TAWANDA HWARIVA

versus

TRISTAR INSURANCE COMPANY ZIMBABWE PVT LTD

HIGH COURT OF ZIMBABWE

BERE J

HARARE, 23 & 28 March 2011, 1 & 6 April 2011 and 14 November 2012

**Civil Trial**

*S. Mugadza*, for the plaintiff

*P. Takawadiyi*, for the defendant

BERE J: At the conclusion of this trial the following factors were found to be common cause.

On 27 February 2009, the plaintiff insured three motor vehicles with the defendant under comprehensive cover. The three motor vehicles included a Nissan Double Cabin bearing registration number 699-074 M which was insured for a sum of US$10 000-00 (ten thousand dollars).

Two weeks into the insurance period, the plaintiff alleged he was involved in an accident and proceeded to file a claim in terms of the insurance policy.

The plaintiff’s claim was lodged with the defendant on 23 March 2009 and in that claim the plaintiff sought to recover the full replacement value of the vehicle since the vehicle was said to have been damaged beyond repair.

The defendant repudiated the claim on the basis that the plaintiff had not made a full disclosure on the motor vehicle allegedly involved in the accident. The defendant also alleged in its letter of repudiation that it was not satisfied with the genuiness of the plaintiff’s claim and averred that the whole scheme was calculated to defraud the defendant

Aggrieved by the stance taken by the defendant, the plaintiff swiftly proceeded to issue summons against the defendant claiming the sum of US$10 000-00 which was the extent of the insurance cover.

In its plea to the claim, the defendant basically re-stated the position as articulated in its letter of repudiation to the plaintiff.

At the pre-trial conference that was held on 28 January 2010, the parties signed a joint pre-trial conference which identified the issues for referral of matter to trial to be as follows:-

1. Whether or not or about the 15th of March 2009, the plaintiff was involved in an accident at corner Coventry Road and Charring Cross in Workington Industrial Area, Harare.
2. Whether at the material time the plaintiff’s motor vehicle was insured with the defendant cover.
3. Whether or not the vehicle in question was damaged beyond repair.
4. Whether or not the defendant is liable, if so the quantum thereof.

THE EVIDENCE

This matter must be decided on the strength of the evidence of the three witnesses who testified as well as the documentary evidence tendered in these proceedings.

THE PLAINTIFF’S TESTIMONY

The plaintiff gave evidence to confirm him having taken comprehensive insurance for his three motor vehicles which included the vehicle under scrutiny in these proceedings. He testified that this cover was taken on 27 February 2009.

The plaintiff gave a fairly detailed account of how his motor vehicle was involved in a serious accident at around 0400 hours in the morning of the 15th of March 2009 after it had allegedly hit a pothole which was covered with water causing one of the wheels to deflate thereby causing him to lose control of the vehicle which in turn tendered him unconscious.

The plaintiff went on to tell the court that he later regained consciousness at Parirenyatwa Hospital where some good samaritan advised he had picked him at the scene of the accident and rushed him to hospital. He told the court that he requested this unknown ‘philanthropist’ to assist by reporting the accident at the police station whilst he remained in the queue seeking treatment at the hospital.

It was the plaintiff’s further uncontroverted evidence that having seen that the queue was not moving he abandoned it and called a friend who is a doctor who came and picked him up from Parirenyatwa Hospital and took him to his surgery where he concluded that other than bruises he had not sustained any serious injuries. After treatment and discharge the plaintiff went home and then to Mbare Police to report the accident via the scene of the accident to assess the accident. At the scene he observed the motor vehicle has sustained extensive damages and organized its removal from the scene to avoid exposure to the harsh weather conditions and criminal elements.

It was the plaintiff’s further evidence that the police witnessed the mechanics removing the vehicle from the accident scene and recorded the necessary documents at the scene before the motor vehicle was towed to the plaintiff’s place, viz, Plot 2363 Dovedale Lane, Glen Lorne, off Chishawasha Road,

The plaintiff advised the court that his motor vehicle had been assessed to be beyond economic repair hence his claim for the full insurance value of it.

The defendant sought to deny liability through the evidence of its claims manager, Grace Ntuli whose evidence mainly centred on the procedure followed by her company in insuring vehicles.

She told the court that after her company suspected that their clients were insuring damaged vehicles to the detriment of his company, from 31 January 2009 they started on pre-inspection of the vehicles to be insured before they gave them appropriate values. The witness, however conceded that the plaintiff’s vehicle was not subjected to pre-inspection before it was insured. She speculated that the plaintiff may have been advised of the need for pre-inspection.

She agreed under cross-examination that the information on exh 1(a) was consistent with the vehicles insured by the plaintiff and shifted from her position in evidence in chief that the plaintiff had been advised for the need for a pre-inspection before insurance cover was taken.

The witness conceded that indeed her company had received a premium for the plaintiff’s motor vehicles which included the one forming the subject matter of these proceedings.

The witness sought to deny liability of the defendant by alleging *inter alia*, that the plaintiff had stated in the claim form that someone and not him had made a report to the police. She said she considered this to be material to the extent of rendering the insurance contract voidable.

