**216**

**SCZ. JUDGMENT NO.9/2012**

**APPEAL No. 18/2009**

**IN THE SUPREME COURT OF ZAMBIA**

**HOLDEN AT KABWE AND LUSAKA**

**[CIVIL JURISDICTION]**

**BETWEEN**

**BECMOCS LIMITED APPELLANT**

**AND**

**AON ZAMBIA LIMITED 1ST RESPONDENT**

**GOLDMAN INSURANCE LIMITED 2ND RESPONDENT**

**CORAM: SAKALA, C. J., CHIBESAKUNDA AND CHIBOMBA, JJS.**

 **ON 10TH AUGUST, 2010 AND 23RD FEBRUARY, 2012**

**FOR THE APPELLANT: MR. O. B. CHILEMBO OF**

 **MESSRS O. B. CHILEMBO AND CO**

**FOR THE 1ST RESPONDENT: MR. N. NCHITO NCHITO OF**

 **MESSRS MNB AND COMPANY**

**FOR THE 2ND RESPONDENT: N/A (But filed Notice of non-Appearance and Heads of Argument).**

**--------------------------------------------------------------------------------------------**

**JUDGMENT**

**--------------------------------------------------------------------------------------------**

**217**

**SAKALA, C. J., delivered the Judgment of the Court.**

**CASES REFERRED TO:**

1. ***Henderson and others v. Merret Syndicates and***

***Others (1994) 3 ALL ER 506***

1. ***Zambia State Insurance Corporation v. Serios Farms ltd (1987) ZR93,***
2. ***Johnson v. Robbins (1977) 1 ALL ER 806***

This is an appeal against the Judgment of the High Court dismissing the Appellant’s claim for damages, arising from an Insurance Cover in the sum of K100 million, interest and costs.

For convenience, the Appellant will be referred to as the Plaintiff; the Respondent will be referred to as the Defendant and the Third Party will be referred to as the Third Party, the designations the parties were at trial.

The facts of the case, which were not in dispute, were that the Plaintiff had requested the Defendant to add, a Motor Vehicle Harrier, Registration No. ABH 5101 to the Plaintiff’s existing Motor Insurance Policy. On 18th of October, 2006, the Defendant issued a Cover Note No. 21534 in respect of the said Motor Vehicle. The Motor Vehicle was accordingly insured for the sum of K100 million.

**218**

Subsequently, the Plaintiff’s Managing Director drove the Motor Vehicle to Johannesburg, South Africa, where it was stolen.

The Plaintiff then lodged a claim to Goldman Insurance Limited, the Third Party, through the Defendant; but the claim was rejected on the grounds that the Insurance Cover was not applicable outside Zambia; and that the additional Premium for the Motor Vehicle was not remitted to the Insurance Company within thirty (30) days.

On the foregoing undisputed facts, the Plaintiff commenced an action, by way of a Writ of Summons issued out of the Commercial Registry, plus claiming damages arising from the Insurance cover in the sum of K100 plus million plus interest and costs.

Before the trial commenced, the Defendant took out an Ex-party Summons for Leave to issue Third Party proceedings against Goldman Insurance Limited, which application was granted.

The Plaintiff called one witness at trial. In his Witness Statement; PW1 confirmed the facts not in dispute. Equally, the Defendant called one witness; whose Witness Statement confirmed the facts not in dispute; but pointed out that no premium was paid by the Plaintiff because the Third Party refused to accept the cover as it had taken the Defendant too long to notify them.

**219**

The Third Party too, called a witness. In his Witness Statement, the witness explained that the Third Party had written the Defendant informing them that it was not in a position to add a Toyota Harrier, Registration No. ABH 5101 to the Policy, effective 18th October, 2006 because the instructions were given on 22nd October, 2006, after the Motor Vehicle had already been stolen in South Africa.

Upon considering the evidence, the arguments and the authorities relied on by the parties; the trial Court identified two (2) limbs to the dispute namely; whether there was a valid Insurance contract between the Plaintiff and the Third Party in respect of the Motor Vehicle in issue. Secondly, whether the loss of the Motor Vehicle in issue, in South Africa, was covered by an Insurance contract.

The Court accepted the facts not in dispute; and noted that the Defendant had a legal obligation to transmit the cover to the Third Party so that the Insurance contract between the Plaintiff (the Insured), and the Third Party (the Insurer), could be concluded. The Court found, through the evidence of PW1, DW1, and Edrick Simwanza, that the Defendant did not do as instructed and only approached the Third Party a month later; after the Motor Vehicle had been reported stolen in South Africa.

