

IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NUMBER 22 OF 2000

BETWEEN:

M. Y. CHANDE.....APPELLANT

AND

ANWAR A. GANI.....RESPONDENT

CORAM: HON. JUSTICE KUMANGE

Mr Wadi, counsel for the plaintiff

Mr Chilenga, counsel for the defendant

L. N. Msiska, court interpreter

WADI: My Lord I appear on behalf of the respondent, Mr Chande. Before coming to this court I did consult counsel for the appellant, Mr Chilenga, on the correct procedure or appeal against a ruling on assessment of damages. We were both of the view that the correct procedure is that appeals must go to the Supreme Court. We also took note of the decision of the court in **Dickson Mini vs The Attorney General**, which is civil case number 786 of 2001. My Lord therefore I would like to seek leave of the court to appeal against the ruling of Hon. Justice Nyirenda on the issue. That would be all.

CHILENGA: My Lord I do not have anything to say on my colleague's submission except suffice to say let the supreme court decide on his opinion and submission. That is all.

ORDER

Where there is uncertainty about the law procedure, decisions of any kind, the Supreme Court of Appeal has the judicial mandate to put matters straight. The only way High Court decisions can be put right is by appeal to that court.

I have seen in the file a ruling which was made by my brother judge, Nyirenda on 20th June 2002, giving the High Court a right to hear appeals from the District Registrar on cases involving assessment of damages. Assessment of damages is a thing considered with serious reservations, and since it is time consuming and involves consideration by the Registrar of both low and quantum, the English jurisdiction has allowed the Court of Appeal to shoulder the responsibility of hearing appeals on such issues.

Here in Malawi we seem to be trailing behind a track that has two parrolels. Today an Appeal on assessment of damages before the Registrar is heard by the Judge and tomorrow that similar case is heard before the Supreme Court of Appeal. Judge Nyirenda might be right, and in my own case of civil cause no. 786 of 2001 – **Dickson Mum vs The A.S.**

I might be right the law has to be investigated for purposes of achieving unanimity in our approach to assessment of damage appeals.

Counsel Wadi has, in view of what I have said above applied to this court for leave of appeal to the Supreme Court. This form of application would better be looked at by my brother judge who made the ruling on the matter but for his absence from the jurisdiction, I dare say I have the right to entertain the application!

I therefore grant leave to the applicant to appeal this matter to the Supreme Court more especially on the most crucial legal argument namely whether a judge in chambers can hear an appeal on assessment of damages from the Registrar. Costs are to be in cause.

ORDER made this day of 16th January 2003 at the Lilongwe District Registry.

D. S. Kumange

JUDGE

CORAM: HON. JUSTICE KUMANGE

Mr Wadi, counsel for the plaintiff

Mr Chilenga, counsel for the defendant

C. Simwaka, court interpreter

CHILENGA: My Lord the matter is for rehearing of the assessment of damages. In terms of Order 38 of the Rules of the Supreme Court, the matter must be heard **de moro**, ie afresh.

My Lord the appellant is ready to have the matter reheard. That is all.

WADI: My Lord that being the case that the matter be reheard I will request the honourable court to return the exhibits to the plaintiff, and that the matter be adjourned to another date when rehearing would take place. That would be all My Lord.

COURT: I have to return to the plaintiff all exhibits as per request.

These are receipt books

- 16 – 17th March 1999,
- April 1999
- 6 April 1999
- 1st April 1999 – 2/4/99
- 20/3/99 – 23/3/99
- 4/4/99 – 5/4/99
- 19/3/99
- Accident report(Police)
- Insurance settlement claim details of 09-07-99 with 3 party discharge receipt.
- copy of blue book for MK 3806, Mitsubishi.
- Minibus daily record 8 copies.

The case is adjourned to another date after the new year's festivities as my diary is now full. I adjourn the case to 15th and 16th January 2003. Costs in the case.

MADE in chambers at Lilongwe this 29th day of November 2002.

Kumange J.

ADJOURNED

4th June 2002

CORAM: HON. JUSTICE NYIRENDA

Mr Wadi, counsel for the plaintiff

Mr Chilenga, counsel for the defendant

E. S. Mlenga, court interpreter

CHILENGA: This is an appeal in terms of Order 58(2) of Rules of Supreme Court. There is a preliminary point for determination i.e. whether that a judge in chambers has jurisdiction to hear appeal on assessment of damages. The position as in Order 58/1/2 of Supreme Court Practice is that there must be an actual rehearing on appeal. That rehearing on assessment means all must have been **judged** + testified. That has obvious difficulties and has bearing on costs + other issues as per Order.

