



JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
PERSONAL INJURY CAUSE NO. 637 OF 2012

BETWEEN:

**LLOYD CHALEMERA (On his own behalf and
on behalf of THOKOZANI CHALEMERA deceased).....PLAINTIFF**

AND

CLOVA HOLDINGS LIMITED.....1ST DEFENDANT

GENERAL ALLIANCE INSURANCE LIMITED.....2ND DEFENDANT

CORAM: K. BANDA, ASSISTANT REGISTRAR

Mwakhwawa of Counsel for the plaintiff

Chagoma of Counsel for the first and second defendants

Miss E. Chimang'anga, Court Clerk

ORDER ON ASSESSMENT

Today I give out an order on assessment of damages consequent to the assessment proceedings held on 25th of April, 2017 in this chamber. The same is premised firstly on a claim for loss of dependency and loss of expectation of life. The plaintiff also claims costs of police and death reports respectively and also funeral expenses. Liability was settled by consent judgment dated 17th August, 2017. And by consent it was agreed that damages payable be determined and assessed by the registrar at a date to be fixed. The said day being the said 25th day of April, 2017.

BRIEF FACTS

The brief facts of the case are that on 3rd May, 2012 the deceased herein, Thokozani Chalemera was near the pedestrian crossing at the polytechnic in Blantyre when the 1st defendant's agent driving motor vehicle registration number SA 4410 Toyota Tipper insured by the 2nd defendant negligently and violently swerved to the extreme nearside onto the sidewalk and hit a pole and in the process collided with the deceased leading to his premature death. At the time of death the deceased was 17 years.

EVIDENCE

The only plaintiff's witness was Lloyd Chalemera, who told the court that he was the father to the deceased. He tendered in evidence: consent order on liability, police report, autopsy report, and limited letters of administration. The same were marked as exhibits 1 up to 4.

In cross examination, he confirmed being the administrator of the estate herein. He also admitted lodging a claim for funeral expenses but had no receipts for the same. He further went on to state that they are other dependents of the deceased namely: Lloyd Chalemera Junior, aged 12 and currently schooling at Phwezi and mother Mrs. Rose Chalemera.

It must be stated that in the course of the proceedings and with permission of the court upon consultation with counsel for the plaintiff, counsel for the defendants cited and presented two cases authorities to which plaintiffs' counsel requested 10 days within which to have a look at the same and respond. To this date, the same is yet to be filed. I feel it has been long and speed is of essence in these matters.

THE LAW

1. LOSS OF EXPECTATION OF LIFE

It is trite law that an action for loss of expectation of life is maintainable on behalf of the estate of the deceased at law. See *Rose v Ford*, [1937] AC 826. That said, it should also be stated that such awards are described as being conventional. See *Cain v Wilcock* [1968] ALLER 817. The reason is that loss of expectation of life is an aspect that cannot be quantified in monetary terms by use of any known mathematical formula. The prime factor

always to be kept in mind is the prospect of a predominantly happy life. See *Benham V. Gambling* (1941) AC 157.

Further in *Nyirongo v United Transport (Mal) Ltd* [1990] 13 MLR it was held that an action of this nature can only be pursued by a personal representative, as opposed to being instituted by or on behalf of dependents, because such damages accrue to the estate. As to who is a "personal representative", *Blacks Law Dictionary*, 6th Edition, at page 1302 defines him as being a person who manages affairs of another because of incapacity or death.

In the present case I notice that letters of administration were obtained on 10th May, 2016. On the other hand, the writ was filed on 17th September, 2012 and issued on 26th of the same month. The defendants did acknowledge this on 16th October, 2012. There was even a defence to it. Clearly there is an anomaly here in that, first was the requirement of obtaining the letters of administration that would then entitle the plaintiff to sue not otherwise. This is so because whereas, in the case of an executor or executrix his title to sue relates back to the date of the death of the deceased, in the case of an administrator, his title to sue relates back to the date of the grant of letters of administration, which must therefore be obtained before the action is commenced. From the foregoing, this means that at the time of commencement of the action, the plaintiff had no capacity to sue.

The question I have to deal with now is; having found that at the time of commencement of the action, the plaintiff had no capacity to sue, should that still impede the plaintiff despite obtaining the said letters even before the proceedings the subject of this order?

