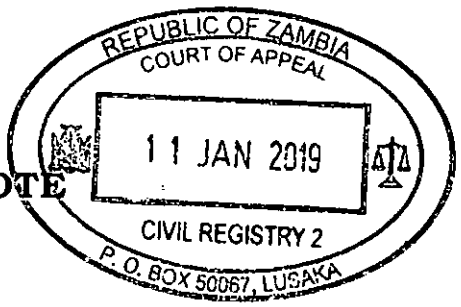
IN THE COURT OF APPEAL OF ZAMBIA APPEAL NO. 62 OF 2018

HOLDEN AT NDOLA

(Civil Jurisdiction)



BETWEEN:

GRIEVER CHOLA SIKASOTE **APPELLANT**

AND

SOUTHERN CROSS MOTORS LIMITED **RESPONDENT**

CORAM: Mchenga DJP, Chashi, and Mulongoti, JJA

ON: 21st and 22nd November 2018 and 11th January 2019

For the Appellant: *K. Kaunda, Messrs Ellis & Company*

For the Respondent: *A.D.M Mumba, Messrs A. D. M Mumba & Associates*

J U D G M E N T

CHASHI, JA delivered the Judgment of the Court.

Cases referred to:

1. ***Ndongo v Moses Mulyango and Roostico Banda (2011) ZR, Vol 1, 187***
2. ***Rosemary Chibwe v Austin Chibwe (2001) ZR, 1***
3. ***Zesco Limited v Redline Haulage Limited (1990/ 1992) ZR, 170***
4. ***Philip Mhango v Dorothy Ngulube and Others (1983) ZR, 61***
5. ***YB & F Transport Limited v Supersonic Motors Limited (2000) ZR, 22***
6. ***Wilson Masauso Zulu v Avondale Housing Project Limited (1982) ZR, 172***
7. ***Zambia State Insurance Corporation v Serios Farms Limited (1987) ZR, 93***

Legislation referred to:

1. ***The Judgment Act, Chapter 81 of the Laws of Zambia***

Other works referred to:

1. **Halsbury's Laws of England, 3rd edition**

This appeal emanates from the Judgment of the High Court delivered on 22nd August 2017, in which the Appellant's claims were all dismissed and the Respondent's counter claim succeeded.

The background to this matter is that, the Appellant who was the plaintiff in the court below, is the owner of a Mercedes Benz Vehicle, registration No. AAR 9876 (the Vehicle).

On 2nd December 2011, the Appellant commenced proceedings in the court below against the Respondent, claiming the following reliefs:

(1) Damages for failure to repair the Vehicle;
(2) Damages for non-use of the Vehicle from 1st December 2010; and
(3) An Order that the Vehicle be returned to the Respondent's garage or to be collected from Mercurious Motors (MM) and be repaired.

According to the accompanying statement of claim, the Appellant took the Vehicle to the Respondent in July 2010 for repairs as the Respondent was the authorised agent for Mercedes Benz, Germany and South Africa. The Appellant supplied some spare parts, five tyres and paid a deposit of K20,000.00 (rebased).

It was the Appellant's averment that the Respondent promised to repair the Vehicle in less than three months. According to the Appellant, this was not done and whenever he went to check, the Respondent kept giving excuses.

That in July 2011, he was informed by the Respondent that the Vehicle was taken to MM and has remained unrepaired.

In its defence, the Respondent averred that the Vehicle was taken to MM for a repeat job on the transmission system upon the Appellant's express instructions.

According to the Respondent, it completed all the repairs the Appellant had asked for, except for the transmission system for which instructions were given to MM, who have withheld the Vehicle for alleged unsettled bills for earlier repairs to the same Vehicle.

The Respondent then counter claimed the sum of K36,000.00 being the balance on the bill for works, interest and costs.

At the trial, the Appellant gave evidence in pursuit of his claims, whilst the Respondent called two witnesses.

After considering the evidence, the learned Judge made several findings of fact and as earlier alluded to, dismissed the Appellant's claims and upheld the counter claim.

Disenchanted with the Judgment, the Appellant has appealed to this Court advancing four grounds of appeal. In turn, the Respondent filed a cross appeal.

The Appellant's grounds of appeal are couched as follows:

(1) The court below erred in both law and fact by holding that the Appellant had given instructions to have the Vehicle taken to MM.

