

Civ. App. 42/2007

IN THE COURT OF APPEAL OF SIERRA LEONE

BETWEEN:

TRANSWORLD INSURANCE

COMPANY LTD

- DEFENDANT/APPELLANT

AND

MOHAMED TAYLOR DUMBUYA

- PLAINTIFF/RESPONDENT

CORAM:

Hon. Mr. Justice S.A. Ademosu

- J.A.

Hon. Mr. Justice N.C. Browne-Marke

- J.A.

Hon. Mr. Justice E.E. Roberts

- J.A.

ADVOCATES:

S.M. Sesay, Esq. for the Respondent

E.E.C. Shears-Moses, Esq. for the Appellant

JUDGMENT DELIVERED ON 25 DAY OF May 2007

ADEEMOSU J.A.

This is an appeal against the decision of the High Court dated the 7th day of September 2007.

Background

Following an accident on 2nd May 2003 between a Honda Motor Cycle No. ACC 856 ridden by the Respondent and vehicle No. ABK 098 owned by a Pastor Sahr A. Samura and insured with the Appellant Company whereby the Respondent was seriously injured.

An action for negligence was taken against Pastor Sahr A. Samura. Interlocutory judgment in default of defence was entered and the assessed damaged amounted to Le61,448.000.00 and costs Le7,500.00.00.

In the High Court the plaintiff's/respondent's claim against the defendant/appellant is for the following.

1. For the recovery of the sum of Le69,148.00/00 (Sixty Nine Million One Hundred and Fifty Eight Thousand Leones).

2. Interest thereon at Le8/00 per centum from the 11th day of July 2007 until payment.

Particulars of Claim

1. By a Policy of insurance issued by the defendant company as authorized insurers with the meaning of the Motor Vehicle (Third Party Insurance) Act Cap. 133. hereinafter referred to as the "Act") the assured Sahr A. Samura, the defendants in consideration of the premium paid to them agreed to insure the aforesaid assured for a period of Twelve months in respect of any liability which may be incurred by him in respect of the death of or bodily injury to any person caused by or arising out of the use on the road of motor vehicle registered ABK098 as required by Section 3(1) of the aforesaid Act.
2. In pursuance of Section 7(3) of the Act the defendant company delivered to the said Sahr A. Samura a certificate of insurance in the prescribed form in respect of the said policy of insurance.
3. On the 2nd May 2003 ^{during} ~~doing~~ the currency of the said policy the plaintiff was riding his Honda XL 125 motor cycle along Fourah Bay college Road, Mount Aureol, Freetown when the said assured's servant or agent so negligently drove and managed the said motor vehicle along the said road that he caused or permitted the same violently to collide with the plaintiff whereby the plaintiff sustained severe personal injuries and suffered loss and damage.
4. The plaintiff brought an action in the High Court of Sierra Leone the short title of which was CC62/2006 2006 D. No. 9 Between Mohamed Taylor Dumbuya and Sahr A. Samura and Mai Kanneh Juana for damages for negligence in respect of the personal injuries and consequential loss and damage and on the 21st day of June 2007 the plain tiff entered an interlocutory judgment in the said action for damages to be assessed and on the 11th day of July 2007 the said damages were duly assessed by the High Court in the sum of Le61,648,000/00 plus costs assessed at Le7,500,000.00.

5. By letter dated 25th July 2007 the plaintiff demanded satisfaction of the said judgment sum the defendant has refused and has continued to refuse to satisfy the said judgment.
6. By virtue of the provisions of Section 11 of the said Act the plaintiff duly served the defendant company with notice of intention to commence civil proceedings against the assured. The aforesaid notice and reminder were dated 6th January 2006 and 9th November 2006.
7. The defendant company by their letter dated the 23rd November 2006 invited the plaintiff's solicitor to a meeting with their claims committee. The plaintiff's solicitor replied and invited the said committee to a meeting. The committee came and after discussions with a view to settling the plaintiff's claim. The members of the said Committee left without settling the aforesaid claims, promising to return later. When the committee failed to settle this matter the plaintiff proceeded to sign judgment against the defendant company's assured.
8. By virtue of the provisions of Section 11 of the Act the defendant became and are liable to pay to the plaintiff the amount of the said judgment and costs together with interest thereon, but the defendant company has failed and refused to pay the plaintiff the said sum or any part thereof.

The defendant/appellant filed a Defence to the plaintiff/respondent's claim.

The Defence is as follows.

1. The defendant admits paragraphs 1 and 2 of the plaintiff's particulars of claim.
2. The defendant cannot admit or deny paragraph 3 of the plaintiff's particulars of claim and will put him to strict proof.
3. The defendant cannot admit or deny paragraph 4 of the plaintiff's particulars of claim but will say they should have been made a party to those proceedings and would have called an expert opinion evidence especially that of Dr. M. Baimba Bayoh, the Medical Doctor who treated the plaintiff on the same foot on the 12th of May 2002 which was allegedly crushed in the accident is so vital to the defendant's case and that a Representative from the Insurance Commission is best suited to verify the quantum to be paid out. And would further say that the

insured was not entitled to retain the services of a solicitor but instead went on to do so.

