

**IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT NDOLA**

(Civil Jurisdiction)

APPEAL NO. 164/2021

BETWEEN:

STRAIGHT LINE INVESTMENT (Z) LIMITED

AND

CHIJIKA CHISOLA NGONGA



APPELLANT

RESPONDENT

CORAM: KONDOLO SC, NGULUBE AND SHARPE - PHIRI, JJA.

On 24th August, 2023 and 31st August, 2023.

For the Appellant: Mr. M. Sitali – Messrs. Ellis & Co.

For the Respondent: Mrs. I. M. Kunda SC – Messrs. George Kunda & Company

J U D G M E N T

NGULUBE, JA, delivered the Judgment of the Court.

Cases referred to:

1. *The Attorney General v D. G. Mpundu* (1984) Z.R. 6
2. *Stroms Bruks Aktie Bolag v Hutchinson* [1905] AC 515
3. *Perestrello E Compania Limitada v United Paint Company Limited*
[1969] 1 W.L.R. 570
4. *Khalid Mohamed v The Attorney General* (1982) Z.R. 49 (S.C.)
5. *Marcus Achiume v The Attorney General* (1983) Z.R. 1

6. *Reuben Nkomanga v Dar Farms International Limited – SCZ Judgment No. 25 of 2006*
7. *Konkola Copper Mines Plc & Another v John Mubanga Kapaya (as Administrator of the estate of the late Geoffrey Chibale) & Other Administrators (2004) Z.R. 232 (S.C.)*
8. *Nkhata & Others v The Attorney General (1966) Z.R. 124 (C.A.)*
9. *Duncan Sichula & Muzi Transport Freight & Fowarding Limited v Catherine Mulenga Chewe (Married Woman) SCZ Judgment No. 8 of 2000*
10. *The Owners of the Steamship Mediana v The Owners, Master and Crew of the Lightship Comet [1900] AC 113*
11. *Reba Industrial Corporation Limited v Nicholas Mubonde – Appeal No. 005/2017*
12. *Benham Gambling [1941] 1All ER 7*
13. *S.P. Mulenga & Associates International Limited – Appeal No. 244/2020*

Other works referred to:

1. *Odgers’ Principles of Pleading and Practice, 21st Edition Page 164*
2. *Munkman on Damages for Personal Injuries and Death (1960), 2nd Edition.*

1.0 INTRODUCTION

1.1 This is an appeal against an assessment of damages made in favour of the respondent against the appellant. The respondent was awarded the following sums: K95,000.00 for pain and suffering, K56,000.00 for loss of amenities,

K105,000.00 for permanent disability and ZAR1,361,810.50 as costs for fitting an artificial arm.

2.0 BRIEF BACKGROUND

2.1 The brief background to the matter is that the respondent commenced an action in the High Court by way of Writ of Summons and Statement of Claim, seeking compensation for permanent disability amounting to the sum of K1,000,000.00, following a bus accident which occurred along the Kitwe - Mufulira Road, on 16th March, 2016.

2.2 The accident was caused by the negligent driving of the servant of the appellant. The respondent also sued for the costs of fitting an artificial arm and the quotation as at 31st March, 2017 amounted to ZAR983,982.27 or its Kwacha equivalent. The respondent further sought general and special damages for emotional stress, pain and suffering, amounting to K500,000.00. The respondent also claimed for loss of income and earnings of K600,000.00 with respect to the business that she used to run which she is unable to continue due to being incapacitated. The respondent also sought costs.

- 2.3 The parties executed a consent order on 21st May, 2018, and the matter proceeded to assessment before the District Registrar who rendered a judgment on 16th January, 2019, based on the parties' affidavit evidence.
- 2.4 The appellant was dissatisfied with the assessment and appealed to this court on 29th March, 2020. This court held that the District Registrar did not receive any evidence regarding the need for the artificial arm subsequent to the accident. This court was of the view that a trial needed to be conducted and the court ordered that the matter be reassessed before another District Registrar.
- 2.5 On 18th August, 2020, the respondent filed an affidavit in support of summons for assessment of damages and deposed that she was a passenger on a bus registration number AOB 3101 belonging to the appellant, driven by Enock Kaselampo, an agent or servant of the appellant.
- 2.6 The respondent deposed that the bus was involved in a road traffic accident along the Kitwe – Mufulira Road, due to the excessive speeding of the driver and as a consequence, her right arm was amputated causing permanent disability. The

respondent deposed that she has suffered emotional stress, trauma and physical pain. The respondent stated that she relied on her right hand and has had difficulties in handling effects as she relied on her right hand for functioning. The respondent deposed that she suffered physical pain, emotional stress and trauma during the period she was hospitalized from 15th February, 2016 to 21st March, 2016, and has continued to suffer as she is constantly reminded of the traumatizing accident whenever she looks at the remainder of her right arm.

