



REPUBLIC OF MALAWI  
MALAWI JUDICIARY  
IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRAR  
CIVIL DIVISION  
CIVIL CAUSE NO. 112 OF 2016

BETWEEN

DICKSON MAKHUMBA.....PLAINTIFF

-and-

BROLL MALAWI LIMITED..... 1<sup>st</sup> DEFENDANT

SHOPRITE TRADING LIMITED.....2<sup>nd</sup> DEFENDANT

**Coram: Honourable Mr. Justice J.M. CHIRWA**

Mr L. Gondwe, Counsel for the Plaintiff

Mr Sauti Phiri, Counsel for the 1<sup>st</sup> Defendant

Mr Kapoto, Counsel for the 2<sup>nd</sup> Defendant

Mr. O. Chitatu Official Court Interpreter

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## JUDGEMENT

### (A) Statement of the Case:

By an amended Specially Endorsed Writ of Summons issued on the 25<sup>th</sup> day of July, 2016 the Plaintiff claims against the 1<sup>st</sup> Defendant, Broll Malawi Limited and the 2<sup>nd</sup> Defendant, Shoprite Trading Limited, the following:

- (a) General damages for negligence under occupier's liability,
- (b) Damages for pain and suffering;
- (c) Damages for loss of amenities of life;
- (d) Damages for cost of replacing HTC mobile phone valued at K450 000.00 and
- (e) Costs of the action.

It is the Plaintiffs' case that the 1<sup>st</sup> Defendant is the agents and /or manager of the 2<sup>nd</sup> Defendant while the 2<sup>nd</sup> Defendant is the occupier of premises popularly known as Shoprite. It is the Plaintiff's case further that on the 19<sup>th</sup> day of February, 2016 he was lawfully walking on the Shoprite premises when he suddenly fell into a ditch which had come about as a result of the Defendants 'opening up the ground, building structures on the land and digging gullies, pits and holes as a consequence of which he has suffered injuries, loss and damage. It is the Plaintiffs' case further that the alleged injuries and loss were caused by the Defendants' negligence. The particulars of the alleged negligence have been pleaded follows:

- "6.1 Failure to put warnings in the relevant places of the premises;
- 6.2 Failure to ensure in all circumstances that the lawful visitors on the premises are safe when using the premises;
- 6.3 Failure to uphold the burden to avoid risk".

The particulars of injuries, loss and damage have also been pleaded as follows: -

- "7.1 Broken ankle and elbow;
- 7.2 Soft tissue bruises;
- 7.3 Damages to mobile cell phone handset valued at K450, 000. 00".

Both the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have denied liability to the Plaintiff's claims.

The 1<sup>st</sup> Defendant on its parts has denied, (a) that it was at any material time in occupation or control of the premises referred to in the Statement of Claim and (b) that the Plaintiff fell into a ditch as alleged.

In alternative, the 1<sup>st</sup> Defendant contends that if the Plaintiff fell into a ditch and suffered the injuries, loss and damage as alleged, then the same was caused by a danger of which the Plaintiff had been duly warned by the occupier of the premises and that such warning was in all circumstances enough to enable the Plaintiff to be reasonably safe. The particular of the warnings have been pleaded as follows;

- (a) All entrances to the premises had signs erected warning visitors of ongoing construction works and requesting them to mind their safety first;
- (b) All active construction areas are cordoned off by appropriate red tape.

And the 2<sup>nd</sup> Defendant on its part has also denied (a) that 1<sup>st</sup> Defendant is its agent and (b) Opening up or digging in the ground, building structures on the land as alleged by the Plaintiff.

In the alternative, the 2<sup>nd</sup> Defendant has contended as follows: -

- (a) That as tenants of Chichiri Shopping Centre Limited they are thus not responsible for any public liability claims such as the Plaintiff's;
- (b) That they did not carry out any maintenance and neither did they sub- contract any person to do the maintenance of any kind; and
- (c) That they are not occupiers of the place called Shoprite save for the parameters of a shop called Shoprite.

### **(B) The Burden and Standard of Proof:**

This being a civil action, the burden of proof lies on the party which asserts the affirmative, hence the latin maxim, '*Ei qui affirmat ei qui negat incumbit probatio*'. See: Lord Maugham in Constatintine Steam Shipline v Imperial Smelting Corporation Limited [1942] AC 154 at p174. The burden of proof in the present action is thus on the Plaintiff to prove what he has asserted.

