IT Section

IN THE SUPREME COURT FOR ZAMBIA **APPEAL NO. 054/2013**

HOLDEN AT KABWE **SCZ/8/389/2012**

(Civil Jurisdiction)

BETWEEN:

THE ANTI-CORRUPTION COMMISSION — APPELLANT

AND

CHARLES SAMBONDU — RESPONDENT

CORAM: **Mwanamwambwa D.C.J., Muyovwe and Kaoma, J.J.S.,**
On 11th August, 2015 and 16th October, 2017

For the Appellant:	*Mr. M. D. Bowa-Director of Legal Prosecutions, Mr. K. Phiri-Chief Legal and Prosecutions Officer, Mr. S. Muchula-Senior Legal and Prosecutions Officer, In house Counsel-Anti-Corruption Commission*
For the Respondent:	*Mr. Christopher Mundia SC, of Messrs. C. L Mundia and Company*

JUDGMENT

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

Cases Referred to:

1. **John R. Ngandu v Lazarous Mwiinga (1988-89) ZR 197**
2. **Chimanga Changa Limited v Stephen Chipango Ng'ombe (2010) 1 ZR 208**
3. **Water Wells Limited v Wilson Samuel Jackson (1984) ZR 98**
4. **Stanley Mwambazi v Morester Farms Limited (1977) ZR 108**
5. **Zambia Breweries v Central and Provincial Agencies (1983) ZR 152**
6. **Zambia Revenue Authority v Jayesh Shah (2001) ZR 60**
7. **John W. K. Clayton v Hybrid Poultry Farm Limited (2006) ZR 70**
8. **Weinberger v Inglis (1918) 1 Ch 133; (1916-17) All ER 843**
9. **Stapeley v Annetts and another (1969) 3 All ER 1541**
10. **Khalid Mohamed v Attorney General (1982) ZR 49**
11. **Zulu v Chipata Construction Ltd (1975) ZR 119**
12. **Hicks v. Faulkner (1882) 8 QBD 167**
13. **Brown v. Hawkes (1891) 2 QB 718**
14. **Claude Samuel Gaynor v Cyril Robert Cowley (1971) Z.R. 50**
15. **Wilson Masauso Zulu v Avondale Housing Project Limited (1982) Z.R. 172**

16. **Abrath v North Eastern Railway (1883) 11 QB 440**
17. **Tempest v Snowden (1952) 1 All ER 1**
18. **Herniman v Smith (1938) 1 All ER 9**

Legislation Referred to:

(1) **Section 13 of the State Proceedings Act, Chapter 71 of the Laws of Zambia**
(2) **Section 4(2) of the Anti-Corruption Act, No. 3 of 2012**
(3) **Order 35 rule 5 of the High Court Rules, Chapter 27 of the Laws of Zambia**

Works Referred to:

1. **Order 18 rule 7of the Rules of the Supreme Court, (White Book) 1999 Edition.**

2. **Paragraph 2-12 of Bullen & Leake & Jacobs's Precedents of Pleadings, Vol. 1, 16th Edition**

3. **Paragraphs 730, 733 and 737 of Halsbury's Laws of England, Vol. 97, 5th Edition**

This appeal is against a Judgment of the High Court dated 28th September, 2012, which the trial Judge delivered after conducting a trial in the absence of the appellant and awarded damages to the respondent for malicious prosecution, mental anguish and strain. The appeal is also challenging a Ruling of the High Court delivered on 16th November, 2016, in which the trial Judge refused to set aside the Judgment he delivered on 28th September, 2012.

The brief background to this case is that the respondent was a Town Clerk at Chingola Municipal Council. He was accused of abusing the authority of his office by initiating and presiding over the subdividing of Farm No. 2470, Chingola and allocating a piece of that land to himself, in breach of land alienation procedures.

The appellant prosecuted him before the Chingola Subordinate Court for the offence of abuse of office, but he was acquitted at no case to answer stage.

In acquitting him, the Subordinate Court held that the respondent did not initiate or preside over the subdividing of Farm No. 2470, Chingola. But that it was the Director of Engineering at Chingola Municipal Council who had initiated the motion to allocate Farm No. 2470 to the respondent, after considering that Farm No. 2963 Chingola which he had applied for was encumbered. The trial Magistrate found that the respondent was not in attendance at the meeting where the decision to allocate him Farm No. 2470 Chingola was made.

It is against this background that the respondent sued the appellant seeking the following reliefs:

a. **Damages for malicious prosecution;**
b. **Damages for mental anguish and strain arising from the malicious prosecution;**
c. **Costs and expenses incurred in preparation of his defence;**
d. **Any other relief the Court could deem fit and appropriate and;**
e. **costs.**

The appellant filed a defence to the respondent's case stating that it received a complaint of abuse of office against the respondent on 14th October, 2006, and its investigations revealed

that there was a prima facie case against him. The gist of the defence was that there was reasonable and probable cause upon which the respondent was prosecuted and that the respondent was only acquitted on a legal technicality.

The matter initially came up for trial on 25th July, 2012, but there was no appearance from the appellant. Counsel for the respondent requested for an adjournment in order to facilitate for the appellant's attendance and the matter was adjourned to the 5th of September, 2012. When it came up on that day, again there was no appearance from the appellant. The trial Judge proceeded to hear the matter, after being satisfied from the respondent's affidavit of service that the appellant was aware of the hearing dates. A trial was conducted in the appellant's absence and the respondent closed his case on the same day. The trial Judge reserved Judgment, which he delivered on 28th September, 2012.

