SCZ Judgment No. 40 of 2017

P1420

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

APPEAL NO. 90/2011
SCZ/8/105/2011

BETWEEN:

JUSTIN MBITA SILUMBWE — APPELLANT

AND

BARCLAYS BANK ZAMBIA LIMITED — RESPONDENT

CORAM: Mwanamwambwa, Ag D.C.J, Hamaundu, Wood, J.J.S.
On the 2nd of December, 2014 and 7th July, 2017

For the Appellant: *Mr L. Kalaluka of Messrs Ellis and Co.*
For the Respondent: *Mr I. M. Mabbolobbolo of Messrs Makala and Co.*

JUDGMENT

Mwanamwambwa, D.C.J., delivered the Judgment of the Court.

Cases referred to:

1. **Scholz Design Inc V. Sard Custom Homes, Llc, Et Al (Case Number 11-3298, Aug 15, 2012).**
2. **Roger Scott Miller V. Attorney-General (1980) Z.R. 126 (HC)**
3. **Georgina Mutale (T/A GM Manufacturing Limited) V. Zambia National Building Society, (2002) Z.R. 19.**
4. **The Solhot (1983) 1 Lloyds Report 605, 608.**
5. **Pagnan SPA v. Feed Products Ltd (1987) 2 Lloyds Report at 610.**
6. **Nkhata and 4 others v. Attorney-General (1966) Z.R. 124**
7. **Augustine Kapembwa v. Danny Maimbolwa and Attorney-General (1981) Z.R. 127**
8. **Gunde and Another v Msiska (1963) R&N 465.**
9. **Nora Kayoba & Another v Ngulube & Another (2003) Z.R. 132.**
10. **Attorney-General v Mpundu (1984) Z .R. 8.**
11. **Rookes v Banard (1964)1ALL E.R. 367.**
12. **Cassel & Company v Broome (1972) 1 ALL E.R.801.**
13. **Cobbet-tribe v Zambia Publishing Company Limited (1973) Z.R. 9.**

Legislation referred to:

1. **The Registered Designs Act, Cap 402 of the Laws of Zambia, Sections 7, 14 and 43.**
2. **The Industrial Designs Act Number 22 of 2016.**
3. **The High Court Act, Chapter 27 of the Laws of Zambia, Order 40, Rule 6.**

Other works referred to:

1. **Robert Bradgate in Commercial Law, 2nd Edition 1995 at pages 17 to 18.**
2. **Cheshire, Fifoot and Furmston's Law of Contract, 13th Edition at page 29.**

This is an appeal, from the Judgment of the High Court, dismissing the Appellant's claim.

The brief facts of the matter are that the Respondent approached the Appellant if it could use the Appellant's image and design of his house to advertise for the Respondent's house loan scheme. According to the Appellant, he allowed the Respondent to take pictures of the house for purposes of comparing the pictures with those of another house which the Respondent was considering using. Further that, the consideration for the use of the image and design of his house had not yet been agreed upon but that to his surprise, he saw the image of his house on billboards around Lusaka, depicting an advertisement by the Respondent for house loans.

The Appellant added that he suffered loss of business because banks refused to grant him loans as they believed that his house was already mortgaged to the Respondent.

The Respondent on the other hand stated that the Appellant allowed it to use the image and design of his house and that that is how they were able to take pictures of it. It was the Respondent's case that the consideration was negotiated from ZMW2,000.00 to ZMW1,500.00. However, the Respondent admitted that due to certain lapses in the communication, the image and design of the Appellant's house was used before reaching a final conclusion with the Appellant.

As a result of the above, the Appellant instituted an action for the following claims:

1. **K1,000,000,000.00 (before the rebasing) being the loss of income and compensation for infringement of intellectual property in, and the unauthorised use of the image and design of the Plaintiff's house;**
2. **Exemplary damages;**
3. **Interest on the amount found due at the Barclays Bank lending rate from December 2007 up to the date of payment;**
4. **Any other relief the Court may deem fit; and**
5. **Costs of and incidental to these proceedings.**

Upon hearing the evidence in support and against the claim, the learned trial Judge dismissed the claim. He was of

the view that the Appellant did not draw the plan to his house or indeed construct the house. That as a result, there was no intellect or creativeness that he applied to the preparation of the plans or indeed the construction of the house. That the Appellant had not professed to possess expertise or intellect in preparation of such plans or indeed construction of a house. The trial Court found that the image of his house did not result from his intellect or creativeness and as such had no intellectual property therein.

