



**JUDICIARY**  
**IN THE HIGH COURT OF MALAWI**  
**PRINCIPAL REGISTRY**

Civil Cause No 67 of 2013

Between

GEORGE SAKONDA

APPLICANT

And

S.R. NICHOLAS LIMITED

DEFENDANT

**CORAM: JUSTICE D F MWAUNGULU**

Mwanguluwe, Counsel for the Applicant

Banda, Counsel for the Defendant

Mwanyongo, Official Court Interpreter

**Mwaungulu, J**

**JUDGMENT (on liability)**

*Introduction*

On a balance of probabilities, on the facts and evidence the applicant, an employee, has established that the defendant, an employer, owed the applicant a duty of care breach of which caused damages for which the defendant must compensate the applicant. *De minimis non curat lex* does not apply. Consequently, the defendant must compensate the applicant in a way as to give the fullest possible compensation leaving the applicant in the financial position he was before the event that caused injury. The applicant has also discharged the burden equally on him to prove on a balance of probabilities, the losses, current and future, on which he seeks compensation.

I approach this matter in a manner which should, I guess, be the norm, in this Court, namely, where, like here, there is a trial, a judge must, in one hearing resolve liability and damages. The practice, vogue in the High Court, where judges resolve liability and defer to registrars to assess damages should be exceptional. The practice multiplies and conflates actions and procedures and is costly for litigants. Splitting trial requires witnesses, more

especially the applicant and expert witnesses, to attend court twice before different arbiters and repeat the evidence or the story. A single hearing means Judges determining liability, more than the Registrar are likely to be empathetic, sentimental and close to matters affecting damages. Moreover, for negligence, where proof of damages is essential to liability, a second hearing is a luxury and costly. Counsel will bill a client or opposite party twice for briefs and attendance. The procedure multiplies and complicates the appeal process and judgment.

As we see later, Registrars, who really should assess damages where there is no trial on liability, namely on judgments in default, judgments on admission of liability and consent judgments, have inadequate guidance because Judges avoid assessing damages by deferring to Registrars. Appeals to the Supreme Court, in the rare circumstances they occur, stilt or stall because of uncertainty on appeal forums on Registrars' assessment of damages. Registrars, for all that is worth, do a great job and it is inconceivable that on matters on which they have been made the dominant participant, their decisions on assessment of damages which, in fact are decisions of this Court and, on correct appeal jurisdiction, are appealable to the Supreme Court, never appear in law reports or some form of publication. Yet Registrar's awards actually inform the Supreme Court and the High Court (*Tabord v David Whitehead & Sons (Malawi Ltd [1995] 1 M.L.R. 297*).

### *Facts*

The defendant, S.R. Nicholas Limited, is a building contractor of renown and, at the time of this litigation's incidents was constructing the Reserve Bank Building in Mzuzu. The applicant, an employee, during employment, on 4 August 2011, was moving mortar from a crane to a floor of the building. He tripped and fell off planks from the floor to the ground, suffering severe injuries. The applicant suffered paraplegia following fracture spine described (weakness of the lower extremities due to fracture of spine (12) and other injuries. The applicant lost permanent and complete control of lower limbs and cannot stool, urinate or walk. The applicant suffered 100% permanent incapacity. He was earning MK7, 500 per a month. He is unfit for manual work and unable to perform his previous job. He recovered MK 400, 000 under the Workers Compensation Act.

During trial, platitudinous that the applicant suffered the injuries described during employment, I paid particular attention to understanding circumstances around the incident, listening closely to critical witnesses on essential and contentious issues. The defendant, rather incredulous, the applicant was adamant he never had any safety gear or protection when the incident occurred. The applicant informed the court that he was told that the wear was arriving from Blantyre. One would have thought, given the defendant's reputation, that a stores officer would be in court to inform and provide information that the defendant issued the plaintiff protective and safety wear. No one testified on this. The defendant called a security officer. His evidence on the point was, to say the least, unsatisfactory and at large. I find no difficulty, the defendant's reputation notwithstanding, to find that, on the plaintiff's impeccable and not controverted word, the applicant was without protection during an extremely dangerous enterprise.

