



IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

APPEAL CAUSE NO 4 OF 2009

BETWEEN

MACDONALD MALIRO

APPELLANT

AND

ADMARC LIMITED

RESPONDENT

CORAM

THE HONOURABLE JUSTICE D.F. MWAUNGULU

Mbeta (Mrs.), for the Appellant

M'bwana, for the Respondent

Mwanyongo, Official Court Interpreter

Mwaungulu J

JUDGMENT

On reading the record, from pleadings, processes, submissions and the order of the Principal Resident Magistrate, from who this appeal lies, it is necessary to restate some aspects of the procedure and mode of assessment created by the Workers Compensation Act. The understanding of this Act better resolves the appeal and matters of consternation that bedeviled the parties and, indeed, the court, since the tragic events prior to the contested awards. There is not much in narrating the story of the circumstances in which the appellant, Mr. Maliro, found himself. The most that we know, and that which suffices for resolving the matter, is that Mr. Maliro sometime on 4 April 2006 sustained injuries during employment with the respondent, the Agriculture Development and Marketing Corporation (ADMARC). The parties never agreed, as provided by section 26 of the Workers Compensation Act, on the compensation. The matter, eventually and presumably after all processes up to that point observed, was twice on the Worker Compensation Commissioner's desk.

On the first occasion, the Worker Compensation Commissioner, based on assessment of Dr Msukwa, an optician, assessed compensation at 40%. The Agriculture Development and Marketing Corporation paid. It is useful to reproduce Dr Msukwa's report:

“We have reviewed Mr McDonald Maliro who was involved in a road accident five months ago. During the accident he sustained a head injury. Our findings as of now are: Visual acuity of 6/9 both eyes; Failure of fusion in extreme gaze (that means he sees double vision when look in extreme).Our impression is that the double vision is as a result of head injury. We assess the functional loss to be at 40%.”

The Worker Compensation Commissioner made a second assessment at 50% based, this time, on a revised report by Professor Wirima. Professor Wirima's report read:

“I have studied the medial reports of the following:

1. Dr Khalid Mizar, Specialist Surgeon, undated
2. Dr Yusus Osman, Specialist Surgeon, dated 5th May, 2006 referring Mr Maliro to Dr Mizar.
3. Dr Chris Cockinos, Eye Specialist, undated
4. Dr M Amin Seedat, Specialist Physician, dated 28th April, 2006

It is concluded and agreed in the correspondence and reports from the above specialists that Mr Maliro was indeed involved in a car accident on the 4th of April 2006 in Malawi. He was in coma for several days and sustained paralysis of the right 3rd nerve.

The 3rd nerve injury started to recover while he was still in South Africa. There was no need for any neurosurgical intervention. It is also stated and agreed in the correspondence that Mr Maliro had pre-existing hypertension and diabetes. While in South Africa, his care was undertaken by Dr Seedat and he states that both the blood pressure and the sugar settled within 72 hours of Dr Seedat's management at Garden City Clinic.

He returned home from South Africa on the 16th of May, 2006 and I saw him on the 22nd

of May 2006. The right sided ptosis had improved with no residual deficit. However we noticed on that day that he had developed a lack of sense and smell. Meaning that the 1st cranial nerve had been damaged. We also noticed that he had developed a clot in the right calf. He was therefore admitted and put on blood thinning medication was discharged on 2nd of June, 2006. The blood thinning medication was taken up to the end of August, 2006. He has fully recovered from this clot... Thus we can conclude the following:

1. Road traffic accident sustained in Malawi on 4th of April, 2006.
2. Coma of several days duration resulting from the accident.
3. 3rd nerve paralysis resulting from the accident which has fully recovered.
4. 1st cranial nerve injury resulting from the accident which has not recovered to date is and is unlikely to recover.

Right calf deep vein thrombosis (clot) which resulted from immobilization as a result of the accident.(Hypertension and diabetes mellitus were already present at the time of the accident)...Based on the above 5 factors and according to the Worker's Compensation Act (No. 21 of 1990) First Schedule, schedule of percentage of incapacities, I put his percentage disability at 50%.”

