FORESTRY COMMISSION
versus
CELL INSURANCE COMPANY (PRIVATE) LIMITED
and
PREMIER INSURANCE BROKERS (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
PATEL J

Civil Trial

HARARE, 17 January and 25 April 2013

L. Uriri, for the plaintiff
T. Mpofu, for the defendants

PATEL J: This matter concerns an insurance claim arising from an accident involving one of the plaintiff's motor vehicles. The plaintiff seeks a declaratory order that its insurance cover with the 1st defendant was effective and operational as from 1 January 2009. It further seeks an order for the 1st defendant to meet its claim, submitted on 4 March 2009, within 14 days of judgment.

At the commencement of suit, the plaintiff had also claimed consequential loss arising from the non-use of its vehicle. However, this claim was abandoned at the trial because the relevant documents had not been duly discovered. The summons and declaration were accordingly amended by consent.

The first issue for determination is whether there was a contract of insurance between the parties at the time when the plaintiff suffered its loss. The second issue is whether payment of the premium for the period of insurance was a condition precedent for insurance cover. The final issue is whether the plaintiff's claim was submitted within a reasonable time.

The Evidence

Webster Tendai Choruma is employed as an accountant at the plaintiff's headquarters. He is responsible for the plaintiff's group insurance portfolio. His evidence was as follows. The plaintiff

entered into a contract of insurance with the 1st defendant (Policy No. MFHR000953) brokered through the 2nd defendant, for the period from 1 October to 31 December 2008. Thereafter, following a letter from the plaintiff to the 2nd defendant on 24 December 2008, the insurance policy was extended for a further two months from 1 January to 28 February 2009. This was confirmed by a letter from the 2nd defendant dated 6 January 2009. Subsequently, the plaintiff received an endorsement to the policy covering the renewal period. This was signed on behalf of the 1st defendant on 30 January 2009. The premium of US$4250 for the renewal period was paid on 6 February 2009.

The accident involving the plaintiff's Toyota Hilux (Reg. No. ABE 5753) occurred on 14 January 2009. The witness telephoned the 2nd defendant the next day and followed up with a letter on 16 January 2009 giving notice of the accident. The relevant claim documents, including three quotations for repairs, were then submitted on 4 March 2009. This was because the driver of the vehicle had damaged his right arm and was hospitalised. He was only available to complete the claim form after his release from hospital in late February 2009. On 19 March 2009 the 2nd defendant wrote to the plaintiff repudiating the claim on the grounds that the premium was paid after the loss had occurred and that the claim papers had been submitted after the permissible period of 30 days.

Under cross-examination, the witness was shown several documents and asked to explain them. On 16 January 2009 the plaintiff wrote to its bank in Bulawayo applying for the transfer of foreign currency to renew its motor insurance policy. He stated that the plaintiff had previously made the same application, on 13 January, to its bank in Harare. The police report in respect of the accident was date-stamped 20 November 2008 and shows that the driver paid a deposit fine for driving without due care and attention. He explained that the date-stamp was clearly wrong but conceded that the insurer's consent was not obtained before the admission of

guilt was made. He also accepted that the claim form itself was completed and signed by the driver (Nkomo) on 5 February 2009 but the claim papers were only submitted on 4 March 2009. When questioned by the Court, the witness was unable to satisfactorily explain why he obtained two further quotations for repairs to the same vehicle in November 2009. These quotations were for figures that were less than half the amount of US$28690 originally claimed by the plaintiff.

