IN THE SUPREME COURT OF ZAMBIA **Appeal No. 19/2017**
HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

MADISON GENERAL INSURANCE COMPANY LTD. **1ST APPELLANT**

AND

AVRILL CORNHILL **1ST RESPONDENT**

MICHAEL KAKOMA **2ND RESPONDENT**

Coram: **Musonda, DCJ, Malila and Kajimanga, JJS**
on 3rd March, 2020 and 27th May, 2020

For the Appellant: Mr. M. Chiteba of Messrs Mulenga Mundashi, Legal Practitioners

For the Respondents: Mr. R. Musumali of Messrs SML Legal Practitioners

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JUDGMENT

MALILA, JS, delivered the Judgment of the Court

Cases referred to:

1. *Shoprite Holdings Ltd. & Another v. Lewis Chisanga Mosho & Another (SCZ Judgment No. 40/2017).*
2. *Ram Auerbach v. Alex Kafwata (SCZ appeal No. 65 of 2000).*
3. *NFC Mining Plc v. Techpro Zambia Ltd. (2009) ZR 230 NFC Mining Plc v. Techpro Zambia Ltd. (2009) ZR 236.*
4. *Zambia Revenue Authority v. Charles Walumweya Muban Masiye (SCZ Appeal No. 56 of 2012).*
5. *Bank of Zambia (As Liquidator of Credit Africa Bank Limited in Liquidation) v. Al Shams Buildings Material Company Ltd (SCZ Appeal No. 214/2013).*
6. *Peter David Lloyd v. JR Textiles Ltd (SCZ Appeal No. 137 of 2011).*
7. *Socote International Inspection (Zambia) Ltd v. Finance Bank (SCZ Appeal No. 149 of 2011).*

8. *Access Bank (Zambia) Ltd. v. Group Five/ZCON Business Park (Zambia) SCZ/8/52/2014.*
9. *Saeli Kalaluka v. Zambia National Commercial Bank (Selected Ruling No. 18 of 2017*
10. *Mary Musambo Kunda v. Attorney-General (1993-1994) ZR 1.*
11. *Bank of Zambia v. Caroline Anderson and Andrew W. Anderson (1993-1994) ZR 47.*
12. *Duly Motors (Z) Ltd. v. Patrick Katongo & Livingstone Motor Assemblies (1986) ZR 61.*
13. *Ozokwo v. The Attorney-General (SCZ Judgment No. 15 of 1985).*
14. *Uctkos v. Mazzetta (1956) 1 Lloyd's Rep. 209.*
15. *Zambia Publishing Co. Ltd v. Pius Kakungu (1982) ZR 167*
16. *Attorney-General v. Fred Chileshe Ngoma (1987) ZR 80.*
17. *Phillip Mhango v. Dorothy Ngulube & Others (1983) ZR 61.*
18. *J. Z. Car Hire Limited v. Chola Scirocco (2002) ZR 113.*
19. *Midlands Breweries (Pvt) Ltd. v. David Munyenyembe (2012) (1) ZR 133.*
20. *Zambia State Insurance Corporation v. Serios Farm Corporation (1987) ZR 93*
21. *Hall v. Barclays (1937) 3 All ER 620 CA.*
22. *Barclays Bank (Z) Ltd v. Patricia Chipepa (SJ No. 15 of 2017).*
23. *Kingfarm Products Limited, Mwanamuto Investments Ltd v. Dipti Rani Sen (Executrix and Administratix of the Estate of Ajil Barad Sen (2008) ZR (2).*
24. *Kasote v. The People (1977) ZR 75.*
25. *Paton v. Attorney-General (1968) ZR 185.*
26. *Castellain v. Preston (1883) 11 QBD 38.*
27. *Wilson and Scottish Insurance Corporation Ltd. (1920) Ch. 28 and Rice v. Baxendale (18610 7 h & N. 96.*
28. *Richard Aubrey Film Productions Ltd. v. Graham (1960) 2 Lloyd's Pep 101.*
29. *Zulu v. Avondale Housing Project (1982) ZR 172.*
30. *In Mhango v. Ngulube (1983) ZR 61.*
31. *Attorney-General v. Kapwepwe (1974) ZR 207.*
32. *Eastern Cooperative Union Ltd v. Yamene Transport (1988-89) ZR 126.*

Legislation referred to:

1. *Supreme Court of Zambia Rules, chapter 25 of the Laws of Zambia.*
2. *Road Traffic Act No. 11 of 2002*
3. *Supreme Court Act, chapter 25 of the Laws of Zambia.*
4. *Rules of the Supreme Court of England (White Book 1999 ed.).*
5. *Roads and Road Traffic Act, chapter 464 of the Laws of Zambia.*

Other works referred to:

1. *Halsbury's Laws of England 4th ed. vol 25.*
2. *Andrew McGee, The Modern Law of Insurance, (3rd ed. London: Lexis Nexis 2011)*
3. *McGregor on Damages (18th ed. para 2 – 046).*

1.0 Introduction and background facts

1.1 The first respondent was at all relevant times a businessman engaged in the business of road passenger transportation and had an operating licence under fleet No. LSK 5178. He also owned a Mercedes Benz bus registration No. ABA 2063 which he used in his said business.

1.2 The second respondent was also a businessman, equally engaged in passenger road transportation in association with the first appellant. He carried on business within the operating licence issued under fleet No. LSK 5178.

1.3 Bookers Bus Services Limited was the second defendant in the proceedings which gave rise to the current appeal. It was at the material time a passenger bus transporter and was the owner of a Scania 946 bus registration No. ABL 3912. It was also the employer of one Justine Sampa, who featured in the proceedings in the High Court as the first defendant. The bus was insured with Madison General Insurance Company Limited (the present appellant, and was third defendant in the proceedings in the lower court).

1.4 On 31st December, 2007 the bus described at paragraph 1.3, collided with the first appellant's Mercedes Benz bus described at paragraph 1.1 which was at the material time being driven by one Oliver Malindi. That collision also involved two other nondescript vehicles, namely a Toyota Cresta which was hit into from the rear by the first appellant's Mercedes Benz on impact from the collision with the Scania bus, belonging to Bookers Bus Services Ltd, and a Mercedes Benz truck which was approaching from the opposite direction.

