Selected Judgment No. 21 of 2017

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IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA

Appeal No. 11/2017
SCZ/8/255/2016

(Civil Jurisdiction)

BETWEEN:

FINANCE BANK ZAMBIA LIMITED — **1ST APPELLANT**

RAJAN MAHTANI — **2ND APPELLANT**

AND

SIMATAA SIMATAA — **RESPONDENT**

Coram: **Hamaundu, Malila and Musonda, JJS**
on 10th May, 2017 and 2nd June, 2017

For the Appellants: Mr. K. Chenda, Messrs Simeza, Sangwa and Associates

For the Respondent: Mr. M. D. Lisimba, Messrs Mambwe, Siwila & Lisimba Advocates

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JUDGMENT

Malila, JS, delivered the judgment of the Court

Cases referred to:

1. *Indo-Zambia Bank Limited v. Mushaukwa Muhanga (2009) ZR 266.*
2. *Mazoka and Others v. Mwanawasa and Others.*
3. *Printing and Numerical Registering Co. v. Sampson (1875) 19 Ex. 462.*

4. *Colgate Palmolive Zambia Inc. v. Abel Shemu Chuka and 10 Others (SCZ Judgment No. 11 of 2005) (Appeal No. 181 of 2005)..*
5. *Attorney-General v. Guardian Newspaper Ltd. and Another (No. 2) (1988) 3 ALLER 545.*
6. *Zambia Radiological and Imaging company Ltd. and 5 Others v. Development Bank of Zambia, SCZ Appeal No. 28 of 2016.*
7. *Re Sentor Motors Limited.*
8. *Mike Waluza Kaira v. Attorney-General (1980) ZR 65.*
9. *J P Karnezos v. Hemes Safaris Limited (1978) ZR 197.*
10. *Printing and Numerical Registering Co. v. Simpson (1875) LR 19 Exch. 462.*
11. *Crompton v. Green (1848) 10LT 442.*
12. *Harmony Shipping Co. SA v. Davis and Others (1973) 3 ALLER 177 at 183.*
13. *Fulham Football Club Ltd. v. Cabra Estates Plc (1992) BCC 863.*
14. *Mhango v. Ngulube (1983) ZR 61.*
15. *David Chiyengele and Others v. Scaw Limited SCZ Judgment No. 2 of 2017.*
16. *Barclays Bank Zambia Plc v. Patricia Leah Chatta Chipepa (Selected Judgment No. 16 of 2017).*
17. *Mappouras v. Waldrons (2002) ALLER D 299 (para 15).*
18. *Anglo-Cyprian v. Paphos (1951) 1 ALLER 873.*

Other legislation referred to:

1. *Chitty on Contracts para 25 – 001 (29th ed).*
2. *Banking and Financial Services Act, chapter 38 of the Laws of Zambia.*
3. *29th ed. (2004) vol. 1 (General Principles), London: Sweet & Maxwell at paragraphs 24 – 001 (p.1365).*
4. *London: Sweet & Maxwell at paragraphs 24 – 001 (p. 1365).*

This appeal involves a settlement agreement concluded between parties with full contractual capacity. In terms of that agreement the appellants and the respondent committed themselves to observe certain terms. The dispute in the appeal

arises from an allegation by one party that the terms of the settlement agreement were breached by the other party.

The background facts are uncontroverted. The respondent was an employee of the first appellant company, serving in the position of Director, Risk and Compliance, immediately preceding his disengagement from employment. The second appellant was the Executive Chairman of the first appellant and was described in the said settlement agreement as the intervener. The respondent had commenced proceedings in the Industrial Relations Court, claiming that his separation from the first appellant's employment was effectively a constructive dismissal. He sought, among other things, payment of his pension benefits and other terminal entitlements he considered due from the first appellant. The first appellant resisted the respondent's claim and had to this effect filed an answer to the complaint denying liability *in toto*.

The first appellant, with the facilitation of the second appellant, then engaged the respondent with a view to reaching an out of court settlement. We can only assume that the

appellants, especially the first appellant, had a strong motivation to seek a settlement of the dispute out of court. This could include a desire to avoid adverse publicity against the first appellant that would naturally arise from the continuation of the suit, and the need on the first appellant's part to diminish chances of similar actions being filed against it. Generally it was in the appellants' interest to make it difficult for anyone who sought to bring claims against the first appellant to prove their case. On the respondent's part, incentives for entering into the settlement agreement were built into the agreement itself. He received K1 million without going through the full legal process of proving his claim. He thereby averted the cost and inconvenience associated with a full trial. Above all, he allayed altogether, any risk or possibility of his claim failing. The respondent no doubt wanted his case to be over and was apparently happy with the size of the settlement sum regardless of what he may have felt about not officially 'winning' the court contest.

