

IN THE SUPREME COURT FOR ZAMBIA

APPEAL NO. 18/2017

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

MILAN GORDIC

AND

JOPHAEL MBIZULE

APPELLANT

RESPONDENT

CORAM : MAMBILIMA CJ, MALILA AND MUTUNA JJS

On 3rd March 2020 and 20th March 2020

For the Appellant : Mr. K.M.G Chisanga of Messrs K.M.G. Chisanga Advocates

For the Respondent : Mr. F. Kachamba of Messrs E.B.M. Chambers

JUDGMENT

MUTUNA JS. delivered the judgment of the Court.

Cases referred to:

- 1) Attorney General v Mpundu (1984) ZR 6
- 2) Livingstone v Rawyards Company (1880) AC 2539
- 3) Attorney General v Ndhlovu (1986) ZR 12
- 4) Nkhata and others v Attorney General
- 5) Director of Public Prosecutions v Margaret Whitehead (1977) ZR 242
- 6) Brimbank Automotive PTY Ltd and Jeffrey Moloney v Patricia Murphy and Magistrates Court of Victoria (200) NSC 26
- 7) Chellearous Plc v Pashtun Nigeria Limited Perouk Aliyu (2014)
LPELR 23 623
- 8) Gerry Musoni v Adam Banda, Appeal number 115 of 2016



Legislation referred to:

- 1) Constitution, Cap 1**
- 2) High Court Act, Cap 27**

Works Referred to:

- 1) McGregor on Damages, 16th edition by Harvey McGregor, Sweet and Maxwell, London**

Introduction

- 1) This is an appeal against the decision of the Hon. Deputy Registrar, Charles Kafunda, on assessment of damages. The appeal questions the procedure he adopted in the assessment and quantification of damages awarded. It also discusses the remedy available to a party aggrieved by a judgment delivered following a hearing which that party did not attend.

Background

- 2) The facts of this case are not in dispute. On 31st May 2011, the Appellant took out an action against the Respondent in the High Court by way of writ of summons and statement of claim. The action sought a declaration that the Appellant is the legal owner of Stand 140/2

Chilanga, Lusaka (the property) and an order of injunction restraining the Respondent from interfering with the Appellant's quest to develop the property or to demolish any structures thereon.

- 3) After the Appellant issued out process, he applied and was granted an order of injunction, *ex parte*, on 6th June 2011 returnable, *inter partes*, on 21st June 2011, at 09.00 hours.
- 4) The order of injunction also reflected the undertaking given by the Appellant to pay costs to the Respondent which he would suffer as a consequence of the injunction if it was subsequently discharged.
- 5) Later, on 18th July 2011, upon application by the Appellant, the Court ordered that two defendants, Asphalt Roads Zambia Limited (Asphalt) and the Attorney General, be joined to the proceedings as Second and Third Defendant respectively. The present Respondent became the First Defendant in those proceedings.
- 6) On 27th July 2011, the matter came up for hearing of the *inter partes* application for an injunction. The Appellant

abandoned his claim against the Respondent, along with the injunction order. This prompted the Respondent to apply to the Learned High Court Judge for an order of costs and damages as a consequence of the abandoned action which effectively set aside the injunction order.

- 7) The Learned High Court Judge granted the Respondent both costs and damages in a ruling dated 2nd August 2011. It is pursuant to this ruling that the Respondent applied for assessment of damages before the Deputy Registrar.

The parties' cases and proceedings before the Deputy Registrar

- 8) The Respondent filed a notice of assessment of damages which was supported by affidavit evidence. The application sought damages to be awarded to the Respondent and Asphalt. The Appellant opposed the application by way of an affidavit.
- 9) The evidence in the affidavit in support was led by Richard Phiri, an accountant in Asphalt. He contended that as a consequence of the injunction which prevented the Respondent from constructing on the property,

between 5th September 2011 and 5th February 2012, the Respondent incurred charges for various equipment which was mobilized for development of the property. To this end he produced invoices which he contended revealed the sum of USD113,752.00 as mobilization expenses.

- 10) In addition, the deponent contended that the Respondent incurred further costs in the sums of K11,200.00 and K12,800.00 being costs of removing squatters, who were on the property at the instance of the Appellant, and bailiffs' fees, respectively.
- 11) The further affidavit in support, was sworn by the Respondent. His evidence revealed that on 5th September 2011, the Appellant obtained another order of injunction against Asphalt which affected him as well.
- 12) The second injunction was discharged on 15th February 2012 with costs and an order for payment of damages to him and Asphalt. Further, as a consequence of the injunction, he incurred expenses in the sums of K37,500.00 and USD7,500.00 in respect of car hire

services and accommodation, respectively, when he came to Zambia to defend the action.

