

**IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST
REPUBLIC OF SRI LANKA.**

In the matter of an application for leave to Appeal under and in terms of Section 5[2] of the High Court of the Provinces [Special Provisions] Act No. 10 of 1996 read with the provisions prescribed in terms of Chapter LVIII of the Civil Procedure Code.

SC Appeal 173/2018

SC[HC] leave to Appeal 114/2017

HC [ARB] 177/2015, 218/2015

Z. O. A

[Formerly Z.O.A Refugee Care
Netherlands]

No. 34, Gower Street

Colombo 05.

Claimant

Vs.

Ceylinco Insurance PLC

4th Floor Ceylinco House

No. 69, Janadhipathi Mawatha

Colombo 1

Respondent

And Then Between

Ceylinco Insurance PLC

4th Floor Ceylinco House

No. 69, Janadhipathi Mawatha

Colombo 01.

Respondent - Petitioner

Vs.

Z. O. A

[Formerly Z.O.A Refugee Care
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No. 34, Gower Street

Colombo 05.

Claimant - Petitioner

And now between

Ceylinco Insurance PLC

4th Floor Ceylinco House

No. 69, Janadhipathi Mawatha

Colombo 1

Respondent - Petitioner - Petitioner

Vs.

Z. O. A

[Formerly Z.O.A Refugee Care
Netherlands]

No. 34, Gower Street

Colombo 05.

Claimant - Respondent - Respondent

Before : Priyantha Jayawardena, PC, J.

P. Padman Surasena, J.

E. A. G. R. Amarasekara, J

Counsel : Nihal Fernando, PC, with Rhadeena de Alwis instructed by Chandana
Madawila for the Respondent -Petitioner Appellant.

Ms. Vijula Arulanantham instructed by Sinnadurai Sundaralingam &

Balendra for the Claimant- Respondent- Respondent.

Argued on : 13.03.2020

Decided On ; 28.02.2024

E. A. G. R. Amarasekara, J.

As per the statement of claim filed before the Arbitrators by the Claimant-Respondent-Respondent, ZOA (hereinafter referred to as the Claimant or the Respondent), the background facts relating to this matter can be summarized as follows;

- In or about 1998, the Claimant, ZOA obtained insurance covers for its fleet of motor vehicles, tractors, trailers, motor cycles etc. under policy numbers BR00071A002012, BR00071C001704 and BR00071H000056 from the Ceylinco Insurance PLC, the Respondent-Petitioner-Petitioner (hereinafter referred to as the Petitioner).
- The Claimant being a registered Non-Governmental Organization had entered into a Memorandum of Understanding with the Ministry of Social Services and in 2002, a project by the name of Vanni Project was established in the Killanochchi and Mullativu Districts to facilitate the humanitarian work of the Claimant. A total of 41 vehicles were used in the Vanni Project in the Killanochchi and Mullativu Districts and were insured with the Petitioner as aforesaid.
- With the upsurge of the war in the Vanni area and with the advancement of the Government Forces in or about February 2009, the staff members of the Claimant organization were compelled to move out of the area, leaving behind the assets in order to safeguard their lives.
- The Claimant immediately informed the Petitioner of this matter, and the Petitioner advised to ensure the safety of the staff and that it would proceed with the claim once normalcy returns.
- After the conclusion of the war, on or about 19.05.2009, the Claimant was informed by the Government officials that the said assets were not traceable and probably destroyed. The Claimant made attempts to trace their assets including the vehicles left behind in the Vanni area. In term of the letter dated 1st of November 2009, the Respondent informed the Petitioner of the said lost and/or destroyed vehicles. In September 2010, the Petitioner informed the Claimant of the decision of the National Insurance Trust Fund (hereinafter sometimes referred to as NITF) that the claim had been rejected for the reason that the vehicles had not been in the care, custody and control of the Claimant. The said rejection had been reiterated once again in March 2011.

As per the Statement of Defense dated 30.01.2013, among other things, the Petitioner has averred as follows.

