

J.Z. CAR HIRE LIMITED AND MALVIN CHALA, SCIROCCO ENTERPRISES LIMITED

SUPREME COURT
SAKALA, CHIRWA AND MAMBILIMA JJS
26TH JULY, 2001 AND 27TH SEPTEMBER, 2002
(SCZ JUDGMENT NO. 26 OF 2002)

Flynote:

Damages - negligence

Headnote:

This was an appeal against the refusal by the Deputy Registrar to award damages arising from a motor vehicle accident involving the appellants motor vehicle registration number AAR 620 and the 2nd respondents motor vehicle registration number AAM 6704 driven by the 1st respondent. The claim in the court below was based on negligence and judgment was entered in default of appearance. The damage to the appellants motor vehicle was estimated at K15 million and the insurance paid him K10 million less K75, 000 excess. The appellants claim was for the loss of business at US\$70.00 per day from 9th April 1998, the date of the accident plus interest. This was claimed from 9th April 1998 to August 1998 when the 2nd defendant bought the appellants damaged motor vehicle. To prove the loss of US\$70.00 per day, the appellant produced the schedule of hiring charges for the appellants car hire business. The learned Deputy Registrar refused to award the appellants any damages on the grounds that the appellants adduced in evidence relating to the accounts of the company to show how much money this car was making for the company. Further he held that there was no evidence that such a business existed and was lawfully registered. The learned Deputy Registrar even refused to award a token sum. The appellant appealed.

Held:

It is for the party claiming any damages to prove the damage, never mind the opponents case- (Zulu V. Avondale Housing Project (1985) ZR 175 and Mhango V. Ngulube and Others (1993) ZR 61,66 applied)

Cases referred to:-

1. MARY MUSAMBO KUNDA V ATTORNEY-GENERAL [1993-95] Z.R. 1
2. ZULU V AVONDALE HOUSING PROJECT [1982 Z.R. 175
3. MHANGO V NGULUBE & OTHERS [1983] Z.R. 61, 66

FOR THE APPELLANT: MR. C. CHONTA, ELLIS & CO.
FOR THE RESPONDENT: MR. C. MWANASHIKU, LARBANTE

Judgment

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

This is an appeal against the refusal by the Deputy Registrar to award damages arising from a motor vehicle accident involving the appellants motor vehicle registration number AAR 620 and the 2nd respondent's motor vehicle registration number AAM 6704 driven by the 1st respondent. The claim in the court below was based on negligence and judgment was entered in default of appearance. The damage to the appellant's motor vehicle was estimated at K15 million and the insurance paid him K10 million less K75,000 excess. The appellant's claim was for loss of business at US\$70.00 per day from 9th April 1998 the date of accident plus interest.

This was claimed from 9th April 1998 to 10th August 1998 when the 2nd defendant bought the appellants damaged motor vehicle. To prove the loss of US\$70.00 per day, the appellant produced the schedule of hiring charges for the appellants car hire business. The learned Deputy Registrar refused to award the appellants any damages on the grounds that the appellants adduced no evidence relating to the accounts of the company to show how much money this car was making for the company. Further he held that there was no evidence that such a business exists and was lawfully registered. The learned Deputy Registrar even refused to award a token sum.

At the hearing of the appeal an application was made and granted to amend the memorandum of appeal by substituting the first ground of appeal and grounds 2 and 3 in the original memorandum of appeal. The appeal was therefore argued on two grounds only, namely:-

- (a) that the court erred in not awarding the plaintiff his claim for loss of business;
- (b) in the alternative the court below should have awarded token damages.

In arguing the appeal, Mr. Chonta for the appellants submitted that as the statement of claim showed that the appellants were carrying on business of car hire, the learned Deputy Registrar erred in holding that there was no evidence that such business exists and was lawfully registered as there was no defence to the claim. Having defaulted to file a defence the statement of claim should have been taken as proved. Further the court should have assessed the damages on the hiring chart produced at the hearing at US\$70.00 per day.

On the second ground of appeal, it was submitted that the learned Deputy Registrar should have awarded a token sum on the authority of **MARY MUSAMBO KUNDA V ATTORNEY-GENERAL (1)** where the trial court awarded a token sum in the absence of proof of special damages and that was upheld by this court.

In reply to the two grounds of appeal, Mr. Mwanashiku for the respondent, submitted that the learned Deputy Registrar was on a firm ground in not awarding damages for loss of business as there was no evidence to show how often this particular car was hired on average to assist the court assess the damages. Further the production of the hire chart charges was not proof that this particular car was hired at any time at the figures indicated in the chart.

We have considered the learned Deputy Registrar's judgment and the submission before us and we have been unable to fault the learned Deputy Registrar in his holding that there was no evidence of loss of business to be quantified. We agree with Mr. Mwanashiku that the mere production of the hire chart charges was not proof that this particular motor vehicle was ever hired and what average earnings it made for the appellants for a month. This court has said it in a number of cases such as **ZULU V AVONDALE HOUSING PROJECT (2) AND MHANGO V NGULUBE & OTHERS (3)** that it is for the party claiming any damages to prove the damage, never mind the opponent's case. If left alone, the court is at large and it may award intelligent awards if any. In the present case, the court was not assisted by the appellant with an evidence at all. The evidence of carrying on car hire business was not enough to persuade the court to make any meaningful intelligent assessment of damages. We would reluctantly award a token award based on the fact that there was this glimmer evidence of a business of car hire. We would award a token figure of K250,000.00 only. Costs to the appellant.