In terms of Order 58/2 of Rules of Supreme Court an appeal on assessment of damages in England lies direct to Court of Appeal and in Malawi the equivalent to Court of Appeal is Supreme Court: such appeals need to tie to Supreme Court. In the premises I seek direction that the matter be held by Court of Appeal notwithstanding the long practice we have held that appeals to Orders of Registration lie to judge in chambers. I am aware Tolamun Mpinganjira v A.G. then before Mr Twea, Assistant Registrar, Assistant Registrar and Appeal went to Mtambo J. do not have appeal judgement but would be traced.

WADI: It is an interesting point revised by counsel by.....from express reading of Order 58/2 it lay down two exceptions of appeal which ought to go to Supreme court. One of it is on assessment of damages. I would urge the court to also look at Section 29 of the Court Act which talks about procedures being those in Court of England except where a local provision does alter the procedure. That is all.

CHILENJE: Court to look at Courts Act. There are Court (High Court Procedure in District Registry of Rules **page 27** Rule 11.

ADJOURNED

CORAM: **Hon Justice Chinangwa**
Mrs Simwaka- Court interpreter

MALERA: I appear on behalf of the plaintiff. The matter was supposed to be prosecuted by counsel Chilenga. He is away in Zambia attending a SADC Lawyers Meeting on behalf of the Malawi Law Society. He asked me to apply to court for adjournment.

I have talked to Mr Wadi representing the other party. He has no objection to the adjournment. Both counsel Wadi and Chilenga are willing to attend to the matter any day next week. I therefore seek adjournment to any day next week if convenient to the court. That is all.

COURT: Adjournment granted but I am reluctant to specify a date next week because the matter will come before the motion judge of I do not know his schedule. However, civil registry will consult him and parties will be advised accordingly.

Chinangwa J.

26.04.2002

ADJOURNED

CORAM: Hon M. C. C. Mkandawire, District Registrar.
Mr Wadi of Counsel for the plaintiff.
Mr Tembenu of counsel for the defendant
Mr Nyaka, official interpreter.

RULING

This is an appointment to assess damages following fulfilment on admission following the ruling of this court on the 10th of May, 2000. My duty therefore is only to assess the said damages.

As per the plaintiff's Statement of Claim; the plaintiff claims from the defendant damages for the loss of business from 9th April 1999 to 9th July. 1999. The history of this case is as follows:

On the 9th day of April, 1999 along the Dedza/Lilongwe road, the defendant's motor vehicle was involved in a road accident with the plaintiff's motor vehicle. The plaintiff's mini bus was extensively damaged. On the 9th of July, 1999 which is three months after the accident, the defendant's insurers fully compensated the plaintiff to the tune of K135,000. The plaintiff is therefore claiming for loss of business profit between the day of the accident and the day he was fully compensated to replace his mini-bus. He is claiming for 80 days as business days.

My humble duty therefore is to assess damages for these 80 days. There have been a lot of arguments put forward by both counsel in relation to these 80 days. The court has taken into account all these arguments in coming up with its assessment. In the first place, let me say that from the reality of the evidence on record, the plaintiff is entitled to damages for loss of profits for the days the minibus was off the road as a result of the accident herein. The plaintiff had

purchased the minibus for business. The minibus was plying on the Lilongwe-Blantyre road usually via Zomba. On the plaintiff's side, there were two witnesses. The first is the plaintiff himself and the second is the accountant for the plaintiff for the plaintiff. These two witnesses told the court that although the minibus was originally 30 but it was modified whereby more seats were added making it 38. There were also several passengers standing to the tune of 20. The witnesses said that on average, the minibus used to make round trips. Thus it would leave Lilongwe early in the morning and come back from Limbe in the late hours of the day. Witness number two who is the plaintiff's accountant tendered in court several receipt books as evidence of the money which this minibus used to make per day on these round trips. I am aware that some of these receipts books were not complete. The explanation given by the witness was that some pages were missing due to the way these receipt books were kept at the office. As a result of this, I did order as a court that the witness should do what is known as audit sampling of these receipt books.

There are indeed a lot of figures that have been exhibited in court. Apart from that, witness number further produced a summary of income for the months of January, February, March and December 1998. This is Ex. No. 3. For these four months the average net income was K10,870.96. The average gross income was at K16,529.09 per day.

I am aware as a court that it was extremely difficult in this case to come up with any mathematical exactitude. Thus I found that it was just and proper to indeed work on the average figures that were presented before me. After having looked at the documentation herein, I find that the average gross of K16,529.09 is justified. From that, I do subtract K6,000.00 as expenses per day. This leaves a net of K10,529.09. This would thus translate to K842,329.20 for the 80 days. To this I subtract 10% for tear and wear. This leaves K758,096.28 I do award the plaintiff the sum of K758,096.28 plus costs of these proceedings.

