HOMEPLUS INVESTMENTS (PVT) LTD
versus
KANTHARIA INSURANCE BROKERS (PVT) LTD
and
GLOBAL INSURANCE COMPANY

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, March 5 2008

Civil Trial

Mr. *Mabulala*, for plaintiff
Mr. *Zuva*, for 1st defendant
Advocate *Nagar*, for 2nd defendant

CHITAKUNYE J: On 26 August 2004, the plaintiff instituted proceedings in the High Court wherein it sued for $60 000 000.00 being the sum assured in terms of a motor vehicle comprehensive policy it held with second defendant. The first defendants were the insurance brokers who facilitated the policy.

On 21 December 2006 and before the pre-trial conference the plaintiff amended its claim by the addition of paragraph 10 which is a claim for consequential damages in the sum of $100 000 000. 00 being the replacement value of the vehicle.

The first defendant pleaded that it first acted as second defendant's agent and its obligation ended as soon as the policy was in place and that the premium had not been paid at the time of the accident hence the policy was revoked.

The second defendant in its plea pleaded ignorance of the policy and put plaintiff to the proof thereof. At the commencement of the trial second defendant applied for, and was granted an amendment to its plea. The amendment was a withdrawal of the initial plea and its substitution with a plea to the effect that;

1. The first defendant as agent of plaintiff entered into an agreement with second defendant that plaintiff should pay the insurance policy premium of $3, 524. 26. in equal installments over a period of 3 months as from 25 February 2004.

2. That plaintiff did not comply with this agreement and as at the date of the accident the plaintiff had not performed its obligations to pay the installments.

3. In any event plaintiff is covered for a total of $60 000.00 in terms of the policy and is contractually precluded from claiming more.

The plaintiff gave evidence through its managing director Mr. Zisengwe. Mr. Gideon Muchakwa gave evidence for first defendant after which Mr. Moses T. Chakaringa and Mr. Member Murasiranwa gave evidence for the second defendant.

From the evidence adduced in court the following are common cause. The plaintiff entered into an insurance contract with the second defendant. This was done through first defendant who acted as broker. The premium was put at $3 524 259.00.The insured value was put at $60 000000.00 (old currency). On 10 February 2004 plaintiff paid $200.00 (revalued) towards the premium. Plaintiff was then issued with a policy document dated 18 February 2004. The period of insurance was stated as 'From 10/02/ 04 to 31/01/05 (both dates inclusive)'. On 23 March 2004 the motor vehicle so insured was involved in an accident and was declared a write off. As at the time of the accident plaintiff had not paid the balance of the premium. Such balance was only paid on 7 April 2004 to first defendant. When the plaintiff attempted to make a claim on the policy second defendant refused to honor the claim on the basis that plaintiff had not paid the premium as per policy.

The testimony by Mr. Zisengwe was to the effect that plaintiff had been asked to pay the premium in three months. It was never stated that the installments had to be equal. At the time of the accident the three months period had not lapsed. When the accident occurred plaintiff was asked to pay the balance in order that its claim can be sent to second defendant and it did so. In this regard he tendered two receipts as exhibits 1 and 2 for the payments. The first defendant's evidence on the other hand was to the effect that when Mrs. Zisengwe came to insure plaintiff's motor vehicle she was told the premium that had to be paid. As she did not have the full amount she was allowed to pay $200.00 on her undertaking to pay the balance in two weeks time. She was warned of the consequences of not paying the full premium. After failing to pay within that period first defendant extended the period to 3 months. According to Mr Muchakwa this extension was at plaintiff's risk

At the pre-trial conference the issues were viewed as;

'1. The interpretation of clause 1 of the contractual document. It being admitted that plaintiff paid its premium on 25 February 2004, and
2. The quantum of damages'.

After hearing evidence from the witnesses it was apparent that the parties were not agreed that the premium was paid on 25 February, 2004. The receipts tendered showed the initial payment was on 10 February 2004 and the 2nd payment was on 7 April 2004. The main issues would thus be;

1. Whether or not plaintiff had paid premium in terms of the policy,
2. Whether or not defendants are liable to plaintiff as per claim and,
3. Whether or not the plaintiff is entitled to payment of the sum of $100 000000.00 in respect of its claim for the loss of its motor vehicle in terms of the policy agreement. And
4. Who between the defendants is liable to pay plaintiff.