Charles Makirimani is the Managing Director of the 2nd defendant and has been an insurance broker for 14 years. He testified as follows. In terms of the policy of insurance between the parties, and the endorsement thereto, insurance cover only began after the premium was paid. Similarly, the extension of the policy was also subject to payment of the premium. This was normal practice at that time. Where a claim is submitted, what is required are a claim form, three repair quotations, a copy of the driver's licence and a police report. Under normal circumstances, it should be possible to notify the accident within 7 days and to submit the claim papers within 30 days. This accords with prevailing practice in the insurance industry. In exceptional circumstances, it might take longer to submit the claim. In this case, the delay of 48 days after the accident and 26 days after the claim form was completed was unreasonable. The only inference one could draw is that the plaintiff was waiting for the required foreign currency amount to be reflected in its bank account. The letters of 13 and 16 January 2009 from the plaintiff to its bank, requesting the transfer of foreign currency, were not stamped by the bank and were therefore probably not authentic. In March 2009 the plaintiff submitted three quotations for repairs to the vehicle. The second set of quotations obtained by the plaintiff in November 2009 was never submitted to the 2nd defendant. It was not clear why they were attached to the plaintiff's further particulars filed in May 2010.

Under cross-examination, the witness conceded that the premium of US$4250 received by the defendants related to the full two-month period of insurance. The witness also accepted that the endorsement to the original policy covered the entire period of insurance and was signed by the 1st defendant on 30 January 2009. As at that date, the 2nd defendant was aware that the plaintiff had given notice of the accident on the 16th of January. In turn, the 2nd defendant would have notified the 1st defendant within a week, *i.e.* by the 23rd of January. Both defendants were therefore aware of the accident when the 1st defendant signed the endorsement on the 30th of January.

The Established Facts

As shown by the evidence adduced at the trial, the following facts are common cause. The plaintiff wrote to the 2nd defendant on 24 December 2008 requesting an extension of the original policy of insurance. By letter dated 6 January 2009, the 2nd defendant confirmed the extension of the policy. The accident involving the motor vehicle in question occurred on 14 January 2009. The plaintiff telephoned the 2nd defendant the next day to give notice of the accident. The plaintiff then followed up with a written notification on 16 January 2009 stating that the claim documents would be submitted in due course. Thereafter, on 30 January 2009, the 1st defendant signed an endorsement renewing the policy as from 1 January 2009 to 28 February 2009. At that stage, both defendants were fully aware of the accident *in casu* and of the pending claim. On 6 February 2009, the plaintiff paid the premium of US$4250 for the renewal period. Subsequently, on 4 March 2009, the plaintiff submitted the requisite claim documents. Eventually, on 19 March 2009, the 2nd defendant wrote to the plaintiff repudiating the claim.

Contract of Insurance at Time of Loss

It is evident from the foregoing that, before the accident in question, the original policy of insurance had been extended by the

2nd defendant. The renewal of the policy was confirmed by the 1st defendant after the accident but before the stipulated premium was paid. Thus, subject to what is stated below, it is reasonably clear that there was a contract of insurance between the parties in place at the time when the plaintiff suffered its loss. What is in dispute is whether the obligations of the 1st defendant under that contract were subject to the prior payment of premium by the plaintiff.

Payment of Premium as Condition Precedent for Cover

Adv. *Uriri*, for the plaintiff, makes two differing submissions in this regard. The first is that the condition requiring the payment of premium had already been met under the original policy and did not apply to the renewed policy after it was extended by the 2nd defendant. This is because an insurance contract requires no special form and comes into existence as soon as the parties have agreed on its terms, without any policy having been issued or any premium having been paid. The second is that the 1st defendant agreed to extend the policy with full knowledge that the accident had occurred during the period of insurance. It is therefore estopped from relying on facts entitling it to repudiate, *i.e.* non-payment of the premium. Consequently, it must be held to have undertaken to cover the claim in question. Counsel relies for these submissions on Gordon and Getz: *The South African Law of Insurance* (4th Ed. 1993) at pp. 133-4 and 152.

While there may be some merit in these submissions, they ignore one critical aspect of all contractual relations, to wit, what the parties have actually agreed. As the learned authors themselves explain, at pp. 133-4:

> "Neither the issue of a policy nor the payment of a premium is essential to the conclusion of the contract, unless the parties have expressly or impliedly agreed to the contrary."
> (The emphasis is mine).

