



REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI ZOMBA DISTRICT REGISTRY
PERSONAL INJURY CAUSE NO. 247 OF 2015

BETWEEN

NAOMI MSOWOYA.....PLAINTIFF

AND

SAYIPHERA NTHALA.....1ST DEFENDANT

REUNION INSURANCE COMPANY LIMITED.....2ND DEFENDANT

Coram: H/H Jean Rosemary Kayira Assistant Registrar

Counsel Benjamin Mandala of Counsel for the Plaintiff

Counsel Mrs. Salome Mdala of Counsel for the Defendant

Mr. Alexander Tepeka Court Clerk and Official Interpreter

RULING

INTRODUCTION

This is an application by the 2nd Defendant to dispose of the matter on a point of law to the extent that the 2nd Defendant be discharged as a party since its policy which was issued to the 1st Defendant did not cover passengers.

FACTS OF THE CASE

The statement of claim in the present proceedings state that the Plaintiff was involved in an accident on or about 10th August, 2015 while she was a passenger in a motor vehicle Registration Number MZ 1732. The said motor vehicle is alleged to have been negligently driven 1st Defendant. As a result of the negligence, the Plaintiff asserts that she sustained injuries and commenced the present action in order to be compensated for pain and suffering as well as loss of amenities of life. On 17th February, 2016, the Plaintiff obtained a

default judgment against the Defendants. Subsequently, the 2nd Defendant applied to the Court to set aside the default judgment and the same was duly granted. The 2nd Defendant then filed a defence to the effect that its policy cover which was issued to the 1st Defendant did not extend to passengers and hence it seeks to be discharged as a party.

Counsel for the Plaintiff strongly submitted that the insurance policy covered the passengers since the motor vehicle in question carries passengers and not goods. As such it cannot exclude insurance policy for passengers. Counsel further argued that the 2nd Defendant's restriction to cover passengers has no effect by virtue of Section 148 of the Road Traffic Act (1997). The Plaintiff contends that the 2nd Defendant only came across of the technicalities of the insurance policy after the accident and that the insurance disk does not indicate the type of insurance policy covering the material motor vehicle. The Plaintiff wherefore prays that the Court should make an order to the effect that the limitation or the restriction in a policy of insurance is a matter between the policy holder and the insurer and cannot be used to defeat the third party claim for compensation, an order directing that the Defendants herein are liable and pay damages to the Plaintiff and an order of costs to the Plaintiff.

DEFENDANT'S EVIDENCE

The second Defendant's Counsel has asserted that according to the law in Malawi, the insurance policies for passengers is not compulsory, and so it was free not to extend the policy cover to the passengers the same not being mandatory by virtue of Section 144(b) of the Road Traffic Act. It is the Counsel's opinion that the restriction imposed by the second Defendant is not void by virtue of Section 148 of the Road Traffic Act since the restriction is expressly stated in Section 144 of the Road Traffic Act.

The Defendant has averred that the policy cover exhibited as SM1 does not extend to passengers. Counsel has cited a number of cases from Malawi which are to the effect that the insurance policy for passengers is not compulsory and Counsel has compared the position in Malawi with that of Singapore and has cited a case to that effect.

REASONED ANALYSIS OF THE COURT

The main issue for determination is whether the insurance policy issued by the 2nd Defendant covered passengers. It is undoubted law that a third party can sue the insurer directly for damages in respect of accident caused by negligent driving of the policy holder by virtue of Section 148 of the Road Traffic Act. This same approach was adopted by the Supreme Court of Appeal in the case of *National Insurance Company v Mzimu and others*¹. As a person pursues such an approach, I must state here that he or she must ensure that the insurance policy for the material motor vehicle covers him or her. To this end, this Court agrees with Counsel for the 2nd Defendant that the claimant must ensure that the claim is covered by the insurance policy before suing the insurer. This will enable the claimant to decide whether to proceed against the insurer or

¹(2002-2003) MLR 178, SCA

both insurer and insured or insured only. In the event that a particular claim is not covered in the insurance policy, the claimant must therefore go against the insured only. In short, the terms of the insurance policy will determine if a third party can proceed to sue the insurer directly or not.

