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IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY  
CIVIL CAUSE NO. 87 OF 2013

BETWEEN:

GOODSON THAWANI t/a TIT B SHOP ..... PLAINTIFF

-and-

CARLSBERG MALAWI LIMITED.....DEFENDANT

CORAM: HON. JUSTICE J.M. CHIRWA

Mr. Kamunga, of Counsel for the Plaintiff

Miss Phiri, of Counsel for the Defendant

Mr.H. Amos , Official Interpreter

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JUDGMENT

*Chirwa J*

(A) Statement of the cases for the parties

The Plaintiff's claim as per his Statement of Claim dated the 8th day of February, 2013 is for damages for (a) loss of business (to be assessed) , (b) breach of contract (also to be assessed) , (c) defamation (also to be assessed) and (d) costs of this action. The Defendant as per its Defence dated the 19th day of March, 2013 denies the Plaintiff's said claims.

It is the Plaintiff's case as per his Statement of Claim that he was at all material times the owner of a mini shop at Machinjiri known as Tit B Shop and has since 2004 carried on the said business as well as a customer of the Defendant, a company carrying on the business of manufacturing and selling of soft drinks, among others.

It is the Plaintiff's assertion in this regard that the Defendant had been supplying him with soft drinks since 2004 and that on 29th of October, 2012 he purchased from the Defendant soft drinks which had among them Fanta pineapple. It is the Plaintiff's assertion further, here relying on the Report dated the 15th of November, 2012 by Malawi Bureau of Standards, that the Defendant negligently and wrongfully caused to arise from one of the Fanta pineapple bottles purchased by him unpleasant foreign substance being pieces of potato crisps. The Plaintiff has given the particulars of the alleged negligence as follows:

*"5.1 failing to set up and/ or implement or properly implement measures to prevent foreign substances being put in the bottle(s) to avoid business loss to the Plaintiff,*

*5.2 failure to take precautionary measures to prevent the pieces of potato crisps being found in the bottle;*

*5.3 failing to exercise proper care in filling the bottle(s) with the appropriate liquids to prevent business loss to the Plaintiff;*

*5.4 failing to take care of the consumer(s) who were surprised by the potato crisps floating in the bottle and the resultant reputational business damage to the Plaintiff ."*

It is the Plaintiff's assertion further that on the 30th of October, 2012 a usual customer at his shop in full view of several customers bought the Fanta bottle which to his and other customers surprise including the Plaintiff himself turned out to contain the unpleasant substances before it was opened.

It is the Plaintiff's case also that the Defendant has also breached the contract [of sale] with him in terms of the Sale of Goods Act. The Plaintiff has also given the particulars of the alleged breach as follows:

*"7.1 .....the implied condition as to fitness for purpose in that the goods were not fit for purpose of reselling because they could not be consumed in the state they were;*

*7.2.....the implied condition of merchantability of quality in that the goods with the potato crisp inside were not of merchantable quality such that the Plaintiff was unable to resell them."*

It is also the Plaintiff's case that the adverse effects of the Defendant's acts have been such that customers have now shunned his shop since the incident on the 30th of October, 2012 and that he has also been defamed as a result of the foreign substance. The Plaintiff has also provided the particulars of the alleged defamation as follows:-

*"6.1 a customer who bought Fanta pineapple with foreign substance on 30th October, 2012 accused the Plaintiff of selling fake drinks;*

*6.2 several people thronged to the shop also accusing the Plaintiff of selling fake drinks and that they would not buy from his shop anymore;*

*6.3 a customer accused the Plaintiff in full view of other customers on 30th October, 2012 of "mixing super dip with water to make fake drinks" these words in respect of the act of the Defendant have greatly lowered the Plaintiff as an honest business man;*

*6.4 The Plaintiff has suffered reputational damage to his business."*

It is the Plaintiff's assertion further that the sales from his shop have plummeted since October 30, 2012 as a result of the negligence of the Defendant who put foreign substances in the drink as particularized.

