



**JUDICIARY
IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
PERSONAL INJURY CAUSE NO. 639 OF 2017**

BETWEEN

MASAUTSO THOMSON 1ST PLAINTIFF

GODFREY AMOS 2ND PLAINTIFF

-AND-

CHARTER INSURANCE COMPANY LIMITED DEFENDANT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA
Messrs. Nthewa and Mbwana, of counsel, for the Plaintiffs
Mr. Chidothe, of counsel, for the Defendant
Mr. D.K. Itai, Court Clerk

JUDGEMENT

Kenyatta Nyirenda, J.

The Plaintiffs are claiming damages from the Defendant as the insurer of motor vehicle registration number NA 3441 Toyoace (Toyota Ace).

The Writ of Summons was filed with the Court on 28th August 2017 and the Statement of Case reads:

- “1. *The Plaintiffs were at all times lawful pedal cyclists.*
2. *The Defendant is being sued by virtue of being the insurer of motor vehicle registration number NA 3441 Toyota Ace under certificate of insurance number 131070551 valid from 20th June, 2017 to 12th March, 2018.*
3. *On or about 24th June, 2017 at about 18:00 hours, the said motor vehicle was so negligently driven, managed and controlled from the direction of Area 25 heading towards Gateway Mall such that upon arrival at ABC road junction it hit the Plaintiffs who were both cycling towards the same direction.*

4. *The said accident was caused by the negligent driving of the driver of the said motor vehicle as set out below:-*

PARTICULARS OF NEGLIGENCE

- (i) *Driving at a speed which was excessive in the circumstances;*
 - (ii) *Failing to keep any or any proper look-out;*
 - (iii) *Failing to take heed of the presence of the Plaintiffs who were lawfully cycling along the said road;*
 - (iv) *Failing to manage, control, brake veer to the nearside, or otherwise maneuver the motor vehicle so as to avoid the accident;*
 - (v) *Generally driving his said motor vehicle without due regard or concern for the safety of other users and in particular the Plaintiff; and*
 - (vi) *Generally failing to observe road traffic rules and regulations.*
5. *The Plaintiff shall also seek to rely, as evidence of negligence, on the fact that the driver of the said motor vehicle was charged with the offence of inconsiderate driving contrary to section 127 of the said Road traffic Act and he paid a fine of MK10,000.00.*
6. *By reason of these matters, the plaintiffs sustained injury and has suffered loss and damage.*

PARTICULARS OF INJURY OF THE 1ST PLAINTIFF (MASAUTSO THOMSON)

The plaintiff sustained a big cut would on the right side of the eye with abrasions and lacerations on the right temporal region. He also had multiple abrasions on the right forearm and right hand and a wound on the dorsal aspect. He now has reduced vision of the right eye, experiences painful forearm and has facial scars. His permanent incapacity was put at 28%.

PARTICULARS OF INJURY OF THE 2ND PLAINTIFF (GODFREY AMOS)

The Plaintiff sustained bruises on both legs and back pains and general body pains. His permanent incapacity was put at 18%.

PARTICULARS OF SPECIAL LOSS

- (a) *K6,000.00 as special damages for fees for police report;*
 - (b) *K10,000.00 as special damages for fees for medical report;*
7. *And Now the plaintiffs claim from the Defendant as the insurer of the said motor vehicle:-*

- (i) Damages for pain, suffering and disfigurement;
- (ii) Damages for loss of amenities of life;
- (iii) Damages for loss of earning capacity;
- (iv) Special damages for police and medical reports; and
- (v) Costs of this action.”

The action is contested by the Defendant and a Defence was filed with the Court on 16th February 2018 by the Defendant’s in-house lawyer, Mr. Joseph Kandeya. The Defence states as follows:

