



Case No. 15 of 2018

**JUDICIARY**  
**IN THE HIGH COURT OF MALAWI**  
**PRINCIPAL REGISTRY**  
**PERSONAL INJURIES CAUSE NO 15 OF 2018**

**BETWEEN**

**RAJABU SWALEYI ..... CLAIMANT**

**AND**

**PRIME INSURANCE COMPANY LIMITED ..... DEFENDANT**

**CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA**

Mr. Kalua, of Counsel, for the Claimant  
 Mr. Tandwe, of Counsel, for the Defendant  
 Mrs. Doreen Nkangala, Court Clerk

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**RULING**

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*Kenyatta Nyirenda,*  
*J*

This is my ruling on the Claimant's application for summary judgment. The application is brought under Order 12, r.23, of the Court (High Court) (Civil Procedure) Rules [Hereinafter referred to as "CPR"].

The background to the application is of the simplest. The Claimant issued a summons against the Defendant and the Statement of Case reads as follows:

- "1. The defendant is being sued pursuant to the provisions of the Road Traffic Act as the insurer at the material time of motor vehicle registration number MHG 3583 Toyota Hiace Minibus.
2. On or about the 24 May, 2017, the defendant 's insured driver/agent one Mr. Patrick Kalema so negligently drove motor vehicle registration number MHG 3583 Toyota Hiace Minibus that upon reaching Molipa Hills along Bakili Muluzi

*Highway he fail ed to negotiate a corner and swerved to the near side where the motor vehicle overturned*

PARTICULARS OF THE NEGLIGENCE

- a) *Driving at an excessive speed in circumstances;*
  - b) *Driving without any regard for the safety of the claimant who was a passenger in the motor vehicle;*
  - c) *Losing control of the motor vehicle and thereby swerving to the extreme offside of the road;*
  - d) *Failing to keep a proper look-out;*
  - e) *Failing to stop, to slow down, to swerve or in any other way so to manage or control the motor vehicle to avoid the accident.*
3. *By reason of these matters, the claimant who was a passenger in the said motor vehicle sustained injuries and has suffered loss and damage.*

PARTICULARS OF THE INJURIES

- (a) *Head injury (Left Frontal Skull Fracture)*
- (b) *Big cut wound on the forehead*
- (c) *Bruises on the left leg*
- (d) *Diffuse brain injury*
- (e) *Subdural haematoma*

PARTICULARS OF SPECIAL DAMAGE

- (i) *Cost of the medical report KJ 0,300.00*
  - (ii) *Cost of the police report K3, 000.00*
4. *As a result of the injuries sustained the claimant has developed hearing problems WHEREFORE the Claimant claims:-*
- (a) *Damages for pain and suffering and loss of amenities of life;*
  - (b) *Damages for disfigurement;*
  - (c) *Special damages as pleaded*
  - (d) *Cost of the action."*

On 20th February 2018, the Defendants filed the following Defence:

- "1. Paragraph 1 of the Statement of Case is admitted in as far as the 2nd Defendant being insurers.
2. The particulars of negligence, injuries and special damages contained in paragraph 2, 3, 4 and 5 of the Statement of Case are denied and the Defendants put the Claimant to strict proof of the same.
3. The 2nd Defendant pleads that its liability, if at all, would be subject to owner of the motor vehicle herein being found liable for the Claimant's injuries resulting from the use of the said motor vehicle and that such liability if any would be subject to limit under the law and policy.
4. SA VE as hereinbefore admitted, the Defendants deny each and every allegation of fact contained in the statement of claim as if the same were set out herein and traversed seriatim. "

I momentarily pause to observe that the Defence is not accompanied by a list of documents as required by Order 5, rule 8, of CPR. On a related note, the Defence is not verified by a sworn statement. This is in contravention of Order 18, rule 2, of CPR. I will revert to these provisions in due course.

The application is supported by a sworn statement by Mr. Chimwemwe Mahekea Kalua wherein he deposes, among other matters, as follows:

- "5. The defendant has served a defence in which it admits having insured the motor vehicle in issue and the occurrence of the accident at the material date and place but has denied that the accident was caused by the negligence of the driver and that the claimant sustained injuries. Now produced and marked "CMK 4" is a copy of the defence.
6. Other than denying the claimant's claims, the defendant has not explained its version of how the accident happened, who was at fault, the parties involved in the accident and whether anyone sustained injuries in the accident.
7. The defence served in thus a general denial of the claimant's claim and offends the rule against general denials.
8. I verily believe that the defendant's defence has no real prospect of success and is a mere sham.

WHEREFORE I humbly pray to this Honourable Court that the defence served be struck out and summary judgement be entered against the defendant. "

Contrary to Order 20(1) of CPR, the Defendants filed neither a sworn statement nor skeleton arguments in opposition to the application. In his oral submissions,

Counsel Tandwe disputes that the Defence contains general denial. It might be useful to set out his oral submissions in full:

*"The defence has limbs. The first limb relates to negligence. The other limb pertains to the cover of insurance.*

*The Defendant is sued under section 148 of the Road Traffic Act. A feature of this section is that a claimant cannot get more than what is covered under the policy.*

*Paragraph 4 of the Defence pleads that the liability is subject to the limit. That is a substantive defence. It is not a general denial. More so because the Claimant has opted to sue the insurer only.*

*The accident might entail many claimants. Thus the issue of extent of cover is relevant. If the limit is exceeded, the Claimant might not get anything from the Defendant.*

*In conclusion, the defence is not a general denial. As far as the limit is concerned, the defence has merit. "*

In his reply, Counsel Kalua insisted that the Defence consists of only general denials. He further invited the Court to note that the defence does not refer to any other claims by third parties or at all and, as such, such claims are non-issues.

