MARIAN TIGERE
and
BENJAMIN MWAKONYA TSANGANYIDZO
versus
NICOZ DIAMOND INSURANCE COMPANY LIMITED
and
ANTONIO IBRAHIM JIVA

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 25 October 2016, 1 & 4 November 2016 and 2 February 2017

Civil Trial

E Chatambudza, for the applicant
T Magwaliba, for the 1st defendant

DUBE J: The plaintiffs' claim damages arising out of a road traffic accident. On 21 October 2008, the plaintiffs' were driving from Mutare to Harare when at the 235, km peg a Toyota Camry which was being driven by the second plaintiff, collided with a vehicle that was being driven by the second defendant. The first plaintiff was a passenger in the vehicle driven by the second plaintiff. The plaintiffs aver that the collision was caused by the sole negligence of the second defendant who was negligent in that, he was not careful and cautious in overtaking and that he attempted to overtake at a place where it is prohibited to do so. As a consequence of the accident the first plaintiff sustained head injuries, left clavicle fracture and multiple body and limbs contrusion. The second plaintiff sustained fractures and multiple body and limbs contrusion. The plaintiffs claim that they will suffer damages in the future in the sums of US$125 000-00 and US$190 000-00 respectively. The first plaintiff further claims that she lost a nokia cell phone and earrings at the scene of the accident totaling $175-00.

The second defendant's vehicle was insured by the first defendant. The defendants were being jointly sued for damages and the matter was initially set down for trial on 30 October

2015. The first defendant defaulted and its defense was struck out. MATHONSI J dealt with the matter as an unopposed matter. The second defendant represented by Mr. Drury, was present at the hearing. He withdrew his defense with regards the negligence claims. Evidence led in respect of quantum of damages was not contested by the second defendant. Judgment was entered with costs against both defendants jointly and severally, the one paying the other to be absolved in the sum of $39 880-00 in favour of the first plaintiff and $85 260-00 in favour of the second plaintiff after quantification of the claim. The second defendant was in addition ordered to pay to the first plaintiff, the sum of $175-00 together with interest with respect to items lost at the scene of accident. The first defendant subsequently applied for rescission of the default judgment entered against it and UCHENA J rescinded the judgment on 22 July 2015 and granted the following order:

> "1. The judgment granted against the applicant in case number HC 2938/09 be and is hereby rescinded and consequently its plea is reinstated.
>
> 2. There shall be no order as to costs."

On 18 October 2016 the matter was once again placed before me for trial. Both defendants were served with notices of set down and the second defendant did not attend court. The court requested the parties to file heads of argument on the point regarding whether the order for rescission of the default judgment obtained by the first defendant applied in respect of the judgment entered against the second defendant. I am most grateful to Mr *Chatambudza* for his thoroughly researched and well-articulated heads of argument. The first defendant did not file any heads of argument. Rule 63 which provides for applications for rescission of judgment provides as follows,

> "63. Court may set aside judgment given in default
>
> (1) A party against whom judgment has been given in default, whether under these rules or under any other law, may make a court application, not later than one month after he has had knowledge of the judgment, for the judgment to be set aside.(my emphasis)
>
> (2) If the court is satisfied on an application in terms of sub rule (1) that there is good and sufficient cause to do so, the court may set aside the judgment concerned and give leave to the defendant to defend or to the plaintiff to prosecute his action, on such terms as to costs and otherwise as the court considers just.''

When the second defendant appeared before MATHONSI J, he withdrew his defense. The resolution of this question rests on an interpretation of the phrase "for the judgment to be set

aside". I agree with Mr *Chatambudza* that if the phrase is read alone, it suggests that the entire judgment is to be set aside. Further that, if read in context, regard being had to the beginning of the sub- rule, which provides that any party against whom judgment has been given in default may apply for default judgment, that the judgment to be set aside, is that relating to the party who was in default alone.

