

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

APPEAL NO 198/2021

BETWEEN:

FREIGHT AND LINERS LTD

AND

BACKLOADS (Z) LTD



APPELLANT

RESPONDENT

CORAM: CHASHI, SIAVWAPA AND BANDA-BOBO, JJA

ON 14TH JUNE AND 28TH JULY 2022

For the Appellant: Mr. K. Khanda of Messrs Central Chambers

For the Respondent: Mr. G. Chisanga of Messrs K.M.G. Chisanga Advocates

J U D G M E N T

SIAVWAPA JA delivered the Judgment of the Court.

Cases referred to:

1. *Zambia Export and Import Bank Limited v Mukuyu Farms Limited, Elias Andrew Spyron and Mary Ann Langley Spyron (1993-1994) ZR 36*
2. *Zambia Revenue Authority v Jayesh Shah (2001) ZR 60*

3. *King Farm Products Limited and Mwanamuto Investments Limited v Dipti Rani Sen (2008) ZR, V2, 72*
4. *Elias Kundiona v The People (1993-1994) ZR 59*
5. *Patrick Dickson Ngulube v Rabson Malipenga SCZ Judgment No. 3/2015 (Appeal No. 18/2011)*

Legislation referred to:

1. *Rules of the Supreme Court 1999 edition*
2. *The Judgments Act, Chapter 81 of the Laws of Zambia.*

1.0 INTRODUCTION

1.1 This appeal is against the Judgment of the Honourable Registrar, Mr. Rodgers Kaoma on assessment of damages. The Judgment was delivered on 14th April 2021.

1.2 By the said Judgment, the learned Registrar converted part of the US Dollar awards to ZMW at the exchange rate of K13.05 to a US Dollar as obtaining at the end of the assessment.

1.3 The learned Registrar also ordered interest at the lending rate from date of Judgment on assessment to date of payment.

2.0 THE BACKGROUND

2.1 By writ of summons and a statement of claim filed into Court on 4th February 2011, the Appellants herein commenced an action against the Respondents herein in the Court below.

2.2 The Appellants sought the following reliefs against the Respondents;

- (i) Possession of the premises
- (ii) Payment of the unpaid rent from 1st July, 2008 to date of commencing these proceedings at the rate of K12, 000,000.00 per month
- (iii) Payment of the sum of USD140, 000.00 being rentals realized from the illegal subletting of the Plaintiff's property by the Defendant.
- (iv) Mesne profits at the rate of K39, 000,000.00 per month from the date of the writ herein till possession is given.
- (v) Interest on (ii) (iii) and (iv) above.
- (vi) An order for an account to be taken on the property in relation to water and electricity and other utility bills on the property.
- (vii) An order that the Defendant pays rent at a rate to be determined by the Court pending the determination of this matter.
- (viii) Any other relief the Court may deem just to give to the Plaintiff.
- (ix) Costs of and incidental to this suit.

3.0 **DECISION OF THE HIGH COURT**

3.1 After hearing the arguments and considering the documents tendered, the learned Judge, Mrs. Justice F.M. Chishimba as she then was, granted the following claims;

1. *An order of possession of Stand Number 5286 Mungwi Road.*
2. *Payment of rent arrears from 1st July, 2008 to 4th February, 2011 at USD1, 000.00 per month or its current Kwacha equivalent sum.*
3. *Damages arising from the sub-letting of the premises without consent to be assessed by the Deputy Registrar.*
4. *Mesne profits to be determined at the current open market rental value of the premises for the period that the Defendant was in unlawful possession to be assessed and determined by the Deputy Registrar from the date of the writ of summons to date hereof.*
5. *Amount found due payable with interest at Bank of Zambia short term deposit rate from date of writ to date hereof, thereafter at the current bank lending rate.*
6. *An order for the Defendant to render an account.*

3.2 On the counterclaim, the learned Judge awarded costs in respect of works carried out by the Respondent on the rented premises up to the time of the Notice to terminate by the Plaintiff on 22nd June 2010. The same was to be assessed by the Deputy Registrar.

3.3 The learned Judge also awarded interest on the assessed amount at the current commercial bank lending rate from the

7.2 The Memorandum of Appeal contained two grounds of appeal set out as follows;

1. The learned Deputy Registrar erred in law and fact when he directed that the exchange rate of the US Dollar to the Kwacha, applicable to the DOLLAR denominated awards is K13.05 when the exchange rate on 14th April, 2021, the date of the Judgment was K22.16 to one US Dollar.
2. The learned Deputy Registrar erred in law and fact when he ordered that the Appellant's (Plaintiff) award of K3, 443,509.13 shall attract interest at lending rate from the date of Judgment on assessment to date of payment, contradicting the Hon. Judge's award that interest was to be at the Bank of Zambia short term deposit rate from date of Judgment and thereafter at current bank lending rate to the date of payment.

