



REPUBLIC OF MALAWI
IN THE SUPREME COURT OF APPEAL

SITTING AT BLANTYRE

CIVIL APPEAL CASE NO. 21 OF 2019

(Being High Court of Malawi, Zomba Registry, Personal Injury Cause No. 367 of 2012)

BETWEEN

REAL INSURANCE COMPANY LIMITED
(NOW KNOWN AS BRITAM INSURANCE CO. LTD)

APPELLANT

-and-

JACK JIMU

RESPONDENT

CORAM : Hon Deputy Chief Justice LP Chikopa SC
Hon Justice H. Potani SC JA
Hon Justice J. Katsala SC JA
Hon Justice I.C. Kamanga SC JA
Hon Justice M.C.C Mkanadawire SC JA
Hon Justice S.A Kalembera SC JA
Hon Justice D. Madise SC JA
Hon Justice R. Mbvundula SC JA
Hon Justice D. nyaKaunda Kamanga SC JA
H. Mwangomba, of counsel for the appellant
F. Tandwe, of counsel for the respondent
W. Shaibu, Research Officer
Chinkono and Mrs. Chimtande, Interpreters
Muntinti, Court Reporter

JUDGMENT

Katsala SC, JA

My Ladies and my Lords,

1. This appeal is about the interpretation of clauses in a policy of motor vehicle insurance issued by the appellant to its client, Mr A. H. Osman t/a Dam Investments (hereinafter "the insured"). The issue at stake is whether in the light of the provisions of section 148 of the Road Traffic Act (hereinafter "the Act") the terms and conditions in the insurance policy issued for purposes of complying with the statutory requirements for third party insurance cover for motor vehicles can affect and limit the insurer's exposure and/or liability to claims by third parties for death or bodily injury in the event of an accident.
2. The facts leading to this appeal are presented in the majority opinion to be delivered by Madise SC, JA hereafter.
3. The starting point should be section 141(1) of the Act. This is the section which introduces the requirement for every motor vehicle plying on the public roads in Malawi to have insurance cover for third party risks. It reads as follows: -

"Subject to this Act, it shall not be lawful for any person to use or cause or permit any other person to use a motor vehicle on a public road unless there is in force in relation to the use of such motor vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third party risks as complies with the requirement of this Part."

4. The question then would be, what are the requirements of Part XIV that the sub-section is referring to? Section 143 of the Act specifies the requirements in respect of policies of insurance. It 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 Director; and

(b) insures such persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of—

(i) the death of or bodily injury to any person; or

(ii) damage to property,

caused by or arising out of the use of the motor vehicle on a public road.”

5. So as per section 143, an insurance policy must, firstly, be issued by an insurer who has been approved by the Director to issue such insurance policies. Secondly, the policy of insurance must insure the persons or classes of persons specified therein against liability incurred by those persons in respect of the death or bodily injury to any person, or damage to property caused by or arising out of the use of the motor vehicle on a public road. Once these two requirements are met, then the policy of insurance is compliant with the Act.

6. A reading of the Act reveals that, except for the compulsory insurance cover required under the Act, it is lawful for the parties to an insurance policy to agree on the parameters of the liability to be covered by the insurance policy. The parties are at liberty to agree on the risks covered as well as the extent of the liability under the policy. This is clear from section 144 of the Act which provides for restrictions on liability. It states: -

“A policy of insurance shall not be required to cover—

(a) any liability in respect of the death of 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;

(b) except in the case of a motor vehicle 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 entering or getting on to or alighting from such motor vehicle at the time of the occurrence of the event out of which the claims arose;

(c) liability under section 143 (b) (i)—

(i) in respect of a total sum in excess of the prescribed amount or the policy limits whichever is the larger arising out of the claims for any one person in respect of the death of or bodily injury to any person;

(d) liability under section 143 (b) (ii)—

(i) in respect of a total sum in excess of the prescribed amount or the policy limits whichever is the larger arising out of the claims for any one accident in respect of each motor vehicle or combination of motor vehicles concerned;

(ii) for damage to property of or in the possession, custody or control of the person insured, his agent, driver or representative;

(iii) for damage to property in or on the motor vehicle of the person insured; or

(iv) for damage to any bridge, weighbridge, road, ramp, ferry, railway line, or anything in or below the surface of a road;
or

(e) any contractual liability.”

7. In other words, under the Act, it is not a requirement that an insurance policy should cover the risks outlined in section 144. If the parties to an insurance policy so wish, they can agree to extend cover to such risks and also provide for limitations in respect thereof. The extended cover can, for instance, be for passenger liability insurance, workers' compensation insurance, personal accident insurance, just to mention a few.

8. For purposes of this appeal, paragraphs (a) and (b) of section 144 are pertinent. There is no requirement that a compulsory insurance policy should cover liability for the death of or bodily injury to a person arising out of and in the course of employment. Also, it is not a requirement

under the Act that a compulsory insurance policy should cover liability for passengers or persons carried on a motor vehicle except where the motor vehicle carries passengers for hire or reward or by reason of or in pursuance of a contract of employment.