- 13) The Appellant's evidence in the affidavit in opposition challenged the Respondent's claim in respect of the mobilization charges. He contended that the claim was misplaced and did not comprise damages which can be said to have been reasonably incurred. According to the Appellant, at the time he was granted the injunction, the Respondent had already passed title in the property to Asphalt. The Respondent was, as a consequence, not the legal and beneficial owner of the property and could thus, not have suffered damages.
- 14) The Appellant challenged the claim for mobilization charges further on the ground that the evidence used to support the claim in the form of the invoices issued by Asphalt do not prove that the Respondent actually paid the sum claimed. He also stated that some of the invoices were for a period after the injunction was discharged.
- 15) In regard to the legal costs claimed, the Appellant contended that costs need to be agreed between the

parties and in default taxed. That the Respondent had not communicated the quantum of legal costs to his lawyers and that the evidence produced in support of the claim is not a correct reflection of legal costs incurred in respect of the injunction.

- 16) The Appellant also challenged the Respondent's claim in respect of costs for travel, accommodation and hire of a motor vehicle while he was in Lusaka on the ground that they cannot be considered as damages suffered as a result of the injunction. The position taken by the Appellant was that the Respondent was not expected to attend Court on all the days that the costs were allegedly incurred.
- 17) The Appellant also questioned Asphalt's entitlement to damages and recovery of the payments allegedly made to the squatters on the property and certificated bailiffs. He contended that the order discharging the injunction did not award any damages to Asphalt but only costs, which costs are to be taxed in default of agreement.

- 18) In regard to the payment to the squatters, the Appellant contended that the claim was not connected to the injunction and that, if indeed Asphalt had made the payment, it was for purposes of securing the use of the property. As for the expense allegedly incurred for use of the certificated bailiffs, the Appellant denied the claim because Court orders are executed by the Sheriff of Zambia and not certificated bailiffs. In any event, there was no order made in the proceedings which is enforceable by certificated bailiffs.
- 19) In his affidavit in reply, the Respondent by and large justified the various claims made in the first two affidavits.
- 20) The Deputy Registrar set the matter down for hearing of the assessment of damages and he heard the matter on various days. On divers days he also adjourned the hearing to other dates on the motion of either party to the proceedings and on his own motion.
- 21) At the hearing, the parties called witnesses. The Deputy Registrar heard the two witnesses for the Respondent in

chief and they were also cross-examined and re-examined. At the close of the Respondent's case, the Appellant opened his defence and gave evidence in chief. During cross examination, his counsel raised an objection in relation to the line of questioning by counsel for the Respondent which related to the second order of injunction.

- 22) In response to the objection, counsel for the Respondent sought an adjournment to amend pleadings to include costs relating to the second injunction. The Court granted the application and gave directions as to service of the process for the application for amendment of pleadings.
- 23) On 23rd May 2016, the matter came up for continued hearing and despite both parties being present, the Deputy Registrar adjourned the matter to a date to be notified to the parties. This prompted the Appellant and his counsel to leave but the Respondent and his counsel stayed behind and prevailed upon the Deputy Registrar

to give a date of hearing. He, therefore, set the matter down for hearing on 26th May 2016.

- 24) On 26th May 2016, the Court reconvened for the hearing. The matter was due for the continued cross examination of the Appellant but he and his counsel did not turn up. Their absence prompted the Respondent's counsel to urge the Court to conclude the matter and in doing so expunge the Appellant's affidavit evidence from the record and render a decision based on the Respondent's evidence and submissions only.
- 25) The Deputy Registrar terminated the proceedings and reserved his judgment subject to the Respondent filing his final submissions in two weeks. He also indicated that he would determine the fate of the Appellant's affidavit evidence in the judgment.
- 26) On 16th June 2016, counsel for the Appellant filed summons and supporting affidavit before the Deputy Registrar to arrest the pending judgment on assessment. The record is not clear if the application was heard, in any event, the Deputy Registrar, delivered the judgment

on assessment on 4th August 2016 in which he appears to have dismissed the application to arrest judgment.

