

THE REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CIVIL CAUSE NO.242 OF 2017

between

Zakiya Jemetala..... Plaintiff
And
Ocean Car Hire.....1st Defendant
Prime Insurance Co. Ltd.....2nd Defendant

CORAM: *Madalitso Khoswe Chimwaza,* *Assistant Registrar*
 G. Taumbe, *Counsel for the Plaintiff (supervisor)*
 K. Mchizi *Trainee Counsel for plaintiff*
 Mpandaguta *Court Clerk*

RULING ON SUMMONS TO STRIKE OUT DEFENCE AND ENTER JUDGMENT

Introduction

This is the plaintiff application to strike out defence and enter judgement. The defendants were duly served with notice but they were not present and no reasons for such failure were furnished. The court proceeded to hear the plaintiff unchallenged.

Briefly the facts are that the 1st defendant was at all material times the owner of vehicle Registration number BP8484 Toyota Station wagon. The 2nd defendant was the insurer, On or about the 22nd October 2016 at around 11:00hours the 1st defendant agent, servant or employee was driving the said motor vehicle from the direction Mwanza heading towards Zalewa with the plaintiff on board. On arrival at Chisesa village along M1 road, he was overtaking an unknown motor vehicle and while in the course he lost control of the motor vehicle and went to the extreme offside where he hit roadside kerbs and overturned twice.

As a result of the 1st defendants negligence which was described in the statement of claim as excessive speeding, driving without due care and attention and failing to slow down, stop or otherwise controlling his motor vehicle so as to avoid the said accident, the plaintiff sustained a deep cut on the left arm.

The defendants deny all particulars of negligence raised by the plaintiff in paragraph 6 of the statement of claim. In their affidavit in support the defendants under paragraph 7 allege that there was no evidence showing that the 1st defendant's agent servant, or employee already admitted to have negligently caused

the alleged accident. Further under paragraph 8 the defendants allege that their defence raises arguable issue which can be tried at trial like:

Whether or not the accident was an inevitable accident, Whether or not the accident was caused by the negligence of the 1st defendant, Whether or not the 1st defendant was recklessly driving the vehicle without reasonable regard and /or concern for the safety of the plaintiff, Whether or not the 1st defendant exercised all reasonable and skill in the circumstances.

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 have raised a bona fide defense to the plaintiff's claim that ought to be heard at trial.

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.**

Counsel for the plaintiff cited 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

This court is mindful that it is the duty of the plaintiff first to prove or establish his /her claim to the satisfaction of the court in order to be entitled to summary judgement. Further he must establish that the defendant have no defense or that their defense does not raise triable issues to take to trial.

The gist of the plaintiff's application for striking out the defence is that the defense does not disclose reasonable defense, it is frivolous and vexatious and that it is an abuse of the process of the court.

This court had occasion to go through the affidavit in opposition to the grant of this application where the defendants have demonstrated that the plaintiff did not raise any specific acts of negligence that the 1st defendant committed. The allegation that the 1st defendant used excessive speed is a matter of fact

which can only be proved by an expert witness. There is no evidence that the 1st defendant admitted liability of negligence.

This court would like to concur with the observation of the defendants that the fact that the 1st defendant's agent paid for reckless driving offence is not conclusive evidence that he was negligent. Most of the times when an accident has happened people are pressured to pay for an accident not because they have been found guilty of negligence but out of pressure.

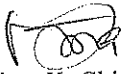
In the circumstances this court finds that the plaintiff have not established their case warranting that the defense of the defendants should be struck out. The defendants have a defense that is raising triable issues and the matter will proceed to trial on a date to be fixed.

The application to strike out defense and enter judgement is dismissed with costs in the cause.

Right of appeal.

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

Made in chambers this 21st day of February, 2018



Madalitso K. Chimwaza

ASSISTANT REGISTRAR