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### Finance Bank and Rajan Mahtani v Simataa Simataa SCZ Appeal No. 11/2017

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*Finance Bank and Rajan Mahtani v Simataa Simataa SCZ Appeal No. 11/2017*

Chanda Chungu<sup>1</sup>

**Facts**

The employer settled an employment dispute with its former employee out of court. They bound their former employee to a settlement agreement that he would not speak badly of the employer or testify against them in future. He subsequently testified against his former employer and the employer sued for a refund of the settlement amount.

**Holding**

The Supreme Court refused to order a refund of the settlement amount or award substantial or special damages as the employer did not prove loss of reputation. Malila JS., (as he was then) delivering the judgment of the Supreme Court stated as follows:

We have stated already that the penalty for breach of a settlement agreement could be specified in the agreement itself. In this case, it could be specified that a breach of the settlement agreement would immediately trigger the respondent's obligation to refund the settlement sum. As a court our role in such a case would be to ascertain whether such a clause would not have been intended to punish the respondent and whether the penalty for breach was connected with the amount of loss which was contemplated by the parties at the time of contracts. This was not the case here. The appellants have not given any basis for claiming a refund of the K1 million which was paid in the settlement. The claim for that refund becomes even more difficult to justify when one considers the essence of damages for breach of contract as we have explained it. In an effort to ascertain the basis of the claim for a refund of the K1 million, we asked Mr. Chenda at the hearing of the appeal whether, if the settlement agreement had not been breached, the appellants would have been K1 million richer. He gracefully conceded that they would not. We are unable to ascertain from either the evidence or the submissions any basis for ordering a refund of the K1 million paid under the settlement. That claim is bound to fail and we dismiss it accordingly.

The court was of the view that only nominal damages (equivalent to K500.00) would be awarded merely to show that there had been a breach of the agreement not to testify. However, the amount was limited to a small sum of nominal damages as loss or damage was not proved.<sup>2</sup> As the court put it, pecuniary compensation intended to put the innocent party in the position he would have been in had the contract not been breached could not be awarded as there was no loss financially or otherwise proved to have been suffered by the appellants as a result of the respondent's breach of the settlement agreement.

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<sup>2</sup> This was also the case in *Barclays Bank v Patricia Leah Chatta Chipepa* SCZ Appeal No. 131/2014 (where the Supreme Court held that where an injured party proves an infraction of legal rights but fails to prove his/her loss or damage, the party would only be entitled to nominal damages which merely indicate a breach occurred, but no substantial damages can be awarded).

## Significance

The Supreme Court confirmed that damages in the law of contract are awarded for the purpose of putting the innocent party in the position in which they would have been had the contractual obligations been performed.

In the law of contract, the victim or innocent party where a breach of contract occurs has several interests that may be protected by an award of damages. For the first time under Zambian law, the Supreme Court guided on the three heads of damage and calculation of damages in a clear and lucid manner. The court guided that Damages for breach of contract will invariably protect one of three interests, namely an expectation interest, a reliance interest or a restitution interest. The award of any damages should be targeted at one of these interests.

The court thereafter went on to give a brief expose on the three interests or heads that are used and considered when awarding damages. Where an innocent party expected benefits from the completion of a contract due to promised performance, the court will take this into consideration when awarding damages. This is referred to as the expectation interest or loss of the bargain according to the Supreme Court in *Finance Bank Zambia Limited and Rajan Mahtani v Simataa Simataa*.<sup>3</sup> The Supreme Court in *Simataa Simataa* per Malila JS held that:

The common interest protected by an award of damages for breach of contract is the expectation or benefit of the bargain interest. Here damages seek to restore the innocent party to the same economic position that party would have been in had the contract not been breached, thus giving that party the benefit of that bargain. In many cases, damages can be assessed by reference to the claimant's direct financial loss.

The above explains that the principle that once the cause for which the injured party may receive damages has been established the issue to be then determined is the size of those damages, that is, how to express the loss suffered in terms of money.

The Supreme Court confirmed that contractual damages are awarded to compensate for the injured party's loss of expectation, that is, what the injured party would have received had the contract been properly performed. Expectation interest are the gains or benefits which the innocent party expected to receive from the completion of the promised performance of the other party's obligations, but which were in the event prevented by the breach of contract committed.

Loss of the bargain is to protect the expectations arising out or created by the contract. When we talk of loss of bargain, essentially, we are saying that the injured party should be compensated for what they were expected to gain, had the breach not taken place and had the contract been properly performed. In a contractual action, damages are recoverable for the loss of expectations created by the very contract for breach of which the action is brought.

Secondly, the Supreme Court asserted that damages for breach of contract also protects the reliance interest. The courts can award damages if the claimant has incurred expenses in reliance of a contract which then becomes aborted. A claimant is entitled also to recover for expenses they have been required to incur in advance of a contract that has been breached.

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<sup>3</sup> Selected Judgment No 21 of 2017.

Such a claim will normally be made where the any loss of profit is too speculative to be able to calculate effectively.

