

**IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)



2023/HP/0044

BETWEEN:

LIMUCHO AUTO PARTS AND GENERAL DEALERS LTD**PLAINTIFF**

AND

**MATHEWS CHINGA
CLEUS MANYIKA**

1ST DEFENDANT**2ND DEFENDANT**

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 17TH DAY OF JULY,
2024.**

For the Plaintiff : Ms. E. C. Museba, Messrs Willis Clement and
Partners Legal Practitioners
For the 1st & 2nd Defendants : No appearance

J U D G M E N T

CASES REFERRED TO:

1. *Miller v Minister of Pensions* 1947 2 ALL ER 372
2. *Kings v Philips* 1953 1 ALL ER 617
3. *Industrial Finance Company Limited v Jacques and Partners* 1981 ZR 75
4. *Khalid Mohammed v The Attorney General* 1982 ZR 49
5. *Attorney General v Mpundu* 1984 ZR 6
6. *Kabwe Transport Company Limited v Press Transport (1975 Limited)* 1984 ZR 43
7. *Eastern Co-Operative Union Ltd v Yamene Transport Ltd* 1988 - 1989 ZR 126
8. *Muliango and Muliango v Magasa and Muruja Transport & Farming Company Limited* 1988 -1989 ZR 209
9. *Abraham Mohamed and Alantara Transport Ltd v Safeli Chumbu* 1993 - 1994 ZR 4
10. *GDC Hauliers Zambia Limited v Trans-Carriers Limited* SCZ No 7 of 2001
11. *Lister v Hesley Hall* 2002 AC 215

12. *Zambia Railways Limited v Pauline S. Mundia, Brian Sialumba* 2008 Vol 1 ZR 278
13. *Robert Simeza (Suing in his capacity as Executor of the estate of Andrew Hadjipetrou) & others v Elizabeth Mzyeche (sued as the mother and guardian as litem of minor beneficiaries)* 2011 Vol 3 ZR 290
14. *Antonyo v Danobo (T/A Juldan Motors) (HP 1323 of 2012) [2014] ZMHC 36*
15. *Madison General Insurance Company Limited v Avril Cornhill and Michael Kakoma Appeal No 19 of 2017*
16. *Mulendema v Zambia Breweries PLC Appeal No 7/2016 [2017] ZMCA (21 March, 2017)*

LEGISLATION REFERRED TO:

1. *The High Court Rules, Chapter 27 of the Laws of Zambia*
2. *The Road Traffic Act No. 11 of 2002 of the Laws of Zambia*

OTHER WORKS REFERRED TO:

1. *Black's Law Dictionary, by Bryan A. Garner, 9th Edition, Thomas Reuters, 2009*
2. *Black's Law Dictionary, 11th Edition by Bryan A. Garner, Thomas Reuters*
3. *Charlesworth and Percy on Negligence 12th Edition*
4. *Harvey Mc Gregor, Mc Gregor on Damages, Eighteenth Edition, (Thomson Reuters (Legal) Limited, 2009)*

1. INTRODUCTION

1.1 The Plaintiff, Limucho Auto Parts and General Dealers Ltd ("the Company"), commenced these proceedings on 16th January 2023, by Writ of Summons which was accompanied by a statement of claim and the other requisite documents against the 1st Defendant, Mathews Chinga and the 2nd Defendant, Cleus Manyika, claiming:

- i. *An Order for the replacement of the motor vehicle which was damaged beyond repair in the accident or its' assessed value thereof;*

- ii. Special damages for towing of the vehicle from the accident scene to Matero Police Station in the sum of K12,000.00;*
- iii. General damages for loss of business at K1,000.00 per day from the date of the accident being 15th May 2022 to the date of Judgment until full and final payment;*
- iv. Interest on all sums due;*
- v. Costs of and incidental to these proceedings; and*
- vi. Any other relief this Honourable Court deems fit to award in the circumstances.*

2. STATEMENT OF CLAIM

- 2.1 The contentions, as laid out in the statement of claim, show that the Company was at the material time, the registered owner of a Mitsubishi – Rosa Bus, motor vehicle, registration number AIB 3574 (“the Rosa Bus”).
- 2.2 It was averred that Cleus Manyika was the driver of a Volvo Truck and Trailer, bearing registration number APB 2652 and 3045 (“the Volvo Truck and Trailer”) respectively, which was involved in an accident with the Company’s Rosa Bus. It was further stated, that Cleus Manyika was an employee of Mathews Chinga, and that at the time of the accident, he was acting in the course of his duties.
- 2.3 The assertion was that on or about 15th April 2022, while the Company’s driver was driving the Rosa Bus ordinarily, and at the time of the accident, which was used to provide a service of public transport to the general public, along Lumumba Mungwi road, just before the traffic lights, it

collided with the Volvo Truck and Trailer belonging to Mathews Chinga, which was being driven by Cleus Manyika during the course of his duties, as an employee of Mathews Chinga.