And as regards the standard of proof it is settled law that the same is on the balance of probabilities: Denning J (as he then was) in Miller v Minister of Pensions [1947] All ER 372 at p374 when he said:



*“That degree is well settled. It must carry a reasonable degree of probability, not so high as in a criminal case, but if the evidence is such that a tribunal can say we ‘we think it more probable than not’ the burden is discharged, but if the probabilities are equal, it is not,”*

**(C) Issues for Determination: -**

From the pleadings in this action the main issues for determination are as follows:

- (1) Whether or not the 2<sup>nd</sup> Defendant was “at all material times the occupier of the premises popularly known as Shoprite;
- (2) Whether or not the 1<sup>st</sup> Defendant was an agent and /or manager of the 2<sup>nd</sup> Defendant; and
- (3) Whether or not the Plaintiff suffered injuries, loss and damage as a result of the Defendants’ negligence, as alleged.

**(D) The Law –**

**(1) Occupiers Liability**

An occupier at common law is defined as follows:

*“a person who has a sufficient degree of control over premises to put him under a duty of care towards those who came lawfully on the premises”* see **Lord Denning** in **Wheat v E Lacon and Co Ltd** [1996] 1 ALL ER 582 at p.593.

The duty of the occupier is to take a reasonable care to see that the premises were reasonably safe for people coming lawfully on them, ibbid at 593. Put simply, the duty of an occupier is the general duty of care which each man owes to his “neighbour” as per **Sir Baliol Brett MR** in **Heaven v Pender** [1881- 85] All ER Rep 35 pp 39,40 and **Lord Atkin** in **Donoghue v Stevenson** [1932] 1 All ER 1 at p. 11.

**Lord Escher MR** was more astute in **Thomas v Quartermaine** (1887) 18 QBD 685 at p 688 when he said:

*“The duty, however, is that you are bound not to do anything negligently so as to hurt a person near you, and the whole duty arises from the knowledge of that proximity. Whether the negligence is your personal act, or arises from using your property in a particular*

*way, the rule equally applies, and you must so use your personal powers or property as not to injure any other person if by the exercise of reasonable care, you can avoid so doing”.*

## **(2) Agency-**

This is “the relationship that exists between two persons, one of whom expressly or impliedly consents that the other should represent him or act on his behalf, and the other of whom similarly consents to represent the former or so act” see: Bowstead on Agency (13<sup>th</sup> Edition) p1.

## **(3) Negligence**

Alderson B in Blyth v Birmingham Waterworks Co. (1856) 11 Ex 781 at p 784 defined “negligence” as follows: -

*“the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do; or doing something which a prudent and reasonable man would not do”.*

In an action founded in negligence for the Plaintiff to succeed he must prove the following:

- (a) That there was a duty of care owed to him by the defendant,
- (b) That the defendant breached that duty of care; and
- (c) That he suffered damage as a result of that breach which is not too remote - see Kadawire v Ziligone and Another [1997] 2 MLR 139 at p 144 per Ndovie J quoting with approval the case of Donoghue V Stevenson (Supra)

## **(C)The Evidence**

In order to prove to his case, the Plaintiff called in three witnesses, namely, **Dickson Makhumba**, the Plaintiff herein (PW1), **Blessings Makhwinja** (PW2) and **Pharaoh Phiri** (PW3).

PW1 adopted his original written statement dated 1<sup>st</sup> August, 2016 and the supplementary written statement date 1<sup>st</sup> November, 2016 and produced Exhibit P1 as his evidence - in- chief in this action. He was cross- examined by both Counsel for the 1<sup>st</sup> and the 2<sup>nd</sup> Defendants and re-examined. PW2 and PW3 having come to court under a subpoena gave oral evidence- in – chief, they were



also cross – examined by both Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. They were however, not re- examined.

In its defence, the 1<sup>st</sup> Defendant called only one witness, namely, **Wonani Msiska** (DW1). DW1 adopted his written statement dated 17<sup>th</sup> March, 2017 and produced Exhibits “DA1” and “DA2” as his evidence – in- chief. He was cross- examined by both Counsel for the Plaintiff and the 2<sup>nd</sup> Defendant and re- examined.

And the 2<sup>nd</sup> Defendant, also in its defence, called only one witness, namely **Mathews Mwase** (DW2). DW2 also adopted his written statement dated 17<sup>th</sup> March, 2017 as his evidence-in -chief. He was however, not cross-examined.

This Court has no intention of reproducing the evidence adduced by each witness in this action but will refer to the same, as and when necessary, in the determination of the issues in this action.

#### **(F)Determination-**

The first question to be determined is: whether or not the 2<sup>nd</sup> Defendant was at all material times the occupier of the premises popularly known as Shoprite.

The evidence of the Plaintiff as per his original written statement dated the 1<sup>st</sup> August, 2016 is that the Defendant is the Manager and is in control of premises known as Shoprite in the City of Blantyre (see Paragraph 6 of the said statement). And by his supplementary written statement the Plaintiff states that “the 1<sup>st</sup> Defendant are the Agents and /or managers of the 2<sup>nd</sup> Defendant and the 2<sup>nd</sup> Defendant are the occupiers of premises popularly known as Shoprite” (see paragraph 6 of the said statement).