9. The evidence which was before the court below shows that the policy of insurance for the motor vehicle in question provided that subject to the limits of liability and jurisdiction clause, the appellant would indemnify the insured against all sums including costs and expenses which the insured would become legally liable to pay in respect of the death of or bodily injury to any person, or damage to property where these arise out of an accident caused by or in connection with the insured's motor vehicle or the loading or unloading of the motor vehicle. The policy also stated that the appellant would provide similar indemnity to any authorized driver of the motor vehicle.

10. It is worth mentioning that the insurance policy for the insured's motor vehicle contained exceptions to the risks it covered. These included some of those risks which the law allows to be excluded under section 144 of the Act. Specifically, and for purposes of this appeal, the material provision under Section II of the policy of insurance stated as follows: -

"The Company shall not be liable

....

(b) in respect of death of or bodily injury to any person arising out of and in the course of such person's employment by the person claiming to be indemnified under this Section.

(c) in respect of death of or bodily injury to any person (other than a passenger carried by reason of or in pursuance of a contract of employment) being carried in or upon entering or getting on to or alighting from the Motor Vehicle at the time of the occurrence of the event out of which any claim arises."

11. As can be clearly seen, the wording of this provision is almost in *pari materia* with the wording in section 144 of the Act. The policy of insurance expressly excluded liability in respect of the death of or bodily injury to any person arising out of and in the course of such person's

employment by the person claiming to be indemnified under Section II. It also excluded liability in respect of the death of or bodily injury to any person being carried in or upon or entering or getting on to or alighting from the motor vehicle at the time of an accident. According to Section II of the policy, the person claiming to be indemnified under Section II referred to in paragraph (b) above was the insured, any authorized driver and the legal personal representatives of the insured or the authorized driver in the event that they (the insured and authorized driver) are dead. (See clauses 1, 2 and 3 of Section II). In short, liability for the death of or bodily injury to employees of the insured or of authorized driver and passengers in the insured's motor vehicle at time of an accident was excluded.

12. One may think that paragraph (c) suggests that liability for death of or bodily injury to passengers carried by reason of and in pursuance of a contract of employment is not excluded. The wording of this paragraph is similar to that in section 144 of the Act. But as earlier indicated, according to this section, insurance cover for liability for the death of or bodily injury to employees of an insured or passengers is not a requirement for compulsory insurance under the Act. The only exception is where the motor vehicle is used for carriage of passengers for hire or reward or by reason of or in pursuance of a contract of employment. (see section 144 (b)). This means that cover for such liability cannot come as standard cover on a compulsory insurance policy under Part XIV of the Act. The insured has to request and pay additional premium for such cover. In the absence of such request and payment, there is no cover. *General Alliance Insurance Company Limited v Andrew Chirwa* [2014] MLR 113 (SCA). And that is the position advanced by the appellant herein.

13. There is no doubt from the evidence before the court below that the respondent was a passenger in the insured's motor vehicle at the time of the accident. There is also evidence which suggests that he was engaged by the insured to load and/or offload the bricks the motor vehicle was carrying at the material time. According to the court record before this Court, during cross examination, among other things, the respondent told the court that he was a casual worker. He used to load quarry stones, sand and bricks for Mr Osman. He was employed by Mr

Osman and was injured whilst in the employment of Mr Osman. In re-examination, he told the court that he was employed by Mr Osman to load and dispatch goods. It was not a permanent position and would be paid immediately. There was no monthly salary. He was paid according to the trips and work undertaken on that day. If there were no trips, he would not be paid at all. In short, he was "wa ganyu".

14. The question is whether in these circumstances the respondent can be said to have been an employee of the insured. Section 3 of the Employment Act defines an employee as —

- "(a) a person who offers his services under an oral or written contract of employment, whether express or implied;
- (b) any person, including a tenant share cropper, who performs work or services for another person for remuneration or reward on such terms and conditions that he is in relation to that person in a position of economic dependence on, and under an obligation to perform duties for, that person more closely resembling the relationship of employee than that of an independent contractor; or
- (c) where appropriate, a former employee".

15. Unfortunately, the Employment Act does not define the term "employment". In my view, this is a serious omission considering, among other things, the different forms that engagement for labour and services may take, the period of engagement, and also the common understanding of the term in everyday usage in this jurisdiction. It would have been better had the Legislature defined what constitutes employment in the context of the Employment Act.

16. In the circumstances, and in my understanding, the definition of "employee" in section 3 suggests that, for purposes of the Employment Act, even casual workers ("a ganyu") are employees. They are entitled to the enjoyment of employment rights. This is regardless of how spontaneous, temporally, brief, or instantaneous casual work can be. I am sure that had it been the intention of the Legislature to exclude casual workers in the definition of employees, it would have specifically

said so. Thus, I am in no doubt that, in terms of the law in our jurisdiction, and to all intents and purposes, the respondent was an employee of the insured.

