HB 29/07
Judgment No. HB 29/07
Case No. HC 319/04

BOENOR TRADING (PVT) LTD T/A
SWANKERS MENSWEAR

Versus

TOTAL INSURANCE COMPANY LTD

And

MOMENTUM INSURANCE BROKERS (PVT) LTD

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA J
BULAWAYO 17 OCTOBER, 23 NOVEMBER 2006 AND 1 MARCH 2007

Mrs S. Nkiwane for applicant
Mr M Ndlovu for 2nd respondent

Opposed Application

KAMOCHA J: The applicant in this matter was seeking for an order in the following terms: -

"It is ordered that: -

(1) It be and is hereby declared that a valid contract of insurance was concluded as between the applicant and the first respondent by the insurance policy member BUDFAA 000665 and amended by the first respondent by endorsement on the third December 2003, and that the first respondent is obliged to meet its obligations in terms of the insurance policy.

(2) First respondent pays the costs of this application."

The applicant's allegations were that sometimes towards the end of November 2003 its sales executive one Menelisi Moyo met an insurance broker, known as Mr Charlton Dzwairo of Momentum Insurance Brokers (Pvt) Ltd -the second respondent. The two began talking business as Moyo wanted to have the applicant's stock insured. Moyo asked Dzwairo to get him a reputable insurance company. Whereupon Dzwairo recommended Total Insurance

Company Ltd –the first respondent as it settled claims within 48 hours of the holdings of the claim.

Moyo alleged that Dzwairo undertook to draw up the policy but before he could do so it was necessary for the two gentlemen to visit the applicant's factory for Dzwairo to have a look at the machinery and stock so as to assess their value. There after he drew up a policy covering a $60 000 000-00 risk and second respondent actually issued applicant a $60 000 000-00 policy document with a monthly premium of $989 100-00,

The applicant averred that the document had already been duly signed and back dated to 30 September, 2003. The policy document was filed of record.

I pause to observe that the underwriting schedule was indeed dated 30 September 2003. The sum insured was $60 000 000-00 the premium was $989 100 –00. The policy was covering the period 1 October, 2003 to 30 September, 2004 (a period of one full year).

Moyo went on to allege that when he was presented with the policy document he advised Dzwairo that the cover was inadequate as the machines in the factory were worth much more than that and proposed that an adequate cover would be $180 000 000-00.

He contended that a contract of insurance was concluded when he signed the policy document which was presented to him. The obligation to pay the premium then remained with him. He said the policy document did not stipulate any condition to the effect that applicant should pay the premium before being covered. It was his further contention that such conditions could not be implied into a contract of insurance. He averred that the policy could only lapse on the ground of non-payment of the premium if there had been a specific time frame set within which the first premium had to be paid. In the absence of such condition, as long as the insurer had issued a policy, it was obliged to indemnify the insured even if no premiums had been paid provided the insured first updated its premiums.

After the applicant, through Moyo, pointed out that the $60 000-00 cover was inadequate and proposed a $180 000 000-00 the insurer accepted the proposal. An endorsement schedule

which formed part of the original policy was drawn up. In other words the policy was updated upwards. The updating documents reads thus in part: -

"ENDORSEMENT SCHEDULE

Endorsement: - 001 attaching and forming part of policy Number BUDFAA 00665

Insured: Swankey's Menswear

Broker: BBR 0015 (Momentum Insurance Brokers)

Period: 01/10/03 – 30/09/04

It is hereby declared and agreed that with effect from 18 November, 2003 the sum of assets including stock is increased to $180 000 000-00 and the sum insured of Burglary (first loss) is increased to $90 000 000-00."

The total premium rose from $989 100-00 to $3 726 100-00. The endorsement schedule was dated 3 December, 2003.

The observation I make here is that although the document was signed and dated 3 December, 2003 it was backdated to 18 November, 2003. The period covered is the same as in the original policy.

The endorsement bore the same number as the original policy. On the issue of the updated total premium, Moyo said he indicated to Dzwairo that the premium was high and the applicant could not afford it.

However, Dzwairo advised that applicant could pay the $989 100-00 premium and pay the balance within 60 days. Mr Dzwairo followed that up with a letter dated 8 December, 2003 marked for the attention of Moyo in the following terms: -

"Re: Multi Peril Policy No. BUDFAA 000665

Further to your instructions, to increase the Burglary/Theft limit to $90 000 000-00 effective from 18 November, 2003, we now attach herewith insurers endorsement to this effect and our debit note in the amount of $3 726 100-00 for your attention. Please note that as per

agreement, this additional premium is payable within sixty days at no interest….." Emphasis added

Believing that applicant had been granted a credit facility as promised by Dzwairo, Moyo asked if he could draw a post dated cheque and Dzwairo said that it was permissible. Instead of paying $989 100-00 he decided to pay a round figure of $1 000 000-00 and wrote a cheque in that sum and post dated it to 10 December, 2003. The post-dated cheque was honoured by the applicant's bankers.

On 5 December, 2003, there was a break-in at the applicant's factory and machinery and stock were stolen resulting in a total loss of $23 000 000-00. Applicant reported the burglary to the police and to the insurers through the brokers. The insurer sent its assessor to the factory to assess the damage. The assessor wrote his report which he submitted to the insurer.

Moyo then submitted the applicant's claim to the 1st respondent. Thereafter he held a meeting with Dzwairo and the branch manager of the 1st respondent where at the 1st respondent said it would pay the applicant under the $60 000 000-00 policy in which case the applicant would get $12 500 000-00. Moyo rejected that, since the $60 000 000-00 cover had been revised upwards to $180 000 000-00 on 3 December 2003 and back dated to 18 November 2003. He refused to sign the minutes and that did not go down well with Dzwairo who stormed out of the meeting.

