

IN THE HIGH COURT FOR ZAMBIA

2011/HP/600

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

KENNEDY WEMBA

Appellant

vs

PRINCE MATAMBO

1st

Respondent

JOHN M. PHIRI

2nd

Respondent

**ZSIC GENERAL INSURANCE
LIMITED**

Third Party

Before the Hon. Madam Justice F. M. Lengalenga this 11th day of September, 2012 in chambers at Lusaka

**For the appellant : Mr. H. Kabwe - Messrs Hobday
Kabwe & Co.**

For the 1st respondent : In person

For the 2nd respondent: Nil

**For the 3rd party : Mrs. Kanyembo Zulu - Group
Legal
Officer (ZSIC Limited)**

R U L I N G

Cases cited:

- 1. KABWE TRANSPORT COMPANY LIMITED v PRESS TRANSPORT (1975) LIMITED (1984) ZR 43 (SC)**
- 2. KABANDA & KAJEEMA CONSTRUCTION v JOSEPH KASANGA (1990/92) ZR 145 (SC)**
- 3. TINLINE v WHITECROSS INSURANCE (1921) 125 LT 632**
- 4. CASTELLAIN v PRESTON (1883) 11 QBD 380**

This is the appellant's appeal against the learned Deputy Registrar's ruling dated 26th August, 2011. The grounds of appeal were filed on 6th January, 2012 and they state as follows:

- "1. That the Deputy Registrar erred in law and fact when he accepted as contended by the respondent that the admission of guilt form as signed and admitted by the defendant amounted to evidence emanating from a trial when none had been instituted.**
- 2. That the learned Deputy Registrar erred in both law and fact when he rules that the third party's admission as to the amount of K23 351 250=00 which it was willing to pay as contained in the Defence amounted to a mere transverse of the Statement of Claim and never was an admission on which judgment on admission could be obtained/entered and the rest of the case disposed of on a point of law."**

In addition to the grounds of appeal Counsel for the appellant filed into court on 6th January, 2012, heads of arguments to support the grounds of appeal, on which the appellant relied.

With respect to the first ground of appeal, Counsel for the appellant, Mr. Hobday Kabwe's contention is that the case of **KABWE TRANSPORT COMPANY LIMITED v PRESS TRANSPORT¹**, was misconstrued and misapplied by the learned Deputy Registrar in arriving at the conclusion that he did. He submitted that the admission of guilty form as signed by the 2nd respondent formed the basis of the police investigation on findings of fact as to the cause of the accident and had nothing to do with any criminal prosecution case involving the 2nd respondent. He added that it was and merely formed part of findings of fact of an investigation into the cause of the accident.

Mr. Kabwe submitted further that the proper approach and construction of the above cited case does not fit in the circumstances at hand. He distinguished the present case from the one cited by submitting that in that case the Supreme Court had to deliberate on whether evidence of previous criminal proceedings could be admissible in civil proceedings and they held that there is no provision in the law for convictions in a criminal trial to be referred to and taken note of in a civil trial. Counsel for the appellant emphatically submitted that there is a distinction between the **KABWE TRANSPORT COMPANY** case and the current set of circumstances. He urged the court to take the contrary view as expressed/held by the learned Deputy Registrar to accept the admission of guilt form as a finding of fact

resulting from the traffic investigations by the police, which investigations cannot be equated to a criminal trial and are substantially different from a criminal trial as no criminal trial had been instituted against the 2nd respondent.

As regards the second ground of appeal it was submitted on behalf of the appellant that the third party as insurer of the 1st respondent through its defence maintained that it sought to indemnify the appellant but the appellant sought unjust enrichment and that the question that needed to be addressed was whether the pre-accident value was the one to be paid to the appellant or the actual value for effecting repairs as at present date or the actual value of the car in an open market should the third party decide to replace and not repair the damaged vehicle.

