GUARDIAN SECURITY (PRIVATE) LIMITED
versus
GLOBAL INSURANCE COMPANY LIMITED

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 11 June 2014, 12 June 2014& 13 June 2014, 1 July 2014 and20 August 2014

Civil trial

E.T. Moyo, for the plaintiff
C. Kwirira, forthe defendant

MAFUSIRE J: The defendant was an insurance company. The plaintiff sued it for US$58 189-00, this being the replacement value and cost of repairs in respect of two vehicles which had been involved in accidents. The plaintiff claimed that it was insured by the defendant in respect of those vehicles. The first vehicle had been declared a write-off. Its insured value was $55 000-00. The second vehicle would cost $3 189-00 to repair. It was those two amounts that made up the claim for $58 189-00.

The defendant repudiated the claim. The basis was that the plaintiff had not paid the full premium due for the period in question for the plaintiff's vehicles insured with it. There were ten vehicles in all.The plaintiff argued that it had.

The one and only issue separating the parties was whether the plaintiff's vehiclesthat had been insured with the defendant at the timehad been on a single contract of insurance or on separate contracts for each of them. In other words, did each of the vehicles have separate policies as the plaintiff contended, or were all the vehicles treated as one package on a single policy as the defendant argued?If each vehicle was a separate contract thenthe plaintiff might have paid the premium due for those two vehicles in full. But if all the vehicles were one package then the plaintiff's premium was probably underpaid. How such confusion would arise over what ordinarily would be an elementary aspect of any contract of insurance will become apparent shortly.

The plaintiff's story was told by its one and only witness, Mr AloisMavhurere ("***Mavhurere***"). He was the transport managerat the time. He said it was his business to ensure that the plaintiff's vehicles were properly insured.

The defendant's story was told by two witnesses; Mr Member Murasiranwa and Ms Dorothy Shamba ("***Shamba***"). At the time they were branch manager and agent respectively.

There was a great deal of convergence in the two stories. Thus most facts were common cause. They were these. Sometime in 2012 the defendant canvassed for business from the plaintiff. Shamba and one other person, a Ms Mboko ("***Mboko***") from the defendant, visited Mavhurere. Mboko was a relative of the plaintiff's chief executive officer. But Mavhurerewould deal withShamba ("***Shamba***"). At the time Shamba had just been engaged as an insurance agent. So she was still a novice in the insurance business.At his request Shamba quoted Mavhurere for ten vehicles. Subsequently, a contract of insurance was concluded between the two. The plaintiff made some payments.They amounted to $1 320-00. The defendant issued, among other things, cover notes for all tenvehicles covering the period of insurance. It was from the beginning of February 2012 to the end of May 2012. The accidents happened in May 2012. Thus, itwas still during the subsistence of the contract.

The plaintiff submitted a claim. The defendant arranged with an insurance assessor to assess the extent of the damage. The one vehicle was declared a write-off. As regards the cost of repairs for the other vehicle, the assessor agreed on a certain figure. Several quotations had been received from various panel beaters. The assessorauthorised the repairs. Later on the defendantrepudiated the plaintiff's claim on the ground that the premium for all the ten vehicles had not been paid in full.

On the contentious issuesthe plaintiff's case was this. Due to its difficult financial situation at the time it could not afford to insure all the vehicles at the same time. Mavhurere said it was his agreement with Shamba that the plaintiff would insure each vehicle separately. No cover note would become binding until such time that the plaintiff would have paid for it. Despite the number of vehicles on Shamba's quotation the plaintiff had already been insured with other insurance companies. Insurance for third party cover cost $30-00 per term with other insurance companies. But defendant's rates were $35-00. To secure the plaintiff's business Shamba had offered to pay the difference in order to make the defendant's rates competitive.

On the plaintiff's bundle of exhibits were copies of three receipts of payments by the plaintiff from the defendant. The amounts were $1 000-00 on 17 February 2012; $105-00 on

some date in February 2012 that I could not make out, and $215-00 on 20 February 2012.In addition, the plaintiff produced a copy of a diary page which was marked exhibit 1(B). The date on that page was 17 February 2012. It had two inscriptions on it in long-hand. The first had been crossed out. It was like this: "~~HANDEDOVER FOUR HUNDRED DOLLARS ONLY FOR BMW REG. Nº ACG 0122 COMPREHENSIVE INSURANCE COVER TO DOROTHY (GLOBAL INSURANCE)~~". The second inscription, which was not cancelled, and which formed a material part of the plaintiff's case, read: "HANDEDOVER EIGHT HUNDRED AND TWENTY FIVE DOLLARS FOR 2 x VEHICLES INSURANCE (COMPREHENSIVE) REG NO ABT 0813 & ABT 0725 SIGNED (***indecipherable signature***) 63 – 1282891 E 47".

The vehicle described in the second inscription as ABT 0725 was one of the two involved in the accidents. It was the one that had been declared a write-off. It was the one the replacement value of which was US$55 000-00. Mavhurere said the document was proof that the plaintiff had insured each of its vehicles separately.

