SCZ Selected Judgment No. 8 of 2016 **P. 263**

IN THE SUPREME COURT FOR ZAMBIA
HOLDEN AT KABWE

Appeal No. 27/2011
SCZ/8/272/2010

(Civil Jurisdiction)

B E T W E E N:

TRYSON MTONGA **Appellant**

AND

WARREN NG'AMBI **Respondent**

Coram: **Malila, Kajimanga and Mutuna, JJS**

On 5th April, 2016 and 20th April, 2016

For the Appellant: Mr. K. Botha of Messrs William Nyirenda & Co.

For the Respondent: Mr. M. Kabesha of Messrs Kabesha & Co.

JUDGMENT

MALILA, JS, delivered the Judgment of the Court

Cases referred to:

1. *Hachibeka Habaad, National Pension Scheme Authority (NAPSA) v. Ronald Nsokoshi (Appeal No. 42 of 2011).*
2. *Eastern Cooperative Union Limited v. Yamene Transport Limited (1988 – 1989) ZR 126.*
3. *Development Bank of Zambia v. Magolo Farms Limited (1995-1997) ZR 67.*
4. *National Airports Corporation Limited v. Reggie Ephraim Zimba and Saviour Konnie (2000) ZR 154.*
5. *Zambia Breweries Plc. v. Lameck Sakala, SCZ Judgment No. No. 19 of 2012.*
6. *Zambia Telecommunications Company Limited v. Mulwanda and Others (2012) ZR 404.*

7. *Minister of Home Affairs and Another v. Habasonda (2007) ZR 207.*

This appeal raises two fairly straight forward legal points namely; (i) the duty to mitigate damages and its place in assessment of damages; and (ii) interest awardable on assessed damages, particularly on a foreign currency denominated judgment sum.

The respondent was the successful party in an action in the High Court wherein judgment for damages to be assessed was obtained. The action in the High Court was precipitated by a road traffic accident in which the respondent's motor vehicle, a Toyota Hiace, light bus, was on 2nd November, 2002, extensively damaged in a collision with the appellant's motor vehicle, a Toyota Cressida. The said accident was attributable wholly to the negligence of the driver of the appellant's motor vehicle.

At the time of the accident, the respondent had a running oral contract with Mpelembe Properties Limited under which he, using his said light bus, provided transportation for some employees of Mpelembe Properties Limited at a consideration of

K7,500,000 (old currency) now K7,500.00 per month out of which he paid 17½% Value Added Tax.

The appellant, in a written memorandum, agreed to pay the respondent the sum of US $3,500, the cost of the respondent's damaged vehicle, by December, 2002, failing which the respondent would be entitled to damages for loss of business. The appellant later disowned the memorandum, claiming that he was wrongfully induced to sign it.

The learned judge found for the respondent, dismissing in effect the appellant's claim that he was unduly influenced to sign the memorandum. He referred the matter to the learned Deputy Registrar for assessment of damages. The learned Deputy Registrar assessed the damages on the basis of affidavit evidence before him and awarded the respondent the sum of US$3,500 which was the agreed value of the respondent's motor vehicle damaged in the accident, and K7,500,000 (old currency) per month for seven years, being damages for loss of use of the respondent's motor vehicle. The learned Deputy Registrar also awarded global interest on the two sums at the current Bank of Zambia lending interest rate up to judgment,

and thereafter at 6% till settlement of the judgment sum. It is this award that has riled the appellant who now seeks to assail the judgment on assessment on three (3) grounds structured as follows:

> "**Ground One**
>
> **The learned Deputy Registrar erred in law and in fact to disregard the principle in the case of *Eastern Cooperative Union v. Yamene Transport Ltd* (1988-1989) ZR 126 regarding the plaintiff's duty to mitigate his damage.**
>
> **Ground Two**
>
> **The learned Deputy Registrar erred in law and in fact when he assessed damages to run for 7 years without limiting the time or taking into consideration the Respondent's duty to mitigate his damage.**
>
> **Ground Three**
>
> **The learned Deputy Registrar erred in law and in fact to grant interest on mispecified rate of lending interest and at 61% per annum when the currency in issue is United States Dollars (US$) whose bank interest is much less than 6%."**

The appellant's case in a nutshell is that on the basis of the foregoing errors and misdirections on the part of the learned Deputy Registrar, this court should interfere with the judgment on assessment and reverse it.

At the hearing of the appeal, both parties relied on the written heads of argument already filed. Mr. Botha additionally drew our attention to our decision in the case of **Hachibeka Habaad, National Pension Scheme Authority (NAPSA) v. Ronald Nsokoshi**[1] which, he submitted, was on all fours with the present case.

