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**IN THE SUPREME COURT OF ZAMBIA**  
**HOLDEN AT KABWE**  
*(Civil Jurisdiction)*

**APPEAL NO. 55A/2011**

**BETWEEN:**

**CHINA HENAN INTERNATIONAL DEVELOPMENT  
CORPORATION LIMITED**

**APPELLANT**

**AND**

**VICTOR CHEWE**

**RESPONDENT**

**CORAM:** Mwanamwambwa, Chibomba, Musonda, J.J.S.  
On the 14<sup>th</sup> of August, 2012 and 16<sup>th</sup> July 2014

*For the Appellant:* Mr C. Chula, of Chibesakunda and Co.  
*For the Respondent:* Mr M. Musaluke, of Musaluke and Co.

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## **JUDGMENT**

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**Mwanamwambwa, J.S., delivered the Judgment of the Court.**

**CASES REFERRED TO:**

1. EASTERN COOPERATIVE UNION LTD V. YAMENE TRANSPORT LTD (1988-1989) Z.R. 126 (SC).
2. VICTOR KONI V. ATTORNEY-GENERAL (1990-92) Z.R. 20 (SC).
3. PHILIP MHANGO V. DOROTHY NGULUBE AND OTHERS (1983) Z.R. 61 (SC).
4. J.Z CAR HIRE LIMITED V. MALVIN CHALA, SCIROCCO ENTERPRISES LIMITED (2002) Z.R. 112 (SC).
5. TIMES NEWSPAPERS ZAMBIA LIMITED V KAPWEPWE (1973) Z.R. 292 (S.C.).

**LEGISLATION REFERRED TO:**

1. THE HIGH COURT RULES, CAP 27 OF THE LAWS OF ZAMBIA, ORDER 36, RULE 8.
2. THE JUDGMENTS (AMENDMENT) ACT NO. 16 OF 1997 OF THE LAWS OF ZAMBIA, SECTION 2.
3. THE RULES OF THE SUPREME COURT, 1999, ORDER 18, RULE 8, SUB RULE 3.

**OTHER WORKS REFERRED TO:**

1. ODGERS' PRINCIPLES OF PLEADING AND PRACTICE, 21<sup>ST</sup> EDITION, PAGE 164.



2. MCGREGOR ON DAMAGES, 18<sup>TH</sup> EDITION, SWEET AND MAXWELL, PARAGRAPH 11-011.
3. BLACKSLAW'S DICTIONARY, 9<sup>TH</sup> EDITION.

When we heard this Appeal, Hon. Mr Justice P. Musonda, was part of the Court. He has since resigned. Therefore, this Judgment is by the majority.

The brief facts of this matter are that on the 1<sup>st</sup> of April, 2008, the Respondent brought out an action in the Ndola High Court, for the following reliefs:

1. **Damages for loss of use of the bus at K1,200,000.00 per day from 4<sup>th</sup> July, 2007, to such date when the said bus is replaced;**
2. **General and exemplary damages for negligence;**
3. **Any other relief as the court may deem fit;**
4. **Interest at the current bank lending rate; and**
5. **Costs.**

The Appellant failed to enter appearance within the prescribed period. As a result, on the 2<sup>nd</sup> of June, 2008, the Respondent obtained an interlocutory judgment in default of appearance and defence against the Appellant. The interlocutory Judgment in default awarded damages to the Respondent at K1,200,000.00 per day from the 4<sup>th</sup> of July, 2007 to date of



judgment, plus interest at the current bank rate and thereafter, at 6%. The learned Deputy Registrar also awarded the Respondent general damages, exemplary damages and costs.

The matter went before the same Deputy Registrar for assessment. The Deputy Registrar found that the Judgment was clear in that it awarded the Respondent a sum certain as damages over a period of 4<sup>th</sup> July, 2007 to the 2<sup>nd</sup> of June, 2008. That this period represents a total of 335 days. The Deputy Registrar was of the view that it is inconceivable that the bus would have been running throughout these 335 days in view of resting days for the crew of the vehicle as well as the need to service it. He was of the view that at least one day is given for the crew to rest in the week. He found that there are 48 weeks represented in the 335 days computed and hence, deducting one day from each of the 48 weeks, to account for rest and servicing days for the vehicle. The Deputy Registrar then computed the remaining 287 days at K1, 200,000.00 per day as damages for loss of use of the motor vehicle. The Deputy Registrar also awarded the Respondent general damages of K5,000,000.00 and exemplary damages of K15,000,000.00.



