Banda 5.

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO.265 OF 1988

BETWEEN:

T.E. MANDA ..... PLAINTIFF

AND

CARGO CARRIERS LIMITED ..... DEFENDANT

CORAM: UNYOLO, J.
Nakanga, Counsel for the Plaintiff
Fachi, Counsel for the Defendant
Kalimbuka Gama, Official Interpreter
Phiri, Court Reporter

JUDGMENT

In this action the plaintiff claims damages from the defendant for negligence.

The plaintiff was at all material times employed by the defendant as a motor vehicle mechanic. He is a grade I mechanic with considerable experience covering a span of some two decades. The defendant, on the other hand, is a haulage company. It operates a fleet of articulated trucks which carry divers kinds of cargo, import and export goods mainly.

It was common case that in the course of his work on 31st March, 1987 the plaintiff was detailed to repair a truck which was about to be sent out. The fault was in the trailer braking system. Accordingly the plaintiff set out to put the fault right. This necessitated his going underneath the truck. But before he did so he placed a set of three blocks both in front and at the back of the truck to prevent it rolling off while he carried out the repairs. The plaintiff then went under the truck and began to work on it. The faulty brake valve was removed and replaced by a valve taken from another truck. Then the engine was started and kept on, in neutral gear, in order to check if the part had been connected properly and that there was no air escaping. It was in evidence that as the plaintiff went about doing the work he had one of his legs jutting out in between the tyres of the truck. It was common case that before the plaintiff

had finished the job, and while he was still under the truck, one of the defendant's drivers got into the truck and without giving any warning drove off. The plaintiff was taken unawares and the truck run over the leg abovementioned causing him serious injury. He was thereafter rushed to the Queen Elizabeth Central Hospital where he was admitted. He remained in hospital up to 29th April, 1987 when he was discharged. Even then he could only walk with the aid of crutches for several weeks. It was the plaintiff's evidence that the driver had earlier been advised that he would be told when the repair work was finished. He said that it was odd that before he had finished the job the driver jumped into the cab and started off without first ascertaining that the plaintiff had finished the job.

The plaintiff then gave evidence relating to what happened after he was discharged from the hospital. He told the Court that he continued attending the hospital as an out-patient for check-up and for pain-relieving drugs since he continued to suffer great pain in the leg. He said that when his condition improved he went back to work. He continued working alright. It appears, however, that the plaintiff expected the company to compensate him for the injury. And having seen that nothing was forthcoming he went to lodge a complaint at the Regional Labour Office. Dutifully the Regional Labour Office sent the plaintiff to the Queen Elizabeth Central Hospital requesting that his degree of incapacity arising out of the injury be assessed. And in his report, Exhibit D1, the Medical Officer advised that the plaintiff had suffered permanent incapacity to the extent of 1%. This was on 16th October, 1987 and on receipt of the report the Regional Labour Officer referred the matter to the Ministry Headquarters for further action. It however took several months before anything was heard from that end.

In the meantime, a different scenario developed. The defendant terminated the plaintiff's services on the ground that he was no longer efficient in his work as a mechanic. The defendant's letter, Exhibit P2, refers. The plaintiff opined that the defendant had treated him unfairly. He therefore went to the Regional Labour Office again to complain. The matter was discussed by that office and the defendant company. In the end, it was agreed that the plaintiff should be reinstated. This was done only that he was given a different and down-graded job to oversee labourers and his pay was reduced from K30.00 per week to K20.00 per week. So, the plaintiff continued working for the defendant.

It was only in February 1988 when the Ministry of Labour Headquarters advised the amount of compensation the plaintiff was entitled to, based on the 1% degree of incapacity assessed by the hospital authorities and the plaintiff's salary at the material time. This came to K57.60 and the defendant were advised accordingly and requested to

remit this amount if they agreed with the calculations. Exhibits D2 and D8 refer. Exhibit D2 shows that the plaintiff agreed to receive the said sum of K57.60 as compensation in full and final discharge of the defendant's liability under the Workmen's Compensation Act. The payment was made at the Regional Labour Office on 15th March, 1988 and the plaintiff appended his signature to the said exhibit acknowledging receipt of the money. Later on, the plaintiff went to see his present lawyers on the matter who proceeded to issue the writ in this case claiming firstly, general damages for the injuries the plaintiff sustained and secondly special damages of K10.00 per week from January 1988 until judgment. This sum represents the difference in salary paid to the plaintiff before the accident and that paid after the accident. As earlier indicated the plaintiff's salary was reduced from K30.00 per week to K20.00 per week after the accident. This far the facts are not in dispute.