17. And in terms of the insurance policy in force at the time of the accident, the insured could not seek and/or obtain indemnity from the appellant for the claims in respect of the injuries sustained by the respondent because he was the insured's employee and or a passenger in the motor vehicle.

18. The question now is; does that mean that the respondent could not proceed against the appellant on the strength of the policy of insurance? The court below found that it does not. It held that such exclusion of liability for death and bodily injury to passengers in the insured's motor vehicle is rendered null and void by section 148 (2) of the Act.

19. Section 148 provides for the right of an injured party to claim directly against an insurer of a motor vehicle. It states as follows: -

"(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:

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 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.

(d)

- (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."

20. I must say that I am very apprehensive with the way the courts have interpreted this section and its predecessor, section 65A. This section is not as averse as it has been made to appear. That is, it does not render void all restrictions of third party insurance cover in a policy as the Judge in the court below held and or as some dicta in the cases which she cited and heavily relied on suggest. Cases like *Chingaipe and another (F Chingaipe Next Friend) v National Insurance Company and another* [2000–2001] MLR 94 (HC) and *Mikeyasi v Ching'amba and others* Civil Cause No. 2726 of 1999 (HC) (unreported). These cases have fed into the jurisprudence in several other cases including the matter under appeal herein.

21. In case of *Agnes Milson and another v United General Insurance Ltd* Personal Injury Case No. 122 of 2012 (unreported), a case also cited and relied on by the Judge in the court below, Mbvundula J (as he then was) said: -

"I must now consider whether or not the defendant, who was the insurer of the vehicle is, in the circumstances of this case, liable in damages to the plaintiffs. It is the submission of the defence that the plaintiffs cannot recover from the defendant for the reason that the policy of insurance in respect of the vehicle specifically excluded liability for passengers and because the plaintiffs were at the time of the accident passengers on the said vehicle. The settled position of the law on the

matter is that contained in the decisions of this court and the Supreme Court of Appeal in *Mzimu and others v Chenic Investments and National Insurance Company* Civil Cause No. 717 of 1999, and in *Chingaipe and another v National Insurance Company and another* [2000-2001] MLR 94 (both High Court decisions) and *National Insurance Company v Mzimu and another* [2002-2003] MLR 178 (Supreme Court of Appeal, on appeal from *Mzimu and others v Chenic Investments and National Insurance Company*).

The courts in these cases were concerned with interpreting the provisions of, amongst others, section 148 of the Road Traffic Act...It has been held, in all the three cases I have cited, that by virtue of section 148 (2) of the Road Traffic Act, once a claim has been made directly to the insurer of a motor vehicle by virtue of sub-section (1) of that section, any condition purporting to restrict the insurance of the person insured thereby shall be of no effect. The provision is clear enough and it must be given its plain and ordinary meaning. It is not ambiguous. In the context of the present case, therefore, the condition in the policy of insurance between the defendant and the owner of the vehicle excluding liability for passengers is rendered null and void by the operation of section 148 (2) of the Road Traffic Act aforesaid. The defendant is liable in damages to the plaintiffs by virtue of the insurance..."

22. Again, in the case of *Chingaipe and another (F Chingaipe Next Friend) v National Insurance Company and another* [2000-2001] MLR 94 (HC) Kapanda J (as he then was) said: -

"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 instructive authority on this position of the law is the case of *Pioneer General Assurance Ltd v Mukasa* ALR Comm 188. In this case of *Mukasa* 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 v 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 cannot rely on them. He can however seek to enforce them against the insured..."

23. It was the Judge's view that the section interpreted by the Ugandan court was similar to our section 148 of the Act. Thus, in construing our legislation he was entitled to look at the construction of similar provisions in foreign jurisdictions, and if the reasoning was correct, there was no reason why he should depart from such construction. Thus, he adopted it and proceeded to hold that: -

"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 so that they are 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 *Workmen's Compensation*

Commissioner v Norwich Union Fire Insurance Society Ltd 1953 (2) SA 546 (A) where Centlivres 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."