On the 23rd May, 2007 a settlement agreement was concluded between the respondent of the one part, and the first appellant and the second appellant of the other part. We sense that the settlement agreement must have given both the appellants and the respondent pause from the irritations and anxieties of the dispute.

The K1 million settlement sum payable under the settlement agreement was to be paid to the respondent in six (6) equal monthly installments with the first such installment being made on or before the 28th May, 2007. As part of the settlement package, the respondent discontinued the Industrial Relations Court action and bound himself not to publish, broadcast or utter any statement adverse to the first appellant calculated to harm, or which would have the effect of harming, the business or character of the appellants.

It was the appellants' case that in breach of the settlement agreement, the respondent, on diverse dates, and out of his own free will, testified in courts of law in various cases against the first appellant and further, that he caused portions of his

statements to be published in a newspaper circulating daily in Zambia.

The first appellant accordingly took out proceedings in the High Court claiming damages for breach of the said settlement agreement, and a refund of the K1 million, interest on the said sum and costs.

In a judgment delivered on the 22nd August, 2016, the learned High Court judge, dismissed the claim, holding that there was no breach of the agreement between the first and second appellants on the one hand and the respondent on the other, and therefore, that the respondent was not liable to provide the relief sought.

The learned trial judge reasoned that the settlement agreement was concluded with regard to the proceedings in the Industrial Relations Court and, therefore, that the obligation not to divulge information adverse to the appellants was confined and attached only to information related to the Industrial Relations Court matter. According to the lower court

judge, the settlement did not constitute a 'global gag' on the respondent to abrogate his right as a citizen to testify in any court of law on matters affecting the appellants or in reporting any perceived misconduct by the appellants which, in his opinion, constituted breach of the law.

It is against that judgment that the appellants launched the present appeal with a basketful of grounds of appeal alleging errors and misdirections on the part of the trial judge. In all thirteen (13) grounds of appeal were filed and they read as follows:

GROUND ONE

That the court below erred in fact and in law by holding (at page J12) that the question to be determined was whether the respondent breached clause 5 of the agreement or any notion of it by testifying before the courts of law in cases cited by the appellants.

GROUND TWO

That the court below erred in fact and in law by holding (at page J12-13) that clause 5 was meant to restrict divulging the contents of the agreement dated 23rd May, 2007 and not a global gag on the respondent not to testify in any court on matters affecting the appellants.

GROUND THREE

That the court below erred in fact and in law by holding (ay page J13) that there was nothing in the newspaper clippings to suggest that the respondent divulged any details of the agreement entered into with the appellants dated 23rd May, 2007.

GROUND FOUR

That the court below erred in fact and in law by holding (at page J14) that holding the respondent to have breached the agreement by testifying would be outside the ambit of the agreement and tantamount to a global gag on the respondent to forego his constitutional right to testify in a court of law.

GROUND FIVE

That the court below erred in fact and in law by holding (at page J14-15) that the defendant's testimony was in public interest and that to hold otherwise would be tantamount to saying that the respondent should never, ever testify against the plaintiffs.

GROUND SIX

That the court below erred in fact and in law by holding (at page J15) that clause 5 was drafted to keep confidential the contest of the agreement and ws not intended to be of such global application as to bar the respondent from saying anything about the 1st appellant let alone bar the respondent from testifying in a court of law.

GROUND SEVEN

That the court below erred in fact and in law by holding (at page J16) that the entire agreement was founded and anchored on the complaint by the respondent in the IRC and as such its application was to be restricted to the contents of the agreement only and cannot be construed to forbid the respondent from disclosing anything at large about the appellants.

GROUND EIGHT

That the court below erred in fact and in law by holding (at page J15) that the submission that the respondent breached the provisions of section 50 of the Banking and Financial Services Act was without merit and that the information alleged to have been disclosed did not fall within the ambit of section 50.

GROUND NINE

That the court below erred in fact and in law by holding (at page J15) that even assuming that the respondent breached the provisions of section 50 of the Banking and Financial Services Act it would not entitle the appellants to the reliefs sought.

GROUND TEN

That the court below erred in fact and in law by holding (at page J16) that is was not persuaded that the appellants need not prove that the respondent's disclosures had a harmful effect in order for the respondent to be liable.

GROUND ELEVEN

That the court below erred in fact and in law by holding (at page J18) that since signing of the agreement dated 23rd May, 2007 up to date, the respondent has kept confidential the contents of the agreement.

GROUND TWELVE

That the court below erred in fact and in law by holding (at page J18) that the respondent did not breach the agreement he entered into with the appellants.

GROUND THIRTEEN

That the court below erred in fact and in law (at page J18) by dismissing the appellant's claims as endorsed on the writ of summons.

