

IN THE SUPREME COURT OF ZAMBIA  
HOLDEN AT LUSAKA  
(CIVIL JURISDICTION)

APPEAL NO. 59/2002

BETWEEN:

ROSEMART INVESTMENTS LIMITED

APPELLANT

AND

ZAMBIA NATIONAL COMMERCIAL BANK LIMITED

RESPONDENT

CORAM: LEWANIKA, DCJ., CHIRWA, CHIBESAKUNDA, JJS  
On 8<sup>th</sup> October 2002 and 9<sup>th</sup> September, 2003

For the Appellant: In Person

For the Respondent: Ms M.K. CHALWE, Legal Counsel

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JUDGMENT

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LEWANIKA DCJ., delivered the judgment of the Court.

This is an appeal against the decision of a Judge of the High Court refusing to review his judgment on an application made to him by the Appellant pursuant to Order 39 of the High Court Rules.

The Appellant had instituted proceedings against the Respondent claiming, inter alia, damages for loss of business resulting from the Respondent's failure to act on specific instructions to transfer a sum of K700,000.00 from its Premium House Branch to its main branch. In his judgment the learned trial Judge found the Respondent liable and awarded damages to the Respondent but refused to award damages for loss of business and profits on the ground that the Appellant had not adduced evidence to support that claim. After delivery of the Judgment, the Appellant applied to the learned trial Judge for

a review of the judgment under Order 39 of the High Court Rules to adduce evidence to prove loss of business, which application was refused by the learned trial Judge, hence the appeal.

The Appellant, who appeared in person, had filed four grounds of appeal and relied on his heads of argument which we do not intend to reproduce in this judgment.

In reply Counsel for the Respondent referred us to our decision in the case of ZAMBIA CONSOLIDATED COPPER MINES LTD VS MOFFAT SINKALA, SCZ APPEAL NO. 149 OF 1998 and submitted that the onus was on the party applying for a review to show that the evidence it intends to adduce falls into one of the categories set out in that case. She said that when the Appellant applied for a review of the judgment they did not give any reason why they did not adduce the evidence relating to the claim for loss of business during the four years that the matter was on trial. She maintained that the evidence referred to in the affidavit of the Appellant in support of the application was not fresh evidence. She contended that the application for review had no basis at law and in fact.

As to the other ground that the learned trial Judge erred because he failed to take into account loss of business when granting general damages, she submitted that the learned trial Judge was on firm ground when he refused to award damages for loss of business. She referred us to our decision in MHANGO VS NGULUBE & OTHERS, 1983 Z.R. 61 where we said that:

*"It is of course for the party claiming a special loss to prove that loss, and to do so with evidence which makes it possible for the court to determine the value of that loss with a fair amount of certainty as a general rule, therefore any shortcomings in the proof of a special loss should react against the claimant."*

She said that she was alive to the fact that this court has at times, in certain cases, awarded damages excepting the general rule. But she said that this case cannot fall in that exceptional category because the Appellant failed to produce evidence to support the claim of loss of business and made no reference in his evidence in the court below of the specification or an estimation of the alleged loss. She urged us to dismiss the appeal as it was misconceived.

We have considered the submissions made by the Appellant and Counsel for the Respondent. The Appellant's main claim in the proceedings was for loss of business occasioned to it by the failure of the Respondent to remit the money to its Mansa Branch. If the learned trial Judge felt that the Appellant has not adduced evidence to support its claim for loss of business, it was open for the learned trial Judge to have referred the matter to the Deputy Registrar for assessment of damages as he had already found for the Appellant on the issue of liability. For this reason we would allow the appeal and remit the matter to the Deputy Registrar for assessment of damages for loss of business. We also award the Appellant costs, to be taxed in default of agreement.

D.M. Lewanika  
DEPUTY CHIEF JUSTICE

D.K. Chirwa  
SUPREME COURT JUDGE

L.P. Chibesakunda  
SUPREME COURT JUDGE

