

VERGYPRO (PVT) LTD
versus
OPTIMAL INSURANCE COMPANY (PVT) LTD

HIGH COURT OF ZIMBABWE
CHAREWA J
HARARE, 12 June, 12 July & 16 August 2017

Trial

Mr O.D. Mawadze, for the plaintiff
Mr D Ochieng, for defendant

CHAREWA J: Plaintiff issued out summons against the defendant claiming \$110 250 being the total price of seed maize from 63 hectares of the crop covered by an insurance policy issued by the defendant.

Upon partial destruction of the crop by a veld fire, defendant denied liability on the insurance policy on the grounds that, firstly, indemnity in terms thereof had lapsed prior to the loss being incurred; and secondly, and in any event, the premium was never paid.

The facts and background

The agreed facts are that plaintiff completed a Maize Insurance Proposal Form with the defendant which relevant terms were that

- i. Plaintiff's maize field of 75-80 hectares would be insured by defendant against fire and field to floor risks till delivery to market at Seedco Zimbabwe (Pvt) Ltd.
- ii. The premium on the policy would be paid by Seedco Zimbabwe (Pvt) Ltd upon the crop being delivered thereto.
- iii. The insurance period or crop cover would run until 31 May 2011.

It was further common cause that the partial destruction of the crop occurred on 4 July 2017. As at that date the premium had not been paid, and remains unpaid to date. In fact, because of the fire, the salvaged crop was not of a quality acceptable to Seedco, and was thus

never delivered to enable it to pay the premium from the proceeds as envisaged in terms of the stop order instruction given to it by plaintiff.

The dispute

Plaintiff asserts that 63 hectares of its crop was destroyed by fire. At a contract price of \$875/tonne, from an average yield of 2 tonnes per hectare, plaintiff expected to harvest 126 tonnes giving rise to the claim of \$110 250. Further, plaintiff argues that it is known that the acceptable moisture ratio of seed maize of 11% could only be attained in August-September. Therefore after allowing for 30 days for harvesting, grading, shelling and fumigation, the marketing could only be in October-November. Thus, the indemnity envisaged in the policy could not have expired on 31 May 2011, as the policy was intended to cover field to market risks. Further, the premium could only have become due during the marketing window. Consequently the plaintiff remained indemnified under the insurance policy.

For its part, defendant asserts that insurance policies are always time-bound, with a specific period of cover specified. In this case, the period was only up to 31 May 2011. Therefore regardless of whether the policy stated that cover was to be from field to market, as at 4 July 2011, there was no cover. Further, and in any event, insurance liability only stems from congruent premium payments. In this case, the premium was never paid, even if it is accepted that it became due during the marketing period. Therefore, defendant could not possibly be liable for plaintiff's loss, as indemnity is predicated upon payment of premiums.

The issues

The issues that were thus distilled from the parties' positions were the following:

- i. Whether or not the plaintiff paid the insurance premium to the defendant?
- ii. Whether or not the defendant is liable to indemnify the plaintiff for its loss?
- iii. Whether the quantum of the plaintiff's loss is the sum of \$110 250 or any lesser amount?

Plaintiff's evidence

The plaintiff called only one witness, Vimba Shayanowako, its co-founder and director who was the person directly involved in the insurance transaction. He led evidence from which the agreed facts are gleaned. However, he went on to state that he received e-mail communication confirming cover till delivery to the market, (see page 1 of Exh.1). To him,

this e-mail meant that plaintiff was covered until delivery to Seedco, or at least the end of the seed maize season in September, despite the express provision in the Policy Schedule that cover was only up to 31 May 2011 (page 19 of Exh. 1).

And since the premium was only payable after delivery to Seedco in terms of the stop-order facility set up by plaintiff, the non-payment of premium as at the time of loss was immaterial to plaintiff's claim.

In so far as the proof of quantum of claim is concerned, the witness testified that this was based on the loss of the crop on 50 hectares of land x yield per hectare x Seedco price. This was obviously 13 hectares less than claimed in the summons.

Under cross-examination the witness confirmed that the premium was not in fact paid as no delivery was made to Seedco. He further confirmed that the insurance contract at page 10-19 of Exh 1, including its schedules, is the document relied upon to make the claim. He also confirmed that in terms of the insurance contract, cover expired on 31 May 2011.

He however asserted that he relied on the email communication, but could not initially say whether plaintiff came to court to enforce the email or the policy. Ultimately, he stated that plaintiff sought to enforce the email correspondence as read with certain clauses of the policy which supported the claim.

He confirmed that Seedco was plaintiff's agent for purposes of paying the premium, and that it failed to so pay since no delivery was made to it, and neither did the plaintiff. However, on redirect, he shifted the obligation to pay the premium to Seedco, even in the absence of delivery of seed maize to it.

He acknowledged that clause 1 of the policy subjects any claim to the proviso that the premium must be paid before any claim may be paid out.

Finally he confirmed that the claim of destruction of 63 hectares of seed maize was incorrect as the assessment report done by Seedco crop specialist which stated that 54.53 hectares were destroyed by fire was accurate. However, the witness did not explain why he testified that plaintiff's loss was based on the destruction of 50 hectares.

Absolution from the instance

Upon the conclusion of the witness's testimony, the plaintiff closed its case, whereupon defendant applied for absolution on the grounds that:

- i. No evidence had been led upon which the court might find for the plaintiff, in that:

- a. On a claim for specific performance on a contract, the plaintiff failed to prove the existence of the contract and its compliance therewith in that the plaintiff did not fulfil its obligation to pay the premium. Such failure to pay the premium amounted to a repudiation of the contract.
- b. The contract itself did not entitle the plaintiff to relief as the cover expired on 31 May 2011, while the peril occurred on 4 July 2011.
- c. Finally, plaintiff could not cherry-pick which clauses to abide by and to base its claim on, and certainly could not rely on correspondence which contradicted the insurance contract.