The plaintiff's case was that the defendant's driver was negligent in, among other things, failing to see that the plaintiff was still working underneath the truck and in failing to give warning that he was driving off. The plaintiff said that the driver should not have driven off before ascertaining that the plaintiff had finished working on the truck as indeed he had earlier been advised he would be told when the truck was ready. The plaintiff also relied on the doctrine of res ipsa loquitur.

The defendant denied their driver was negligent as alleged or at all. It was the defendant's case that the accident was caused wholly by the plaintiff's own negligence or that he contributed to the same. The defendant's case at the trial was that the plaintiff was negligent in putting his leg out between the tyres while he repaired the truck. A witness was called, DW2, an assistant mechanic, who assisted the plaintiff in carrying out the repairs to the truck. It was this witness's evidence that he did not position himself like the plaintiff did as he reckoned then it would be folly and dangerous to put the leg(s) out in between the tyres in case the truck rolled.

With respect DW.2 did not impress me as a reliable witness. Actually it is not correct in my view to call him an assistant mechanic. It appears he is simply a spanner boy, to use popular jargon in that field. In contrast, the plaintiff as earlier pointed out is a qualified mechanic with considerable experience. I would therefore take with a pinch of salt DW2's statement that the plaintiff positioned himself negligently as he carried out the repairs underneath the truck. Indeed it is significant that the truck did not roll on its own and it could not have done so since the plaintiff had put adequate blocks in appropriate place to avoid such an event. To my mind it was because somebody drove the truck off that the accident happened. I have already alluded to the fact that it was not disputed the driver had been advised

that the plaintiff was repairing the truck and that he would be told when it was ready i.e. when the plaintiff had finished the job. The uncontroverted evidence was that the plaintiff was still working on the truck at the time the driver jumped in and drove off. Actually the fact that the engine was on at the time should in my judgment have put the driver on the alert. According to the evidence all this happened so quickly giving the plaintiff no time to be able to withdraw his leg. In sum, I cannot find any iota of evidence upon which the plaintiff can be faulted. Rather I am satisfied that the accident was caused wholly by the driver's negligence, and I so find.

The matter does not, however, end there. It was contended that even if the defendant was negligent, as I have just found, the plaintiff is estopped from bringing the present action because he already received compensation for the injuries he sustained. The defendant referred to the payment made under Exhibit D2, already mentioned, in the sum of K57.60. It was the defendant's contention that the plaintiff received this payment willingly and knowing very well that it was payment made in full and final discharge of the defendant's liability under the Workmen's Compensation Act. It was the defendant's contention further that in the circumstances the plaintiff cannot be heard to complain. The plaintiff took issue with the defendant on this point. He told the Court that when he was advised by the Regional Labour Office of the money paid by the defendant herein he refused to accept it and that it was only when he was told the payment was only for his transport and food expenses that he accepted to receive the money. He said that as a matter of fact the money he received was K50.00 only and not K57.60 as indicated in Exhibit D2. Before I go any further it is only proper that I first resolve the controversy on this aspect. To start with it is to be observed that the plaintiff was unable to produce any documentary evidence relating to the alleged payment of K50.00. For my part I cannot see the defendant making the alleged payment without supporting documentation. Indeed the plaintiff was unable to explain how the alleged expenses were incurred and why they were paid. Without beating about the bush I gained the distinct impression that he had just made up the story on this point. By way of contrast, Exhibit D2 is clear. It is a form devised by Government under the provisions of Section 16(1) of the Workmen's Compensation Act to incorporate any agreement that may be reached between an employer and a workman injured in an accident in the course of his employment and who claimed compensation for such injury under the provisions of the said Act. The exhibit shows the payment of K57.60 made by the defendant to the plaintiff. It was not disputed the plaintiff appended his signature on this exhibit acknowledging receipt of the said sum. According to the unassailed evidence the payment herein was effected by a Labour Officer at the Regional Labour Office in the presence of DW1, an employee of the defendant company. As earlier

indicated it was the evidence of both these witnesses that the plaintiff was informed the money had been paid as compensation under the Act and that the plaintiff received the same both willingly and knowingly. With respect I have no reason to disbelieve the two witnesses or doubt their evidence. They both impressed me as credible witnesses and they emerged unshaken in their testimony. Indeed the Labour Officer was, in my judgment, an independent witness from the very office the plaintiff lodged his complaint and he had no axe to grind in this matter. In a word, I am satisfied that the plaintiff received the said sum of K57.60 and I am further satisfied that he received the same as compensation under the Workmen's Compensation Act. I find accordingly.