8.0 APPELLANT'S ARGUMENTS

8.1 The gist of the Appellant's argument in ground one is that the applicable exchange rate is the one in force at the time of enforcing the Judgment. It is therefore argued that as at 14th April 2021, the date of the Judgment on assessment, the exchange rate was K22.10 to a US Dollar and not the K13.05 applied by the learned Registrar.

5. That the Respondent pays for all the improvements made to the property that can be validated from the inception up to the end of the Notice period.
6. The Court below was on firm ground when it determined the interest rates in accordance with the Judgment Act from the date of refusal to sell to date when full refund will be made in accordance with the Judgments Act.
7. That PW1 was of age at the time of appointment as director having attained the age of eighteen.

5.2. The appeal partially succeeded.

6.0 **JUDGMENT ON ASSESSMENT**

- 6.1 Following the delivery of our Judgment on 26th March 2018, Counsel for the Appellants filed summons in the Court below for assessment.
- 6.2 The summons was filed on 12th April 2018 while the affidavit in support thereof was filed on 17th August 2018.
- 6.3 The learned Registrar delivered his Judgment on assessment on 14th April 2021 after hearing the parties.
- 6.4 The learned Registrar then made the following awards;

1. The sum of USD28, 000.00 or its kwacha equivalent of K365, 400.00 at the rate of K13.05 to USD1.00 in rent arrears was awarded to the Appellant.

This award was reduced to K21, 115.00 after deducting amounts paid into Court.

2. A total sum of K7, 904,932.99 with interest was awarded to the Appellant as Mesne profits

3. A total sum of USD80, 000.00 or the kwacha equivalent of K1, 044,000.00 at the rate of K13.05 to USD1.00 was awarded to the Appellant as damages for illegal sub-letting

4. A total sum of K5, 526,537.87 was awarded to the Respondent as cost of improvements.

6.5 After allowing a set off of the amount owed to the Respondent by the Appellant, the learned Registrar awarded the Appellant the difference of K3, 443,509.13 as the sum due.

6.6 The awarded amount was to attract interest at lending rate from the date of the Judgment on assessment.

7.0 **2ND APPEAL**

7.1 On 1st July, 2021, the Appellant filed into Court a Notice and Memorandum of Appeal. The Appeal was against some parts of the Judgment on assessment.

date the Plaintiff informed the Dependent that it would not proceed with the sale of the property to date hereof. Thereafter, at the Bank of Zambia short term deposit rate until payment.

4.0 **1ST APPEAL**

4.1 Dissatisfied with the Judgment, the Respondent in the Court below, appealed against the awards against it.

4.2 The Memorandum of Appeal contained nine grounds of appeal impugning the learned Judge's findings in favour of the Plaintiff.

5.0 **OUR DECISION**

5.1 After considering the grounds of appeal, the Judgment appealed against and the arguments advanced by the parties, we held as follows;

1. The learned Judge below was on firm ground to grant possession of the property to the Plaintiff.
2. The learned Judge below was right in awarding Mesne profits to the Plaintiff.
3. The Appellant to pay rent from 1st July 2008 to 22nd November 2010, the date of the expiry of the Notice to Quit.
4. That the same be quantified and the amount payable be determined by the Deputy Registrar at the rate of USD1, 000.00 per month.

- 8.2 In support of the argument, we were referred to the cases of Zambia Export and Import Bank Limited v Mukuyu Farms Limited, Elias Andrew Spyron and Mary Ann Langley Spyron¹ and Zambia Revenue Authority v Jayesh Shah. ²
- 8.3 The two cases affirm the principle that in a foreign currency denominated Judgment payable in Kwacha, the applicable exchange rate is that ruling on the date of enforcement.
- 8.4 In arguing ground two the Appellant contends that by stating that interest would be at the lending rate from the date hereof (date of Judgment on assessment), the learned Registrar varied the order of the learned Judge.
- 8.5 In support of the argument we were referred to the cases of King Farm Products Limited and Mwanamuto Investments Limited v Dipti Rani Sen³, Elias Kundiona v the People⁴ and Patrick Dickson Ngulube v Rabson Malipenga⁵.
- 8.6 The position taken in all the cited cases is that a lower Court has no power to vary or set aside an order or Judgment made by a superior Court.