The second witness for the defendant, Josephat Sammie gave his designation as a risk assessor with a degree in mining engineering.

The witness told the court that after seeing the extensively damaged vehicle belonging to the plaintiff, he proceeded to the scene of the accident alone, made and noted certain observations.

Of significance to this witness was his admission that he had not been privileged to see the plaintiff’s vehicle before it was comprehensively insured.

The witness further confirmed that the plaintiff’s insured vehicle was a complete write off. He however speculated that the accident was not consistent with what he claimed to have seen at the scene of the accident. Ironically this witness did not himself witness the accident.

The witness explained in great detail the value of pre-insurance inspection which is basically to curtail fraudulent claims as some vehicles can be insured with damages unknown to the insurer.

There was a further concession made by the witness when he stated in his evidence in chief that it was difficult in some cases to distinguish between damages caused by an accident after the vehicle has been insured and those damages that existed prior to insurance particularly where such vehicles have not been subjected to pre-insurance inspection.

The bulk of the witness’ evidence was devoted to justifying that the plaintiff’s vehicle had pre-insurance damages as evidenced by among other things, body filler which he theorised about, as well as different paint shades on the vehicle.

The witness speculated that in his belief the vehicle had been involved in an accident elsewhere and then moved to the scene of the accident.

The witness further advised the court that he was a mining engineer by profession but had attended courses in what he termed risk fraud management.

ANALYSIS OF THE EVIDENCE

The plaintiff’s story that his motor vehicle was involved in an accident was well told and confirmed by non other than the second witness for the defendant in the sense that indeed he saw the motor vehicle and concluded that it was a complete write off.

In my view in the absence of clear evidence the court could not accept the speculative indication by the second defendant’s witness that the vehicle must have been involved in an accident elsewhere and then taken and planted onto the scene of accident. Such averment is certainly not reliable and it must not be used to deny the plaintiff the desired relief.

The plaintiff clearly explained that his vehicle had no pre-accident record filed by the insurers and that the damages were as a result of the accident after it had been comprehensively covered.

There was a stout effort particularly by the 1st witness for the defendant to deny that the plaintiff had not sought a quotation let alone insured his motor vehicle yet there was overwhelming evidence to the contrary. The dithering of the first defendant’s witness on this point did not portray her in good light. What emerged through her testimony was her determination to ensure that the plaintiff’s claim was unfairly repudiated.

That the plaintiff’s motor vehicle was involved in an accident was further confirmed by the fact that the police found the vehicle at the scene of the accident.

Even more revealing is that the police’s report tallied in material respects with the explanation given by the plaintiff.

What the court found to be unconvincing was the stout effort by the second witness to try and convince the court that an accident follows a certain pattern. Those who are more familiar with accidents know for a fact that it is not always possible to explain some accidents like one would explain a mathematical formula. Strange and inexplicable things often happen in an accident.

The theories put forward by the second defendant who did not witness the accident must certainly not be afforded great weight if juxtaposed with the clear evidence of the plaintiff.

In conclusion, it must be a very gullible insurance company which shows much enthusiasm in receiving a premium for an unseen or unexamined motor vehicle but is quick to raise all sorts of defences when a claim for the insured motor vehicle is lodged with it.

The defendant had a natural obligation thrust upon it take elementary precautions to guard against possible misrepresentations by the plaintiff by insisting on pre-inspection of the plaintiff’s motor vehicle before accepting a premium for it.

It was clearly a monumental risk for the defendant to blindly enter into a contract with the plaintiff without ascertaining the state of the vehicle to be comprehensively insured. The defendant, with its eyes wide open lost the opportunity to adequately protect itself. The same enthusiasm it demonstrated in blindly accepting the plaintiff’s premium must be the same enthusiasm it ought to have demonstrated in accepting liability because it was extremely reckless in the manner it entered into a contract with the plaintiff.

Other than the purely combined speculative evidence of the defendant’s two witness (both of whom did not witness the accident and could not have denied its occurrence) who could not reasonably controvert the story told by the plaintiff, there was no tangible evidence presented to me to deny the plaintiff the amount of claim in the summons which accords well with the insurance which he had taken for his motor vehicle.

For the defendant to start arguing now after the event that the plaintiff had over insured his motor vehicle, when the defendant had happily accepted the plaintiff’s premium for US$10 000-00 would be to encourage unjust enrichment or fraud on the part of the defendant. I find no legal basis to reduce the claim from US$10 000-00 to US$6 000-00 as suggested by counsel for the defendant in her closing submissions.

Consequently, I am satisfied on a balance of probabilities that the plaintiff has established his claim.

It is ordered as follows:-

1. That the defendant pays the sum of US$10 000-00 being the sum assured on the insurance policy for the plaintiff’s damaged motor vehicle.
2. That the amount shall attract interest at the prescribed rate from the date of judgment to the date of payment in full.
3. That the defendant shall pay costs of suit.

*Madanhi, Mugadza & Co.* plaintiff’s legal practitioners

*P. Takawadiyi & Associates*, defendant’s legal practitioners