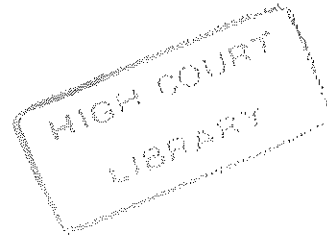


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**REPUBLIC OF MALAWI**  
**JUDICIARY**  
**IN THE HIGH COURT OF MALAWI**  
**PRINCIPAL REGISTRY**  
**CIVIL DIVISION**  
**PERSONAL INJURY CAUSE NO. 151 OF 2018**

**BETWEEN**

**MOLESI WADREK.....CLAIMANT**

**-and-**

**GALA ESTATE LIMITED..... DEFENDANT**

**Coram: Honourable Mr. Justice J. M. Chirwa**  
Mr. Supedi, Counsel for the Claimant  
Mr. Kara, Counsel for the Defendant  
Mrs. D. Mithi, Official Court Interpreter

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## JUDGMENT

### **1.0 Introduction:**

By his Summons, Specially endorsed, the Claimant makes the following claims against the Defendant:

- (i) damages for pain and suffering;
- (ii) damages for loss of amenities of life;
- (iii) damages for disfigurement;
- (iv) special damages in the sum of **MK10,500.00**, being the cost for procuring a medical report; and
- (v) costs of the action.

And by its Defence dated the 14<sup>th</sup> day of June, 2018 the Defendant has denied the Claimant's alleged claims.

When the action came for mediation before **N'riva J** on the 11<sup>th</sup> day of October, 2018 mediation was terminated with the following as issues for trial:

- “(a) whether negligence by the Defendant led to the injuries to the Claimant;
- (b) whether the Defendant breached Section 13 of the Occupational Safety Health and Welfare Act;
- (c) if the answers are in the positive, whether the Claimant is entitled to damages.”

### **2.0 Background:**

The Claimant was at all material times an employee of a company called **Namadzi Tobacco Company Limited** at one of its estates called **Gala Estate**. The name of Company was on or about the 18<sup>th</sup> of April, 2018 changed to **Gala Farms Limited**. On or about the 19<sup>th</sup> of March, 2017 at around mid-night in the course of his duties as a firebox operator the Claimant got injured by the door of the tunnel when he was feeding firewood therein. Three of his fingers, namely, the third, the fourth and the ring, were as a consequence crashed.

### **3.0 Statement of the Cases of the parties.**

#### **(A) The Claimant's Case:-**

It is the Claimant's case that the accident giving rise to the injuries, loss and damages were caused by a breach on the part of the Defendant, its agents or servants of its statutory duties under the Occupational Health, Safety and Welfare Act (Cap.55:07 of the Laws of Malawi). Here the Claimant is relying on the provisions of Section 13 of the said Act.

It is the further case of the Claimant that the accident was caused by the negligence on the part of the Defendant, its agents or servants. The particulars of negligence relied upon by the Claimant are as follows:

- (a) failing to take any adequate precautions for the safety of the Claimant whilst he was engaged upon his work;
- (b) failing to provide the Claimant with adequate protective gear whilst he was engaged upon his work;
- (c) directing and requiring the Claimant to carry out the work without providing him with suitable or effective equipment to protect himself e.g. boots, gloves, and when it knew or ought to have known that it was unsafe and dangerous for him to carry out the work without any equipment;
- (d) exposing the Claimant to a risk of damage or injury of which it knew or ought to have known.

**(B) The Defendant's Case:-**

It is the Defendant's case whilst denying the alleged breach of its statutory duty and negligence that if at all the alleged accident occurred, which it has also denied, then the same was caused solely by the negligence of the Claimant and/or contributed to by the Claimant himself. The particulars of the alleged negligence or contributory negligence being relied upon by the Defendant are as follows:

- (a) failing to take heed of his surroundings so as to prevent injury to himself;
- (b) failing to take any or adequate measures for his own protection to prevent injury;
- (c) failing to follow set procedures in the execution of his duties;
- (d) failing to use or use effectively tools provided for the execution of his duties;  
and
- (e) failing to understand the danger arising from the risk he put himself to voluntarily accepted the risk of injury arising from each and every one of the acts and commissions complained of in carrying out the work.