2.7 The respondent incurred medical expenses during the period she was hospitalized and requires artificial prosthetic rehabilitation services as she is compromised in terms of performing house chores, lifting, carrying and performing at ground level. After three doctors conducted an assessment on her, the respondent was advised to seek upper limb prosthetic rehabilitation.

2.8 At the hearing, the respondent testified in line with her affidavit evidence and called one witness. She testified that she ran a décor business prior to the accident and she would conduct workshops but is currently unable to do so without

her two hands. She testified that she needs to fit a Myo-electric prosthetic arm which will assist her in functioning. This is the closest she can get to a real arm.

2.9 The respondent testified that she earned K10,000.00 in her decor business but had no evidence to prove this as her record keeping was poor.

2.10 The second witness for the respondent was Louise Naude, a certified Orthotist Prosthetist under the Health Professionals Council of Zambia. Her testimony was that she assessed the respondent and concluded that the Myo-electric prosthetic would give the respondent a better chance to function because it is closer to having a normal arm. She was of the view that the respondent's residual arm is short and will improve if the Myo-electric prosthetic arm is fitted to it.

2.11 The learned District Registrar considered the evidence before her and came to the conclusion that she would adjust the respondent's claims by 30% as this was appropriate in the circumstances of this case. The District Registrar ordered the following: K95,000.00 for pain and suffering, K56,000.00 for

loss of amenities, K105,000.00 for permanent disability and ZAR1,361,810.51 as the cost for fitting an artificial arm.

2.12 The District Registrar also awarded interest at the average short-term deposit rate from the date of judgment and thereafter at the rate of six percent per annum until full settlement. The respondent was also awarded costs to be taxed in default of agreement.

3.0 THE APPEAL

3.1 Dissatisfied with the judgment on Assessment of the District Registrar, the appellant launched an appeal in this court on the following ground-

1. The learned District Registrar erred in law and fact when she awarded the sum of ZAR1,361,810.51 as damages for the cost of fitting an artificial arm.

4.0 THE ARGUMENTS

4.1 In support of the ground of appeal, the appellant's counsel filed the heads of argument on 26th July, 2021.

4.2 In arguing the sole ground of appeal, it was submitted that the claim for the cost of fitting an artificial arm falls under the category of special damages and should have been specifically

pleaded in the Statement of Claim. According to Counsel, the aforementioned claim was not specifically pleaded as required by law nor was any evidence adduced in relation to the acquisition of the said arm.

- 4.3 We note that the entire appeal was based on the argument that the Deputy Registrar erred by awarding the respondent the sum of **ZAR1,361,810.51 as damages for the cost of fitting an artificial arm** when the respondent had not pleaded special damages.
- 4.4 For reasons that shall become apparent, we find it necessary to regurgitate the appellant's arguments in this regard.
- 4.5 This court's attention was drawn to the learned District Registrar's holding on page 21 lines 5 to 21 and page 2 lines 8 to 14 of the record of appeal where it was held that-

"I now turn to the claim of costs of fitting an artificial arm. It was submitted on behalf of the Plaintiff that the cost of fitting an artificial arm is claimed as a consequence of the accident and it was strongly submitted that the amount is rightly claimed as a prospective expense arising from the accident. The plaintiff has led evidence through exhibits "CCN2", "CCN3" and "CCN4."

I quite agree with the plaintiff's submission that this claim is justified. The Trans Humeral Myo - electric prosthetic arm from B Tech Medical Orthotics and Prosthetics (South Africa) which now costs ZAR1,361,810.51 as per exhibit "CCN3" is the appropriate prosthetic arm for the plaintiff especially that the price includes cost of service for a significant period. The evidence from PW2 is that this arm is closer to the normal arm as it will enable the plaintiff function better. It was also submitted and I quite agree in light of the evidence of the expert that any other prosthetic arm would just add to the problems that the plaintiff already has to go through as a result of the accident such as back pain as the same are but for cosmetic purposes. It is in the light of the foregoing that I allow that the Trans Humeral Myo - electric Prosthetic arm in the sum of ZAR1,361,810.51 be purchased for life. I find that this is for the sum of ZAR983,682.27 but it is common cause that the Kwacha has depreciated considerably since the suit was filed and the cost allowed is as per current quote."