- “1. The Defendants refer to the contents of paragraph 1 of the Plaintiffs Statement of Claim and make no comment thereof.
2. The Defendants refer to the contents of paragraph 2 of the Plaintiff Statement of Claim and admit the contents thereof in so far as it states to the Defendant being at all material times the insurer of motor vehicle registration number NA 3441 Toyota Ace alone but make no comment thereof in so far as it states to the Defendant being sued as the insurer of the said motor vehicle.
3. The Defendants refer to the contents of paragraph 3 of the Plaintiff’s Statement of Claim and admits to the contents thereof in so far as it states to the occurrence of the accident alone but deny the particulars of the accident as claimed and put the Plaintiffs to strict proof of each and every allegation.
4. The Defendants refer to the contents of paragraph 4 of the Plaintiff’s Statement of Claim and deny that the alleged accident was caused by the negligence of the driver of motor vehicle registration number NA 3441 Toyota Ace as particularized therein and as such the Plaintiffs are put to strict proof of each and every allegation
5. In the alternative, the Defendants plead that the said accident was wholly caused by both Plaintiffs negligence as particularized below:-

PARTICULARS OF NEGLIGENCE

- (a) Cycling on the lane that is used by on coming motor vehicle;
- (b) Suddenly cycling into the path of a motor vehicle which was so close that it was impossible for the driver to apply emergency brakes;
- (c) Failing to swerve, brake or turn the pedal cycle so as to avoid hitting the Defendants insured motor vehicle;

- (d) *Failing to give way to the Defendant insured motor vehicle which had the right of way at the material time;*
 - (e) *Cycling without due care on a busy public road;*
 - (f) *Cycling without proper lookout and due regard for oncoming traffic by particularly disregarding the Defendants insured motor vehicle;*
 - (g) *Willfully hindering or interrupting the free and proper passage of traffic on a busy public road;*
 - (h) *Occupying himself in a position which prevented the driver of the said motor vehicle from exercising complete control over the movement of the motor vehicle.*
 - (i) *Conducting himself in such a manner that was likely to constitute a source of danger to himself or to other traffic;*
 - (j) *Failing to abide by the safety and emergency measures on the road;*
 - (k) *Generally failing to observe the necessary precautionary measures;*
 - (l) *Generally failing to observe road traffic rules and regulations.*
 - (m) *In the alternative, the Defendants will rely on the doctrine of res ipsa loquitor in proving negligence.*
6. *The Defendants refer to the contents of paragraph 5 and 6 of the Plaintiffs Statement of Claim and make no comment thereof.*
7. *The Defendants refer to the contents of paragraph 7 of the Plaintiffs Claim and deny that the Plaintiff is entitled to any of the reliefs being sought therein attributing the same to the negligence of the plaintiffs thereof and as such, the Plaintiff is put to strict proof of each and every allegation.*
8. *The Defendants will accordingly contend that the plaintiff failed or neglected to mitigate his own injuries, loss or damage and to that extent, the Plaintiffs are not entitled to the reliefs being claimed.*
9. *Without prejudice to the foregoing, the Defendants plead that: _*
- (a) *their liability, if any , which is denied is subject to the owner of motor vehicle registration number NA 3441 Toyota Ace being found liable in respect of the said accident.*
 - (b) *Its liability, if any, which is denied, is also limited to identifying the owner of the said vehicle to the extent of the maximum liability contained in the contract of insurance between the said owner and the Defendants.*

Save as herein expressly admitted, the Defendants deny each and every allegation of fact contained in the Plaintiffs Statement of Claim as if the same were herein set forth and traversed seriatim” – Emphasis by underlining supplied

The Plaintiff filed with the Court its Mediation Bundle on 19th April 2018 and mediation session was set for 10th December 2018. On the set hearing date, Mr. Chidothe informed the Court that his firm had been retained earlier that day by the Defendant and he needed more time to study the matter. The case was, accordingly, adjourned to 22nd January 2019.

When the case was called on 22nd January 2019, Counsel Chidothe addressed the Court as follows:

“We have noted that the 2nd Defendant is not the insurer of the motor vehicle. I was discussing with my learned friend here that we should seek an adjournment so that we trace the insurer from the Insurers Association of Malawi. We believe this is the best way to proceed. If the information is available, proper amendments can be done and this will help in the speedy finalization of this case.”

Counsel Mbwana, appearing on brief, stated that he had no objection to the prayer for adjournment.

This case has all the hall marks of a classic example to be used by law lecturers in demonstrating how a case should not be prosecuted. Orders 5, 7 and 13 of the Courts (High Court) (Civil Procedure) Rules [Hereinafter referred to as “CPR”] are relevant.

