

IN THE SUPREME COURT FOR ZAMBIA
HOLDEN AT NDOLA
(Civil Jurisdiction)

APPEAL NO. 196/2010

BETWEEN:

FALCON PRESS LIMITED

GEORGE FRANCIS ROBERTS

AND

MIKE ROBBIE ABASS MALIK

(Suing as Administrator of the Estate of
The Late Robbie Abass Malik)

1ST APPELLANT

2ND APPELLANT

RESPONDENT

Coram: Chibesakunda, Ag. CJ, Phiri and Muyovwe, JJS
On 3rd March, 2015 and 29th November, 2016

For the Appellant: Mr. D. Tambulukani, Messrs Ellis & Co

For the Respondent: Mr. C. Mukonka, Messrs Caristo Mukonka Legal
Practitioners

J U D G M E N T

MUYOVWE, JS, delivered the Judgment of the Court

Cases referred to:

1. Kasengele and Others vs Zanaco SCZ No. 11 of 2000
2. Limpic v. Mawere and Others SCZ Appeal No. 121 of 2006.
3. Nkongolo Farms Limited v. Zambia National Commercial Bank SCZ 19 of 2007.
4. ACE Audit Expertise Zambia Limited v. Africa Feeds Limited (2009) Z.R. 1

Legislation referred to:

1. The Companies Act, Chapter 388 of the Laws of Zambia.

When we heard this appeal, we sat with Hon. Lady Justice Chibesakunda. She has since retired and therefore this judgment is by the majority.

This is an appeal against the judgment of the High Court sitting at Ndola which granted the respondent's claim in the sum of K129,468,568.00 with interest at 10% per annum from 19th September, 2002 the date of the commencement of the action.

The background to this appeal is that the late Mr. Robbie Abus Malik worked for the 1st appellant rising to the position of General Manager, a position he held until 13th June 2001. The dispute between the parties revolves around the quantum of terminal benefits due to the respondent. According to the evidence of one Paul Malama PW1, a former accountant in the employ of the 1st appellant, who testified on behalf of the family of the late Mr. Malik, the deceased served the company for 28 years. Paul Malama explained that after calculating the amount due to the late Mr. Malik, he submitted the same to the 2nd appellant who disputed the amount claiming it was above the late Malik's entitlement. The respondent, son to the late Mr. Malik, who was the plaintiff in the

court below, commenced an action against the appellants claiming for the following as per writ of summons-

1. Terminal benefits accrued in respect of services rendered to the defendants for 28 years from 1973 to June 2001 at the rate of 3 months for each completed year of service at K1,500,000 per month x 28 years	K126,000,000.00
2. Fuel and medical refunds up to November 2000	K 895,550.00
3. Fuel allocation up to June 2001	K 400,000.00
4. Balances on advances from January to May 2001	K 420,000.00
5. 246 days accrued leave days	K 1,753,013.00
	<u>K129,468,563.00</u>
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The plaintiff therefore claims-

- a) The sum of K129,468,563.00
- b) Interest thereon at current bank rate
- c) Electricity and water arrears which the deceased was entitled to up to the time of his death
- d) An order restraining the defendants from evicting the plaintiff from the house No. 5 Bulimi Road, Kansenshi, Ndola
- e) Costs

This in sum was the respondent's case.

The 2nd appellant who was/is managing director and shareholder of the 1st appellant company gave evidence on behalf of the appellants in the court below. In summary, his evidence was

that he had a very cordial relationship with the late Mr. Malik. The 2nd appellant blamed all the confusion in this matter on Paul Malama who held the position of accountant in the 1st appellant company. According to the 2nd appellant, there was no increment of salary awarded to the late Mr. Malik as he as managing director never sanctioned any increment. That as a company, they had agreed to transfer the house to the estate of the late Mr. Malik as part of his terminal benefits. An evaluation of the property was carried out and the matter was referred to the lawyers of the Malik family but there was no response. That the next thing was the involvement of Paul Malama who inflated the terminal benefits far in excess of the valuation of the house. There was confusion in the whole process and his (the 2nd appellant's) household goods were seized by the bailiffs and by the time he raised their fees in the sum of K7,000,000 it was too late as his goods were already sold.

