

IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)

Appeal No. 80/2017

BETWEEN:

ZESCO LIMITED

APPELLANT

AND

ETHEL MKANDAWIRE

RESPONDENT

(Suing as Administratrix of the estate of the late Paul Mbulo)



Coram: Mchenga DJP, Mulongoti and Lengalenga, JJA

**On the 24th April, 2018, 14th May, 2018, 22nd August,
2018 and 4th October, 2018**

*For the applicant:
For the respondent:*

*Mr. P. Mulenga, In-house counsel, ZESCO Limited
Dr. O.M.M. Banda, O.M.M. Banda and Company*

JUDGMENT

MULONGOTI, JA, delivered the Judgment of the Court

Cases referred to:

1. Benham v Gambling (1941) 1 ALL ER 726
2. Elijah Bob Litana v Bernard Chimba and the Attorney General (1987) ZR 26

3. Zambia State Insurance Corporation Limited and another v Muchili (1988-1989) ZR 146
4. Kabanga and another v Kasanga (1990-1992) ZR 145
5. Tony Nyirenda v ZESCO Limited Appeal 169 of 2000
6. Kalanga v Konkola Copper Mines Plc (SCZ) No. 5 of 2004
7. Konkola Copper Mines Plc v Kapaya (2004) ZR 233
8. Michael Mukula and Highway Transport Limited v Pamela Ngungu Chiwala and James Mutungu Chiwala (SCZ) No. 21 of 2014
9. Attorney General v Administrator General (1987) ZR 1
- 10 Faindani Daka (Suing as administrator of the estate of the late Fackson Daka) v the Attorney General (1990-92) ZR 131
11. Masauso Zulu v Avondale Housing Project Limited (1982) ZR 172
12. Duncan Sichula and another v Catherine Chewa SCZ Judgment NO.8 of 2000
13. Kabwe International Transport Limited v Madison Insurance Company v Mathews Njelekwe SCZ Judgment NO.12 of 1998
14. The Minister of Home Affairs and the AG v Lee Habasonda (Suing on his behalf and on behalf of the Southern African Centre for the Constructive Resolution of Disputes) (2007) ZR 207 (SC)

Legislation referred to:

1. **Law Reform (Miscellaneous) Provisions Act, Chapter 74 of the Laws of Zambia**

This is an appeal against the awards granted to the respondent Ethel Mkandawire, following a decision of the Deputy Registrar at assessment. The brief background to the matter, is that on or about 4th June 2015, the deceased Paul Mbulo, aged 20 at the time, was electrocuted by the appellant's cable and died of cardiac arrest. The respondent, as an administratrix of his estate, sued the appellant in the High Court.

The respondent sought damages as follows:

- "(i) K230,000.00 being damages under the heads of Law Reform Miscellaneous Provisions Act,*
- (ii) K10,000.00 being damages for pain and suffering before death*
- iii) K75,000.00 for loss of expectation of life,*

- (iv) K25,000.00 being for funeral expenses, that includes, coffin, lodging, transport to and from burial site, foods for mourners and*
- (v) Damages for stress, anguish and trauma the deceased's family has suffered and is suffering as a result of the death of the deceased."*

The appellant admitted liability on the merits which culminated in a consent Judgement. The matter was then referred to the Deputy Registrar for assessment of the quantum of damages contained in the writ.

The respondent applied before the Deputy Registrar for assessment by summons and affidavit in support in which she proposed that damages be paid as follows:-

- "(i) K230,000.00 for damages under the Law Reform Miscellaneous Act;*
- i. K10,000.00 for pain and suffering;*
- ii. K100,000.00 for loss of expectation of life;*

- iii. *K25,000.00 for funeral expenses; and*
- iv. *K80,000.00 as damages for stress, anguish and trauma."*

The appellant filed an affidavit in opposition to the respondent's affidavit in support. The deponent Paul Mulenga, its legal officer, averred that the proposed amounts are exaggerated and not tenable at law. The respondent had not demonstrated how she arrived at the proposed figures. K100,000.00 for loss of expectation of life is unreasonably excessive and not in line with decided cases.

No tangible proof had been shown outlining funeral expenses incurred. He further deposed that the K80,000.00 damages for stress, anguish and trauma to the family are not quantifiable and therefore not justifiable nor tenable at law.