1.5 The respondents attributed the said road traffic accident to the negligent driving of Mr. Justine Sampa of Bookers Bus Services Limited who was at the time of the accident driving the Scania bus. Mr. Sampa and his employer, however, denied any negligence stating instead that it was the respondent's driver who was negligent.

1.6 In consequence of the accident, the first respondent's Mercedes Benz bus was totaled. This prompted him and his business partner to launch a claim in the High Court against

three parties, namely, Mr. Sampa, the owner of the vehicle and the insurer of the vehicle.

1.7 The claim was for: the replacement value of his Mercedes Benz vehicle; damages for loss of use of the vehicle from the date of the accident to date of replacement; and consequential loss of business for the said period. He also claimed interest and costs.

1.8 The action in the lower court by the now respondents was, as intimated, taken out against Justine Sampa (as first defendant), Bookers Bus Services Limited (as second defendant) and the insurer, Madison General Insurance Company Limited (as third defendant).

1.9 As disclosed at paragraph 1.5, the first and second defendants in the lower court denied liability, claiming that the accident was caused by the reckless over-speeding of the first respondent's bus on a slippery road surface following a heavy down-pour. The insurance company, for its part admitted having insured the Scania bus on behalf of Stanbic Bank (Z) Ltd, which was the absolute owner, but otherwise denied liability.

1.10 The parties eventually opted to settle a consent judgment couched in the following terms:

> **IT IS THIS DAY ADJUDGED AND ORDERED that judgment be and is hereby entered in favour of the Plaintiff for payment of the following as claimed:**
>
> 1. **The replacement value of a similar motor vehicle to the 1st Plaintiff's Mercedes Benz Mini Bus registration No. ABA 2663 being damages and consequential loss caused by the negligent driving of the 1st Defendant as servant or agent of the 2nd Defendant;**
>
> 2. **Loss of use of the 1st Plaintiff's motor vehicle from 31st December 2007 to the date of replacement and consequential loss of business for the said period.**
>
> 3. **Interest at the current Bank of Zambia rate from the date of the writ;**
>
> 4. **Costs.**
>
> **IT IS FURTHER ORDERD that the matter be referred to the Deputy Registrar for assessment of damages.**

1.10 Pursuant to that consent judgment, the matter was referred to Zulu C, learned Deputy Registrar as he then was, for assessment. He received evidence from the parties and undertook an assessment exercise of sorts, following which, in a ruling that has occasioned grievance to the appellant,

he awarded the first respondent the sum of K390,161.40 as the replacement value of his Mercedes Benz bus. He also awarded what he termed as a 'token' sum of K600,000 for general loss of use of the said motor vehicle, bringing the total sum awarded in damages to K990,161.40. That sum was to carry interest at Bank of Zambia lending rate from the date of the writ as agreed by the parties in the consent judgment.

2.0 Appeal to the Supreme Court

2.1 Disenchanted with the ruling of the Deputy Registrar, the appellant appealed to this court on two grounds which were framed as follows in the amended memorandum of appeal:

1. **The learned court below erred in law and in fact when it made an award against the appellant, for replacement of the respondent's vehicle, in excess of its pre-accident value.**

2. **The court below erred in law and in fact when it made an award against the appellant and in favour of the respondents for the sum of ZMW600,000.00 for the loss of business, in the absence of any supporting evidence establishing the said claim.**

2.2 Both parties filed heads of argument which they each subsequently amended. They relied principally on those amended heads of argument which they respectively supplemented orally at the hearing of the appeal.

3.0 The preliminary objection

3.1 Before the appeal was scheduled for hearing, the respondents' learned counsel filed a notice to raise preliminary objection pursuant to rule 19 of the Supreme Court Rules, chapter 25 of the laws of Zambia. Two grounds of objection were assigned. The first was that the record of appeal was incompetent because the affidavit in reply to the second defendant's affidavit in opposition, filed in the lower court had been omitted from the record of appeal. The second was that the record of appeal was riddled with fatal mistakes because the typed proceedings of the court below had not been arranged chronologically to reflect the order in which the evidence was presented.

3.2 affidavit in support of the notice, sworn by Raymond Musumali, learned counsel for the respondents, was filed. In it the affidavit omitted from the record was exhibited.

3.3 The application was opposed by the appellant who filed skeleton arguments in remonstrance. The opposition was premised on multiple grounds. First, that the preliminary objection was incompetent because it did not comply with rule 19(1) of the Supreme Court Rules, chapter 25 of the laws of Zambia, which directs that a respondent intending to take a preliminary objection to any appeal must give not less than seven days' notice to the court and the other party prior to the hearing of the appeal. The preliminary objection in this case, taken on 26th February 2020, did not comply with rule 19(1).

3.4 Second, counsel for the appellant referred us to Order 2 Rule 2 of the **Rules of the Supreme Court of England** (White Book (1999 ed.)) which states that an application to set aside any proceedings for irregularity shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity.

3.5 The learned counsel observed that the appellant filed its record of appeal on 10th March 2017 and the respondents filed their objection on 26th February 2020 - several years later. In this sense the respondents' notice of objection, according to counsel, goes contrary to the direction of Order 2 rule 2. In any case the respondents filed their heads of argument on 1st November 2017.

3.6 The third premise upon which the appellant challenged the preliminary objection was that the omission of the affidavit in reply from the record of appeal did not, in any case, breach rule 58(4)(h) of the Supreme Court Rules, as alleged by the respondent. This is because sub-rule (h) of that rule categorically states that what ought to be filed as part of the record of appeal are all affidavits read in evidence in the High Court *so far as they are material for the purpose of the appeal.* Neither the appellant nor the respondent made reference to the affidavit in their original or amended heads of argument thus confirming the appellant's view that the omitted affidavit was, after all, not material to the appeal.

3.7 Further, counsel contended that by including the affidavit in support and the affidavit in opposition in the record of appeal, the appellant had technically met its obligation to provide all material relevant to the appeal. In any case, concluded counsel for the appellant, the respondents were at liberty to file a supplementary record of appeal to include any document the respondents consider relevant to the determination of the appeal but had been omitted from the record of appeal.

