

**EMMANUEL MUTALE v ZAMBIA CONSOLIDATED COPPER MINES LIMITED
(1994) S.J. 67 (S.C.)**

SUPREME COURT
NGULUBE, CJ., GARDNER, AND CHIRWA, JJ.S.
4TH AUGUST AND 26TH AUGUST, 1994
S.C.Z. JUDGMENT NO. 12 OF 1994
APPEAL NO. 27 OF 1994

Flynote

Assault - False Imprisonment - Award of damages for assault - No order for appellant for payment of interest and costs

Headnote

The appellant was arrested by mine policemen for conduct likely to cause a breach of peace. During the course of his arrest he was assaulted, as a result of which he suffered a swollen eye, a bleeding nose and bruises on his hands. The appellant issued a writ against the respondent claiming damages for assault and false imprisonment. The learned trial judge awarded the appellant damages for assault but found that the appellant had not proved false imprisonment. In awarding damages for assault, the trial judge did not make an order in favour of the appellant for the payment of interest and costs. The appellant appealed in this regard and it was held:

Held:

- (i) That under the Law Reform (Miscellaneous Provisions) Act Cap 74 s.4 the plaintiff was entitled to recover interest on money withheld from him and that there was nothing in the Act to make it necessary to state in the pleadings that it was intended to ask for interest.

Cases referred to:

1. Ward v The Chief Constable for Avon and Somerset (1995)
2. Collet v Van Kyl Bros Ltd (1966) Z.R. 65
3. Musamba v Simpemba (1978) Z.R. 175
4. United bus company of (Z) Ltd v Shanzi (1977) Z.R. 397 (S.C.)
5. Riches v Westminster Bank Limited (1943) 2 A11 E.R 725

For the appellant: E D Lyuwa of D M Lyuwa and Company

For the respondent: M N Nchito of Zambia Consolidated Copper Mines Ltd

Judgement

GARDNER, J.S.: delivered the judgement of the court.

This is an appeal against a High Court judgement in which damages were awarded for assault but no order was made in favour of the appellant for the payment of interest and costs.

The facts of the case are that the appellant was arrested by mine policemen for conduct likely to cause a breach of peace. During the course of his arrest he was assaulted, as a result of which he suffered a swollen eye, a bleeding nose and bruises on his hands.

The appellant issued a writ against the respondent claiming damages for assault and false imprisonment. The learned trial judge found that the mine police were

justified in arresting and detaining the appellant so that he had not established his claim in

respect of False imprisonment.

It was found however, that the mine police used more force than was necessary in effecting the arrest. In commenting on the conduct of the appellant the learned trial judge said:

"He was in fact a nuisance to all those around him that night His contention for a night was legal. It gave him a chance to sober up".

The learned trial judge then found that the end result was that he found for the appellant and awarded him K40,000.00 damages for assault and battery. It was ordered that each party should bear its own costs.

The appellant now appeals against the failure to award interest on the damages and failure to award costs to the appellant.

Mr Lyuwa on behalf of the appellant argued on the question of costs that, although costs were in the discretion of the court, the appellant as a successful plaintiff should have been awarded the costs of the action and, if the learned trial judge had reasons for depriving the appellant of his costs, those reasons should have been set out in the judgement.

As to interest Mr Luywa argued that it was the practice in this country to award interest on general damages from the date of the writ to the date of judgement, and, again, if there were reasons for depriving the appellant of such interest, they should have been set out in the judgement.

Mr Nchito on behalf of the respondent argued that the learned trial judge had indicated his reasons for depriving the appellant of his costs in the court below by saying in the judgement that the appellant had been such a nuisance to all those around him that night and that his arrest was justified. It was argued that if costs were awarded to the appellant in addition to the damages this would be an extra benefit to him to which he was not entitled having regard to the result of the case.

As to interest, Mr Nchito drew the court's attention to the Supreme Court practice of England, Order 13, rule 8, note 10 of which in the 1993 edition of the White Book reads as follows:

"interest - a claim for interest must be specifically pleaded whether it is claimed under section 35A of the Supreme Court Act 1931 (see Order 4(1) or otherwise.