Shamba admitted signing exhibit 1(B). It was her national identity number that was written on it. But she denied she had signed the document any time in February 2012. She maintained it was sometime in May 2012. She said Mavhurere had called her to her office. At that time the plaintiff had already made three payments for the insurance policy. The payments had been in tranches: $1 000-00, US$105-00 and $215-00. She said Mavhurere explained that the plaintiff wanted the signed documents for its records. She had insisted on some written confirmation. Mavhurere had promised to send her an e-mail. But he never did. Instead, three days after signing exhibit 1(B) Mavhurere had phoned to inform her about the accident.

The totality of the defendant's evidence was that the plaintiff had a pre-existing motor policy with the defendant in respect of one car. The new business concerning the tencars was just an upgrade. The plaintiff was adding more cars to that policy. After the new contract an endorsement had been sent to the plaintiff which, among other things, itemised the vehicles covered, the type of cover, the insured value for each and the third party limit. Because of its challenging financial situation the plaintiffhad beenallowed to pay the premiums quarterly. Furthermore, it was given the latitude to pay an amount as a deposit to actualise the contract. The deposit was $1 000-00. It was paid on 17 February 2012. However, the plaintiff would be required to pay the balance of the quarterly premium soon thereafter. Shambahad made

several phone calls to Mavhurere for the balance of the premium. However, despite promises the defendant had never paid.

It was also the defendant's evidence that after the accidents the plaintiff had requested a copy of the endorsement document. The defendant had delivered it. The defendant said it is standard procedure to engage an insurance assessor to assess the damage to the insured vehicle once a claim has been submitted. In this case when the defendant checked its records and discovered that the premiums had been outstanding itrepudiated the claim. In the insurance industry there is no contract of insurance where the premium has not been paid or where it has been paid only in part.

The defendant dismissed exhibit 1(B). Among other things, it said it was an informal document that nobody recognised. Furthermore, the information on it was false. Plaintiff had not paid $825-00 on 17 February 2012 or at any time. The amount the plaintiff had paid on 17 February 2012 was $1 000-00. There was a receipt to back that up. The defendant said exhibit 1(B) was an attempt by Mavhurere to reconstruct the contract. There had been no individual contract for individual vehicles but a globular policy for such of the plaintiff's fleet as had been insured with it.

I have considered the evidence as a whole. The plaintiff's case is limping. The defendant's case reads better. Evidently Shamba was a rookie. Defendant's counsel concedes as much in his closing submissions. She confused issues. She was somewhat careless. For example, her quotation for the ten vehicles was undated. The figures on the premiums paidand the premiums due did not add up. On being pressed she started saying she had submitted two quotations; the first that did not have the payments by the plaintiff, and the second that reflected the payments by the plaintiff. But still her figures have been difficult to reconcile.

Shamba undoubtedly blundered. The copy of the endorsement document that she said she sent to the plaintiff after the conclusion of the contract was dated 17 July 2012. That was well after the accident and even after the plaintiff had already issued summons. She said the date was a systems error. But there was more. There was no consistency on the cover notes particularly in relation to the exact date when the period of cover had begun in February 2012. Some cover notes had 1 February. One had 3 February. Most had 4 February. One had no dates at all!

To cap it all was exhibit 1(B). There was no conceivable reason why Shamba signed that document when she had not been given that kind of money by the plaintiff. Apparently

she had never concerned herself with the date on which she had signed the document until in cross-examination when plaintiff's counsel was tearing into her. There was also no record of delivery of any of the documents that she said she had delivered to the plaintiff. These included the endorsements and the policy document.

However, in spite of Shamba's blunders I still find the defendant's case the more plausible. On the standard of proof in civil cases the plaintiff's counsel has in his closing submissions made reference to the cases of*Joel Melamed and Hurwitz* v*Cleverland Estates(Pty) Ltd*; *Joel Melamed and Hurwitz* v*Vorner Investments (Pty) Ltd*1984 (3) SA 155. A trial in a civil case involves making finding facts or inferences of factsby balancing probabilities and selecting a conclusion which seems to be the more natural or plausible one from several conceivable ones, even though that conclusion may not be the only reasonable one.

Shamba might have confused matters in her dealings with the plaintiff. However, I have not seen or read anything sinister in her conduct. Plaintiff's strongest point was exhibit 1(B). But viewed against the totality of the evidence it was its weakest. Plaintiff did not pay $825-00 on 17 February 2012 or at any time. It is curious that the document purported to apportion the false payment totwo vehicles. One of them happened to be one of the two involved in the accidents. Why would the plaintiff require this particular record only once and not in respect of all the payments that it made? Why was that kind of endorsement not made on the actual receipt of payment? What sounds plausible is that Mavhurere tried to take advantage of Shamba, a novice. I find it probable that in spite of the diary date on that document, Shamba signed it in May 2012 after the accident. The document was an attempt by Mavhurereto reconstruct the contract of insurance to read retrospectively that there wereseparate contracts for separate vehicles instead of a globular contract for the whole fleet.