Decision by the Deputy Registrar

- 27) The Deputy Registrar began by clarifying the position he had taken earlier in regard to the further affidavit in support of the application for assessment of damages that it related to the second injunction which was not the subject of the proceedings. He, therefore, restricted his determination of the application to the evidence in the affidavit in support.
- 28) The Deputy Registrar found that the Respondent had proved to his satisfaction, the claim for travel, accommodation, car hire and legal costs which he called special damages. He also awarded the claims for living and travel expenses in the sums of USD3,233.00 and K15,500.00, respectively, notwithstanding that the Respondent may have incurred more than he was claiming. He referred to the case of **Attorney General v Mpundu**¹ without elaborating.

- 29) On the issue of mobilization charges for the equipment for development of the property, the Deputy Registrar acknowledged that it was a claim made by Asphalt against the Respondent and that ownership of the property had already changed into the name of Asphalt by the time the injunction was granted. Here, the Appellant had contended that the Respondent could not claim on behalf of Asphalt and consequently, was not entitled to the damages.
- 30) The Deputy Registrar held that notwithstanding the change in ownership of the property, the wording of the injunction order was such that it restrained, not only the Respondent, but everyone else including Asphalt from developing the property. According to the Deputy Registrar, the order affected the Respondent's right to pass title in the property to Asphalt, therefore, Asphalt was in order to make a claim against the Respondent.
- 31) In relation to the quantum of the mobilization charges, the Deputy Registrar considered the claim of USD105,908.00 made by the Respondent, and found it to

be unreasonable because Asphalt had a duty to mitigate its loss. He accordingly awarded the amount of USD35,612.00 for a period of twenty one days between 1st June 2011 and 21st June 2011. The Deputy Registrar also awarded the Respondent costs.

Grounds of appeal to this Court and arguments by counsel

- 32) The Appellant is unhappy with the decision of the Deputy Registrar and has launched this appeal on five grounds crafted as follows:
 - 32.1 The decision by the Learned Deputy Registrar not to allow the Appellant to lead evidence on oath and call witnesses to dispel the false evidence that the Respondent had incurred equipment mobilization charges was attended by a case of extreme prejudice and amounted to a denial of justice to the Appellant;
 - 32.2 The Learned Deputy Registrar misdirected himself in law and fact when he found that the documents produced as "JM3" amounted to sufficient evidence on which to make an award for mobilization costs relating to the equipment in the sum of USD35,612.00;

- 32.3 The Learned Deputy Registrar misdirected himself in law and fact when he found that the Respondent who had allegedly passed title to a third party should be the one to be reimbursed the mobilization charges allegedly incurred by Asphalt Roads Zambia Limited;
- 32.4 The Learned Deputy Registrar misdirected himself when he opined that the Appellant had been subjected to cross examination upon the testimony contained in his affidavit in opposition and when he elected to ignore the contents of the Affidavit in opposition in their entirety without giving any reason therefore; and
- 32.5 The Learned Deputy Registrar misdirected himself in law and in fact when he awarded special damages in the sum of USD3,233.00 and K15,500.00 without giving the reason for his finding and in the absence of credible evidence on record for such expenditure.
- 33) Prior to the hearing, counsel for the parties filed heads of argument which they relied upon along with *viva voce* arguments at the hearing.
- 34) In respect of ground 1 of the appeal, counsel for the Appellant, Mr. Chisanga, set out the background to the proceedings before the Deputy Registrar with emphasis

on the various adjournments and in particular how the date of 26th May 2016 for the continued hearing was given on 23rd May 2016.

- 35) Counsel contended that after the date was fixed for 26th May 2016 and served upon the Appellant, he indicated to the Respondent's counsel that the date was not convenient as he had a prior commitment. For this reason, the Deputy Registrar ought not to have proceeded in the absence of the Appellant. The fact that he proceeded in the absence of the Appellant and allowed himself to be prodded by the Respondent in the absence of the Appellant to issue a date of hearing amounted to a failure on his part to act independently and impartially as prescribed by the **Constitution** and a denial of the Appellant's constitutional right to a fair trial. Counsel relied on Article 18(9) of the **Constitution** which states as follows:

"Any Court or other adjudicating authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by

any person before such a Court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time."

