

IN THE COURT OF APPEAL OF ZAMBIA APPEAL No.154/2019
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

MANDA HILL CENTRE LIMITED

APPELLANT

AND

FRESHVIEW CINEMAS LIMITED

RESPONDENT



CORAM: Chisanga JP, Mulongoti and Ngulube, JJA

On 20th November, 2019 and 28th January, 2020

For the Appellant:

Mrs. M.S. Namwila-Mwaala of Corpus Legal Practitioners

For the Respondent:

Mrs. P.C. Hampungani of Milner & Paul Legal Practitioners

J U D G M E N T

Mulongoti, JA, delivered the Judgment of the Court

Cases referred to:

1. *Dunlop Pneumatic Tyre Company Limited v New Garage and Motor Company Limited (1915) A.C 79*
2. *Colgate Palmolive (Z) Inc. v Abel Shemu Chuka and 110 others SCZ Judgment No. 181 of 2005*

3. *Minister of Home Affairs, Attorney General v Lee Habasonda* SCZ Judgment No. 23 of 2007
4. *Kansanshi Mine Plc v Maini Joseph Mudimina & others* SCZ Appeal No. 149 of 2010
5. *Sun Country Limited and Others v Rodgers Redin Savory and another* SCZ Appeal No. 122 of 2006
6. *Zambia Telecommunications Company Ltd (ZAMTEL) v Mulwanda and another* (2012) ZR 404
7. *Wilson Masauso Zulu v Avondale Housing Project Limited* (1982) ZR 172 (SC)
8. *R. R. Sambo N. N. Sambo and Lusaka Urban District Council v Paikani Mwanza* SCZ Judgment No. 16 of 2000
9. *Corpus Legal Practitioners v Mwanandani Holdings Limited* SCZ Judgment No. 50 of 2014
10. *Milorand Saban (being sued as Administrator for the estate of the late Savo Saban), Machinist Engineering Limited v Gordic Milan* (2008) ZR 233
11. *Mususu Kalenga Building & Another v Richman's Money Lenders Enterprises* (1999) ZR 27
12. *General Nursing Council of Zambia v Ing'utu Milambo Mbangweta* (2008) ZR 105
13. *Afrope Zambia Limited v Anthony Chate and Others* SCZ Appeal Number 160 of 2016
14. *YB And F Transport Limited v Supersonic Motors Limited* SCZ Judgment No. 3 Of 2000
15. *Emmanuel Mutale v Zambia Consolidated Copper Mines Limited* (1994) Z. R. 67 (S.C.)
16. *Kuta Chambers (Sued as a firm) v Concillia Sibulu and another* SCZ Selected Judgment Number 36 of 2015

Legislation and Other Works Referred to:

1. *Bryan A. Garner (Ed). Black's Law Dictionary, 9th Edition. Thomson West: USA, 2009.*
2. *The Court of Appeal Act No. 7 of 2016.*

3. **Dr. P. Matibini, *Zambian Civil Procedure: Commentary and Cases, Volume 2: Lexis Nexis, 2017.***
4. **Justice M. M. Corbett, *Writing a Judgment, South African Law Journal [1997] Volume 115***

1.0 **Introduction**

1.1 This is an appeal against the Judgment of his Lordship Nkonde J, which found *inter alia* that the appellant (Manda Hill Centre Limited) was only entitled to rentals for the period the respondent (Freshview Cinemas Limited) did not occupy the premises. The learned Judge found that the appellant's claim for liquidated damages for the respondent's failure to occupy the premises was a penalty, and therefore, unconscionable and could not be awarded even though the parties had agreed to it.

2.0 **Background**

2.1 The respondent (plaintiff in the court below) had sued the appellant (defendant in the court below) claiming the following:

- I. A declaration that the charging of penalty is unreasonable and is contrary to the Landlords and Tenants (Business Premises) Act Cap. 193 and therefore illegal.***
- II. A declaration that the plaintiff has no duty to settle an arrear for a company distinct from itself.***
- III. A declaration that the payment of the fees for registration of the lease by the plaintiff without agreement is illegal or unlawful.***

- IV. A declaration that the charging of rental and other charges in United States Dollars is illegal and should thus be denominated in Zambian Kwacha.**
- V. A refund to the plaintiff of any such sums paid due to any of the illegal or unlawful transactions above and for which the defendant had no right of claim.**
- VI. An injunction to restrain the defendant or its agent or servants from evicting the plaintiff from the leased premises pending the determination of this action.**
- VII. Costs**

