

SELECTED JUDGMENT NO. 2 OF 2017

IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT KABWE
(Civil Jurisdiction)

APPEAL NO. 177/2013

BETWEEN:

DAVID CHIYENGELE
CHARLES CHIN'GAMBO
AND 4 OTHERS

1ST APPELLANT
2ND APPELLANT

AND

SCAW LIMITED

RESPONDENT

Coram: Mwanamwambwa, DCJ, Musonda and Chinyama, JJS
On 5th April, 2016 and on 19th January, 2017.

For the Appellants: Mr. David Chiyengele, acting as representative of the
Appellants.

For the Respondent: Mr. S.H. Twumasi of Messrs Kitwe Chambers.

J U D G M E N T

Musonda, JS, delivered the Judgment of the Court.

Cases referred to:-

1. Chilanga Cement Plc vs. Kasote Singogo (2009) Z.R. 122.
2. Clement H. Mweempe vs. Attorney General, International Police and Avis Rent-A-Car (2012) SCZ No.13 of 2012.
3. Wilhelm Roman Buchman vs. Attorney General (1993-1994) Z.R. 131.
4. Barclays Bank Zambia Plc. vs. Zambia Union of Financial Institution and Allied Workers (2007) Z.R. 106.
5. *The Mediana* [1900] A.C, 113

Legislation and Other Materials referred to:-

1. The Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia.

Other Works referred to:

1. Order 13/2/2 of the **White Book** (1999 edition)
2. Order 13/0/10 of the same **White Book**
3. Harvey McGregor, **McGregor on Damages** (15th edition)
4. Andrew Burrows, Q.C, (1994) **Remedies For Torts and Breach of Contract** (Butterworths: London)
5. Fry, I.C.F, (1971) **Equitable Remedies: Injunctions and Specific Performance** (The Law Book Co limited: Sydney)
6. Sprack John, (2007), **Employment Law and Practice**.

The Appellants have appealed to this Court against the Ruling of the Deputy Registrar at assessment, whereby the Honourable Deputy Registrar determined that the Appellants were not entitled to recover damages or compensation for loss of employment together with interest and costs consequent upon the entry of a judgment in default of appearance and Defence against the Respondent on 11 May, 2012.

The facts leading up to this appeal are substantially not in dispute.

The Appellants were all employees of the Respondent and were Mine Workers Union of Zambia (the union) officials. By letters dated 16th September, 2006, the Respondent terminated the Appellants'

employment contracts by reason of redundancy and paid them their respective redundancy dues.

It would appear from the Record relating to the proceedings in the Court below that the appellants were not happy with the redundancy packages which they received consequent upon the termination of their employment contracts via redundancy. Accordingly, on 3rd April, 2012, the Appellants instituted a Court action in the Kitwe High Court, seeking the following reliefs:-

- “i) Specific Performance;**
- ii) Damages or compensation for unfair dismissal;**
- iii) Any relief the court may deem fit;**
- iv) Interest on the amount found due; and**
- v) Costs.”**

On 11th May, 2012, a Judgment in default of Appearance and Defence was entered against the Respondent for damages or compensation for loss of employment together with interest and costs. The damages or compensation were to be assessed by the Honourable Deputy Registrar.

On 14th June, 2012, the Appellants took out an application for the assessment of damages consequent upon the entry of the said

default judgment. This application was tenable before the Deputy Registrar at Kitwe and was supported by two affidavits which were sworn by the 1st Appellant. The first Affidavit was filed on 14 June, 2012 and its material depositions were that judgment had been entered in favour of the Appellants for unlawful dismissal and that the Court had ordered that the Appellants recover damages, interest and costs as earlier indicated and that all such damages as were to be found to be due to the Appellants were to be assessed by the Deputy Registrar.

On 24 July, 2012, the 1st Appellant filed his second Affidavit which was styled: *'Further Affidavit in Support of Application for Assessment of Damages and Costs'* and, in it, the deponent (who was then the 1st Plaintiff) deposed as follows:

- "4. That on 31st April 2012, the Plaintiffs commenced suit against the Defendant in the Kitwe High Court.***
- 5. That the Plaintiffs' claim was for:-***
 - (a) Court order of specific performance***
 - (b) Damages or compensation for loss of employment***
 - (c) Any relief of the court deemed fit and;***
 - (d) Interest and costs.***
- 6. On 17th May 2012 the Honourable Court entered a Default Judgment in favour of the Plaintiffs and ordered that the Plaintiffs recover against the Defendant amounts found due in***