We note from the pleadings in the lower court that the respondent had put in a counter-claim. The judge below does not appear to have dealt with it in her judgment, nor has the respondent counter appealed.

The plenitude of the grounds of appeal only serves to obfuscate the real issues determinative of this appeal. It is also apparent that as structured, there is circumlocution and repetition in the grounds of appeal over the issues to be determined. And we shall revert to this point shortly.

The learned counsel for the appellants filed heads of argument in which grounds one, four, and ten were argued on a stand-alone basis while grounds two, five, six and seven were argued compositely. Ground three was abandoned altogether. Grounds eight and nine were argued together and so were grounds eleven, twelve and thirteen. Those heads of argument run into nineteen pages.

At the hearing of the appeal, Mr. Chenda, learned counsel for the appellant, relied on the filed heads of argument and briefly supplement them orally.

Ground one attacked the learned trial judge's formulation of the issue to be determined. The trial court structured the question for determination as being whether the respondent breached clause 5 of the settlement agreement or any notion of it by testifying before courts of law in the cases cited by the appellants in their pleadings. Counsel for the appellants submitted that this formulation of the issue for determination was faulty as the appellant's pleadings particularized instances of the alleged breach of clause 5 of the settlement agreement,

and those particulars went beyond the respondent merely testifying in court – which was just a single breach. This, according to the appellant's counsel, amounted to an abdication by the trial court of its duty to adjudicate on the whole case put forward by the appellants in its pleadings.

In relation to grounds 2, 5, 6 and 7, which, as we have already intimated, were argued globally, it was the appellant's case that the trial judge did not use the correct tool of interpretation of the settlement agreement. According to counsel for the appellant, the court should have interpreted clause 5 of the settlement agreement, using the ordinary meaning of the words. Had it done so, it would not have come to the conclusion it did that clause 5 was meant to restrict the respondent from divulging the contents of the settlement agreement and not a global restriction on the respondent not to testify in any court on matters affecting the appellants. Counsel quoted various authorities of this court including **Indo Zambia Bank Limited v. Mushaukwa Muhanga**[1] and **Mazoka and Others v. Mwanawasa and Others**[2] to buttress his argument.

Another limb of the argument under this cluster of grounds of appeal was that by refusing to enforce the clear and unequivocal terms of clause 5 of the settlement agreement, the court below actually acted contrary to public policy. It is in this connection that counsel for the appellant quoted from the cases of **Printing and Numerical Registering Co. v. Simpson**[3] as endorsed by us in **Colgate Palmolive (Z) Inc. v. Able Shem Chukka and Others**[4] on the policy of English law regarding the need to uphold freedom to contract and the sanctity of contracts.

Regarding ground four of the appeal, the contention of the appellant was that the reasoning of the trial court that holding the respondent to have breached the agreement by testifying would be outside the ambit of the agreement and tantamount to a global gag on the respondent to forego his constitutional right to testify in a court of law, was destitute of any legal justification. Counsel argued that the Constitution of Zambia does not invest in any person the right to testify in a court of law as held by the trial court; that the respondent was not

under compulsion of the law to testify but did so voluntarily in breach of clause 5 of the settlement agreement.

The submissions relative to grounds 8 and 9 were focused on the provisions of section 50 of the Banking and Financial Services Act, chapter 387 of the laws of Zambia. Counsel contended that the learned trial judge was wrong to hold that the appellant's claim that the respondent had breached section 50 of the Banking and Financial Services Act was without substance. According to counsel for the appellants, the respondent admitted in his evidence in the lower court that the Banking and Financial Services Act did impose a confidentiality obligation on him with respect to the first appellant's affairs. It was contended that the respondent divulged confidential information about his former employer and such information did not come within the ambit of the exceptions set out in that Act.

Under ground 10 of the appeal, the argument on behalf of the appellants was simply that the trial court erred when it held, in effect, that the appellants needed to prove that the

respondent's disclosures had a harmful effect on the appellants. Counsel argued that such holding by the trial court was wrong because any breach of contract gives rise to a cause of action. He cited **Chitty on Contracts** para 25–001 (29th ed) where it is stated that:

> **The rule is usually stated as follows: Any breach of contract gives rise to a cause of action.**

It was further contended on behalf of the appellants that the mere unauthorised disclosure of confidential information is in itself detrimental to the owner of the information regardless of whether any tangible harm is suffered thereby. We were referred to the case of **Attorney-General v. Guardian Newspaper Ltd. and Another**[5] from which counsel quoted the following passage from the House of Lords' judgment:

> **The anonymous donor of a very large sum to a very worthy cause has his own reasons for wishing to remain anonymous which is unlikely to be discreditable. He should surely be in a position to restrain disclosure in breach of confidence of his identity in connection with the donation. So I would think it a sufficient detriment to the confider that information given in confidence is to be disclosed to persons whom he would prefer**

not to know of it, even though the disclosure would not be harmful to him in any positive way.

