

IN THE SUPREME COURT FOR ZAMBIA

APPEAL NO. 83 OF 2001

HOLDEN AT LUSAKA

(Civil Jurisdiction)

B E T W E E N:

JOILY MUTUKELWA MWINANYAMBE
DAVID SIKAYASA MUNTANGA
SUSAN MWELWA MULENGA

1st APPELLANT
2nd APPELLANT
3rd APPELLANT

AND

HYBRID POULTRY FARM (ZAMBIA) LIMITED AND THREE OTHERS

CORUM: Ngulube, CJ, Chirwa and Chibesakunda, JJS

On 28th March and 17th July, 2002

For appellants - R.K. Malipenga, of Mofya Chambers
(instructed by R. Akafumba, of Lisulo and Company, Livingstone)

For respondents - A. Dudhia, of Musa Dudhia and Company.

J U D G M E N T

Ngulube, CJ, delivered, the judgment of the Court.

The appellants used to be employees of Hybrid Poultry Farm (Zambia) Limited and they were in management positions. They were aggrieved that the shares of the 1st respondent company were sold to the 2nd, 3rd and 4th respondents without affording the appellants any opportunity to buy some of the shares. It was not in dispute that the 1st respondent was an entirely private company whose shares were owned in the main by

Arbor Acres Incorporated, of the U.S.A., which in turn was owned by Booker Tate Limited of the UK. The owners of the 1st respondent decided to sell some operating units to third parties and their shares to the other respondents who floated a new company – HPF Holdings Limited – which bought the shares formerly held by Arbor Acres. All this happened in a series of straight forward commercial transactions to which the appellants were not privy. They felt cheated and defrauded and launched proceedings against the respondents seeking declaratory and injunctive relief, including cancellation of the sale of the shares and an order in favour of the plaintiffs declaring that they too were entitled to buy some shares. The appellants asserted that there was a Management Buy Out Scheme (MBO), an obvious reference to a similar scheme available in the privatization of some parastatal companies by the Zambia Privatization Agency.

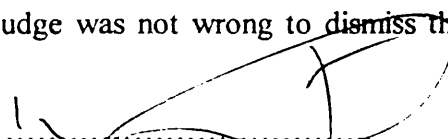
The respondents applied to the Judge below to dismiss the action for not disclosing a reasonable cause of action. The appellants resisted the application but the Judge agreed with the defendants. He did not see how a normal private commercial transaction could be set aside at the behest of the plaintiffs who did not have any visible locus standi. The appeal is from the summary dismissal of the action.

The main thrust of the appellants appeal was that the Judge ought not to have dismissed the action without a trial and without giving them a chance to be heard live and in person when they hoped to demonstrate that there were within the company plans to enable Zambians in management to participate in the purchase of the company shares. They did not have the exact details of the proposed MBO but they had expected that these details would be publicized and communicated in due course. Instead, by what could only have been fraudulent, secretive and underhand manoeuvres and misrepresentations,


the non-Zambian expatriate managers ended up buying the company to the exclusion of the Zambians. The bottom line of their plea on appeal was simply that they wished to be given a chance to be heard, at a trial. This was underlined by Mr. Malipenga who otherwise relied entirely on his written heads of argument.

The attitude and the expectation of the appellants was surprising, to put it mildly. Faced with a challenge that they had no locus standi and no cause of action, a challenge which on the face of it appeared unanswerable, it was clearly incumbent upon them to reveal their standing and the basis upon which they claimed to be entitled to the reliefs sought. It was pointless to simply retort that this would be disclosed at a trial. The cause of action cannot be deployed in stages or in dribs and drabs. The defendant is entitled to know what he has been sued for. As Mr. Dudhia observed during the appeal, this was not a parastatal but a private company; the sale agreement on record is a regular commercial agreement; the record has nothing to indicate there was an MBO. The action was ill-fated and liable to collapse of its own inanity. Without disclosing the cause of action, it cannot be assumed that there was any form of agreement or contract or even a condition of service helpful to the appellants and which they can call to their aid.


