REPUBLIC OF MALAWI

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

PERSONAL INJURY CAUSE NO. 891 OF 2016

BETWEEN

STEPHANO CHIKOTI.....CLAIMANT

AND

BLANTYRE CITY COUNCIL.....DEFENDANT

Coram: **WYSON CHAMDIMBA NKHATA** (ASSISTANT REGISTRAR)

Matumbi - of Counsel for the claimant

Chitsulo - Court Clerk and Official Interpreter

RULING

This is the court's ruling on an application by the defendant that this matter be disposed of on a point of law. The application has been brought under order 14A rule 1 of the Supreme Court Rules. It is supported by an affidavit sworn by Clifford Banda an employee of the defendant working as Cemetery Supervisor. The substantive part of the affidavit reads:

2. On the morning of 16th April 2014, the cemetery staff of the Defendant had an exercise to remove all unclaimed bodies at Queen Elizabeth Central Hospital. The Claimant reported for duty as normal and assisted in this operation.

3. After the exercise the claimant returned to the Blantyre City Council Head Offices where he collected his bicycle and departed for his standby station, which is Chitawila Cemetery.

4. The next day the Claimant went to the offices of the defendant in the morning and informed that me that he had been hit by a car while on his way to Chitawila cemetery.

5. After being hit by the car the Claimant had reported the matter to the police and then gone to Queen Elizabeth Central Hospital where he was treated.

6. The incident was reported to management and he was directed to stop working as he had been seriously injured. The claimant was still receiving his salary as he continues to do this day.

7. On the 21st of November 2016, writ of summons praying for damages for pain and suffering arising out of the road accident that occurred on or about 16th April 2014 wherein the claimant was injured, was served on the defendant.

8. On the 14th of December 2016, the defendant served a defence to the writ of summons. The defence denied that the defendant had been in breach of any statutory duty or in any way been negligent.

9. I verily believe that the claimant was injured in a road accident which has nothing to do with the defendant at all as the claimant was not using any of the defendant's modes of transportation for employees during the accident.

10. Further, I verily believe that the circumstances under which the claimant was injured do not constitute an injury during the course of his employment and therefore the claimant is not entitled to compensation. He therefore prays for an order disposing the matter on a point of law.

The claimant did not avail himself for the hearing of the application. However, through Counsel for the defendant they sought to rely on an affidavit in opposition they had filed with the court sworn by Stephano Chikoti the claimant. The affidavit reads in part:

3. I work for Blantyre City Council (Cemetery Office) as a grave digger and my duty station is Chitawira Cemetery.

4. On the morning of the 16th of April 2014, I invited from my duty station to our Blantyre City Council Office in Ginnery Corner by our Supervisor Mr. Noel Banda to take part in the exercise of removing

all unclaimed bodies at Queen Elizabeth Central Hospital where we collected the said unclaimed bodies for burial in Naperi.

5. On the same morning an ambulance from Queen Elizabeth Central Hospital picked us up at Blantyre City Council (Cemetery Office) to Queen Elizabeth Central Hospital where we collected the said unclaimed bodies and buried them.

6. After the said Burial in Naperi the ambulance took us back to Queen Elizabeth Central Hospital where after changing to fresh clothes the same ambulance drove us back to Blantyre City Council (Cemetery Office) Ginnery Corner.

7. While at the office at Ginnery Corner, our Supervisor Mr. Noel Banda instructed me to go back to my duty station in Chitawira.

8. I was not offered transport by our said Supervisor from my duty station in Chitawira to our Cemetery Office in Ginnery Corner. Likewise, I was not offered transport whatsoever from our office in Ginnery Corner back to my duty station in Chitawira. As a result I used my personal bicycle from Chitawira to Ginnery Corner back to Chitawira after the aforesaid burial exercise.

9. While cycling along the Chipembere Highway from Ginnery Corner on my way back to Chitawira Cemetery at around 1:00pm I was at a junction near Chipiku Plus Shop in Ginnery Corner hit by a motor vehicle which was coming behind me and was suddenly branching off the main road.

13. I was injured in an accident which is as a result of carrying out the instructions of my employer the defendant herein. Had I been offered transport from my duty station in Chitawira to our office in Ginnery Corner and back I would not have used my personal bicycle in the course of employment.

Wherefore I pray that the defendant's prayer that my injury had nothing to do with the defendant should not be sustained and alternatively that the court should find in my favour that I was injured in the course of employment.

