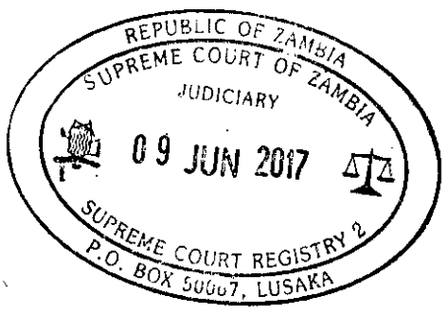
IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT NDOLA

APPEAL NO.176/2014
SCZ/8/73/2014

(Civil Jurisdiction)

BETWEEN:



WESLEY KHUNGA — **1st APPELLANT**

LLOYD MALAMBO — **2nd APPELLANT**

AND

HONOURABLE PETER DAKA (MP) — **RESPONDENT**

Coram: **Hamaundu, Wood and Kaoma, JJS**
on 6th June, 2017 and 9th June, 2017

For the Appellant: Messrs KBF Partners (Filed notice of non-appearance)

For the Respondent: Ms. N. M. Mulenga, Messrs Isaac and Partners, on behalf of Mrs. D. Findlay, Mesdames D. Findlay and Associates

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JUDGMENT

HAMAUNDU, JS, delivered the Judgment of the Court

Cases referred to:

1. **A-G v Mpundu, [1984] Z.R. 6**

This is an appeal against the assessment of damages by the Deputy Registrar. The facts of the case are these:

On 27th March, 2011, a motor vehicle owned by the 2nd appellant and being, at the material time, driven by the 1st appellant was involved in a collision with the respondent's motor vehicle, a Range Rover. On 9th May, 2011, the respondent commenced this action. The claims which the respondent advanced were for: (i) the sum of K500,000,000.00 (unrebased) being the cost of repair to his motor vehicle, and (ii) damages for loss arising as a result of the accident. At this point, we note that, in his statement of claim, the respondent set out particulars of the special damage that he claimed to have suffered: And these were the cost of repairs to his motor vehicle which he pegged at K500,000,000.00.

Judgment was entered summarily by the Judge on 31st December, 2012, in favour of the respondent. The quantum of damages was referred to the Deputy Registrar for assessment. At assessment, the respondent did not advance the head of claim for cost of repairs. This was understandable because the respondent's insurance company paid for the cost of repairs and were pursuing the appellants for re-imbursement. However, the respondent advanced three heads of claim;

(i) a claim for K2,500.00 (rebased) as towing charges; (ii) a claim for K60, 775.00 (rebased) for hiring an alternative vehicle; and (iii) a claim for K24,717.72 being the excess insurance premium that his insurance company had charged him as a result of having declared him an insurance risk after this particular accident.

The appellants challenged the heads of claim. With regard to the head of claim for towing charges, the appellants contended that it was in fact the insurance company which paid for them. Coming to the head of claim for hiring an alternative vehicle, the appellants contended that the cost of K60,775.00 was unreasonable and that the respondent should have mitigated his loss, especially that he had been at the material time a Cabinet Minister who had the use of a government motor vehicle. On the head of claim regarding the higher insurance premium charged on account that the respondent was a high insurance risk, the appellants contended that, in fact, the respondent had made an insurance claim of K350,000.00 (rebased) the previous year; and it was for that claim that he was considered a high insurance risk. The appellants also contended that the franchise dealers had advised that the price of a good second-hand vehicle of the same class as that of the respondent had gone up to about K800,000.00(rebased). The appellant

argued that this was the reason why the respondent's insurance premiums went up.

The learned Deputy Registrar agreed with the appellants that the towing fees were paid by the insurance company and that it was that company which should claim for a refund. On the hiring of an alternative vehicle the Deputy Registrar observed that the respondent had at his disposal a government motor vehicle which he could have resorted to using, even for personal use. The Deputy Registrar, therefore, felt that the hiring of a very expensive motor vehicle was somewhat unreasonable. However, the Deputy Registrar felt that it was the accident which compelled the respondent to hire an alternative. On that ground, the Deputy Registrar apportioned the head of claim at fifty-fifty. On the payment of a higher premium, the Deputy Registrar observed that the appellants were not solely to blame for the insurer's demand for a higher premium. For that reason, the Deputy Registrar apportioned liability, again at fifty-fifty.

