KDV FOAM MANUFACTURERS (PRIVATE) LIMITED
versus
ZIMNAT LION INSURANCE COMPANY LIMITED

HIGH COURT OF ZIMBABWE
MAKONI J
HARARE, 24 November 2016 and 5 April 2017

**Stated Case**

*F Girach,* for the plaintiff
*T Mpofu,* for the defendant

MAKONI J: At a pre –trial conference held in this matter, the parties agreed to proceed by way of stated case. The agreed facts are as follows;

1 The plaintiff is KDV FOAM MANUFACTURERS (PRIVATE) LIMITED, accompany duly incorporated according to the laws of Zimbabwe, who carries on the business of, inter alia, the manufacture of mattresses.

2 The defendant is ZIMNAT LION INSURANCE COMPANY LIMITED, a company duly incorporated according to the laws of Zimbabwe and carrying business of providing insurance

3 The plaintiff has its business operation at Lytton Road Workington Harare (the premises) and from time to time and at least since 2009 secured insurance with Defendant.

4 At no time was the plaintiff asked to or required to fill in a proposal form. The policy was secured directly with the defendant by the plaintiff. The defendant's representatives did however inspect the Premises wherafter a premium was fixed by the defendant. The premiums were duly paid by the plaintiff.

5 On or about 11 August 2013 a fire broke out at the Premises causing severe damage.

6 As at the date of the fire the policy of insurance was fully paid up and in full force and effect. Following the fire, a claim was made of the defendant by the plaintiff in terms of insurance contract.

7 The defendant has since paid the plaintiff for the loss suffered by it and occasioned by the said fire for assets (in terms of machinery), stocks and loss of profits. The instant matter relates solely to the claim for damage to the immovable property.

8 A claim was made by the plaintiff in respect of the damage to the immovable property by the plaintiff. By way of letter dated 20 March 2014 the defendant repudiated liability in respect of the claim made damage to the immovable property.

9 It is common cause that the plaintiff was never asked whether it was the owner of the Premises or whether it was merely a lessee, nor did the defendant request a copy of the lease.

10 It is agreed that the damage to the Premises will cost more than $1 million to repair and that the limit of liability in terms of Annexure A is $1 million

11 The insuring clause in terms of Annexure A read as follows:

> "*All Tangible Property in Zimbabwe owned, leased, held in trust or on commission for which the insured are legally responsible including employees personal effects if insured…*"

12 The sole issue that arises for determination is as follows:

12.1 On a proper interpretation of the insuring clause aforesaid as read with clause 7 (a), 8 (a) and 12 (a) of the lease, is the plaintiff entitled to compensation for the damage caused by fire.

13 The parties are agreed that in the event of this Honorable Court answering the issue in the affirmative, then judgments must be entered in terms of the summons. If this Honorable Court finds that the policy has been properly repudiated, then the plaintiff claim must be dismissed.

14 I will start by setting out the relevant clauses that will assist in the determination of this matter.

The insurance clause provides that,

> "All Tangible Property in Zimbabwe owned, leased, held in commission for which the insured are legally responsible including employees personal effects if insured…."

Clause 7 (a) provides:

> "The tenant shall make goods and pay any damage caused to any part of the leased premises or the building by the tenant, his employees, licensees or invitees and he shall not mark, drive-in-nails, screws or hooks or in any way deface the wall, windows, window frames, doors, door frames, ceilings, floors or any other part thereof by reason of his improving anything to and from the premises."

Clause 8 (a) provides:

> "The premises are leased in the condition it is at the commencement of this lease and the tenant shall, subject to any defects or deficiencies reported in terms of clause 8 (b) hereof, during the period of lease keep the same, together with fixtures and fittings therein contained in a clean and sanitary condition and in good order and repair. At the termination of this lease, the tenant shall return the said premises to the landlord in the same state of repair and condition it way at the beginning of the lease"

Clause 12 provides,

> "The lessor shall keep the leased premises for their full value under a comprehensive policy taken out with a reputable insurance company and shall make known to such insurance company the use to which the leased premises will be put."

It is the plaintiff's position that the repudiation by the defendant is bad in law in that the policy has been incorrectly applied by the defendant and in particular the expression 'legally responsible as it appears in insurance clause'. The defendant has clearly misunderstood the legal responsibility imposed on the plaintiff in terms of the lease agreement. The legal responsibility assumed by the plaintiff in terms of the lease agreement is to return the premises to the landlord in the same state of repair and condition that it was in at the beginning of the lease. The insurance clause captures the risk and therefore the policy attaches.

The defendant's position is that no claim as against the defendant could arise from the common cause facts as stated in the stated case. In terms of clauses 7a, 8a, and 12a of the lease agreement, the plaintiff was not legally responsible to pay for the destruction of the building. Plaintiff had no insurable interest in the building. The obligation to insure the building lay with landlord.