This application raises a short but difficult question of the true construction of s.4(6)(a) of the Workmen's Compensation Act, hereinafter called "the Act", and its application to the facts of this case as discerned from the affidavit evidence laid above. The application is brought under Order 14A of the Rules of the Supreme Court. Let me make the following pertinent observations on conditions precedent to the evoking of the procedure under that Order. It appears the court may upon the application of a party

determine any question of law or construction of any document in any cause or matter at any stage of the proceedings where it appears to the court that:

(a) such question is suitable for determination without full trial of the action; and

(b) that the determination will finally determine the entire cause or matter or any claim or issue in the case, subject only to any possible appeal.

In the premises, the suitability of disposing of an action under this procedure entirely depends on whether the court can determine the question of law raised without a full trial of the action. Thus upon making its determination of the question of law or construction, the court may dismiss the action or make such order or judgment as it thinks just. In this way, the action will be finally disposed of without a full trial and the judgment or order will have the same force and effect as the judgment or order after a full trial of the action.

Pausing here I believe the question that arises and fall to be decided is whether the claimant was injured in the course of employment under the ambit of s.4(6)(a) of the Workers Compensation Act which reads:

> For the purposes of this Act, an injury incurred by a worker while he is travelling to or from his work place of employment shall be deemed to have been arisen out of and in the course of his employment if he is, with the express or implied permission of the employer, travelling on or by means of transport provided by the employer for carrying workers employed by him.

In the present case, the defendant contends that the claimant was under no express or implied permission to use his personal bicycle to go from one duty station to another. It is stated that the claimant was not using a mode of transportation that he was instructed or given to use by the plaintiff as such whatever happened to him cannot be attributed to an injury in the course of employment. On the other hand, the claimant does not dispute having used his bicycle. However, he claims that he was under instruction from his Supervisor one Mr. Noel Banda to go back to his duty station. He further contends that the instruction was not supported by provision of transportation that is why he opted for use of personal means.

I have two observations to make. Firstly, it appears to me that the provision that the defendant bases this application on covers two scenarios *to wit* usage of transport provided by the employer when one is

travelling to his or her work place and when one is travelling from his or her work place. In **St. Helens Colliery Co. Ltd v. Hewlston, 1924 AC 59** it is indicated that as a rule, the employment of a workman does not commence until he has reached the place of employment and does not continue when he has left the place of employment, the journey to and from the place of employment being excluded. However, from the same case one takes note that it is now well-settled that this is subject to the theory of notional extension of the employer's premises so as to include an area which the workman passes and repasses in going to and in leaving the actual place of work following a contractual duty or obligation on the part of an employer to use only a particular means of transport.

What I seem to gather from the affidavit evidence herein is that the claimant was already at work and he was moving from one duty station to another. He claims that he had gone to assist with the burial of unclaimed bodies and he met his fate on his way back to his duty station. If this is the truth of the matter then the claimant cannot be said to have been caught in the going to or coming from extended notion of "in the course of employment". In my view, rather, the claimant was where he was in direct consequence of his employment. He was still within the time he was supposed to take instructions from his supervisor in the furtherance of the defendant's objectives. I choose to believe that this renders s.4(6)(a) of the Workers Compensation Act inapplicable in the circumstances of this case assuming the affidavit evidence is sufficient for the court to accept the cogency of what actually happened.

In case I have misconstrued the provision my second observation is that the provision in question further suggests that if the employer is providing a vehicle or is paying for the transportation in some way, the case may be compensable. Essentially, the provision stresses on the use of means of transport authorized by the employer. In the case of **Weaver v. Tredegar Iron and Coal and Co. Ltd. 1940 3 All ER 157** the words "arising out of and in the course of his employment" have been authoritatively construed that an accident happening to an employee in the course of his transit to his house after he left the precincts of his work would be outside the scope of the said words unless he has an obligation under the terms of the contract of service. This decision accepts the principle that, there should be a duty or obligation on the part of the employee to avail himself of the means of transit offered by the employer; the said duty may be expressed or implied in the contract of service.

In the present case, a perusal of the evidence so far on the record does not disclose any form of recommended transportation by the defendant whether expressly or impliedly. It is merely mentioned that the claimant was not using any of the defendant's modes of transportation for employees during the accident. What is not clear is whether there was an obligation on the defendant to provide such means and a reciprocal obligation on the claimant to avail himself of them. If the claimant was not even entitled

to any means of transportation by the employer, the other question that surfaces is how to factor in the consideration of him possibly being in the furtherance of his employer's objectives.

All in all, I deem it necessary that we proceed with caution so that we eventually attain the justice of the case. The case must go for full trial so that the rights and obligations of each party are properly determined. I so order.

Costs for this application shall be in the cause.

MADE IN CHAMBERS THIS 13th DAY OF AUGUST 2018

WYSON CHAMDIMBA NKHATA

ASSISTANT REGISTRAR