Both parties also filed skeleton arguments citing several cases which the Deputy Registrar considered.

No trial was conducted at assessment as the parties relied on their respective affidavits and arguments. The Deputy Registrar then awarded as follows:

- "i. *Law Reform Miscellaneous K300,000.00*
- i. *Loss of expectation of life K150,000.00*
- ii. *Funeral expenses K30,000.00*
- iii. *Stress, anguish and trauma K50,000.00."*

No explanation was given for these awards, which we must hasten to state, were higher than what was proposed by the respondent except for K50,000.00 for stress, anguish and trauma. In making the awards, the Deputy Registrar simply stated that "*the case of Maxwell Musonda (suing as administrator of the estate of Ebo Mwango Bwalya) v the Attorney General* has guided on how the awards should be apportioned. Going by that guidance I make the following awards." The Deputy Registrar declined to award damages for pain and suffering because the death was instant.

Dissatisfied with these awards the defendant appealed on one ground as follows-

"The Court erred in law and fact when it awarded excessive amounts at assessment as the same were outside the law and decided cases when she awarded K300,000.00 Law Reform Miscellaneous ACT, K150,000.00 for loss of expectation of life,

K30,000.00 for funeral expenses and K50,000.00 for stress, anguish and trauma."

Mr. P. Mulenga, who appeared for the appellant, also filed Heads of Argument in support of the ground of appeal. Counsel argued in paragraph six that damages under the **Law Reform (Miscellaneous) Provisions Act** are restricted to heads such as pain and suffering, loss of expectation of life and funeral expenses. The wholesome award of K300,000.00 made by the Deputy Registrar is not tenable under the law nor is it justifiable as there is no clearly outlined head upon which it is based. The award is also excessively disproportionate.

In paragraph seven of the Heads of Argument, counsel argued that damages for loss of expectation of life should be moderate and preferably fixed. The **Benham v Gambling**¹ case which the Supreme Court followed in **Elijah Bob Litana v Bernard Chimba and the Attorney General**² was relied upon as follows:

"We respectfully agree with the principles which have been laid down in the case of Benham v Gambling..., that is to say, that awards for loss of expectation of life under the Law reform (Miscellaneous) Provisions Act should be moderate and should be

fixed because, in the words of Lord Devlin in the latter case, the law is less likely to fall into disrespect if Judges treat Benham v Gambling as an injunction to stick to a fixed standard than if they start revaluing happiness each according to his ideas.... We recommend that the proper award of damages for loss of expectation of life, regardless of the age of the deceased should be K3,000."

Counsel argued that since the **Litana case**², the Supreme Court has gradually increased the amount of awards under this head. In the case of **Zambia State Insurance Corporation Limited and another v Muchili**³ the Court awarded the sum of K3,500.00. In the case of **Kabanga and another v Kasanga**⁴, this was increased to K25,000.00. In the case of **Tony Nyirenda v ZESCO Limited**⁵ the Court awarded the sum of K3,000,000.00. In the case of **Kalanga v Konkola Copper Mines Plc**⁶, the Court also awarded K5,000,000.00. In the same year, the Court also awarded K5,000,000.00 in the case **Konkola Copper Mines Plc v Kapaya**⁷ as loss of expectation of life. Learned counsel amplified that in the recent case of **Michael Mukula and Highway Transport Limited v Pamela Ngungu Chiwala and another**⁸, the Court upheld an amount of K7,000 for loss of expectation of life.

Counsel opined that K150,000.00 for loss of expectation of life awarded by the Deputy Registrar was excessive, unjustifiable and must be adjusted in line with the case of **Michael Mukula and Highway Transport Limited v Pamela Ngungu Chiwala and another**⁸. An award of K7,000.00 would be appropriate.

Regarding damages for funeral expenses, it is contended that **section 2(2)(c) of the Law Reform (Miscellaneous) Provisions Act** provides as follows:

"...where the death of that person has been caused by the act or omission which gave rise to the cause of action, shall be calculated without reference to any loss or gain to his estate consequent on his death, except that a sum in respect of funeral expenses may be included."

The section is clear that funeral expenses may be awarded. However, in *casu*, the respondent did not provide documentation of what funeral expenses were incurred.