- 2.4 The contention was that the accident occurred when Cleus Manyika failed to keep his lane, with no due care of other road users, and as a result of this, he hit into the Rosa Bus which had the right of way, and caused the accident. It was stated that the Rosa Bus had passengers who sustained injuries as a result of the accident.
- 2.5 Further averment was made that upon impact, the Rosa Bus was extremely damaged, to a point of no repair, making it uneconomical to repair it, as it could only be used as scrap metal in its' current state. It was also stated that due to the extent of the damage, the Rosa Bus had to be towed from the scene of the accident to Matero Police Station, where the matter was reported.
- 2.6 Further averment was made, that Cleus Manyika was charged with the offence of dangerous driving by the police, and he was taken before the Subordinate Court, where he was fined K2,000.00, upon being found guilty of the offence by the Court.
- 2.7 The contention was that the accident was caused by the careless and negligent driving by Cleus Manyika, in the course of his duties as an employee of Mathews Chinga, with the particulars of negligence being alleged as follows:

PARTICULARS OF NEGLIGENCE

2.8 Cleus Manyika was negligent when he:

(a) Failed to keep a proper look out for other road users including the Rosa Bus;

(b) Failed to keep to his lane and as a consequence hit into the Company's Rosa Bus;

(c) Was driving the Volvo Truck and Trailer with no due regard or care for other road users to whom he owed a duty of care including the Company;

2.9 The assertion was that as a result of the negligence, the Company suffered extensive damages as itemized below:

PARTICULARS OF SPECIAL DAMAGES

(i) Loss of business income from 15th April 2022 to date at K1,000.00 per day;

(ii) Extensive damage to motor vehicle whose replacement cost is about USD21,000.00;

(iii) Towing of the motor vehicle from the accident scene to Matero Police Station at K12,000.00;

2.10 It was averred that the Company attempted to settle this matter with Mathews Chinga, as employer of Cleus Manyika ex curia, but all such attempts had proved futile, as Mathews Chinga denied liability, and had shown no care whatsoever for the actions of his employee.

3. DEFENCE

3.1 Mathews Chinga and Cleus Manyika did not enter appearance and file their defences and the other requisite documents.

4. EVIDENCE AT TRIAL

4.1 At trial, the Company called Two (2) witnesses.

PW1- BEBITON KABUBI SITENGA

4.2 Bebiton Sitenga produced his witness statement at trial as his evidence.

4.3 The evidence as contained in that witness statement, was that he is a driver, in the employment of the Company. He further testified that on 15th April 2022, he was driving the Rosa Bus along Lumumba-Mungwi road, and just before the traffic lights, he collided with Mathews Chinga's Volvo Truck and Trailer. It was Bebiton Kabubi Sitenge's evidence that at the time of the accident, he was ordinarily using the bus to provide a service of public transport to the general public.

4.4 He identified page 1 of the Company's bundle of documents as the registration certificate for the Rosa Bus, and pages 3 and 4 of the said bundle of documents, as the insurance documents for the said Rosa Bus.

4.5 Further testimony was given that Cleus Manyika was driving the Volvo Truck and Trailer at the time of the collision, during the course of his duties, as an employee of Mathews Chinga. Bebiton Kabubi Sitenge identified page 2 of the Company's bundle of documents, as Cleus Manyika's driver's license.

4.6 He also stated that the collision occurred when Cleus Manyika while driving on the Lumumba-Mungwi road, while approaching the traffic lights, failed to keep his lane, with no due care for other road users. As a result, he hit into the

Rosa Bus which Bebiton Kabubi Sitenga was driving. Bebiton Kabubi Sitenga added that he had the right of way, and that the passengers on the Rosa Bus sustained injuries as a result of the accident.

- 4.7 It was further his testimony that the Rosa Bus was extensively damaged, to a point of no repair, adding that it could only be used as scrap metal in its' current state. It was also Bebiton Kabubi Sitenge's testimony that due to the accident, the Rosa Bus was towed from the scene of the accident to Matero Police Station, where the matter was reported.
- 4.8 He stated that Cleus Manyika was charged with the offence of dangerous driving by the police, and he appeared before the Subordinate Court where was found guilty of the offence and he was fined K2,000.00. Bebiton Kabubi Sitenge referred to the notice of intended prosecution, Complaint, Warrant to Undergo Sentence of Imprisonment, the Traffic Offence Report and the Charge Sheet which were at pages 5,6,7, and 9-10 of the Company's bundle of documents respectively, as the said documents.
- 4.9 Further in his testimony, Bebiton Kabubi Sitenge told that the Court that the accident was caused by the careless and negligent driving by Cleus Manyika.

PW2 – MUBITA NAMILUKO

- 4.10 The last witness, Mubita Namiluko also produced his witness statement at trial, and he relied on it, as his evidence.

4.11 In his witness statement, Mubita Namiluko testified that he was the business owner, and managing director of the Company. He added that the Company was the registered owner of the Rosa Bus, stating that the certificate of registration for the said bus was at page 1 of the Company's bundle of documents. Mubita Namiluko also identified the insurance documents for the bus, which were at pages 3 and 4 of the same bundle of documents.

4.12 His testimony was that on 15th April 2022, he received a phone call from Bebiton Kabubi Sitenge, his employee, who narrated the accident to him. Mubita Namiluko reiterated the contents of Bebiton Kabubi Sitenge's witness statement.

