

IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
PERSONAL INJURY CAUSE NO. 352 OF 2017

BETWEEN

CHIMWEMWE NJANJI (suing on her own behalf and

All the dependents of Charles Njanji) -----CLAIMANT

-AND-

FATSANI SINGANO-----FIRST DEFENDANT

-AND-

PRIME INSURANCE COMPANY LIMITED-----SECOND DEFENDANT

CORAM: HON. JUSTICE JACK N'RIVA

Mr Minjale, of Counsel for the Claimant

Mr Zwelethini Chipembere, of Counsel for the Defendants

Ms Deliwé Mtegha, Court Clerk

RULING

This is an application for summary judgment pursuant to Order 12 Rule 23 of the Courts (High Court) (Civil Procedure) Rules, 2017.

The claimant's claim against the defendants is for damages for loss of expectancy of life, damages for loss of dependency, damages for bereavement and some special damages of MK 88, 000.00 and costs of this action.

This case is based on the accident that was caused by the alleged negligence of the 1st defendant. Particulars of the negligence are over speeding and driving dangerously leading to failure to negotiate a corner and ending up hitting the victim outside the road.

The defendant denies that the first defendant was guilty of the alleged, or any, negligence. The defendants pleaded that the occurrence of the accident was solely or alternatively contributed by the negligence of the claimant. The particulars of negligence are failure to see the motor vehicle in sufficient time to avoid the occurrence of the accident, failure to have regard to his own safety and failure to wear reflectors during that particular night.

The claimant argued that the defence by the defendant was a general denial and that it was frivolous and vexatious

The defendants argued that entry of summary judgment is not appropriate. They argued that their defence raises triable issues that the claimant (sic) was negligent and that he contributed to his injuries by not wearing reflectors. Counsel for the defendants argued that those allegations require further inquiry by the Court during trial.

During oral arguments, the defendant's counsel further argued that the evidence the claimant relied on (the police report) was not from an eye witness; it was hearsay evidence.

In summary, in the wake of the allegation that the first defendant drove his vehicle speedily and dangerously, that he failed to negotiate a corner, and killed the deceased, the defence denies the allegation. Instead, they attribute the deceased's death to his negligence.

The defendants argue that the defence raises a triable issue.

Under the previous regime of procedural rules, it was enough for a defendant to merely show that they had a triable issue. Under the High Court (Civil Procedure)

Rules, 2017, Order 12 Rule 23, a claimant may apply for summary judgment where the defendant has filed a defence but the claimant believes that the defendant has no real prospects of defending the claim.

“Real prospects of success” can be traced back to the old rules. *Alpine Bulk Transport Co. Ltd Inc v Saudi Eagle Shipping Co. Ltd* [1986] 2 Lloyd’s report 221 set down this formula of no real prospects of success as a standard for summary judgment. There had been criticism to the formula [Plant, C. (2000) *Blackstone Civil Procedure 2001*. London: Blackstone Press, 312]. However, the test has been adopted in English and Wales Civil Procedure Rules, 1998- *Swain v Hillman* CPLR 799, *Penningtons v Abedi* (1999) LTL 13/08/99 CPR [2008] P558. That is also the standard under our own Courts (High Court) (Civil Procedure) Rules. What this means is that the Court will disregard prospects that are false, fanciful or imaginary- *Swain v Hillman*. The inclusion of the word “real” means the defendant must have a case which is better than merely arguable (*International Finance Corp v Ute Africa Sprl* [2001] C.L.C. 1361

In this case, on the allegation that the driver was speeding and hit the deceased at the side of the road, I hardly find the argument convincing that the deceased contributed to the incident. How can one argue that the deceased solely (or alternatively) caused his predicament? Can one be heard to say that the hitting of the deceased was due his failure to see the motor vehicle in ‘sufficient time?’ Can it be said that the incidence took place because the deceased had no reflector? I do not find the defence to have real prospects of success. I find the case to be merely arguable. This is a proper case to enter judgment.

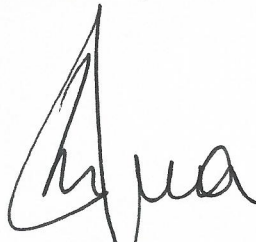
It seems to me that the defendants raised many issues to simply to appear to have issues worth pursuing. However, in my judgment, the issues fall short of raising real prospects of succeeding. The defendants also raised, though not in their defence and pleadings, the issue of police report being hearing.

As I said, the police report hearsay issue arose during the hearing of the application. This appears to me to be another fishing expedition, as it were. However, I do not appreciate as to what would be said to be challengeable against the police report. Nonetheless, as Manda J said in *Sadik Jimu v Nico General Insurance Company*

Limited Civil Cause number 984 of 2007, police reports are public documents and are exempt from rule against hearsay.

In sum, the defence does not raise issues that have real prospects of success. I enter summary judgment against the defendants, with costs. The matter should be set down for assessment of damages.

MADE the 15th day of May, 2019

A handwritten signature in black ink, appearing to read 'J N' RIVA', written in a cursive style.

J N' RIVA

JUDGE