The appellant's learned counsel argued grounds one and two together. The plinth upon which the appellant's case rested is the apparent failure by the learned Deputy Registrar to consider the necessity for mitigation of damages on the part of the respondent. The learned counsel for the appellant submitted that it was an error and a misdirection on the part of the learned Deputy Registrar to have assessed damages to run for seven years without limiting the time or taking into account the respondent's duty to mitigate his damage. According to the learned counsel for the appellant, the approach taken by the learned Deputy Registrar flew in the face of established principles pertaining to mitigation of damages set out in the case of **Eastern Cooperative Union Limited v. Yamene**

Transport Limited[2] and as expatiated upon by the learned authors of **McGregor on Damages**, 14th Edition at page 150.

According to the learned counsel for the appellant, if the learned Deputy Registrar had cared to be guided by available precedents, both binding and persuasive on him, he would not have allowed damages for loss of use of the motor vehicle to be calculated beyond six months.

Under ground three, the learned counsel alleged misdirection and error on the part of the learned Deputy Registrar when he awarded interest on the assessed damages on mispecified lending interest and at 61% per annum when the currency in issue is United States Dollars whose bank interest rate is much less than 6%, and that this violated Order 36 Rule 8 of the High Court Rules and section 2 of the Judgment Act chapter 81 of the laws of Zambia as amended by Act No. 16 of 1997.

The learned counsel pointed out that the rate of interest awarded by the learned Deputy Registrar in his judgment on assessment for both the United States Dollar denominated

judgment sum and the Kwacha judgment sum had no justifiable legal basis. We were urged to set aside the judgment on assessment.

In his equally brief submissions, Mr. Kabesha, learned counsel for the respondent, supported the decision of the learned Deputy Registrar, arguing that the present case was distinguishable from the **Yamene Transport** case in that in the present case, the parties had agreed to settle the matter and reduced their agreement into writing, stating precisely what the respondent would be entitled to in the event of default on the part of the appellant. As it turned out, the appellant defaulted and the Deputy Registrar assessed damages based on the parties' agreement. The learned counsel made an interesting submissions, namely that the respondent could not mitigate because he had not been paid, save for the K7,000,000 paid on 15th June, 2006.

In regard to ground three, Mr. Kabesha contended that the learned Deputy Registrar was on firm ground to grant interest on the amount at the current Bank of Zambia lending rate up

to judgment and thereafter at 6% to time of payment in line with section 2 of the Judgments Act.

At the hearing of the appeal, we elicited Mr. Kabesha's view on whether the court's award of damages at K7,000,000 per mouth for seven years was a reasonable estimate of the loss the respondent would have incurred bearing in mind his duty to mitigate his losses. Mr. Kabesha gracefully conceded that the award of damages for seven years was overly generous, and that in his view, damages for twenty-four months would have been a reasonable estimate of the respondent's losses. The learned counsel did not give any basis for his settling for twenty-four months.

On the issue of interest, Mr. Kabesha equally conceded, honourably in our view, that the interest awarded by the learned Deputy Registrar was not in accord with the law governing the award of interest.

Quite plainly the effect of Mr. Kabesha's concession is that there is really no contestation in this appeal and we would be inclined to uphold it without more. We must observe, however,

that not often do appeals to this court turn the court's feeling from initial rueful concern to eventual deep dismay by the lower courts casual approach to determining the issues before it. This particular appeal has brought forth this eventuality. It is partly for this reason that we are impelled to consider the full legal arguments and set the law in perspective. We think it well that we should ventilate our views, particularly given the approach taken by the learned Deputy Registrar in this case which should be deprecated. In doing so, we are not unmindful that assessment of damages is peculiarly the province of the trial court, and this court, as an appellate court, will only interfere if the finding is out of proportion to the facts. In other words we would only interfere with the quantum of assessed damages on the ground that the trial judge acted upon some wrong principle of law or that the amount awarded was so extremely high or so very low as to make it an erroneous estimate of the loss suffered.

The learned Deputy Registrar was faced with what is, on all accounts, a simple issue of determining damages where an income-yielding vehicle was damaged.