MADE in chambers this 7th day of December 2001 at Lilongwe.

M. C. C. Mkandawire

DISTRICT REGISTRAR

CASE CALLED 12TH OCTOBER 2001

CORAM : Mrs Kamanga, official reporter
Wadi, for plaintiff
Tembenu, for defendant.

TEMBENU: This is an assessment of damages. The plaintiff closed his case. It is Defence turn to give evidence. Defence will be calling one witness.

COURT: We can proceed.

DW1: (Sworn and states). I am Rahim Ismail Hamden of P. O. Box 577, Lilongwe residing in Area 2. I am a transporter, landlord and formerly minibus operator. I operated minibuses for 4 years. I had two mini buses for 4 years from 1995 to 1999. I had some long routes and short routes in which I was operating.

When I say short routes they were Likuni Area 25 called Ngwenya. The long routes were Salima, Mvera, Blantyre and Mwanz. This is because my payment was Class A covering all roads and sometimes I would cover Kasungu.

One minibus was a sixteen sitter. Actually both were sixteen sitters. BLA sometimes we used to overload.

I was not operating everyday on the long routes. It was difficult to operate long routes everyday because of stiff competition, there is too many bus operators. It was also impossible because there were round trips. For example I could go Lilongwe to Blantyre, but to have a

return to Lilongwe from Blantyre it takes about two to three days. So in seven days I could make two to three round trips a week.

As to the short routes, you make about five trips a day depending on the road that you are using. You do not have a full capacity every time.

I had employees I cannot tell how long it would take to drive to Blantyre, as the drivers would only stop where there passengers.

Yes I had times to service my mini-buses. There is heavy wear and tear in mini-buses as in mini buses breaks are used more often when stopping. I used to service my long distance minibus every week on mmost Saturday and Sundays.

As to the short distances I would service the minibus twice a month. **(Shown doc Exb P4)** This is a photocopy of the registration book for a motor vehicle. **(Reads)** The sitting capacity of the vehicle is thirty. It is a thirty seater. This vehicle had a bigger capacity. Mine was a 16 seater but I would overload to twenty or twenty one.

This vehicle was propelled by diesel. My minibuses were also propelled by diesel. Wear and tear depends on the minibus. The speed of minibus is also dependant on the type of minibus. The smaller the minibus the more the speed, the bigger the minibus the less the speed because in a bigger minibus there are more passengers. The more you load the more the wear and tear. I have no experience in big minibuses. There could be more intervals on the service side of a bigger minibus because of the bigger capacity but the bigger minibus definitely makes more money. The age of the minibus would also have an effect on the performance. The older the minibus the less the performance.

A 30 sitter minibus can make the same three round trips to Blantyre just as the 16 sitter mini bus.

It is not possible for a minibus to make seven round trip to Blantyre. This is because Blantyre has a long distance.

In 1999 the price of fuel was not steady. It depended on the dollar. I would put it at K42.00 considering that the price was from K40.00 to K45.00 as to diesel (**Shown Exhibit P3**). The allowance for driver is the same as the one that I was giving my drivers.

There is stiff competition on the Blantyre-Lilongwe route and it is not possible for the plaintiff to have been having full capacity on each trip, and on everyday. On that road there are the bigger buses, there are also truck drivers making matola so a minibus cannot be full at each turn. From Exhibit I have seen the average that plaintiff was making is K9,000.00 per day.

The expenses that one would incur on such a trip, minus breakdown are, fuel, the drivers and conductors allowance, overloading charges if you overload. Wear and tear is worked out on the net profit as each day. I would work out my wear and tear at 25% at each day. The plaintiff was doing a different calculation of wear and tear from mine. He was considering it on breakdown. I cannot say his calculations are wrong or right as they are different. In transport business it is different. Minibuses are unpredictable. As to wear and tear there is no difference.

XXN: Yes I operated two minibuses both 16 seaters. One was an MJ1186 the other was CP494 and I bought both of them second hand. There were all Toyota Hiace 16 seaters. 16 seater includes the driver. Sitting arrangement was five people on the roll. Sometimes I would overload when I overloaded, these passengers would stand.

You could be wrong and right to say that I am not competent to say anything on a 30 seater minibus as a minibus is run by a driver but I was the controller of the minibuses that I had.

No I have no experience of a thirty seater minibus.