Grounds 11, 12 and 13, raised issues already substantively covered in the other grounds, namely whether or not there was a breach of the settlement agreement. The learned counsel for the appellant once again recited the instances of the perceived breaches and concluded that there was indeed a breach by the respondent of the settlement agreement.

It was Mr. Chenda's prayer that we uphold the appeal and order damages to be assessed by the Deputy Registrar and that the K1 million settlement sum together with interest be refunded to the appellants.

Mr. Lisimba, learned counsel for the respondent, chiefly relied on the heads of argument filed on the 28th March, 2017 which he also briefly supplemented orally. The learned counsel was in full agreement with the findings and holding of the learned trial judge.

As regards ground one, it was contended that the trial judge was right in holding that the only issue was whether or not the respondent had breached clause 5 of the settlement agreement. It was Mr. Lisimba's argument that the court was only bound to consider facts relevant to the issue. He quoted from our judgment in **Zambia Radiological and Imaging Company Ltd. and 5 Others v. Development Bank of Zambia**[6] and also referred us to the case of **Re Sentor Motors Limited**[7] to buttress his argument.

In responding to grounds 2, 5, 6 and 7 of the appeal, counsel for the respondent submitted that from the recitals of the settlement agreement, which he quoted, the first operative paragraph as well as the consideration clause, it was clear that the agreement was premised on the complaint filed in the Industrial Relations Court, and therefore, that any restrictive obligations assumed by the respondent were confined to that agreement. He quoted two case authorities, namely **Mike Waluza Kaira v. Attorney-General**[8] and **J P Karnezos v. Hemes Safaris Limited**[9] to support his proposition.

Under ground four of the appeal the respondent's counsel's short response was that there was no restriction in the settlement agreement on the respondent testifying in courts of law and that such clause, if it had existed, would be unconscionable and unenforceable.

In reacting to grounds 8 and 9, Mr. Lisimba submitted that the disclosures made by the respondent were not the type envisioned in section 50 of the Banking and Financial Services Act as the disclosures given related to the creation of a pension scheme fund for employees and that the documents and information relied upon were of a public nature and were not confidential within the intendment of section 50 of the Banking and Financial Services Act. More pertinently perhaps, Mr. Lisimba submitted that even if there was a breach of section 50 of the Banking and Financial Services Act, there would still be no basis for the appellants to claim a refund of the K1 million paid in settlement.

Regarding ground 10 counsel contended that the argument made and authorities cited by counsel for the appellant were inapplicable as there was, in the present case, no breach of the clause 5 of the settlement agreement.

The respondent's reaction to the arguments under grounds 11, 12 and 13 of the appeal was very brief. It was submitted that these grounds were a repetition of the other grounds already argued and, therefore, that they should be dismissed.

The learned counsel concluded his submissions by beseeching us to dismiss the whole appeal for lacking merit.

We are grateful to counsel for both parties for their exertions in this regard. Notwithstanding the unusually long list of grounds of appeal raised and the very detailed arguments made in respect of each ground of appeal, and the equally forceful responses to them, our view is that there are two real questions for determination in this appeal, namely, first, whether there was a breach of the settlement agreement by the

respondent; and second – and this is only if there was any such breach – what damages are due to the appellants. These were, in our considered opinion, the real questions which should have preoccupied the trial judge. Our approach, therefore, is to consider the broader picture premised on these two issues before we zero in on the individual grounds of appeal raised. And while still on the subject of the issues for determination, we can state right away that the issue formulated by the trial judge as requiring determination was not borne out of the contours of the dispute as defined by the pleadings. The learned judge below narrowly confined the alleged beach to the respondent's testimony in court contrary to what was particularized in the pleadings. This did not accurately accentuate the appellants' entire grievance. We agree with Mr. Chenda's submission under ground one of the appeal that the trial judge misdirected herself. Ground one is bound to succeed and we uphold it.

We see the current appeal as broadly calling for a reconciliation of two equally important public policy concerns, namely, one that favours settlement of disputes by parties without resort to the judicial process, and the other which places great weight on freedom of expression and the civic duty of citizens to assist the judicial truth-seeking process by testifying before courts of law.

