IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO.183 OF 1993



BETWEEN:

ALFRED WALTERS (MALE) ..... PLAINTIFF

- and -

COMMERCIAL UNION ASSURANCE CO. (PLC) ..... DEFENDANT

CORAM: MWAUNGULU, REGISTRAR

Kasambala, Counsel for the Plaintiff
Banda, Counsel for the Defendant

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O R D E R

On the 21st of April, 1993 I heard an application by the defendant, Commercial Union Assurance Company (PLC), that the writ of summons and the statement of claim be struck out. The plaintiff was hit by a motor cycle on the 30th September, 1991. The motor cycle Registration No. BF 1210 is insured by the defendant. The motor cycle was being riden by Justice Mahilasi. The plaintiff has not sued Justice Mahilasi. He has decided to rely on section 65A of the Road Traffic Act that was introduced in 1988. The section provides as follows:

"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."

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The application is sought on the ground that the liability of the defendant, if any, to third parties, such as the plaintiff, under section 65A of the Road Traffic Act, is a liability to indemnify only in the event of the defendant's insured is found to be liable to a third party. It is contended that as no liability on the part of the insured has been established and no other defendant is joined in the action the writ and/or the statement of claim does not disclose a cause of action against the defendant.

If I understand the defendant correctly, he is arguing that the plaintiff cannot sue the insurer directly unless the insured has been found liable by a judgment, arbitration award or agreement and to that end the tortfeaser is to be joined as defendant. Mr. Banda, who appears for the defendant, has argued that generally insurance policies are cover for indemnity for legal liability which only arises where liability against the insured has been established by action, arbitration, or agreement. He argues that legal liability in circumstances like the present where there is an action cannot be established without joining the insured as a defendant. He cited the cases of Post Office v. Norwich Union Fire Insurance Society Ltd (1967) 1 All E.R. and Freshwater -vs- Western Australian Insurance Company (1932) All E.R. and Bradley -vs- Eagle Star Insurance Company Ltd. (1989) 1 All E.R. 961.

The plaintiff has cited before me a very recent decision by the the Honourable the Chief Justice in Ngosi -vs- The Attorney General and National Insurance Company Ltd., Civil Cause No.133 of 1991. He has also cited the Zimbabwean case of Eagle Star Insurance -vs- Grant (1989) 3 ZLR 278 and the South African case of Workmen's Compensation Commissioner -vs- Norwich Union Fire Insurance Society Ltd. (1953) 2 AD 546.

The first case to consider is the case of Post Office -vs- Norwich Union Fire Insurance Society Ltd. This case is based on section 11 of the Third Parties(Rights against Insurers) Act U.K. which is as follows:-

"Where under any contract of insurance a person (hereinafter referred to as the insured) is insured against liabilities to third parties which he may incur, then -

(a) in the event of the insured becoming bankrupt or making a composition or arrangement with his creditors; or

(b) in the case of the insured being a company, in the event of of a winding-up order being

> or a resolution for a voluntary winding-up being passed, with respect to the company, or of a receiver or manager of the company's business or undertaking being duly appointed, or of possession being taken, by or on behalf of the holders of any debentures secured by a floating charge, of any property comprised in or subject to the charge;
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> if, either before or after that event, any such liability as aforesaid is incurred by the insured, his rights against the insurer under the contract in respect of the liability shall, notwithstanding anything in any Act or rule of law to the contrary, be transferred to and vest in the third party to whom the liability was so incurred."

This Act was passed to remedy an injustice created by two decisions of the Court of Appeal in Re-Harrington Motor Co., Ex p. Chaplin (1928) Ch. and Hood's Trustees v. Southern Union General Insurance Co. of Australia, Ltd. (1928) Ch. 793. In the Re-Harrington Motor Company Limited case a company, the insured, went into liquidation after judgment had been obtained by the plaintiff. The money ordered to be paid to the plaintiff was paid to the liquidator who treated the insured person as an unsecured creditor. The Court of Appeal held that the liquidator had been right to deal with the matter in that way. In the Hood's Trustees case the insured became bankrupt. The Court of Appeal upheld Justice Tomlin's order that the insurance money vested in the Trustees in Bankrupcy and could not be given to the victim of injury. Section 11 of the 1930 Act therefore was intended to cure an anomaly created by these two decisions of the Court of Appeal.