5. DECISION OF THIS COURT

5.1 I have considered the evidence and the submissions.

FACTS NOT IN DISPUTE

5.2 It is common cause that the Company, Limucho Auto Parts and General Dealers Limited, alleges that on 15th April, 2022, Cleus Manyika who was driving a Volvo Truck and Trailer registration number APB 2652 and 3045 ZM respectively, which is owned by Mathews Chinga, along the Lumumba-Mungwi Road failed to keep his lane, and he went and hit into the Mitsubishi Rosa Bus registration number AIB 3574, which is owned by the Company, and was being driven by Bebiton Kabubi Sitenge, as a public service vehicle.

5.3 It is also not in contention, that the Company alleges that Cleus Manyika was negligent in the manner that he drove the Volvo Truck and Trailer registration number APB 2652

and 3045 ZM, which resulted in him hitting into the Mitsubishi Rosa registration number AIB 3574, which was being driven by Bebiton Kabubi Sitenge, and resulted in the said Rosa Bus being damaged beyond repair.

ISSUES IN DISPUTE

- 5.4 It is in contention whether Cleus Manyika was negligent in the manner that he drove the Volvo Truck and Trailer registration number APB 2652 and 3045 ZM, and whether Cleus Manyika and Mathews Chinga are liable to pay the Company for the replacement of the motor vehicle or its' assessed value, as well as special damages for towing the vehicle and damages for loss of business.

ANALYSIS

- 5.5 The Defendants, Cleus Manyika and Mathews Chinga, did not enter appearance and file any defence to the Company's Writ of Summons and Statement of Claim.
- 5.6 The evidence as given by Bebiton Kabubi Sitenge, who was driving the Mitsubishi Rosa registration number AIB 3574 on the material day, was that as he was driving along the Lumumba-Mungwi road, Cleus Manyika who was driving the Volvo Truck and Trailer, registration number APB 2652 and 3045 ZM, approached the traffic lights, and he failed to keep his lane.
- 5.7 Thus, he went and hit into the Mitsubishi Rosa registration number AIB 3574, which had the right of way, and the said Rosa Bus was damaged beyond repair.

- 5.8 In the submissions, the Company stated that it is entitled to the reliefs sought. It was submitted that Cleus Manyika and Mathews Chinga, without justifiable reason failed to enter appearance, and attend trial to defend themselves or cross-examine the witnesses.
- 5.9 Acknowledgement was made that the burden was on Limucho Auto Parts and General Dealers Limited to prove the case on a balance of probabilities, with the cases of ***Zambia Railways Limited v Pauline S. Mundia, Brian Sialumba*** ⁽¹²⁾ and ***Miller v Minister of Pensions*** ⁽¹⁾ being cited as authority in that regard.
- 5.10 The case of ***Industrial Finance Company Limited v Jacques and Partners*** ⁽³⁾ was relied on, where it was held that:
- “Where a party to the proceedings of this nature is given time and ample opportunity to oppose entry of Judgment, and does not do so, so as to disclose a defence whether that defence is acceptable by the Court or not, the other party is entitled to have the Judgment entered in his favour.”***
- 5.11 The submission was that the principle in that matter, is applicable to all matters, and it does not relate to only matters for entry of Judgment. It was stated that in this matter, Cleus Manyika and Mathews Chinga had a legal right to enter appearance, but they chose to completely disregard the rules of the Court.

5.12 Reliance was also placed on the case of **Robert Simeza (Suing in his capacity as Executor of the estate of Andrew Hadjipetrou) & others v Elizabeth Mzyeche (sued as the mother and guardian as litem of minor beneficiaries)** ⁽¹³⁾.

5.13 **Order 35 Rule 3 of the High Court Rules of the High Court Act Chapter 27 of the Laws of Zambia** provides as follows;

“If the Plaintiff appears, and the Defendant does not appear or sufficiently excuse his absence, or neglects to answer when duly called, the Court may, upon proof of service of notice of trial, proceed to hear the cause and give Judgment on the evidence adduced by the Plaintiff, or may postpone the hearing of the cause and direct notice of such postponement to be given to the Defendant.”

5.14 This rule gives the Court authority to hear a matter, and to give Judgment on the evidence that is adduced by a plaintiff, where the defendant does not appear at trial.

5.15 In the case of **Robert Simeza (Suing in his capacity as Executor of the estate of Andrew Hadjipetrou) & others v Elizabeth Mzyeche (sued as the mother and guardian as litem of minor beneficiaries)** ⁽¹³⁾ which was relied on by the Company in its’ submissions, the Supreme Court held that:

“We agree with Ms. Kalunga that no procedural injustice is occasioned when a party who is aware of the proceedings does not turn up as we said in Imbwae Vs Imbwae supra. In Chibuye and others Vs The People which was a criminal matter we said:

“It is for an accused person to avail himself in Court when called upon and let due process of law take its course. An accused should not be allowed to dictate whether or not to be tried or unreasonably hold the court to ransom. Procedural rights must be invoked.”

The tenor of our Judgments in these two cases is that ‘you cannot force a litigant who does not want to litigate to litigate’.