**220**

The Court pointed out that in these circumstances, it could not fault the Third Party in refusing to include the Motor Vehicle in question to the Plaintiff’s Motor Insurance Policy at that stage and after the loss of the subject matter to be insured. The Court was satisfied that the Third Party having declined or refused to confirm the cover, there was no contract obliging the Third Party to indemnify the Defendant.

On the issue of the loss of the Motor Vehicle in South Africa, the Court accepted, on the evidence on record, that the Plaintiff neglected to extend the cover of its Motor Vehicle to South Africa; and that, the Plaintiff could not have been expected to be indemnified for its own negligence; that the onus to extend the Insurance Cover to South Africa was that of the Plaintiff and not the Defendant; that the loss in South Africa had nothing to do with the Defendant’s negligence in failing to facilitate the Insurance of the Motor Vehicle by the Third Party; but if the loss had occurred in Zambia, the Defendant could not have extricated itself from liability.

The Court concluded that there was no valid Insurance between the Defendant in respect of the Motor Vehicle in question; and that the Defendant was not liable for the Plaintiff’s loss of the Motor Vehicle in South Africa.

**221**

The action was, accordingly, dismissed with costs to be taxed in default of agreement.

The Appellant appealed to this Court and filed a Memorandum of Appeal containing five (5) grounds, namely;

1. *“*That *the learned trial judge misdirected himself in law and fact when he failed to consider the professional negligence of the Defendant in the execution of their duty of care to the plaintiff in their failure to effectually arrange insurance cover for the additional vehicle within the existing policy as instructed due to their failure to timely notify the Third Party as the Insurers and to remit the premium within the thirty (30) days stipulated by the Insurance Act;*
2. That *the learned trial judge misdirected himself in law and fact when he failed to adjudicate on the matter of contractual relationship that existed between the parties during the hearing in the Court below in that the contract between the Plaintiff and the Third Party was breached when the Defendant failed to remit the premium to the Third party within the stipulated thirty (30) days, so much that the Cover Note was worthless;*

**222**

1. That *the learned trial judge misdirected himself in fact and in law when he approached the entire case as one for the enforcement of the insurance policy and contract between the plaintiff and the Third Party and made pronouncements thereon, in the process totally ignoring that the claim was in negligence against the broker such that the Plaintiff did not even sue their insurers who were dragged into the case by the Defendant;*
2. That *the learned trial judge erred in principle and in law when he condemned the faultless plaintiff in costs, firstly, of the Defendant in the case after finding they were guilty of wrong doing and only lucky the theft occurred in another country and, secondly, the Third Party who had the litigation needlessly inflicted on them at the instance of the Defendant, and not the Plaintiff, and*
3. That ***IN THE ALTERNATIVE*** *to Ground One to Three, the learned trial judge erred in the law in his interpretation of the consequences of the broker breaching his obligation to remit the premium within thirty (30) days when Section 21 of the Insurance Act itself does not nullify the contract or the transaction but provides different sanctions against the broker, and none against the client who could have extended cover*

**223**

*outside Zambia on their valid contract of insurance taking in the additional vehicle.”*

The parties filed written heads of argument based on the five grounds of appeal.

The gist of the Plaintiff’s written heads of argument on ground one, relating to the failure by the trial Judge to consider professional negligence of the Defendant in the execution of their duty of care to the Plaintiff and in their failure to timely notify the Third Party, is that the Trial Judge narrowed down the issues to the validity of the insurance contract between the Plaintiff and the Third Party, covering the additional vehicle; and whether the loss of this vehicle in South Africa was covered by an insurance contract.

It was contended that those were not the issues raised by the Plaintiff in the case and not the basis for the action; that the Court failed to address the case as pleaded and presented by the plaintiff; that it was precisely because there was no valid insurance, and no cover for the vehicle lost in South Africa that they sued the insurance brokers and not the insurers.

**224**

It was submitted that the Plaintiff failed to obtain a valid and effective policy of insurance extension as a result of the negligence of the insurance brokers; and that the insurance brokers do owe a duty of care to their clients as per discussion in the case of ***HENDERSON AND OTHERS V. MERRET SYNDICATES AND OTHERS1.***

It was further submitted that it was the broker who failed to arrange any cover at all, whether local or foreign for this vehicle; and that it was not unreasonable for the Plaintiff to have driven to South Africa, believing the brokers had added the vehicle to the existing policy.