Section 1 of the 1930 Act was considered in Post Office v. Norwich Union Fire Insurance Society Ltd. The statement of Lord Denning, M.R. on page 579 in the Court of Appeal was approved by the House of Lords in Bradley v. Eagle Star Insurance Company Limited in a judgment in which Justice Templeman dissented not on the law as stated by Lord Denning but on a different complexion of the facts. At page 579 - 580 of the Court of Appeal decision Lord Denning said:-

> "Under that section the injured person steps into the shoes of the wrongdoer. There is transferred to him the wrongdoer's "rights against the insurer under the contract". What are those rights? When do they arise? So far as the "liability" of the insured is concerned, there is no doubt that his liability to the injured person arises at the time of the accident, when

negligence and damage coincide; but the "rights" of the insured against the insurers do not arise at that time. The policy in the present case provides that -

> "the (defendants) will indemnify the insured against all sums which the insured shall become legally liable to pay as compensation in respect of loss of or damage to property."

It seems to me that A.J.G. Potter & Sons, Ltd., acquire only a right to sue in the money when their liability to the injured person has been established so as to give rise to a right of indemnity. Their liability to the injured person must be ascertained and determined to exist, either by judgment of the Court or by an award in an arbitration or by agreement. Until that is done, the right in an indemnity does not arise. I agree with the statement by DEVLIN, J., in West Wake Price & Co. v. Ching (3):

> "The assured cannot recover anything under the main indemnity clause or make any claim against the underwriters until the assured have been found liable and so sustained a loss."

Under section 1 of the Act of 1930 the injured person cannot sue the insurance company except in such circumstances as the insured himself could have sued the insurance company. Potters could have sued for an indemnity only when their liability to the third person was established and the amount of the loss ascertained. In some circumstances an insured might sue earlier for a declaration, e.g., if the insurance company were repudiating the policy for some reason; but when the policy is admittedly good, the insured cannot sue for an indemnity until his own liability to the third person is ascertained."

In my view both the decisions of the Court of Appeal and the House of Lords turn out on the construction of the particular provision, namely section 11 of the Third Parties (Rights against Insurers) Act 1930 and the wording of the contract policy. A close reading of section 11 will show that the rights which were conferred on the third party were those that the insurer and the insured agreed in the contract policy. These were transferred or vested in the third party in the event of the insured becoming bankrupt or an insured company being wound-up. Admittedly under the contract policy and at common law the liability of the insurer did not arise until the liability of the insured had been established either by the

Court action, arbitration or agreed. This was because, as pointed out by Counsel for the defendant, a policy of insurance is agreement to indemnify for legal liability. What the 1930 Act did was to vest or transfer the rights that the insured had under the contract policy to the third party. The third party had no rights against the insurance company because of lack of privity of contract. The rights that the insured had against the insurer were that, in the event that legal liability had been established either by action, arbitration or agreement, he would be indemnified by the insurer under the policy contract. The third party, according to the English Act, could not have more rights than the ones the insured had under the policy contract. Since under the indemnity clause the insured could only recover from the insurer on proof of legal liability against the insured by Court action, arbitration or agreement the third party's rights under the English Act were similarly muted. The third party could not recover without legal liability being established against the insured. On the basis of the policy contract and the Act of 1930 the law as laid down by the Court of Appeal and House of Lords is correct. This is what was vested in the third party under the 1930 Act. In England they do not have the equivalent of our section 65A of the Road Traffic Act. The United Kingdom Act and the Malawi Act are not in par-materia. I will consider our section 65A in due course.

Mr. Kasambala appearing for the plaintiff cited the case of Ngosi v. The Attorney General and the National Insurance Company. At page 6 of the unreported judgment the Honourable the Chief Justice said:

> "There is another issue on which Mr. Mwafulirwa addressed me but Mr. Chisanga was unable to make any submission. And this is whether, in view of the provisions of Section 65A of the Road Traffic Act, it is possible to directly sue the insurer before establishing liability against a third party. Zimbabwean and South African cases were cited to me and I have considered these decisions but it seems to me that the provisions of Section 65A itself are very clear and there was no need to even cite further authorities. It is my considered view that Section 65A gives the right to sue the insurer directly before liability is established against the assured."

This was an action for loss of dependency under the Statute Law (Miscellaneous Provisions) Act Chapter 501 of the laws of Malawi. The plaintiff actually sued the Attorney General as a tortfeaser and the National Insurance Company Limited under Section 65A of the Road Traffic Act. From the judgment it is

doubtful whether the second defendant queried the right of the insured under section 65A of the Road Traffic Act. It looks like Mr. Mwafulirwa who appeared for the plaintiff just addressed the Court and Mr. Chisanga who appeared for the second defendant did not comment or raise the issue. The issue of whether the third party can directly sue the insurer under section 65A of the Road Traffic Act was probably not before the Court. The statement could therefore be obiter. Mr. Kasambala however relied on the case of Workmen's Compensation Commissioner v.Norwich Union Fire Insurance Society Limited. This was the decision of the Appellate Division of South Africa. The action was based on very clear and direct Statutory Provision in section 8 of the Workmen's Compensation Act 30 of 1941 as substituted by section 3 of the Act 36 of 1949:

> "Where an accident in respect of which compensation is payable, was caused in circumstances creating a legal liability in some person other than the employer (hereinafter referred to as the third party) to pay damage to the workman in respect thereof -
>
> (a) the workman may both claim compensation under this Act and take proceedings in a Court of law against the third party to recover damages: .....; and
>
> (b) the Commissioner .....shall have a right of action against the third party for recovery of the compensation he is obliged to pay under this Act as a result of the accident, and may exercise such right either by intervening in proceedings instituted by the workman against the third party or by instituting separate proceedings: ....."

