ZAMBIA STATE INSURANCE CORPORATION LIMITED v ANTHONY MUYANA MUSUTU, AFRICAN NATIONAL CONGRESS, ALLAN NSENGALA (1994) S.J. 60 (S.C.)

SUPREME COURT
NGULUBE, CJ., GARDNER AND CHIRWA, JJ.S.
7TH JULY 1994 AND 3RD AUGUST, 1994
S.C.Z. JUDGMENT NO. 10 OF 1994

Flynote

Road traffic accident - Liability - Roads and Road Traffic Act - Third party who has suffered damadge solely to property - Whether he has a right to recover damages from the insurance company - Where insurance comapny has a legitimate ground to repudiate liability to a policy holder

Headnote

In a road traffic accident the vehicle of the first respondent was in collision with a vehicle belonging to the second respondent driven by its servant, the third respondent, in the course of his duties. The appellant was joined as defendant, under the terms of the Roads and Traffic Act, Cap 766. The High Court held that the appellant was statutorily liable to compensate the first respondent for damage to a motor vehicle and resulting damages. The appellant appealed.

Held:

(i) Where the only damage suffered by the third party is damage to property, no action lies directly against an insurance company under section 137 of the Roads and Road Traffic Act, nor, in view of the fact that there is no privity of contract, does any such action lie otherwise.

(ii) Where damage to property is the only damage suffered, a breach of a condition by a policy holder will, if proved, effectively bar a claim under the policy

For the appellant: M.M Mundashi ZSIC.
For the respondents: K.M. Maketo of Christopher Russel Cook and Co.
S.S. Kakoma of Mundia, Kakoma and Co.

Judgement

GARDNER, J.S.: delivered the judgement of the court.

This is appeal against a judgement of a High Court holding that the appellant was statutorily liable to compensate the first respondent for damage to a motor vehicle and resulting damages.

The facts of the case were that in a road traffic accident the vehicle of the first respondent was in collision with a vehicle belonging to the second respondent driven by its servant, the third respondent, in the course of his duties. The appellant was joined as defendant, under the terms of the Roads and Traffic Act, Cap 766, and its defence claimed firstly that it did not insure

the second respondent's motore vehicle, as alleged, and, in the alternative, that, if it did so insure, the second respondent was in breach of a warranty that it should notify the appellant of any claims brought against it. At the trial little or no defence as to liability for negligence was put forward, and the learned trial judge found that the accident had occurred solely due to the negligence of the third respondent while driving in the course of his duties on the business of the second respondent. The appellant did not press its denial of the existence of an insurance policy, and the learned trial judge found that, under section 137 of the Act, the appellant was liable to pay the first respondent for the damages arising out of the damges to his motor vehicle.

It was speficically held by the learned trial judge that the appellant's liability under section 137 was not limited solely to damages for bodily injury or death.

The appellant now appeals against that finding, and on its behalf Mr Mundashi has urged us to find that section 137 makes an insurance company directly liable to a third party only for damages arising out of personal injury or death as set out in section 135.

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Mr Maketo on behalf of the first respondent argued that the learned trial judge was right in his finding because section 137 contains no words of limitation of liability, and, had it been intended to limit liability to damages arising solely out of bodily injury or death it would have been easy to say so in the section.

Mr Kakoma on behalf of the second and third repondents argued that the appellant should have entered a conditional appearance if it were right in its contention that it was not liable for the damages which occurred to the first respondent's motor vehicle and ensuing loss as claimed in the writ, and further that the appellant should have raised a preliminary issue to the same effect at the trial. As to the merits of the case Mr Kakoma adopted the arguments of Mr. Maketo.

It its defence the appellant put the first respondent to proof that there was an insurance policy in existence to support the claim, but no insurance policy was produced. It appears to have been accepted, however, by the court and the parties that there was some form of comprehensive insurance which insured the second respondent against liability for damage to third parties' property. There is no doubt that the appellant maintained its argument at the trial that, although there may have been an insurance policy, the terms of section 137 of the Act did not make the appellant liable for damage to the first respondent's motor vehicle. There is no rule of practice which makes it mandatory for conditional appearance to be entered or for preliminary points to be taken before trial, and Mr Kakoma's argument in this respect cannot succeed.

The essential question in this appeal is whether a third party who has suffered damadge solely to property, in this case a motor vehicle, has a right to recover damages from an insurance company which has a legitimate ground to repudiate liability to a policy holder because such policy holder did not give notice of the claim in accordance with the terms of the policy. This situation is dealt with in section 138 of the Act, which reads as follows:

> "Any condition in a policy given under this part providing that, in the event of some specified thing being done or omitted to be done no liability shall arise under the contract, or that in any such event any liability so arising shall case, shall be of no effect in connection with any claim in respect of which the policy holder is required to be insured by virtue of the provisions of this Part:"

Claims for which a policy holder is required to be insured are set out in section 135 which reads, in part, as follows:

> "In order to comply with the requirements of this Part, a policy of insurance must be a policy which---
>
> > (b) insures such person, persons, or classes of person as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of, or bodily injury to, any person caused by, or arising out of the use of the motor vehicle or trailer on a road."

It follows, therefore, that a condition which enables an insurance company to avoid liability is only of no effect in connection with claims in respect of bodily injury or death. So far as claims in respect of damages to property are concerned any breach of a condition by the policy holder will effectively prevent a third party from claiming from the insurance company.

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In view of the fact that the effect of section 137 was dealt with in the court below we should comment that, in construing the meaning of that section, all the words must be taken into account and given effct to because no words in a statute may be regarded as otiose. Section 137 reads as follows:

> "Any person having a claim against a person insured in respect of any **5**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 said person having the claim"

The words 'for the purposes of this Part' govern the claim and the policy, and such purposes must be ascertained in order to construe the meaning of the section. It is clear from the wording of section 135 set out above that the purpose of Part IX of the Act is to provide for compulsory third party insurance in respect of death or bodily injury only. Policy giving insurance in respect of damage to property is not a policy issued for the purposes of Part IX of the Act and therefore no direct claim against an insurance company in respect of such damage can price under section 137 or otherwise.

For the reasons we have given we confirm that, where the only damage suffered by the third party is damage to property, no action lies directly against an insurance company under section 137 of the Roads and Road Traffic Act, nor, in view of the fact that there is no privity of contract, does any such action lie otherwise. We also confirm that, where damage to property is the only damage suffered, a breach of a condition by a policy holder will, if proved, effectively bar a claim under the policy.

The question of whether or not there was an effective breach of any condition by the respondent was not dealt with in the court below, and, if the parties so require, we send the case back to the same judge for that issue to be resolved.

The appeal is allowed with costs to the appellant in this court and in the court below.
Appeal allowed.
