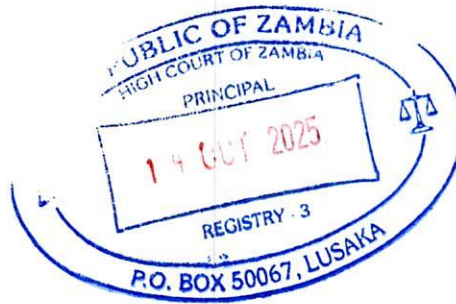


**IN THE HIGH COURT FOR ZAMBIA  
AT THE PRINCIPAL REGISTRY  
HOLDEN AT LUSAKA**  
(Civil Jurisdiction)

**2023/HP/1345**

**BETWEEN:**

**SOLOMON SIMUTOWE**



**PLAINTIFF**

**AND**

**PROFESSIONAL INSURANCE CORPORATION**

**ZAMBIA PLC**

**DEFENDANT**

**A-PLUS GENERAL INSURANCE LIMITED INTENDED 2<sup>ND</sup> DEFENDANT**

**BEFORE: HONOURABLE, LADY JUSTICE G. C. CHAWATAMA  
IN CHAMBERS ON THE 08<sup>TH</sup> NOVEMBER, 2024.**

|                   |   |                                                                                     |
|-------------------|---|-------------------------------------------------------------------------------------|
| For the Plaintiff | : | Mr. D. Kalima of Messers D Kalima & Company.                                        |
| For the Defendant | : | No Appearance for the Defendant.                                                    |
|                   |   | For the 2 <sup>nd</sup> Intended Defendant. Mr. Chulu of<br>Messers Kasama Chambers |

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***RULING***

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**CASES REFERRED TO:**

1. *Mike Hamusonde Mweemba v Kamfwa Obote Kasongo and ZSIC (intended joinder)* 2006 ZR 101
2. *Sachar Narendra Kumar v Joseph Brown Mutale*<sup>2</sup> SCJ No. 8 of 2013
3. *Colgate Palmolive (Z) Inc v Able Shemu Chuka* SCZ 181 of 2005
4. *Kenson Kapemba v Mwangi Chileshe* No. 9 of 2021
5. *Anderson Mazoka v Levy Patrick Mwanawasa* (2005) ZR 138
6. *Kapembwa v Maimbolwa and Another* S.C.Z judgment 4 of 1981
7. *Law Association of Zambia and Another v Attorney General* (2019) CCZ 14

**LEGISLATION AND OTHER WORKS REFERRED TO:**

1. *The High Court Rules Chapter 27 of the laws of Zambia*
2. *The Rules of the Supreme Court (Whitebook) 1999 edition.*

## 1.0 INTRODUCTION

1.1 This is a Ruling on an application by the Plaintiff for joinder of parties. The application was made by way of summons pursuant to **Order 3, 14 Rule 5(1) and Order 18 of the High Court Rules, chapter 27 of the laws of Zambia, and Order 15 Rule 6 (2) (b) of the Rules of the Supreme Court of England 1999 edition**. The said provides that:

### **Order 3**

1. *"The sittings of the Court for the hearing of causes and matters shall ordinarily be public, but the Court may, for a reason to be specified by it on the minutes, hear any particular cause or matter in the presence only of the parties, with their legal advisers, if any and the officers of the Court.*

2. *Subject to any particular rules, the Court or a Judge may, in all causes and matters make any interlocutory order which it or he considers necessary for doing justice, whether such order has been expressly asked by the person entitled to the benefit of the order or not".*

**Order 14 rule 5(1)** *" If it shall appear to the Court or a Judge, at or before the hearing of a suit, that all the persons who may be entitled to, or claim some share or interest in, the subject-matter of the suit, or who may be likely to be affected by the result, have not been made parties, the Court or a Judge may adjourn the hearing of the suit to a future day, to be fixed by the Court or a Judge, and direct that such persons shall be made either plaintiffs or defendants in the suit,*

*as the case may be. In such case, the Court shall issue a notice to such persons, which shall be served in the manner provided by the rules for the service of a writ of summons, or in such other manner as the Court or a Judge thinks fit to direct; and, on proof of the due service of such notice, the person so served, whether he shall have appeared or not, shall be bound by all proceedings in the cause:*

