**IN THE HIGH COURT OF MALAWI**

**PRINCIPAL REGISTRY**

**CIVIL CAUSE NO. 66 OF 2000**

**BETWEEN:**

**NJIRUZAWO CHINGAIPE.....1ST PLAINTIFF**

**SOFIA KAJONGOLE.....2ND PLAINTIFF**

**F. CHINGAIPE (next friend)**

**and**

**NATIONAL INSURANCE COMPANY .....DEFENDANT**

**and**

**MISS A. RASHID.....3RD PARTY**

**CORAM: KAPANDA, J.**

**Mr Chisale, of Counsel for the Plaintiff**

**Mr Mhango, of Counsel for the Defendant**

**JUDGMENT**

On 7th January, 2000 the Plaintiffs, Njiruzawo Chingaipe and Sofia Kajongole, who are infants and are suing through a next friend F. Chingaipe, commenced an action against the National Insurance Company (hereinafter referred to as "the defendant"). In the action the Plaintiffs are claiming, inter alia, against the Defendant, general damages for personal injuries sustained in a road accident on 14th May, 1999 involving the Defendant's insured minibus Reg. No. MH 1671. The relevant part of the Plaintiffs' statement of claim is as follows:-

"The Defendant was at all material times the insurer of minibus Reg. No. MH 1671 Toyota Hiace under certificate of insurance No. A 55374 issued on 3/5/99 to 12/5/2000 which was at the material time being driven by Chipiliro Kankhuni."

The Defendant filed a Notice of intention to defend on the 25th day of January, 2000 and proceeded to plead in its defence that it was not liable to indemnify the insured because the minibus in question was being driven by a person who had no valid or relevant driving licence. In so far as it is relevant to quote, the pertinent paragraphs of the Defence in relation to this denial of liability to indemnify, it was averred by the Defendant as

follows:-

“6. The Defendant estates that it was the term of the policy of insurance between the Defendant and the insured that the liability of the Defendant would only extend to indemnify any licenced driver whilst driving the

vehicle herein referred to on the order or with the permission or consent of the insured.

7. At the time of the accident referred to in the statement of claim, the driver of the said Toyota Hiace registration No. MH 1671 had no valid or relevant driving licence for a minibus contrary to the policy of insurance.

8. In the premises and by reason of the said breach of the policy of insurance the Defendant is not liable to indemnify its insured or at all.”

At the hearing of the Summons for Directions, before the Deputy Registrar on 28th June, 2000, it was prayed for by the Defendant and ordered, amongst other orders, that the following question of law be tried as a preliminary issue viz:-

“Whether regard being had to Section 148 of the Road Traffic Act the Defendant would, in (at) law, be liable to the Plaintiffs for damages in respect of injuries sustained by the Plaintiffs in a road accident on 14th May, 1999 in view of the fact that the driver of the motor vehicle herein did not have a valid driving licence contrary to the contract of insurance and the Road Traffic Act.”

On the 17th day of October, 2000 the hearing of this preliminary point of law was before me and Counsel for the Defendant addressed me at length on what position the Defendant is taking regarding the said preliminary point of law. Despite being served with the Notice of hearing, for the inquiry into said preliminary point of law, Counsel for the Plaintiff did not appear to argue the Plaintiffs’ position regarding the said preliminary point of law. I proceeded to hear the matter because there was proof that Plaintiffs’ Counsel had been ordered with the said Notice of hearing.

In his submission learned Counsel for the Defendant has argued that the requirement that a person driving must have a valid driving licence is a stipulation of the Road Traffic Act and that a person commits an offence if he/she drives a motor vehicle without a valid licence in respect of a particular class of a vehicle. Thus an insured can not be indemnified where his/her vehicle is involved in an accident when such vehicle, at the time of the accident, was being driven by a person who had no valid driving licence for such type or class of a vehicle.

It has further been contended by the Defendant that Section 148(2) of the Road Traffic Act of the Laws of Malawi does not create an absolute liability when it provides that a policy of insurance shall be void if it has a condition (a clause) that purports to restrict the insurance of the person insured. In the opinion of the Defendant, Section 148(2) of the said Road Traffic Act was enacted to overcome the doctrine of privity of contract that

disentitled a third party from claiming on a contract of insurance he/she was not a party to as was the position in the case of Harriman Akule -vs- The National Insurance Company Civil Cause No. 148 of 1984 (unreported).

The Defendant has further argued that in terms of Section 148(1)(a) of the said Road Traffic Act the rights of the Plaintiffs are not greater than those of the insured. Consequently, since in this case the insured can not successfully claim for an indemnity under the policy in view of the fact that the driver was not a person authorised to drive, in terms of the clause in the policy, then the Plaintiffs' claim against the Defendant as an insurer should also fail on that ground. It appears Cousel is reading the said Section 148(1) (a) of the Road Traffic Act in isolation. In my view this section must be read with the provisions of Section 148(2) of the Act for one to get a full meaning of what this section is all about.

