IN THE COURT OF APPEAL OF ZAMBIA Appeal No 053/2022

HOLDEN AT LUSAKA

(Civil Jurisdiction)

B E T W E E N:

Francis Ng'omba **APPELLANT**

AND

Kitwe City Council **RESPONDENT**

CORAM: Majula, Ngulube, and Banda-Bobo, JJA
On 18th January, 2024 and 31st January, 2024.

For the Appellant: N/A

For the Respondent: Mrs. J. N. M. Luwawa
In-House-Counsel, Kitwe City Council

JUDGMENT

Banda-Bobo, JA delivered the Judgment of the Court.

Cases referred to:-

1. Costa Tembo v. Hybrid Poultry Farm (z) Limited (SCZ Judgment No. 13 of 2000)
2. R. R. Sambo and Lusaka Urban District Council v. Paikani Mwanza (SCZ J No. 16 of 2000)
3. Sam Chisulo v. Mazzonites Limited (Appeal No. 67/2019)
4. Y B and F Transport Limited v. Supersonic Motor Limited (SCZ J No. 3/2000)
5. Kalunga Chansa v. Evelyn Hone College (Appeal No. 134 of 2019)
6. Road Development Agency v. Agro Fuel Investments Limited (CAZ Appeal

114/2019)
7. AEL Redifussion Music Limited v. Phonographic Performance Limited (1999) 1 WLR 1507
8. Kuta Chambers v. Concilia Sibulo (selected Judgment No. 36 of 2015)
9. Collet v. Van Zyl Brothers Limited (1966) ZR 65 (CA) 76
10. Attorney General v. Seong San Company Limited (Appeal No. 182/2010)

Other Works referred to:-

- Patrick Matibini: Zambian Civil Procedure, Commentary and Cases, (Vol. 2 page 1705)

1.0 Introduction

1.1 This appeal is against part of the Judgment on Admission rendered by Honourable Mr. Justice J. H. Mbuzi on 27th October, 2021, at the Kitwe High Court.

2.0 Background

2.1 The appellant, Francis Ng'omba was the plaintiff in the court below. He had instituted process against the respondent, Kitwe City Council, by way of Writ of Summons accompanied by a statement of claim. He claimed the following reliefs:-

(i) Payment of outstanding terminal benefits in the sum of K578,705.74;

(ii) Interest on the amount from the date of writ, and

(iii) Legal Costs

2.2 In the statement of claim, the appellant averred that he had been an employee of the defendant from 30th November, 1989. He rose through the ranks and his last job was at Kitwe City Council in 2012. That at point of exit, he was entitled to be paid K679,286.54 Long Service Terminal Benefits. That out of the calculated amount, there remained a balance of K578,705.74 being terminal benefits to be paid to him.

2.3 The defendant settled defence to the claim. Under paragraph 4 of the defence, appearing at page 28 of the Record of Appeal, the defendant admitted the plaintiff's claims to the extent that the plaintiff was entitled to be paid K679, 286.54 as Long Service Bonus.

2.4 **Summons for An Order for Judgment on Admission**

2.5 The above admission in the defence, prompted the plaintiff to file summons for an order for judgment on admission. In the affidavit sworn by the plaintiff, at paragraph 4 thereof, it was averred that; **"the defendant both in the Ledger Card and in paragraph 4 of their statement of**

claim (sic) have made express admission of fact of owing K578,705.74 and K679,286.54 respectively".

2.6 Further at paragraph 5 thereof, he averred that originally he was owed K679,286.54 but after some payments, the amount outstanding reduced to K578,705.74. He thus prayed for entry of judgment on admission in the sum of K578,705.74 with interest thereon and costs.

2.7 The application was opposed. In the affidavit in opposition to the application for entry of judgment on admission sworn by Elizabeth Mutinta Shumba, it was deposed that the defendant had only admitted the amount that was due to the plaintiff as Long Service Bonus at the time he was transferred to Choma Municipal Council which was ZMW679, 286.54. That the amount of ZMW578, 705.74 was the outstanding balance for Long Service Bonus and not Terminal Benefits, as Terminal Benefits are owed by Vubwi Town Council where the plaintiff retired from and not Kitwe City Council.

2.8 It was further averred that the plaintiff claimed Terminal Benefits when the Ledger Card shows Long Service Bonus.

It was deposed that indeed the plaintiff was owed a sum of K578, 705.74. However, the entry of judgment on Admission was opposed, as the defendant did not owe Terminal Benefits, but Long Service Bonus.

