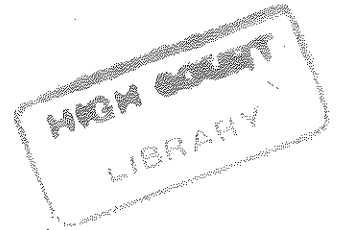




REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI



PRINCIPAL REGISTRY

PERSONAL INJURY CAUSE NUMBER 750 OF 2019

BETWEEN:

MUSTAFA NJOLINJO

CLAIMANT

AND

WALTER NOEL KASSAM

1st DEFENDANT

NICO GENERAL INSURANCE COMPANY LIMITED

2nd DEFENDANT

CORAM: JUSTICE M.A. TEMBO

Masanje, Counsel for the Claimant
Nanthuru, Counsel for the Defendants
Mankhambera, Official Court Interpreter

ORDER

1. This is the order of this Court on the claimant's application for judgment following the alleged admission of the claimant's claim by the 2nd defendant herein. The claimant indicated that the application is taken out under Order 12 rule 28 (4) and rule 32 (3) of the Courts (High Court) (Civil Procedure) Rules.
2. The application is supported by a sworn statement filed by the claimant. The defence contested the application by arguments.
3. The claimant commenced this matter on 6th September, 2019. His claim is for damages for pain and suffering, loss of amenities of life, special damages and

costs. This claim is for unliquidated damages in that damages at large and is not for a specified sum of money.

4. This Court observes that the application is aptly taken out under Order 12 rule 28 (4) Courts (High Court) (Civil Procedure) Rules. The said Order 28 provides that:

(1) A party may admit the truth of the whole or any part of another party's claim.

(2) The party may do this by giving notice in writing, such as in a statement of case or by letter.

(3) Where the only remedy which the claimant is seeking is the payment of money, the defendant may also make an admission in accordance with— (a) rule 32; (b) rule 33; (c) rule 34; or (d) rule 35

(4) Where the defendant makes an admission as mentioned in paragraph (3), the claimant has a right to enter judgment, except where—

(a) the defendant is a person under a disability; or

(b) the claimant is a person under a disability and the admission is made under rule 33 or 35.

5. Order 12 rule 32 (3) Courts (High Court) (Civil Procedure) Rules alluded to by the claimant is not applicable in the present matter as the present matter does not concern an admission concerning a matter where the only remedy sought by a claim is the payment of a specified sum of money. Order 12 rule 32 Courts (High Court) (Civil Procedure) Rules provides as follows:

(1) This rule shall apply where—

(a) the only remedy which the claimant is seeking is the payment of a specified amount of money; and (b) the defendant admits the whole of the claim.

(2) The defendant may admit the claim by returning to the claimant an admission in the relevant practice form.

(3) The claimant may obtain judgment by filing a request in Form 5 and, where they do so—

(a) where the defendant has not requested time to pay, the procedure in sub-rule (4) to (6) shall apply; (b) where the defendant has requested time to pay, the procedure in rule 37 shall apply.

- (4) The claimant may specify in his request for judgment
 - (a) the date by which the whole of the judgment debt is to be paid; or
 - (b) the times and rate at which it is to be paid by instalments.
- (5) On receipt of the request for judgment, the Court shall enter judgment.
- (6) Judgment shall be for the amount of the claim, less any payments made, and costs—
 - (a) to be paid by the date or at the rate specified in the request for judgment; or
 - (b) if none is specified, immediately.

- 6. The claimant's claim is based on the tort of negligence by which the claimant alleges that the 1st defendant negligently drove vehicle in question herein and hit the claimant pedal cyclist who suffered injuries in the process.
- 7. The claimant notes that the defendants filed a defence in which they admitted being driver and insurer of the motor vehicle herein respectively but denied negligence on the part of the driver of the motor vehicle herein. Further, that the defendants denied the injuries suffered by the claimant.
- 8. The claimant observes that subsequently, the defendants wrote a letter to the claimant's lawyers, dated asking that the claimant should go for a medical re-assessment of his injuries at a hospital of the insurers choice. In the view of the claimant that is an admission that he suffered injuries herein.
- 9. The claimant pointed out that in the letter from the insurer herein to the hospital in question, the insurer admits that the claimant got injured in the road traffic accident herein. Further, that the said letter instructs the hospital to conduct a re-assessment with a view to determining the degree of incapacity as a result of the injuries suffered by the claimant. Additionally, that the said letter stated that the insurer awaits the medical report and that hospital's fee note to enable them process the claim further.
- 10. The claimant then observed that the hospital in question produced a re-assessment report on the claimant and confirms the injuries he claimed he suffered herein.
- 11. The claimant indicated that it is his understanding of personal injuries claims, like the present one, that once negligence is denied as was the case in this matter, there is nothing further to process until a court judgment is passed finding for the claimant and requiring the defendant to pay compensation.

