

CBZ INSURANCE COMPANY (PVT) LTD
versus
REINSURANCE BROKERS INTERNATIONAL (PVT) LTD

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 26 June & 11 October 2017

Civil Trial

T Magwaliba with S Ngwenya, for the plaintiff
P Takawadiyi with R S Ruona, for the defendant

TAGU J: The plaintiff is a corporation registered in terms of the laws of Zimbabwe. The defendant is also a corporation registered in terms of the laws of Zimbabwe. The defendant accepted appointment as a reinsurance agent of the plaintiff whose duties included delivering communications from the plaintiff to its reinsurers. The appointment was effected in terms of Article 21 of the Crop Quota Reinsurance Agreement, signed between the plaintiff and the five reinsurers sometime in May 2012. It was an implied term of the contract of agency that the defendant would deliver to the reinsurers all communication, including insurance returns delivered to it by the plaintiff as soon as it was reasonably practicable to do so after receiving them from the plaintiff. Alternatively, the defendant as the plaintiff's agent owed the plaintiff a duty of care to have delivered the quarterly returns to the reinsurers as soon as it was reasonably practicable to do so after receiving them from the plaintiff.

On 3 July 2012 and 22 August 2012 the plaintiff in terms of the contract delivered to the defendant quarterly returns which showed the amount which each reinsurer would be obliged to pay in the event of any claim being made in terms of the reinsurance agreement. The defendant delivered to the reinsurers the returns delivered to it on 3 July 2012 in terms of the contract of agency but; either in breach of the contract or alternatively, negligently in breach of the duty of care to the plaintiff, failed or neglected to deliver the returns delivered to it on 22 August 2012. Sometime in November or December 2012 the lead reinsurers of the plaintiff in terms of the reinsurance agreement, Grand Reinsurance (Private) Limited rejected a claim for the sum of US\$238 913.99 made by the plaintiff in terms of the reinsurance agreement on account of the non-delivery of the quarterly returns sent to the defendant on 22 August 2012.

As a consequence, the plaintiff paid out to its insured the sum of US\$238 913.99 which amount should have been paid by Grand Reinsurance (Private) Limited in terms of the reinsurance agreement.

The plaintiff is now suing the defendant for damages for the breach of the contract of agency or alternatively delictual damages arising from the breach of the duty of care to have delivered to Grand Reinsurance (Private) Limited the quarterly returns delivered to it on 22 August 2012 in the sum of US\$ 238 913.99; interest at the rate of 5% per annum, the prescribed rate of interest from the date of service of the summons to the date of full payment and costs of suit.

The issues to be decided in this matter were agreed as follows-

1. Whether the defendant failed to deliver to the reinsurers the quarterly returns delivered to it on 22 August 2012?
2. Whether the alleged failure to deliver the quarterly returns was in breach of the contract between the parties or was it negligent?
3. Whether the plaintiff's lead reinsurer rejected the claim made by the plaintiff on account of the non-delivery of the quarterly returns by the defendant as stated above? And
4. What loss, if any, was suffered by the plaintiff as a result of the rejection of the claim by the reinsurers?

At the Pre- trial conference the defendant admitted, in its Summary of Evidence that the documents delivered to it by the plaintiff on 3 July 2012 and 22 August 2012 were the documents commonly referred to as returns in the insurance industry but now wishes to withdraw such admission.

Evidence was led from the plaintiff's sole witness Mr James Mharadze a Principal Officer with CBZ Insurance Company (Pvt) Ltd. He produced documentary evidence as well as giving viva voce evidence. The summary of his evidence was that the defendant failed to deliver to the reinsurers the quarterly returns delivered to it by the plaintiff on 22 August 2012 timeously and as a result the lead insurer Grand Reinsurance (Pvt) Ltd rejected its claim for US\$238 913.99. The plaintiff had to pay out the said sum to its insured, thereby incurring damages to the tune of US\$238 913.99 which it is now claiming from the defendant.

The defendant also led evidence from its sole witness a Mrs Rachel Nyasha Hakutangwi the defendant's Operations Executive. They denied that they were negligent in failing to deliver the returns to the Lead Insurers timeously. Her evidence was basically that the documents delivered by the plaintiff would not have assisted the reinsurer as they were not accounts or

returns in terms of insurance practice. They were not in the correct format. Defendant after advising the plaintiff did not submit the said list waiting to be furnished with a proper return. When it was later submitted other reinsurers honoured the claims save for Grand Reinsurance (Private) Limited who repudiated liability on the basis that the second list had been submitted out of time resulting in plaintiff instituting the present action against the defendant for alleged negligence.