PAYMENT IN TERMS OF THE POLICY

The policy document in its preamble states that "whereas the insured by a proposal and declaration which shall be the basis of this contract and deemed to be incorporated herein has applied to the company for the insurance and has paid the premium as consideration for such insurance in respect of accident loss or damage occurring during the period of insurance". That preamble presupposes applicant has paid the premium. I did not hear any party to interpret that paragraph in any way as presupposing that premium would not have been paid. It is in that light that the issue of payment of the premium is important. The plaintiff's case was that in spite of this there was a premium payment plan in place which was agreed with the first defendant at the time the policy was agreed in terms of which the premium was payable over a period of three months. Mr. Zisengwe tendered exhibit 3 as proof of the arrangement. Paragraph 2 thereof states that "We hasten to add that a premium payment plan had been agreed to spread payment over three months and initial payment had been effected on receipt of policy before the accident, which we take cognizance of."

This letter is from first defendant to plaintiff. The 1st paragraph thereof shows clearly that second defendant was refusing to pay on the premise that premium payment was done after the loss which aspect they contended vitiates the terms and conditions of the policy. In his evidence Mr. Muchakwa did not deny this. First defendant having allowed plaintiff to pay in installments found itself in difficulties to persuade second defendant to pay. In both its plea and in evidence first defendant acknowledged that it had no authority to allow plaintiff to pay its premium in installments. It is because of that lack of authority that it asked plaintiff to pay

up before they could file their claim. It is clear beyond doubt that the payment arrangement was initially as between plaintiff and first defendant. That arrangement was apparently not in terms of the policy document. It was an arrangement first defendant agreed to for the convenience of plaintiff and not because there was express authority from second defendant for first defendant to grant such payment terms. The second defendant's evidence was to the effect that the insurance policy plaintiff took out required a one off payment. In the instance case no such payment was made hence it declined plaintiff's claim. However in its amended plea second defendant stated that 'first defendant, acting in its capacity as agent for plaintiff entered into an agreement with second defendant that plaintiff should pay the insurance policy premium of $3 524, 26 in equal installments over a period of 3 months as from 25 February 2004.' There was thus contradiction between the second defendant's plea and evidence by its witnesses. The witnesses could not explain away the contradiction. Mr Muchakwa who should have been better placed to testify on this was a ball of confusion and contradictions. For instance whilst being categorical that the policy was of a one off payment at inception he was at some stage heard to say second defendant should nevertheless have honored the claim. He found it difficult to admit first defendant's negligence in not advising plaintiff of the consequences of partial payment and also in not advising second defendant about the credit arrangement with plaintiff. The second defendant through Mr Murasiranwa indicated that upon receipt of $200.00 towards payment of the premium they questioned first defendant about it. First defendant was reminded that a failure to pay the full premium would lead to the invalidity of the policy for non remittance. When asked why second defendant had not advised first defendant of the invalidity of the policy in view of non payment of the premium Mr Murasiranwa said that events took over as the accident took place. In terms of clause 8 of the General Conditions of the policy document second defendant could have cancelled the policy.

Despite not receiving full premium second defendant issued the policy document and had not cancelled it by the time of the accident. The amended plea acknowledges the arrangement to pay in installments. If therefore second defendant wishes to rely on a breach of contract the burden of proof is on it (see *Brightside Enterprises (Pvt) Ltd vs*. *Zimnat Insurance Co. Ltd* 1998 1 ZLR 117). In *casu* second defendant seemed to have condoned the payment in installments and conceded in its amended plea that 'First defendant, acting in its capacity as agent for plaintiff entered into an agreement with second defendant that plaintiff should pay the insurance policy premium of $3523,26 in equal installments over a period of 3 months

from 25 February 2004.' (The underlining is mine) Second defendant can thus not seek to rely on such mode of payment not to honor the claim.

Another point regards first defendant's position. Though in their initial pleadings impression was created that first defendant was second defendant's agent the closing submissions were clear that an insurance broker can act as agent for both the insured and insurer. In GORDON and GETZ on THE SOUTH AFRICAN LAW OF INSURANCE 4th edition by D.M Davis at page 161 it is stated that:

> "An Insurance broker acts primarily as the insured's Agent to obtain insurance, though he receives his commission from the insurer, and may, for limited purposes such as collecting the premium, be the latter's Agent."

In casu, therefore, the first defendant was the insured's agent when they secured insurance cover for the plaintiff from the second defendant but in collecting the premiums and remitting them to the second defendant the first defendant acted as the second defendants agent. When first defendant was now collecting money this was for and on behalf of second defendant. Upon receipt of the money it was first defendant's responsibility to account to second defendant as second defendant's agent. The second defendant by accepting part payment of the premium was in fact confirming its acceptance of the arrangement first defendant had made with plaintiff for the payment of the premium and that first defendant was its agent in collecting the premium. That probably explains the assertion in its amended plea acknowledging the arrangement to pay in three installments. If second defendant had rejected the arrangement it should not have issued the policy document or at least it should have cancelled the contract as soon as it became aware of the credit arrangement if such had not been known to it when it issued the policy document. Instead of canceling the contract second defendant opted to merely warn first defendant who by then had become its agent of the risk of non payment of the full premium yet the contract provides that second defendant could have cancelled the contract. Paragraph 8 of the general conditions states that 'The Company may cancel this policy by sending seven days notice by registered letter to the insured at his last known address and in such event will return to the insured the premium paid pro-rata portion thereof for the period the policy has been in force…….' The second defendant gave an impression to plaintiff that the arrangement was acceptable. If second defendant now wishes to rely on such breach which was there from inception the onus is on it to prove such breach and to show that such vitiated the contract in spite of its own conduct. This the second defendant did not do.