The summary of the Defendant’s written response, to the arguments based on ground one, is that negligence had to be specifically pleaded, that the Plaintiff did not plead negligence in its pleadings, but only raised it in the submissions in the Court below, and that the Plaintiff did not address evidence to show that the Defendant was in breach of a duty of care that it owed to the Plaintiff and that the Plaintiff suffered loss as a result of that breach. It was submitted that ground one must fail.

**225**

The gist of the Third Party’s response to ground one is that perusal of the judgment shows that the trial judge properly directed himself

on the issue of professional negligence by holding that the loss of the Plaintiff’s motor vehicle in South Africa had nothing to do with the Defendant’s negligence or it could only have been a factor if the loss occurred in Zambia.

We have addressed ourselves to the arguments on ground one. We have also considered the evidence on record, and the Judgment appealed against. The issue raised in ground one centres on the question of pleadings. In the Writ of Summons, the endorsement was couched as follows:

***“The plaintiff’s claim is for: The claim by the plaintiff is for damages arising from an Insurance Cover in the sum of K100,000,000 interest and costs.” (sic)***

And paragraph 12 of the Statement of Claim reads as follows:

***“12 That since the defendant has not even proposed ex-curia settlement the plaintiff has no alternative but to claim;***

1. ***Full payment of the assured sum of K100,000,000.00***
2. ***Costs and interest at Current Bank Rate.***
3. ***Any other relief the court may deem fit”***

**226**

It is quite clear to us that the Plaintiff’s case was not anchored on professional negligence. Above all, the Statement of Claim does not make any mention of professional negligence.

We totally agree with the submissions of the Defendant that negligence had to be pleaded. We are satisfied that the Plaintiff did not plead negligence. It is settled practice that in civil matters parties are bound by their pleadings. The spirited arguments by the Plaintiff on ground one, based on professional negligence, cannot assist the Plaintiff. We are satisfied that the trial judge properly directed himself on the issue of professional negligence when he stated that:

***“The Plaintiff contends that the Defendant was negligent in failing to submit the cover note to the Third Party within thirty days. I cannot agree more with the plaintiff and from the evidence of DW1; this fact is not even denied by the Defendant. But this is not the crux of the matter. As already stated, the onus to extend the insurance cover to South Africa was that of the Plaintiff and not the Defendant. The Plaintiff neglected to do so. The loss in South Africa had nothing to do with the Defendant’s negligence in failing to facilitate the insurance of the motor vehicle by the Third Party. If this***

**227**

***loss had occurred in Zambia, the Defendant could not have extricated itself from liability. That is how fortunate the******Defendant is in this case.***

We are satisfied that the trial Judge did not misdirect himself in law and fact on the issue of professional negligence. Ground one of appeal, therefore, fails.

On ground two, relating to the trial Court’s failure to adjudicate on the contractual relationship that existed between the parties, the gist of the written heads of argument is that the trial Court blamed the Plaintiff for the non-existence of a valid Insurance Cover extending to South Africa; but that the facts before the Court showed that, but for the failure of the Defendant, the existing policy would have been amended to add the vehicle in issue and cover could have been extended to cover a trip to South Africa.

It was submitted that the alleged failure to extend cover extra territorially had been wrongly laid at the Plaintiff’s door; that the Plaintiff failed to recover under the existing policy because of the Defendant, the broker’s failures and shortcomings, which resulted in breaches of the insurance contract which enabled the Third Party to repudiate the loss claim, as the vehicle lost was not successfully added to the existing policy.

**228**

The Defendant’s brief written response to arguments on ground two is that the evidence adduced at trial disclosed that the onus of extending cover extra territorially was on the Plaintiff; that it was found as a fact that the Defendant was in breach of its duties under the contract between the two parties, when the Defendant failed to remit the premium to the Third Party within the stipulated 30 days, but that the breach did not result in any loss to the Plaintiff. It was submitted that the Plaintiff’s loss was outside the contract between the two parties. The Court was referred to the case of **Zambia State Insurance Corporation v. Serious Farms ltd2,** where this Court held inter alia, “**an insurance policy only covers the losses which were the subject matter of the insurance itself and that any consequential losses cannot be claimed under the policy unless expressly stipulated in the contract”**

It was pointed out that the trial Judge found that the contract between the Plaintiff and the Defendant was to the effect that the Defendant was to effect insurance policies by the Defendant on behalf of the Plaintiff and that the policy only covered Zambia; that in the circumstances, no liability fell on the Defendant for any acts outside the contract.