3.8 The appellant's learned counsel referred us to the case of **Shoprite Holdings Ltd. & Another v. Lewis Chisanga Mosho & Another[1].** In that case, the appellant had omitted from the record of appeal, the summons and affidavits which formed the basis of the appeal on an interlocutory application. We held that the appellant had substantially complied with rule 58 by filing an affidavit in opposition which exhibited the documents that had been omitted from the record of appeal. In the present case, the affidavit in support of the notice of preliminary objection contains the affidavit in issue. The omission was, according to counsel, thus cured.

3.9 As regards the objection that the record of proceedings in the court below was not arranged chronologically, counsel for the appellant quoted rule 58(4)(j) of the Supreme Court Rules and submitted that all that the rule does is to direct that the notes of the hearing at first instance should be provided. It does not state that they should be arranged chronologically.

3.10 Counsel ended by submitting that the record of appeal complied with the rules, but just in case the court were to hold that it did not, any defect that afflicted it is curable and in keeping with the **Lewis Mosho case**[1] the court should order a rearrangement of the record. We were urged to dismiss the preliminary objection.

4.0 Our ruling on the preliminary objection

4.1 After hearing and considering the arguments of the parties on the preliminary objection, we gave our *ex-tempore* ruling dismissing it. We undertook to give our reasons for doing so in the main judgment. We now do so.

4.2 Rule 68 of the Supreme Court Rules, chapter 25 of the laws of Zambia gives this court the power to dismiss an appeal where the record is not prepared in accordance with the rule. It provides as follows:

> **If the record of appeal is not drawn up in the prescribed manner, the appeal may be dismissed.**

4.3 We have been consistent in restating this position of the law as we, in fact, did in **Ram Auerbach v. Alex Kafwata[2]** that litigants default at their own peril since any rights available as of course to a non-defaulter are usually jeopardized. Likewise, in **NFC Mining Plc v. Techpro Zambia Ltd[3]** we cautioned that failure to comply with court rules by litigants could be fatal to their case. We proceeded in that case to dismiss the appeal on account of the appellant's failure to comply with the rules.

4.4 We have in many cases such as **Zambia Revenue Authority v. Charles Walumweya Muban Masiye[4]** dismissed appeals under rule 68(2) of the Rules of the Supreme Court. We have however, made it plain that it is not every breach of a procedural rule that should attract the ultimate sanction of dismissal of the appeal. (See **Bank of Zambia (As Liquidator of**

Credit Africa Bank Limited in Liquidation) v. Al Shams Buildings Material Company Ltd[5]).

4.5 We held in **Peter David Lloyd v. JR Textiles Ltd[6]** that the omission from the record of appeal of an affidavit and a transcript of proceedings was, on the facts of that case, a curable omission which did not warrant the dismissal of the appeal. We thus allowed the appellant to make amends. More purposely, in **Socote International Inspection (Zambia) Ltd v. Finance Bank[7]**, in allowing a defective record to be amended, we stated that:

> **Whether the appeal will be dismissed or not will depend on the peculiar circumstances of each case.**

And in clear acknowledgement that the spirit of justice does not always reside in rules of court, in forms and formalities, nor indeed in technicalities, we repeated the same sentiment in **Access Bank (Zambia) Ltd. v. Group Five/ZCON Business Park (Zambia)[8].**

4.6 With the foregoing position of the law in mind, and given the specific circumstances of the appeal before us, we asked ourselves the question whether the ends of justice would be best served by upholding the preliminary objection. We

noted with particular interest that the learned counsel for the respondent had produced the affidavit in reply which had been omitted from the record of appeal. We also considered Mr. Chiteba's submission on what we stated in **Shoprite Holdings Ltd. & Another v. Lewis Chisanga Mosho[1],** namely that by producing in the affidavit in support of the objection, the documents missing from the record of appeal, the defect had affectively been cured.

4.7 We were inclined to accepted Mr. Chiteba's submission on the interpretation to be placed on rule 58(4)(h) as it touches on the issue of relevance to the appeal, of the documents to be produced in the record of appeal. This is especially given that neither party had made any reference to the omitted affidavit in their heads of argument, as counsel Chiteba pointed out.

4.8 As we stated in the case of **Saeli Kalaluka v. Zambia National Commercial Bank[9]**:

> **Omission of any document from the record by the appellant on grounds that the same is not relevant or material for the proper determination of the appeal, should not routinely be used by the respondent as a minefield for the appellant's appeal. This is particularly in view of Order 59 of the**

Supreme Court Rules which entitles the respondent to prepare and file a supplementary record. This rule, in our view, is designed to, among others things, avert dismissal of appeals on account only of the omission of some documents from the record of appeal which the appellant had considered irrelevant to the determination of the appeal at the time of preparing the record.

4.9 Taking into account all the issues we have discussed in the preceding paragraphs, we did not think it was necessary to consider the technical challenge as to the propriety of the preliminary objection premised on the timing of its filing as argued by Mr. Chiteba as we view it as largely inconsequential.

4.10 We thus came to the conclusion that we announced at the hearing that the objection by the respondent was not well anchored as the scales of justice tilted heavily in favour of allowing the appeal to proceed. This, in our view, was the option that readily presented itself as being in the interests of justice. In any case, the respondents had not demonstrated any prejudice that would be occasioned to them if we allowed the appeal to be heard on the merits in the absence of the omitted affidavit which was, in any event,

now before us. It was for all these reasons that we dismissed the preliminary objection.

5.0 The appellant's case on appeal

5.1 As we have elsewhere intimated, the learned counsel for the appellant relied on the amended heads of argument. Those arguments were augmented orally.

5.2 In regard to ground one of the appeal, counsel submitted, with verve that the award against the appellant by the lower court was wrong because the awarded sum for the replacement of the respondent's motor vehicle was way in excess of the pre-accident value of the damaged motor vehicle.

5.3 The learned counsel referred us to the testimony of the first respondent where he stated that he purchased the vehicle for either K58,000 or K48,000 at a public auction in 2003. The learned Deputy Registrar recorded the first respondent as having stated that at the time of purchase of the motor vehicle, it was relatively new.

