IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 1778 OF 1994

BETWEEN:

H.R. MAKAWA.....PLAINTIFF

and

INDEFUND LIMITED.....1ST DEFENDANT

NATIONAL INSURANCE COMPANY.....2ND DEFENDANT

CORAM: HON. JUSTICE F.E. KAPANDA

Mr T. Chirwa of Counsel for the Plaintiff

Mr Balakasi, Official Interpreter

Kapanda, J.

JUDGMENT

Introduction

The Plaintiff's commenced by way of writ of summons issued on 14th September, 1994, against the Defendants is for the sum of K35,700.00. It is alleged by the Plaintiff that this sum represents the proceeds of an insurance policy, he allegedly took out with the 2nd Defendant through the 1st Defendant, covering the risk of destruction of his tobacco crop grown in the

1991/92 growing season. It is the further prayer of the Plaintiff that he should be awarded costs of this action.

The Defendants filed notices of intention to defend the action commenced by the Plaintiff. This was done on 29th September 1994. After the filing of the said Notices of intention to defend the Defendants served their defences on the Plaintiff through his legal practitioners.

Pleadings

The Plaintiff, in his statement of claim annexed to the said writ of summons issued on

14th September 1994, made the following relevant allegations of fact:-

"1. At all Material times the Plaintiff was and still is a commercial farmer growing, among other crops, flu-cured tobacco at Mahala Estate in Mangochi District.

2. The 1st Defendant are a banking institution who among other services, provide loans to people like the Plaintiff for farming.

3. The 2nd Defendant are an Insurance Company who among other undertakings provide cover to farmers for damaged crops.

4. The Plaintiff states that in the growing season of 1991-92, he, with a loan from the 1st Defendant, grew 4 hectares of flu-cured tobacco at his said farm with an estimated value of K35,700.00.

5. The Plaintiff also states that in the said 1991/92 growing season, he took out an insurance policy with the second Defendant through the 1st Defendant to cover the risk of destruction of his tobacco crop.

6. It was a condition of the said policy of insurance that in the event of the Plaintiff's tobacco being destroyed, the 2nd Defendant indemnify him to the value of K35,000.00.

7. The Plaintiff states that during the said growing season of 1991/92, his entire crop of tobacco was destroyed by a hailstorm and that when he presented his claim to the 2nd Defendant through the 1st Defendant, the claim was rejected.

8. The Plaintiff's cover for the insurance policy was affected on his behalf by the 1st Defendant who added the premiums therefore to his loan, and the proceeds of the indemnity from the 2nd Defendant should have been paid to him through the 1st Defendant.

9. The insurance cover for the tobacco was made through Mandala Insurance Brokers acting as agents of the 2nd Defendant.

10. The Plaintiff therefore claims from both Defendants singularly and jointly the sum of K35,700.00 and costs of this action."

The 1st Defendant, in its Statement of Defence, denies being liable, either singularly or jointly with the 2nd Defendant, to pay the Plaintiff the said sum of K35,700.00 or at all. It is the 1st Defendant's further contention that the Plaintiff's allegation of fact do not disclose a cause of action and it has therefore been prayed that the Plaintiff's action against the 1st Defendant should be dismissed with costs.

In respect of the 2nd Defendant it made the following pertinent averments in its statement of defence to the Plaintiff's statement of claim:-

"2. The 2nd Defendant provides insurance cover for perils insured against only and not otherwise.

3. The 2nd Defendant admits that the Plaintiff grew flue cured tobacco in the growing season of 1991-92. Save as aforesaid, paragraph 4 of the statement of claim is denied.

4. The Policy insurance referred to in paragraph 5 of the statement of claim does not cover loss occasioned by hailstorm.

5. Under the policy of insurance referred to in paragraph 6 of the statement of claim, the second Defendant agreed to indemnify the Plaintiff for losses occasioned by perils insured against only and not otherwise.

6. The 2nd Defendant admits that the said loss (if any which is denied) was occasioned by hailstorm. Save as aforesaid, paragraph 7 of the statement of claim is denied.

7. The 2nd Defendant said loss (if any which is denied) was not occasioned by any perils insured against as alleged or at all.

8. The 2nd Defendant refers to paragraph 8 of the statement of claim and pleads that the policy of insurance issued by the second Defendant was in favour of the Plaintiff and the 1st Defendant obtained the said policy. The second Defendant does not admit that the first Defendant added premiums as alleged or that the proceeds were to be paid in the manner alleged.

9. At the time of issuing the said policy of insurance, Mandala Insurance Brokers did not act as agents of the second Defendant as alleged in paragraph 9 of the statement of claim or at all.