The question of payment of the balance of the premium is between first defendant and second defendant. This is so because plaintiff paid to first defendant and it was for first defendant as agent for second defendant, to account to second defendant. First defendant received the money on 7 April 2004 as agent for second defendant. Second defendant had an arrangement with first defendant on when and how premiums received on its behalf by first defendant would be transmitted. Though the two witnesses for second defendant did not seem of the same mind on the period of credit first defendant was granted, it was certainly a period of at least 60 days. Mr. Chakaringa put the credit period granted the broker at 90 days whilst Mr. Murasiranwa put the period at 60 days. They both agreed however that such credit was only to the broker and did not extend to the insured. As already alluded to, this contradicts the amended plea. Both witnesses indicated that queries on premium payments would be by the accounts department of which they were not part of.

Exhibit 2 confirms payment of the balance to first defendant on 7 April 2004. First defendant alleged that it paid that sum over to second defendant. As proof of the payment, first defendant produced a document called BORDEREAU. Mr. Muchakwa argued that this was proof of payment to second defendant. The document is addressed to Global Insurance from Kantharia Insurance Brokers and is titled 'INTIMATION OF MARCH 2004 BORDEREAU'. It was tendered in as exhibit 5. Item 6 thereon refers to plaintiff and the balance of the premium. Whilst Mr. Muchakwa argued that that was proof of payment Mr. Murasiranwa said that was just an intimation of what was to be expected. Proof of payment would be titled 'Payment bordereau'. In any case this could not have been proof of payment as plaintiff had not paid the balance. It is my view that not enough evidence was adduced to show that that sum was paid over to second defendant. That is however as between the defendants and should not prejudice the plaintiff.

QUANTUM

It is common cause that plaintiff insured its motor vehicle with second defendant through first defendant for the sum of $60 000.00 (revalued). In terms of that contract second defendant, in the event of a loss may pay plaintiff the estimate of the value of the motor vehicle as specified in the schedule or the reasonable market value of the motor vehicle at the time of the loss or damage whichever is less. Paragraph 2(a) of section 1of the policy document is quite clear on this when it states that, *inter alia*, '…The Company may at its own

option repair, reinstate or replace the motor car and /or …..may pay in cash the amount of the loss or damage and the liability of the Company shall not exceed the actual value of the parts damaged or lost plus the reasonable cost of fitting and such parts shall in no case exceed the insured's estimate of the value of the motor car including the accessories and spare parts thereon) as specified in the schedule or the reasonable market value of the motor car including accessories and spare parts thereon) at the time of the loss or damage which ever is less.' I did not hear plaintiff to deny that this was a limited value policy. In his evidence Mr. Zisengwe conceded that the policy was indeed a limited value policy. His argument for $100,000,000.00 was thus not based on the provisions of the contract. The plaintiff alleged that 'as a result of the defendants' breach of the insurance contract the plaintiff has suffered consequential damages in the sum of $100 000 000.00 which is the current replacement value of the motor vehicle.' This amendment was only to that extent. It did not go so far as to expunge the initial basis of the claim which was contractual. In his closing submissions plaintiff's legal practitioner argued that it is not unheard of that even where a party is contractually bound to perform certain obligations, should he do so negligently the wronged party may sue both in contract and in delict. Unfortunately counsel could not cite any authority in support of this and, in any case, the suit here was in contract and not delict. The nature of the amendment did not change the nature of the suit at all. Nowhere in the amendment is there any allegation of negligence on the part of the defendants. The basis advanced by plaintiffs counsel for seeking consequential damages are based on what he termed common cause that;

1. That the sum assured is $60 000 000.00 (which is now $60 000.00 revalued).
2. That at the time of the inception of the contract that sum was the pre-accident estimated value of the motor vehicle.
3. That due to the volatile economic environment (which the court was urged to take judicial notice during the trial), the sum of $60 000.00 is, but a tiny fraction of the actual market value or replacement value of such a vehicle.
4. That the first defendant in a letter to the plaintiff acknowledged the premium payment plan and acknowledged liability on behalf of the plaintiff.
5. That had payment of the $60 000.00 been made in 2004 the plaintiff would have been indemnified against his loss.
6. That the refusal to pay was grossly unreasonable in view of the facts.