In terms of Order 5 of the CPR, a defendant intending to contest the proceedings has a maximum period of (a) 14 days from the date of service of the summons on him or her within which to file a response and (b) 28 days from the date of service of the summons on him or her within which to file a defence. To my mind, 28 days is more than enough time for a defendant to file and serve a defence, more so for a straight forward personal injury case like the one before this Court. In any case, a defendant who wishes to be given more time has to make an application for that purposes before the expiry of the time periods stipulated by Order 5 of the CPR.

In the present case, the summons was served on the Defendants on 25th January 2018. This means the Defendant had up to on or about 28th February 2018 to make proper inquiries about the case, including finding out if the Defendant was the insurer of Toyota Ace. The Defendant, as already mentioned, filed its Defence on 16th February 2018. I, therefore, do not understand why the Defendant should be coming at the eleventh hour, that is, more than 10 months since the expiry of the

time period for filing a Defence, to verbally allege that the Toyota Ace was not insured by the Defendant.

Further, Order 5, r. 8, of the CPR states that a defendant shall serve the defence together with a list of documents verified by a sworn statement and have copies of the document on the list. In the present case, the Defendant filed neither a list of documents nor a sworn statement.

I turn to Order 7 (Statement of Case) of CPR. Order 7, rr. 5, 6, 7, 8 and 9 of CPR deals with how a defendant should address allegations contained in the statement of claim and these rules provide as follows:

- “5. *Where the defendant intends to contest the claim, the defendant shall file and serve a defence on the claimant within the period required by Order 5 Rule 7 (2) (b).*
6. *A defendant shall deal with each fact in the claim and shall not deny a claim generally.*
7. *Where the defendant does not agree with a fact that the claimant has stated in the claim, the defendant shall file and serve a defence that denies the fact and states what the defendant alleges happened.*
8. *Where the defendant does not deny a particular fact, the defendant shall be taken to agree with that fact.*
9. *Where the defendant does not know about a particular fact and cannot reasonably find out about it, the defendant shall say so in the defence.*”– Emphasis by underlining supplied

In paragraph 2 of the Defence, the Defendant expressly admits “*to the Defendant being at all material times the insurer of motor vehicle registration number NA 3441 Toyota Ace*”. I do not suppose that such a categorical statement could have been made without the Defendant first being satisfied of the truth of the statement. Viewed from this angle, the reason given by Counsel Chidothe for seeking adjournment of the mediation session does not hold water and, if I may be allowed to say so, it is the lamest excuse [in so far as requests for adjournments are concerned] that I have heard during my seven years on the High Court bench.

Order 13 of CPR governs mediation and it states, in part, as follows:

“3. (1) Within 7 days from the time the statement of case is deemed to be closed, every party shall prepare a statement in Form 15 and provide a copy to every other party to the mediation session and to the Judge.

(3) The statement referred to in sub rule (1) shall identify the factual and legal issues in dispute and briefly set out the position and interest of the party making the statement.

(4) A party who makes a statement under this rule shall attach to it any material which the party considers of central importance in the matter.

4. (1) The parties and their legal practitioners, if the parties are represented, shall attend the mediation session.”

In the present case, the statement of case closed on or about 26th February 2018: see Order 9 of CPR. This means, according to Order 13, rule 3(1), of CPR, both the Plaintiffs and the Defendant should have prepared and filed with the Court their respective Statement of Issues (Form 15) not later than 5th March 2018. As already noted, the Plaintiffs filed its Mediation Bundle on 19th April 2018. On the other hand, the Defendant has yet to do so. In this regard, it cannot be said that the Defendant was not ready for the mediation session.

Further, it is clear from Order 13, rule 4(1), of CPR that parties are obliged to attend mediation session. Here again, the Defendant was in breach.

All in all, I think I have said enough to show that the Defendant is bent on frustrating the further conduct of this case. Leaning on the side of leniency, I will give the Defendant one more chance to do the needful. I order that the Defendant must comply with Order 13, r3(1), of CPR, within 7 days hereof. Failure to comply with my UNLESS ORDER will leave the Court with no option but to strike out the Defence and enter judgement for the Plaintiffs.

Pronounced in Court this 5th day of February 2018 at Lilongwe, Blantyre, in the Republic of Malawi.

Kenyatta Nyirenda
JUDGE