KAFUE DISTRICT COUNCIL v JAMES CHIPULU (1997) S.J. 13 (S.C.)

SUPREME COURT
M. M. W. S NGULUBE, C.J., SAKALA AND MUZYAMBA, JJ.S.
3RD MARCH AND 16TH MAY, 1997.
(S.C.Z. JUDGMENT NO. 5 OF 1997)

Flynote
Damages - Inconvenience and mental torture, transport and upkeep costs.
Practice - Parties' advocate swore an affidavit when contentious matter in issue - Propriety of.

Headnote
Appeal from a judgment of the High Court awarding damages amounting to K2 200 000 for inconvenience, mental torture, transport and upkeep costs. Respondent had been employed by the Chipata Municipal Council and had applied to appellant council for employment. His application had been accepted, whereupon he terminated his employment at Chipata and travelled with his family to Kafue. On his arrival there he was refused the employment. His plea for reversal of the decision was not granted , nor was his request for a refund of transport costs. He was successful in regaining his employment at Chipata. He claimed damages, but out of the nine items, respondent was awarded damages under the following heads: inconvenience, mental torture, transport and upkeep. The award of damages for inconvenience and mental torture was challenged, as was the award of transport costs. Although not a ground for appeal, appellant took exception to an affidavit by respondent's advocate in support of the summons for assessment.

Held:
(i) Damages for anguish and vexation arising from a breach of a contract of employment are recoverable
(ii) This is a proper case for the award of damages for inconvenience and mental torture

Cases referred to:
1. Hayes and Another v James & Charles Dodd (a firm) (1990) 2 ALL E.R. 815.
2. Jarvis v Swans Tours Ltd (1973) 1 Q.B. 233.
3. Mhango v Ngulube & Others (1983) Z.R. 61.
4. Eastern Co-oprative & Union Ltd v Yamene Transport Ltd S.C.Z. Judgment No. 3 of 1989
5. Koni v Attorney –General S.C.Z. Judgment No. 7 of 1990
6. McGregor on Damages 15th Ed. para 343.
7. Chikuta v Chipata Rural Council (1974) Z.R. 241.
8. Livingstone v Rawyards Coal Co. (1880) 5 A.C. Page 25 at page 39.
9. Zambia National Building Society v Nayunda S.C.Z. Judgment No. 11 of 1993.
10. Attorney-General v Mpundu (1984) Z.R. 6.
11. McCall v Abelesz & Another (1976) 1 ALL E.R. 727.

For the Appellant: Mr. P. Matibini of P. Matibini & Associates
For the Respondent: In person

Judgment

SAKALA, J.S.: delivered the judgment of the court.

This is an appeal against a decision of the learned District Registrar of the High Court at Chipata awarding the respondent damages totalling K2,200,000.00 for inconvenience, mental torture, transport and upkeep costs. The assessment was as a result of a Judgment entered in favour of the respondent against the appellant in default of appearance.

The brief facts of the case as can be ascertained from the oral and documentary evidence are that, on 7th December, 1993, the respondent, who was then working for the Chipata Municipal Council, applied to the appellant Council for employment as Chief Health Inspector. On 24th March 1994 the Appellant Council wrote the Town Clerk of the Chipata Municipal as follows:

24th March, 1994
The Town Clerk,
Chipata Municipal Council,
P.O Box 510020,
Chipata.

Dear Sir,

STAFF TRANSFER: MR J CHIPULU – CHIEF HEALTH INSPECTOR.

The above employee of your Council has applied for Staff Transfer to Kafue District Council.

The Establishment, Housing and Social Service Committee held on 27th January,1994, considered and approved his transfer on promotion to the Post of Chief Inspector on probation for six (6) months at the salary scale of LAM 1 (1,553,364x68,364) per annum.

We would therefore be grateful if you could kindly facilitate his transfer to this Council.

Yours faithfully

B.M. LUTABI
ACTING DEPUTY SECRETARY
FOR/COUNCIL SECRETARY

This letter was copied to the respondent. On 29th March,1994, the respondent wrote the appellant Council accepting the appointment and on 5th April the Town Clerk of Chipata Municipal Council informed the respondent that he had no objection to moving to appellant Council.