- 36) In the second ground of appeal, counsel questioned the award of USD35,612.00 for mobilization charges from two fronts. The first front was that the evidence which the Deputy Registrar relied upon to make the award was not conclusive that the Respondent had actually incurred the cost or suffered the damages. He argued that the award, for this reason, contradicts the rationale for awarding damages, which is to compensate a party for loss actually suffered. According to counsel, the award, amounts to unjust enrichment.
- 37) Counsel referred us to passages from the text ***McGregor on Damages***, 16th edition and the cases of ***Livingstone v Rawyards Company***² and ***Attorney General v Mpundu***¹. The authorities set out the principle in the award of damages which is to put a claimant back in the position he was in prior to the loss.
- 38) Secondly, counsel, without elaborating, quoted a passage from our decision in the case of ***Attorney General v***

Ndhllovu³, in which we quoted, with approval, a passage from the case of **Nkhata and others v Attorney General⁴** in regard to how Courts should treat findings of fact made by a trial Court.

- 39) In the third ground of appeal, counsel for the Appellant, once again, questioned the award for mobilization charges when the facts clearly revealed that title to the property had changed prior to the grant of the injunction. He also questioned the award based on the conflicting evidence in regard to the type of equipment allegedly deployed at the property.
- 40) In ground 4 of the appeal, Mr. Chisanga's arguments were simply that the record of appeal reveals that the Appellant was not given an opportunity to conclude tendering his evidence by way of cross examination.
- 41) Lastly, in ground 5 of the appeal, counsel challenged the documentary evidence relied upon by the Deputy Registrar in awarding the USD3,233.00 and K15,500.00 special damages.
- 42) We were urged to allow the appeal.

- 43) In response, counsel for the Respondent argued grounds 1 and 4, and 2 and 3 together, and ground 5 last. In regard to grounds 1 and 4, Mr. Kachamba summarized the events which occurred during the sitting of 26th May 2016 and concluded that the exercise of the power to adjourn a matter is entirely in the discretion of the Court based on the circumstances of each case. He, in this regard, quoted a number of foreign and local decisions to this effect as follows: ***Director of Public Prosecutions v Margaret Whitehead⁵, Brimbank Automotive PTY Ltd and Jeffrey Moloney v Patricia Murphy and Magistrate Court of Victoria⁶*** and ***Chelleanaus Plc v Pashtun Nigeria Limited Farouk Aliyu⁷***. Counsel was essentially saying that there was no obligation whatsoever on the part of the Deputy Registrar to adjourn the hearing on 26th May 2016 when the Appellant and counsel did not appear. He was therefore, on firm ground when he proceeded to terminate the proceedings and render the judgment on assessment of damages.

- 44) Coming to grounds 2 and 3 of the appeal, Mr. Kachamba argued that the Deputy Registrar was on firm ground when he awarded the mobilization charges to the Respondent, which were as a consequence of the loss incurred by Asphalt, because the wording of the order of injunction was such that it affected Asphalt as well. The order, he argued, directed the Respondent and his servants and whomsoever (which included Asphalt) not to construct on the property. As a result of its wide application, Asphalt, being a purchaser from the Respondent, was prevented from constructing on its property prompting it to make a claim against the Respondent. The Respondent, therefore, suffered damages which the Appellant undertook to pay in the order of injunction.
- 45) Counsel reinforced his arguments by referring to the English case of ***Livingstone v Rawyards Company***² which defines what constitutes damages.
- 46) As regards the quantum of damages, counsel's argument was that the award was correct because it was supported

by the evidence of the invoices. The Deputy Registrar considered these invoices and all matters that he ought to and reduced the claim to USD35,612.00. In an apparent departure from this argument, Mr. Kachamba submitted in the *viva voce* arguments that the Deputy Registrar had no justification whatsoever to reduce the claim for mobilization charges from UUSD111,752.00 to USD35,612.00. He urged us to disturb the award of damages, in this respect, by awarding the amount initially claimed of USD111,752.00.

- 47) In ground 5 of the appeal counsel addressed the award of USD3,233.00 and K15,500.00 as special damages. He argued that the documentary evidence produced by the Respondent proved the claim notwithstanding that it was in the form of invoices. These, he said, were as good as receipts especially that later in the further affidavit the Respondent produced invoices stamped with the word '*paid*'.
- 48) Mr. Kachamba justified the Deputy Registrar's reliance on our decision in the case of ***The Attorney General v***

Mpundu¹ in awarding these damages. He contended that the case sets out the principles for the award of special damages. He concluded by repeating the principle in the case of **Livingstone v Rawyard²**.

- 49) We were urged to dismiss the appeal.
- 50) In reply, Mr. Chisanga explained the reason for his absence at the hearing of 26th May 2016 and that he had notified counsel for the Respondent that the date of hearing was not convenient to him due to a prior commitment.