On the Appellant's claim for ZMW1,000,000.00 compensation and damages, the learned trial Judge found that the damages were not due in view of the finding above. That even assuming that the above finding was to the contrary, the claim would not be tenable. That this was because the basis of the Appellant's claim for the ZMW1,000,000.00 was the alleged financial growth attained by the Respondent allegedly as a result of the adverts. That PW1 stated that it was not possible to segregate growth of the Respondent attributable to the home loan scheme from growth arising from the Respondent's other products. The trial Judge found that this indicated failure by the Appellant to justify his claim.

On the claim for damages based on failure by the Appellant to obtain loans from lending institutions, the Court stated that lending institutions will normally investigate on the status of the property which a client intends to mortgage at the Lands and Deeds Registry, to ascertain if it is encumbered. He

added that there is an obligation on the intending borrower to convince the lending institution that the property is not encumbered by way of exhibiting the original certificate of title or indeed a printout from the Lands and Deeds Registry indicating the status of the property. The learned trial Judge found that the Appellant could have achieved this quite easily which would have resulted in his getting the loan.

Further, the Judge found that there was nothing in the pleadings and evidence to demonstrate the damage suffered by the Appellant in respect of his business. That the Appellant failed to inform the Court how much it was he intended to borrow from the lending institutions that allegedly turned him down.

On the claim for exemplary damages, the learned trial Judge disagreed with the argument by counsel for the Appellant that the conduct of the Respondent was cruel, malicious, insolent, violent, fraudulent and in contumelious disregard of the Appellant's rights. The Judge stated that this fact was reinforced by the absence of such allegations in the pleadings and evidence of PW2 which merely attempted to prove that the use of the image was without the consent of the Appellant. From the evidence of the Respondent's witnesses, the learned trial Judge discerned that the agreement for the use of the image was reached. He stated that in arriving at the finding, he considered the conduct and evidence of the Appellant, in parti-

cular, his allowing the taking of the photographs of his house.

Dissatisfied with the above Judgment, the Appellant appealed to this Court on six grounds. These are:

Ground one

The trial Court erred in law and in fact when it held that the image of the house in issue herein does not result from his intellect or creativeness and as such he has no intellectual property therein.

Ground two

The Court below misdirected himself in law and in fact when he held that there is nothing in the pleadings or evidence to demonstrate the damage suffered by the Appellant without referring the matter for assessment of damages.

Ground three

The Judge in the Court below erred in law and fact when he held that the Plaintiff's case failed in totality notwithstanding the Defendant's admission that it omitted to pay the Appellant any monies for the use of the image of his house.

Ground four

The trial Court erred in law and in fact when it held that the conduct of the Defendant was not cruel, malicious, insolent, violent, fraudulent and in contumelious disregard to the Appellant and that as such, exemplary damages cannot be awarded.

Ground five

The Court below misdirected itself in law and in fact by holding that allowing the taking of photographs of his house, the Appellant had agreed for the use of the image of his house notwithstanding the evidence that the taking of was subject to the approval and agreement as to quantum.

Ground six

The Court below erred in law and in fact when it awarded costs to the Respondent notwithstanding that the Defendant admitted not paying the Appellant anything for the use of the image of his house.

For convenience, we shall deal with grounds one, two, three and five together because they are interrelated. Further, we shall discuss ground five immediately after ground one because they deal with the same issue.

On ground one, on behalf of the Appellant, Mr. Kalaluka referred us to **Scholz Design Inc v Sard Custom Homes, Lic, Et Al**[1], a decision of the United States Court of Appeal, which decides that: -

> **"Architectural technical drawings might be subject of copyright protection even if they are not sufficiently detailed to allow for construction."**

He submitted that the design of the house was specifically constructed to the taste and specifications of the Appellant. That there was need to protect the image as an intellectual

property of an industrial design vests therein. He added that if the law did not protect the outward appearances of articles, there could be chaos in that people could get any images and use them for any purposes.

Counsel pointed out that in **AMP Incorporation v. Utilax Pty Ltd,** whose full citation he did not give, the House of Lords held that when determining the existence of a design, the following proposals must be considered:

a) **The eye to be considered is the eye of the customer not the eye of Judge; and**

b) **The article may still appeal to the eye even though it is not of aesthetic quality or work of art.**

He argued that the image of the Appellant's house qualifies to be a design and must thus be protected as it has an eye appeal.

