



THE REPUBLIC OF MALAWI  
IN THE HIGH COURT OF MALAWI  
LILONGWE DISTRICT REGISTRY  
CIVIL CAUSE NO. 458 OF 2016

BETWEEN

Jabes Emmanuel..... Plaintiff

AND

General Alliance Insurance Ltd.....Defendant

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<b>CORAM:</b>	Madalitso Khoswe Chimwaza,	<b>ASSISTANT REGISTRAR</b>
	C. Khakhi,	<b>Counsel</b> for the plaintiff
	Mtchuka Mwale,	<b>Counsel</b> for the defendant
	Mpandaguta,	Court Clerk

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**RULING ON PRELIMINARY OBJECTIONS AGAINST APPLICATION FOR SUMMARY  
JUDGMENT**

These are summons for summary judgment taken out by the plaintiff under **Order 14 of the Rules of the Supreme Court (R.S.C)**. The defendant raised two preliminary objections:

The defendant is objecting to the use of exhibits number 'CK4' and 'CK5' which was a letter requesting that the plaintiff should go for re-assessment and it was copied to the mediator and the re-assessment report. They are also objecting to the use of exhibit 'CK6' which was a proposed quantum of damages made before mediation was terminated.

The defendant is claiming that such communications are privileged as they are protected under **Rule 15(2) (c) of the (Mandatory Mediation Rules), 2004** therefore the plaintiff cannot rely on them to make their case.

The second objection is with regard to the applicability of the Rules of the Supreme Court in view of the amendment made to **section 29 of the Courts Act** and that the Rules of the Supreme Court are therefore obsolete. Counsel for Plaintiff filed affidavits in opposition to the objections.

**Reasoned Analysis of the Law and Facts**

**On the first objection:**

**Rule 15 of the Courts (Mandatory Mediation Rules), 2004** states that:

A party to mediation shall not rely on:-

- (i) The record of mediation
- (ii) Statement made at mediation session or;
- (iii) Any information obtained during mediation, as evidence in court proceedings or any other subsequent settlement initiative

Counsel for the plaintiff cited the case of *Alesho Tembo & Another vs C.G. Gome & 2others* Civil cause No. 813 of 2013 in which Her Hon. Patemba, citing with authority the decision of Justice Mbyundula in the case of *Flora Chagoma vs Charter Insurance*, held that :

‘...Communications not made at the mediation and information not obtained during the mediation are not privileged, even though they may relate to the case...’

In the *Alesho* case Her Hon. Patemba referred to the *Chagoma* case as being on all fours in that in the *Alesho* case there was a settlement agreement which was accepted by the defendants at mediation but they never paid. She however proceeded to hold that such offers were made outside the mediation session and were not contrary to **Rule 15(2) (c) of the Courts (Mandatory Mediation Rules)** and the plaintiff was entitled to enter judgment on admission against the defendant.

She observed that if the offers were made during the mediation session, the same could have qualified to privileged information and that it would amount to miscarriage of justice if the courts were to hold that discussions or offers made between parties is privileged simply because the matter was referred to mediation and yet the mediator knows nothing about what parties have agreed outside the mediation session.

This court has noted that the documents being referred to by Counsel for the defendant were disclosed for purposes of mediation although they did not lead to any settlement. Exhibit ‘CK4’ and CK5 were copied to the mediator. Even the quantum of damages was requested at the mediation session although the defendants did not accept the offer. It is the view of this court that such documents are privileged information which ought not to have been used in

these proceedings as such defendants objection is sustained and the exhibits 'CK4'; 'CK5' and 'CK6' are struck off from the record.

**On the second objection**, counsel for the defendant argued that summary judgement procedure which was governed by **Order 14 of the Rules of the Supreme Court (RSC)** is no longer applicable in view of the amendment to **section 29 of the Courts Act**.

Indeed **Section 7 of the Courts (Amendment) Act of 2016** repealed and replaced **Section 29 of the Courts Act**. The effect of this amendment is that the Rules of the Supreme Court (RSC) are no longer applicable in the High Court, since by **Section 67 of the Courts Act**, The Hon the Chief Justice is to make Rules for Practice and Procedure, for the High Court, which Rules are not yet in force at the moment thereby creating a gap in the Rules of procedure to be followed in the High Court.

Counsel for the defendant cited the case of *Damiano Meleka vs Malawi Mangoes Co. Ltd and NICO General Insurance Ltd* Civil cause No. 377 of 2015 in which the Assistant Registrar then H/H Chipao was faced with a similar application and held that the lacunae in the law could not be cured by applying an obsolete law and therefore an application for summary judgment was dismissed.

However in a recent judgment of the High Court in the case of *Mohssin Mahomed Salim vs Mac Donald Chapola* Civil Cause No. 317 of 2017, dated 24<sup>th</sup> July, 2017, Justice Mkandawire, held that:

'...Rules of the Supreme Court are not obsolete, since they are subsidiary legislation and that the repealing of section 29 of the Courts Act did not automatically repeal the said Rules of the Supreme Court, unless they are also repealed'.

The Judge conceded that indeed the repealing of **Section 29 of the Courts Act**, has created a gap in the law, as the rules promulgated by the Chief Justice under **Section 67 of the Court Act**, were not yet in force.

He however sated that the purpose of **Section 13 and 14 of the General Interpretation Act** is to avoid a gap in the event when a written law repeals or replaces a former written law.

**Section 13 of the General Interpretation Act** states that:

Where a written law is repeals wholly or partially any former written law and substitutes provision for the written law repealed, the repealed written law shall remain in force until the substituted provision come into operation.

Further **Section 14 (1) of the General Interpretation Act** states:

Where a written law repeals and re-enacts with or without modification, any provision of any other written law, then unless a contrary intention appears;

(e) any subsidiary legislation made under such repealed provisions shall remain in force, so far as it is capable of being made under the repealing written law and is not inconsistent therewith, until it has been revoked or repealed by any other written law, and shall be deemed for all purposes to be subsidiary legislation made under such repealing written law.

In view of the fact that the Rules of the Supreme Court were subsidiary legislation, by the authority of **Sections 13 and 14(1) (e) of the General Interpretations Act** they are still applicable Rules to the High Court. The two provisions gives life to a repealed law until it is replaced.

Therefore objection to the application for summary Judgment is overruled.

In the circumstances there being no more opposition and the defence not being persuasive but general denials the plaintiff is granted the application under Order 14 RSC for Summary Judgement with costs.

Made in Chambers this 27<sup>th</sup> day of July 2017



Madalitso Khošwe Chimwaza

**ASSISTANT REGISTRAR**