24. With the greatest respect, if indeed the idea behind compulsory insurance is that it should protect third parties in any event then I do not think that section 144 of the Act would have made insurance cover for an insured's employees or passengers to be optional and or conditional. Such cover would have been compulsory. Further, I am in serious doubts that it was the intention of the Legislature that insurance companies should be forced to provide insurance cover even to persons who are committing offences under the Act such as driving a motor vehicle without a valid licence or driving under the influence of intoxicating liquor or a drug having a narcotic effect. In my considered view, where insurance cover is vitiated by a breach of an agreed condition under the policy, which breach occurs before an accident giving rise to a claim, the right to recover directly from the insurer under section 148 (2) does not accrue to an injured third party.
25. A breakdown of sub-section (1) would help to fully understand its full meaning and import and also to understand the meaning of sub-section (2). In my view, for a person to claim and recover directly from the insurer under sub-section (1): -

- (i) there must be in existence a policy of insurance issued in compliance with Part XIV (such as compulsory insurance (as the minimum)); and
 - (ii) the policy of insurance must cover the liability in respect of which the claim is being made.
26. Further, it must be noted that the direct recovery from the insurer is limited to the amount covered under the policy of insurance. In other words, the insurer's liability cannot exceed the limit of liability prescribed in the policy of insurance held by the insured. Also important to note here is that the liability in respect of which the claim is being made must be a liability that is covered by the policy of insurance. Where the liability is not so covered, a person cannot recover directly from the insurer. With the greatest respect, I feel that this is the fundamental aspect of section 148 (1) which the courts have been missing or ignoring when interpreting the section.
27. Now section 148 (2) picks it up from there. It says that any condition in the policy of insurance which seeks to restrict the insurance of the person insured thereby shall be of no effect. In my view, what it means is that once there is in place a policy of insurance covering the liability in respect of which the claim is being made, any provision in the policy which purports to restrict the indemnity of the insured for such liability will be ineffective. The reverse side of it is that once it is established that the policy of insurance does not cover the liability in respect of which the claim is being made, the insurer cannot be sued directly under section 148 (1) nor can he be held liable for the claim being made. (See *White v Kaondo and another* [1993] 16(2) MLR 909 (HC).
28. Section 148 (2) must always be read in the context of sub-section (1). It must never be read in isolation, which seems to be the trap that the court below fell into. It is also the trap which the court fell into in *Agnes Milson and another v United General Insurance Ltd* (supra), *Chingaipe et al v NICO*,(supra) and *Mikeyasi v Ching'amba and others* Civil Cause No. 2726 of 1999 (unreported) which the court below cited

and heavily relied on in its interpretation of the section 148 and other provisions of Part XIV of the Act.

29. I wish to comment on the *Mikeyasi* case further because it involved the interpretation of clauses in a policy of insurance worded similarly to the clauses in this appeal. The trial judge held that the exclusion clauses did not apply *vis a vis* the liability of the insured. They only applied as regards the liability in respect of the injury sustained by an employee of the insured's driver. This case came to this Court on appeal where the decision of the judge was upheld. I wish to reproduce in *extensio* a passage from the judgment of this Court before I can make some observations - *National Insurance Company Limited v Mikeyasi and others* [2002-2003] MLR 185 (SCA). This is what the Court said at pages 189 - 190: -

"Learned Counsel has further argued that the learned Judge misdirected himself in fact and in law when he held that the exclusion clause in the document is exclusion of liability to an employee of the insured's driver and not an employee of the insured.

Clearly, the appellant's contentions turn on the wording of the document itself whose relevant parts read as follows:

'Section II - Liability to third parties

1. Indemnity to the insured

The company will ... indemnify the insured against all sums including claimant's costs and expenses which the insured shall become legally liable to pay in respect of (a) ... bodily injury to any person where such ... injury ... arises out of an accident caused by or in connection with the Motor Vehicle

2. Indemnity to other persons

The Company will ... indemnify any Authorised Driver against all sums including claimant's costs and expenses which shall become legally liable to pay in respect of (a) ... bodily injury to any person where such ... injury ... arises out of an accident caused by or in connection with the Motor Vehicle ...

Exceptions to section II

The Company shall not be liable ... (b) in respect of bodily injury to any person arising out of and in the course of such person's employment by the person claiming to be indemnified under this section (the

underlining is our own, and the term 'Company' refers to an insurer which would have been the appellant in the present case if the document had been admitted in evidence).'

It seems clear to us, from reading the above clauses, that an insurer contracts to indemnify both an insured and any authorised driver against all liability in respect of bodily injury to any person arising out of or in connection with an insured motor vehicle, subject of course to limitations which may be placed by the policy. It would seem to follow, therefore, that with regard to the exception clause, the phrase "the person claiming to be indemnified" refers to both a person taking out a policy and an authorised driver because, as we have already said above, an insurer contracts to indemnify both of these. And this, in our view, settles learned Counsel's contention that a person claiming to be indemnified can only be the person taking out a policy. Yes, that may very well have been the intention of the drafter of the document, but it is not what it says, perhaps unfortunately. What we are saying here is that it is not the intention of the drafter that matters but rather what the document itself says the insurer would do in terms of the policy. And it seems to us that it says the insurer would indemnify an authorised driver in the same way it would indemnify an insured thereby, as we have already said, making an authorised driver a person claiming to be indemnified in terms of the exception clause above.