5.4 The learned counsel contended that the respondents did not provide proof of the value of the vehicle, nor did they deploy evidence to show that it was relatively new as they asserted and it was thus wrong for the court to make a finding of fact on that issue. He relied for that submission on the case of **Mary Musambo Kunda v. Attorney-General**[10]. In that case, the plaintiff did not keep any accounts nor adduce any evidence at assessment to quantify her loss of earnings. We stated as follows:

> **This court has frequently lamented these failures by plaintiffs and the practice of expecting the courts to make inspired guesses must be discouraged.**

5.5 Referring to the case of **Bank of Zambia v. Caroline Anderson and Andrew W. Anderson**[11] the learned counsel submitted that a claimant must prove his/her losses by providing evidence to the court. He quoted a passage from the judgment of this court in that case as follows:

> **Even in the absence of such figures, it is within the power of the court to make some award for the possibility that by some misfortune the first respondent might be left in a position where she had no support.**

Arising from the above quoted statement, the learned counsel submitted that the court does have the discretion to make awards where no evidence is adduced so as to take into consideration the misfortune of the innocent party.

5.6 In the present case, however, the respondents gave the amount of K58,000 as the value of the damaged motor vehicle which was a 2001 model, but provided a quote for a 2008 model bus. The Deputy Registrar in his ruing stated that the difference between the two values was 'negligible'. Counsel submitted that this holding was wrong in principle as authorities have established that the normal measure of damages, when a motor vehicle is destroyed or damaged beyond repair, is the market value at the time and place of destruction. He quoted the case of **Duly Motors (Z) Ltd. v. Patrick Katongo & Livingstone Motor Assemblies**[12] as authority for that position.

5.7 Counsel also cited the case of **Ozokwo v. The Attorney-General**[13] as additional authority for the submission that damages awardable for loss must be realistic. In that case, we stated that:

A plaintiff who has been deprived of something must be awarded realistic damages which will afford him a fair recompense for his loss.

5.8 Counsel referred us to the case of **Duly Motors Ltd. v. Patrick Katongo & Livingstone Motor Assemblies[12],** where a brand new motor vehicle caught fire and was damaged beyond repair. We ordered the second defendant to deliver to the plaintiff a new motor car of substantially the same value as the car that was lost, bearing in mind inflation. Counsel submitted that the court should always seek to place the innocent party in the position they would have been in but for the act or conduct in question.

5.9 Counsel contended that the Deputy Registrar was clearly wrong to have based the replacement value of the first respondent's vehicle on a 2008 model. Apart from the 2008 model being too advanced, the Deputy Registrar failed to take into consideration that the 2001 model had depreciated in value from the time of purchase to the time of the accident. This factor should have been discounted when computing the replacement value.

5.10 If indeed the 2001 model vehicle was no longer available in Zambia, as the respondent claimed, the Deputy Registrar should have awarded damages for the replacement value based on a vehicle that would reasonably meet the first respondent's needs and which was in a similar condition as the totaled motor vehicle immediately preceding the accident. This would accord with the holding in the case of **Uctkos v. Mazzetta**[14] where a motorboat of an unusual type and very expensive to construct was lost. The court awarded damages to meet the reasonable cost of another craft which reasonably met the owner's needs and which was reasonably in the same condition.

5.11 The learned counsel for the appellant also grumbled that the Deputy Registrar should never have awarded the respondents an additional sum to cover the expenses in respect of tax importation. This, according to counsel, was an unreasonable award to make given that the respondent's 2001 model vehicle was purchased in Zambia.

5.12 The short point made by the appellant's counsel was that the Deputy Registrar employed a wrong principle in arriving at the award and on the authorities of **Zambia Publishing Co. Ltd v. Pius Kakungu**[15] and **Attorney-General v. Fred Chileshe Ngoma**[16], this court should interfere with the award as it was so totally unreasonable as to be excessive.

5.13 Counsel urged us to uphold ground one of the appeal.

5.14 Ground two was focused on the award of K600,000 for loss of business in the absence of supporting evidence. It was submitted that the law ordinarily requires that there should be specific proof of loss before an award for special damages can be made. The learned counsel cited the case of **Phillip Mhango v. Dorothy Ngulube & Others**[17] where we stated that:

> **.... any party claiming a special loss must prove that loss with a fair amount of certainty.**

Counsel complained that despite the Deputy Registrar agreeing that the respondents failed in the court below to prove their claim for loss of business, he went ahead to award them K600,000 on the basis that the same was a token award. In doing so he cited the case of **J. Z. Car Hire**

Limited v. Chola Scirocco[18]. In that case, however, the Deputy Registrar refused to award the claimant any damages as the claimant failed to adduce evidence of the company's accounts.

5.15 The case of **Midlands Breweries (Pvt) Ltd. v. David Munyenyembe**[19] was also cited in aid of the same submission. In that case the court accepted evidence of projections of income for the hire of the plaintiff's bus even if there was no documentary evidence produced in the form of actual accounting books.

5.16 Counsel argued that in the present case the court was absolutely wrong to have given the award of K600,000 for loss of use based on no evidence and in light of what was stated by this court in **Zambia State Insurance Corporation v. Serios Farm Corporation**[20].

5.17 In his oral augmentation of the heads of argument, Mr. Chiteba submitted that the purpose of compensation should be to place the parties in the position they would have been in prior to the accident. He reiterated the point that in considering a replacement value of a 2001 model vehicle, the

Registrar relied on the value of a 2008 model vehicle. This was wrong in principle and in fact.

5.18 Mr. Chiteba also accused the Deputy Registrar of ignoring the evidence which he received when he stated that the vehicle was bought at an auction sale in 2003, three years after its manufacture. If he had properly directed himself he would have awarded an amount of the purchase price, discounted for depreciation and general wear and tear. The Deputy Registrar's reliance on the case of **Hall v. Barclays**[21] was, according to Mr. Chiteba, a misdirection as what was in issue here was a motor vehicle with nothing specialized about it.

5.19 As regards the 'token' sum of K600,000 awarded by the Deputy Registrar for loss of use, counsel submitted that the Deputy Registrar disregarded the reasons for submitting evidence of earning and proceeded to make the token award relying on **J Z Care Hire Ltd v. Chola Scirocco**[18]. In that case, however, the token sum awarded was only K250 (rebased).

5.20 Counsel further submitted that in **Barclays Bank (Z) Ltd v. Patricia Chipepa**[22], the court awarded nominal damages of K500. All circumstances and precedents considered, the sum of K600,000 given was way excessive. He ended by once again imploring us to uphold the appeal.

6.0 The respondents' case on appeal

6.1 The respondents' learned counsel relied principally on the amended heads of argument that were filed in response. He supplemented those orally.