It is optional to the passengers to use a big minibus or a small minibus so I cannot say that a passenger would rather use a big minibus on long distance. As at now, it is now a requirement that for long distance, bigger minibuses should take the routes.

No it was not possible for a minibus to go to Blantyre and come back the same day. The reasons are, the distance and minibus business is matola business.

Yes I am familiar with the information that small minibuses like Toyota Hiace have a higher accident rate rating on long distances. I do not think that a passenger would take that information into consideration. When considering whether he takes a big minibus or small minibus when driving long distance, all he will need to do is to be taken from point A to point B..

Yes I am familiar with the coachline operations in this country. I am aware that the coachline can leave for Blantyre and return to Lilongwe on the same day.

My service intervals for truck is a maximum of 10,000 for the heavy trucks. To the best of my knowledge the mileage service interval for the minibuses for the minibuses was at every 4,000. This was subject to breakdowns.

When talk of service of minibus we are talking about normal service on mileage. This involves oil change, lubricants, greasing and road worthy condition.

We would also replace frequent engine knocks, tyres, break linings knocks were occasional every three to five months.

The engine capacity of the minibus was 2400 cc(**shown Exhibit P4**). The cubic capacity of the minibus is 6550 cc. This was a big engine, yes it could go to the speed of the minibus as the engine was big it could correlate to the sitting capacity. On a level road, the speed would be the same as that of a smaller minibus but when it comes to the escarpments the bigger minibus would still be slower.

I disposed all my minibuses when they were both..... (unreadable) after repairs. I sold them in 1999, I sold one at K180,000.00 and the other at K190,000.00. In 1995 I bought them at the very same prices.

I allow my tear and wear on my net income per day. The significance of tear and wear is motor vehicle expenditures and unforeseen breakdowns are allowed for.

RE-EXAM: The experience of running a minibus is the same as a 16 seater or 30 seater. The difference is on the consumption and carrying capacity.

Yes I know of coachline services that they go to Blantyre and come back the same day. The coachline service is not the same as the minibus service. With coachline, the bus moves according to a timetable and there are not stop overs. From the exhibits I saw, this was not a coachline but a minibus.

Wear and tear applied on a motor vehicle. Percentage of wear and tear on long distance is the same as short distance only that on long distance it is heavy.

14.04.00

CORAM: **S & R**

Tembenu of counsel for the defendant

Liwimbi of counsel for the plaintiff

Nyaka: official interpreter.

LIWIMBI:

Tembenu: My objection to this case is the mode adopted by the plaintiff. In terms of O/9 R/9(1a), an application of this nature is not supposed to be supported by any evidence because that is prejudicial to the whole matter. The application by the plaintiff is for an order to strike

off the defendant. In any application of this nature, the court is required to merely look at the defence and determine whether it discloses a good defence. But what is sought by the plaintiff is to bury evidence where such evidence is not required. There is an affidavit in support of the affidavits. I therefore apply that this application should be determined without looking at the affidavit. I would also say that the proper thing to do is to dismiss the application because it is misconceived of that it has been improperly brought.

LIWIMBI: This appointment is brought under O 18 R19 and O 19 R 19. What is sought is specified in the summons. The affidavit evidence including the necessary documents are very necessary. The statement of claim alludes to factual issues which in any case ought to have been traversed; on the plaintiff's application says that the defence filed does not traverse the specific facts pleaded. There is no way the court will appreciate that the defendants defence is unreasonable or scandalous without bringing to light the issues. I submit that the summary is properly brought and should be heard.

TEMBENU: Order 18 R 19 S⁽¹⁹⁾ makes it clear that evidence be it affidavit or oral ...unreadable) and the paid by an application by this nature. Therefore court does not lie in the mouth of the plaintiff and argue that the court should appreciate the issues. The rules envisages that an application of this nature can be determined without evidence being displayed. There is all that I can say. There is this argument that the defence does not traverse the pleadings. We served the defence and you have it. Sufficient. It denies the allegations in their entirety therefore putting them on the issue. If there is no.....(unreadable) then under O 1 & R 14 they could have entered judgement on(unreadable).....if you look at the defence exhibited. There is nothing that is scandalous, vexatious or unreasonable. The defence does not contribute on abuse by the process. My application is misconceived so far as it.....(unreadable) for being in evidence. The plaintiff should not seek to determine the case on ex.....facts. Therefore in terms of the same will I pray for

RULING

This matter was brought under O 18 R 19 RSC. It is a summons to strike out pleadings. Defence counsela preliminary objection arguing that the matter was wrongly brought and that in terms of O/9 R19(1a), the order does not require the applicant to back up their application by attaching an affidavit by the defence.