In view of what we have said above, we can see no escape from the conclusion that the liability of an authorised driver would be covered by the insurance even in respect of a person in the employ of the person taking out the policy who suffers injury in the course of employment through a fault of a driver because the exclusion clause excludes liability to an employee of the driver and not an employee of the insured. We, therefore, hold that the exclusion clause would not have been helpful to the appellant even if the standard policy document had been allowed in evidence."

30. Again, with the greatest respect, I wish to respectfully differ with their Lordships' interpretation to the effect that the exclusion of liability for injury sustained by an employee only applied to injury sustained by an employee of an authorized driver and not to an employee of the insured. As earlier stated herein, according to Section II of the policy, the person claiming to be indemnified under Section II includes the insured, any authorized driver and the legal personal representatives of

the insured or the authorized driver in event that these are dead. As such to say that the exclusion of liability for the death of or bodily injury to employees only applied to employees of an authorized driver is not supported by the provisions of the policy. Since the person claiming to be indemnified includes the insured, it follows that liability for death of and bodily injury to employees of the insured is also excluded.

31. However, on a positive note, I wish to agree with their Lordships that an insurer's contract to indemnify an insured and any authorised driver against liability in respect of death of and bodily injury to a person arising out of or in connection with an insured motor vehicle, is subject to limitations which may be placed by the policy. And as already stated in this judgment, this is dully acknowledged under Part XIV of the Act and especially by section 144.
32. In the premises, and with a high sense of restraint, it is my considered view that it is high time we revisited the position taken by our courts on the interpretation of section 148 of the Act as demonstrated in the dicta I have reproduced in *extensio* above and many other cases which I have not cited. I do not believe it is the correct interpretation of the section in the context of Part XIV of the Act. Such interpretation, impliedly in essence, suggests that there is a conflict between sections 144 and 148 of the Act. In my opinion, the conditions purporting to restrict the insurance of the person insured rendered ineffective by section 148 (2) are not those conditions which are allowed by section 144 of the Act. I do not think that it can be said that it was the intention of the Legislature to, in one breath, allow those restrictions of liability in section 144 but in another breath, in section 148 make such restrictions be of no effect. Any interpretation which suggests such a clash should be viewed with great trepidation.
33. In my judgment, the conditions falling under the ambit of section 148 (2) would be those which I may describe as ancillary terms, that is, terms which are not condition precedent to the validity of the insurance cover or the liability under the insurance. An apt example would be conditions relating to policy excess – clauses which prescribe that in the event of a claim payable under the insurance policy, the insurer will pay only a certain percentage of the claim leaving the balance to be paid by

the insured. Such clauses, if allowed to be effective would mean that a third party would be put to the trouble and expense of having to chase payment from both the insurer and the insured for their respective proportions of the claim. In my view, that would be restricting the insurance of the insured in as far as how much the insurer is liable to pay direct to the third party. Section 148 (2) does not want such a thing to happen. Instead, the insurer must pay the full liability and recover from the insured the portion, which under the conditions of the insurance policy, it is not liable to pay because it is borne by the insured.

34. I see that the majority opinion in this judgment seeks to distinguish the *Mikeyasi* case from the present appeal. I feel in so doing we are missing an opportunity for this Court to state in clear terms the correct interpretation of section 148 (2) of the Act. I dare say that the approach by our courts in their interpretation of section 148 has been clouded by the idea that the section is intended to assist poor citizen to recover compensation for injuries sustained in road accidents. Some of the statements made in our courts are reflective of the view that these are essentially cases of the poor citizens against the rich corporates who have all the resources at their disposal and can afford to pay any amount. I wish we could look at the cases differently.
35. For the reasons I have given I find that the appellant was not liable for the injury sustained by the respondent. The insurance policy issued by the appellant to the insured did not cover liability for injuries sustained by the passengers carried on the insured's motor vehicle or the insured's employees. In the circumstances, the respondent's remedy lied against the insured, Mr Osman, and not the appellant. And even if I were to find the appellant liable in respect of the injury to the respondent, in terms of section 148 (1) of the Act such liability would have been limited to a maximum of K5 million only being the maximum liability under the policy of insurance issued to Mr Osman. The appellant would not have been liable for the whole K8 million damages awarded by the court below. The K3 million difference would have been payable by the insured.
36. Therefore, I would also allow the appeal in its entirety with costs both in this Court and in the court below.

MADISE SC, JA (majority opinion)

Facts.