On the other hand, it is the Defendant ' s case ( a) that it has not been supplying the Plaintiff with soft drinks since 2004 as alleged by him and (b) that it did not supply the Plaintiff with the said Fanta pineapple which, allegedly, contained deleterious chemicals or substances. Further, the Defendant while denying the assertion that it manufactured the said bottle of Fanta pineapple, contends as follows:

- "(a) it denies that it carries on the business with the knowledge or with the intention that its products should be consumed without any prior examination as alleged or at all;
- (b) [it] does not prohibit any consumer from examining its products prior to consumption;
- (c) its products leave its factory ready and safe f or consumption;
- (d) [it] takes reasonable care in the manufacture of its products."

Otherwise the Defendant has denied being negligent as alleged by the Plaintiff and the alleged loss and damage.

(B) **The Burden and Standard of Proof**

This being a civil action this Court is mindful that the burden of proof is on the party who asserts the affirmative, hence the latin maxim: **ei qui affirmat non ei qui negat incumbit probatio** - per **Viscount Maugham in Joseph Contantine Steamshipline v Imprerial Smelting Corporation Limited** [1942] A .C . 154 at p. 174. This Court is further

mindful that in civil cases the standard of proof is that on a balance of probabilities - see Denning J ( as he then was) in Miller v Minister of Pensions [ 1947] All ER 372 at p. 374.

(C) **The Evidence**

For the Plaintiff's case, four witnesses had been paraded, namely, **Goodson Thawani, (the Plaintiff herein, (PW1), Eliza Kazembe (PW2), **Seven Kamuloni** (PW3) and **Amon Matemba** (PW 4) . And for the Defendant's case there was only one witness namely, **Malizani Gamaliel** (DW1) .This Court will make reference to the evidence adduced on behalf of the parties to this action in the course of this judgment.**

(D) **Determination**

In the determination of this action this Court intends to consider the Plaintiff's claims based on the law upon which each claim is founded.

First, the claim founded on the tort of negligence

For the Plaintiff to succeed in this claim he needs to prove the following:

- (a) That there was a duty of care on the part of the Defendant to him;
- (b) That there was a breach of that duty by the Defendant; and
- (c) that damage resulted from the breach of that duty - see:  
**Donoghue v Stevenson** [1932] A.C, 562 approved by **Ndovi J in Kadawire v Ziligone & Another** [1997] 2 M.L.R. 139 at p. 144 .

(a) Was there a duty of care on the part of the Defendant to the Plaintiff?

The duty of a manufacturer like the Defendant herein was succinctly put by **Lord Atkin** in the case of **Donoghue v Stevenson** (supra) at p. 599 as follows:

*"A manufacturer of products which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form which they left him with no reasonable possibility of intermediate examination and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in injury to the consumer's life or property owes a duty to the consumer to take that reasonable care."*

The duty of care as stated above, in this Court's considered view, is owed to a consumer of the product and not any other person. There is no evidence before this Court to show that the Plaintiff herein was the consumer of the said Fanta pineapple. He was simply the seller of the said product. It would, therefore, seem to follow that the Defendant herein did not owe the Plaintiff herein any duty of care.

But in case this Court 's finding is erroneous and that there was in fact a duty of care owed to the Plaintiff, then it is necessary to consider, if there was (b) breach of such duty by the Defendant.

(b) Was there a breach of that duty by the Defendant?

It is the evidence on the part of the Plaintiff herein that the bottle of Fanta pineapple manufactured by the Defendant herein and purchased from the Plaintiff's shop by a certain customer, was found to contain some foreign substances, to wit, "pieces of potato crisps." PW3, Steven Kamuloni, a Director of Quality Assurance Services at the Malawi Bureau of Standards, produced Exhibit P5, a report of the

Bureau's findings after the said Fanta pineapple bottle had been delivered to the Bureau for verification of the contents thereof.