In the Judgment, the trial Judge found that the respondent proved that he had been prosecuted at the appellant's instigation and that the prosecution terminated in his favour. That although the appellant in its defence had averred that there was reasonable and probable cause on which it prosecuted the respondent, it did not go further to elaborate the reasonable and probable cause. He noted that the appellant's defence did not dispel the fact that the appellant acted with malice. He took the view that malice does not necessarily have to be express; it can be implied from the actions or conduct of a party.

According to the trial Judge, had the appellant taken its time to investigate the matter regarding the procedures pertaining to land alienation and how the respondent found himself in possession of the land, it would have found that:

1. **the respondent was not in any way involved in the allocation of the land apart from his action of having applied for it;**
2. **it was Chingola Municipal Council, through the Works and Development Committee, which was legally tasked to do so, which allocated the land to the respondent.**

He stated that the fact that the appellant rushed and prosecuted the respondent only smacked of malice. The trial Judge agreed with the respondent that there was no reasonable and probable cause for prosecuting the respondent. He further found that the prosecution was based on some ulterior motive which the appellant could not disclose, which motive was totally in contumelious disregard of the respondent's rights.

Having so found, the trial Judge came to the conclusion that the respondent proved his case on a preponderance of probability and awarded him damages for malicious prosecution, mental anguish and strain; and costs and expenses the respondent incurred in the preparation of his defence before the Subordinate Court. He referred the matter to the Deputy Registrar for assessment of damages.

Following this decision, the appellant's advocate on 12th October, 2012, filed applications to stay execution and to set aside Judgment. In support of the applications, counsel deposed to an affidavit in which he stated that it only dawned on him that the matter had been heard in the absence of the appellant, after he was served with the respondent's submissions on 19th September, 2012. He deposed that he was never served with any notice of hearing. That although it was possible that a notice could have been served on some officers of the appellant, it did not ultimately reach him as counsel seized with conduct of the matter. He stated that there were internal procedures at the appellant which allowed senior officers to handle correspondence before it gets down to counsel seized with conduct of a matter. He said the officer upon whom the notice was served, if at all, could have misplaced the notice due to administrative red tape and counsel never received the notice.

In arguing the applications before the lower Court, counsel for the appellant had relied on Section 13 of the **State Proceedings Act** which provides that:

> **"13. All documents required to be served on the State for the purpose of or in connection with any civil proceedings by or against the State shall be served on the officer of the Attorney-General's Chambers having the conduct of such proceedings, or, if a legal practitioner in private practice is acting for the State in such proceedings, on such legal practitioner."**

He argued that this provision applies to the appellant by virtue of Section 4(2) of the **Anti-Corruption Act** which provides that:

> **"4(2) The provisions of the State Proceedings Act shall apply to civil proceedings by, or against, the Commission as if, for a reference to the State there were substituted a reference to the Commission."**

The gravamen of counsel's argument was that the service of the notice of hearing was improper, as it was not served on him personally but on some other officer.

The learned trial Judge dismissed the applications by counsel for the appellant. He noted that the Court issued a notice of hearing to the parties on 22nd March, 2012, and set the 25th of July, 2012 as the date for the trial. That the respondent's affidavit of service showed that the appellant was served with the Notice of hearing vide letter dated 23rd March, 2012. That when the matter came up for trial on 25th July, 2012, neither the appellant nor its advocates were present. He pointed out that the respondent's advocate was gracious enough to apply for an adjournment in order to facilitate for the appellant's attendance and the matter was adjourned to 5th September, 2012. But on the return date, the appellant was again not before Court. He noted that there was an affidavit of service which showed that the appellant was notified of the 5th September, 2012 as the hearing date. He stated that it was surprising that despite both services having been acknowledged by the appellant, counsel for the

appellant was claiming not to have received notification although, at the same time, he seemed to concede to there being red tape and bureaucracy in the handling of correspondence at the appellant.

He dismissed the appellant's contention that there was no proper service of the notices of hearing as untenable. According to the learned trial Judge, Section 13 of the **State Proceedings Act** does not make it requisite that there should be physical service on the advocate. He stated that he did not think that the intention of the legislature was for one serving the documents to physically place them in the hands of the advocate seized with conduct of the matter.

He noted that in this case, the letter notifying the appellant of the hearing date, though addressed to the Director General of the Anti-Corruption Commission, was specifically marked for the attention of Mr. Mataliro, the advocate who was seized with conduct of the matter, and receipt was acknowledged. In his view, the fact that the letter was marked for the attention of the advocate seized with conduct of the matter and left at the appellant was enough service. The learned trial Judge agreed with counsel for the appellant that there seemed to be red tape and bureaucracy at the appellant, which was no fault of the respondent nor the rules of service. That it was totally the fault of the appellant because of how it had chosen to attend to correspondence.

Furthermore, the trial Judge took judicial notice that the appellant had a pigeon hole at the High Court, and the notices of hearing which the Court issued ought to have been received by the appellant's advocate since they were placed in the pigeon hole. In his view, the reason or ground which was advanced by the appellant's advocate for non-attendance was not satisfactory. He found that there was sufficient service on the appellant as was evidenced by the proof of service.