3.0 **Decision of the Lower Court on Judgment on Admission**

3.1 After due consideration of the law on Judgment on admission, the learned Judge acknowledged that judgment on admission may be entered where a party to the proceedings admits facts or part of the case through pleadings or statements made even prior to commencement of the matter. That the rationale for entering judgment on admission is to save time and costs.

3.2 He formulated the question for resolution in the matter before him as:-

> **"Does the defence filed by the defendant constitute a clear and unequivocal admission or a clear express or clear implied admission of the sum of K578,705.74 as Terminal Benefits for a**

judgment on Admission to be entered by a court of law against the defendant?

3.3 The court answered the question in the affirmative, and gave reasons for holding as such. The learned Judge went on to state that what was clear on the documents, and which was not in dispute was that the plaintiff was owed K578,705.74 as Long Service Bonus, though he used the terminologies interchangeably. The learned Judge proceeded to enter judgment on admission for the admitted sum, as Long Service Bonus.

3.4 The learned Judge then went on to order that because of the manner in which the pleadings were drafted, each party should bear their own costs.

4.0 **The Appeal**

4.1 The plaintiff, now appellant was riled by the order that each party should bear own costs; contending that since he was the successful party, he was entitled to costs.

4.2 To that effect, he filed a Notice and Memorandum of Appeal, fronting two grounds of appeal as follows:-

1 : The Hon. Court in the court below misdirected itself when it failed to award the appellant costs of the proceedings following the appellant's being successful in the application for judgment on admission

2 : The Hon. Court misdirected itself at law in taking irrelevant consideration to deny the appellant costs.

5.0 **Appellant's Head of Argument**

5.1 The appellant filed heads of argument on 9th March, 2022. The two grounds of appeal were argued together. The contention in the two grounds is that costs follow the event and the lower court was wrong to take irrelevant considerations into account when denying the appellant costs, after determining the application for judgment on admission in his favour.

5.2 It was submitted that in the case of **Costa Tembo v. Hybrid Poultry Farm (z) Limited**[1] the Supreme Court held that:-

"a successful party is entitled to costs."

5.3 Further that costs are discretionary. In support, the case of **R. R. Sambo and Lusaka Urban District Council v. Paikani Mwanza**[2] was cited where Chaila J, as he was then held that:-

> **"... costs are discretionary. It is trite law that costs normally follow the event. There are several instances where the courts make no order as to costs ... There are no special reasons for the successful party to be denied costs."**

5.4 Further reliance was placed on the case of **Sam Chisulo v. Mazzonites Limited**[3] where this Court cited with approval, the case of **Y B and F Transport Limited v. Supersonic Motor Limited**[4] that:-

> **"the general principal on costs is that costs should follow the event. In other words, a successful party should normally not be deprived of his costs. Such an unusual turn of events should have an explanation, for example, if the successful party did something wrong in the action or in the conduct of it."**

5.5 It was submitted that in this matter, the appellant was the successful party as the claim for K578,705.74 and interest were sustained and upheld by the lower court.

5.6 That the inter changing of the words "terminal benefits" and "long service bonus" should not be taken as something wrong in the conduct of the matter. That the parties were agreed as to the amount owed and there was no serious dispute as to the two terminologies. That the respondent admitted owing the appellant the sum of K578,705.74.

5.7 We were beseeched to reverse the decision of the lower court, as the reasons proffered by the learned Judge for denying him costs were wrong at law as there was no serious dispute on the amount claimed.

6.0 **Respondent's Heads of Argument**

6.1 The respondent filed heads of argument on 12th May, 2022. The two grounds were argued together. The submission on the two grounds was to the effect that the lower court was on firm footing in holding as he did when he refused to grant the appellant an order for costs.

6.2 Counsel acknowledged that Order 40 rule 6 of the High Court Rules gives the court discretion to award costs as it deems just. That the lower court therefore had power to exercise its discretion in relation to the award of costs. That the only time this discretion can be impeached is if the Judge did not exercise it judiciously. The case of **Kalunga Chansa v. Evelyn Hone College**[5] was adverted to in support.

6.3 On when a successful party can be deprived of costs, reliance was placed on the works of Patrick Matibini: Zambian Civil Procedure, Commentary and Cases where it is stated that:-

> **"... In addition, courts also apply the following principles:**
>
> **(a)a successful party may be deprived of costs if there is good reason for this ..."**

Further that:-

> **"In making a proper costs order, the courts exercised their discretion in such a manner as to**

not only reflect the extent to which each party has succeeded in his claim or defence, but also to do justice in all the circumstances of a particular case."

