IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO.405 OF 1987

BETWEEN:

KWACHA GONDWE ..... PLAINTIFF

and

DAVID WHITEHEAD & SONS (MW) LTD. ..... DEFENDANT

CORAM: MTEGHA, J.

Osman, Counsel for the plaintiff
Kaliwo, Counsel for the defendant
Katunga, Official Court Interpreter
Maore, Court Reporter

JUDGMENT

The plaintiff in this case, Kwacha Gondwe, is claiming against the defendant for the sum of K4,000.00 being the amount which he would have been compensated for an injury to his knee had the defendant submitted his claim to the Insurance Company concerned.

The statement of claim alleges that the plaintiff was at all material times a registered football player of a club known as Whitex United Football Club (The Club) which club was sponsored by the defendant. The defendant took out a Group Personal Accident Policy for and on behalf of its players including the plaintiff specifically to cover the players for injuries sustained during play, training and travelling to and from games or training. The policy, No.PAG 4830612 was obtained through Hogg Robinson (MW) Ltd. The plaintiff alleges that in December, 1983, while playing competitive football he sustained a knee injury and temporary disablement was assessed at 20% and he was paid K1,000.00 in accordance with the policy. According to the policy, the maximum payment for 100% disablement is K5,000.00. According to the pleadings, the plaintiff underwent an operation and the resulting medical report showed that he was 100% permanent disabled, entitling him to K5,000.00 less K1,000.00 already paid.

The plaintiff further pleaded that since the defendant took out the policy for and on behalf of its players including the plaintiff the defendant owed them a duty and or obligation to present their claims to the Insurance Company concerned and such duty and obligation was

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contractual and could be implied from the relationship between the plaintiff and the defendant. The plaintiff further pleaded that the defendant, in breach of this duty and or obligation, failed and or neglected to submit the plaintiff's medical report and claim to the Insurance Company within the period and as a result the plaintiff lost compensation of K4,000.00.

The defendant pleaded that it took out the policy not for and on behalf of players, but it took it on its own behalf to cover itself in the event of the players sustaining injuries. It was also the defendant's pleadings that the plaintiff was not entitled to 100% disablement compensation for an injury to the knee. Further the defendant denied that it owed a duty and obligation to the players to present their claims to the Insurance Company; nor was the duty contractual or implied from their relationship. The defendant further pleaded that the Policy provided for 100% compensation only in the case of total and permanent disablement from following any employment or occupation, and that the plaintiff's employment or occupation is that of Assistant Creditors Supervisor, in which capacity he is still employed by the defendant and not that of playing football, he is therefore fit to follow the said employment or occupation. In any case, the defendant pleaded, the plaintiff was not a party to the Policy and was not and is not entitled to any benefit thereunder, and could not compel the defendant to present any claims thereunder, especially that the defendant itself paid the premiums from its own resources.. These then were the parties' pleadings.

The first witness for the plaintiff was Dr. Blair, an orthopaedic specialist based at Queen Elizabeth Central Hospital, Blantyre. It was his evidence that Dr. Ryken, an orthopaedic surgeon referred the plaintiff to him for his opinion, and as a result he saw the plaintiff on 7th March, 1986. The plaintiff had a swelling on the right knee which was loose and unstable. He found that the plaintiff had fluid in his knee, but he did not have damaged ligaments and on 14th March, 1986, he withdrew the fluid from his knee and injected him with a drug. When the plaintiff returned on 11th April, 1986, it was found that he still had some fluid and he got treated. Prior to the examination by Dr. Blair, the plaintiff had been seen on several occasions by Dr. Ryken who assessed permanent disability at 20%. It was Dr. Blair's evidence that he filled in the medical report form and assessed him that as far as football playing is concerned, the plaintiff suffered 100% permanent disability because he would never play football again. He came to this conclusion because the plaintiff himself told him that he was a football player, and if the plaintiff had told him that he had other occupation, he would not have assessed him at 100%, but as far as football playing is concerned, he had no doubt that the 100% permanent disability is correct.

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The plaintiff himself gave evidence as PW2. It was his evidence that he is employed by the defendant as Assistant Creditors Supervisor, having joined the defendant company on 3rd October, 1978. It was his evidence that he also used to play football for Whitex United Football Club a Club which is sponsored by the defendant. There were 25 registered players and five officials, some of whom were employees of the defendant and others were not. In 1983, besides being Assistant Credit Supervisor, and playing football he was also Assistant Coach. If they won the match, each player would get K15.00; if they drew, they would get K7.50 and if they lost the game they would get nothing; and as Assistant Coach he used to get K40.00 per month and K2.00 for each day after three days of training. It was his evidence that the defendant provided the monies, uniform and transport. It was the plaintiff's evidence that the defendant had taken up two policies - one for the employees and another one for football players and their officials, and he was covered by both of these.