Section 11(1) of the Motor Vehicle Insurance Act 1942 provides:

> "A registered company which has insured .....a motor vehicle .....shall be obliged to compensate any person whatsoever (in this section called the third party) for any such loss or damage which the third party has suffered ....."

Chief Justice Centlivres said at page 551:

> "Prior to the coming into operation of Act 29 of 1942 a person who was injured through the negligent driving of a motor vehicle had an action at law for damages against the driver of the vehicle as well as

against the employer of the driver if the driver was at the time the injury was caused driving the vehicle in the course of his employment. In practice, however, that right of action was not infrequently of little value because the defendant did not have the means wherewith to pay the damages. To remedy this state of affairs the Act was passed. It made the insurance of motor vehicles compulsory and in order to protect the public made the insurer of the vehicle directly liable in damages to a person who was injured through negligence or other unlawful act, in respect of the driving of a motor vehicle even though the injury was caused neither by the insured nor by a driver in his employ or driving with his permission. The insurer is liable even if the vehicle concerned was driven by a thief."

Finally, there is the case of Eagle Insurance Company Ltd. v. Grant. In Zimbabwe it appears there is a section which is equivalent to our section 65A for Korsah, J.A., says at page 280:

"Section 25 of the Act confers on a claimant the right to recover directly from the insurer, within a period of two years commencing from the date on which such claim arose, any amount not exceeding the amount covered by the statutory policy. This right to proceed against the insurer directly is purely a statutory provision given to a claimant who issues process in respect of a statutory policy. It differs from the situation at common law where an injured third party cannot proceed against the insurer directly because there is no contract of insurance between the third party and the insurer. Under the common law, a third party must perforce exercise his delictual rights against the insured who may then call upon the insurer, by virtue of the contract existing between the insurer and the insured, to indemnify him from the liability incurred."

He goes on to say:

"By the enactment of section 25 of the Act and by making the insurer liable directly for the death or bodily injury of a third party the legislature introduced a new form of vicarious liability, which in certain circumstances absolves the person who would otherwise be liable to compensate a third party. Except for this statutory innovation, this provision has not amended the common law principles of delictual liability.

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Section 11(1) of the Motor Vehicles Insurance Act 29 of 1942 of South Africa created a right of action against an insurer similar to that introduced by our section 25 of the Act."

Unfortunately section 25 of the Zimbabwean Act is not in the library and is not quoted in the judgment. From what one can mesmerize from the judgment of the Supreme Court of Appeal it is obvious that both it and the South African provision create a cause of action for which the third party can directly sue the insurer without having to establish legal liability by an action, arbitration award or agreement as is the case in the United Kingdom and at common law. It is also platitudinous that the sections actually create an alternative, abridged and handy way to third parties that never existed at common law. The provision does not denigrate the common law position for the third party can still sue the insured hoping and trusting that the insured will request the insurer to indemnify the third party. It is for this reason that there is a statutory limitation to the period in which a third party can sue the insured. It is still open to the third party to sue the insured after the expiration of 2 years from the date on which the cause of action arose. Now coming to our section 65A and I think I should reproduce it:

"(1) 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:"

There seems to be a measure of semblance between our provision and the Zimbabwean and South African ones. I think in going to a statute one should look at the plain words in the statute itself. There is always a temptation particularly in common law jurisdiction to countenance the common law position and to gloss over the plain words of the statute. There could be situations where this could be necessary particularly where the statute is codifying the common law. If that is not the case there should be considerable care because the legislation could be very well intended to alter the common law position. In my opinion to contend that legal liability established by Court action, arbitration or agreement is a condition precedent to a third party suing the insurance under section 65A of the Road Traffic Act is to read into this plain provision what is not there for there is nothing in the provision to suggest that

that is the case. Mr. Banda argued that liability means legal liability in the sense that liability must have been established. Section 65A, however, provides that:

"Any person having a claim (the emphasis is mine) 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 ....."