What is not in dispute therefore is that the plaintiff submitted to the defendant what it thought were quarterly returns on 22 August 2012. In terms of the contract between the plaintiff and the defendant, the defendant was obliged to deliver the said returns in the format they were to the insurers for processing and payment of the claims. The defendant in its wisdom or lack of it thought that the documents delivered to them were not in the correct format. They did not deliver the said documents timeously, and when the corrected documents were later given to them it was out of time resulting in one of the insurers rejecting it. It is not in dispute that as a result of the rejection of the claim the plaintiff had to pay out a total of US\$238 913.99 to its clients an amount that should have been paid by Grand Reinsurance (Private) Limited. What is now left is for the court to determine if any, is the liability of the defendant.

The specific duties of the defendant in terms of the insurance policy in this case were set out in Article 21 of the CBZ Insurance Company- 2011-2012 Crops Quarter Share Treat Cover Note at p 31 of the plaintiff's bundle of documents which reads as follows:-

“The recognised intermediary negotiating this agreement, through whom all communications relating thereto shall be transmitted, are specified in the schedule.”

Paragraph 15 to the insurance policy identified Reinsurance Brokers International, Harare, Zimbabwe which is the defendant in this case.

In *Linaerts v JSN Motors (Pty) Ltd & Anor* 2001 (4) SA 1100 (W) at 1109 H-J PORTIEGETOR AJ put the duties of an intermediary as follows:-

“I consider that in our law, as in English Law, the duty to exercise reasonable care and skill in appropriate cases extends to the duty to take reasonable steps to elicit and convey information both from and to the insured. This includes information about the terms of the policy which, if contravened, might leave the insured without cover. It is part and parcel of the brokers' general duty to use reasonable care to see that the insured is covered.”

See also *McNealy v Pennine Insurance Co. Ltd, West Lanc Insurance Brokers Ltd and Cornell* (1978) 2 Lloyd's Rep 18 (CA) and *F W Bollom & Co.Ltd v Byas Mosley & Co. Ltd* (2000) 2 Lloyd's Rep 136 (QB).

It is settled law therefore that an intermediary or broker is the agent of the insured not the insurer. PORTIEGETOR AJ in the *Linaerts* judgment *supra* at 1108 F states the legal position as follows:-

“On general principles it seems clear enough that the position in South African law is that an insurance broker performs a mandate on behalf of the insured. Accordingly, he/she owes the insured a duty to exercise reasonable care and skill in the execution of the mandate.”

In the “*Superhulls Cover’s*” case [1990] 2 Lloyds’s Rep 431 (QB) at 445, the duty of a broker is stated as follows:

“The ordinary function of the insurance broker or other intermediary is to receive instructions from his principle as to the nature of the risk, risks and the rate or rates of premium at which he wishes to ensure, to communicate the material facts to the potential insurances and to obtain insurance for his principal in accordance with the principals instruction and on the best terms available. The liability of an insurance agent to his employer for negligence is comparable to that of any agent. He is bound to exercise reasonable care in the duties which he has undertaken. In no case does the law require an extraordinary degree of skill on the part of the agent but only such a reasonable and ordinary degree as a person of average capacity and ordinary ability in his situation and profession might fairly be expected to exert.”

I agree with the counsel for the plaintiff’s submissions that after considering the pleadings, the documentary evidence and the evidence in court it will be apparent that 3 July 2012 and 22 August 2012 the plaintiff delivered to the defendant quarterly returns which showed the names and hectarage of crops (barley) which the reinsurers were going to insure in terms of the reinsurance policy. The defendant considered that the returns did not meet the industry standards in respect of a return. This was as I said earlier apparent in the evidence of the defendant’s sole witness Rachel Nyasha Hakutangwi. The alleged non-compliance with industry practice was the sole basis upon which the defendant decided not to transmit the returns in respect of 22 August 2012 to the reinsurers. There was no explanation why the returns in respect of 3 July 2012 which were not properly formatted returns were delivered to the reinsurers and delivered timeously.

The lead reinsurer Grand Reinsurance rejected the plaintiff’s claim for the sum of US\$ 238 913.99 on account of the fact that no return had been submitted to it by the defendant for the quarter ending 30 October 2012. It however, paid claims relating to the return submitted to the defendant on 3 July 2012. The defendant through its witness accepted the fact that the return was not submitted with the reinsurers until 8 November 2012. She indicated that the return which was then submitted on 8 November 2012 was a properly formatted return which had

been obtained from the plaintiff after the defendant had given proper advice on how to prepare a proper return which conformed to industry standards.

In this case the quantum of the plaintiff's loss that is the sum of US238 913.99 is not disputed by the defendant. It represents the amount paid by the plaintiff to its own insured customers that is the various farmers which were set out on the insurance returns after risk had eventuated.

