

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 668 OF 1985

BETWEEN:

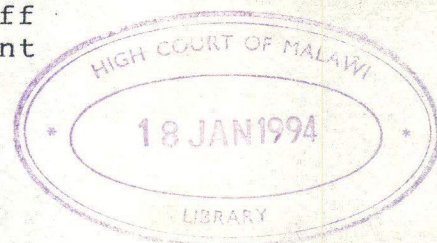
Mc J MILANZI.....PLAINTIFF

- and -

ATTORNEY GENERAL.....DEFENDANT

CORAM: MTEGHA, J.

Kumange, of Counsel, for the Plaintiff
Matenje, of Counsel, for the Defendant
Kadyakale, Official Interpreter
Phiri, Senior Court Reporter



J U D G M E N T

The plaintiff in this case, M J Milanzi, has brought this action against the Attorney General, in a representative capacity, to recover damages for breach of contract and professional negligence on the part of the Legal Aid Department of the Ministry of Justice.

At the time this cause of action arose, the plaintiff was a self-employed mechanic. The Department of Legal Aid is constituted under the Legal Aid Act, Cap. 4:01 of the Laws of Malawi. This act was enacted in order to make provision for the granting of legal aid to poor persons who cannot afford legal expenses for the pursuance of their legal rights. The legal aid is provided in the form of legal representation.

As I pointed out, the plaintiff's claim is based on breach of contract and professional negligence. The particulars of negligence have been set out in the statement of claim. The defendant has denied the existence of the contract and the breach thereof and has also denied any professional negligence.

The plaintiff's evidence is that he is a mechanic at Biwi Triangle in the City of Lilongwe. On 8th March 1980 he went to Alimaunde to collect money from his debtors. At about 10.30 pm he stopped a vehicle, MG 591A, which was coming from Salima side going into the City of Lilongwe, and asked for a lift into the City. He was given a lift and paid 40t. The vehicle reached the town, but the driver decided to go to Biwi Triangle to drop some of the

passengers. As he was also going there, he proceeded and at Biwi Triangle this vehicle was involved in a head-on collision with another vehicle, Registration Number BE 2068. As a result of the accident, he broke his right arm. He was taken to hospital where he stayed for one month. When he came out of hospital he went to the Department of Legal Aid in Lilongwe in June and asked them if they could assist him to get damages for his injury. He filled the necessary forms and Legal Aid took up the matter with the necessary parties. As time went by, the plaintiff frequently visited the Department. He was told that they were pursuing the matter with Spearhead Transport, the owners of BE 2068. At one time they told him they had approached NICO, the insurers of the vehicle; but nothing happened. Because he was frequently visiting the Legal Aid Department, he was told not to go there again, until he got a letter dated 3rd September 1984, which stated:

"Efforts to try to secure a claim from the insurers for compensation for injuries you sustained in the above accident have so far been futile due to the fact that, primarily, you were an unauthorised passenger in that vehicle. Secondly the driver who caused the accident disappeared and is still at large. If he was available we would assist by claiming the compensation direct from him.

In the circumstances, therefore, we are not pursuing the matter any further and consequently, our file is being closed."

After receipt of this letter he went to Kumange and Company. It was further his evidence that the Department of Legal Aid was claiming K2,000.00 for him, which he has not, as of now, received.

I might as well point out here that, according to the Police report, BE 2068 was clearly in the wrong and if the matter went on in the normal way, the plaintiff would certainly have been compensated for his injuries. It is also significant that Legal Aid did not advise the plaintiff of any other developments in his case until the letter of 3rd September 1984. By that time the claim, if any, had been statute-barred. This was the close of the plaintiff's case.

