

RECENT JUDICIAL DECISIONS

CRIMINAL LAW

Kelvin Mwinga and Aphias Muchindu v. The People (Appeal No. 10, 11/2017)

This was an appeal against the judgement of the High Court convicting the Appellants on 4 counts of Aggravated Robbery contrary to Section 294 of the Penal Code. The trial court found that the Prosecution had proved its case beyond reasonable doubt and convicted the Appellants. On appeal, the Appellants argued that the judgement of the lower court was scanty and did not reveal its reasoning in arriving at the decision to convict the appellants, and further argued that the learned trial judge did not sufficiently evaluate or analyse the evidence before her. The court opined that ‘it is trite that a judgement of a trial court must contain points for determination, the decision and reasons for the decision,’ which is stipulated in mandatory terms, in Section 169 of the Criminal Procedure Code.

The court was of the firm view that the judgement subject of the Appeal did not meet the criteria of what a judgement must contain. In addition, there was no review of the evidence adduced in the court below by the judge. Thus in the circumstances of this case, the court held that it would be in the interest of justice that the matter be sent back for retrial as it would not cause an injustice to the Appellants. The conviction was accordingly set aside and an order for a retrial before another judge in the High Court.

BANKING LAW

Chrismar Hotel Limited v. Stanbic Bank Zambia Ltd (SCZ Judgement No. 06 of 2017)

This is an appeal against the judgement of the lower court that dismissed all claims made by the appellant except on the issue of Value Added Tax. The events that gave rise to this matter are that the respondent debited the appellant’s kwacha account when it did

not have a credit balance in order to credit the operational Dollar account from which the leases were serviced. An overdraft was thus created on the Kwacha account, with no prior notification, nor secured concurrence of the appellant. The overdraft account so created, attracted overdraft charges, and the appellant's Dollar account suffered additional default interest charges. In this case, the cardinal issues were whether the amount having been paid by the appellant before the expiry date of the facility settled its liability in full over and above the amount that the parties had agreed would be paid up to the end of the facilities; and whether the respondent charged penal interest on the appellant's account. It needed to be established if there was an agreement of an overdraft facility between the appellant and the respondent, and was concluded that there was no such agreement. Therefore, the trial court erred by stating that the respondent could apply and charge overdraft cover charges on the reasoning that 'it was not an overdraft facility *per se* but overdraft cover charges.' On appeal, it was held that the respondent bank clearly exceeded its liberties by unilaterally creating an overdraft facility without the concurrence of the appellant. Thus, the Supreme Court found that the overdraft cover charges were wrongfully debited to the appellant's account and ought to be reversed; ordered that the appeal substantively succeeded.

CONTRACT LAW

Ndola Energy Company Limited v. Lamamuda Limited (Appeal No. 62/2014)

This was an Appeal against the decision of the High Court which awarded damages for breach of a labour supply contract. The appellant and the respondent had a Memorandum of Agreement in which the latter was to supply labour to the former and the agreement had effect from 15th August 2011 to 30th June 2012. The respondent supplied labour to the appellant until 8th November 2011 when the Zambia Environmental Management Agency halted the project due to the

absence of an environmental impact assessment report. Consequently, on 20th March 2012, the appellant entered into a contract with another company to execute works and remedy any defects.

The Appeal was therefore allowed and the decision of the court below set aside.

EMPLOYMENT LAW

Maguwudge v. Mopani Copper Mines PLC (Appeal No. 234/2013)

This is an appeal against the entire judgement of the Industrial Relations Court whereby that the court dismissed the appellant's complaints in which he had sought a variety of reliefs against the respondent including, damages for wrongful termination of employment, loss of salary and all unpaid dues inter alia. The background facts surrounding the complaint in question are that the appellant was employed as Manager, Information Technology, by the respondent. Among the perquisites which the appellant's employment carried was entitlement to two post-paid mobile phones to be used for official duties and subject to the respondents' policy concerning Information Technology and Telecommunications. In addition, the contract provided that the company would have the right to instantly dismiss the employee in the event of a contravention of its policies, rules or regulations.