The defendant's evidence on the safety wear is that, normally, no employee is allowed without the safety wear, comprising, among other things, a helmet and a safety belt. The defendant's witness informed the court that the employer issues these to employee as a matter of course. Employees carry them home. Some wear remains at the office. As seen earlier, the witness could not vouchsafe whether the applicant received the safety gear. He informed the court that the applicant received the safety gear because normally there is a safety drill before work where all staff is advised to wear safety gear and prioritize safety. On this date, not him but another conducted the drill. The security officer could not, therefore, vouchsafe that the drill occurred and all employees wore safety gear. The security officer, however, informed the court that he, as usual, inspected the work place and that, on inspection, he would not allow the applicant to work without safety gear. The assumption, then, is that the applicant had, during inspection, safety gear, otherwise, the security officer, with considerable experience, would have withdrawn him from work. The security officer, buttressing the point, informed the court that, subsequently, another employee

recovered the safety belt where the applicant landed. This, according to the defendant, reinforces the defendant's theory that the applicant fell because he never wore safety gear and never used the safety measures.

The security officer informed the court that the applicant either avoided or overlooked the protective barriers and rails and this coupled with non-use of safety gear premised the accident. If, as the defendant contends, the applicant, during the security officer's inspection wore safety gear and the belt was found where the applicant fell, *ex hypothesi*, the defendant argues, and vehemently for that matter, that the applicant conducted himself badly in avoiding or overlooking safety measures. This, therefore, depends on whether the defendant supplied the applicant with safety gear, whether the work place was safe, whether the safety gear was adequate and whether there was a safe workplace.

I for one, on the evidence and on credibility of the witnesses, find that the defendant never supplied the uniform and if the defendant did, the defendant did very little to ensure the employee used or was using safety wear at a safe work place. I find it improbable as to be incredulous that the applicant who, according to the defendant, was fully adorned during inspection could decide to remove the safety gear not to use it during work. The defendant's theory is that the defendant had safety gear and that he did not use it or the safety apparatus *in situ*. I do not find so. Besides, the applicant's evidence that he fell when he tripped off the planks on which he conveyed mortar is not controverted.

The defendant's evidence on the safety arrangements is unclear. One can assume though that, if, as the applicant contends, he tripped on the planks, the few and sparse safety measures the defendant described would save the situation. The crane brought the mortar to the wall. There was no dais or platform. Employees stretched to collect mortar from the crane receptacle unless, of course, the crane receptacle entered the building. The applicant says that the former happened. The defendant is unclear. Employees went on planks to deliver mortar elsewhere. It is unclear from the defendant that employees were required to put on safety belts and that there were belt holdings all the way and around where employees deposited mortar. If holders were not so placed and employees could not put belts all the way, the situation was so dangerous and that the employee could, as happened in this case, slip off planks and have no safety or protection from safety belts. It could be that the applicant is lying, I do not think so. I am, however, aware of the remarks of Davies, L.J., in *Parocjic v Parocjic* [1959] 1 All E.R. 1, 5-6, quoted with approval in *Mahomed Nasim Sirdar v Republic* (1968-70) A.L.R. Mal. 212, 218:

*"It would not, I think, be right to approach it from the point of view that as she and her witnesses have lied about one thing, the remainder of their evidence must be equally unreliable. It is not unknown for people, particularly simple and uneducated people such as these are known to be, to fall in the error of lying in order to improve an already good case."*

