THE ATTORNEY-GENERAL v THE ADMINISTRATOR-GENERAL (ADMINISTRATOR AD LITEM FOR THE ESTATE OF THE LATE WARNER SCHULLE) (1987) Z.R. 1 (S.C.)

SUPREME COURT
SILUNGWE, C.J., NGULUBE, D.C.J., AND GARDNER, J.S. 7TH AND 8TH MAY AND 29TH JUNE 1987
(S.C.Z. JUDGMENT NO. 12 OF 1987)

Flynote
Damages - Fatal accident - Accrual of interest of deceased in house to surviving spouse - Whether damages of spouse should be reduced.
Damages - Fatal accident - funeral expenses - Deceased - foreign national working in Zambia - Body flown back to own country - Whether cost can be claimed.

Headnote
The deceased, a foreign national, was working in Zambia on aid terms. At the time of his death the deceased owned a house jointly with the surviving widow, dependent, in his own country on which there was an outstanding mortgage. The court allowed a claim as part of the estate for flying the body back to the deceased's home country. The court did not reduce the damages awarded for dependency under the Fatal Accidents Acts to take account of the accrual to the estate of the deceased's interest in the house.

The appellant appealed.

Held:
(i) That where a surviving spouse would live in the house on which there is an outstanding mortgage it is difficult to say the spouse has benefited from the death to any useful extent and no sum should be deducted for the house or the surviving spouse's share of it.
(ii) That although a claim for certain funeral expenses is allowed under the Law Reform (Miscellaneous Provisions) Act such expenses must not be unreasonable and unnecessary. It was not unreasonable and unnecessary to repatriate the body of the deceased, a foreigner working under an aid programme, to the home county.

Cases cited:
(1) Nkhata & Four Others v The Attorney-General (1966) Z.R. 124
(2) Nkambwa v The People (1983) Z.R. 103
(3) Davies v Powell Duffryn Associated Collieries, Ltd. [1942] 1 A.C. 657
(4) Flint v Lovell [1935] 1 K.B. 354
(5) Lory v Great Western Railway Company [1942] 1 All E.R. 230
(6) Heatley v Steel Company of Wales Limited [1953] 1 All E.R. 489

Legislation referred to:
Law Reform (Miscellaneous Provisions) Act, Cap. 74
Fatal Accidents Acts 1846 to 1908

Other Works referred to:
Halsbury's Laws, Vol. 12 (4th Edn.)

For the appellant: L. P. Mwanawasa, Solicitor-General with M. E. Mwaba, Senior State Advocate.
For the respondent: A.M. Hamir, Messrs Solly Patel, Hamir and Lawrence.
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Judgment
NGULUBE, D.C.J.: delivered the judgment of the court.

This is an appeal against a decision of the High court which awarded the respondent damages in the sum of K336,891.13n and dismissed the appellant's defences. The respondent, the administrator ad litem of Warner Schulle, deceased, brought the action under the Law Reform (Miscellaneous Provisions) Act, Cap. 74, and the Fatal Accidents Acts 1846 to 1908, on behalf of the estate of the deceased, and on behalf of the widow and the two children of the marriage. The deceased was killed in the early hours of 1st January, 1981 in a shooting incident which was alleged to be due to the negligence of the servants or agents of the state. In his defences the appellant alleged that the shooting occurred solely due to the deceased's own fault; alternatively that the deceased contributed to it by his negligence. The appellant now appeals to this court on the question of liability and of quantum. There is a cross-appeal to which we shall turn later.

It was common ground that the deceased was driving his car in the company of his wife and going towards his home in the Makeni area of Lusaka, and which wars situated at about one hundred metres off the Great North road on a gravel road leading to, inter alia, the Casanova flats, when he was shot by the members of the Defence Forces. He died as a result. On the night in question, which was new years eve, the deceased had taken his wife out for an evening of entertainment. Meanwhile, at about midnight, a combined contingent of soldiers and police officers went for an operation at the Casanova flats. There was evidence that the said flats were surrounded by some officers while a search party went into the flats. There were two road signs warning of a police roadblock ahead put up on the Great North road, that is, the Kafue road, and placed about 25 metres away on either side just before the junction into the gravel road. It was common cause that there were in fact no police officers at those road signs on the Great North Road. The evidence was further that, two soldiers (one of them DW3) were posted to prevent vehicles from coming into the gravel road from the main road and that these positioned themselves on either side of the gravel road a few metres away from the junction. Another pair of soldiers (one of them DW4) was similarly positioned some metres further down on the gravel road. According to the widow, when the couple turned into the gravel road, she did not see any roadblock signs and both she and her husband were frightened when, all of a sudden, a figure clad in what appeared to be army uniform sprang al their car from the roadside shouting something which she could not catch. She and the deceased exchanged the opinion that the person seen must be a bandit. They became scared and got confused. The deceased decided to drive past their house and as soon as they had done so, a second person came into the road. After passing this second person, they heard gunshots; the deceased was fatally injured; she turned back; this time stopped to talk to the officers and drove to the hospital where the deceased was pronounced dead. From the appellant's side of the case, what happened was that DW3 and his colleague tried to stop the car and shouted to the occupants to halt and come out of the car. When the deceased did not stop DW4 and his companion again came into the road to try