The real issue for determination in this matter is whether the insurance policy issued by the 2nd Defendant to the 1st Defendant extends to passengers to enable the Plaintiff herein to directly sue the 2nd Defendant. This Court bears in mind that this is a contractual relationship guided by the terms of the contract. It is on that premise that this Court will have recourse to the insurance contract which the Defendants executed. Pertinent to our discussion is Section 11 of the said contract which covers liability to third parties which also contains some exceptions.

Section 11(1) of the said terms and conditions of the contract is to the effect that the company will indemnify the insured in respect of death of or bodily injury to any person and damage to property where the insured is legally liable to pay. It should be noted that such death, injury or damage to property should arise out of an accident caused by or in connection with motor vehicle insured by the insurer. Section 11(2) is to the effect that the company will indemnify any authorised driver or any person at the request of the insured (other than the person driving in, or getting into or out of the motor vehicle) against all sums including claimant's costs and expenses. It is clear from this portions that the insurer indemnifies the insured or his authorised driver or at the request of the insured, to indemnify any person. It should also be noted that the company cannot indemnify the torts committed by the passengers. In my considered view, the said portions do not preclude third party claims such as a passenger in the position of the Plaintiff.

Furthermore, the said Section below it contains exceptions in which the company cannot be liable. Exception (a) is to the effect that the company shall not be liable under sub section 2 or 3 to indemnify any person unless such person shall observe, fulfil and be subject to the terms of the policy in so far as they can apply and if such person is entitled to indemnity under any other policy. Even these exceptions do not apply to the Plaintiff. I should state that exception (c) states that the company shall not be liable in respect of death of or bodily injury to any person being carried in or upon or entering or getting onto or alighting from the insured motor car at the time of occurrence of the event out of which any claim arises. **This exception excludes the liability of the 2nd Defendant to passengers.** Counsel for the Defendant asserted that the restriction set out in exception (c) is sanctioned by Section 144 of the Road Traffic Act. It is therefore pertinent to reproduce Section 144.

A policy of insurance shall not be required to cover—

(b) *except in the case of a motor vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, liability in respect of the death of or bodily injury to persons being carried in or upon entering or getting on to or alighting from such motor vehicle at the time of the occurrence of the event out of which the claims arose;*

The interpretation of the Section above is to the effect that it provides for restrictions to passengers except those passengers carried for hire or reward or by reason of contract of employment. Counsel for the Defendant did not concentrate on the exceptions given in the above Section. He rather focused much on the

second part of the Section. The question is now whether the Plaintiff herein was a passenger for hire or reward or was in pursuance of contract of employment. It is our considered view that the Plaintiff was a passenger for reward and hence covered by first part of Section 144(b) above. The law is clear from Section 144 that it is mandatory for passengers for reward among others that they must be covered by the insurance cover. The contention by the Defendant's Counsel that the law in Malawi does not make it compulsory for passengers to be covered in insurance cover is not tenable. It is not compulsory for those passengers who are on hire or for reward or those not in pursuance of contract of employment. This means that it is a must for all motor vehicles carrying passengers for reward or hire or those under contract of employment to have insurance policy for their passengers.

It is not in dispute that the vehicle in question was carrying passengers as evidenced in motor vehicle registration number certificate. It is a light passenger vehicle. So why should a car meant for carrying passengers exclude its passengers from insurance policy? As Counsel for the Plaintiff has noted, the car in question never carries goods but passengers. In these circumstances, it can be absurd to expect that passengers should be excluded. In light of Section 144 of the Road Traffic Act, it is clear that exception © is invalid since it is contrary to statutory law and therefore cannot apply to the Plaintiff.

CONCLUSION

The above discussion clearly shows that it is compulsory for passenger vehicles to provide for insurance policy for their vehicles and the exception © being contrary to statutory provision, is invalid and has no application to the Plaintiff. The consequence is that the policy contract extends to passengers in the position of the Plaintiff and so can claim damages directly from the 2nd Defendant. This Court therefore that the 2nd Defendant is a right party to the present proceedings.

PRONOUNCED IN CHAMBERS ON 23RD JUNE, 2017@7:30AM



H/H J.R. KAYIRA (MRS.)

ASSISTANT REGISTRAR