It was further submitted that by the 1st respondent joining the third party to the proceedings he implicitly accepted liability vicariously so that the only issue to be determined by the court is the amount to be made payable to the appellant, hence the appellant's application to enter judgment on admission on the said amount and to determine the remainder of the issue of damages on a point of law. Counsel for the appellant relied on Order 14A Rule 1 (1) (a) and (b) of the Rules of the Supreme Court, 1999 (White Book) which is instructive on the determination of questions of law or construction.

In conclusion, it was submitted on behalf of the appellant, that the learned Deputy Registrar's ruling be set aside to allow for the two applications, namely, that judgment on admission be entered for the amount of K23 351 250=00 and that the rest of the issue be determined on a point of law. The issues being whether it is the pre-accidental value of the car that should be paid to the appellant as compensation or present market value of repairing the said vehicle or its replacement.

On 7th February, 2012, heads of arguments were filed into court on behalf of the 1st and 2nd respondents and the third party.

With regard to the first ground of appeal, it is contended that the Deputy Registrar did not err in law and fact when he accepted that the admission of guilt form as signed and admitted by the 2nd respondent amounted to evidence emanating from a criminal conviction. It was submitted by Legal Counsel that the case of **KABWE TRANSPORT** was not misconstrued and misapplied by the learned Deputy Registrar when he concluded that the admission of guilty form signed by the 2nd respondent amounted to evidence of facts emanating from a criminal conviction and not trial, as it was held in that case that there is no provision for convictions in criminal trial to be referred to and taken note of in a civil trial. He further referred to the case of **KABANDA & KAJEEMA CONSTRUCTION v JOSEPH KASANGA**² where it was held that despite changes in English law, results of criminal cases

may not generally be used to establish civil negligence in this country. The third party's and respondents' contention is that when the 2nd respondent was charged and accepted or admitted by way of signing the admission of guilt form and paid the fine, this act amounted to a conviction and summary trial. He submitted that, therefore, the Deputy Registrar was on firm ground in his finding.

With respect to the second ground of appeal, legal Counsel submitted that the learned Deputy Registrar did not err in both law and fact when he ruled that the Third party's admission to the amount of K23 351 250=00 which it was willing to pay as contained in the Defence amounted to a mere transverse of the Statement of Claim and could not be treated as an admission on which judgment on admission could be entered whilst the rest of the issues could be disposed of on a point of law. He submitted further that the Third party was joined to the action as the insurer of the 1st respondent and the contract of insurance entails that the insurer should where the insured is found liable indemnify the party claiming from the insured. He added that whatever the case might be, the third party cannot be deemed to admit the appellant's claim against the respondents outside an admission by the respondents. He reiterated that, therefore, the court was on firm ground to hold that paragraph 3 of the Third party's Defence was a mere transverse and not admission. He relied on the case of **TINLINE v WHITECROSS INSURANCE**³ and he submitted that all contracts of insurance except life insurance,

personal accidents and sickness insurance are contracts of indemnity. He added that in this class of insurance, the amount that is recoverable is measured by the extent of the pecuniary loss sustained through the occurrence of the event upon which the insurer's liability arises. Legal Counsel also relied on the leading case on the principle of indemnity, **CASTELLAIN v PRESTON**⁴ where it was held *inter alia* that the contract of insurance is a contract of indemnity and indemnity only, meaning that the insured, in case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified. It was submitted, therefore, that in motor insurance, where there is a total loss, for instance, where the insured's vehicle is damaged beyond economic repair, the insured is paid the market value of vehicle immediately after the accident. He submitted further that the sum insured is the maximum liability of the insured and that where there is only partial loss to insured's vehicle, the insurer indemnifies the insured by paying for the cost of repairing the damage, where the vehicle is repairable. He added that in some cases, the damaged vehicle is still repairable but because the estimated cost of repair would exceed the market value of the vehicle after it has been repaired the insurer might decide to deal with the claim as constructive total loss. Legal Counsel submitted that in which case, insurer indemnifies the insured by paying him the pre-accident market value of the vehicle or the value of a vehicle of similar type, model, age and condition.