Mr. Chenda, in dealing with Order 35 RSC 1999 only highlighted the provision to set aside the Judgment, he did not highlight “general indications” to be taken into account when considering to set aside the Judgment. We restate the relevant ones in this case. These are:

Where a party with notice of proceedings has disregarded the opportunity of appearing and participating in the trial, he will normally be bound by the decision....”

5.16 In this matter, the Court record shows that Court process was served by substituted service on Cleus Manyika and

Mathews Chinga. However, no appearance was entered or any defence filed by either of them. In line with the authorities cited, this Court has authority to determine this matter.

5.17 The non-appearance and filing of a defence by Cleus Manyika and Mathews Chinga, however does not mean that Judgment is automatically entered in the favour of the Company.

5.18 In the case of *Khalid Mohammed v The Attorney General* ⁽⁴⁾ the Supreme Court held that:

“A Plaintiff must prove his case and if he fails to do so the mere failure of the opponent's defence does not entitle him to Judgment.”

5.19 Thus, the issue in this matter, is whether the Company has proved its' case on a balance of probabilities, thereby entitling it, to the reliefs sought.

5.20 It has been seen that Bebiton Kabubi Sitenge testified that on 15th April 2022, whilst he was driving the Rosa Bus along Lumumba-Mungwi Road, he collided with Mathews Chinga's Volvo Truck and Trailer, just before the traffic lights. He stated that at the time of the accident, he was carrying passengers as the Rosa Bus was being used as public transport for the general public.

5.21 He narrated that the collision occurred when Cleus Manyika, the driver of the Volvo Truck and Trailer, failed to keep his lane, without due care to other road users, and as a result, he hit into the Rosa Bus, which Bebiton Kabubi Sitenga was

driving. It was also testified that as a result of the accident, the Rosa Bus was extensively damaged, and the passengers on it sustained injuries.

5.22 In its' submissions, the Company stated that Cleus Manyika owed Bebiton Kabubi Sitenge and all the other road users, a duty of care, not to cause them harm and injury while driving the vehicle. In support of this submission, reliance was placed on the case of **Kings v Philips** ⁽²⁾ where it was held as follows:

“An allegation of negligence postulates a breach by the Defendant of a duty owed by him to the Plaintiff. In the civil law there is no such thing as negligence in the air; liability only arises where there is a duty to take care and where failure in that duty has caused damage.

...

In so deciding he followed the decision of the House of Lords in Hayfork Bourhill v. Young reported in 1943 Appeal Cases at page 92, in which it was held:

“(1) that the duty of the motor cyclist on the public road to other persons using it was to drive with such reasonable care as would avoid the risk of injury (including injury by shock although no direct impact occurred) to such persons as he could reasonably foresee

might be injured by his failure to exercise that care;”

5.23 The case of *Antonyo v Danobo (T/A Juldán Motors)* ⁽¹⁴⁾ was also relied on, where it was stated that:

“...a driver who fails to observe the Highway Code falls short of the objective standard of a reasonably prudent driver. It is submitted such a driver is a negligent driver. It is argued that the driver ought to have adapted his driving to suit the road conditions.”

5.24 The submission was that Cleus Manyika failed to adhere to the guidelines of the Highway Code, which was to drive with care and precaution, and in consideration of other road users. It was further submitted that Cleus Manyika breached this duty of care to other road users, including Bebiton Kabubi Sitenga, when he failed to keep his lane, and he collided with the Rosa Bus, and as a result, caused it damage, and injuries to the passengers who were on the said vehicle.

5.25 The allegation was that the accident was caused by the careless and negligent driving by Cleus Manyika in the course of his duties, as an employee of Mathews Chinga. In *Black’s Law Dictionary, 11th Edition by Bryan A. Garner, Thomas Reuters*, *negligence* is defined as:

“The failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation; any conduct that falls below

the legal standard established to protect others against unreasonable risk of harm, except for conduct that is intentionally, wantonly, or willfully disregarding of others' rights; the doing of what a reasonable and prudent person would do under the particular circumstances, or failure to do what such a person would do under the circumstances.

5.26 The ingredients of negligence as stated in ***Charlesworth and Percy on Negligence 12th Edition at page 17***, are as follows;

***“1. The existence of a duty to take care, which is owed by the defendant to the complainant;
2. The failure to attain that standard of care, prescribed by the law, thereby committing a breach of such duty; and
3. Damage, which is both casually connected with such breach and recognised by the law, has been suffered by the complainant.”***

5.27 The above authorities, show that in Order to establish that a defendant was negligent, it must be shown that there was an existence of a duty of care to the plaintiff, and the failure to exercise that duty of care, which resulted in damage to the plaintiff being sustained.

5.28 In this matter, it has been stated that the accident occurred when Cleus Manyika failed to keep his lane while driving on Lumumba-Mungwi road, without due care to other road

users, thereby hitting into the Rosa Bus which was being driven by Bebiton Kabubi Sitenge, and was owned by the Company.

5.29 This allegation is supported by the Zambia Police Traffic Offence Report, which is at page 9 of the Company's bundle of documents, where it was stated as follows:

"The driver of the Volvo Truck failed to keep to near side hence hit into the Mitsubishi Rosa Bus."

