ABRAHAM MOHAMED AND ALANTARA TRANSPORT LTD v SAFELI CHUMBU (1993 - 1994) Z.R. 4 (S.C.)

SUPREME COURT
GARDNER, SAKALA AND CHIRWA, JJ.S.
23RD FEBRUARY AND 23RD MARCH,1993
(S.C.Z. JUDGMENT NO. 3 OF 1993)

Flynote

Damages - Awards - Value basis.
Civil Procedure - Interest - Award of - Procedure to be employed.

Headnote

In an appeal against an assessment of damages and interest by the deputy registrar, the Court considered the following questions: firstly, whether the award should be based on the value of the damaged goods, rather than on the replacement cost. Secondly, whether the deputy registrar had the power to award interest when the trial Court had omitted to do so, since it had not been specifically pleaded.

Held:

(i) The general rule as to the normal measure of damages for tort is the value of the chattel at the time of the loss.

(ii) When a trial judge fails to award interest it would not in the normal way be proper to apply to the registrar on assessment of damages to remedy the defect. The proper course would be to apply for a review of the judgment and in default of a revision to appeal to the Supreme Court.

Cases referred to:

(1) ''The Edison'' [1933] 1 All E.R. 144.
(2) Clippers Oil Company v Edinburgh District Water Trustees [1907] A.C. 291.
(3) Dodd Properties (Kent) Ltd. and Another v Canterbury City Council and Others [1979] 2 All E.R. 118.
(4) United Bus Company of Zambia v Shanzi (1977) Z.R. 397.
(5) Riches v Westminster Bank Ltd. [1943] 2 All E.R. 725.

For the appellant: A.Chiinga, Chitabo, Chiinga and Associates.
For the respondent: G.K. Chilupe, Chilupe & Co.

Judgment

GARDNER, J.S.: delivered the judgment of the Court.

This is an appeal from an assessment of damages by the deputy registrar awarding K2, 947, 478.20 together with interest for the loss of the respondent's motor vehicle. The history of this case is that the respondent's motor vehicle was damaged beyond repair in a motor accident . The respondent claimad damages from the first appellant as the driver who caused the accident and against the second appellant as the employer of the driver. The learned trial judge found that the accident was caused by the negligence of the first appellant but held that in view of the fact that the second appellant had said that his motor vehicle was roadworthy before the accident the second appellant was not liable. The learned judge, however, found that the first appellant was driving in the course of his employment by the second appellant.

The learned judge made an award of damages in the sum of K150,000.00 for the value of the motor vehicle and for general damages to be assessed.

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The respondent appealed to this Court against the learned judge's finding that the second appellant was not liable in damages and at the hearing the appeal was not opposed. This Court found that the second appellant was vicariously liable in damages to the respondent. We accordingly awarded damages against it for ''the damages awarded by the learned judge''. The respondent then applied to the deputy registrar for assessment of damages and, at the hearing of the application, put forward an affidavit by the respondent to the effect that the respondent's vehicle, a Volvo 240 GL sedan, was brand new at the time when it was completely written off, and that the cost of purchasing a new vehicle in June, 1992, was K2,947,473.20. No evidence of any other general damages was adduced before the learned deputy registrar who awarded damages in the sum of K2,947,478.20 plus interest. The appellants now appeal against that award.

On behalf of the appellants Mr Chiinga pointed out that the original award of the trial judge specified that the damages for the loss of the vehicle should be K150,000, and that the Supreme Court had made an order for the same damages. He maintained that the only assessment should be for general damages about which no evidence had been led and he suggested that K15,000, would be an adequate sum for the unquantified general damages.

Mr Chilupe on behalf of the respondents argued that the respondent should be put in the same position as he was before the accident and that it was only fair that he should receive now the current purchase price of a new vehicle similar to the one which was damaged beyond repair. He maintained that the respondent had every right to ask the deputy registrar to assess damages in the sum claimed.

In considering the arguments in this appeal we note that the main claim in the statement of claim was the value of the vehicle, namely K150, 000, plus general damages. There was no specific claim for interest. The general rule as to the normal measure of damages for tort is the value of a chattel at the time of the loss (see ''*The Edison*'' [1]). Mr Chilupe argued that the respondent did not have the money to purchase a new vehicle immediately after the accident so that he had to wait until he obtained judgment against the second appellant before he would be in a position to purchase a new vehicle. The law relating to the result of the impecuniosity of the plaintiff is referred to at page 241 of McGregor on damages (14th ed.) and the cases set out therein.''*The Edison*'' case is compared with a dictum of Lord Collins in *Clippers Oil Company v Edinburgh and District Water Trustees* [2] that:

> ''In my opinion the wrongdoer must take his victim *talem qualem*, and if the position of the latter is aggrieved because he is without the means of mitigating it, so much the worse for the wrongdoer, who has got to be answerable for the consequences flowing from his tortuous act.''

In the *Edison* case this *dictum* was cited and it was concluded that it was not in point since it was actually ''dealing not with the measure of damages but with the victim's duty to minimise damages, which is quite a different matter''. Various other cases referred to in *McGregor* which relate to the assessment of damages when, for instance, there is delay in carrying out repairs to a car or to real property, are not relevant to the issue, but in particular in *Dodd Properties v Canterbury City Council* [3] it was held that

one must first arrive at the normal measure of damages before considering the issue of mitigation and before Lord Collins became relevant. As we have said the normal measure of damages is the value at the time of loss and consequently the award or K150, 000.00 as claimed in the writ was the correct figure for damages. We note that in the judgment of the learned trial judge no reference was made to interest and no such claim was included in the statement of claim. However, the learned deputy registrar made an order for interest to be payable, and, although no date from which interest should run was mentioned, it would be proper to infer that interest, if payable, should run from the date of the loss. In the case of *United Bus Company of Zambia Limited v Shanzi* [4] we said at page 417:

> ''It should be noted that under the authority of *Riches v Westminster Bank Ltd.* [5] it is not necessary for a plaintiff to claim interest in his pleadings and the result of that decision in my view is that it is the duty of the Court to award interest unless there is good reason for the exercise of its discretion not to do so.''

Although we have held that the award by the learned deputy registrar in respect of the loss of the vehicle cannot stand, and although there is no evidence to support an award relating to any other general damages, the deprivation of the money required for the purchase of a replacement motor vehicle could raise an entitlement to general damages which should be compensated for by an award of interest. In the circumstances of this case therefore we find that interest was properly awarded by the learned deputy registrar in default of the learned trial judge's having done so. We hasten to comment that when a trial judge fails to award interest it would not in the normal way be proper to apply to the registrar on assessment of damages to remedy the defect. The proper course would be to apply for a review of judgment and in default of a revision to appeal to this Court. However, as the same result should have occurred whichever method was adopted and in order to do justice in this case we order that interest should be payable on the amount awarded from the date of the accident.

At the time when the claim arose the rate of bank interest was very low but since then over the years it has become very high indeed. Taking this into consideration, we award interest over the whole of the period at the rate of 30% per annum from the date of the accident, 30th November,1985, until the date of the assessment, the 6th November, 1992.

The appeal is allowed; the assessment by the deputy registrar is set aside and in its place we award K150,000,00 damages for the loss of the motor vehicle and interest at the rate of 30% per annum from the date of the accident, 30th November,1985, to the date of assessment, 6th November,1992. Costs of this appeal to the applicants.

Appeal allowed.