In truth, the learned Judge was not wrong to dismiss the action. The appeal is equally dismissed, with costs.



 M.M.S.W. NGULUBE
 CHIEF JUSTICE



 D.K. CHIRWA
 SUPREME COURT JUDGE



 L.P. CHIBESAKUNDA
 SUPREME COURT JUDGE

IN THE HIGH COURT FOR ZAMBIA

-APPEAL NO. 201/00.

HOLDEN AT LUSAKA
(CIVIL JURISDICTION)

1994/HP/2235)

BETWEEN:

OSALU CONSTRUCTION LIMITED - **APPELLANT**

AND

HEMA WHOLESALERS LIMITED - **RESPONDENT**

Coram: Sakala JS, Chirwa JS, and Mambilima AJS.

On 26th July, 2001 and 5th April, 2002.

For the Appellant : Mrs. L. Mushota, of Mushota & Associates.

For the Respondent: No Appearance.

JUDGMENT

MAMBILIMA, AJS, delivered the Judgment of the Court.

Case referred to:

**Development Bank of Zambia Limited vs Mangolo Farms
Limited, ZR65**

This is an appeal from the decision of the Deputy Registrar on

assessment of damages. The Appellant had, by a Specially Endorsed Writ, claimed various reliefs before the High Court. Chitengi J, entered Judgment in favour of the Plaintiff. "...for unlawful detention and loss of the Plaintiff's tools," and another Judgment in favour of the Defendant on a counter-claim for money overpaid. He Ordered the Deputy Registrar to assess the Parties' damages.

The Appellant called viva voce evidence in Support of its claim for unlawful detention and loss of its tools while the Respondent called no evidence. After evaluating the evidence presented, the learned Deputy registrar arrived at the conclusion that the figures quoted by the Plaintiff as hire charges were not correct. He awarded the Plaintiff a sum of K600,000.00, a figure he considered reasonable in the circumstances bearing in mind the period that the items were in the defendant's custody and the amount of money which the Plaintiff used to make on sub contracts. He awarded the Plaintiff another K495,000,00 representing the value of two wheel barrows, three popping hammers and three shovels. The total amount was to

be paid with interest at 6% per annum from the date of the Writ up to the date of Judgment.

Mrs. Mushota, for the Appellant, has advanced three grounds of appeal, namely: that the Deputy Registrar erred in fact and in law, when, in spite of recognizing that 'the normal measure of damage in cases of detinue is in two parts: first, it is the marked value of the goods and secondly it is in such sum as represent the normal loss through detention of the goods, which sum should be the marked rate at which the goods could have been hired during the period of detention; the Deputy Registrar erred in fact and in law when, unsupported by facts or authority and contrary to law, he held and awarded the Appellant, K600,000.00 as the hire rate for all the goods during their detention and a sum of K435,000.00 as the value of the goods which were not returned and ordered that the monies be paid with interest and 6% per annum from the date of the Writ up to the date of Judgment; and that the Deputy Registrar erred in failing to make an award for loss of business.

In her submissions, Mrs. Mushota argued the first two grounds together. She pointed out that the goods in this case were detained in February, 1994 and were returned Pursuant to a Court Order given on 18th September, 1996. She referred us to our decision in the case of **Development Bank of Zambia vs Mangolo Farms Limited** ⁽¹⁾ in which we held:

"In an action of detinue, the value of goods to be paid by the Defendant to the Plaintiff in the event of the Defendant failing to return the goods to the Plaintiff must be assessed as at the date of the verdict or Judgment in his favour and not at the date of the Defendant's refusal to return the goods, and the same principle applies whether the defendant has converted the goods by selling them or has refused to return them for some reason."