6.2 In responding to ground one of the appeal, it was submitted that for a number of reasons ground one lacks merit. Counsel argued that to begin with the ground of appeal contradicts the terms of the consent judgment, clause 1 of which provided that the parties had agreed that the appellants were to pay 'the replacement value of a similar motor vehicle', and not the pre-accident value. The Deputy Registrar was thus correct to assess the replacement value of the vehicle as K390,161.40 having considered the evidence of both parties.

6.3 In developing his argument further, the learned counsel quoted from clause 1 of the consent judgment which states that the appellant was to 'pay the replacement value of a similar motor vehicle' and submitted that this clause, given life in the Deputy Registrar's order that the appellant pays K390,161.40, was binding on the appellant. If the Deputy Registrar had ordered otherwise, he would have, in effect, varied, altered or disturbed the decision of the High Court (consent judgment). This would have been contrary to the holding of this court in **Kingfarm Products Limited, Mwanamuto Investments Ltd v. Dipti Rani Sen (Executrix and Administratix of the Estate of Ajil Barad Sen**[23].

6.4 Counsel contended that a 'replacement value' and a 'pre-accident value' are two different bases for measurement of loss. The replacement value, in the context of the consent judgment, means the cost of replacing the vehicle, while the pre-accident value is the value of the vehicle immediately prior to the accident. He quoted the following passage from the author (Prof. Andrew McGee) of **The Modern Law of Insurance**, (3rd ed, London: Lexis Nexis 2011, p 509):

> **Quantum of loss is a difficult issue in motor insurance cases, especially where the vehicle is entirely written off. A common problem is that the policyholder finds that the sum offered by the insurance company is not enough to replace the car he previously had... The explanation of both situations is the same. The policyholder is entitled to receive what the car was worth to him immediately before the accident, which is the sum which he would have had to pay to buy an identical car from a dealer... The inevitable consequence of this is that even under an indemnity policy the policyholder loses out in that he has to find the dealer's profit out of his own pocket.**

6.5 The learned counsel submitted that it is clear from the quoted passage that there is a distinction between the replacement value and the pre-accident value. The parties to the consent judgment chose the former.

6.6 The learned counsel made what in every sense is a stunning submission. This is that in the consent judgment the parties had agreed to replace the vehicle with 'a similar motor vehicle' and that it was a finding of fact made by the Deputy Registrar that the difference between a 2001 and a 2008 model vehicle was 'essentially negligible'. That being so it cannot be upset by the appellate court in keeping with numerous case authorities on the point. He urged us to dismiss ground one of the appeal.

6.7 As regards ground two of the appeal, it was counsel's submission that the award of K600,000 'token' for loss of business was properly made by the Deputy Registrar. He cited the case of **Midlands Breweries (Pvt) Ltd. v. David Munyenyembe**[19] and submitted that, that case was on all fours with the current case. In that case, like in the present one, a consent judgment was executed in favour of the respondent for damages in respect of loss of use of a minibus, repair costs and towing charges. These were to be assessed by the Deputy Registrar. The appeal was against the award by the Deputy Registrar of K6,500,000 towing charges, K261,000,000 repair costs and K349,600,000 for loss of business for 184 days during which the minibus remained immobile. The basis of the appeal was that there were no documents produced to support those awards.

6.8 The learned counsel quoted the following passage from our judgment in the **Midlands Breweries case[19]:**

> **The second portion of the second ground of appeal attacks the sum of K349,600,000 awarded for loss of business. The major contention is that the award was not supported by any documentary evidence as the books of accounts which the respondent said he used to keep for the motor vehicle were not produced in court. On the other hand, the respondent's**

> **argument was that the motor vehicle used to make K3,000,000 per day. That the Deputy Registrar, however, deducted fuel and personnel expenses which left the sum of K349,600,000 awarded in this matter.**
>
> **We have considered the above arguments. It is our considered view that it is a fact that as a result of the appellant's conduct, the respondents' motor vehicle was damaged and that as a result, it could not be used to carry passengers at a fee. There can be no doubt that the respondent must have incurred some loss of business during the period his motor vehicle was not operating ... Therefore, we award the sum of K288,800,000 for the loss of business.**

6.9 It is on the basis of the above quoted dicta that counsel contended that the respondents are entitled to loss of business notwithstanding the non-production of evidentiary documents. The respondents were out of business for almost 10 years from the date of the accident and the Deputy Registrar's estimated average bus fare of K60 per person per trip provided a fair guide to him in the damages assessment exercise.

6.10 Counsel stressed that the lower court was bound by the **Midlands Breweries case**[19] by operation of the doctrine of *stare decisis* as explained in **Kasote v. The People**[24] and **Paton v. Attorney-General**[25]. That being the case, the authorities relied

upon by the appellant, namely **Phillip Mhango v. Dorothy Ngulube and Others**[17] and **J C Car Hire v. Chola Scirocco**[18] are not, according to counsel, of relevance to the appellant's case.

6.11 The learned counsel for the appellant also submitted that the case of **Zambia State Insurance Corporation v. Serios Farms**[20] is distinguishable in that there, the claim arose from an insurance policy which limited the insurance company's liability whereas in the present case, the claim and award of consequential loss of use of the motor vehicle and loss of business arose from the consent judgment. It is for these reasons that counsel argued that ground two was without merit.

6.12 In his oral augmentation of the heads of argument, Mr. Musumali, with great relish, reminded us not to lose sight of the fact that the basis of the Deputy Registrar's assessment was the consent judgment executed by the parties. That consent judgment was quite clear on what the respondents were to recover.

6.13 In our oral engagement with him, Mr. Musumali disclosed that the other parties to the consent judgment opted not to join the appeal probably because they may have been satisfied with the ruling of the Deputy Registrar on assessment.

6.14 When asked whether the liability of the insurance company under the consent judgment should not be viewed in the context of the insurance policy with its limitation on liability which such policies ordinarily carry, Mr. Musumali stood pat on his position that the consent judgment superseded all other arrangements and relationships between the parties in as far as the definition of the obligations are concerned.