- damages for loss of employment, interest and costs all to be assessed by the Honourable Deputy Director, Court Operations.*
- 7. The Plaintiffs shall submit that if they had never been wrongfully discharged from employment by the Defendant their total terminal benefits package to date for 6 persons could have been K483,655,100 representing benefits, repatriation, housing allowance, subsistence allowance, Christmas bonus and shift differential respectively....*
 - 8. The Plaintiffs shall further submit that, according to their conditions of employment at the time of their unlawful discharge in 2006 as amended in 2012, their total monthly package for 6 people for 84 months to date stands at K486,780,920 in accrued monthly salaries.*
 - 9. The Plaintiffs will submit that in addition to the K483,655,100 and K486,780,920 representing benefits and salaries now believed to be due they are also entitled to recover from the Defendant K2,950,000.00 being costs plus interest at bank lending rate from date of commencement of this cause.*
 - 10. That since the Honourable court has already ruled in favour of the Plaintiffs in the judgment of 11th May 2012 and all court process have been served on the Defendant, it is our belief that if the Defendant cannot submit any opinion (sic.) in regard to this application for assessment, this Honourable court should proceed to grant the order sought...”.*

On 23rd August, 2012 the Respondent filed its opposing Affidavit to the Application for Assessment of Damages. The gist of the Respondent's opposing Affidavit was that the Appellants were not entitled to the monies they were claiming because they were adequately compensated at the time when they were declared redundant and that, in fact, what the Appellants had been given was way above and beyond the measure of damages awarded by Courts

of law in matters of the nature and type that the Appellants were prosecuting.

The Assessment Application was subsequently heard and tried before the Deputy Registrar who heard three witnesses, two for the Appellants and one for the Respondent.

In his Ruling on Assessment, the learned Deputy Registrar found, as fact, that all the Appellants had their employment contracts terminated by way of redundancy and that they were all paid their redundancy benefits. The Deputy Registrar observed that the Appellants had failed to prove that they were entitled to recover damages for loss of employment; that the Respondent had adequately and fairly paid the Appellants all their dues at the time they lost their employment via redundancy; that the Appellants' claim on account of loss of employment was illegitimate and untenable as was their claim for accrued salary arrears; and that the latter claim was even unfounded, frivolous and vexatious. The learned Deputy Registrar accordingly concluded that the Respondent did not owe the

Appellants any monies and, consequently, dismissed the Appellants' claims in their entirety.

It is against the above Ruling on assessment by the Deputy Registrar that the Appellants are now appealing on the basis of three Grounds of Appeal as follows:-

"Ground 1

The learned court below erred at law and facts upon holding that the Plaintiffs had failed to prove their damages for loss of employment and that the Defendant had adequately and fairly paid the Plaintiff the dues notwithstanding the evidence of victimization cited by the Mine Workers Union of Zambia in the Plaintiffs statement of claim where the positions that the Defendant had purported to have been scrapped were however replaced by new employees.

Ground 2

The court below erred at law and facts upon holding that the termination of employment was neither null nor void against the resolution of the meeting stated in the Plaintiffs' statement of claim between the Defendant's management and the representatives of the Mines Workers Union of Zambia where the Defendant openly admitted the unlawful dismissal of the Plaintiffs and further pledged to compensate the Plaintiffs.

Ground 3

The court below erred at law and facts to hold that the Defendant does not owe the Plaintiffs any monies against the evidence on Record."

The Appellants who have been and continue to be legally unrepresented filed their Heads of Arguments on 26th September, 2013 to buttress their appeal.

The Appellants have contended, in relation to the First Ground of appeal, that they were not disputing the fact that they were all declared redundant and paid their redundancy packages by the Respondent. The Appellants have maintained, however, that what they were seeking in the Court below was compensation or damages for unlawful dismissal. They further contended that they were the only ones who were served with redundancy letters by the Respondent and that this had been so because they were the ones who were championing the cause to rejoin the union; that they were unfairly dismissed and victimized because of their union affiliation and that, previously, the Respondent had even been warned against victimizing workers who intended to exercise their right to form or join a Trade Union of their choice.

