Law Reports

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

PERSONAL INJURY CAUSE NUMBER 73 OF 2018

BETWEEN:

LOUIS THONYIWA **CLAIMANT**

AND

CASTEL MALAWI BREWERIES LTD **DEFENDANT**

CORAM: JUSTICE M.A. TEMBO

Ndlovu, Counsel for the Claimant
Ulaya, Counsel for the Defendant
Mankhambera, Official Court Interpreter

JUDGMENT

1. This is this court's judgment following a trial of this matter on the claimant's claim for damages for the personal injuries he had suffered due to the alleged negligence on the part of the defendant, a soft drinks manufacturer, in producing a drink known as Fanta Pineapple which the claimant consumed and caused him injury that necessitated treatment at a hospital.
2. The claimant's statement of claim indicates that on 23rd November, 2017, he consumed part of Fanta Pineapple which he bought from one of the defendant's retail outlets in Ndirande Township and he noted that the bottle contained some foreign matters.

3. He stated that, as a result of consuming the said Fanta Pineapple, he sustained injuries and was treated at Mwaiwathu Private Hospital. The injuries were abdominal pains, severe diarrhea, vomiting and fever. He also suffered medical expenses.
4. The claimant then indicated that he took the bottle to the defendant where the foreign bodies were confirmed and the claimant was offered a coupon for a case of Fanta Pineapple or a soft drink of his choice.
5. He asserted that the injury, loss and damage that he suffered was caused by the defect in the Fanta Pineapple and negligence of the defendant. He indicated the particulars of negligence, namely, that the Fanta Pineapple was not fit for human consumption, it contained foreign matters, the defendant failed to ensure that it was fit for human consumption and the claimant also relied on the doctrine of *res ipsa loquitur* which entails that the mere occurrence of the injury is sufficient to imply negligence.
6. The defendant denies that it was negligent as alleged. It however admitted receiving the claimant's complaint about a bottle that had foreign matter and offering him a coupon for soft drinks.
7. The issue for determination before this Court is whether the defendant was negligent in the manner it produced the Fanta Pineapple herein resulting in the injury and damage to the claimant.
8. The standard of proof in these civil matters is on a balance of probabilities as rightly noted by the parties. And, the burden of proof lies on he who asserts the affirmative, in this case the claimant. See *Nkuluzado v Malawi Housing Corporation* [1999] MLR 302 and *Miller v Minister of Pensions* [1947] All ER 372.
9. The claimant testified and the defendant brought a single witness in its defence. The evidence established that, on 20th November, 2017, the claimant indeed bought a crate containing 20 bottles of Fanta Pineapple manufactured by the defendant. By 23rd November, 2017 the claimant had consumed 16 bottles. On 23rd November, 2017 the claimant consumed a bottle of Fanta Pineapple in the morning hours. He indicated that an hour later he started having abdominal pains. Towards lunch time he took two other bottles. By the evening he had diarrhea which prompted him to go to hospital where he was diagnosed with gastroenteritis which is characterized with abdominal cramps, diarrhea, palpitations, nausea and general body weakness.

10. When he went back home from the hospital he decided to take the last bottle of Fanta Pineapple and discovered that it had some foreign matter. He never took that bottle. He later reported the issue to the defendant and the Malawi Bureau of Standards.
11. The claimant had last eaten the previous night and had the bottle of Fanta Pineapple for breakfast on the material day.
12. The defendant follows high standards when bottling beverages which standards are ensured by computerized equipment and humans. This system is not 100 percent error free or perfect.
13. This Court agrees that on a claim of negligence the plaintiff must prove that there was a duty of care owed to him by the defendant, that the duty was breached and that as a result of the said breach the plaintiff suffered loss and damage. See *Kadawire v Ziligone* [1997]2 MLR 139.
14. This Court further agrees that a manufacturer of products, such as bottled drinks, who produces them with an expectation that they will be consumed in the state they leave his production unit owes a duty of care to end users of such products. In the absence of any intervening opportunity for tampering, then the manufacturer would be liable for negligence if he fails to exercise reasonable care in the preparation of packaging of the products which results in injury to the consumer. See *Phiri v Carlsberg Malawi Breweries Limited*, Civil Cause Number 747 of 2016 (High Court) (unreported).
15. This Court also agrees that, to succeed in an action for negligence in product liability, there must be a nexus by means of scientific analysis between the alleged contaminants and the claimed illness/injuries arising from drinking the defective product. See *Banda v Southern Bottlers Limited*, Civil Appeal Number 7 of 2013 (MSCA).
16. On the evidence and upon a consideration of the submissions of the parties, this Court finds that the defendant breached the duty of care resulting in a foreign matter being found in the last bottle of Fanta Pineapple that the claimant had bought in this matter and which he never consumed. The defendant cannot generally rely on its system of inspection as a reasonable system to foreclose a finding of breach of duty where its inspectors could have seen foreign matter in a beverage bottle upon their exercise of reasonable care on visual inspection. The claimant was able to see the foreign matter on visual inspection. See *Salima v Southern Bottlers* [2007] MLR 89.

17. In such a case, had the claimant consumed the Fanta Pineapple with such foreign matter resulting in injury, negligence would have been implied on the part of the defendant by reason of the doctrine of *res ipsa loquitur* in circumstances where there was no way of knowing why and how that the foreign matter caused the injury.
18. The doctrine of *res ipsa loquitur* applies where the occurrence is such that the damage inflicted would not have happened without negligence; the thing that inflicted the damage was under the sole management and control of the defendant; and there is no evidence as to why or how the occurrence took place. See *Tembo and others v Shire Buslines Limited* [2004] MLR 405.
19. However, as submitted by the defendant on the facts in this matter, this Court finds that since the claimant never consumed the contents of the bottle of Fanta Pineapple that had foreign matter, no connection has been established between the consumption of the rest of the Fanta Pineapple and the abdominal problems that the claimant suffered. The claimant has not brought evidence proving that his stomach upset was a result of consuming the rest of the Fanta Pineapple. Therefore, he failed to prove that his abdominal upset was caused by the rest of the Fanta Pineapple. See *Banda v Southern Bottlers Limited*, Civil Appeal Number 7 of 2013 (MSCA).
20. The doctrine of *res ipsa loquitur* is also not applicable in circumstances where the claimant never consumed the contents of the suspect bottle of Fanta Pineapple that had foreign matter and there being no evidence that the rest of the Fanta Pineapple he had consumed was suspect.
21. In the circumstances, contrary to the claimant's views, his claim fails with costs.

Made at Blantyre this 23rd December, 2021.

M.A. Tembo
JUDGE