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IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY
CIVIL CAUSE NO. 414 OF 2015

BETWEEN:
ELIEZER ENERST MNTHUNZI **PLAINTIFF**

-AND-

AMPEX LIMITED
CHARTER INSURANCE COMPANY **DEFENDANT**

CORAM: ANNELINE KANTHAMBI **ASSISTANT REGISTRAR**

Mr. P. Mzembe for the Plaintiff

Mr B. Matumbi for the Defendant

Mr. Maxwell Manda Court Clerk

ORDER ON SUMMARY JUDGMENT

This is an application by the plaintiff herein seeking summary judgment under Order 14 of the Rules of the Supreme Court. The Applicant filed an affidavit and skeletal arguments in support of the Application, in which the issues are raised. The plaintiff commenced an action claiming damages for personal injuries against the first defendant as a company that operates AXA branded buses, among other routes, between Mzuzu and Blantyre and employs drivers to drive its buses and against the second defendant an insurance company, as the insurer of the AXA branded buses. The plaintiff avered that on Friday the 19th of June 2015, at around 3:00 am, when it was noticeably dark, the bus the plaintiff was on approached Balaka Bus depot. He claims he was injured when he got off the bus and fell into an old bus/ vehicle repair pit. That the first defendant's driver did not warn the plaintiff, or any of the other passengers, of any danger in the terrain immediately outside or around the bus. That the

Road Traffick (Public Services Vehicles) (Operations) Regulations under section 181, subsection 4(f) imposes a statutory duty of care upon the driver or conductor of a bus. And that by failing to warn the passengers of the open pit between the bus and the toilet facilities, the said bus driver breached the above mentioned statutory duty of care. That the conduct or omission to warn is negligence per se under the above mentioned Act and consequently the bus driver is liable in negligence. In paragraph 14 the deponent avers their belief that there is no defence to the present action, and in paragraph 15 states the belief that the 1st defendant has no real prospect of successfully defending the issue of negligence at trial.

Counsel for the Plaintiff alleges that the defence is a mere general denial.

The defendant on the other hand filed an affidavit in opposition in paragraph 4 of which counsel avers that the plaintiffs have failed to demonstrate that the said accident as deponed by counsel for the plaintiff. The defendant also raises in its skeleton arguments the issue of whether the correct party has been sued in this matter. The 1st defendant maintains that this is a matter of occupier's liability where the owners of Balaka bus depot should be held responsible for the injury sustained by the plaintiff.

The defendant on the other hand argues that it is in dispute how far away from the bus the pit into which the applicant fell was. That this is pertinent as it has a bearing on what "reasonable precaution" the driver could have taken in relation to the plaintiff. The defendant then argues that this is a proper matter that has to be adjudicated upon and cannot be disposed of summarily and prays that the plaintiffs application for summary judgme nt against the defendant be dismissed with costs.

Issues

The court has to decide whether or not summary judgment has to be entered against the defendant herein.

The Law

Order 14 rule 1 provides that where in an action a statement of claim has been served on a defendant and that defendant has given notice of intention to defend the action, the plaintiff may, on the ground that that defendant has no defence to a claim included in a writ, or to a particular part of such a claim or part except as to the amount of any damages claimed, apply to the court for judgment against the defendant.

The summary juris diction the court is asked to exercise is under Order 14 rule3 of the Rules of the Supreme Court which provides as follows:

> " *unless on the hearing of an application under rule 1 either the court dismisses the application or the defendant satisfies the court with respect to the claim, or part of the claim, to which the application relates that there is an issue or question in dispute which ought to be tried or that there ought, for some other reason, to be a trial of that claim or part , the court may give such judgment for the plaintiff against that defend ant on that claim or part as may be just having regard to the nature of the remedy or relief claimed ."*

Case authorities abound on the fact that the purpose of the order under consideration is to enable a plaintiff to obtain summary judgment without trial on proving his claim clearly and if the defendant is unable to set up a bona fide defence or at least raise an issue against the claim which ought to be tried. (See ***Roberts v Plant [1985] 1 QB 597, Robinson and*** **Co.** ***v Lynes [1894] 2 QB 577.*** Indeed it is only where the court is satisfied that there is no defence or a fairly arguable point to be argued on behalf of the defendant that it becomes the duty of the court to enter judgment in favour of the applicant. This has been said to be in line with the policy of Order 14 which is to prevent delay in cases where there is no defence .(***European Asian Bank AG v Punjab and Sind Bank (No.2) [1983] 1WLR 642***

Expounding further on the ambit of Order 14, Mwaungulu J, had this to say:

> *"there are two sides to the germane purposes of the summary procedure under Order 14 of the Rules of the Supreme Court. On the one side is a plaintiff who has a clear case and the only impediment to him realizing his right is a defend ant who not only has no defence but has no fairly arguable point against the plaintiff s claim. In giving judgment to the plaintiff in these circumstances the court is really acting by what is dictated by reason, common sense and good judgment. Courts cannot allow themselves to be instruments of delay and unnecessary expense to the parties. On the other side is a defend ant faced with an action where there is a reasonable doubt that the plaintiff is entitled to judgment and the defend ant could show that there is an issue to be tried. Order 14 was not intended to shut out a defendant who could show that there is an issue to be tried from presenting his case to the court, or to impose conditions* ***Lucky Haulage v Nobrega t/a Cargo Force [1997] 2 MLR 120***

Quoting the case of ***Sheppards and*** **Co** ***v Wilkinson [1889]*** **6** ***TLR 13,*** Justice Mbalame stated that the provisions of the order must be used with great care to guard against shutting up a defendant from defending his case unless it is very clear that he has no case. ***Chiwoko v ESCOM [1995] 2 MLR 702.***

The Finding of the Court;

Herein are the points under consideration:

(a) Have the plaintiffs clearly proven their claim?
(b) Does the defence have no fairly arguable point against the plaintiffs claim?
(c) Have the requirements of Order 14 been satisfied?

I have thoroughly read the defendant's affidavit. I have also studied the record and I am satisfied that the application comes within the scope of the Order and that the plaintiffs have satisfied the preliminary requirements of Order 14 have been complied with and these are:

1. The applicants were duly served with the defence;
2. The applicants did not give a reply to the counterclaim;
3. The affidavit in support of the application complied with the requirement of rule 2.

Consequently, the burden shifts to the defendants to satisfy the court why judgment should not be entered against them. The defendants in this case seek to discharge the burden on the merits as well as the law. They argue that they have a good defence to the plaintiffs claim and seem to be suggesting that there is a dispute as to facts which ought to be tried.

In the present case, having carefully heard and scrutinized the parties ' submissions, I can confidently say that I am not satisfied that there is no defence or a fairly arguable point to be argued on behalf of the defendant. The defendant has a fairly arguable point in that, for starters, they raise the issue of whether

These are issues that need to be settled at trial. As such, I find that this is not a proper case in which a summary judgment should be entered. The application is hereby dismissed.

The Costs of this action are in the cause.

Made in **Chamber** this 16th day of November 2016.

Anneline Kanthambi
ASSISTANT REGISTRAR