5.30 The report also shows that Cleus Manyika was charged for Dangerous driving contrary to ***Section 155(1) of the Road Traffic Act No. 11 of 2002 of the Laws of Zambia*** which provides as follows:

"155. (1) Any person who drives a motor vehicle upon any road recklessly, or at a speed or in a manner which is dangerous to the public, having regard to circumstances of the case, condition and use of the road, and to the amount of traffic, which is actually at the time, or which might reasonably be expected to be on the road, commits an offence and is liable, upon conviction, to a fine not exceeding fifteen thousand penalty units or to be imprisonment for a period not exceeding three years, or to both."

5.31 The Company submitted that it was mindful of the guidance that was given in the cases of ***Kabwe Transport Company Limited v Press Transport (1975 Limited)*** ⁽⁶⁾ and ***Muliango and Muliango v Magasa and Muruja Transport***

& Farming Company Limited ⁽⁸⁾ that a conviction in a criminal trial, is not to be referred to in a civil trial, to establish liability.

5.32 As rightly guided, the evidence of the criminal conviction cannot be referred to in this matter to establish liability. A perusal of Mathews Chinga's letter of reply to the Company's demand letter, reveals that Mathews Chinga did not deny the occurrence of the accident. In the letter of reply he stated as follows:

- i. That Truck and Trailer involved in the above accident was insured.***
- ii. The Mitsubishi Rosa Bus is expected to have been insured comprehensively, in which case you are expected to get a replacement and your loss of business from your insurance company.***
- iii. In view of the above circumstances, our client denies liability for your claims."***

5.33 By driving on a public road, Cleus Manyika owed a duty of care to other road users, including Bebiton Kabubi Sitenga, to observe the traffic rules and to drive with care so as not harm any of the other road users. He failed to exercise that duty of care, as he failed to keep his lane, and as a result, he went and collided with the Mitsubishi Rosa bus which Bebiton Kabubi Sitenga was driving, when Bebiton Kabubi Sitenga had the right of way.

5.34 It also an ingredient of negligence, that damage must have been suffered, as a result of the failure to exercise the duty of care.

5.35 In the case of *Mulendema v Zambia Breweries PLC* ⁽¹⁶⁾ the Court of Appeal held that:

“Negligence alone does not give rise to a cause of action; it must be accompanied by damage or injury suffered as a result of that negligence.

.....

ingredients necessary to prove negligence namely, a duty to care owed, breach of that duty and the consequential damage must be proved, and are not separate from each other. The breach or negligence must be shown to have caused the injury.”

5.36 In this matter, the evidence that was given was that the Rosa Bus was extensively damaged, to a point of no repair and that the passengers who were on it, sustained injuries as a result of the accident. In the Police report, the description of the damage to the Rosa Bus was stated as that it was ‘*extensively damaged*’.

5.37 The report also stated that Mwansa Bridget, Mwile B Johnson, Marshal Chinkobela, Mfula Joyce and Nelson Kunda sustained injuries.

5.38 As earlier stated, in his letter of reply, Mathews Chinga, did not deny the occurrence of the accident. It was however stated in the letter of reply, that the Rosa Bus was expected

to have been comprehensively insured. Therefore, replacement of the vehicle and loss of business should be obtained from the insurance company.

5.39 The damaged that was caused to the Rosa Bus, was therefore not denied, and it is confirmed by the Police report which is at pages 9-10 of the Company's bundle of documents.

5.40 In its' evidence, the Company alleged that the accident occurred during the course of Cleus Manyika's duties as an employee of Mathews Chinga. Then in the submissions, it stated that in line with the case of **Antonyo v Danobo (T/A Juldán Motors)** ⁽¹⁴⁾, Mathews Chinga is vicariously liable for the acts and omissions of his employee, that were done during the course of his employment.

5.41 In defining *vicarious liability*, reliance was also placed on the case of **Lister v Hesley Hall** ⁽¹¹⁾ where it was held that:

"a wrongful act is deemed to be done by a "servant" in the course of his employment if "it is either
(a) a wrongful act authorised by the master, or
(b) a wrongful and unauthorised mode of doing
some act authorised by the master.

...

a master is liable even for acts which he has not authorised, provided they are so connected with acts which he has authorised, that they may rightly be regarded as modes - although improper modes - of doing them."

5.42 It was submitted that having established the fault on the part of Cleus Manyika, which he admitted at the police station, Mathews Chinga as his employer, is vicariously responsible for the accident under the master and servant principle of vicarious liability, and he is equally liable to the Company.

5.43 *Vicarious liability* is defined in ***Black's Law Dictionary, by Bryan A. Garner, 9th Edition, Thomas Reuters, 2009 at page 998*** as:

“Liability that a supervisory party (such as an employer) bears for that actionable conduct of a subordinate or associate (such as an employee) based on the relationship between the two parties.”