(2) The court below erred in both law and fact by holding that the Respondent had fully repaired the Vehicle and subsequently granted the Respondent the counter claim for the sum of K36,000.00.

(3) The court below erred both in law and fact by considering the interests of MM, and one Elijah Muchima, non-parties herein, by holding that the said Muchima exercised a lien over the Vehicle.

(4) The court below erred both in law and fact by awarding costs to the Respondent.

At the hearing of the appeal, both parties relied on their respective heads of argument, which they augmented with brief oral submissions.

In arguing the first ground of appeal, Mr. Kaunda, Counsel for the Appellant submitted that, whilst DW1's evidence was that the Respondent always record all the client's instructions, there were no such written instructions adduced by the Respondent.

According to Counsel, the evidence of DW1 and DW2 were contradicting as to who was given instructions by the Appellant between the two.

Counsel contended that, there was no reliable evidence to warrant the court's finding that the Appellant had given instructions to take the Vehicle to MM.

According to Counsel, the finding by the court is perverse and should be reversed. Counsel relied on the case of **Ndongo v Moses Mulyango and Another**[1].

As regards the second ground, Counsel submitted that, the fact that the Vehicle was unilaterally taken to MM is evidence that the Vehicle was not repaired. Counsel contended that if the Vehicle had been repaired, it could not have been taken to MM for repairs on the transmission system.

According to Counsel, there is no reason the Appellant could have instructed MM to work on the Vehicle as it is only the Respondent who is the registered authorized agent in Zambia.

Counsel further submitted that, as regards the service of the Vehicle and replacement of parts, there was no documentary proof before the court of the Respondent having ordered the parts from Germany.

As for the alleged outstanding invoice, Counsel submitted that, even assuming that the Appellant had acknowledged receipt, which is denied, that would be inconsequential as the Vehicle had not been repaired and there is no evidence that the parts were ordered and fitted to the Vehicle.

In respect to the counter claim, Counsel submitted that, the Respondent failed to prove the same to the required standard.

Lastly, Counsel submitted that DW2 confirmed in his testimony that the Respondent did not finish repairing the Vehicle as he was told by DW1 to take it back so that the Respondent can finish the repairs. However, the Vehicle has never been taken back.

In arguing the third ground, Counsel submitted that, it was a serious misdirection to base the Judgment on the alleged interest of MM and Mr. Muchima who were not parties to the matter. Further that, there is no evidence that, MM and Mr. Muchima are owed any money by the Appellant.

On the learned Judge's holding that MM and Mr. Muchima had a lien on the Vehicle, it was Counsel's submission that, that was a misdirection as the Appellant did not leave the Vehicle in their custody but that of the Respondent.

We were in that respect referred to the learned authors of ***Halsbury's Laws of England***[1] paragraph 228 where they stated the following:

> *"Lien in its primary legal sense is a right in one man to retain that which is rightfully and continuously in his possession belonging to another until the present and accrued claims of the person in possession are satisfied."*

As regards the fourth ground of appeal, it was Counsel's argument that on the basis of the Appellants submissions, it was a misdirection for the court to condemn the Appellant to costs.

In response, Mr. Mumba, Counsel for the Respondent, in respect to the first ground, submitted that it was not always that the Appellant's instructions were reduced in writing by way of raising a job card.

That as would be observed from the record of appeal (the record), some client's instructions came through by way of proforma invoices and labour estimates, which documents were produced in the court below and were not objected to.

According to Counsel, there is historical evidence at pages 61 to 66 of the record proving the passage of the Vehicle between the Appellant, MM and the Respondent and that the Vehicle had been worked on in the absence of the Appellant's written or signed for instructions. Counsel further submitted that, there is unchallenged evidence by Humphery Mutemwa (DW2), a director at MM, showing that the Appellant gave instructions to the Respondent to have the Vehicle taken to MM for a return job, which evidence is fatal to the Appellant's assertion that he never gave such instructions.

It was Counsel's contention that the courts' conclusions were based on the facts stated on record. Reliance in that respect was placed on the case of **Rosemary Chibwe v Austin Chibwe**[2] where the Supreme Court held that:

> *"It is a cardinal principle supported by a plethora of authorities that Court's conclusions must be based on facts stated on record."*

Counsel further submitted that, the trial Judge's findings of fact can only be reversed on grounds that the findings in question were perverse or made in the absence of any relevant evidence or upon a misapprehension of facts, or that they were findings which on a proper view of the evidence, no trial court acting correctly could reasonably make.