On 2 January 2004, the 2nd respondent wrote to the applicant advising it that the 1st respondent had not accepted its policy and had refused to accept the $1 000 000-00 paid as premium and returned it. The reason proffered for the refusal by 1st respondent was that when the loss occurred no premium had been paid by the applicant.

In a letter dated 7 January 2004, addressed to the applicant's legal practitioners the legal practitioners of the 2nd respondent pointed out that a contract of insurance existed.

To sum up the applicant contended that where there is no specific condition to the effect that a premium has to be paid on such and such date, payment or non-payment of a premium was

not a condition precedent to the existence of a contract of insurance. It asserted that should a loss occur before the premium is paid, the insurer was bound to indemnify, although, as a pre-condition, payment of the premium had to be effected.

It contended that it was given a credit facility and had paid $1 000 000-00 which was honoured by the bank. Further the 60 days had not yet expired. It was prepared and would pay the balance of the premium. Another option open to the 1st respondent apart from demanding payment of the premium before indemnifying was to deduct the due premium from the amount to be paid out to the applicant.

Applicant denied that there were any serious factual disputes to warrant the matter being referred to trial. It averred instead, that the matter could be resolved on the papers as the issues were clear and these were: -

(a) whether or not the policy lapsed; and

(b) whether or not it was a condition precedent to pay premiums before indemnifying.

The respondents opposed the application. The Bulawayo branch manager of the 1st respondent Mr Simba Griffiths Matsika deposed to an affidavit in which he made assertions some of which were of a general nature. He was talking from a disadvantaged view point in that he was not privy to what actually took place between Dzwairo and Moyo.

Matsika averred that the introduction at page 2 of the policy document clearly indicated the insurer would indemnify the insured against payment of the premium. The relevant part of the introduction reads as follows: -

“INTRODUCTION

In return for the premium the insurers will indemnify the insured during the period of insurance against loss or damage described herein which exceeds any excess shown herein up to the limit of liability.”

Matsika who was using intemperate language stated that insurer’s legal practitioners explained to the applicant’s legal practitioners that the principle of “no premium, no cover” applied in casu.

Matsika, however, seemed to ignore the fact that the lawyers came onto the scene long after Dzwairo and Moyo had reached agreement on the alleged credit facility.

He said the policy document and its under writing schedule constituted the entire insurance policy. He went on to speculate that Dzwairo must have clearly indicated to Moyo that there were time limits imposed on the payment of the premium. The client was obliged to pay the premium immediately once it had been raised. He said the premium was raised on 30 September 2003 and a premium had not been paid by 5 December 2003 when the risk occurred. The broker is allowed to bring to the insurer within 30 days from the last day of the month the premium is raised. That requirement was not met by the insured and his agent. Failure to meet that condition resulted in the policy lapsing.

Matsika said the 1st respondent sent its assessor to the applicant's factory to assess the extent of the loss so as to protect itself. At that stage it was not aware that applicant had not paid the requisite premium within the time allowed. It only discovered that after checking its records and it became clear to it that the policy had lapsed at the time of the burglary due to failure to honour premium payment. The applicant was, therefore, not entitled to any indemnity. While admitting that a meeting was indeed held between Moyo, Dzwairo and himself he denied ever proposing to pay the applicant under the $60 000 000-00 policy in terms of which applicant would be paid $12 500 000-00. He emphasized that he made no undertaking to pay. What admits of no doubt, however is the fact that Matsika never mentioned the non-payment of premium and the lapsing of the policy.

The Marketing Director of the 2nd respondent Mr Simba Dhoro deposed to an affidavit. He is based in Harare but purported to depose an affidavit dealing with matters which took place in Bulawayo between Moyo and Dzwairo. Apart from hearsay he has no independent and personal knowledge of what took place. His hearsay shall be disregarded.

The 2nd respondent ought to have filed an affidavit from Mr Charlton Dzwairo. He is the only person who could deny or confirm what Menelisi Moyo said is what took place. Moyo repeatedly asserted that the applicant was afforded a credit facility by Dzwairo who also

allowed him to make part payment using post-dated cheque. Dzwairo followed that by letter dated 8 December 2003. He said Dzwairo did not talk of "No premium no cover". Further more, he did not put the payment of a premium as a condition precedent to indemnity. The policy document itself does not say so either. Moyo stated in his answering affidavit that several meetings were held between Dzwairo, Matsika and himself during the months of December 2003 and January 2004 over the question of indemnity and neither Matsika nor Dzwairo ever raised the question of the policy having lapsed due to non-payment of the premium. He contended that there would have been no point in appointing an assessor or seeking to pay on ex gratia basis on a lapsed policy. What is more difficult to understand is that the applicant asked for a review of the policy upwards which was granted. The review upwards and the endorsement was dated

3 December 2003. There was no acceptable explanation why that was done if the policy had lapsed at the end of November 2003. Moreover, the issue of the lapsing of the policy seems to have been raised as an after thought.

The court finds that since Dzwairo did not file an affidavit to controvert Moyo's assertions they shall be taken as not being challenged. Consequently I find that Dzwairo afforded the applicant a credit facility. Further the conduct of the parties points to the policy as being in existence and it was so at the time of the break-in and the applicant is entitled to indemnity.

In the result I would grant the application in terms of the draft on page 1 of this judgment.

Messrs Majoko and Majoko, applicant's legal practitioners

Hare and Partners, 1st respondent's legal practitioners

Messrs Mbidzo, Muchadehama and Makoni, 2nd respondent's legal practitioners.