In December, 1983, while playing football for Whitex United Football Club he was injured on his knee. He was taken to Queen Elizabeth Central Hospital where Dr. Ryken treated him. He went for an operation in April or May 1984 when the doctor removed the damaged part of his knee. Even after this operation, he used to go back to the hospital now and again. Knowing that there was a Policy which covered him he filled in Claim Forms and forwarded these to the Personnel Manager, who forwarded them to the Insurance Company. His disability was assessed at 20% and he was paid K1,000.00 from the Football Policy. He was again paid on the other Policy based at 20%, as an employee of the defendant. It was his further evidence, that he continued to suffer and went back to the hospital where he was examined by Dr. Blair who gave him Eh.P1. This is the medical report which says he was 100% permanent disabled. When he handed this report to Mr. Rix, the Financial Manager to process the claim, Mr. Rix cancelled it and wrote on it that it is "NOT TRUE" that he suffered 100% permanent disablement. But he had suffered and will no longer play football. Since his claim was not being processed, he wrote a memo to the defendant's Company Secretary, dated 30th May, 1986. He said in that memo (Eh.P3):

> "About three weeks ago I submitted a Medical Report with a covering letter stating the final degree of incapacity of my injured knee ..... but before the report was sent he consulted the Chief Accountant for his comments but it was turned down due to the fact that I have already been compensated.

From my understanding, I believe there are two types of cover and are divided into categories:-

1. Club Cover: Commercial Union

   (a) Temporary disablement which was settled at 20%.

   (b) Permanent disablement which is still outstanding.

As I have explained above, I beg you, Sir, to look into the matter ..... after examining (the knee) again, it was discovered that it is totally disabled. I have been and I am still in pain for almost two and half years now."

It was the plaintiff's evidence that he did not get a reply to this memo. He then wrote another memo on 9th July, 1986 reminding them of the need for a reply. There was no written reply, but on the memo were written these words:

"This must await Mr. Rix's return as he has been dealing with the matter."

It was his evidence that nothing was done. So he wrote them again on 24th November, 1986 - Eh.P4. He addressed his memo to the Executive Finance Manager - Mr. Rix. He said, in that memo:-

"You are very much aware that Whitex Football Club is covered under the above mentioned Policy (Policy No. P.A.G. 4830612). I am very much surprised to note that after having a serious injury which resulted into an operation in the year 1984, you are not willing to submit the medical report certificate to the Insurance for them to take up the matter despite my so many reminders.

For your information, the file at Hogg Robinson will be stale on 7th December, 1986 and this being the case, I still plead to you to submit the medical report for compensation for the balance as my knee is 100% totally disabled.

I would very much appreciate if you could help me on this matter within 7 days from the date of this letter - because once the Policy expires I will have no resource of being compensated."

No reply was received. Then he instructed A.R. Osman to take legal action. As a result there was some correspondence between lawyers - Ehts.P7-11.

It was the plaintiff's evidence that the defendant paid the premiums and he got the benefit of the Policy for K1,000.00. The Insurance Company paid this money to the defendant, who in turn paid to him, but if the defendant had forwarded the final medical report, he would have been compensated at 100% permanent disability. It was his evidence that under this Policy he was insured as a football player and if he could not play football because of injury, he was entitled to 100% permanent disablement in that occupation.

It was the plaintiff's evidence in cross examination that he looked upon playing football as a source of income, apart from what he was getting as an Assistant Creditors Supervisor, now at a salary of K546.00 gross; that he did not sign any contract with the defendant to play football; that although the claim form stipulates occupation as Assistant Creditors Supervisor, he nevertheless earned income from football playing, and therefore, he was entitled to 100% disablement.

The first witness for the defendant was Anthony James Rix; employed by the defendant as Executive Finance Manager from November, 1977. In 1983 the job description was Chief Accountant. He told the Court that he is responsible for the entire finances of the defendant Company, including insurance - paying premiums, forwarding claims and settling the same. It was his evidence that Whitex Football Club is a self organising welfare club to play football during spare time. The defendant is responsible to pay the expenses for running the Club and the players are not recruited to play football, and the only control they have over them is financial control, as the players themselves were responsible for electing Chairman and the Committee and are responsible for discipline.