Starting with the first of these, it is well settled that public policy encourages consensual resolution of disputes and favours settlement agreements. Our justice system has, as its primary objective, the just, speedy and inexpensive determination of every action. The value and necessity of a vigorous policy of encouraging fair and reasonable settlement of civil claims whenever possible, is in this sense, beyond paradventure. Settlements in the form of private out of court contracts no doubt obviate the need for resort to the judicial process. This saves the parties costs and time. The courts are, in turn, spared the burdens of a trial and the preparations and proceedings that must forerun such trial, and this helps to

unclog the courts. Out of court settlements in this regard have the obvious advantage of saving scarce judicial resources as well as offering a variety of benefits for litigants. In addition to the ones we have referred to already, the parties to a settlement agreement have the opportunity to determine an outcome satisfactory to all. Little wonder, therefore, that the policy of the law is to uphold and enforce settlement agreements if they are fairly made and are not in contravention of some law or other overriding public policy.

A settlement agreement, like any other agreement, is amenable to the core principle of English law applicable in this country, namely the need to preserve the value and sanctity of contracts. In the case of **Colgate Palmolive Zambia Inc. v. Abel Shemu Chuka and 10 Others**[4], which Mr. Chenda referred us to, we reaffirmed the shibboleth of freedom of contract as summed up in the often quoted dictum of Sir George Jessel MR in **Printing and Numerical Registering Co. v. Sampson**[10] that:

> **If there is one thing more than another which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting and that their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by Courts of Justice.**

And yet, public policy itself does in some instances restrict freedom of contract for the public good.

A violation of a settlement agreement, being a breach of contract, entitles a party who believes that he or she has been harmed by such breach to bring an action for damages for the harm he or she allegedly suffered from the breach. It is important to recollect the principle of the law that where there is a right, there is a remedy. A right would be of little value if there was no remedy available in the event of its infringement. A breach of contract by one party necessarily entails an infringement of a contractual right of the other party. A remedy is given as a means of vindicating the right, or as pecuniary compensation in lieu of performance.

A breach of contract usually, but not always, causes a loss. In either case, there is a right of action against the contract-breaker. We think this is the sense in which the case of **Attorney-General v. Guardian Newspaper Ltd. and Others**[5] (No. 2) cited by the appellant's counsel, was decided. In our view, that case underscores the point that a cause of action for damages for breach of contract arises even if the actual loss suffered is not immediately obvious. It is for this reason that we think there is merit in ground ten.

We have already stated that another limb of public policy has to do with the administration of justice. The administration of justice benefits all members of the society. Each competent citizen is under an obligation to aid in furthering the administration of justice as a matter of public duty. Giving evidence is a civic duty which obliges persons to appear before courts of law when required to do so and to testify, and thereby assist the course of justice.

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A question can perhaps be posed whether a settlement agreement which has the effect of preventing one party from testifying in a court of law is itself unlawful or against public policy. The test, as it appears to have been explained in **Crompton v. Green**[11], is whether the purpose of the agreement is to prevent a party from giving evidence in court, if summoned by legal process, or whether it is merely an agreement not to take the initiative to divulge the information in the first instance. In that particular case, the court formed the view that as the statement in question did not purport to prevent the defendant from giving evidence in a law court, the contract was valid and therefore binding on the defendant.

It seems that the public policy to encourage people to testify is qualified by the need for some legal compulsion. In **Harmony Shipping Co. SA v. Davis and Others**[12] Lord Denning stated as follows:

> **If there was a contract by which a witness bound himself not to give evidence before the court on a matter on which the judge said he ought to give evidence, then I say that any such contract could be contrary to public policy and would not be**

> **enforced by the court. It is the primary duty of the courts to ascertain the truth; and, when a witness is subpoenaed, he must answer questions as the court properly asks him. This duty is not to be taken away by some private arrangement or contract by him with one side or the other.**

In **Fulham Football Club Ltd. v. Cabra Estates Plc**[13] the English Court of Appeal put it plainly when it stated at p.873 that:

> **Clearly no covenant or undertaking can lawfully require a covenator to give false evidence .... Nor can a covenant or undertaking prevent a witness from attending to give evidence in response to a subpoena.**

Reverting to the settlement agreement that gave rise to the present dispute, the question is whether there was breach by the respondent of provisions of that agreement as alleged by the appellants in their statement of claim, bearing in mind the two public policy concerns we have highlighted.

The appellants alleged that the respondent breached the settlement agreement through the medium of other persons and publications; through publishing and uttering statements

adverse to, or which were intended to harm or have the effect of harming the business and character of the appellants. They particularized instances of such breach as including the fact that the respondent, out of his free will, attended various court proceedings and testified as a witness for parties who had claims adverse to the interests of the first appellant. More specifically, according to the appellants, such testimony was given on 5th June, 2013 in cause No. 2008/HP/1012; in March 2014 in cause No. 2011/HPC/670 and a statement published in Issue No. 722 of the *Daily Nation* newspaper of 2nd April, 2014 attributable to the respondent.