The Appellant now appeals against this award.

There are two grounds of appeal. These are:

### **Ground one**

**The Hon Deputy Registrar of the High Court erred in fact and in law in determining that the Respondent's assessed damages were to be based on K1, 200,000.00 per day without taking into consideration the mitigating factors together with the running costs of the income earning chattel.**

### **Ground two**

**The Hon Deputy Registrar of the High Court erred in fact and in law by awarding the Respondent general and exemplary damages.**

In ground one of the appeal, Counsel for the Appellant submitted that the amount of K1,200,000.00 is not a specific sum but that it should be determined through assessment. Counsel argued that even the Respondent testified that the amount made per day was K850,000 and not K1,200,000.00. Counsel argued that the Respondent should have taken steps to mitigate its losses. He cited the case of **Eastern Cooperative Union LTD V. Yamene Transport Ltd**<sup>(1)</sup> which held that-

**"a Plaintiff who has a profit making chattel damaged beyond economic repair is under obligation to replace that chattel and the poverty or otherwise of the Plaintiff is irrelevant. Credit should be given for the salvage when limiting the period within which the Respondent should have mitigated his loss by purchasing a replacement chattel of similar age and value."**



Counsel argued that the Respondent had a duty to mitigate his loss and that his failure to do so should not cause unreasonable hardship on the Appellant. That in the mitigation process, the learned Deputy Registrar should have considered the salvage value of the motor vehicle and a reasonable time period for the Respondent, in which to replace the subject motor vehicle. That the amount awarded amounts to unjust enrichment, taking into account the amount paid by the insurance company, which amount represents an estimated value of the motor vehicle. He also added that despite the evidence in chief and in cross examination, it was erroneous for the Deputy Registrar not to go through the process of conducting a thorough and considered examination of the evidence in making a finding on the assessment of damages in respect of the loss of business.

On behalf of the Respondent, counsel submitted that there is a judgment in this matter which has not been set aside or appealed against by the Appellant. That this judgment is clear as it awards the Respondent a sum certain as damages over a specified period. Counsel added that the only award which was



supposed to go for assessment was that relating to general and exemplary damages.

He submitted that it was the duty of the Appellant to punch holes in the evidence of the Respondent during the hearing of the assessment. That it is too late now for the Appellant to challenge the figures when it failed to do so in the court below. Counsel argued that the Respondent could not mitigate his loss because the insurance company only paid him 90% of the value of the bus and this was over a year later after the accident happened. He cited the case of **Victor Koni V. Attorney-General**<sup>(2)</sup> to support his argument. Counsel argued that the Respondent had provided documentary proof of the loss he suffered. That this is in accordance with the case of **Philip Mhango V. Dorothy Ngulube and others**<sup>(3)</sup> and **J.Z Car Hire Limited V. Malvin Chala, Scirocco Enterprises Limited**<sup>(4)</sup>.

We have looked at the evidence on record and considered the submissions filed by both parties on this ground. We wish to agree with the submissions by the Respondent that what is being appealed against is the assessment by the Deputy Registrar and not the Judgment that awarded the Respondent damages of



K1,200,000 per day for loss of business. We wish to state from the onset that the amount of K1,200,000 per day for loss of business is extremely excessive. However, we are constrained from interfering with this amount because there is no appeal against the interlocutory Judgment in default of appearance and defence which granted that award.

We agree with the submissions by the Appellant that the Respondent should have mitigated his loss, in the circumstances of this case. In the case of **Eastern Cooperative Union LTD V. Yamene Transport Ltd**, referred to above, the court found a period of six months as a reasonable period within which to mitigate one's loss. In the case before us, the Respondent was paid his insurance money on the 30<sup>th</sup> of September, 2008. That was almost a year and two months after the accident. The Respondent was a student at the time. We would expect that despite his financial circumstances, on the authority of **Eastern Cooperative Union V. Yamene Transport**, he could have mitigated his loss by the 2<sup>nd</sup> of June, 2008, when judgment was delivered. It would be unjust enrichment to grant him damages up to the 30<sup>th</sup> of September, 2008, when the insurance company



paid him money for insurance. Therefore, we are of the view that he should be given damages for loss of business for a period of 4<sup>th</sup> July, 2007 to 2<sup>nd</sup> June, 2008 which amounts to eleven months.

