

**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO. 462 OF 2001**

BETWEEN:

KHALIDWE CHILIBVUMBO(male).....PLAINTIFF

- and -

GDC HAULAGE.....1ST DEFENDANT

UNITED GENERAL INSURANCE CO.....2ND DEFENDANT

CORAM: CHIMASULA PHIRI J.

Dr Mtambo, Counsel for the plaintiff

Ching'ande(absent, Counsel for the defendants)

Nsomba, Court Clerk.

JUDGMENT

Chimasula Phiri, J

The plaintiff's claim is for K217,322.16 being repair expenses for damage to the plaintiff's vehicle caused by the negligence of the driver, servant or agent of the 1st defendant. The plaintiff also claims costs for this action.

On 8th January 2004 the plaintiff served notice of hearing on the defendant's lawyer. The case was scheduled for hearing on 24th March, 2004. On the date for hearing neither the defendants nor their lawyer appeared. Nobody communicated with the court to explain the absence of the defendants. Further, the defendants had failed to submit their skeletal arguments and witness statements. On the other hand, the plaintiff and his lawyer attended court. The plaintiff's lawyer had prepared and submitted a court bundle containing all the relevant documents. In terms of Order 35 Rule 2 of the Rules of the Supreme Court I proceeded to hear the matter. This Rule provides that if, when the trial of action is called on, one party does not appear, the judge may proceed with the trial of the action or any counterclaim in the absence of that party. In such a case, it is incumbent

on the plaintiff to prove his claim. The proof will be limited to the allegations in the Statement of Claim – see **Barker v Furlong** (1891) 2Ch.172 at page 179. The plaintiff having proved his case is entitled to such relief as he claims and such other relief as is consistent therewith (**Stone v Smith** (1887) 25 Ch.D 1888.

PLEADINGS

The Statement of Claim in this action is set out as follows:-

- 1 The plaintiff is the owner of a Mitsubishi Colt registration number NB 535.

- 2 The 1st defendant is a haulage company having a registered office in Malawi and at the material time owner or controller of a truck and trailer registration numbers BJ 342 and BJ 2931 respectively.

- 3 On or about 21st June 1999 at or about 20.00 hours the plaintiff was driving his motor vehicle from the direction of Blantyre going towards Lilongwe on Zalewa Road when on approaching Mponda Full Primary School he encountered the 1st defendant's vehicle driven by its servant or agent covering the whole road.

- 4 The plaintiff upon finding the 1st defendant's vehicle aforesaid pulled to the extreme left of the road but he was nevertheless hit by the 1st defendant's truck.

- 5 As a result of the accident, herein the plaintiff suffered loss and damage.

PARTICULARS OF LOSS AND DAMAGE

{A quotation from Little Ways Motors is attached}

- 6 The plaintiff asserts that the accident herein was caused by the negligence of the 1st defendant's driver.

PARTICULARS OF NEGLIGENCE

- (a) Failing to keep proper left side of the road.
- (b) Failure to take a look out to avoid colliding into the plaintiff.
- (c) Failure to stop.

- 7 The plaintiff's claim against the 2nd defendant is based on the Road Traffic Act.

WHEREFORE the plaintiff claims K217,322.16 being repair expenses and costs of this action.

The defendants put a joint defence which is set out as follows:-

1st Defendant

1. The 1st defendant makes no admission as to paragraph 1 of the Statement of Claim.
2. Paragraph 2 of the Statement of Claim is admitted.
3. The 1st defendant refers to paragraph 3 of the Statement of Claim and save for the allegation therein contained that its (1st defendant's) truck was being driven covering the whole road, admits it.
4. The 1st defendant denies paragraph 4 of the Statement of Claim.
5. Paragraph 5 of the Statement of Claim and the alleged or any loss and damage therein pleaded are not admitted.
6. The 1st defendant refers to paragraph of the Statement of Claim and denies that the said accident was caused by the alleged or any negligence of its driver as alleged therein or at all.
7. Without prejudice to the defences afore-pleaded the 1st defendant refers to paragraph 7 of the Statement of Claim and denies the claim for K217,322.16 or at all.

