IN THE HIGH COURT FOR ZAMBIA **2016/HPC/0388**
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

B E T W E E N:

NATASHA MAIMBA **PLAINTIFF**

AND

FOCUS GENERAL INSURANCE LIMITED **DEFENDANT**

Delivered in Chambers before the Hon. Mr. Justice Sunday B. Nkonde, SC at Lusaka this 22nd day of February, 2017.

For the Plaintiff : N/A
For the Defendant : Mr. L. Phiri of Messrs Chonta, Musaila & Pindani Advocates

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RULING

CASES REFERRED TO:

1) *Atlantic Shipping & Trading Co. v Louis Dreyfus & Co (1922) 2 A.C 250*
2) *Vulcan Insurance Company Limited v Maharaj Sighn & Another 1976 AIR, 287*

LEGISLATION REFERRED TO:

1) *Supreme Court Practice Rules 1999 Edition (White Book)*
2) *Limitation Act, 1939*

OTHER WORKS REFERRED TO:

1) *Chitty on Contracts (28th Edition) Volume 1 – General Principles. London Sweet & Maxwell (1999)*

2) *General Principles of Insurance Law. London Butterworths, 1966*

This is a Ruling on the Defendant's application filed on 31st January, 2017 by way of Notice to Raise a Preliminary issue pursuant to **Order 14A** of the **Rules of the Supreme Court (1999) Edition**, namely "**That the matter herein should be dismissed in its entirety for non-compliance of (sic) the contractual period of limitation being three months after a disclaimer of liability within which time the aggrieved party is to commence an action or suit failing which all benefit under the policy is to be forfeited as per clause 7.4 of the Policy document regulating the relationship between the Plaintiff and the Defendant as Insured and Insurer respectively.**"

The supporting Affidavit was sworn by Barbara Mwandila, Managing Director of the Defendant in which it was deponed, inter-alia, as follows:

4. *That the Plaintiff commenced the action herein by way of Writ of Summons and Statement of Claim on the 5th of August, 2016 for the following reliefs as the Court record will show:*

   (1) Damages for breach of Contract of Insurance by the Defendant's Failure to honour the claim.

   (11) A declaration that the Plaintiff's Motor Vehicle Ford Focus Registration No. BAB 7557 had a valid Insurance Cover at the time of the accident running from 7th October, 2015 to 6th October, 2016.

(111) Interest on the amount found due.

(1V) Costs.

5. That the period of Cover referred to above is on the basis of a Cover Note Certificate No. 006976 dated 22nd October, 2016.

6. That the said Cover Note was issued subject to the terms, conditions, and limitations of the Company's ordinary form of Motor Insurance Policy as clearly set out on the face of the said Cover Note.

7. That the Motor Insurance Policy aforementioned and in particular clause 7.4 provides for Repudiation of any claim and limitation to bring a suit or action accordingly as follows:

> "In the event of the Company disclaiming liability in respect of any claim and an action or suit be not commenced within three months after such disclaimer or (in the case of an arbitration taking place in pursuance of Condition 11 of this Policy) within three months after the Arbitration or Arbitrator or umpire shall have made their award all benefit under this policy in respect of such claim shall be forfeited."

8. That the Defendant herein repudiated the claim thus disclaiming liability on the 9th of December, 2015.

9. That this letter was acknowledged as received by letter dated 28th January, 2016.

10. That the action herein as stated above was only commenced on the 5th of August, 2016 a period of close to 8 months after the 9th of December, 2015 being the date the Defendant repudiated the claim or disclaimed liability."

Copies of the Cover Note, Motor Insurance Policy, letters dated 9th December, 2015 and 28th January, 2016 were exhibited to the supporting Affidavit.

For completeness, the letter dated 9th December, 2015 which conveyed disclaimer of liability is re-produced here below.

"9th December, 2015.

Ms. Natasha Maimba
Luanshya.

Dear Madam,

RE: ROAD TRAFFIC ACCIDENT INVOLVING FORD FOCUS BELONGING TO MS. NATASHA MAIMBA ON 24TH OCTOBER 2015.

With reference to the above, we acknowledge receipt of the claim supporting Documents that were submitted at our office and after a thorough review, it Has been noted that:

> *The Motor Vehicle was insured on 7th October 2015, for a period of one year effective 7th October 2015 to 6th October 2015 at a declared value of ZMW300,000.00 and the total premium payable was ZMW15,660.00*
>
> *On 30th October, 2015 the Company received a premium payment in The amount of ZMW15,660.00, which was settled after date of loss.*

Please note that for any Insurance Policy to be effected, the premium is to be paid in full at inception of cover or in instalments as per the agreed written instalment plan with the Company.