According to the appellants, these utterances breached clause 5 of the settlement agreement which provided that:

> **In consideration of and pursuant to this agreement and as aforesaid the complainant [respondent] BIND HIMSELF that he shall not from the date hereof either by himself or otherwise through the medium of other persons or publications publish, broadcast or offer any statements adverse to or which are intended to harm or have the effect of harming the business or character of the Bank, the Intervener or any employee (in the capacity as such employee) of the Bank and the complainant HEREBY AGREED to sufficiently indemnify and save harmless**

the Bank, the intervener or any such employee in respect hereof.

The respondent's defence to the appellant's claim was three-pronged namely, first, that clause 5 of the settlement agreement was meant to restrict divulging the contents of the settlement agreement only and was not a 'global gag' on the respondent to abrogate his right as a citizen to report any perceived activities by the appellants which, in the respondent's view, constituted breaches of the law. He, in any case, denied that he divulged details of the settlement agreement. Second, that his giving evidence in court on the occasions cited by the appellant's was to assist the court in arriving at just decisions and that there were in that testimony no publications adverse to the appellant. Finally, that clause 5 of the settlement agreement was unconscionable and untenable.

We have already stated that the voluntary settlement of civil disputes finds high judicial favour. This court, as should all other courts faced with civil litigation of a purely private nature, strives assiduously to promote amicable settlement of

disputes for the most wholesome of reasons and in the process to preserve the sanctity of contracts which, as we have stated already, is a cardinal principle of English law.

The learned counsel for the appellants contended that the provisions of clause 5 of the settlement agreement ought to have been interpreted using the rule of interpretation that requires words to be given their natural and ordinary meaning.

The learned counsel for the respondent, on the other hand, maintained that the settlement agreement in this case was premised on the complaint which the respondent had filed in the Industrial Relations Court.

We have carefully examined clause 5 of the settlement agreement to ascertain the extent of the obligation assumed by the respondent and to situate the respondent's claim that he bound himself only to not disclosing the contents of that settlement agreement. According to that clause, the respondent bound himself not to "publish, broadcast or utter any statements adverse to or which are intended to harm or have

the effect of harming the business or character of the [first respondent] Bank, the Intervener [second respondent] or any employee (in the capacity as such employee of the Bank ....."

Our reading of clause 5 of the settlement agreement does not reveal any reference to the fact that what the respondent was bound not to do was merely confined to the settlement agreement itself. Given the plain meaning of clause 5 of the settlement agreement, we do not understand the basis of the trial judge's holding which restricted the obligations of non disclosure of information detrimental to the appellants to the agreement itself. To us clause 5 of the settlement agreement clearly bound, in a broad way, the respondent not to utter publicly or broadcast *any* statements adverse to the business or character of the appellants, or which were intended to harm the business or character of the appellants or which would have that effect. The statements in contemplation clearly went beyond the settlement agreement itself.

Although indeed the stimulus and motivation for entering the negotiations that culminated in the settlement agreement all had to do with the dispute between the parties and the subsequent court action, we understand the import of the provision of clause 5 to be fairly broad and did not confine the respondent only to avoid disclosing anything adverse about the appellants in relation to the agreement itself. We do not, therefore, accept Mr. Lisimba's argument that the obligation not to issue statements adverse to the appellants was narrowly confined to statements regarding the settlement agreement itself or indeed the dispute underlying the settlement.

As the record will show in the transcript of proceedings, the respondent voluntarily testified against the first appellant in favour of Weluzani Banda in an action before the High Court. The record further shows that the respondent also gave evidence against the first respondent in a different court action involving Hotelier and that he gave an interview to the *Daily Nation* in which he made various allegations against the appellants, including claims that the appellants were engaged

in money laundering and insider dealing. What is also beyond dispute is that the respondent testified of his free will and without any compulsion by way of subpoena.

In an adversarial system of justice such as we have in Zambia, being a witness of one party to a dispute very often entails siding with that party to the dispute against the other. In this case the respondent, by his testimony, clearly sided with the appellant's adversaries. It is inconsequential whether the evidence given, which was unfavourable to the appellants, actually did cause reputational damage to them. The point is that such statements as would cause damage were made.

There is, no doubt, public interest in disputes being brought to a binding conclusion by settlement. There must be strong reasons before a party is allowed to resile from an agreement freely reached. This is so whether the agreement could have been better or differently drafted or more fairly balanced between the parties. Terms of settlement agreements should not be ignored or breached merely because one party regrets the agreement he had reached. That would be unfair to

the other party and it would undermine the sanctity of agreements, and more generally the public policy which encourages settlements. It is not uncommon that one side or the other, and sometimes both, regret a settlement after it has been arrived at and concluded but such hindsight does not afford grounds for resiling from the agreement. That is what integrity is all about. We believe that one's reputation and integrity are everything. Even in the absence of a contractual commitment, honesty and integrity demands that people follow through on what they say they are going to do. Their credibility is after all built from their words and actions. Betrayal of compromises and settlements is a tragedy that only evidences diminished integrity.

