IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

PERSONAL INJURY CAUSE NUMBER 323 OF 2019

BETWEEN:

NOEL ZONDOLA **CLAIMANT**

AND

MAHOMED HANIF TARMAHOMED t/a SUPER HARDWARE **1st DEFENDANT**
NICO GENERAL INSURANCE COMPANY LTD **2nd DEFENDANT**

CORAM: JUSTICE M.A. TEMBO

Msuku, Counsel for the Claimant
Mhone, Counsel for the 1st Defendant
Mankhambera, Official Court Interpreter

ORDER

1. This is this Court's order following an application for summary judgment on the claimant's claim and for striking out the 1st defendant's defence for being an abuse of the court process. The 1st defendant contests the application.
2. The facts of this matter are uncontroverted. The claimant was the owner of a motor vehicle in which one Ajusu Mwikho was a passenger. The said motor vehicle was hit by the 1st defendant's vehicle damaging the claimant's vehicle and injuring the passenger, Ajusu Mwikho.
3. The passenger, Ajusu Mwikho, commenced a prior action before the Magistrate Court in which he testified together with the driver of the

vehicle in which he was travelling. After the closure of Ajusu Mwikho's case, the defendants in that matter, were the son to the 1st defendant in this matter and the 2nd defendant insurance company in the present matter. The 2nd defendant indicated that it would no longer contest liability and judgment was entered. The judgment was satisfied by the 2nd defendant.

4. Subsequently, the claimant herein, who is the owner of the motor vehicle in which Ajusu Mwikho got injured, commenced the within action against the 1st defendant's son and the same insurer the 2nd defendant herein. His claim was for the cost of replacement of his vehicle or alternatively cost of its repair and for loss of business and loss of use of his motor vehicle. Judgment was then entered against the 1st defendant's son and the 2nd defendant insurer. The judgment was satisfied by the 2nd defendant insurer but subject to its insurance policy limit. In all this there was an error in that the 1st defendant's son was sued as the owner of the offending motor vehicle. The claimant has now amended the summons and statement of case to indicate the 1st defendant as the correct party in place of his son.
5. There are two judgments, one before the lower court and another before this Court, in which according to the claimant herein the driver of the 1st defendant was found liable for negligence.
6. When the 1st defendant was substituted as the such in the present matter he filed a defence in which he alleged that his driver was not negligent in that the collision was an inevitable accident occasioned by the actions of a third party cyclist who suddenly went in the path of his driver and also that the collision herein was contributed to by the claimant's driver by his wrongful parking. The 1st defendant also denied the claimant's claim to damages for loss of business and damage to his vehicle.
7. In the foregoing circumstances, the claimant contends that the 1st defendant cannot deny liability given that there is already a finding before this Court against the 1st defendant's driver on account of his negligent conduct and with respect to whom the 1st defendant now denies negligence. The claimant also contended that the reference to a third party as contributing to the collision does not exonerate the 1st defendant since he is a joint tortfeasor herein.
8. During oral argument it turned out that the 1st defendant also has issues with the amount of damages that are due and payable since his insurer paid up on the claimant's claims up to the relevant policy limit.

9. The view of this Court is that the claimant has properly filed an application for summary judgment under Order 12 rule 23 (1) of the Courts (High Court) (Civil Procedure) Rules which provides that:

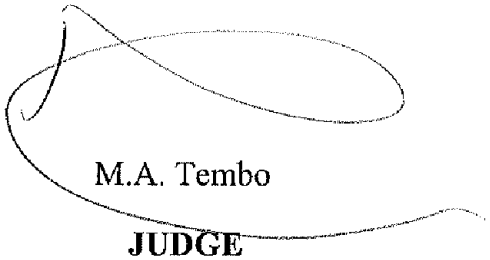
> A claimant may apply to the court for summary judgment where the defendant has filed a defence but the claimant believes that the defendant does not have a real prospect of defending the claim.