In line with the above, kindly be advised that we are unable to proceed with your

Motor claim due to non payment of premium.

Attached to this letter is a refund of the premium paid on 30th October, 2015.

Should you require further clarifications please do not hesitate to contact the undersigned.

Yours faithfully,
For & on Behalf of
FOCUS GENERAL INSURANCE LIMITED

(Signed)
Munshya Hara
CLAIMS OFFICER

(Signed)
Barbara Mwandila
MANAGING DIRECTOR "

In the Skeleton Arguments, Learned Counsel for the Defendant contended that this Court has the power to consider the herein application by relying on the provisions of **Order 14A** of the **Supreme Court Practice Rules** which provide as follows:

> "1. ***Determination of a question of law or construction:***
> ***(1)*** ***The Court may upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that –***
> ***(a) such question is suitable for determination without a full trial of the action, and***
> ***(b) such determination will finally determine (subject only to any***

possible appeal) the entire cause ***or matter or any claim or issue*** *therein.*

(2) *Upon such determination the Court* ***may dismiss the cause or matter*** *or make such Order or Judgment as* ***it thinks just.***

(3) *The Court shall not determine any question* ***under this Order unless*** *the parties have either –*

(a) Had an opportunity of being heard ***on the question, or***

(b) Consented to an Order or Judgment ***on such determination."***

On the merits of the application, Learned Counsel for the Defendant started by making reference to the Learned Authors of **Chitty on Contracts** at paragraph 29 – 115 at page 1441 where they discussed as follows:

"Agreement of the parties. It is open ***to the parties to a contract*** *to stipulate in the contract that legal* ***or arbitral proceedings*** *shall be commenced within a shorter* ***period of time than that*** *provided in the Limitation Act 1980.* ***Such stipulations are not*** *uncommon in commercial agreements* ***and their effect may be*** *(depending on the precise wording of* ***the stipulation) to bar or*** *extinguish any right of action, or to* ***deprive a party to his right*** *to have recourse to particular proceedings,* ***e.g. arbitration, after*** *the expiration of the agreed time limit.* ***It is also open to the parties*** *to agree that one party shall be released* ***from liability or the other*** *party's claim shall be extinguished or* ***become barred unless a*** *claim has been presented within a* ***stipulated period of time.***

According to the Learned Counsel, from the foregoing authority, it was clear that apart from the statutory limitation periods as stipulated by various statutes and by the **Limitation Act** which is applicable in this jurisdiction, parties are at liberty, in exercise of their freedom to contract to agree on shorter periods of limitation. It was thus argued that the rationale behind this is to not only bring a finality to the threat of litigation but to provide an incentive for Plaintiffs to bring suits in a timely fashion.

The case of **Atlantic Shipping & Trading Co. v Louis Dreyfus & Co**[1] was cited for the foregoing where in a Charter party between the parties it was provided thus;

> *"All disputes from time to time arising out of this contract shall, unless the parties agree forth with on a single arbitrator, be referred to the final arbitrament of two arbitrators ...one to be appointed by each of the parties, with power to such arbitrators to appoint an umpire. Any claim must be made in writing and claimant's arbitrator appointed within three months of final discharge, and, where this provision is not complied with, the claim shall be deemed to be waived and absolutely barred."*

The Court held in interpretation of the above clause as follows:

> *"It follows that the clause here is not obnoxious in so far as it provides for arbitration. It goes on, however, to say that if the claim is not made and the arbitration started within a certain*

time the claim is to be held to be departed from. Now, if it were illegal to arrange that a claim should not be good unless made within a certain time I should understand the argument, but as it is admitted that it is perfectly legal to make such a stipulation – it is done, e.g. every day in insurance policies – then why should it be bad because it is tacked on to a provision for arbitration instead of to an action at law? All it comes to is this. I stipulate that you shall settle your differences with me by arbitration and not by action at law, and I stipulate that you shall state your differences and start your arbitration with a certain time or you shall be held to have waived your claim."

The Learned Counsel for the Defendant while admitting that the aforementioned case was made with specific reference to an arbitration clause, however, contended that the principle was clear that where parties agree on a stipulation to bring an action within a stipulated time, such a stipulation cannot be considered obnoxious or bad at law.

As regards what constituted a condition in a contract of insurance, the Court was referred to the Learned Authors of **General Principles of Insurance Law** at pages 220 and 221 where it was discussed as follows:

"The question whether a particular stipulation is a condition or not depends upon the intention of the parties, as shown in the language which they have selected to express their

meaning. It is not a question of fact, but a question of pure construction, to be determined by the Court in accordance with the ordinary rules of construction after looking at all the terms of the policy... A stipulation which, in addition to imposing an obligation upon the assured, further requires that his failure to perform it shall render the policy null and void, or preclude him from recovering under the policy, is clearly intended to be a condition."