In my view, from the foregoing it is evident that the defendant cannot escape liability. It was bound in terms of the reinsurance policy to transmit documents to and from the reinsured, that is, the plaintiff. It admitted that it had failed to do so timeously. The explanation given by Rachel Nyasha Hakutangwi was that the defendant did not want to be used merely as a "post office box". The defendant therefore took a deliberate decision not to comply with its duties in terms of the contract. It was not the duty of the intermediary to ensure that the documents submitted to the reinsurers complied with the insurance contract. This is so on the basis of judicial authority and the attitude of Grand Reinsurance, the reinsurer in issue in this matter. Clearly the defendant was mistaken as to its duties. The judgment of *PFC Food CC v Three Peaks Management [Pty] Ltd* (5573/2009) (2012) ZAKZDHC 57, per SISHI J in para 89 states that:-

"Again, in Lapperman's case the court said the following in paragraph (44):
"A broker does not, and cannot be expected to control the business of the insured. Even the specialist broker's duty does not encompass the duty to ensure that the insured complies with his obligations under the policy. He is not the insured's keeper. His duty, as a specialist broker, is discharged when he has done everything reasonably necessary to draw the attention of the insured to obligations imposed by the policy. It is the insured's responsibility to ensure compliance.""

In casu, the defendant was therefore not obliged to reject the returns as not conforming to industry practice or standards. It could not reject the returns on account of failure to comply with the requirements of the reinsurer. It lay with the reinsurer itself to reject the returns. That is why all claims made under the insurance policy relating to the return of 3rd July were met by the reinsurers, notwithstanding the alleged no-compliance with industry practice or standards by deciding not to forward the returns to the reinsurers, the defendant breached its duty. It exposed the plaintiff to the potential of the reinsures rejecting liability. Indeed, when risk eventuated, the lead reinsurer rejected liability. I say so because the lead reinsurer's attitude affirms that it could have accepted the returns, defective as they may be. In its letter dated 5

November 2013 which was produced by the defendant, which I will quote in greater extent Grand Reinsurance (Private) Limited said-

“16. The requirements of the quota share treaty are that the reinsured must submit to the reinsurers quarterly returns within 30 days of the end of the quarter. The return or declaration is a list of the farmers who were insured and should contain limits for each farmer. This is a critical piece of document because it is what insurers and reinsurers use to compute premiums particularly as premiums are paid at the end of the bally crop farming season. The sequence of events in this particular case as follows:-

1.6.1 The first quarter ran from 1 April 2012 to 30 June 2012. Your clients, acting as brokers for the reinsured, submitted this return on 4 July 2012. While the return was defective in that it did not show the sum insured per each farmer, our client did not take issue with the defect and does not do so now.

1.6.2 The second quarter was to run from 1 July 2012 to 30 September 2012. The return and premium for this quarter was due on or before 30 October 2012.

1.6.3 According to our client, in its discussion with the reinsured, the reinsured sent the returns for the second quarter to your client on or around 22 August 2012 for onward transmission to the reinsurers, including our client. However your client for reasons unknown to ours, failed or neglected to send the return to our client until 8 November 2012. The return only came together with claims that had occurred.

1.6.4 Our client settled the claims in respect of the farmers who were on the return for the first quarter and repudiated liability in respect of the losses relating to farmers that were on the late return but on the first quarter return because the reinsured, through its agent, your client, had failed to submit the return on time.

1.6.5 Our client has not up to now received any premiums for the farmers list on the second quarter return but not listed on the first quarter return.

1.7 It is the failure to submit the second quarter return to our client by your client on time that has now resulted in CBZ insurance making a claim against your client for professional negligence in the course of their business as the reinsured’s brokers.” (the underlining is mine for emphasis)

In the circumstances, it is evident that if the returns, defective as they may have been, had been submitted to the reinsurance company, Grand Reinsurance, timeously by the defendant, the plaintiff’s claim in terms of the Crop Quota Share Treaty would have been met. The plaintiff would not have suffered loss as it did. The plaintiff paid out to its insured clients without recompense from the reinsurer which was the whole purpose of seeking reinsurance. The defendant was therefore negligent in the manner it carried out its mandate. The defendant is therefore liable to pay damages to the plaintiff in the sun of US\$238 913.99.

IT IS ORDERED THAT

- (a) The defendant shall pay to the plaintiff the sum of USD238 913.99 being damages arising from the breach of an agency agreement or alternatively delictual damages arising from a breach of the duty of care to have delivered to Grand Reinsurance (Private) Limited the quarterly returns delivered to it on 22 August 2012.
- (b) Interest at the rate of 5% per annum from the date of service of the summons to the date of final payment; and
- (c) Costs of suit.

Atherstone & Cook, plaintiff's legal practitioners
P. Takawadiyi & Associates, defendant's legal practitioners