I have considered the submissions by both Counsel. The first question for consideration is whether this matter is fit for summary judgement. Summary judgement is entered where the claimant has clearly proved his or her claim and the defendant is unable to set up a bona fide defence or raise an issue against the claim which ought to be tried: **Sydney Chikhwaya t/a Sherks Engineering and Welding Contractors v. United General Insurance Co Ltd [2013] MLR 415.**

There can be no question that the Claimant has clearly established his claim. He states that he sustained injuries as a result of the negligent driving of motor vehicle registration number MHG 3583 Toyota Hiace Minibus which was insured by the Defendant at the material time. On its part, the Defendant admits being the insurer of the motor vehicle and that the motor vehicle was involved in a road accident as alleged by the Claimant. However, the admission is qualified by a "bare defence", that is, a defence that is neither verified by a sworn statement nor a list of documents in support thereof.

The wording of the Defence and the Defendant's handling of this case shows that the Defendant, like so many other defendants, has yet to grasp or embrace the concept of "front-loading". The concept applies with equal force to statement of case and defence.

Front-loading can be described as a process of filing litigation documents in courts ahead of trial. For instance, a claimant files his or her writ of summons, a statement of case, a list of documents he or she intends to rely on at the trial and copies thereof and sworn statement verifying claim. Likewise, a defendant, who wishes to contest a claim, must upon being served with the originating process, file a statement of defence, verified by a sworn statement, together with a list of documents, verified by a sworn statement, and have copies of the document on the list: see Orders 5, 7 and 18 of CPR.

Order 7, RR. 5, 6, 7, 8, 9 and 14, of CPR deals with how a defendant should address allegations contained in the 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 an 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.*
14. *In a defence or a reply, the statement of case shall specifically mention a matter that-*
  - (a) *makes another party's claim or defence untenable;*
  - (b) *shows a transaction is void or voidable; or*
  - (c) *raises a question of fact not arising out of a previous statement of case.*

Emphasis by underlining supplied

With front-loading, all processes and documents are before the court prior to the very first hearing of the matter. This does not only help in the quick identification of issues but it also means the case is bound to proceed very quickly. It also

eliminates or reduces element of surprise in that the documents give parties in the suit prior knowledge of the components of the case and enables them prepare ahead of it. While adducing surprise evidence may produce drama, it more often than not leads to poor justice.

Further, it has to be recalled that a defence falls within a statement of case and Order 7, r.1, of CPR requires a statement of case to, among other matters:

- (a) *set out the material facts between the parties, as each party sees them, but not the evidence to prove them;*
- (b) *show the areas where the parties agree;*
- (c) *show the areas where the parties disagree that need to be decided by the Court;*
- (d) *be as brief as the nature of the proceeding permits ;*
- (e) *Identify any statute or principle of law on which the party relies, but not contain the legal arguments about the statute or principle.*
- (f) *Where the party is relying on customary law, state the customary law;*
- (g) *state specifically any fact that if not stated specifically, it would take another party by surprise* – Emphasis by underlining supplied

In the present case, the Defendant is in breach of almost all the above-mentioned provisions. Firstly, The Defendant has not only failed to specifically traverse the allegations in the Statement of Case but has also not stated the facts of the accident as known to it.

Secondly, the oral submissions by Counsel Tandwe shows that the Defendant seeks to rely on section 148 of the Road Traffic Act but the same is not referred to in the Defence. This also goes for the contentions by Counsel Tandwe that the accident might entail many claimants and that the policy limit might be exceeded and, as a result, the Claimant might not get anything from the Defendant. The contentions are purely speculative and not supported by any evidence before the Court.

Thirdly, the Defendant filed neither a list of documents verified by a sworn statement nor copies of the document on the list. This is clearly in breach of Order 5, rule 8, of CPR and Order 18, rule 2, of CPR.

Fourthly, the Defendant has not met the requirements of Order 20(1) of CPR which requires that *"in all interlocutory applications the parties shall file and serve skeleton arguments to be relied upon at least 2 days before the hearing of the application"*. The Defendant did not comply with this peremptory requirement and no reason was given for its failure to do so. The rationale behind Order 20(1) of CPR is to remove the element of surprise.

All in all, I am satisfied that (a) the Claimant has clearly established his claim and (b) The Defendant does not have any real prospect of defending the action. By reason of the foregoing, the Claimant's application is allowed. Accordingly, the Defendants' defence is struck out and judgement is entered in favour of the Claimant. It is so ordered.

Pronounced in Court this 31st day of July 2018 at Blantyre in the Republic of Malawi.



**Kenyatta Nyirenda**  
**JUDGE**



