

IN THE HIGH COURT OF MALAWI



CIVIL CAUSE NO. 529 OF 1979

between

R.H. KNOWLES PLAINTIFF

and

T. HODGES 1ST DEFENDANT

and

J.K. CHINTOLO 2ND DEFENDANT

Coram: Jere J.

For the Plaintiff: Kaliwo of Counsel
1st Defendant absent: unrepresented
For the 2nd Defendant: Chiudza Banda of Counsel
Chimasula Phiri of Counsel
Official Interpreter: Kalimbuka/Kaundama
Court Reporter: Brown

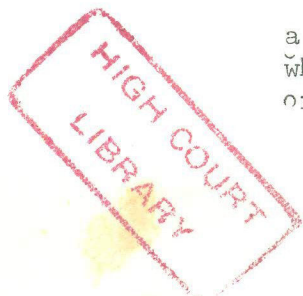
JUDGMENT

The plaintiff claims against the defendants special damages and general damages and interest on such damages arising out of alleged negligent driving by the first defendant of a motor vehicle CA 4926 which resulted in the plaintiff's motor vehicle being badly damaged.

The plaintiff's evidence is that at all material times he was resident in Kitwe, Zambia, although at the time of trial of this action he was resident in Malawi.

His evidence was that while in Zambia he had arranged to come and spend a holiday in Malawi with his family. They would be staying at a cottage at the lake belonging to W.C. French. They would not be charged for the use of the cottage.

In June 1978 the plaintiff arrived in Lilongwe and stayed for a few days in the Capital City. He then travelled to Blantyre, where he intended staying from the 9th of June until about the 12th or so, before proceeding to the lake.



Around 9 p.m. on the 9th of June 1978 the plaintiff parked his car, a Mercedes Benz EK 3565, and went into the Chinese restaurant with his wife and family and some friends. They had just sat down and were ordering the food when a security guard came to inform him that his car had been damaged. He went out with the guard and found that the car had been moved about fifteen feet down the road, had mounted the pavement, and was facing up the road towards the Mount Soche Hotel. There was considerable damage to the vehicle. This damage had been caused by a collision between his vehicle and a Daihatsu four-wheel drive, a utility vehicle, jeep type, registration number CA 4926. This vehicle had not stopped after the collision with the plaintiff's car but had continued being driven down Glyn Jones Road; unfortunately it overturned. The plaintiff saw a European standing beside the overturned car, and he presumed that this man was the driver of CA 4926. This man was Thomas Hodges; he denied that he was the driver of the vehicle, and said that prior to the accident he had hired a Malawian driver to take him to Shire Highlands Hotel where he was staying. It was the plaintiff's evidence that Hodges was completely under the influence of alcohol and he was eventually taken away by the police. On the side of CA 4926 was painted the name Mchedwa Estates and the address in Ntchisi district.

The plaintiff said that the General Manager of the National Insurance Company lent him a car, which saved him a lot of money and trouble. He said they could not go to the lake because they did not know when they could take up the cottage and W.C. French had let it go to someone else. Instead they stayed at Club Makokola. The plaintiff said he paid K418.85 for their stay there: see Exhibit 1. They also stayed at the Mount Soche Hotel on the night of the 16th/17th June 1978 and for this he paid K64.93. The plaintiff said from the 9th to the 12th of June 1978 they stayed at Ryall's Hotel and paid K64.98. On 24th June 1978 he and his family flew out from Chileka Airport and paid K222 for the air fares. He said the tickets had been lost. He told the court that his vehicle was repaired by Malawi Motors at a cost of K1,350.89. This amount represented a staff concession.

The plaintiff said that as a result of the accident his holiday had been completely ruined. His wife had come to Malawi on her doctor's orders, and as a result of what had happened she was very distressed.

In answer to the court the plaintiff said they had booked the cottage from the 10th to the 22nd of June 1978. They were going to spend the whole time there and then start driving back. They flew out on the 24th because there had been a slight mix-up with the air line over their original booking for the 22nd and they were not on the plane. They spent the last two nights with Mr. Gibbons of the National Insurance Company because there was no hotel accommodation to be had.

Mrs. Barbara Knowles, the wife of the plaintiff, gave evidence which was substantially the same as that of her husband. She said they came to Malawi for a holiday. She was recuperating after an

operation and they were also job-hunting. They were to stay at a cottage at the lake. The first evening after they arrived in Blantyre they went for a meal and parked the car outside the restaurant. The night watchman came in and as a result she went out with her husband. She saw somebody who was trying to drive away a Daihatsu, and this vehicle overturned.

Mrs. Knowles said they had been planning to go to the lake, but they couldn't because they had no vehicle. They eventually went to the lake on the 12th of June, and stayed until about the 13th. She was not quite sure about the dates now, as it was a long time ago. They went to Club Makokola and left there on the morning of the 22nd. They eventually left Malawi on the 24th. She said their whole routine had been upset because of the crash. She had come here to recuperate but in fact she had got worse and had to seek medical assistance while in this country.