*Provided that a person so served, and failing to appear within the time limited by the notice for his appearance, may, at any time before judgment in the suit, apply to the Court or a Judge for leave to appear, and such leave may be given upon such terms (if any) as the Court or a Judge shall think fit. The Court or a Judge upon the application of any party may give directions for service upon a new party of copies of any writ of summons or other document or process and also may give such other directions in relation to the adding of such new party as justice and the circumstances of the case may require.*

*”*

**Order 18**

*“The Court or Judge may, at any stage of the proceedings order any proceedings to be amended, Whether the defect or error be that of the party applying to amend or not and all such amendments as may be necessary or proper for the purpose of eliminating all statements which may tend to prejudice, embarrass or delay the fair trial of the suit and for the purpose of determining, in the existing suit, the real question or questions in controversy between the parties, shall be so made”.*

*Every such order shall be made upon such terms as to costs or otherwise as shall seem just”.*

**Order 15 rule 6(2)(b)**“*Subject to the provisions of this rule, at any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application—*

(a) *Order any person who has been improperly or unnecessarily made a party or who has for any reason ceased to be a proper or necessary party, to cease to be a party;*

(b) *Order any of the following persons to be added as a party, namely—*

(i) *Any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, or*

(ii) *Any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between him*

*and that party as well as between the parties to the cause or matter.”.*

- 1.2 The summons was accompanied by an affidavit in support and skeleton arguments.

## **2.0 AFFIDAVIT EVIDENCE**

- 2.1 The affidavit in support of the application was sworn by the Plaintiff himself. It was deposed that the plain reading of the statement of claim, defense, and reply reveals that A-Plus General Insurance ought to be joined as the 2<sup>nd</sup> Defendant to these proceedings.
- 2.2 It was the deponent's further averment that his motor vehicle was hit by a person insured by A-Plus General Insurance, and all documentation was served on the Defendant, and it is important for A-Plus General Insurance Limited to be joined so that it could state its role in this matter as it is likely to be affected by the Judgment of this Court. Copies of the correspondence were exhibited and marked “SS1”.
- 2.3 That the Plaintiff verily believes in its veracity that this is a proper case for the Court to join A-Plus General Insurance Limited and no prejudice will be caused; instead, the interest of justice will be served.

### **3.0 SKELETON ARGUMENT**

- 3.1 It was submitted that the provisions governing joinder of a party are set out in **Order 15 rule 6 (7) of the Rules of the Supreme Court of England** which provides that:

*“To entitle a person not a party to an action to intervene and to be joined as a party, the rule requires that would be intervener should have some interest which is directly related or connected with the subject matter of the action”.*

- 3.2 The case of **Mike Hamusonde Mweemba v Kamfwa Obote Kasongo and ZSIC (intended joinder)**<sup>1</sup> was called in aid, wherein the Supreme Court held that:

*“A court can order a joinder if it appears to the court or judge that all person who may be entitled to or claim some share or interest in the subject matter of suit or who may be likely to be affected by the result require to be joined”.*

- 3.3 It was then argued that the subject matter is that the insurer for the tortfeasor caused the accident in question and needs to explain their role in 2019 when the accident occurred as a third party insurer.

### **4.0 THE DEFENDANT’S AFFIDAVIT IN OPPOSITION**

- 4.1 In opposing the application, Prudence Mazovu, deposed that she is the Claims Manager of the Defendant. That on the 5<sup>th</sup> November, 2024, the Plaintiff filed an affidavit in support of

summons for an order for joinder of party in the principal registry of this Court.

- 4.2 It was deposed that the intended 2<sup>nd</sup> Defendant, A-Plus General Insurance, is the insurance company of the Third party who was liable for the Road Traffic accident in which the Plaintiff's motor vehicle was damaged thereby giving rise to the Plaintiff's claims herein.
- 4.3 That the 3<sup>rd</sup> Party, in whose favour A-Plus general issued a motor policy insurance, who was liable for the said accident, is not a party to these proceedings and therefore, it would be a waste of the Court's time to add the intended 2<sup>nd</sup> Defendant to these proceedings.
- 4.4 It was averred (sic) there is no issues in the pleadings that relates to the intended 2<sup>nd</sup> Defendant or the third party who was liable for the accident, or indeed the insurance issued in relation to the wrongful third party, who is not a party to these proceedings.
- 4.5 That the issues raised in this matter can be sufficiently and thoroughly dealt with without the intended 2<sup>nd</sup> Defendant, being joined to these proceedings, because the Plaintiff decided to claim for the repair of his motor vehicle directly through the Defendant, his insurance company.