In the final analysis, the trial Judge found that there was no plausible or sufficient cause shown by the appellant to propel him to exercise his discretion to set aside Judgment. He stated that a perusal of the Judgment showed that he had taken into consideration the appellant's defence and observed that the appellant in its defence substantially gave general pleadings by way of denials. He took the view that even assuming that he was inclined to setting aside the Judgment and allowing the appellant to adduce evidence, there was nothing new which would have come to the fore to change the direction of the Judgment since parties were bound by their pleadings. That all matters considered, the trial Judge could not see a defence on the merits. Accordingly, he dismissed the appellant's applications.

Dissatisfied with both the Judgment and the Ruling of the trial Judge, the appellant appealed to this Court, advancing eight grounds of appeal. These read as follows:

1. That the learned trial Judge misdirected himself in law and fact when he held that service envisaged under section 13 of the State Proceedings Act Chapter 71 of the Laws of Zambia does not mean service on the actual officer seized with conduct of a matter;
2. That the learned trial judge in the Court below misdirected himself in law and fact when he held that the fact that the appellant has a pigeon hole at the High Court at Lusaka then there was a notice that was placed in the pigeon hole regarding the hearing of this matter;
3. That the learned trial judge in the court below erred in law and fact when he refused to set aside judgement where the Appellant exhibited a plausible defence and showed that it was apparent that there was need to hear the matter on its merits where the Respondent failed to show any prejudice that could be caused if the matter went to trial on merit;
4. That the learned trial judge in the court below misdirected himself in law and fact when he held that the Appellant needed to elaborate further the defence of reasonable and probable cause in the pleadings ;
5. That the learned trial judge in the court below erred in law and fact when he ordered that the matter be heard in the absence of the Appellant;
6. That the learned trial judge in the court below erred in law and fact when he held that the Appellant had malice in prosecuting the Respondent based on a mere finding of absence of reasonable and probable cause as conclusive evidence when there was no evidence showing any ulterior motive;
7. That the learned trial judge erred in law and fact when he held that there was no reasonable and probable cause to prosecute the Respondent without finding out as to what were the facts as known by the Appellant and consider whether or not the Appellant had an honest belief in the guilt of the Respondent ;
8. That the learned trial judge misdirected himself in law and fact in finding that there was damage for mental anguish and strain and costs incurred in the preparation of his defence in the subordinate court caused following the prosecution of the Respondent without any evidence to that effect.

In support of these grounds, counsel for the appellant filed written heads of argument. The respondent opposed the appeal arguing that it is without merit, frivolous and vexatious.

For convenience's sake, we shall address grounds one, two and five together since the three grounds are interrelated. We shall then deal with grounds three and four. Grounds six, seven and eight will also be addressed as one ground.

In support of ground one, Mr. Bowa and his team referred us to Section 13 of the **State Proceedings Act** and Section 4(2) of the **Anti-Corruption Act**. They argued that in civil suits, an action against the appellant should be treated as if it were an action against the State. They submitted that when it comes to civil procedure, including procedure on service of process, the provisions of the **State Proceedings Act** apply with full force to the appellant.

Counsel submitted that the issue in dispute on this ground revolves around Section 13 of the **State Proceedings Act**. They argued that the law in that provision envisages service on the actual advocate and not another person. They argued that the trial Judge misdirected himself in construing Section 13 of the **State Proceedings Act** as to mean service on any other person at the institution where the officer is found. They submitted that if that were the case, the law could have indicated in no uncertain

terms, that leaving process at the Attorney General's chambers would be enough.

The gist of their submission was that the fact that the respondent addressed the notice of hearing to the advocate seized with conduct of the matter and the notice was purported to have been left with one of the officers at the appellant's offices, was not proper service. They therefore urged us to find that service on any person, other than an advocate seized with conduct of a matter, is not proper service according to Section 13 of the **State Proceedings Act**. It was further argued that since service was not proper, the trial Judge was wrong in refusing to set aside the Judgment.

On behalf of the respondent, Mr. Mundia SC opposed ground one. He submitted that that although the appellant was relying on the provisions of Section 13 of the **State Proceedings Act**, the appellant did not deny that process was served. He submitted that the appellant was trying to shift the blame on the Court below, yet it was clear that it was due to inadequate or inefficient administrative procedures in the appellant's office. He argued that the delay was due to inefficiency and lack of seriousness towards the Court orders.

He submitted that there was an affidavit of service that was attached to the respondent's affidavit in opposition to the summons to set aside Judgement, which showed that on 27th

March 2012, a notice of hearing for 25th July 2012 was served on the appellant's Director General and was received by a Natasha Singogo. He stated that, however, the appellant did not attend. That due to the appellant's non-attendance, the matter was adjourned to the 5th of September, 2012 and a letter to that effect was sent on the 25th of July 2012 and was duly received on the same date by Paul Phiri. He argued that the appellant was given ample time to sort out its red-tape. He submitted that it was inconceivable that the appellant wanted to shelter in the highly translucent provisions of Section 13 of the **State Proceedings Act**. That in any event, the appellant through its advocate should have been proactive to find out when the case was coming up for hearing.