It was his evidence that he knows the plaintiff since he was employed and he is working directly under him. He also knows that the plaintiff used to play football. In 1983, because of a serious accident, the Company decided to take out a Policy of Insurance to cover them in respect of the Club. The defendant used to pay premiums and if the Company had desired it would have withdrawn the Policy. It was his evidence that when the plaintiff was injured, the

Insurance paid up to 20% permanent disablement. When he got Eh.P1 he did not forward it because the medical report said the plaintiff was employed as a football player and therefore it was not correct and the plaintiff was advised of this, and there were some verbal discussions. It was his evidence that the plaintiff did not suffer 100% disablement because he is still working, and has since been promoted at a salary of K600.00 per month. There was no duty on the defendant to forward the claim forms since the parties were the defendant and the Insurance Company. It was his evidence in cross-examination, that the Whitex Football Club is open to not only employees of the defendant but even outsiders. He emphasized that the Policy was taken to cover themselves, vis-avis players since football was not covered by their other Policy. He admitted, however, that if he had sent the claim forms, the Insurance Company would have looked at it. After being cross-examined by Mr. Osman, the witness denied that the defendant was a trustee for the plaintiff.

The second witness for the defendant was Peter Charles White, who is employed by Hogg Robinson (MW) Limited as General Manager. Hogg Robinson (MW) Limited are Insurance Brokers. His evidence in chief was brief. He told the Court that at their advice, the defendant obtained a collective Personal Accident Policy, Eh.P2, to cover their Football Club known as Whitex Football Club. The parties to the Policy were Whitex Football Club and Commercial Union. The Policy covered 25 football players and five officials. According to his knowledge, only one claim in respect of the plaintiff was settled under result g(16) of the Policy, and his claim under g(1) was not settled because it was not applicable. The reason was that the plaintiff could pursue other occupations, and in fact he was working for the defendant. Therefore there was no total disablement. Of course the plaintiff could not play football, but he could pursue other occupations. His evidence was that for a person to be entitled to 100% total disablement, he must literally be a "cabbage". I will revert to the provisions of the Policy later in this judgment.

The last witness for the defendant was Christopher Ambrose Kapanga. He is employed by Commercial Union, the parties to the Policy, as Assistant Manager. He has been with them for over 9 years now. It was his evidence that Eh.P2, Personal Accident Policy was issued to Whitex Football Club specifically to cover 25 players and 5 officials and the plaintiff was one of the players so covered. It was his evidence that the plaintiff was paid K1,000.00 under item g(16) and they could not have paid under g(1) since the plaintiff was not a "cabbage" - he was still working. It was his evidence that although the Policy was in a standard form it was modified to take care of the game of football, and the defendant was the beneficiary and not constituted

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a trustee under the Policy.

This then is the evidence before me. I must now evaluate it and relate the evidence to the law applicable. I am aware that this is a civil case, and the onus of proof is on the plaintiff to prove his case on a balance of probabilities. The facts that emerge clearly are these. The plaintiff was employed by the defendant as an Assistant Creditors Supervisor. He has risen in the job and now he is earning K600.00 per month. In addition to his job he was also playing football for the Club which is run by the defendant. The Club is part and parcel of the defendant. The defendant took out a Policy, through Hogg Robinson (MW) Ltd. This Policy was known as Collective Personal Accident Policy. The parties to the Policy were Whitex Football Club and Commercial Union Assurance Company PLC. The defendant paid the premiums. The Policy covered players and officials in respect of accidental death and or bodily injury while "actual playing, competitive and practice of football including travel to and from matches, practice or training".

On 7th December, 1983, the plaintiff was injured on the knee while playing football. He was taken to the hospital where he was hospitalised and treated by Dr. Ryken. He underwent operations. His permanent disability was assessed at first at 15% and subsequently at 20%. He submitted the claim forms and he was paid a total of K1,000.00 representing 20% permanent disability. He was still not well. He went back to the hospital. Dr. Blair saw him and treated him. He submitted his report - Eh.P1. In the report Dr. Blair said the plaintiff was 100% permanently disabled to play football - because he was told by the plaintiff that his occupation was playing football. Dr. Blair said that had he known that the plaintiff had another occupation or employment he would not have assessed him at 100%.

Armed with this report he went to the defendant and submitted a claim based on 100% permanent disablement to play football. He based his claim under g(1) of the results in Policy. Result g(1) stipulates:

> "1. Total and permanent disablement from following <u>any</u> employment or occupation."