It is the further case of the Defendant that the Defendant is a none entity and unable to be sued because there is no entity/company in the name of Gala Estate Limited.

#### **4.0 The Issues for determination:**

The following are, in this Court's considered view, the issues for determination:

- (a) Whether or not the Defendant is guilty of the breach of its statutory duty, to wit, Section 13 of the Act and/or negligence;
- (b) If the answer to (a) above is in the positive, whether or not the Claimant suffered any injuries, loss and damage as a result of the said breach; and
- (c) Whether or not the Defendant is a legal entity capable of suing and being sued.

#### **5.0 The Evidence:**

To prove his case the Claimant called only one witness, the Claimant himself (CW1). On the other hand, the Defendant called two witnesses, namely, **Dyton Muzozoma** (DW1) and **Sandra Mpingasa** (DW2).

CW1 adopted his written statement and produced Exhibit, "C1", the Medical Report dated the 13<sup>th</sup> of March, 2018 as his evidence-in-chief. In his written statement the Claimant states as follows:

"

1. *My name is **Molesi Wadreck** and I reside in Chingale Village in Zomba District. I am 51 years old and until recently I have been in the employment of Gala Estate Limited as a Fire box operator based in their Farm at Thondwe in Zomba. I remember that on 19<sup>th</sup> March, 2017 I was involved in an accident whilst working at their farm in Zomba.*
2. *What happened was that I was smoking tobacco in burns using fire wood, at this time I was trying to fix a heavy log to the turmoil and the 2 middle fingers got cut. This was due to negligence of the Defendant of failing to provide adequate precautions for my safety, the Defendant did not provide me adequate protective gear whilst I was engaged upon my work. I was directed to carry out work without providing me effective equipment to protect myself such as boots, gloves and masks when they knew it was unsafe and dangerous for me to work without any protective equipment.*
3. *I was rushed to Mwandama Health Centre where later I was referred to Zomba Central Hospital where I got treated. As a result of this accident I underwent very painful experience though I was treated the fingers were giving me problem which later resulted to amputation as per attached Medical Report herein.*

4. *I have not been compensated by this reason I pray to this Honourable Court should find the Defendant liable on negligence and an award of reasonable compensation to me for same. That I make this statement concisely believing to be true for the best of my knowledge”.*

In cross-examination this is what CW1 told this Court:

He was employed as a firebox operator from January, 2017. He conceded that he had been taught how to execute his duties by his kapitao. He further conceded that at the time of the accident he was conversant with his job quite well.

He however, maintained that he was employed by Gala Estate Limited, the above-stated Defendant. He did not know the difference between a place of work and an employer. He further conceded that Gala Estate is a farm where he worked but he had never heard of a company called Namadzi Tobacco Company Limited.

He disputed the suggestion that all workers were provided with boots, work suits and gloves. He however, conceded that he had been given a metal rod for feeding firewood into the tunnel. He further conceded that had he worn the boots and the mask he would still have been injured. The accident could however, not have happened or been mitigated if he had worn some gloves. He maintained that there were no gloves at the estate at the time of the accident. He however, conceded that he was injured at the time when he was feeding firewood into tunnel (oven). He further conceded that he had been doing this type of work on several occasions before the accident happened and that he knew what to do in order to execute his duties safely. He was however, tongue-tied when it was put to him that the accident happened because he did not execute his duties as safely as he used to do. And when it was also put to him, he did not secure the door when feeding in the firewood, CW1 said that it was not the frame but the wood which caused the accident. He further disputed the suggestion that when feeding the firewood into the tunnel they were using a rod.