2.2 The appellant denied the respondent's claims and averred that the liquidated damages it was claiming were not a penalty and were provided for in the lease agreement between the parties. The appellant then counterclaimed against the respondent the following reliefs:

- i. The sum of Kwacha One Billion, One Hundred and Fifty Million, Nine Thousand, Eight Hundred and Eight and Fifteen Ngwee (ZMK1, 150, 009, 808.15) [unrebased] being in respect of outstanding rentals for Silverbird Cinemas, liquidated damages, rates, lease and registration fees.**
- ii. Interest on the sum above at current bank lending rate from due date to date of payment.**
- iii. Any other relief the Court may deem fit and costs.**

2.3 On 13th June, 2018 the parties filed into court a statement of agreed facts and agreed questions for the trial court's determination as follows:

2.3.1 *Agreed facts:*

1. *The plaintiff is, and was at all material times, a company incorporated in Zambia and having its registered office at Lusaka.*
2. *The defendant is, and was at all material times, a private company limited by shares duly incorporated pursuant to the provisions of the Companies Act, Chapter 388 of the Laws of Zambia and the registered proprietor of a shopping complex trading as Manda Hill Shopping Complex "Manda Hill" in Lusaka Zambia.*
3. *The plaintiff and defendant voluntarily entered into the lease dated 28th February 2011 (the "Lease agreement") whereby the defendant demised to the plaintiff, shops numbered BU6 and BU7 (being that portion identified on the plan Annexure C of the Lease agreement) measuring 1, 149m² (BU6) plus 556m² (BU7) (the "premises").*
4. *The plaintiff was supposed to commence trading on the premises on 1st June, 2011 but instead actually commenced trading on 1st December, 2011.*
5. *At all material times, one Ceaser Siwale was both a Director and Shareholder of the plaintiff and Silverbird Cinemas.*
6. *The said Ceaser Siwale facilitated the assignment of the commercial interest in the Lease agreement from Silverbird Cinemas to the plaintiff with the consent of the defendant subject to the terms and conditions of the Lease agreement.*
7. *It was a term of the Lease agreement, in Clause 3.7.3 and 3.8.2 of the Lease agreement and Clause 8.2 of Annexure A of the Lease agreement, that the plaintiff would be liable to pay monthly in advance its prorated share of the rates and taxes and all other national and/or local levies which may be levied against the defendant.*
8. *The plaintiff and defendant agreed in Clause 3.10 and 3.11 of the Lease agreement that the plaintiff would*

pay the registration fees, for the Lease agreement, at the Lands and Deeds Registry.

- 9. Pursuant to Clause 43 of Annexure A of the Lease agreement, the plaintiff agreed that in the event that it did not commence trading on 1st June, 2011, it would pay the defendant liquidated damages, an amount equal to the basic rental in addition to the rent payable for the period of the breach.*
- 10. The defendant claimed liquidated damages from the plaintiff for the months of September, October and November, 2011, amounting to US\$103, 241.16 (United States American Dollars One Hundred Three Thousand Two Hundred and Forty-one and sixteen Cents).*
- 11. Pursuant to Special Condition Three, in Annexure D of the Lease agreement, the plaintiff agreed to pay the defendant the following amounts being loss of rental due to the delay in opening the Premises:*
 - a. 1st July, 2011 -US\$38,465.00 (United States American Dollars Thirty-Eight Thousand Four Hundred and Sixty-Five)*
 - b. 1st August, 2011 -US\$38,465.00 (United States American Dollars Thirty-Eight Thousand Four Hundred and Sixty-Five)*
 - c. 1st September, 2011-US\$38,456.00 (United States American Dollars Thirty-Eight Thousand Four Hundred and Sixty-Five)*

2.3.2 Agreed questions for determination:

- 1. Whether the plaintiff and defendant's agreement that the plaintiff is liable to pay liquidated damages under the Lease agreement is enforceable;*
- 2. Whether the plaintiff is entitled to any of the reliefs set out in the plaintiffs Writ of Summons and Statement of Claim;*