Mr Kalaluka stated further and cited **Interlogo Ag v. Tyco Industrial Incorporation**, whose full citation he did not give. That case held that: -

> **"an article qualified as a design of its features or configuration, taken as a whole, had an eye appeal."**

He submitted that the eye appeal of this image is evident in the profits the Bank had made because of this home loan advertisement.

On ground five, Mr. Kalaluka submitted that it was clear from the Record of Appeal that the Respondent was considering many other houses to use for the loan scheme and that they should have informed the Appellant before using the image of the house. He added that the evidence on record indicates that the images of the house were taken pending the Respondent's committee which was supposed to agree before the image was used. That it was clear that the stage at which the images were taken, there was no preferred image as the Respondent's committee was yet to decide as to which image to be used.

On ground two, Mr. Kalaluka submitted that **Section 43 of the Registered Designs Act Cap 402** of **the Laws of Zambia** provides for damages as one of the civil remedies for infringement of a design and that as a result, the Court below erred in law and fact by not taking section 43 into consideration and not referring the matter for assessment of damages.

Next, he cited **Roger Scott Miller v. Attorney-General** [2], which held that: -

> **"when assessment of damages is referred to the Deputy Registrar, it is to be presumed that there is little or no evidence of quantum before the Judge."**

Further, he cited **Georgina Mutale (T/A GM Manufacturing Limited) v. Zambia National Building Society,** [3], wherein this Court held:

"in the absence of specific evidence of the values of loss, justice would have been better served by referring the matter to the Deputy Registrar for assessment of damages."

In ground three, it was submitted by Mr. Kalaluka that the Respondent did not deny not paying the Appellant for use of the image of the Appellant's house. That the Respondent, through Mr Wililo Mzyeche (DW1), agreed that a price of K1,500.00 for use of the Appellant's image of his house was agreed by the parties, should the Respondent so decide to use it. *(That although the Appellant denies that the amount agreed was ZMW1,500.)* Mr. Kalaluka argued that this clearly showed that there was an agreement for the use of the image of the Appellant's house which, was subject to a consideration.

Further, counsel stated that the Respondent witnesses, DW2 and DW4, were very consistent, stating that there was a verbal agreement for payment of ZMW1,500.00 for the use of the Appellant's image of the house. That both the Respondent's witnesses testified that the Appellant was never paid for the use of the image of his house. He stated that the court below erred in law and fact in that it did not give effect to the agreement reached between the Appellant and the Respondent that use of the image of the Appellant's house was subject to a fee yet to be agreed. He cited a passage from the learned authors of **Cheshire, Fifoot and Furmston's Law of Contract, 13th Edition at page 29** which states that-

"agreement is not a mental state but an act and as an act is a matter of inference from conduct. The parties are to be judged not by what is in their minds but what they have said or done."

He submitted that there was a dispute between the parties as to whether or not the consideration for the use of the Appellant's image was agreed. He stated that the Appellant on one hand submitted that an agreement to use the image of the house was subject to approval. That on the other hand, the Respondent submitted that the agreement was reached when the Respondent took the images.

On behalf of the Respondent, Mr Mabbolobbolo submitted, in ground one, that the trial court was on firm ground in holding that the Appellant had no intellectual property by way of copyright in the design of the house which was created for him by his architect. He added that the argument by the Appellant and the authorities cited in reliance of this ground of appeal are misconceived. That the assertion that the image should be protected as intellectual property of industrial design is untenable. Counsel added that there is no evidence on record to show that the design was registered under **the Registered Designs Act, Cap 402** of **the Laws of Zambia** to have been entitled to copyright. Mr. Mabbolobbolo cited **Section 7 and 14 of the Registered Designs Act** to support his argument.

He further submitted that the performance of the Respondent's home loan scheme is irrelevant for purposes of determining the Appellant's claim because consideration for use of his property had been pre-agreed. That in any case, the Appellant's first witness in the Court below failed to tell the Court how much of the loans portfolio could be attributable to the house loan scheme as a result of the use of the Appellant's house image. He cited the case of **The Solhot** [4] where it was held that-

> **"when assessing damages for breach of contract, the Court is concerned with the (Plaintiff's) loss and not the (Defendant's) profit, the latter being wholly irrelevant."**

He submitted further that the Appellant suffered no loss at all save the disappointment arising from the Respondent's use of the image of his house before paying him the amount agreed upon and expected. That even assuming that the Respondent had not agreed with the Appellant on the amount to be paid, the Appellant had authorised the taking of the images of his house for use by the Respondent.

