

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

2010/HP/0060



B E T W E E N:

SUSAN MWALE HARMAN

PLAINTIFF

AND

LUSAKA CITY COUNCIL

DEFENDANT

**Before Honourable Mrs. Justice M. Mapani-Kawimbe on the 6th day of
June, 2017**

For the Plaintiff : In Person
For the Defendant : No Appearance

J U D G M E N T

Case Authorities Referred To:

1. *Wilson Masauso Zulu v Avondale Housing Project Ltd* (1982) Z.R 172
2. *Khalid Mohamed v The Attorney General* (1982) Z.R. 49
3. *The Attorney General v Sam Amos Mumba* (1984) Z.R. 14 (S.C)
4. *J.Z. Car Hire v Malvin Chala and Scirocco Enterprises Limited* (2002) Z.R. 112
5. *Zambia National Building Society v Ernest Mukwamataba Nayunda* S.C.Z Judgment No. 11 of 1993

Legislation Referred To:

1. *High Court Act, Chapter 27*

By Writ of Summons and Statement of Claim, the Plaintiff seeks the following reliefs:

- (i) ***Reinstitution of assorted farm products and the crates in which the said products were parked. In the alternative their value equivalent.***
- (ii) ***General and special damages***
- (iii) ***Costs occasioned and incidental to these proceedings.***

The particulars given in the Statement of Claim are that the Plaintiff went to the Bank of Zambia to deliver farm products to her clients. She parked her vehicle in the outer Bank parking lot where her clients collected their products. Whilst in the parking lot, she was approached by the Defendant's agents, servants and or employees who grabbed all the farm products and did not accord the Plaintiff an opportunity to explain her circumstances

After the incident, the Defendant never returned the Plaintiff's farm products and did not charge her with any offence but merely refused and or ignored to attend to the Plaintiff's several demands. The Plaintiff states that she has suffered loss and damages.

The Defendant settled a Defence and contends that the Plaintiff's farm products were confiscated because she was vending

on the street without a Council Business Permit or a Hawker's licence. The Defendant states that it conducted the operation at Bank of Zambia, because it had received a complaint from the Bank that street vendors had crowded its premises and made it unsafe. The Defendant avers that the Plaintiff is not entitled to any of the reliefs sought.

The matter was initially scheduled for trial on 19th January, 2017, but was adjourned at the instance of the Defendant to 31st March, 2017. On 31st March, 2017, the Plaintiff appeared while the Defendant filed a Notice of Motion to adjourn. The matter was rescheduled for trial to 17th May, 2017, but adjourned to 26th May, 2017, at the Court's instance.

In the meantime, both parties were served with the new notice of hearing on 13th April, 2017. The record shows that the Defendant conducted a search on the date of trial on 10th May, 2017. Thus, I am satisfied that the Defendant was fully aware of the date of hearing. I decided to proceed with the trial under Order 35 Rule 3 of the High Court Rules.

At trial, the Plaintiff called two witnesses. **Susan Mwale Harman** testified as **PW1**. It was her evidence that on 12th January, 2010, at about 16.00 hours, she went to Bank of Zambia to sell farm products and parked her vehicle in the outer car park. She was accompanied by her husband and worker. At about 16.30 hours, her clients, some Bank of Zambia employees went to her vehicle to collect their orders. Afterwards, PW1 testified that she went to deliver eggs at Harriet's Bakery.

It was PW1's evidence that she went back to her vehicle and stayed there till 18.00 hours because she had another delivery to make at Protea Hotel along Cairo Road. PW1 stated that she, her husband and worker were standing by the vehicle when they approached by a group of unknown men. The men asked them their mission, to which PW1 responded that she desired to deliver farm products to Protea Hotel. According to PW1, the men accused them of selling farm products on the street. When PW1 asked who they were, they became hostile and went on to offload her farm produce from her vehicle and went away with it. PW1 testified that

she went to the Lusaka City Council the following day where she met the Head of Security. She narrated the occurrence of the previous day and with his assistance identified the Defendant's employee who was in charge of the operation.

PW1 testified that she was not charged with hawking and that her farm products were never returned. As a result, she suffered loss of business because her clients namely Protea Hotel, Chrismar Hotel, Ndeke Hotel and Melisa Supermarket cancelled the supply agreement and offered her business to other suppliers. PW1 referred the Court to her Notice to Produce as proof of the supply agreements she had with various clients. PW1 testified that she was harassed, humiliated and shoved around by the men, such that, she found it difficult to return to the Bank of Zambia complex for a very long time.

