IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM

COMMERCIAL CASE NO. 50 OF 2004

TANGAMANO TRANSPORT SERVICE LTD.....PLAINTIFF
VERSUS
1. ELIAS RAYMOND.....1ST DEFENDANT
2. CASAGRANDE GARAGE LIMITED.....2ND DEFENDANT

JUDGMENT

Date of Receiving Opinion of Assessors – 9/5/2006

Date of Judgment – 12/5/2006

MASSATI, J:

Through Mr. K. Mwitta Waissaka, learned Counsel, the Plaintiff **TANGAMANO TRANSPORT SERVICE LTD** has filed a suit in this court against the Defendants for negligence for which it claims Tshs.86,394,000/= as replacement cost of its motor vehicle damaged by the negligence of the 1st Defendant in the course of his employment with the 2nd Defendant, and Tshs.10,000,000/= as damages *"for loss of use, loss of income, profits, mental and psychological torture"* . The cause of action as framed in paragraph 4 of the plaint is couched in the following terms:

"4. That the first Defendant while being employed by the 2nd Defendant and while driving his motor vehicle IVECO truck with registration number TZR 9323 as attached to trailer No. TZL 1733 did negligently park the said vehicle on a public road and failed to take necessary precautions hence causing the Plaintiff's vehicle an IVECO truck registration No. TZJ 150 and Trailer TZJ 106 collide with it and in consequence causing death to the plaintiff's driver HASSAN MZONGE and totally wrecking the said Plaintiff's truck on 27/7/2000 at Mkumbara Area, Korogwe district along the Moshi – Mombo highway."

The Defendants initially engaged MS Professional Centre, Advocates, who filed a Written Statement of Defence. In answer to the above paragraph, the Defendants state in paragraph 2 of their statement of defence:

"2. Save for allegations of negligence which are strongly denied the contents of paragraph 4 of the plaint are denied. It is further stated that the said accident is wholly blamable upon the negligence of the Plaintiff's driver one HASSAN MZONGE."

For purposes of record it is to be noted that the Defendants later withdrew their instructions from the Professional Centre,

who had also filed an application for Third Party Notice to join the National Insurance Corporation, from which the 2nd Defendant claims to be entitled to be indemnified for the whole of the Plaintiff's claims with costs. It was at the Final Pre trial Conference that Mr. Malimi, learned Counsel, took over the conduct of the Defendants' case.

The third party took out a defence. According to paragraph 6 of the Third Party's Written Statement of defence, the Third Party denies liability on the ground that:

> *"...at the time of the accident motor vehicle No. TZL 1733 had no valid insurance policy which was in force and that no claim was lodged with the third party."*

It is on those pleadings and mediation having failed that the case had to go for trial, and I directed that both the suit and the third party notice be tried together. The trial was with the aid of the able assistance of Mr. Mwamukonda and Mr. Matondane, gentlemen assessors.

The following issues arising from the pleadings were framed. As between the Plaintiff and the Defendants

(1) *Whether the accident is wholly blamable on the 1st Defendant?*

2. *Whether the Plaintiff's driver was contributorily negligent?*

3. *Whether the Plaintiff's vehicle was damaged as alleged?*

4. *Whether the Plaintiff suffered the damages claimed?*

5. *To what reliefs are the parties entitled?*

As between the 2nd Defendant and the third party

1. *Whether the 2nd Defendant had a valid insurance cover in respect of its truck and trailer at the date of the accident?*

2. *Whether the Third Party was aware of the accident and informed by the 2nd Defendant in time?*

3. *Whether the Third Party is liable to indemnify the 2nd Defendant?*

To prove these issues one way or the other the parties produced 2 witnesses each. I will now go over the testimonies of these witnesses, very briefly, in the next paragraphs.

PW1 SAIDI SUDI SAID, described himself as the Plaintiff's Managing Director. He said on the small hours of 27/7/2000 he received a telephone call from Mombo police notifying him of the accident involving their motor vehicle TZJ 150. He proceeded to the scene of the crime. A sketch plan of the scene of the accident was drawn. His vehicle was extensively damaged, and their driver HASSAN MZONGE had died on the spot. He found out that the 1st Defendant ELIAS RAYMOND was the driver of the offensive motor vehicle. He was eventually charged and convicted at Korogwe District Court on 20/12/2002 for wrongful parking. PW1 then began to follow up claims with the 2nd Defendant who referred him to the National Insurance Corporation Ltd, together with a Cover Note. The National Insurance Corporation advised him to revert to the 2nd Defendant for settlement of his claims.

PW1 further testified that he bought the vehicle from the United Arab Emirates in 1995 at the price of USD.85620, and paid all import and customs duties. He said as a result of the accident which rendered the motor vehicle a complete wreck his company suffered the total loss of the vehicle valued at Tshs.86,394,000/= and was also claiming Tshs.10,000,000/= per annum for loss of earnings; loss of use and mental torture.

In cross examination by the defence Counsel and gentlemen assessors, PW1 admitted he was not present at the scene of the accident, that the offensive vehicle was parked 4 metres off the road against the 6 meter wide road, but that the sketch plan does not show that there were signs to warn on coming vehicles of the stationary vehicle. He admitted that it was their vehicle which knocked the stationery vehicle. He said at the time of the accident the vehicle had been on the road for 4 ½ years and that the replacement value is based on the value of the Tanzanian currency. He said it took them up to 2/5/2003 to write to the Defendants because they were waiting for the outcome of the traffic case. Finally he said the judgment for overdraft default for Tshs.137,426,270 was a matter that accrued before the accident. And that his estimate of loss of income, Tshs.10,000,000/=[was on the lower side.

Pw1 tendered a total of 10 documentary exhibits, namely Exh.P1 to P10. ExhP1 collectively is a collection of the particulars of a road accident (PF90) Final Report (PF115) and the Vehicle Inspection Report for motor vehicle TZJ 150, with trailer TZJ 106. According to Exh.P1 the motor vehicle was extensively damaged. Exh.P2 is a copy of the Korogwe District Court judgment delivered on 20/12/2002, in which the 1st Defendant was convicted of (1) failing to take reasonable steps to ensure that the broken vehicle was removed from the public

road, and (2) careless or inconsiderate use of a motor vehicle in a public road to wit, by parking his motor vehicle without precautions and consideration for other traffic. Exh.P3 is a copy of the claim letter dated 9/5/2003 that the Plaintiff sent to the 2nd Defendant, in which the witness was asking the 2nd Defendant to supply her cover note so that he may forward his claim to her insurers. Exh.P4 is a letter dated 11/10/2003 from the 2nd defendant in which two Cover Notes are forwarded to the Plaintiff. The Cover Notes were No. 325848 and 243931 for motor vehicle No. TZF 9323 and trailer No. TZL 1733. Exh.P5 is a letter dated 15/10/2003 from the Plaintiff to the National Insurance Corporation Ltd (The Third Party herein) notifying them of the accident and attaching the Cover Notes forwarded to them by the 2nd Defendant. The Third Party was asked to send an assessor to assess the damage. Exh.P6 is the Import Declaration Form dated 9/11/95 in which the value of the vehicle is shown as Tshs.55,653,000/= or USD 85,620 and the exchange rate was Tshs.583/5060 to a dollar. The terms of payment are shown as prepaid. Exh.P7 is a Tax Assessment Notice.

On a casual examination of Exh.P7 I note that some of the particulars are different from those shown in Exh.P6. For instance in Exh.P6, the Invoice No. is shown as Q 170A 115/Sir/MT , of 9/11/95 the FOB value in foreign currency is USD 85,620, whereas in Exh.P7, the Invoice No. is 5177 of

29/11/95, the FOB value in foreign currency is USD 77,000. It is therefore apparently doubtful whether the two documents refer to the same subject matter. But at this stage I will not give a conclusive opinion on these documents. Exh.P8 is a Certificate of Customs Clearance in which the vehicle is described as new. Exh.P9 is the registration card for the vehicle in which it is also described as new. And lastly, Exh.P10 is a Consent Settlement Order issued by this court in Commercial Case No. 200 of 2001 on 23/11/2001, in which the Plaintiff was ordered to pay to CRDB the sum of 137,426,270/= plus interest.