- No cause of action had accrued to the Claimant to proceed to Arbitration against the Petitioner and no dispute and/or difference has arisen between the Claimant and the Petitioner, that would attract the provisions of the Arbitration agreement.
- The purported claim is based on the loss of vehicles used by the Claimant in the North during the terrorist conflict and as per the Claimant's stance, the loss allegedly caused was due to terrorism or violence.

- The insurance policies issued to the Claimant were subject to the Terrorism Endorsement, which expressly provided inter alia that; “ *It is further declared and agreed that this extension is granted for and on behalf of the Government Terrorism Fund and any liabilities whatsoever under this specific extension shall devolve solely upon the said Fund in any action, suit or proceeding, where the Fund alleges that by reason of the provisions of this extension any loss or damage is not covered by this insurance, the burden of proving that such loss or damage is covered shall be upon the insured.*”
- The NITF rejected the claim of the Claimant on the ground that the said vehicles had not been in the care, custody or control of the Claimant and the said rejection was repeatedly communicated to the Claimant.
- The insurance policies were subject to the Terrorism Endorsement, whereby the Claimant obtained the insurance cover from the NITF against ‘*physical loss or damage to the vehicles insured*’ as a result of terrorism or violence, and in that regard the Petitioner was merely the collector of the insurance premium who forwarded the relevant component of the premium to the NITF.
- The Claimant cannot in fact and in law, claim to be indemnified by the Petitioner, and in any event, the Claimant has not suffered any loss/damage as alleged or over estimated its alleged loss/damage and sought to unjustly enrich itself.

The matter had been taken up before an Arbitral Tribunal consisting of three arbitrators. After recording admissions and issues, the Claimant had led its evidence along with the documentary evidence. However, the Petitioner had closed its case without leading any evidence. Parties tendered their written submissions, and the Arbitral Tribunal delivered a divided decision where the Majority awarded the Claimant a sum of Rupees 10,958,685/- together with legal interest on the aggregate sum as from 20.12.2012 and further sum of Rupees 500,000/- as cost, while the Minority dismissed the statement of claim of the Claimant.

After the award was made by the Arbitral Tribunal, before the High Court, the Claimant and the Petitioner had agreed to consolidate the two applications, namely the application for the enforcement of the Arbitral award and the application to set aside the majority decision of the Panel of Arbitrators, and to have a single judgment. After the filing of objections, both parties had agreed to conclude the inquiry by way of written submissions and the High Court had fixed the matter for judgment on the written submissions as agreed by the parties. The Learned High Court Judge delivered his judgment dated 16.10.2017 allowing the enforcement of the Majority decision of the Arbitral Tribunal.

Being aggrieved by the said Judgment, the Petitioner had filed a leave to appeal application before this Court and, when that application was supported, this Court had granted leave on the three questions of law mentioned in paragraph 30 (c), (d), and (g) of the Petition dated 27.11.2017- vide journal entry dated 29.10.2018. In addition to that, when this matter was taken up for argument, this Court allowed another question of law – vide Journal entry dated 13.03.2020. The questions of law so allowed are quoted below for easy reference;

1. Whether the learned High Court Judge had failed to consider that there could not have been any dispute with the Petitioner in as much as it was known to the Respondent that the settlement or determination as to the settlement in respect of any claim arising out of the terrorism cover was with the NITF and not with the Petitioner?
2. Whether the learned High Court Judge had failed to appreciate and /or realize that the said award deals with alleged disputes not contemplated by and/or arising out of the Contract [Insurance Policy marked “C4”] and thus contains decisions on matters beyond and/or not falling within the terms of submissions to Arbitration and thus, violates Section 32(1) (a)(iii) of the Arbitration Act No.11 of 1995?
3. Whether the learned High Court Judge had misdirected himself by failing to appreciate that the National Insurance Trust Fund in terms of Section 3 of the National Insurance Trust Fund Act No.28 of 2006 was solely responsible for the purported claim, if any, of the Claimant-Respondent-Respondent, and not the Petitioner?
4. Whether the award deals with a dispute not contemplated or not falling within the terms of the submission to arbitration?