In re-examination, CW1 stated that he was not provided with protective wear at the time of the accident and that if he had been provided with the same the accident would not have happened.

DW1 on the other hand also adopted his written statement as his evidence-in-chief. This is what is stated in his written statement:

“

1. *My name is **Dyton Muzozoma**. I am a security officer employed by Namadzi Tobacco Company Limited since August, 2010. I have always worked as security officer. On the material day Wadreck was working at the tunnel, curing the tobacco. His specific task was to feed wood into the tunnel. As he was doing so, the door of the tunnel swung closed because he did not secure it open while feeding the fire wood.*

2. *All his colleagues had secured the doors of the tunnels while they were working so as to prevent the doors closing and to prevent injury. The door hit his finger and caused his injury. I went with him to the hospital.*
3. *He had worked for Namadzi Tobacco Company Limited for more than a year and was experienced at the time of the accident.*
4. *All staff are issued with gloves, gumboots and work suits. On the day Mr. Wadreck choose not to wear the gloves. All the staff are also trained by their respective supervisors when they start working for the company.*
5. *I verily believe that the statement is true to the best of my knowledge and belief and I know that if it will be tendered in evidence I shall be liable to prosecution if I wilfully state in it anything which I know to be false or do not believe to be true.”*

In cross-examination DW1 confirmed to this Court that he is employed as a security officer and that his duties are to assign the guards to their various duties. He further confirmed being present at the time the Claimant got injured. This was at the place where the Claimant was working. He further confirmed that he was the one who took the Claimant to the hospital and that they were three of them including the Claimant. He also confirmed that the company was previously known as **Namadzi Tobacco Company Limited**. He was at the place of the accident because there were some workers working thereat. He denied being the kapitao, and went on to state he is concerned with the security of the company property. The kapitao, Mr. Golozera, was also at the scene of the accident. He contended that as a security man he has no definite place where he stays.

He further confirmed that the Claimant did not wear any protective gear. He saw that the gloves were on the floor and not worn by the Claimant at the time of the accident where he had been for not less than 2 hours. It was also his evidence that although it is not his duty to distribute protective wear to the workers, as a security man, he is present when the same is being distributed. He maintained that protective gear like gloves, gumboots and work suits were distributed to the workers. He confirmed that the accident happened and that the Claimant got injured as a result.

In re-examination DW1 stated that gloves are provided to protect the workers from burns on the arms and that at the material time the gloves were laying on the floor.

DW2 also adopted her written statement and produced Exhibits “D1”, the certificate of Incorporation for **Namadzi Tobacco Company Limited** dated the 4<sup>th</sup> of July, 2014 Exhibit “D2”, the certificate for change of name from **Namadzi Tobacco Company Limited** to **Gala Farms Limited** dated the 18<sup>th</sup> of April, 2018 and

Exhibits “D3A” to “D3G” the various invoices as her evidence-in-chief. The following is what is stated in her written statement:

“

*My name is **Sandra Mpingasa**. I was employed by Namadzi Tobacco Company Limited, now Gala Farms Limited.*

- 1. I Namadzi Tobacco Company Limited was incorporated in July, 2014. A copy of the incorporation certificate is now produced and shown to me exhibited hereto and marked “SM1”.*
- 2. In April 2018 the Company changed its name to Gala Farms Limited. A copy of the amended certificate of incorporation is now produced and shown to me exhibited hereto and marked “SM2”. At the time the writ of summons in this matter was issued, the Defendant company was still known as Namadzi Tobacco Company Limited.*
- 3. I am also responsible for procurement of the company’s stock, including protective gloves which we procure from Phalombe Wholesalers in Limbe. All staff, including the Claimant, are issued with gloves, gumboots and work suits. If on the day Mr. Wadreck got injured, he was not wearing gloves it was because he himself choose not to do so.*
- 4. I verily believe that the statement is true to the best of my knowledge and belief and I know that if it will be tendered in evidence I shall be liable to prosecution if I wilfully state in it anything which I know to be false or do not believe to be true.”*