The next witness for the Plaintiff was SALUM CHAKI (PW2). Essentially this was an expert witness. He assessed the damage caused to the Plaintiff's vehicle after the accident. He said he arrived at his opinion after studying the damaged vehicle for 1 ½ hours on 6/3/2004, more than 4 years after the accident. He opined that based on the new price of the motor vehicle the necessary depreciation, the devaluation of the shilling the pre accident value of the vehicle was tshs.86,394,000/= as at 2004. It must be noted that PW2 was asked by the Plaintiff to do the assessment of the scrap vehicle PW2 produced photographs he took of the scrap vehicle as Exh.P11 and his own report as Exh.P12. According to Exh.P12 the damage done to this vehicle is so massive that the

cost of repairing it will exceed its pre accident value less the value of the salvage and so in his opinion the loss is total.

In cross examination PW2 said he based his assessment partly on the police report PF 90 (Exh.P1).

For the defence the 1st Defendant was its first witness (DW1). He testified that he had 14 years driving experience. On the fateful night as he was proceeding to Moshi, his vehicle developed a mechanical fault by failure of the fuel pump. So he decided to park the truck on the left hand side of the road. He exhibited illuminated triangles on the back of his parked truck to warn on coming motorists. He also put on park lights. No sooner the Plaintiff's vehicle coming from behind at a high speed rammed into his vehicle and partly damaged it, before falling on the left hand side of the road a few metres away. Its driver was seriously injured and was taken to Mombo Hospital where he later died. He said next morning the police came and drew a sketch plan of the accident to which he appended his signature. He was taken to court and charged with two offences and convicted and sentenced to pay shs.50,000/= fine. He said he was aggrieved by the finding and intends to appeal against conviction, as he did not cause the accident. In cross examination he insisted on his innocence and that he did take all the necessary precautions to prevent the accident, and that it was the oncoming vehicle

which was the immediate cause of the accident. He said the district court did not explain to him his right of appeal, but he wrote to apply for a copy of the proceedings. DW1 also produced two documentary exhibits. Exh.D1 is the sketch plan. According to the sketch plan, the Defendants vehicle was parked off road leaving a gap of 4 metres from the other side of the road, and that the Plaintiff's vehicle fell off 7 metres away from where the vehicle had parked. According to Exh.D1 there are no signs exhibited by the 1st Defendant to warn oncoming road users. The highway is 6 metres wide. Exh.D2 is a report of the accident. According to DW1 he made this report for insurance purposes only. In Exh.D2, Dw1 repeated his account as he told the court. He insisted that he deposited the "triangles" and fresh leaves to warn other motorists.

The main thrust of the testimony of DW2, MORIETE MARIA LUISA is that she is the 2nd Defendant Company's Director, and has been in the transport Industry since 1962. While admitting that the accident did indeed happen, and the Plaintiff's vehicle damaged, DW2's testimony rested on two fronts. First she said the value of the damaged vehicle was exaggerated. In her view, the absence of such documents as the Invoice, the bill of single entry, bill of lading, a customs receipt was fatal in determining the real pre accident value of the vehicle. She also criticized the assessor's report (Exh.P12) on the ground that it lacked such particulars as differential,

gear back rear transmission, rear axle, rear suspension system size of the tyres and whether or not it was left hand driven. So in her opinion, the value of the vehicle when it was new could not be more than 50,000,000/= let alone the depreciation for 4 ½ years it had been on the road. The second limb of her testimony is that even if she was held liable, she was fully insured by the Third Party who should therefore indemnify her. DW2 then produced Exh.D3 – D14 to show, in essence, that the vehicle in question was fully insured by the Third Party. Let us now turn to examine these documents.

Exh.D3 collectively consists of 3 documents. The first is Interim Cover Note No. 243931 issued by **ALLIANCE INSURANCE AGENCY LTD** of Moshi. It indicates that a comprehensive policy, had been taken out and acknowledges that the policy holder has paid the sum of tshs.2,520,000. The policy holder is shown as **CASAGRANDE GARAGE LTD**, and the duration is for the period 1/1/2000 to 31/12/2000 and the vehicle covered was TZL 1733 a trallco trailer, with chassis No. 846441. The notice was issued on 13/12/99 by Agency Code No. 390. The second document is NIC official receipt No. 00187016 dated 20/10/99 paid by the 2nd Defendant for the sum of shs.783,625/= to insure goods in transit and refers to Cover Note No. 107040. It is to be noted that this receipt is not related to Cover Note No. C 243931

referred to above. The last document is the Interim Protection Note also dated 10/10/99 for goods in transit and covers the period 16/10/99 to 16/10/2000. It is therefore clear that those two documents are related, and they in turn are not related to the first document. In Cover Note No. C 243931, the policy No is shown as 04VC 78043.

Exh.D4 is a letter dated 17th August 2000 from **ALLIANCE INSURANCE AGENCY LTD** to the Regional Manager NIC (T) LTD, Moshi in which the agency reports that vehicle No. TZF 9323 and TZL 1738 have met with an accident

It is to be noted that the date of the accident referred to is not mentioned in the said letter. The policy No is also mentioned as No. MS/DC/DI/GT.447182 which is referred to in the official receipt No. 00187016. So the notification contained in Exh.D4 refers to goods in transit insured vide Interim Cover Note No. C 107040.

Exh.D5 is a letter dated 5/9/2000 from the 2nd Defendant to the Regional Manager NIC, Moshi in which the Defendant submits claim forms for Vehicle No. TZF 9323 TZL 1733, and asks the national Insurance Corporation Ltd to assess the vehicles as soon as possible. It must hastily be noted in passing that the accident occurred on 27/7/2000, whereas the accident was reported to the Third Party on

5/9/2000 and the claims submitted were for the damage to the 2nd Defendant's motor vehicles and goods in transit. The damages to the Plaintiff's vehicle were not referred to in Exh.D5. Exh.D6, is another letter from the 2nd Defendant to the Regional Manager NIC (T) Moshi dated 9/9/2000. This is a follow up to Exh.D5.

Exh.D7 collectively are letters dated 18/9/2000 from the Regional Manager NIC (T) Moshi in response to the 2nd Defendant's letter of 5/9/2000 and asking the 2nd Defendant to submit certain documents. So is Exh.D8.

Exh.D9 is a letter dated 5/7/2000 from the Third Party headquarters in response to various motor and marine claims and referring to a visit by the 2nd defendant on 4/7/2002 to discuss the said claims. Attached to Exh.D9 is the position of the 2nd Defendant's pending claims. There is also a list of premiums offset by discharge vouchers. It is to be noted that TZL 1733 was insured vide Policy No. 04VC 78044 for 12,012,700/= and the provision approved by NIC (T), was shs.7,000,000/= for the accident that occurred on 27/7/2000. Although a claim for motor vehicle TZF 9323 also appears, the amount approved for the accident that occurred on 22/9/98 was shs.2,670,909/= which, according to the remarks column, the insured utilized the same as premium. On the list of premiums offset the vehicle mentioned is TZF 9323 and the

amount offset as premium is shs.7,264,818. The last sheet in this bundle of Exh.D6 is a statement of the premium paid by the 2nd Defendant to the Third Party for both Commercial and Private motor vehicles and for motor and marine insurance, covering the period 1995 to 2000. It is shown that the total amount of premium paid is Tshs.226,495,645.05. Of immediate relevance is that by Policy Nos. 04VC 78044, the 2nd Defendant insured 9 vehicles for tshs.21,794,500 and in policy No. 04VC 78043 the 2nd Defendant insured 7 vehicles for 13,651,274.00 and 2 vehicles for 1,890,000/=. I note that these are relevant as the period of insurance covers the period relevant in the present case. Now we have already noted above that Policy No. 04VC – 78043, is part of Exh.D3 and refers to goods in transit; Policy No. 04VC 78044 refers to other vehicles not the subject of the present suit. This is as per page 2 of Exh. D9. Exh.D10 on the other hand is a letter from **ALLIANCE INSURANCE LTD** to the Regional Manager of NIC (T) dated 29/10/99. This refers to the Goods in Transit policy No. GT. 447182 and refers to a credit facility. This has a bearing to the 2nd and 3rd documents in Exh. D3. Exh.D11 is a letter from the Third Party dated 29/2/2000 acknowledging to have issued 4 Credit Notes. These Credit Notes refer to policy No. 04VC 78403 and relate to settlement of claims for 1998/99. The Third Party's official receipts are also attached. Exh.D12 is a letter from the Third Party to the 2nd Defendant dated 26/5/2003 in which they acknowledge to

have issued various cover notes to the 2nd Defendant. On p. 2 of Exh.D12, Cover Note No. 243931 is listed as among those. This is part of Exh.D3 for trailer TZL 1733. It is also mentioned on p. 2 and the Sticker No. 20975 also appears on Exh.D3. The period of insurance is shown as between 11/1/2000 to 31/12/2000.