On 26th April, 1994, the Town Clerk Chipata Municipal Council wrote the respondent as follows:

26th April, 1994

Mr. James Chipulu,
Chipata Municipal Council,
P..O Box 510020,
Chipata.

Dear Sir,

Re: Transfer to Kafue District Council – Yourself

Reference is made to the offer of employment to yourself by Kafue District Council as Chief Health Inspector and my letter to the Council Secretary indicating my non objection to the same.

I wish to advise that 30th April, 1994, is your last day to work with this Council. Could you therefore make the necessary arangements to travel to Kafue and take up your new appointment.

By copy hereof, the Director of Finance is directed to delete your name from this Council's payroll with effect from 1st May, 1994.

I wish you the best in all your future endavours.

Yours faithfully.

A. R CHIPOSA
FOR/ TOWN CLERK

The evidence accepted by the learned District Registrar was that, upon accepting the offer, the respondent made arrangements for the transfer of his school children and subsequently travelled to Kafue. Upon his arrival at Kafue, he was told that he could not take up the appointment because of a confidential letter from Chipata Municipal Council raising certain issues. Despite the respondent's plea to the appellant to take him on, the appellant refused to take him on. His request for the refund for transport was rejected. He returned to Lusaka where he stayed for 21 days seeking the intervention of the Ministry of Local Government. The intervention by the Ministry was also unsuccessful. Conseqently, the respondent returned to Chipata where he explained his plight to the Town Clerk and requested that he be taken on again. The Chipata Municipal Council agreed to re-employ him. The respondent testified that after his rejection by the appellant Council and after the Chipata Municipal Council had deleted him from the payroll, he considered himself unemployed. He felt totally disturbed as he did not know how he was going to look after his family. He said he lost appetite to eat, and could not concentrate on any thing.

On 14th September, 1994, the respondent issued a writ of summons against the appellant claiming for damages for inconvenience, mental torture, loss of promotion as a result of the appellant's wilful refusal to take him on after having offered him an appointment as Chief Health Inspector, one month's salary and transport costs to Kafue from Chipata and upkeep in the sum of K435,000.00. The appellant Council did not enter an appearance to the writ. Consequently, on 18th January, 1995, the respondent obtained judgment in default of appearance, and damages to be assessed.

The respondent subsequently applied for assessment of damages. The application was supported by an affidavit sworn by Counsel. Suffice it to mention that at the hearing of the application the appellant's Counsel's objection to the use of an affidavit sworn by the respondent's Counsel was overruled. The respondent, however, gave viva voce evidence. Paragraph 5 of the affidavit in support of the application set out the respondent's claims as follows:

(a)by an affidavit sworn by Counsel. Suffice it to mention that at the hearing of the application

the appellant's Counsel's objection to the use of an affidavit sworn by the respondent's Counsel was overruled. The respondent, however, gave viva voce evidence. Paragraph 5 of the affidavit in support of the application set out the respondent's claims as follows:

(a) Inconvenience
K2,000,000=00

(b) Mental torture
K3,400,000=00

(c) Loss of promotion
K2,380,000=00

(d) May, 1994 Salary K 170,272=50

(e) Transport and up-keep
Chipata – Lusaka and back
5 times at K10,000=00 K 100,000=00

Upkeep for 21 days at
K25, 000 per day K 525,000=00

(g) Upkeep for 2 days during the travels from Chipata to Lusaka at K25,000=00
K5,000,000=00

(h) Settling in allowance at 30% of annual salary of K1,553,364 already strike off K 455,009=50

(i) Legal fees
K1,000,000=00

The appellant filed an affidavit in opposition sworn by the Council Secretary, which apart from denying some of the figures claimed, confirmed the documentary evidence. Both parties adduced oral evidence.