Based on his submissions, Legal Counsel submitted that the learned Deputy Registrar's ruling be upheld and the parties be allowed to proceed to trial as opposed to allowing the matter to be decided on points of law as proposed by Counsel for the appellant.

I have carefully considered the appellant's appeal against the learned Deputy Registrar's ruling and the grounds of appeal together with the appellant's heads of argument and the respondents' heads of arguments.

With respect to the first ground of appeal, I must state that the Supreme Court in the **KABWE TRANSPORT** case clearly stated the position of the use or reference of criminal convictions in civil cases when they held *inter alia* that there is no provision for convictions in a criminal trial to be referred to and taken note of in a civil trial. However, in the case of **MANFRED KABANDA & KAJEEMA CONSTRUCTION v JOSEPH KASANGA**, the Supreme Court in upholding their decision in the **KABWE TRANSPORT** case, held *inter alia* that:

“Despite changes in English law, results of criminal cases may not generally be used to establish civil negligence in this country unless the criminal evidence relates to an admission of negligence.”

From the aforesaid, it is clear that criminal evidence may only be used when it relates to an admission of negligence. The admission of guilt by the 1st defendant to the police for careless driving is such a situation when such criminal evidence is admissible even though it did not emanate from a criminal trial as the criminal proceedings did not take place when the 1st defendant signed an admission of guilt. In relation to the first ground of appeal, however, the learned Deputy Registrar's typed ruling was not availed to this court and I am unable to read his handwritten ruling but if what is contained in the first ground of appeal is correct, then the error in law and fact would be in the wording and specifically the phrase:

“...the admission of guilt form as signed and admitted by the defendant amounted to evidence emanating from a criminal trial (or criminal conviction)”

In the cases decided by the Supreme Court, there is reference to “convictions in criminal trial” and “results of criminal cases”

It is, therefore, clear that the reference is to criminal evidence which may emanate from a criminal trial or results of criminal cases and in the present case, the admission of guilt may be categorized as a result of a criminal case even if it was not taken to court as a consequence of the defendant having paid a fine. Therefore, it can be said that the misdirection was in the choice of

language and not on the principle from the **KABWE TRANSPORT** case.

Turning to the second ground of appeal, considering the arguments advanced by the parties, I am not satisfied that the learned Deputy Registrar erred both in law and fact by ruling as he did that the third party's admissions as to the amount of K23 351 250=00 which it was willing to pay amounted to a mere traverse of the Statement of Claim and was never an admission on which judgment on admission could be obtained. The reason for this court's finding is that the third party in its denial of the contents of paragraph 10 of the plaintiff's Statement of Claim averred that the damages of its car were assessed at K23 351 250=00 being the value of vehicle at US \$4 790 at K4 775=00 (K23 351 250=00) inclusive of freight and insurance charges. From the defence that is on record there is nothing else in the form of an admission hence the learned Deputy Registrar's conclusion that it amounted to a mere traverse of the Statement of Claim and could not be treated as an admission on which judgment on admission could be entered or obtained.

Therefore, I, accordingly find that the learned Deputy Registrar did not err in both law and fact as contended by the appellant. Further, considering the issues raised in the respondent's arguments, it is clear that despite the fact that the 2nd respondent's admission of guilty is admissible as it relates to

an admission of negligence, this is not a proper case in which to proceed by way of judgment on admission as there are triable issues that cannot be disposed of on points of law as the same may bring about injustice being occasioned to some of the parties to this action.

In the circumstances, therefore, the appeals succeeds in part in as it relates to the misdirection or error in law and fact in terms of usage of terminology or language used by the learned Deputy Registrar in the first ground of appeal but it fails in the second ground.

DATED this.....day of September, 2012 at Lusaka

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F. M. Lengalenga

JUDGE