



**IN THE HIGH COURT OF MALAWI**

**PRINCIPAL REGISTRY**

**CIVIL CAUSE NO. 636 OF 2010**

**BETWEEN**

**JACQUES MARIETTE ..... CLAIMANT**

**AND**

**TOYOTA MALAWI LIMITED ..... DEFENDANT**

**CORAM : HER HONOUR EDNA BODOLE, ASSISTANT REGISTRAR**

Msuku, of Counsel for the Claimant

Kara, of Counsel for the Defendant

Ms. Kazembe, Court Clerk

**ORDER ON ASSESSMENT OF DAMAGES**

**Introduction**

The claimant brought proceedings against the defendant claiming damages for conversion, loss of use of motor vehicle, and costs of the action. Judgment on liability was entered for the claimant on 12<sup>th</sup> October, 2015. The matter has now come for assessment of damages.

**The Evidence**

The evidence before this court is that in January, 2008, the claimant sold his motor vehicle, a Toyota Runx, 2002 model to Mr. Lobo at a price of K500,000.00. The

condition of sale was that Mr. Lobo would have possession of the motor vehicle after he paid the full price. Mr. Lobo paid K100,000.00 and remained with a balance of K400,000.00. In February, 2008 the claimant left his motor vehicle at the defendant's garage for repairs. When he took the motor vehicle to the defendants, the motor vehicle was not running. The defendant then handed over the motor vehicle to Mr. Lobo. The motor vehicle was handed over when it was not in running condition. The defendant never gave the claimant any bill that they had fixed the motor vehicle. The defendant did not inform him that they had failed to fix it and he would have taken it to another garage for repairs. Mr. Lobo had not fully paid for the motor vehicle when it was handed over to him. He has not paid the balance up to date and the non-payment was not due to the fact that he had paid repairing costs.

The claimant never disrupted the use of the motor vehicle by Mr. Lobo. It was the defendant's responsibility to retrieve the motor vehicle from Mr. Lobo because they were the ones who gave him the motor vehicle. The claimant instituted proceedings against the defendant in March, 2010. Mr. Lobo knew in 2011 from the defendant's lawyers that the claimant had sued the defendant in respect of the motor vehicle. He knew that the claimant was protesting his use of the motor vehicle. During this time, Mr. Lobo was still using the motor vehicle. He used it for 3 years and then sold it.

The claimant tendered a quotation of the motor vehicle of a similar make valued at K3,700,000.00. The quotation was obtained on 23<sup>rd</sup> October, 2015. During cross-examination, the claimant stated that the quotation was for a Toyota Runx 2007 model while his motor vehicle was a 2002 model. He had bought it as a second hand or pre-owned motor vehicle. He admitted that the quotation was for a properly functioning motor vehicle and he would just put in the key and drive off. He also stated that the quotation does not demonstrate to the court the average price of the motor vehicle as he had just exhibited one quotation to the court.

The claimant testified that he did not incur hire costs after Mr. Lobo took the motor vehicle from the defendant. The exhibits he tendered are just quotations for hiring charges and not receipts. The period of loss of use of the motor vehicle would not be stated with certainty because he could not tell that by such a date the motor vehicle would have been running. He stated that the period of loss of use of motor vehicle



should be the time between Mr. Lobo took the motor vehicle from the defendant to the time he would have made full payment of the motor vehicle.

DW1, Mr. Levison Mvuta tendered some documents that showed that Messrs. Blantyre Legal who are counsel for the defendant purchased a motor vehicle similar to that of the claimant in 2017. The purchase price was K3,500,000.00. During cross-examination he testified that he did not know the date for the initial registration of the motor vehicle. He also testified that he does not know how long the initial user used it. He confirmed that pricing of motor vehicles is not only based on year of make but usage. He stated that the price of this motor vehicle is not the price of motor vehicles generally but the price of this particular motor vehicle.

### Applicable Law

A person who suffers damage due to the breach of another is entitled to the remedy of damages. Such damages are recoverable for both pecuniary and non-pecuniary losses. The principle underlying the award of the damages is to compensate the injured party as nearly as possible as money can do it and be put in the same position as if he has not suffered loss – *Elida Bello v Prime Insurance Co. Limited* Civil Cause No. 177 of 2012.

### Damages for Conversion

The normal measure of damages for conversion is the reasonable cost of repair – *Kadango and Others v Stagecoach Malawi Limited* (1995) 2 MLR 677. But where the goods have been damaged beyond economic repair, the measure of damages is the replacement market value of the damaged goods – *Chimbereko v Chigwe* [2005] MWHC 95.

### Damages for Loss of Use

On the claim for damages for loss of use of a motor vehicle the court in *Chinema v World Vision International* Civil Cause No. 1097 of 1991 stated that:

*“It is conceded that the courts are rather conservative in awarding damages for loss of use and the cases do not show a criteria for awarding damages for loss of use...I have pointed out that awards for loss of use are not consistent and they depend on the circumstances of each case.”*

The court also takes into account the value of the motor vehicle and period of loss – *Namandwa v Tennet (J) & Sons Limited* 10 MLR 383. The claimant must prove that there was indeed use of the motor vehicle which eventually came to a halt by virtue of interference by the actions of the defendant. In *Nchiza and Living Waters Church v Malawi Telecommunications Limited and CGU Insurance Limited* Civil cause number 1093 of 2002 the claimant lost use of a motor vehicle for domestic purposes for a period of 8 months. The court awarded him a sum of K40,000.00 on 19<sup>th</sup> May, 2003. In *James Rodger Kadango Simika v Prime Insurance Company Limited* Civil Cause No. 4087 of 2002 the claimant lost use of his motor vehicle for 7 months. The court awarded the claimant a sum of K50,000.00 in February, 2004.