Mr. Maliro on 23 December, 2008 on a without notice on the other party, obtained an order before the Principal Resident Magistrate under section 43 of the Worker Compensation Act for the award to be entered as a judgment of the court.

There is some discussion about what happened when the Agriculture Development and Marketing Corporation (ADMARC) applied to set aside the judgment entered under the Courts Act and the Worker Compensation Act. Once a judgment is entered under section 43 of the Worker Compensation Act, the course to take depends on the subject matter of the appeal. First, if all there was is a question of law on the judgment so entered, a party can appeal to this court without having to revert to the Worker Compensation Commissioner to reconsider the matter. Moreover, the Worker Compensation Commissioner can under section 39 of the Workers Compensation Act suo motu frame a case stated for consideration by the High Court. Under section 40 of the Workers Compensation Act the Worker Compensation Commissioner can, whenever the Commissioner has any doubt as to the correctness of any decision given by the Chief Resident Magistrate court or such other magistrate court as the Minister appointed under section 37 on any question of law in connexion with this Act, submit that decision to the High Court and cause the matter to be argued before it, in order that the High Court may determine the said question for the future guidance.

In this matter, before applying for the order of the Worker Compensation Commissioner to be a judgment of the court, the Worker Compensation Commissioner had already, as we see shortly, aggregated the awards as required under section 9 (2) of the Workers Compensation Act. Subject to sections 39 and 40 of the Workers Compensation Act, the Worker Compensation Commissioner was, so to speak, *functus officio*. The way to proceed was not, as the Agriculture Development and Marketing Corporation did, to apply to set aside the judgment so entered. This is more so because of the issue framed before the Principal Resident Magistrate, namely, whether the Worker Compensation Commissioner could, as he did, aggregate the two awards. This was a question of law.

The Principal Resident Magistrate, however, in his decision of 23 January 2009 thought that the Agriculture Development and Marketing Corporation should have, instead of applying to set aside the judgment, applied to the Worker Compensation Commissioner under section 34 have raised an objection so that the

Worker Compensation Commissioner under section 36 of the Workers Compensation Act so that the Worker Compensation Commissioner mount a formal inquiry and the Commissioner could have confirmed or varied the decision for which the objection was lodged or given such other decision as was in the Worker Compensation Commissioner's opinion equitable. The Principal Resident Magistrate's order was, in my judgment, sufficient for the requirements under section 32 of the Workers Compensation Act.

At the subsequent proceedings, the Workers Compensation Commissioner confirmed the earlier aggregation. The Principal Resident Magistrate, on appeal from the Worker Compensation Commissioner's award reversed the Worker Compensation Commissioner's award deciding that Professor Wirima's assessment covered all injuries including impairment to vision assessed by Dr Msukwa. This appeal is against the decision by the Principal Magistrate. The appeal to this court was held by Justice Manyungwa who never lived long to deliver the judgment. The parties, properly, in my judgment, agreed to have the matter considered on the papers.

There is nothing in the first ground of appeal that the Principal Resident Magistrate should have called the Worker Compensation Commissioner. Under sections 33 to 44 of the Workers Compensation Act, the Worker Compensation Commissioner exercises quasi-judicial functions from which the Workers Compensation Act creates a right of appeal, proceedings by the way of case stated to a Magistrate court, a further appeal to the High Court, proceedings by case stated or referral to the High Court. Had Mr. Maliro been seeking judicial review, no doubt, the Worker Compensation Commissioner, could have been a party. Before the Principal Resident Magistrate, however, the Agriculture Development and Marketing Corporation was appealing and there was no judicial review or case stated or referral to this court. A tribunal from where the matter is appealed from is *functus officio* and cannot, therefore, be made party to the appeal. For the same reason, probably from a different perspective, the second ground must also fail.

In the second ground Mr. Maliro contends that the Principal Resident Magistrate erred in setting aside the Worker Compensation Commissioner's award without hearing the Commissioner on how he made the award. First of all, it is clear how the Worker Compensation Commissioner arrived at the award: the

Worker Compensation Commissioner aggregated the awards. Secondly, the Workers Compensation Act does not, unlike the Supreme Court Act or the Supreme Court of Appeal Rules, allow for the court appealed from addressing it *de novo* on the matter appealed from. In the absence of specific provisions in the Workers Compensation Act and other general statutes, the Principal Resident Magistrate cannot be faulted for declining what Mr. Maliro now asks us to do.