In response to the second ground of appeal, it was submitted that, in the face of the Appellant's verbal instructions to DW1 and the Appellant's own evidence, as found by the court, the Appellant could not be said to be a credible witness as he lied on oath when he stated that he had not seen the Vehicle since 2009 when he took it for repairs.

According to Counsel, that piece of evidence is false, as the Appellant delivered the Vehicle to the Respondent for repair works on 27th July 2010 as evidenced by the job card appearing at page 68 of the record.

Further according to Counsel, the Appellant as shown at page 168 of the record, admitted and confirmed that the repairs were undertaken, though the Vehicle took long to be repaired.

Counsel argued that the trial court cannot be faulted for finding that the Respondent had fully repaired the Vehicle and consequently granting the Respondent the counter claim in the sum of K36,000.00.

As regards the third ground of appeal, Counsel submitted that the learned Judge was on firm ground in considering the evidence relating to MM and Mr. Muchima, non-parties and holding that they had a lien over the Vehicle, in view of the fact that when evidence was adduced by DW1 and DW2 relating to MM and Mr. Muchima, the Appellant did not object to the evidence. Counsel drew our attention to the case of **Zesco Limited v Redline Haulage**[3] where the Supreme Court held that failure to object to the admission of evidence led on issues not pleaded, may lead to the consideration of such evidence.

In response to the fourth ground of appeal, it was Counsel's submission that a successful party unless there is a special reason for costs not to be granted, will be entitled to costs. Counsel drew our attention to a number of authorities,

notable amongst them, the case of **YB & F Transport Limited v Supersonic Motors Limited**[5] where the Supreme Court held as follows:

> *"A successful litigant is always entitled to his costs unless it is shown that he is guilty of improper conduct in the prosecution of his claim."*

The discretion to deprive a successful party of his costs must be exercised judicially, on grounds which are inexplicable or evident and which disclose something blameworthy in the conduct of the case.

In arguing the cross appeal, Counsel submitted that the court below having awarded the Respondent the sum of K36,000.00, erred and misdirected itself by omitting to order payment of interest on the amount in accordance with the law.

In his brief response to the cross appeal, Counsel for the Appellant submitted that the awarding of interest is in the discretion of the court.

We have considered the respective arguments by the parties and the Judgment being impugned.

We note from the onset that, the first and second grounds of appeal are challenging the learned Judge's findings of fact. The Supreme Court has on numerous occasions dealt with the issue of when the appellate court can reverse a finding of fact of a trial court.

In **Philip Mhango v Dorothy Ngulube and Others**[4] they held as follows:

> *"The court will not reverse findings of fact made by a trial Judge, unless it is satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts or that they were findings which on a proper view of the evidence, no trial court acting correctly could reasonably make."*

The first ground of appeal attacks the learned Judge's finding that the Appellant had given instructions to have the Vehicle taken to MM. The assertion by the Appellant in his evidence in the court below is that he did not instruct the Vehicle to be taken to MM and if he had done so, the instructions would have

been in writing as the Vehicle was expensive. Although the Appellant admitted to MM having worked on the Vehicle's transmission sometime in 2007 and to knowing DW2, it was his evidence that he did not know how the Respondent knew that MM had previously worked on the transmission.

The evidence by Robert Omer (DW1), the Respondent's workshop manager was that, after the repairs were done to the Vehicle, the final check carried out prior to certifying the Vehicle as road worthy, showed that there was a problem with the transmission system as it was malfunctioning.

The Appellant was informed and upon consultation, the Appellant informed DW1 that the transmission system had previously been attended to by MM.

According to DW1, the Appellant instructed DW1 to ask DW2 to collect the Vehicle for a repeat job as the Appellant was not prepared to pay for a job that had been done by MM, which DW2 did.

We note from the record that the evidence by DW1 on the giving of instructions by the Appellant for DW2 to collect the Vehicle was not challenged in cross examination and therefore remained uncontroverted.

Additionally, there was evidence from DW2, that he was in January 2011 called by the Appellant and asked to pick the Vehicle from the Respondent. That after two weeks, he went to the Respondent and tested the Vehicle with DW1 and found that the gear box had slipperage due to oil leakage. The Vehicle was signed off by the Respondent to MM.

