IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO. 287 OF 1995

BETWEEN:

L. KACHANDE.....PLAINTIFF

- and –

NORSE INTERNATIONAL.....1ST DEFENDANT
ROYAL INTERNATIONAL INSURANCE
HOLDINGS LIMITED.....2ND DEFENDANT

CORAM: **KATSALA J**,
Absent of the counsel for the plaintiff
Mr Hara of counsel for the defendant
Mr Mdala, official interpreter

Katsala J,

JUDGMENT

By a writ of summons issued on 24th February 1995, the plaintiff claims from the defendants the sums of K45,033.07 and K15,643.43 being cost of repairs to his motor vehicle and hiring charges respectively. The plaintiff alleges that on or about 4th November 1994, his motor vehicle collided with the first defendant's motor vehicle at Newlands along the Limbe-Thyolo road. He alleges that the collision was caused by the negligence on the part of the first defendant's driver one De Sa. The particulars of negligence are set out in the statement of claim. The defendants deny negligence as alleged or at all and allege that the collision was solely caused or contributed to by the plaintiff's own negligence whose particulars are set out in the defence.

The parties agree on the following facts – on 4th November 1994 at about 9p.m. the plaintiff and the 1st defendant's servant or agent one De Sa were driving motor vehicles registration number BA 5050 and BJ 3667, respectively along the aforesaid Limbe-Thyolo road. The plaintiff was coming from Thyolo while De Sa was heading towards Thyolo. At Newlands, the two

motor vehicles collided. The collision was on the plaintiff's lane. Both vehicles suffered extensive damage. The cost of repairs to the plaintiff's motor vehicle was estimated at K45,033.07.

Three witnesses testified before the court. Two for the defence and the plaintiff himself.

The plaintiff's case is that on the material day he was driving his Houda Ballade motor car registration number BA 5050 along the Limbe – Thyolo road. He was coming from Luchenza heading for Limbe. At Chigumula near the turn off to Newlands Homes, he saw the 1st defendant's motor vehicle coming from the opposite direction. He dipped his lights but the other motor vehicle did not do likewise. He then saw that the 1st defendant's motor vehicle was heading towards him and collided with his car on his lane. His car was on the near side dirt verge at the time of the collision. His car sustained extensive damage. He reported the matter to the police who carried out their usual formalities. He repaired his car at a cost of K45,033.07. He hired a motor vehicle at a cost of K15,643.43 whilst his car was at the garage for repairs.

The defendants case is that on the material night the 1st defendant's servant or agent one De Sa was driving the 1st defendant's pick up motor vehicle registration BJ 3667 along the said road heading towards Chigumula from Limbe. At the turnoff to Newlands Homes he collided with the plaintiff's care which was moving in a zig zag way. The plaintiff swerved to the 1st defendant's lane and Mr De Sa swerved to his right in order to avoid a collision but unfortunately, the plaintiff also swerved back to his lane thereby colliding with the 1st defendant's motor vehicle. The defendants admitted that the collision took place on the plaintiff's lane.

The plaintiff's action is founded in negligence. In the case of **Blyth v Birmingham Waterworks Co**. (1856) 11 Ex.781 negligence was defined as the omission to do something, which a reasonable man, guided upon those considerations, which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent or reasonable man would not do. The question therefore is whether the plaintiff has proved on a balance of probabilities that the 1st defendant's servant or agent was negligent.

I have looked at the evidence critically and considered the submissions made. Let me state that the court was not able to hear from Mr De Sa himself on what happened on the material night because sadly he passed away before the trial of the matter had commenced. An attempt was made by the court to record his evidence before his death but was not successful because in the view of the Registrar, he was too ill to give his testimony. Consequently, the defendant's testimony on how the collision occurred came from a Mrs Harriet Kambalame who followed Mr De Sa on that road from as far back as Limbe Country Club to the scene of the accident.

In **Kachingwe v Mangwiro Transport Motorways Co. Ltd** 11 MLR 362, the court said that its duty in a case like this where the issue is the evidence of the plaintiff as against that of the DW, is to determine which one of the two explanations is more probable that the other.

The parties agree that the collision took place on the plaintiff's lane. This *per se* may be taken as evidence of negligence on the part of the 1st defendant's servant or agent. However, as the testimony from DW2 , Mrs Harriet Kambalame alleges, it is the plaintiff's manner of driving, namely his zig-zag fashion of driving, that caused Mr De Sa to swerve to the plaintiff's lane in an attempt to avoid a collision with the plaintiff. If this piece of evidence were accepted then the plaintiff would be held responsible for the collision In **Waydev Lady Carr** (1823) 2 Dowl & Ry.255 and **Wallace v**

Bergius, 1915 S.C 205 (whose full texts I have not been able to find) it was held that the fact that a collision occurs on a driver's wrong side of the road is not conclusive evidence of negligence against him, because the circumstances may be such as to make it reasonable for him to depart from the ordinary rule of the road. However, this places upon him the burden of proving that circumstances which made it reasonable for him to depart from the ordinary rule.

Mrs Harriet Kambalame told the court that she drove behind Mr De Sa from Limbe Country to the scene of the collision. She said Mr De Sa was driving very slowly such that she felt necessary to overtake him. But she did not. On several occasions whenever she wanted to overtake him, she backed out because she found it not to be safe so in the end she gave up and decided to trail him. However, she did not say why it was not safe to overtake Mr De Sa. Now the question that one would ask is why was it difficult if not impossible to overtake Mr De Sa when he was driving very slowly. What really made Mrs Kambalame to give up the idea of overtaking him and to resort to trailing such a slow driver? In my judgment there can be two possibilities. First, Mr De Sa may have been driving on the middle of the road thereby not leaving enough room for other vehicles to overtake him, or second he may have been swerving between the lanes of the road, and Mrs Kambalame found it unsafe to overtake him or indeed it may have been a combination of both.

In my judgment on the evidence before me I am inclined to believe that plaintiff's explanation of what happened as the truth. I do not believe the defendant's allegation that the plaintiff was driving in a zig zag manner at the time of the collision. In my view the defendants have failed to prove that the plaintiff created circumstances, which made it reasonable for Mr De Sa to swerve to the plaintiff's lane. In short I am satisfied that the plaintiff

has made out his case. I therefore enter judgment for the plaintiff for the sum of K60,676.50 and costs of the action.

PRONOUNCED in open court at Blantyre this 1st day of April 2005.

Katsala J

JUDGE