The Appellants further argued that the learned Deputy Registrar misdirected himself when he misapprehended the nature of the Appellants' claim as one founded on the redundancy packages paid when, in fact, what they were seeking were damages or compensation arising from the Respondent's declaration of a redundancy which, so they contended, was not genuine and for

scrapping off the Appellants' positions which positions the Respondent immediately filled with new employees. The Appellants argued that it was their belief that the Respondent's actions pointed to unfair dismissal as provided for in Section 108(1) of the **Industrial and Labour Relations Act, Chapter 209 of the Laws of Zambia** which states as follows:-

"No employer shall terminate the services of an employee or impose any other penalty or disadvantage on any employee, on grounds of race, sex, marital status, religion, political opinion or affiliation, tribal extraction or status of the employee."

The Appellants also made reference to Section 108(3)(a) of the same statute which provides that:-

"The Court shall, if it finds in favour of the complainant-

- (a) Grant to the complainant damages or compensation for loss of employment;"**

The Appellants further argued that Section 5 of the **Industrial and Labour Relations Act, CAP 269 of the Laws of Zambia** created rights for employees to belong to trade unions of their choice and to participate in the activities of such unions by stating that:-

"Notwithstanding anything to the contrary contained in any other written law and subject only to the provisions of Constitution and this Act every employee shall have the following rights:

- (a) The right to take part in the formation of a trade union;**

- (b) **The right to be a member of a trade union of that employee's choice."**

The Appellants prayed that this ground be upheld.

In support of Ground 2 which attacks the judgement of the court below to the extent that that Court held that the termination of the Appellants' employment contracts was not null and void, the Appellants contended that correspondence from the Labour Office of the Ministry of Labour suggested that the redundancy exercise had not been properly carried out.

The Appellants also repeated their earlier arguments above by contending that no genuine redundancy situation had arisen in the Respondent company because the business or positions that were previously occupied by the Appellant were not affected nor did they cease to function or operate. The Appellants relied on the repealed Section 15(c)(2) of the **Industrial and Labour Relations Act** to support their argument.

In support of Ground 3, the Appellants relied on evidence in the form of various correspondence which allegedly suggested that the

Respondent had agreed to compensate them (i.e., the Appellants). The Appellants contended in this regard that the Respondent had, in fact, admitted the unlawfulness of its action prior to the institution of their (i.e., the Appellants') action in the Court below and had even proposed to pay a total sum of K173,749,200.00 to the Appellants.

In response to the Appellants Heads of Argument, Counsel for the Respondent, Mr. Twumasi, relied on the Respondent's Heads of Argument which, upon application, he was allowed to file out of time and did so on 15th April, 2016. Counsel argued Ground 1 on its own while Grounds 2 and 3 were argued together.

In response to Ground 1, Mr. Twumasi argued that the Appellants had failed to prove their case for damages and that the learned Deputy Registrar was perfectly right when he made his finding that the Appellants had failed to prove that they were entitled to damages for loss of employment. Counsel also supported the Deputy Registrar's conclusion that the Respondent had adequately and fairly paid the Appellants at the time when they lost their employment via redundancy and that, consequently, the Appellants'

claim for K483,655,100.00 on account of loss of employment was illegitimate and untenable. Counsel submitted that the learned Deputy Registrar had the opportunity to assess the evidence from both parties and that the Appellants had failed to demonstrate that the trial court's assessment of the evidence which had been deployed before him had been wrong or flawed in any way.

Counsel went on to argue that, in fact, the Appellants had, in their own evidence, admitted that they were properly and adequately compensated for the loss of their employment and that the findings of the trial court on these facts was comprehensively covered by the facts of the case.

To reinforce his exertions, Counsel for the Respondent relied on the principle which we restated in the case of **Chilanga Cement Plc vs. Kasote Singogo**¹ when we held that, when awarding damages for loss of employment, the common law remedy for wrongful termination of a contract of employment is the period of notice and that, in deserving cases, the courts have awarded more than the common law damages as compensation for loss of employment.

Counsel submitted that, in the context of the present appeal, the money which was paid to the Appellants more than amply demonstrated that the Appellants had been adequately compensated.

Counsel also discounted the Appellants' argument that the Respondent's failure to file its Defence and the resultant entry of the Default Judgement by the Appellants automatically entitled the Appellants to the relief which they were seeking. To support this argument, counsel for the Respondent cited our judgment in the case of **Clement H. Mweempe vs. The Attorney General, International Police and Avis Rent-A-Car**² where we held that it was for the Appellant to prove his case irrespective of whether or not the opposing party had mounted a viable defence. Counsel for the Respondent further contended that some of the matters upon which the Appellants had advanced arguments in this Court through their Heads of Arguments were not canvassed in the Court below and that it was not, therefore, competent for the appellants to raise those matters before this Court. To support this argument, Counsel relied on our decisions in **Wilhelm Roman Buchman vs. Attorney General**³ and **Barclays Bank Zambia Plc. vs. Zambia Union of**

Financial Institution and Allied Workers⁴. In the latter case, we reiterated the point we have repeatedly made that an issue which had not been raised in the Court from which an appeal arises cannot and must not be raised in an appellate court.

