HH 426-24

Ref : HCHC 331/23

SEBATA INVESTMENTS (PVT) LTD
versus
OLD MUTUAL LIFE ASSURANCE COMPANY ZIMBABWE LIMITED

HIGH COURT OF ZIMBABWE
COMMERCIAL DIVISION
CHIRAWU-MUGOMBA J
HARARE, 11, 12, 17, 18, 19, 20 and 23 September 2024

G. R. J Sithole, for the plaintiff
R. Moyo, for the defendant

TRIAL CAUSE

CHIRAWU-MUGOMBA J: In considering this matter of insurance, I kept reminding myself of the words of R.H Christie, in *Business law in Zimbabwe,* (Juta and company Limited, 1998, 2016 edition at page 221), as follows,

> " The object of insurance is to protect people from financial disaster. They buy this protection by the payment of a moderate price in exchange for a promise to pay an agreed amount if or when the disaster occurs. The seller of this protection is known as the insurer, the buyer the insured (or assured in life insurance), the price is known as the premium and the disaster as the risk."

In *casu,* the plaintiff seeks payment of the sum of USD$495 593 on a contract of marine insurance entered into between the parties on the 5th of April 2022. Initially, the plaintiff had sued Minerva Risk Solutions (private) Limited as the second defendant. After a case management meeting, the claim against Minerva was withdrawn, thus effectively leaving one defendant. The policy provided for cover against any loss, hijack and theft. In pursuance of the contract, the plaintiff paid a total sum of USD$ 5 204 and was issued with a certificate of marine insurance under policy number 1656 X 5197171. On the 4th of May 2022, the plaintiff claimed to have suffered loss in that some insured goods being television sets, sound bars and projectors were lost due to a hijacking incident in the Republic of South Africa, while en route to Zimbabwe. The plaintiff lodged a claim with the defendant through Minerva. In response, the defendant engaged three loss assessors to conduct an investigation. The plaintiff averred that the defendant has since failed, refused or neglected to pay the

claimed sum. The plaintiff thus seeks specific performance for the insurance contract, interest plus costs of suits on a legal-practitioner to client scale.

On its part, the defendant pleaded as follows. It contested the assertion that the plaintiff had acquired goods allegedly hijacked or stolen. It contested the claim that the goods were hijacked or stolen. The defendant, while accepting that the plaintiff had lodged a claim, averred that not all the necessary documents in support of the claim had been submitted. Further that after the claim was submitted the services of three loss control adjustors had been secured and that it repudiated the claim after various inconsistencies were unearthed. The defendant denies that the plaintiff had established an insurable interest to the alleged stolen goods and hence denied liability. All the ingredients outlined by Christie are there, the insured, the insurer, payment of the premium and the risk.

At the close of a case management meeting convened on the 20th of June 2024, the sole issue identified for trial related to the liability of the defendant to pay the amount claimed by the plaintiff for the alleged stolen and hijacked goods.

At the trial the evidence of Wayne Farai Chakauya, (hereinafter 'Chakauya') a director of the plaintiff was led to buttress the claim against the defendant. Evidence for the defendant was led through Kudakwashe Rufudza (hereafter 'Rufudza) who is a claims executive of the defendant, Hilary Tabva Toto (hereinafter ' Toto') an assessor with Golden Gates Risk and loss assessors since 2006 and Michael Patterson (hereinafter 'Patterson'), a director of Patterson and Associates, a firm based in South Africa, since 1981. The evidence largely mirrored the summaries already filed of record. From this a clear picture emerged. It is that the plaintiff and the defendant entered into a marine insurance contract in terms of which the defendant insured various goods including electronics, i.e TV sets and sound bars. The alleged hijacking was reported to the South African Police who conducted an investigation. Part of the documents submitted by the plaintiff included a statement of the driver of the alleged hijacked truck. In support of a claim under the policy, the insured was to submit the original policy or certificate of insurance, original copy shipping invoices together with shipping specification and /or weight notes, original bill of lading and /or other contract of carriage, survey report or other documentary evidence to show extent of the loss or damage, landing account and weight notes at final destination and correspondence exchanged with the carriers and other parties regarding their liability for the loss or damage. The plaintiff

submitted its claim and after engaging loss control adjustors, the defendant repudiated the claim.

