



REPUBLIC OF MALAWI  
**IN THE HIGH COURT OF MALAWI**  
PRINCIPAL REGISTRY  
**CIVIL CAUSE NUMBER 325 OF 2017**

**BETWEEN:**

DAVISON MADYO.....CLAIMANT

**AND**

SABLE FARMING COMPANY LIMITED.....DEFENDANT

**CORAM: WYSON CHAMDIMBA NKHATA (AR)**

Mr. Mzembe- of Counsel for the Claimant

Mr. Sambakunsi- of Counsel for the Defendant

Ms. Chida- Court Clerk and Official Interpreter

**RULING**

*INTRODUCTION*

This is a ruling following the defendant's application to separate claims and remove defendant as a party to and/or strike out the claim for negligence. The application is taken under order 10 rule 1 and 2 as read with order 6 rule 8 and 10 of the Courts (High Court)(Civil Procedure) Rules, 2017, the proviso to section 4 of the Limitation Act and under the Court's Inherent Jurisdiction. The application is supported by a sworn statement sworn by Omega Sambakunsi and another responding to the claimant's sworn statement in opposition of the same. The claimant through Counsel Paul Mzembe vehemently opposes the application. They filed a sworn statement in opposition to that effect.

*BACKGROUND*

Apparently, the Claimant was injured on December 17, 2013. The Ministry of Labour issued its Form W.C. 6 (Compensation award) on 2<sup>nd</sup> June, 2014 and instructed the Defendant to remit payment of

MWK107,908.20 not later than 2<sup>nd</sup> July, 2014. The Respondent however did not pay the Claimant the said amount. The claimant filed summons on 3<sup>rd</sup> October, 2017 and were served on the Defendant on 2<sup>nd</sup> November, 2017. On 3<sup>rd</sup> November, 2017, the Defendant, sent the Claimant's Legal Representatives a letter, via email, asking that its insurers, United General Insurance Limited (UGI) be added as a party and, by response dated November 10, 2017, the Defendant was informed that they were at liberty to add UGI as a party. The defendant has now brought the application herein arguing that the action is statute barred. They further move the court to grant an order separating the claims and simultaneously make an order removing the Defendant as a party to and/or striking out the claim for negligence, breach of statutory duty and all the claims naturally flowing from these two claims.

### *THE LAW AND ANALYSIS*

The starting point should be a look at the relevant provisions of the Limitation Act. The claimant's claim is for damages for negligence and breach of duty. In terms of section 4 (1) of the Act it ought to have been commenced within 6 years from the date the cause of action arose. The section has a proviso which provides that in the case of actions for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under any written law or independently of any such contract or any such provision) where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to any person, this subsection shall have effect as if for the reference to six years there were substituted a reference to three years.

From the foregoing, actions for damages for negligence and breach of duty, would be statute barred if not brought before the expiry of three years from the date on which the cause of action arose. According to the information before this Court, the action ought to have been commenced, latest, by 3<sup>rd</sup> July 2017. Counsel Sambakunsi submits that paragraph (b) of the Form WC6 clearly states that the K107,908.20 was to be paid by the Defendant not later than 2<sup>nd</sup> July 2014. Thus, this claim would have become statute barred on 3<sup>rd</sup> July 2017. However, Counsel Mzembe contends that the Claimant's present action is not for negligence or breach of duty stemming from the date on which the Claimant was injured. He argues that the Claimant's present action is for:

1. the Defendant's breach of statutory duty that resulted from the Defendant not ensuring that the Claimant had worker's compensation cover; and, most importantly, its failure to ensure that the Claimant was paid the assessed compensation; and,
2. the Defendant's negligence in failing to ensure that the Claimant was justly compensated for his injuries by failing to act with due care and diligence in processing the Claimant's [Workers Compensation assessed] claim; and by wilfully and/or fraudulently representing to the Claimant

that its insurers were processing payment - with the illicit intent to defraud and/or avoid paying the Claimant for his injuries.

The issue before me is whether in the circumstances the claimant's cause of action can be deemed to have accrued on the date the defendant and or its insurer fell in default of payment of the compensation in accordance with Form WC6 clearly states that the K107,908.20 was to be paid by the Defendant not later than 2<sup>nd</sup> July 2014. Counsel Mzembe argues that the Claimant's present claim, arose, and the limitation period would have started to run, when/if the Claimant came into knowledge of the Ministry of Labour's Form W.C. 6 (assessed compensation) and, specifically, from the deadline the said Form W.C. 6 gave for payment, to wit, 2<sup>nd</sup> July, 2014. He submits that the Defendant concealed the fact that it was supposed to have paid the Claimant by 2<sup>nd</sup> July, 2014 by representing to the Claimant that its insurers General Alliance Insurance Limited (GAI) were processing payment - for a period exceeding 3 years.

Essentially, the claimant's case is predicated on fraud on the part of the defendant. They submit that the Defendant was not being honest in its representations to the Claimant and this was only discovered on October 2, 2017, when the Claimant received a response from the insurers denying covering the Defendant during the period that the incident occurred. The claimant evokes section 25 of the Limitation Act which provides that where the fraud of the Defendant conceals the right of action, the period of limitation does not begin to run until the Claimant has discovered the fraud. In this case, the claimant submits that the discovery of fraud was on October 2, 2017 and they filed the instant action a day later alleging breach of statutory duty and negligence as relates to the assessed compensation payment.

This court is of the view that much as the claimant's Statement of Case seems to be speaking to the circumstances under which the Claimant was allegedly injured, it would appear he was labouring under the belief that the compensation was going to be paid as assessed under the Workers Compensation per exhibit **DML#1**. One way or the other, the issue of fraud as pleaded by the claimant seems to claim a position in this matter. Nonetheless, this court is mindful that the issue of fraud is an issue whose veracity must be proved at trial. The court has been brought to the attention of the case of **Kaunda v Mhango & Ors** [2018] MWHC 986 in which it was stated that the mere appearance or manifestation of fraud or mistake, that is apparent herein, ought to be sufficient for purposes of the application herein. The position is impeccably and I adopt it entirely. In the circumstances, therefore, the Defendant's averment that the negligence and breach of statutory duty are statute barred cannot stand.

Further to that, I wish to concur with the claimant in that a separation of the claims in the instant matter, 4 years after the matter was commenced would also work an injustice to the Claimant, as commencing the same now, in the Industrial Relations Court, would result in the matter thereat being statute barred. Further, the Defendant is an integral party to this action, all allegations being made against it, its conduct

as well as the claim of fraud, such that removal of the Defendant from this action would be tantamount to dismissing the Claimant action, without adjudication of the substantive issues – which would not be in the interests of justice.

In the circumstances, it is necessary that this claim must proceed to mediation. I so order. Costs shall be in the cause.

DELIVERED IN CHAMBERS THIS 23<sup>RD</sup> DAY OF AUGUST 2021

  
**WYSON CHAMDUMBA NKHATA**

ASSISTANT REGISTRAR