and stop the car and, when again the deceased did not stop, warning shots were fired in the air. When this did not stop the car, DW4 fired at the car, intending to shoot a wheel but, unfortunately, the bullet went to strike the deceased.

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After reviewing the evidence, the learned trial judge found as a fact that there were no warning signs on the gravel road; that the signs placed on the main road only controlled traffic on the Kafue road, i.e. Great North road, and that, having regard to the hour of the day, the officers had positioned themselves in such a manner that anyone seeing them would be frightened. He also found as a fact that the State had a duty to alert persons likely to use the gravel road; that they failed to give adequate warning to the deceased of the presence of the soldiers and of their intention to stop the deceased; and that they failed to place any road sign to alert the deceased of their presence in the area. Accordingly, the learned trial judge found the shooting of the deceased in the circumstances to have been negligent.

On behalf of the appellant, the learned Solicitor - General advanced two grounds of appeal on the issue of liability. The first ground stated that the learned trial judge erred in holding that the appellant's servants were guilty of negligence or negligence for which the appellant would be liable to pay damages to the respondent. The argument in this behalf was that, since the deceased and his wife saw, or ought to have seen, the road signs on the main road which warned of "police ahead", the signs should have been understood to mean that that there were police officers ahead even on the side road. The argument was further that, those road signs should have put the deceased on alert and that, therefore, when a soldier attempted to stop him only a few metres away from the junction and when another set of soldiers made a similar attempt a short distance further down the gravel road, the deceased should not have thought that the of officers were bandits. It was submitted that, the couple's panic was groundless and that they should have realised that the persons stopping them were soldiers. That being the case, it was the learned Solicitor - General's submission that the appellant had given adequate warning and was not guilty of the alleged negligence by failure to place signs and to give adequate warning of the presence of the officers in the vicinity. The second ground alleged contributory negligence which, though not pleaded with clarity, it was accepted should be considered. It was submitted as an alternative to the first ground that there was not, in this case, a total lack of warning and that, in any case, the officers had not acted with recklessness. Mr. Mwanawasa contended that, in the same way that the deceased thought the officers to be bandits, they too were justified in thinking the same of him when he failed to respond to orders to stop. For this reason, he urged us to find that there was substantial contributory negligence on the part of the deceased which should go to reduce the damages. In reply, Mr Hamir supported the learned trial judge and drew attention to the evidence upon which the learned trial judge relied.

The learned trial judge made findings of fact to which we have already alluded. Such findings disclosed that the officers did not mount the sort of roadblock to which members of the public are accustomed. They further supported the conclusion that the deceased must have been taken by surprise when persons he assumed to be bandits sprang from the sides of the road. The findings which were made exclude the possibility of upholding any of the submissions which the learned Solicitor - General advanced unless there are grounds upon which we can reverse those findings of fact. A concise formulation of the grounds on which this court can reverse a trial judge's findings of

fact is to be found in *Nkhata & Four Others v The Attorney-General* [1] where our predecessor court held, at page 125, that:

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> "A trial judge sitting alone without a jury can only be reversed on fact when it is positively demonstrated to the appellate court that:
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> > (a) by reason of some non-direction or otherwise the judge erred in accepting the evidence which he did accept; or
> > (b) in assessing and evaluating the evidence the judge had taken into account some matter which he ought not to have taken into account, or failed to take into account some matter which he ought to have taken into account; or
> > (c) it unmistakably appears from the evidence itself, or from the unsatisfactory reasons by the judge for accepting it, that he cannot have taken proper advantage of his having seen and heard the witnesses; or
> > (d) in so far as the judge has relied on manner and demeanour, there are other circumstances which indicate that the evidence of the witnesses which he accepted it is not credible, as for instance, where those witnesses have on some collateral matter deliberately given an untrue answer."