In support of the second ground, counsel for the appellant submitted that it was a misdirection for the trial Judge to hold that since the appellant has a pigeon hole at the High Court, then the appellant received a notice of hearing. They argued that the fact that the appellant has a pigeon hole at the High Court cannot, by itself, be conclusive evidence that the appellant received the notice. That there has to be evidence to that effect. They submitted that there was no evidence that there was a notice dropped in the appellant's pigeon hole. They argued that the finding of the trial judge that service of notices of hearing was done based on the pigeon hole available for the appellant, without any further evidence to that effect, was erroneous. They contended that this only went to show that there was no service,

and proceeding with trial in the absence of the appellant was prejudicial to the appellant.

State Counsel Mundia opposed ground two. He submitted that the Court below was referring to the appellant having a pigeon hole as one way it could check for its court processes. He argued that the appellant was served with process at its headquarters. He contended that every effort was made to accommodate the appellant but it ignored the Court orders and blamed the delay on its internal shortcomings. State Counsel urged us to dismiss this ground.

On ground five, Mr. Bowa and his team contended that a court has discretion to adjourn a matter where a party or parties are not in attendance at the hearing. That the exercise of such discretion must be judicious and without prejudice to any of the parties. They submitted that in this case, the matter was adjourned once and on the next date the trial Judge proceeded with trial in the absence of the appellant. They argued that this was erroneous as it was not in the best interest of justice. That it, in fact, prejudiced the appellant. For this argument, they relied on the case of **John R. Ngandu v Lazarous Mwiinga**[1].

They argued that in this case, there was no proof of service at the time the trial Judge proceeded with trial in the absence of the appellant. Therefore, the proper course was to

adjourn the matter and to have the appellants informed of the new date of hearing. They submitted that even if later on it was proved that there was an attempt to have the appellant served with a notice of hearing, there was no such proof at the time of hearing. That the later discovery, even assuming such purported service was correct service, could not make good the prejudice.

In opposing ground five, State Counsel Mundia submitted that the Court below was on firm ground when it heard the matter in the absence of the appellant because the appellant was given every opportunity to be heard. State Counsel basically reiterated his earlier arguments in grounds one and two.

We have considered the issues raised in grounds one, two and five. The appellant's main contention in these three grounds of appeal, is that the trial Judge should not have proceeded to hear this matter in the absence of the appellant because there was no proper service of the notices of hearing in accordance with Section 13 of the **State Proceeding Act**. Mr. Bowa and his team on behalf of the appellant did concede, when we heard this matter in Kabwe, that the appellant was served with the notices of hearing as was indicated in the respondent's affidavits of service. The bone of contention for them, was that there was no proper service because counsel seized with conduct of the matter was not personally served as required by Section 13 of the **State Proceedings Act**. Their

other argument was that in absence of any evidence, it was wrong for the trial Judge to hold that since the appellant has a pigeon hole at the High Court, then the appellant received a notice of hearing.

At the outset, we wish to make it clear that we agree with Mr. Bowa and his team that by virtue of Section 4(2) of the **Anti-Corruption Act**, the provisions of the **State Proceedings Act** do apply to civil proceedings by or against the appellant. We also agree with them that under Section 13 of the **State Proceedings Act**, all documents required to be served on the State in connection with any proceedings by or against the State should be served on the officer of the Attorney General's chambers having conduct of such proceedings.

In this case, there is no dispute that the notices of hearing for the two occasions when this matter came up in the court below, were not served on the advocate who was having conduct of the matter. As we have noted above, other officers at the appellant were served with the notices of hearing. Therefore, the question that arises is: was this proper service?

This Court had occasion to consider the rationale behind the rules of service in the case of **Chimanga Changa Limited v Stephen Chipango Ng'ombe**[2]. In that case, we pointed out that there is no doubt that rules of Court do require that parties to a dispute must be served with any Court process,

including a notice of hearing, so that they can react to the process. We further stated that the rationale behind this requirement is the common law principle of natural justice. In other words, the idea is basically to give parties an opportunity to be heard. For this reason, we take the view that the most important thing is that parties to a dispute should have proper and sufficient notice of the Court process so that they can accordingly react to the process.

It is for this reason that a court is at liberty to infer from the circumstances in a case whether a litigant is aware of the hearing date. In **Chimanga Changa Limited v Stephen Chipango Ng'ombe**[2] we further held that:

> **"There is no sacrosanct method to prove service of process... A Court is at liberty to infer from the circumstances in a case whether a litigant is aware of the hearing date."**

In the present case, the Court below was entitled to infer from the circumstances in this matter that the appellant was aware of the hearing dates. Although the advocate seized with conduct of the matter was not personally served, the notices of hearing were marked for his attention and served on some other officers of the appellant who acknowledged service. We also note that the appellant did not dispute that it had a pigeon hole at the High Court, but instead it argued that there was no evidence that it received the notices. Court processes that are placed in the pigeon holes are usually put at the instance of the

Court, and it cannot be reasonably argued that the Court should adduce evidence that the processes were so placed and that litigants received them.

In the face of this evidence, we are satisfied that the appellant was aware of the hearing dates and it cannot be said that it was prejudiced in any way. Moreover, the matter came up on two occasions but the appellant did not attend court. The first time it came up, the matter was adjourned because the appellant was not in attendance. When it came up the second time, again the appellant did not turn up. In view of the circumstances surrounding this matter, we cannot fault the learned trial Judge for hearing the matter in the absence of the appellant. For these reasons, we hereby dismiss grounds one, two and five for lack of merit.