The 2nd appellant seriously disputed the payslip produced by Paul Malama describing it as fraudulent and the terminal benefits calculated by Paul Malama were inflated, according to him. Further, he alleged that he was arrested by the Drug Enforcement

Commission at the instance of Paul Malama. This was the appellants' case before the court below.

In his judgment, the learned trial judge noted though, erroneously, that the appellants filed a memorandum of appearance and defence. The learned judge found Paul Malama to be more credible than the 2nd appellant taking into account that he had no interest in the matter. The learned judge accepted that the late Malik had been given an increment of salary during the period that the 2nd appellant was on stand down. The view that the learned judge took was that the 2nd appellant had an interest in the matter and was making every effort to defend the company's interests. After considering the evidence, he found that the respondent had proved his case on a balance of probabilities and awarded him the amount of K129,468,563.00 as claimed.

The appellants, aggrieved by the lower court's judgment appealed to this court advancing two grounds of appeal couched in the following terms-

- 1. That the honourable judge erred in law and fact by deciding that the salary of Robbie Abus Malik had been increased**

without the approval of the Managing Director of the company.

- 2. That the honourable judge erred in law and fact when he refused to give effect to the fact that the parties had already agreed to the transfer of some of the property as part settlement of the terminal benefits due to Mr. Robbie Abus Malik.**

This appeal was adjourned twice on account of the fact that the parties were exploring an ex-curia settlement. However, at the last hearing of this appeal, learned counsel for the parties informed us that efforts at reaching an ex-curia settlement had proved futile and the parties were now ready to proceed with the appeal.

At the hearing of the appeal, Mr. Tambulukani, counsel for the appellant relied on his filed heads of argument. He indicated that in relation to ground one, he was also relying on the case of **Kasengele and Others vs. Zanaco¹**.

In support of ground one, it was submitted that the purported salary increment had no blessings of the 2nd appellant who was/is the Managing Director of the 1st appellant. The 2nd appellant was the appellants' witness in the court below. It was argued that the 2nd appellant's evidence remained unshaken as he stated that there

were no increments during his tenure of office. Counsel relied on Section 203(1) of the Companies Act, Chapter 388 of the Laws of Zambia which reads as follows:

For the purposes of this Act, any person who is appointed by the members of a company to direct and administer the business of the company shall be deemed to be a director of the company, whether or not he is called a director.

It was submitted that in line with Section 203(1) of the Act the officer responsible for the affairs of a limited liability company, and its employees, is the managing director, in this case the 2nd appellant.

It was contended that contrary to the findings by the court below that PW1 Paul Malama had no interest in the case when he testified about the increment, his own evidence revealed that he worked as an accountant in the 1st appellant company and that this was acknowledged by the court below. Counsel argued that the court below failed to discern that the appellants and Paul Malama had differences which culminated in his reporting the 2nd appellant to the Drug Enforcement Commission on false charges. Counsel pointed out that this evidence was uncontroverted and there was no

evidence that the 2nd appellant was later convicted or even prosecuted on the false allegations.

Turning to ground two, it was submitted that the 2nd appellant told the court that the parties had agreed to transfer the property in issue in settlement of the terminal benefits. In addition to the said agreement, the respondent was paid K8,800,000-00 as part payment of his terminal benefits which in total amounted to K40,220,000-00 leaving the balance of K33,298,000-00.

Counsel submitted that Paul Malama did not dispute the part payment. Counsel pointed out that the proposal to apply benefits towards the purchase of the house in issue was initiated by the family of the late Robbie Abass Malik and the letter to this effect is on record. Counsel referred us to the offer of sale of House No. 5, Bulimi Road, Ndola, which offer was accepted by the respondent. Further that it was on the strength of this offer and acceptance that the respondent as intending purchaser proceeded to have the caveat entered on the property at the Lands and Deeds Registry.

It was submitted that despite the agreement that the house be sold to the Malik family, the respondent sent bailiffs who seized the

2nd appellant's household goods which were three times the value of the benefits due to the respondent.

