



**IN THE HIGH COURT OF MALAWI  
LILONGWE DISTRICT REGISTRY  
CIVIL CAUSE NO. 206 OF 2006**

BETWEEN

LUCY B. CHERENGWA ..... PLAINTIFF

-AND-

SOUTHERN BOTTLERS LIMITED ..... 1<sup>ST</sup> DEFENDANT

NICO GENERAL INSURANCE COMPANY LTD ..... 2<sup>ND</sup> DEFENDANT

**CORAM : T.R. Ligowe : Assistant Registrar**  
Ottober : Counsel for the Plaintiff  
Chilenga : Counsel for the Defendant

**ORDER ON ASSESSMENT OF DAMAGES**

A judgment was entered in this case for the plaintiff against the defendant before Hon. Justice Singini on 22<sup>nd</sup> November 2007. It was perfected on 4<sup>th</sup> December 2007. The perfected judgment reads:

“Upon hearing counsel for the plaintiff and the defendants. It is hereby ordered that judgment on admission be entered against the defendants for the sum of K34 700.09, damages for loss of use and costs to be assessed.”

The plaintiffs claim rises from a road accident involving her motor vehicle Ford Courier Registration No. BK 3021 and the 1<sup>st</sup> defendant's motor vehicle Reyland DAF Registration NO. 8167 insured by the 2<sup>nd</sup> defendant. The accident occurred on or about 29<sup>th</sup> April 2005 due to the negligent driving of the 1<sup>st</sup> defendant's employee. The plaintiff's motor vehicle was damaged beyond repair. On 15<sup>th</sup> December 2005 the 2<sup>nd</sup> defendant paid the plaintiff K150 000 as replacement value of the motor vehicle. In her statement of claim the plaintiff averred that she used to hire out her motor vehicle and was making the sum of K5 500 as profit per day. As a result of the motor vehicle being put out of use she suffered loss which she particularized as follows:

The sum of K5 500 per day from

The 29<sup>th</sup> April to 15<sup>th</sup> December 2005 = K1 265 000.00

Cost of alternative transport to collect

Tobacco and groundnuts from Mchinji

To Lilongwe = K 76 400.00

Cost of Police Report

= K 2 000.00

Cost of towing motor vehicle from Kamwendo

Trading Centre to Lilongwe = K 32 700.00

She therefore claimed, (a) the sum of K1 376 100 and interest at the ruling Stanbic Bank lending rate from the 15<sup>th</sup> of December 2005 to the date of payment, (b) the sum of K162 610 as indemnity for collection costs and the sum of K28 456.75.

I would like to observe before I proceed as regards the judgment and the claim. After the judgment was entered before the Judge, the plaintiff's counsel drafted

the formal order and caused it to be issued by the court. The matter comes before me to assess damages. From the reading of the judgment I have to assess damages for loss of use of the motor vehicle in addition to the sum of K34 700.09 and costs, but that does not seem to be what was claimed. The claim is for loss of profit and other consequential losses and indemnity for collection costs.

Damages for loss of profits of a profit earning chattel are different from damages for loss of use. The former are special damages and as such must be specifically pleaded and particularized and, of course, proved. The measure is based on the nature of business the chattel is put to and the general return therefrom. (See **Namandwa v. Tennet & Sons** 10 MLR 383 applying **Barrows Engr. Ltd v. Jewa**, Supreme Court of Appeal, Civil Cause No. 7 of 1981, unreported, at p.386). The latter are general damages and are calculated on the basis of interest upon the capital value of the damaged chattel at the time of the damage, this value being ascertained by taking the original cost and deducting depreciation. (See **Admiralty Commissioners v. S.S. Chekiang** [1926] A.C. 637 applied in **Namandwa v. Tennet & Sons** 10 MLR 383).

Three witnesses testified and their testimony seeks to prove the loss of profits and the other consequential losses. Counsel for the plaintiff made written submissions to the court. She does not seem to distinguish loss of profits from loss of use. But her arguments go more along damages for loss of profits. Just like counsel for the plaintiff, counsel for the defendants made written submissions to the court and he also does not seem to distinguish loss of profits from loss of use. He however argues more along damages for loss of use. It is very clear though from the evidence that the motor vehicle was a profit earning chattel. Which way do I go?

Perhaps I can be guided by the proceedings in open court before the Judge. Counsel for the plaintiff addressed the court first, referring to the conference both counsel for the plaintiff and the defendant had in the Judge's Chambers where the Judge observed there was no dispute between the parties as to liability but the quantum of damages. So she prayed for a judgment to be entered for the plaintiff. Counsel for the defendant did not object to the judgment being entered and so it was entered for the damages to be assessed by the Registrar. I should believe the judgment was meant to be for damages as claimed in the pleadings which as already stated above are damages for loss of profit and other consequential losses. I think I should go that way.