The Claimant and the Petitioner have filed their written submissions dated 17.05.2019 and 19.12.2018 respectively prior to the hearing. After the argument that took place on 13.03.2020, as directed by the Court, additional written submissions, dated 15.07.2020 and 03.06.2020 have been filed respectively by the Claimant and the Petitioner.

The Petitioner attempts to indicate that there is a jurisdictional error made by the Arbitral Tribunal as there cannot be any dispute between the Petitioner and the Claimant when there is no liability on the Petitioner as the liability for any claim arising out of the terrorism cover is determined and borne by the NITF. The Petitioner further argues that the Arbitration award deals with disputes not contemplated by and /or arising out of Contracts of Insurance, and thus, falls beyond the scope of the submission to Arbitration or the alleged dispute is not covered by the Arbitration agreement.

In this regard, the Petitioner brings this Court’s attention to certain parts of the Terrorism Endorsement and of the Strike, Riot Civil Commotion Endorsement contained in the insurance policies which reads as follows;

“ ... It is further declared and agreed that this extension is granted for and on behalf of the Government Terrorism Fund and any liabilities whatsoever under this specific extension shall devolve solely upon the said Fund in any action, suit or proceeding where the Fund alleges that by reason of the provisions of this extension any loss or damage is not covered by this insurance, the burden or(sic) proving such loss or damage is covered shall be upon the insured....

It is hereby declare(sic) and agreed that the Riot & Strike Extension if granted for and on behalf of the government fund for Strike, Riot and Civil Commotion and Terrorism and any liability whatsoever under this specific extension shall devolve solely upon the said fund.”

Highlighting that the said terrorism extension has been granted on behalf of the Government Terrorism Fund and that any liability whatsoever under the specific extension is solely upon the said Fund, the Petitioner takes up the position that the NITF is solely liable for disputes arising out of the said endorsement. However, it is observed that the terminology used in the above Terrorism Endorsement is that “*Liabilities/Liability whatsoever shall devolve solely upon the said Fund*”. For a liability to devolve on one entity, first it must be accrued to another entity. In the given context it appears to be from the insurer to the said Fund.

In relation to the stance taken up by the Petitioner in its written submissions dated 19.12.2018, it has brought this Court’s attention to section 28 of the National Insurance Trust Fund Act No.28 of 2006 which established the said NITF, and the said section further states that benefits from the Fund shall be paid to persons to whom the said Act applies, and such monies as are specified in section 18 of the Act shall be paid to the Fund. It must be noted here that the said Act was passed in 2006 while the relevant Insurance Policies were obtained in 1998. However, as per the aforementioned section 18(c), all monies lying to the credit of the Strike, Riot and Civil Commotion and Terrorism Fund established in terms of the Cabinet Decision of November 18th, 1987 in Accounts in Peoples Bank, Union Place and Bank of Ceylon, Corporate Branch should be paid into the NITF. This provision apparently indicates that the NITF has absorbed the Government Terrorism Fund referred to in the Terrorism Endorsement in the Insurance Policies.

The Petitioner has further referred to certain regulations made by the Minister in charge of the subject in terms of section 28 (2)(c) of the said Act published in the Gazette Number 1542/11 dated 25th March 2008.

However, those provisions that came into existence after the Petitioner and the Respondent entered into the contract of insurance as found in the relevant insurance policies cannot establish a contractual nexus between the Respondent and the Government Terrorism Fund or NITF.

However, while referring to the aforesaid provisions of the law, the Petitioner takes up the position that, it issued the relevant Strike, Riot and Civil Commotion Endorsement and Terrorism Endorsement in compliance with the law on behalf of the said NITF and the Respondent’s attempt to hold the Petitioner liable for a claim under the said endorsement is contrary to the contract and law. Thus, the Petitioner submits that no dispute can ever arise and/or has arisen between the Petitioner and the Respondent which is subject to the arbitration agreement contained in the contract of insurance. In this regard, the Petitioner brought this Court’s attention to the evidence of the Respondent where during cross examination the Respondent admitted the liability of the NITF to pay what is covered under the said endorsement. The Petitioner has also referred to some communications between the Petitioner and the Respondent where it is either mentioned that the Petitioner would be presenting the claim to the NITF or that the claim was rejected by the NITF. Hence, the Petitioner states that the Respondent was aware of the involvement of the NITF and has conceded that the dispute is with the NITF. The Petitioner, therefore, argues that there is no dispute between the Petitioner and the Respondent that would fall within the terms of submission to arbitration as required by section 32(1)(a)(iii) of the Arbitration Act. If there was a direct contractual relationship