A contract of insurance is based on the concept of insurable interest, a term that has been defined in a plethora of cases. To that end, I can do no better than to cite a passage relied upon by MAKONI J (as she then was) in *KDV FOAM MANUFACTURERS (PVT) LTD versus ZIMNAT LION INSURANCE COMPANY LIMITED,* HH-233-17 as follows,

> "Looking at the matter from another angle, insurable interest has been defined in *Brightside Enterprises (Pvt) Ltd* v *Zimnat Insurance Ltd* 1998 (1) ZLR 117 (HC) where it was held
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> > "Thus insurable interest is very widely defined to cover instances in which the insured is so circumstanced in respect of a thing as to produce a detriment or prejudice to him should risks insured against occur (in this regard, see the definition in *Lucena* v *Craufurd* (1806) 2 Bos & PNR 296, HL, quoted with approval by ER Hardy Ivamy in *General Principles of Insurance Law* 4 ed at p20)"

An insurable interest has been found to exist in respect of a husband who insured the property of his wife which was under his management and from which he derived a benefit. This was the decision in *Littlejohn* v *Norwich Union Insurance Society* 1905 at 374 in which WESSELS J, after examining a number of court decisions in England, South Africa and America, said at 380-381:

> "The principles to be derived from these cases appears to be this: if the insurer can show that he stands to lose something of an appreciable commercial value by the destruction of the thing insured, then even though he has neither a *jus in re* nor a *jus ad rem* to the thing insured, his interest will be an insurable one"

See also *Refrigerated Trucking Pty Ltd* v *Zive NO (Aegis Insurance Co Ltd , Third Party)* 1996 (2) 361 (T) at(372-H) where the following was stated,

> "It seems then that in our law of indemnity an insurable interest is an interest which relates to the risk which a person runs in respect of a thing which , if damaged or destroyed , will cause him to suffer an economic loss or, in respect of any event , which it happens will likewise cause him to suffer an economic loss. *It does not matter whether he personally has rights in respect of that article, or whether the event happens to him personally, or whether the rights are those of someone to whom he stands in such a relationship that, despite the fact that he has no personal right in respect of the article, or that the events does not affect him personally, he will nevertheless be worse off if the object is damaged or destroyed, or the event happens."*

In, *casu,* a critical issue is whether or not the plaintiff stood or stands to suffer loss on the alleged theft and hijacking of the goods in question, also recalling the defendant's contention that there was no loss suffered at all or that it was a stage -managed hijacking.

The repudiation itself is critical to the issue of onus. It is trite that courts lean in favour of upholding contracts. See *Book vs. Davidson,* 1981(2) ZLR 365 at 369 F. Both parties were in agreement that the defendant had repudiated the contract. It is also trite that the onus is on the insurer who alleges fraud- see *Wamambo vs. General Accident Insurance Co (Zimbabwe) Ltd,* 1997 (1) ZLR 299(H).