The sole issue for determination is,

On a proper interpretation of the insuring clause aforesaid as read with clauses 7 (a), 8 (a) and 12 (a) is the plaintiff entitled to of the compensation for the damage caused by the fire.

I must point out, at the outset, that what is in issue, before me, is the destruction of the leased premises caused by the fire.

What I am being asked to do in this matter is to interpret the contract of insurance as it relates to plaintiff's lease agreement. The parties are agreed on the law relating to the interpretation of documents. According to the golden rule of interpretation, words used by the parties to a contract are given their ordinary meaning unless this leads to a clearly unintended absurdity. The point was made in *Madoda* v *Tanganda Tea Company Ltd* 199 (1) ZLR 374 (SC) at 377 where SANDURA J applied the approach in South Africa to the interpretation of written contracts where he stated:

> "As JOUBERT JA said in *Coopers and Lybrand and Ors* v *Bryant* 1995 (3) SA 761 (A) at 767 D-F:
>
> The matter is essentially one of interpretation. I proceed to ascertain the common intention of the parties from the language used in the instrument. Various canons of construction are available to ascertain their common intention at the time of concluding the cession. According to the 'golden rule' of interpretation the language in the document is to be given its grammatical and ordinary meaning unless this would result in some absurdity, or some repugnancy or inconsistency with the rest of the instrument."

See also *Metro International (Pvt) Ltd* v *Old Mutual Property Investment Corporation (Pvt) Ltd & Anor* 2007 (1) ZLR 408 (SC) at 413-414 F

In other words where the literal interpretation is clear as in *casu* then nothing more needs to be done than simply expound the literal meaning of the provisions.

The Insurance clause can be broken down as follows;

> "All tangible property in Zimbabwe
> **owned,**
> **leased,**
> **held in trust**
> **or on commission**
> for which the insured (plaintiff) are legally responsible………" (My emphasis).

What does the term 'legally responsible' in the context of the contract of insurance and relevant clauses of the lease agreement mean.

Mr *Girach* for the plaintiff contended that the property insured, *inter alia*, is leased property for which the insured are legally responsible. It is the legal responsibility of the plaintiff to return the premises in good order that is covered by the insurance contract. The premises were

damaged by fire. The Plaintiff requires compensation to enable it to meet its legal responsibility to restore the premises in good order to the landlord. It is neither here nor there that the landlord was required to take out an insurance policy in terms of the lease agreement. In accordance with freedom of contract, the plaintiff was entitled to take out such policy as it deemed fit.

Mr *Mpofu* submitted that the insurance clause sets out the length and breath of the insurance contract and the parties are confined thereto. The property insured falls into two categories. The first one relates to property owned by the insured which property yields a loss directly to the insured upon its damage. The second is property where the insured has an interest which makes the insured liable upon destruction of the property. He further submitted that the property insured under the insurance contract is property whose destruction causes actual loss to the plaintiff.

As regards the relevant clauses in the lease agreement, Mr *Girach* contended that legal responsibility arises out of clause 8 (a) of a lease in that the plaintiff has suffered a loss in that it has now to repair the premises in order to meet its obligations in terms of the clause. The plaintiff therefore had an insurable interest in the premises as it is legally responsible to return the premises to the lessor in the same order and condition that it received it in.

Mr *Mpofu* submitted that in terms of clause 7 (a) the plaintiff has the responsibility to make good any damage caused by it. He contended that the plaintiff does not claim nor have caused the damage. In respect of clause 8a he submitted that it is headed “Interior”. The clause is aimed at the plaintiff’s conduct and does not regulate that which happens outside of the plaintiff’s control. Its application is subject to clause 12 (a) which obliges the lessor to keep the premises for their value under a comprehensive policy. In the event of destruction it is the lessor’s insurer that must pay.

As is clear from the sole issue, the question that has to be determined is whether the plaintiff is legally responsible for the destruction to the premises. Put differently does the plaintiff have an insurable interest in the building?

Mr *Girach* submitted that the words responsibility and liability do not mean the same thing. One can be legally responsible to perform a particular act but if that act is performed properly then one is not legally liable in respect of the act. In terms of the insurance clause, the property that was destroyed by fire is covered by the insurance contract. It is property that was

leased by the plaintiff and in respect of which it was legally liable. The legal responsibility arises from clause 8a whereby the plaintiff had a legal responsibility to return the premises to the landlord in the same state of repair and condition as it was at the beginning of the lease.

Mr *Mpofu* submitted that the word responsibility and liability mean the same thing. He relied on the meaning of the words given in *Blacks Law Dictionary 8th ed.* In terms of clause 12 (a) of the lease agreement, the plaintiff is not responsible to the lessor for the damage caused by the fire. The obligation was upon the landlord to take out insurance cover.