In view of this action, counsel took the view that the respondent has already recovered the value of the terminal benefits and for the respondent to receive further payment is tantamount to unjust enrichment. Counsel contended that even the enforcement of the agreement between the parties will amount to unjust enrichment as the respondent has already recovered the terminal benefits. The case of **Limpic v. Mawere and Others**² was cited in support of this argument where we stated that:

"To allow the Respondent to take the property in question with massive improvements made by the Appellant will amount to unjust enrichment of the Respondent and equity will not allow that."

Counsel questioned the award of the sum of K129,468,563-00 to the respondent stating that the court below should have taken into account the undisputed evidence that the respondent was partly paid and that the bailiffs had seized goods three times the value of the terminal benefits. Counsel relied on the case of **Nkongolo Farms Limited v. Zambia National Commercial Bank**³ and

submitted that the court below failed to assess and evaluate the evidence before it. Counsel prayed that the appeal be allowed with costs.

On behalf of the respondent, Mr. Mukonka also relied on his filed heads of argument. Responding to ground one, it was submitted that the learned judge was on firm ground when he made a finding of fact that the evidence of the respondent was more credible than that of the appellant.

Relying on the case of **ACE Audit Expertise (Z) Limited v. Africa Feeds Limited**⁴, he submitted that the learned judge had an opportunity to listen to the witnesses and after evaluating their evidence, more weight was placed on the respondent's witness. Counsel argued that the appellants have not shown how the court below erred in its findings of fact.

In responding to ground two, we were referred to the endorsement on the writ of summons and statement of claim. According to counsel, the endorsement shows that the issue of the purchase of the house was not raised in the court below. In his

view, the issue of the purchase of the house was an arrangement outside court proceedings and that, therefore, the learned judge cannot be blamed for not adjudicating on the issue.

Counsel took the view that this court cannot determine the issue of the purchase of the house because the matter was left hanging in the court below. We were referred to the evidence of the 2nd appellant who told the court below that seven weeks after Mr. Malik's death an evaluation report was generated and an offer was made to the Malik family for their consideration and that a copy was sent to their legal counsel who never responded to the offer.

According to Mr. Mukonka the issue of deductions of the purchase price of the house was not pleaded by the appellants and, therefore, the court below was on firm ground when it considered only the issues pleaded in the pleadings. Mr. Mukonka submitted that there is no evidence on record of any part payment adding that the only amount which was paid by the appellant was the bailiffs' fees in the sum of K7,000,000.00.

Counsel reiterated that the issue of the sale of the house is not in dispute though it is a matter outside these proceedings and the

respondent has no objection to the deduction of the sum of money indicated in the letter of offer from the amount due to the respondent.

We were urged to dismiss the appeal for lack of merit with costs.

At the hearing, Mr. Mukonka in his brief response to Mr. Tambulukani's submission, submitted in relation to ground two that the appellants never filed any defence in this matter. He argued that the issue raised in ground two was not raised in the court below either by claim or counter-claim.

In his brief augmentation in reply, Mr. Tambulukani submitted that the issue in ground two did arise in the court below through the evidence of the 2nd appellant. Mr. Tambulukani conceded, however, that the appellants did not file any defence to this action. According to counsel, subsequent to the offer of sale of the house, the respondent refused to accept the value of the property, claiming that the benefits were less and the appellant claimed that there was fraud in the calculation. And so there was a stalemate, hence these proceedings.

We have considered the evidence on record, the submissions by counsel for the parties and the judgment of the court below.

Before we consider the two grounds of appeal raised, we think it is prudent to clarify that although the learned trial judge in his judgment alluded to the fact that memorandum of appearance and defence were filed by the appellant, this is not the correct position.

The record does reveal, and Counsel for the appellant conceded, that they did not file a defence. The record shows that a default judgment was entered and the appellant filed an application to set it aside. Unfortunately, the order setting aside is not on record. Be that as it may, if the appellant had filed a memorandum of appearance and defence, the same would have been included on the record of appeal which was prepared by the appellants.

It appears to us that the learned judge allowed the appellant to be heard even though it did not file any pleadings.

We now turn to deal with the two grounds of appeal.