The learned counsel for the appellant has argued, and we agree with him, that the respondent was duty bound to mitigate his loss and that an award of damages by the Deputy Registrar should have taken this requirement into account. **McGregor on Damages**, 14th Edition at paragraph 209, in a passage quoted by the learned counsel for the appellant, states as follows:

> **"The first and most important rule is that the plaintiff must take all reasonable steps to mitigate the loss to him consequent upon the defendant's wrong doing and cannot recover damages for any such loss which he could have avoided but failed, through unreasonable action or inaction, to avoid, put shortly, the plaintiff cannot recover for avoidable loss."**

This in our view, represents the correct position of the law, not only in England but also in this jurisdiction. In **Eastern Cooperative Union Limited v. Yamene Transport**[2] we stated that a plaintiff who has a profit making chattel is obliged to mitigate his loss. We further held in that case that the amount due as damages for loss of business ought not to have been calculated beyond six months. In other words the period for which loss of profit is recoverable is a reasonable time depending on the circumstance of a particular case. What is a reasonable time is a matter of fact determinable from the

circumstances. Mitigable loss is not recoverable. Damages awarded are, therefore, subject to the rule that the innocent party must take reasonable steps to mitigate his losses. The onus is on the defendant to prove that the plaintiff or innocent party ought reasonably to have taken steps to mitigate his losses. If the party that suffers loss fails to do so, normal damages will apply.

Where therefore, as in the present case, an income earning vehicle was damaged in a motor accident, the plaintiff has a duty to minimize his loss and should not wait until the date of judgment, which might be long in coming. In the present case, there was evidence that the vehicle was extensively damaged, but there was no suggestion that it could not be repaired.

The learned Deputy Registrar determined that he was not bound by the guidance that we so clearly gave in **Eastern Cooperative Union Limited v. Yamene Transport Limited**[2] on the basis that the case before him was "somewhat peculiar" in that this case was founded on an agreement between the parties. As the learned counsel for the appellant has pointed

out, we stated in this very case as is recorded at page 148 of the record of appeal in lines 15 to 21 that:

> **"The appellant was sued on his own undertaking which was construed as a contract between himself and the respondent, independently of who was to blame for the accident...."**

The duty to mitigate losses, however, exists regardless of whether liability arises in contract or in tort. The learned authors of **McGregor on Damages**, 14th Edition state at paragraph 209 that:

> **"The principle meaning of the term "mitigation," with which alone this chapter deals, concerns the avoiding of the consequences of a wrong, whether tort or breach of contract, and forms probably the only exact use of the term."**

In our considered view, it was plainly a poor attempt on the part of the learned Deputy Registrar to distinguish authorities that no doubt bind him in the order of the court system in this jurisdiction. The learned Deputy Registrar clearly misdirected himself when he failed to take into account the respondent's duty to mitigate and when he ignored the guidance we gave in **Eastern Cooperative Union Limited v. Yamene Transport Limited**[2].

In **Hachibeka Habaad, NAPSA v. Ronald Nsokoshi**[1] this court was confronted with substantially the same issues as arose in the present appeal. In that case, the respondent's motor vehicle was involved in a road traffic accident with the 2nd appellant's motor vehicle which was being driven by the 1st appellant. In consequence, the respondent's motor vehicle was a write-off. The respondent commenced proceedings in the High Court claiming among other things, the sum of US $40,000, being the value of his motor vehicle and a refund of transport expenses incurred as a result of deprivation of the motor vehicle. The learned judge entered judgment in favour of the respondent in which he, among other things, awarded the plaintiff refund of transport expenses suffered by the plaintiff from the date of the accident to the date a replacement would be procured. The learned judge also awarded interest at 20% per annum from the date of the writ of summons to the date of payment.

Based on our decisions in **National Airports Corporation Limited v. Reggie Ephraim Zimba and Saviour Konnie**[4] and **Eastern Cooperative Union Limited v. Yamene Transport**[2],

we held that the learned trial judge misdirected himself by failing to take into account the respondent's duty to mitigate his damages and limiting the appellant's liability. This is the position of the law on this issue.

Ground one has merit and we uphold it.

As regards ground two of the appeal, the appellant's argument is simple, namely that the award of interest on the judgment sum denominated in United States Dollars at a mispecified rate of lending interest was arbitrary and in contravention of at least two statutes, namely Order 36 Rule 8 of the High Court Rules and section 2 of the Judgment, Act chapter 81 as amended by Act No. 16 of 1997.

We agree with the learned counsel for the appellant. Order 36 Rule 8 of the High Court Rules provides that:

> **"Where a judgment or order is for a sum of money, interest shall be paid thereon at the average short-term deposit rate per annum prevailing from the date of the cause of action or writ as the court or judge may direct to the date of judgment."**

Section 2 of the Judgments Act on the other hand states that:

> **"every judgment, order or decree of the High Court whereby any sum of money, or any costs, charges or expenses, is or are to be payable to any person shall carry interest as may be determined by the court which rate shall not exceed the current lending rate as determined by the Bank of Zambia."**

It is preferable in the interest of finality for the trial judge or Deputy Registrar to ascertain the prevailing interest rates and thereafter to specify the one applicable in a particular case. In **Zambia Breweries Plc. v. Lameck Sakala**[5] we pointed out that the standard practice on debts is to award interest on the sum owing at the average short term bank deposit rate, from the date of issue of the writ of summons to the date of judgment. This is pursuant to Order 36, Rule 8 of the High Court Rules. Thereafter, up to the date of settlement, interest is awarded at the current lending rate, as determined by the Bank of Zambia. This is pursuant to section 2 of the Judgments Act.