10. In that connection, this Court observes that, as correctly submitted by the claimant, and as persuasively held in the case of *Swain v Hillman* [2001] 1 ALL ER 91, on an application for summary judgment the court considers whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success. And a "realistic" claim is one that carries some degree of conviction. And that is a claim that is more than merely arguable. See *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8].
11. The court must not conduct a mini-trail in reaching its conclusion. See *Swain v Hillman* [2001] 1 ALL ER 91. This, however, does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court because in some cases it might be clear that the claimant's assertions have no real substance, particularly if contradicted. See *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [10].
12. It has been pointed out that, in reaching its conclusion the court must take into account not only the evidence actually put before it on an application for summary judgment, but also the evidence that can reasonably be expected to be available at trial. See *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550.
13. The foregoing persuasive authorities, as persuasively discussed in *Easyair Ltd (t/a Openair) v Opal Telecom Ltd* [2009] EWCA 339 (Ch), show that on an application for summary judgment the one applying for summary judgment must show his case by statements placed before the court and then show why in view of his case the other side has no prospect of success. The Court will not conduct a mini trial but will consider the evidence before it and decide accordingly.
14. The foregoing authorities are persuasive since Part 24 CPR on summary judgment in England and Wales is materially the same as our own rule on summary judgment in Order 12 rule 23 (1) of the Courts (High Court) (Civil Procedure) Rules.

15. It is clear that the driver of the 1st defendant was found to have caused the collision the subject matter of these proceedings. He was also found liable for causing the collision with respect to the claim before the lower court which was never appealed against. The 2nd defendant who insured the motor vehicle of the 1st defendant paid up on account of the said findings. These findings are based on the decision of the insurance company not to contest the claims in the present matter and in the matter before the lower court. The 1st defendant was never involved.
16. During oral argument the parties appeared to agree that the issue of the value of the motor vehicle was already settled by the 2nd defendant insurance company. The 1st defendant felt that the claimant should have clarified on that aspect. There are other claims that remain to be resolved on the present claim, namely on loss of use and loss of business for which the 1st defendant seeks to get credit on account of the settlement by the 2nd defendant if he is to be found liable.
17. The claimant cited the case of *Chirambo v Manica (Malawi) Ltd and another* personal injury case number 701 of 2016 (High Court) (unreported) in which the owner of the vehicle and its insurer were defendants and the vehicle in question had collided with a cyclist who was carrying a pillion passenger. Both the cyclist and the pillion passenger got injured. The cyclist brought an action for negligence against the defendants before the Magistrate Court and succeeded. There was no appeal. When the pillion passenger brought an action against the same defendants for negligence before the High Court the defendants sought to deny liability and the High Court found that they could not do so having been found liable on the same facts before the lower court.
18. The claimant in the present matter sought to rely on the decision in *Chirambo v Manica (Malawi) Ltd and another* and sought summary judgment and contended that similarly the question of liability was already settled in the prior actions as against the driver of the 1st defendant in the present matter. The 1st defendant contends that the case of *Chirambo v Manica (Malawi) Ltd and another* can be distinguished in that he was not a party to the prior actions sought to be relied on by the claimant herein.
19. This Court observes that indeed the facts in the present matter and in the case of *Chirambo v Manica (Malawi) Ltd and another* are different and therefore that case is distinguishable from the present one.

20. This Court observes, in agreement with the 1st defendant, that the decision to settle on the part of the 2nd defendant as insurance company should not jeopardize the rights of the 1st defendant who never participated in the two prior proceedings. He cannot be bound by the decisions of the 2nd defendant to settle. He alleges a defence of contributory negligence on the part of the driver of the claimant. That is an issue that calls for investigation at trial and may reduce the liability of the 1st defendant if successfully proved at trial. There is no way of disposing of that aspect of the matter at this stage even regard being had to the settlements on the 2nd defendant as alluded to by the claimant. There is no proof from the sworn statements of the claimant herein that discount the allegation of contributory negligence on the part of his driver herein.
21. In the circumstances of this matter, the right to be heard on the part of the 1st defendant prevails. The facts do not allow for a summary judgment because there is no prospect of success established on the evidence of the claimant as against the 1st defendant who is alleging contributory negligence on the part of the claimant's driver and also that the accident was inevitable.
22. The application for summary judgment fails. On account of the foregoing, this Court does not find the 1st defendant's defence herein to be an abuse of the court process.
23. The matter shall proceed to scheduling conference and a notice for the same shall be filed within 14 days.

Made in chambers at Blantyre this 6th April 2021.



M.A. Tembo

JUDGE