ALPHA ABIOT MOYO
versus
ALLIANCE INSURANCE COMPANY (PVT) LTD

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 13, 14, 15 & 16 February and 21, 22 & 26 March 2018

Civil Trial

B. Diza, for the plaintiff
R. Jambo, for the defendant

ZHOU J: The plaintiff's claim is for payment of US$247 704.01, together with interest thereon at the prescribed rate from the date of summons to the date of full payment, and costs of suit on the legal practitioner and client scale. The claim is in respect of loss suffered by the plaintiff as a result of the destruction of some of his tobacco crop by hailstorm and windstorm and by a fire. The loss suffered was insured by the defendant, an insurance company, in terms of an agreement of insurance. The claim is contested by the defendant on the ground that it was absolved from indemnifying the plaintiff for the loss by reason of the plaintiff's failure to pay the premium in terms of the contract. The defendant's case is that payment of the premium was a condition precedent to the liability of the defendant to indemnity the plaintiff for the loss. The defendant also put in issue the quantum of the loss suffered by the plaintiff.

The plaintiff gave evidence himself. His evidence was that the premium for the insurance was to be paid by stop-order. He signed the necessary stop-order form on 11 November 2013. The insurance cover which he was given by the defendant was for the 2013 / 2014 tobacco crop. The stop-order form was given to the defendant's representatives who were to take it to the Tobacco Industry Marketing Board (hereinafter referred to as TIMB). The stop order deduction was to be effected on the proceeds from the sale of the tobacco in 2014. The agreed premium was US$14 300.00. The cover was effective from 11 November 2013. The plaintiff's evidence was that once

he had signed the stop-order form he could not revoke it. Only the defendant could cancel it. When he lodged his claim for the loss occasioned by the damage to his tobacco crop initially by wind and hailstorm and later by a fire he was advised that no deduction had taken place and, therefore, the premium had not been paid. This was so notwithstanding the fact that on all the times when there was damage to the tobacco the defendant's employees visited the plaintiff's farm and undertook an assessment of the loss. However, the defendant became evasive when the plaintiff sought information on their assessed loss. That was before he was told that his claim could not be met.

The defendant led evidence from two witnesses. These are Jasper Manyika, its Account Executive, and Solace Marembo who is also its employee. The evidence of these two witnesses was that the defendant did enter into an insurance contract with the plaintiff. The terms of the contract were captured in writing in a memorandum. They both confirmed that the defendant signed a stop-order form which was presented to the TIMB for actioning. Upon realising that the premium money had not been deducted from the plaintiff's money as agreed upon, Solace Marembo made inquiries with TIMB who confirmed that the stop-order deduction had not been made. No satisfactory reason was given for the failure to deduct premium money from the defendant's proceeds. The witness wrote a letter seeking to re-register the stop-order. No deduction was also made from the proceeds of the sale of the plaintiff's tobacco which followed after that instruction to TIMB to re-register the plaintiff's stop order.

The plaintiff suggested that the failure to deduct the premium through the stop-order could be attributable for the defendant which wanted to use the nonpayment of the premium to avoid its contractual obligation to indemnify the plaintiff for the loss. The plaintiff stated that only the defendant could cancel the stop-order or reduce the amount to be paid through the stop-order. That is indeed the position of the law as set out in s 11 of the Farmers Stop-Order Act [*Chapter18:11*]. The plaintiff did not lead any evidence to prove the allegation that the defendant took steps to frustrate the deduction of the premium. In any event, the conduct of the defendant in seeking to re-register the premium is inconsistent with allegations being made against it. The plaintiff could have called employees of TIMB to explain what exactly happened to the stop-orders. The onus is on the plaintiff to prove its allegation.

The plaintiff submitted that TIMB was an agent of the defendant. No evidence was led to prove the allegation that TIMB was an agent of the defendant. The Act in terms of which the plaintiff registered his stop-order does not appoint TIMB as an agent of the insurance company. In fact, contrary to the plaintiff's assertions, the farmers stop-orders are registered with the Registrar of Farmers stop-orders. Section 7 of the statute provides as follows:

> "1. Any person wishing to register a stop order shall submit the stop-order to the Registrar on the form and in the manner prescribed.
> 2. Subject to this Act, the Registrar shall, as soon as may be, register such stop order in the register and on any certificate of registration.
> 3. Stop-orders shall be registered in the order in which they are received by the Registrar.
> 4. Not later than three days after the registration of a stop-order the registrar shall in the manner prescribed forward a certificate of registration to the addressee, the holder and the farmer. Such certificates shall be in the form prescribed and shall include particulars of all prior registered stop-orders binding the same crop."