The question then becomes one of whether or not the defendant has discharged its onus of proving that the claim by the plaintiff is fraudulent. In other words, is the defendant justified in repudiating the claim? The defendant placed reliance on reports by two experts, Toto and Patterson. According to the evidence of Rufudza, when the claim was submitted, the defendant engaged Toto to carry out an independent investigation to verify the existence of the subject matter, collect all claim requirements, verify documents and their authenticity. The report appears from the amended consolidated record from page 171. In that report as confirmed by Toto, the overall conclusion was that, based on the investigations conducted, the proximate cause, that is, the 'hijack' though covered by the policy, seemed to have been staged and potentially fraudulent and hence the recommendation to repudiate pending further investigations. Under paragraph 14.0 of the report, the assessors' comments were captured under two heads, that is, 'suspicions' and 'recommendations'. Under suspicions the assessor stated that their suspicions were raised during the interviews when the insured indicated that they had not yet started business and yet they had ordered stock of a high value. They did not have a shop or employees. With that kind of stock, one would have expected that such ground work as obtaining shops or offices would have already been done. On recommendations, the assessor made the following. That the proof of payment for the goods needed confirmation with the bank in South Africa. The insured should submit their Zimbabwean company registration documents, certificate of incorporation and CR6 and 14 forms. The assessors were still awaiting a copy of the license of the driver of the alleged hijacked truck. Preliminary investigations had indicated that Chakauya owned two companies in South Africa and it might be prudent to get information from the registrar of companies there and lastly it might be prudent to engage the two banks that were used for the transactions to verify who the directors were. Following this report, the defendant engaged a Mr Miller based in South Africa to conduct further investigations. However, allegedly the plaintiff was not cooperating. As per Rufudza, rather than close the case, the plaintiff was given the benefit of the doubt hence the engagement of Mr. Patterson, who is based in South Africa.

Toto testified further that when they requested for an invoice for purchase of the goods from Chakauya, he gave them a customs declaration accompanied by proof of payment from F.N.B, a bank in South Africa. This payment reflected that the goods were purchased using a DIKANA account in favour of CAMDEN group. Both companies as confirmed by Chakauya belong to him. Essentially, the goods were not purchased by the plaintiff but by and though two companies, both of which were controlled by Chakauya.

The evidence presented reveals that two years after the initial investigation, Toto was again approached by the defendant to conduct another investigation. The first one was limited in that it was only carried out locally. The second one was conducted in South Africa. This was after a case management meeting where I had directed that the plaintiff furnishes the defendant with proof of purchase of the items. The assertion by the plaintiff was that the goods had been purchased from an entity known as Reddington Group. The report appears from page 344 of the amended consolidated record. Toto went through meticulously, over the report and gave key highlights. The submitted proof of purchase by the plaintiff indicated that Reddington was operating from 25 Japan Crescent, Roodepoort, Gauteng. According to the companies and Intellectual Property (CIPC), the company was operating from number 82 Capricon Road, Lonehill, Sandton, Gauteng. Toto physically went to the two places. He discovered that 25 Japan Crescent was a residential area and not a business premise. There was no proof of physical business activity at the premises. Pictures of the place were attached to the report as well as a google map. 82 Capricon Road, Lonehill, is also located in a residential area. There was a family found at the premises that had been resident there for six years. Pictures of the place and a google map were attached to the report. Part of the proof submitted by the insured included an invoice from Reddington and proof of payment ostensibly from FNB. Under the loss adjusters opinion, the assessor gave the following comments. Both the addresses in Japan crescent and Capricon road are residential areas with no links to Reddington group of directors. The said company had been deregistered in South Africa. The FNB proof of payment related to one being made from DIKANA Consolidated group (Pvt) Ltd making a payment into CAMDEN Group. Given the plaintiff's assertion that the goods were purchased from Reddington, the payee details should be for Reddington and not CAMDEN. Sources from FNB tried to run the reference number provided but it was not found in the system. The assessor suspected that the submitted proof might be an edited document. An attempt to verify the payment using FNB APP yielded no results as there was no verification. A screenshot of the process was attached to depict this state of affairs. Some discrepancies were noted, for instance, for an authentic payment, the figures were depicted starting with ZAR but the one appearing on the submitted proof by the plaintiff only started with the figures without the ZAR. The overall conclusion by Toto is that the insured has not provided any form of proof that they had been in possession of the stolen/hijacked goods as the submitted documentation did not support this position. Following this report, and after the convening of a case management meeting, the defendant once again contracted Golden Gate Risk and loss assessors led by Toto to conduct another investigation. The specific terms

of reference were for them to obtain an official response from F.N.B on the authenticity of the submitted proof of payment, to investigate when Reddington Group was deregistered and to confirm the serial numbers of the television sets from LG Electronics Harare and South Africa and Samsung South Africa. The report appears from page record 359. According to the investigation, Reddington Group was deregistered in November 2021. The assessors also opined that the prices of the television sets were in line with dealers prices. However, no serial numbers had been availed by the plaintiffs. Only model numbers were availed.