This Court is inclined to believe the evidence of the Plaintiff in this regard. But even if there was no such evidence, the evidence of DW 1 in cross - examination also confirms this fact. DW 1, as a matter of fact, conceded that this particular bottle contained foreign bodies. He further conceded that the Defendant offered an apology to the Plaintiff for the substances found in this particular bottle. And since the substances found in this particular bottle are substances which one would not reasonably expect to be found in such a bottle this Court would, in the premises, be inclined to find that there was a breach of duty on the part of the Defendant as a manufacturer of the said drink.

The fact that there was a breach of duty is however, not the end of the matter, there is need for the Plaintiff to prove that there was damage or loss resulting from that breach.

c) Was there damage resulting from the said breach?

It is the evidence of the Plaintiff as PW 1 that

*"18 My shop used to be highly patronized by several customers most of them parents who used to buy drinks for their children in the morning as their children were going to school;*

*19, This incident happened the same morning when several customers were at the shop;*

*20. My business reputation has been damaged; my sales have tremendously gone down since the incident on 30th October, 2013;*

*21. This is how my sales have been plummeted; For example sales for August 2012 K870,000.00; sales for September 2012*

*K930,000. 00; sales for October 20 12 K9 1 5,000.00; sales for November 2012 K330,000.00; sales for December 2012 K285,000. 00; sales for January 2013.....*

*23. In the month of December 2012 the sales continued to drop from K330,000.00 in November to K285,000.00 in December; copy of the sales records prepared by myself is attached and marked GT1 ."*

On the loss of business the Plaintiff (PW1) was generally corroborated by most of his witnesses, who told the Court that the Plaintiff has lost customers in that while the shop used to be patronized by a lot people prior to the incident, the same is no longer the case.

The question which Court finds pertinent to determine now is: with this evidence has the Plaintiff successfully proved that he suffered damage as a result of the breach of the duty of care, that is if there was indeed a duty owed to the Plaintiff , which this Court believes is not the case herein. This Court prefers to answer the foregoing question in the negative on the grounds that the wrong complained of is too remote, i.e. not sufficiently closely connected with the harm suffered by the Plaintiff . It is also the view of this Court that since the Plaintiff herein was not in the business of selling soft drinks only there cannot be any good basis for his customers to shun his shop merely because a particular Fanta pineapple bottle had been found with foreign substances, given that the Plaintiff is not the manufacturer of such a product but only an intermediary. If any loss of business were to result from such a bottle the same ought to be that of the Defendant as the manufacturer thereof.

It is, in the premises, the finding of this Court that the Plaintiff's claim as founded in negligence cannot be sustained. Firstly, because the Defendant did not owe him a duty of care and, secondly, because

the alleged loss of business and/or loss of profit is too remote. The Plaintiff's claim under this head can thus not be sustained.

Secondly, the claim founded in contract i.e. the breach of the implied condition of merchantability of quality.

There is no doubt in this Court ' s mind that there was a contract for the sale of the soft drinks between the parties herein with the Defendant herein being the seller and the Plaintiff herein being the buyer. This Court is, however, not inclined to accept the Defendant ' s denial that it has not been supplying the Plaintiff with soft drinks since 2004 because there is overwhelming evidence from all the witnesses before this Court, including DW1 that the Plaintiff was in the business of selling soft drinks. Where could the Plaintiff have got the drinks like the Fanta pineapple in this action considering that there is · no other manufacturer than the Defendant? It would seem to follow thus, that the implied condition that the soft drinks shall be of merchantable quality (see Section 16(b) of the Sale of Goods Act (Cap.48:01) applied to the contract of sale between the parties hereto.

The vexing question however, is: was the Defendant in breach of this condition? The evidence adduced on the part of the Plaintiff herein does not show if at all the soft drinks bought by the Plaintiff had foreign substances. In the absence of any such evidence this Court would be inclined to find that there was a breach only in respect of this particular bottle which was proved by the Malawi Bureau of Standards to have contained foreign elements/substances i.e. pieces of potato crisps. This is evident from the following evidence of PW3 , Mr Kamuloni:

"7 Mr. Goodson Thawani brought a Fanta pineapple bottle to MBS on 2ndNovember, 2012 and registered a complaint against

Carlsberg Malawi Limited regarding foreign substances in the bottle,"