6.15 Mr. Musumali fervidly prayed that we dismiss the appeal for lacking merit.

7.0 The issues for determination in this appeal

7.1 We have carefully considered the respective positions of the parties and the submissions of the learned counsel.

7.2 In considering the current appeal, we are not unmindful of what we stated in **Attorney-General v. Kapwepwe**[31] in regard to our role as an appellate court dealing with an appeal on assessment of damages. There we made it clear that:

> **Before an appellate court can interfere with an award of damages, it must be shown that the trial judge has applied a wrong principle or has misapprehended the facts or that his award is so high or so low as to be utterly unreasonable. It is no ground for varying an award made by the trial judge that the judge in the appellate court would have awarded a different sum.**

7.3 We entertain no doubt whatsoever that the appeal raises the crisp issue of assessment of damages where a totaled motor vehicle was being used to generate income in a business. And yet the appeal also raises fairly interesting questions gyrating around the efficacy of a consent judgment and the effect of such a judgment on a policy of insurance.

7.4 Although the amended grounds of appeal reshaped the initial questions for determination by veering them away from the relationship between the award as assessed by the Deputy Registrar and the insurance policy, we believe that the issues agitated in this appeal have underlying insurance

ramifications and should best be considered within the factual and evidentiary framework of the whole appeal.

7.5 In specific terms, it will be necessary to consider whether a consent judgment can effectively supersede the agreement between an insured and the insurer by creating a heavier obligation for the insurance company than that assumed under the insurance policy. In our considered view, this is an issue directly arising from the ruling of the learned Deputy Registrar. It is also an issue upon which both parties had initially reflected (in their un-amended heads of argument) and from which they resiled following the amendment of the grounds of appeal. Yet it is also an issue upon which we specifically requested counsel for both sides to address us at the hearing of the appeal.

7.6 To be certain, it is important to comprehend whether, under a policy of insurance, a third party claiming directly on such policy can claim for the replacement value of the property lost and for loss of business arising from the accident on the basis of a subsequent consent judgment where the heads of claim are not covered in the insurance policy.

7.7 We are clear in our belief that the issue of insurance and its effect on the assessed award is not insignificant, nor can it be wished away by pointing to a consent judgment concluded subsequent to the policy. There is, in the present case, no doubt as to why and in what capacity the appellant was in the first place, joined to the proceedings in the High Court.

7.7 The respondents had of course taken the liberty to claim directly from the appellant as the insurer of the Scania bus belonging to Booker Bus Services Limited on no other basis than that it was the insurer (see paragraph 5 of the respondents' statement of claim). This is in keeping with section137 of the Roads and Road Traffic Act No. 11 of 2012. That section enacts that:

> **(1) Any person having a claim against a person insured in respect of any liability in regard to which a policy of insurance has been issued for purposes of this part, shall be entitled in his own name to recover directly from the insurer any amount, not exceeding the amount covered by the policy, for which the person insured is liable to the said person having the claim:**
>
> **Provided that:-**

(i) the rights of any such person claiming directly against the insurer shall, except as provided in subsection (2), be not greater than the rights of the person insured against such insurer;

(ii) the right to recover directly from the insurer shall terminate upon the expiration of a period of two years from the date upon which the claimant's cause of action against the person insured arose;

(iii) the expiration of such period as mentioned in proviso (ii) shall not affect the validity of any legal proceedings commenced during such period for the purpose of enforcing a right given under this section.

7.9 Given the foregoing basis upon which the claim against the appellant was made in the lower court, it follows that any judgment imputing liability upon the insured cannot ignore the provisions of the insurance contract — the very basis upon which the right to claim directly against the insurer is premised and which, above all, is the foothold of the appellants' liability. In other words, it is the policy of insurance which covered the Bookers Bus Services Ltd. against the consequences of the negligence which the

respondents looked to for relief within the intendment of section 137 of the Roads and Road Traffic Act.

7.10 The consent judgment to which the appellant, the respondents and Bookers Bus Services Limited were all parties, must thus be understood in the context of the insurance contract subsisting between Bookers Bus Services Limited and the appellant.

7.11 It is of course a well-known position that all contracts of insurance, except life insurance, personal accident and sickness insurance, are contracts of indemnity, meaning that in the event of loss resulting from the risk insured against, the insured shall be placed in the same position he or she was in immediately before the happening of the event insured against. The insured is not, under any circumstances, to recover more than his or her actual financial loss.

7.12 In the old case of **Castellain v. Preston**[26] the English Court of Appeal described the principle of indemnity in the following terms:

> **The very foundation, in my opinion, of every rule which has been applied to insurance law is this, namely, that the contract of insurance contained in a marine or fire policy (and that equally applies to accident policy other than personal accident) is a contract of indemnity and of indemnity only, and that this contract means that the insured, in case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified. This is the fundamental principle of insurance law and even a proposition brought forward which is at variance with it, that is to say, which either will prevent the insured from obtaining full indemnity, or which will give the assured more than a full indemnity, the proposition must certainly be wrong.**

7.13 What was stated in the foregoing paragraph is the principle of indemnity as it applies between the insurer and the insured. We shall shortly explain how that principle applies in relation to a third party claiming directly from an insurer on a policy issued to the insured as happens to be the case here.

7.14 Under a policy of insurance, the sum insured is the maximum liability of the insurer. Once an insurer settles the claim either as a total loss or as constructive total loss, and provided the insured has been fully indemnified, the insurer's obligation abates and he automatically becomes

entitled to the salvage or remains of the insured property and may deal with it as he deems fit.

7.15 As the respondents in the present case were seeking to recover from the appellant on the basis of the policy of insurance which Bookers Bus Services limited held with the appellant, it should follow that the appellant's liability could not exceed its total policy liability to Bookers Bus Services Limited, the insured in this case. This is what section 137(1) of the Roads and Road Traffic Act which we have quoted at paragraph 7.7 states.

7.16 As we held in **Zambia State Insurance Corporation v. Serios Farms Limited**[20]:

> **...contracts of insurance providing cover for loss or damage are construed so as to extend only to loss or damage to the subject matter of insurance itself. The loss of profits and other consequential losses, such as loss of rent when a house is burnt down or loss of salary after an accident...are not covered unless expressly stipulated.**

7.17 Given the operation of the doctrine of indemnity, as we have explained it, the respondents, claiming under the insurer's policy, could not, in our respectful view, be allowed to

recover more than the insured would have recovered unless the policy of insurance expressly so provided.