We now proceed to ground three and four.

On ground three, counsel for the appellant submitted that the law is clear and well settled on the need to have matters determined on their merits. They argued that the most important consideration on an application to set aside a default judgment is a defence on the merits. They submitted that if an applicant shows that he has a plausible defence, the court should be inclined to set aside a default judgment and to allow triable issues to be tried, especially where no prejudice would be caused to the other party. For this submission, counsel

referred us to the case of **Water Wells Limited v Wilson Samuel Jackson**[3].

It was argued that in the case in casu, the appellant's defence was plausible and the lower court was supposed to consider it as prime consideration on whether or not to set aside the Judgment. They argued that the trial Judge misdirected himself when he stated that the appellant's defence was no defence at all. They further stated that there was no issue that would have irreparably prejudiced the respondent had the said judgment been set aside. Counsel submitted that the need for matters to be heard on their merits is a fundamental principle of law which cannot be glossed over. For this submission, we were referred to the following cases:

1. **Stanley Mwambazi v Morester Farms Limited**[4]
2. **Zambia Breweries v Central and Provincial Agencies**[5]
3. **Zambia Revenue Authority v Jayesh Shah**[6]

It was further submitted that there is always need to balance up the interest between the effect of the need to follow rules, and the prejudice that goes along with default judgments. They argued that it is in the greater interest of justice that where there are triable issues in a matter, a default judgment must be set aside to allow those issues to be resolved on the merits. Counsel contended that if this matter is not heard on its merits, the appellant would be punished not because it is guilty of the allegations of malicious prosecution; but because it did not

attend court on the hearing date. We were urged to set aside the judgment in this matter so that it is heard on the merits.

Ground three was countered by State Counsel Mundia. He argued that the Judgment of the Court below was not a default one. He submitted that the matter was heard in the absence of the appellant but evidence was given by the respondent. His contention was that the authorities which the appellant relied on relate to situations where a Judgment is entered without evidence being called.

He submitted that this Court has, even in a truly default case, refused to set aside Judgment where the Court felt that the case is one without merit. He argued that in **John W. K. Clayton v Hybrid Poultry Farm Limited**[7], the Court refused to set aside Judgment because firstly, the appellant sat on his rights and secondly, there was no good ground for setting aside that Judgment. State Counsel Mundia submitted that the importance of the **Clayton case** was that, even though Clayton was a layman, this Court took the view that by engaging in other inquiries rather than observing the rules of court that required him to enter a memorandum of appearance and defence, he sat on his rights. State Counsel Mundia argued that in this case, the appellant was well represented but decided to rely on its red-tape, as a ground for default in appearing before Court. He argued that in this case, there were good grounds for the Court below to reject the application to set aside Judgment.

In respect of ground four, Mr Bowa and his team contended that the learned trial Judge misdirected himself when he held that the appellant needed to elaborate further the defence of reasonable and probable cause in the pleadings. They submitted that it is a common legal principle that in pleadings, only material facts are pleaded and one does not go on into the evidence. They argued that calling upon the appellant to elaborate the defence of reasonable and probable cause meant asking the appellant to bring in evidence to support the defence. Counsel contended that it was therefore a misdirection on the part of the trial Judge to state that the appellant's defence were bare denials. In support of these arguments, counsel referred us to the case of **Weinberger v Inglis**[8] and the case of **Stapeley v Annetts and another**[9].

According to counsel, the allegations in the statement of claim were properly traversed. They wondered how else the appellant's defence ought to have been. They further submitted that it was up to the respondent to prove the allegations that he had made and not the appellant to prove them wrong. They contended that even assuming it was true that the appellant's defence had failed, it was also an error on the part of the trial Court to state that since the defence had failed, then the plaintiff had succeeded. They submitted that for a plaintiff to succeed, he must prove his case and it is not for the defendant to disprove the allegations. In support of this argument,

counsel cited the case of **Khalid Mohamed v Attorney General**[10] and the case of **Zulu v Chipata Construction Ltd**[11].

Ground four was opposed by State Counsel Mundia. He submitted that parties plead facts and not law, and that such facts should clearly disclose what the claim or defence is all about. He further submitted that mere denials do not meet the rules as to pleadings. He referred us to **Order 18 rule 7 of the White Book (1999) Edition**, for this submission. He argued that the Court below was on firm ground when it stated that the defence did not go further to elaborate the reasonable and probable cause.

State Counsel submitted that the authorities on which the appellant relied were not applicable to this case because the Court never ordered the appellant to give particulars of fact that the appellant needed to disprove the respondent's claim. He pointed out that it was merely an observation by the Court that the appellant's pleadings were not helpful to its defence. He submitted that the respondent proved his case on the balance of probability and therefore the case of **Khalid Mohamed v Attorney General**[10] and that of **Zulu v Chipata Construction Limited**[11] cited by the appellant, were irrelevant to this action.