The first witness for the defendant was Roosevelt Gondwe. It was his evidence that between 1980 and 1982 he was Legal Aid Advocate based in Lilongwe. His job was to receive instructions from members of the public to assist in civil and criminal cases. It was his evidence that he learned about the plaintiff's accident through a Police report and he sought permission from the Chief Legal Aid Advocate to assist the plaintiff. He was summoned for personal details. According to the form, Exh.D3, the

plaintiff filed the form on 13th July 1981 and the Police report dated 6th March 1981 was received by the Department on 2nd July 1981 and the details of the other vehicle were obtained from the Road Traffic Commissioner on 31st July 1981.

It was further Mr Gondwe's evidence that when he got all these papers, he wrote to Spearhead Transport on 24th August 1981. Since this letter is of some importance in these proceedings, I reproduce it hereunder in extensio; it stated, inter alia:

"I have been instructed by Mr M J Milanzi to bring proceedings against yourselves for damages arising out of a serious road accident on or about 8th March 1980 along Lilongwe/Dedza Road in particular at Biwi Triangle involving your vehicle registration number BE 2068 driven by your servant/agent, one Kashoni in the direction of Lilongwe.

I am informed that one Milanzi, was a passenger in a Government vehicle number MG 591A.....Whilst at or near Biwi Triangle your driver/servant so negligently drove and/or controlled BE 2068 in that he caused or permitted it to collide with MG 591A and in consequence Mr M J Milanzi sustained serious bodily injuries.....On these premises your driver was at fault.....I claim as follows:

| | |
|------------------------------|------------------|
| (a) Pain and suffering | K2,000.00 |
| (b) Loss of earning capacity | K500.00 |
| (c) Legal costs | <u>K80.00</u> |
| | <u>K2,580.00</u> |

If the vehicle was insured at the time of the accident, please send this letter to your insurers. Let me hear from you soon."

It was his evidence that he did not get a reply from them, so he took them to a Magistrate's Court and filed a Summons on 15th October 1981, but the Court issued it on 31st December 1981. He was then transferred to Blantyre and he handed over the matter to Mr Mhone who succeeded him.

The second witness for the defendant was Kandako Mhone, who took over from Mr Gondwe. It was his evidence that when he took over the file, he got a letter from Sacranie, Gow & Company. The letter stated, and it was dated 27th January 1982:

"Reference is made to the telephone conversation of today's date Mhone/Banda with regard to the above matter and we would now like to be noted as having

said that the action is defective, in that neither a non-existing defendant or a wrong defendant is being brought to court. It will therefore be appreciated that if we were to make a formal application to court to strike this matter out it will involve a lot of costs especially that the case is a Lilongwe case which will necessitate a lawyer from Blantyre coming to Lilongwe....."

It was his evidence that when he got this letter he talked to the plaintiff about the position that Spearhead was under liquidation and that he had a problem of identifying the defendant, and that he would file a discontinuance notice. Finally, the discontinuance notice was filed with the Court on 29th April 1982 and served on Sacranie, Gow & Co. on 1st July 1982. He also wrote Sacranie Gow & Co. if they could consider *ex gratia* payment since the plaintiff was seriously injured. But he never got a reply.

Finally, the last witness was Ms. Jane Ansah who at that time took over from Mr Mhone. Her evidence was that she knew the plaintiff, who frequently came to her office in relation to his case. When she read the file she found that there was a discontinuance notice, and her predecessors had written to the insurers for *ex gratia* payment. She advised the plaintiff of all these developments and that the time had elapsed. This then is the evidence before me.

There is no doubt at all that the plaintiff was seriously injured in this road accident. According to the medical report, he may not stand for a long time, neither can he lift anything heavy. There is no dispute, again, that the plaintiff approached the Department of Legal Aid to assist him to recover damages for him for the injury he sustained. It is also common ground that the Department of Legal Aid embarked upon the process of doing so. At this stage, in my considered view, a relationship of a legal practitioner and client was established. This is so because section 7(2) of the Legal Aid Act stipulates:

"The Principal Legal Aid Advocate, upon receiving an application under subsection (1), may, if he is satisfied.....undertake the legal representation of such proceedings as if he were a legal practitioner instructed by the applicant."

