IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NUMBER 1464(A) OF 1993

BETWEEN

R. MPHANGAZIRA **PLAINTIFF**

AND

THE ATTORNEY GENERAL **DEFENDANT**

CORAM: MWAUNGULU, J

Chizumila, for the plaintiff

Chigawa, for the defendant

Mkandawire, Recording Officer Mwaungulu, J

ORDER

In this action the plaintiff is suing for general and special damages following a road accident that occurred on the 27th of March 1993. There was a collision between the plaintiff's minibus and a motor vehicle of the Department of Customs and Excise. The plaintiff's motor vehicle was severely damaged. It cannot be repaired. On 28th October the plaintiff took out this action. Judgment was obtained by default. The application to set aside judgment was abandoned. The only issue for determination by this Court is the amount of damages.

The damages claimed are special and general. For the former the plaintiff is claiming the value of the motor vehicle. He puts the value at K50, 000. He claims towing charges of K1, 400, hire expenses of K2, 505, the cost of a police report at K25, medical expenses of K60 and the cost of a valuation repot at K35. On general damages the plaintiff is claiming for loss of earnings and inconvenience. There is much ado about the value of the car and loss of earnings. Much of that ado relates to proof of the value for the motor vehicle.

The disputation is resolved by considering the law on the matter. In this matter the Court has to consider what the measure of damage is when the subject matter has been destroyed by the defendant's action whatever that may be. The principles to apply were developed in relation to damage to a ship. They apply however to destruction of any chattel. "In these cases," declared Lord Wright in Liesbosch Dredger -v- S.S. Edison

[1933] A.C. 449,463, “the dominant rule of law is the principle of restitutio in integrum, and subsidiary rules can only be justified if they give effect to that rule.” The purpose of the law is to bring the parties status quo ante. “The true rule,” Lord Wright said, “seems to be the measure of damages in such a case is the value of the ship to her owners as a going concern at the time and place of loss. In assessing that value regard must naturally be had to her pending engagements, either profitable or the reverse.” The Lord Justice then laid down what the award should have been:

“The value of the Liesbosch to the appellants, capitalised as at the date of loss, must be assessed by taking into account: (1) the market price of a comparable dredger in substitution; (2) costs of adaptation, transport, insurance, etc., to Patras [the place of the collision]; (3) compensation for disturbance and loss in carrying out their contract over the period of delay between the loss of the Liesbosch and the time at which the substituted dredger could reasonably have been available for use in Patras, including in that loss such items as overhead charges, expenses of staff and equipment, and so forth thrown away, but neglecting any special loss due to the appellant’s financial position. On the capitalised sum so assessed, interest will run from the date of the loss.”

The measure of damages then in case of total destruction of the chattel that is a going concern is the market value to enable the plaintiff to obtain a replacement.

The problems of establishing that value have been recognised by Courts. Those problems arise here. The motor vehicle in question was bought in 1973. It was a runner. It might be old. It was being put to good use. One can conceive of the difficulties one might have in giving a value to such a car. Anyway its actual value may be less and, if awarded, may not enable the plaintiff to find a replacement to enable him to continue using the vehicle as a going concern. If such a value were to be applied, the court will not have achieved restitutio in integrum. The problem was recognised by Gorell Barnes, J., in The Harmonides [1903] P 1, 6:

“If one goes to the root of the matter, it is obvious that what the shipowners lose if a vessel like this is run into and sunk is what it would cost is what it would cost to replace them in the position they were in before the accident. But where a ship like this has gone to the bottom you cannot, speaking from a business point of view, replace them in a position they were in before, because you cannot replace a vessel which is at the bottom of the sea; you cannot buy another like her in the market; you cannot get another made immediately, and if you bought another ship she would be new, and consequently more valuable, because she would start as a new ship from that day, and, therefore, you would have to discount her value down. So that the real test, where there is no market, is, as counsel from both sides agree, what is the value to the owners, as a going concern, at the time the vessel was sunk. You cannot get at this with any great certainty, for you cannot get at it from the market value. Possibly, for such a ship at such time there would be no buyers and she would be sold for iron. ... You must look at it and see what is the loss to the owners. It has been pointed out that you may look at original cost, plus the money expended on her, and so forth. That is of assistance, but it is not complete assistance, because it is a rough and ready method. You may look and see also how the ship is paying. That, however, is not a complete test, because you cannot be sure the way she has

been paying will continue. But one thing is certain - you cannot say the test is her market value."