In cross-examination Mrs. Knowles said that Mr. Hodges had caused the accident. When they approached him he said he had hired a Malawian to drive him and it was this man who had caused the accident.

Mr. Tony Stainer Chapambala gave evidence on behalf of the plaintiff. He said he was employed by the Registrar-General's Department as a senior examining officer, and his duties involved the processing of applications for the formation of companies, applications for registration of business names, and assessment of stamp duties on the increase of share capitals of companies. He produced Exhibit 5, which is a photostat copy of a Certificate of Incorporation of Mchedwa Estates Limited dated 25th August 1978, Registered No. 1893. He said that the directors of that company were Joseph Kanyamula Chintolo, Michael Kanyamula Chintolo and Kanyamula Chintolo.

In cross-examination the witness stated that the documents for the formation of the company came in to their office early in 1978. He said he could neither confirm nor deny that the documents reached their office in March 1978.

Mr. Ndalala of the Road Traffic Commissioner's Office gave evidence on oath. He said his duties were to look after the registration papers of motor vehicles and licences. In 1979 he was working at the Road Traffic Commissioner's Office. He identified Exhibit 6 as a letter coming from his office. He said the first registered owner of CA 4926 was Mchedwa Estates, whose real owner was J.K. Chintolo. He said according to the records the vehicle was now owned by Mr. N.C. Nthonga, who purchased it on 19th April 1979.

In cross-examination the witness said that the registered owner of CA 4926 was Mchedwa Estates (J.K. Chintolo). In re-examination he said that there might have been a change of ownership which was not registered.

The evidence of the second defendant is that he, Mr. Chintolo, is a business man. He started business in 1972 as an electrical and building contractor, and he also has estates. He said he knew a man by the name of T.H. Hodges who had been employed by Mchedwa Estates Limited in 1978 as a farm manager. He was recruited by Sacranie Pannell Fitzpatrick & Company, Chartered Accountants.

The witness identified Exhibit DX.1, which reads:-

"16 March 1978

Our Ref. SMY/EDM/LB/M5

The Manager,
National Bank of Malawi,
Capital City Branch,
P.O. Box 30317,
LILONGWE 3.

Dear Sir,

MACHEDWA ESTATES

We refer to signor's telephone conversation with you this morning and confirm that we have recruited Mr. Thomas Hodges as the Estate Manager for the above estate. His brief details are as follows :

Age	51 years
Marital Status	Married
Experience	12 years growing tobacco 10 years as Tobacco Extension Officer in Rhodesia including farm planning
Acreage grown	400 acres
Yield Achieved	1500 lbs per acre

The cash flow for the above estate is just being prepared and will be submitted to you next week.

We shall be most grateful if you will consider bringing him into the country immediately and apply to the Reserve Bank of Malawi for the permission to pay return airfare for himself.

Yours faithfully,

SACRANIE PANNEL FITZPATRICK & CO

c.c. J.K. Chintolo,
P.O. Box 402,
Lilongwe."

The witness said that he had not been informed that a man by the name of Hodges was going to be employed. This was between the accountants and the bank manager. He told the court that if you get a large amount of money from the bank they do not allow you to employ anybody alone. They simply tell you that someone is going to run the farm. He said he had no power to reject anybody.

He testified that Mchedwa Estates was incorporated as a company. Instructions were given on 6th March 1978 to a firm of legal practitioners to form a company. He tendered Exhibit DX.2 to support his evidence. He said the company was finally incorporated on 25th August 1978. It was functioning before incorporation.

The witness said the company had a pick-up which was involved in an accident. It was bought by him in March or April 1978. He said the bank told him to buy a vehicle for use by the farm manager, and that he would be refunded his money. The money was refunded after the bank had approved the loan to Mchedwa Estates. The vehicle was registered in the name of Mchedwa Estates Limited. The witness tendered DX.3, the certificate of insurance.

He said that Hodges was not employed by him but by the bank. He was dismissed without the knowledge or permission of the witness. The witness produced DX.4, a letter to the Deputy Chief Immigration Officer from Sacranie Pannell Fitzpatrick & Company. He said he had no control over Hodges. He further said that he was just as an ordinary man, as a director, with no power to control anything. Cheques were being signed by the bank. All the machinery for the estate was being bought by the farm manager, and he was controlling everything for the estate, together with the accountants. The witness said he himself had never used the vehicle since it had been bought, and he was not there when it was involved in the accident. Hodges ran away after causing the accident, and the vehicle was sold by the bank.