Counsel for the defendants cited two cases in his purported effort to buttress the point that the court should not make any determination on this aspect of the claim on damages. I had a look at the said two cases of *Tafwirachi Mwakiyeye v Kangawe Ali and General Alliance Insurance*, Civil Cause No.116 of 2012 and that of *Mr. D Helani v A.J Hawken and others*, Personal Injury Cause Number.808 of 2011. From these cases, firstly I take note that both cases were decided by my colleagues whom we have concurrent jurisdiction and therefore I am not bound in anyway. That said, in the first case, that of *Tafwirachi*, the plaintiff at the time of hearing had no letters of administration obtained from any

competent court of law and neither was there a will appointing an executor or executrix. I find no problem therefore with the finding of that court as regards the facts before it.

I however notice that the situation before me is slightly different. Much as the letters of administration were obtained later, the same was done before the assessment proceedings. Such that at the time of assessment the letters of administration were on court file. To the extent that the procedural technicality that was overlooked at commencement of the proceedings was remedied before the matter came to assessment. I hasten to state that in my view the very reason of this procedural requirement is; to a larger extent to ensure that the right person(s) gets the benefit and nothing more. In other words I see no justification of dismissing this aspect of the claim and punish the innocent plaintiff on such non-fatal procedural impropriety.

That said, my learned colleague concurred with the defendants in that case that admission of liability by consent did not expressly and unequivocally settle the question of whether damages for loss of expectation of life are awardable. I find the position to be the same in the matter herein. However as alluded in the preceding paragraph, the same on the reasons given in that paragraph suffices to be distinguishable and I do so for this case.

All having been said and reverting to the matter herein, what is important and also not in contention is that the deceased was 17 years old at the time of death and enjoyed good health and that were it not for the accident, with the life expectancy pegged at 58.8(*this is an average: world bank puts it at 63.9 see. www.worldbank.org/en/country last accessed at 12.22am on 10/01/2017, National statistics office at www.nsomalawi.mw puts it at 53.35 last accessed on 10th January,2017 at 12.14am, and World Health Organisation puts it at 58.3 and Lancet Journal puts it at 60.8*) the deceased had all the chances of reaching 55, that is taking into account all the eventualities that life consists of and hence had close to 38 years to live.

That said I now have to determine what sum to award in this circumstances. To achieve this, I have considered the cases of *Chimbula v Yona t/a Chokhotho*, Civil Cause No.301 of 2001, where the court awarded the sum of MK60,000.00 to a person who died aged 21. And also of *Florence Aaron v M Tarhomed*, Civil Cause No.407 of 2004, where the court

awarded a sum of MK100,000.00 for a person who died aged 18. Again I also noted that in the case of *Beatrice Ramero v Prime Insurance company Limited*, Civil Cause Number 1407 of 2008 pronounced on 22nd July, 2011, the court awarded the sum of MK250,000.00.

The above said, I am however not oblivious of the fact that these awards are not supposed to fluctuate with each case but are ordinarily supposed to be fixed. See. *Benham v Gambling* [1941] A.C.157. In our own scenario here, that is on the fixing of the award, Mwaungulu, R as he then was in *Nyirongo v United Transport(Mal) Ltd*(1990) 13 MLR 344(HC), fixed it at MK1,500.00. To date unless otherwise inadvertently overlooked, neither the High Court nor the Supreme Court of Appeal has made any decision that departs from the amount fixed by the learned registrar then. Such that a slightly different award was made in *Beatrice Ramero v Prime Insurance company Limited* cited earlier.

That said, in the absence of such sum being fixed by the higher court as at the time of writing this order the discretion remains with me as to how much should be awarded. In respect of the matter herein I revert to the cases cited earlier and considering that the cited cases were decided way back, I consider the sum of **MK700, 000. 00** as a reasonable sum and award the same under this head.