Counsel added that according to **Robert Bradgate in Commercial Law, 2nd Edition 1995** at **pages 17 to 18,**

> **"a court considering a dispute of a commercial transaction should therefore, give effect, so far as possible, to the commercial expectation of the parties. Thus, where parties have acted on the basis that they have a contract, the court will normally seek to treat their agreement as contractual."**

He went on to state that in the case of **Pagnan SPA v. Feed Products Ltd** [5], Bingham J. stated that-

> **"Even a failure to agree on important matters will not prevent a contract coming into being if the parties' objective intentions as expressed to each other are to enter into a mutually binding contract."**

In ground two, Mr. Mabbolobbolo submitted that **Section 43 of the Registered Designs Act** cannot be called in aid for damages as one of the civil remedies for the purported infringement of the Appellant's design. That this is because the Court correctly found that the Appellant had no intellectual property rights as argued above. That **Section 43 of the Registered Designs Act** deals with persons entitled to or interested in a registered design or an application for registration of a design under the Act.

Counsel argued that the case of **Roger Scott Miller v. Attorney-General** [2] was cited out of context. That what was cited by the Appellant as the holding was in fact obiter dicta. It was submitted that the case of **Georgina Mutale (T/A Manufacturing Ltd) v. Zambia National Building Society,** [3] can be distinguishable from this one. That in that case, the Court agreed that the Appellant was entitled to damages, hence its decision that in the absence of specific evidence of the value of loss, justice would have been better served by referring the matter to the Deputy Registrar for assessment. That in this case, no liability for damages was found.

In ground three, Mr. Mabbolobbolo submitted that the learned trial Judge was on firm ground when he held that the Plaintiff's case had failed in totality. That there was no dispute, as rightly submitted by the Appellant under this ground, that there was an agreement for the use of the image of the Appellant's house which was subject to a consideration of ZMW1,500.00. He argued that the Respondent accepted that it delayed paying the Appellant the agreed sum of ZMW1,500.00 as a result of which the Respondent offered amounts significantly higher than the agreed sum which the Appellant rejected. Counsel added that the Appellant failed to show any loss of income as claimed and that there was no infringement or unauthorised use of the image and design of the Appellant's house.

In ground five, Mr. Mabbolobbolo submitted that the Appellant agreed to the taking and using of the images of his house. Counsel argued that pages 128 and 129 of the Record of Appeal shows this evidence.

We have looked at the evidence on record and considered the submissions by both parties on these four grounds. We have also looked at the authorities cited.

These four grounds of appeal invite us to reverse the findings of fact made by the trial Court. **Nkhata and 4 others v. Attorney-General** [6], dealt with circumstances under which

an appellate can reverse findings of fact made by a trial Court. That case held as follows: -

> **"A trial judge sitting alone without a jury can only be reversed on questions of fact if (1) the judge erred in accepting evidence, or (2) the judge erred in assessing and evaluating the evidence by taking into account some matter which he should have ignored or failing to take into account something which he should have considered, or (3) the judge did not take proper advantage of having seen and heard the witnesses, (4) external evidence demonstrates that the judge erred in assessing manner and demeanour of witnesses."**

In another case of **Augustine Kapembwa v. Danny Maimbolwa and Attorney-General** [7] it was similarly held that:-

> **"The appellate court would be slow to interfere with a finding of fact made by a trial court, which has the opportunity and advantage of seeing and hearing the witnesses but in discounting such evidence the following principles should be followed: That:**
>
> **(a) by reason of some non-direction or mis-direction or otherwise the judge erred in accepting the evidence which he did accept; or**
>
> **(b) in assessing and evaluating the evidence the judge has taken into account some matter which he ought not to have taken into account, or failed to take into account some matter which he ought to have taken into account; or**

(c) it unmistakably appears from the evidence itself, or from the unsatisfactory reasons given by the judge for accepting it, that he cannot have taken proper advantage of his having seen and heard the witnesses; or

(d) in so far as the judge has relied on manner and demeanour, there are other circumstances which indicate that the evidence of the witnesses which he accepted is not credible, as for instance, where those witnesses have on some collateral matter deliberately given an untrue answer."