4.6 The Court's attention was also drawn to the respondent's claim in the writ of summons where she sought the following reliefs:

- i. Compensation for permanent disability amounting to the sum of ZMW1,000,000.00 following a bus accident along the Kitwe-Mufulira road on 15th March, 2016 which was caused by the negligent*

driving of the Defendant's (appellant) company's servant or agent.

- ii. Cost of fitting an artificial arm quotation as at 31st March 2017 the sum of ZAR983,682.27.*
- iii. General and Special damages for emotional stress, pain and suffering ZMW500,000.00.*
- iv. Loss of income and earnings from her business due to being incapacitated.*

4.7 Counsel argued that the award of ZAR1,361,810.51 being the cost of fitting the Trans Humeral Myo-electric Prosthetic arm ought not to have been granted as the same constitutes special damages and should therefore have been specifically pleaded in the Statement of Claim. That a perusal of the respondent's pleadings shows that the respondent did not plead special damages. To buttress this argument, Counsel referred us to various authorities that stress the requirement to plead special damages such as *The Attorney General v D. G. Mpundu*,¹ *Stroms Bruks Aktie Bolag v Hutchinson*² and *Perestrello E Compania Limitada v United Paint Company Limited*.³ We were also referred to the learned authors of *Odgers on Pleadings*¹ and *Munkman on Damages for Personal Injuries and Death*.²

4.8 It was submitted that the respondent did not discharge her burden of proof because she did not adduce evidence to prove actual loss

for the cost of purchase of the prosthetic arm. It was argued that there was no loss because the respondent has not yet purchased the artificial arm. To support the argument that the respondent did not lead evidence to prove her claim, we were referred to the case of ***Khalid Mohamed v The Attorney General***⁴ where the Supreme Court held that a plaintiff must prove his case and a mere failure of the opponent's case does not entitle him to judgment.

4.9 It was submitted that in view of the fact that there is no evidence of the respondent's actual loss, this Court should reverse the finding of the lower Court in accordance with the principles in the case of ***Marcus Achume v The Attorney General***.⁵

4.10 In opposing to the appeal, Counsel for the respondent filed heads of argument on 26th August, 2021. It was submitted that the lower Court was on firm ground when it made the award of ZAR1,361,810.51 as damages for the cost of fitting the artificial arm, because the respondent adhered to the guidelines enunciated in the case of ***Reuben Nkomanga v Dar Farms International Limited***⁶ and the learned authors of ***Munkman on Damages for Personal Injuries and Death***, page 3 paragraph 6.10.

4.11 It was submitted further that in this matter between the same parties herein, this Court guided that the respondent claimed for the cost of fitting the artificial arm not as "a special damage" but as

“a consequence of the accident.” That this Court held that the cost of fitting the artificial arm was rightly claimed as a prospective expense arising out of the accident.

4.12 Counsel argued that the award of the Court was not unreasonable as it was supported by evidence which this Court should not interfere with. Counsel urged this Court not to interfere with the finding and award of the lower Court and to follow the decision of the Supreme Court in ***Konkola Copper Mines Plc & Another v John Mubanga Kapaya (as Administrator of the estate of the late Geoffrey Chibale) and Other Administrators.***⁷ Counsel submitted that this Court can only interfere with a finding of fact of the lower Court if it was unsupported by evidence. To buttress this argument, we were referred to the cases of ***Nkhata & Others v The Attorney General***⁸ and ***Duncan Sichula and Muzi Transport Freight & Fowarding Limited v Catherine Mulenga Chew.***⁹

4.13 In making reference to the case of ***The Owners of the Steamship Mediana v The Owners, Master and Crew of the Lightship Comet***¹⁰ Counsel argued that the award of the lower Court was fair and proper as it was based on sufficient and self-explanatory evidence as to the fatality of the accident and the nature of the pain suffered and endured by the respondent. That the evidence also

consisted of quotations which show the cost of purchasing and fitting the artificial arm and did not suggest that the arm had already been purchased.

