

JUDICIARY
IN THE HIGH COURT OF MALAWI
CIVIL DIVISION
PRINCIPAL REGISTRY
PERSONAL INJURY CASE NUMBER 227 OF 2016
BETWEEN
FLORA PHWETETE.....CLAIMANT
AND
MEDECINS SANS FRONTIERS FRANCE.....FIRST DEFENDANT
AND
UNITED GENERAL INSURANCE COMPANY
LIMITED.....SECOND DEFENDANT
Coram
Mr Bonongwe and Mr Mphote for the first defendant
Mr Msuku for the claimant
Ms D Nkangala, court official

RULING

When this case was set down for mediation, I dismissed the first defendant's statement of defence on the account of their failure to attend that session. The defendant now applies for the restoration of the defence. The application is made under Order 13 Rule 6 (3) of the Courts (High Court) (Civil Procedure) Rules under which a defendant whose defence is thrown out may apply for its restoration.

The central point in the argument by the first defendant is that the failure to attend the meeting was not intentional. The argument is that counsel, who was respecting them that time, did not inform them of the mediation. They were only

informed that the matter was to come for assessment of compensation for the claimant's injuries.

Counsel for defendant argued that the defendant only talked of the failure to attend the mediation yet they have been defaulting several court processes all along. Counsel recited the defaults on the part of the applying defendant. The defendant did not respond to the allegations. I, therefore, take it that it is true that the defendant has been in default of requirements in this case. However, the issue in this application has to do with the failure to attend the mediation.

A party, whose process has been thrown out on an account of failure to attend mediation, may apply to have the process restored. Not much is provided for under the rule. Quite apparently, the Court has to exercise discretion in allowing or disallowing such an application. The defaulting party has to convince the Court why the claim or the defence, as the case may be, should be restored.

The question, therefore, is whether the defendant has shown a good reason why they did not attend the mediation on the appointed day. The defendant argued that they did not know of the day of mediation. They later got information that their counsel forgot to inform them about the session.

It appears to me that the defendant was absent from the mediation on account of counsel's failure to inform them of the day of the meeting. We cannot put much blame on the defendant. I am convinced that they were not aware of the mediation session.

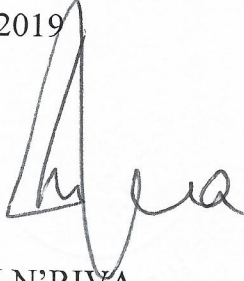
I, therefore, allow the application to restore the defence. I restore the defence and set aside the judgement I entered. The next question is the next step to take. Next step is mediation. However, in my discretion, I consider that mediation is not worthwhile. I refer the matter to trial before another Judge on whether the first defendant is liable for the injuries that the claimant suffered.

Finally, let me touch on the issue of costs. The claimant asked for costs in case I restore the defence. Costs are discretionary. In exercising discretion to award costs, the Court looks at the conduct of the parties. The claimant outlined acts of the first defendant in relation to mediation. These include failure to attend mediation on one more occasion, and asking for the proposal for damages after getting which they did not respond.

I believe that the conduct of the defendant leaves a lot to desired. In the circumstances I order the first defendant to meet the costs of the claimant for mediation, preparation for assessment of damages and this application. There has been an allegation of several acts of omission attributed to the first defendant. As I said, the defendant did not reply to the allegations. I am convinced that the acts

of the defendant were inconsistent with the overriding objectives of the rules of procedure. Thus, they must pay the costs to be assessed if not agreed.

MADE the 22nd day of September, 2019

A handwritten signature in black ink, appearing to be 'J N'RIVA', written over a faint rectangular stamp.

J N'RIVA

JUDGE