It is also acknowledged by the Third Party that the premium was Tshs.2,520,000/= and the policy issued was No. 04 VC 78043.

Exh.D13 is a letter dated 12/12/2000 from the Third Party to the 2nd Defendant in which they refer to a letter from the 2nd Defendant dated 9/11/2000, in which they confirm that Policy No. 04VC 78043 expired on 31/12/2000 and that their request for a credit facility had been approved. It must be noted here that as seen above Policy No. 78043 covers the period 11/1/2000 to 31/12/2000 as per Exh.D12, and the Third Party acknowledges that much. And with that DW2 prayed for the dismissal of the suit against her, or alternatively that the Third Party indemnify her for any amount found due to the Plaintiff. That also marked the end of the Defendants' case, and the beginning of the Third Party's defence.

The evidence of TPW1 AND TPW2 is essentially the same in many aspects. It can be summarised as follows. That the

Plaintiff first approached the third party for settlement of the claim against the 2nd Defendant following an accident that occurred on 27/7/2000 at Mkumbara, along Same Road. The Third Party advised him to lodge the claims directly with the 2nd Defendant because they had not been notified of the Plaintiff's claims by the 2nd Defendant, and in any case the 2nd Defendant had no valid insurance at the time of the accident.

They said according to their terms and conditions an insured is required to report an accident orally within 48 hours or in writing within 7 days. They rationalized that during such period, fresh information could be obtained and assessors could make a more correct assessment. But here the two witnesses differ. TPW1 says a report could be lodged either with their offices or through their agents, whereas TPW2 firmly asserts that such reports could only be lodged with their head office.

The witnesses went on to testify that they received a report of the accident after about I month from the date of the accident, and the report was lacking in some material information but in particular, did not refer to the damages to the Plaintiff's vehicle, but rather damage to the Defendant's vehicle. In such a case the Plaintiff's claim lies with the wrong doer as may be found by the court. Here according to TPW1, Exh.D5 was not exhaustive. He said that the claim form was

filed on 18/8/2000, and Exh.D5 was received on 5/9/2000 and was incomplete.

The witnesses were then shown various defence exhibits such as Exh.D3, D6, D9 and D10, and D13. While recognizing them some being their own documents and some from their agents, they denied their validity as far as the 2nd Defendant's claims are concerned. In particular, they said the Cover Note in Exh.D3 was not valid as no premiums had been paid and that the credit facility (Ex.D13) offered to the 2nd Defendant was issued in December 2000 and had no retrospective effect to cover the date of the accident. They said Exh.D9 was only indicative not conclusive and the figures shown were not approved but only estimates.

TPW2 produced Exh.D14, a collection of correspondence between the 2nd Defendant, the Insurance Supervisory department and the third party. She said that from these correspondences it was their stand that the 2nd Defendant had never paid any premium and that although a long standing customer they had never renewed their policies with the 2nd Defendant after this dispute. TPW2 was categorical, that although the 2nd Defendant owed huge sums to the third party by way of premiums the third party neverless continued to issue cover notes for over 10 years, shown in Exh.D9. According to Exh.D9, the Third Party is owed a substantial

sum by the Defendant and that however many claims were valid, for the many vehicles. TPW2 said the claims submitted by the 2nd Defendant in respect of the material accident were for goods in transit. On the question of reporting an accident again TPW2 differed with TPW1, in that not only had the accidents to be notified to TPW2 at the head office, but must be done so within 14 days of the happening of the accident. Asked by the court TPW2 said the Cover Note in Exh.D3 is their own but not covered by any supporting document.

Now Exh.D14 collectively is a series of correspondence between the Insurance Supervisory department, the 2nd Defendant and the third party between 30/7/2004 to April 2005. These demonstrate that as between the third party and the 2nd Defendant, there are claims and counter claims that are yet to be sorted out. This then marked the end of the Third Party's defence.

Learned Counsel then addressed the court on each of the issues framed for trial. We shall begin with the claim between the Plaintiff and the Defendants.

On the first two issues, which are –

(i) Whether the Plaintiff's driver was contributorily negligent in the accident and

(ii) Whether the accident is wholly blamable on the 1st Defendant?

The learned Counsel for the Plaintiff and the Defendants decided to tackle them together, and I intend to do the same in my judgment.

Mr. Waisaka, learned Counsel for the Plaintiff submitted that according to Exh.P1, P2 and D1, all the evidence points to the fact that the 1st Defendant was wholly to blame for the accident. He said the evidence does not incriminate the Plaintiff's driver. He said the complaint that the Plaintiff's driver was driving at a high speed is contradicted by Exh.D1, the sketch map, which shows that the Plaintiff's vehicle stopped only 7 metres away from the point of impact. The learned Counsel also relied on the decision of this court in **FAKHRUDIN EBRAHIM VS BANK OF TANZANIA** [1978] LRT n. 45 as part of his submission.

On the other hand Mr. Malimi, learned Counsel for the Defendants submitted that from the evidence on record the Plaintiff's vehicle knocked the Defendant's vehicle which was stationery and was plainly visible, so the onus was on the Plaintiff to prove that the driver took all reasonable care. He cited an English case of **RANDALL VS TARRANT** [1955] All

ER. 600 in support of his argument. He said, on the totality of the evidence of DW1, PW1 and Exh.D1, it was his view that the Plaintiff's driver was not only negligent but solely blamable for the accident.

Alternatively, Mr. Malimi, submitted that although the 1st Defendant was convicted by Korogwe District Court of two counts under the Traffic Act and although under s. 43 A of the Evidence Act such conviction is conclusive evidence on the matter the Court of appeal of Tanzania in **NIMROD ELIREHEMA MKONO VS STATE TRAVEL SERVICES LTD & MASOO SAKTAY** [1992] TLR 24, held that the provision does not make it conclusive that the convicted person is wholly to blame and that therefore he is not precluded from alleging contributory negligence on the part of another person in subsequent civil proceedings. So, in Mr. Malimi's view, if the Plaintiff's driver was not wholly to blame, then he was contributorily negligent. He therefore urged me to answer the two issues in the affirmative and in the negative respectively.

I directed the gentlemen assessors on the ingredients of the tort of negligence, and the law on contributory negligence. I also directed them on the effect of a conviction in a criminal case under s. 43 A of the Evidence Act and modification thereof by case law. I directed them on the burden and standard of proof placed on each party. It was the view of Mr.

Mwamukonda gentleman assessor that; the 1st Defendant was not wholly to blame, and that the Plaintiff's driver was also contributorily negligent. Mr. Matondane also opined that the 1st Defendant was negligent, but so was the Plaintiff's driver.

According to paragraph 4 of the plaint the Plaintiff's cause of action is founded on the first Defendant's negligent parking of his vehicle on public road and failing to take necessary precautions, leading to the collision. The Defendants deny the allegations of negligence and shift the blame to the Plaintiff's driver. The Defendants however admit that the 1st Defendant was convicted in Traffic Case No. 20 of 2000, but challenge the evidence on which the conviction was based.

The judgment of Korogwe District Court in Traffic Case No. 20/2000 was admitted in Court as Exh.P2. According to the judgment the 1st Defendant was convicted of two counts; of (i) failing to take reasonable steps to secure the removal of the broken motor vehicle from the public road, and (ii) Inconsiderate use of a motor vehicle on the public road. The conviction was entered on 20/12/2002 and as at the date of hearing their defence in the present case on 28/11/2005 no appeal against that conviction has been preferred. Mr. Malimi has alluded to the weaknesses of the evidence on which the conviction was based in his written statement of defence, but

with respect, the complaint is misdirected, as this is not the right forum of lodging such an assault. This means, in terms of s. 43 A of the Evidence Act 1967 the conviction is conclusive evidence of matters on which the 1st Defendant was convicted. In **ROBINSON VS OLUOCH** [1971] E.A. 376 the East Africa Court of Appeal observed that careless driving necessarily connotes some degree of negligence. **BLACK'S LAW DICTIONARY** 8TH edition p. 1061 defines the term *"negligence"* to mean:-

> *"The failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation..."*

KJ AIYAR in his **JUDICIAL DICTIONARY** 13th edition p. 670 also defines, *"negligence"*

> *"Negligence signifies want of proper care i.e. absence of taking care demanded by circumstances in a given situation."*

The conviction of the 1st Defendant for failing to take steps, and inconsiderate use of a motor vehicle on a public road, in my view, necessarily connote some degree of negligence. And so, I find as a fact that on the evidence on record, the 1st Defendant was negligent and that his negligence was the

proximate cause of the accident that damaged the Plaintiff's vehicle.