between the Respondent and the NITF or the Government Terrorism Fund as alleged by the Petitioner, it is questionable the necessity for the Petitioner to be involved in claims or communications in that regard.

As per the notices of Arbitration, each reference for Arbitration has been done in term of Clause 8 of the General Exceptions in the relevant policies. Such reference was based on disclaiming of liability in respect of insurance claims made under the relevant policies. Said Clause 8 provides for the parties to the relevant policy to refer all differences arising out of the relevant policy for arbitration as a dispute resolution mechanism. When it refers to all differences, it encompasses any dispute that is arisen out of the contract of insurance. Thus, there is an arbitration agreement between the parties to the relevant insurance policy as far as each policy is concerned.

It should be noted that neither any person from any authority which was responsible for the Government Terrorism Fund or later the NITF (once it came into existence in terms of the Act No. 28 of 2006) had taken part in signing the policies for them to become a party to the policy. It is also common ground that the Petitioner collected the relevant premiums from the Respondent including the premiums for the protection under the Terrorism Endorsement which endorsement became part of each relevant policy. If one looks at the relevant Terrorism Endorsement quoted above, it is clear that the said *extension is granted by the Petitioner for and on behalf of the Government Terrorism Fund. This could have happened due to situations such as;*

- A) There was an administrative or contractual or statutorily established or supported arrangement or agreement between the Petitioner and the relevant Authority that was responsible for the said Fund at the time of entering into the Policies without any involvement of the Respondent to grant such cover through the Petitioner. (However, it is clear that NITF Act was passed only in 2006. No statute or regulation relevant to the time of entering into the policies prior to 2006 has been brought to the notice of the Court other than stating that the Government Terrorism Fund was established by a Cabinet Decision).
- B) The Petitioner was acting as the Agent of the relevant Fund or the Authority responsible for the said Government Terrorism Fund.

Whatever it is, it appears that an arrangement has been made in a manner to devolve any liability that may accrue to the Petitioner to the said Fund. If it is a separate arrangement or an agreement between the Petitioner and the Fund or the relevant authority, as the Fund or the relevant authority responsible is not a party to the relevant policy, the Respondent has to claim and go after the Petitioner for any liability in terms of the insurance policy and claim it from the Petitioner. If Petitioner is liable or proved liable it is up to the Petitioner to cause the settlement of claims through the Fund as per the agreement or arrangement between it and the Fund or the Authority that is responsible for the Fund. The Respondent or the Claimant cannot go after the Fund or the relevant Authority since there is no contractual nexus between the Claimant and the Fund or the relevant authority. Even if it is an undisclosed agency between the Petitioner and the Government Terrorism Fund, the Respondent or the Claimant still has to go after the Petitioner to enforce any obligation. It is only when a disclosed agency exists between the Petitioner and the said Fund, the Respondent can go after the disclosed principal

