



MALAWI JUDICIARY

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

PERSONAL INJURY CAUSE NO. 527 OF 2017

BETWEEN

FRANCIS CHASWEKA.....CLAIMANT

AND

JAMES MALENGA.....FIRST DEFENDANT

AND

BRITAM INSURANCE COMPANY.....SECOND DEFENDANT

CORAM: THE HON. JUSTICE J. N'RIVA

Mr Khan, of Counsel for the Claimant

Ms. Khaki, of Counsel for the Defendants

Ms. D Mtegha, Court official

ORDER

This matter was set down for mediation on 26<sup>th</sup> day of July 2018. On the date, the defendants sought an adjournment so that they should trace the first defendant. On the date of further mediation, counsel for the defendants told me that she could not locate the driver. She said that the second defendant's legal officer informed her that the driver was deceased.

Counsel for the claimant argued, on the other hand, that the claimant knows the driver of the motor vehicle, the first defendant. The claimant, counsel said, did not know about the defendant's death but that he had gone to South Africa.

Counsel therefore suggested that the defendants should provide information on the death. Counsel, therefore, argued that in the circumstances, the first defendant was not available for mediation whether he was deceased or he was at large. Counsel therefore suggested that we could not deal with the issue of the liability, but only with the issue of damages. Counsel for the claimant argued that the judgment should be entered against the defendants.

Counsel for the defendants disagreed with that suggestion. Counsel argued that there is need for a full trial for the claimant to bring evidence. On that point, counsel for the defendants argued that the second defendant should not be penalised due to the absence of the first defendant. Counsel argued that entering judgment at this point would be unfair to the second defendant. Counsel argued that I should just enter judgment ordering termination of mediation or in other order that this court may deem fit.

According to the second defendant's legal officer, upon my inquiry, the first defendant died in 2014.

This action was commenced in 2017. The defendants entered a defence dated 22<sup>nd</sup> September 2017. In the defence 'the first defendant' denied all the claims by the claimant. In other words, the 'first defendant' 'denied' liability for negligent conduct.

What I see in the circumstances is that if it is true that the first defendant had died in 2014, it is then surprising that there is a defence filed in 2017 in relation to him.

Looking at a defence it is a defence of general denials. I am alive to the fact that the defendants entered the defence before the Honourable the Chief Justice promulgated the new rules for court procedure. By the rules that were applicable at the time, defences of general denial were a common feature. Under the new rules, general defences are not tenable because it is a defence that offers no alternative explanation to the allegations that have been made by the claimant.

Under the new rules, a Judge has a managerial role over matters. Now, before me the question is whether there is a defence by the first defendant. I think there is none.

If the defendant died in 2014, no way could he have entered a defence in 2017. Now, assuming he filed a defence, the defence does not respond to the claimant's assertions. Assuming that the matter goes for trial, and assuming that the first defendant is deceased, the assertions by the claimant can hardly be challenged.

In that event, I am of the view that justice of the matter would require that judgment be entered against the first defendant. There is nothing to keep on pursuing in relation to the first defendant. After all, the second defendant's defence is that their liability (and this is insurer's liability) is dependent on the first defendant being found liable. The question is: is there a defence to the first defendant's negligence? The answer is no. Now that there is no defence, I do not see why the matter should go to trial. That would be a futile exercise.

In all this, I enter judgment against the first defendant. The matter shall proceed to consider the issue of damages.

MADE the 14<sup>th</sup> day of August, 2018

A handwritten signature in dark ink, appearing to read 'J. N. Riva', written over a horizontal line.

J NRIVA

JUDGE