#### *Employer's Duty to Employees*

On the facts of this case, certainly, there was a duty of care on the defendant towards the applicant. Generally, as between employer and employee, such duty, in certain respects, arises from the nature of the relationship and the nature of the operation (*Chidule v Medi* (1993) M.S.C.A Civil Case No 12 (unreported)). In this case, the latter is determinative. The operation was latently and patently dangerous, requiring employers to work from a height where a crane would hoist mortar for employees to collect from several floors from the ground. Where, like here, an operation or substratum is dangerous, latently or patently, the Common law, apart from statute, imposes a duty of care on one in relation to another to act or abstain from acting in such a way that damage, reasonably foreseeable, does not result to the other. The starting point is Lord Herschell's statement in *Smith v Baker* [1891] A.C. 325, 326:

*"It is quite clear that the contract between employer and employee involves on the part of the former the duty of taking reasonable care to provide proper appliances, and to maintain them in a proper*

*condition, and so to carry on his operations as not to subject those employed by him to unnecessary risk. Whatever the dangers of the employment which the employed undertakes, amongst them is certainly not to be numbered the risk of the employer's negligence and the creation or enhancement of danger thereby engendered."*

In *Wilsons and Clyde Coal Co v English* [1938] A.C 57 Lord Wright said the employer's duty entails "provision of a competent staff ... adequate material, and a proper system and effective supervision ... [I]t is not fulfilled by entrusting its fulfillment to employees, even though selected with due care and skill."

The standard required of a duty bearer is that of a reasonable man, the duty bearer normally and ordinarily required to do no more and no less than the exigency and urgency of the enterprise to any reasonable man. Consequently, the greater the risk the greater is the incidence. Conversely, ordinarily enterprises entail ameliorated incidence. Providing competent staff in Lord Wright's formulation does not arise here except, may be, in so far as it suggests that the defendant, through better staffing, should have provided elaborate safety at the work place for the nature of the enterprise. This is something I am reluctant to hold against the defendant. The defendant, however, is under a duty, not mentioned by Lord Wright, to provide a safe work place (*Cole v De Trafford* (No20 [1918] 2 K.B. 535, per Scrutton, L.J.; and *Davidson v Handley Page* [1945] 1 All E.R. 235, 236, per Lord Greene, M.R). The matter, whether there was required care, turns on facts in a particular case and irrespective of whether the employer owns the premises:

*"The master's own premises are under his control: if they are dangerously in need of repair he can and must rectify the fault at once if he is to escape the censure of negligence. But if a master sends his plumber to mend a leak in a private house, no one could hold him negligent for not visiting the house himself to see if the carpet in the hall creates a trap. Between these extremes are countless possible examples in which the court may have to decide the question of fact: Did the master take reasonable care so to carry out his operations as not to subject those employed by him to unnecessary risk? ... So viewed, the question whether the master was in control of the premises ceases to be a matter of technicality and becomes merely one of the questions of fact very important one, in a consideration of the question of fact whether, in all the circumstances, the master took reasonable care."*

In this matter, I really doubt whether, on the facts, the defendant created a safe place for employees. In my view, it was potentially dangerous, not having a dais or platform where the crane should have landed the mortar. It was dangerous to allow employees to collect the mortar with a gap and no protection after the wall. Moreover, the use of wooden planks, even if it is the norm, is potentially dangerous and risky as it made tripping, as happened here, very likely and foreseeable. The employer was under a duty to exclude the possibility or probability. The place was not just safe.

The defendant's Counsel submits that an employer is obliged to take reasonable care but not necessarily required to guarantee safety. He relies on the decision of this Court in *sub nomino Tabord v David Whitehead & Sons (Mal) Ltd* (19...) 12 M.L.R. 125. In this Court Mtegha, J., cited Asquith L.J., in *Edwards v National Coal Board* [1949] 1 All E.R. 747:

*"'Reasonably Practicable' is a narrow term than 'physically possible' and seems to imply that a computation must be made by the owner in which the quantum of risk is placed on one scale and the sacrifice involved in the measures necessary for averting the risk is placed in the other and that, if it be shown that there is a gross disproportion between them – the risk being insignificant in relation to the sacrifice – the defendant discharged the onus on them."*

In *Tabord v David Whitehead & Sons (Mal) Ltd* the Supreme Court of Appeal reversed the judgment of Mtegha J.,<sup>7</sup> On the very test by Asquith, L.J. in *Edwards v National Coal Board*, the employer's actions left employees at a high risk, even if, as Counsel submits, the employer must not guarantee safety.