To begin with, we wish to state that architectural designs belong to a type of intellectual property known as copyright.

On its website, wipo.int, the World Intellectual Property Organization (WIPO), has stated the legal position on copyright as follows:

> **"Copyright and related rights protection is obtained automatically without the need for registration or other formalities. However, many countries provide for a national system of optional registration and deposit of works. These systems facilitate questions involving disputes over ownership or creation, financial transactions, sales, assignments and transfer of rights."**

In Zambia, the registration of architectural work was governed by **the Registered Designs Act, Chapter 402** of the Laws of Zambia, *(hereinafter referred to as "the Act")*. We say

"was" because this Act has since been repealed and replaced by **the Industrial Designs Act Number 22** of **2016**. However, our decision has to be based on the repealed Act, as it was the applicable law at the time when the dispute in this matter arose. **Section 14** of **the Act** provides as follows:

> **"14. (1) The registration of a design under this Act shall give to the registered proprietor the copyright in the registered design, that is to say, the exclusive right in Zambia to make or import for sale or for use for the purposes of any trade or business, or to sell, hire or offer for sale or hire, any article in respect of which the design is registered, being an article to which the registered design or a design not substantially different from the registered design has been applied, and to make anything for enabling any such article to be made as aforesaid.**
>
> **(2) Subject to the provisions of this Act, the registration of a design shall have the same effect against the State as it has against a subject."**

From the above provision of the Law, it is clear that for the owner of a design to claim copyright in a design, the design should have been registered by the owner.

The Appellant relied on the case of **Scholz Design Inc v. Sard**[1] in an effort to convince this Court that the design of the house in question was subject of copyright protection.

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The background to **the Scholz case** is that the Scholz Design Inc, alleged that three front elevation architectural drawings of homes it designed in the late 1980s were copied and posted on various websites by the Respondents, in violation of Scholz's copyrights. Scholz created technical drawings for three homes which it called "*Springvalley A,*" "*Wethersfield B*" and "*Breckinridge, A*". It submitted them to the Copyright Office in 1988 and 1989 together with suit, each showing the appearance of the front of the houses surrounded by lawn, bushes and trees.

In February, 1992, Scholz and Sard Custom Homes entered into an agreement permitting Sard to construct homes using Scholz home plans including these three designs. The agreement required that Sard not "*copy or duplicate any of the materials nor use them in any manner to advertise or build a Scholz Design or derivative, except under the terms and conditions of the agreement.*" Scholz alleged that after the termination of Scholz's agreement with Sard and in a manner not permitted by the agreement, Sard posted copies of Scholz's copyright drawings of the Springvalley and Wethersfield homes on two different websites, to advertise Sard's "*ability*" to build the homes.

The United States Court of Appeal held that the district court erred in deciding that because the architectural drawings at issue did not contain a level of detail sufficient to enable

construction of homes based on them, they were not protected by the copyright Act.

In our view, **the Scholz case** is distinguishable from the case at hand. In that case, Scholz Design Inc registered the designs of the three houses in issue and copyright was granted. Further, the drawings in **the Scholz case** were found to be original, having been generated by Scholz Design Inc itself.

In the case at hand, the design of the house in question was not registered in accordance with the Act. The drawings of the house were done by an architect and not the Appellant himself. The learned trial Judge stated that the Appellant did not construct the house. As such, no intellect or creativeness was applied to the preparation of the plans or indeed construction of the house. He added that the Appellant did not profess to possess expertise or intellect in the preparation of the plan or construction of the house. He went on to state that it could not be said that the Appellant applied any intellect or genius in giving the instructions he gave to the architect, as the instructions he gave comprise the basic need for the plan and construction of house. He found that the image of the house in issue does not result from the Appellant's intellect or creativeness. And as such the Appellant had no intellectual property in it.

We are of the view that the findings of fact by the learned trial Judge are supported by the evidence on record. We find

no basis to reverse them. We agree with him that the Appellant had no intellectual property in the design of the house.

Next, we move to ground five. The issue in this ground is whether the Appellant agreed to the use of images of his house by the Respondent. The Appellant's position is that he did not agree to the use of his house. The Respondent's argument is that he agreed to its use.