Our view is that the settlement agreement between the parties to the present appeal was concluded at arms length and the question of unconscionability has no place.

All circumstances considered, we are satisfied that the respondent did in fact breach clause 5 of the settlement agreement. We do not agree with the holding of the lower court

that the settlement agreement prevented the respondent from disclosing adverse information related only to the settlement agreement itself or the underlying dispute.

Grounds 2, 5, 6 and 7 of the appeal have merit and we uphold them accordingly.

Turning to the respondent's claim that his giving evidence in court was in exercise of his constitutional right and that he made statements for the purpose of assisting the court reach a just decision, we do not for one moment doubt that the respondent had freedom of expression which is constitutionally guaranteed. We acknowledge also, as we have already stated, that individual citizens have a civic duty to assist the course of justice by testifying when called upon to do so. In the absence of compulsion to testify the respondent remained within the obligations he voluntarily assumed when he signed the settlement agreement. We think that there is merit in ground four of the appeal.

Regarding the arguments premised on the alleged breach of the provisions of the Banking and Financial Services Act, we need to make a pertinent observation. The claim by the appellant as structured in the writ of summons and the statement of claim in the lower court, was for "damages for breach of an agreement in writing dated 23rd My, 2007" and a refund of the sum of K1 million, interest and costs. It was not a claim for breach of a statutory duty. The trial court should have been guided by the pleadings and should have confined her judgment to the issues raised in the appellant's claim as structured.

The lower court's extensive expedition into issues extraneous to those raised in the pleadings, just like the brilliant submissions of the learned counsel for the appellant on them, were outside the contours which the appellants had mapped in their statement of claim and are liable to be disesteemed. The lower court, perhaps buoyed by the line taken by the appellant's counsel in cross-examination, veered off tangent from the appellant's case as pleaded and made

mountains of what they called the respondent's breach of the duty of confidentiality under the Banking and Financial Services Act.

If the respondent had wished to rely on the Act for his defence, he surely would have raised and pleaded a statutory defence. As it is now, we are of the view that the grounds of appeal premised on the alleged breach of the Banking and Financial Services Act orbited outside the canvas of the narrow question raised by the appellant's pleadings in the lower court. We do not think, therefore, that grounds 8 and 9 should even have been raised in the first place. They are dismissed accordingly.

Having found that there was a breach of the settlement agreement, we now turn to the question what the consequences of that breach are. We must state that there must be a response to any breach of contract. Unless an infringed right is vindicated by a remedy, it is hallow and devoid of all practical force and content.

The penalty for violating a settlement agreement will, of course, vary depending on the terms of the agreement. The violating party may be required to pay a fixed amount of money as stated in the agreement or the agreement may require the violating party to forfeit any funds received in the settlement. Where the agreement is silent on damages or penalties for breach, then the party who alleges breach will have to prove their actual loss and can only recover those.

It is settled that the general rule for measuring damages for breach of contract is just compensation for the loss or damage actually suffered. Damages for breach of contract will invariably protect one of three interests, namely an expectation interest, a reliance interest or a restitution interest. The award of any damages should be targeted at one of these interests. The common interest protected by an award of damages for breach of contract is the expectation or benefit of the bargain interest. Here damages seek to restore the innocent party to the same economic position that party would have been in had the contract not been breached, thus giving that party the benefit

of that bargain. In many cases, damages can be assessed by reference to the claimant's direct financial loss.

The appellants in this case claimed in paragraph 10 of their statement of claim that they suffered loss and damage. In consequence, they claimed damages for breach of the settlement agreement, a refund of the sum of K1 million; interest on the said sum of K1 million and costs.

We first wish to address the claim for a refund of the K1 million. We have stated already that the penalty for breach of a settlement agreement could be specified in the agreement itself. In this case, it could be specified that a breach of the settlement agreement would immediately trigger the respondent's obligation to refund the settlement sum. As a court our role in such a case would be to ascertain whether such a clause would not have been intended to punish the respondent and whether the penalty for breach was connected with the amount of loss which was contemplated by the parties at the time of contracts. This was not the case here.

The appellants have not given any basis for claiming a refund of the K1 million which was paid in the settlement. The claim for that refund becomes even more difficult to justify when one considers the essence of damages for breach of contract as we have explained it.

In an effort to ascertain the basis of the claim for a refund of the K1 million, we asked Mr. Chenda at the hearing of the appeal whether, if the settlement agreement had not been breached, the appellants would have been K1 million richer. He gracefully conceded that they would not.

We are unable to ascertain from either the evidence or the submissions any basis for ordering a refund of the K1 million paid under the settlement. That claim is bound to fail and we dismiss it accordingly.