We anxiously considered grounds three and four. These grounds are challenging the learned trial Judge's refusal to set

aside Judgment on the basis that the appellant did not have a plausible defence. It is common cause that the Court below delivered the Judgment after hearing the respondent in the absence of the appellant. State Counsel Mundia has argued that the Judgment was not a default Judgment as it was delivered after hearing the respondent. We would like to clarify that the law gives power to the Court to set aside any final Judgment obtained in the absence of any party. **Order 35 rule 5 of the High Court Rules,** provides that:

> **"Any judgment obtained against any party in the absence of such party may, on sufficient cause shown, be set aside by the Court, upon such terms as may seem fit."**

We agree with counsel for the appellant that matters should, wherever possible be heard on the merits. We also agree that the most important consideration in an application to set aside Judgment is an arguable defence on the merits, although it is also necessary for the defendant to give an explanation for the default. In **Water Wells Limited v Wilson Samuel Jackson**[3], we held that:

> **"....Although it is usual on an application to set aside a judgment in default not only to show a defence on the merits, but also to give an explanation of that default, it is the defence on the merits which is the more important point to consider. We agree... that it is wrong to regard the explanation for the default, instead of the arguable defence, as the primary consideration"**

In the present case, the learned trial Judge refused to set aside the Judgment because he took the view that the appellant

had no defence on the merits. He found that the appellant's defence contained bare denials. We had occasion to peruse the appellant's defence. Our perusal revealed that indeed the appellant did not have an arguable defence on the merits. The appellant did not sufficiently traverse the allegations contained in the respondent's statement of claim. While we agree with counsel that pleadings must not contain evidence, they should at least contain, in summary form, the material facts on which the party pleading relies for his claim or defence. In this case, the appellant merely indicated that there was reasonable and probable cause upon which the respondent was prosecuted. As rightly observed by the Court below in its Judgment, the appellant did not do justice to its case because its defence did not go further to elaborate the reasonable and probable cause. In saying this, we do not think that the trial Judge shifted the burden of proof from the respondent to the appellant. We therefore take the view that the learned trial Judge was on firm ground, when he refused to set aside the Judgment in this matter. There is no merit in grounds three and four. We hereby dismiss them.

We shall now move to grounds six and seven.

In support of ground six, counsel for the appellant submitted that it is a common laid down principle that in a case of malicious prosecution, malice is not proved by merely proving the absence of a reasonable and probable cause. To support their argument, counsel referred us to the case of

Hicks v. Faulkner[12] and the case of **Brown v. Hawkes**[13]. They submitted that malice in malicious prosecution is some other motives than a desire to bring to justice a person whom the prosecutor honestly believes to be guilty. That as such, it must be proved that the prosecutor had a desire different from that of bringing to justice an offender. Counsel submitted that it was clear from the facts of this case that the appellant had no ulterior motive when it prosecuted the respondent.

It was submitted that the offence for which the respondent was prosecuted could only be prosecuted after consent of the Director of Public Prosecutions (DPP) has been granted and it is almost impossible that the appellant could maliciously prosecute someone. Counsel contended that this matter was investigated and submitted to the office of the DPP, who granted his consent to have the respondent prosecuted. They argued that it was therefore difficult to understand why the trial Judge was convinced that the appellant acted with malice.

Mr. Bowa and his team submitted that it is not every case that results in an acquittal which entitles the person prosecuted to allege malice and sue for malicious prosecution. That it must be proved that the prosecutor acted out of malice, ulterior motive, as opposed to the desire to pursue justice. According to counsel, the trial Judge imputed malice out of what seemed to be negligence in the manner the investigations were conducted. They submitted that the finding by the Court

below, that there was an ulterior motive, was not supported by evidence. Counsel cited the case of **Claude Samuel Gaynor v Cyril Robert Cowley**[14] to support their submissions. They argued that the appellant merely prosecuted the respondent because it believed in his guilt, and there was nothing more. Counsel submitted that the trial Judge made a finding of malice on the part of the appellant without any relevant evidence, and we were urged to reverse the findings of the Court below. For this argument, they relied on **Wilson Masauso Zulu v Avondale Housing Project Limited**[15].

Mr. Mundia SC countered ground six. He submitted that the Court below was on firm ground when it found that the appellant rushed to prosecute the respondent as there was no evidence suggesting that he committed any offence. He argued that the prosecution was malicious. State Counsel Mundia referred us to the case of **Claude Samuel Gaynor v Cyril Robert Cowley**[14]. He submitted that that the appellant was malicious in arresting and prosecuting the respondent as there were no true reasons for the arrest. That if proper investigations, not actuated by malice, had been carried out, the appellant would have found that the respondent committed no offence. He submitted that the findings of the Court below that the respondent was maliciously prosecuted find sanctuary in the case of **Wilson Zulu v Avondale Housing Project Limited**[15].

On ground seven, Mr. Bowa and his team submitted that the trial Judge misdirected himself when he found that there was no reasonable and probable cause for the prosecution of the respondent. They argued that the trial Judge was supposed to first of all consider the facts known to the appellant at the time of the respondent's prosecution, and whether out of such facts, any person would hold a belief that the respondent was guilty of an offence. Counsel submitted that it is for the plaintiff to prove that the defendant did not have reasonable and probable cause, and not for the defendant to prove that he did. They relied on the case of **Abrath v North Eastern Railway**[16] and the case of **Stapeley v Annetts and another**[9] for their submission.