Moreover, under the third limb in Lord Wright's judgment, the defendant, in my opinion, failed to provide a safe work system at the work place. In *Speed v Thomas Swift & Co.*[1943] K.B. 557 at 563-564, Lord Greene said:

*"...the physical lay-out of the job-the setting of the stage, so to speak-the sequence in which the work is to be carried out, the provision in proper cases of cases of warnings and notices and the issue of special instructions. A system may be adequate for the whole course of the job or it may have to be modified or improved to meet the circumstances which arise; such modifications or improvements... equally fall under the head of system."*

For once, I do not think that it was enough for the defendant just to provide safety apparel and leave the whole place potentially dangerous trusting that a safety belt would be the last and only insurance. As it often happens, employees can make mistakes and the nature of this duty necessitates the employer forestalling foreseeable and common employer's mistakes. As it turned out here, at least, according to the defendant's theory, the applicant overlooked putting on the safety belt. The law expects the employer to account for such employees' oversights and errors because employees normally overlook personal safety (*Kerry v Carter* [1969] 1 W.L.R. 1372). In *General Cleaning Contractors v Christmas* [1953] A.C. 180, 189-190, Lord Oaksey said:

*"In my opinion, it is the duty of an employer to give such general safety instructions as a reasonably careful employer who has considered the problem presented by the work would give to his workmen. It is, I think, well known to employers, and there is evidence in this case that it was well known to the appellants, that their workpeople are very frequently, if not habitually, careless about the risks which their work may involve. It is, in my opinion, for that very reason that the common law demands that employers should take reasonable care to lay down a reasonably safe system of work. Employers are not exempted from this duty by the fact that their men are experienced and might, if they were in the position of an employer, be able to lay down a reasonably safe system of work themselves. Workmen are not in the position of employers. Their duties are not performed in the calm atmosphere of a board room with the advice of experts. They have to make their decisions on narrow window sills and other places of danger and in circumstances in which the dangers are obscured by repetition."*

In *Smith v National Coal Board* [1967] 1 W.L.R. 871, 873, Lord Reid said:

*"An employer, or those for whom he is responsible, must always have in mind, not only the careful man, but also the man who is inattentive to such a degree as can normally be expected. And it is common experience that if one is accustomed to pass along a safe route one may be less attentive than when going where one has not been before. So an employer, who allows a normally safe route to become blocked by a dangerous obstruction without warning those who may use it, will, in my view, be guilty of negligence, at least, unless the obstruction is so obvious that even an inattentive man would notice it in time to avoid danger. If it is not as obvious as that it contributes to an accident, the man may be guilty of some contributory negligence, but some share of the blame must fall on the employer."*

Moreover, even if the system is impeccable, if an employee fails to follow it, the employer will be liable if an employer's actions cause injury to another employer (*McDermid v Nash Dredging and Reclamation Co. Ltd* [1987] A.C. 906. It follows *a fortiori* that, if the injury in the circumstances emanates from the employees own action, contributory negligence no longer being a total defence, the employer's liability is subject to contributory negligence. In so stating I am aware of Viscount Simond's clear expression of the law in *Qualcast*

*(Wolverthampton) Ltd v Haynes* [1959] A.C. 743, 760, where he said: “I depreciate any tendency to treat the relation of employer and skilled workman as equivalent to that of a nurse and imbecile child.”