4.6 That the alleged addition of the intended 2<sup>nd</sup> Defendant, as well as the reason given by the Plaintiff for their involvement, which is stated as “so that it could state its role in this matter,” does not go to the root of the question or its determination, therefore being likely to waste the court's time.

4.7 It was averred that the deponent verily believes that the Plaintiff will not suffer prejudice if this court does not grant their application.

## **5.0 THE DEFENDANT’S SKELETON ARGUMENT IN OPPOSITION**

5.1 Counsel began his submission by referring to **Order 14 rule 5(1) of the High Court Rules** reproduced above. It was argued that this Court has jurisdiction to grant an Order for joinder at any stage of the proceedings in the interest of justice and on such terms as the Court thinks are just. In support the case of **Sachar Narendra Kumar v Joseph Brown Mutale<sup>2</sup>** was cited, wherein the Court held that:

***“The rationale for this is to allow the Court to determine all matters in dispute in one cause and is thus meant to prevent multiplicity of actions”.***

5.2 Counsel then argued that the intended 2<sup>nd</sup> Defendant is the insurance company of the third party that was involved in a road traffic accident with the Plaintiff. The issues raised in this matter can be sufficiently and thoroughly dealt with

without their being joined to the proceedings. That the questions raised in this matter relate to:

1. *Whether or not the Defendant is liable to indemnify the Plaintiff for his loss in a sum exceeding his sum insured of Sixty Five Thousand Kwacha on his comprehensive motor policy, despite this being the limit he can be indemnified by less than 10% as stated in the contract of insurance and*
2. *Whether or not the Defendant is liable to indemnify the Plaintiff for loss of use, considering the fact that the contract of insurance, specifically in the private motor policy, states that the Plaintiff is not covered for loss of use.*

5.3 It was submitted that the alleged addition of the intended 2<sup>nd</sup> defendant, as well as the reason given by the Plaintiff for their involvement, which is stated that: ***“so that it could state its role in this matter,”*** does not go to the root of the question or its determination. It is the counsel’s considered view and in line with the Sachar case, that the Court will be able to effectively determine all matters in dispute without the intended 2<sup>nd</sup> Defendant being joined, and that there can be no multiplicity of actions, seeing that the Plaintiff decided to claim on his own comprehensive insurance.

- 5.4 Counsel argued that subrogation is defined in the Dictionary of Insurance Second Edition, C, Bennet as *“the right of the insurer who has granted an indemnity to take over any recovery rights the insured may have against the parties liable for some loss”*. In the case of **Crip v Security Nat. Ins Co. 369 S.W.2d 326 (Tex.1963)** the Court stated that:

***“Indemnity is the basis and foundation of insurance coverage not to exceed the amount of the policy, the objective being that the insured should neither reap economic gain nor incur a loss if adequately insured”***.

- 5.5 Furthermore that the right of subrogation does not arise until the insurers have admitted the assured’s claim and have paid the sum payable under the policy, as stated in the case of **Mason v Sainsbury 1782 99 E.R 538**. That due to the principle of subrogation, the intended 2<sup>nd</sup> Defendant will only be liable once the Plaintiff has been indemnified and that the Defendant can then, as per procedure, go ahead and claim from them, because their insured (who is the 3<sup>rd</sup> Party that was involved in the road traffic accident with the Plaintiff) was liable for the road traffic accident as evidenced by the duly signed admission of guilty form. This procedure is without the involvement of the Plaintiff, as it is only done once he has been indemnified. The case of **Colgate Palmolive (Z) Inc v Able Shemu Chuka<sup>3</sup>** was called in aid wherein the Court held that:

***“If there is one thing more than another which public policy requires it is that men of full age and competent understanding shall have the utmost liberty in contracting and that their***

***contract when entered into freely and voluntarily shall be enforced by the Courts of Justice”.***

Counsel then stated that by virtue of the Plaintiff claiming on his own insurance policy of insurance, he would have to fulfill the terms and conditions of paying the 10% excess on his claim as stated in the contract of insurance between the Plaintiff and the Defendant. That the entirety of these proceedings and the issues pertinent to the determination of the matter will not be defeated in any way by the Court not granting the order for joinder to the intended 2<sup>nd</sup> Defendant.