The appellants appeal on two grounds, as follows:

First, that the Deputy Registrar erred in both law and fact when she ordered the hiring charge of K60,775.00(rebased) to be apportioned

at fifty-fifty, notwithstanding her observation that the hire of the alternative Land Cruiser vehicle was unreasonable.

Secondly, that the Deputy Registrar erred both in law and fact when she apportioned liability at fifty-fifty contribution on the higher premium of K24,717.72 demanded by the insurer when the evidence showed that the cause of the higher charge was the respondent alone.

In their arguments before us, the parties maintained their respective contentions. In view of the position that we have taken in this matter, we shall not delve into the arguments.

In **A-G v Mpundu**[1], we reviewed a number of authorities on the subject of pleadings and claims for special damages. We then said the following:

> ***"It is thus trite law that, if a plaintiff has suffered damage of a kind which is not the necessary and immediate consequence of a wrongful act, he must warn the defendant in the pleadings that the compensation claimed would extend to this damage, thereby showing the defendant the case he has to meet and assisting him in computing a payment into court. The obligation to particularize his claim arises not so much because the nature of the loss is necessarily unusual but because a plaintiff who had the advantage of being able to base his claim upon a precise calculation must give the defendant access to the facts which make such a calculation possible. Consequently, a mere statement that the plaintiff claims*** *'damages'* ***is not sufficient to***

> ***let in evidence of a particular kind of loss which is not a necessary consequence of the wrongful act and of which the defendant is entitled to a fair warning. In other words, usual, ordinary or general damages may be generally pleaded; whereas, unusual or special damages may not, as these must be specifically pleaded in a statement of claim (or where necessary, in a counter-claim) and must be proved."***

We went on to hold in that case that it was a misdirection on the part of the Deputy Registrar to have not only allowed the respondent to lead evidence to prove special damages which had not been pleaded, but to have awarded them as well.

In this case, the damages in the contention are the sum of K60,775.00 for hiring of an alternative vehicle and the sum of K24,717.72, being the higher charge slapped on the respondent for being an insurance risk. The genesis of this dispute was the collision between the motor vehicle of the appellants and that of the respondent. The necessary and immediate consequence of that collision would be the damage to the respondent's motor vehicle; and personal injuries, if any, to the respondent or any other person who may have been in the motor vehicle. Any other damage would be considered as *"special damage"*. That damage must be specifically pleaded. In this case, the cost of repairs fell squarely in the category of damages which are the necessary and immediate consequence of the collision. However, these

were paid for and were being claimed by the insurance company. The two heads of damage which the respondent advanced at assessment were not the necessary and immediate consequence of the collision. Therefore, they were special damages.

At the beginning of this judgment, we set out what the respondent pleaded, both in his writ of summons and statement of claim. Neither of the damages in the two heads assessed by the Deputy Registrar were pleaded. For that reason, as we held in **A-G v Mpundu**[1], it was a misdirection for the Deputy Registrar to have received evidence on them and proceeded to award them.

Looking at it from another point of view, the judgment in this case was a summary one. It merely granted the respondent his claim, as pleaded. Since the special damages that the respondent claimed at assessment were not pleaded, they could not have been in the contemplation of the judgment when it referred the quantum to the Deputy Registrar for assessment. It can, therefore, also be said that the respondent was allowed to introduce at assessment, and was awarded, heads of damages which the judgment did not refer for assessment.

Whichever way one looks at it, the Deputy Registrar erred when she entertained and awarded the respondent those heads of claim at

assessment. There is, therefore, merit in the appeal. We allow the appeal and set aside the Deputy Registrar's assessment. We award the appellants costs of this appeal.

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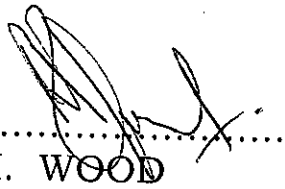
E. M. HAMAUNDU
SUPREME COURT JUDGE



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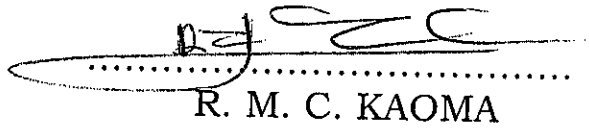
A. M. WOOD
SUPREME COURT JUDGE



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R. M. C. KAOMA
SUPREME COURT JUDGE