3. *Whether the defendant is entitled to claim liquidated damages from the plaintiff as they did not commence trading on 1st June, 2011 contrary to the Lease agreement as claimed in paragraph 2 of the defendant's Counterclaim;*
4. *Whether the plaintiff can assume liabilities that Silverbird Cinemas incurred under the Lease agreement as claimed in paragraph 4 of the defendant's Counterclaim;*
5. *Whether the plaintiff is liable to pay the lease and registration fees and the pro-rated rates and taxes for the Premises as agreed in the Lease agreement as claimed in paragraphs 5 and 6 of the defendant's Counterclaim; and the issues referred to in the submissions by the plaintiff and defendant.*
6. *Whether it is legal under the Landlord and Tenant (Business Premises) Act, Chapter 193 of the Laws of Zambia, for the landlord to set the following as conditions for granting a new tenancy;*
 - 6.1. *That the prospective tenant assumes the liability of a previous tenant;*
 - 6.2. *That the prospective tenant pays taxes for the premises and registration fees for the lease; and*
 - 6.3. *That the landlord should charge rentals in United States Dollars not in Kwacha.*

3.0 **Consideration of the Issues and Decision of the Lower Court**

3.1 The lower court simultaneously addressed the first and third issues which relate to the question, whether or not the appellant was entitled to liquidated damages, on account that

the respondent did not commence trading on 1st June, 2011 as agreed.

3.2 The lower court found that as per Clause 43.3 of the lease agreement, the parties agreed that on breach, the lessor (respondent) was obligated to pay the rentals due for the period as well as another sum termed liquidated damages. The trial court found that the appellant could only recover rentals for the period of the breach and interest, if claimed. The trial Judge found that the extra amount that was agreed to be paid was a penalty though referred to as liquidated damages in the lease agreement. Accordingly, the same was unconscionable and therefore not recoverable by the appellant. In reaching this conclusion, the trial Judge followed the English case of **Dunlop Pneumatic Tyre Company Limited v New Garage and Motor Company Limited**¹. The trial Judge concluded that, in awarding damages for breach of contract, the claimant must as far as money can do it, be placed in the same position as if the contract had been performed. Thus, the appellant could only recover rentals.

3.3 The trial court dealt with the fourth, fifth and sixth issues simultaneously. The questions it addressed when determining

these issues were, essentially, whether or not the appellant could recover rentals from the respondent that were incurred by a separate company and whether the respondent was mandated to pay registration fees, taxes and rates in relation to the leased premises.

3.4 The trial Judge found that the respondent was mandated to pay the said fees because the parties had agreed on these terms as evidenced by the lease agreement. He was fortified by the decision of the Supreme Court in **Colgate Palmolive (Z) Inc. v Abel Shemu Chuka and 110 others**² where it was held that:

"courts will enforce contracts that men of full age and competent understanding have executed freely and voluntarily".

The trial Judge further found that there was no evidence before him pointing to the fact that the respondent was forced or coerced into assuming the liabilities as agreed by the parties.

3.5 Furthermore, that following the revocation of Statutory Instrument No. 33 of 2012; it was no longer illegal to charge rentals in United States Dollars.

3.6 Consequently, the trial court found that the respondent's claims had failed save for the claim relating to the *'penal*

damages'. The Court proceeded to award the respondent a third of the costs as the majority of its claims had failed.

4.0 **The Appeal**

4.1 Dissatisfied with the decision of the lower court the appellant appealed to this Court on two grounds:

- 1. That the learned Judge erred in law when he failed to make express orders in the Judgment, in relation to the appellant's counterclaim despite the learned Judge having clearly made findings of fact which addressed the appellant's counterclaim, thereby resulting in a dereliction of duty; and*
- 2. That the learned Judge erred in law and in fact when he exercised his discretion by awarding a third of the costs of the action to the respondent without awarding costs to the appellant despite the appellant having succeeded on its counterclaim.*

5.0 **The Arguments:**

5.1 Both parties filed heads of argument for and against the appeal respectively. The appellant argued, in respect to ground one, that the lower court's Judgment did not meet the minimum standard required of Judgments as the trial Judge erred when he failed to make express orders in relation to the appellant's counter-claim thereby resulting in dereliction of duty. Counsel referred to the cases of *Minister of Home Affairs, Attorney General v Lee Habasonda*³, *Kansanshi Mine Plc v Maini*

Joseph Mudimina & others⁴ and **Sun Country Limited and Others v Rodgers Redin Savory and another⁵** where the Supreme Court confirmed the case of **Zambia Telecommunications Company Limited v Aaron Mulwanda and Paul Ngandwe⁶**. In these cases, the Supreme Court gave guidance on how a Judgment must be drafted by highlighting that a Judgment must reveal a review of the evidence, where applicable, a summary of the arguments and submissions, if any made, findings of fact, the reasoning of the court on the facts and the application of the law and authorities if any, to the facts, a conclusion and Order of the court.