In our considered view, the evidence which was accepted fully justified the findings made and we have no doubt that none of the conditions quoted obtained here so as to enable this court to disturb those findings. The issue here was simply one of giving proper and adequate notice to motorists intending to use the gravel road, including the mounting of a proper roadblock. This the officers failed to do and the deceased cannot be said to have been at fault for mistaking the identity and purpose of persons who sprang up from the side of the road late in the night. After all, it is common knowledge these days that some robberies have been committed by persons masquerading as soldiers or police officers; see for example *Nkambwa v The People* [2], where this court expressly recognised this fact and took it into account to impose a heavier sentence on one such culprit. Indeed the legislature has also recognised this fact: See the new section 182 of the Penal Code introduced by Act No. 2 of 1987.
The grounds of appeal pertaining to liability have not been accepted.

The second question in this appeal is whether the learned trial judge was right in his assessment of the amount of damages under the Fatal Accidents Act, 1846 to 1908, and in awarding certain amounts as funeral expenses under the Law Reform (Miscellaneous Provisions) Act, Cap. 74.

The deceased was a German national aged 50 years at the time of his death. The widow was aged 49 years, while the children who were found not to be dependants for whom specific provision should be made, were aged 23 years and 26 years. Though the deceased was working with Contract Haulage in Lusaka, this was under an aid agreement for technical co-operation and his real employers were a German organisation called GOPA. In the event, all his earnings were paid in Germany in that country's currency. His earnings totalled DM 56,283 over a ten month period, i.e. about DM5,628 per month. This was inclusive of a foreign service allowance of DM 300 per mensem. In Zambia, the deceased occupied a rent free fully furnished house; he had a company car for which free fuel was provided to him. He was entitled to 35 working days leave and to airfares.

He was spending in Zambia, K950 per month on his family while he maintained the family home in Germany at a cost of DM24,000

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per annum, inclusive of mortgage repayments and upkeep. When he died, his remains were flown back home and there cremated. Someone not disclosed in the evidence bore the cost of flying the body to Frankfurt and from there the widow, his relict, bore all the funeral expenses whose kwacha equivalent at the date of judgment was K10,191.13n.

The first issue raised was whether funeral expenses which would have been incurred any way even had the deceased died in any other manner, such as by natural causes, must be reimbursed as damages. Mr Mwanawasa argued that it must be regarded as wrong in principle to award such damages and to refund bereaved persons the cost of coffins and the like. The short answer is that this is a statutory head of claim, which has been expressly provided for in the Law Reform (Miscellaneous Provisions) Act. In contesting certain of the items under funeral expenses, Mr Mwanawasa made a general submission, with which we entirely agree, that the expenditure claimed must not be allowed unless it is both necessary and reasonable. However, in this regard, we do not accept his argument that it was unreasonable and unnecessary to repatriate the remains of the deceased, a foreigner working under an aid programme, back to his own home town. Thus, we see no merit in the contention that the expense incurred in transferring the body from Frankfurt, the place of arrival in Germany, to Harxheim, his home town, should be disallowed. The DM280 spent on this exercise was, we consider, a reasonable and necessary expense. The learned Solicitor - General also complained against the allowance of DM526. 13 for a newspaper advertisement and DM40.70 for mourning cards. We do not regard it as unreasonable or unnecessary for the widow to have incurred this expense to notify friends and relations in a manner which can only regarded as usual in their community. The award of K10,191. 13n in respect of funeral expenses was not wrong and will not be disturbed.

The next question was whether the award under the Fatal Accidents Acts 1846 to 1908 was so high and/or so erroneous that we must interfere and reduce it. The learned trial judge correctly observed that there are basically two ways in which to compute the dependency; the first is to build up the dependency item by item end then to cross-check it against the deceased's net annual income at the date of his death. The second method is to take the starting point as the net amount of wages the deceased was earning; estimate how much was required or expended for his own personal or living expenses; the balance will give a datum or basic figure which will be turned into a lump sum by taking a certain number of years' purchase. The learned trial judge relied on *Davies v Powell Duffryn Associated Collieries Limited* [3]. He also indicated that he would adopt the second method but in fact went on to apply the first. In that way, he came to a multiplicand of K27, 100 to which he applied a multiplier of twelve years. Mr Mwanawasa argued that both the multiplicand and the multiplier deserve to be scaled down.

The courts have long acknowledged, in fact ever since the introduction of this new statutory cause of action under the Fatal Accidents Act, that the art of assessing the damages payable to the dependants in respect of their lost dependency is anything but precise or exact. At the end of the day, after a trial judge sitting alone has assessed such damages, we as an appellate court will not

interfere unless he has clearly fallen into error so that, in the language of Greer, L.J., in *Flint v Lovell* [4], we are

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> "convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this court, an entirely erroneous estimate of the damage to which the plaintiff is entitled."

