IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL DIVISION
CIVIL CASE NO. 452 OF 2010

BETWEEN:

LUKA MOYENDA .....PLAINTIFF

V

SABLE FARMING COMPANY LIMITED.....DEFENDANT

CORAM: Hon. Justice M L Kamwambe

Gulumba of counsel for the Plaintiff

Maele of counsel for the Defendant

Amos....Official Interpreter

JUDGMENT

Kamwambe J

The plaintiff commenced action against the defendant seeking damages for personal injury sustained as a result of the defendant's alleged negligence.

The Plaintiff states in his statement of claim that:

i. He was an employee of the defendant in its coffee factory. As a result of exposure to coffee dust he developed a persistent cough.

ii. He sought treatment from various hospitals but the cough persisted. A recommendation was made to the defendant that he be reassigned to another job which did not involve exposure to coffee dust.

iii. The defendant did not react to the recommendation by the hospital and failed to give the plaintiff alternative work.

iv. The plaintiff was compelled to resign from his employment on health grounds. He alleges that if it was not for the illness caused by the coffee dust, he would have been a fit and able person and would not have retired.

v. He claims damages for the deterioration of his health as a result of the exposure to the coffee dust. His level of incapacity was assessed at 33%.

The defendant served an Amended Defence dated 30th April, 2014. The defendant denies the plaintiff's allegation of negligence as follows:

a) The processing of coffee is done at a place which is away from the office where the plaintiff used to work.

b) The plaintiff despite being Factory Manager, used to spend most of the work time at the field.

c) Two of the employees of the defendant, Miss Lapken and Mr Kalasa have never complained of or developed any sickness related to coffee despite working in close contact with coffee.

d) No employee has in the history of the defendant ever complained of or fallen sick because of or purporting the same to be caused by coffee dust.

e) The defendant denies that there was no proper protection from coffee dust in the event that he could come in close contact with coffee dust. The defendant made arrangements which ensured that respirators/coffee dust protectors were available for use at all times by any of the concerned employees.

f) The plaintiff went to two hospitals which produced profoundly inconclusive reports which did not medically link the cause of the plaintiff's illness to coffee dust; consequently, the plaintiff did not and does not have medical information that specifically and scientifically points to the coffee dust as the cause of the plaintiff's illness.

g) The recommendation to remove the plaintiff from the factory had no medical basis; further, the defendant had no vacancy in any of its departments to accommodate the plaintiff.

I wish to bring out part of the Statement of Claim from paragraph 15 for reasons I will state later.

15. The Plaintiff contends that save for the illness due to the coffee dust the plaintiff would have been a fit and able person and not liable to retirement at the age of 47.

16. The plaintiff therefore claims damages for the deterioration in health as a result of exposure to the coffee dust based on 33% incapacity.

17. The plaintiff further claims compensation for future deterioration of health and loss of earning capacity as a direct consequence thereof.

18. The plaintiff further contends that he would not have been prone to future illness of this nature but for the environment in which the defendant placed him.
19. The plaintiff repeats paragraph 7 hereof and further states that the doctor recommended that the plaintiff stop using a motor bike to help improve upon his health but this advice was ignored and or not attended to by the defendant.
20. Wherefore the plaintiff claims exemplary damages.
21. The plaintiff claims further for other relief which the court might consider appropriate in the circumstances.
22. The plaintiff claims the following special damages...
23. And the plaintiff claims costs of this action.

Issues for determination are as follows:

I. Whether or not the defendant owed the plaintiff a duty of care.
II. Whether or not plaintiff's injury was as a result of defendant's failure to discharge its duty to the plaintiff.
III. Whether or not the defendant's negligence materially increased the plaintiff's risk of getting the disease that he suffered from.
IV. Whether or not the defendant took the necessary steps that would have brought a material reduction in the risk of disease posed to the plaintiff.
V. Whether or not as a result of the defendant's breach of duty, the plaintiff is entitled to compensation in damages for the injury sustained.