Mrs. Mushota submits that quotations on the value of hiring were submitted and the K600,000 awarded was far below the Market value and unrepresentative of the normal market rate loss occasioned by the detention. According to Mrs. Mushota, the machines were unlawfully detained for three years and an average period should have been taken because it is difficult for one whose tools are detained to continue the work. In the absence of an exact number of days of hire, the Deputy Registrar should have applied an average for each tool for the 33 months that the tools were detained.

On the award of K435,000 in respect of costs for the unreturned tools, Mrs. Mushota points out that the amounts add up to K495,000 and yet the Deputy Registrar only awarded K435,000. On interest, Mrs. Mushota submits, relying on the Judgments Act Cap 81 of the Laws of Zambia that it is mandatory for interest to be paid from the date of Judgment or decree until the same is satisfied.

On the third ground of appeal, Mrs. Mushota submits that evidence which was not challenged was led on loss of business.

There was testimony that the Appellant Company used to make K10,000,000 per month. Its business slowly ground to a halt after tools were detained until, in a chain reaction, the Appellant's offices were closed for failure to pay rent. According to Mrs. Mushota, the Court should have considered the social and economic realities of the matter. It should have given due regard to the Appellant's plight and awarded a fair, just and reasonable sum. Mrs. Mushota submits that damages in this case were unreasonably low and this Court should interfere with the quantum.

We have carefully examined the Ruling of the learned Deputy Registrar, the grounds of appeal and the submissions by Mrs. Mushota. It is common cause that the normal measure of damages in cases of detinue is as outlined in *McGregor on Damages*, referred to by the Deputy Registrar and as endorsed in our decision in the case of *Development Bank of Zambia vs Mangolo Farms Limited*. The value of the goods must be assessed as at the date of Judgment. A Plaintiff is also entitled to a sum representing the normal loss occasioned by the detention of the goods calculated at the market

rate at which the goods could have been hired during the period of detention.

The Deputy Registrar considered the evidence and the documents presented to him and found that the Plaintiff had no capacity to pay the hired sum claimed because the Plaintiff had failed to complete the contract which gave rise to this litigation which was for a lesser amount; buy food for its workers and the value of its sub contracts with other companies were generally below K500,000. He reached the conclusion that the figures given were incorrect and went on to award a figure which he found to be reasonable in the circumstances. We find that the Deputy Registrar followed the correct principle applicable to damages on detention and loss of goods. For very clear reasons, he was not persuaded to accept the figures presented by the Plaintiff and came up with a figure which was reasonable in the circumstances. We find no basis to fault his reasoning on the award he made. Ground 1 therefore fails.

On the second ground of appeal, we find that the Deputy Registrar applied the correct principle to award the Plaintiff damages for loss of goods on the basis of the Market Value of the goods. In line 10 on page 8 of the record of appeal, he correctly reflects the total amount of K495,000 for the tools which were not returned. For some reason, this amount appears as K435,000 in line 12. We would like to believe that this was a typographical error because the total amount of K1,095,000 has taken into account K600,000 plus K495,000.00. The correct figure in line 12 on page 8 should be K495,000. On the claim for interest, we agree with Mrs. Mushota that a Judgment debt attracts interest up to the date of payment. To this effect, we Order that the Judgment debt should be paid with interest at the average lending rate as determined by Bank of Zambia from the date of the Ruling up to the date of payment.

On the third ground of appeal, to the effect that the Deputy Registrar erred in failing to make an award for loss of business, we have had recourse to the Judgment of Chitengi J. On page J5, the Deputy Registrar was ordered to assess damages for unlawful

detention and loss of tools. There was no order for loss of business as no such Judgment was entered in favour of the Plaintiff. Apart from the award of interest on the Judgment debt from the date of Ruling up to the date of payment, this appeal is unsuccessful. We make no order in costs.

E. L. Sakala
SUPREME COURT JUDGE

D. K. Chirwa
SUPREME COURT JUDGE

I. C. M. Mambilima
SUPREME COURT JUDGE