The judgment granted against the second defendant was not a default judgment and it fell outside the purview of the very notion of rescission. The second defendant acquiesced to the judgment and the second defendant is barred from re-opening the matter. UCHENA J's order is also clear that the rescission order granted relates only to the first defendant as it makes specific reference to the applicant in that application who was the first defendant. The judgment set aside is the one granted in default against the first defendant. Regard should also be had to r 63 (2) which provides that if the court is satisfied that there is good and sufficient cause for rescission, the court may set aside the judgment concerned and give leave to the applicant (defendant) to defend. The judgment granted in default is the judgment concerned and is the one under scrutiny and for which rescission has been filed. The question of leave to defend cannot arise in respect of a party who does not seek to defend at all. The second defendant decided not to oppose the action, has not applied for rescission of the judgment against him and is not defending these proceedings. It is clear that the judgment of UCHENA J was issued in favour of the first defendant only.

The import of r 63(1) is that only the party against whom judgment has been given in default may apply to have the judgment set aside. It makes legal sense to find that he notion of rescission can only be applicable to a judgment granted in default. Where a party who has been granted a judgment or order jointly and severally with another party applies for rescission of the order against him, the rescission of that judgment does not have the effect of setting aside judgment granted against the party who did not oppose the proceedings in the main matter and who has not applied for rescission of his part of the judgment or order. A rescission of judgment cannot affect a party who did not apply for rescission of the judgment. The second respondent did not oppose the proceedings and has not applied for rescission of the order granted in the main matter or to set it aside. The order against the second defendant is still extant. The part of the judgment relating to him has not been rescinded.

The court proceeded only with respect to the claim against first defendant, [hereinafter referred to as the defendant]. At the hearing the court was requested to determine the following issue;

> "Whether the first defendant is liable to meet the plaintiff's claim in terms of the insurance policy held by the second defendant at the material time and if so in what amount."

The parties agreed to have the issue argued as a preliminary issue because of its potential to dispose of the dispute before court. In the event that the court found in favour of the plaintiffs, the court was requested to proceed on the basis of the findings of MATHONSI J.

The defendant acknowledges that the plaintiffs have the right to sue the insurer but argued that the insurer is liable only for what is specified in the policy. The defendant submitted that the policy was taken in Zimbabwean dollars and cannot cover a claim brought in United States dollars. Further, that the liability of the defendant is limited to the amounts stated in s 23 of the Act in the form in which it was at the time of the accident. The plaintiffs are opposed to the point. They submitted that s 23 (2) of the Road Traffic Act insures against "any liability" that may be incurred, including foreign currency payments. The plaintiffs further contended that the statute sets out minimum amounts and not mandatory amounts and that the statutory policy covers more.

The issue is whether the insurer is liable to meet the plaintiffs' claim in United States dollars. Central to this dispute is a contract of insurance. A contract of insurance has been described as an agreement where an insurer promises in return for a money consideration, the premium, to pay the other party, the insured, and a sum of money or provide him with some corresponding benefit upon the occurrence of a specified event. See *Prudential Insurance Company* v *Inland Revenue Commissioners* [1904] 2 K.B 658, *Gordon and Getz, The South African Law of Insurance, Third Edition @p 77.*

The insurance contract involved here is a statutory insurance policy. The requirements of this form of insurance are the same as those of the common law insurance contract except that the party claiming or on whose behalf a claim is brought, is not a party to the insurance contract, his claim being based on statutory requirements. A third party is able to sue an insurer directly on the basis of ss 22, 23 , and 25 of the Road Traffic Act, [*Chapter 13:11*] , hereinafter referred to as the Act. These sections provide for compulsory statutory insurance cover to third parties

harmed by conduct of insured persons or an authorized driver of the insured person. Section 22 of the Road Traffic Act makes it a requirement for users of motor vehicles and trailers to be insured against third parties. The defendant's liability to the plaintiff is therefore statutory. The plaintiffs derive their right to sue an insurer from the provisions of s 23.

