



REPUBLIC OF MALAWI  
IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NUMBER 204 OF 2013

**BETWEEN:**

**RAINER FRANZEL**

**CLAIMANT**

**AND**

**MALAWI TELECOMMUNICATIONS LIMITED**

**DEFENDANT**

**CORAM: JUSTICE M.A. TEMBO**

Ngwata, Counsel for the Claimant  
Banda, Counsel for the Defendant  
Mankhambera, Official Court Interpreter

**JUDGMENT**

1. This is this court's decision following a trial of this matter on the claimant's claim for damages due to the loss occasioned to him when his residence's brick wall fell allegedly due to the careless excavation made by the defendant directly behind to the said brick wall. He claims the particulars of loss to be K2 248 688.00 cost of erecting the fallen brick wall and K41 000.00 the cost of professional evaluation of the cause of the collapse plus interest on the foregoing sums at 3% above base lending rate from December, 2012 when wall fell to date of payment. He also seeks general damages.

2. The defendant denied excavating the land directly behind the claimant's brick wall. It asserted that the last time it excavated a trench near the claimant's wall was in 2001 and that the trench was duly compacted and stabilized. It asserted further that the trench which was excavated directly behind the claimant's wall was not so excavated by the defendant and that it was this new trench which acted as a water passage and coupled with the claimant's negligence led to the weakening of the claimant's brick wall and hence its collapse.
3. The defendant asserted that the particulars of the claimant's negligence were that he built a brick wall without weep holes and failing to take measures to avoid the water weakening the wall.
4. The claimant and the defendant both offered evidence. The critical part of the evidence in the disposition of this matter is indeed whether the defendant is the one that negligently did the excavation directly behind the brick wall in 2010 as alleged by the claimant.
5. As submitted by both parties, the burden of proof in such matters is on a balance of probabilities and he who asserts the affirmative bears the same, and in the present case it is the claimant. See *Nkuluzado v Malawi Housing Corporation* [1999] MLR 302 and *Miller v Minister of Pensions* [1947] All ER 372.
6. As correctly submitted by both parties, for a claim of negligence to succeed, the defendant must owe a duty of care to the claimant not to do or omit to do a thing which a reasonable person having the claimant in contemplation might reasonably foresee to be injurious to the claimant. Authorities abound for this trite position. In an action claiming negligence the claimant must show that there was a duty of care owed to her, that the duty has been breached and that as a result of that breach of duty the claimant has suffered loss and damage. See *Mkandawire v Ziligone* [1997] 2 MLR 134, 144.
7. The claimant's evidence was that he never saw anyone do the excavation from inside his compound. What he saw was that his brick wall had collapsed and that a trench appeared to have had been recently excavated and backfilled directly behind the wall and had no proper compaction which led to water pooling up and weakened the claimant's 20-year-old brick wall.
8. The claimant essentially presumes that the defendant must be the one that did the excavation because the same follows the route taken by the cables laid by the defendant. The claimant therefore asserted that the defendant owed a duty

of care when doing the excavation. See *Mkandawire v Ziligone* [1997] 2 MLR 134, 144.

9. The evidence of the defendant is that it last laid cables in the area in 2001 and never went back to do further work in the area. And that therefore it is not responsible for the excavation in issue in this matter. It asserts that a relationship has not been established between itself and the claimant to lead to the duty of care claimed by the claimant in this matter.
10. This Court has thought long and hard about this matter. This Court agrees with the claimant that it is only logical that a conclusion be made that it must be the defendant that excavated the offending trench given that the pattern of the trench followed the path of the defendant's cables up to the manhole.
11. Whilst the defendant rightly submitted that it bears no burden of proof, the moment the claimant showed on a balance of probabilities that the evidence strongly points to the defendant excavating its cables herein, the evidential burden shifted to the defendant to explain away the facts as proved by the claimant. This is where the evidence of Mr Kawawa of the defendant comes in.
12. The defendant's witness in charge of works, Mr Kawawa, asserted that the defendant never came to this site after 2001. He was asked whether the defendant keeps an inventory of all works carried out by its contractors and where such work is carried out. He confirmed the existence of such an inventory. However, the said inventory was never brought before this Court to back up the defendant's assertion that the excavation of a trench showing its cables was not done by the defendant through its contractors.
13. In the foregoing circumstances, and contrary to the submission by the defendant, it was not enough for the defendant to simply assert that it was not responsible for the excavation when it was not forthcoming with its inventory to disprove a clear excavation along the path of its cables up to its manhole. The defendant did not even assert that the excavation was an act of vandalism or similar acts by third parties. The defendant was supposed to explain why a clear excavation along the path of its cables creating the offending trench herein was not done by it. This was not done.
14. In the premises, this Court agrees with the claimant that, on the evidence, the excavation was done by the defendant and a relationship existed between the defendant and the claimant which gave rise to a duty of care on the part of the