Counsel for plaintiff argued that in view of the above facts and also of what he perceived to be clear liability the defendants acted wrongfully in repudiating the claim.

The law in this aspect is quite clear. 'Property insurance is a contract for indemnity. The insurer's liability is therefore limited to the 'real and actual' value of the loss suffered by the insured through the happening of the event insured against. It cannot exceed either the amount insured or the amount of the insurable interest; and if it exceeds either or both these items, it must be reduced to correspond with the smaller of them.' See GORDON and GETZ on The South African Law of Insurance 4th edition (SUPRA) at page 247. In cases of limited valued policy which specified the agreed value of the subject matter of the insured therefore the parties are bound by the value agreed to. In the case of *Elcock v Thomson* [1949] 2 ALL ER 381 at page 385 Morris J said "When the parties have agreed a valuation, then, in the absence of fraud or of circumstances invalidating their agreement,, they have made an arrangement by which for better or for worse, they are bound."

In General Principles of Insurance Law by E.R.H. Ivamy 4th edition, at page 228 the author thereof states that 'In the case of a "valued" policy the amount recoverable is fixed by the policy,……..In the case of an insurance upon property, the value of the subject matter may be fixed by agreement and inserted in the policy as the amount recoverable in the event of loss. This valuation is binding, except in the case of fraud or mistake, and dispenses the assured from the necessity of proving the value of his interest, though he still must prove that he has an interest in the subject-matter of insurance'. A valued policy is one which specifies the agreed value of the subject-matter of the insurance. In casu there is no allegation of fraud or mistake. The plaintiff simply argued that by their refusal to pay when he lodged his claim the defendants acted grossly unreasonable and so must be made to pay consequential damages that would enable plaintiff to buy a similar motor vehicle.

From the evidence adduced can it really be said that defendants' refusal to pay was grossly unreasonable? It is my view that there was no such unreasonableness as clearly defendants were entitled to contest the claim as plaintiff had only paid a fraction of the premium by the time of the accident. The contract required a one off payment but for plaintiff's failure to do so that led to first defendant granting an extension of time within which to pay the balance. This not having been an express term of the contract and in fact being contrary to the express provisions of the contract second defendant cannot be said to have been unreasonable in seeking to repudiate the contract. The defendants had an arguable case. I am

of the view that the plaintiff has not made out a case for a claim outside the policy document. The policy document shows the sum insured as $60 000000.00.In terms of that document there are some deductions to be made in the event of a claim as indicated in exhibit 6. The defendants witnesses out lined the deductions as including salvage value @ 30% of the sum assured ,excess applicable in term s of the policy @ 4%of the value. Mr. Murasiranwa confirmed the calculations as per exhibit 6. The calculations were as follows:

Sum insured of the vehicle at the time of the loss……..	$ 60 000.00
Less salvage value @ 30% of the sum insured	$ 18 000.00
	$ 42 000.00
Less Excess applicable in terms of the policy (4% of vehicle value)	$ 2 400.00
Claim amount	$ 39 600.00
Less outstanding premium $3 524.26 less $200.00	$ 3 324.26
Amount due and payable	$ 36 275.74

As it was proved that plaintiff paid the balance of $3 32459, albeit after the accident, it follows that the sum payable to plaintiff is $39 600.00

As between the defendants the issue is who must pay plaintiff. In as far as first defendant acted as agent for second in collecting the premium second defendant cannot be absolved as the principal. Indeed 'where the agent has authority to receive payment of premiums on behalf of the insurers, the effect of the payment is the same as if it had been made to the insurers themselves, and the fact that the premiums thus received by the agent have been misappropriated by him, or have not reached the insurers owing to his bankruptcy, affords them no defence against a claim by the assured upon the contract' (see General Principles of Insurance Law {Supra} at page 208). In the circumstances second defendant is liable as the insurer.

COSTS

In as far as plaintiff has succeeded albeit to the sum as per policy document I am of the view that second defendant's argument for costs on a higher scale cannot succeed.

The plaintiff is entitled to costs on the general scale from both defendants.

Accordingly judgment is entered for plaintiff and against second defendant in the sum of $39 600.00 (re-valued) with interest at the prescribed rate from the date of summons to date of payment in full.

Costs on the general scale against both defendants jointly and severally with one paying and the other to be absolved

Mabulala & Motsi, plaintiff's legal practitioners
Muzondo & Chinhema, 1st defendant's legal practitioners
Scanlen & Holderness, 2nd defendant's legal practitioners.