Consideration and decision by this Court

- 51) In our consideration of this appeal, we have looked at the record of appeal and arguments by counsel.
- 52) We must begin by dismissing the Respondent's request that we disturb the Deputy Registrar's award of the mobilization charges. The reason for this is that there was no cross appeal launched by the Respondent. We as such, cannot consider any arguments or requests that ought to have been preceded by a cross appeal.

- 53) The decision which the Appellant contests is a judgment made after his failure to attend court for continued hearing. The hearing was at the stage of the Appellant presenting his case in defence of the application for assessment of damages.
- 54) The Deputy Registrar in proceeding in the absence of the Appellant acted in accordance with Order 35 rule 3 of the **High Court Act** which states as follows:
- "If the plaintiff appears, and the defendant does not appear or sufficiently excuse his absence, or neglects to answer when duly called the Court may, upon proof of service of notice of trial, proceed to hear the cause and give judgment on the evidence adduced by the plaintiff, or may postpone the hearing of the cause and direct notice of such postponement to be given to the defendant."**
- 55) The Order gives the Court two options in a case where a defendant or respondent to an application, as was the case in this matter, does not attend. That is, to proceed to hear the cause and give judgment on the evidence of the plaintiff or applicant or adjourn the matter to enable the defendant or respondent attend.

- 56) In the case with which we are confronted, The Deputy Registrar chose the former option, that is to say, having already heard the plaintiff or applicant, he terminated the proceedings which were at the stage of the Appellant, as respondent or defendant, to the application for assessment of damages, presenting his case. He then proceeded to render his judgment. In effect, he denied the Appellant an opportunity to fully present his case by concluding the tendering of his testimony and that of his witness.
- 57) What then is the remedy which is available to a defendant or respondent and indeed a plaintiff or applicant where judgment has been rendered following a hearing he/she did not attend? Order 35 rule 5 prescribes the remedy as follows:

"Any judgment obtained against any party in the absence of such party may, on sufficient cause shown, be set aside by the Court, upon such terms as may seem fit."

Hence, the remedy lies in applying before the same Court, in this case the Deputy Registrar, to set aside the judgment, and not appealing. The reason for this is that

a party in such a situation seeks to be heard by the Court as he or she was denied a hearing as a result of the non attendance.

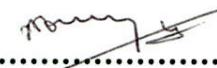
- 58) The setting aside has the effect of nullifying the judgment which is not a judgment on the merits. Matters will only come on appeal where they have been determined on the merits in the Court below.
- 59) The effect of our decision in the preceding paragraph is that, to the extent that the remedy of setting aside is provided for as opposed to appeal, this appeal is incompetent. Recently we took a similar position in an appeal that came before us last year at Kabwe in the case of **Gerry Musoni v Adam Banda⁸**. In that case, like in this one, the Appellant appealed against a decision of the High Court which was given in her absence. In dismissing the appeal we held that it was incompetent because the Appellant's recourse lay in setting aside the judgment appealed against.

Conclusion

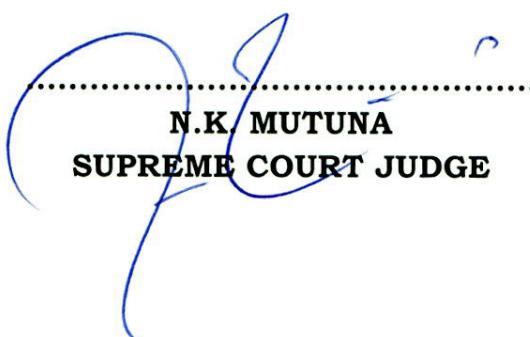
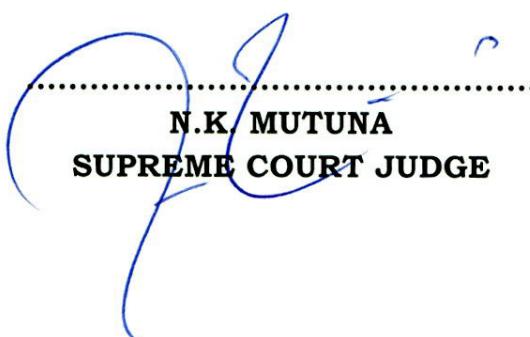
60) The decision we have made in the preceding paragraphs render the consideration of this appeal based on the grounds of appeal *otiose*. The appeal is, therefore, dismissed with costs, to be taxed in default of agreement.



**I.C. MAMBILIMA
CHIEF JUSTICE**



**M. MALILA
SUPREME COURT JUDGE**

**N.K. MUTUNA
SUPREME COURT JUDGE**