The law

For an application for absolution to succeed, it is trite that it must be shown that no evidence had been led upon which the court might find for the plaintiff.¹

And for a plaintiff to withstand absolution on a claim for specific performance on an insurance contract, the plaintiff must be able to show in its evidence that the contract does in fact exist and is still valid at the time the peril sought to be indemnified occurred. Secondly, the plaintiff must show that the terms of the contract entitle it to the relief sought. And thirdly, plaintiff must show that it has complied with the terms of the contract and has fulfilled or is ready to fulfil its own obligations in terms thereof.²

Analysis

In the instant case, it is evident on the face of it that the contract only existed up to 31 May 2011. As at 4 July 2011, there was no valid insurance contract between the parties. Reliance by the plaintiff on email correspondence as to the duration of cover can at best be described as misguided, more so since, no amendments were sought to the insurance contract or implied in the email correspondence. Therefore as at 4 July 2011, regardless of the wishes of the plaintiff to be covered up to October-November 2011, no such cover in fact existed. It behove on the plaintiff to read the terms of its contract and ensure that they accorded with its wishes, which it did not do.

¹ See *Supreme Service Station 1969 (Pvt) Ltd vs Fox and Goodridge (Pvt) Ltd* 1971 (1) RLR 5 (A) per BEADLE CJ. See also *Walker v Industrial Equity Ltd* 1995 (1) ZLR 87 SC at p 94 and *Mbundire v Buttress* 2011 ZWSC 13)

² See *Forestry Commission v Cell Insurance (Pvt) Ltd & Anor* 2013 (1) ZLR 332 (H); *Mabvuramiti v Altfin Insurance Company* 2013 (1) ZLR 182 (H); *Lasagne Investments (Pvt) Ltd v Highdon Investments (Pvt) Ltd & Ors* 2010 (2) ZLR 296 @ 302D-303A

In the circumstances, I am in complete agreement with the plaintiff that it is not the function of the court to re-write contracts for the parties or to read any implied or tacit term into them.³ Against the clear provision in the contract that cover runs until 31 May 2011, I cannot read into it that since the seed maize season runs until September, cover was therefore intended to run until then.

It is my view therefore that plaintiff seeks to be indemnified for losses which occurred after the contract ceased to exist.

Moreover, the indemnification was predicated on the payment of premiums. Clause 1 of the policy specifically provides that indemnification would only be availed if premiums were paid. A diligent plaintiff, once it noticed that the assessment report showed that no produce was deliverable to Seedco, and therefore that Seedco could no longer implement the stop-order instruction, would have immediately made arrangements for the premium to be paid. This would have been in accord with a party which believed that cover extended beyond 31 May 2011.

On the contrary, the position of the plaintiff, according to its witness's statement is quite untenable, suggesting as he does, that regardless of non-delivery of produce, Seedco had the obligation to pay the premium. His testimony further suggests that even if the premium was never paid, plaintiff being under no obligation and having no desire to pay, defendant was obliged to indemnify plaintiff. Clearly this is a wrong position to take. Seedco's obligation only arose upon it being in receipt of plaintiff's seed maize. In the absence of that, plaintiff, as the procurer of insurance cover, was obliged to make alternative arrangements to pay its premiums. It cannot be reasonably justified for the court to order indemnification on an insurance policy where the insured has no intention to pay its premium.

I will not belabour the point as to whose agent Seedco was. Plaintiff's own witness testified that Seedco was plaintiff's agent. He went further to inform the court that plaintiff in fact arranged a stop order with Seedco. Clearly Seedco was acting on plaintiff's instruction to pay the premium. In any event, plaintiff had the obligation to pay the premium. Therefore it makes no sense for defendant to appoint an agent to discharge plaintiff's obligation.

The court takes note that this was an insurance contract were the parties had agreed that the premium could be post-paid. However, the plaintiff's challenge is that it made no

³ *Kundai Magodora & Anor v Care International* SC 191/13.

attempt, and still makes no attempt to pay the premium. I am thus in agreement with the defendant that plaintiff's failure to comply with the terms of the agreement up to this date amounts to an abrogation of the contract.

In the premises I find that plaintiff has not led any evidence that it paid the premium or intends to do so, and that therefore the defendant ought to indemnify it. Consequently, there is no basis upon which the court might find in plaintiff's favour such that the defendant should be obliged to be put on its defence.

While the defendant has not addressed this issue in its application for absolution, it seems to me too, that there has not been any proper quantification of the plaintiff's claim. The summons seeks payment of \$110 250 predicated on the loss of 126 tons from 63 hectares. The Seedco loss report which plaintiff's witness accepted as accurate quantifies the loss as 102.52 tonnes from 54.53 hectares. The witness himself asserted that loss was based on the destruction of 50 hectares.

Plaintiff made no attempt to amend its claim as stated in the summons, nor did it try to align the discrepancies in the quantification of its loss. Therefore, even on this aspect, there is improper quantification upon which basis the court might also have granted absolution.⁴

Disposition

Accordingly, absolution is granted with costs.

Mawadze & Mujaya, plaintiff's legal practitioners
Atherstone & Cook, defendant's legal practitioners

⁴ (See *Seti Lucas Shumba v Imbayago & Glens Removal Storage (Pvt) Ltd* HH 14-05).