## **6.0 THE 2<sup>nd</sup> INTENDED DEFENDANT’S AFFIDAVIT IN OPPOSITION**

- 6.1 In opposing the application, Anita Mukutu, deposed that she is the Deputy Manager Underwriting and Claims in the 2<sup>nd</sup> Intended Defendant.
- 6.2 It was deposed that there is no dispute in regard to the fact that on 27<sup>th</sup> May, 2019, there was a road traffic accident involving the motor vehicle Toyota Mark II registration No. 5970 owned by Sammy Nalishebo and the Plaintiff’s vehicle Mitsubishi Pajero registration No. ACT 7898.
- 6.3 That there is no further dispute that motor vehicle Toyota Mark II registration No. 5970 owned by Sammy Nalishebo had a valid third-party insurance cover with the intended 2<sup>nd</sup> Defendant.

6.4 It was averred that while the Plaintiff has a right to lay a claim directly on the insurer, the deponent was duly advised by her advocates on record and verily believe the same to be correct that such a claim can only be made within a period of three years from occurrence of the accident and as the record will show, the accident involving the Plaintiff's vehicle happened 5 years ago thereby making the claim statute barred. A copy of the traffic accident report was exhibited and marked "AM1".

6.5 That the intended 2<sup>nd</sup> Defendant advocates also advised the deponent, and which the deponent verily same to be correct, that the application for joinder of the intended 2<sup>nd</sup> Defendant is misconceived as no legal action can be brought against the insurer for compensation after the expiry of the three-year period from the date of the accident. That the intended 2<sup>nd</sup> Defendant was not mentioned in the writ of summons and statement of claim, thereby making it difficult to tell what exactly the Plaintiff is claiming against the intended 2<sup>nd</sup> Defendant.

## **7.0 THE INTENDED 2<sup>ND</sup> DEFENDANT'S SKELETON ARGUMENT IN OPPOSITION**

7.1 Counsel began his submission by referring to **section 90 (1) of the Road Traffic Act No. 11 of 2002**, which provides that:

*"Any person having a claim against a person insured in respect of any liability in regard to which a policy of insurance has been issued, for the*

*purposes of this part shall be entitled in that person's 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 person having the claim:*

*Provided that-*

- (i) The rights of any person claiming directly against the insurer shall, except as provided in subsection (2), be not greater than the rights of the person insured against such insurer;*
- (ii) The right to recover directly from the insurer shall terminate upon the expiration of a period of three years from the date upon which the claimant's cause of action against the person insured arose*
- (iii) The expiration of such period as is mentioned in paragraph (ii) of this proviso shall not affect the validity of any legal proceedings commenced during such period for the purpose of enforcing a right given under this section".*

7.2 It was argued that the remit of **section 90 (1)(ii) and 90(1)(iii)** is that a person can claim compensation directly from the insurance company within three years from the date of the incident. Further that the validity of legal proceedings will not be affected, provided legal action is commenced within the three-year period. That in the case in casu, the Plaintiff waited until five years to bring an action against the intended 2<sup>nd</sup> Defendant.

7.3 Counsel then argued that the validity of legal proceedings, particular where the action is statute-barred, goes to the jurisdiction of the Court. The case of **Kenson Kapemba v Mwango**

**Chileshe<sup>4</sup>** was cited in support wherein it was stated that a Court's jurisdiction is not a matter of procedural technicality but one that goes to the root of the court's adjudication process. That if a court lacks jurisdiction to entertain a matter, it downs its tools.

7.4 It was submitted that the Plaintiff in his pleadings, has not made any claim against the intended 2<sup>nd</sup> Defendant, thereby not disclosing the cause of action against the intended 2<sup>nd</sup> Defendant. Order 18/19/10 of the Supreme Court Rules provides that a reasonable cause of action is a cause of action with some chance of success when only the allegations in the pleading are considered. That a reasonable cause of action can be said to exist where there are facts alleged which, when proven or established, would entitle the claimant to obtain a favourable judgment. Furthermore, a cause of action can be dismissed where it is certain that it will fail or that letting it go to trial amounts to abuse of court process.

7.5 Counsel argued that it is apparent that the Plaintiff, in his pleadings, neglected to provide sufficient claims against the intended 2<sup>nd</sup> Defendant. The cases of **Anderson Mazoka v Levy Patrick Mwanawasa<sup>5</sup>** and **London Passenger Transport Board v Moscrop (1942) UKHL 115-1** was cited in support.