Before this statement the judge laid down the sort of evidence that would establish the market value of the ship. "There is no doubt," he said. 'That in this class of case the best evidence is that of those who know the ship, and the next best evidence that of those who have experience of the market, but who do not know the vessel except from the shipping records." He went on to say:

"There are other criteria, such as the amount of capital invested, the amount of depreciation, the amount of profits, and so forth. All these matters have to be considered, to my mind, where it is impossible to say that there is a real market test of the value of such a vessel as this."

Here two categories of witnesses have come to help the court to arrive at the correct measure of damages. The plaintiff himself is claiming K120, 000. He says this is the value of a second hand motor vehicle he has found. This aspect of the evidence has not been challenged. The plaintiff also called Mr. Ali. Mr. Ali works for Mobile Motors, the car dealers of the motor vehicle damaged. He has been servicing this car for a long time. His evidence is that the replacement value of the motor vehicle is K50, 000. With the devaluation of the Kwacha, the replacement value is K70, 000. He told the court that a new car of the same make costs K270.000. The figure of K50, 000 was based on the amount the plaintiff was spending on the repairs of the motor vehicle. The replacement value, according to the witness, is what has to be paid for a second hand motor vehicle like the one destroyed. The defendant called Mr. Khonje. He has a qualification in mechanical engineering. He is working for the National Insurance Company. He put the market value of the car at K15, 000. His estimate is based on depreciation of the motor vehicle. All these were here to help the court arrive at the correct award.

The plaintiff's claim for K120, 000 is to my mind exagerrated. The Court can only award the plaintiff the market value of the vehicle plus the other items referred to by Lord Wright. The plaintiff cannot go into the market, choose a car that suits his taste and come to Court and say to the court, 'Give me this car.' The evidence of Mr. Khonje, though evidence of value and Mr. Khonje also saw the motor vehicle, is of inferior weight compared to the evidence of Mr. Ali who deals in the type of cars and has been repairing the plaintiff's car.(The Harmonides, ibid., The Ironmaster (1859) Swab. 441). The plaintiff pleaded that he is claiming K50, 000 for the value of the motor vehicle. The plaintiff can only do so for liquidated damages. General damages are at large. The plaintiff cannot plead an amount for them. The market value at the time of the loss is K70, 000 at devaluation value.

The plaintiff is also claiming for loss of profits. The plaintiff is not entitled to these where the motor vehicle has been destroyed. What the plaintiff is entitled to is what was said by Lord Wright in a passage I have referred to earlier. Once the Court has awarded the sum as mentioned by Lord Wright, the claim for profit must be approached with caution because of the fear of overlapping. Lord Wright said:

“The rule ... requires some care in its application; the figure of damage is to represent the capitalised value of the vessel as a profit-earning machine, not in the abstract but in view of that actual circumstances. The value of prospective freights cannot be simply 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 damage twice over. The vessel cannot be earning in the open market, while fulfilling the pending charter or charters.”

In The Llanover [1947] P. 80 the Court determined that the claim for profit did not form a head of damages because as these were contained in the enhanced market value of the ship. In The Fortunity [1961] 1 W.L.R. 351 the amount was awarded but it was because it was ‘the expectation of a reasonable return on his capital, and not taking into account the fact that she was already fixed with considerable bookings for the next season, with a virtual certainty of full employment throughout the season.’ The other approach is to reduce the market value and award for the loss of profit (The Philadelphia [1917] P. 101). The change in the market value, therefore is not relevant to the normal measure of damages.

Here Mr. Ali has told the court that the market value of the motor vehicle is K50, 000. We cannot take the price at devaluation. This is catered in a way by changes in the rate of interest. The plaintiff will therefore be awarded K50, 000. There is no award for loss of earnings. On the capitalised sum interest will run from the date of loss up to the date of payment. The plaintiff is entitled to the other claims totaling K4, 025.

Made in open Court this 17th Day of September 1997.

D.F.Mwaungulu

JUDGE