In response to Grounds 2 and 3, Counsel argued that the issues which these Grounds raised were not raised in the court below and, consequently, could not be entertained by this Court. Counsel relied on the cases cited above to buttress his objection.

We are indebted to both parties for their undoubted industry and clarity of argument.

We have carefully considered the arguments which were canvassed before us as well as the authorities which were cited to buttress the same in the context of the judgment of the Court below which is now being assailed in this Court.

In the view which we have taken, the central issue which falls to be determined in this appeal (and which, in our view, was the only legitimate issue upon which the Court below ought to have

pronounced itself) is whether any and what loss or damage the Appellants had suffered consequent upon the loss of their employment and whether such loss had been sufficiently or at all atoned by the Respondent in the context of the redundancy exercise in question.

Having regard to the foregoing, and subject to the observations which we shall be making in relation to the effect of the entry of the default judgment in the Court below, we consider that both Grounds Two and Three were totally misapprehended or misconceived in that while Ground Two did not speak to the issue of assessment (which was the issue at play in the Court below), Ground Three raised an issue of fact which, as formulated, is totally incompetent before us. Save to the extent we have just indicated above, we outrightly dismiss Grounds Two and Three.

As regards the First Ground of appeal, the undisputed evidence which had been deployed before the Court below was to the effect that the Appellants had suffered loss or damage at the instance of the Respondent and that this loss was of the nature of loss of

employment and that this loss of employment arose by way of redundancy.

It was also not in dispute that the Appellants did receive compensation from the Respondent for the employment loss in question.

Having regard to the foregoing, was the Appellants' search for the relief which they were seeking in the Court below and which search has now been escalated to this Court legitimate or well-founded?

Although counsel for the Respondent was quite categorical when he submitted that "*...the amounts [which were] paid to the Appellants [suggested that they had been] adequately compensated*", he did not speak directly nor candidly to the issue of what the effect of granting the relief which the Appellants had been seeking in the Court below would be.

In our view, the learned assessing Deputy Registrar was perhaps more categorical and unequivocal in his rejection of the Appellants' search for more relief than had already been availed to

Although our research has not yielded a Zambian case on the point, the position we have taken has enjoyed some pride of place in the writings of some renown jurists.

Professor Andrew Burrows, Q.C, a widely respected jurist, has written in his book entitled: *Remedies For Torts and Breach of Contract* (1994) that:

"[A] plaintiff [cannot] recover double damages for the same loss" (at p.4).

Fry, I.C.F, another well-known jurist, has also written in his text entitled: *Equitable Remedies: Injunctions and Specific Performance* (1971) that:

"Damages would not be granted in such a manner as to give rise to double relief...".

Turning to the case at hand, it is not in dispute that a default judgment for *"damages or compensation ...to be assessed for loss of employment..."* had been entered in favour of the Appellants by the Court below.

Subsequent to the entry of this judgment, an assessment, which was of the nature of a trial, took place for the purpose of

determining what compensation or damages were due to the Appellants. Following the conclusion of that trial, the learned assessing Deputy Registrar determined that the Appellants had failed to prove that they were entitled to damages for loss of employment and that, in fact, the appellants had been "*adequately and fairly*" compensated for the loss of their jobs via redundancy.

Although, in principle, we remain somewhat in agreement with the lower Court's conclusion that the Appellants had failed to prove that they were entitled to "*...damages or compensation ...for loss of employment...*" beyond what they had received in the redundancy in question, the Ruling appealed against fell short in the sense that it did not address the Appellants' key argument relating to the effect of the Respondent's failure to file its Defence and the resultant entry of the Default Judgement by the Appellants. In his Ruling on Assessment, the learned Deputy Registrar said:

"Notwithstanding the fact that the Plaintiffs obtained an interlocutory default judgment, the Plaintiffs are still duty-bound to prove their damages on the usual standard of preponderance of probability, otherwise the interlocutory judgment will be rendered futile.... I will be quick... to state that the damages for loss of employment have not been proved ...because the Defendant adequately and fairly paid the Plaintiffs their dues at the time they lost employment via redundancy..."