Counsel for the plaintiff replied by saying that the matter is brought under O18 R19 and not O19 R19 (1a) as submitted by defence counsel. It would therefore appear that defendant's counsel was relying on a different order. I have looked at the scope of order 1 and R19 and I find that this application was properly filled and that counsel for the applicant is allowed to display the defence herein. The matter to proceed.

LIWIMBI I will be very brief otherwise I will adopt my affidavit including its attendant exhibits. As can be seen from the summary, the application is for the defence to be struck off on those three points as put on the summons. I pray that the arrears sought should be granted with costs to the plaintiff.

TEMBENU: Looking at the application, there are those three points.

1. a reasonable defence being disclosed. You have to look at the defence andwhether it can't succeed. In terms of O 18, issues of to whether its reasonable or not, it has anything to do with weakness. In my submission, the defence..... It is said in the affidavit that the defendant insurers paid money to the plaintiff v that the plaintiff was use that. You will notice that apart from exhibit "MC1" there is nothing that is made on the basis of admission by liability phone call, the insurance company is not a party and these proceedings we are do details by the terms of playment.
 - (b) Pleadings being scandalous, frivolous and vexatious.the defence before you. There is doubt if there is anything scandalous. There is nothing that doesthe plaintiff.

(c) I do not see anything that is frivolous and vexatious. The defendant simply denies and puts the facts in the Statement of Claim in issue. What the plaintiff is seeking is aand if the defence reasonable there is again no way it can be abuse court process. I would therefore submit that the application be dismissed. May be a statement by claim, the a defence. That is all.

LIWIMBI: I refer you to para 2 of statement of claim. If you consider that in light of para 2 of the defence and para 3. The defendant admits that he drove the car in issue. Here is the defendant who admits in para 6 thereby the insurers paid. The same defendant claims in para 2 during driving the vehicle. The issue here is like the defendant are admitting in principle that there was an accident between the two cars and the defendant's insurers compensated the plaintiff. All the plaintiff is saying is that there is an attendant loss by use of a vehicle. The fact that they were duly compensated confirms that the defendants were liable otherwise why compensate. All the plaintiff claims is loss by use of profits. The defendant states plea so that if any loss has been suffered. It is not for High Court to.....The plaintiff has not pleaded any liability. Even in itself, para 5 does not say anything to prove it.

(Ruling reserved)

10.08.2000

CORAM: S & R

Tembenu of counsel for the defendant

TEMBENU: This case was adjourned to this day and I got that confirmation from Messrs Liwimbi. The case was coming up for assessment of damages I will have at 8.30 a.m. This is 8.50 a.m. In the absence of counsel, I would pray for an adjourned for them to file another notice of adjournment. I do pray for costs.

COURT: I do adjourn the case to a date to be fixed. Costs for today's attendance to the defendant.

10.20 a.m.

CORAM: All parties present

LIWIMBI: The matter is for assessment of damages. I have one witness.

PW NO 1 states in CHICHEWA

I am Maxwell Chavule, c/o Box148, Kawale, Lilongwe 2. On 9th April, 1999 I got a phone call from Dedza Hospital that my bus had been involved in an accident. I went to Dedza and found my BK30 – Mitsubitsi Fuso.....is a 38 seater. I have forgotten the other car. It is a Boyw. I found the owner there known as Kasim Gani. My minibus was responsible for carrying people from Lilongwe to Zomba. The accident occurred 5 miles before Dedza on the way from Zomba. I have seen this document. This is a document from the Police. It is a police report. The report says that my vehicle as hit by the other motor vehicle. At the scene, I found a brother to the plaintiff. They had put 4 policemen on the scene. They duly pull the vehicle to garage. I do tender the document as part of my evidence.

COURT: Mark it as P Ex I

After the accident, bus was taken to Pagas. At Pagas found that the bus was beyond repair. My vehicle have insurance at that time. The other vehicle was also insured. The insurance people paid K385,000 as replacement value of the bus. But for loss of business, they paid me only for one day the amount of K10,000 and told me that I would be paid the other money by the defendant. This is the document on which I was paid the K385,000. I do tender it as part of my evidence.

COURT: Mark it at P Exp 2.

The insurers paid me only K10,000 for one day loss. Thus the total was K385,000 plus the one day loss.

Before the accident, I was making K15,000 per day if the day was good. After deducting everything, it could come to K10,000.00 per day. Between accident and day by payment by insurers i.e from 9/4/99 and I was paid on the 9/7/99. Thus they paid me after 3 months. After payment of K385,000, the bus was retained by the insurers. I made a formal tabulation of business loss. In those three months, I could have made K790,000. This bus was on loan. This is a loan statement from the company that sold me the motor vehicle. No, it's a later that I wrote to Citizen Insurance about the loss. I have worked at these documents. They represent my calculations whenever the bus came back from business. These documents were written by my accountant. He is available.