But, it is true that according to **MKONO VS STATE TRAVEL SERVICES LTD & ANOTHER** (Supra) Exh.P2 alone is not conclusive evidence that the 1st Defendant was wholly to blame. So the next question is whether the Plaintiff's driver was contributorily negligent? Mr. Waisaka learned Counsel for the Plaintiff relied on Exh.D1, the sketch map and relied on **FAKHRUDIN EBRAHM's** case (Supra).

With due respect to Mr. Waissaka **FAKHRUDIN'S** case is only authority for vicarious liability. There, the issue was whether it was necessary to join the driver in order to found the owner's vicarious liability. Biron J, thought it was not. In the present case, vicarious liability is not in issue, and in any case the driver concerned is a party in these proceedings. So **FAKRUDIN'S** case is not relevant here.

On the other hand, Mr. Malimi has relied on an English case of **RANDALL VS TARRANT** [1955] 1 All ER. 600, and submitted that having knocked a stationary vehicle, and on the strength of Exh.D1 judging from the distance where the Plaintiff's vehicle stopped from the point of impact, the Plaintiff's driver must have been guilty of contributory

negligence. I think **RANDALL'S** case is closer to the facts in the present case.

In **JONES VS LIVOCK QUARRIES LTD** [1952] 2 QB 608 at 65, it was held that

> *"A person is guilty of contributory negligence if he ought to reasonally to have foreseen that if he did not act as a reasonable prudent man, he might hurt himself and in his reckoning he must take into account the possibility of others being careless."*

As a general rule, a person who drives into the back of an unlit vehicle is guilty of some negligence (See **HASSAN BIN MBARAK AND ANOTHER VS MOHAMED M. KHAN** (EACA Civil Appeal No. 48 of 1972 (K) (Unreported) but the burden of proof lies on the Defendant to prove that the Plaintiff was negligent (See **NANCE VS BRITISH COLUMBIA ELECTRICITY RY** (1951) AC. 60. But in doing so it must be shown that the Plaintiff's lack of care was a contributory factor to the accident which caused the damage. However it was held in **ELIYAFORO HOSEA VS FRAELI KIMANYO** [1967] HCD n. 331 that, the degree of want of care which would constitute contributory negligence varies with the circumstances of each case.

Both in **RANDALL's** case and **HASSAN BIN MBARAKA's** case the Defendants' Lorries had parked, (in **RANDAL'S** case), on the offside of the road, and (in **MBARAK's** case) on the middle of the road. In **RANDALL** the Plaintiff was held guilty of contributory negligence but in **MBARAK'S** he was found not guilty of contributory negligence. So each case was decided on its own peculiar circumstances. In the present case it can't be controverted that the position and the manner in which it was parked, the lorry constituted a real threat and danger to other users of the road. But according to DW1, the Plaintiff's driver's speed contributed to the accident. That is the only allegation on which he intends to rely on to prove that the Plaintiff's driver did not take proper care and skill. DW1 is the only eye witness as to the Plaintiff's driver's speed. As an interested party with his own interest to serve and having failed to produce his turnboy (whom he claimed was also present), as a witness I am minded to treat his testimony with a lot more care. Mr. Malimi has sought to rely on the distance of 7 metres braking distance as corroborating evidence of contributory negligence. Mr. Waisaka is of the view that 7 metres is such a short distance that it would not have been possible if the Plaintiff's driver was traveling so fast. Unfortunately no traffic officer was produced to testify as an expert on a correlation between speed and braking distance. However according to **BINGHAM & BERRYMANS MOTOR CLAIMS CASES** 11th edition, p. 344 (table 9.26) the overall

braking distance of 12 mettes, presupposes a speed of 20 mph. In the present case the braking distance was 7 metres from the point of impact. So the Plaintiff's driver must have been driving at less than 20 miles per hour. In the circumstances, I am unable to accept the 1st Defendant's version that the Plaintiff's driver contributed to the accident at all by his speed. In a number of almost similar cases the Plaintiffs were found liable for contributory negligence due to an unreasonable speed, and failing to control their vehicles. Thus in **K.C.M. THYSSEN WAKISU ESTATE LIMITED** [1966] EA 288 (U) the Plaintiff collided with an unlit stationary lorry. He claimed he was dazzled by an oncoming vehicle. He was held guilty of contributory negligence, because he was driving at 40 m.p.h and failed to slow down or stopped when dazzled. In **GIAN SINGH PANESSAR AND OTHERS VS LOCHAB AND ANOTHER** [1966, ea 401 (K) the Plaintiff who was also driving a Saloon car at 40 mph and collided with an unlit stationary lorry, was found guilty of contributory negligence because he was found to have been driving too fast in the circumstances.

In the present case the only negligent act allegedly committed by the Plaintiff's driver was high speed. However on the basis of Exh.D1 and the table in **BINGHAM'S MOTOR CLAIMS** (Supra) I am not persuaded that this was so. And so, I find that the 1st Defendant has failed to discharge his burden of proof to the requisite standard. In the event I find and hold

that the Plaintiff's driver was not guilty of contributory negligence at all. So in answer to the first two issues, I find that the 1st Defendant is wholly to blame for the accident and absolve the Plaintiff's driver from any degree of contributory negligence. Mr. Mwamukonda's opinion is based on the finding that the 1st Defendant took all the necessary precautions to prevent the accident. But so long as he stands convicted of this same offence, this in law was conclusive proof of that fact. The issue cannot thus be reopened and a fresh finding made. Mr. Matondane's opinion is premised from Exh. D1 to a finding that the Plaintiff's driver mist have been driving at a high speed. I have already indicated above why I do not consider this finding as unfounded on the circumstances. So, with unfeigned respect, I do not agree with the gentlemen assessors on the second issue.

On the third issue, whether the Plaintiff's vehicles were damaged as alleged, it was submitted by Mr. Malimi, learned Counsel for the Defendants that there was insufficient evidence as to the preaccident value of the damaged vehicle and took to task the opinion of PW2, and the deficiencies in Exh.P7, P8, P9 and P12, and concluded that the alleged damage was far less than that alleged by the Plaintiff. He said according to DW2 the value of a new vehicle was less than 50 Tshs.million. On the other hand Mr. Waissaka, learned Counsel for the Plaintiff also relied on Exh.P7, p8, p11 and

p12 and the evidence of PW1 and PW2 to submit that the damage on the vehicle had been proved. He submitted that although DW2 boasted of over 30 years experience in the truck industry, her suggestion as to the value of the vehicle is not supported by any documentary evidence. So in his view, the third issue should be answered in the affirmative.

I directed the gentlemen assessors on the burden of proof in such cases and on whose duty the burden lies. I also directed the gentlemen assessors the value of the opinion of PW2 as an expert witness. The gentlemen assessors were of the view that the Plaintiff has failed to prove the extent of the damage to the vehicle, and doubted the value of Exh.P12. With due respect I do not agree.

I have no doubt in my mind that the burden of proving that the vehicles in question were damaged rests on the Plaintiff, and that the standard is on a balance of probability. According to the plaint, (paragraph 4) the Plaintiff's vehicles consisted of a truck TZJ 150, and its trailer TZJ106. But his claim is for the value of the truck only, and not the trailer.

From the submission of the learned Counsel, I think, it is not disputed that the truck was damaged. What is disputed is the extent of that damage. According to PW2 and Exh.P12 the truck was a total write off. According to DW2 and Mr. Malimi

Exh.P12 is of doubtful value because it lacks essential information such as the mechanical report of the vehicle, the gear differential, gear box suspension system and whether it was left hand or not. Furthermore the inspection was conducted 3 years after the accident, and at the Plaintiff's home.

