

HOLDEN AT LUSAKA

(CIVIL JURISDICTION)

B E T W E E N:

MAYBIN MUBANGA
ATTORNEY-GENERAL

1ST APPELLANT

2ND APPELLANT

AND

SUNBOY JAIROS ZULU

RESPONDENT

Coram: Chaila, Chirwa and Muzyamba, JJS

29th September, 1994

For the Appellants: D.K. Kasote, State Advocate

For the Respondent: S.J. Banda, Lwangwa Chambers

J U D G M E N T

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

CASES REFERRED TO:

1. LAZARUS MUMBA V ZAMBIA PUBLISHING COMPANY 1982 Z.R. 53
2. SHAM V SHAM 1954 3 WLR 265

In this judgment we will refer to the respondent as plaintiff and the appellants as defendants which is what they were in the court below.

This is an appeal against a decision of the High Court nullifying the transfer of the plaintiff from Chipata to Katete and an award of K75,000 nominal damages.

At the hearing of the appeal we announced the verdict and said we would give reasons later. We now give our reasons.

The plaintiff was employed by the Government of the Republic of Zambia in the Department of Marketing and Co-operative, Ministry of Agriculture Food and Fisheries as a Provincial Marketing and Co-operative Officer for Eastern Province and stationed at Chipata. He owned a farm which he was developing at the material time. The Ministry, through his immediate supervising officer, the first defendant transferred the plaintiff to Kasama, which he resisted. He was then transferred to Lusaka. Again he resisted giving the same reason that he was constructing a house at his farm. He was then transferred to Katete, which is near Chipata so that his project was not disrupted. He again resisted. Later, on 17th June 1992 he brought an action against the first defendant for damages for intimidation arising from personal differences and sought an injunction.

to restrain the first defendant from evicting him from a pool house. Subsequent to that the second defendant applied to be joined as a party to the proceedings. The application was granted.

The acts constituting the alleged intimidation are couched in this manner, in paragraph 3 of the statement of claim:

"The first defendant has carried out several activities aimed at intimidating the plaintiff such as issuing adverse press statements against the Plaintiff, refusing to grant permission for the secondment of the plaintiff to E.C.U., rejecting the plaintiff's application for an early retirement and ordering numerous transfers of the plaintiff from Chipata to Lusaka, Choma, Kasama and Katete without proper justification due to personal differences between the plaintiff and the first defendant".

In dealing with this cause of action this is what the learned trial judge said at page 14 of the record:

"It is plain from the record that the first defendant did not desire the plaintiff to progress. In simple terms, he hated the plaintiff. This is a point settled beyond debate. This judgment will demonstrate this remark. A situation such as this, in my view, would not be termed intimidation. Secondment is not a right. It may be refused or defeated even maliciously as here. I do not see any relief for the plaintiff on this aspect of the case.

The plaintiff alleges the first defendant rejected or caused to be rejected plaintiff's intention for early retirement. The first defendant's response to this was that the plaintiff did not qualify for early retirement because he had broken his service at one time. This aspect is actually a storm in a tea cup and deserves no serious attention.

The complaint is that the first defendant threatened the plaintiff or 'ordered numerous

transfers of the plaintiff from Chipata to Lusaka, Choma, Kasama and Katete, without proper justification due to personal differences between the plaintiff and the first defendant'. This is a wild statement. It cannot be justified".

Notwithstanding the rejection of the claim as pleaded in the writ and statement of claim the court awarded the plaintiff nominal damages. This was a misdirection because it is trite law that such damages are awarded only where an action has succeeded but the plaintiff has suffered no damages. Indeed Mr. Banda had difficulties in supporting this award and rightly conceded that the learned trial judge had misdirected himself in making the award.

The court also found that the transfer of the plaintiff to Katete was mala fide and then nullified it. This finding was based mainly on the first defendant's confidential letter to the second defendant dated 14th July 1992. We wish to observe here that this letter was written after the action had commenced and therefore not made in contemplation of the action and could not therefore be relied upon by the plaintiff to prove mala fides.

It was contended by Mr. Kasote for the defendants that the order nullifying the transfer was perverse as the plaintiff had not pleaded or sought for such an order in his pleadings. In support of his stand he cited a number of authorities, one of which is *Lazarus Mumba V Zambia Publishing Company* (1). On the other hand, Mr. Banda argued that on the evidence adduced the court was right in its finding that the plaintiff's transfer to Katete was mala fide and to nullify the transfer and in support of his argument he relied on the same authority that the court cited in arriving at its conclusions, namely *Shaw V Shaw* (2). In this case it was held by Denning, LJ at page 273:

"It is said that an implied warranty is not alleged in the pleadings, but all the material facts are alleged, and in these days, so long as those facts are alleged, that is sufficient for the court to proceed to judgment without putting any particular legal label upon the cause of action".

That was a case of a man representing himself as a widower when not and going through a ceremony of marriage with another woman. When he died the widow became aware that she had not been legally married to him as his first marriage was still subsisting at the time he married her. She sued the Administrators of his estate, claiming damages for breach of promise to marry her lawfully. The court upheld her claim on the ground that there was an implied warranty on the part of the deceased to legally marry the plaintiff.

We have said before, that English decisions are merely persuasive and not binding on our courts. On the other hand, decisions of this court are binding on all the lower courts. In *Lazarus Mumba V Zambia Publishing Company (1)*, a case of libel arising out of an article published by the respondent which referred to a divorce suit filed by the appellant's wife, the trial judge, though he found that the article was not contemporaneous with court proceedings and inaccurate nevertheless extended the defence of absolute privilege to an alternative set of facts which were not pleaded or relied upon. On appeal Ngulube, DCJ as he then was, said at pages 56 to 57:

"While it is open to a trial court and indeed, it is the duty of such court to admit and if thought fit to decide a case on a variation, modification or development of what had been averred, nevertheless, radical departure from the case pleaded amounting to a separate and distinct new case cannot entitle the party to succeed".

It is quite clear from the two decisions that a court trying a cause has jurisdiction on its own motion to make a slight variation, modification or development of what has been averred and enter judgment thus but cannot enter judgment for a separate and distinct cause of action which is not pleaded. In this case the only cause of action pleaded by the plaintiff was intimidation. He never pleaded for nullification of his transfer to Katete, a declaratory relief or cause of action normally sought by way of writ of certiorari. Nullification of transfer is, in our view a distinct and separate cause of action. It is nowhere nearer intimidation and cannot therefore be said to follow within the ambit of the case pleaded to entitle the court to vary or modify what was averred in the pleadings. Had the learned trial judge

addressed his mind to the decision in the case of Lazarus Mumba (1) we have no doubt that he would not have fallen into error. For the foregoing reasons we allow the appeal and set aside the order nullifying the transfer of the plaintiff from Chipata to Kateta and the award of nominal damages. Costs will follow the event and to be taxed in default of agreement.

M.S. CHAILA
SUPREME COURT JUDGE

D.K. CHIRWA
SUPREME COURT JUDGE

W.M. MUZYANBA
SUPREME COURT JUDGE