



IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

PERSONAL INJURY CAUSE NUMBER 689 OF 2012

BETWEEN:

CHRISTOPHER CHILAMBA

PLAINTIFF

AND

SPAR CASH AND CARRY

1st DEFENDANT

CITIZEN INSURANCE COMPANY LIMITED

2nd DEFENDANT

AND

MERVIN CHAGUNDA

1st THIRD PARTY

DUNCAN CHAMBAMBA

2nd THIRD PARTY

CORAM: JUSTICE M.A. TEMBO

Jere, Counsel for the Plaintiff
Dr Nkhata, Counsel for the 1st Defendant
Third parties, absent and unrepresented
Kakhobwe, Official Court Interpreter

JUDGMENT

This is this court's judgment following a trial of this matter. The plaintiff's claim is for damages for personal injuries that he had suffered herein when a vehicle owned by the 1st defendant and insured by the 2nd defendant, in which the plaintiff was a

passenger, was negligently driven and hit an oncoming vehicle. The 1st defendant denies liability and asserts that at the time of the collision it had already sold the motor vehicle herein to the 1st third party who is said to have sold it further to the 2nd third party but that the 1st third party had not yet changed registration of ownership of the said motor vehicle then.

This Court heard evidence from both the plaintiff and the 1st defendant. They also filed written submissions. The third parties did not appear at trial and never served any papers in this matter.

It is common cause that there was indeed a collision of the motor vehicles herein as claimed by the plaintiff. The collision took place on 5th May 2013 at Njuli along the Blantyre –Zomba road . It is also common cause that the collision herein was due to the negligence of the driver of the motor vehicle that is registered in the name of the 1st defendant. The motor vehicle is registered as MHG 1668. As such the plaintiff is entitled to damages for the personal injuries he suffered herein and special damages that he claimed herein. The only issue for determination on this matter is: which party is liable to pay those damages between the defendants and the third parties?

The evidence of the plaintiff is that a search that he conducted at the Road Traffic Directorate to ascertain the ownership of the motor vehicle MHG 1668 showed that this motor vehicle was registered in the 1st defendant's name at the date of the collision herein.

On its part, the 1st defendant disputed ownership of the motor vehicle herein. The 1st defendant's witness was its manager Mr George Nkhata. He testified that he had worked for the 1st defendant since 1999. Further, that the 1st defendant used to own the motor vehicle herein MHG 1668 but that the same was sold to the 1st third party in December 2010. Mr Nkhata tendered in evidence a document signed by a partner in the 1st defendant on the one hand and by the 1st third party on the other hand signifying approval for the motor vehicle herein to be transferred from the former to the latter. Mr Nkhata then further testified that he was subsequently informed that the 1st third party had also sold the motor vehicle herein to the 2nd third party herein. Mr Nkhata's testimony was to the effect that at the time of the collision herein the motor vehicle MHG 1668 was not being operated by the 1st

defendant or its agents. He also testified that the 1st third party never effected change of ownership of the motor vehicle MHG 1668 after the said motor vehicle was sold to the 1st third party.

With regard to the applicable law the plaintiff rightly submitted that in civil matters such as the instant one the burden of proof is on the party who asserts the affirmative and that the standard of proof is on a balance of probabilities.

The plaintiff then referred to parts of section 2 of the Road Traffic Act which provide that

“owner” in relation to a vehicle, means—

(c) the person who is a title holder and has the use and enjoyment of the vehicle.

Title holder in relation to a vehicle, means-

- (a) The person who has to give permission for the alienation of that vehicle in terms of a contractual agreement with the owner of such vehicle, or
- (b) The person who has the right to alienate that vehicle, and who is registered as such under section 11 of the Act.

The plaintiff further referred to section 139 (1) of the Road Traffic Act which provides that

A document purporting to be an extract from or copy of any register or record kept in terms of this Act and purporting to be certified as such shall in any court and upon all occasions whatsoever be admissible as evidence and shall be prima facie evidence of the truth of the matters stated in such document without the production of the original register or record or any certificate, licence, other document, microfiche, microfilm or computerized record from or of which such extract or copy was made.