9.0 ARGUMENTS BY THE RESPONDENT

9.1 The Respondent filed its heads of argument on 21st October 2021 and essentially argued that the Court has discretion to award Judgment either in a foreign or a local currency.

9.2 It is further argued that having converted the amounts awarded in foreign currency to the Kwacha equivalent, the final amount awarded reflected the total amount in Kwacha and therefore, not a foreign currency.

9.3 On the question of Judgments requiring the application of the exchange rates, the Respondent largely relied on order 42 rule 1(5) of the Rules of the Supreme Court 1999 edition in support of the argument. The relevant portion of the order states as follows;

***“It is not clear; whether the Plaintiff has the right to elect that the Judgment should be expressed in sterling or in a foreign currency. It would seem that the Court retains a residual discretion to determine whether the Judgment should be expressed in sterling or in a foreign currency*”**

9.4 In ground two, it is argued that since the Bank of Zambia short term deposit rate awarded by the learned Judge ran from the date of the writ to the date of Judgment by the learned Judge, the learned Registrar did not vary or substitute the learned Judge’s Judgment.

9.5 It has also been argued that the learned Registrar did in fact consider the short term deposit rate by adding it to the amount awarded in Mesne profits at pages 21 and 22 of the Record of Appeal.

10.0 **OUR ANALYSIS AND DECISION**

10.1 When the matter came up for hearing on 14th June 2022, counsel for the Appellant, Mr. Khanda, informed the Court that he would rely entirely on the Heads of Argument and arguments in reply.

10.2 On his part, Mr. Chisanga, Counsel for the Respondent, equally informed the Court that he was going to rely on the filed Heads of Argument and briefly augment orally.

10.3 In augmenting the Heads of argument, Mr. Chisanga informed the Court that the Appellant wished to withdraw the argument in opposition to ground one on the applicable rate of interest. He conceded that the arguments by the appellant, in that regard, reflected the position of the law.

10.4 As for the second ground, Mr. Chisanga augmented the argument by stating that the ground was a misapprehension of the Registrar's reasoning. In his view, the reasoning was not

that of setting aside the Judgment or award by the learned Judge but complimentary of the same.

10.5 Mr. Chisanga concluded by stating that upholding the second ground of appeal would amount to unjust enrichment of the Appellant.

10.6 With the first ground of appeal conceded by the Respondent, we will direct our analysis to the second ground.

10.7 We start by stating that there is no dispute that the Registrar, sitting in assessment, has no power to vary or set aside orders made by the Judge. The authorities referred to are very clear in that regard.

10.8 The issue therefore, that we have been called upon to determine, is whether the Judgment of the Registrar on assessment had the effect of varying or setting aside the learned trial Judge's orders pertaining to the tenure and the scope of the interest awarded by the learned Judge.

10.9 In contention on the issue are the two statements on interest made by the learned Judge and the learned Registrar.

10.10 At page 72 lines 16 to 19 of the Record of Appeal, the learned Judge stated as follows in her Judgment;

“The amount found due shall be payable with interest at the Bank of Zambia short term deposit rate from date of writ to date hereof”.

10.11 Then at page 23 paragraph 6.1 of the Record of Appeal, the learned Registrar stated as follows in his Judgment;

“The Plaintiff is hereby awarded the sum of K3, 443,509.13 which shall attract interest at the lending rate from the date hereof”.

10.12 In considering the two statements in dispute, we have taken note of the fact that the learned Judge, in her Judgment, considered and disposed of the claims one after the other and made the relevant orders on each claim granted.

10.13 It is therefore, noted that in her award of monthly rental arrears in the sum of USD1,000 or its equivalent per month, appearing at page 69 lines 24 to 26, of the Record of Appeal the learned Judge did not award interest.

10.14 The award on illegal subletting was referred to assessment as reflected at page 71 lines 8 to 10 of the Record of Appeal.

10.15 The statement in dispute occurs at page 72 starting from line 14 to 19 of the Record of appeal. The award of interest in this case, attached to the award of mesne profits only.

10.16 The learned Judge also prescribed interest on the Respondent's counter claimed amount upon assessment.

10.17 From the above analysis of the learned Judge's Judgment, it is clear that the Judge only prescribed interest on two awards namely, mesne profits to the Appellant and the value of repairs and renovations to the Respondent.

10.18 This then brings us to the second disputed statement emanating from the Judgment on assessment in which the learned Registrar awarded interest on the final combined award to the Appellant after offsetting it against the Respondent's counterclaim.

10.19 The point to note is that after assessing the Respondent's award for improvements, at K5,526,537.87, the learned Registrar went ahead to offset it against the sum total of the awards to the Appellant to leave a net balance of K3,443,509.13 as due to the Appellant.