6.4 That the learned author, Dr. Matibini guided that in addition to the other considerations available to the court, the court will also consider the manner in which a party has pursued or defended his case or particular allegation or issue.

6.5 It was contended that in this case, the Judgment of the lower court suggests that the Judge critically considered the manner in which the matter was pursued and defended, when the learned Judge stated that:-

"Because of the nature in which the pleadings were drafted, I order that each party bears their own costs."

6.6 Counsel contended that it is clear that a successful party could be denied costs in the interest of justice; reiterating that there are various considerations that are taken into

account. That costs cannot be awarded merely because a party is successful.

6.7 Counsel argued that the court was on firm ground when it ordered costs in the manner it did. That the appellant was obliged to present clear pleadings to allow the court make a concise decision judiciously.

6.8 Counsel again reverted to the works of Dr. Matibini on the question of pleadings and their functions. That in this matter, the appellant sat on his rights when he failed to prepare his originating process in a clear and concise manner, which caused contention by the respondent to put it on record that what the appellant was owed was Long Service Bonus, whereas Terminal Benefits were owed by a different local Authority. That the requirement for clarification was further necessitated by the appellant's inability to differentiate the terms applicable to the respondent for payment.

6.9 That it was not stated in the summons for Entry of Judgment on Admission what the claim was, but that in the skeleton arguments, it was stated as being Long

Service Bonus. That the words Terminal Benefits and Long Service Bonus could not be used interchangeably because they refer to two different types of entitlements and were payable by two different local authorities.

6.10 That the respondent crafted its defence in the manner it did due to the way the pleadings were couched. That as a result the proceedings in the lower court materialized in the way they did. That the respondent would have simply admitted the claims and the court's time would not have been wasted.

6.11 Counsel relied on the case of **Road Development Agency v. Agro Fuel Investments Limited**[6] for the proposition that the court will depart from awarding costs to the successful party only on good reasons, and if it is proved that but for his conduct, the action would not have been brought.

6.12 It was counsel's submission that if the discretion of the lower court is overturned, an inequity will be occasioned to the respondent, as it will be condemned in costs merely because it sought to ensure that the pleadings were clear

and concise. The case of **AEL Redifussion Music Limited v. Phonographic Performance Limited**[7] was relied upon where Lord Woolf stated that:-

> **"(To) follow the event principle (is) a starting point from which a court can readily depart ... the ... rules ... require courts to make separate orders which reflect the outcome of different issues ... it is now clear that a too robust application of the "follow the event principle" encourages litigants to increase the cost of litigation since it discourages litigants, from being selective as to the points they take. If you recover all your costs as long as you win, you are encouraged to leave no stone unturned in your effort to do so."**

6.13 It was contended that the amount claimed was not disputed by the respondent; and there was no delay in paying once the matter was concluded. That their only contention in the court below was with regards to the terms used and pleaded, which were vital in the establishment of the appellant's entitlement.

6.14 That the court below, in exercising its discretion, took into account all the relevant circumstances in the matter. That the appellant is not entitled to the reliefs sought in this appeal. That it should be dismissed with costs.

7.0 **Hearing**

7.1 The matter was heard on 18th January, 2024 and only Counsel for respondent was in attendance. Mrs. Luwana, in opposing the appeal relied on the heads of argument filed into Court on 12th May, 2022.

8.0 **Decision**

8.1 We have considered the appeal, the evidence in the lower court, heads of argument and list of authorities filed by learned counsel for both parties.

8.2 The two grounds will be tackled together as they speak to the same subject. The nub of the argument in this appeal is that the appellant, having succeeded in his claim in the court below, ought to have been awarded costs of the action and not made to bear his own costs. That the reason for denying him costs by the learned Judge is

wrong at law as there was no serious dispute as to the amount claimed.

8.3 The respondent on the other hand contends that the lower court was on firm footing when it ordered that each party should bear its own costs. That this is because the appellant did not present clear pleadings to allow the court make a concise decision judiciously.

8.4 The issue for determination, in our view is whether the court exercised its discretion judiciously when it deprived the successful party of his costs.

8.5 It is trite that a court hearing a matter has a wide discretion with regard to costs; though such discretion should only be exercised in accordance with well established principles. One of the principles is that a party who has substantially succeeded in bringing or defending his claim is generally entitled to costs. Matibini[1], referred to this as the "costs follow the event or outcome of the case principle."