Reliance loss refers to the expenditure which is said to have been wasted because of the defendant's breach. In some cases, the expenses are of the kind which the claimant must incur if he is to perform his part of the contract. In other cases, wasted expenses may be recoverable as reliance loss even though the claimant was, under the contract, obliged to incur them.

Further to the above, the Supreme Court confirmed that the law recognised the recovery of the restitutionary interest as another head for calculating damages. Under the restitutionary interest, an innocent party can, for example, recover the price they paid for goods or services that were subsequently terminated. This is simply a repayment to the claimant of any money or other benefits passed to the defendant in advance of the contract that has been breached.

Therefore, where a bargain is made and the price paid, the plaintiff is entitled to recover the price paid plus interest if the defendant fails to deliver the goods bargained for. The Supreme Court in *Simataa Simataa* identified restitution interest as one of the interests that an award of damages should target. Here, the purpose is not to compensate the claimant for a loss, but to deprive the defendant of a benefit.

The court gave further guidance on the principle of nominal damages. Nominal damages are awarded where the claimant has failed to prove any loss or damage but established a course of action. In an earlier decision, the Supreme Court in *Barclays Bank Zambia Plc v Patricia Leah Chatta Chipepa*,<sup>4</sup> the respondent purchased an air ticket using a debit card that was availed to her by the Appellant bank. A month later, a similar amount was debited from the Respondent's account suggesting that the Respondent had purchased another air ticket.

Before the second debit on the Respondent's account was effected, her account was overdrawn and was, therefore, incurring interest charges agreed upon by the parties. These charges increased when the second debit was effected notwithstanding that her account continued to receive deposits by way of bank transfers. The Appellant was later prompted to close the account without prior notice to the Respondent. The Supreme Court held that:

we decline to overturn the Learned High Court Judge's order that the Appellant reopen the Respondent's account. The reason for this is that at the time the Respondent's account was debited in the sum of K3,471.50 a second time, it was already in a negative balance. What this means is that the second K3,471.50 remitted from her account to that of Kenya Airways was the Appellant's money availed to her as an overdraft. We, as a result, cannot award her what she did not own. The debit did, however, have an impact on her account because it increased the amount in negative balance in her account resulting in higher charges being levied. This needs to be redressed.

The Supreme found that the Appellant was wrong in debiting the Respondent's account a second time and charging higher interest and commissions. The position we have taken, in this regard, is that there has been an infraction of the Respondent's legal rights which entitles her to an award of nominal damages. This notwithstanding, the Supreme Court held that although the Respondent proves an infraction of legal rights, she failed to prove their loss or damage. In

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<sup>4</sup> SCZ Appeal No 131/2014.

the circumstances she would only be entitled to nominal damages which merely indicate a breach occurred, but no substantial damages can be awarded.

Following the *Patricia Leah Chatta Chipepa* decision, Justice Malila in this case guided further on the nominal damages. As outlined above, Mr. Simataa Simataa testified against his former employer despite entering into a settlement agreement and agreeing not to testify against the Bank. As such he sued for a refund of the settlement amount. The court refused to order a refund of the settlement amount or award substantial or special damages as the employer did not prove loss of reputation. Malila JS, delivering the judgment of the Supreme Court stated that:

We have stated already that the penalty for breach of a settlement agreement could be specified in the agreement itself. In this case, it could be specified that a breach of the settlement agreement would immediately trigger the respondent's obligation to refund the settlement sum. As a court our role in such a case would be to ascertain whether such a clause would not have been intended to punish the respondent and whether the penalty for breach was connected with the amount of loss which was contemplated by the parties at the time of contracts. This was not the case here. The appellants have not given any basis for claiming a refund of the K1 million which was paid in the settlement. The claim for that refund becomes even more difficult to justify when one considers the essence of damages for breach of contract as we have explained it. In an effort to ascertain the basis of the claim for a refund of the K1 million, we asked Mr. Chenda at the hearing of the appeal whether, if the settlement agreement had not been breached, the appellants would have been K1 million richer. He gracefully conceded that they would not. We are unable to ascertain from either the evidence or the submissions any basis for ordering a refund of the K1 million paid under the settlement. That claim is bound to fail and we dismiss it accordingly.

The court was of the view that only nominal damages (equivalent to K500) would be awarded merely to show that there had been a breach of the agreement not to testify. However, the amount was limited to a small sum of nominal damages as loss or damage was not proved. As the court put it, pecuniary compensation intended to put the innocent party in the position he would have been in had the contract not been breached could not be awarded, as there was no loss financially or otherwise proved to have been suffered by the appellants because of the respondent's breach of the settlement agreement.

This case will prove to be one of, if not the leading case on the award of damages under the law of contract. The case brilliantly outlines the purpose of damages, the interests protected and the way damages should be measured and calculated.

In addition, the Supreme Court guided on situations where breach may have occurred, but the loss has not been proven, in such circumstances, only nominal damages can be awarded.