In *Blacks Law Dictionary* **(***supra*), the primary meaning of the word 'responsibility' is identified as liability. The following observation is then made,

> "To say someone is legally responsible for something often means only that under legal rules he is liable to be made either to suffer or to pay compensation in certain eventualities."

The two words therefore have the same meaning.

The plaintiff argues that it had a legal responsibility to restore the building in the state it was in when it took occupation. It relies on clause 8 (a). To my mind, clause 8 (a) is a standard maintenance clause found in lease agreements where a leasee is expected to use the property with the same amount of care as a *bonus pater familias* would use his own property. A breach of such a duty by the leasee will give rise to normal contractual remedies such as cancellation of the lease. See G. Bradheld and K Lehmann, *Principles of the law of Sale and Lease* 3rd ed p 162. Such a maintenance clause cannot be relied on by a landlord in the event of destruction of leased premises. As was rightly pointed by Mr *Mpofu,* clause 8a is headed INTERIOR suggesting that its application would be limited to damages to the interior of the premises.

Further clause 8 (a) governs the conduct of the plaintiff in relation to the lease agreement. The plaintiff does not point to any conduct, on its part, that caused the destruction of the building.

The above clauses should be read together with clause 12 (a) which places an obligation on the landlord to keep the leased premises for their value under a comprehensive policy of insurance. In terms of this clause, if there was to be any damage or destruction of the leased premises, the cover taken by the landlord would cover such.

My view is that if it was the intention of the contracting parties to use clause 8 (a) to cover destruction of the building, there would have been no need to include clause 12 (a). The

fact that the agreement contains those two separate and distinct clauses support the defendant's contention that in terms of the lease agreement, the plaintiff is not legally responsible to pay for the destruction caused by the fire to the leased building. This obligation falls squarely on the landlord's insurers. The plaintiff cannot and could not have suffered any loss in the circumstances.

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

> "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."*

Can the plaintiff be said to stand to lose something of an appreciable commercial value by the destruction of the building. I would want to agree with Mr *Mpofu* that the plaintiff does not stand to suffer any loss as a result of the damage caused by the fire to the building.

It is settled in our law that an insurable interest is a *sine qua* non for the validity of an insurance contract. In *Old Mutual Fire & General Insurance Company of Rhodesia (Pvt) Ltd* v *Springer* 1963 (2) SA 324 (SR) it was held;

> "Mr Christie submitted that lack of insurable interest in the Roman–Dutch law is not fatal to the validity of an insurance contract, although he quoted no authority which directly supported any such proposition. On the contrary, the South Africa cases seem to assume that an insurable interest is necessary in an insurance contract." For example, see ***Littlejohn*v *Norwich Union Insurance Society, 1905 T.H.374; Steyn* v *Malmesbury Board of Executors and Trust and Assurance Co, 1921CPD 96.***
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> Gordon, in his well-known text book, ***South African Law of Insurance, says at p 42,***
>
> > **'***This requirement of insurable interest is fundamental to all insurance, whether it be indemnity or non-indemnity'*
> >
> > *and again at p.46*
> >
> > > *'While insurable interest is a sine qua non in all cases of insurance, there is a difference between indemnity and non-indemnity insurance'.*
>
> At p. 292, when dealing with the effect of **van de Pitte's** case, (*supra)*, the learned author remarks that insurable interest is necessary by the ordinary common law.
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> Finally, Mr. Ellison Kahn , ibid , p61, 'It is submitted that the opinion in van de Pitte's case sets out the true legal position ' I have no doubt , therefore , that under our common law the position is the same as in in the English law.
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> In the course of his article, Mr. Ellison Kahn strongly criticizes the Transvaal case of ***Croce* v *Croce, 1940 T.P.D 251,*** in which an extension clause was held to be enforceable, although not for the same purpose as concerns me here. It seems to me, with respect, that his criticisms are well – founded , and Mr. Christie, not surprisingly , did not rely on this decision in support of his argument for it was disapproved in Court by BEADLE, J (as he then was), and YOUNG . J, in the case of ***Quick* v *Goldwasser, 1956(2) SA 525* (*SR*)**"

In *casu,* the plaintiff has not shown that it stands to loose something as a result of the destruction of the building. The policy of insurance therefore created no binding contractual relationship between the defendant and the plaintiff.

Applying the law to the facts of this matter, it is clear that the plaintiff has failed to establish an insurable interest in this matter, its claim is bad at law.

In view of the above the defendant properly repudiated the claim and plaintiff's claim cannot succeed. I will therefore make the following order:

1. The plaintiff's claim is dismissed.
2. The plaintiff to pay the defendant's costs.

*Hussein Ranchhod & Co*, plaintiff's legal practitioners
*Gill, Godlonton & Gerrans*, respondent's legal practitioners