defendant herein. This is contrary to the submission by the defendant on the point.

15. The defendant disputed that the excavation is one that caused the claimant's wall to fall. It cast doubt on the evidence of the claimant's witness, an Engineer Mr Kanyoza, who testified that soil sample analysis taken in 2014 two years after the wall fell confirmed the claimant's assertion that the trench excavated by the defendant led to loosening of soil at the base of the claimant's wall and led to its collapse. The defendant successfully showed that the soil samples were taken by another person in the absence of the engineer and that it would be unsafe to rely on the soil analysis results.
16. However, this Court does not take lightly the engineer's opinion with regard to the cause of the fall of the claimant's brick wall that had been standing for 20 years and suddenly fell after the excavation herein. The engineer was emphatic that a brick wall that stood for 20 years cannot fall or collapse on account of its age as suggested by the defendant. The finding of this Court on the basis of pictures taken at the time of the collapse of the claimant's wall is also that a pool formed along the claimant's wall in the trench that run along the wall and this definitely softened the base of the wall as alleged by the claimant. This Court is prepared to maintain this finding on the basis of the claimant's evidence alone.
17. In view of the foregoing, this Court agrees with the claimant that the wall herein fell due to the negligent actions of the defendant who excavated a trench following its cables along the wall of the claimant. The backfilling of the excavation was not done with due care and attention and resulted in water pooling behind the claimant's wall and the eventual collapse of the claimant's wall that had previously stood strong for 20 years.
18. On the whole of the evidence, this Court finds that it is more probable than not that the defendant is responsible for what is claimed by the claimant. That is contrary to the submission by the defendant on the point.
19. In the final analysis, contrary to the defendant's submissions, this Court finds the defendant liable for negligence in this matter and accordingly enters judgment for the claimant. The claimant is entitled to damages.
20. On the question of damages, the defendant correctly submitted that special damages must be specially pleaded and proved. See *Govati v Manica Freight Services (Mal) Ltd* [1993] 16 (2) MLR 521.

21. It then submitted that the claimant failed to prove special damages pleaded because he stated in his evidence that the sums claimed as special damages were only estimates and not actual expenditures receipted for and also estimated lower sums in evidence as having been spent on the erection of the wall. The defendant asserted that the claimant having failed to prove special damages cannot seek to get general damages in this matter. It asserted that the claimant is bound by his pleadings as held in the case of *Venetian Blind Specialists Ltd v Apex Holdings Ltd* [2007] MLR 422.
22. This Court agrees with the submission that a party is bound by its pleadings as held in the case of *Venetian Blind Specialists Ltd v Apex Holdings Ltd* [2007] MLR 422. This Court observes however that the claimant sought special damages and general damages in this matter.
23. This Court agrees with the defendant that the claimant could not prove the special damages by way of the sums pleaded. However, although the claimant has not proved special damages it is open to him to have general damages that he suffered assessed in this matter. These are at large and these were also pleaded by the claimant. No authority was cited by the defendant to bar the claimant from proceeding to have the general damages in the circumstances of this matter. The value of the wall that fell herein is within the scope of general damages suffered by the claimant and which were pleaded. It would be a grave injustice to deny damages to be assessed in favour of the successful claimant where general damages were actually pleaded. This assessment shall be done before the Registrar.
24. The claimant sought interest on the special damages pleaded being the Engineers costs and the cost of erecting the brick wall. Given that these were not proved specially this claim fails.
25. Costs normally follow the event and shall therefore be for the successful claimant.

Made at Blantyre this 15<sup>th</sup> February, 2021.



M.A. Tembo  
**JUDGE**