8.6 In the case of **Kuta Chambers v. Concilia Sibulo**[8], the Supreme Court stated that:-

"... all the costs necessary to enable the adverse party to conduct or defend the litigation, ... will generally be awarded to the successful party. The object of these costs is to indemnify the successful party against the expenses to which he has been put by the unsuccessful party. We must also stress that the effect of this is to give the successful litigant a full indemnity for all costs reasonably incurred by him in relation to the action ..."

8.7 The case of **Collet v. Van Zyl Brothers Limited**[9] sets out principles that a judge must conform to in exercising his discretion. Despite the discretion vested in the judge, it is a fundamental principle that a successful litigant is entitled to his costs, unless it is shown that he is guilty of improper conduct in the prosecution of his claim.

8.8 In **Attorney General v. Seong San Company Limited**[10] the Supreme Court examined what amounted to improper conduct, and held that:-

"Although the inclusion of the Drug Enforcement Commission which was not a body corporate as a party was irregular, it did not necessary amount to improper conduct within our decision in George Chishimba v. Zambia Consolidated Copper Mines"

8.9 The learned author of Zambian Civil Procedure[1] at page 1706 stated thus, as regards conduct of successful litigant that would compel a court to deny him an order of costs:-

"... when the courts are required to exercise the discretion to order costs, the courts must take into account the conduct of the parties. The parties are expected to demonstrate that they have conducted the litigation in a reasonable and proportionate way and that they have concentrated on the real issues between them ... in this regard, cue may be taken from the English practice where the conduct of parties is assessed or considered from the perspective of –

(a)The conduct before as well as during the proceedings, and in particular, the extent to which the parties followed any relevant pre action protocol;

(b)Whether it was reasonable for a party to raise, pursue, or contest a particular allegation or issue;

(c)The manner in which a party has pursued or defended his case or a particular allegation or issue;

(d)Whether a claimant who has succeeded in his claim in whole or in part exaggerated his claim ..."

8.10 Our view, in light of the cited authorities is that the Judge in the lower court did not exercise his discretion judiciously. We agree with the appellant that using the words **"terminal benefits"** and **"long service bonus"** can certainly not be akin to wrong conduct. What was in issue was whether the appellant was owed money or not, by which ever name. This was recognised by the learned

Judge when he stated at page 12 of the Record of Appeal, paragraph 15 – 20 that:-

> **"What is clear on the documents which is also not in dispute is that the plaintiff is owed K578,705.74, as Long Service Bonus, albeit he used the terminology interchangeably. This fact, the defendant does not dispute. I therefore hold a strong view that there are no issues between the parties and no further evidence can be administered. In the premises I find the defendant to have impliedly admitted the plaintiff's claim and therefore that summary judgment should be entered."**

8.11 The respondent, in their defence, appearing at page 28, record of appeal, paragraph 4 admitted that the plaintiff was entitled to be paid K679,286.54 as Long Service Bonus. They did not take any issue with the terminology. It is that long service bonus for which the judgment on admission was entered.

8.12 We disagree with the respondent's assertion that the appellant herein did not present his pleadings clearly to allow the court make a concise decision. The portion of

the lower court's decision set out in paragraph 8.10 above clearly shows that the learned Judge did not have difficulties comprehending the issue that confronted him for determination. In any case, and to a large extent, pleadings are for the parties, to appraise the opponent of the case that he or she will be required to answer to. In this case the respondent had no difficulty in appreciating the nature of the case that they were required to respond to.

8.13 It is our view therefore that there was no basis upon which the learned Judge denied the appellant his costs. The fact that the appellant used words interchangeably can certainly not by any stretch of the imagination be considered improper conduct, sufficient to deny him his costs. We find merit in the appeal.

8.14 This appeal relates to costs only. Leave to appeal was granted. In the case of **Collett v. Van Zyl Brothers Limited**[9], it was guided *inter alia* that:-

> **"where leave to appeal is required, i.e against an order as to costs only and such leave is granted,**

the order for costs can be reviewed by the Court of Appeal."

8.15 Having found as we have above, we are of the view that this is a matter in which we can review the order of costs by the lower court. We therefore set aside the lower court's Order as to costs. We substitute it with an order that costs follow the event, to be taxed in default.

8.16 The appeal succeeds. Costs of the appeal are for the appellants to be taxed in default of agreement.

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B. M. Majula
COURT OF APPEAL JUDGE

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P. C. M. Ngulube
COURT OF APPEAL JUDGE

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A. M. Banda-Bobo
COURT OF APPEAL JUDGE