



IN THE HIGH COURT OF MALAWI

MZUZU REGISTRY

CIVIL CASE NO. 198 OF 2017

BETWEEN

ZGOWE SIMBEYE ..... CLAIMANT

-AND -

DANIEL MSUKWA.....1<sup>ST</sup> DEFENDANT

PRIME INSURANCE COMPANY LIMITED..... 2<sup>ND</sup> DEFENDANT

CORAM:

H.H. Brian Sambo, Assistant Registrar

Mr. C. Ghambi, counsel for the Claimant

Mr. E. Mbotwa, counsel for the Defendants

Mr. Henry Kachingwe, Court Clerk/Official Interpreters

RULING

### **BRIEF FACTS OF THE UNDERLYING MATTER**

On the 3<sup>rd</sup> of July, 2017, the 1<sup>st</sup> Defendant was driving motor vehicle registration number BU 4092 Futso Fighter Van from the direction of Chitipa heading towards Karonga. On arrival at Lufita Trading Centre in the district of Chitipa, the 1<sup>st</sup> Defendant reversed his motor vehicle towards a bus stage with the aim of picking bags of potatoes. In the processing of reversing the motor vehicle, the rear door of the motor vehicle, which was left open, hit the Claimant on his leg.

The 2<sup>nd</sup> Defendant was the owner of the said motor vehicle while the 3<sup>rd</sup> Defendant was the insurer of the said motor vehicle at the material time. They are all sued in their respective capacities with regard to the stated motor vehicle.

### **BRIEF FACTS OF THE PRESENT MATTER**

The Claimant applied that summary judgment should be entered against the 3<sup>rd</sup> Defendant on the ground that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had not proffered any defence in response to the allegations of negligence against them. The 3<sup>rd</sup> Defendant opposes the application for summary judgment on the ground that there are arguable issues to be determined at full trial between it and the Plaintiff and that the Defendant has a *bona fide* defence against the Plaintiff's claims.

### **ISSUE TO BE DETERMINED**

The main issue to be determined is whether or not summary judgment can be entered against the 3<sup>rd</sup> Defendant as played for by the Claimant.

## THE LAW

I wish to go straight that summary judgments are only possible where the Defendant has a defence but the Claimant is of the view that the Defendant does not have the intention of defending the Claim. **Order 12 rule 23 of the Courts (High Court) (Civil Procedure) Rules, 2017 (CPR)** provides that a claimant may apply to the Court for a summary judgment where the defendant has filed a defence but the claimant believes that the defendant does not have any real prospect of defending the claim.

I am of the considered view that, where a claim is being defended jointly, the entire defence must show no real prospects of defending the claim before an application for a summary judgment can be filed. It is a common argument that in a personal injury matter, an insurer does not have exclusive interests; entailing that where the other attendant defendants admit liability or do not show prospects of defending the claim then the insurer should go down the drain with them. I strongly believe, and I think my belief is honest and true, that in personal injury cases, the insurer is the most interested bearing in mind that at the end of the day, more often than not, they will be expected to settle judgement debts.

Just going a little further, in **Oasis International & another versus Mahomed t/a CNC Medical Supplies (1996) MLR 62** it was held that in an application for summary judgment, the Court has to be satisfied that the case comes within the order and whether the claimant has satisfied the requirements for proceedings under the law.

The present matter does not qualify for an application for a summary judgment. The Statement of Defence and indeed even the Sworn Statement in support of the application for summary judgment clearly indicate that the Defendant has a *bona fide* defence against the Claimant's claim in that it is the 3<sup>rd</sup> Defendant's contention



that the Claimant was negligent and the accident was the result of the Claimant not exercising due care by having a proper look out of his circumstances at the time of the accident. Furthermore, it is the 3<sup>rd</sup> Defendant's contention that the Claimant remained on the road even when he saw that a motor vehicle was reversing in his direction.

Counsel for the defence submitted that the issue which ought to be determined at trial is whether or not the Claimant was negligent in that he remained on the road even when he saw that a motor vehicle was reversing in his direction.

From the foregoing, it is obvious that entering a summary judgment against the 3<sup>rd</sup> Defendant at this stage would have the effect of shutting up the 3<sup>rd</sup> Defendant from defending their case.

The general principle in summary judgments is that where in an action to which this rule applies, a statement of claim has been served on a defendant and the defendant has given notice of the intention to defend, the Claimant may, on the ground that the defendant has no defence to the claim or part of the claim, apply to the court for a summary judgment against that defendant except as to the amount of any damages claimed.

The rationale of summary judgments was articulated in the case of **Sichinga v National Bank of Malawi**, 15 MLR, 452. In this case the plaintiff wishing to make provision for his during the time he would be abroad, signed a declaration of authority containing several paragraphs, authorising the defendant, his bank, to pay out moneys to his wife from accounts held by him with the defendant. In each paragraph the signatory was required to delete references to accounts over which he did not intend to grant the powers set out in the paragraph which he did except

for a paragraph (e) which concerned withdrawals from accounts. The plaintiff's wife made withdrawals from his savings account (the total amount of which was in dispute) which were permitted by the defendant on the basis of the declaration of authority. The plaintiff sought summary judgment against the bank in the amount withdrawn from his savings account. He argued that the declaration did not stipulate his savings account number and therefore was not applicable to his savings account, and that reading paragraph (e) in the context of the document as a whole it was clear that he had not intended to grant authority over his savings account. Alternatively, he argued that it was clear that he had made a mistake in paragraph (e) and that that mistake had rendered the declaration ambiguous to the extent that the defendant had been under a duty to ascertain from the plaintiff his true intention. The court dismissed the application and stated that summary judgment was not an appropriate remedy in this matter. *Summary judgment should be granted where the plaintiff's claim could not be resisted and the Claimant.*

The short of this is that I dismiss the application for summary judgments. This matter has never been to mediation. I order the Defendant herein to file notice of mediation before the honourable judge within 7 days.

Each party to shoulder its own costs.

Made in chambers today Monday the 10<sup>th</sup> of December, 2018.

  
Brian Sambo  
Assistant Registrar