IN THE HIGH COURT OF MALAWI
CIVIL DIVISION
PRINCIPAL REGISTRY
PERSONAL INJURY CASE NUMBER 972 OF 2019

BETWEEN

MERCY AJIBU AND ANNIE WELOSI (Suing on behalf of the estate of AJIBUKAFODYA, deceased).....CLAIMANTS

AND

GOSTEN WILLIAM .....FIRST DEFENDANT

AND

REUNION INSURANCE COMPANY LIMITED..... SECOND DEFENDANT

Before: Honorable J. N' riva, Judge
Mr Mlazi of counsel for the claimant
MrZambezi of Counsel for the defendant
Mrs D Nkangala, Court Clerk

RULING

The matter was on 17th June, 2022, set down for hearing. The second defendant raised a preliminary issue.

The second defendant asked if the claimant had served the first claimant. The other issue was the claimant commenced the action against the second defendant almost two years after the occurrence of the alleged accident. This is contrary to section 148 of the Road Traffic Act (RTA) which provides that "the right to recover directly from the insurer shall terminate upon expiration of a period of two years from the date upon which the claimant's cause of action against the person insured arose".

The other issue was that Annie Welosi does not appear anywhere as a party and that her legal capacity to sue is at large. Counsel further said that it is not clear if the two claimants are suing jointly or severally.

Counsel argued that the second defendant was served on 19th November, 2019, with the amended summons. Counsel argued that according to the summons, the accident happened on 26 May 2017. Counsel observed that the action against the second defendant was commenced seven months after the expiry of the two-year period fixed by section 148 of the RTA.

Counsel, therefore, submitted that the right to proceed against the send defendant was extinguished by the expiry of the two-years period in section 148 of the RTA and they cannot directly bring action against the second defendant.

Counsel argued that the claimant could not bring new issues and that Annie Welosi had no legal capacity as she did not have letters of administration. Counsel argued that he was representing only the second defendant who became a party through amendment. Therebefore, the second defendant was not a party because the time for the claimant to sue the second defendant directly had expired.

The claimant opposed the preliminary objection. On the capacity of the parties, counsel for the claimants argued that Mercy Ajibu was the biological mother to the deceased legible to commence the action under section 7 of Statute Law (Miscellaneous Provisions) Act ("SL(MPA")), as a direct beneficiary. Anne Welosi, counsel argued, was an aunt to the deceased and was part of the suit to protect the deceased estate.

As to the date of commencing the action, Counsel argued that the first summons was filed on 18 April 2019, within the two years of the occurrence of the accident. The claimant amended the summons to add the second defendant on 19 November 2019.

Counsel further argued that section 148 (1) (c) of RTA was to the effect that the claimant can proceed with the insurer so long as the claim is commenced within the two years of the accident. Counsel argued that the police had indicated a wrong insurer leading to the amendment resulting in the joining of the second defendant. Counsel further argued that the provision was about directly suing the insurer. In this case, counsel argued, the claimants did not directly due the insurer. They also sued the first defendant but did not enter any appearance and they proceeded with the second defendant.

In reply to the opposition, counsel for the second defendant argued that Mercy Ajibu appeared only as a beneficiary .The rest was said by counsel in the oral submissions. Counsel argued that parties are bound by pleadings. Counsel further stated that that Annie

Welosi was an aunt to the deceased did not appear anywhere in the statement of claim. Counsel argued that an aunt does not appear in the SL(MPA) as a beneficiary to claims of this nature.

Concerning the error by the police officers I relation to the insurer, counsel argued a mistake committed by a party, unless provided by law, does not stop the limitation from running.

As to the date of the accident, counsel argued that the statement of claim indicated 26 May, 2017 and that that was the date of the case of action.

As to paragraph c of section 148 (1) of the RTA, counsel argued that his understanding of the provision was that an action against the first defendant may commence. However, the right to claim against the second defendant expired. Counsel argued that directly suing the insurer meant adding the insurer regardless whether the claimant has resolved to only sue the insurer or joining both the insurer and the insured. Counsel argued that the claimant only sued the tortfeasor. Counsel reiterated that time for suing the second defendant had expired.