And during cross examination by Counsel for the 1<sup>st</sup> Defendant the Plaintiff said:

*“I know what the 1<sup>st</sup> Defendant is. I do not know that Shoprite do not own the premises”.*

And during cross examination by Counsel for the 2<sup>nd</sup> Defendant the Plaintiff conceded that he did not fall inside the Shoprite shop but outside where there are other shops. And when referred to Exhibit “P1”, the Plaintiff conceded that he fell on the car park which is outside the shop. And when further asked if he knew who the occupier of the car park is, the Plaintiff, after a lot of hesitation, said that the occupiers are the customers or any other persons who may come on to the premises to transact their business. He then changed his answer and said that “he does not know the owner of those premises but chose to sue the 2<sup>nd</sup> Defendant

because some people told him that Shoprite (the 2<sup>nd</sup> Defendant) ought to be one of the landlords”.

And during re-examination the Plaintiff said that “he has sued the 2<sup>nd</sup> Defendant on the assumption that the Manager whom he knows personally could be working on behalf of all the people responsible for the premises, including Shoprite (the 2<sup>nd</sup> Defendant)”.

The 2<sup>nd</sup> Defendant by its Defence has denied being the occupiers of the place called Shoprite. It has also adduced evidence through DW2 denying being the proprietor or the occupier of the premises where the Plaintiff, allegedly, got injured (vide paragraphs 2 and 3 of DW2’s written statement).

From the totality of the evidence adduced by the Plaintiff in this action it should be apparent that the Plaintiff has failed to adduce any evidence to prove that the 2<sup>nd</sup> Defendant was the occupier of the premises where he, allegedly, got injured. On what basis can this Court then proceed to make a finding that the 2<sup>nd</sup> Defendant was at all material times the occupier of the premises popularly known as Shoprite. This Court finds none.

In the premises, it is the finding of this Court that the 2<sup>nd</sup> Defendant was not at all material times the occupier or proprietor of the premises popularly known as Shoprite. It is the uncontroverted evidence of the Defendants before this Court that the 2<sup>nd</sup> Defendant was just one of the so many tenants of the Chichiri Shopping Centre Limited.

The second question to be determined is: whether or not the 1<sup>st</sup> Defendant was an agent and/or manager of the 2<sup>nd</sup> Defendant.

The only evidence adduced by the Plaintiff in relation to his assertion that the 1<sup>st</sup> Defendant was an agent and/or manager of the 2<sup>nd</sup> Defendant is as follows:

*“6 The 1<sup>st</sup> Defendant are the agents and/or Managers of the 2<sup>nd</sup> Defendant and the 2<sup>nd</sup> Defendant are the occupiers of premises popularly known as Shoprite”.*

There is no further evidence either to substantiate how the agency relationship between the parties came about or to show that the Defendant had requested the 1<sup>st</sup> Defendant to act on its behalf in any transaction and that the 1<sup>st</sup> Defendant had consented to do so as required by the law.

In the premises, this Court finds no basis for holding that the 1<sup>st</sup> Defendant was at any material time an agent/or manager of the 2<sup>nd</sup> Defendant as alleged by the Plaintiff.



The third question to be determined is: whether or not the Plaintiff suffered injuries, loss and damage as a result of the Defendant's negligence as alleged.

This Court has earlier in this judgment found that the 2<sup>nd</sup> Defendant was not at all material times an occupier of the premises where the Plaintiff, allegedly, got injured. In the premises, it would follow that the 2<sup>nd</sup> Defendant did not thus owe the Plaintiff any duty of care as would give rise to any liability on its part. In the further premises, this Court is inclined to find that the Plaintiff did not suffer the alleged injuries, loss and damage as result of the 2<sup>nd</sup> Defendant's negligence as alleged.

Consequently, this Court finds no merit in the Plaintiff's claim against the 2<sup>nd</sup> Defendant and proceeds to dismiss the same.

Turning to the Plaintiff's claim against the 1<sup>st</sup> Defendant, it is clear from paragraph 6 of the Statement of Claim that the Plaintiff has sued the 1<sup>st</sup> Defendant as agent of the 2<sup>nd</sup> Defendant with the 2<sup>nd</sup> Defendant being, allegedly, the occupier of the premises popularly known as Shoprite. The Plaintiff has supported his assertion by his written statement where in paragraphs 6 and 7 he states as follows:

*"6. The 1<sup>st</sup> Defendant is an agent of the 2<sup>nd</sup> Defendant, and the 2<sup>nd</sup> Defendant, are occupiers of premises popularly known as Shoprite".*

*7. On the 19<sup>th</sup> February, 2016 I was walking on Shoprite premises when I suddenly fell into a ditch and suffered injuries and loss."*