The report by Patterson appears from page 308. In his evidence, he confirmed the contents of the report and explained the process that was conducted to reach the conclusions made. In his evidence, he noted that the plaintiff failed to submit documentation that relates to the movement of goods between South Africa and Zimbabwe. Critically, there should be a corresponding list from customs in South Africa and the Zimbabwe boarder authorities in relation to the goods. The commercial invoice supplied relates to a company based in India. The address given, that of 25 Japan Crescent relates to a property in a residential area. There was no documentation from the plaintiff in relation to where the goods were collected and when they had been purchased. Payments for the goods reflected that it was DIKANA that paid for the goods from CAMDEN. There was no evidence as to how the South African supplier had been paid. Patterson had no mandate to approach F.N.B. He noted that the address given of the supplier was false. A visit to SAMSUNG in South Africa revealed that the prices shown on the invoices supplied by the plaintiff were above the expected inter trade prices. A check with LG Harare revealed that the supplied serial numbers were fraudulent. Further that no entity except LG Zimbabwe is allowed to import LG televisions into the country. Patterson contacted one Samantha an employee of the transporter who was said to be in possession of some of the documents. It was noted that the depot where she was based, was used as a place to store gas and she claimed that the documents were unavailable, a mere five months after the alleged transaction. On movement of the truck that was said to have transported the goods, Patterson testified as follows. That the transporter used had no satellite tracking system which is a standard requirement for most insurers so as to be able to track movement of the vehicle. When such report is given, an exercise is conducted of physically driving the route taken and making observations. The assessor had to rely on the statement given to the police by the driver. It was noted that the movements did not match. From where the truck is said to have commenced its trip, there are service stations along the way. However, the driver moved about one and a half hours away. One of the service stations on

the alleged route used had been closed for two years. From this alleged route, it took two hours for the driver to travel a distance of fifteen kilometres. The driver had also indicated that the truck had been loaded on the 1st of May 2022 which is unusual given that it is a nationally recognised workers day holiday and it is unlikely that the truck was loaded on that day. After loading, the truck allegedly suffered a breakdown and was taken for repairs but no proof of this was availed. Another red flag from information obtained from the South African police, was that when the truck was located, the doors were locked and padlocks were intact. This does not normally occur in a hijacking. Though it is appreciated that a polygraph test is not admissible, one was administered on the driver and he failed it. The investigating officer of the South African police anti-hijacking unit had not been satisfied with the conduct of the driver and his version of events. In paragraph 22 of the report Patterson reached the following conclusions. That the load may never have existed at all. That the claim was fraudulent and the insured had not realised that perhaps the principles would have the matter investigated in South Africa. Further that the load may have been obtained by nefarious means and the insured wished to stage a hijacking. That if the load indeed existed, the intention perhaps was to off load the goods and sell them on the South African market.

On the other hand, the court is faced with the single person evidence of Chakauya, a director of the plaintiff. Upon the alleged incident, he testified that he travelled to South Africa to the scene of the hijacking. Prior to that he had informed the Minerva agent. He observed that the goods were not in the truck. A report was lodged with the Benoni branch of the South African police. He provided to the insurer all the documentation listed in the policy document including shipping invoices. DIKANA purchased the goods on behalf of the plaintiff through CAMDEN because funds were available in South Africa. The relationship between the plaintiff and the two companies is that they all belong to Chakauya as a shareholder and director. There is nothing amiss in this transaction. When goods were purchased from Reddington, they were in a warehouse. The plaintiff then contracted Lucid Freight, a company that facilitates cross border movements between South Africa and Zimbabwe. Regarding payment of the goods, this was done online and the proof of purchase is different from the normal banking platform.