7.18 The consent judgment could not, and did not, in our considered view, create additional obligations for the insurer over and above those assumed under the policy of insurance. And this does not make the consent judgment nugatory or less officious in any respects. Other than against the appellant insurer it remains enforceable against the other parties to it to the extent that they assumed liability beyond that covered by the indemnity insurance policy.

7.19 With specific reference to what is recoverable when there is a total loss of the property insured, the general test adopted by insurers as a guide in determining the amount that would suffice to indemnify the insured is the 'market value' test, that is to say the market value of lost or damaged property at the time and place of the event resulting in the loss or damage.

7.20 We have examined the certificate of motor insurance No. 1625 dated 27 December 2007 issued in respect of the Mercedes Benz Scania, registration ABL 3912. It gives the

estimated value of the insured motor vehicle as US$280,565.00. The policy number to which the certificate was issued was indicated as 'TBA' (To Be Advised). The Premium was 'ON A/C' (on account) and the third party limit was 'APP' (As Per Policy). The policy of insurance was itself not produced in evidence.

7.21 Mr. Musumali, in his intimated argument, stressed that there was no limit of liability to third parties specified in the insurance certificate and, therefore, that a proper construction of the policy is that it covered the awards made by the learned Deputy Registrar, which were in any case agreed upon by the insurance company in the consent judgment, and as such the full replacement value of the motor vehicle should be borne by the appellant.

7.22 Indeed, as we have extrapolated from the insurance certificate in paragraph 7.20 above there is no indication of the limit of liability to third parties that the insured under that certificate assumed. That does not, however, mean that there was no policy limit. That limit, as the certificate says, is to be found in the policy of insurance itself. That policy

was not produced in evidence before the Deputy Registrar during assessment.

7.23 However, the legal point remains that the insured can never recover more than the maximum expressly stated in the policy; also known as the sum insured. This is an overriding point because the premium payable by the insured to consummate the contract of insurance is calculated largely on the basis of this figure.

7.24 In respect of loss of insured goods, the measure of what the insured has lost will *prima facie* be the market value of the property lost at the time and place of the loss. (See **Wilson and Scottish Insurance Corporation Ltd. and Rice v. Baxendale**[27]. This means that what is recoverable is the property's second-hand resale value as this is the sum that it will cost to obtain equivalent property.

7.25 In **Richard Aubrey Film Productions Ltd. v. Graham**[28], a film producer lost a film and negatives that were almost complete. He had taken a policy to cover loss of negatives and films. On completion, the film would have had a market value of £20,000. To finally complete the film, however, a

sum of between £4,000 and £5,000 was required. The insured recovered the difference between those sums. This measure concentrated only on the loss in material terms and ignored everything else.

7.26 That what is recoverable is the value at the date of loss means that what may in fact be recovered may not correspond to the value at the commencement or renewal of the policy.

7.27 It bears stressing that when a motor vehicle is totaled, i.e. declared a total loss as in the present case, the insurance company pays for the totaled car value. Put differently, it pays for what the value of the car was immediately before the accident.

7.28 In giving the award for the replacement motor vehicle the learned Deputy Registrar was fully aware of the circumstances in which the first respondent purchased the said motor vehicle. It was for a price of K58,000 or K48,000. This was in 2001. The purchase was at an auction sale. Not much evidence was adduced to show the exact state of the vehicle at the time of its purchase although the Deputy

Registrar appears to have readily accepted the testimony of the first respondent that the vehicle was 'relatively new' at the time of purchase.

7.29 We must equally stress that granted that the payment in this case must be related to the insurance policy, it is the pre-accident market value of the motor vehicle that should be the relevant calculation reference point unless it can be shown that the policy covered the replacement cost value.

7.30 This case is indeed distinguishable from that of **Duly Motors v. Patrick Katongo & Livingstone Motor Assemblies**[12] where we ordered the replacement of the vehicle damaged beyond repair. In that case, the vehicle lost in the fire was brand new. In the present case, the lost motor vehicle was second-hand, purchased at an auction sale some four years previous to the loss. Through normal wear and tear, it had no doubt depreciated further at the time of the accident.

7.31 We thus agree with the appellant's counsel that the learned Deputy Registrar used a wrong principle in computing damages in respect of the motor vehicle damaged in the accident. The correct method of assessment should have

been to consider the pre-accident value of the motor vehicle, having taken into consideration the cost at which it was purchased, depreciation and such other factors. Ground one of the appeal has merit and it succeeds accordingly.

7.32 Turning to ground two of the appeal, the grievance relates to the assessment of special damages in the nature of loss of use. The short question is whether the learned Deputy Registrar was right to have awarded K600,000 as damages for loss of use.

7.33 Two key principles mitigate against the respondent's recovery against the appellant for loss of use in the current circumstances. The first is the operation of the doctrine of indemnity as we have explained it above and the second is the limitation imposed by the insurance policy.

7.34 We have, in dealing with ground one of the appeal, already held that the principle of indemnity in insurance law would not allow the insured recovery for loss of use unless that is an express stipulation of the contract of insurance. In the present case, the insured, Bookers Bus Services Ltd, would not have been entitled to recover from the insurer for loss of

use. It should follow that third parties such as the appellants claiming directly under the same insurance policy, can equally not recover from the appellant, any damages under that head.

7.35 We have already generously quoted at paragraph 7.16 from the case of **Zambia State Insurance Corporation v. Serios Farms Limited[20]** regarding the attitude of the law as far as recovery for loss of business or profit. That is still good law.

7.36 A claim for special damages such as loss of use must be proved through cogent evidence. This has been the consistent position of the law as restated in cases such as **Zulu v. Avondale Housing Project[29].** In **Mhango v. Ngulube[30]**, we stated the position thus:

> **It is, of course, for any party claiming a special loss to prove that loss and to do so with evidence which makes it possible for the court to determine the value of the loss with a fair amount of certainty.**

7.37 Later in the same judgment we observed and stated as follows:

> **The result is that the evidence presented to the court was unsatisfactory and, in our opinion, the learned trial judge would have been entitled either to refuse to make any award**

or to award a much smaller sum, if not a token amount in order to remind litigants that it is not part of the judge's duty to establish for them what their loss is.

7.38 Special damages for financial outlay or loss in terms of `earnings or profits are awarded on one basic principle — the imperative to properly plead, particularise and prove damages. And this is universal. It even applies where, as in this case, the loss is allegedly on-going.