It is true that the accident occurred in July 2000, while PW2 examined the vehicle sometime early March 2004. PW2 admits that much. However in the words of PW1, the delay was caused by the delay in getting the outcome of the criminal case in Korogwe which was finalized on 20/12/2003. I accept that as a reasonable explanation for the delay. But as we shall see below the delay is in my view not without significance. As for the missing parts in the report (Exh.P12) I accept the evidence of PW2 that his report was based not only on his own physical observations coupled by photographs (Exh.P11) of the wreckage but also on the Police Report PF.90 (Exh.P1) I have looked at Exh.P1 and P11. It is true that such information on things like differential, gearbox rear transmission rear axle, rear suspension system or size of the tyres are not mentioned in Exh.P1 either. However the Plaintiff is not required to prove his case beyond reasonable doubt. Based on the totality of Exh.P1, P11 and partly P12 I am satisfied that the Plaintiff has proved that his truck TZJ 106 was damaged beyond repair.

The next question is on the value of the vehicle before and after the accident. Relying on Exh.P6, P7, P8, and P9 the Plaintiff sought to show that the damaged vehicle was imported from Dubai United Arab Emirates, at the price of USD 85,620/= the equivalent of shs.55,653,000/=. At that time the rate of exchange was Tshs.583/5060 to a dollar. On the other hand DW2 said that the documents submitted by PW1 (i.e. Exhs.P6, P7, P8) were lacking in certain particulars, such as invoice, a bill of lading, a single bill of entry, a customs receipt. She ventured to suggest that the truck would not cost more than 50 million today let alone 4 ½ years that it was on the road after it was imported. She also suggested that from the U.A.E. the truck must have been imported second hand.

Mr. Waissaka, learned Counsel for the Plaintiff contested DW2's evidence on this aspect. He said DW2 did not produce any documentary evidence to substantiate her assertions. I reject that criticism, because, the Defendant did not thereby assume any burden of proof. She was entitled to her opinion based on her experience in the truck industry. The burden of proof is on the Plaintiff and the question is whether he has discharged that burden?

I agree with DW3 and Mr. Mwamukonda, gentleman assessor that documents such as a bill of lading, an invoice, a customs receipt would go a long way to prove the price of an imported vehicle, but I do not agree that those are the only evidence that must be produced to ascertain the price. So I do not accept the proposition that failure to produce them would necessarily lead this court to draw an adverse inference against the Plaintiff, because I am satisfied there is some other evidence to assist the Court especially as in this case the authenticity of Exh.P6, P7, P8 and P9 is not doubted.

I have now closely and critically examined Exh.P6 to P9 together. I am first of all, satisfied that they all refer to the same motor vehicle identified by its chassis number JWMS 3 TP 5000 606260. However a close scrutiny of Exh.P6 and P7 reveals some interesting features, but of more and particular relevance is the price of the motor vehicle. According to Exh.P6, the Import Declaration Form, the FOB total value in foreign currency is USD. 85620 or equivalent to Tshs.55,653,000/= (C & F) but at the exchange rate of Tshs.583,5060 to a dollar the FOB value is Tshs.49959783.72. This is what the Plaintiff declared on 9/11/95. This was then subjected to the inspection and assessment by the SGS on 15/1/96. Compared to Exh.P6, SGS assessed the FOB price at USD. 77,000, freight (USD.1800) and insurance (USD 1173) and so found that the dutiable value of the vehicle was USD

79373. Together with import duty, the total price was USD 83,341.65. The exchange rate was also different. It was Tshs.554,76,000 to a dollar. These particulars are contained in Exh.P7. What this means is that Exh.P6 and P7 reflect different figures of the price of the motor vehicle. In terms of Exh.P6, the price is USD 85,620 or Tshs.55,653,000/=. But according to Exh.P7, the price was USD.83,341.65 or equivalent of Tshs.46,170,914/=. If converted at the exchange rate of the round figure of Tshs.554/= to a dollar prevailing at that time and reflected in Exh.P7. I am inclined to believe and accept the figures shown in Exh.P7 because Exh.P7 is the work of an independent body and therefore more objective. Exh.P6 was a declaration by the Plaintiff, which was subject to the assessment, whose results are reflected in Exh.P7. So I find and hold that the price of the motor vehicle at the time of its importation in 1995/96 was USD 83,341.65 or TShs.46,170,914/= and not Tshs.55,653,000/= or USD 85,620 as per Exh.P6.

The Second Defendant has suggested that if the vehicle was imported from the United Arab Emirates then it must have been second hand or used. But this is not borne out by the evidence on record. According to Exh.P8 and P9 the vehicle was imported as new. Exh.P8 is a certificate of Customs Clearance of Motor Vehicle and Exh.P9 is a copy of the certificate of registration. These are documents kept and

issued by a public office. The Defendants have not doubted the genuineness of these documents. In the circumstances the Court is entitled to infer that the documents were issued regularly, a presumption permissible under s. 122 of the Evidence Act. If there is need for an authority I would draw support from the observations of Newbold J.A. in **THE COMMISSIONER OF INCOME TAX VS C.W. ARMSTRONG** [1963] E.A. 505 at p. 513; that:

> *"That section authorizes the presumption that an official act, which is proved to have been performed, has been performed regularly and this is a presumption which is not lightly overridden."*

Now according to Exh.P8 and P9 the vehicle is described as new. So I reject DW2's evidence and the gentleman assessor's opinion that the vehicle must have been imported second hand. But in any case, whether the vehicle was imported new or used is of little relevance once its price has been established as I have done above.

The next bone of contention is on the preaccident value of the vehicle. According to PW2 the value of shs.86,394,000/= was arrived at by relying on an invoice from INCAR, which, quoted the price of a similar vehicle at the time of the inspection as Euro 121,000, and the exchange rate of

the Euro is Tshs.1400/= per euro. Now, however credible PW2 may be he cannot be allowed to introduce hearsay evidence. As long as the said invoice was not produced in Court, that remains hearsay, and I cannot act on it.

I am aware that the preaccident value of the vehicle is a matter of special damages, and that it must be strictly proved. I have already held that the Plaintiff's vehicle is a complete write off. I have already held that it was imported at the price of Tshs.46,170,914/= and not Tshs.55,653,000/=.

Now, although like the gentlemen assessors I don't accept the opinion of PW2 that the price of a similar new vehicle was Euro 121,000/=, it is, I think the law, that where one's property has been destroyed by negligence, the owner of that article is entitled to be compensated the market value of the article. For that proposition I would refer to the statement to that effect from **EXPRESS TRANSPORT COMPANY LTD VS B.A.T. TANZANIA LTD** [1968] EA. 443 at p. 451 decided by the defunct Eastern African Court of Appeal.

In the light of what I have stated above, it may be that the Plaintiff has not managed to prove the value of the motor vehicle at the date of importation neither has he strictly proved the pleaded damages of shs.Tshs.86,394,000/= which proceeds from the unproved quotation from INCAR, I am

nevertheless satisfied from Exh.P7 that the price of the vehicle in 1995/96 was Tshs.46,170,914/=. However it is also a notorious fact requiring no proof that the value of our shilling has been, steadily going down very fast, and in the circumstances the Court is entitled to take into account the rate of devaluation of our shilling in order to arrive at the preaccident value. This, I gather, is the spirit of the decision of the Court of Appeal of Tanzania, in **ZUBERI AUGUSTINO VS ANICET MUGABE** [1992] TLR 137 in which a pleaded special damage was not proved but the Court of Appeal upheld it and further held that the Respondent was entitled to an award of some amount to offset the devaluation of the shilling in addition to what he pleaded.