7.6 Furthermore that a court cannot grant a relief which a party has not specifically pleaded. The following case were cited:

1. **Kapembwa v Maimbolwa and Another**<sup>6</sup>, wherein it was held that:

*"In this case, the plaintiff's version of the facts was not just a variation of the pleadings, but something separate and distinct so that there was a radical departure from the pleaded case."*

- 7.7 It was then argued that **Order 18 rule 7/11 of the Supreme Court Rules, 1999 edition** provides that:

*"Where the evidence at trial establishes facts differently from those pleaded... which are not just a variation, modification or development of what has been alleged but which constitutes a radical departure from the case pleaded, the action will be dismissed".*

## **8.0 DECISION OF THIS COURT**

- 8.1 At the hearing of this matter, Mr. Kalima and Mr. Chulu made oral submission. Due to the position I have taken in this matter, I will not recast the oral submission but include the same in the decision. Although this application was for joinder of the intended 2<sup>nd</sup> Defendant. The intended 2<sup>nd</sup> Defendant has raised a jurisdictional question before this Court. It is trite law that where a question of jurisdiction is raised, the Court must address it. Jurisdiction for any Court is of paramount importance, because where the Court lacks jurisdiction, its decision amounts to nothing.

8.2 I will start by determining the issue of jurisdiction, that is, whether or not this matter is properly before this Court in light of **section 90(1) of the Road Traffic Act No. 11 of 2002**. In so doing, **section 90(1)** provides that:

*“Any person having a claim against a person insured in respect of any liability in regard to which a policy of insurance has been issued, for the purposes of this part shall be entitled in that person’s 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 person having the claim:*

*Provided that-*

- (iv) The rights of any person claiming directly against the insurer shall, except as provided in subsection (2), be not greater than the rights of the person insured against such insurer;*
- (v) The right to recover directly from the insurer shall terminate upon the expiration of a period of three years from the date upon which the claimant’s cause of action against the person insured arose.*

*The expiration of such period as is mentioned in paragraph (ii) of this proviso shall not affect the validity of any legal proceedings commenced during such period for the purpose of enforcing a right given under this section.”*

8.3 The reading of **section 90 (1) (v) of the Road Traffic Act No. 11 of 2002** reveals that:

*“The right to recover directly from the insurer shall terminate upon the expiration of a period of three years from the date upon which the claimant’s cause of action against the person insured arose”.*

This entails that the Plaintiff ought to have within 3 years of the cause of action commence legal proceedings against the Defendant. The section is couched in mandatory terms as it uses the word “shall”.

- 8.4 The Constitutional Court in the case of ***Law Association of Zambia and Another v Attorney General***<sup>7</sup> guided that:

***“It is now settled that a Court cannot arrogate to itself jurisdiction through the craft of interpretation. The Court’s jurisdiction is donated by either by the Constitution or Statute or both. And a Court’s jurisdiction is not a matter of procedural technicality but one that goes to the root of the court’s adjudication process. If a court lacks jurisdiction to entertain a matter, it downs its tools”.***

- 8.5 In the current matter, the Plaintiff commenced this matter on the 19<sup>th</sup> August 2023. The accident leading to the Plaintiff’s cause of action occurred on the 27<sup>th</sup> May, 2019. The Plaintiff did not commence this matter when the cause of action arose on the 27<sup>th</sup> May, 2019; he instead waited for a period of more than 3 years before filing this action. By that time, he was caught up with **section 90(1)(v) of the Road Traffic Act**, which limits the cause of actions under the Road Traffic Act. Clearly, the commencement of this matter was not done within the 3 years stipulated by the law in the Road Traffic Act. The Plaintiff had the opportunity to challenge the Defendant, he lost that opportunity because of tardiness in this part. Consequently, this matter is not properly before this Court. It is my firm view that timing in bringing challenges in court

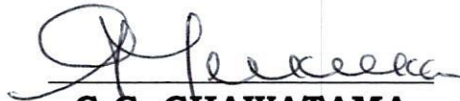
under the Road Traffic Act is crucial. This matter is accordingly dismissed forthwith.

8.6 Since the Defendant had not taken issue and the fate of this matter has been prompted by the intended 2<sup>nd</sup> Defendant, it is hereby ordered that the costs of this application shall be for the intended 2<sup>nd</sup> Defendant, who was put to some expense in reacting to the Plaintiff's application; the costs must be taxed in default of agreement.

8.7 For the avoidance of doubt, the Defendant shall bear its own costs.

8.8 Leave to appeal is hereby granted.

**DELIVERED AT LUSAKA THIS 14<sup>TH</sup> DAY OF OCTOBER, 2025.**

  
**G.C. CHAWATAMA**  
**HIGH COURT JUDGE**