However, we note that the assessment by the learned Deputy Registrar only took into account days for rest and not public holidays, costs of service and repairs, driver's salary and the cost of fuel. The Deputy Registrar assessed these days as 48 and subtracted them from the total number of days which the bus in issue would have worked on the road. We wish to state that apart from resting days, the assessment should have taken into account the cost of service and repairs of the motor vehicle, fuel as well as public holidays.

There are a number of public holidays celebrated in Zambia between 4<sup>th</sup> July, 2007 and 2<sup>nd</sup> June, 2008. For the period in question, there are about 13 public holidays celebrated in Zambia. Ordinarily, people do not work on public holidays. We are therefore of the view that the 13 days be deducted from the 287 days assessed by the Deputy Registrar. This leaves us with 274 days. 274 multiplied by K1,200,000 gives us K328,800,000.



In our opinion, we feel that a motor vehicle like the bus which is used for commercial services, requires service and repairs every month in order to keep it running. We are of the view that in 2007 to 2008, an amount of K800,000.00 would be sufficient for the cost of service and repair every month, including the labour of the person that would service the vehicle. Therefore, the period of 4<sup>th</sup> July, 2007 and 2<sup>nd</sup> June, 2008 gives us 11 months. 11 multiplied by K800,000.00 gives us K8,800,000. When we deduct this figure from K328,800,000, we remain with K320,000,000.

Further, the motor vehicle could not have operated without fuel costs. We assess the amount of fuel at K350,000 every day. When we multiply this figure by 274 days it gives us K95,900,000. When we subtract this figure from K320, 000,000, we remain with K224, 100,000.

From this figure, we note that the driver who was driving the motor vehicle was also entitled to a salary. The Respondent, in his affidavit in support did not state how much the driver of the bus was paid as a salary. We are of the view that an amount of K500, 000 in 2007/2008 would be a reasonable amount to



cover a salary of a bus driver. K500, 000 multiplied by 11 months gives us K5, 500,000. When we subtract this figure from K224, 100,000, we remain with an amount of K218, 600,000.

We also note that the Respondent was obliged to pay presumptive tax of K10,000 per day as well as council levy of K10,000 per day. The two taxes add up to K20,000 per day. When we multiply K20,000 by 274 days, we come up with a figure of K5,480,000. When we subtract this amount from K218,600,000, we remain with K213,120,000 (*unrebased*).

Therefore, in the circumstances of the case, we are of the view that an amount of **K213,120(*rebased*)** is what should be paid to the Respondent as damages for loss of business.

This ground of appeal therefore succeeds in part. We set aside the Deputy Registrar's award of K344,400,000(*unrebased*) as damages for loss of business and replace it with an award of K213,120(*rebased*). We award interest on this sum, at the average short term Bank deposit rate from the date of the action to the date of Judgment. Thereafter, up to date of settlement, we award interest, at the current lending rate, as determined by the Bank of Zambia.



The interest on the sums found due is awarded pursuant to **Order 36, Rule 8** of the High Court Rules and **Section 2** of the Judgments (Amendment) Act No. 16 of 1997 of the Laws of Zambia.

In ground two, Counsel for the Appellant submitted that the Respondent did not show any proof to warrant him being awarded the general and exemplary damages. Counsel argued that Order 18, rule 8(3) of the Rules of the Supreme Court requires that general and exemplary damages are pleaded. He stated that the Respondent did not plead them in the court below. It was counsel's argument that the Deputy Registrar failed to consider the pertinent requirements in pleading the general and exemplary damages awarded as the awards appear not to have any basis at all.

On behalf of the Respondent, Counsel conceded that exemplary damages should be specifically pleaded. That they are awarded when it is found that the Defendant's wilful acts were malicious, grossly reckless or fraudulent. He argued that in the Respondent's statement of claim, acts of the Appellant's recklessness were pleaded. That this aspect was not even



challenged by the Appellant during cross examination on assessment in the court below and therefore, must fail. He cited the case of Victor Koni above, to support his argument.