10.20 As shown in paragraph 10.16 above, the learned Judge had ordered the assessed award to the Respondent in the following terms, as reflected at page 76 lines 6 to 14;

“In respect of the actual value of the costs of repairs, renovations and upgrades undertaken by the Defendant, the same shall be determined and assessed by the Deputy Registrar. The amount found

due shall be paid as earlier contractually agreed upon by the parties at the current commercial bank lending rate from the date the Plaintiff informed the Defendant that it would not proceed with the sale of the property to date hereof. Thereafter, the interest shall be calculated at Bank of Zambia short term deposit rate until payment.”

10.21 In the Judgment on assessment, there is no indication that the amount found due to the Respondent was awarded interest as prescribed in the Judgment rendered by the Judge.

10.22 Interestingly, however as noted by the Respondent in paragraph 2.2 of the Heads of Argument, the learned Registrar, complied with the learned Judge’s order by applying the interest as prescribed on the award on mesne profits.

10.23 Having accepted the computations submitted by the Appellant for mesne profits due in the sum of K4,499,704.53, the learned Registrar then computed the interest at short term deposit rate as prescribed by the learned Judge. The interest found was K3,405,288.46 giving the total sum due in mesne profits of K7,904,932.99 (see pages 21 and 22 of the Record of Appeal).

10.24 In our view, the learned Registrar erred when he failed to comply with the learned Judge’s order to apply interest on the Respondent’s allowed amount in the counterclaim.

- 10.25 However, since there is no cross-appeal on the matter, we will not take it further but return to the issue raised in the second ground as argued by the Appellant whether or not the learned Registrar varied or set aside the Judge's order.
- 10.26 Having already found that the learned Registrar complied with the learned Judge's order by computing the interest as ordered by the learned Judge on the amount assessed on the award for mesne profits, it was erroneous for the learned Registrar to impose interest on the final amount due to the Appellant as it included tax on mesne profits.
- 10.27 We therefore, agree with Mr. Chisanga's submission that doing so amounted to unjust enrichment. We would go further to state that the decision amounted to compounding interest which is unlawful, unless agreed by the parties.
- 10.28 Since the total amount due in mesne profits with interest added was found to be K7, 904,932.99, this amount should be excluded from the amount eligible to receive interest pursuant to the provisions of Section 2 of the Judgments Act, Chapter 81 of the Laws of Zambia.
- 10.29 It is noted that in arriving at the total amount due to the Appellant as shown at page 23 paragraph 5.6 volume one of

the Record of Appeal, the learned Registrar added the amount of mesne profits which includes interest as shown in paragraph 10.28 above to the K21,115.00 being the difference in rental arrears and the sum of K1,044,000.00 being damages for illegal subletting.

10.30 The above figures brought the total amount awarded to the Appellant to K8, 870,047.00 from which the sum of K5, 526,537.87 due to the Respondent was set off.

11.0 CONCLUSION AND ORDERS

11.1 In view of the withdrawal of the first ground of appeal, it follows that the computation of the awards that were denominated in the United States Dollars and converted to the Zambia Kwacha at the exchange rate of 1US Dollar to K13.05, is set aside.

11.2 It is further ordered that the interest imposed on the final amount of K3, 443,509.13 is equally set aside.

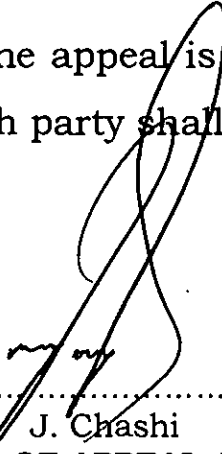
11.3 The Record is hereby remitted back to the same Registrar to convert the United States Dollar denominated award to the Zambian Kwacha at the exchange rate of K22.16 to 1 US Dollar.

11.4 The learned Registrar shall then impose statutory interest on the amounts found as the difference on rent arrears and the amount for damages for illegal sub-letting.

11.5 Thereafter the learned Registrar shall add the amounts found due as mesne profits with interest and the amounts in paragraph 11.4 with interest.

11.6 The learned Registrar shall then subtract the sum of K5, 526,537.87, due to the Respondent as set off and the difference will be the final amount due to the Appellant with no further interest to be added.

11.7 The net effect is that the appeal is partially successful and as such we order that each party shall bear their own costs.



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J. Chashi
COURT OF APPEAL JUDGE



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M. J. SIAVWAPA
COURT OF APPEAL JUDGE



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A. M. Banda Bobo
COURT OF APPEAL JUDGE