In cross-examination the witness said he bought the vehicle with his own cash and Hodges was using it as farm manager of Mchedwa Estates Limited. Mchedwa Estates Limited had a lease of the land on which it carried on its farming operations. If the company made a profit the bank would decide whether to give them dividends or not.

The witness tendered Exhibit DX.5. He said he did not sell the vehicle to the bank, but the bank gave him money for buying it. In other words, the bank gave him a refund, presumably charging the Estate. It was his evidence that there was no change of ownership.

He said when Hodges was being recruited the accountants were sending copies of the letters to him.

He tendered Exhibit DX.6.

He said the bank sold a lorry; there were many things which were sold.

In re-examination the witness said that the accountants asked him to lend money to Mchedwa Estates, which he did, and after a month they refunded his K6,500.

In answer to the court he said the bank refunded him the purchase price of the vehicle by cheque, on production of the receipts.

I remind myself about the burden of proof in civil cases. On the evidence before me I am satisfied on a balance of probabilities that a motor vehicle belonging to the plaintiff was parked near the Chinese restaurant on the night of the 9th of June 1978 as described by P.W.1. I am further satisfied that it was hit by another vehicle, a Daihatsu, and that as a result of this collision it sustained severe damage as described again by P.W.1. I accept his evidence on this point.

The circumstances in which CA 4926 was driven, leading to the hitting of the plaintiff's vehicle, namely, Mercedes Benz registration number EK 3565, amount in my view and in law to negligence. I cannot think of a clearer case of *res ipsa loquitur* than the present one. Here is a vehicle, parked in a proper parking bay, stationary. It is subsequently hit and in consequence it is moved fifteen feet down the road and ends up facing in the opposite direction. It must have been hit with great force. There is no explanation from either the first or the second defendant. Liability is clearly established.

The next issue is, who was the driver of CA 4926? There is the evidence of P.W.1 and P.W.2 that they were alerted by a watchman while waiting for a meal in the China Bar that something had happened to their vehicle. They went outside and found the vehicle about fifteen feet down the road, its front wheels having actually mounted the pavement. As P.W.1 ran down the road he saw a man standing beside the Daihatsu CA 4926, which had overturned. When questioned this man said it was a Malawian who had been driving the vehicle, the implication being that he had run away. He alleged that he had hired this man to take him to the Shire Highlands Hotel where he was staying. He, Hodges, the first defendant, subsequently fled the country. He did not appear in this action.

In my view it was Hodges, the first defendant, who was driving CA 4926, and if that vehicle had not overturned he would have run away - a clear case of hit and run. I am satisfied in my mind that Hodges was the driver of the offending vehicle.

The next question to be considered is, who was the owner of CA 4926? The second defendant alleges by paragraph 3 of his defence that this vehicle was at the material time the property of the National Bank of Malawi. It is alleged that the vehicle was sold to the bank around May 1978 at a price of K6,500. The

vehicle was bought from the second defendant so that it could be used for the purposes of Mchedwa Estates Limited.

This defence is difficult to understand. Does it mean that the vehicle belonged to Mchedwa Estates Limited or the National Bank? The evidence on record is that the vehicle was registered in the name of Mchedwa Estate (Mr. J.K. Chintolo) - note, not Mchedwa Estates Limited. (See Exhibit 7.) Mchedwa Estate before incorporation belonged to the second defendant. At the material time there had been no change of ownership. The vehicle was sold to Mr. Nthonga on 19th April 1979. There is documentary evidence to show that there was such a change.

The second defendant argued that the National Bank of Malawi refunded him the money he paid for the vehicle. The vehicle was used by Mchedwa Estates' farm manager. The burden is on him, the second defendant, to substantiate his story. There is no evidence that there was a change of ownership from him to the National Bank.

It must be borne in mind that under the Road Traffic Act section 6 the registered owner is under a duty to deliver the registration book to the new owner within seven days. The law prescribes what is to be done in order to effect a transfer of a motor vehicle. No evidence was produced of the payment of the K20 transfer fee, or any other relevant evidence.

Further, there is in evidence the letter of 23rd June 1978 from the defendant's solicitors to the National Insurance Company Limited, Exhibit DX.6. This letter reads:-

23rd June, 1978.

The General Manager,
The National Insurance Company Limited,
P.O. Box 501,
BLANTYRE.

Dear Sir,

RE: ACCIDENT ON GLYN JONES ROAD, BLANTYRE - MOTOR
VEHICLE REGISTRATION NUMBER CA 4926 : POLICY
NUMBER O/LL/97/28/78/ (F.C.)

We have received instructions from your insured, Mr. J. Chintolo, the proprietor of Mchedwa Estate, P.O. Box 402, Lilongwe, to report to you that his motor vehicle Registration Number CA 4926 (which is covered by your Policy Number O/LL/97/28/78 issued on 13th April, 1978, at Lilongwe) was recently involved in a road accident along Glyn Jones Road in Blantyre when it collided with another motor vehicle Registration Number EK 3565, owned by Mr. R. H. Knowles.