Here again, the evidence that it was the Appellant who asked for the Vehicle to be collected from the Respondent and taken to MM remained uncontroverted.

In arriving at the finding being challenged, the learned Judge took into consideration the evidence which was before the court and this is what she had to say at page 29 of the record (J20):

> *"Thus, I find as a fact that the plaintiff did give his authority for the vehicle to be taken to MM for repair for transmission system after the defendant did a diagnostic check on the Vehicle..."*

The second ground of appeal attacks the learned Judge's finding that the Respondent had fully repaired the Vehicle as a result of which she granted the Respondent the counter claim in the sum of K36,000.00.

The Judgment being impugned shows that the learned Judge addressed the issue at length before arriving at the decision. The Judge considered the evidence of the witnesses and the documents before the court.

The issue of whether the Vehicle was fully repaired was considered under the Appellant's claim for damages for failure to repair the Vehicle.

After analyzing the evidence, the learned Judge concluded that, after supplying the spare parts the Appellant had instructed that the spare parts indicated be replaced with what had been supplied. The court then went on to opine that the question that arose is whether the Respondent did carry out the works that it was counter claiming payment for.

According to the learned Judge, the Appellant, during cross examination agreed that the Vehicle was spray painted using Auto Pantique who were outsourced after the Appellant's approval. That there being no denial that this service was provided, the Appellant was liable to pay the amount of K16,008.00 as quoted on page 14 of the defendant's bundle of documents for the spray painting.

The learned Judge then considered the other works as per the bundles which needed to be done, totaling K29,853.78 and to that added the charges for the windscreen bringing the amount to K39,119.93 which according to DW1 were ordered from Germany as evidenced by the documents on pages 20 to 27 of the defendant's bundle of documents. These amounts were debited to the Appellant's account as the documents at page 32 to 36 of the same bundle show that they were moved from the parts department to the workshop.

The learned Judge also considered the Appellant's assertion that if the said spare parts were fitted, he would have been shown the parts that were removed and opined that if the Respondent was to succeed on its counterclaim it had to prove on a balance of probability that it did in fact supply and fit the spare parts as alleged.

The learned Judge was of the view that the Appellant did not adduce any evidence to dispute that after the repairs were concluded, and at the point of the diagnostic check, that is when he was told of the defect in the transmission system.

The learned Judge found as a fact that the Appellant only gave his authority for the Vehicle to be taken to MM after the Respondent had concluded its repairs on the Vehicle. This evidence was supported by the invoices which were issued to the Appellant appearing at pages 32 to 36 of the bundle.

According to the learned Judge, the only defence raised by the Appellant in response to the documents before the court was that, they were not signed by him, although there was an explanation from DW1 that these documents are issued internally when spare parts are moved from the parts department to the workshop, which was not disputed by the Appellant.

In conclusion on this issue, the court at page 30 of the record (J21 line 5) had this to say:

> *"The finding that the spare parts were put on the plaintiff's vehicle is regardless of the allegation made by the plaintiff that he was not shown the spare parts that were removed, or that the invoices from Mercedes Benz Germany which were issued after the spares were supplied are not before the court, as the plaintiff when cross examined did concede that spare parts were in fact put on his vehicle, and this supports DW1's evidence that in fact the plaintiff was informed when the repairs had been completed after the spare parts were put on the vehicle, and that there was a problem with the transmission system."*

The learned Judge further noted that there was evidence of DW2 that DW1 had requested that the Vehicle be returned to the Respondent after MM attended to the transmission system, but this did not mean that the Respondent had not completed the repairs as DW2 could not state the nature of works yet to be concluded because he had no knowledge of the same.

That there was also evidence that, when DW2 went to collect the Vehicle, he tested it with DW1 and there was no other problem which was detected apart from the gear box.

The court found that it had not been proved that the Respondent did not repair the Vehicle after supplying the parts quoted in the bundles.

It was on the basis of the aforestated evidence that the learned Judge was of the view that the Respondent did in fact repair the Vehicle after supplying the spare parts. The court found that the Appellant's claim for damages for repair of the Vehicle failed as the evidence showed that the Vehicle had been repaired. That the Respondent on the other hand succeeded on a balance of probabilities on the counterclaim, as it had established that it did repair the Vehicle after supplying the spare parts.

