Paton case was decided, would in 1991 cost K467,134-00. Having regard to the High inflation that has taken place since the earlier awards this must be reflected in later awards. Although awards of damages must obviously be increased to reflect the severe inflation, it would be quite unrealistic simply to multiply former awards by the figures produced by the Statistical Office. We must, in the same way as those who award salary increases, attempt to arrive at figures that are both reasonable and fair to all parties in the circumstances prevailing to-day. We have already indicated that damages for false imprisonment are not calculated on a daily basis, but obviously imprisonment for twenty-one days is much more serious than for one day and this must be reflected in the award. In this case at the date of trial the appropriate award, taking into account inflation, should have been K400,000 and this is the figure we award the appellant.

On the third and last ground of appeal that the award of exemplary damages was inadequate and wrong in principle, Mr. Kawanambulu submitted

that exemplary damages were punitive and deterent in nature and therefore much higher than general damages and should in any event be twice the amount of general damages. That the award of K60,000 was therefore totally inadequate and wrong in principle. He further submitted, in relation to the cross appeal, that exemplary damages, not having been pleaded in the writ of summons and facts relied upon set out, should not have been awarded, that in Zambia, unlike in England, there is no specific rule of law which requires that exemplary damages, like special damages, be specifically pleaded to be awardable. That such damages were an extension of general damages and should be awarded in any case where it is proved that the defendant acted in contumelious disregard of the plaintiff's rights. He cited the case of Kapwepwe (3) in support, wherein this court said, inter alia:-

> "In Zambia exemplary damages may be awarded in any case where the defendant has acted in contumelious disregard of the plaintiff's rights".

He further submitted that the case of Eliya Mwanza (4) which came after the Kapwepwe case and which adopted the English practice that exemplary damages are not awardable unless specifically pleaded was wrongly decided and should be reviewed. In that case at page 80, Gardner, J.S. said:

> "In this case a Claim for exemplary damages was not included in the statement of claim and therefore such damages cannot be considered".

Mr. Kawanambulu went further and said that in any case these damages were pleaded in the statement of claim served upon the respondent before the assessment. Therefore that the Deputy Registrar was in order to award them.

In reply and arguing his cross appeal, Mr. Kinariwala submitted that it was the practice in Zambia that to be awarded, exemplary damages should be specifically pleaded and the facts relied upon set out. That apart from the case of Eliya Mwanza (4) cited by Mr. Kawanambulu, this court, in the case of Mpundu (5), restated the position that exemplary damages are awarded only where they have been specifically pleaded. He further submitted that the statement of

claim in this case was irrelevant and irregular having been served after judgment was entered.

We would readily agree with Mr. Kawanambulu that the High Court Rules, Cap. 50 do not provide that exemplary damages should be pleaded in a writ. But then Section 10 of the High Court Act provides that where our own rules are silent on a matter of procedure then the English rules shall apply and Order 18 rule 8 subrule 6 R.S.C. Volume 1, (1988 Edition) provides that a claim for exemplary damages must be specifically pleaded together with facts relied upon for such damages to be awardable and it is not uncommon in Zambia for a statement of claim to accompany a writ. The same order 18 provides that the object of the rule is to give the defendant fair warning of what is going to be claimed with the relevant facts to be relied upon set out and thus to prevent a surprise at the trial. And this is precisely what this court said in Mpundu case (4). It was held there, at page 12 that 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, thereby showing the defendant the case he has to meet. That in fact is the whole purpose of pleadings i.e. to narrow issues and give the defendant sufficient warning or notice of the case he will meet at the trial and not pull out surprises. We do not therefore agree with Mr. Kawanambulu that the case of Eliya Mwanza (4) was wrongly decided. In our view, it sets out good law and practice that exemplary damages, to be awardable, must be specifically pleaded. We would hasten here to refer to the decision of this court in the other Kapwepwe case (6) which was followed in the case of Mwiinde (7) that where there is any aggravating conduct on the part of a defendant then the court should take into account that conduct in awarding compensatory damages and that only if such compensatory damages are insufficient to punish a particular defendant should a further sum be awarded as punitive or exemplary damages.

With regard to submissions on the statement of claim that was served in this matter we would comment that the writ claims damages without setting out the heads of such damages and the form of endorsement was entirely proper. In the ordinary way, a statement of claim would follow in which general, special and if necessary, exemplary damages could be set out. In this case, the fact that judgment was signed before a statement of claim became necessary does not affect the appellant's right to claim all damages which flow from the tortious act. It is, of course, usual for such details to be set out in an affidavit and at this stage, the statement of claim was inappropriate. However, in as far as the statement of claim gave notice to the defendant of the details which were going to be put before the Deputy Registrar together with evidence on oath the procedure adopted cannot be said to be so improper as to defeat the plaintiff's claim for exemplary damages and we would therefore agree with Mr. Kawanambulu that exemplary damages could be awarded in this case. But having regard to our comments in the Kapwepwe (6) and Mwiinde (7) cases that the aggravated element should be taken into account in the final award of compensatory damages, this is the course we have taken in this case.

For the foregoing reasons we would dismiss the cross appeal with costs in this court and in the court below to the appellant to be taxed in default of agreement.

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E.L. SAKALA
SUPREME COURT JUDGE

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D.K. CHIRWA
SUPREME COURT JUDGE

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W.M. MUZYAMBA
SUPREME COURT JUDGE