**229**

The Third Party’s short response to ground two is that the trial Judge properly directed himself on the question of contractual relationship between the Plaintiff and the Third Party.

We have considered the arguments of the parties on ground two, which relate to the Court’s failure to adjudicate on the contractual relationship that existed between the parties. We have examined the judgment of the trial Court. The trial Judge, at page 14 of the Record, had this to say on the question of contractual relationship:

*“****The evidence on record clearly shows that sometime in October, 2006, the plaintiff instructed the Defendant to include the motor vehicle in question to its existing motor insurance policy. Following these instructions the Defendant issued a Cover Note No. 21534 on the Third Party’s stationery. The Defendant had a legal obligation to transmit the cover note to the Third Party so that an insurance contract between the Plaintiff (the insured) and the Third Party (the insurer) could be concluded. It is plain from the evidence of PW1, Dw1 and Edrick Simwanza that the Defendant did not do so and only approached the Third Party a month later after the vehicle had been reported stolen in South Africa. I cannot fault the Third Party in refusing to include the***

**230**

***vehicle in question to the plaintiff’s motor insurance policy at that stage and after the loss of the subject matter to be insured. I am satisfied that the Third Party having declined or refused to confirm cover, there was no contract obliging the Third Party to indemnify the Defendant”.***

We agree with the reasoning of the trial Judge. We are satisfied that on the evidence on Record, the trial judge properly directed himself on the question of contractual relationship contrary to the contention on behalf of the Plaintiff. The fact that the Defendant did not carry out the Plaintiff’s instructions, but only approached the Third Party after the vehicle was stolen in South Africa, means that there was no contract obliging the Third Party to indemnity the Defendant.

On the evidence on record, we cannot fault the trial Judge when he found that no contract of insurance existed between the Plaintiff and the Third Party. We find no merit in ground two. It is also dismissed.

The summary of the written heads of argument on ground three, relating to the trial Judges’ approach to the entire case as one of enforcement of the insurance policy contract between the Plaintiff

**231**

and Third Party, ignoring that the claim was in negligence, is that the arguments in ground one equally apply to this ground, that the trial Court dealt with issues which were not the basis for bringing the action, that as a result, there was no clear cut pronouncement on the claim in negligence against the brokers (the Defendant) on the basis of their failures to validly add the vehicle to the existing policy which might have been capable of extension if not for the failure to remit the premium.

The gist of the Defendant’s response to ground three is that there was no misdirection when the trial judge approached the entire case as one for the enforcement of the insurance policy and contract between the Plaintiff and the Third Party; that the Plaintiff’s Statement of Claim should be taken as a disclosure of the action in totality; that in the instant action, the Plaintiff’s claim on the Writ of Summons was for damages arising from an Insurance Policy Cover in the sum of K100,000,000; and that in the Statement of Claim, the Plaintiff was claiming for full payment of the assured sum of K100,000,000; and there was no claim for negligence in the pleadings.

It was submitted that in the Court below, the Plaintiff did not claim for negligence and did not in fact suffer any loss as a result of the Third Party’s alleged negligence.

**232**

The summary of the Third Party’s response to ground three in that the response to ground one largely covered ground three; that contrary to the Plaintiff’s argument that the claim was based in negligence the endorsement on the Writ and on the Statement of Claim shows that the Plaintiff’s claim was clearly based on the purported contract of insurance and not on negligence.

We have considered the argument and submission on ground three. We agree with the submissions on behalf of the Defendant and the Third Party that the arguments on ground one apply to ground three as well, namely; that the Plaintiff did not plead negligence and that the Plaintiff’s case was based on enforcement of an Insurance policy. Ground three also fails.

The summary of the written heads of argument on ground four, relating to the trial Judge condemning the Plaintiff in costs for the Defendant, after judging them guilty of wrongdoing, but only lucky that the theft occurred in another country; and that the Third Party having the litigation inflicted on them at the instance of the Defendant and not the Plaintiff, is that the trial Judge, while blaming the plaintiff for the loss in another country, nonetheless accepted that the Defendant negligently failed to facilitate the Insurance of the car and would not have escaped liability had the loss occurred in Zambia.