In the present case according to Exh.P7, the rate of exchange of shilling in 1995/96 was Tshs.554.76 to a dollar. When led by his Counsel PW1 said the rate of exchange at the time he was testifying in October 2005) was Tshs.1150/= to a dollar. That is more than 107% over the rate prevailing in 1995/96. But, I agree with Mr. Mwamukonda, gentleman assessor, that the preaccident value should be that prevailing at the date of the accident which is July 2000 nearly 5 years later; and not that prevailing at the date PW1and PW2 were testifying or when PW2 did the assessment. Doing the best I could in the circumstances I would reduce the rate of exchange prevailing in July 2000 to 50% that prevailing in

1996. On the principles laid down in **AUGUSTINO'S** case, I would assess the market value of the vehicle in July 2000, by adding 50% on the one prevailing in 1996. In my judgment that brings the market value of the vehicle in July 2000 to Tshs.78,256,371/=. Going by the deductions accepted in the Exh.P12 from that amount a total of 55% will have to be deducted by way of depreciation. That brings it down by Tshs.43,041,004/=. We are left with Tshs.35,215,367/= which I hereby find as the preaccident value of the motor vehicle. And so that is what I hold on the third issue. To that extent, in substance I agree with the opinion of DW2 that the value of the vehicle not only at the date it was imported but even before the accident was less than Tshs.50,000,000/=.

The fourth issue is whether the Plaintiff suffered damages as claimed. In the plaint, the Plaintiff claimed to have suffered damages for loss of use, loss of income, profits and mental and psychological torture, in the tune of Tshs.10,000,000. This is what led to the framing of the 4th issue.

Mr. Malimi, learned Counsel for the Defemdamt did not specifically and separately address the court on this issue but preferred to argue it along with the 3rd issue. He submitted that the prayer sounded out by PW1 in his testimony, for Tshs.10,000,000/= per annum, was not pleaded and so in

principle could not be awarded. He cited **COOPER MOTORS CORPORATION (T) LTD VS ARUSHA INTERNATIONAL CONFERENCE CENTRE** [1991] TLR. 165 as authority for that proposition. Secondly he submitted that the claim for loss of profit was a special damage, and must not have been pleaded but strictly proved which the Plaintiff in this case has failed. For that he cited the decision of **MASOLELE GENERAL AGENCIES VS AFRICAN INLAND CHURCH TANZANIA** [1994] TLR. 192.

Lastly, the learned Counsel submitted that since the Plaintiff was a corporate person, no award for damages for mental and psychological torture could be awarded. For that, he cited the celebrated case of **SALOMON VS SALOMON & CO. LTD** [1897] A.C 22 for the proposition that a company is separate from its members and as opposed to natural persons, it cannot suffer mental or psychological torture. He therefore prayed that the issue be answered in the negative.

On the other hand Mr. Waissaka learned Counsel for the Plaintiff submitted that according to Exh.P10, it was clear that the Plaintiff was indebted to the bank, and the default was due to loss of income following the accident. He said, the Plaintiff has proved that it was suffering not only Tshs.10,000,000/= per annum, but that in fact it was on the lower side. On whether the Plaintiff could suffer mental anguish it was the

learned Counsel's view that it could. In support of his argument the learned Counsel cited the decision of this court in **JACKSON MUSSETI VS BLUE STAR SERVICE STATION** [1997] TLR. No. 114. He also referred to the evidence of PW1 and PW2.

I directed the gentlemen assessors that in law there were two types of damages, general and special and that special damages had to be specifically pleaded and proved as opposed to general damages. Thus the burden of proving special damages was higher than that of proving general damages. The gentlemen assessors had the considered unanimous opinion that; the Plaintiff has not proved the alleged damage and the claim should be dismissed.

I have no doubt that in law the basic principle for the measure of damages in tort or contract is *"restituto in intergrum"* which means that the law will endeavour, so far as money can do it to put the party who has been injured or who has suffered in the same position as he would have been if he had not sustained the wrong for which he is now getting his compensation or reparation (See **WINFIELD & JOLOWCZ ON TORT,** 10th ed, p. 561 – 62). This principle was followed by the Court of Appeal of Tanzania in **THE COOPER MOTOR CORPORATION LTD VS MOSHI/ARUSHA OCCUPATIONAL HEALTH SERVICES** [1990] TLR. 96 **NJORO FURNITURE**

MART LTD VS TANZANIA ELECTRIC SUPPLY CO LTD [1995] TLR. 205, **REV CHRISTOPHER MTIKILA VS THE HON ATTORNEY GENERAL OF TANZANIA** (CAT) CIVIL APPEAL NO. 27 OF 2000 (Unreported).

It is also the law that damages are categorized in two groups. General damages, and Special damages. While general damages need not be specifically pleaded and may be asked for by a mere statement or prayer of claim (**THE COOPER MOTOR CORPORATION LTD)** (Supra), Special damages must be specifically pleaded and proved. **COOPER MOTORS CORPORATION (T) LTD VS ARUSHA INTERNATIONAL CONFERENCE CENTRE** [1991] TLR. 165; and **MASOLELE GENERAL AGENCIES VS AFRICAN INLAND CHURCH TANZANIA** [1994] TLR. 192.

In the present case, the Plaintiff claims shs.10,000,000/= as damages for loss of use, profits and mental suffering and psychological torture. The claims for loss of use have been classified and consistently treated as general damages (See **COOPER MOTOR CORPORATION VS AICC** (Supra) but profits are special damages and have to be pleaded and proved **(MASOLELE GENERAL AGENCIES** (Supra).

The claim for mental suffering and psychological torture has also been the subject of contention in this case. And the

contention is this: Whether the Plaintiff, a body corporate could be awarded such types of damages. I have already cited the arguments of the learned Counsel.

It is my considered view that the case cited by Mr. Waissaka Counsel for the Plaintiff of **JACKSON MUSSETI** (Supra) is not on all fours with the present case. There, the award for mental torture/suffering was made in favour of a natural person not a corporate person as claimed in the present case. The submission by Mr. Malimi learned Counsel that such damages cannot be awarded to corporate persons is, with respect, I think sound both in law and logic. According to **WINFIELD AND JOLOWCZ** (Supra) such damages have been classified, as non pecuniary loss awarded in "*actions for personal injury*". In **NAUSHAD M.H. VIRJI VS TANZANIA INTERNATIONAL F.S. LTD AND ANOTHER** [1982] TLR 154, such damages were also described as damages for personal injury. Apart from that I am aware however, that in **HAJI ASSOCIATES COMPANY LTD AND ANOTHER VS JOHN MLUNDWA** [1986] TLR. 107 in which a corporate person and a natural person sued for defamation, Mwalusanya J. (as he then was) awarded both of them general damages for the Plaintiffs' *"loss of reputation, as well as as a solation for mental pain and suffering".* But I am not prepared to take that as setting out the proposition that a corporate person may be awarded damages for mental pain and suffering. Since the

issue was not specifically raised and decided upon by the learned Judge, it would be unfair to associate him with that view, especially in view of the fact that one of the Plaintiffs was a natural person entitled to such an award; unlike in the present case. Apart from this I know of no (other) authority and none has been suggested by Mr. Waissaka, that such damages have ever been awarded to a corporate person, who is the Plaintiff in the present case. I have no scruples in staking out that claim as misconceived; and so I agree with the gentleman assessors that the Plaintiff is not entitled to such damages.

Therefore we are left with the claim for loss of use and loss of profit. I have shown above that as a special damage, the claim of loss of profit should not only have been pleaded but also specifically proved. Has the Plaintiff proved so?

In the attempt to prove loss of profits PW1 was led to testify that as a result of the accident he was disabled to service the overdraft facility with CRDB resulting into a judgment against the Plaintiff in the sum of Tshs. 137,426,270/- and produced the consent judgment of this Court in Commercial Case No. 200/2001 as Exhibit P10. However this was not specifically pleaded. Besides PW1 admitted in Cross Examination by the defence and learned gentlemen assessors that the truck in question was not

bought by the money from the overdraft facility, and in any case the default had occurred before the accident. The second piece of evidence that PW1 attempted to bring, (and then, only in re-examination), was that with a total of his fleet the plaintiff used to earn a total of 45,000,000/= (p.a) but that amount has now been reduced with one vehicle less. Asked by one gentlemen assessor PW1 contradicted his earlier statement and estimated that his annual income from his fleet was 96,000,000/= million, and not shs. 45/- million earlier stated. However he also went on to concede that he did not have any documents to substantiate the said statement of account or loss of Tshs. 10,000,000/-. He said he had them but did not bring them to Court. As can be seen above this piece evidence was not pleaded and was clearly an afterthought which was not proved anyway. As the Court of Appeal said in **MASOLELE** (Supra)

> *"Once a claim for specific damage is made that claim must be strictly proved ... In the present case, the applicant company claimed loss of business profit in the sum of shs.1, 660,000/= it would have realized from the cement business...*
>
> *No documents were produced to back up these figures which would therefore appear to have been plucked from the air..."*

An almost similar remark was made by the Court of Appeal in **CMC (T) LTD v. AICC** (supra) at p. 171.