The court also considers whether or not the motor vehicle was for domestic or commercial use. In *Chimbereko v Chigwe* (supra) the court stated that:

*“I must mention that difficulties arise in measuring damages for loss of use of damaged chattels used for utility and not profit earning. I am facing that difficulty here because no evidence has been given whether the vehicle in question was being used for earning profit and how much. In England damages would not be awarded under such circumstances until 1897 when the House of Lords in **The Greta Holme** [1897] AC 596 corrected the error and decided that in such a case general damages might be recovered. This decision was later followed and clarified by two further decisions of the House of Lords in **The Mediana** [1900] A.C. 113 and **The Marpessa** [1907] A.C. 241. Where there is no substitute vehicle hired and no stand-by vehicle kept available, the amount of damages is generally to be calculated on the basis of interest upon the capital value of the damaged vehicle at the time of the accident; this value being ascertained by taking the original costs and deducting depreciation. This is even difficult in the present case as no figures for depreciation have been given in evidence.*

The court went on to say that:

*“Where damage is shown but its amount is not sufficiently proved, the courts have awarded nominal damages.”*

The court then went on to award the claimant nominal damages of K20,000.00 for loss of use of motor vehicle for a period of 3 years. The claimant had claimed a sum



of K650,000.00 and the court held that no evidence had been given to justify that figure.

### Mitigation of Damages

A party under loss is supposed to mitigate his loss. Whether or not a party failed to mitigate his loss is judged by the facts of the case. Where a party that is liable in damages claims lack of mitigation and that wants damages otherwise due to be reduced, it is for such a party to bring evidence to justify reduction. In ***Phiri t/a Construction Service v Attorney General*** 12 MLR 112 the court stated that:

*“The burden of proving that a plaintiff should have taken steps in mitigation which he failed to do so is on the defendant, and whether the plaintiff has satisfied the duty to mitigate is a question of fact.”*

A claimant will be put under no further burden in the name of mitigating damages than that which is ordinary in the circumstances. In ***Hassen v SR Nicholas Ltd*** 11 MLR 505 the court stated that:

*“The law is satisfied if the party placed in a difficult situation by reason of the breach of a duty owed to him had 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.”*

### Analysis

The evidence before this court shows that the claimant commenced the action as early as March, 2010. By this time, Mr. Lobo was in possession of the motor vehicle. Mr. Lobo knew in 2011 from the defendant’s then lawyers that the claimant had sued the defendant in respect of the motor vehicle. He knew that the claimant was protesting his use of the motor vehicle. During this time, Mr. Lobo was still using the motor vehicle. He went on to use it for 3 years and later sold it. The commencement of the action shows that the claimant was protesting the possession of the motor vehicle. He was protesting against the defendant who was the one who handed over the motor vehicle to Mr. Lobo. Mr. Lobo was not a party to the arrangement between the claimant and the defendant. Upon being sued it was up to the defendant to follow-up with Mr. Lobo and retrieve the motor vehicle from him.

Moreover, Mr. Lobo was still using the motor vehicle and the defendant could have easily retrieved it from him. The claimant had, therefore, done all he could to mitigate the damages.

The evidence before this court further shows that the motor vehicle which was converted by the defendant was a non-runner. It was a Toyota Runx 2002 model. The quotation tendered by the claimant for a replacement motor vehicle is a quotation for a running Toyota Runx 2007 model. The claimant is only entitled to be compensated with an amount which will enable him to acquire another motor vehicle in the same state as the one which was converted by the defendant. This would be a non-runner Toyota Runx 2002 model.

As it is, there is no quotation to show the market price of a non-runner Toyota Runx 2002 model. The available evidence is that the claimant sold the motor vehicle to Mr. Lobo at a price of K500,000.00 in 2008. This sum will be treated as the market value of the motor vehicle in 2008. This court will, therefore, determine a sum of money that will reasonably compensate the claimant. The claimant is awarded a sum of K3,000,000.00 as damages for conversion.

As regards loss of use of motor vehicle, the claimant could not specifically say the period he would have been able to use the motor vehicle. The motor vehicle was a non-runner at the time the claimant took it to the defendant. This means that at that particular time, he was not using it. However, if it had been repaired, he could have used it until the time Mr. Lobo would have paid the full price. Unfortunately, the defendant delivered an unrepaired motor vehicle to Mr. Lobo. This motor vehicle would have been repaired and be of use. This is evidenced by the fact that Mr. Lobo was able to repair it and use it. The claimant was deprived use of the motor vehicle from the time it would have been repaired to the time Mr. Lobo would have paid the balance.

There is no evidence to show what the motor vehicle was used for i.e. for private use or for business. Also, the claimant did not hire another motor vehicle. This court agrees with the claimant that the quotation on hiring charges are evidence of market value and not costs spent by the claimant. With all these ambiguities, this court is unable to calculate the amount to represent loss of use of the motor vehicle. This court is of the view that this is a proper case for awarding nominal damages. This



court awards the claimant a sum of K600,000.00 as damages for loss of use of motor vehicle.

Conclusion

The claimant is awarded a total sum of K3,600,000.00 as damages for conversion and loss of use of motor vehicle. The claimant is also award costs of the proceedings.

Made in court this 23<sup>rd</sup> day of May, 2019 at Blantyre.



**EDNA BODOLE**

**ASSISTANT REGISTRAR**