Section 23 reads as follows;

> **"23 Requirements in respect of statutory policies of insurance**
> (1) ……...
> (2) Subject to this section, a statutory policy shall insure such persons or classes of persons as may be specified in the policy in respect of <u>any liability</u> which may be incurred by them in respect of—
> (a) the death of, or bodily injury to, any person; and
> (b) the destruction of, or damage to, any property; caused by or arising out of the use of the motor vehicle or trailer concerned on a road.
> (3) A statutory policy shall not be required to cover—
> (a) any contractual liability; or
> (b) liability in respect of the death of, or bodily injury to, persons who were being carried in or on or entering or getting on to or alighting from the vehicle or trailer concerned when the event out of which the claims arise occurred, to an amount exceeding—
> (i) one thousand dollars (USD 1 000) in respect of any one such person killed or injured; or
> (ii) five thousand dollars (USD 5 000) in respect of any one accident or series of accidents due to or arising out of the occurrence of any one such event, where the vehicle concerned is a vehicle other than an omnibus; or
> (iii) ……
> or
> (c) ……
> (d) ……
>
> (4) Notwithstanding any other law, a person who issues a statutory policy shall be liable to indemnify the persons or classes of persons specified in the statutory policy in respect of <u>any liability</u> which the statutory policy purports to cover in the case of those persons or classes of persons" (the underlining is mine for emphasis)

Section 23(2) provides that a statutory policy shall insure persons specified in the policy in respect of 'any liability' which may be incurred. In *Johanne* v *Clarion Insurance Company and Ors* HH 429 /12, the court considered the meaning of the phrase, "any liability" and concluded that the word "any" as used in s 23,

> "simply means that the nature of the liability claimable in respect of a statutory policy is unlimited. To say that "any" means that the extent of the liability *viz-a-viz* the quantum, is unlimited, is to stretch the word to elasticity limit."

Section 23 is couched in wide terms. The legislature intended that persons injured or suffering damages resulting from an accident were afforded wide protection and are left with a

remedy. The phrase "any liability" speaks to the actual injury and nature of damages or injuries that may give rise to a claim. The mischief behind the use of that phrase was in order that all manner of injuries and damages in respect of death and bodily injury to, any person and the destruction of, or damage to, any property was covered. The use of the phrase "any liability" allows the court in the event of a dispute over what actual injuries or damage a policy covers, to always lean in favour of a third party. The phrase does not suggest that the amount claimable or arising from any injury to the claimant is unlimited. This is supported by the fact that the legislature put a cap on amounts claimable by prescribing the cover payable in those instances. The amounts payable are prescribed in the Act. *See also Eagle Insurance Co Ltd* v *Grant 1989 (3) ZLR* 278 at 280H to 281A. Both ss 23 (2) and 25 of the Act cover injuries and damages suffered as a result of an accident but limits the claim to amounts covered by the statutory policy. Section 25, reads as follows;

> "25 Right of injured parties to proceed against insurers
> (1) A person who has a claim against a person insured or indemnified in respect of any liability in relation to which a statutory policy has been issued shall be entitled—
> (a) in his own name to recover from the insurer any amount, <u>not exceeding the amount covered by the statutory policy, for which the person insured or indemnified, is liable</u>; and….
> (b) ……. " (my emphasis)

Section 25 allows a third party to proceed directly against the insurer for any liability arising out of the accident and to recover amounts not exceeding the amount covered by the statutory policy. The section creates a form of vicarious liability on the part of the insurer. The section allows a third party to claim so much of his claim as exceeds the amount recoverable from the insurer from the insured. A person who sustains injuries and suffers damages in a road traffic accident may make a claim for a wide variety of damages but the amount claimable by him from the insurer is limited to amounts specified in the statutory policy. He may not claim all his monetary damages from the insurer but may claim so much of his claim as exceeds the amount recoverable from the insurer from the insured. Section 25 (1) sets out mandatory amounts and minimum amounts claimable.

The history of the statutory provisions governing the amounts claimable from insurers reveals the following. During the Zimbabwean dollar era, the amounts claimable were provided for in s 23 of the Act. These amounts having been set in terms of the Road Traffic (Prescribed Amounts for Statutory Policies of Insurance) Notice, S.I 176/07, which came into effect on