4.14 We were referred to the case of **Reba Industrial Corporation Limited v Nicholas Mubonde**¹¹ where we held that-

“Damages are awarded for the reduction in the ability of the claimant to perform everyday tasks and enjoy life, and it does not matter whether the claimant is conscious or not of the effect upon his life. It can include interference with hobbies, a reduction in marriage prospects as in Moriaty v McCarthy (1978) 1 WLR 155 or interference with the claimant’s sex life as was the case in Cook v K. L. Kier and Company Limited (1970) 1 WLR 774.”

4.15 We were further referred to the case of **Benham v Gambling**¹²

where it was held as follows:

“The assessment of damages is not to be made upon actuarial basis. It is not the assessment of compensation for loss of years or for future pecuniary prospects, but is fixing upon common sense principles of a reasonable figure for the loss of prospective happiness.”

4.16 Lastly, it was submitted that the issue raised by the appellant in its sole ground of appeal is a matter that has been adjudicated upon by this Court as seen on page 106 of the record of appeal.

4.17 Counsel filed heads of argument in reply to the respondent's heads of arguments. However, he reiterated his arguments in the heads of arguments earlier filed into Court on 26th July 2021. We will not reproduce for the avoidance of repetition.

5.0 THIS COURT'S DECISION

5.1 We have considered the evidence in the record of appeal, the grounds of appeal, the arguments of the parties and the judgment appealed against.

5.2 The sole ground of appeal advanced by the appellant raises the question of whether the learned District Registrar erred when she awarded the appellant the sum of ZAR1,361,810.51 as damages for the cost of fitting an artificial arm. Counsel for the appellant raised two issues. Firstly, that the cost of fitting the artificial arm ought to have been specially pleaded in the Statement of Claim. Secondly, that the respondent failed to prove this claim because there was no evidence of actual loss as the respondent had not yet purchased the artificial arm.

5.3 The appellant previously raised the issue of whether the respondent could claim for the cost of fitting the artificial arm. It is pertinent to note that in our judgment dated 29th April 2020 under this cause, we determined these issues when we guided as follows:

“The gist of ground one is the award of ZAR 983,682.27 for cost of fitting an artificial arm. The DR awarded the amount as special damages. We should point out from the outset that this was wrong as in this jurisdiction special damages must be specially pleaded before they can be awarded, as canvassed by the appellant’s counsel.

Be that as it may, the respondent claimed this amount, not as a special damage but as a consequence of the accident. According to Munkman on Damages for Personal Injuries and Death (1960) 2nd edition at page 24 to 25

‘Special damages consist of additional expense and loss which has been incurred in the particular case, such as loss of earnings at a certain rate, and medical expenses. Special damages must be alleged and proved with full details. In practice the terms special damages is used in a more restricted sense to signify the loss of earnings...the liquidated damages are then a liquidated sum...prospective expenses are included in general damages...prospective loss cannot be claimed as

special damages because it has not yet been incurred at the date of trial.'

The cost of the artificial arm was rightly claimed as a prospective expense, arising from the accident. This could very well fall under general damages."

- 5.4 The above extract of our judgment shows that we determined the issues which are subject of this appeal. Therefore, this appeal is an attempt by the appellant to re-litigate these issues, which courts have frowned upon.
- 5.5 In the case of **S.P. Mulenga Associates International & Another v First Alliance Bank Zambia Limited**¹³ we held that-

"We wish to make it plain that res judicata means that an issue has been adjudicated upon. The rationale for res judicata is that there must be an end to litigation. Its purpose is to support the good administration of justice in the interest of both the public and the litigants by preventing abusive and duplicative litigation. The twin principles of res judicata are often expressed as being: (1) the public interest that courts should not be clogged by re-determinations of the same disputes and (2) the private interest that it is unjust for a man to be vexed twice with litigation on the same subject matter. It is critical, therefore, that parties to litigation bring forward their whole cases at once."

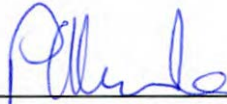
- 5.6 We therefore hold that the issues raised by the appellant herein are *res judicata*.

6.0 CONCLUSION

6.1 In view of the foregoing, we find that this matter is *res judicata* and it is accordingly dismissed. Costs shall be for the respondent, to be taxed in default of agreement.



M. M. KONDOLO SC
COURT OF APPEAL JUDGE



P. C. M. NGULUBE
COURT OF APPEAL JUDGE



N. A. SHARPE-PHIRI
COURT OF APPEAL JUDGE