It is not in dispute that the Appellant allowed the Respondent to take images of his house. What was in dispute was the amount of the consideration for such use. If he did not agree to the images of his house being used, he would not have allowed the Respondent to take images of his house. The fact that he allowed them to take images of his house shows that he had agreed to the use of the images of his house.

On the evidence before him, the learned trial Judge was correct in finding that the Appellant agreed to the use of the images of his house by the Respondent. Since the Appellant consented to the use of the images of his house, he cannot claim infringement of any copyright.

We now wish to deal with the Appellant's claim for damages, as per ground two. The issues in this ground is whether, firstly the learned trial Judge erred holding that the Appellant did not suffer damages; and secondly in not referring the matter for assessment of damages.

The short answer to the arguments on this ground, is that where liability has not been proved, referring the matter to the Deputy Registrar for assessment of damages does not arise; because there are no damages to assess.

In the present case, as pointed out above, on the pleadings and evidence, the learned trial Judge correctly found and held that there was no infringement by the Respondent, of intellectual property in the image and design of the Plaintiff's house. And that there was no authorised use of the Appellant's house, by the Respondent.

We wish to emphasize that the Plaintiff's claim was for K1,000,000,000 being the loss of income and compensation for infringement of intellectual property in, and unauthorised use of the image and design of the Plaintiff's house. This claim having failed, the learned trial Judge cannot be faulted for not having referred the matter for assessment of damages.

In the same vein, **Section 43** of **the Act** was relied on out of context. It can only be invoked when liability has been established. Additionally, the Section deals with remedy for groundless threats of infringement of proceedings, in relation to copyright in a registered design. This case does not involve threats of infringement-proceedings.

The cases of **Miller v Attorney General** [2] and **Mutale v Zambia National Building Society** [3] deal with the need to refer the matter to the Deputy Registrar, for assessment of damages, when there is little or no evidence of quantum before the Judge. These cases were cited out of context in this matter; because the claims failed on liability. Hence, the matter did not need assessment of damages.

We now come to the argument in ground three that the learned trial Judge erred when he held that the Appellant's case failed in totality, notwithstanding the Respondent's admission that it omitted to pay the Appellant any monies for the use of the image of the house. In our view, the issue here is very narrow and simple. The question is: *what did the Plaintiff claim or plead for?* To repeat, the answer, is K1,000,000,000, being loss of income for alleged infringement of intellectual property in, and unauthorized use of the image and design of his house. This is the case which the learned trial Judge said had failed in totality. In short, what failed in totality was what was pleaded. And in grounds one, two and five above, we have upheld the learned trial Judge's holdings on liability.

We wish to point out that the Appellant did not plead for payment of allowed or agreed use of images and design of his house, by the Respondent. Apparently, he did not do so because his argument is that he never agreed to such use. He chose to plead for infringement of intellectual property and

unauthorized use of the house. But at trial he failed to prove the two claims. In our view, ground three is an attempt to deviate from what was pleaded. As a general rule, a party cannot rely on matters which have not been pleaded: **See:-**

(a) Gunde and Others v Msiska [8], and

(b) Nora Kayoba & Another v Ngulube and Another [9].

True, the Respondent admitted that it did not pay the Plaintiff any money for use of the images of his house. There is evidence on record that the Respondent did not pay him because he rejected all the figures it offered him for the agreed use of his house. The first offer was K1million, the second was K1,5 million and the third offer was K2, million. The fourth offer was for K15,000,000-00, in full and final settlement of the whole case. The Appellant demanded K250,000,000=00. He subsequently reduced it to K225,000,000.00. All these figures were offered for agreed use of the images of the house and not for infringement of copyright or for unauthorized use of the house images. This evidence is found in correspondence at pages 50-57 of the record of appeal. The learned trial Judge adjudicated on what was specifically pleaded, as set out above. He was not expected to adjudicate on what was not pleaded. And he cannot be faulted for not granting what was not specifically pleaded.

We are alive to the fact that under claim (4), the Appellant claimed for *"any other relief the Court may deem fit"*.

In our view, the learned trial Judge cannot be faulted for not awarding the Appellant, under claim 4, the offered sums of K1 million to K15 million for use of images of the house, for two reasons.