5.44 In the case of ***GDC Hauliers Zambia Limited v Trans-Carriers Limited*** ⁽¹⁰⁾ the Supreme Court noted as follows with regard to vicarious liability:

“We accept the principles discussed in the previous cases and that some of the tests propounded do assist to resolve whether or not an employee was in the course of his employment when he was involved in the act or conduct which is called in question. However, when there is credible evidence that an employee was actually authorised to perform tasks – such as driving fellow workers – which would ordinarily not be associated with his designation or job title, such

evidence cannot be ignored and it will support a finding of vicarious liability if the worker was engaged on his employer's business. Here, the court below accepted the evidence of the witnesses and the question of the label attaching to the position held by the second Defendant becomes wholly immaterial. It is not true that only a person specifically employed as a driver can attach vicarious liability from a driving incident in the course of employment or while engaged on the employer's business. We are prepared to take judicial notice that there are many people in this country who drive what are popularly called personal-to-holder and/or duty vehicles whose specific occupation is not that of a driver but can attach vicarious liability if the incident arises in the course of employment or while engaged on the employer's business. This is akin to the liability of the owner of a car who has lent it to a friend or relative for use on an errand which is to the benefit of the owner: See, for example, Clerk and Lindsell on Torts, 16th Edition, paragraphs 3-49 to 3-50. The third ground cannot succeed."

- 5.45 In this matter, the evidence on record, attaching Mathews Chinga to Cleus Manyika, is that the Volvo Truck and Trailer is registered in the name of Mathews Chinga. The Police report on record, shows that the insurance for the Volvo

Truck and Trailer is in the name of Mathews Chinga. Further, the letter of demand and letter in reply which are on record, also show that Mathews Chinga is the owner of the Volvo Truck and Trailer.

- 5.46 It is noteworthy that in his letter of reply, Mathews Chinga did not deny the accident regardless of the fact that he was not the driver of the Volvo Truck and Trailer.
- 5.47 In the case of **GDC Hauliers Zambia Limited v Trans-Carriers Limited** ⁽¹⁰⁾ which has been cited above, the Court acknowledged that vicarious liability applies even in cases where an employee is authorised to perform a task that is not ordinarily associated with the job title. It also applies to cases where an employee is driving an employer's personal-to-holder vehicles, but whose designation is not that of a driver.
- 5.48 The decision in that case, further encompassed liability to the owner of a vehicle, who lends a vehicle to a friend or relative, for use on an errand, which is to the benefit of the owner. It is apparent that the principle of vicarious liability is quite wide.
- 5.49 In **Charlesworth and Percy, On Negligence 12th Edition at page 185** the author states as follows:

“Course of employment a question of fact. In determining whether or not an employee's wrongful act is done in the course of his employment, it is necessary that a broad view of all the surrounding circumstances should be taken

as a whole and not restricted to the particular act which causes the damage. There is no simple test which can be applied to cover every set of circumstances, so that it remains essentially a question of fact for decision in each case. Some common situations follow.

Employer's vehicle entrusted to employee. When an employer's vehicle is entrusted to the employee to be driven or used in some other way, the employer is liable if the employee is negligent while using the vehicle either wholly or partly on the employer's business or in the latter's interest..."

5.50 In this matter, it has not been stated under what circumstances, Cleus Manyika was driving the Volvo Truck and Trailer that belongs to Mathews Chinga. However, the allegation that the accident occurred in the course of his business has not been denied by Cleus Manyika and Mathews Chinga.

5.51 Therefore, the surrounding circumstances, lead to the conclusion that the accident occurred during the course of Cleus Manyika's employment with Mathews Chinga or during a time that Cleus Manyika was authorised to use the vehicle for the benefit of Mathews Chinga. Therefore, both Mathews Chinga and Cleus Manyika are liable for the damage that was caused to the Mitsubishi Rosa Bus in negligence.

**REPLACEMENT OF THE MITSUBISHI ROSA
REGISTRATION NUMBER AIB 3574**

- 5.52 Having established liability on the part of both Cleus Manyika and Mathews Chinga, it follows that they are liable to pay for the loss occasioned by the damage to the motor vehicle Mitsubishi Rosa Bus registration number AIB 3574. This is loss that was occasioned directly as a result of the negligence on the part of Cleus Manyika, and falls under the head general damages, and not as special damages as pleaded.
- 5.53 Both Bebiton Kabubi Sitenga and Mubita Namiluko testified that the Mitsubishi Rosa Bus was damaged beyond repair. This evidence is supported by the police report, which is at pages 9-10 of the Company's bundle of documents, which recorded the damage to the vehicle as extensively damaged. In the submissions, it was stated that the insurance cover for the motor vehicle, which was at page 4 of the Company's bundle of documents, showed that at the time of the accident, it did not cover the damage caused to the Mitsubishi Rosa Bus.
- 5.54 In the case of ***Abraham Mohamed and Alantara Transport Ltd v Safeli Chumbu*** ⁽⁹⁾, the respondent's motor vehicle was damaged beyond repair in a motor accident. The respondent claimed damages from the first appellant, as the driver who caused the accident and against the second appellant, as the employer of the driver.