(My underlining). For all practical purposes, therefore, a relationship of solicitor and client was established.

It has been submitted by Mr Matenje that, in order to succeed on the allegation of breach of contract, the plaintiff must prove, on the balance of probability, that there was a contract between him and the Department of Legal Aid; but in the instant case, such a contract does not exist, no document has ever been signed by both parties to establish a contract, and there was no consideration because

the advice was given free. I have cited earlier on in this judgment the provision of s.7(2) of the Legal Aid Act and its effect of status between the Department and the plaintiff. Now that relationship is based on contract as Charlesworth on Negligence, 16th Edition, p.601 has said, that:

"Solicitors are bound to exercise a reasonable degree of care, skill and knowledge in all legal business they undertake. Their liability to their client arises out of contract."

Again, in *Clark v. Kirby-Smith* (1984) Ch.506 Plowman, J. said:

"I do not accept the argument that the *Hedley Byrne* case is an authority for saying that the liability of a solicitor to his client for negligence is a liability in tort."

I do not, therefore, subscribe to Mr Matenje's argument that there was no contract between the Department of Legal Aid and the plaintiff; it was there and a clear relationship of solicitor and client was established and if the solicitor, and in this case the Department of Legal Aid, performed their duty negligently, they will be liable for the consequential damage.

It has been submitted by Mr Matenje that there was no contract because there was no consideration; that the defendant paid nothing. The position is that, whether money was paid by the plaintiff or not for services rendered or to be rendered is here not there. In *Kitchen v. Royal Air Force Association and others*, (1958) 2 All E.R.241, it was held that it was immaterial whether a solicitor is retained for reward or volunteers his services; the relationship of solicitor and client subsists. The negligence which is to be considered is the negligence, if any, in the performance of this contract by the Department of Legal Aid.

It is common ground that a solicitor owes a duty of care to his client alone, and that duty binds the solicitor to exercise reasonable degree of "care, skill and knowledge" in legal businesses that he undertakes. The standard of care that is usually adopted is that of a reasonably competent solicitor. It is also stated that ignorance of the law is no excuse, though not absolute as *Abbot, C.J.* said in *Montriou v. Jeffereys* (1825) 2 C & P 113:

"No attorney is bound to know all the law; God forbid that it should be imagined that an attorney or counsel, or even a Judge is bound to know all the law; or that an attorney is to lose his fair recompense on account of an error, being such an error as a cautious man might fall into."

However, a solicitor, though not bound to know all the statutes, he is expected to know some which it is his duty to know, such as statute of limitation - *Kitchen v. Royal Air Force Association and others* - (supra). He is liable, however, as *Tindal, C.J.* said:

"for the consequences of ignorance or non-observance of the rules of practice of this court; for the want of care in the preparation of the cause for trial or of attendance thereon with his witnesses and for the mismanagement of so much of the conduct of a cause as is usually and ordinarily allotted to his department of the profession. Whilst, on the other hand, he is not answerable for error in judgment upon points of new occurrence, or of nice or doubtful construction or of such as are usually entrusted to men in higher branch of the profession of the law."

The position in the instant case is going to be determined on the ground of whether the Department of Legal Aid discharged that duty or not. In order to do so, I must examine the sequence of the events. According to the evidence before me, the accident occurred on 8th March 1980. The cause of action, therefore, accrued on that date. In June 1980 the defendant approached the Department of Legal Aid. According to Mr Gondwe, he knew about this accident in July 1981, when he got a Police report - actually, it came to his office on 2nd July 1981. According to him, a letter was written to the Road Traffic Commissioner on 9th July 1981 asking him to supply him with the particulars of the owner of the other vehicle. That information was supplied on 31st July 1981. Meanwhile, on 13th July 1981 the plaintiff filled forms requesting legal aid. On 24th August 1981 a letter of demand was written to Spearhead Transport claiming the sum of K2,580.00. There was no reply. Meanwhile, on 21st October 1981 a writ was issued in the Magistrate's Court at Lilongwe. It would appear the Summons was served on Sacranie, Gow & Co., who, as a consequence, wrote the letter I have reproduced above - on 27th January 1982, the Department wrote to M/s Sacranie, Gow & Company advising them that the Summons would be discontinued and requested *ex gratia* payment. There was no reply from M/s Sacranie, Gow & Co. and on 29th April 1982 notice of discontinuance was filed with the Court effectively terminating the proceedings.