He made further reference to section 136 (1) of the Road Traffic Act which provides that

Where in any prosecution relating to the driving of a vehicle on a public road, it is immaterial to prove who was the driver of a vehicle, it shall be presumed, until the contrary is proved, that such vehicle was driven by the owner thereof.

The plaintiff then referred to the case of *McGreevy and another v Sattar* [1987-89] 12 MLR 258 at 263 where it was held that in cases involving ownership of a motor

vehicle, proof of registration creates a rebuttable presumption that the person in whose name the vehicle is registered is the legal owner of the vehicle. The plaintiff made further reference to the case of *Yanu-Yanu Company Limited v Mbewe and another* [1981-83]10 MLR 417 on that point.

The plaintiff further referred to section 3 (1) of the Sale of Goods Act which defines a contract of sale of goods as a contract whereby the seller transfers or agrees to transfer property in goods to the buyer for a money consideration, called the price. The plaintiff then referred to Stroud's Judicial Dictionary of Words and Phrases 7th ed. vol. 3 and to Benjamin's Sale of Goods 17th ed. on the definition of a contract of sale of goods. The plaintiff concluded that for a transaction to amount to a valid sale in law, apart from the transfer of the property in the goods, there must be proof that some consideration, called price, was paid.

With regard to ownership of the motor vehicle MHG 1668 the plaintiff submitted that the 1st defendant had powers and rights to alienate, and it in fact alienated motor vehicle number MHG 1668 to the 1st Third party. And that according to section 2 of the Road Traffic Act, the 1st defendant was the title holder of the motor vehicle herein and by operation of law, the owner of the said motor vehicle.

The plaintiff further submitted that, in terms of section 139 (1) of the Road Traffic Act the contents of a register of motor vehicles are prima facie conclusive evidence as regards ownership of the motor vehicle. He however submitted further that the law places a duty on the party denying the presumption to rebut the same.

The plaintiff further submitted that in the present matter the plaintiff has shown that a search that was conducted at the Road Traffic Directorate on 13th September 2012 revealed that the motor vehicle herein was owned by the 1st defendant. He submitted that a rebuttable presumption was therefore established that the 1st defendant was the owner of the motor vehicle herein and that it was incumbent on the 1st defendant to rebut the presumption herein.

The plaintiff submitted that in purporting to rebut the presumption herein, the 1st defendant has stated, through its witness Mr Nkhata, that the motor vehicle herein was already sold to the 1st third party by the date of the collision herein. The plaintiff then referred to the agreement of 5th December 2010 signed between the 1st defendant and the 1st third party which reads that, 'this is to approve the transfer

of a Nissan Vehicle Registration number MHG 1668 from Spar Cash and Carry to Mr Malwin Chagunda of Anaconda Services'. The plaintiff submitted that this agreement is merely an approval of the transfer of the motor vehicle. Further, that it does not state as in what respect the motor vehicle herein was being transferred from the 1st defendant to the 1st third party. The plaintiff submitted that the agreement does not show a consideration or price.

The plaintiff contended that according to the definition of a contract of sale consideration is the main requirement for any valid contract of sale and that there cannot be a sale in absence of consideration. And therefore that the agreement tendered in evidence by the 1st defendant is not a sale agreement and does not say anything about the vehicle being sold.

The plaintiff further contended that if anything, the evidence of the testimony of the 1st defendant is not only unsupported by the evidence but is at best hearsay as he never authored the agreement of transfer herein. Further, that the 1st defendant's witness does not seem to have first-hand knowledge of the matters he purports to testify on since he is not a partner in the 1st defendant.

The plaintiff contended that in the circumstances, the 1st defendant has failed to rebut the presumption that it was the legal owner of the motor vehicle herein at the time of the collision and therefore it was the legal owner then.

The plaintiff further contended that since in terms of section 136 (1) of the Road Traffic Act, in any prosecution relating to the driving of a vehicle on a public road, it is immaterial to prove who was the driver of a vehicle, it shall be presumed, until the contrary is proved, that such vehicle was driven by the owner thereof by implication no person can be allowed to drive a motor vehicle unless he has authority from its owner. Further, that since the plaintiff has established that the 1st defendant was owner of the motor vehicle herein he prays that this Court finds that the 1st defendant authorized the driver herein to drive its motor vehicle in which case the 1st defendant is vicariously liable. This Court seriously doubts the applicability of section 136 (1) Road Traffic Act herein as this matter does not involve a prosecution as such.