COURT: Mark them as 1 & 3

I am claiming for my business loss. The motor vehicle is on loan. The loan is for the minibus which I got from Dinkum. I have lost K790,000 as business loss. The profit was K10,000 per day. This is after deducting diesel(fuel), maintenance etc.

XXN:

TEMBENU: My bus was 5 months old with me. The age of the bus is on the blue book. But it is at my house. I was called to the court in a hurry. I can bring it to court. This was a 38 seater. Those standing was 12. The bus has been damaged beyond report - but the insurance people sold me at K65,000. The bus is a wreck. I did buy it. The company wanted their money and I bought the wreck, purchased another body and put in the parts. After deducting the wreck, I was paid K375,000 but the initial value was K440,000.00 I was paid K375,000 because of the wreck. They paid me K10,000 per day as a business loss. They said that they could only pay me K10,000 as a day's loss due to the nature of insurance. This was for a day's loss. They wrote here and that is what they said to me. If they did not tell me, that is not my mistake. What I am saying is the truth. The breakdown is the one on I & 3. We were issuing receipts to passengers. I do not know if the copies of the receipts are there. But I & 3 represents the information from

the receipts. The bus was involved in an accident and I do not know if they are there. They used to move in the bus. My conductor used to collect the receipts and give them to the accountant. Finally, the accountant would return them back to the account. I can give them back. I was not travelling in this bus. It was the conductor. I would not know if the bus was always full. But it is trite that a lot of people board it. On the way money was coming for me, I knew that there was a lot of profit. The money could fracture from K15,000 to K10,000. The capacity of the tank was K2,500.00. If I look for documents, I can find the capacity of the tanks. I did not stay with the bus for a long time. My bus was insured. It was 3rd party insurance. The month of April has 31 days. I am claiming for 30 days. On Sunday, there could be repairs. I would do service twice a month. On Sunday, it could be on the road.

COURT: I do adjourn the case to the 6/10/2000.

6/10/2000

CORAM:

Mr Nyaka

COURT: This matter was adjourned for further hearing to the 6/10/2000. Both parties are not available. There are no reasons given for their failure. I therefore adjourn the case indefinitely.

22/03/2001

CORAM:

Wadi of counsel.

WADI: The matter was adjourned on 10/08/2000 for hearing. The mater was then called to today. The notice of.....on duty served. An affidavit by service has been served. My secretary told me that counsel from Blantyre is busy. I had to adjourn to a specific date. But I

am concerned with the relaxed attitude of counsel for the defendant. I therefore ask for an adjournment to a specific date.

COURT: I do adjourn to the 6/4/2001. If the defendant fail, then we proceed.

6/4/2001

Coram: As before.

WADI: I.....to seek for an adjournment to 10.30 a.m. The defendant' counsel is flying.

COURT: I do adjourn to 10.30 a.m.

WADI: This is a continuation of assessment of damages. The matter was adjourned on 10/9/2000. The matter was handled by Liwimbi before. I have taken over him.

PW NO 2 states in CHICHEWA

I am.....Limeza. I am a book keeper. I am an independent book keeper. In 1981 I qualified in intermediate book keeping. I was employed by Mr Chande in 1990. I was his book keeper. In 1998, Mr Chande sought a bus from Dinkum and Guild. I was keeping all financial records for Mr Chande. The bus was purchased from Dinkum on credit. It was not perfectly okay and we worked on it so that it should be on the road. I have looked at these documents. I am the one who prepares these documents. These were figures representing the expenditure from tickets, plus all the expenses that were being incurred on the way. The bus used to move from Lilongwe to Limbe then back. At that time, the bus used to carry not less than 42 people at K195.00 per day, the bus could make around K16,000.00 We used to deduct K6,000 per day as expenses. These documents are from December 1998 to 8th April 1999. Then on 9th April 1999, there iis when the accident took place. I do tender them in evidence.

COURT: What was P1 & 3 to be Ex 3.

The capacity of the bus was 50. The passengers from Lilongwe to Lilongwe (BT) was K195.00 per person. On 9/4/99, that is when the accident took place. On 9/7/99 that is when the insurers paid us. There were 80 days that elapsed before the bus could be replaced. This document is in blue book. I do tender it. The original blue book is with Dinkum because the vehicle was on loan and we have not paid back.

COURT: Mark it as P Ex 4.