The issue is whether to entertain the objection or not.

On the parties, listening to counsel, it seems it is agreed that one claimant is a mother to the deceased and can sue for damages clamed in this matter under SL(MPA). For the other claimant, she is an aunt, though this is not stated in the statement of case. Her standing in the matter is questionable. However, the capacity of the parties is not the operative part of my decision. The suit against the second defendant is.

However, before I proceed, it seems the first defendant is not featuring in the trial. Counsel argued that the first defendant did not respond to the proceedings, and thus, they resorted to bringing the action against the second defendant. The claimants had a right to enter judgment against the first defendant but they did not.

In bringing the action against the second defendants, the claimants invoked section 148(1) of the RTA. The provision states in part:

> Any person having a claim against a person insured in respect of any liability in regard to which a policy of insurance has been issued for the purposes of this Part shall be entitled in his own name to recover directly from the insurer any amount, not exceeding the amount covered by the policy, for which the person insured is liable to the person having the claim:
>
> Provided that—

(a) the rights of any such person claiming directly against the insurer shall, except as provided in subsection (2), be not greater than the rights of the person insured against such insurer;

(b) the right to recover directly from the insurer shall terminate upon expiration of a period of two years from the date upon which the claimant's cause of action against the person insured arose; or

(c) the expiration of such period as is mentioned in paragraph (b) of this proviso shall not affect the validity of any legal proceedings commenced during such period for the purpose of enforcing a right given under this section.

It seems to me that what was contentious was paragraph (c) in the proviso.

My understanding of that provision is that it is a sequel to paragraph (b), limiting to two years the commencement of an action to recover from the insurer. This paragraph provides that the expiry of that period does not affect the validity of proceedings commenced during that period. That is, if a proceeding -to recover directly from the insurer- has been commenced, within the two years and the two years expire, the proceeding would still be valid. That is to say expiration of two years would not affect any legal proceedings commenced within the said two years. If there is any other commencement, other than commencement directly from the insurer, the period would have expired.

In this matter the accident happened on 26 May, 2017. The amendment joining the second defendant was done on 14 November 2019. That was after the expiry of the two-year period. The Act does not provide that in case of mistake, the period may extend.

I, therefore, allow the preliminary objection.

The suit against the second defendant is time-barred by the RTA.

On costs, the Court has discretion to decide whether costs are payable to one party or the other. Where the court decides to make an order of costs, the unsuccessful party is to be ordered to pay costs of the successful party (Order 31 rule 3(1) (a) and Order 31(3)(3), Courts (High Court) (Civil Procedure Rules) ("CPR"), 2017. That notwithstanding, the Court may make a different order about costs based on the circumstances of the case including the conduct of the parties. See Order 31 rule 3(3),(4) of CPR. The conduct of the parties incluses the conduct before and during the proceeding.

The claimants added the second defendant to the proceedings in November, 2019. The parties had mediation on by 6 May, 2020. We had a scheduling conference in this Court on 13 December, 2021. The hearing was set down for 17 June 2022. I believe the second defendant could have raised the issues at an earlier occasion. I wonder how the defence

could not have raised to the issue in defence, at the mediation or during the scheduling conference only to raise it when we were set to hear the matter. believe time and resources have been wasted. The conduct of the second defendant cannot be condoned.

For this reason, I condemn the second defendant in costs despite succeeding in the objection. The conduct is not consistent with the overriding objectives behind the conduct of matters in this Court. We have to conduct matters in such a way that we save expenses by ensuring that proceedings are dealt with expeditiously and fairly- Order 1 rule 5 (1)(b) and (d). This is achieved by, among other issues, identifying, at an earlier stage, issues for resolution, and the ones in need of full investigation, and, where appropriate, resolve the issues expeditiously (order 1 rule 5(5) (b) (c) of the CPR.

It is, in my view, ineffective, unfair and uneconomic for the defendant to raise this objection at the time of hearing of the matter. The issue would have been resolved at an earlier occasion.

If not agreed the costs shall be assessed by the Registrar.

MADE the 16th day of September, 2022

J N' RIVA

JUDGE