In ground one, the argument is that the salary increment alluded to by Paul Malama who was the accountant at the time the

late Malik worked for the 1st appellant, was not authorized by the 2nd appellant. The case of **Kasengele and Others vs Zanaco**¹ was relied on where we held, *inter alia*, that shareholders enjoy as a matter of right overriding authority over company affairs, even over the wishes of the Board of Directors and Managers. We have considered the arguments on this ground. The starting point is the fact that the learned judge accepted Paul Malama's evidence over that of the 2nd appellant. According to the learned judge, Paul Malama had no interest in the matter whereas the same could not be said of the 2nd appellant. In his argument, counsel for the appellant submitted that the learned judge did not take into account the fact that at the commencement of these proceedings

“ most of the former workers, including PW1 had not been paid their benefits. Consequently, the appellants and PW1 had differences, and he also reported the 2nd appellant to the Drug Enforcement Commission (DEC) on false charges.”

We take the view that counsel was giving evidence from the Bar with regard to the alleged acrimonious relationship between former employees including Paul Malama. This was not raised in cross-examination of Paul Malama and the learned judge properly

discounted the allegation including that of reporting the 2nd appellant to DEC. In the case of **Ace Audit Expertise (Z) Limited vs African Feeds Limited**³ we held that-

“The Supreme Court has evolved and constantly affirmed some definite principles when it comes to reversing the trial court’s findings of fact especially those based on credibility. This is so because this court being the Appeal Court not having the opportunity to see or to hear a witness at the trial does not rightly interfere with the findings of the fact by the trial court.”

We agree with Mr. Mukonka that the appellants have not shown how the lower court erred in finding that Paul Malama was more credible than the 2nd appellant. Indeed, simply because the 2nd appellant was a shareholder and managing director did not mean that whatever he said had to be believed. The learned judge accepted that the late Malik was granted an increment of salary and we cannot fault him as he had the opportunity to hear the witnesses before him. We decline to disturb the findings of fact by the learned judge. Ground one, therefore fails.

Coming to ground two which attacks the learned judge’s alleged failure to acknowledge that the parties had agreed to

transfer the house occupied by the Malik family as part of the terminal benefits payable to the estate of the late Mr. Malik.

This ground has been met with resistance from counsel of the respondent who argued that this issue was not raised in the court below and neither was it pleaded even as a counter-claim.

At the beginning of this judgment, we reproduced the respondent's claim in the court below and it definitely does not include the issue of the agreement relating to the house occupied by the Malik family. Whereas it is an undisputed fact that the Malik family did write to the appellants to request that either the house be given to them or sold to them and the purchase amount deducted from the terminal benefits – this was not the issue in the court below. The dispute between the parties was the amount owing to the estate in terms of the late Malik's conditions of service. According to the appellant, the amount due was less than that calculated by Paul Malama. In fact, the 2nd appellant in his evidence did not specifically state what he believed was the correct amount. The figure of K40,220,220 was mentioned by counsel for the appellant in his submissions. And so we tend to agree with Mr.

Mukonka that the mere mention of the agreement relating to the house by the 2nd appellant did not call for the evaluation of this aspect by the learned judge. The issue was clearly not pleaded. Further, it was not raised in cross-examination of Paul Malama. The 2nd appellant raised this issue in his evidence and counsel for the appellant's argument that the evidence was not challenged when it was entirely up to him to raise it with the respondent's sole witness Paul Malama cannot be sustained. Counsel has also alluded to an execution that was carried out by the bailiffs. The 2nd appellant testified that he paid K7,000,000 bailiff's fees. We are baffled as we are not clear which proceedings the execution related to. We can only conclude that the execution was outside these proceedings.

All in all, we cannot fault the learned judge in the court below for not addressing an issue which was not pleaded. The appellants can only blame themselves for lamentably failing to defend this case in the court below. Ground two also fails.

In conclusion, having considered both grounds of appeal which raised specific issues, we find no merit in this appeal and we

dismiss it. Costs to the respondent to be taxed in default of agreement.



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G.S. PHIRI
SUPREME COURT JUDGE



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E.N.C. MUYOVWE
SUPREME COURT JUDGE