SCZ APPEAL NO. 54 OF 1996

IN THE SUPREME COURT OF ZAMBIA

HOLDEN AT LUSAKA

(CIVIL JURISDICTION)

BETWEEN:

THE ATTORNEY GENERAL	APPELLANT
AND	
HUMPREY MAPOMA	RESPONDENT

CORAM:	Sakala, Chirwa and Lewanika JJs at Lusaka on 6th February 1997and 6th October 2000.
For the Appellant:	Mr. D.K. Kasote, Asst. Senior State Advocate
For the Respondent:	Mr. M. Maketo, Christopher Russell and Cook

JUDGMENT

Chirwa, J.S. delivered the judgment of the Court

Cases referred to:

1. *The Edison [1933] All E.R. 144*
2. *A. Hohamed & Another V Chumbu, SCZ Judgment No. 3 of 1993*
3. *Zulu V Avondale Housing Project Ltd. [1982] Z.R. 172*
4. *Mhango V Ngulube and another [1983] Z.R. 61*

The late delivery of this judgment is deeply regretted and we apologize to the parties. The draft judgment was ready in June 1997 and unfortunately the former secretarial staff misplaced it and it was only realized when a check of judgments delivered was made that is was discovered that this judgment had not been delivered. Once again we apologize it is not the Court's wish to delay justice.

This is an appeal against the assessment of damages following the obtaining of judgment by the respondent in default of defence. This judgment was obtained on 23rd

July 1991. On assessment by the Deputy Registrar, the respondent was awarded K12 million and it is this ward that the Attorney General has appealed against.

Briefly the facts are that the respondent was the owner of 1970 Ford Transit Mini Bus model registration number AAB 8526. He bought it second hand two years before the accident and the accident happened on 24th August 1988 when his driver was in collision, with the servant of and driving the appellant's vehicle. The appellant's driver accepted being negligent and paid K50.00 (fifty kwacha) admission of guilty fine for careless driving.

According to the respondent, his vehicle was towed to a garage and he was told it was a write off, meaning it was uneconomic to repair. He left the wreck at the garage and that at the time he was giving evidence in 1993 he was not sure whether the wreck was still there. At the time of assessment he produced a quotation from Avalon Motors that a second hand 18-seater mini bus would cost K12,000,000-00 (twelve million kwacha) and it was this that he claimed as replacement value. He also claimed K2,800,000-00 (two million, eight hundred thousand kwacha)as costs for transport he spent on his workers since the accident and as he was obliged to give them transport as they knocked off late. Further he claimed K6,000-00 (six thousand kwacha) as the cost incurred in towing his vehicle from the scene of accident to the garage. Both the claim for K2,800,000-00 (two million, eight hundred thousand kwacha) for transport and K6,000-00 (six thousand kwacha) for towing his vehicle were dismissed by the learned Deputy Registrar on the ground that since these were specific claims they ought to have been specifically pleaded. There was no appeal or cross appeal by the respondent on this decision by the Deputy Registrar. It is the appeal by the appellant against the award of K12,000,000-00 (twelve million kwacha) that this appeal is all about.

In arguing the appeal, Mr. Kasote for the appellant submitted that the K12,000,000-00 award is very high. The wrecked vehicle was over 18 years at the time of accident and the quotation is for newer second hand mini bus in 1993 and that the

Respondent had obtained quotations earlier for a similar ford transit and these were no nearer to K12,000,000-00 (twelve million kwacha). He submitted that the law of assessing damages for a loss of a chattel is as stated in **THE EDISSON (1)** and also **A. MOHAMED and ANOTHER V CHUMBU (2).** The damages are the value of the Chattel at the time of loss or accident. The quotation from Avalon Motors in 1993 is irrelevant. The respondent, further never mitigated his loss, he even did not care to salvage anything from the wreck. Further in the absence of expert evidence that the Respondent's motor vehicle was a total wreck; the best the Deputy Registrar could have done was to award nominal damage. He therefore prayed that the award be reduced.