5.2 Learned counsel for the appellant also referred to the case of **Wilson Masauso Zulu v Avondale Housing Project Limited⁷** where the Supreme Court stated that it is a duty of a court to adjudicate upon every aspect of the suit between the parties so that every aspect of the suit is determined with finality.

5.3 It is the appellant's further submission that an Order of the court is an essential element of a Judgment because it outlines what a party is or is not entitled to. Furthermore, that the lower court having made no express orders regarding the appellant's counterclaim did not adjudicate on all aspects of

the suit. As such the appellant has been left with uncertainty as to what exactly it is entitled to under the Judgment. This is despite the fact that the appellant's counterclaims as they appeared in the pleadings were reflected in the agreed issues for determination by the trial court.

5.4 It is argued that the issue as to whether the appellant was entitled to liquidated damages following the delay in commencement of trading by the respondent was dealt with by the lower court at page J10 of the Judgment.

5.5 The appellant made a claim for liquidated damages which took into account the rentals for the period of breach and interest. Reference was made to paragraphs 2 and 8 (a) and (b) of the Defence and Counterclaim, appearing at page 196 vol.1 of the record of appeal. Therefore, the trial court erred when it did not make an express Order on the damages due despite making a finding that the appellant could reasonably recover rentals for the period of the breach plus interest.

5.6 Furthermore, that the lower court also made findings in relation to the respondent's liability to pay taxes, registration fees and lease fees as well as pro-rated rates in respect of the lease agreement between the parties. Despite making the

finding that the above terms were binding on the parties having been agreed to, the lower court did not make express orders in favour of the appellant. The claims in relation to these payments were made by the appellant under paragraphs 5, 6 and 8 (a) and (b) of the counterclaim appearing at pages 196/197 of the record of appeal (vol.1) as K4,470.00 in registration fees and K23,514.93 for prorated share of rates plus interest thereon.

5.7 The appellant's counsel further pointed out that the lower court also made findings in relation to the respondent's responsibility for the debt owed by Silverbird Cinemas to the appellant, as agreed. However, it did not make an express Order to the effect that the respondent was liable to pay K601,784.93 the liabilities for Silverbird Cinemas. This, according to the appellant, formed part of its counterclaim at paragraphs 4 and 8 (a) and (b) of the counterclaim.

5.8 The appellant has urged us to grant express Orders entitling the appellant to (i) damages equivalent to rentals for the period of breach plus interest, (ii) recovery of K4,470 and K23,514.93 in registration fees and pro-rated taxes as agreed (iii) payment by the respondent of K601,784.93 being liabilities of Silverbird

Cinemas. The basis for these orders, it is argued, are the findings already made by the lower court.

5.9 Under ground two, it is argued that the appellant was entitled to costs in the lower court having succeeded in its counterclaim. Additionally, that there was no special reason to deny them costs. Reference was made to the provisions of **Order 62/2/10 of the Rules of the Supreme Court of England (White Book) 1999 Edition** where it is stated that a party who does not misconduct himself in pursuing a legal right is entitled to costs as of right. And, that although the award of costs is at the court's discretion, such discretion ought to be exercised judiciously as held in cases of *R. R. Sambo N. N. Sambo and Lusaka Urban District Council v Paikani Mwanza*⁸ and *Corpus Legal Practitioners v Mwanandani Holdings Limited*⁹. The Court of Appeal can only interfere with such discretion where the Judge has erred.

5.10 The appellant maintains that the lower court erred in awarding a third of the costs in the High Court to the respondent as it was unsuccessful on most of its claims, and fell in error when it did not award the appellant costs at all.

We are urged to award costs of the action in the lower court to the appellant.

5.11 In response, the respondent's counsel argued, in relation to ground one that, the parties agreed to narrow the issues and also agreed on the facts to be relied upon by the trial court in determining the specific legal issues raised. Among the issues to be determined by the court below, there was no specific relief sought by the appellant with regard to the counterclaim. For the obvious reason that, at the time the parties were executing the statement of agreed facts and legal issues for determination, the appellant had already executed on the respondent and was in possession of the business premises in issue, following entry of Judgment on admission on 30th April, 2013, appearing on pages 311-312 volume 2 of the record of appeal. Relying on the case of **Milorand Saban (being sued as Administrator for the estate of the late Savo Saban), Machinist Engineering Limited v Gordic Milan**¹⁰, it was argued that the parties had departed from their original pleadings and that by their own consent, they were bound by the statement of agreed facts. Thus, the appellant could not raise issues not agreed upon.