The defendant refused to forward the claim form. In a number of correspondence the plaintiff argued that since the Policy was specifically taken out for his benefit as a player, and since he can no longer play football, he fell within the provisions of Result g(1) with 100% permanent disablement.

The defendant's argument is that they were right not to forward the plaintiff's forms because he was already paid under Result g(16). This stipulates:

> "Any permanent partial disablement not specified above other than loss of sense of taste or smell."

The percentage is described as follows:

> "Such proportion to be assessed by the Company as in the opinion of the Company's medical advisers is not inconsistent with the foregoing and without regard to the insurer's occupation."

In any case, the defendant argued, the plaintiff was not a party to the Policy to take advantage of the benefits thereunder.

It has been submitted by Mr. Kaliwo, for the defendant, that a contract of Insurance must be construed as any other contract and when construeing it one must follow the words used in the contract and interpret them in the normal way, attributing the words their ordinary meaning. As such, it is not correct to construct the words "total and permanent disablement" as applicable to the plaintiff because he can do other jobs except that he cannot play football any more. I agree with this submission. I see no reason to restrict these words to football only. If we apply these words in relation to Result g(1) which states "total and permanent disablement from following any employment or occupation," it will be found that for the plaintiff to succeed, he must be unable, as a result of the injury, to do anything in the form of employment or occupation. In other words, he must be a "cabbage". The word "any" was explained in the case of Clarke Jervoise v. Scutt 1920 1Ch.D. 383 at p. 388, EVE, J. pointed out that "the word "any" is a word with a very wide meaning, and prima facie the use of it excludes limitation." In my considered opinion the use of the word "any" in Result g(1) excluded any form of employment or occupation and that is including football as well; since the plaintiff was working, and doing very well for that matter the use of the word "any" excluded him from the benefits under g(1). In his letter, dated 20th June, 1985 (Eh.D2) addressed to the defendant, Mr. White, DW2 had this to say:

> "Please note that the intention of the Policy is to cover loss of earnings or disability from following usual occupation due to a football accident.

> Full benefits would only be payable if a player is totally unable to follow his usual occupation and not just being unable to play football."

I think Mr. White interpreted the Policy very well. Mr. Osman has submitted that he concedes that the plaintiff was not a party to the contract of insurance. But he submits that the plaintiff was entitled to the benefits of the Policy because the defendant was a trustee for the resulting trust in the event of the monies being paid by the Insurance Company. The trust arose as a result of the relationship between the defendant and the plaintiff.

In order to appreciate the problem here it might be necessary to have a look at some of the case law. Some authorities have been cited by both learned Counsel. In Re Harrington Motor Company Ltd. Ex Parte Chaplin 1928 Ch.D 105 the headnote in that case states:

> "The applicant recovered judgment for damages and costs in an action for personal injuries caused to him by the negligence of one of its servants. Before the execution could be levied the Company went into liquidation and the Insurance Company with which the Company in liquidation was insured against third party risks paid the amount of the damages and costs to the liquidator. (It was held) that the applicant had no right at law or in equity either against the Insurance Company or against the liquidator to require the money so paid should be handed out to him, but the money formed part of the assets of the Company, available for distribution among its general creditors.....including the applicant."

After summarising the facts of the case EVE, J. had this to say:

> "The plaintiff's claim is put forward on the ground that there is, or should be an equity binding the liquidator to apply the moneys towards satisfying the liability in respect of which they have come to his hands..... I fail to see how any such equity can be raised. The liquidator, as recepient of the fund stands in no fiduciary relation to the plaintiff. The money has been recovered under contract made between the Company and the insurers, to which the plaintiff was not a party..... In these circumstances neither the Company nor the liquidator can be treated as a trustee for him in enforcing the claim against the insurers."

The other case that was cited to me was Vandepitte v. Preferred Accident Insurance Corporation of New York (1933) AC 70. In that case the appellant sued the respondents to recover a judgment debt which she had obtained against R.E. Berry's daughter, Jean Berry, for injuries she sustained in a motor accident. The accident was caused by the negligent driving of Jean Berry. The motor car that Jean Berry was driving was insured by her father with the respondents. The parties to the contract of insurance were R.E. Berry, the father, and the respondents. By the Policy, the respondents agreed to indemnify the insured i.e. R.E. Berry against third party risks and that the indemnity should be available to any person who was operating the car with the permission of the insured i.e. Mr. Berry. It was held, by the House of Lords (Privy Council) that the appellant cannot succeed because Mr. Berry contracted on his own behalf and not on behalf of the daughter and that he did not create any beneficial interest for his daughter

Mr. Osman has submitted, the plaintiff is not suing the defendant on the Policy, but his action is based on negligence - failure to submit his claim to the Insurance Company, because the defendants were trustees for the plaintiff and other football players. It was Mr. Osman's contention that the defendant owed a duty to forward the claim forms to the Insurance Company.