In insurance law a cover note, or certificate of insurance, is part of the contract of insurance. It provides temporary cover until a detailed proposal has been accepted or until the insurer has accepted the insured's proposal; see GORDON AND GETZ on *The South African Law of Insurance*, 3rd ed. at pp 134 – 135. The general practice is that the cover note is issued by the insurer's agent. Renowned authors,MacGILLIVRAY& PARKINGTON on *Insurance Law*, 8th ed., discuss some characteristics of a cover note in Chapter 4. They say in paras 283 – 293 that a cover note records the receipt of a premium from the assured. In consideration the insurer agrees to insure him for the period stated in the note. Once a cover note has been issued it creates a binding insurance for the period of time specified in it. The temporary

cover invariably takes effect at once since its object is to give immediate protection pending the decision of the insurer and the issue of the policy.

In this case when the defendant issued those cover notes and released them to the plaintiff, it had assumed risk. It would be liable to third party claims in terms of Part IV of the Road Traffic Act, [*Cap*13:11]. Mavhurere claimed that his agreement with Shamba was that even though the cover notes had been released to him as one block, the plaintiff would hold onto them until it had paid for each. They would only come into force one by one upon payment. In the meanwhile they would remain invalid.

In my view, that kind of story is ludicrous. If the plaintiff had insured its vehicles with other insurance companies all Mavhurere needed todo was to reject or return Shamba's cover notes. He did not. Instead he went on to licence the ten vehicles using Shamba's cover notes. But be that as it may, none of this proves whether or not the defendant insured plaintiff's vehicle individually or as a package. What it helps show is that Mavhurere was not being truthful.

I also find it incredible that Shamba would have offered to pay part of the premium for the plaintiff,allegedly so that it did not have to pay more than it would if it had insured elsewhere. Shamba denied it. In my view, only in kindergarten would such a story probably make sense.

Since it was common cause that the plaintiff was already insured with the defendant in respect of one vehicle, what makes sense is that when Mboko successfully canvassed for more business, the defendant simply endorsed the existing policy by adding the extra nine.

It is customary for a policy document to have a schedule attached to it, among other things, specifying the vehicles covered and the amounts of the premiums. In the present case, the plaintiff produced a policy document with another insurance company as proof that it had insured some of its vehicles elsewhere. However, this does not detract from the fact that the plaintiff had contracted with the defendant in respect of the ten vehicles in question. In fact,the defendant produced two of its own schedules. The one was titled "MOTOR PRIVATE POLICY SCHEDULE". It was dated 11 August 2011. It had one vehicle on it. The defendant explained that it had been the schedule attached to the original policy document sent to the plaintiff when the defendant had insured the first of the plaintiff's vehicle way back then. The second schedule was titled "MOTOR PRIVATE **ENDORSEMENT** NUMBER 1" (my emphasis). The significance of this is that the second

schedule, as the title says, was simplyan endorsement. The defendant said it was what was delivered to the plaintiff upon the conclusion of the new contract. That makes sense.

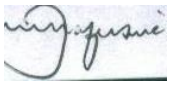
Generally a contract of insurance is vitiated by the non-payment of the premium. A premium is generally a condition precedent to the existence of the contract. In *National Employers' Mutual General Insurance Association Ltd* v *Myers* 1938 TPD 11 it was stated that *prima facie* the *quid pro quo* for a premium is an indemnity.In my view, the reverse should also be true. *Prima facie* the *quid pro quo*for an indemnity is the premium which has been paid. MacGILLIVRAY& PARKINGTON, (*supra*), in paras 890 and 891, define the premium as the consideration required of the assured in return for which the insurer undertakes his obligations under the contract of insurance. They say there is no rule of law to the effect that there cannot be a complete contract of insurance concluded until the premium is paid. They also say that it has been held in several jurisdictions that the courts will not imply a condition that the insurance is not to attach until payment.

In my view, whether or not a contract of insurance will attach only upon payment willdepend on the exact terms of the parties' agreement. In *Myers*' case above, the insurance was expressly made conditional upon the prior payment of the premium. Until such payment was made, the policy was of no effect in protecting the plaintiff. See also *Wood's Trustee* v *SA Mutual Life Assurance Society* (1892) 9 SC 220, and *African Guarantee & Indemnity Co Ltd* v*Couldridge* 1922 CPD 2.

In the present case,I find that the agreement between the parties was plainly that there was an indivisible contract of insurance in respect of the plaintiff's ten vehicles that were insured with the defendant. I also find that it was plainly the agreement that the prior payment of the premium was a condition precedent to the protection or cover sought by the plaintiff. Among other things,Shamba would not issue any cover notes until Mavhurere had paid some deposit. He paid $1 000-00 on 17 February 2012. Only thereafter did things start to happen. Mavhurere also said in his evidence that it was his understanding thatonly those cover notes that he would have paid for would become binding from the date of payment. This means that he clearly understood that payment of the premium was a condition precedent to the enjoyment of cover.

The plaintiff was in breach of the policy of insurance between the parties by failing to pay the full premium that was due for the period of cover. As a result the contract was vitiated. The defendant was entitled to repudiate.In the premises the plaintiff's claim is hereby dismissed with costs.

20 August 2014



Scanlen& Holderness, plaintiff's legal practitioners
Magwaliba&Kwirira, defendant's legal practitioners