In reply Mr. Maketo agreed with Mr. Kasote on the general principle of the law as stated in the **EDISON (1)** case but submitted that the court would be in difficulties, as the appellant adduced no evidence to support his misgivings. We have looked at evidence on record and also the judgment of the learned Deputy Registrar. We have also benefited from the submissions of counsel before us. We would like to deal with the argument advanced by Mr. Maketo that the appellant produced no evidence to back up his misgivings. It is elementary law and this Court has reiterated this point in many cases such as **ZULU V AVONDALE HOUSING PROJECT LTD. (3)** that it is generally for a party that makes an allegation to prove that allegation. The learned Deputy Registrar misdirected himself where he says in his judgment that

> ***"It would have been very easy for the plaintiff (respondent here) to establish that his motor vehicle was a total write off by a report from a garage. This was not done, and all we have is the plaintiff's say so"***

and later down he says:

> ***"In the absence of alternative evidence, however, I find I have to accept the plaintiff's say so as to what actually happened to his motor vehicle and its value. I thus will award him the K12,000,000-00 (twelve million) as quoted by Avalon Motors Ltd."***

Having started very well, the last quoted portion is a misdirection. It was for the respondent to prove that his vehicle was beyond economic repair and as the Deputy

Registrar said the expert at the garage could have given this evidence. To say that it was uneconomic to repair means they had given a value to this vehicle but this has been suppressed by the respondent and as such this must have reacted against the respondent. But the Deputy Registrar proceeded to award him damages.

Further, it is the duty of the injured to mitigate his loss. Here again the observations made in the court below are pertinent. He observed as follows:

> ***"The plaintiff stated that the wreck of his motor vehicle was abandoned at a garage and he recovered nothing from it. Surely it is hard for this Court to accept that even in a situation when a car is a total write off nothing can be recovered. Whereas the mechanical parts and body may be affected there are such other parts as the wheels, which are not easily affected. A report from the garage would have settled all these unsettled questions which arise in my mind very easily and with finality."***

We agree with these observations. For a vehicle to be beyond economic repair really just means that the costs of repair are more than the value of the vehicle. Some parts are salvageable and these could have been sold to mitigate the loss. The respondent showed no concern to mitigate the loss; this too should react against him.

With all these issues against the respondent, it is obvious that the misdirection of the Deputy Registrar, must have influenced the award, we agree with Mr. Kasote that the award of K12,000,000-00 (twelve million kwacha) must be disturbed downwards.

The parties are in agreement as to the law on assessment of damages on the loss of a chattel as stated in **THE EDISON (1)** and in our own **CHUMBU (2)** case. The measure of damages should be at the time of the loss and in our present case on 24th August 1988. We have looked at the quotation from Avalon Motors; it is dated 21st September 1993, 5 years after the loss. This does not help the Court. Further, it merely talks of "MINI BUS"; it does not say it is a ford transit mini bus similar to the one that the respondent had. The two quotations from Duly Motors are of 3rd February 1992 and 10th February 1992 they too are 4 years after the loss. Although they talk about ford

Transit Mini Bus, the quotation is for a new bus. They do not assist the Court also. The last quotation from Guardian Motors is dated 6th February 1992 and it gives a quotation of a new 26 seater Nissan Civilian mini bus. This quotation too does no help the court. We are therefore at large in assessing the damages.

As we said in the case of **MHANGO V NGULUBE (4)** that

> ***"It is for the party claiming special loss to prove that loss and to do so with evidence which makes it possible for the Court to determine the value of that loss with a fair amount of certainty. As a general rule, therefore, any shortcomings in the proof of a special loss should react against the claimant."***

As can be seen from what we have said in this judgment, the quotations are not helpful. The loss could easily have been proved by the respondent if evidence had been led from the garage that assessed the vehicle to be a write off. As we said to write off something, that thing must have value, which would be less than the cost of repair. Lack of this evidence must react against the respondent.

In doing our most intelligent guess in assessing damages we take into account the following factors: - the vehicle was a 1970 model and the respondent bought it in 1986 at K3.200,000-00 (three million, two hundred thousand kwacha). The vehicle was being used to transport workers to various locations. We take judicial notice that at that time vehicles were appreciating in value. The accident happened 2 years after the respondent bought the vehicle. Taking into account all these factors and the respondent's failure to mitigate by selling the salvage, we feel that K4,000,000-00 (four million kwacha) is appropriate in this case. We accordingly quash the award of K12,000,000-00 (twelve million kwacha) awarded by the Deputy Registrar and in its place give K4,000,000-00 (four million kwacha). The award will attract interest at average rate at the current short-term investment bank account from the date of issue of the writ to today and thereafter 6% until paid. Costs in this court to the appellant to be agreed, in default to be taxed.

E.L. SAKALA
SUPREME COURT JUDGE

D.K. CHIRWA
SURPEME COURT JUDGE

D.M. LEWANIKA
SUPREME COURT JUDGE