On the other hand, the crux of the 1st defendant's defence to the plaintiff's claim is that the 1st defendant was not at the material time owner or manager of the motor

vehicle MHG 1668 and that therefore the 1st defendant cannot be liable for the negligence of the person who was driving the said motor vehicle at the time of the collision herein.

The 1st defendant submitted that the plaintiff has failed to establish any connection between the 1st defendant and the driver of the motor vehicle herein at the time of the collision herein. And that the only connection between the 1st defendant and the collision herein is the fact that the motor vehicle herein was still registered in the 1st defendant's name.

The 1st defendant also referred to parts of section 2 of the Road Traffic Act which provide that

“owner” in relation to a vehicle, means—

(a) the person who has the right to the use and enjoyment of a vehicle in terms of a contractual agreement with the title holder of such vehicle;

(b) any person referred to in paragraph (a), for any period during which such person has failed to return that vehicle to the title holder in accordance with the contractual agreement referred to in paragraph (a);

Title holder in relation to a vehicle, means-

(c) The person who has to give permission for the alienation of that vehicle in terms of a contractual agreement with the owner of such vehicle, or

(d) The person who has the right to alienate that vehicle, and who is registered as such under section 11 of the Act.

The 1st defendant then referred to section 20 (a) of the Sale of Goods Act which provides that

Unless a different intention appears, the following rules shall apply for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer—

(a) where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods shall pass to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery or both be postponed.

The 1st defendant then submitted that, in the present matter, it concedes that the registration of the motor vehicle herein in its name raises the presumption that the 1st defendant was the owner of the said motor vehicle. However, that the presumption can be rebutted. The 1st defendant contended that in rebuttal it has stated that it sold the motor vehicle herein to the 1st third party who had sold the said motor vehicle to the 2nd third party whose agents were in control of the motor vehicle herein at the time of the collision herein. The 1st defendant further submitted that this evidence has not been disputed by the plaintiff and amounts to adequate rebuttal of the presumption of ownership herein.

The 1st defendant noted that the plaintiff contends that the evidence of the 1st defendant's witness is hearsay and does not prove the alleged sale. The defendant then took the view that it is a duly registered entity and can provide evidence through testimony of any of its duly recognized employees. Further, that the witness of the 1st defendant is a manager who has worked for the 1st defendant since 1999 and it is the belief of the 1st defendant that he is competent to testify on the 1st defendant's behalf.

The 1st defendant further contended that the agreement to transfer the motor vehicle from the 1st defendant to the 1st third party is ample confirmation that the 1st defendant had parted possession with the motor vehicle herein. The 1st defendant asked why it would have authorized the transfer of the ownership of the motor vehicle herein if not because it had sold the same and was divesting of its interest in the said motor vehicle. The 1st defendant submitted that the agreement to transfer the motor vehicle confirms that the 1st defendant took all steps to cease to be legal owner of the motor vehicle herein long before the collision occurred herein.

The 1st defendant also brought to the attention of this Court the effect of Order 16 Rules of Supreme Court in the present proceedings. The 1st defendant submitted that Order 16 r. 1 Rules of Supreme Court allows a defendant to take out a third party notice through which a defendant can claim contribution or indemnity from a person that is either already a party to the action or not. The 1st defendant submitted that it duly took out a third party notice against the 1st and 2nd third party claiming indemnity with regard to the plaintiff's claims herein. It submitted further that, neither of the third parties herein acknowledged the third party notice or

entered a defence. The 1st defendant submitted that in these circumstances and in terms of Order 16 r. 5 Rules of Supreme Court the third parties must be deemed to have admitted the claim as stated in the third party notice and shall be bound by any decision in the action in so far as it is relevant to any claim in the third party notice.

The 1st defendant submitted that its claim against the third parties is for indemnity on the plaintiff's claim and costs or contribution to the extent to be adjudged by this Court. In the foregoing circumstances the 1st defendant asked that this Court should find that the plaintiff's claim is not proved against it or in the alternative that if the plaintiff's claim is proved against the 1st defendant then this Court should immediately order the third parties to indemnify the 1st defendant to the full extent of the plaintiff's claim such that any judgment entered against the 1st defendant should be executed directly on the third parties.