Certainly, Viscount Simonds had in mind a skilled worker and never had in mind the person, like the appellant, who is a mere unskilled labourer doing menial and manual duties. The employer must, as it must be, consider the employee’s situation in determining the precautions that must be taken (*Paris v Stepney Borough Council* [1951] A.C. 367). In *Qualcast (Wolverthampton) Ltd v Haynes*, Lord Radcliffe said:

“...[A]n experienced man dealing with familiar and obvious risk may not reasonably need the same attention or the same precautions as an inexperienced man who is likely to be more receptive of advice or admonition.”

More importantly, although no breach was established in the particular case, that an employee does not comply with employer’s orders does not deprive the employee of the protection, subject to contributory negligence (*Rands v McNeil* [1955] Q.B. 253).

The defendant’s Counsel, therefore, cited two cases suggesting that there was, on the evidence, contributory negligence (*Bisiketi v Ruo Tea Estate Ltd* [1992] 15 MLR. 26; and *Khomba v Malawi Railways Ltd* [1993] 16(1) MLR 205). In the latter case Unyolo J., in this Court said: “The law is clear. All that is required in case of contributory negligence is that the plaintiff should have failed to take reasonable care for his own safety.” Unyolo J, relied on *Nance v British Columbia Electric Railway Co., Ltd* [1951 A.C. 601 and this statement by Denning, L.J., in *Jones v Livox Quarries Ltd* [1952] 2 Q.B. 608, 615:

“A person is guilty of contributory negligence if he ought reasonably to have seen that, if he did not act as a reasonable, prudent man he might be hurt himself, and his reckonings must take into account the possibility of others being careless.

I have come to the conclusion that the appellant did not have protective gear because, apparently, it was en route from Blantyre. Consequently, his only fault was to continue working without the protective gear. As earlier stated, this, in the peculiar circumstances in which the applicant found himself, namely, that he had had no stable job before and was, therefore enthusiastic to work, was a usual and foreseeable error (of judgment) that the employer should have foreseen and anticipated as a matter of course. It appears that the employer fell short of its supervisory functions in allowing the employee to continue to work. The security advisor is on record that, as a matter of course, he would not allow employee to work in those circumstances. On the other hand, as indicated earlier, the operation was in its formation and execution dangerous. In those circumstances, I doubt if the safety gear would have availed much. I rest in the solace that if the employee was negligent, if at all, the negligence was *de minimis* and so was its contribution to the damage suffered. The contributory negligence can be conveniently and properly ignored.

#### *Liability*

The applicant was fairly new to the job and had very sporadic experience even in the work embarked. From his own evidence, having not been in a job of the like before, he willingly had to forego the need for a uniform. Obviously, he was overly enthusiastic about the job. These alone did not override the employer’s duty to the employee as discussed. The employee being new and raw, the employer’s supervision and attention was urgent and, in my understanding, in treating a new employee in a group in the same way as other experienced employees, the employer is guilty of treating the unlike alike. I am inclined to think that, if at all the employee never used the safety belt, his actions contributed to an otherwise precarious situation at the employer’s place of work. I think the employer had a duty, on the facts, for more and better supervision of a new and enthusiastic employee. On balance, I am inclined to think that the defendant did not provide a complete safety outfit. This differentiates the case of *Smith*

v *Scot Bowers* [1986] I.R.L.R 315 where, being available, the court held it sufficient that the employer told employees about availability of boots and that it was unnecessary for the employer to inspect from time to time. I, therefore, do not attribute any employee's contribution to the accident. The defendant breached the duty owed to the employee in failing to provide adequate equipment, safe work place and work systems. There is no doubt in my mind that the defendant's actions and commissions caused the personal injuries subject of these proceedings. Personal injury was foreseeable in the circumstances and the injuries were severe and not undermined by the principle *de minimis non curat lex*.

This judgment is the first installment of it. The second installment covers damages. Much as I would have loved to include it here, Counsels' submissions on damages need more and better examination which would make this judgment bulky. For this reason, I in this judgement, find the defendant liable. The applicant will also have the costs of the proceedings.

Made this 26<sup>th</sup> Day of September 2014

D.F. Mwaungulu

**JUDGE**