5.12 That in relation to paragraphs 2 and 8 (a) and (b) of the counterclaim, according to the legal issues to be determined, what was to be determined was not the rights or entitlements of the parties under the lease agreement, but the legality of the terms of the lease. In this regard, the parties requested the trial court to determine whether or not it was legal for the appellant as landlord to; (a) charge a tenant damages for not trading; and (b) require a tenant to assume liabilities of a previous tenant. According to counsel determination by the trial court was meant to be limited to the extent of 'legality' only. Therefore, the appellant's contention that the trial Judge needed to make Orders in their favour regarding the counterclaim is misplaced.

5.13 Regarding the respondent's liability to pay for registration of the lease, taxes and rates, it is argued that the Judge found in favour of the appellant when it held that the terms of the lease agreement were binding on the parties. The Judgment needed not to be any clearer than that.

5.14 Learned counsel maintained that the trial court was not asked to determine the rights of the parties but the legal issues raised hence the appellant's claim for an order entitling it to

damages, rates and taxes and Silverbird Cinemas' rental arrears is misconceived. Granting the orders sought by the appellant would amount to allowing it to depart from what the parties reasonably thought was agreed, thereby prejudicing the respondent, contrary to the Supreme Court decision in the case of **Mususu Kalenga Building & Another v Richman's Money Lenders Enterprises**¹¹.

5.15 In relation to ground two it was argued that the Supreme Court has, in a plethora of cases including the case of **General Nursing Council of Zambia v Ing'utu Milambo Mbangweta**¹² held that,

"In awarding costs, the court has to consider the particular circumstances of the case."

In *casu*, the trial Judge properly adjudged that, the penalty for not trading, otherwise termed as liquidated 'damages' by the appellant was illegal. And, in exercise of its judicial authority, it made a finding that the amount charged as a penalty was also unconscionable and amounted to unjust enrichment on the part of the appellant. According to counsel, it is because of these circumstances that the respondent was awarded a third of the costs of the action. Therefore, the learned trial Judge judiciously exercised his discretion.

5.16 At the hearing of the appeal, Mrs. Mwaala, who appeared for the appellant relied on the appellant's heads of argument. Mrs. Hampungani, who appeared for the respondent, equally relied on the respondent's heads of argument which she briefly augmented. She submitted that since the amounts in the counterclaim were not specifically pleaded, they could not be awarded. In response to questions from the court, she admitted that the amounts could be assessed.

In reply, Mrs. Mwaala, argued that the appellant did not depart from its pleadings by executing the statement on agreed facts and issues to be resolved by the trial court. She amplified that specific amounts were claimed (as seen at page 196 of the record of appeal vol. 1) but the lower court did not make express Orders regarding the same.

6.0 **Issues on Appeal**

The following are the issues arising on appeal:

6.1 Whether by executing the statement of agreed facts and the legal issues to be determined by the trial court, the appellant had forfeited its claims as stated in the counterclaim. Key to this issue is the question whether the trial court erred when it made findings of fact in favour of the appellant but omitted to

expressly order that the appellant was entitled to the amounts it counterclaimed.

- 6.2 The issue whether the Judge erred to award a third of the costs to the respondent when the appellant also succeeded in most of its claims, also arises.

7.0 **Consideration and Determination of Issues on Appeal**

- 7.1 The gist of the appellant's argument in ground one, is that, despite making several findings of fact regarding the appellant's counterclaims, the trial court omitted to make specific orders regarding the amounts of money in the counterclaim.

- 7.2 It must be noted that a perusal of the legal issues that the parties presented before the lower court for determination, encompassed both the respondent's claims as well as the appellant's counterclaims. The trial Judge found that the appellant was entitled to rentals only for the months that the respondent failed to trade or occupy the premises. The claim for rentals was part of the appellant's counterclaim. The claim for liquidated damages which were in fact a penalty was disallowed.