This Court will have to determine if it is proved that the 1st defendant was owner of the motor vehicle herein at the time of the collision herein. This Court wishes to agree at the outset that the 1st defendant is right that the plaintiff has not at all connected the 1st defendant to the driver of the motor vehicle herein except through the presumption of ownership through registration.

As rightly submitted by both the plaintiff and the 1st defendant the law is that registration of a motor vehicle raises the presumption that the one in whose name the motor vehicle is registered is the owner of the said motor vehicle. The fact that at the time of the collision herein the 1st defendant was registered owner of the motor vehicle herein raises the presumption that it was the owner of the said motor vehicle. However, as rightly noted by the plaintiff and the 1st defendant, that presumption is rebuttable, as any other presumption is. The issue then is whether the 1st defendant has brought adequate evidence to rebut the presumption.

The 1st defendant has brought evidence to show that well before the collision herein it had agreed to transfer the motor vehicle herein to the 1st third party. The evidence of the 1st defendant's long serving employee is that the transfer was consequent upon a sale of the motor vehicle herein. The plaintiff disputes this and argued that the agreement to transfer the motor vehicle only shows a transfer and not a sale. Further, that the evidence is hearsay as it is given by a person other than

a partner in the 1st defendant firm and who was not a party to the agreement to transfer.

This Court is prepared to accept that the transfer agreement was not signed by the employee of the 1st defendant and he therefore cannot testify as to the truthfulness of its contents. As such, the issue as to the import of the agreement of transfer does not arise. However, the 1st defendant's employee, being a long serving employee, must have been familiar with the goings-on at the 1st defendant's firm. Additionally, his credibility was never questioned at all as he was never cross-examined by the plaintiff who sought at the submissions stage to contend that the said employee is not a partner and therefore cannot speak to the goings-on at the 1st defendant's firm. If the plaintiff wanted to question the competence of the 1st defendant's employee he should have cross-examined him on his evidence. The third parties too have also not contradicted the evidence of the 1st defendant's witness. On account of the foregoing, this Court accepts the 1st defendant's uncontroverted evidence that the motor vehicle herein had been sold by the 1st defendant to the 1st third party by the time of the collision herein. The 1st defendant has therefore rebutted the presumption that it was the owner of the motor vehicle herein at the time of the collision herein. The 1st defendant is therefore not liable for the negligent driving of the motor vehicle herein that resulted in the collision that caused the injuries suffered by the plaintiff. The motor vehicle was however owned by the 1st third party at the time of the collision herein . The evidence by the 1st defendant's employee that he was informed that the 1st third party had subsequently sold the said motor vehicle to the 2nd third party is clearly hearsay and cannot be relied upon by this Court.

In the final analysis, this Court finds that the 1st third party is liable for negligence in this matter and judgment is entered for the plaintiff against the said 1st third party with costs. There is therefore no issue of indemnification or contribution herein since the 1st defendant is not liable for the negligence herein. In fact, with hind sight, what the 1st defendant should have asked for by the third party proceedings was for this court to determine the issue of liability herein as between the 1st defendant and the third parties pursuant to Order 16 r 1 (c) Rules of Supreme Court. Order 16 r 1 (c) Rules of Supreme Court provides that

Where in any action a defendant who has given notice of intention to defend -

(c) requires that any question or issue relating to or connected with the original subject-matter of the action should be determined not only as between the plaintiff and the defendant but also as between either or both of them and a person not already a party to the action;

then, subject to paragraph (2), the defendant may issue a notice in Form No. 20 or 21 in Appendix A, whichever is appropriate (in this Order referred to as a third party notice), containing a statement of the nature of the claim made against him and, as the case may be, either of the nature and grounds of the claim made by him or of the question or issue required to be determined.

The damages herein shall be assessed by the Registrar.

The 1st third party is also condemned in costs for the 1st defendant herein who had to suffer this action when the 1st third party did not change ownership of the motor vehicle herein after having acquired ownership of the same. The costs shall be taxed if not agreed.

Despite the plaintiff's claim herein he did not mention the 2nd defendant at all in his testimony and so no order is made against it.

Made in open Court at Blantyre this 14th October 2015.

M.A. Tembo
JUDGE