The Deputy Registrar awarded K30,000.00 as funeral expenses without any plausible justification.

This was, in counsel's view, contrary to the Supreme Court decision in **Attorney General v Administrator General**⁹ that although certain funeral expenses are allowed under the **Law Reform (Miscellaneous) Provisions Act**, such expenses must not be unreasonable and unnecessary.

In paragraph nine of the Heads of Argument, Mr. Mulenga argues that damages for stress, anguish and trauma are sentimental in nature. To support this proposition, we were referred to a passage from the case of **Faindani Daka (Suing as administrator of the estate of the late Fackson Daka) v the Attorney General**¹⁰ as follows:

"Here I can only refer to a passage in McGregor on Damages (4) where the learned author said:

"It was early established in Blake v Midland RY that the mental suffering of a wife for the loss of her husband could not be considered in computing the damages, and thus from the start the action became limited to pecuniary loss. The two most authoritative statements of this principle emanate from the House of Lords. First, Viscount Haldane L.C. in Taff Vale Ry v Jenkins said:

'The basis is not what has been called solatium, that is to say damages given for injured feelings or on the ground of sentiment, but damages based on compensation for a pecuniary loss. 'More recent and graphic is Lord Wright in Davies v Powell Duffryin Collieries. "There is no question here of what may be called sentimental damages, bereavement or pain and suffering. It is a hard matter of pounds, shillings and pence."

The foregoing passage is instructive on non-pecuniary loss which includes loss of society claimed herein. This head of damages cannot be sustained in law. I shall therefore make no award under it."

It is submitted that the award of K50,000.00 which the Deputy Registrar made under this head is devoid of legal backing because it relates to injured feelings which brings into play matters that may not be quantified. There was no evidence presented before the Deputy Registrar on funeral expenses. Neither does the judgment provide legal justification for making the award.

We are urged to allow the appeal with costs as the appellant failed to demonstrate its claims on a balance of probabilities. The case of **Masauso Zulu v Avondale Housing Project Limited**¹¹ was cited in

as authority that "***a plaintiff who fails to prove his case cannot be entitled to Judgment, whatever maybe said of the opponent's case.***"

In response, Dr. Banda who appeared for the respondent filed the respondent's Heads of Argument. It is argued that the appeal lacks merit as the parties settled a consent Judgment. It is therefore a misuse of the court process for the appellant to now seek proof of liability. It is counsel's view that the appeal lacks merit as the parties took time to deliberate on the issue and had an opportunity to present the affidavits and arguments before the Deputy Registrar who made the assessment. That as an appellate court, we cannot reverse the findings of fact made by a trial court unless they are perverse or made in the absence of any relevant evidence or upon a misapprehension of facts or that they are findings which, on a proper proof of new evidence, no trial court acting correctly could reasonably make.

The case of **Masauso Zulu v Avondale Housing Project Limited**¹¹ was cited as authority for this position of the law.

It is Dr. Banda's position that there is no new evidence which the appellant has provided to necessitate changing the assessment of the Deputy Registrar. The case of **Duncan Sichula and another v Catherine Chewes**¹² was cited where the Supreme Court observed that:

"An appellate court should not interfere with an award unless it was clearly wrong in some way, such as because a wrong principle has been used or the facts were misapprehended or because it is so inordinately high or so low that it is plainly a wrong estimate of the damages to which a claimant was entitled."

Additionally, that in **Michael Mukula v Pamela Ngungu Chiwala and another**⁸, the Supreme Court held that serious fluctuations to the value of the Kwacha ought to be considered at the time of passing Judgment.

It is the further submission by counsel that the Deputy Registrar cannot be faulted for the awards she gave as she reviewed past awards in a number of cases like **Elijah Bob Litana v Chimba and the Attorney General**². She also reviewed the case of **Kabwe International Transport Limited v Madison Insurance Company v Mathews Njelekwe**¹³ where the Supreme Court took judicial

notice of the fact that ***"in as much as the respondents did not produce receipts for various expenses it was a well-known fact that funeral expenses were incurred and must be awarded."***

Therefore, the fact that the respondent did not provide receipts does not mean that the funeral expenses were not incurred and are not to be awarded. According to the respondent's counsel, the Deputy Registrar considered the relevant authorities and also the depreciation of the Kwacha when she awarded the amount she did to the respondent. All in all that the appeal must fail for want of merit with costs to the respondent.