- 7.3 The respondent's arguments that by asking for an order for rentals the appellant is departing from the pleadings, in this case the agreed statement of facts and agreed issues, are therefore meritless. We find the argument that the agreed issues to be determined became the pleadings highly flawed. The agreed facts and agreed issues to be determined are stemming from the pleadings and cannot be divorced from the same. We also find the argument that the court was only asked to determine the legality or otherwise of the appellant's claims without awarding the amounts claimed to be equally flawed. The appellant did not abandon its counterclaim at all.
- 7.4 It is therefore, imperative for us to assess the lower court's findings regarding the issues presented before it. Regarding the first and third issues, the lower court made the following key findings:

"I find and hold that ...Clause (43.3) in the lease agreement though worded as liquidated damages is actually a penalty."

"... the stipulated damages for failing to open the leased premises are a payment of rentals for the period of the breach, as well as another sum equivalent to the rentals. This amount, in my view, is unconscionable and would amount to unjust enrichment."

"The only loss which I see, and which the defendant [appellant] is entitled to, is rentals for the period of the breach plus interest if claimed."

7.5 The fourth, fifth and sixth issues dealt with the terms of the contract as agreed by the parties relating to the respondent's liabilities for (i) Silverbird Cinemas' debts. (ii) the lease and registration fees and the pro-rated rates and taxes and (iii) charging of rentals in United States Dollars. In this regard the lower court made the following key finding:

"I...find and hold that the above mentioned terms are binding on the parties"

Regarding the second issue which dealt with whether or not the respondent was entitled to any relief, at all, as claimed; the lower court found that the respondent only succeeded, in part, in relief (i) as endorsed on the writ which related to the liquidated damages (penalty) for breach. This was found to be illegal and unconscionable.

7.6 At page 20 (J13) of the record of appeal vol. 1 lines 5 to 6 the Judge held that;

"... I am of the consequent view that the plaintiff is not entitled to reliefs (ii), (iii), (iv) and (v)."

Relief (ii) relates to the respondent's payment of debts owed by another company. Reliefs (iii) and (iv) on payment of

registration fees, and pro-rated taxes and charging of rent in United States Dollars.

7.7 It is clear from the excerpts of the Judgment that the findings of the lower court effectively allowed the appellant's counterclaim on payment of registration fees and pro-rated rates and taxes, charging rent in United States Dollars and the respondent incurring the liabilities of Silverbird Cinemas. Although it was not expressly stated in the Judgment as to whether the specific amounts as counterclaimed were allowed as is. The trial court, in our view, ought to have clearly pronounced itself on the amounts claimed by the appellant in the counterclaim.

7.8 Regarding the paying of taxes and registration fees, the lower court held at page 18 (J11) of the record of appeal vol. 1, lines 7-13 that ***"furthermore, there is no provision under the Landlord and Tenants (Business Premises) Act, that proscribes a prospective tenant from assuming the liabilities of the previous tenant, as well as from paying taxes and registration fees for the premises, provided the tenant has assumed the liability freely and voluntary. In this case, there is no evidence that the plaintiff was forced or coerced into assuming the said liabilities. I, therefore, also find and hold the issues raised in four and five in the affirmative."***

7.9 Thus, the appellant's counterclaim for the respondent to pay debts of Silverbird Cinemas and payment of registration fees, and pro-rated rates and taxes succeeded as they were in the affirmative. The trial court found that it was no longer illegal to charge rent in United States Dollars following revocation of Statutory Instrument No. 33 of 2012. Clearly, all of the appellant's counterclaims were allowed except for the liquidated damages. However, the Judgment does not expressly state if the amounts claimed were granted as is or they were to be assessed.

7.10 As a trial court, the lower court had a duty to distinctly outline its verdict in relation to the rights and obligations of the parties regarding the issues that were presented before it for determination. In his book **Zambian Civil Procedure: Commentary and Cases, Volume 2**, Dr. Matibini observes at page 1117 that;

"A judgment is the final decision of the Court resolving the dispute and determining the rights and obligations of the parties. A judgment has two functional components. First, it is a command to the party or parties at which it is directed. Second, and perhaps more importantly, it regulates the legal relationship between parties and settles their mutual rights and obligations."

7.11 It is evident that the Judgment was not clear enough. In the case of **Zambia Telecommunications Company Ltd (ZAMTEL) v Mulwanda and Another**⁵ the Supreme Court observed at page 415 that;

"A judgment is not supposed to be interpreted. It should be thorough, exhaustive, and clear on all issues."