1 November 2007. The figures claimable were cast by legislation. The liability of an insurer in terms of the instrument was limited in respect of death or bodily injury to $10 000 000-00 in respect of one such person injured or killed and ZW$75 000 000-00 in respect of any one accident or series of accidents due to or arising out of the occurrence or any one such event. Statutory policies were taken and paid out in in Zimbabwean dollars. Clearly the statutory instrument did not cover claims in United States dollars. It was not the intention of the legislature that those claims be paid out in United States dollars. The next development lends support to that position. The United States dollar was introduced in 2009 and s 23 was amended to repeal limits set in Zimbabwe dollars. In line with this development, S.I 176 /07 was repealed and substituted by the Road Traffic (Prescribed Amounts for Statutory Policies of Insurance) Notice, S.I 124/09 to address the changed circumstances. The new limits are set at US$1 000-00 for one person killed or injured and US$5 000-00 in respect of any one accident or series of accidents arising out of the occurrence at any one such event where the vehicle is not a commuter omnibus. The statutory instrument increased the amounts claimable and denominated them in United States dollars in line with the change in currency. The limits are restated in s 23 of the Act. Statutory Instrument 124/09 provides as follows in s 1(2),

> "1 (2) The increase by this notice of the amounts specified in sections 23(3), 38 B (1) and 38 C of the Act shall not have effect in relation to any statutory policy issued before the date of commencement of this notice , until the end of the current term of that policy"

The Statutory Instrument has no respective effect, meaning that it only applies to insurance policies taken after the commencement date of the notice, which is January 2009. This entails that third parties wishing to lodge a claim based on a policy taken in 2008 for instance, will be required to make their claims in Zimbabwean dollars. Statutory Instrument 124/09 covers only those claims where policies were taken after the introduction of the US dollar and where premiums were paid in US dollars, or instances where policies where renewed after 2009 and premiums paid in US dollars. Statutory Instrument 176/2007 had a similar provision in para 1(3). The effect of such a provision is that the increases affected by the notice are effective from the date of commencement of the notice and forbids retrospective application of the notice. It was clearly the intention of the legislature in both instances that the increases affected should not have any effect on policies taken outside the terms of the instruments. It was not contemplated that insurers would meet claims in United States dollars for policies taken before January 2009

and hence the need to substitute the amounts claimable under S.I 2007 in 2009. Such a course would be illegal. Further the notice sets out mandatory and minimum amounts. It is succinctly clear from this analysis that the phrase "any liability" in the repealed s 23 did not include foreign currency payments as contended by the plaintiffs.

The defendant issued an insurance policy in favour of the second defendant in 2008. There is no contract of insurance between the defendant and the plaintiffs. The insurance contract was entered into by the defendant and Baines Imaging Group for its vehicles. The second defendant is employed by Baines Imaging Group. The plaintiffs have the right to sue the insurer in terms of ss 23, and 25 of the Act. The policy entered into has a clause that deals with liability in terms of legislation under clause (vi).

Clause (vi) reads as follows:

"(a) ……...

(b) Nothing contained in this endorsement shall extend the liability of the Company beyond the minimum requirements of the legislation or any amendments thereof.

(c) Any limitations of liability stated in this policy as to the amount or amounts which may become payable in respect of the death or injury to any person or persons shall not apply to the indemnity which is by law required to be provided in terms of the Legislation and which is provided by reason of this section.

(d) All terms, exceptions and condition of the policy, provided they do not conflict with requirements of the Legislation shall apply to this section."

The plaintiffs submitted that subpara (c) of the insurance contract introduces an ambiguity because subpara (b) limits liability only to the minimum and yet subpara (c) says that no limitation of liability shall apply. I do not agree with the view that there is ambiguity between clauses (b) and (c). The whole clause ought to be read together. Subparagraph (b) provides that the liability of the insurer shall not be extended beyond the minimum requirements of legislation. Subparagraph (c) on the other hand provides that any limitations of liability stated in the policy as to amounts that may be payable in respect of death or injury shall not apply if they are contrary to the indemnity required to be provided by legislation. The subparagraph favours third parties in that the legislative provisions take precedent. When all the paragraphs are read together including subpara (d), the picture that comes out is that the insurer may be sued by third parties and become liable to them for any sums not exceeding amounts specified in legislation. Further that limitations of liability as to amounts payable which insurance companies may place in their

policies will not apply to liability provided in terms of statutory insurance policies. The clause endorses the provisions governing compulsory statutory policies. The amount claimable is limited as the policy defers to legislation. There should not be conflict between the policy and statutory provisions. Where an insurance policy places any limitations as to amounts payable which are contrary to the requirements of the law, these will be overridden by statutory provisions.