for the enforcement of obligation. As per the submissions made, originally, the Government Terrorism Fund was established through a decision of a Cabinet meeting. Thus, such a Fund cannot be considered as a legal person. The Terrorism Endorsement in the policy quoted above does not refer to any authority or legal person who is responsible for the Fund. The NITF Act which came into existence in 2006 has established a Board which is a corporate body for administration of the NITF. However, there is no such Board referred to in the said Government Terrorism Fund Endorsement found in the Policies. Hence, if it is an agency, there is no disclosure of any principal who should be liable relating to Terrorism Endorsement in the policy. Thus, as per the material placed, there is nothing to show that there was a contractual nexus creating obligations between the Respondent and the said Government Terrorism Fund or NITF or any authority responsible for such Fund. Each relevant insurance policy was between the Petitioner and the Respondent, and it is the Petitioner who granted the terrorism cover on behalf of the said Fund. Further, in my view it is the Petitioner's responsibility and obligations that devolve on the Fund. The Respondent is not a party to any contract, agreement or arrangement between the Fund or any authority responsible for the Fund. Thus, in my view, it is the responsibility of the Petitioner to fulfill its obligations through the Fund as per any arrangements it has with the Fund. However, there is no contractual nexus between the Fund and the Respondent. As per each Policy of Insurance, the contract is between the Petitioner and the Respondent. Thus, the Arbitration agreement contained therein is between the Petitioner and the Respondent.

As stated in the Majority decision of the Arbitration award, there is no provision found in the policies that allows the then Government Terrorism Fund to refuse payment on the basis that the relevant vehicles were not in the care, custody and the control of the Respondent. As a party to the contract of insurance, when the insurer refuses the claim on the basis that the NITF refused payment, there is a clear dispute with regard to the payment of claim arising out of the relevant policy of insurance, especially in terms of the Terrorism Endorsement. As explained above, parties to each relevant policy are the Petitioner and the Respondent and there is no contractual nexus proved between the Petitioner and the NITF. It is not in dispute that the premiums relevant to each policy including the amount relevant to the Terrorism Endorsement were collected by the Petitioner and as per some arrangement between the Petitioner and the Government Terrorism Fund, the Petitioner would have transmitted the relevant amounts to the said Fund or the NITF. Due to this arrangement, parties would have stated in the Terrorism Endorsement that the liability arising out of terrorism related damages or loss covered by the insurance policy devolves on the said Fund. However, to claim it from the Fund, there is no contractual relationship between the Respondent and the Terrorism Fund or the NITF.

The contract of insurance that contained an arbitration agreement was between the Petitioner and the Respondent and, the dispute with the refusal of the claim has arisen from that agreement. Further, there is an arbitration agreement to refer all differences arising out of the policy for arbitration. The words "All differences" is a very wide term that include any dispute arising out of the relevant insurance policy.

For the reasons given above, I am unable to agree with the submissions of the Petitioner that there could be no dispute between the Petitioner and the Respondent, on the basis that the liability for any claim arising out of the terrorism cover is determined and borne by the NITF

and not by the Petitioner or that the award deals with disputes not contemplated by and/or arising out of contract of insurance or that the alleged disputes are not covered by the arbitration agreement. If there is any liability to devolve on the NITF as per any arrangement between the Petitioner and the NITF or the then Government Terrorism Fund, it is the Petitioner's liability arising out of the contract of insurance between the Petitioner as the insured and the Respondent as the insurer and nothing else.

As per the Terrorism Endorsement quoted above, when the Fund alleges that by reason of the provisions of this extension any loss or damage is not covered by this insurance, the burden of proving such loss or damage is covered, is upon the insured. The reason that appeared to have been given by the NITF was that the vehicles were not in the care, custody and control of the Respondent. No such ground is found in the relevant policies to absolve the insurer or the Fund from liability. As such, there is nothing to be proven by the Respondent against such refusal after proving that the harm, damage or loss caused was due to the terrorist activities that existed at the relevant time. On the other hand, when there is a war, terrorist activities or natural disasters it is natural to expect that the insured may leave behind the insured property. Moreover, the decision on facts is solely with the Arbitrators and the learned High Court Judge is not expected to sit in appeal against the findings of facts by the Arbitrators.