The last ground on similar reasoning, albeit higgledy-piggledy, raises a point overlooked by the Principal Resident Magistrate. The inclusion of the Worker Compensation Commissioner as party to the appeal, as just demonstrated, is impermissible. Consequently, the argument that had the Worker Compensation Commissioner been called, the Principal Resident Magistrate would have had information to the effect that the Worker Compensation Commissioner was acting on distinct injuries is inconsequential. The Principal Resident Magistrate could only act, subject to fresh evidence from the parties, act on the record presented by the authority appealed from. That information, in any case, was on the record.

The record shows that the Worker Compensation Commissioner acted first on Dr Msukwa's report. That report related to loss of an eye. Subsequently, the Worker Compensation Commissioner acted on Professor Wirima's report which covered nerve paralysis resulting from the accident; first cranial nerve injury resulting from the accident and right calf deep vein thrombosis. These, as we see shortly, are distinct injuries under the First Schedule to the Workers Compensation Act. The Principal Resident Magistrate's conclusions on the report are put succinctly in this passage:

“Thirdly, out of the five factors which the professor considered is factor number 3 which indicates that “3rd nerve paralysis resulting from the accident which has fully recovered.” According to Davie – Ellen Chabner, The Language of Medicine, 5th Edition at Pg 301 the 3rd nerve affects eye movement. In the view of the court the 3rd nerve paralysis had an effect on the sight of vision of the plaintiff and therefore the

professor's report covered the issue of vision or sight of the plaintiff and at the time of the report it had healed completely. From the foregoing it is more probable that Professor Wilima's assessment included injuries pertaining to the vision or eye sight of the plaintiff than not. And therefore it is more probable than not that Professor Wilima's assessment included all injuries sustained by the plaintiff which included those with effect on eye or visual impairment the subject of Doctor Msukwa's assessment. I would therefore, hold that Professor Wilima's assessment covered all the injuries suffered by the plaintiff. It follows therefore that the Commissioner was wrong to aggregate the true assessment as they were not mutually exclusive when they are not.

Of course, the approach should not have been the Principal Resident Magistrate's, suggesting, rather obliquely, that the Worker Compensation Commissioner was wrong to aggregate because, in so doing, there was an overlap for the different the injury. Starting with the procedural aspects, it is just fortuitous that things happened the way they did in this matter. I would suggest that doctors, when assessing incapacity, should check list all injuries in the First Schedule to the Workers Compensation Act, marking between 0 to 100%, respectively, where there is no partial incapacity and where there is total incapacity. Where, nevertheless, there is incapacity but no total capacity each item in the First Schedule must be entered with its appropriate percentage incapacity. This is because of sections 7-9 of the Workers Compensation Act. Sections 7 and 8, respectively, of the Workers Compensation Act, deal with compensation for situations, not arising here, of fatal cases, on the one hand, and cases of permanent total incapacity. Section 8, when read with section 9 of the Workers Compensation Act however, should be cited for demonstrating the details and the form that medical personnel should complete under this legislation.

Had Dr Msukwa received the complete list of injuries under the Schedule, if he was indisposed, as it seems he was, not to assess other injuries, as covered by Professor Wirima, the form would have been completed by other specialists, in this case Professor Wirima, before sending to the Worker Compensation Commissioner. This never happened here. Instead, another report had to be made for injuries not covered by Dr Msukwa. There is nothing wrong with Mr. Maliro requesting for another report if, as he did, he felt that other injuries had not been covered. The Worker Compensation Commissioner can under section 32 of the Worker Compensation Act revisit an earlier award.

Section 8 of the Workers Compensation Act provides:

(1) Subject to section 10, where permanent total incapacity results from injury to a worker in circumstances in which compensation is payable, the amount of compensation shall be a sum equal to fifty-four times the monthly earnings at the time of the injury; but so, however, that in no case shall the amount of compensation be less than the equivalent of fifty-four times the worker's minimum monthly wages calculated in accordance with the relevant order made under the Regulation of Minimum Wages and Conditions of Employment Act.