One is that the Appellant did not specifically plead for any of the figures for agreed use of images of his house. The figures in question fall in the category of what is known as *"special damages"*. In **Attorney General v Mpundu** [10], this Court dealt with special damages. And we said: *"....usual, ordinary or general damages may be generally pleaded, whereas unusual or special damages may not, as these must be specifically pleaded in a statement of claim* ***(or where necessary, in a counter-claim)*** *and must be proved"*. In line with that decision, we are of the view that a specific figure in the form of special damages cannot be awarded under a general pleading: *"4. Any other relief the Court may deem fit."*

Second is that the Appellant had consistently rejected the figures, when the Respondent offered them to him. Courts are there to deal with disputes and not the obvious, such as compensation which a party was offered but rejected. For the same reasons, we would not grant the Appellant the same figure under the fourth claim.

For the reasons we have stated above, we dismiss grounds one, two, three and five, for lack of merit.

In ground four, Counsel for the Appellant contended that the nature of damages in this case should reflect the seriousness of the offence by way of awarding exemplary damages. He added that financial institutions like the Respondent should not be allowed to take over the property rights of individuals with impunity. He cited the case of **Corbett-Tribe v. Zambia Publishing Company Limited** [13] to support his argument.

Counsel argued that the Respondent's action of using the image was malicious and fraudulent in that had the Appellant not seen the advertisement, the Respondent would have gotten away with the fraudulent behaviour. That therefore, exemplary damages will deter other Banks from such behaviour.

On behalf of the Respondent, counsel argued that on the totality of the evidence before the lower Court, nothing was disclosed of offensive conduct or of arrogance or insolence on the part of the Respondent. He stated that the case of **Corbett Tribe v. Zambia Publishing Company Limited** [13] is distinguishable from this case in that there is nothing to indicate that there had been outrageous behaviour on the part of the Respondent to justify a punitive award.

We have looked at the evidence on record and considered the submissions and authorities cited by both parties.

The law is well settled as to what constitutes exemplary damages and when they can be awarded. Exemplary damages are punitive. They are awarded where the conduct of the Defendant merits punishment. This is where his conduct is wanton; where he acts in contumelious disregard of the Plaintiff's rights. Examples are where the Defendant's conduct discloses fraud, malice, vindictiveness, violence, cruelty, insolence or arrogance or the like. They are mostly awarded in two classes of cases. One is cases of offensive, arbitrary or unconstitutional action by servants of the State. The other is where the Defendant's conduct has been calculated by him to make a profit for himself, which may exceed the compensation payable: **See:-**

(a) Rookes v Barnard [11];

(b) Cassel and Company v Broome [12]; and

(c) Cobbet-tribe v Zambia Publishing Company Ltd [13].

Even assuming that liability was found against the Respondent, this is not a case where exemplary damages could have been awarded. On the evidence on record, there was no wanton behaviour or related conduct on the part of the Respondent that warranted an award of exemplary damages. The parties agreed that the Respondent uses the image of the Plaintiff's house for housing loans advertisement. Thereafter, the Appellant allowed the Respondent to take pictures of the house. The only issue the parties differed, and failed to agree, on was the amount of fee for such use. There is evidence by

the Appellant that the Respondent started using the house for advertisement before the fee was agreed upon. That is what caused the Court action. However, there is undisputed evidence that the parties had negotiations on the amount of the fee but failed to agree. In our view, use of the house photos for advertisement, by the Respondent, before the fee for its use was agreed upon, does not fall under the category of offensive behaviour stated above.

In effect, ground four lacks merit. We dismiss it.

Finally, we move on to ground six. The issue in this ground is whether the learned trial Judge was in order to award costs to the Respondent.

Costs are awarded at the discretion of the Court. **See Order 40, Rule 6** of **the High Court Rules.** And the discretion must be exercised judiciously. The standard practice is to award costs against the losing party. The rationale is that such a party unnecessarily made the opponent incur costs, by going to Court when he should not have done so or being taken to Court when he should have settled out of court, rather than being taken to Court.

In the present case, the Appellant went to Court for reliefs that were not available to him, at law. He lost the case. In the process, he made the Respondent incur costs to defend against his legal suit. In the premises, the learned trial Judge was

correct in ordering him to pay costs. We hereby dismiss ground five, for lack of merit.

On the totality of issues, this appeal fails. We dismiss it, with costs to the Respondent, to be taxed in default of agreement.

M. S. MWANAMWAMBWA
DEPUTY CHIEF JUSTICE

E. M. HAMAUNDU
SUPREME COURT JUDGE

A. M. WOOD
SUPREME COURT JUDGE