> *... it is simply clear that the respondent did not prove to the Court that he incurred the special damages... The Respondent had not produced even an invoice demanding payment let alone a receipt to show that he incurred expenses in ..."*

Those were the only pieces of evidence on record which attempt to establish the Plaintiff's claims for loss of profits. And as observed above the claim were not only not pleaded, but not proved at all to the required standard. For these reasons and like the gentlemen assessors I also reject the Plaintiff's claim for loss of profits.

So what remains is the claim for loss of use, which in practice Courts have awarded the same either as special or general damages. I have no doubt in the present case the Plaintiff has suffered not only loss, but total loss of use of the vehicle in question. The only question is the quantum. In assessing the amount to be awarded. I have taken into account that it was a Commercial Vehicle which has been put off the road permanently. Although from the evidence on record there are difficulties in arriving at an exact figure,

having heard PW1 and PW2 it is my duty to make the best I could out of the evidence and arrive at a figure which is a reasonable estimate of the damage suffered by the Plaintiff.

However, before I do that let me dispose of one simple thing arising from the submissions of the learned Counsel. Mr. Waisaka, learned Counsel for the Plaintiff, picking from the evidence of PW1, submitted that the damages awarded under this head should be computed per annum. Mr. Malimi Counsel for the Defendant has different views. He submitted that since this was not pleaded, no such award could be awarded.

In my view, Mr. Malimi is right. This claim is contained in paragraph 10 (A) and 13 (B) of the plaint. It is just shown as a lumpsum claim. There is no element of its continuity per annum. If I concede to Mr. Waissaka's prayer I would be awarding more than what the Plaintiff has claimed. And by that, I would be waging war against the holding of the Court of Appeal in **CMC (T) LTD VS AICC**. (Supra) that:

> *"it (is) wrong...to award special damages which were more than what the respondent (Plaintiff) has claimed."*

Although in the present case I am not now considering special damages the principle behind the rule is that parties are

bound by their pleadings. (See **GANDY VS GASPAR AIR CHARTERS LTD** [1956] 23 EA. CA 139 for the proposition that as a general rule a relief not founded on the pleadings will not be given).

If I were to award the Plaintiff on all the damages claimed under paragraphs 10 (A) and 13 B (i) of the Plaint, I would have had to apportion the damages into four headings. But as the vehicle was a commercial one, the other heads would only attract nominal damages, but loss of profits and loss of use would have attracted substantial damages if not equal. Doing the best I could in the circumstances, I would assess general damages for loss of use of the vehicle at only Tshs.5,000,000/=. It is so ordered. So, in answer to the fourth issue I would hold that under this head, the Plaintiff is entitled to damages to the tune of shs.5,000,000/= only. To that extent, the issue is answered in the affirmative, and to that extent I would with respect, differ from the gentlemen assessors general opinion that the Plaintiff's is not entitled to any damage at all.

As for the last issue between the Plaintiff and the Defendants, learned Counsel have naturally each pulled strings to their sides. The Plaintiff's Counsel thinks that his client is entitled to all the reliefs claimed. Whereas the Defendants' Counsel has strenuously urged me to dismiss the

suit against his clients. Having carefully considered the evidence on record, the submissions of the learned Counsel, and my directions one of the gentlemen assessors Mr. Mwamukonda was of the view that, as the Plaintiff has failed to prove his claim the suit be dismissed. However as indicated above, on the other hand, Mr. Matondane held the view that the Plaintiff produce more cogent evidence to prove his claim and after doing so, the Court should knock off a proportion that would be attributed to the Plaintiff's contributory negligence. I do not agree with both gentlemen assessors as their opinions are not only contrary to the evidence on record, but contrary to the rules of procedure.

In view of my opinion expressed on the various issues above I am of the unshakeable view that the Plaintiff's suit should succeed. I declare that the Plaintiff is entitled to a compensation of Tshs.35,215,367/= for the total loss of its vehicle, and Tshs.5,000,000/= for loss of its use. The total sum decreed shall attract interest at the court rate of 10% per annum from the date of judgment to that of full payment. The Plaintiff shall also have its costs.

Emanating from the judgment above I will now examine whether the third party is liable to indemnify the 2nd Defendant? Three issues were framed, namely:

(i) *Whether the 2nd Defendant had a valid insurance cover in respect of the truck and trailer at the date of the accident?*

(ii) *Whether the 3rd Party was aware of the accident and informed by the 2nd Defendant in time?*

(iii) *Whether the Third Party is liable to indemnify the 2nd Defendant?*

In the course of the trial DW2 produced a number of documentary evidence to prove that there was a valid insurance cover in respect of its truck and trailer at the date of the accident, while the third party vigorously defended the absence of such cover. I have given above my close analysis of the evidence on record. Mr. Malimi, relied on the evidence of DW2, and Exh.D3, D9, D10, D11, D12 and D13 to convince the court that the answer to the first issue should be in the affirmative. He also referred to s. 2 (1) (d) of the Law of Contract Ordinance and **NGAIRE VS NATIONAL INSURANCE CORPORATION OF TANZANIA LTD** [1973] E.A. 56 to propose that in the circumstances the third party is estopped from denying that the 2nd Defendant was insured with them.

On the other hand Mr. Victor learned Counsel for the third party relying on the evidence of TPW1, TPW2, Exh.D3,

submitted that Exh.D3 was invalid as it was not accompanied by a receipt for the premium for the cover note. He submitted that the receipts accompanying Exh.D3 were for insuring goods in transit, and were not for the vehicle and trailer in question. As to Exh.D13 Mr. Victor submitted that TPW2 showed that the credit facility was issued after the date of the accident and had no retrospective effect. So, he submitted, the cover note had no consideration, thus unenforceable.

I directed the gentlemen assessors that it was the duty of the 2nd Defendant to prove that it had a valid insurance with the third party before calling upon the third party to be answerable. Mr. Mwamukonda was of the view that as the Plaintiff had not proved its case, he did not need to express any opinion, on the third party's liability. On the other hand Mr. Matondane opined that the 2nd Defendant had not proved that she had a valid insurance cover with the third party.

In my view the answer to the first issue is simple. It is true that the Cover Note forming part of Exh.D3 is not supported by the receipts accompanying it. But when asked by the court one of the third party witnesses, clearly acknowledged that the Cover Note in question was their official document. There was no attempt by them to suggest that it was fraudulently issued. All that they said was that the receipts accompanying it were not valid.

Now, that may be so. Quite correctly as observed above, the receipts accompanying the Cover Note and forming part of Exh.D3 cover goods in transit and other vehicles. But that in itself does not mean that the Cover Note was invalid. This is because elsewhere the third party expressly recognizes the validity of this Cover Note in Exh.D9, and D12 (letters from the third party) in which it attaches a list of outstanding claims by the 2nd Defendant and mentions a number of cover notes including the one forming part of Exh.D3 (i.e. IC N 243931).

So, in my view, unlike the one taken by Mr. Matondane, gentleman assessor, the 2nd Defendant validly insured trailer No. TZL 1733 with the third party for the period 1/1/2000 to 31/12/2000; so within the period in which the accident occurred. I also agree with Mr. Malimi that in the circumstances the third party is estopped from denying this fact. So the first issue is answered in the affirmative.

The second issue is whether the third party was informed of the accident in question in time? According to DW2, the third party was informed of the accident vide several correspondence between the 2nd Defendant and either the third party itself or its agents. But both witnesses for the third party testified that the 2nd Defendant did not inform them of the accident and damage to the Plaintiff's vehicle. Mr.

Malimi learned Counsel, capitalized on the failure of the third party to produce the policy in question, and the contradictions between the testimonies of the third party witness on the time within which an accident ought to have been reported. According to him, the 2nd Defendant did report the accident through the third party's agent, and that what the third party's agent did, he did it on behalf of the third party. He cited ss. 138, and 139/140, 148 and 149 of the Law of Contract Ordinance and also relied on Exh.D2, D4, D5, D6, D7, D8, D9 and D10 to support his argument.