(2) Where the permanent total incapacity is of such a nature that the injured worker must have the constant help of another person, compensation additional to that provided under subsection (1) shall be payable at the discretion of the Commissioner up to a maximum of one half of the amount which is payable under subsection (1).

Section 9 of the Workers Compensation Act, dealing with compensation in the case of permanent partial incapacity, provides:

(1) Where permanent partial incapacity results from injury to a worker in circumstances in which compensation is payable, the amount of compensation shall be—

(a) in the case of an injury specified in the First Schedule, such percentage of the compensation which would have been payable in the case of permanent total incapacity as is specified in that Schedule as being the percentage caused by that injury; and (b) in the case of an injury not specified in the First Schedule, such percentage of the compensation which would have been payable in the case of permanent total incapacity as is proportionate to the loss of earning capacity permanently caused by the injury in any employment which the employee was capable of undertaking at the time of his injury:

Provided that in no case shall the amount of compensation payable under this subsection be greater than the amount of compensation payable under section 8.

(2) Where more injuries than one are caused to the worker by the same accident, the amount of compensation payable under this section shall be aggregated, but not so as to exceed the amount which would have been

payable if permanent total incapacity had resulted from the injuries.

Under section 9 of the Workers Compensation Act, where, like here, there is no total incapacity or there is partial incapacity, the compensation is by aggregation, as the Worker Compensation Commissioner did in this case. Consequently, forms for purposes of the Act must catalogue and make percentage entries all possible injuries mentioned in the First Schedule.

FIRST SCHEDULE OF PERCENTAGE OF INCAPACITIES

Injury Percentage of Incapacity

Loss of two limbs 100

Loss of both hands or of all fingers and
thumbs 100

Loss of both feet 100

Total loss of sight 100

Total paralysis 100

Injuries resulting in being permanently
bedridden 100

Any other injury causing permanent total
disablement 100

Loss of arm at shoulder 70

Loss of arm between elbow and shoulder
60

Loss of arm at elbow 55

Loss of arm between wrist and elbow 50

Loss of hand at wrist 50

Loss of four fingers and thumb on one hand
50

Loss of four fingers 35

Loss of thumb—

both phalanges 35

one phalange 10

Loss of index finger—

three phalanges 10

two phalanges 8

one phalange 4

Loss of middle finger—

three phalanges 6

two phalanges 4

one phalange 2

Loss of ring finger—

three phalanges 5

two phalanges 4

one phalange 2

Loss of little finger—

three phalanges 4

two phalanges 3

one phalange 2

Loss of metacarpals—

first or second (additional) 3

third, fourth or fifth (additional) 2

Loss of leg—

at or above knee 70

below knee 60

Loss of foot 40

Loss of toes—

all of one foot 15

great, both phalanges 5

great, one phalange 2

other than great, if more than one toe
lost—each 1

Loss of sight of one eye 30

Loss of hearing in one ear 10

Total loss of hearing 50

Scars from injuries or burns which result in disfigurement shall be treated as resulting in from 0 to 50 per cent permanent incapacity, according to their size and location.

Total permanent loss of the use of a member shall be treated as loss of such member.

The percentage of incapacity for ankylosis of any joint shall be reckoned as from 25 to 100 per cent of the incapacity for loss of the part at that joint, according to whether the

joint is ankylosis in a favourable or unfavourable position.

Where there is a loss of two or more parts of the hand, the percentage of incapacity shall not be more than for the loss of the whole hand. Injuries which result in permanent incapacity but which are not included in this Schedule shall be assessed in relation to the percentage of incapacity specified in this Schedule, wherever possible.

If, as The Principal Resident Magistrate thought, Professor Wirima's assessments included Dr Msukwa's assessments, the form was incorrectly or incompletely completed. The Principal Resident cannot, however, be right that Professor Wirima's assessment covered Dr. Msukwa's assessment. It is incontrovertible that Dr Msukwa's assessment only covered incapacity in the eye and no other injuries included in Professor Wirima's assessment. Dr Msukwa's assessment, according to the First Schedule, relates to loss of sight. Dr Msukwa's assessment was that there was no total loss of sight in both eyes or one eye. The question is did Professor Wirima's assessment cover Dr Msukwa's assessments?