37. A motor vehicle registration number BJ 5400 was at all material times owned by Mr. A.H. Osman t/a Dam Investments (the insured) and insured by the Appellant. On 31st July, 2012 the vehicle was transporting bricks from Mpemba to Blantyre City. Mr. Jack Jimu (the Respondent) was being carried in the vehicle to assist with off-loading of the bricks upon reaching its destination. The police report however stated that the Respondent was a passenger in the vehicle. He was on top of the bricks. Upon reaching a place called Kadammanja the vehicle was involved in an accident as it fell on its side. As a result of the accident the Respondent's leg was crushed and later amputated.
38. By writ of summons dated 11th October, 2012 the Respondent commenced an action against the Appellant claiming general damages for pain and suffering and loss of amenities of life, disfigurement, special damages amounting to MK55,500, damages for future treatment and costs. The action was based on the allegation that the driver of BJ 5400 negligently drove the vehicle thereby causing the accident. The Appellant filed a defence denying liability. The Appellant's main argument was that the policy extended to the insured only and did not cover employees of the insured injured whilst in the vehicle in the course of employment nor did it cover passengers being carried on the vehicle.
39. After a full trial and by judgment delivered on 29th May, 2018 the Judge in the Court below found against the Appellant and held that the clause in the insurance policy excluding liability for injury to passengers and employees was rendered null and void by section 148 (2) of the Road Traffic Act (Cap 69:01 of Laws of Malawi. The Court awarded the Respondent damages in the sum of MK8, 158,000. Being dissatisfied with the judgment, the Appellant filed this appeal on the basis that the limit of the policy of insurance on the said motor vehicle was K5, 000,000 which the 37, Appellant was therefore obliged to pay the insured. The Appellant was allowed to pay the said sum into Court pending the outcome of this appeal in which the Appellant is arguing that the insurance policy excluded the Respondent. The 1st Defendant in

the Court below now Appellant settled with the Respondent the sum of MK3, 158,000.00 of the assessed sum of MK8, 158,000.00.

Notice and Grounds of Appeal

1. The learned judge erred in law and fact in holding that section 148 (2) of the Road Traffic Act rendered null and void a clause in the insurance policy between the Appellant and the insured excluding liability for injury to passengers.
2. The learned judge erred in law and fact in failing to uphold that the insurance contract between the Appellant and the insured excluded liability for injury to passengers or employees of the insured.

Preliminary objection to the appeal

40. The Respondent filed a notice of preliminary objection to the appeal under Order III r.14 of the Supreme Court of Appeal Rules. The objection was that the said appeal is incompetent on the ground that the appeal had omitted a party directly affected by the Appeal, namely Mr. A.H. Osman t/a Dam Investments (the Insured), who in the Court below was the 1st Defendant. The Respondent raised two issues to wit:

- (1) The insurance contract whose construction is the subject matter of this appeal was actually between the said insured and the Appellant.
- (2) If the appeal herein were to succeed, the said insured would be the one to settle the balance on the judgment debt awarded by the Court below to the Respondent.

41. The Respondent prayed to Court to dismiss the appeal on that basis with costs. In opposition to the objection the Appellant submitted that the Respondent directly sued the Appellant as an insurer of a motor vehicle. That section 148 (1) of the Road Traffic Act allows a claimant to directly sue the insurer. The Appellant submitted that the insured decided it was not necessary for him to attend trial and defend himself. That it was clear that the 1st Defendant decided that he would be bound by the outcome of the case having declined to attend trial on the ground that according to him it was not necessary. For this reason there was no

point to drag such a person into this appeal. 40, Finally the 1st Defendant was aware of the appeal and if he had wished to be part of the appeal, he could have applied to be joined in the appeal as a party. Alternatively the Respondent could have applied to add the owner of the vehicle as a party. This did not happen.

Preliminary finding.

42. It is our considered view that an appellant cannot be forced to pick and add a party he wants to take to the appellant court. We as a Court cannot choose and add a respondent unless the interest of justice so require under Order 3 rule 5 (1) of the Rules of the Supreme Court. It is up to the Appellant to decide who must be a respondent. Order 3 rule 5 (1) of the Rules of the Supreme Court provides that the Registrar of the Court below shall after the notice of appeal has been filed cause to be served a true copy thereof upon each of the parties mentioned in the notice of appeal. It shall not be necessary to serve any party not directly affected. The insured has not been mentioned in the notice of appeal and there has been no application to add the insured as a party in this appeal. Lastly this Court has not moved itself *suo moto* to add the insured as a party. It is not our business to do so since the Appellant has erected not to include the insured in this appeal. In this regard the preliminary objection is overruled. We will not proceed to determine the appeal.

Arguments in support of the appeal.

43. The Appellant filed skeleton arguments in support of the appeal. The Respondent did not file any arguments in opposition to the appeal. The Appellant submitted that the main issue before the Court was whether section 148 (2) of the Road Traffic Act rendered null and void a clause in the insurance contract between the Appellant and the insured excluding liability for injury to passengers and employees travelling on the insured's vehicle. Second the other issue for determination is whether the clause in the insurance contract between the Appellant and the insured is enforceable and therefore in this case the liability incurred by the Appellant excludes the Respondent and cannot be paid by the Appellant. The Appellant argued that the contract of insurance between the 1st and 2nd Defendants has the following salient clauses relevant to the issue at hand:

44. That the limit of liability to third parties for death or bodily injury is fixed at MK5, 000,000. Section II of the policy of insurance stipulates liability to third parties. It then goes on to stipulate the categories of persons to who it may provide indemnity. The clauses relevant to this matter are 1 and 2 which provides:

Indemnity to the insured

45. The company will subject to the limits of liability and the jurisdiction clause *indemnify the insured against all sums including claimant's costs and expenses which the insurer shall become legally liable to pay in respect of:*

(a) *Death or bodily injury to any person.*

(b) *Damage to property.*

That where such death or injury or damage arises out of an accident caused by or in connection with the Motor vehicle or the loading or unloading of the motor vehicle.