The plaintiff's case is founded on the endorsement signed by the 1st defendant on 30 January 2009. This clearly covers the date of the accident in question within the agreed period of insurance. However, the endorsement, which operated to renew the insurance policy, explicitly incorporates and forms part of the original policy. Therefore, it cannot be doubted that it is governed by the provisions of that policy. In other words, the policy as renewed is subject to the same terms and conditions as applied to the original policy. In terms of the preamble to that policy:

> "In consideration of the Insured having actually paid the premium for the period of insurance … the Insurers agree to indemnify the Insured in respect of accident loss or damage occurring during the period of insurance".

Taken in its ordinary and unadorned sense, what this means is that the insured must have actually paid the premium for the period of insurance in order to be indemnified for any loss or damage that occurs during that period. In short, the payment of premium is clearly a condition precedent to the provision of insurance cover.

The fact that the endorsement renews the policy for the entire period of insurance does not assist the plaintiff's case. As was recognised in *Malaba* v *Takangovada* 1991 (1) ZLR 1 (H) at 4-5, a contract of sale subject to as condition precedent that has not been fulfilled cannot be regarded as a sale; no sale exists until fulfilment of the suspensive condition. By parity of reasoning, an insurance contract subject to a condition precedent cannot be enforced before the fulfilment of the condition. After that condition is fulfilled, the contract operates prospectively. In *National Employers' Mutual General Insurance Association Ltd* v *Myerson* 1938 TPD 11 at 15, the court was called upon to interpret a clause similar to the one presently under consideration. It was held that:

> "It is not contended on the appellant's behalf that these documents constitute a contract of insurance, but merely a contract to insure, and if this be correct the so-called premium is the consideration (a) for the promise to insure if the event,

> namely the payment of the premium, takes place and (b) for the subsequent insurance."

Thus, in the instant case, what existed between the parties as at the date of the accident was not a contract of insurance *sticto sensu*. It was essentially a contract to insure subject to the payment of premium by the plaintiff as a condition precedent to the 1st defendant's obligation to indemnify. Moreover, this obligation only materialised once the premium had been paid and then only in relation to any accident, loss or damage that occurred thereafter. It follows that the plaintiff's claim for a *declaratur* and consequent relief cannot be sustained.

In any event, I should add that the relief sought by the plaintiff is questionable on the further ground that the amount it originally claimed in March 2009 was US$28690. This is more than double the amount reflected in the repair quotations that it subsequently obtained in November 2009. This aspect was not satisfactorily explained by the plaintiff's witness in his testimony and not addressed at all by plaintiff's counsel in his closing submissions.

Submission of Claim in Reasonable Time

Although the final issue seems redundant in view of the above conclusion, I think necessary to deal with it for the sake of completeness. In this regard, the undisputed facts are as follows. The accident *in casu* occurred on 14 January 2009. The plaintiff gave notice of the accident by telephone the next day and in writing on 16 January 2009, stating that the claim forms would follow in due course. Coincidentally, on the same day, the plaintiff wrote to its bank applying for the transfer of foreign currency to renew the insurance policy. The claim form was signed by the plaintiff's driver on 5 February 2009. The full premium of US$4250 was paid on 6 February 2009. Eventually, on 4 March 2009, the plaintiff submitted the claim form with the necessary supporting documents.

The relevant conditions incorporated in the original policy are clauses 1 and 12. Clause 1 stipulates that notice in writing of any accident, loss or damage must be given to the insurer as soon as possible after its occurrence. Clause 12 exempts the insurer from any liability after the expiration of 12 months from the happening of the event, unless the claim is the subject of any pending action or arbitration.

It is clear that the policy itself only deals with notification of an accident and not the submission of claim documents. Does this mean, as is contended by Adv. *Uriri*, that once notice of the accident is duly given, the insurer is liable to satisfy any subsequent claim made within 12 months? It seems to me, however, that the relevant case authorities lean heavily against any such contention. The purpose of immediate written notification is to enable the insurer to investigate the matter quickly in order to obviate the perpetration of any fraud or forgery. In this context, the claim itself should be expeditiously lodged within a reasonable period. See *Wamambo* v *General Accident Insurance Co. (Zimbabwe) Ltd* 1997 (1) ZLR 299 (H); *Radar Holdings Ltd & Another* v *Eagle Insurance Co. Ltd* 1998 (1) ZLR 479 (H); *Ndawana* v *Nasho & Others* 2000 (1) ZLR 23 (H).