The question that I am called upon to answer is this? Has the defendant discharged the onus on it to show that the claim is fraudulent? Both Toto and Patterson stated their expertise and experience in the industry of insurance loss assessment. Both have a long

history in this sector. In my view, they fall under the category of expert witnesses as provided for in the Civil Evidence Act [Chapter *8:01*] as follows.

PART V
OPINION EVIDENCE
22 Expert and lay opinion evidence

(1)The opinion of a person who is an expert on any subject, that is to say, of a person who possesses special knowledge or skill in the subject, shall be admissible in civil proceedings to prove any fact relating to that subject which is relevant to an issue in the proceedings.
(2)…….
(3) A court shall not be bound by the opinion of any person referred to in subsection (1) or (2), but may have regard to the person's opinion in reaching its decision.

In my view, the defendant cannot be faulted for repudiating the claim as presented. The law allows me to have regard to the evidence of an expert in making my decision. While Chakauya was evasive, Toto and Patterson gave their evidence well. Their demeanour was impressive. They did not seek to exaggerate and the reports actually indicate that these were based on their opinion. The reports all raised red flags some of which were very similar in nature. I find the reports very persuasive and authentic. Nothing of substance came out of the cross examination of Toto and Patterson over the reports. The contents of the reports remained intact. I have also taken into account the evidence that came out of the cross examination of Chakauya who was very evasive. The trail of the payment for the goods raises red flags. It is that DIKANA paid money to CAMDEN for purchase of goods ostensibly for the benefit of the plaintiff. However, Chakauya testified that if the goods had been sold in Zimbabwe, the money would ultimately have gone to DIKANA. There was no evidence of the plaintiff having funded DIKANA for the purchase of the goods. There was no evidence to show CAMDEN paying Reddington for the goods. Chakauya changed tune and stated that the payments to Reddington were actually from third parties that owed CAMDEN some money and they had simply been advised to pay to Reddington. Chakauya himself never personally went to Reddington to identity the goods to be purchased because he 'feared' going to a crime ridden area. He was not there when the goods were allegedly packed into the truck. The goods on the packing list and Reddington do not tally. On the CAMDEN group invoice it states 181 TV sets and on the Reddington one, it states 161 television sets. Between the alleged date of loading being the 1st of May 2022 and departure of the truck on the 4th of May 2022, there is no indication of how the safety of the goods was ensured. Assuming that the goods were indeed loaded into the truck, there is a period of three days that has not been accounted for in terms of what was happening to the goods. If indeed the truck was loaded as claimed, anything could have happened to them between the 1st to the

3rd of May 2022. The 'star' witness who could have shed light and rebutted the assertions in the reports is the driver of the truck. However, inexplicably, his evidence was not placed before the court. Nor was the evidence of those present when the truck was loaded presented to the court. I say this mindful of the fact that the onus lies on the defendant. However, the standard of proof, that on a balance of probabilities does not change. The evidence from the cross examination, in my view buoyed the assertion by the defendant that the claim was fraudulent. Having read the report of Patterson many times as Chakauya testified, and also the Toto reports on why the defendant had repudiated, the court did not have the benefit of any reports to the contrary.

I had occasion to look at the case of *Brightside Enterprises (PVT) LTD vs. ZIMNAT Insurance Co LTD,* 1998 (1) ZLR 117 (H) at . CHINHENGO J had occasion to deal with the issue of when insurable interest is established. He opined as follows,

> "I have expressed my opinion that I am entirely in agreement with the proposition that the requirement of insurable interest is but only a consideration in the real inquiry whether or not the agreement in question is a betting or wagering agreement. I am unable therefore, with all due respect, to agree with McCall J's persuasive argument that loss or damage to the party concerned is the determinant as to whether or not that party has an insurable interest. In my view, an insurable interest can only be determined with reference to the time that the policy of insurance is taken out. It is at that time that the insured perceives a risk against which he wishes to guard and the insurer issues a policy of insurance on the basis of the risk contemplated. The loss may occur or it may not occur, save in life assurance. But at the time of entering into the contract of insurance, the insured's interest is to preserve the thing from which he derives a benefit or advantage and to cover himself against prejudice that may arise as a result of damage or loss of the thing. The insured at that moment would invariably be interested in the preservation of the thing in its entirety and in the condition in which it has utility value to him. His interest in the preservation of the thing insured need only be sufficient to meet the test laid down in Littlejohn's case supra that he would stand —to lose something of appreciable commercial value."