4. The Defendant admit paragraph 5 of the plaintiff's particulars of claim to the extent that he was a stranger to those proceedings and will further say that an interlocutory judgment in itself does not give exclusive judgment because the other side must be heard.
5. The Defendant admits paragraph 6 of the plaintiff's particulars of claim but will further say that the motor vehicles (Third Party Insurance) cap. 133 of the Laws of Sierra Leone say a mere notice of proceedings is not sufficient and that there are exceptions to section 11 of the Act.
6. The Defendant admits paragraph 7 of the plaintiff's particulars of claim and will further say that they were asked to settle a claim which they thought it will be best to call experts (sic) opinion evidence hence the refusal to settle the claim.
7. The Defendant's denies (sic) paragraph 8 of the plaintiff's particulars of claim to the extent that the claim was so exorbitant which the Act does not provide for.
8. General traverse.

Following a Notice of Motion dated the 21st day of August, 2007 the High Court by an Order dated the 7th day of September 2007 granted leave to the plaintiff to enter judgment against the defendant company for the reliefs set out in the special endorsement in the Writ of Summons plus costs assessed at Le2,000.000.00.

Being dissatisfied with the Ruling of the Court an Amended Notice of Appeal was filed pursuant to an order of this Court. The grounds of appeal are as follows:

- (1) The learned trial judge failed to consider whether any triable issue was raised by the defence considering paragraphs 2 and 6 of the defence.
- (ii) The learned trial judge acted on the wrong premise in saying that the appellant did not disclose any reasonable and bona fide defence, holding the view that the defence could only have been necessary to set aside the earlier judgment against the assured. The application however pertained to a default in filing a defence.
- (iii) The learned trial judge failed to consider the matter of quantum raised in the

defence.

- (iv) The cost assessed was arbitrary and so unreasonably high without anything before the court to support the award.

Counsel for the Appellant, in his argument on ground (1) drew the court's attention to paragraph 89 of the records where the learned trial judge said:

"Even if the court were to consider the defence filed in their proceedings, I am of the view that the defence does not disclose any reasonable and bona fide defence. The defendant is bound to show that he has some reasonable ground of defence to the action. This is clearly absent in the defence filed by the defendant company."

Counsel submitted that once a defence is in the file it must be considered and pronouncement made on it. For the proposition he referred to the Annual Practice 1999 page 361 paragraph 19/2/1 and page 365 paragraph 19/7/4. The pith and substance of the law cited there is that if before judgment is entered, the defendant serves a defence even though it be out of time judgment in default cannot be entered (*Gill V Wodfin* (1884) 25 Ch. D. 707 C.A; *Gibbings V Strong* (1884) 26 Ch. D 66 C.A. Having perused the Ruling I am left in no doubt that the learned judge did consider the defence filed before dismissing it.

I am in full agreement with the learned trial judge that the issues raised in the appellant's defence could only have been raised in an application to set aside a judgment obtained against their assured and even as regards the quantum of the award and costs these have no place in the present claim against the appellant. It should be borne clearly in mind that at the present stage of the proceedings all the respondent has to show is that there is a judgment against the insured in respect of the policy and also proving that due notice of the commencement of the proceedings was served on the insurer (the Appellant). That is why the action against the Appellant is to recover the amount of his judgment obtained against the insured pursuant to Section 11(2) of Motor Vehicle (Third Party Insurance) Act Cap.133 of the Laws of Sierra Leone 1960. As regards obligation of the Insurers to indemnify under the Act. See section 7(2) of cap 133 and *White Cross Insurance Co. Ltd. V Sesay* (1960-61) S.L.L.R. 162. The present proceedings appealed against cannot be said to be a judgment in default but a summary judgment. The appellant ought to have known that under the Motor Vehicles (Third Party

Insurance) Act when the respondent commenced this action respondent had no remedy against the appellant. It was indeed a misconception on the part of the appellant's solicitor to have expected the respondent to bring in the appellant as a Third Party.

The proper procedure as I comprehend it is that when the respondent instituted the action for negligence; the insurer (i.e. appellant) had a right to defend the action against the insured when the issues now being raised would have been dealt with at the trial or they could have defended the action in their own name. By then they could have called an expert medical evidence and whatever other issues arising therefrom. On the other hand another option opened to the appellant which they did not avail them self of, was either to appeal against the judgment in the previous action or apply to set it aside either in their own name or in the name of the assured.

The present action is based on a right accorded to the respondent by section 11 of the Motor Vehicles (Third Party Insurance) Act Cap. 133 because it gives direct recourse to the insurer. The conclusion I have reached is that there is no merit in this appeal. It is therefore accordingly dismissed with costs to the respondent and such costs to be taxed if not agreed.

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HON. MR. JUSTICE S.A. ADEMOSU J.A.

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HON. MR. JUSTICE N.C. BROWNE-MARKE J.A.

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HON. MR. JUSTICE E.E. ROBERTS J.A.