The evidence given by Mrs. Lucy Cherengwa and her sister Mrs. Juliet Kanjombonda clearly establishes that the vehicle was being used for earning profits. The two witnesses proved to this court that in April and May 2005, they earned K77 550 and K57 990 respectively. This indicates a daily average of K2 990.58 and K2 319.60 respectively. EX P 2 is a notebook in which the daily earnings were being recorded. There are six days in April and May when the vehicle was in garage for service. The plaintiff lost earnings on the vehicle for a period of 230 days from 29<sup>th</sup> April to 15<sup>th</sup> December 2005. In paragraph 5.2 of his written submission, counsel for the defendant has submitted that over the period of 230 days, the garage days would be estimated at 23. Leaving 217 days which if multiplied by the average daily earnings for the two months of K2 655 gives K576 135. I think this amount would fairly compensate the plaintiff for her loss of profits in that period. So I award her that much.

There are the expenses. A plaintiff is entitled to recover expenses made necessary by the tort. In **Liesbosch Dredger v. S.S. Edison** [1933] A.C. 449 the damages that were awarded included not only the market value of a dredger comparable to that sunk but also the costs of adapting it to the plaintiff's needs, of transporting it to the place where the original dredger had

been sunk, and insuring it for this journey. In **Moore v. D.E.R. Ltd.** [1971] 1 W.L.R. 1476 C.A. where the plaintiff's Rover car, which was used by him as a dentist, was rendered a total loss in an accident caused by the defendant's negligence, the Court of Appeal of England held that the plaintiff was entitled to recover for the cost of hiring another Rover car for the 18 months which it took to obtain a new Rover. The plaintiff had been paid the agreed value of the destroyed car by the insurance company. Davies LJ referred to a passage in **Halsbury's Laws** (3<sup>rd</sup> Edn) 263, para 437 and in **Mayne and McGregor on Damages** (12<sup>th</sup> Edn) 1961 para 158 where it is said:

“Although the plaintiff must act with the defendant's as well as with his own interest in mind, he is only required to act reasonably and the standard of reasonableness is not high in view of the fact that the defendant is an admitted wrongdoer. Lord Macmillan put this point well for contract in **Banco de Portugal v. Waterlow** [1932] AC 452 at 506: his remarks apply equally to tort. He said: “Where the sufferer from a breach of contract finds himself in consequence of that breach placed in a position of embarrassment the measures which he may be driven to adopt in order to extricate himself ought not to be weighed in nice scales at the instance of the party whose breach of contract has occasioned the difficulty. It is often easy after an emergency has passed to criticize the steps which have been taken to meet it, but such criticism does not come well from those who have themselves created the emergency. The law is satisfied if the party placed in difficult situation by reason of the breach of duty owed to him has acted reasonably in the adoption of remedial measures and he will not be held disentitled to recover the cost of such measures merely because the party in breach can suggest that other measures less burdensome to him might have been taken.” Whether the plaintiff has acted reasonably is in every case a question of fact, not law.”

Commenting on the rule in **Liesbosch Dredger v. S.S. Edison** McGregor on Damages 16<sup>th</sup> Edn para 1371 observes that:

“Instead of adopting the conventional separation between market value of the property as representing normal measure and loss of profits as representing

consequential loss, the rule fuses the two heads: this leads to a danger of duplication of damages if the two heads are not viewed in relation to each other, a danger recognized by Lord Wright. He said:

The rule ... requires some care in its application; the figure of damage is to represent the capitalized value of the vessel as a profit-earning machine, not in the abstract but in view of the actual circumstances. The value of prospective freights cannot simply be added to the market value but ought to be taken into account in order to ascertain the total value for purposes of assessing the damage, since if it is merely added to the market value of a free ship, the owner will be getting *pro tanto* his damages twice over. The vessel cannot be earning in the open market, while fulfilling the pending charter or charters.”

In view of this observation and in view of the fact that the plaintiff has been awarded damages for loss of profits for the period her motor vehicle was not in use to the time she got what would be termed the normal measure of damages for the destroyed motor vehicle, I see it not fit to award anything more in terms of the cost of hiring another vehicle to transport her farm produce from Mchinji. If I did, it would amount to making the plaintiff get *pro tanto* his damages twice over. However, I take judicial notice of the K2 000 she paid for the police report and make an award for that.

In summary the plaintiff is awarded K576 135 for loss of profits and K2 000 for the police report making a total of K578 135 plus costs of the action.

Made in chambers this 10<sup>th</sup> day of October 2008.

T.R. Ligowe

ASSISTANT REGISTRAR