The next point for my determination relates to the effect of such payment. Again, as I have earlier indicated, the defendant's position is that the payment was made on the footing that it was a full and final discharge of the defendant's liability under the Act in so far as any claim arising out of the accident in this matter was concerned. Mr. Fachi, for the defendant, referred in argument to section 25(1)(c) of the Act which provides:

> "(1) Where the injury was caused by the personal negligence or wilful act of the employer or of some other person for whose act or default the employer is responsible, nothing in this Act shall prevent proceedings to recover damages being instituted against the employer in a civil court independently of this Act:
>
> Provided that -
>
> (c) an agreement come to between the employer and the workman under section 16(1) shall be a bar to proceedings by the workman in respect of the same injury independently of this Act."

And section 16(1) provides -

> "The employer and workman may after the injury in respect of which the claim to compensation has arisen agree in writing as to the compensation to be paid by the employer. Such agreement shall be in duplicate, one copy to be kept by the employer and one copy to be kept by the workman:
>
> Provided that -
>
> (a) the compensation agreed upon shall not be less than the amount payable under this Act; and
>
> (b) where the workman is unable to read and understand writing in the language in which the agreement is expressed the agreement shall not be

> binding against him unless it is endorsed by a certificate of a magistrate or labour officer to the effect that he read over and explained to the workman the terms thereof and that the workman appeared fully to understand and approve of the agreement."

Mr. Fachi submitted that there can be no doubt that the plaintiff and the defendant came to an agreement as to the amount of compensation to be paid to the plaintiff and that Exhibit D2 is written evidence of such agreement. Learned Counsel contended that in these circumstances the plaintiff is estopped from bringing the action herein since the said agreement is, in terms of section 25(1)(c), a bar to the proceedings in the present case which have been brought independently of the Workmen's Compensation Act. Mr. Nakanga for the plaintiff submitted that Exhibit D2 is merely evidence of payment and receipt of money, not an agreement as contended by the defendant. Learned Counsel submitted further that the so-called agreement in Exhibit D2 has no significance at law firstly because the document, and all other relevant documents, were completed by the Ministry of Labour and the defendant, not the plaintiff. Secondly because the defendant did not explain to the plaintiff the consequences of signing the same and receiving the money; thirdly because the agreement was not registered with a court and made into a court order; and fourthly because the plaintiff was not given a copy of the agreement.

I will deal with these four points in turn. In regard to the first point it is to be observed that the Ministry of Labour were at all times acting as the plaintiff's agent. As indicated earlier it was the plaintiff himself who went to the Regional Labour Office and lodged the complaint regarding the accident in this matter. The evidence shows that whatever action the Ministry took was taken on behalf of the plaintiff. Indeed the document, Exhibit D2, shows that the parties to the agreement are the plaintiff and the defendant. It is also significant that the plaintiff appended his signature on the agreement. In the result the plaintiff cannot, in my judgment, turn around and disown the agreement.

Referring to the second point I have already indicated that it was the evidence of the Labour Officer who officially witnessed the payment that he took time to explain the terms of the agreement to the plaintiff. He said that he was certain the plaintiff understood the terms of the agreement before he signed the same and received the money. Again, I believe the witness.

I can deal with the third point quickly. I agree with Mr. Fachi's submission on this point that it is not mandatory that an agreement reached under the provisions of section 16 of the Act should be made into a court order. The word used

under sub-section (2) is "may" which gives the parties to such an agreement a discretion in the matter.

And finally, concerning the fourth point, it is noted that section 16(1) provides that an agreement for compensation should be in duplicate and that the employer and the workman should each keep one copy. Referring to the present case the plaintiff said that he did not get a copy of the agreement. The Labour Officer however disputed this. He said that the plaintiff did get a copy. That too was DW1's evidence. I would prefer the evidence of these two witnesses to that of the plaintiff. Actually I do not think that failure to give a copy of the agreement to the workman does nullify the agreement.

In the upshot I agree with the submission that the plaintiff is barred from bringing the present action having accepted the payment made under the provisions of the Workmen's Compensation Act. Significantly it is not contended the compensation so paid was less than the amount payable under the Act. Perhaps I should mention in passing that it was initially intended to deal with this point first, as a preliminary point, before coming to the point whether or not the defendant was negligent. The application was however made belatedly and it was therefore found convenient to hear the case as a whole. All in all the action must fail and it is dismissed with costs.

PRONOUNCED in open Court this 28th day of August, 1991 at Blantyre.

L.E. Unyolo
JUDGE