Put simply, the breach of the implied condition of merchantable quality ought therefore, to be confined only to this particular bottle and not the whole consignment. Thus, any damages to be awarded to the Plaintiff, as rightly contended on behalf of the Defendant herein, ought only to be the cost of the one bottle of Fanta pineapple which is said to have contained foreign substances. There would in this Court's view be no basis for awarding the Plaintiff any damages in relation to any other bottles or loss of profits. Unfortunately, for the Plaintiff, the pleadings before this Court do not contain a claim for the cost of this particular bottle of Fanta pineapple. In the premises, this Court would find no basis on which to award the Plaintiff damages for the same.

As regards the claim for loss of profits this Court finds the following dictum of **Alderson B** when delivering the judgment of the Court of Exchequer in **Hadley v Baxendale** (1854) 9 Exch. 341 at p. 354 pertinent:

*" where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such a breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from the breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both the parties, at the time they made the contract, as the probable result of the breach of it."*

There is no evidence before this Court from which it can be reasonably inferred that the loss of profits being claimed by the Plaintiff herein is such as may be considered to be either arising

naturally, i.e. according to the usual course of things, from the breach of contract by the Defendant herein or such as may reasonably be supposed to have been in the contemplation of both the parties hereto, at the time the sale of the soft drinks took place as the probable result of its breach. It is the considered view of this Court that there is no reasonable connection between the alleged breach of contract and the loss of profits.

For the reasons given above this Court is thus not inclined to allow the Plaintiff's claim for the loss of profits in contract either.

Thirdly, the Plaintiff's claim founded in the law of defamation.

For the Plaintiff to succeed here, he needs to prove the following:

- a) That the statement was defamatory,
- b) That the statement referred to him, and
- c) That the statement was published to a third party.

After carefully reviewing the evidence adduced on behalf of the parties hereto it is the view of this Court that there is no evidence to prove that any defamatory statement was made by the Defendant herein. The defamatory statements made as per the available evidence are those made by the Plaintiff's own customers, some of whom accused him of "selling fake drinks" or of "mixing super dip with water to make fit drink," etc. These statements cannot be imputed to the Defendant herein because they were not uttered by either its servants or agents.

Further, it is the view of this Court that if at all the manufacturing of the said bottle was defamatory, which this Court is not inclined to find, then there was again absence of its publication by the Defendant herein to a third party. If any publication of the same was made to a third party the same was made either by the Plaintiff

himself or his alleged customer . The particulars averred under paragraph 8 of the Statement of Claim are also in support of the view of this Court. None of the said particulars does suggest, in any way, that the Defendant herein had accused the Plaintiff herein of selling fake drinks. Put simply, the Plaintiff's case for defamation is thus also not made out.

In passing, it is observable that albeit the Plaintiff had claimed damages for defamation in the Statement of Claim, the final submissions made on his behalf are totally silent as regards this claim. Whether or not, the Plaintiff had intended to totally abandon his claim in this regard without seeking an amendment of his pleadings is, however, not clear. Further, this Court finds it surprising that the Plaintiff in his final submissions introduces a new claim for damages f or breach of the Consumer Protection Act, a claim which had not been pleaded in the Statement of Claim. Certainly, by the Rules of Pleadings the parties are bound by their pleadings. The Plaintiff can thus not be allowed to argue any other matter outside the matters pleaded without first seeking leave from the court for an amendment thereof. The Plaintiff's claim for breach of the Consumers Protection Act also ought to fail for lack of pleading for the same.

(C) **Conclusion:**

From the findings made above, it is the view of this Court that there is no merit in the Plaintiff's entire action. It ought thus to be dismissed.

(D) **The Costs:**

The costs of an action are in the discretion of the Court and normally follow the event. The event in this action being that the Plaintiff

Here in has not succeeded, this Court proceeds to exercise its discretion on costs by awarding the same to the Defendant. It is so ordered.

**Dated this .....15<sup>th</sup>....day of.....December.....2016**



Chirwa

**J. M. Chirwa  
JUDGE**