Thus, the respondent's contended that the termination of the appellant's employment was within its contractual rights given that the appellant had allowed his wife to use the respondent's mobile phone for the purpose of her personal business at the respondent's expense, and this abuse consequently constituted a contravention of the respondent's policy. Consequently, the court held that the trial court directed itself properly and correctly when it decided that the conduct of the appellant was a dismissible offence seeing as the judgement was consistent with the evidence deployed before that court and was not against the weight of the evidence as clearly misapprehended by the appellant. The appeal was accordingly dismissed as it was completely without merit.

Kenny Sililo v. Mend-a-Bath and Spenco Zambia Limited SCZ
Appeal No. 168/2014

In this case, the amendment to the General Order had just come into effect. The employer thereafter attempted to introduce new conditions of service which reflected reduced salaries. The Supreme Court was categorical that the legislation is not intended to pull down an employee's terms and conditions which are higher than those provided for in the Ministerial Orders. The case brought to the fore that while the statutory instruments relating to minimum wages and conditions are important, employers should not seek to provide the bare minimum. They should merely use them as parameters to provide terms and conditions of employment based on their needs and the requirements of the job the employee has been called to perform. When new minimum conditions of employment are promulgated, an employer is not permitted to vary the contract by reducing the benefits in the contract to meet the basic minimum.

The Supreme Court took a different approach regarding the ramifications of and remedies available to an employee following an adverse, unilateral variation of his or her contract of employment. Unlike previous Zambian decisions which state that these unilateral variations amounted to a redundancy, this case stated that it amounted to a breach of contract, for which the remedy is damages.

The case also stated that an employer is not justified in dismissing an employee for questioning him on these matters and must provide reasonable answers, insofar as they relate to the employee's employment relationship with the employer.

Lastly in relation to attestation of the contract, the Supreme Court was therefore doubtful of the notion that failure to attest a written contract of employment would lead to an employee not being able to enforce his rights under a contract of service – especially where the employee is literate and understands the terms of the contract.

TORT LAW

Reba Industrial Corporation Limited v. Nicholas Mubonde CAZ
Appeal No. 005/201

The Court of Appeal in Reba considered a claim by a worker who chose to sue his employer directly for a workplace injury rather than resorting to the provisions of the Workers' Compensation Act because he was not a permanent worker but a student on a short-term attachment. In this case, the worker was a student who was attached to the employer for a period during his studies. While he was on duty, he was instructed by his supervisor to go underneath a truck which was being repaired and had no chocking blocks to stop the truck from moving. The truck thereafter rolled over the worker as he was carrying out an instruction from his supervisor.

The Court of Appeal in developing principles for personal injury against any party who causes injury or disease or death during the course of employment, stated that these can be claimed under the following heads:-

- i. pain and suffering;
- ii. loss of amenities
- iii. permanent disability
- iv. loss of future or prospective earnings.

In relation to damages for pain and suffering, the court held that these damages are subjective. This notwithstanding, the damages under this head will depend on the duration and intensity of the pain and suffering suffered. The court will award damages under this head for the pain felt, both past and present as a result of the incident.

For loss of amenities, the court stated that this means damages for the changes in life style which the claimant will suffer as a result of the injury. Damages for loss of amenities are damages for the loss

or reduction of the worker's mental and/or physical capacity to do the work and activities that he used to do before the personal injury.

When considering the damages for permanent disability, the court will consider the extent and percentage of the permanent disability. Where a contract of employment expressly provides for the nature of damages, the court will interpret such a provision to avoid an absurdity and to ensure the employee is properly and fairly compensated.

Damages for prospective loss are very difficult to calculate because it is very difficult to produce evidence on the future with so many uncertainties, such as uncertainty as to what exactly the worker's future earnings would have been but for the workplace injury. To curb this difficulty, a worker must produce evidence showing the likely pattern of future earnings if not injured and the likely pattern of the future earnings of the claimant given the fact that she has now been injured as a result of the employer's negligence.

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