

**IN THE HIGH COURT OF MALAWI  
LILONGWE DISTRICT REGISTRY**

**CIVIL CASE NUMBER 1099 OF 2002**

**BETWEEN**

**SOFINA MBEWE.....PLAINTIFF**

**-AND-**

**PRIME INSURANCE COMPANY LIMITED..... DEFENDANT**

**CORAM: SINGINI, J.**

**Khonyongwa, of counsel for the Plaintiff**

**Chipao, of counsel for the Defendant**

**Gonaulinji, Court Official**

**JUDGMENT**

I last heard this matter in chambers on 29<sup>th</sup> November, 2007, when I adjourned it for judgment which I now give. It is an appeal against the ruling of the Assistant Registrar dismissing an application by the appellant to set aside a default judgment obtained by the respondent against the appellant.

The appellant, an insurance company, was sued in that capacity by the respondent, Miss Sofia Mbeve, in a claim for damages for injuries the respondent sustained in a motor vehicle accident in which two vehicles collided. One of the vehicles, a Bedford Truck Registration Number BG 9962, was insured by the appellant. The accident occurred due to the negligent driving of the vehicle insured by the appellant which hit the rear of the other vehicle, a Ford Truck Registration Number BF 9800. The accident occurred on 26<sup>th</sup> August, 1999, at around 19:30 hours at or near Mzuzu University. Both vehicles were in motion going in the same direction towards Mzuzu coming from Ekwendeni. The respondent was a passenger on one of the two vehicles.

The appellant applied to have the default judgment set aside on two grounds, first, that it was irregularly obtained in default of defence in that the appellant had not been served with the writ of summons and therefore could not file a defence. Service was by post and the appellant claims to

have not received the writ. However, following the default judgment, the appellant was served with notices of assessment of damages on two occasions and acknowledged service with a clear marking of its company seal on the returned copy. The Assistant Registrar, rightly in my view, dismissed the ground of irregularity. The appellant has not sought to pursue that ground in this appeal.

The second ground for applying to have the default judgment set aside was that there was a defence on the merits to the suit and the defence on merit had a reasonable prospect of success, arguing that the respondent was a passenger on the vehicle insured by the appellant and that the policy of insurance covered the vehicle only as a goods carrying vehicle and did not extend liability for carrying passengers and therefore the appellant was not liable towards the respondent. The appellant relies on the accident report by the police which is clearly to the effect that the respondent was a passenger on the vehicle insured by the appellant, BG 9962, and this vehicle having been insured as a goods carrying vehicle the appellant disclaims liability towards the respondent as a passenger on that vehicle. The Assistant Registrar dismissed that ground too, holding that the respondent was a passenger on the other vehicle, BF 9800, and that therefore such disclaimer of liability by the appellant was not valid. The Assistant Registrar must have drawn his finding from the statement of claim on behalf of the respondent and from the pleadings by counsel for the respondent which throughout consistently presented the fact that the respondent was a passenger on the BF 9800 and the appellant, as insurer of the other vehicle which was at fault in the cause of the accident, was liable for third party risks towards the respondent.

The contradiction between the statement of claim and the police accident report alluded to in the skeleton arguments in support of the appeal regarding which vehicle the respondent was travelling in presents an issue for trial. The mistake of fact could be in either of those documents, and it may well be that the appellant may have a defence on merit to the action by the respondent with a reasonable prospect of success. It is the single issue in the matter. It is though an issue of a matter of fact which counsel, working together sincerely to pursue justice in the case, should be able to ascertain without the need for a trial and to come to some consent agreement.

This being an appeal from the Assistant Registrar, I have treated it as a rehearing of the application that was before the Assistant Registrar allowing me therefore sufficient discretion to determine the matter as the interests of justice require. I have come to the conclusion that there could

be a defence on merit to the action in this matter. I therefore give judgment allowing the appellant's appeal and I set aside the default judgment obtained by the respondent against the appellant.

**MADE** in chambers at Lilongwe District Registry this 11<sup>th</sup> day of April, 2008.

E.M. SINGINI, SC  
**JUDGE**