7.39 We agree with Mr. Chiteba that special damages must be proved strictly. The point is that special damages are damages that have already crystallised before the matter is dealt with in court, and the claimant of such damages must be able to prove such damages strictly. This does not mean that such damages must be proved beyond reasonable doubt. The usual standard of proof applicable in civil matters, that is to say, on a preponderance of evidence, applies. What the requirement does mean though is that special damages cannot be presumed as may be the case with general damages.

7.40 A pertinent question is whether a person, such as the respondents in this appeal, seeking special damages by way of loss of use or loss of profit must always produce receipts or other documentary evidence in support of his claim as contended by Mr. Chiteba.

7.41 We would be inclined to answer the question in the negative. While we agree that such receipts or other documentary evidence would offer the best evidence, there is no rule of law that requires a claimant to adduce such evidence to prove his or her position in a civil matter. In our considered view, it is chiefly a question of whether the claimant's evidence, even if only oral, is believed by the court and the weight attached to it by the court. It is not unlikely that in certain situations the claimant would clearly be expected to produce documentary evidence, and if no such evidence is produced, the situation would impact negatively on the credibility or weight of his or her evidence.

7.42 Turning to the case before us, the learned Deputy Registrar observed, quite pertinently, at page R11 of the Ruling that:

> **Regarding loss of business, I totally agree that the plaintiff failed to prove the claim in the sum of K4,472,160 for loss of business with certainty and particularly, by failing to provide documentary proof. The oral evidence solely relied on was speculative and unfounded. The explanation that documentary evidence to support this claim was impracticable to retrieve is not justification to make the award suggested by the plaintiff ... Notwithstanding the lack of proof for the said special loss, what is undeniable is that the motor vehicle was a profit making chatter, a passenger bus, carrying passengers at a fee ...**

7.43 Following the above observation, and after citing the case of **J. Z. Car Hire Ltd v. Chola Scirocco**[18], the learned Deputy Registrar quoted from the learned authors of **McGregor on Damages** (18th ed. Para 2 – 046) that where no specific loss of profit can be shown, a claimant may be awarded damages for general loss of use. He then awarded K600,00 for general loss of use — which he elsewhere in his ruling also referred to as 'loss of business'.

7.44 Our view, which finds resonance in the authorities to which Mr. Chiteba referred us, is that the learned Deputy Registrar failed to undertake a proper assessment in the circumstances because he had no material to work with.

Having noted that there was no documentary evidence, the next thing he could have considered was whether the oral evidence submitted to him was of any assistance in enabling him engage with the figures presented to him, taking into account many imponderables which go with the business of the nature the respondents were engaged in. He quite plainly dismissed the oral evidence as 'speculative' and 'unfounded' leaving him with nothing to base his assessment on.

7.45 Not only did the learned Deputy Registrar not have an evidentiary basis for coming up with the award of K600,000, he did not take into account the need for the claimant to mitigate the loss. In **Eastern Cooperative Union Ltd v. Yamene Transport**[32], we emphasized that it is always the duty of the plaintiff to minimize his loss and where he or she fails to do so, he or she cannot expect the court to award damages which are limitless both in time and quantum. This crucial consideration should have exercised the learned Deputy Registrar's mind if indeed there was any legitimate basis to award damages for loss of use or loss of business in the circumstances.

7.46 The respondent relied on the cases of **J. Z. Car Hire Ltd v. Chola Scirocco**[18] and **Midlands Breweries (Pvt) Ltd v. David Munyenyembe**[19] to argue that the Deputy Registrar was correct in awarding damages for special loss in the absence of evidence of proof of such loss.

7.47 The case of **Midlands Breweries (Pvt) Ltd v. David Munyenyembe**[19] is clearly distinguishable from the present case. We have earlier on stated that it is not in all cases that documentary evidence need to be produced to support a claim for special damages. Oral evidence, where sufficient and credible, will in appropriate cases suffice. In the **Munyenyembe case**[19] there was evidence independently for the receipts, which was received, evaluated and relied upon. In the instant case, not only was documentary evidence lacking, but such oral evidence as was presented was dismissed as 'speculative' and 'unfounded'.

7.48 The case of **J. Z. Car Hire v. Chola Scirocco**[18] is equally distinguishable from the present appeal. In that case, we stated as follows:

> **The evidence of carrying on car hire business was not enough to persuade the court to make any meaningful intelligent assessment of damages. We reluctantly award a token award based on the fact that there was this glimmer evidence of a business of car hire. We would award a token figure of K250 [rebased] ...**

7.49 The basis upon which we awarded the token sum in that case was clear. The token sum itself was commensurate with its name. Understanding as we do, of the award 'token' to mean a gesture or mere indicia, we do not see how the sum of K600,000 compares with K250 in being token sums.

7.50 We are satisfied, therefore, that in the present case, the learned Deputy Registrar was wrong in principle in his assessment of damages and in awarding K600,000 for loss of use. Interference by this court with the award is thus justifiable. Ground two of the appeal has merit and we uphold it.

7.51 In sum, this appeal has merit and it is allowed. The award of K390,161.40 as the replacement value of the first respondent's Mercedes Benz bus is hereby set aside. In its place, we award the respondent, as against the appellant,

only the pre-accident value of the totaled Mercedes Benz bus subject to the policy limit. As the Deputy Registrar did not access the value on that basis, the matter is sent back to the Deputy Registrar for that assessment to be undertaken.

7.52 Up to the policy limit, the appellant shall be liable to settle its obligations under the insurance policy in respect of the totaled bus. Beyond the policy limit, the insured and the other party to the consent judgment shall be liable to settle the balance of the claim with the respondents in terms of that consent judgment against which they have not appealed.

7.53 As against the appellant, we set aside the award of K600,000 awarded for loss of use as this is outside the policy of insurance and has, in any case, not been proved by the production of cogent evidence. The two other parties in the court below have not appealed against the learned Deputy Registrar's award and we thus make no order in respect of their position.

7.54 The appellant shall have its costs to be taxes in default of agreement.

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M. C. MUSONDA

DEPUTY CHIEF JUSTICE

.....

M. MALILA

SUPREME COURT JUDGE

.....

C. KAJIMANGA

SUPREME COURT JUDGE