Counsel cited the case of **Hicks v Faulkner**[12], and submitted that if it can be shown that the defendant had an honest belief in the guilt of the plaintiff, a tort of malicious prosecution cannot stand. They contended that the plaintiff must show from the set of facts and circumstances, assuming them to be true, that no reasonable and prudent person would arrive at a conclusion that the plaintiff was guilty of the offence charged. They submitted that a prosecutor must have a set of facts which he believes to be true at the time of commencing the prosecution and it is irrelevant whether or not those facts become false at a later time. It was argued that the prosecutor must honestly believe that there is a reasonable and probable cause to prosecute the plaintiff.

Counsel contended that in the present case, it was clear that the appellant believed that the respondent was guilty of the offence based on the facts that were present before it. They submitted that if the trial Judge had taken time to consider the appellant's evidence, he would have come to the conclusion that the appellant had some facts upon which it based its prosecution. He contended that the trial Judge erroneously omitted to consider the facts known to the appellant at the time of the prosecution. In support of this argument, they cited the case of **Tempest v Snowden**[17], and the case of **Herniman v Smith**[18].

Counsel referred us to the contents of various documents from the appellant's bundle of documents and submitted that there was evidence, which any person would reasonably believe, that the respondent had committed an offence. It was their contention that the trial Judge misdirected himself when he found that there was no reasonable and probable cause to prosecute the respondent. They urged us to make a finding that the respondent failed to prove his case.

Mr. Mundia S.C., opposed ground seven. He submitted that the Court below found as a fact that there were no probable or reasonable grounds upon which the respondent could have been prosecuted for abuse of office. He argued that the definition of reasonable and probable cause which was

being canvassed by the appellant had no merit in this case, to the extent that the Court below did not take this element into account but considered all material facts. He submitted that the respondent gave evidence and from that evidence, there was no offence committed.

In response to the appellant's contention that the Court should have asked the appellant what facts were known to the appellant in the matter, State Counsel argued that there was no way the trial Court could have found out from the appellant what facts were known to the appellant. He however pointed out that the matter was fully pleaded and the parties were bound by their pleadings, which the lower Court took into account together with the respondent's evidence. Mr. Mundia SC argued that ground seven lacks merit and he urged us to dismiss it.

In support of ground eight, Mr. Bowa and his team submitted that it was clear from the trial Court's Judgment that it never evaluated any evidence proving that the respondent suffered mental anguish and that he incurred costs in the preparation of his defence. They argued that the respondent had argued, from the outset, that he was innocent. Counsel submitted that if the respondent's belief was that he was innocent, at what point did he suffer from mental anguish? They argued that it does not always follow that proof of want of reasonable and probable cause and malice in cases of malicious

prosecution amounts to proof of mental anguish. It was submitted that each allegation must be proved by evidence. They argued that there was nothing in the respondent's evidence that went to prove mental anguish and suffering of costs. It was counsel's submission that the trial Judge erred when he held that suffering of mental anguish and strain was proved.

Mr. Mundia SC opposed ground eight. He argued that this matter was fully pleaded and one of the claims was for damages for mental anguish and strain arising from the malicious Prosecution. He submitted that this was a highly traumatic case where an innocent person, in the position of Town Clerk, was accused of a crime that he did not commit. He submitted that the appellant traversed the respondent's claim for damages for mental anguish and strain by a mere denial. It was further contended that if the appellant had wanted further and better particulars, it could have made an appropriate application. It was State Counsel's submission that this ground has no merit and that we should dismiss this appeal with costs.

We have considered the issues raised in grounds six, seven and eight. These grounds of appeal, when looked at together, raise the question of whether all the essential elements of malicious prosecution were proved by the respondent. A malicious prosecution is an abuse of the process of the court by wrongfully setting the law in motion on a

criminal charge. There are primarily five essential elements which a plaintiff should establish in order to prove malicious prosecution. These have been enumerated by the learned authors of **Bullen & Leake & Jacobs's Precedents of Pleadings, Vol. 1, 16th Edition,** who have indicated in **Paragraph 2-12**, that to establish a claim for damages for malicious prosecution, the claimant must plead and establish that:

> **(a) he was prosecuted by the defendant, i.e. that proceedings on a criminal charge were instituted or continued by the defendant against him;**
> **(b) the proceedings were terminated in the claimant's favour;**
> **(c) the proceedings were instituted without reasonable and probable cause;**
> **(d) the defendant instituted the proceedings maliciously; and**
> **(e) the claimant suffered loss and damage as a result."**

It is abundantly clear from the arguments advanced in this appeal that there is no controversy regarding whether the first two essential elements of malicious prosecution were proved. It is the third, fourth and fifth elements which the appellant argues were not proved by the respondent.

As shown above, the first element the plaintiff must establish to prove malicious prosecution is that legal proceedings were instituted or carried on by the defendant against him. In this, it is common cause that the respondent was prosecuted by the appellant before the Chingola

Subordinate Court and it is no wonder this issue has not been raised.

The second element the plaintiff is required to establish to prove malicious prosecution is that the prosecution terminated in his favour. Again here, there is no dispute that the proceedings against the respondent before the Subordinate Court terminated in his favour after he was acquitted at no case to answer stage.