There was, in this case, no suggestion that the learned trial judge had applied a wrong principle in arriving at the multiplicand. The argument was that evidence of earnings and the extent of dependency lacked adequate particularity and that the overseas allowance would not have continued and should have been excluded. Mr Hamir countered this argument by pointing out that there were other benefits relevant to computing the multiplicand which were not taken into account, such as leave pay, the value of air tickets, free transportation, free housing, free fuel and so on. It was demonstrated that, if the dependency was set at one-third of the net earnings, a proportion suggested by the learned Solicitor - General, and, if all the benefits had been taken into account, a figure considerably higher than that adopted by the learned trial judge resulted and which Mr Hamir promptly asked to be used. As Mr Mwanawasa correctly countered in reply, there was no cross-appeal on the multiplicand which the State sought to have reduced. It is obvious that the only logical result of any interference on our part, and in any recalculation, would be to bring about a higher multiplicand and that being the case, and since there was no cross-appeal on the point, we simply decline to disturb the learned trial judge's determination of the multiplicand.

With regard to the multiplier, Mr Mwanawasa suggested that one as low as five years would have been more appropriate in place of twelve years. He argued that, in the absence of any evidence of the longevity of Germans, an appropriate retiring age of fifty-five years should have been considered since this is generally the official retiring age for most Zambians. Mr Hamir, in reply, pointed out that the retirement age which was in evidence was sixty-four to sixty-five years; that the deceased was not employed in any hazardous capacity and was in reasonably good health. Having regard to comparable cases listed in Kemp and Kemp, it was Mr Hamir's submission that the learned trial judge had not erred in his assessment.

The basic question is whether, on the facts of this case, the assessed multiplier adopted and applied to the annual dependency was wholly erroneous. It seems to us that twelve years was not such an unrealistic figure to adopt in the case of a man who, all things being equal, would have been expected to continue working for another fifteen years during which the widow would have continued to receive support. There was no suggestion that either the deceased or the widow had other than the normal expectation of life in that part of the world and which the learned authors of Kemp and Kemp indicate as being common in England, which we do not suppose can be much different from Germany. There have been no supervening factors to be taken into account-such as her death or remarriage or that she is now gainfully employed. There is, in truth, no ground for us to interfere with the multiplier assessed by the learned trial judge.

Apart from the cross - appeal, that - leaves only one major point which was raised by Mr Mwanawasa. He submitted that, in computing the net pecuniary loss suffered by the dependent,

account ought to have been taken of the benefit which the widow would

receive as her share of the family house in Germany and that such share must be taken to have been at least 50% of the value. The courts have indeed evolved some common law rules for the assessment of damages under these Acts and one such rule is concerned with the deduction of certain pecuniary benefits accruing to the dependent in consequence of the death: *see* for instance *Lory v Great Western Railway Company* [5]. On the same rationale, if the Law Reform damages due to the estate will in fact accrue to the same beneficiary - the Fatal Accidents dependent - a deduction is made from the Fatal Accidents damages: *see* for example *Davies v Powell Duffryn* [3] (Supra). In this case, however, there was no issue concerning the K1,500 award to the estate. The question of deducting He widow's inheritance in respect of the matrimonial home was considered in *Heatley v Steel Company of Wales Limited* [6]. As in that case, the widow in our case would require to live in the house exactly as before her husband' death, or if she sold it, in another house. We take into account here, as was done in that other case, the fact that there was still outstanding a substantial mortgage debt of DM70,000. In these circumstances, it is difficult to say that she is not in the same position as before and that she had benefited on this account by her husband's death to any useful extent. Accordingly, we are satisfied that no sum requires to be deducted for the value of the house or her presumed share of it.

That brings us to the cross-appeal. Simply put, Mr Hamir argued that, as the deceased received his entire salary in Deutsche Marks and not in Kwacha, the widow would not receive a realistic or meaningful dependency if the pre-auction exchange rate is maintained. He asked for the Kwacha equivalent at the current exchange rates.

In answer to this submission, Mr Mwanawasa referred us to paragraph 1201 of Halsburys Laws, Vol. 12, 4th Edition, to the effect that the conversion to the local currency must be at the exchange rate prevailing at the time of the trial court's judgment and that fluctuations in the parity occurring thereafter, whether due to revaluation or devaluation, are irrelevant. We are in agreement with the learned authors and the authorities they have cited. It follows, therefore, that we do not accede to Mr Hamir's eloquent submission.

The net result is that we affirm the judgment appealed against; both the appeal and the cross - appeal are dismissed. The appellant has been unsuccessful and since the cross-appeal added very little to the litigation, the respondent will have his costs to be taxed in default of agreement.

Appeal anal Cross - Appeal dismissed
