

**IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CIVIL CASE No. 877 OF 1998**

BETWEEN

ALIAS KHAKI BANDA.....PLAINTIFF

-AND-

F.B. CHAKHUMBIRA.....DEFENDANT

CORAM: MANDA, SENIOR DEPUTY REGISTRAR

Chipao for the plaintiff

Court Clerk

ORDER ON ASSESSMENT OF DAMAGES

The plaintiff's action was for damages for pain and suffering and loss of amenities. The issue of liability was already settled by way of default judgment, which was granted by the court on the 26th day of June 2000.

The plaintiff's claim comes from personal injuries, which he sustained after he was hit by a wheel of a truck, which broke his leg. It was the plaintiff's evidence; the wheel of the truck hit him after it had come off a trailer registration number NU 456, which at the time was being drawn by a truck registration number NU 802. When the accident occurred, the plaintiff was riding his bicycle along the Lilongwe/Mchinji road, towards Namitete and the truck was overtaking him. The truck belonged to the defendant, but at the time of the accident was being driven by his driver, Mr. Edward Zimba.

According to the police report, which the plaintiff tendered in evidence, the wheel came off the trailer after the wheel nuts were severed. It was thus the conclusion of the police that the accident was caused by a mechanical fault and they proceeded to close their file on their part. Having noted this conclusion, I did ask counsel for the plaintiff to make a submission on this point. This was on the view that if the accident was caused by a mechanical fault, the element of negligence becomes negated.

In his submission, counsel asked the court to infer negligence from the circumstances, in other words, that the court should rely on the doctrine of ***res ipsa loquitur***. In this regard, counsel for the plaintiff argued that since the vehicle was within the sole control of the defendant's driver, it would be fair to attribute to the defendant responsibility of what had happened as, according to him, the defendant had a duty of care to make sure that the vehicle was roadworthy.

at this point, I did consider the question as to whether in the circumstances, the plaintiff can rely on the doctrine of ***res ipsa loquitur*** because I do believe that this question has some significance in this matter. This is in the sense that the law is clear in that where the cause of the accident is known the doctrine of ***res ipsa loquitur*** has no application and that it becomes the duty of the plaintiff to prove, whether, upon the facts of the case negligence on the part of the defendant is proved or not. (See ***Phekani v Automotive Products Ltd*** [1996] MLR 23). In this case, it was established that the accident was caused when the wheel nuts were severed. Having this fact established, the question ceased to be one where the facts spoke for themselves. Rather, it fell on the plaintiff to prove that the defect in the wheel nuts could have been discovered by the due diligence on the part of the defendant. If not, it would have been up to the plaintiff to show to the court that the severing of the nuts would not have occurred without showing any visible external marks, which a competent driver would be able to recognize. Looking at the

manner in which this case was presented, this was not clearly done.

Of course, for the most part it could be explained that the plaintiff failed to prove that the defendant did not show any due diligence because that this matter never went to trial and that the plaintiff would have had no opportunity to lead any evidence to that effect. Indeed a further point to consider would be the fact that there is a default judgment on this matter, which, for the moment, binds this court and therefore obliges me to assess and award damages to the plaintiff. However, as a court I would be failing in my duty if I do not recognize the reality that a default judgment does not consider the merits of the case and that it can be set aside, along with any award of damages I am going to make. Further I am also inclined to consider the possibility that if the default judgment is set aside and this matter were to go for trial, the plaintiff's action may not succeed and he would not be entitled to any damages.

In view of this then and in order to avoid a situation where the plaintiff is awarded a sum that he would not be in a position to refund should his action fail, I am only inclined to award him, at this point of the case, nominal damages of K5 000 and costs of this action.

Made in Chambers this.....day of.....2007

K.T. MANDA
SENIOR DEPUTY REGISTRAR