The third element the plaintiff must establish to prove malicious prosecution is that there was no reasonable or probable cause for the prosecution. Reasonable and probable cause for a prosecution has been said to be an honest belief in the guilt of the accused based upon a full conviction founded upon reasonable grounds, of the existence of a state of circumstances, which assuming them to be true, would reasonably lead any ordinary prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed. For this principle, see:

1. **Hicks v Faulkner [1881] Q.B.D.167**
2. **Paragraph 730 of Halsbury's Laws of England, Vol. 97, 5th Edition**

It is also important to note that the presence of reasonable and probable cause for a prosecution does not depend upon the

actual existence, but upon a reasonable belief held in good faith in the existence, of such facts as would justify a prosecution. In this matter, the appellant argued that there was reasonable and probable cause upon which the respondent was prosecuted. Counsel for the appellant referred us to the evidence in the appellant's bundle of documents, which formed the reasonable and probable cause for prosecuting the appellant.

We have considered whether the evidence we were referred to can be said to be reasonable and probable cause. It should be noted that the offence for which the appellant was prosecuted is abuse of the authority of his office. Particulars were that he initiated and presided over the subdividing of Farm No. 2470, Chingola and allocated a piece of that land to himself, in breach of land alienation procedures. The evidence that is on record shows that the respondent neither initiated nor presided over the subdividing of the land which was given to him. It was the Director of Engineering at Chingola Municipal Council who had initiated the motion to allocate him Stand No. 2470. The respondent was also not present at the meeting where the decision to allocate him the said land was made. Given this background, it is clear to us that there was no reasonable and probable cause for prosecuting the respondent.

The fourth element which the plaintiff must prove in a claim for damages for malicious prosecution is that the defendant was actuated by malice. The plaintiff has to prove

malice indicating that the defendant was actuated either by spite or ill-will against the plaintiff, or by indirect or improper motives. In this case, the appellant's contention was that there was no evidence of malice.

In our considered view, the existence of malice is always a question of fact and the absence of reasonable and probable cause affords some general evidence of the presence of malice. The proper motive for any prosecution is to secure the ends of justice. If securing the ends of justice in a prosecution was not the true and predominant motive, then malice is proved. It is for this reason that the absence of reasonable and probable cause may be evidence of malice. Malice can therefore be inferred from want of reasonable and probable cause. **Paragraph 737 of Halsbury's Laws of England, Vol. 97, 5th Edition** states as follows:

> **"737. Inference of malice from want of reasonable and probable cause.**
>
> **Those facts which constitute the want of reasonable and probable cause may also supply evidence of malice..."**

For these reasons, we cannot fault the learned trial Judge for making an inference of malice from the want of reasonable and probable cause in the prosecution of the respondent. Looking at the facts of this case, there was absolutely no plausible explanation why the appellant prosecuted the respondent, other than ill-will against him or other improper motives. One of the arguments put forward by

counsel for the appellant is that the offence for which the respondent was prosecuted could only be prosecuted after consent of the DPP had been granted and it was not possible that the appellant could have maliciously prosecuted the respondent. This argument is flawed, and we cannot accept it, because there is no evidence on record that such consent was in fact given by the learned DPP. We entirely agree with the learned trial Judge that the fact that the appellant rushed to prosecute the respondent only smacked of malice.

The fifth and final element that needs to be proved in an action for malicious prosecution is that the plaintiff has suffered injury or damage. This element is well explained by the learned authors of **Halsbury's Laws of England, Vol. 97, 5th Edition, at Paragraph 733**, where it is stated as follows:

> **"733. Damage.**
>
> **To support a claim for damages for malicious prosecution, one of three heads of damage must be shown. The damage may be: (1) damage to a man's fame, as where the matter of which he is accused is scandalous; or (2) damage done to the person, as where his life, limb or liberty is endangered; or (3) damage to his property, as where he is put to the expense of acquitting himself of the crime with which he is charged. The claimant must show that any damage to fame suffered was a necessary and natural consequence of the charge itself, and as regards the second head of damage, that actual loss of liberty was suffered. Once one of these heads of damage is proved, damages are at large and may include compensation for loss of reputation and injured feelings."**
>
> *(The emphasis is ours).*

We have considered the issue of whether the respondent suffered any damage in this case. We note that the respondent was a Town Clerk at Chingola Municipal Council. We are of the considered view that the offence for which he was prosecuted was scandalous. We are, therefore, satisfied that he suffered injury and damage to his fame, under the first head described by Halsbury's Laws of England. Also, the record shows that the respondent sought the services of a lawyer in defending himself before the Subordinate Court and he was represented by State Counsel Mundia. In our view, the respondent suffered damage to his property under the third head, as he was put to the expense of acquitting himself of the crime with which he was charged. The respondent, therefore, succeeded on two heads of damage. As shown above, once one of these heads of damage is proved, damages are at large and may include compensation for loss of reputation and injured feelings. On this basis, we support the decision of the learned trial Judge to award the respondent damages for mental anguish and strain, as well as costs incurred in the preparation of his defence in the Subordinate Court.

All the essential elements of malicious prosecution were proved in this case. Therefore, we find no merit in grounds six, seven and eight. We hereby dismiss them for lack of merit.

In the circumstances, we shall dismiss this appeal since all the eight grounds of appeal have failed. The matter is referred to the

Deputy Registrar for assessment as ordered by the Court below. We award costs to the respondent. These are to be taxed, in default of agreement.

M S MWANAMWAMBWA
DEPUTY CHIEF JUSTICE

E. N. C. MUYOVWE
SUPREME COURT JUDGE

R. M. C. KAOMA
SUPREME COURT JUDGE