In the same Judgment the Supreme Court quoted with approval an article on '**Writing a Judgment**' by Hon. Mr. Justice M. M. Corbett, the former Chief Justice of the Supreme Court of South Africa. The article states that the structure of a judgment must contain; an introductory section, a setting out of facts, the law and issues, applying the law to the facts, the reliefs and the Order of the Court. Regarding an Order of the Court Justice Corbett opined:

"As far as the parties are concerned, this is what the litigation was all about. This is what the winner will take to the sheriff for execution. Make sure that the order is properly formulated; that it reflects the intended result."

7.12 In *casu*, the trial Judge omitted to do so. He ought to have made specific orders regarding both the respondent's claims as well as the appellant's counterclaims. Be that as it may, this Court, pursuant to the provisions of **Section 24 (1)(a) of the**

Court of Appeal Act, has powers to give effect to the findings of the trial court. The above section stipulates thus:

"The Court may, on the hearing of an appeal in a civil matter; (a) confirm, vary, amend, or set aside the judgment appealed against or give judgment as the case may require;"

We, therefore, Order that the appellant is entitled to be paid registration fees and taxes pro-rated, debts of Silverbird Cinemas as agreed, to be assessed by the Deputy Registrar.

7.13 Regarding the claim for damages for breach, the lower court allowed as damages rentals for the period the respondent failed to commence trading. Instead of commencing in June, 2011 they only did so in December, 2011. A perusal of the record of appeal, reveals that Judgment on Admission, which related only to rentals for June, July, August and September, 2011, was entered in favour of the appellant at United States Dollars 115,395.00 with interest as stated in the said Judgment on Admission, at pages 311-312 of the record of appeal vol. 2.

7.14 The amount entered in favour of the appellant was United States Dollars 115,395.00 or Kwacha equivalent. It is not clear if this amount included all the months for June, July, August

and September, 2011 because at line 13 of the said Judgment it is stated that the respondent admitted to owing United States Dollars 174,665.93 in rentals. The entry of this Judgment culminated in execution against the respondent. We therefore, agree with Mrs. Hampungani, that the rentals were settled for some months. We note that the appellant claimed rentals for September, October and November, 2011 initially, but it later changed and counterclaimed rentals from June, 2011 as revealed in paragraph 3 of the counterclaim at page 196 of the record of appeal vol.1. We therefore, order that the rentals due be assessed by the Deputy Registrar.

Accordingly, ground one of the appeal has merit and succeeds.

7.15 Ground two deals with the issue of costs. The appellant's argument is that most of the respondent's claims having failed they should not have been awarded costs by the lower court. Instead costs should have been awarded to them as its counterclaim succeeded.

7.16 It is trite law that costs follow the event and are awarded at the Court's discretion. However, this discretion ought to be exercised judiciously. There are a plethora of cases that emphasize this position of the law. In the case of **Afrope Zambia**

Limited v Anthony Chate and others¹³ the Supreme Court opined that;

"We have stated in a number of authorities that costs are in the discretion of the court."

In **YB And F Transport Limited v Supersonic Motors Limited**¹⁴ it was held that;

"The general principle is that costs should follow the event; in other words, a successful party should normally not be deprived of his costs, unless the successful party did something wrong in the action or in the conduct of it."

7.17 In **Emmanuel Mutale v Zambia Consolidated Copper Mines Limited**¹⁵ the Supreme Court reiterated that;

"... the general rule is that a successful party should not be deprived of his costs unless his conduct in the course of the proceedings merits the court's displeasure or unless his success is more apparent than real, for instance where only nominal damages are awarded"

In the case of **Kuta Chambers (Sued as a firm) v Concillia Sibulu and another**¹⁶ Malila JS., stated as follows;

"At the end of a proceeding, the unsuccessful party pays the costs (i.e lawyer's fees and disbursements) of the successful party."

7.18 The question at this point, is whether the appellant was entitled to costs. We are of the considered view that the counterclaim having succeeded in the main; and the

respondent's claim against penalties having succeeded, the court below should have ordered each party to bear own costs. To this extent, we opine that the lower court misapplied the principles regarding the award of costs.

We, accordingly, set aside the award of the third of costs to the respondent. We order each party to bear own costs in the court below.

Ground two accordingly succeeds.

7.19 The appeal having substantially succeeded, we award costs in this Court to the appellant, to be taxed in default of agreement.



F.M. CHISANGA
JUDGE PRESIDENT



J.Z. MULONGOTI
COURT OF APPEAL JUDGE



P.C.M. NGULUBE
COURT OF APPEAL JUDGE