The burden of proof in civil matters rests on the party who asserts the affirmative. The standard of proof is that on a balance of probabilities. In **Miller v Minister of Pensions** (1947) 2 All ER 372, Denning J said:

> *"...That degree is well settled. It must carry a reasonable degree of probability, not so high as is required in a criminal case. If the evidence is such that the tribunal can say, 'we think it more probable than not' the burden is discharged, but if the probabilities are equal it is not." See also the cases of* ***Mr Lipenga (Administrator of the Estate of Janet George) v Prime Insurance Co. Ltd*** *Civil Cause No. 1386 of 2005 and* ***Catherine James Kachale v Alisa Ashani and Annie Ashani*** *Civil Cause No. 2306 of 2004.*

Obviously the defendant had a duty of care under common law and statute as an employee of the defendant in the factory. Alderson .B explained the legal duty under common law as negligence, being the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or

doing something which a prudent and reasonable man would not do.

According to **Donaghue v Stevenson** (1932) A. C. 562, negligence must prove that:

1. The defendant owed plaintiff a legal duty of care.

2. The defendant broke his legal duty of care, and

3. The plaintiff suffered damage in consequence of the breach.

The defendant will owe a legal duty of care if he could reasonably foresee that his act or omission would cause loss damage to the plaintiff. That which is unforeseeable goes beyond the control of the defendant and therefore to place a legal duty on him would be unthinkable and unfair.

A duty under Statute is governed by the **Occupational, Safety, Health and Welfare Act Cap. 55:07** of the laws of Malawi which requires every employer to ensure the safety, health and welfare at work of all employees. The employer's duty is not to expose his employees to unnecessary and unreasonable risk. Simply put, the duty of the employer is to take reasonable care for the safety of his workmen (**Wilson and Clyde Coal Co Ltd v English** [1937] 3 All ER 628 at 644). It is better to bring out the Act which reads as follows:

1. It shall be the duty of every employer to ensure the safety, health and welfare at work of all his employees.
2. Without prejudice to the generality of an employer's duty under subsection (1), the matters to which that duty extends includes in particular
    a) The provision and maintenance of plant and systems of work that are safe and without risk to health;

b) Arrangements for ensuring safety and absence of risks to health in connection with the use, handling, storage and transportation of articles and substances.

My better understanding of the provision above is that once there is failure to ensure the safety, health and welfare of employers thereby rendering a risky situation which would worsen the health state of the employer who may already be suffering some ailment, the statutory duty is breached. All that plaintiff has to prove is that the environment in which he worked posed a great risk to his health.

I observe that the defendant has brought an interesting point that the statement of claim in paragraphs 16, 17 and 22 state that the deterioration of health of the plaintiff was caused by exposure to coffee dust. It neither pleads negligence nor the **Workers Compensation Act or the Occupational, Safety, Health and Welfare Act,** hence, plaintiff's claim has no basis in law at all. Pleadings guide the direction of the claim and the case and if the claim fails to state clearly particulars of the negligence or the head under which the claim is made, the claim is incomplete and wanting.

The most important element in any negligence case is to prove that the injury that the plaintiff suffered was caused by the breach of duty of care by the defendant. The pertinent question to ask is whether the coughing was caused or worsened by the coffee dust. Of most interest to me is document Exh. P5, from purporting to be from St Joseph's Hospital Nguludi, authored by Chimwemwe Msukwa, a Senior Clinical Officer. It is dated 4th November, 2008. The author PW2 admitted that he wrote the letter in his personal capacity yet there was a stamp for the Chief Medical Officer dated 2nd January, 2009. This is a worrisome contradiction. This means that it was not an official letter although bearing an official stamp. It did not originate from St Joseph's Hospital at Nguludi. This letter

deserves to be disregarded as a forged document. The document conclusively says that plaintiff was found with Chronic Obstructive Airways Disease yet he could not explain how he established that COAD was due to coffee dust. I am hesitant to accept this document as genuine and conclusive. It appears that it was deliberately made to help the plaintiff. Of all the exhibits, there was none that conclusively said that ailment of the plaintiff was due to coffee dust.