2nd Defendant

8. The 2nd defendant adopts as far as is material the defence of the 1st defendant.

9. The 2nd defendant pleads that its liability if any, under the Road Traffic Act is liability only to indemnify of its insured in the event of the latter's liability having been established.

THE EVIDENCE

The plaintiff adopted his witness statement and tendered documents as exhibits. Basically, he confirmed the allegations contained in the Statement of Claim. He stated that when he saw the 1st defendant's vehicle approaching from the opposite direction with full lights, he reduced his speed whilst still driving on the left side of the road. Sensing danger, he went out of the main road on the said left hand side. Despite having done that, the defendant's vehicle hit the plaintiff's vehicle on the right front from the bumper up until the body canopy, thereby damaging the front right rim extensively. The truck driver did not stop. A good Samaritan followed the truck driver on a motor-bike. The driver of the truck was traced and his particulars are Elliot Fandson Mpeketula of Private Bag 3231, Blantyre. Police Officers who were coming from a Presidential function in Lilongwe stopped at the scene of the accident and took a statement and subsequently reported the matter to police at Zalewa Roadblock. The plaintiff removed the damaged rim and replaced it with another rim and slowly drove up to Zalewa Roadblock. Traffic Police Officer number A.4348 Constable Nyamayanyerere of Chileka Police Station visited the scene of the accident and took particulars. The plaintiff has tendered a police report as part of his evidence. The police report clearly puts blame on the 1st defendant's driver for the accident in that he failed to keep to his near-side. The plaintiff approached Little Ways Motors for quotation in respect of the damage done to his vehicle. The plaintiff tendered in court the quotation which put the repair cost at K217,322.16 as at 9th July 1999. The plaintiff forwarded the quotation to his insurers King Fisher and Associates who in turn forwarded the same to 2nd defendant. The plaintiff took his vehicle to the 1st defendant's General Manager upon his request but nothing was done. He stated in his evidence that Mr Durby, the General Manager of the 1st defendant company admitted that their driver was in the wrong. After 2 days the plaintiff drove his vehicle to Lilongwe. The defendants have not paid for the said repairs up to now hence this action.

THE LAW

Dr Mtambo has relied on the case of *Dilla v Rajani* 11 MLR 113 at 116 where Mtegha Ag. J (as then was) said the duty of a person who drives a motor vehicle on a public road is to use reasonable care to avoid causing damage to persons and property. Again in ***Banda v Admarc and Another*** [1990] 13 MLR 59 it was stated that a driver of a motor vehicle owes a duty of care to other road users, and the reasonable care expected of him is the care an ordinary skilful driver would exercise under all circumstances. Finally, in *Burgess v Aisha Osman and Jimu* (1964-66) 3ALR Mal 475 at 481 Bolt J said a driver of a vehicle should travel at a speed which will allow him to stop within the limits of his

vision. There is no doubt that a duty of care exists on the part of every driver. This duty is towards other road users. The duty extends to driving reasonably and anticipating that one would take reasonable steps to avoid or avert occurrence of an accident which might result in inflicting loss and damage to life and property. Breach of such duty attracts liability for the unpleasant loss and damage naturally flowing therefrom.

FINDINGS

On the evidence before this court, I am satisfied that the plaintiff has proved that the 1st defendant's driver, servant or agent owed him a duty of care. In breach of that duty of care, the 1st defendant's driver, servant or agent veered on the wrong side of the road and in the process damaged the plaintiff's vehicle. I find it as a fact that the plaintiff was in touch with the 1st defendant to pursue his claim but that the defendants have failed to repair the plaintiff's vehicle. The repair costs are supported by a quotation for K217,322.16. The plaintiff did not submit an updated quotation. Therefore I am bound to use the quotation he tendered in evidence.

CONCLUSION

I award the plaintiff the sum of K217,322.16 claimed in this action. The defendants are also condemned in the costs of this action, to be taxed by the master, if parties fail to agree.

PRONOUNCED in open court this 14th day of April, 2004 at Blantyre.

Chimasula Phiri

JUDGE