12. He indicated further that it is his understanding, that once negligence is denied, the defendant has nothing to do with the claimant's injuries and the degree of incapacity. Additionally, that the extent of the injuries and degree of incapacity do not go to the issue of liability but to the issue of the extent of damages to be paid.
13. The claimant asserted that it is his understanding that by requiring the medical report to process the claim further the defendants herein have gone past the issue of liability and want to determine how much they should pay to him and that this is an admission of liability for negligence.
14. The claimant added that it is in view of the foregoing that his lawyers wrote the defendants on 11th August, 2020 asking them to sign a consent order on liability. He observed that the defendants have neither signed the consent order nor reverted to the claimant.
15. The defendants responded that there is no admission of liability in the circumstances and that judgment on admission should therefore not be entered.
16. The claimant replied that in the event judgment on admissions is declined then mediation should be terminated and the matter should be escalated to scheduling conference for trial. The defendants opposed this view. They asked that the matter proceed to mediation.
17. This Court is well aware of the settled law on judgment on admission. The admission that will warrant judgment is one that is clear and unequivocal. Such admission may be either express or implied. See *SE Masauli v Malawi Congress Party* [2007] MLR 277 (SCA).
18. There appears to be no clear and unequivocal admission of liability in this matter. All that the defendants sought was to understand the injuries of the claimant with a view to processing the claim further. No definite position was communicated as to admission of liability. Admission of liability cannot be implied in the circumstances where the defendants wanted to process the claim. The defendants were undertaking a process. No final decision was made or communicated at this point. Upon processing the claim, the defendants were to advise on settlement. It is open to the defendants to settle the claim without admitting liability and such a decision could be informed by the examination of the injuries.
19. If this Court were to hold the defendants liable in the circumstances of this case, that would not be just as it would stifle the public policy of the law that encourages settlement of disputes. Defendants would be afraid to seek

verification of injuries allegedly suffered by claimants and that would have a chilling effect on processes that enable defendants to consider settlement of claims.

20. The application for judgment on admissions is accordingly declined with costs.
21. On the matter of mediation, this Court notes that in the present matter the defendants filed a defence in September, 2019. We have the application for judgment on admissions a year after that. In March, 2020 the defendants got a verification of the claimant's injuries but up to date no decision has been taken on settlement. On the foregoing facts, in this matter, it appears to this Court that taking this matter to mediation will simply result in unnecessary delay.
22. This Court is buttressed in the foregoing view considering the provisions in Order 13 rule 2 Courts (High Court) (Civil Procedure) Rules which is couched in the following terms:

(1) Subject to sub rule (2), all proceedings shall first go through mediation in accordance with this Order.

(2) This Order shall not apply to proceedings—

(a) in a matter where by law or practice, the trial is expedited;

(b) in an application for summary judgment;

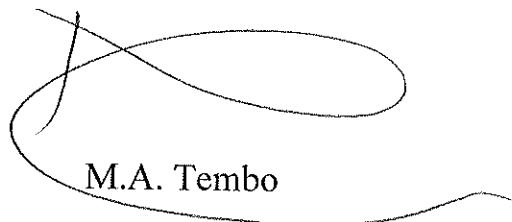
(c) in an application for judgment on admission; or

(d) where the Court, in its discretion, so orders.

23. Firstly, on an application for judgment on admissions a matter shall not go through mandatory mediation in terms of Order 13 rule 2 (c) Courts (High Court) (Civil Procedure) Rules. More importantly, as is the case in the present matter, this Court has discretion to order that this matter shall not go through mediation as provided in Order 13 rule 2 (d) Courts (High Court) (Civil Procedure) Rules. Like with every discretion, such must be exercised judicially, that is, for good reasons.

24. Given the lapse of time since the filing of the defence and the present objection to admit liability by the defence, it is ordered that this matter proceed to trial and the claimant shall proceed to file a notice of scheduling conference within seven days.

Made in chambers at Blantyre this 17th November 2020



M.A. Tembo
JUDGE