IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO. 3674 OF 1999

BETWEEN:

PETER THEU..... PLAINTIFF

AND

ROYAL AND SUNALLIANCE..... DEFENDANT

CORUM: **POTANI, DEPUTY REGISTRAR**
Kachika, Counsel for the Plaintiff
Ndau, Counsel for the Defendant

RULING

This is the defendants application made under Order 18 Rule 19 and under the inherent jurisdiction of the court. The defendant seeks the plaintiff's statement of claim to be struck out and the action dismissed on the grounds that the statement of claim discloses no resonable cause of action, the action is frivolous and vexatious and an abuse of the process of the court. There is an affidavit of Benard Mkweche Winston Ndau, of counsel for the defendant, in support of the application.

The defendant's main submission in support of the application is that in terms of Section 148(1) of the Road Traffic Act and the provisions of the insurance policy in respect of which the defendant is being sued, the defendant as an insurer is only liable to compensate third parties for claims arising from the use of the vehicle by the insured or the insured's permitted driver. The said policy of insurance has been exhibited to the affidaivt in support as SC1, the relevant part thereof being Section 2 A(1) and 2B. It is the defendant's contention that being the actual driver of the vehicle at the time of the accident giving rise to this action as stated in paragraph 3 of the statement of claim, the plaintiff cannot be said to be a third party as to claim compensation under the policy.

Counsel for the plaintiff objects to the application principally on two grounds namely: that the application has been made out of the prescribed time and that the use of affidavit evidence by the defendant is not permissible under the Rules of the Supreme Court Practice.

On the first ground of objection, the plaintiff relies on Practice Note 18/19/4 which is to the effect that the application should be made before the close of pleadings. It is counsel's submission that since defence in this case was served on January 5, 2000, pleadings were, as a rule, deemed to have been closed 14 days thereafter, in which case on January 19. This application having been made on Frbruary 16, counsel for the plaintiff submitts that it offends Practice Note 18/19/4 and therefore should not be

enertained. The defendant does not dispute that the application was brought after pleadings were deemed to have been closed. It is, however, the defendants observation that under the same provision the plaintiff relies on, there is a further provision that such an application may be made even after the pleadings are closed. It is indeed provided for under Practice Note 18/19/4 that the application may be made even after pleadings are closed and **Tucker vs. Collinson** (1886) 34 WR 35 is a case in point. I would tend to uphold this submission especially considering that under Order 18 rule 1, any order to strike out or amend any pleading can be made any stage of the proceedings. I would thus not dismiss the present application merely on the account that it was made after pleadings were deemed to have been closed.

I shall now consider the plaintiff's second objection namely that the use of the affidavit in support is not permissible by the rules. It is quite correct that under Order 18 rule 2, where the only ground for an application to strike out a statement of claim is that it does not disclose a reasonable cause of action, no evidence, including affidavit evidence, is admissible. see also **Republic of Peru vs. Peruvian Guanco co.**. (1887) 36 D 489. In the instant case, although the summons for the application indicate three grounds of the application, in arguing the application, only one ground that the statement of claim does not disclose a reasonable cause of action has been advanced. However, it should be observed that according to the summons, the application is not only made under Order 18 rule 19 but also under the court's inherent jurisdiction. It is clearly stated in Practice Note 18/19/6

that where the application is made under the inherent jurisdiction of the court, affidavit evidence may be used, regardless of the nature of the ground the application is based. In the circumstances, I am prepared to allow the use of the affidavit in support.

As indicated earlier on, the defendant's submission in support of the application is that in terms of Section 2A(1) and 2B of the Insurance Policy 'SC1', the plaintiff, as a driver of the vehicle can not be a third party and therefore can not claim against the defendant under the policy as the policy only makes the defendant liable to indemnify the insured in respect of claims by third parties against the insured or its permitted or authorised driver.

It should be borne in mind that the power to strike out a statement of claim or defence bestowed upon the court by Order 18 r 19 is only exercisable in plain and obvious cases. Thus, it is only appropriate to take recourse to Order 18 rule 19 in cases where it can clearly been seen that a claim is on the face of it obviously unsustainable. see **Attorney General of Duchy of Lancaster vs. London and Northwest Railways** (1892) 3 ch 274. In the case at hand, a perusal of the plaintiff's statement claim, on the face of it, would not show that the claim is obviously unstainable. What the defendant attempts to do is to engage the court in an examination of the policy of insurance on the basis of which the defendant is being sued inorder to ascertain whether really the plaintiff has a cause of action which I would think is not within the purview of Order 18 rule 19. I would consequently dismiss the application

with costs to the plaintiff.

Made in Chambers this day of March 8, 2000 at Blantyre.

H.S.B. Potani
DEPUTY REGISTRAR