It was Mr Mhone's evidence that they terminated the proceedings because the defendant was non-existent, because Spearhead Transport was under liquidation and the driver of the other vehicle could not be traced. Meanwhile, the plaintiff kept going to the Department where he was being told that they were pursuing his case with the National Insurance Company. They even told him that he should go and obtain another Police report so that they can take it up with the National Insurance Company, and indeed the

plaintiff got the report and handed it to the Department on 24th September 1984. The report was dated 25th July 1984. When the report was sent to NICO, NICO could not do anything, because the claim, by 25th July 1984, was statute-barred - a period of three years having elapsed.

Mr Kumange, on behalf of the plaintiff, has submitted that, looking at the conduct of the defendant, there was gross negligence on the part of the defendant. Firstly, if it knew, and this it did, that Spearhead Transport was under liquidation, it should certainly have found out who were the Liquidators, or Receivers or Manager of the Company, and the Department should have sued them; there was no need to discontinue the action commenced in the Magistrate's Court. He further submitted, that during all this period they told the plaintiff that they were pursuing the matter with NICO, yet they ought to have known that the cause of action was statute-barred - they only informed the plaintiff by their letter dated 3rd September 1984. They, therefore, concealed the relevant facts from the plaintiff. All these factors constitute gross negligence by a solicitor.

Mr Matenje, however, has the opposite view. He states that the defendant took all reasonable steps in the conduct of the case. The defendant could not be expected to do more than this. In effect, he is saying the defendant complied with the standard of care which I have outlined above.

I have looked at the evidence. The defendant was told that Spearhead Transport was under receivership. Certainly, the defendant should have known which party should be taken to court, but the defendant decided to enter a notice of discontinuance. Again, the defendant should have known the effect of the Limitation Act; that the cause of action will be time-barred. Finally, worse still, the defendant never advised the plaintiff of the fact that the case could no longer be taken to court; as a result, he kept going to the defendant's offices; the plaintiff was even told to go and get a copy of the Police report, yet the defendant knew the cause of action was statute-barred.

In *Fletcher & Son v. Jubb, Booth and Helliwell* (9120) 1 K.B. 275, *Bankes, L.J.* said at p.279:

Now solicitors are under an obligation to bring to the discharge of their duty as solicitors reasonable care and skill and knowledge of the practice of the Court whose process they invoke on behalf of a client."

A solicitor is liable for the consequences of ignorance of non-observance of the rules of practice of this court - *Godefry v. Dalton* - (1830) 6 Bing.460. The same principles were stated in *Kitchner v. Royal Air Force Association* and others.

Looking at the case at hand, it is quite clear, in my view, that the conduct of the plaintiff's case left much to be desired. The defendant was negligent, and I find the defendant liable.

I will now turn to the question of damages. The plaintiff is asking for K2,000.00. This amount is the sum which the defendant promised him. This amount is special damages. According to the established practice, special damages must be strictly proved. This the plaintiff has failed to do. He is also claiming K5.00 for Police report. However, although he got the report, and this has been tendered in Court, there is no evidence that he paid K5.00 for it. He is also claiming general damages for breach of contract - this I agree. If the case was properly handled, he would certainly have recovered some money for his injuries. He was seriously injured and he can hardly use his hand. I consider a sum of K6,000.00 adequate.

I, therefore, enter judgment for the plaintiff in the sum of K6,000.00 with costs.

PRONOUNCED in open Court this ^{1st}.... day of ^{July}...., 1992,
at Blantyre.


H M Mtegha
JUDGE