- 5.55 The learned trial judge found that the accident was caused by negligence on the part of the first appellant, but held that in view of the fact that the second appellant had said that his motor vehicle was roadworthy before the accident, the second appellant was not liable.
- 5.56 The learned Judge, however, found that the first appellant was driving in the course of his employment with the second appellant. The learned Judge made an award of damages in the sum of K150,000.00, for the value of the motor vehicle and for general damages to be assessed.
- 5.57 The respondent appealed to the Supreme Court against the learned Judge's finding that the second appellant was not liable in damages, and at the hearing, the appeal was not opposed. The Supreme Court found that the second appellant was vicariously liable in damages to the respondent. They accordingly awarded damages against it for "the damages awarded by the learned judge".
- 5.58 The respondent then applied to the deputy registrar for assessment of damages and, at the hearing of the application, put forward an affidavit by the respondent to the effect that the respondent's vehicle, a Volvo 240 GL sedan, was brand new at the time when it was completely written off, and that the cost of purchasing a new vehicle in June, 1992, was K2,947,473.20.
- 5.59 No evidence of any other general damages was adduced before the learned deputy registrar who awarded damages in

the sum of K2,947,478.20 plus interest. The appellants appealed against that award.

5.60 The Supreme Court in that matter, held as follows:

“(i) The general rule as to the normal measure of damages for tort is the value of the chattel at the time of the loss.”

5.61 Further in the case of ***Madison General Insurance Company Limited v Avril Cornhill and Michael Kakoma*** (16), the Supreme Court stated as follows:

“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
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.”

5.62 They further stated that:

“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."

- 5.63 In this matter, no evidence was adduced to show the value of the Motor Vehicle Mitsubishi Rosa registration number AIB 3574 at the time that the accident occurred. Further, no evidence was led to show whether insurance paid any amount under the insurance policy which is at pages 9-10 of the Company's bundle of documents.
- 5.64 I do however, note that such insurance cover was for third parties, and it would therefore not have compensated for the loss with regard to the Mitsubishi Rosa Bus. The police report at pages 9-10 of the Company's bundle of documents shows that the Volvo Truck and Trailer registration number APB 2652 and 3045 ZM was insured by Goldman Insurance at the time of the accident.
- 5.65 The value of the Mitsubishi Rosa registration number AIB 3574 at the time of the accident not having been stated, and there being no evidence to show that Goldman Insurance as insurers of the Volvo Truck and Trailer registration number APB 2652 and 3045 ZM paid any money to the Company under the insurance policy, the value of the Mitsubishi Rosa Bus, registration number AIB 3574 at the time of the accident shall be assessed by the Registrar.

5.66 The amount assessed shall be less any amounts that may have been paid by Goldman Insurance as insurers of the Volvo Truck and Trailer registration number APB 2652 and 3045 ZM. The amount found due shall carry interest at the average short-term deposit rate, from the date of issue of the Writ of Summons until Judgment, and thereafter at the Bank of Zambia lending rate until payment.

CLAIM FOR THE PAYMENT OF SPECIAL DAMAGES IN THE AMOUNT OF K12, 000.00 FOR TOWING THE VEHICLE TO MATERO POLICE AND DAMAGES FOR LOSS OF USE OF THE VEHICLE

5.67 The Company also claims damages from Cleus Manyika and Mathews Chinga. The Writ of Summons shows as follows:

- i. Special damages for towing of the vehicle from the accident scene to Matero Police Station in the sum of K12,000.00;*
- ii. General damages for loss of business at K1,000.00 per day from the date of the accident being 15th May 2022 to the date of Judgment until full and final payment;*

5.68 In the statement of claim, the damages were particularised as special damages as follows:

- (a) Loss of business income from 15th April 2022 to date at K1,000.00 per day;*
- (b) Extensive damage to motor vehicle whose replacement cost is about K21,000.00;*
- (c) Towing of motor vehicle from accident scene to Matero Police Station at K12,000.00;*

- 5.69 In his evidence, Bebiton Kabubi Sitenga stated that the Rosa Bus was damaged beyond repair, and it had to be towed from the scene of the accident to Matero Police station where the matter was reported.
- 5.70 The case of *Attorney General v Mpundu* ⁽⁵⁾ was relied on, in support of the submission, where the Supreme Court held that:

“It is thus trite law that, if a Plaintiff has suffered damage of a kind which is not necessary and immediate consequence of a wrongful act, he must warn the Defendant in the pleadings that the compensation claimed would extend to this damage, thereby showing the Defendant the case he has to meet and assisting him in computing a payment into Court. The obligation to particularise his claim arises not so much because the nature of the loss is necessarily unusual but because a Plaintiff who had the advantage of being able to base his claim upon a precise calculation must give the Defendant access to the facts which make such calculation possible. Consequently, a mere statement that the Plaintiff claims “damages” is not sufficient to let in evidence of a particular kind of loss which is not a necessary consequence of the wrongful act and of which the Defendant is entitled to a fair warning. In other words, usual, ordinary or general damages may be

generally pleaded; whereas, unusual or special damages may not, as these must be specifically pleaded in a statement of claim (or where necessary, in a counter-claim) and must be proved”

5.71 The Company submitted that it had pleaded and proved that the act of Cleus Manyika, caused a huge financial loss to the Company’s business. It pointed to the Police report, which speaks to the extent of the damage caused to the Rosa Bus. I have already stated that the damage to the Mitsubishi Rosa Bus fell under the head of general damages which I have dealt with above.