Due to the accident we lost K10,000 per day and we take off K10,000 that we got from the insurers. There is thus a balance of K790,000.

XXN:

TEMBENU: When the minibus was bought, I was working for Mr Chande. The purchase was bought at K600,00. There was interest of K229,000.00 There was a purchase price document. I have the document with me. Here it is. The original document should be with Mr Chande. I have looked at P Ex4. I have looked at item number 9 (records). The capacity here is 30. Our bus was carrying 30 seated and there were 20 standing. Total 50. We worked on the..... All the expenses were coming to me and that is how I knew about this. I do confirm that 30 were sitting and 20 standing, but some of the standing ones were finding seats. This is what we used to do at that time. We did not think that this was wrong. We thought that we were doing it as per the way the bus was. If my boss said 38 seated was the capacity then I feel that he was saying the truth. I was not in the bus most of the times. I only boarded it twice and dropped on the way. I travelled with the bus on two occasions half way. When I travelled on the bus, it was not up to full capacity. On those days, it could carry 40 – 42. But most of the days, it was full. I was told by the driver. I have looked at P Exp 3. The information here was from receipts of tickets. I have carried some of the tickets – others were destroyed. As for expenses, they are not here. This is my first day to come. This bus used to be on the road for 16 – 28 days per month. The bus used to be serviced. We could service every two weeks. I have a calculator. Each of the passengers was paying K195.00. This is the fare between Lilongwe and Limbe. Our bus was express. This was between Lilongwe and Limbe. It used to carry very few passengers for the road. We did not want to disturb our customers. The majority were on express. There were

several bus operators. The bus could carry usually 40 – 45. It was very rare to have full to 50. We could make K8,190.42. This was the usual trend. Similarly, the return trip. This gives us K16,000 plus. We used make a profit of K12,000 per day. This bus used to leave Lilongwe at 6.30 a.m.. The of ficial time was 6.30 a.m. but since I was not there I could not tell. But they used to come back at 6.30 p.m. The bus used to take about 10 hours going and coming. This was via Zomba. I have some of the tickets here which can act as evidence on my side. These are the tickets.

TEMBENU: It is whole bunch of tickets. If I can examine the tickets, that is when I can refer to the tickets. Even my colleague can assist.

WADI: I do intend to object. The receipts were made by a qualified person. They should have objected some time ago or call for them from expert.

TEMBENU: May be, I have been misunderstood in this case. Initially we have this. The 1st witness said that he had an accountant. The accountant is here. He then says that there were extracted from the receipts and he has just showed them now. The claim is a very big one. In fact if we had these before, we could have looked at them in a different way. The claim is for specialdamages and they hav tobe proved specifically. If they are just dumped in....., I will do a deservice to my client. It is just a question of connecting these documents. That is all.

COURT: I do adjourn the case to the 4/5/2001.

4/5/2001

COURT: Unfortunately I have been unable to atted to this matter because I have to attend a meeting on Community Service at Lilongwe.

15/5/2001

Coram: S &R

This matter was to come today for further cross-examination. I have seen no parties present. I therefore adjourn the case to a date to be fixed.

Coram: As before.

TEMBENU: They sent me the books to study them. I have had the opportunity to look at them. We can proceed to wind up the cross-examination.

PW 2 states in Chichewa

I am known as Mr Limeza as already put.

XXN: The bus used to leave Lilongwe around 6.30 a.m.

TEMBENU:

We gave them the time of 6.00 a.m. but due to other problems, they could leave at 6.30 a.m. The bus used to take 10 hours from Lilongwe to Blantyre via Zomba. This was an express bus. The bus was to load from the starting point . It used to pucker very few people on the way. Most of them were from Lilongwe. The bus used to return the same day. The 10 hours were the whole time that it would take going and coming. I have never ridden a coachline. I have never ridden an express bus via Zalewa. This was around 1997 – 98. We left around 6.30 a.m. and arrived around 10.00 a.m. It was around 5 hours. The time depends on whether the bus stops. This is possible My Lord.. I have looked at this book as of 16/3/1999(Exp 3). This document shows Lilongwe to Limbe. The next ticket show 17/3/1999. It indicates Lilongwe- Limbe. It shows Lilongwe-Limbe. On 17/3/1999 it shows Lilongwe-Limbe. On 16/3/1999 it also Lilongwe-Limbe. They were changing tickets. On 16/3/99, there was a trip from Lilongwe – Limbe. On 16/3/99 Lilongwe-Limbe. What I am saying as per this book, is true. It is the very book. There were two books. They were using both of them. This is what used to happen. We would give two books so that if one finishes they could use the other one. On 16/3/99 we went to Limbe and back. On 17/3/99, there is also LL-Lilongwe. On 16/3/99 they came back. Counsel shouldme. This book is very clear. The books could finish. It is not strange to use two books the same trip. These books are good evidence. Other books were lost. What we were doing is what is in this book. They would use any book that is available. Our contention was the number of tickets they have used. If they were consistent with use of books, we could easily