Indemnity to other persons

46. The Company will subject to the limits of liability and the jurisdiction clause indemnify any authorized driver against all sums including claimant's costs and expenses which such shall become legally liable to pay in respect of:

(a) Death or bodily injury to any person.

(b) Damage to property.

47. That where such death or injury or damage arises out of an accident caused by or in connection with the motor vehicle or the loading or unloading of the motor vehicle. That it must be noted that in this matter the Respondent sued the insured (1st Defendant) and it is the insured who filed a claim (to be indemnified) with the insurer. That under exceptions to section II, it is provided that the company shall not be liable:

- (i) 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 indemnified under this Section (in this case the 1st Defendant)
- (ii) In respect of death or bodily injury to any person (other than a passenger carried by reason of or in pursuance of a contract of employment) being carried in or upon or entering or getting on to or alighting from the motor vehicle at the time of the occurrence of the event out of which any claim arises (paragraph c).

Compulsory third party insurance

48. That it must be noted that under section 141(1) of the Road Traffic Act (hereinafter "the Act"), third party insurance is compulsory. This provision states:

Subject to this act, it shall not be lawful for any person to use or cause or permit any other person to use a motor vehicle on a public road unless there is in force in relation to the use of such motor vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third party risks as complies with the requirement of this part.

The Act allows restriction of some liability

49. Section 144 of the Act provides that a policy of insurance shall not be required to cover

- (a) *Any liability in respect of the death of 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.*
- (b) *Except in the case of a motor vehicle 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 entering or getting on to or alighting from such a motor vehicle at the time of occurrence of the event out of which the claims arose.

50. The Appellant argued that it follows that the Act allows exclusion of liability in respect of persons travelling on the vehicle in the course of employment at the time of the accident and passengers on a vehicle which is not used to carry passengers for hire or reward. That under section 147 (1) of the Act conditions that are allowed by the Act and included in an insurance policy will have full effect.

Exceptions of liability in the contract between 1st Defendant and 2nd Defendant.

That the contract of insurance between the 1st Defendant and 2nd Defendant excluded liability in respect of:

- (i) Persons on the vehicle and is injured in the course of employment by the person claiming to be indemnified (i.e. the insured).
 - (ii) Persons being carried in or upon or entering or getting on to or alighting from the motor vehicle at the time of the accident. These are passengers.
51. The Appellant has submitted that the Act allows these exceptions or limitations of liability as stipulated in section 144 of the Act. The Appellant cited the decision of Mwaungulu (R) (as he was then) in White vs. Kaondo 16 (2) MLR 909. The learned Registrar stated:

The policy taken out by the first defendant exclude 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).

52. The Appellant submitted that this reasoning would equally apply in respect of the exclusion of liability for employees under the current policy. In this respect section 148 (2) was misapplied. Section 148 (2)

of the Road Traffic Act which the learned Judge stated that it nullified the exclusion clauses in issue in this matter deals with rights to injured party to directly sue the insurer. This provision states:

(j) 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 other than or towards 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.

53. That the issue in this case is not whether the Respondent could directly sue the insurer. The Appellant submitted that the learned Judge misapplied this provision. The proper provision to consider should have been section 144 of the Act.

Mikeyasi Case is distinguishable

54. The Appellant stated that the Court below relied on the High Court case of Beston Mikeyasi v Aaron W. Ching'amba and Surfacing Enterprises and National Insurance Company Ltd civil cause no. 2726 of 1999. The finding in this case in the High Court was confirmed by the Supreme Court of Appeal in National Insurance Company Ltd vs. Mikeyasi [2002 -2203] MLR 185. In this case the plaintiff was injured in the course of employment while travelling on motor vehicle registration number BJ 6117. By reason thereof the plaintiff commenced action against the driver Aaron W. Ching'amba, of Surfacing Enterprises the employer, the owner of the vehicle and National Insurance Company Ltd, the insurer.
55. In that case the plaintiff had sued the driver (Mr. Ching'amba). In this case the driver was not a party. He had not been sued by the Respondent. Therefore, he may legally not be liable to pay anything in this case in terms of clause 2 under section II of contract of insurance

because there is no way that a court can make any order against the driver in this case, him not having been added as a party. That in the Mikeyasi Case the High Court and Supreme Court held that the plaintiff's claim was not excluded because it was the driver who was claiming to be indemnified in that case and the plaintiff was not an employee of the driver.