There would be no justification for me to continue looking at the merits of the case after a finding that negligence and statutory breach of duty of care were not pleaded and I have observed that plaintiff's counsel did not even bother to address this aspect. However, I feel compelled to say that just because no one has suffered of the disease before in the history of the defendant company does not mean that the defendant cannot be liable. Plaintiff has just to prove that the ailment was caused by the coffee dust.

Save for what I have said above, I observe that indeed negligence (duty of care at common law) and statutory negligence or statutory breach of duty of care were not pleaded by the Applicant, instead, they have arisen in Defendant's submissions in which he is arguing his case. I was wondering if this is the right time to introduce the claims which were not pleaded without amending the statement of claim. Counsel for the Defendant did not argue the case with case authorities on failure to plead a claim, but just mentioned it as if in passing, that Plaintiff did not plead what he is claiming for. I would have wished him to have argued the issue of failure to plead adequately enough as he did on the issues of negligence and statutory breach of duty to take care.

In **Alex Monti v G4 Securicor Civil Cause No. 282 of 2013** Kenyatta Nyirenda J pertinently cited the case of **P.T.K. Nyasulu v**

Malawi Railways (1998) MLR 195 in which the Supreme Court of Appeal quoted with approval Sir Jacob in (1960) **Current Legal Problems** entitled "**The Present importance of pleadings**" as follows:

> *"As the parties are adversaries, it is left to each of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by their pleadings. Indeed, the Court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice ... In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called 'Any Other Business' in the sense that points other than those specified may be raised without notice."*

In **Martin Nyirenda v Press Agriculture Limited, MSCA Civil Appeal No. 16 of 2006 (unreported)** the court declined to grant the reliefs that were not repeated in the prayer clause though they were claimed in the writ and this was in accord with the statement

of law in **Bullen and Leakey and Jacob's Precedents of Pleadings at p.63**, citing **Lewis & Lewis v Durnford (1907)24 T. L. R.** that: "if in the prayer the plaintiff omits to ask for any relief or remedy claimed in the writ, he will be deemed to have abandoned that claim". In the **Martin Nyirenda case** there was total omission from the prayer of any mention of some of the reliefs that had been sought in the writ while in the instant case there was mention of damages in the prayer among the reliefs sought

Katsala J in **Chidzamkufa v Nedbank Malawi (Ltd) (No. 2) 2008 (MLR) Commercial Series at page 158** said that:

> *"If the Court were to do what the Plaintiff is asking for, it would be guilty of ignoring well settled principles of practice. It would render the whole essence of pleadings obsolete and/or nugatory. Such a practice would also create chaos and uncertainty on the kind of orders that will be made in the case before our Courts. It is desirable that parties should walk out of our courts with what they wanted when they came to Court. Likewise, it is desirable that the Defendants must be condemned on matters for which have forewarned and given an opportunity to defend themselves through pleadings..."*

In his conclusion, Kenyatta Nyirenda J held that:

> *"...However, I hasten to add that the suit by the Plaintiff could also have been dismissed on the other ground advanced by counsel Mhango, namely, that the claims based on contract, negligence, trespass to good and inconvenience were not pleaded or properly pleaded by the Plaintiff and some of these claims were altogether omitted in the Plaintiff's prayer for relief Reliefs cannot be granted outside the contents of the pleadings."*

In the spirit of religiously adhering to the principles of pleadings as advised above, the claim in negligence and breach of statutory

duty of care cannot stand and I dismiss the Plaintiff's application with costs accordingly.

Pronounced in open court this 20th day of August, 2018 at Chichiri, Blantyre.

M L Kamwambe
JUDGE