O 80 RSC
Approval of Settlement.

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NUMBER 675 of 1993

BETWEEN:

BOBBY NYIRENDA ..... PLAINTIFF

and

ROYAL INTERNATIONAL
INSURANCE ..... DEFENDANT

Coram: D F MWAUNGULU, REGISTRAR
Kasambala, Counsel for the Plaintiff
Banda, Counsel for the Defendant

ORDER

On the 23rd of June 1993, I heard an application by the defendant, Royal International Insurance company, to have an originating summons taken out by the plaintiff, Bobby Nyirenda, on the 26th of May 1993 struck out under Order 18, rule 19 and under the inherent jurisdiction of the court.

The originating summons taken out by the plaintiff was made under Order 80, rule 11 of the Rules of Supreme Court. The interpretation of the rule has some bearing on the conclusion I have drawn on the defendant's application. It is important therefore to lay down the rule:

> "Where, before proceedings in which a claim for money is made by or on behalf of a person under disability (whether alone or in conjunction with any other person) are begun, an agreement is reached for the settlement of the claim, and it is desired to obtain the Court's approval to the settlement, then, notwithstanding anything in Order 5, rule 2, the claim may be made in proceedings begun by originating summons and in the summons an application may also be made for:
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> (a) the approval of the Court to the settlement and such orders or directions

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> as may be necessary to give effect to it or as may be necessary or expedient under rule 12,"

The plaintiff is the widower of Ruth Nyirenda. Ruth Nyirenda died on the 19th of August 1991 when she was a passenger in the motor vehicle of her employer, Senga Baptist Mission. The motor vehicle was insured by the defendants.

On the 17th November 1992, the defendant's ex-gratia paid the sum of K11,000 to the plaintiff in respect of death of Ruth Nyirenda.

Whatever happened between November 1992 and 26th May 1993, the plaintiff took out a summons, purpotedly, under Order 80, rule 11. In it he was claiming an estimated loss of dependency of
K40,115.52. Surprisingly, and that is surprising indeed, the summons was not seeking for approval of the compromise. It was seeking non-approval of the compromise.

On 7th June 1993, the defendant took the summons under consideration. He takes no issue with the prayer or relief in the plaintiff's summons rather he wants the summons struck out because of provisions in the Road Traffic Act. Put very succinctly, the defendants contend that he cannot be sued because albeit, they insured the plaintiff's employer's car against third party risks under part 5 of the Road Traffic Act, the plaintiff was clearly excluded from cover both under the Act and the policy contract.

I must confess that I agree with this submission entirely. I am entitled to assume that really the plaintiff was suing the insurers under Section 65 A (1) of the Road Traffic Act. At Common Law, the victim of a motor vehicle accident could not sue the insurer directly because a contract of insurance was an agreement between the insured, the tortfeaser, and the insurer. There was no privity of contract between the victim and the insurer. The only recourse available to the victim of a road accident was to sue the insurerd. Once liability had been established against the insured, the insurer, following the agreement, would indeminify the insured. This was the case until 1988 when this amendment was made:

> "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 effect of this amendment was to create a statutory cause of action available to a victim of a road accident to sue the insurer directly where the tort feaser was covered by a policy of insurance. Waters vs. Commercial Union Insurance Company plc, Civ. Cause number 183 of 1993 (unreported); Ngosi vs. The Attorney General and the National Insurance Company, Civil Cause number 133 of 1991, (Banda, C.J. obiter (unreported)).

I think Section 65 (A) must be construed strictly when applying it to the facts as they obtain in this case. It is important that a victim of a road accident should sue somebody who has a policy of insurance covering the victim against the tortfeaser. The affidavit of the defendant clearly shows that the policy in relation to that car did not cover the victim of the accident, namely, Mrs. Ruth Nyirenda. Section 62 (A) provides that a policy of insurance shall not be required to cover any liability in respect of the death or bodily injury to a person in the employment of a person insured by the policy, if such death or bodily injury arises out of and in the course of his employment. This provision is included directly in the policy agreement entered between the plaintiff's employer and the insurer. The exception to Section II of the policy contract provides that the company, namely, Royal International, shall not be liable in respect of death or bodily injury to any person arising out of and in the course of such person's employment by the person claiming to be indeminified under this section. The plaintiff's summons in paragraph II clearly says that the deceased, an employee of Senga Baptsist Mission, was travelling on duty. She was in the course of her employment when the accident occured. She would be clearly not covered by the policy contract that the defendants entered with the plaintiff's employer.

The amendment will no doubt cause a bit of problem to litigants. The proper advice would be for victims of road accidents to first check whether they are covered in the insurance policy of the wrong doer. After that they should consult a legal practitioner. For, as is the case in this application, the victim is not covered by the policy of the owner of the motor vehicle albeit in law

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the victim can directly sue the insurer, it is an abuse of the process of the court to drag into court an insurance company that has not contracted to cover victims not included in the policy. On this score, I would dismiss the application.

I should mention in passing, however, that I found the plaintiff's summons unusual. In my judgment, Order 80, rule 11 requires the applicant to request the court for approval of the settlement. It does not as was done here, request the court to disapprove the settlement or compromise.

Order 80, rule 11 was introduced for very beneficient reasons. First the rule was introduced to protect minors and patients from unskilled and novice legal practitioners who could accept less amounts of compensation. Secondly, at common law, a contract of compromise or settlement, does not bind the plaintiff unless it is demonstrated reasonably that it was beneficial to the minor or patient. It behoves any defendant to seek the approval of the court to obtain a valid discharge. Thirdly, it was a check on solicitors who would otherwise claim exorbitant costs while acting for minors or patients. There was prospect of the solicitors overcharging or temptation to accept less compensation in return for huge costs to the solicitor. Finally, it was introduced to ensure that money paid out to a minor or patient is properly looked after and wisely applied. It is for these reasons that court's approval is required for compromise involving minors and patients.

It is unusual therefore to seek for disapproval. For, if as is in this case, it was felt that the settlement or compromise is inadequate, the plaintiff still had a right to sue. It was up to the defendant in the action to show that the compromise was beneficial to the plaintiff. It was unnecessary to apply for disapproval of the settlement or compromise.

As I have endeavoured to show, on the facts as appear in the affidavit and the summons, the defendant's insurance company did not cover the victim. It is doubtful whether an action lies against them even if the compromise is considered unreasonable.
I would therefore dismiss the action for being an abuse of the process of the court under the inherent power of the court.

Made in Chambers this 2nd day of November 1993.

D F Mwaungulu
REGISTRAR