He reiterated that the default judgment which awarded general and exemplary damages was never appealed against.

We have looked at the evidence on record and considered the submissions filed by both parties on this ground.

The learned authors of **Odgers' Principles of Pleading and Practice, 21<sup>st</sup> Edition**, stated at **page 164**, that-

**"... General damage such as the law will presume to be the natural or probable consequence of the defendant's act need not be specifically pleaded. It arises by inference of law and need not, therefore, be proved by evidence, and may be averred generally."**

In the case before us, the natural and probable consequence of the accident is the damage to the bus, loss of business and inconvenience. We are of the view that the Respondent suffered inconvenience as a result of the accident. The Respondent was paid K63,000,000 by the insurance company for the damage caused to the bus. We have awarded the Respondent damages for loss of business. Since we have awarded the Respondent interest on the damages for loss of business, we are of the view that the



interest will cover the inconvenience suffered by the Respondent. Therefore, the award of K5,000,000 as general damages is set aside.

We now come to exemplary damages. The learned authors of McGregor on Damages, 18<sup>th</sup> Edition, Sweet and Maxwell, paragraph 11-011 stated that-

**“... it can confidently be said that today exemplary awards are possible across the whole range of tort. Provided always that there is unacceptable behaviour on the part of the defendant, behaviour that displays features which merit punishment by way of malice, fraud, cruelty, insolence and the like, there is no tort where the writ of exemplary damages will not run.”**

Further, this Court, in the case of Times Newspapers Zambia Limited v Kapwepwe <sup>(5)</sup> held that-

**“In Zambia exemplary damages may be awarded in any case where the defendant has acted in contumelious disregard of the plaintiff's rights.”**

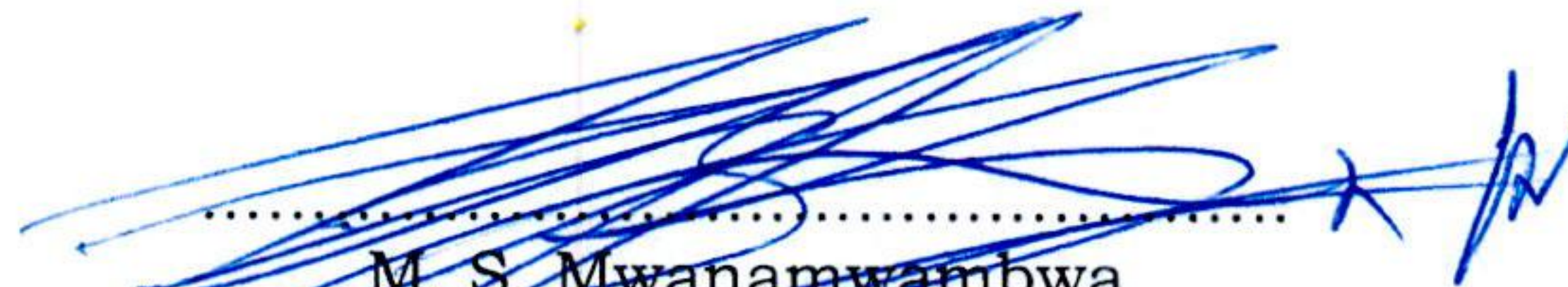
Blackslaw's Dictionary, 9<sup>th</sup> Edition defines the word 'contumelious' as **“insolent, abusive, spiteful or humiliating.”**


In the case before us, no such thing happened. This matter arose as a result of a road traffic accident. There was no malice, fraud, cruelty or insolence which may have resulted in the accident. Therefore, exemplary damages cannot be awarded in



cases of this nature. We therefore allow this ground of appeal. We set aside the Deputy Registrar's award of K15,000,000 as exemplary damages.

Due to the circumstances of this case, we order that each party pays its own legal costs.

  
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M. S. Mwanamwambwa  
**AG/DEPUTY CHIEF JUSTICE**

  
.....  
H. Chibomba  
**SUPREME COURT JUDGE**

.....  
P. Musonda  
**SUPREME COURT JUDGE (RT.)**