**233**

It was submitted that the Plaintiff acted reasonably in bringing this action provoked by the Defendant’s failures, that the Plaintiff did not implead the Third Party and sought no remedy against the Third Party; that they were not a Defendant to the Plaintiff; but to the Defendant brokers. It was submitted that there was no justification to have condemned the Plaintiff to pay the Third Party’s costs.

It was further submitted that the fairest order should have been for the Defendant to meet the costs of the Third Party, while between the Plaintiff and the Defendant; each party should have been required to meet its own costs.

The gist of the Defendants’ response to ground four is that the trial Judge was correct in principle and in law in awarding costs to the Defendant and the Third Party.

The response of the Third Party to arguments in ground four is that it concedes that the trial Judge erred in principle and law when he condemned the Defendant in costs of the Third Party; that the Third Party was dragged into the litigation by way of Third Party proceedings initiated by the Defendant.

**234**

We have considered the arguments on ground four. The answer to the arguments on this ground is in ***Order 16/1/1 of the Rules of the Supreme Court (1999 Edition) of the White Book*,** where it states:

*“****A defendant and a Third Party stand in relation to one another as if the Defendant had brought a separate action against the Third Party and therefore the costs of the successful Third Party should normally be ordered to be paid by the*** ***Defendant and not the Plaintiff……………”.***

Further in **JOHNSON V. ROBBINS3**, the Court of appeal held:

*“****Since generally, a defendant and Third Party stand in relation to each other as if the defendant has brought an action against the Third Party, the normal principle that costs should follow the event is applicable and in the* *exercise of its discretion the Court should normally order the defendant though successful in the action to pay the costs of the Third Party if he also is successful”.***

We totally agree with the above principles. The Defendant dragged the Third Party to Court through proceedings to which the Plaintiff was not a party.

**235**

The Defendant, though successful in the action must pay the costs of the Third Party. We, therefore, so order.

Ground four of appeal therefore succeeds and is allowed in ***toto.***

The gist of the written heads of argument on ground five, which is in the alternative to grounds 1 to 3, is that the Defendants’ failures ought not to have been accepted as preventing the coming into force of a valid Insurance Cover on the additional vehicle, that if the insurer was considered to have been properly joined in the case at the instance of the Defendant, the failures of the Defendant should have been held to be incapable of precluding the Plaintiff from recovering on the existing policy. **Section 21 of the Insurance Act No. 27 of 1997** was quoted at great length in support of the arguments on ground five.

The Defendant’s short response to ground five is that the trial Judge did not err in Law in his interpretation of the consequences of the brokers breaching his obligation to remit the premium within 30day; that no evidence was adduced at trial to the effect that due to the Defendant’s breach, the contract or the transaction was nullified, that the trial Judge made no reference to the nullity of contract, that it was a fact that the contract between the Plaintiff and the Defendant was valid and that the Defendant was in breach

**236**

of that contract; but that the breach did not cause any loss to the Plaintiff.

The summary of the Third Party’s’ response to ground five is that the Plaintiff’s arguments in ground five are irrelevant; that whether non transmission of premium within 30 days has an effect on the validity of the insurance, the cover note was not the issue; that the issue was whether the insurance cover was extended to cover the subject motor vehicle in South Africa ; and even assuming that there was local insurance cover for the motor vehicle here in Zambia; the evidence on record showed that no territorial extension was obtained; and therefore, the Third Party would still have not been liable either to the Plaintiff or to the Defendant.

We have considered the alternative arguments on ground five. We are persuaded and inclined to accept the arguments of the Third Party that the Plaintiff’s arguments in ground five are irrelevant. The issue was not the transmission of the premium with 30 days; but whether the insurance cover was extended to cover the subject motor vehicle in South Africa. The evidence on record showed that there was no territorial extension obtained; thus, the Third Party would still not have been liable either to the Plaintiff or to the

**237**

Defendant. We also agree that the trial Judge never discussed the nullity of the contract.

We find no merit in ground five. It is also dismissed.

In conclusion, the outcome of this appeal is that out of five grounds of appeal, only the fourth ground, relating to costs has succeeded.

The appeal is, therefore, dismissed. On the facts of this case, we make no order as to costs in this Court.

E. L. SAKALA

**CHIEF JUSTICE**

L. P. CHIBESAKUNDA

**SUPREME COURT JUDGE**

H. CHIBOMBA

**SUPREME COURT JUDGE**