The learned District Registrar considered the oral and documentary evidence. He found as a fact that the appellant had offered the respondent the post of Chief Health Inspector . On the evidence on record the learned District Registrar further found that the respondent, by the conduct of the appellant council, had been inconvenienced and mentally tortured in that when the appellant Council offered him the appointment, they wrote the Chipata Municipal Council who caused the respondent's name to be deleted from the payroll. Subsequently, the respondent was asked to vacate the house and travel to Kafue to take up the appointment. The appellant council refused to give him the job that he had been offered. The learned District Registrar found that this was not only an inconvenience but also mental torture in that the respondent had become jobless. He had to think about how he was going to look after his family, where to get a job and how to return to Chipata. The learned District Registrar considered each item of the respondent's claims. Out of the nine items he only assessed and awarded damages under the following heads:-

(a)	Inconvenience	K 500,000=00
(b)	Mental Torture	K1,600,000=00
(c)	Transport and upkeep from Chipata via Lusaka to Kafue	K 100,000=00

The respondent was also awarded costs. This is the award the appellant Council has appealed against.

In arguing the appeal before us, Mr. Matibini, on behalf of the appellant, filed heads of argument under three grounds of appeal. In his oral arguments he abandoned the first ground of appeal that raised the question of whether or not the respondent had been offered an appointment. On the documentary evidence on record and in the light that there was no appeal against the default judgment, counsel took a proper course to abandon the ground raising the issue of employment between the parties. The first ground which was argued in two parts was that the learned District Registrar erred in assessing and awarding damages for inconvenience and mental torture. The first part of the argument on this ground related to Mr. Matibini contended that there was in this case, no basis for assessing and awarding damages for inconvenience and mental torture . For this argument he cited a passage by ***Lord Blackburn in Livingstone v Rowyards Coal Co.*** **(1)** where he said :

"You should as nearly as possible get at 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".

Counsel also cited a passage in the case of ***Zambia National Building Society v Nayunda*** **(2)** where this court said:

"The essence of damages has always been that the injured party should be put as far as monetary compensation can go in about the same position he would have been had he not been injured. He should not be in a prejudiced position nor be unjustly enriched".

The submission by Counsel was that no basis for the assessment in the present appeal.

The second part of the argument was that if a basis of assessment existed then this was not a proper case to assess and award damages.

For inconvenience and mental torture. In support of this argument Mr. Matibini relied on the obeservations of **L. J.Stanghton in *Hayes and Another v James & Charles Dodd* (a firm) (3)** where at page 818 he had this to say:

> **"It seems to me that damages for mental distress in contract are as a matter of policy limited to certain classes of cases. viz, where the contract which has been broken was itself a contract to provide a peace of mind or freedom from distress."**

And at page 824 where he further said:

"That it may be that the class is somewhat wider than that. Bit it should not in my judment inlcude any case where the object of the contract was not comfort or pleasure or the relief of discomfort but simply carrying on a commercial activity with a view to profit."

Mr. Matibini cited the case of ***Jarvis v Swans Tours Ltd*** **(4)** as a classical example of a contract whose objective is to produce a peace of mind or freedom from distress.

The second ground of appeal argued before us was that the learned District Registrar erred in law by awarding a sum of K100,000=00 despite the fact that there was no documentary evidence to support the claims for transport and upkeep cost. Counsel argued that the respondent having not adduced any evidence to support those claims, the learned District

Registrar misdirected himself in making those awards. Counsel referred us to the case of ***Mhango v Ngulube & Others*** **(5)** in which this court held that a party claiming a special loss must prove that loss and do so with the evidence which make it possible for the court to determine the value of that loss with a fair amount of certainity. In the same case the court further observed:

> **"As a general rule, therefore, any short comings 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 meagre evidence"**

Counsel also cited the case of **Eastern Co-operative & Union Ltd Vs Yamene Transport Ltd (6)** where the court again reminded both the litigants in general the bar in particular, that the court will not always be prepared to make inspired or intelligent guesses when the parties could have easily obtained evidence which could easily be placed before the courts. Another case cited by Mr. Matibini which also emphsises the need for documentary or independent evidence is **Koni Vs Attorney General (7).** Counsel also referred us to a passage in Mcgregor On Damages 15th Edition paragraph 343 and submitted that this court must interfer with the award of K1,00,000.00

Finally Mr. Matibini invited the court, to consider, although the issue was not being raised as a ground of appeal, the propriety or otherwise of the practice of an Advocate swearing an affidavit on behalf of a Client in support of an assessment of damages where the matters in issue are contentious in the light of the advice in the case of ***_Chikuta v Chipata Rural Council (8).***

The respondent, who appeared in person relied on the heads of argument earlier filed by his them advocates.