5.72 With regard to the special damages that are claimed, ***Harvey Mc Gregor, Mc Gregor on Damages, Eighteenth Edition, (Thomson Reuters (Legal) Limited, 2009) at paragraph 1-029, page 20*** guides as follows:

“In the cases of damage, or damages are often said to be “general” or “special”, and these two terms are usually contrasted with each other, yet the terms are used in a variety of different meanings, and if these meanings are not kept separate, the indiscriminate use of the terms only spells confusion. Such a separation is not seen very often, and is therefore wise to elucidate these terms at the very start.”

5.73 In essence, the cited authority guides that general and special damages refer to different categories of damages. ***Black’s Law Dictionary 9th Edition by Bryan A. Garner,***

Thomas Reuters, 2009 at pages 446 and 448 respectively defines *general damages* and *special damages* as follows:

“general damages. Damages that the law presumes follow from the type of wrong complained of; specif., compensatory damages for harm that so frequently results from the tort for which a party has sued that the harm is reasonably expected and need not be alleged or proved. • General damages do not need to be specifically claimed.

...

special damages. Damages that are alleged to have been sustained in the circumstances of a particular wrong. • To be awardable, special damages must be specifically claimed and proved.”

5.74 **McGregor on Damages, by Harvey McGregor, 16th Edition, London Sweet & Maxwell, 1997, in paragraph 2063** states that the evidence in proof of special damage must show the same particularity, as is necessary for its' pleading.

5.75 The authorities which have been cited above, show that it is not enough to simply plead or particularise special damages. A party claiming special damages must also lead evidence to prove the special damages.

5.76 In the case of **Madison General Insurance Company Limited v Avril Cornhill and Michael Kakoma** ⁽¹⁶⁾ the

Supreme Court had this to say as regards proof of special damages:

“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. In Mhango v. Ngulube, 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.”

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.”

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.

....

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.”

5.77 The Supreme Court went on to note as follows:

“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.

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. The case of Midlands Breweries (Pvt) Ltd v. David Munyenyembe is clearly distinguishable from the present case. We have earlier on stated that it is not in all cases that documentary evidence needs 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 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'."

5.78 In this matter, the Company particularised the special damages that it claims in its' pleadings.

5.79 However, it will be noted that the evidence that was led at trial in proving the special damages for loss of business, was that Bebiton Kabubi Sitenge was using the Mitsubishi Rosa

Bus as a public service vehicle and at the time of the accident, there were passengers on the said bus, who were injured. The police report names a number of people who were on the bus as having been injured.

5.80 However, the Company failed to show proof that the said bus earned the amount of K1, 000.00 a day as income. Further no receipt for the amount that was charged for towing the bus from the accident scene was produced.

5.81 While it has been shown that there were passengers on the Mitsubishi Rosa Bus that Bebiton Kabubi Sitenge was driving when Cleus Manyika hit into it, thereby causing it damage, there being insufficient evidence to show that the Company incurred costs to tow the Mitsubishi Rosa to Matero Police or that fact that K1, 000.00 a day, was earned as income from the bus a day. I therefore refer those claims for assessment by the Registrar.

5.82 With regard to the claim for income that was earned from the Mitsubishi Rosa Bus, the claim is from the date of the accident being 15th May, 2022 to the date of Judgment. The Supreme Court in the case of ***Madison General Insurance Company Limited v Avril Cornhill and Michael Kakoma*** ⁽¹⁶⁾ in relation to such claims held that:

“In Eastern Cooperative Union Ltd v. Yamene Transport, 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.”

5.83 In the case of ***Eastern Co-Operative Union Ltd v Yamene Transport Ltd*** ⁽⁷⁾ the holding was that:

“A Plaintiff who has a profit-making chattel damaged beyond economic repair is under obligation to replace that chattel, and the poverty or otherwise of the Plaintiff is irrelevant.”

5.84 In that case, the period for loss of use of the vehicle was limited to a period of six months. Similarly, in this matter, the period for loss of business shall be limited to six months on assessment, as the Company was under a duty to mitigate its' loss, and its' impecuniosity or otherwise was irrelevant, looking at the prevailing economic situation in the country.

5.85 The amounts found due shall carry interest at the average short-term deposit rate from the date of issue of the Writ of Summons until Judgment and thereafter, at the Bank of Zambia lending rate until payment.

6. CONCLUSION

6.1 The company has succeeded on the claim for the value of the Mitsubishi Rosa registration number AIB 3572 at the time of the accident, the amount for towing the vehicle from the accident scene to Matero Police, and for damages for loss of business for a period of six months from the date of the accident.

6.2 The amounts found due shall carry interest at the average short-term deposit rate from the date of issue of the Writ of Summons until Judgment, and thereafter, at the Bank of Zambia lending rate until payment. The Company is also awarded costs, which shall be taxed in default of agreement. Leave to appeal is granted.

DATED AT LUSAKA THE 17th DAY OF JULY, 2024

kaunda
**S. KAUNDA NEWA
HIGH COURT JUDGE**