In the first place, I do not see how a trusteeship could arise in the present circumstances. In Re Engelbach's Estate: Tibbetts v. Engelbach (1923) All ER 93, by a Policy of Insurance which a father took with the insurers, it was stipulated that the insurers should pay £3,000.00 to the insured's daughter if she was still living on 3rd February, 1923. The father who was the assured died in 1926, but the daughter was still living on 3rd February, 1923. It was held that the mere fact that the Policy monies were stated to be payable to the daughter did not confer any interest on the daughter either at equity or in law. It was further held that the fact that the father signed the proposal form expressing "for his daughter M.N. aged one month" did not constitute him a trustee for the daughter. Romer J. had this to say at page 96:

> "Coming, therefore, as I do to the conclusion that the daughter did not acquire any interest at law or in equity in the Policy or the Policy monies merely by reason of the fact that the Policy moneys are expressed to be payable to her, still have to consider whether the tastator ever constituted himself as a trustee for the daughter in some other way."

It appears that in the proposal form which the father had to fill up and sign, he inserted opposite these words "Full name and description of the proposer" the words "Edward Coryton Engelbach for his daughter Mary Noel aged one month" and it is said that by that means he constituted himself a trustee of the moneys payable under the Policy. I cannot think that that is the true construction of the proposal." The same principle was voiced as early as 1875 in the case of Worthington v. Curtis (1875-76) 1 Ch.D. 419.

Mr. Osman cited to me two cases. The first one was Protherol v. Protherol (1968) 1 AER IIII. In that case a husband and wife acquired a leasehold dwelling house as their matrimonial home. The leasehold was transferred into the name of the husband only despite the fact that both had contributed to the purchase. The parties divorced and later on the husband purchased the freehold reversion in the home. It was held that the wife was entitled to half of the share in the freehold of the matrimonial home because the husband, as a trustee for the leasehold, was regarded in equity as having acquired the freehold as a trustee.

The other case cited to me by Mr. Osman was Industrial Development Consultants Ltd. v. Cooley (1972) 2 ALL ER. 162. The ratio decidendi in that case was that there existed a fiduciary relationship between the plaintiff and the defendant, who was Managing Director of the plaintiff, and that any information which the defendant obtained and which came to him as Managing Director should have been disclosed to the plaintiff and if the defendant made a profit as a result of the information which came to him in that capacity, that profit must be accounted for to the plaintiff, because he breached that fiduciary relationship.

I do not think these two authorities help Mr. Osman's argument that the defendant in the present case had a duty to forward the claim forms. The facts of these cases are very different from the present case. They are not helpful at all.

What then is the position in the present case. Applying the principles to the present case, I cannot see how the defendant can be constituted a trustee for the football players and officials of Whitex United Football Club, let alone the plaintiff. I cannot even see how the fiduciary relationship can be established between the defendant and the plaintiff with relation to the Policy. There was therefore no duty on the defendant to forward the Policy.

Assuming I have not come to the right conclusion that there was no duty, it appears to me that the defendant did not fail to submit the claim forms because the defendant was negligent. The Personnel Manager, Mr. D.D. Nhlane wrote to the General Manager of Hogg Robinson on 15th May, 1985, Eh.D1. He said, in that letter:

> "At the time when payment was effected we believed that Mr. Gondwe would play football again. A second assessment conducted on 5th February, 1985 revealed that Mr. Gondwe will not be able to play competitive football any more. Consequently Mr. Gondwe ceases to benefit from any allowances paid after winning a match. Due to this fact, Mr. Gondwe has been wholly incapacitated from playing football we seek full reimbursement on the benefits under our Policy for this player. Would you therefore please refer the matter to our insurers and let us have your full and final settlement of this claim."

The reply to this letter came and the request was rejected on the ground that the plaintiff was not totally unable to follow his usual occupation. I cannot, therefore, see how it can be said that the defendant failed to send the claim forms.

For the reasons I have outlined above this action cannot succeed. I dismiss it with costs.

PRONOUNCED in open Court this 6th day of September, 1989, at Blantyre.

H.M. Mtegha
JUDGE