It is an undisputed fact that the insured took out a third party motor vehicle insurance policy that stipulated that the persons authorised to drive motor vehicle Registration No. MH 1671 were viz:-

"The insured or any person driving with the insured's permission provided that the person driving holds a licence to drive the motor vehicle--- The term "licence" means a licence or other permit required by the licencing or other laws or regulations."

Further, it is provided for in the said insurance policy that the Defendant's liability to third parties was subject to the said motor vehicle being driven by any authorised driver as defined above. I would have preferred to see some documentary evidence, in a form of a police report, to prove that the insured's driver did not have, in fact, a valid driving licence to drive the motor vehicle Reg. No. MH 1671. However, since the evidence that the driver of the insured did not have a valid driving licence was not challenged or controverted I have no reason to doubt it. This court, therefore, finds that on the evidence on record the insured's driver had no valid driving licence for the public service vehicle Registration No. MH 1671. I hasten to add that at the time the driver of the insured was driving the said vehicle he was literally on the same standing as a person driving without a driving licence at all. This statement does not need an authority, it is a well settled principle. What are the parties' positions regarding the operation of the insurance policy herein in view of the fact that the driver of the insured had no valid driving licence?

The Plaintiffs, in their letter from their legal practitioners dated 4th October, 1999, exhibited in the affidavit of the Defendant filed in support of its application herein, contended that although the driver had no valid driving licence to drive a minibus the insurers were still liable. The Defendant submits that an insurer can not be held liable to indemnify an insured where the insured's vehicle was being driven by a person with no valid driving licence, like in the instant case, due regard being had to the terms of the insurance policy

It is obvious, from the pleadings; the facts deponed in the affidavit of the Defendant and the question of law that the Deputy Registrar ordered that it be tried as a preliminary

issue; that this court is being called upon to construct the provisions of Section 148 of the said Road Traffic Act in so far as it relates to the facts in dispute in this case. Put in another way the issue for determination, at this stage, is what is the effect of the third party insurance over with regard to third parties where the driver has no valid driving licence or no driving licence at all? Was the Defendant absolved from liability to the Plaintiff on the ground that the insured had not complied with the condition in the insurance policy by letting a driver without a valid driving licence to drive the vehicle Registration No. MH 1671?

Before proceeding to interprete the provisions of the said Section 148 of the said Road Traffic Act it is necessary that the terms of the said section be stated in extensio. The section provides that:-

"(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:

(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 the 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.

(2) In respect of the claim of any person claiming directly against the insurer by virtue of subsection (1), any condition in a policy purporting to restrict the insurance of the person insured thereby shall be of no effect:

Provided that nothing in this section shall require an insurer to pay any sum in respect of the liability of any person otherwise than in or towards the discharge of that liability, and any sum paid by an insurer in or towards the discharge of any liability of any person which is covered by the policy by virtue only of the operation of this subsection may be recovered by the insurer from that person."

It must be noted that, before the amendment of the said Road Traffic Act Section 148 was previously Section 65A. In interpreting the said Section 65A of the said Road Traffic Act the Malawi Supreme Court of Appeal, in the case of Commercial Union Assurance (Plc) -vs Alfred Waters MSC Appeal Case No. 46 of 1995 (unreported), had this to say at page 16 of its Judgment:-

"--- In our Legislation, the third party has been given the right to sue not only for damages, but also to establish his case before the courts which he could not do before. We are fortified in our reasoning by the fact that Section 65(1) and (2) specifically provides that the insurer can not disclaim liability for breach of conditions of the policy of insurance. This being the case, therefore, it appears to us that whether the third party sues the insured or the insurer, neither of them can disclaim liability except, perhaps, the quantum of damages---"

I am in total agreement with this interpretation. As was rightly observed by their Lordships in the case of Alfred Waters cited above, this section was intended to allow a third party to sue the insurer directly and if the said insurer is found liable the insurer would be required to pay the damages according to the statute. The insurer can not disclaim liability except as to the quantum of damages. In essence Section 148(1) of the said Road Traffic Act has provided that the third party can not recover any amount of damages exceedings the amount covered by the policy.

It was put in argument by learned Counsel for the Plaintiff that in terms of Section 147 as read with Section 148 of the said Road Traffic Act the rights of a third party can not be greater than those of the insured. Thus where the insured can not recover damages against the insurer, if the insured is in breach of the conditions of the insurance policy, it follows therefore that the third party can not recover damages against the insurer. This argument by Counsel, with due respect, is not in conformity with the interpretation that has been given to this type of a section in other countries which have a similar section like our said Section 148 of the Road Traffic Act.

The position at law is that if a person drives a vehicle, with the authority or consent of the insured, the insurance is not operative or the insurance is invalidated at the time such person is driving the vehicle without a valid driving licence but this is only as regards the insured and not third parties. An in instructive authority on this position of the law is the case of Pioneer General Assurance Ltd -vs- Mukasa A.L.R. Comm. 188. In this case the court was concerned with interpreting Section 102 of the Traffic Act of Uganda which provided as follows:-

"Any condition in a policy of insurance providing that no liability shall arise under the policy--- shall, as respects such liabilities as are required to be covered by a policy under Section 99 of this Act, be of no effect."