We must state from the outset that the issue the appeal raises is whether the respondent proved that it was entitled to the awards given by the Deputy Registrar. The appellant is not denying liability as contended by Dr. Banda but is rather questioning the quantum of damages at assessment.

As alluded to, there was no trial held before the Deputy Registrar at assessment. Simply put, the Deputy Registrar did not receive oral

evidence. The nature of the affidavit evidence is such that it needed to be tested at trial. In its affidavit in opposition, the appellant avers that the respondent had not demonstrated how she arrived at the proposed amounts. However, instead of receiving oral evidence so the respondent could explain how it arrived at the amounts, the Deputy Registrar simply accepted the amounts in the respondent's affidavit in fact she increased the amounts and provided no reasons for doing so. She also did not specify what was awarded under the Law Reform Miscellaneous Act. The Deputy Registrar simply awarded "**K300,000 for Law Reform Miscellaneous.**" In the case of **Zambia State Insurance v Muchili**³, the Supreme Court elucidated that the awards under the Law Reform Miscellaneous Provisions Act are for the estate. Furthermore, that the Act is mostly for employees to recover loss of prospective earnings and that this had been particularly important where the estate constitutes dependants who recover loss of dependency which is calculated on the basis of the same prospective earnings.

In *casu*, as no oral evidence was received, it is unclear what the deceased was doing for a living or whether he had dependants, or a

widow who survived him. The documentary evidence before the Deputy Registrar did not reveal those facts. No explanation was given how she arrived at the figure of K300,000.00 for damages under the Act without even specifying under which head they were awarded.

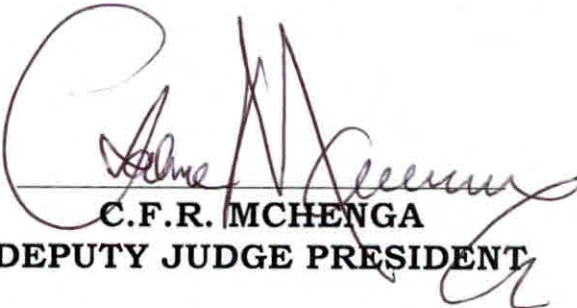
In **Konkola Copper Mines Plc v Kapaya**⁷ the Supreme Court pronounced itself as follows on loss of expectation of life:

"In the present case as we already pointed out the learned Judge awarded K4,000.00 for loss of expectation of life...loss of expectation of life is a head of damage which is claimed on behalf of the estate of the deceased and it is by law that such an award is by a small sum..."

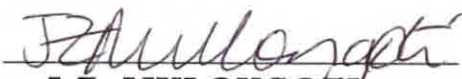
The Deputy Registrar further did not explain how she arrived at the amount of K150,000.00 for loss of expectation of life. No evidence was received as to whether the estate constituted dependants or not. It is therefore difficult to appreciate the awards given by the Deputy Registrar. It is trite law that every Judgment must reveal the reasoning of the Court on the facts and the application of the law and authorities if any to the facts. See the **Minister of Home Affairs and the Attorney General v Lee Habasonda (suing on his**

own behalf and on behalf of the Southern African Centre for the Constructive Resolution of Disputes)¹⁴.

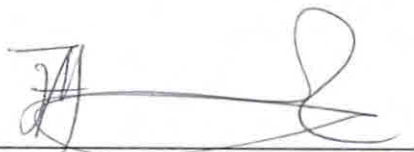
In light of the foregoing, we find it difficult to vary the awards made by the Deputy Registrar as no trial was held and no explanation was given on how these figures were arrived at. The appeal is allowed. We therefore set aside the Ruling including the awards made by the Deputy Registrar. We remit the case back to the High Court for re-hearing at assessment. We order the Deputy Registrar to receive oral evidence as explained. In the circumstances, we order each party to bear own costs in this court.



C.F.R. MCHENGA
DEPUTY JUDGE PRESIDENT



J.Z. MULONGO
COURT OF APPEAL JUDGE



F.M. LENGALINGA
COURT OF APPEAL JUDGE