Professor Wirima's report does not say so. Professor Wirima is adamant that his assessment is based on the three categories he mentioned and no other. The Principal Resident Magistrate concluded that Professor Wirima's assessment included Dr. Msukwa's assessment because, relying on Davie-Ellen Chabner's book, The Language of Medicine, fifth edition, the injury to the nerves, probably described by Professor Wirima, could affect sight. This cannot be correct. If it is correct, it is contradictory to the finding by the Principal Resident Magistrate that the same nerve injuries affected the sense of smell whose organ is the nose, not the eye.

The Principal Resident Magistrate's conclusion, based on Chabner's book, should not have been made. Dr Msukwa's assessment was on loss of sight or vision. The Principal Resident Magistrate's conclusion that the 3rd nerve healed, the loss of vision or sight disappeared, assumes that loss of vision or sight can only

be caused by loss of a nerve and, therefore, ex hypothesi, if the nerve healed, as Professor Wirima, suggested, there was no loss of vision. Professor Wirima never said that paralysis to the 3rd never causes loss of sight vision, Chabner did. Chabner never suggested that loss of sight or vision is only caused by damage to the 3rd nerve. The eye has many tissues, apart from nerves; a direct damage to the lens or blood veins or arteries, for example, without damage to nerves, may affect sight or vision. It does not, therefore, follow that if the 3rd nerve was healed, sight or vision was restored. Professor Wirima acted on the nerves and cranial nerves. Professor Wirima does not suggest that Mr. Maliro had full or impartial vision. That, however, does not, if he never said it, prove that there was full or impartial vision. The only evidence we have is that of Dr Msukwa according to which, irrespective of what injury caused it, Mr. Maliro had 40% incapacity. The injuries here were from an accident and there cannot be a choice as to the tissue or part of an eye to be injured. Chabner does not suggest that injury to a nerve is the only case of loss of sight or vision.

It is important to recognise that in the first schedule, loss of sight is put as a distinct item with loss of sense of hearing. It must follow, therefore, that loss of any part that affects the sense of smell and indeed other senses must be a distinct injury which, although not provided specifically in the listed items, falls in the category of injuries which, obscurely inserted in the First Schedule, are “Injuries which result in permanent incapacity but which are not included in this Schedule” and should, therefore be assessed in relation to “the percentage of incapacity specified in this Schedule, wherever possible.”

If, as Professor Wirima suggests in the report, there was loss of smell, that loss must be assessed as a separate loss and assessed based on assessment of other senses. Loss of sight in both eyes, according to the schedule, is assessed at 100%, loss of sight in one eye is assessed at 30%. Loss of hearing is assessed at 50%. This suggests that losses of other senses, other than sight, are rated much lower. Loss of smell is total and, therefore, should be assessed at 50% or slightly lower than loss of the sense of hearing. The other injuries, according to Professor Wirima, there is full recovery, there was no loss of capacity. The 50% loss of capacity, therefore, must relate to the total loss of smell. Professor Wirima’s assessment of 50% for loss of smell is impeccable and in tandem with assessment for losses of other senses in the First Schedule.

The scheme of the Workers Compensation Act is that if injury to one part actually results in total loss of capacity, the incapacity is 100% in all circumstances, including where other incapacities are total, namely, 100%, or impartial, less than 100%.(Section 8 of the Workers Compensation Act).Where, however, there is impartial capacity, the Workers Compensation Act requires, as the Worker Compensation Commissioner did, aggregation, provided that the aggregation does not exceed 100% (Section 9 of the Workers Compensation Act).

The Worker Compensation Commissioner was, therefore, right to aggregate the incapacities. There cannot be an overlap of injuries under the scheme of the Act. If there are more than one injury which are total incapacity, namely, 100%, the award remains the same. Conversely, if there are injuries of different capacities, compensation, as long as the aggregated percentage does not exceed 100%, compensation bases on aggregation. The appeal, therefore, is allowed with costs to the appellant for here and below.

Made this 27th day of November 2015

D.F. Mwaungulu

JUDGE