In explaining the meaning of this Section 102 of the Traffic Act of Uganda, in the case of Pioneer General Assurance Ltd -vs- Mukasa , cited above, Law Ag. V.P. had the following to say, at page 191, which is very illuminating:-

"The liabilities to be covered--- are liabilities in respect of third parties. Such a third party, in a claim against an Insurance Company, is not affected by the conditions in the policy which may relieve the company of liability towards the insured, but those conditions remain effective contractually between the company and the insured--- third parties are enabled to recover their damages from the insurer notwithstanding such conditions. Such conditions are not void, but in relation to third parties the insurer can not

rely on them. He can however seek to enforce them against the insured---”

This section being interpreted by the Ugandan court is similar to our Section 148 of the Road Traffic Act of the Laws of Malawi. Thus in construing our legislation this court is entitled to look at the construction of similar provisions in foreign jurisdiction, and if the reasoning is correct, there is no reason why a court should depart from that construction - Commercial Union Assurance (plc) -vs- Alfred Waters MSC Civil Appeal No. 46 of 1995 (unreported). In my judgment the interpretation in the case of Mukasa cited above is the correct one and I see no reason why I should depart from it and I therefore adopt it in relation to our Section 148 of the said Road Traffic Act. In my opinion Section 148 is intended to offer third party protection. The legislature’s intention is that third parties should be entitled to enjoy the benefit of compulsory third party protection conferred by statute. The insurer’s remedy is to recover from the person insured the amount paid to the third party. I am fortified in this finding upon my reading of the proviso to Section 147(1) of the said Road Traffic Act. Thus it is high time that insurance companies redrafted their insurance policies to be in line with this proviso instead of disclaiming liability to third parties. If the courts were to allow the insurance companies to disclaim liability on the premise that an insured has breached a condition of an insurance policy then this right conferred by the Road Traffic Act, of the Laws of Malawi, will be of little value because most of the insured do not have the means to pay the damages. This is the mischief the legislature wanted to take care of. Indeed the idea behind compulsory insurance is that it should protect third parties in any event and the insurer can only raise the issue of the conditions in the insurance policy against the insured and not a third party. A further illuminating case authority on what effect Legislation has had on a compulsory third party insurance with regard to third parties is the case of Workers Compensation Commissioners -vs- Norwish Union Fire Insurance Society Ltd (1953)2 SA. 546 where Centtivres CJ had this to say at page 551 B-C:-

“It made the insurance of motor vehicles compulsory and in order to protect the public made the insurer directly liable in damages to a person who was injured through negligence or other unlawful act, in respect of a motor vehicle.”

In my view, even though the driving of a motor vehicle by a person who has no valid driving licence or no licence at all is an unlawful act still the insurer would be liable to third parties notwithstanding the clause in the insurance contract disclaiming liability. The intention of Parliament, when it regulated that an insurance policy that purports to restrict the policy of the insured shall have no effect, was that even in cases where there is an unlawful act, on the part of the insured or an authorised driver the third party should still be in a position to sue and recover damages directly from the insurer.

Finally, as was rightly observed by Korsha JA, in the Zimbabwean case of Eagle Insurance Co -vs- Grant (1989)3 ZLR 278 at page 280 A-B- when construing a provision similar to our Section 148 of the Road Traffic Act:-

“The 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--- By 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---"

The above observation holds as well for the position, at law, in Malawi for I see no reason why I should depart from it in view of the fact that our Section 148 of the Road Traffic Act is similarly worded. It is the correct exposition of the law on compulsory third party insurance as engendered by our statute.

In conclusion, the question is answered in the affirmative. It is therefore ordered that the Defendant would, at law, be liable to the Plaintiffs for damages in respect of the injuries sustained by the Plaintiffs in a road accident on 14th May 1999 notwithstanding the fact that the driver of the motor vehicle did not have or possess a valid driving licence contrary to the contract of insurance between the Defendant and the third party and the Road Traffic Act. The costs occasioned in this preliminary hearing are costs in the cause.

Lastly, I would like to make some remarks in passing regarding the procedure that was adopted in this matter concerning the preliminary issue that has just been decided above. It is my opinion that the provisions Order 14A of the Rules of the Supreme Court were not considered at the time the order for the determination of the preliminary issue was being prayed for by the Defendant. I am of this view because it is evident from the case file that, even though this court has made a determination on the question put before it, there will be no finality to the entire cause or matter. It is as if the court was given an academic question to answer. That is not the purpose of this procedure. In future it would be advisable that before an application for order is made for the determination of a preliminary point of law, like in the instant case, the provisions of the said Order 14A of the Rules of the Supreme Court should be borne in mind so that once a determination is made there is finality to the entire cause or matter.

Pronounced in Chambers this 30th day of October, 2000, at Blantyre.

**F.E. Kapanda**

**JUDGE**