The Learned Authors of **General Principles of Insurance Law** at pages 223 and 224 proceeded to discuss the breach of a condition precedent to the liability of the Insurers as follows:

"The breach of a stipulation which is a condition precedent only to the liability of the Insurers, does not affect the validity of the policy, but prevents the assured, in the case of loss, from recovering anything under the policy, unless and until, where it is still possible the condition is performed..."

Learned Counsel for the Defendant, therefore, vehemently argued from the foregoing that clause 7.4 in the policy document herein was a condition as it precluded the Insured, the Plaintiff, from commencing an action after the expiration of three months from the date the Insurer, the Defendant, disclaims liability.

Further, it was argued that it was not in dispute that the Plaintiff herein only brought this action close to eight months after the Defendant disclaimed liability and, thus, there was non – compliance with the contractual limitation period and as such the right to bring this claim was forfeited by the Plaintiff.

Learned Counsel for the Defendant also briefly orally submitted to buttress the Skeleton Arguments.

The Plaintiff did not file any opposing Affidavit.

I am very grateful to the Learned Counsel for the Defendant for the useful authorities placed before me. I have taken into account the arguments and authorities filed and the submissions made in determining the application.

The question really is whether a condition in an Agreement providing for extinguishing or forfeiture or release of all benefits or rights unless an action or suit is brought within a specified period therein is valid or enforceable.

It is settled law that an agreement whose objective is to restrain a person from commencing an action or suing in a Court of law to exert his or her legal rights is invalid. Similarly, an agreement which provides that an action or suit whose term therein has been breached should be brought within a time shorter than the time prescribed in the **Limitation Act** is equally invalid.

However, the two scenarios above are different from a term or condition in a Contract that stipulates that rights or benefits to a party to a Contract would be extinguished or forfeited or released if the party did not commence an action or sue within a shorter time agreed in the Contract. Such a restraint which is a common feature of Insurance Policies has been held to be valid and enforceable. Thus, in **Vulcan Insurance Company v Maharaj Sighn and Another**,[2] the Supreme Court of India found as valid an Insurance Policy Clause that provided as follows:

> *"**13 If the claim be in any fraudulent, or if any fraudulent means or devices are used by the Insured or any one acting on his behalf to obtain any benefit under this Policy; or if the loss or damage be occasioned by the willful act or with the commence of the Insured; or if the claim be made and rejected and an action or suit be not commenced within three months after such rejection,... all benefit under this Policy shall be forfeited.***

The Court held:

> *" **As per Clause 13, or rejection of the claim by the Insurer, an action or suit has to be commenced within three months from the date of such rejection. Otherwise, all benefits under the Policy stand forfeited. That is, as soon as there is a rejection of the claim, and not the raising of a dispute as to the amount of any loss or damage, the only remedy open to the claimant is to file a suit for establishing the Insurer's liability."***

In the case before me, it is clear that clause 7.4 of the Motor Insurance Policy cited by the Defendant's Learned Counsel and which forms the basis of the application herein is an agreement relating to forfeiture or extinguishing or release of rights or benefits if no action was commenced or a suit brought within the contractually agreed three months of disclaimer of liability or repudiation of the claim by the Defendant.

It is further clear, and cannot be in contention, that the disclaimer of liability or repudiation of the claim herein was done by letter from the Defendant's Managing Director to the Plaintiff dated 9th December, 2015 which has already been referred to above. Yet this action was commenced at the Commercial Registry of the High Court for Zambia on 5th August, 2016. In the circumstances, I entirely agree with the Learned Counsel for the Defendant that the Plaintiff 's rights or benefits under the Motor Insurance Policy were extinguished, forfeited or released after the failure by the Plaintiff to commence the action or sue within three months of the disclaimer of liability or repudiation of the claim by the Defendant. I further agree that clause 7.4 of the Motor Insurance Policy as a contractual stipulation cannot be considered abnoxious or bad at law. It accords with freedom to contract available to parties.

The result is that the Defendant's action as prayed succeeds. The entire action is dismissed for non compliance by the Plaintiff with a contractual condition limiting time within which to commence an action or sue failing which all benefits under the subject Motor Insurance Policy is to be forfeited.

The costs of the application shall be for the Defendant to be taxed in default of agreement.

Dated at Lusaka this 22nd day of February, 2017

HON MR. JUSTICE SUNDAY B. NKONDE, SC
HIGH COURT JUDGE