The respondent pointed out in the written heads of argument that the awards were extremely fair and very reasonable. The respondent argued that before an appellate court interfers with the findings of the trial court as to the amount of damages, it must be shown that the trial court has applied a wrong principle or has misapprehended the facts or that the award was so high or so low as to be utterly unreasonable or was an entirely erroneous estimate of the damages.

A number of authorities were cited in the written heads of argument in support of this proposition.

We have very carefully examined the evidence in support of the assessment and the quantum awarded. We have also considered the various authorities cited to us. The case of the appellant as argued, appears to us, if we understood counsel correctly, not to be complaining against the quantum of damages as being very high but that the assessment had no basis and if it had, that it was not a proper case to award damages or inconvenience and mental torture and to award damages and transport and upkeep in the absence of independent or documentary evidence. The principles upon which an appellate court can interfer with an award of damages seemed not to be in issue. We totally agree with authorities cited by Counsel for the appellant that an assessment of damages must have a basis. In general the party claiming damages must have been injured or must have suffered and must therefore be put in the same position as he would have been if he had not been injured.

The case for the respondent was that upon applying for the position of Chief Health Inspector

with the appellant council, he was given the offer which he accepted. Consequent to the acceptance, he was deleted from the pay roll of the Chipata Municipal Council. He moved out of the Council house and travelled to Kafue with his family to take up the appointment with the appellant council. Upon arrival at the appellant council, the appointment was not given to him. According to the appellant he considered himself unemployed. He felt totally disturbed and lost appetite to eat.

The documentary evidence on record reveals that when the judgment in default was entered in favour of the respondent, the appellant council did not challenge it. Instead when the summons for assessment of damages was issued the appellant made attempts to settle the matters out of court. We are satisfied that by the appellant council's conduct the respondent was injured and suffered inconvenience and mental torture and hence a basis on which damages had to be assessed had been established and the respondent had to be put in the same position as he would have been in if he had not been inconvenienced by the appellant Council which caused him to leave employed with Chipata Municipal Council and travel to Kafue . We therefore hold that there was a basis for the assessment. The first part of the first ground argued before us therefore fails.

The second part of the ground was whether this was a proper case for the award of damages for inconvenience and mental torture. We note with some amazement that the very authorities cited by Counsel are on all fours against him and yet he wants us to rely on them to find in favour of the appellant council.

The facts of the case of Hayes relied upon by Counsel as they appear from the headnote are:-

"The Plaintiffs ran a motor repair business and in 1982 decided to purchase larger premises. They accordingly entered into negotiations to purchase a leasehold workshop and yard which had access by means of a narrow and inconvenient tunnel from the street at the front of the property and access over the land at the rear of the property. In the course of the negotiations the defendants, who were acting as the Plaintiff's solicitors, were given notice that the owner of the land at the rear of the property asserted that there was no right of way over his land, the defendants, however, informed the Plaintiffs that there was such a right of way. Access via the rear of the property was critical to the success of the repair and in reliance on the defendants' assurance the Plaintiffs purchased the workshop and yard and also a freehold maisonette which was part of the property., for a total of 65,000=00 Pounds with the assistance of a bank loan of 55,000=00 Pounds within two or three days of completion on 28th July 1982 the owner of the land at the rear of the property blocked the rear access, with the result that the Plaintiffs were unable to run their business properly. After 12 months they closed the business down and attempted unsuccessfully to sell the property as a single unit. Eventually they managed to sell the maisonette in June, 1986, for 38,000 Pounds and they disposed of the workshop and plant a year later. In an action for damages for breach of contract brought by the Plaintiffs against the defendants the judge awarded damages on the basis of the capital expenditure thrown away in the purchase of the business., the expenses incurred, including bank interest up to the time of the sale of the maisonette, damages of 1,500=00 Pounds for each Plaintiff for anguish and vexation. The Defendants appealed against the award.