As explained above, the contract of insurance was between the Petitioner and the Respondent. There was no contractual nexus between the Respondent and the Government Terrorism Fund or the NITF and or any authority that was responsible for such Fund. The dispute has arisen from the contract of insurance due to the refusal to pay the claim after collecting the premium for Terrorism Endorsement. Whether the Petitioner is liable or not as per the contract of insurance itself is a part of the dispute. There was an arbitration agreement as explained above to refer all differences arising out of the contract of insurance found in the policy to refer for arbitration. Thus, the Arbitrators had the jurisdiction to hear and decide the dispute. In my view, the Majority award dealt with a dispute contemplated by or falling within the terms of submission for arbitration and contains decisions on matters within the scope of the submission to arbitration. As this was to enforce an award made in Sri Lanka, to set aside, it must fall within the ambit of section 32 (1) (a)(i) or(ii) or (iii) or(iv) or (b)(i) or (ii) of the Arbitration Act No. 11 of 1995. Other than that, the High Court is not empowered to sit in appeal over the decision of the Arbitrators. No such ground as contemplated by the said section has been established before the High Court. In this regard, it is relevant to refer to the following decision made by our superior courts.

Light Weight Body Armour Ltd. Vs. Sri Lanka Army (2007) 1 Sri L R 411

“In exercising jurisdiction under section 32 Court cannot sit in appeal over the conclusions of the Arbitral Tribunal by scrutinizing and reappreciating the evidence considered by the Arbitral Tribunal. The Court cannot re-examine the mental process of the Arbitration Tribunal contemplated in its findings nor can it revisit the reasonableness of the deductions given by the Arbitrator- since the arbitral tribunal is the sole judge of the quantity and the quality of the mass of evidence led before it by the parties...”

“... Section 32 contains the sole grounds upon which an award may be challenged or set aside, courts have no jurisdiction to correct patent and glaring errors of law in an Award unless the

error can be established to be a jurisdictional error or can be shown to be of such nature as to render the Award contrary to public policy.”

For the reasons elaborated above, the questions of law allowed by this Court which are mentioned above are answered as follows;

Q. 1. Whether the learned High Court Judge had failed to consider that there could not have been any dispute with the Petitioner in as much as it was known to the Respondent that the settlement or determination as to the settlement in respect of any claim arising out of the terrorism cover was with the NITF and not with the Petitioner?

A. Answered in the negative as the Contractual nexus is only with the Petitioner.

Q 2. Whether the learned High Court Judge had failed to appreciate and /or realize that the said award deals with alleged dispute not contemplated by and/or arising out of the Contract [Insurance Policy marked “C4”] and thus contains decisions on matters beyond and/or not falling within the terms of submissions to Arbitration and, thus, violates Section 32(1) (a)(iii) of Arbitration Act No.11 of 1995?

A. Answered in the Negative. The terms of contract of insurance contained in the relevant policy including Terrorism Endorsement are parts of the insurance policy and it is a contract between the Petitioner and the Respondent and not with any other Fund. Who is liable for payment for the claims made under the said endorsement is a dispute arising out of the contract, and parties have agreed to refer “all differences” arising out of the contract for arbitration.

Q 3. Whether the learned High Court Judge had misdirected himself by failing to appreciate that the National Insurance Trust Fund in terms of Section 3 of the National Insurance Trust Fund Act No.28 of 2006 was solely responsible for the purported claim, if any, of the Claimant-Respondent-Respondent and not the Petitioner?

A. Answered in the Negative. Section 3 establishes the National Insurance Trust Fund from which the benefits shall be paid to the persons to whom the Act applies. As per the insurance policy liability, devolves on the Terrorism Fund which appears to have been absorbed by the NITF. However, to devolve on the Terrorism Fund, liability must first accrue to the Insurer, the Petitioner. The Respondent’s (Claimant’s) Contractual nexus is only with the Petitioner

Q4. Whether the award deals with a dispute not contemplated or not falling within the terms of submissions to arbitration?

A. Answered in the Negative. As explained above, it is a dispute arising out of the insurance contract between the Petitioner and the Respondent, and both parties have agreed to refer all differences arising out of that contract for arbitration.

Hence, this Court affirms the decision of the Learned High Court Judge dated 16.10.2017 and decides to dismiss this appeal.

Appeal dismissed with costs.

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Judge of the Supreme Court

Hon. Priyantha Jayawardena, PC, J.

I agree.

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Judge of the Supreme Court

Hon. P. Padman Surasena, J.

I agree.

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Judge of the Supreme Court