The requirement here is not that the liability must be established. The requirement is that the person must have a claim against the insured, not the insurer. The claim could succeed or fail but if he has a claim he can recover directly. That claim, as far as the third party is concerned, does not arise when he brings the action and the Court pronounces liability on it but when the cause of action arose, namely, the time of the accident. If Parliament had intended that the rights of the third party to sue the insurer was to depend on proof of legal liability it should have made that clearly in words like "any person who has a judgment against a person insured" or words to like effect. If the interpretation proposed is to be taken then there would be a multiplicity of actions and the third party would probably have to obtain a judgment from the insured and if the insurer refuses to honour the judgment against the insured the third party will have to sue the insurer on the judgment. This would be more circumlocuitous than the position at common law. I think that the position in our statute is akin to one obtaining in Zimbabwe and South Africa. In terms of clarity the South African Provision probably excels, but I do not think that our statute intended anything different from the Zimbabwean and South African statutes. In that sense the statement of the Chief Justice in Ngosi v. The Attorney General and the National Insurance Company Limited, albeit obiter, is the correct interpretation of the law.

Let me also add that, if this summons is to strike out the action for non-joinder, the practice of the Courts is not to strike out action for non-joinder or misjoinder of parties. Order 15 rule 6(1) of the Rules of the Supreme Court provides:

"No cause or matter shall be defeated by reason of misjoinder or non-joinder of any party: And the Court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to actions and in no way diminishes the importance of having before the Court the proper parties necessary for determinging the points at issue."

In Performing Right Society Ltd. v. London Theatre of Varieties Ltd. (1924) A.C. 1, 14 VISCOUNT CAVE, L.C. said:

> "Further under Order xvi., r. 11, no action can now be defeated by reason of the misjoinder or non-joinder of any party, but this does not mean that judgment can be obtained in the absence of a necessary party to the action, and the rule is satisfied by allowing parties to be added at any stage of a case."

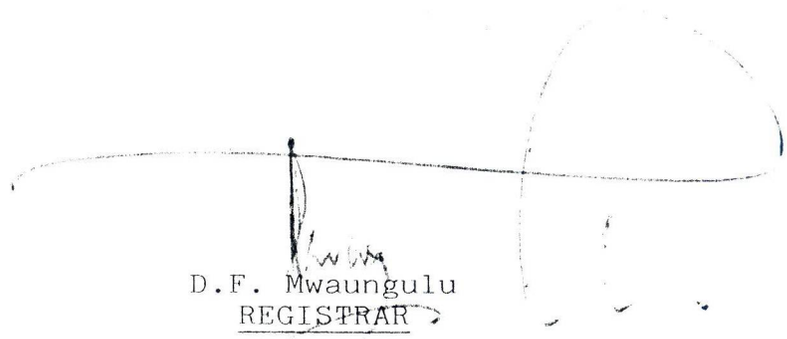
I think that in view of the nature of these actions the tortfeaser and the insurer should be joined in the action for practical reasons. Hence, the plaintiff risks the case if the tortfeasor is called and denies liability and this he must because generally policy contracts require the insurer not to make concessions on liability. This, however, is a rule of practice and rules of practice cannot circumvent the Act. The Act does not say so. To say that all parties necessary must be included in the action to decide the issue between the parties does not in any way derogate the other rule that the plaintiff has the right to decide who he is going to put in as a defendant. The defendant can himself apply to the Court that another be included as a defendant to the action. (Union Bank of Middle East Ltd. v. Clapham, The Times July 20, 1981). In this case the plaintiff has just taken out the writ. There is a notice of intention to defend. The right to add parties still remains until trial. I would be very slow, therefore, to strike out the action for non-joinder. I think I am content with the general principle that the Court will not defeat a matter by misjoinder or non-joinder of any party. It is also contended that the statement of claim discloses no cause of action. No evidence is admissible in this aspect. The Court looks at the pleadings alone Attorney General of Duchy of Lancaster v. London and North Western Railway Co. (1892) 3 Ch. 274. Section 65A of the Road Traffic Act employs the word "recover". "Recover" is a word wide enough to include recovery by suit or action. In Page v. Burtwell (1905) 2 K.B. 758 Cozens-Hardy, M.R., said at page 761-762:

> "I decline to limit the word 'recover to recover by virtue of legal proceedings. I think, to take the language of Vaugham Williams, L.J., in Oliver v. Naulilus Steam Shipping Co. (1903) 2 K.B. 639, "if there is a payment and receipt of money under the Workmen's Compensation Act, and that receipt is in no way qualified, I think that is sufficient to bring the case within the operation of Section 6 and put the workman in the position of having proceeded against his employer for compensation, and recovered it."

If the word recover includes recovery by legal action section 65A creates a statutory cause of action which exists in the statement of claim. It cannot be said that there is no cause of action in the statement of claim.

I therefore dismiss the application with costs to the plaintiff.

MADE in Chambers on this 27th day of April, 1993, at Blantyre.



D.F. Mwaungulu
REGISTRAR