Mr. Victor, Counsel for the Third Party submitted that although according to Exh.D4 and D5, the accident was reported through the third party's agent the said reports did not mention other damages to other vehicles, and so the third party could not have acted on such reports to process the Plaintiff's claims. So he submitted that the 2nd Defendant did not fulfill her responsibility as an insured of notifying the third party and so the 2nd issue be answered in the negative. Mr. Matondane, the gentleman assessor's view is that; the accident was reported to the third party and in time through their agency and so the answer to this issue should be in the affirmative.

From the evidence on record and the submissions of the parties it is clear that a notification of the accident to the third

party was required. As TPW1 said, the third party had a good reason to want to be notified promptly, to enable it inspect the locus in quo at an early stage to satisfy themselves about the claims. But whether such notification was a condition precedent of liability, and the duration of the notice would depend on the wording of the policy. Unfortunately, as Mr. Malimi rightly pointed out, the said policy was not produced for the inspection of the court, since the Interim Cover Note No. 243931, which I held was validly issued to cover the trailer TZL 1733 by the third party was issued *"subject to the corporations' usual form of comprehensive policy".*

I agree with Mr. Malimi that it was incumbent upon the third party to produce it, and did not produce it. That is why, I also agree with Mr. Malimi, that the contradictions in the testimonies of TPW1 and TPW2 as to the period of notification, with one alleging 7 days, while another alleging 14 days is not without significance. I am unable to accept Mr. Victor's broad statement that the Defendant did not report the accident within the required time, since he did not indicate which of the two periods introduced by his witnesses was the *"required time" "contrary to"* insurance contracts. But, since insurance is a contract of indemnity, it is also partly governed by the general principles of contract. If no time for notification can be ascertained from the policy the court may infer that the notice must be given within a reasonable time, under s. 46 of

the Law of Contract Act (Cap. 345). What amounts to a reasonable time is often a question of fact.

However, that is as far as I am prepared to go. In the absence of the policy, I am unable to determine whether notification was a condition precedent, since such term cannot be implied, because even in some cases where the policies had such clauses, it had been held that its breach would not necessarily lead to a repudiation of contract, unless the clause is so specific. For instance in **ALFREDI MC ALPINE PLC VS BAI (RUN OFF) LTD** (2000) Lloyds Report I.R. 352 (CA) the insurance contract in question contained a clause which provided:

> *"In the event of any occurrence which may give rise to a claim under this policy, the insured shall as soon as possible, give notice thereof to the company in writing with full details."*

The question was whether non compliance with this provision operated as a substantive defence to the claim which would amount to a repudiatory breach? It was held that as there was no term of general application to make the clause a condition precedent to the insurer's liability, and since the clause was not expressed as a condition precedent breach of that requirement, though a breach of contract would not

entitle the insurer to repudiate the policy, nor to deny the claim in its entirety, although the insurer would be entitled to damages for its breach. This leads me to the conclusion that in the present case in the absence of the policy in question (for which it was upon the third party to produce) although the court may imply that a reasonable notice of the accident was required, it cannot also imply that failure to give such notice was a condition precedent to the liability of the third party. I would however have been prepared to draw adverse inference against the third party for not producing the policy if the 2nd Defendant's claim was for damages for its own vehicle. Why? I will explain.

I have analysed above that the 2nd Defendant through DW2, claims that she gave notice to the third party and relied on exhibits, D2, D4, D5, D6, letters from ALLIANCE INSURANCE AGENCY and the Defendant to the third party dated 17/8/2000, 5/9/2000, and 9/11/2000 respectively, and Exh.D7 and D8, which are letters from the third party dated 18/9/2000, and 22/5/2002 to the Defendant.

Exhibit D4 is a letter from ALLIANCE INSURANCE AGENCY LTD dated 17/8/2000 to the Regional Manager of the NIC (T), Ltd, Moshi, in which the insured is asked to submit a number of documents. The opening sentence of the letter reads:

"We regret to report that the above vehicles met with an accident."

The *"vehicles"* referred to are TZF 9323 TZL 1738. Now, it must be noted here that the vehicle covered by the Interim Cover Note No. 243931 and Policy No. 04VC 78043, was TZL 1733. As it turned out this was a mere slip of the pen, as it was to be clarified by the subsequent correspondence (Exh.D6). It must also be noted that the accident occurred on 27/7/2000, and the report made on 17/8/2000 for the first time. I consider this to be a reasonable time for it is less than a month. But critical, in the present issue, are exhibits D5 and D6 which also originate from the 2nd Defendant.

The heading in Exh.D5 is: -

"MOTOR & MARINE CLAIMS VEHICLES NO. TZF 9323 TZL 1733".

The documents forwarded in exh.D5 are motor claim forms for both lorry and trailer, marine claim forms, original Agip Invoice. Agip delivery note, Original Vehicle Inspection report No. E 0097429, and the original driver's statement. Now according to Exh.P1, the vehicle Inspection Report for the Plaintiff's vehicle TZJ 106 was No. 0097431. So although not

produced in Court I am entitled to infer that the Report submitted to the third party through Exh.D5 referred to the Defendant's vehicle. It must be noted also that the rest of the claims submitted refer to goods in transit. As to Exh.D2, the driver's statement which Mr. Malimi, strenuously argued as part of the information to the third party on the damage to the Plaintiff's vehicle, it is true that Exh.D2 refers to the Plaintiff's vehicle but reading the statement between lines, it is obvious that DW1 was exculpating himself from blame and shifting it to the Plaintiff's driver for the cause of the accident.

And as DW1 himself had testified this statement was only meant to facilitate the 2nd Defendant's claim with the insurer. It was not meant to specifically inform the third party on the damage to the Plaintiff's vehicle. After all, Exh.D2 does not indicate the extent of the damage to the Plaintiff's vehicle. So I don't think, in the circumstances, Exh.D2constitutes the intended notification.

On the other hand, Exh.D6 further only fortifies the Defendant's own claims referred to in Exh.D5. Part of Exh.D6 reads:

> *"These documents were submitted for both our motor and marine claims."*

This also confirms my conclusion that ExhD2 was not submitted for purposes of notifying the third party on the damage to the Plaintiff's vehicle.

Exh.D7 and D8 were letters from the third party to the 2nd Defendant with regard to the Defendant's motor and marine claims i.e. for goods in transit. So what does all this lead to?

It is clear to me from the above, that while the 2nd Defendant may have reported the accident to the third party within a reasonable time the notification was only in respect of its own claims and not in respect of the Plaintiff's claims. Which means that as far as the third party notice is concerned the second issue must be answered in the negative.

The third and last issue between the 2nd Defendant and the third party is whether the third party is liable to indemnify the 2nd Defendant. Mr. Malimi submitted that if the 2nd Defendant was found liable in negligence the third party ought to indemnify her. Mr. Victor thinks not. Mr. Matondane, the gentleman assessor thinks that since the 2nd Defendant did not have a valid insurance cover with the third party, the third party has no liability to indemnify the 2nd Defendant.

As I said above, there is no term of general application to make a clause on notification, a condition precedent to the insurer's liability unless there is an express provision to that effect. But in **ALFRED MC ALPINE** (Supra) the court had access to the policy, and considered the wording of the clause on notification. Here, I have the disadvantage of not seeing the policy in question and considering the wording of the particular clause. Furthermore as I have held above in the present case the third party was, not at all, notified of the Plaintiff's claims by the 2nd Defendant. As hinted above failure to give notification of the claims of the other claimant deprived the insurer of its right to investigate and properly defend its position. It would therefore be extremely prejudicial to the third party if they were ordered to indemnify the 2nd Defendant in respect of the sum adjudged in favour of the Plaintiff considering that the accident occurred in July 2000 almost 6 years ago, and for which they were not notified.

So I agree with Mr. Matondane, gentleman assessor but for different reasons that the third party is not liable to indemnity the 2nd Defendant. In the result the third party notice is dismissed with costs.

In sum total, judgment, is entered for the Plaintiff against the Defendants jointly and severally in the sum of Tshs.35,215,367/= as replacement cost, 5,000,000/= as

ıeral damages, interest thereon at court rate at 10% from : date of judgment to that of payment in full, and costs. The rd party notice against the third party is dismissed with ;ts.

Decree accordingly.

S.A. MASSATI

JUDGE

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9/5/2006

152+ words