In cross-examination, the witness confirmed joining **Namadzi Tobacco Company Limited** as an Accountant in 2016 and that the Company was incorporated in 2014. She further confirmed that Gala Estate was previously owned by **Kamphonje Estate Limited**. She further stated that she is responsible for procurement of items which are sent to the farm supervisors who in turn provide the items to the workers on the estate. She conceded that there is no guarantee that the items would get to the workers. She could thus not say if the Claimant was given the protective items. She conceded that she was not at the estate at the time of the accident and that her assertions in paragraph 8 of her written statement are what the supervisor told her. She could not dispute the suggestion that the Claimant did not receive the items.

There was no re-examination.

## 6.0 The Law:-

### (a) The Statutory Law.

Section 13 of the Occupational Health, Safety and Welfare Act which is alleged to have been breached by the Defendant provides as follows:

“13.

*It shall be the duty of every employer to ensure the Safety, Health and Welfare at work of all his employees.”*

### (b) The Common Law.

The burden of proving negligence is on the person who alleges it. And “when accidental harm is done, it is not for the doer to excuse himself by proving that the accident was inevitable and due to no negligence on his part, it is for the person who suffers the harm to prove affirmatively that it was due to the negligence of him who caused it. **Unless the plaintiff produces reasonable evidence that the accident was caused by the defendant’s negligence, then it is the duty of the judge to enter judgment for the defendant.**” see Salmond on Tort, 13<sup>th</sup> edition at page 445 quoted with approval by Villiera J in B. Sacranie v Escom Limited, Civil Cause No.717 of 1991.

*“It is the duty of an employer or acting through his servant or agents to take reasonable care for the safety of his workmen and other employees in the course of their employment. This duty extends to safety of place of work, the plant and equipment and the method and conduct of work. Briefly, the duty of an employer towards his servants is to take reasonable care for his servant’s safety in all circumstances of the case. Alternatively, the employer’s duty is that he must not expose his employees to unnecessary risk or unreasonable risk.*

*Therefore, where an employer has exercised all due care and yet a workman sustained injury through an inherent risk of employment, he can not recover damages against the employer because an employer is not liable in the absence of negligence.”* see: Nchizi v Registered Trustees of the Seventh Day Adventist Association of Malawi [1990] 13 M.L.R 303 at p.308.

## 7.0 Determination:

### (a) Whether or not the Defendant is guilty of the breach of its statutory duty and/or negligence.

The burden of proof in civil cases rests on a party who asserts the affirmative, hence the maxim: *ei qui affirmat non ei qui negat incumbit probatio* - see Joseph Constantine Steam-Shipline v Imperial Smelting Corporation Limited [1942]



A.C.154 at p.174 quoted with approval in Limbe Leaf Tobacco v Chikwakwa and Others [1996] M.L.R. 480 at p.484.

It is the evidence of the Claimant as per his written statement that he was not provided with protective wear. In cross examination the Claimant even went on to assert that there were no gloves at the estate at the time of the accident. On the other hand, it is the evidence of the Defendant through DW1 that the Claimant was in fact provided with protective wear. And DW2 produced in this Court Exhibits “D3A” to “D3G” which are invoices for the purchase of gumboots, padlocks, wire nails, roofing nails, hoes, filter dust masks, leather gloves, thinners, work suits, overalls, etc to show that the Defendant bought various items for use by its workers. The contents of the said Exhibits are here reproduced as follows:

<b>EXHIBIT NO.</b>	<b>DATE</b>	<b>INVOICE NO.</b>	<b>ITEMS PURCHASED</b>
“D3A”	07.02.17	7907	-Tube light 4ft. -Gumboots (6)
“D3B”	30.08.17	9751	-Padlock Brass -Wire Nails -Roofing Nails -Welding Rods -Kulimba Hoe -PVC Gloves (10)
“D3C”	13.08.16	6432	Filter Dust Mask (24)
“D3D”	09.01.17	7720	Leather Gloves (56)
“D3E”	24.08.17	9715	-Gumboots (40) -Thinners
“D3F”	14.01.17	7748	-Work Suit (18) -Gumboots (18)
“D3G”	09.08.16	6377	Overalls (24)

It should be evident from Exhibit “D3D” that the Defendant bought 56 leather gloves on the 9<sup>th</sup> of January, 2017. It is also evident from Exhibit “D3F” that the Defendant bought 18 gumboots and 18 work suits on the 14<sup>th</sup> of January 2017. And further, it is also evident from Exhibit “D3G that the Defendant bought 24 overalls on the 9<sup>th</sup> August, 2016. Thus, for the Claimant to have asserted in his cross

examination that there were no gloves at the estate at the time of the accident is a misstatement and quite untrue.

It is the further evidence of DW1 as per his written statement that “all staff are issued with gloves, gumboots and work suits”-(see paragraph 12). He reiterated his assertion that all the workers were given protective wear in cross examination and further stated that at the time the same are being given out, he is present. He even went further to state that the Claimant had at the time of the accident not worn the gloves because he (DW1) saw the same on the floor after the accident. DW1 was not controverted in his assertion which was, no doubt, very critical for the purpose of determining if there was indeed a breach of duty on the part of the Defendant.

This Court is inclined to believe DW1’s assertions in this regard. Indeed the Defendant having bought, say, 56 leather gloves on the 9<sup>th</sup> January, 2017 what could have been the plausible explanation for it not to have provided the Claimant with the same considering the fact that the accident happened 2 months after the same had been bought? No explanation has been proffered by the Claimant to this Court. Why would the Defendant have bought the same if not meant for use by its workers in the discharge of their duties? This Court has again, found no answer to the foregoing question.

It is in this regard the view of this Court that the Claimant has failed to discharge the burden of proof reposed on him. And the totality of the evidence before this Court is inclined to hold that the Claimant had at the material time been provided with protective wear such as leather gloves. The Claimant had however, and for reasons best known to him, chosen not to wear the same.

Consequently, this Court is not inclined hold the Defendant guilty of the breach of its duties, both under statute and at common law.

Strictly speaking, this should have been the end of the matter. But for the avoidance of any doubt this Court will proceed to consider the other two issues.

**(b) Whether or not the Claimant suffered any injuries, loss and damage as a result of the alleged breach.**

The Claimant in his written statement in paragraph 4 has stated as follows:

*“What happened was that I was smoking tobacco in burns using firewood, at this time I was trying to fix a heavy log to the turmoil and the two middle fingers got cut. This was due to negligence of the Defendant of failing to provide adequate precautions for my safety, the Defendant did not provide me adequate protective gear whilst I was engaged upon my work. I was*

*directed to carry out work without providing me effective equipment to protect myself such as boots, gloves and masks when they knew it was unsafe and dangerous for me [to] work without any protective equipment."*

It is worthy of note that throughout his evidence there is no place where the Claimant has explained how the fixing of a heavy log to the tunnel could have resulted in his 2 middle fingers being cut. It is also worthy of note that the Claimant in his cross-examination conceded that "he had been doing this type of work on several occasions before the accident happened and that he knew what to do in order to execute his duties safely." Indeed, if the failure on the part of the Defendant to provide him with gloves had been the cause of the accident, how come is it that the Claimant had on the previous occasions, and for a period of almost 3 months, managed to execute his duties safely?

It is, in this Court's considered view, that the more probable cause of the accident in this action was the Claimant's own failure to secure the open door for the tunnel as opposed to his failure to wear the gloves. This Court's view is fortified by the evidence of DW1 that "as he was doing so, the door of the tunnel swung closed because he did not secure it open while feeding the firewood". This also goes to explain why the Claimant failed to give any response when it was put to him by Counsel for the Defendant that the accident happened because he did not execute his duties as safely as he used to do.

