

**IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI  
LANKA**

In the matter of an application  
for leave to appeal and revision

Court of Appeal No: CALA 89/2006

CA 402/2006 (Revision)

Sri Lanka Insurance  
Corporation Ltd.,

Intervenient-Petitioner-  
Applicant-Petitioner

Vs.

1. Nimal Rathnaweera

Plaintiff-Respondent-  
Respondent

2. P.A.Jayasinghe

Defendant-Respondent-  
Respondent

**Before: Eric Basnayake J**

**Counsel: Prasanne Jayawardene instructed by Sudath Perera Associates for the  
Intervenient-Petitioner-Applicant-Petitioner**

**W. Dayaratne P.C. with Uditha Bandara for the Plaintiff-Respondent-  
Respondent**

**2<sup>nd</sup> Defendant-Respondent-Respondent absent and unrepresented**

Argued on: 8.3.2011 & 8.9.2011

Written submissions tendered on: 18.7.2007 & 25.1.2012

Decided on: 8.8.2012

Eric Basnayake J

1. The intervenient-petitioner-applicant-petitioner is the Sri Lanka Insurance Corporation (hereinafter referred as SLIC). The SLIC filed a leave to appeal application as well as a revision application to have the orders dated 23.3.2004 (J) and 14.2.2006 of the learned District Judge of Kalutara set aside. By order dated 23.3.2004 the court had issued a writ of execution against the SLIC. By order dated 14.2.2006 the court had refused to recall the writ.
2. The SLIC states that it received a prohibitory notice dated 5.7.2005 (A). On perusal the SLIC states that it found that a plaint dated 22.9.1997 was filed to recover damages for injuries suffered by the plaintiff-respondent-respondent (plaintiff) due to an accident which occurred on 7.5.1997. The defendant-respondent-respondent (defendant) had filed answer on 11.3.1998. The trial had commenced on 18.6.1998 and the judgment delivered on 10.2.2000.

3. On 7.4.2000 the defendant had filed a petition of appeal. At the hearing of this appeal the defendant appellant was absent and the appeal was dismissed on 5.2.2003. On 28.1.2004 (H) the plaintiff had applied for execution of the decree against the SLIC and a writ was issued.
4. The SLIC complained that no notice of the writ was issued to the SLIC to show cause as to why the writ should not be executed against it. The SLIC also complained that it did not receive notice under section 106 of the Motor Traffic Act. The SLIC complained that it never appeared in the District Court for the defendant. Thus the SLIC made an application to the District Court to recall the writ.
5. The learned Judge after an inquiry dismissed the application of the SLIC. SLIC is seeking to have both these orders set aside.

#### Submissions of the learned counsel for the SLIC

6. The learned counsel for the SLIC submitted that an insurer can be made liable to pay monies under a decree entered against a defendant for damages arising out of a motor accident only if that insurer had been given notice under section 106 of the Motor Traffic Act. In terms of this section notice has to be given to the insurer before or within seven days of filing the action. No such notice had been given to the SLIC. The learned

President's Counsel for the plaintiff conceded in court that notice under section 106 had not been given.

### Submissions of the learned President's Counsel for the plaintiff

7. The learned President's Counsel submitted that the correspondence the plaintiff was having with the SLIC shows that the SLIC was aware of this case and the awareness can be considered as having given notice under Section 106.
  
8. Documents X1 to X10 had been filed for SLIC in the Court of Appeal by counsel for the SLIC to convince court the bona fide of not receiving notice under S.106. Particulars of some of these documents are as follows:-
  - X1. Letter dated July 1997 written by the plaintiff to the Chief Legal Officer of the SLIC seeking redress.
  
  - X3. Letter dated 27.11.1997 by the Chief Legal Officer to the defendant requesting to retain a lawyer for the case and to inform the SLIC of the judgment when delivered in the Magistrate Court.
  
  - X4. Letter dated 4.3.1998 by the Chief Legal Officer to the Plaintiff requesting for originals of documents, namely birth certificate, diagnosis card, particulars of income for the month of May 1997 and the judgment of the Magistrate Court.

9. The learned President's Counsel submitted that although section 106 notice had not been given, no prejudice had been caused to it since the SLIC was aware of this action from the very inception. The learned counsel submitted that the conduct of the SLIC amounts to waiving off the notice under section 106.
10. The above submission is untenable in law and cannot be accepted. "The insurer's liability under section 105 of the Motor Traffic Act does not arise, if the plaintiff has not given notice of action to the insurer either before or within seven days of filing the action" (Amaratunga J in Fernando vs. De Silva (2000) 3 Sri L.R. 29, Abdul Majeed vs. Gunasekera, Secretary, Ministry of Justice (2003) 3 Sri L.R. 237). If the insurer establishes that he did not receive the notice under section 106 of the MTA his obligation to satisfy the decree will not arise (Jana Shakthi Insurance Co. Ltd., vs. Dasanayake Manike and others (2005) 1 Sri L.R. 299). This action was filed in the District Court on 22.9.1997.

11. Section 106 (now repealed by Act No 8 of 2009) is as follows:-

**No sum shall be payable by an insurer under the provisions of section 105-**

**(a) in respect of any decree, unless before or within seven days after the commencement of the action in which the decree was entered, notice of the action had been given to the insurer by a party to the action; or (emphasis added)**

**(b) in respect of any decree, so long as execution thereof is stayed pending appeal.**

The learned President's Counsel concedes that notice under Section 106 of the MTA was not given to the petitioner. In that event no sum shall be payable by an insurer. Considering the above legal provision I am of the view that the learned Judge erred in issuing the writ and not recalling the same on the application of the SLIC. Therefore the orders dated 23.3.2004 and 14.2.2006, are set aside. The appeal is allowed. Under the circumstances of this case I make no order for costs.

Judge of the Court of Appeal