The liability of the defendant arises from a statutory policy. The insurance contract was issued in terms of s 22 of the Act and was subject to the limitations set out in s 23. The policy was issued in 2008 and premiums were paid in Zimbabwe dollars. The insurance policy itself does not specify its currency which is stated in the relevant statutory instruments. The accident which is the subject of these proceedings occurred on 21 October 2008. These proceedings were instituted in 2009 when the economy had dollarized and the claim made is in US dollars. This claim is basically one of specific performance. The policy having been taken in 2008, is governed by S.I 176/07 which sets out limits in Zimbabwean dollars, applies to Zimbabwe dollar claims and is payable in Zimbabwean dollars. The plaintiffs have chosen to bring a claim in United States dollars realizing that the Zimbabwean dollar has lost value. The plaintiffs' claims are for US$120 000-00 and US $190 000-00, respectively. These claims far exceed the statutory limitations. An order for specific performance requires a party to perform a specific act based on what is stated in a contract. The statutory provisions, under which this contract was entered into, provide for a claim in Zimbabwean dollars. The policy having been taken out in Zimbabwean dollars cannot cover a claim made in United States dollars. No liability attaches to the defendant in United States dollars in respect of a policy issued in Zimbabwean dollars.

The principle of currency nominalism was stated in *SA Eagle INS Co. Ltd* v *Hartley* 1990 (4) SA 833 A at 839 as follows:

> "This result seems to me to be in conflict with the nominalism of currency which underlies all aspects of South African Law including the law of obligations. Its essence, in the field of obligations, is that a debt sounding in money has to be paid in terms of its nominal value irrespective of any fluctuations in the purchasing power of currency. This places the risk of a depreciation of the currency on the creditor and saddles the debt with the risk of an appreciation. See Farlam and Hathaway Contract: *Cases Material and Commentary 3rd Ed* at 719 note 2; H J Deplort "*Inflation and South African Law*" (1982) 4 *Modern Business Law* 115 and A Spandau "*Inflation and Law*" 1975 SALJ 31" (emphasis supplied)

The principle is part of our law; see *Mukoreva* v *Ocean Breeze Engine and Cooling Systems HH13*/08, where the court stated as follows;

> "The concept of currency nominalism has been held to be applicable in all aspects of South African Law. (See *SA Eagle Insuarance Co* v *Hartley 1990 (4) SA 833*). In my view the provisions of the Prescribed Rate of Interest Act, there is a strong case for arguing that he concept also underlies all aspects of Zimbabwe Law and that revalorization, or the appreciation of debts to take into account inflation has no place in our law." See also *Mbudire* v *Butress* 2011 (1) ZLR 501 (S),

Clearly the plaintiff's claims cannot be successful. The plaintiffs are only entitled to bring a claim on the basis of the statutory policy entered into which was premised on S.I 176/07. Such a claim is limited to Z$75 million dollars. The liability of the defendant was reduced after devaluation or demonetization of the Zimbabwean dollar. The value of such an amount is established by finding the value of that amount in United States dollars. Statutory Instrument 70/15 provides for demonetarization of the Zimbabwean dollar. Holders of one hundred and seventy five quadrillion dollars were paid US$5-00.This equations show clearly that the plaintiff's claim cannot exceed US $1-00. The defendant is not liable to the plaintiffs in any meaningful amount. Having found that the plaintiffs cannot competently bring a claim in United States dollars in terms of S.I 124/09 as it has no retrospective effect, I must find against the plaintiffs.

The dilemma that third parties who were injured in accidents where policies were taken during the Zimbabwean dollar era find themselves in is most unfortunate. These are people who deserve to be compensated for injuries and losses suffered but sadly find themselves without recourse in the event of an accident. This consequence defeats the purpose and spirit of the Act which strives to afford third parties protection where they are injured or suffer damages arising from road traffic accidents. Courts find themselves constrained to uphold claims in United States dollars in a situation such as this. This situation calls for a policy decision to be urgently made to address the situation and map the way forward. In the result it is ordered as follows;

The preliminary point is upheld.

The claim is dismissed with costs.

Messrs Coghlan, Welsh and Guest, plaintiff's legal practitioners
P Takawadiyi & Associates, defendant's legal practitioners