If the claim for interest is not pleaded the court will not award the plaintiff any interest. *Hard v The Chief Constable For Avon And Somerset* (1)"

With regard to the argument as to costs the general rule is that a successful party should not be deprived of his costs unless his conduct in the course of the proceedings merits court's displeasure or unless his success is more apparent than real, for instance where only nominal damages are awarded. These principles have been followed by the courts in this country and two examples of their application are the cases of *Collet v Va ZYL Bros Ltd* (2) and *Musamba v Simpemba* (3)

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In this case it is clear that when the learned trial judge awarded K40,000.00 for damages in respect of an assault by persons in authority he was taking into account the conduct of the appellant at the time of his arrest. In the event result of the case was that the appellant was successful in his claim and, although the damages were reduced, they were certainly more than nominal damages. A defendant who wishes to avoid the payment of costs may, of course, make a payment into court, and, provided any damages which are awarded do not exceed the amount of such payment, the defendant may avoid payment of costs after the date of the payment into court. If this is not done the general rule applies and a successful plaintiff who has committed no impropriety in the conduct of the proceedings should be entitled to his costs. In this case there were no circumstances which justified the depriving of a successful litigant of his costs and the appeal on this ground succeeds.

As to the claim for interest, there has been a change in the enactment of the rules of court in England since this court last adjudicated on this subject. In the case of *United Bus Company Of (Z) Ltd And Shanzi* (4) we said:

"It should be noted that under the authority of *Riches v West-Minster Bank Ltd* (5), it is not necessary for a plaintiff to claim interest in his pleadings, and the result of that decision in my view is that it is the duty of the court to award interest unless there is good reason for the exercise of its discretion not to do so."

The case of *Riches* was decided on the effect of the Law Reform (Miscellaneous Provisions) Act 1954, S.5 which was identical in wording to the Law Reform (Miscellaneous Provisions) Act Cap 74 S.4 in this country. It was held that under the Act the plaintiff was entitled to recover interest on money withheld from him and that there was nothing in the Act to make it necessary to state in the pleadings that it was intended to ask for interest. Since that decision as pointed out by Mr Nchito, there has been an amendment to the rules of the of the Supreme Court in England, so that order 15 rule 8(4) now provides as follows:

"(4) A party must plead specifically any claims for interest under sections 35A of the Act or otherwise."

There has also been enacted in England the Supreme Court Act, 1981. Under that Act section 35A (1) reads as follows:

"35A - (1) Subject to rules of court, in proceedings (whenever instituted) before High Court for the recovery of a debt or damages there may be included in any sum for which judgement is given simple interest. At such rate as the thinks fit or as rules of court may provide, on all or any part of the debt or damages in respect of which judgement is given...."

Subsection (2) then goes on to provide that in a judgement for damages for personal injuries or death which exceed £200 it is mandatory to award interest. That Act also repealed the law Reform (Miscellaneous Provisions) Act 1949 which was the same as our Law cap 74, section 4, of which provides that in any proceedings triad in any court of record for the recovery of any debt or damages the court may if it thinks fit order that there shall be included in the sum for which judgement is given interest at such rate as it thinks fit on all or any part of the debt

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or damages. The section does not include the words "subject to rules of court" whereas section 35A of the English Act includes these words, thus bringing into effect Order 13 rule 8(4), as a result of which it has been held in a number of cases in England that failure to include a claim for interest in the pleadings has debarred a plaintiff from obtaining an award of interest.

In view of the fact that Cap 74 is still in force in Zambia, the practice and procedure relating to the award of interest is governed by that Act and, section 35A of the Supreme Court Act, 1981, of England does not apply in this country, nor does Order 13 rule 8(4) so far as interest under Cap 74 is concerned.

It follows therefore, that Cap 74, which is not expressed to be subject to any rule of court, sets out the law and the practice with regard to the award of interest in judgements for debt or damages, and our ruling in *United Bus Company of Zambia Limited vs Shanzi* still applies in this country namely that there is no necessity to include in the pleadings a claim for interest under Cap. 74. Different considerations would of course apply in the case of a contractual liability for interest but this does not effect this situation in this case.

For the reasons we have given the appeal is allowed. The judgement in favour of the appellant is amended to include an order for payment of interest on the damages of K40,000.00 at ten per cent per annum from the date of the issue of the writ to the date of this judgement and on order for costs in favour of the appellant in the court below.

Costs of this appeal to the appellant.

Appeal allowed.
