The Judiciary

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NUMBER 146 OF 2017

BETWEEN

SAHID SATTAR.....CLAIMANT

AND

EDWIN NJOLOMA.....1ST DEFENDANT

BOWLER BEVERAGES.....2ND DEFENDANT

GENERAL ALLIANCE INSURANCE Co. LTD.....3RD DEFENDANT

CORAM: A.J. BANDA, ASSISTANT REGISTRAR

Mr. Mbeta and Mr. Kamangira, of counsel, for the Claimant

Ms Mndolo, for the 1st and 2nd Defendants

Mr. Chitsulo, Clerk/ Official Interpreter

BANDA, AR:

RULING

Background

The claimant brought a suit against the defendants on 15th May, 2017 claiming for cost of repairing his motor vehicle, damages for loss of use and the sum of K3, 000.00 for procuring a police report, following a motor vehicle accident involving the claimant's vehicle and that of the 2nd defendant which was driven by the 1st defendant and insured by the 3rd defendant. The defendants entered a defence in which they denied liability and alternatively pleaded that the claimant contributed to the accident. The defendants did not take any interest to have the issue resolved by mandatory mediation. They did not take part at all, until the proposed mediator issued a certificate of non-compliance.

The claimant then applied to the court to strike out the statement of defence which was filed by the defendants under rule 14 (2) of the Courts Mandatory Mediation Rules, 2004. This application was granted on 13th February, 2018. The court further entered judgment for the claimant. The claimant then filed a notice of appointment for assessment of damages scheduled for 17th May, 2018. On that day, counsel on both sides intimated that they would settle the issue of quantum of damages by agreement. The court adjourned the case to the 30th of May, 2018 in the event that the parties failed to agree within the 7 days that they asked for. It is obvious that the parties did not agree as the matter came again for assessment of damages on 30th May, 2018.

On the stated date, the 1st and 2nd defendant who had now retained Tembenu, Masumbu and Company as their legal representatives in this proceeding, applied for adjournment through counsel Mndolo, stating that they needed to be given chance to apply for the setting aside of the judgment and restoration of their defence. The claimant's counsel objected but the court granted the adjournment to allow counsel to file documents for this application. The present application therefore is for an order to set aside judgment and to restore the 1st and 2nd defendant's defence.

Facts

The facts which are not in dispute per se, are in the two sworn statements filed, one in support of the application and the other in opposition. I have alluded to some facts in the background to the case provided above. The 1st and 2nd defendant had trusted that the 3rd defendant as their insurer would defend the matter on their behalf as well. They only learnt later that there was a judgement entered against the defendants and that the claimant would claim damages in excess of K6, 000,000.00 whilst the third defendant's limit of liability was only K1, 000,000.00 as per the insurance policy entered between the 2nd and third defendants.

Both parties to the case state that the third defendant handled the matter in an unprofessional way which led to the defence being struck out and judgment entered against the defendants by

not availing themselves in the mediation process. The 1st and 2nd defendants state that unless the judgment is set aside, the 1st and 2nd defendant will be condemned without being heard, which will be against rules of natural justice.

Issue

Two connected issues in this application are; whether the judgment entered on 13th February, 2018 should be set aside, and whether the defence that was struck out should be restored to the cause.

Analysis of Law and Fact

The concern of the 1st and 2nd defendant is that they will be condemned by the judgment that was entered without them being heard. The two defendants state that they had no knowledge of how the case was being conducted by the third defendant whom they entrusted to defend the matter as their insurer. It is clear from the facts that all the three defendants had one legal practitioner in this matter. The question that has exercised my mind is whether we can say that the two defendants were not heard, or were not given a chance to be heard. In answering that question, I remind myself that the judgement that was entered is not a default judgment. It was a judgment entered according to the dictates of the Mandatory Mediation Rules that were applicable then. Courts are creatures of the law. They are mandated to interpret the law and in fact courts have to follow the law as they dispense justice, which justice is not according to whim, religion or anything, but law.

The 1st and 2nd defendant were aware or ought to have been aware of the insurance limit as counsel for the claimant submitted. They knew that they were jointly and severally sued and as such they should have known the consequences in case they were liable and the damages exceeded the insurance limit. They chose to litigate by the skill and diligence of their insurer. The insurer did not inform them of the mediation even though there was due service. The 1st and 2nd defendants were wanting also in not following up with their insurer, aware of possible outcomes of the case. Surely that should not be the business of the claimant who did everything right to see his claim dealt with by the court. The 1st and 2nd defendant did not care about the suit enough to defend it by themselves or even to follow through with the 3rd defendant whom they entrusted the lawsuit with. In short they were not diligent. The judgment was entered because of a lack of due diligence on the part of the defence as a whole.

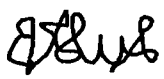
I have considered whether it would not occasion an injustice to the claimant to allow the application even though the judgment the 1st and 2nd defendant is trying to stay was entered as a result of the defendants' own lack of care as found, in the interest of justice on merits. I considered whether costs are the only loss of the claimant which can be compensated for at this stage by the defendants footing them. I find that the claimant stands to lose time, and more importantly the use of the motor vehicle if repair costs are not paid for. As they say justice delayed is justice denied. The judgment that was entered, even though not on merits, was

regular, and there is no lawfully justifiable excuse why the judgment entered in favour of the claimant should be set aside. It would therefore be unfair and prejudicial to the claimant if the court allowed this application. It would also be promoting laziness, carelessness and a lack of respect for procedural law to allow the application. The law favours the diligent and abhors sheer indolence.

Conclusion

For the reasons given above, I dismiss the application with costs to the claimant. The claimant is at liberty to file a notice of assessment of damages.

Made this 7th day of June, 2018.



Austin Jesse Banda

ASSISTANT REGISTRAR