- Practice and Procedure - O.6 r.2 - Application to cease to be a party to an action - Road Traffic Act - Creates no obligation to insure against passenger risk - S65(A) - Cannot be invoked to make insurer liable under a policy of insurance which expressly excludes liability for passengers - procedure.

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

19 Oct 93

CIVIL CAUSE NO.953 OF 1992

BETWEEN:

CHABWERA WHITE ..... PLAINTIFF

- and -

CREVRAND KAONDO ..... 1ST DEFENDANT

- and -

NATIONAL INSURANCE COMPANY LTD. ..... 2ND DEFENDANT

CORAM: MWAUNGULU, REGISTRAR

Absent, Counsel for the Plaintiff
Absent, Counsel for the 1st Defendant
Banda, Counsel for the 2nd Defendant

O R D E R

Order 6, rule 2 of the Rules of the Supreme Court authorizes the Court at any stage of the proceedings in any cause or matter on such terms as it thinks just, either on its own motion or application, to order any person who has been improperly or unnecessarily made a party or who has for any reason ceased to be a proper or necessary party, to cease to be a party. The second defendant, the National Insurance Company Limited, applies to this Court under this rule to be ordered to cease to be a party in an action in which Mr. White, the plaintiff, has sued Mr. Kaondo, the first defendant, the second defendant, as insurers for of the first defendant, for damages following an accident that occurred on the 29th of December, 1991. The plaintiff was a passenger in the first defendant's motor vehicle BG 126, driven at the time by the first defendant. The first defendant's motor vehicle is insured

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by the second defendant. It is contended for the second defendant that they cannot be sued by the plaintiff.

The question I have to decide, therefore, is whether the second defendants being insurers for the first defendant can be sued by the plaintiff. The answer is no. On that score the second defendants must cease to be a party to the action.

At common law, there being no privity of contract between the insurer and the victim of a car accident, the victim had no remedy against the insurer. The victim had a remedy against the insured. The insured, once liability has been established by action, consent or arbitration, was idemnified by the insurer. There is no way, therefore, at common law in which the victim of an accident could sue the insurer. This delictuality has now been circumvented by section 65(A) of the Road Traffic Act introduced in 1988:

> "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."

The requirements of this part are contained in section 61 which provides:

> "In order to comply with the requirements of this Part a policy of insurance must be a policy which -
>
> (a) is issued by an insurer approved by the Minister; and
> (b) insures such persons or classes of person as may be specified in the policy in respect of any liablity which may be incurred by him or them in respect of -
>
> (i) the death of or bodily injury to any person;
> (ii) damage to property,
>
> caused by or arising out of the use of the motor vehicle or trailer on a road."

Section 62(a) provides:

> "A policy of insurance shall not be required to cover - ... except in the case of a motor vehicle or trailer 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 or entering or getting on to or alighting from the vehicle or trailer at the time of the occurrence of the event out of which the claims arose."

The policy taken out by the first defendant excludes liability for passengers. Although the statement of claim does not state so, in view of the position at common law, under section 65(A) is the only way in which the plaintiff was proceeding in this action. Since the policy of insurance clearly excludes liability for passengers, there is no way in which the second defendant can be joined as a party to this action under section 65(A).

Mr. Banda appearing for the plaintiff is right on this aspect. He has cited the case of Connell v. Motor Insurers' Bureau (1969) 3 All E.R. 572. The conclusion I have reached is probably supported generally by the decision. It was not, however, the basis of the reasoning in that case. That case proceeded essentially on the question whether under the Road Traffic Act, 1960 it was compulsory to insure for passengers. There was an agreement between Ministry of Transport and the Motor Insurers Bureau that where the owner of a motor vehicle was bound to insure against injury to a victim the Motor Insurers Bureau would pay the damages in every case where the driver is uninsured when he ought to have been insured. The ratio decidendi of the case can be seen from the judgment of Lord Denning, M.R., at page 573:

> "The plaintiff's case is perfectly good if Mr. English was bound, under the statute to insure against injury to the plaintiff; because the Motor Insurers Bureau have agreed with the Ministry of Transport that they will pay considerable damages in every case where the driver is uninsured when he ought to have been insured. So the question comes down to this; was Mr. English compelled by statute, to insure against injury to the plaintiff?
>
> The relevant provisions are contained in section 36 of the Road Traffic Act, 1930, which are now in substance indicated in section 203 of the Road Traffic Act 1960. Summarised, it comes to this. Everyone who is using a vehicle on a road is compelled by law to insure against third party liability; but there is this important exception: he is not compelled to insure against injury to passengers."

That case did not decide whether the victim of an accident can sue the insurer directly. In English law there is not the equivalent of our section 65(A) of the Road Traffic Act. The conclusion is, however, supported by the case of Weidemann v. Pearl Assurance Co. Ltd. (1963) R. & N. L.R. 482. This case was based on a provision in the Northern Rhodesia Road Traffic Act which is in pari materia with our provision. There, like in this case, the policy of insurance excluded, in accordance with the statute, liability for passengers. Blagden, Acting Chief Justice, correctly, in my view, held that the insurance company was not liable, could not be sued. That rests the matter, but Mr. Banda went further.

Mr. Banda submitted that even if an insurance policy provided for cover against passengers the insurers cannot be sued under section 65(A) because such a policy would not have been issued under Part V of the Road Traffic Act. He relied heavily on the case of Weidemann v. Pearl Assurance Co. Ltd. That decision, as I pointed out earlier, cannot be followed for what Mr. Banda suggests because there the policy specifically excluded liability for passengers. This was consistent with the Act. The Acting Chief Justice pointed out the difficulty in deciding the question whether a policy was issued under the Part of the Act. He did not decide on the question because the particular policy excluded passengers. Said he:

> "I think there may well be difficulties in deciding whether the policy has been issued for the purposes of Part IX of the Ordinance or not, but there is no difficulty in the present case, because the endorsement expressly declares and records that:
>
> > "It is agreed, that the policy shall, subject to the conditions which follow, be a policy for all purposes of the Ordinance ..."
>
> Nor can I see in the conditions that follow anything which runs counter to the provisions of the Ordinance. The defendant company was perfectly entitled to limit their liability to the requirements of the Ordinance. What they have done in effect by their endorsement is to extend their liability under the policy to include liability directly to injured third parties, but at the same time, they have limited that extension to those classes of third parties in respect of whom third party risks cover is required under the provisions of Part IX of the Ordinance. By so doing they have excluded liability directly to injured voluntary passengers such as the plaintiff."

The question, as I understand it from Mr. Banda, is that even if the policy covered passengers they cannot sue directly under

section 65(A) because the policy would not have been issued under Part V. This situation did not arise in the Northern Rhodesia case. It does not arise in this case either. Whatever statements are made will be obiter. The question can be reserved for future consideration by the Court.

The second defendant ceases to be a party to the action. Costs to the second defendant.

MADE in Chambers on this 19th day of October, 1993 at Blantyre.

D.F. Mwaungulu
REGISTRAR OF THE HIGH COURT OF MALAWI