Clearly if the learned Deputy Registrar had properly guided himself and taken these clear provisions into account he would not have awarded interest in the manner that he did.

In **Development Bank of Zambia v. Magolo Farms Limited**[3] and in **Hachibeka Habaad, NAPSA v. Ronald Nsokoshi**[1] we were categorical in our holding that it is wrong to award interest on a dollar denominated judgment sum on the same footing as a Kwacha denominated judgment. In the **Habaad case**[1] we stated as follows:

> **"Ground 2 of this appeal raises the question whether the learned trial judge was in order when he awarded interest at 20% per annum on a dollar claim. It is our considered view that ground 2 of this appeal has merit in that this was a claim in Dollars. The interest of 20% awarded per annum on the Dollar Claim is unconscionable and cannot be allowed to stand as it amounts to unjustly enriching the respondent."**

Ground three has merit. The net result is that this appeal succeeds on all grounds.

We come now to the learned Deputy Registrar's approach to dealing with this matter. As we have set them out in this judgment, the issues before the court were fairly straight forward. The record of appeal shows the parties were heard on assessment on the 22nd October, 2008. The learned Deputy Registrar reserved his judgment for the 3rd December, 2008. He, however, only delivered his three and half paged judgment on

11th October, 2010, some two years later. Even then it is obvious that the learned Deputy Registrar did not interrogate the issues that needed to be brought out during an assessment. After considering the agreement of the parties on liability the learned Deputy Registrar stated the following:

> **"Clearly, my duty had been simplified by the parties having themselves agreed as they did.**
>
> **I have not been told that the 3,500 US Dollars has been paid as agreed. I now therefore assess the agreement as between the parties is good. I stand by it and order as such.**
>
> **All told, my assessment herein is as hereunder:**
>
> 1. **$3,500 being the agreed amount.**
> 2. **K7,500,000 x 12 months x 7 years (from December, 2002) = K630,000,000.00.**
>
> **The total amount is then to attract interest at the current Bank of Zambia lending interest up to judgment and thereafter at 6% (six) to the time of judgment."**

In our view, this was a very casual approach to judgment writing. The learned Deputy Registrar made no reference to the evidence submitted before him let alone an analysis of it; he made no findings of fact. The learned Deputy Registrar should have subjected the evidence before him on assessment to a

qualitative and quantitative evaluation to arrive at a proper determination. Worse still, he failed to be guided by clear written laws and precedents on the issues before him. In **Zambia Breweries Plc. v. Lameck Sakala**[5], an appeal against assessment of damages by the same Deputy Registrar, Mwanamwambwa, JS, observed the following on behalf of the court:

> **"In our view, there was no evaluation of the evidence of all. We would add that there was no assessment of damages by the lower court in this matter."**

We would be inclined to adopt and repeat those words in the present case. The judgment on assessment before us is a classic repudiation of the features of a good judgment as we set them out in numerous authorities including **Zambia Telecommunications Company Limited v. Mulwanda and Others**[6] and the earlier case of **Minister of Home Affairs and Another v. Habasonda**[7]. On a proper conspectus of the circumstances of this case it is obvious the learned Deputy Registrar adopted a mechanical posture. We take a dim view of this kind of approach, particularly considering the time it took

the learned Deputy Registrar to come up with what appears as a semblance of a judgment on assessment.

The award given on assessment together with the interest are hereby set aside. The appeal is allowed. We award the respondent the sum of US$3,500 as agreed and as adjudged by the High Court. We also award the respondent damages for loss of business at the agreed sum of K7,500.00 per month. The later award shall, however, be for six months only in keeping with our decision in the case of **Eastern Cooperative Union v. Yamene Transport Limited**[2]. The resultant sum on this award shall attract interest at the average short term bank deposit rate from the date of issue of the writ of summons to the date of judgment. Thereafter, and up to the date of settlement, interest shall be at the current lending rate as determined by the Bank of Zambia.

As regards the US Dollar denominated judgment sum, we order that interest on the same shall be at LIBOR or 6% per annum, whichever is the less from the date of the writ to the date of settlement.

Given the concerns we have raised attributable largely to the learned Deputy Registrar, and given also Mr. Kabesha's concession, we order that each party shall bear his own costs of this appeal.

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M. Malila, SC
SUPREME COURT JUDGE

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C. Kajimanga
SUPREME COURT JUDGE

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N. K. Mutuna
SUPREME COURT JUDGE