

REPUBLIC OF MALAWI
MALAWI JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL CIVIL REGISTRY
CIVIL CAUSE NO. 297 OF 2018

BETWEEN

CHARLES CHITEKWE **PLAINTIFF**

-and-

HORIZON HEALTH **DEFENDANT**

Coram : **Honorable Mr. Justice D. Madise**

Mr. Kusiwa Counsel for the Plaintiff

Defendant absent/unrepresented

Mr. Michael Mike Mbekeani Official Interpreter

Madise, J

JUDGMENT

Introduction

1. The Plaintiff and three others took out originating summons against the defendants on 18th October, 2016 seeking several declarations and orders. The summons are supported by an affidavit jointly sworn by the plaintiffs. The summons have not been opposed as evidenced by the defendant failure to file an affidavit in opposition. When the case was called on 14th January, the defendant stated that they had an application to make and they were ordered to file a written application within 7 days. The said application was never filed.
2. The case was called again on 14th January, 2019 but trial did not place and the matter was set for 18th February, 2019. On the appointed date the defendant and their lawyer did not show up and no reasons were given as to why they had failed to attend trial. I allowed the plaintiffs to present their case. The plaintiffs then presented their sworn statements in aid of their case.

The Facts

- 3 The plaintiffs are seeking a declaration against the defendant for the unlawful use of an images of the plaintiffs on their diary which was used for commercial purposes without the permission and consent of the plaintiffs. The Plaintiffs are therefore seeking an order that they be awarded damages for the unlawful use of the image plus costs of this action.
- 4 The 3rd and 4th plaintiffs are minors being children of the 1st and 2nd plaintiff. The defendant is a company which provides Health Insurance services and is dully registered in the Republic of Malawi. The defendant

advertises its Health Insurance products through various means including production of diaries which are distribute to its customers.

- 5 Thus the defendant without permission and consent of the plaintiffs used an image of the plaintiffs on their diaries which is being used for commercial purposes to wit advertising its Health Insurance. The plaintiffs claim that they were not compensated for the use of such an image. As earlier stated, the defendant has not defended this action.

The Issues

- 6 The main issue for determination is whether the defendant violated the plaintiffs' right to privacy by using an image of the plaintiffs on their diaries without permission or consent.

The Law

- 7 The burden and standard of proof in civil matters is this. He/she who alleges must prove and the standard required by the civil law is on a balance/scales of probabilities. The principle is that he who invokes the aid of the law should be the first to prove his case as in the nature of things, a negative is more difficult to establish than an affirmative.
- 8 As Denning J., stated in Miler vs. Minister of Pensions [1947] 2 A II E.R. 372.

If the evidence is such that the tribunal can say 'we think it more probable than not' the burden is discharged, but if the probabilities are equal it is not

Similarly the degree of probabilities will depend upon the subject matter. When a civil court is deciding on a charge of fraud, it naturally follows that a higher degree of probability is required than when deciding with an issue of negligence. However, the standard does not reach as high as that required in a criminal court which is beyond a reasonable doubt. The

general principle is that the court must require a degree of probability which suits the occasion and is commensurate with the law and facts.

9 Section 19 of Malawi Construction

"The dignity of all persons shall be inviolable".

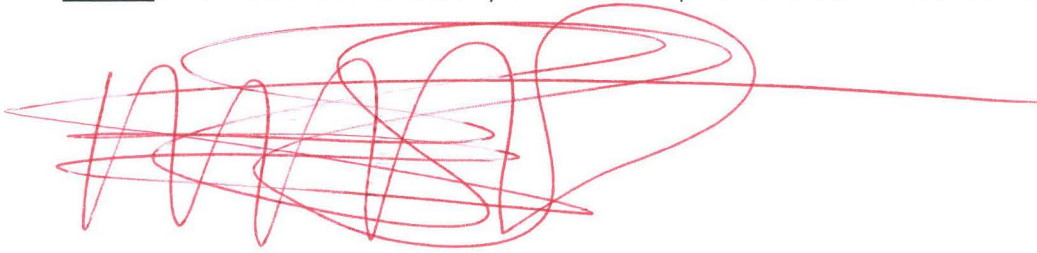
The Finding

10. It is not in dispute that the defendant used the plaintiffs' image as a family on their diaries. I have seen a copy of the diaries and I will not hesitate to mention that the family looks beautiful in the image. I therefore disagree with the plaintiffs that the image violated their right to dignity.
11. is not true that as a family they lost dignity due to the publication of the image. I however agree with the plaintiffs that the right to privacy was violated because the defendant did not have express and implied permission or consent to muse the image on their commercial diaries.
12. On a balance of probabilities, I find in favour of the plaintiffs and the defendants must pay damages for using the plaintiffs' image as a family without permission or consent. The Plaintiffs must file summons for assessment of damages before the Registrar within 14 days.

Cost are awarded at the discretion of the Court. However, the general rule is that they follow the event. The plaintiffs are awarded the costs of this action.

I so order.

Made in chambers at Blantyre in the Republic on 27th March, 2019.

A large, complex, and illegible red scribble or signature, possibly representing the name Dingiswayo Madise, written in red ink.

Dingiswayo Madise
Judge