have followed. But we were getting money thought the tickets no matter how random they were. This book is 7/4/99 from Limbe – LL. One trip here is 7/4/99 from Lilongwe – Limbe. They went and came back. It was possible for breakdown but all we needed were tickets. The bus was a 30 seater as per the blue book. But we increased for it to carry 50 people. This bus was not always full to capacity. The bus went to the Road Traffic Commissioner. There was COF given to us. Once in a while it used to pick people on the way. I was not moving on the bus. That is true. I've seen a ticket from Zomba and Lizulu. This shows hat it was not always full. That is true. We were making a summary a day. I already gave my summary. These are the summaries which I have submitted. These summaries show different figures. At one point, there is K8,000, then we have K5,000, K6,000, K9,915.00, 7,605.00, K8,667.00, K9,915.00, K7,995.00. These figures give us an idea of a rough income.

On expenses, there was K2,000.00 going and K2,000.00 back. The expenses were about K5,000.00 depending on what had happened. The trips were two. Therefore, we would make K14,000 round trip. The expenses were K5,000 to K8,000.00. But the average was K5,000. The average round trip was K9,000.00 to K11,000.00. If there are no mechanical problems, then that was okey. This is what used to happen.

I've looked on the book of 4/4/99. We made K7,605 on the outward trip. On inward K8,970.00. Our income was the difference. Per trip, there were two i.e. driver and conductor. The monthly average income for these activities is forgotten here now. I have the figures. We are claiming for 80 days. The days are from the accident day to the time the insurers paid us. The bus was bought on a loan. We informed the financier. But they told us that they needed their instalments although there was this accident. These 80 days included both Saturday and Sunday but we took off the days of service. The bus used to take one day to Blantyre. In a month, the bus was serviced once. It could have a breakdown. There is no allowance for that.

WADI: The capacity of the bus was 50. In a month, the bus ooperated almost 28 days. I can not give off hand figures of net per month.

TEMBENU: We will call one witness.

COURT: I do adjourn to the 27/8/2001.

27/8/01

Coram:

Wadi.

WADI: This matter was coming today. But Mr Tembenu said that he thought the matter was coming next week. We have agreed to adjourn the case.

COURT: I do adjourn to the 3/9/01.

Coram: His Honour, M.C.C. Mkandawire
District Registrar
Liwimbi of counsel for the plaintiff
Tembenu of counsel, for the defendant
Mr Nyaka, official interpreter.

RULING

This is a summons by the plaintiff to strike out defence pursuant to Order 18 Rule 19 of the Rules of the Supreme Court. The summons is supported by an affidavit deponed by Mr George Liwimbi of Counsel for the plaintiff. The application herein is based on the following grounds:

- (a) that the defence is disclosing no reasonable defence.
- (b) That the defence is scandalous, frivolous and vexatious.
- (c) That the defence is just an abuse of court process.

The history of this case is very recent and brief. I shall therefore narrate it in toto. On the 9th day of April 1999 along the Dedza/ Lilongwe road, the defendant's motor vehicle was involved in an accident with the plaintiff's motor vehicle. The plaintiff sued the defendant for negligence. It would appear that the defendant had referred the matter to his insurers because on the 9th of July 1999, the defendant's insurers fully compensated

the plaintiff to the tune of K385,000 comprising K375,000 as loss of the value of the salvage and K10,000 being the limit of liability by the defendants. The plaintiff apart from suing for loss of the motor vehicle also sued for loss of profits from the date of accident. The defendants have put a defence avenging that the plaintiff is not entitled to the anticipated losses in profits. It is this defence that the plaintiff would like to be struck off for reasons mentioned herein before.

I have looked at both sides of the arguments. I take it that the first, part of the case has already been settled by virtue of the settlement in full by the defendants insurers. The plaintiff would however like to have the profits which he says he has lost since the minibus was out of the road. The defendant in their defence aver that the plaintiff is not entitled to that. I have looked at the nature of the defence put forward herein. I find that it has no merit at all and it can not be sustained. I rule that it should be struck off. The plaintiff therefore succeeds. Costs to the plaintiff.

MADE in chambers this 10th day of May, 2000 at Lilongwe.

M.C.C Mkandawire
DISTRICT REGISTRAR