The office of the Registrar is a statutory one. The Registrar is not an agent of the defendant. The plaintiff as the party with the obligation to pay the premium was therefore enjoined to check with the registrar why the premium was not deducted from the proceeds of the sale of his tobacco. The fact that the defendant took the stop-order form to the TIMB did not absolve the plaintiff of his obligation to ensure that the premium was paid. The insurance contract in any event explicitly states that "the insurers shall not be liable for non-payment of premiums." A contract of insurance is one in which valuable consideration is a requisite. The premium, as stated by Getz *et al*, "is the consideration required of the insured in return for which the insurer undertakes its obligations under the contract Getz on the South African Law of Insurance 3rd Edition p 181."

An insurance policy is to be construed according to the same principles as are applicable to commercial contracts generally see *Lion of Zimbabwe Insurance Co Ltd* v *Tabex (Pvt) Ltd* 1993 (2) ZLR 112 (S) at 117B.

It was submitted on behalf of the defendant that payment of the premium was a condition precedent to the liability by it for any loss suffered by the plaintiff in respect of the insured risk. Reference was made to the "conditions precedent" under clause 1 of the "General Conditions", and to clause 6 under the same head which states: "the indemnity provided herein is subject to the grower having paid his premium for the insurance provided." But the sentence which follows immediately after that qualifies the statement, by recording that the insurers agreed that the plaintiff would pay his premium by way of a "Prescribed Cost Order which will be lodged against

the proceeds of the crop." Quite clearly, therefore, it was the agreement of the parties that the premium would only be paid in 2014 when the tobacco was sold. The cover was not therefore suspended pending payment of the premium, as long as the premium was going to be paid in terms of the contract. If the parties intended that there would be no cover until the stop-order deduction had taken place then the contract would have stated so. Parkington states that:

> "…. The condition that it (the insurance policy) shall not be in force until the premium is paid is probably not in itself sufficient to exclude all liability for loss happening after the execution or delivery of the policy and before payment of the premium. If insurers desire to avoid all risk of having to pay upon such a loss they must either delay execution … of the policy until the premium has been paid or else insert the less ambiguous provision that they shall not be liable in respect of the loss happening before the premium is paid." M Parkington & N. legal-Jones, MacGillivras & Parkington on *Insurance Laws 8th ed* p. 894

The proviso referred to in the last sentence of the above passage would, of course, be meaningless *in casu* given that the stop-order deduction would have taken place after the sale of the tobacco in which case there would be nothing to insure. Be that as it may the facts of this case present a unique dimension upon which the matter can be disposed of. It is common cause that the premium ought to have been paid when the tobacco was sold and a deduction was to be effected on the proceeds of the sale. That did not take place. Even after the effort by the defendant's employee to re-register the stop-order, no deduction took place. There is evidence that there were some sales of the plaintiff's tobacco which took place after that re-registration. The failure to pay means that the plaintiff failed to perform his obligation in terms of the contract.

More significantly, even after realising that no deduction had taken place on the stop-order, the plaintiff made no effort to pay the premium. The summons in this case was issued in January 2017, almost three years from the time that the premium ought to have been paid. Even as he issued the summons the plaintiff was aware that he had not paid the premium. Not only has the premium not been paid; but also it has not been tendered in the summons or even in the evidence of the plaintiff or in the closing submissions. The plaintiff, in short, does not consider that he is obliged to perform obligations in terms of the contract.

This is a contract in which the principle of reciprocity applies. There should be an exchange of performances. The court cannot order specific performance by the defendant in circumstances where the plaintiff has not only not yet performed, but has also not tendered to perform. The essence of the principle of reciprocity is to create the presumption that in any bilateral contract the

common intention is that neither should be entitled to enforce the contract unless he had performed or is ready to perform his own obligations. See *Beitbridge-Bulawayo Railway (Pvt) Ltd* v *Commercial Union Insurance Company of Zimbabwe* 2008 (1) ZLR 207 (S) at 208E – F.

In view of the failure by the plaintiff to pay the premium and his failure to tender the same, this court cannot order specific performance by the defendant.

In the result, the plaintiff's claim must be, and is hereby dismissed with costs.

Mhishi Nkomo Legal Practice, plaintiff's legal practitioners
Jambo Legal Practice, defendant's legal practitioners