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

Civil Cause No. 49 OF 2016

BETWEEN

Funny Chidzalo..... Plaintiff

AND

PRIME Insurance Company Ltd.....Defendant

CORAM:	Madalitso Khoswe Chimwaza,	ASSISTANT REGISTRAR
	E. Chapo	Counsel for the plaintiff
	C. Mhone,	Counsel for the defendant
	Mpandaguta,	Court Clerk

RULING ON APPLICATION FOR SUMMARY JUDGMENT

This is a ruling on a summons for summary judgment which is supported by an affidavit and skeleton arguments. The application was heavily opposed at the hearing but the defendants did not file affidavit in opposition.

Brief facts:

Briefly the facts are that on 23rd October 2015 at about 10:30 hours the plaintiff was walking from the direction of Kanengo Petroda Filling Station heading towards the main road that upon reaching the main road, she was hit by a motor vehicle Registration Number BQ 2102 Toyota Spacio which was negligently driven managed and controlled from the same direction as the plaintiff. Due to the impact



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the plaintiff suffered soft tissue injuries to the back and abdominal injuries. As a result she forcefully aborted her foetus due to internal bleedings. D& C was done to remove the remains of the conception.

The defendant is being sued as the insurer of the said vehicle BQ 2102 Toyota Spacio. In their defence the defendant denies that the accident ever happened and that if it did, then the same was due to the negligence of the plaintiff who contributed by walking without due regard to her own safety, walking without due regard to the presence of a motor vehicle and failing to stay away from the main to avoid being hit by the said motor vehicle. The defendants pleaded in the alternative that its liability is subject to the owner of the insured being found liable in respect of the accident and that its liability will be limited to the maximum liability contained in the contract of insurance.

The plaintiff has applied for summary judgement on the grounds that the defendants defence are general denials which cannot stand the test of trial.

The issues for determination by the court are twofold:

- (i) Whether the plaintiff has proved their claim and therefore entitled to summary judgment
- (ii) Whether the defendant has raised a bona fide defense to the plaintiff's claim.

The Law

A plaintiff is entitled to obtain summary judgment under Order 14 of the Rules of the Supreme Court if he can clearly establish his claim and the defendant is unable to set up a *bona fide* defense or raise an issue (s) against the claim which ought to be tried (See *Roberts v Plaintiff* [1985] 1BB 597; *Bowsprit Trading (Pty) Ltd v Namalunga Enterprises Ltd* [1992] 15 MLR 33).

Order 14 rule 1 provides as follows;

"where in an action to which this applies a statement of claim has been served on a defendant and that defendant has given notice of intention to defend the action, the plaintiff may, on the ground that that defendant has no defense to a claim included in the writ, or to a particular part of such a claim, or has no defense as to the amount of any damages claimed, apply to the court for judgement against that defendant."

The law allows a defendant to file and serve an affidavit in opposition to the summons. The defendant is entitled to show cause as to why summary judgment should not be entered.

The defendant's affidavit must dwell upon particulars and should as far as possible, deal specifically with the plaintiff's claim and state clearly and concisely what the defense is, and what facts are relied on to support it. It should also state whether the defense goes to the whole or part of the claim, and in the latter case it should specify the part: **Practice note 14/4/5.**

This court is quite mindful of the fact that summary judgment is an exception to the general rule that ideally where parties dispute the claims the court should not deny the defendant an opportunity to be heard.

In the case of *Pereira vs Ndeule t/a Cenda Building Contractors* [1993] 16(2) MLR 712, in which Chipeta JA, sitting as Deputy Registrar made a distinction between an application for summary judgment under O.14 RSC, and application to set aside a default judgment where the rules allows the presiding officer in a summary judgment application to delve into questions of merits in order to decide whether any proposed defense is valid or only a sham.

Reasoned Analysis of Law and Facts

In his arguments counsel for the defendant said their defence had raised issue relating to the plaintiff's contributory negligence especially in this case where the plaintiff was a pedestrian crossing the road. It is suggested that the pedestrian may not have acted prudently which is a fact that ought to have been responded to by the plaintiff and if not it has to be determined at trial so that it can be determined that there was contributory negligence.

This court upon looking at the defence of the defendants of contributory negligence it is not a defence per se. This is a fact that is to be taken into account when considering the quantum of damages, but it does not absolve the liability of a party. In the present case the liability of the defendant is vicarious and since they have not disputed to have been the insurers of the vehicle that was involved in this accident, this court finds their defense to be a sham, general denial without substantive facts and ought not to go for trial.

This court finds that the plaintiff has proved her case. Summary Judgment is granted on all claims as stipulated in the statement of claim. Costs are in the course.

Either party aggrieved by the decision of the court has the right to appeal.

Made in Chambers this 29th day of November, 2017



Madalitso K. Chimwaza (Mrs)

ASSISTANT REGISTRAR