There is no doubt in this Court's mind that working at the tunnel has an inherent risk since it involves the opening and closing of the tunnel where the firewood is fed into. And if the door of the tunnel is not secured at the time when the firewood is being fed thereto, the same can flip back and injure the worker in the process. The Claimant must, no doubt, have been fully aware of this risk.

It is trite that unless the Claimant produces reasonable evidence that the accident was caused by the Defendant's negligence, then it is the duty of the judge to enter judgment for the Defendant. -see **Salmond on Tort** and the case of **B. Sacranie v ESCOM Limited** (*supra*).

Thus, even if this Court had earlier held the Defendant guilty of the breach of its duty, it would thus have been constrained to further hold that the injuries, loss and damage, allegedly, suffered by the Claimant were as a result of the alleged breach.

**(c) Whether or not the Defendant is a legal entity capable of suing and being sued.**

The Defendant having asserted that "there is no entity/company in the name of Gala Estate Limited and that the Defendant is therefore, a non- entity and unable to be sued bears the burden of proving this assertion.

DW1 in his written statement has stated that he had been working for **Namadzi Tobacco Company Limited** since August, 2010 and that on the material day the Claimant was working at the tunnel, curing tobacco. And in his cross-examination he stated that previously the Company was called **Namadzi Tobacco**.

DW2 also in her written statement has stated that she was employed by **Namadzi Tobacco Company Limited**, now **Gala Farms Limited**. The Company was incorporated in July, 2014. She produced Exhibit "D1", a Certificate of Incorporation, to substantiate her assertion. She has further stated that in April, 2018 the Company changed its name to **Gala Farms Limited**. She further produced Exhibit "D2" as evidence of the change of name of the company. And in cross-examination DW2 confirmed the said year of incorporation of **Namadzi Tobacco Company Limited** and that she was aware of the change of name. She further confirmed the name of the estate at which the accident happened as **Gala** and that it was previously owned by **Kamphonje Estate**.

The evidence of the Defendant on the proper name of the company which had employed the Claimant was not controverted by the Claimant. And given the available evidence, this Court would be inclined to find as a fact that the correct name of the company which had employed the Claimant is indeed **Namadzi Tobacco Company Limited**. Further, that as per Exhibit "D2" the company only changed its name on the 18<sup>th</sup> of April, 2018, that is to say, 8 days after the commencement of these proceedings.

In the premises, the proper party to these proceedings should have been **Namadzi Tobacco Company Limited** and not **Gala Estate Limited**. And considering the fact that the new name of the company is **Gala Farms Limited** it would thus follow that **Gala Estate Limited**, the above-named Defendant, is not a legal entity capable of suing and being sued. This Court proceeds to so find.

There is however, no doubt in this Court's mind that since the Claimant was being represent by Counsel in these proceedings a proper party should have been cited as the Defendant after conducting a search in the companies register at the offices of the Registrar of Companies.

### **8.0 Conclusion:**

From the findings made above the Claimant's action can not be sustained on the grounds that:

- (a) the Defendant did not breach its duties, both statutory and common law.  
But even if the Defendant had breached any such a duty, which apparently is not the case, the accident giving rise to the injuries sustained by the Claimant was not caused as a result of the said breach; and

(b) even if the alleged injuries, loss and damage had been caused by the alleged breach of duty, which apparently is not the case, the Claimant has sued an entity which is incapable of suing and being sued.

Consequently, this Court proceeds to dismiss this action in its entirety. This Court is however, constrained to award costs to the above-named Defendant since the same is a non-entity. There will thus be no order as to the costs of this action. It is so ordered.

Dated this *8<sup>th</sup>* ..... day of *June* ..... 2020.

  
CHIRWA J  
JUDGE