



MALAWI JUDICIARY

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 855 OF 2006



**BETWEEN:g**

**CHARTER INSURANCE COMPANY LIMITED.....PLAINTIFF**

**AND**

**SHABS CARRIERS.....1<sup>ST</sup> DEFENDANT**

**PRIME INSURANCE COMPANY LIMITED.....2<sup>ND</sup> DEFENDANT**

**CORAM: THE HON JUSTICE H.S.B. POTANI**

**Mr. Makwinja, Counsel for the Plaintiff**

**Mr. Chipeta, Counsel for the 1<sup>st</sup> Defendant**

**Mr. Chikaonda Counsel for the 2<sup>nd</sup> Defendant**

**Mr. Kanchiputu, Court Clerk**

### **JUDGEMENT**

In this action, the plaintiff is claiming from the defendants the sum of K 1,155,521.82 with interest thereon and costs of the action.



The claim arises from the damage occasioned to a crane insured by the plaintiff allegedly due to the negligent manner in which a truck owned by the 1<sup>st</sup> defendant and insured by the 2<sup>nd</sup> defendant was being driven. In their respective defences, both defendants deny that the alleged accident occurred and further plead in the alternative that if at all the accident occurred, it was caused or largely contributed by the negligence of the crane driver.

As has just been pointed out, in their respective defences the defendants join issue with the plaintiff on all the material allegations of fact averred in the statement of claim. Therefore, the state of the pleadings is such that the burden lies on the plaintiff to prove all material allegations on which their case against the defendants rests. This position of the law was duly reiterated by Villiera J in **SOMANJE v ESCOM** Civil Cause No. 717 of 1991 as follows:

*“It is important to observe that the burden of proof never shifts from the plaintiff to the defendant except perhaps where the defendant has pleaded contributory negligence.”*

As regards the level or standard of proof, these being civil proceedings, the required standard proof is proof on a balance of probabilities. It is a lesser standard than that required in criminal proceedings which is proof beyond reasonable doubt.

The evidence the court has is from three witnesses that testified for the plaintiff. The case record shows that after the last hearing which took place at the scene of the alleged accident on September 29, 2015, counsel Chikaonda representing the 2<sup>nd</sup> defendant indicated that the 2<sup>nd</sup> defendant would not call any witnesses but asked the court to adjourn the matter to a date to be fixed so as to allow the 1<sup>st</sup> defendant advise if they would call defence witnesses but the 1<sup>st</sup> defendant stayed put and mute although served with notices of hearings scheduled for December 8 and 13, 2016. When the court convened on December 13, there was no attendance on the side of

the defendants and counsel for the plaintiff moved the court to proceed with judgement on the basis of the evidence before it.

According to Cordwell Dambo PW3 who was operating the crane insured by the plaintiff on the day of the alleged accident, the accident occurred because when the 1<sup>st</sup> defendant's truck offloaded a container it moved forwards instead of backwards. To buttress this assertion, it is his evidence which he gave right at the scene of the alleged accident that the point of the collision is a no go zone area for trucks. The evidence of PW3 is not disputed as he was not asked even a single question by way of cross examination and the defendants did not call any witness to counter such evidence.

As indicated earlier, apart from denying the occurrence of the accident and that it occurred due to the negligence of the 1<sup>st</sup> defendant's driver, both defendants have put forward an alternative plea that if at all the accident occurred, then it was caused or largely contributed by the negligence of the crane driver.

It is general rule on evidential burden of proof that it is the party that alleges the existence of certain facts on whom burden of proof rests. The principle was stated in the case of **Robins v National Trust Co** [1927] AC 515 that the burden of proof in any particular case depends on the circumstances in which the claim arises. In general, the rule is *Ei qui affirmat non qui negat incumbit probatio* which means the burden of proof lies on him who alleges.

In the case of **Ruo Tea Estate Limited V Owen Mwalwanda** [2002-2003] MLR 198 the Malawi Supreme Court of Appeal had occasion to consider the meaning and scope of the defence of contributory negligence. The court had this to say:



*“Before we look at the submissions by both Counsel, we wish to state briefly here what the expression “contributory negligence” means in law. Charlesworth and Percey on Negligence [9ed] at 194 have stated the expression “contributory negligence” means that there has been some act or omission on the plaintiff’s part which has materially contributed to the damage caused and is of such a nature that it may properly be described as negligence, only in the sense of careless conduct and not given its usual meaning.”*

What clearly comes out from the above dictum is that for there to be contributory negligence, there has to be some act or omission on the plaintiff’s part which has materially contributed to the damage caused. The defendants in this case have not adduced any evidence in defence to prove such act or omission. There has been an attempt by counsel for the 1<sup>st</sup> defendants, in the cross examination of PW1 Mageed Dyton, to suggest that since the findings off the police investigations as contained in the Police Report he tendered as exhibit **MD1** state that the 1st defendant’s driver contributed to the cause of the accident, then it means that the crane driver also was partly to blame. The quick point the court would wish to make is that author of the police report did not appear before the court to give evidence on the findings and to be cross examined thereon and there being the uncontroverted evidence of the crane driver PW3 that the accident was wholly caused by the truck driver in that he moved forwards to a no go area instead of moving backwards, the court would not render any credence to the suggestion the 1<sup>st</sup> defendant seeks to advance.

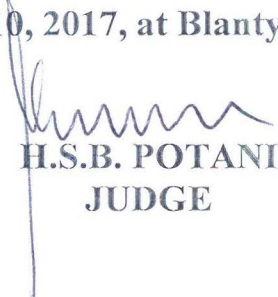
In the end result the court finds and holds that the plaintiff has proved to the required standard that the accident indeed happened and that it was due to the negligence of the 1<sup>st</sup> defendant’s driver as result of which a crane which the plaintiff was the insurer got damaged on its motor. Due to the damage caused to the crane the plaintiff as an insurer thereof ended up paying the claim to the tune of K1,155,521.82 by the insured GMS Freight Limited as per the evidence of PW1 as supported by exhibits

**MD 2(a) , MD 2(b), and MD 2(c).** The 1<sup>st</sup> defendant having been found liable, the plaintiff by virtue of section 148 of the Road Traffic Act is entitled to claim against the 2<sup>nd</sup> defendant as insurer of the 1<sup>st</sup> defendant except that the liability of the 2<sup>nd</sup> defendant would be limited to amount covered by the policy of insurance and so judgement is accordingly entered against both the 1<sup>st</sup> and 2<sup>nd</sup> defendant in the sum of K1,155,521.82

Then, there is the claim for interest on the sum of K1,155,521.82 from 23<sup>rd</sup> September, 2005, till payment of the claim in full. Section 11(a)(v) of Courts Act gives the court the power to award interest on judgement sums but decided case are to the effect that interest may not be claimed as of right. The a court may order payment of interest only cases of a debt as distinct from an award of damages. See **Gwembere v Malawi Railways Ltd** 9 MLR 369 **Shaba v Agricultural Development and Marketing Corporation** [1996] MLR 384 (SCA). It appears to this court that the claim herein although in a liquidated sum is essentially one for damages and not necessarily a debt. It is the position of the court that the claim for interest is not justified as there seems to be no basis on which it can be made. It is accordingly dismissed.

On costs, since the plaintiff's action has succeeded and on the basis of the principle that costs follow the event, it is ordered that the defendants be condemned in costs such costs to be taxed by the Registrar if not agreed.

**Made this Day of February 10, 2017, at Blantyre in the Republic of Malawi.**



**H.S.B. POTANI**  
**JUDGE**