According to the uncontested testimony of the 2nd defendant's witness, the documents that need to be furnished for the purpose of making a claim are the claim form, three quotations for repair work, a copy of the driver's licence and a police report. Under normal circumstances, in keeping with prevailing practice in the insurance industry, it should be possible to notify the accident within 7 days and to submit the claim documents within 30 days. However, in exceptional circumstances, it might take longer to submit the claim.

In the instant case, having regard to the relative practicability of the steps required, the documents furnished by the defendant could have been obtained and forwarded within two weeks. Instead, they were furnished almost 50 days after the occurrence of the accident in question. The reason given for this delay is that the

driver of the vehicle had fractured his right arm and was only available to complete the claim form after his release from hospital in late February 2009. It seems to me that this explanation tendered by the plaintiff's witness is no more than a tissue of lies. It does not appear in the plaintiff's pleadings and was put forward for the first time at the trial. No plausible explanation was given as to why the claim form could not have been completed or signed by someone else on behalf of the driver. Moreover, the fact that the driver himself completed and signed the claim form on 5 February 2009 utterly belies the allegation that he was hospitalised until late February 2009. Again, the plaintiff's witness was unable to explain why further repair quotations for considerably lesser amounts were obtained over 8 months after the claim papers were submitted. All in all, taking into account all the surrounding circumstances, I am satisfied that the delay in submitting the claim documents was unreasonably inordinate. It follows that the plaintiff's claim was not submitted within a reasonable time.

The plaintiff's reliance on clause 12 of the policy conditions does not detract from this conclusion. That clause is a prescriptive provision which precludes any court action or arbitration beyond the stipulated period of 12 months. It does not assist the plaintiff in advancing its contention that its claim was submitted within a reasonable time.

Disposition

One outstanding issue pertains to the additional defence put forward by Adv. *Mpofu* at the trial. This arises from clause 2 of the policy conditions which prohibits any admission by or on behalf of the insured without the consent of the insurer. It was conceded by the plaintiff's witness that its driver had admitted to driving without due care and attention without obtaining the 1st defendant's consent. Ordinarily, this would operate to disentitle the plaintiff from making any claim.

It is fairly well established that, where a relevant issue of fact or law is not pleaded but is adequately canvassed at the trial, the court is not strictly bound by the pleadings and has the discretion to take it into account in making its determination. However, the exercise of this discretion is always subject to the limitation that any such departure from the pleadings should not cause any prejudice to either party or prevent full enquiry. See *Robinson* v *Randfontein Estates GM Co. Ltd* 1925 AD 173 at 198; *Shill* v *Milner* 1937 AD 101 at 105. In the present matter, an amendment to the Plea at the trial stage, advancing an entirely new defence founded on the driver's admission of guilt, would undoubtedly occasion prejudice to the plaintiff. In any event, having regard to my findings and conclusions on the agreed issues for determination, I take the view that the proposed amendment is superfluous and entirely unnecessary at this stage in the proceedings.

For all of the afore-stated reasons, the plaintiff's claim for a declaratory order and consequential relief cannot succeed. Its only remedy might be to seek a proportional refund of the premium paid in respect of the period for which it was unindemnified. I note that an offer to that effect was in fact made by the 2nd defendant through its letter dated 12 June 2009.

As for costs, there is no reason *in casu* why costs should not follow the cause in the ordinary way. In the result, the plaintiff's claim is hereby dismissed with costs.

Dube Manikai & Hwacha, plaintiff's legal practitioners
Mbidzo Muchadehama & Makoni, defendants' legal practitioners