PW2 was Chishimba Chipasha. His evidence was no different on the events of 12th January, 2010 as given by PW1. He affirmed the deliveries that PW1 made to the Bank of Zambia employees and how they were approached by unknown men who grabbed the farm

products that were supposed to be delivered to Protea Hotel. He repeated PW1's evidence on the hostile manner in which the Defendant's employees approached them and off loaded the farm products from PW1's vehicle.

I have seriously considered the pleadings and evidence adduced. There is no dispute that on 12th January, 2010, the Plaintiff went to Bank of Zambia complex and parked her vehicle in the outer car park. Further, she had farm products in her vehicle which were delivered to her clients at Bank of Zambia. In addition, she had other deliveries to make. It has not been disputed that the Plaintiff's goods were confiscated by the Defendant's employees and were never returned to her.

In my considered view, the issue that arises for determination is therefore, very narrow, and it is whether the Plaintiff is entitled to compensation for the confiscated farm products and damages.

In the case of **Wilson Masauso Zulu v Avondale Housing Project**¹, it was stated that where a Plaintiff makes any allegation,

it is generally for him to prove these allegations. That a Plaintiff who has failed to prove his case cannot be entitled to judgment whatever may be said of the opponent's case. Further, in **Khalid Mohamed v The Attorney General**², the Supreme Court held that a Plaintiff must prove his case and if he fails to do so, the mere failure of the opponent's defence does not entitle him to judgment. It follows that for the Plaintiff to succeed in the present case, it would not be enough to say that the Defendant has completely failed to provide a defence or to call witnesses, but that the evidence adduced must establish the issues raised.

From the evidence led by the Plaintiff and which has not been gainsaid by the Defendant, I am satisfied that the Plaintiff's farm products were unlawfully seized by the Defendant. The pleadings show that the goods were valued at K3,652,740.00 (unrebased). Hence, I have no hesitation in reacting an obvious decision which condemns the Defendant. That is to say, the Defendant must forthwith pay the Plaintiff the sum of K3,652.74 (rebased) for the confiscated goods.

The Plaintiff has presented a claim for general and special damages. The evidence led by both PW1 and PW2 is that at the time the goods were confiscated, the Defendant's employees acted in a hostile and aggressive manner. In my considered view, the evidence adduced does not cogently lead me to a finding that there was an altercation between the Defendant's employees and PW1 whereby PW1 was publicly disgraced. For the claim of defamation, PW1 was required to prove that the words communicated to her by the Defendant's employees were uttered in a manner that would have greatly prejudiced her against the right thinking members of society and they were communicated. This has not been proved. In any event, the claim was not specifically pleaded.

I find no merit in the Plaintiff's claim for loss of business. It was equally not specifically pleaded or proved as required by the principles laid down in the case of **The Attorney General v Sam Amos Mumba**³, where the Supreme Court held that:

"where loss of business forms part of the claim, it must be pleaded as special damages and strictly proved."

This principle of law was reinforced in the case of **J.Z. Car Hire v Malvin Chala and Scirocco Enterprises Limited**⁴, where the Supreme Court held that:

"It is for the party claiming any damages to prove the damage.... We have considered the Learned Deputy Registrar's judgment and the submissions before us and we have been unable to fault the Learned Deputy Registrar in his holding that there was no evidence of loss of business to be quantified. We agree with Mr. Mwananshiku that the mere production of the hire chart charge was not proof that this particular motor vehicle was ever hired and what average earnings it made for the Applicants per month."

Further, in the case of **Zambia National Building Society v Ernest Mukwamataba Nayunda**⁵, the Supreme Court held that:

"The essence of damages has always been that the injured party should be put as far as monetary compensation can go in about the same position he should have been had he not been injured. He should not be in a prejudiced position nor be unjustly enriched."

My firm view therefore is that the Plaintiff has failed to prove her claim for general and special damages. It accordingly fails.

For the avoidance of doubt, I award the Plaintiff the sum of K3,652,740 rebased. I also award her interest from the date of Writ to the date of payment at the short term deposit rate and interest from the date of judgment to the date of full payment at the rate determined by the Bank of Zambia.

Costs shall abide the event to be taxed in default.

Leave to appeal is granted.

Dated this 6th day of June, 2017.

M. Mapani

M. Mapani-Kawimbe
HIGH COURT JUDGE