56. That the position in this case is different. The Respondent had only sued the insured the owner of the vehicle (the 1st Defendant). It follows that the insured himself (1st Defendant) was the person claiming to be indemnified in this case and he was the person that the insurer will have to indemnify under clause 1 of section II of the insurance contract. The Respondent was engaged by the 1st Defendant, Mr. A.H. Osman. It follows that the exclusion clause applied to him. The Appellant submitted that the scenarios in the Mikeyasi Case and the present case are different. The driver is nowhere in the picture in this case. The person who has been sued is the owner of the vehicle. That the Respondent confirmed in cross-examination that he was an employee of the said owner. Therefore, liability for his injury is excluded under clause (b) of Exceptions to section II.
57. That the Mikeyasi Case was decided on its own facts. That the critical distinguishing fact is that the driver in that case was a party to the claim, which is not the case in the present case.

Section 144 of the Act provides that a policy of insurance shall not be required to cover (inter alia):

- (a) *Any liability in respect of the death of 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.*
- (b) *Except in the case of a motor vehicle 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 entering or getting on to or alighting*

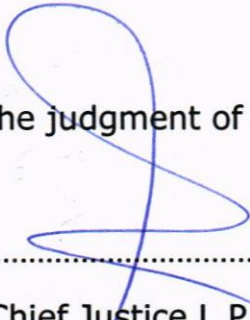
from such a motor vehicle at the time of occurrence of the event out of which the claims arose.

Determination

58. In the premises, we in our very considered view find that that the contract of insurance expressly excluded liability for injuries to employees of the insured (1st Defendant) and to passengers unless the vehicle in question is for hire or reward which requires a separate insurance contract. The Respondent herein was neither an employee of the insured nor was he a passenger within the meaning in section 144 of the Act. Therefore, the 2nd Defendant now Appellant cannot be liable for the injuries sustained by the claimant now Respondent who was not an employee of the insured and was not injured in the course of his employment. The Respondent was a casual laborer (Nganyu) who was hired to offload bricks. We therefore find that the Appellant was not liable to pay any sums of money to the Respondent. The Appellant was only contracted to pay K5, 000 000 to the insured (indemnity) being the maximum sum in the policy of insurance. It is for this reason that we allow the appeal with costs here and below. We so order.

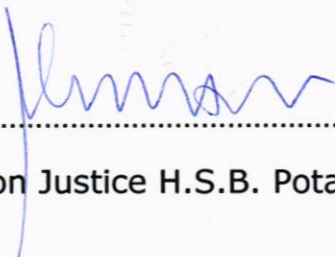
Pronounced in open Court at Blantyre in the Republic on 17th December 2024.

I concur with the judgment of the Court




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The Hon Deputy Chief Justice L.P. Chikopa SC

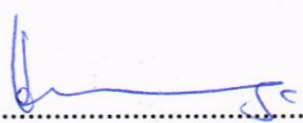
I concur with the decision of the Court



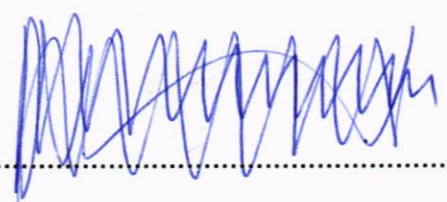
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Hon Justice H.S.B. Potani SC JA


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Hon Justice J. Katsala SC JA.

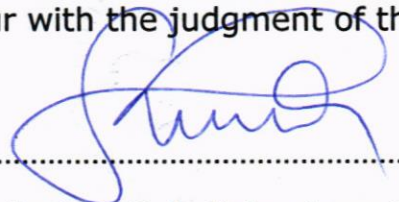
I concur with the decision of the Court


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Hon Justice I.C. Kamanga SC JA.

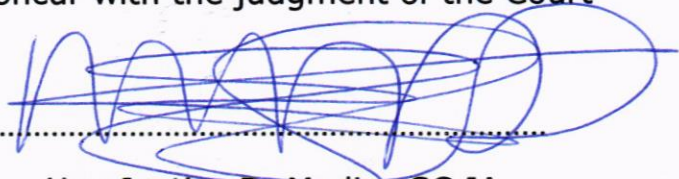
I concur with the decision of the full bench.


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Hon Justice M.C.C. Mkandawire SC JA

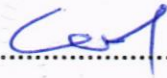
I concur with the judgment of the Court


.....
Hon Justice S.A. Kalembere SC JA

I concur with the judgment of the Court


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Hon Justice D. Madise SC JA

I concur with the judgment of the Court

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Hon Justice R Mbvundula SC JA.

I concur with the judgment of the Court

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Hon Justice D. nyaKaunda Kamanga SC JA