In cross examination by Counsel for the 2<sup>nd</sup> Defendant the Plaintiff said:

*"I did not fall inside Shoprite shop. There are other shops around the Mall. I fell on the car park".*

And the evidence of the 1<sup>st</sup> Defendant through DW1 in relation to the ownership of the premises in question is as follows:

*"5.2 Chichiri Shopping Mall Limited is the owner of the Mall which is let out to two anchor tenants namely, Shoprite Trading Limited and Game Stores. The other smaller shops are let out to various tenants.*

*5.3 The owners of the Mall embarked on a refurbishment of the entire Mall. They employed a contractor, Built Environs Limited, who started extensive construction and rehabilitation works on 22<sup>nd</sup> September, 2015."*



This evidence remained uncontroverted.

This Court having already found that the 2<sup>nd</sup> Defendant was not the occupier of the premises where the Plaintiff was, allegedly, injured, it would thus follow that the Plaintiff's claim against the 1<sup>st</sup> Defendant as an agent of the 2<sup>nd</sup> Defendant cannot be sustained. It remains the uncontroverted evidence of DW1 that the said premises are owned by Chichiri Shopping Mall Limited which is a different legal personality from the 2<sup>nd</sup> Defendant.

It is trite that each party to the proceedings is bound by its pleadings – see: **Mandala Limited -v- Soche Tours and Travel Limited** [1991] 14 MLR 210 at p 213. Consequently, the Plaintiff and the Defendants herein are all bound by their pleadings. For the Plaintiff to succeed in his action against the 1<sup>st</sup> Defendant he should have proved on the balance of probabilities, first that the 2<sup>nd</sup> Defendant was an occupier of the premises at which he, allegedly, got injured, secondly, that the 1<sup>st</sup> Defendant had carried out the construction works on the said premise as an agent of the 2<sup>nd</sup> Defendant, thirdly, that the 1<sup>st</sup> Defendant as such an agent had breached his duty of care and finally, that it was as a result of that breach that he suffered injuries, loss and damage which is not too remote.

After critically analysing the evidence before it, this Court finds that there is no iota of evidence adduced in the action to prove the said requirements. Consequently, this Court finds that there is also no merit in the Plaintiff's claim against the 1<sup>st</sup> Defendant and proceeds to dismiss the same.

In passing, it is the considered view of this Court that the Plaintiff's case was more or less a moot because it leaves a lot of questions unanswered. For example, at what time did the Plaintiff fall into a ditch? Is it as he was walking along the car park going to meet PW2 and PW3 or is it after he had been given the money and was walking away? Did the Plaintiff fall into the ditch before or after he had been given the money? Who called the Plaintiff, is it PW2 or PW3 because each one these witnesses said he phoned the Plaintiff? Did the Plaintiff come out of the ditch on his own as per PW2 or he was helped out as per PW3? Who gave the Plaintiff the money, is it PW2 or PW3? Given that PW3 said that from the vehicle to where the Plaintiff fell into a ditch it was just about 1/2m away how come is it that his vehicle cannot be seen in Exhibit P1 as confirmed by PW3 in his evidence? etcetra.

It is also worth noting that the nature of the business which the Plaintiff was transacting at the said premises, to wit, collecting money for the Ngolongoliwa chieftaincy function, had nothing to do with the business of any of the two

Defendants herein. In other words, the Plaintiff was neither an “invitee” nor a “licensee” (a “visitor”) at the premises but a trespasser who had entered on the said premises at his own risk. The only duty owed by the occupier being not to inflict damage intentionally or recklessly on a trespasser he knew to be there. See: Commissioner for Railways v Quinlan [1964] 1 All ER 897. The Plaintiff would thus have to prove that the Defendants intentionally or recklessly inflicted the damage on him and knew that he was at the premises. This would have been quite a mammoth task for the Plaintiff to accomplish.


The fact that the Plaintiff's witnesses continued to contradict themselves unnecessarily also made this Court conclude that the probabilities are not equal but tilt very much in favour of the Defendants.

In short, even if the Plaintiff had succeeded in proving that the 1<sup>st</sup> Defendant was an agent of the 2<sup>nd</sup> Defendant and that the 2<sup>nd</sup> Defendant was an occupier of the premises on which the Plaintiff, allegedly, fell into the ditch this Court would still have not decided this action in his favour because the evidence adduced by the Plaintiff is not such as would have discharged the burden shouldered on him.

**(G) The Costs:**

The costs of an action are in the discretion of the court. They normally follow the event. In the exercise of such discretion, the Defendants having successfully defended the Plaintiff's action, this Court proceeds to award the costs of this action to the Defendants, the same are to be taxed if not agreed upon by the parties hereto.

Dated this 2<sup>nd</sup> day of March 2018

  
CHIRWANJ  
JUDGE