Held- The judge had been entitled in the circumstances to award damages on the basis of comparing the Plaintiff's actual situation with the position in which they would have been if they had never entered into the transaction at all rather than with the position they would have been in had the transaction been successful. He had therefore been entitled to award damages on the basis of the capital expenditure thrown away in the purchase of the business and the expenses incurred. <u>However, damages for anguish and vexation arising out of a breach of contract were not recoverable unless the object of the contract was to provide peace of mind or freedom from distress and accordingly were not recoverable for anguish and</u>

vexation arising out of the breach of a purely commercial contract. It followed that the damages would be reduced by the amount awarded for anguish and vexation and to that extent the appeal would be allowed. "(underlining supplied).

Our understanding of this case is that damages for anguish and vexation arising from a breach of a purely commercial contract are not recoverable. For us this makes a lot of sense and is certainly good law. At the same time where the object of the contract is to provide peace of mind or freedom from distress, the *Hayes* case acknowledge that damages for anguish and vexation arising out of the breach of such contract are recoverable. This was the position in the case of *Jarvis* also cited to us by counsel for the appellant council, in which the Plaintiff's holiday turned out to be a great disappointment and the Plaintiff claimed damages for inconvenience and loss of benefit. The court held in that case that the Plaintiff was entitled to be compensated for his disappointment and distress at the loss of entertainment and facilities for enjoyment which he had been promised in the defendant's brochure. In our considered opinion a contract of employment provides peace of mind and freedom from distress.

There is now a chain of authorities to support the recovery of damages for mental distress or inconvenience In ***McCall v Abelesz & Another* (9)** 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"

The *Jarvis* case relied upon by counsel for the appellant was cited with approval in our own decision in the ***Attorney-General v Mpundu* (10)** which was a case of unlawful suspension in which the plaintiff, among others,claimed damages for inconvenience and discomfort. The Supreme Court under head note (ii) held :

> "Damages for mental distress and inconvenience may be recovered in an action for breach of contract."

The Mpundu case was a case for unlawful suspension and not termination of employment. The Plaintiff was later reinstated. He successfully recovered damages for mental distress and inconvenience. the evidence in the instant case clearly established that the respondent was extremely inconvenienced and mentally tortured by the appellant Council's inconsiderate treatment. When they offered him employment and allowed him to travel to Kafue with his family but subsequently refused to employ him. We are satisfied on the evidence on record that this is a proper case for an award of damages for inconvenience and mental torture. This part of ground also fails.

On the second ground of appeal relating to misdirection in law by awarding the sum of K100,000=00 for claims for transport and upkeep costs in the absence of documentary evidence, we agree that there was no evidence. But we accept the evidence, as did the learned District Registrar, that the respondent travelled from Chipata to Kafue with his family and then back to Chipata. In the *Mhango* case we observed the general rule that any short comings in the proof of a special loss should react against the claimant. But Ngulube C.J also said in that case:-

> "However, we are aware that in order to do justice not withstanding 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 meagre evidence."

We are satisfied that K100,000.00 as transport and upkeep costs for a family travelling from

Chipata to Kafue and back to Chipata after spending some days in Lusaka was an intelligent and inspired guess of the value of the special loss on the meagre evidence. This ground also fails.

The last issue, which was not a ground of appeal, but a complaint in form of an observation related to an affidavit sworn by the respondent's advocate in support of the summons for assessment. On the facts of this case whereby the parties gave oral evidence in addition to affidavit evidence, we find it unnecessary to make any comments but to stress that we still stand by the advice tendered by Doyle C.J. the then Chief Justice in the ***Chikuta* case,** that is, that the practice is highly undesirable where matters are contentious.

On the two grounds of appeal it is quite clear that the respondent did suffer mental distress and inconvenience as a result of the wrongful rejection by the appellant Council to take him on as their Chief Health Inspector. In our opinion the conduct of the appellant amounted to unlawful termination of employment. But since there was no cross appeal we propose to say no more in the case.

The appeal is dismissed with costs to be taxed in default of agreement.
Appeal dismissed
