ADMINISTRATOR GENERAL v PAUL MEYN
(1990 - 1992) Z.R. 15 (S.C)

SUPREME COURT
SILUNGWE, C.J., AND GARDNER, J.S.
23RD OCTOBER, 1990
(S.C.Z. JUDGMENT NO. 8 OF 1990)

Flynote
Damages - Negligence - Devastavit - When established.

Headnote
The respondent's wife had been killed in a traffic accident. The appeellant, as the executor of her estate, had delayed in instituting a claim against the relevant insurance company, which duly repudiated the claim on that ground. The respondent instituted an action and the Court below awarded him damages. On appeal it was contended on behalf of the appellant that he was not liable under the Administrator General Act Cap. 200 unless he had acted illegally.

The Court held that the appellant had been negligent and had not used due care and diligence in looking after the interest's of the deceased's estate and that the principle of *devastavit* applied. While holding the appellant liable for damages, the Court reduced the amount awarded by the Court below in accordance with the Law Reform (Miscellaneous Provisions) Act.

Legislation referred to:
1. Administrator General's Act Cap. 200, s.30
2. State Proceedigs Act Cap. 92
3. Law Reform (Miscellaneous Provision) Act.

Other works referred to:
Williams and Mortimer On Executors, Administrators and Probate 15th ed

For the appellant: A. Kinariwala, Acting Director of Legal Services Corporation.
For the respondent: B.O. Ngenda, of Ben Ngenda and Co.

Judgment
GARDNER, J.S.: delivered the judgment of the Court.

This is an appeal against an award of damages for negligence by the Administrator General failing to issue a writ within the time laid down by

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the Statute of Limitations in respect of a road traffic accident which resulted in death.

The facts of the case were that the respondent's wife was killed in a traffic accident and he himself and other members of his family were injured in the same accident. After the accident letters of administration to the estate of the deceased wife were taken out by the Administrator General, the appellant in this appeal. The respondent and the other members of the family claimed damages against the Zambia State

Insurance Corporation, and because the driver of the vehicle responsible for the accident was insured under what is known as an 'Act only' policy, the insurance company applied the provisions of the policy and the Roads and Road Traffic Act and paid out in respect of each of these claims K10 000. As there were two claims, the total amount was K20 000.

The appellant entered into correspondence with the Zambia State Insurance Corporation and their advocates, claiming damages in respect of the death of the wife of the respondent. However, before any arrangement was made with the insurance company to pay such damages, the company's advocates were instructed to repudiate liability on the grounds that the writ had not been issued in time. Accordingly, the advocates repudiated liability and the respondent issued a writ against the appellant claiming damages in negligence for the failure by the appellant to pursue the respondent's claim with due care and diligence. The learned trial judge found that the appellant owed to the respondent the same duty of care as would be owed by a professional lawyer to his client and awarded a sum of K20 000 damages on the grounds that of the total K40 000 that could be claimable under the policy in respect of any one accident there was still K20 000 unpaid by the insurance corporation which should have been available to the respondent.

Mr *Kinariwala*, on behalf of the appellant, has argued first that under s. 30 of the Administrator General's Act Cap. 200, the appellant was not liable unless he had acted illegally and that in this particular case the appellant had certainly done nothing illegal. With regard to this argument we note that in the defence filed by the appellant in the Court below the only statute referred to is the State Proceedings Act Cap. 92 and this, Mr *Kinariwala* agrees, is irrelevant to this case. It follows then that the statute limiting the liability of the appellant was not pleaded in the Court below and, under the terms of order 18, rule 8 of the Supreme Court Practice of the United Kingdom (The White Book) the statute cannot avail the appellant as a defence to the action or as a ground of appeal.

The Court drew the attention of Mr *Kinariwala* to the principles of *devastavit* by negligence and he was unable to indicate that the appellant was not negligent in that respect, in this case. In this connection we would refer to Williams and Mortimer *On Executors, Administrators and Probate* (15th ed.) at page 951 which reads as follows:

> ''Again, if the executor, by his delay in commencing in action, has enabled the debtor of his testator to protect himself by pleading the limitation Act, this amounts to a *devastavit.*''

> We are satisfied, especially from the evidence of the first witness for the defence in the Court below when he said: ''I was fully aware of the

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> statutory limitation time of three years from the date of death or accident, 29th September, 1977; the three years expired on 29th September, 1990,' that the appellant was negligent in this matter and certainly did not use due care and diligence in looking after the interests of the estate which included those of the beneficiaries.''

In answer to a point made by the Court, Mr *Kinariwala* maintained that if there was judgment against the appellant, it should not be for more than would have been obtainable in an action under the Law Reform (Miscellaneous Provisions) Act for loss of expectation of life of the deceased. In this latter respect, we confirm that the date of the High Court judgment in this case is the date which governs the amount of damages which can be claimed by the respondent, and at that date the appropriate damages for loss of expectation of life of a deceased of any age should be a sum of K3 500.

In reply, Mr *Ngenda* accepted that the respondent is entitled to no more damages than he could have recovered under the Law Reform (Miscellaneous Provisions) Act for loss of expectation of life. He did argue, however, that because of the conduct of the appellant's advocates in the Court below, where at one time they appeared to admit liability and yet denied that admission at another time, there had been an unnecessary delay in the proceedings which resulted in his client being kept out of his money for a long time. He asked, therefore, that there should be some account taken of this when this Court calculates the award.

As we have said, we agree that in this case there was *devastavit* by the appellant in that the claim against the insurance company was not pursued with due care and diligence; we do not agree that the appellant was acting in the capacity of a legal practitioner and owed a professional duty of care to the estate or to the respondent in particular. We agree with both counsel that no claim can be made on behalf of the respondent personally for any loss of *consortium* and Mr *Ngenda* has taken a very proper course by indicating to this Court that any damages he is entitled to claim are those which could have been obtained under the Law Reform (Miscellaneous Provisions) Act for loss of expectation of life. We have taken into account what Mr *Ngenda* has said about the unnecessary delay in this case and we accept that the damages were aggravated by this delay. However, we cannot depart from our usual norm of damages for loss of expectation of life and the only compensation for the delay would be in awarding a generous rate of interest and awarding damages from the earliest date as is equitable.

For the reason which we have given, this appeal is allowed; the judgment of the High Court awarding damages in the sum of K20 000 and interest at the rate of 13% is set aside. In its place we give judgment to the respondent in the sum of K3 500 damages, with interest thereon at the rate of 15% per annum from 21st December, 1979, which is the date when the other claims were satisfied by the Zambia State Insurance Corporation. The order as to costs in favour of the respondent in the Court below will stand, and in view of the fact that this Court itself raised the question of devastavit, there will be no order as to the costs of this appeal.

Appeal allowed.