In view of the learned Judge's articulate evaluation of the evidence, and there being neither an allegation by the Appellant nor any apparent evidence that the learned Judge's finding in question on both grounds one and two were perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts or that they were findings which on a proper view of the evidence, no trial court acting correctly could reasonably make, we find no basis on which to tamper with and reverse the findings made by the learned Judge.

In the view that we have taken both grounds one and two are dismissed for lack of merit.

The third ground of appeal attacks the learned Judge's consideration of the interests of MM and Mr. Muchima, non-parties by holding that they had exercised a lien over the Vehicle.

We note from the onset that one of the reliefs endorsed on the writ of summons was for an Order that the Vehicle be returned to the Appellant by the Respondent or be collected from MM and be repaired. This clearly brought the interest of MM in realm as it was an undisputed fact that the Vehicle was in their possession.

It is in fact pleaded by the Appellant in its statement of claim that the Respondent took the Vehicle to MM without the Appellant's consent and authority and it has since remained there. Further, that it was wrong for the Respondent to have taken the Vehicle to MM. it was on that basis that the court's Order was being sought and in addition damages for non-use of the Vehicle from the time it was taken for repairs to date.

In settling its defence, the Respondent pleaded that they took the Vehicle to MM at the Appellant's instructions for a repeat job. In turn MM withheld the Vehicle for allegedly unsettled bills for earlier repairs.

There is also evidence from DW2 that after working on the Vehicle and stopping the leakage, as he was about to return the Vehicle to the Respondent, Mr. Muchima demanded for the keys as the Appellant had unsettled bills relating to the Vehicle.

As these pleadings and evidence were before the court and were part of the issues in controversy, the court had a duty to consider the issue in ascertaining whether it would be appropriate for the court to grant the reliefs that were being sought. It is also trite law as was held by the Supreme Court in the case of **Wilson Masauso Zulu v Avondale Housing Project Limited**[6] that the trial court has a duty to adjudicate upon every aspect of the suit between the parties so that every matter in controversy is determined in finality.

In the view we have taken, we find no basis for faulting the learned Judge in his consideration of the issue as it was pleaded before the court. The third ground of appeal is therefore also dismissed as it lacks merit.

The fourth ground of appeal attacks the awarding of costs to the Respondent in the court below. The Judgment of the court below shows that the Appellant's claims were all dismissed whilst the Respondent was successful on its counterclaim.

Indeed, as was held in **YB & F Transport Limited**, the general principle is that costs should follow the event, unless the successful party did something wrong in the action or conduct of it.

The Respondent having succeeded in its counterclaim, it is entitled to costs as no wrong doing or misconduct was alleged and/or shown by the Appellant against the Respondent.

In view of the aforestated, the learned Judge cannot be faulted for awarding costs to the Respondent.

We now turn to the cross appeal.

Having awarded a Judgment sum to the Respondent, the learned Judge in the court below erred in not awarding the Respondent interest on the said sum according to Section 2 of ***The Judgments Act***[1] which provides as follows:

> *"Every Judgment, order or decree of the High Court or of the Subordinate Court whereby any sum of money, or any costs, charges or expenses, is or are to be payable to any person shall carry interest from the time of entering up such Judgment, order, or decree until the same shall be satisfied and such interest may be levied under a writ of execution on such Judgment, order or decree."*

In the case of **Zambia State Insurance Corporation v Serios Farms Limited**[7] the Supreme Court held that payment of interest is normally regarded as equivalent to an award of damages for the detention of a debt.

The Respondent therefore succeeds on the cross appeal as it is entitled to interest for being kept out of pocket.

We accordingly order that the Respondent be awarded interest on the sum of K36,000.00 at the prevailing Bank of Zambia short term deposit rate per annum from the date of the counterclaim to the date of the Judgment in the court below and thereafter at the average commercial lending rate as determined by Bank of Zambia per annum from the date of the aforestated Judgment till full satisfaction of the Judgment debt.

The Respondent shall have its costs in this Court and in the court below. Same to be taxed in default of agreement.

C. F. R. MCHENGA
DEPUTY JUDGE PRESIDENT
COURT OF APPEAL

J. CHASHI
COURT OF APPEAL JUDGE

J. Z. MULONGOTI
COURT OF APPEAL JUDGE