2. LOSS OF DEPENDENCY

Apart from damages for loss of expectation of life, the plaintiff also claimed damages for loss of dependency. For a start, for damages under this head, the basic rule is that they are to be calculated in reference to a reasonable expectation of pecuniary benefit as of right or otherwise, from the continuance of life (per *Pollock C.B* in *Franklin v S.E.Ry.*(1858)3H &N.211, at page 214. Again there is no need for the dependent to show that the deceased was under legal liability to support him or her. See. *Franklin v S.E .Ry.* (ibid). Again there is no need to show that the dependent was receiving pecuniary benefit at the time of the death, a purely prospective loss being sufficient. That is to say a dependent parent might not have reached an age requiring assistance; alternatively, a deceased child might not have reached an age when he or she could afford to render assistance. See. *Taff Vale Ry. v Jenkins* [1913] A.C. 1.

That said, in arriving at the damages recoverable the courts use the multiplicand multiplier approach. See. *Mallet v. McMonagle* (1970) A.C. 166, 175 and *Mbila and Another v Attorney General and Another* [1993] 16 MLR 313. The multiplicand is a figure representing the annual value of the dependency, and the multiplier is the approximate number of years that dependency is deemed to continue. See. *Banda and Chibukhu Products Ltd v Chunga*[1987-89]12MLR 283. Now, to get a proper multiplicand, the calculations are made on the assumption that the deceased would have spent a third of his income for personal expenses. See. *Thindwa v Attorney General and Another* [1995] 1MLR 336. The resulting amount is then scaled down by reason of two considerations. Firstly that a lump sum is being given instead of the various sums over the years and secondly that contingencies might have arisen to cut off the benefit prematurely.

A look at several case authorities on point show that the most relevant factor which the courts have in mind when making these awards is the age of the deceased at the time of death. In the case herein, the deceased at the time of death was 17years old and as alluded earlier at the University doing her studies.

Taking it that currently life expectancy is at 58.8(see under loss of expectation of life), and lowering it to 55, on the premise that other factors could have arisen that could have a cutting effect on his life, then it can be said that the deceased would have leaved 38 years more.

That said, the deceased at 17, was not of employable age as she was not yet 18. We however note that he was a university student. That to us explains her potential abilities nipped in the bud and truly possibilities of good employment he would have enjoyed had he lived to reach that age. As such to do justice to the case, I find it pertinent to use half the minimum wage as the multiplicand.

As of now and according to the Employment (Minimum wages) (Amendment) Order, 2017, the minimum wage now stands at MK 962.00 per day effective 1st July, 2017. As these proceedings were had before the 1st of July, 2017, then the applicable sum is MK17, 880.20 (K687.70x26) per month. And half of this is MK8, 940.10.

Using the formula, the value of lost dependency becomes: **MK8, 940.10 x 38 x 12 x 2/3**
=MK 2,717,790.40

I therefore award the plaintiff the sum of MK2, 717,790.40 as damages for loss of dependency. For the avoidance of doubt, the plaintiff is awarded a total sum of **MK3,417,790.40.**

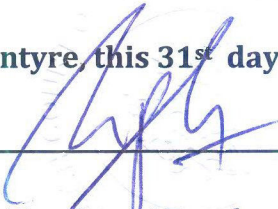
That said, plaintiff told the court that other dependents include the mother of the deceased, Mrs. Rose Chalemera (aged not disclosed) and Lloyd Chalemera Junior aged 12 at the time of assessment and schooling at Phwezi. I therefore apportion the sums as follows:

1. Lloyd Chalemera MK 1,065,337.20
2. Mrs Rose Chalemera MK 1,065,337.20
3. Lloyd Chalemera Junior MK1,287,116.00

The sum awarded to Lloyd Chalemera Junior shall be paid into court and shall be deposited in interest earning account for his benefit.

That said, unlike general damages, special damages have to be specifically pleaded. In the matter herein, the plaintiff did plead but did not give receipts or any evidence in support of what obtained as the costs of police and death reports respectively. Equally nothing was tendered in support of funeral expenses. In the absence of tangible evidence, I decline to speculate that the same were paid for. The law is clear, that these must not only be pleaded but must be strictly proved. See. *Masiye v Chibukhu Products Ltd and Another* [1997]1 MLR(ibid). The plaintiff failed to prove the same. However, despite my declining on the above, I still grant costs to the plaintiff. And as per the consent order of 17th August, 2017, executed by the parties, the same are to be taxed if not agreed by the parties.

Ordered in Chambers here at Blantyre, this 31st day of January, 2018 in the Republic



Kondwani Banda

Assistant Registrar