It is worthy of note from the Deputy Registrar's reasoning, as set out above, that he totally ignored the meaning and effect of a judgment in default of defence which is not set aside as was the case in the instant case.

In terms of Order 13/2/2 of the White Book (1999 edition),

"The term 'interlocutory judgment' means that such a judgment is interlocutory only as to amount and is final as to the right of the plaintiff to recover damages (emphasis ours)".

On the other hand, Order 13/0/10 of the same White Book provides as follows:

"Effect of judgment in default. By making default in giving notice of intention to defend the defendant admits all the allegations in the statement of claim indorsed on the writ..."

The net effect of the two provisions of the White Book which we have just cited above in relation to the Ruling under appeal is that the Court below erred in having failed to acknowledge and give effect to the fact that the Judgment in Default of Appearance and Defence which was entered in favour of the Plaintiffs (now Appellants) on 11th May, 2012 and which judgment remained unchallenged "**[was] final as to the right of the plaintiffs to recover damages**" which damages were to be assessed. In short, what that default judgment

meant was that the Respondent had "**admitted**" having committed a legal wrong or injury against the Plaintiffs on which that default judgment was based.

Professor Harvey McGregor, the author of the legendary Practitioners' and self-titled text, McGregor on Damages (15th edition) has stated, at paragraph 396, that:

"Technically, the law requires not damage but an *injuria* or wrong upon which to base a judgment for the Plaintiff, and therefore an *injuria*, although without loss or damage, would entitle the Plaintiff to judgment".

In the context of the Ruling under appeal, the Court below determined that the Appellants had failed to prove the **loss** or **damage** which the Appellants had suffered beyond the loss of their employment and which loss the Respondent had redressed via the redundancy payments and also to the fact that the entry of the default judgment earlier referred to entitled the Appellants to damages (notwithstanding the compensation which the Appellants received for the loss of their jobs by way of redundancy payments), how does the law reconcile the two positions, particularly in the light

of the rule against “*double compensation*” or “*double relief*” as explained earlier in this judgment?

It seems to us that, *rather than leaving the Appellants without legal redress for the legal injury or wrong* which had been occasioned to them by the Respondent (and which the Respondent had admitted by not challenging the entry of the default judgment in question against it), we are of the considered view that, notwithstanding the Appellants’ failure to prove the loss/damage which they had suffered when they had lost their jobs, the Court below should have affirmed the infraction of the Appellants’ legal right by granting them nominal relief in the form of *nominal damages* whose purpose was explained by Lord Halsbury, L.C. in *The Mediana*⁵, in the following terms:


“ ‘Nominal damages’ is a technical phrase which means that you have negatived anything like real damage, but that you are affirming by your nominal damages that there is an infraction of a legal right which, though it gives you no right to any real damages at all, yet gives you a right to the verdict or judgment because your legal right has been infringed” (p.116).

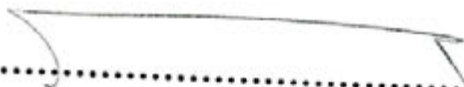
Turning to the case at hand, and, as we have demonstrated earlier in this judgment, the entry of the default judgment on 11th

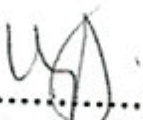
May, 2012 in favour of the Appellants “...*for damages or compensation... to be assessed...*” meant, thereby, that the Appellants became entitled to damages or compensation for losing their jobs. However, since the Deputy Registrar at assessment found, as fact, that the appellants had failed to prove that they were entitled to damages or compensation over and above what they were paid by way of redundancy payments and, consequently, were not, to borrow Lord Halsbury’s words, entitled to “*any real damages at all...*” , the Court below should, as earlier noted, have affirmed the infraction of the Appellants’ legal right by granting them nominal relief in the form of *nominal damages* by way of acknowledging that the Appellants had suffered an infraction of their legal right at the hands of the Respondent which the latter had admitted as earlier noted.

The net effect of the preceding narrative is that although the appeal has substantially failed on all the Grounds, Ground One has narrowly succeeded in the nominal sense we have described above for which we award the Appellants a sum of K500.00 by way of nominal damages.

As regards the costs, we order that the parties should bear their respective costs.


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M.S. MWANAMWAMBWA
DEPUTY CHIEF JUSTICE


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M. MUSONDA, SC
SUPREME COURT JUDGE


.....
J. CHINYAMA
SUPREME COURT JUDGE