Mr. Knowles is claiming damages against your insured (we hope that you have by now received a copy of a letter from Messrs. Wilson and Morgan dated 13th June, 1978, Ref: PMS/BAK/K). Our Client would like to lodge a claim with you and for this purpose we request you to send us Claim Forms so that our client can fill in and return to you.

We have in the meantime written back to Wilson and Morgan denying liability for the accident.

Yours faithfully,

B.S.A. CHIUDZA BANDA AND COMPANY

c.c. Mr. J. Chintolo,
P.O. Box 402,
LILONGWE.

In view of the above evidence I come to the conclusion that CA 4926 belonged to the second defendant.

Paragraph 2 of the defence is as follows:-

- "2. The 2nd Defendant denies that the 1st Defendant was his servant at the time the accident happened as alleged in the Statement of Claim. The 2nd Defendant states that the 1st Defendant was employed by the National Bank of Malawi and Messrs. Sacranie, Pannell Fitzpatrick and Partners. These 2 parties, namely, National Bank of Malawi and Messrs. Sacranie, Pannell Fitzpatrick and Partners having employed the 1st defendant later dismissed him without the knowledge of the 2nd defendant, so that at the time the Writ was issued the 1st Defendant was no longer within the jurisdiction of this Court."

The second defendant told the court that he got a lot of money from the National Bank and they could not allow him to employ on his own. He was not allowed to run the estate. It was managed by the accountants and Mr. Hodges. He further complained that he did not recruit Hodges, did not pay him, and did not even dismiss him.

I have examined Exhibit DX 1, which is a letter to the National Bank from the accountants informing the bank about the employment of Hodges. A copy of the letter was sent to J.K. Chintolo, the second defendant. I have also examined Exhibit DX 4, which was a letter asking the Deputy Chief Immigration Officer to treat the TEP application in respect of Hodges as withdrawn. This is the only evidence on record. There is no evidence to show that Hodges was employed by the bank for the bank's purposes or for the benefit of the accountants.

What is clear is that Hodges was recruited by the accountants and went to work on the Mchedwa Estate, which at all material times belonged to the second defendant, who had got a loan from the bank to run the estate. There may have been conditions as to how the money should be utilized. Does this mean that the bank employed Hodges? I do not think so. I think that the bank and the accountants were acting as agents of Mchedwa Estate. In these circumstances, Hodges remained an employee of Mchedwa Estate, which at that time was not incorporated.

It has been submitted by counsel for the second defendant that Hodges was not acting in the course of his employment when he was involved in this accident. It was submitted that he was on a frolic of his own. I think this submission must fail. In the first place it was not pleaded. I cannot give judgment on issues that have not been pleaded. Secondly, there is no evidence on record that Hodges was not acting in the course of his employment. Thirdly, on the authority of Harvey v. R.G. O'Dell Ltd. and Another (1958) 2 Q.B. 78, and also the Supreme Court decision A.S.A. Bhimani v. A.A. Pendame, M.S.C.A. Civil Appeal No. 9 of 1981. The plaintiff is entitled to succeed on this issue.

In these circumstances, therefore, the plaintiff succeeds. I give judgment for the plaintiff.

The plaintiff has claimed in all K2,276.75 as special damages. The first head is for repairs. It is made up as to spare parts K1,150.89 and labour K200. This is reasonable and I allow the claim.

The next claim is hotel accommodation, which comes to K703.86. This bill causes me a lot of thought. The plaintiff was booked to stay at the lake, where he had a cottage lined up for him. He had an accident on the 9th. Why could he not go on the 10th? He was given a motor vehicle by his colleagues. Why could he not go? He said he was trying to trace Hodges. His wife was more open. She said because of the accident their whole plans were upset. Their plans were indeed upset, but there was no need to upset the plans. It was not the plaintiff or a member of his family who was involved in the accident, it was their vehicle. They were under a duty to mitigate their losses. Even if they had gone to stay at the cottage they would still have incurred expenses. To make matters worse, the claim includes a sum of K64.98, a bill at Ryall's Hotel incurred on the 8th of June 1978. This was before the accident. It cannot be allowed. In these circumstances I disallow the claim for K703.86. I grant the plaintiff the sum of K300 as reasonable in all the circumstances.

The last claim is for K222.00 for air fares. The plaintiff would in any event have spent K70 had he been using his vehicle. I allow therefore K152.00 on this head.

On damages I award him a sum of K50. There is no need for me to award interest.

The total amount is therefore: K 1,350 . 89

K 300 . 00

K 152 . 00

K 50 . 00

K 1,852 . 89

I give costs for the plaintiff.

Pronounced in open court this 29th day of June, 1982, at
Blantyre.


N.S. JERE
JUDGE