At the time the insurance policy was taken, I accept the opinions stated in the Toto and Patterson reports that at best, no goods were ever purchased and at worst that the hijacking seemed to have been stage-managed. The reports are clear and self -explanatory. In my view, the defendant has discharged the onus of proving that the plaintiff had no insurable interest in the goods at the time of taking the insurance policy. The reports were not rebutted. Chakauya could not shed light on the progress of the investigations by the South African police of the hijacking. He did not seem to have actively pursued the matter. As I have indicated, under cross examination, Chakauya was evasive. The evidence in the reports support the assertion that the goods never existed at all or if they did, the intention was to stage manage a hijacking and make a claim. I conclude by way of the words of WILLES J as quoted in MacGillivray & Parkington On Insurance Law 8 ed at para 1926 (also cited in the *Wamambo* case (*supra)* in the case of *Britton v Royal Insurance Co* (1866) 4 F & F 905, that

> *"……The law is, that a person who has made such a fraudulent claim could not be permitted to recover at all. The contract of insurance is one of perfect good faith on both sides, and it is most*

> *important that such good faith should be maintained. It is common practice to insert in fire-policies conditions that they shall be void in the event of a fraudulent claim and there was such a condition in the present case. Such a condition is only in accordance with legal principle and sound policy. It would be dangerous to permit parties to practice such frauds and then, notwithstanding their falsehood and fraud to recover the real value of the goods consumed. And if there is wilful falsehood and fraud in claim the insured forfeits all claim whatever upon the policy".*

The import of the *ratio* is that a person or entity that submits a fraudulent claim as the plaintiff attempted to do cannot benefit and forfeits any claim whatsoever.

In his closing submissions, Mr. *Moyo* prayed for an order of costs on a punitive scale. In my view, the conduct of the plaintiff has been less than honourable. It is one seeking to induce payment of almost half a million United States dollars through a clearly fraudulent claim. The plaintiff sought not only to mislead the defendant but the court. It had to be compelled to produce documents through the case management meetings rather than be forthcoming from the start. I refer specifically to the proof of purchase of the goods from Reddington.

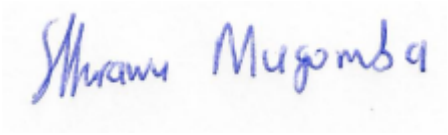
In the *Wamambo* matter, MALABA J(as he then was) reached the following conclusion,

> *"I have also considered whether to dismiss the action or grant judgment to the defendant company. Dismissal of an action is an absolution from the instance. In that case the plaintiff could take fresh proceedings without having to face the plea of lis finita. The defendant company bore the onus of proof on both issues that decided the matter. It successfully discharged the onus. More importantly the defendant company exposed the fraud in the plaintiff's claim. There are no prospects of another action being successfully sustained against the defendant in the circumstances. The plaintiff does not deserve a second bite at the cherry as it were. The proper judgment in this case ought to be judgment for the defendant with costs. See also Vink's Estate v New Zealand Insurance Co (1905) 22 SC 470 at 474; Assigned Estate Amod Cassim v London Assurance Corp (1924) 45 NLR 6; Morris v Northern Insurance Co Ltd supra p 306. Judgment is therefore granted to the defendant, with costs on the legal practitioner and client scale".*

I cannot express it more eloquently than that.

DISPOSITION

1. Judgment is granted in favour of the defendant.
2. The plaintiff shall pay costs on a legal practitioner to client scale.



Hungwe Samkange Attorneys, plaintiff's legal practitioners
Gill, Godlonton and Gerrans, defendant's legal practitioners