We now revert to the unliquidated damages for breach of contract sought by the appellants. Where a party claims damages for breach of contract, it is normally the function of the court to assess the money value of the loss suffered and to

award that sum as damages. Damages are thus a compensatory remedy to the injured party; punishment of the contract breaker is not the object of damages.

Where, as in this case, damages claimed are unliquidated, they may be any of the following three: (a) substantial damages, that is to say, pecuniary compensation intended to put the innocent party in the position he would have been in had the contact not been breached; or (b) nominal damages, i.e. a small token award where there has been an infringement of a contractual right, but no actual loss has been suffered; or (c) exemplary damages, that is to say, a sum awarded which is far greater than the pecuniary loss suffered by the innocent party.

The appellants, as we have already stated, did claim in their pleadings that they suffered loss as a result of the respondent's breach of the settlement agreement. Mr. Chenda informed us that the damage suffered by the appellant was reputational in character. No evidence was, however, led in the lower court to show this loss. The only witness for the

appellants in the lower court, Mrs. Mutale Chilangwa Chisela, testified in cross-examination that:

> **It is difficult to prove negative effects .... There is no proof because it is difficult to quantify reputational damage. I do not have evidence that the bank lost money or customers as a result of what Mr. Simaata said.**

Later in re-examination, the witness testified that:

> **In relation to paragraph 16 of my witness statement, the Defendant's statement about insider lending can have adverse effects company customer confidence and attract sanctions from Bank of Zambia, the regulatory Authority.**

It is clear from the extract of the testimony of the appellants' witness in the trial court that there was no loss financially or otherwise proved to have been suffered by the appellants as a result of the respondent's breach of the settlement agreement, though potentially the respondent's unguarded disclosures could lead to adverse effects on customer confidence and could lead to sanctions from the Bank of Zambia. This is, however, not a good enough basis for finding loss to justify compensatory damages.

Since the averments in the pleadings that the appellants suffered loss and damages are unsupported by evidence, they are unavailing and must be discountenanced. To us the explanation for this is simple: an averment in a pleading is not evidence and cannot be substituted for evidence. Such averment does not, therefore, amount to proof unless, of course, it is admitted. In **Mhango v. Ngulube**[14] the Supreme Court put the position thus (at page 66):

> **It is, of course, for any 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.**

Later on, the court stated that:

> **The result is that the evidence presented to the court was unsatisfactory and, in our opinion, the learned trial judge would have been entitled either to refuse to make any award or to award a much smaller sum, if not a token amount in order to remind litigants that it is not part of the judge's duty to establish for them what their loss is.**

In his submission before us, Mr. Chenda requested that upon finding that the settlement agreement was breached, we should refer the matter to the Deputy Registrar for assessment. We think, with respect to the learned counsel, that such a course would be patently flawed. It is not the province of the Deputy Registrar to conduct a trial on the question whether or not there was loss following a breach of a contract. That responsibility belongs with the trial judge. The trial judge should find both the breach of contract and loss or damage resulting therefrom. It is only the monetary quantification of that loss that should, in appropriate cases, be referred to the Deputy Registrar. In the present case, no evidence was availed to ground a finding of loss resulting from the breach of the settlement agreement.

In two recent cases, we were confronted with situations where parties to litigation proved that there was an infraction of their legal rights, yet loss or damage was not proved. In both **David Chiyengele and Others v. Scaw Limited**[15] and **Barclays Bank Zambia Plc v. Patricia Leah Chatta Chipepa**[16] we awarded nominal

damages of K500 to the successful parties. We owe it to the parties to explain that as was articulated by Kay L J in **Mappouras v. Waldrons**[17], nominal damages are 'not intended to compensate for anything at all' but are awarded simply to 'mark the fact that there has been a breach of contract.'

We have no reason to depart from these precedents. We in the circumstances award the appellants K500.00 damages for breach of contract.

As regards the issue of costs, we are fully alive to the fact that the use of an award of nominal damages as a 'peg on which to hang costs' has been undermined by the courts' reluctance to adopt, in a mechanical fashion, the principle that costs follow the event where the event is no more than an award of nominal damages (See **Anglo-Cyprian v. Paphos**[18]). The appellants' claim in the lower court was anchored on a perceived violation of a contractual right, prompting the appellants to urge the court to perform its vindicatory function and award it a remedy for the breach. They may not have put their tackle in order, but there was nothing untoward or

vexatious about their action. We believe that this is a proper case in which the appellants should have their costs. We accordingly order that the appellants shall have their costs to be taxed if not agreed.

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E. M. HAMAUNDU
SUPREME COURT JUDGE

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DR. M. MALILA, SC
SUPREME COURT JUDGE

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M. C. MUSONDA
SUPREME COURT JUDGE