10. The Defendant denies paragraph 8 and 10 of the statement of claim.

11. The alleged or any loss of damaged to the Plaintiff's tobacco crop is denied."

The foregoing are the pleadings that were exchanged between the Plaintiff and the Defendants. By reason of the Defendant's statements of defence the parties joined issues on the legal action commenced by the Plaintiff.

It then became necessary for the matter to be set down for hearing in order for evidence to be called to prove the allegations of fact made either in the statement of claim or the statements of defence. In this regard the Plaintiff caused this matter to be set down for hearing on 9th March 2001 and formal notice for the hearing of the matter was issued and served on the Legal Practitioners for the Defendants.

On 9th March 2001 when this case was called for hearing both Counsel for the Defendants and the Defendants, or their representatives, were not available, this was so notwithstanding the fact that they were served with the said Notice of hearing. The court was not communicated on the reasons for the said non attendance. Thus I proceeded to hear the case of the Plaintiff, in the absence of the Defendants and Counsel, because there was proof that service of the notice of hearing had been affected on the Defendant's Counsel. The only evidence, therefore, on record is that of the Plaintiff.

Evidence

It is the testimony of the Plaintiff in the 1991/92 tobacco growing season he got capital to grow tobacco from the 1st Defendant who gave him a loan on condition that he took out an insurance policy. The Plaintiff told this court that the taking of an insurance cover was a condition precedent to being furnished with the capital to grow the tobacco.

It has further been put in evidence by the Plaintiff that he was asked to pay the sum of K4,000.00 for the said insurance policy and that after making the said payment in the sum of K4,000.00 he was given a loan. Unfortunately, the Plaintiff told this court that he could not remember how much he was given as a loan in this regard. In his evidence the Plaintiff said that he was not given a copy of the insurance policy.

The Plaintiff further testified that he used the loan obtained to grew 18 hectares of flue cured tobacco and 10 hectares of burley tobacco. It was further put in evidence by the Plaintiff that all his tobacco was destroyed by hailstorm whereupon he then went to the 1st Defendant to seek compensation for the tobacco that had been destroyed. It was further given an evidence by the Plaintiff that a servant of the 1st Defendant, in the company of some insurance person, assessed the value of the tobacco that had been destroyed. The Plaintiff further put it in his evidence that the 1st Defendant told him that he was going to be given the sum of K35,700.00 for the 4 hectares of tobacco which had been destroyed by the hailstorm but that he only got K4,497.00. A photostat copy of a cheque in this sum was tendered in evidence and it has been marked as exh. P1.

I wish to observe that even though the Plaintiff, in his pleadings, stated that he grew only 4 hectares of flue cured tobacco in his testimony he stated that he grew 18 hectares of flue cured tobacco and hectares of burley tobacco. The evidence of the Plaintiff as regards the growing of 10 hectares of burley tobacco and 18 hectares of flue cured tobacco is a total departure from what was pleaded. It will therefore be totally disregarded - Zgambo -vs- Kasungu Flue Cured Tobacco Authority 12 M.L.R. 311

The foregoing is, in a narrative form, the evidence that the Plaintiff adduced to prove the allegations of fact made in his statement of claim. I now wish to isolate the issues for determination in this action.

Issues for Determination

In my opinion, after looking at the pleadings that were exchanged between the parties; the evidence on record and the submission of Counsel for the Plaintiff, the questions that require this court’s determination are as follows:-

(a) whether or not, the growing season of 1991/92, the Plaintiff grew 4 hectares of flue cured tobacco with an estimated value of K35,700.00.

(b) whether or not there was a contract of insurance between the Plaintiff and the 2nd Defendant, effected by the 1st Defendant on behalf of the Plaintiff, to cover risk of destruction, of the Plaintiff’s tobacco, by hailstorm.

© whether or not the 1st Defendant added to the Plaintiff's loan the premiums, if any, that the 1st Defendant paid on the alleged insurance policy purportedly effected by the 1st Defendant on behalf of the Plaintiff.

(d) whether or not, if there was an insurance cover, it provided for the proceeds of the insurance to be paid or payable to the Plaintiff.

(e) whether or not, if there was an insurance cover, the insurance policy provided for indemnity to the Plaintiff in the sum of K35,000.00 or any other sum in the event of the said tobacco being destroyed by hailstorm.

(f) whether or not Mandala Insurance Brokers acted as agents of the 2nd Defendant.

It must be noted that although I have singled out the question for determination in this action I will not specifically refer to them when making my findings. I will decide on the said issues for determination on the basis of the evidence on record and the relevant law. Let me now proceed to make my findings of fact in this action.

Law and Finding

It is trite law, and I have reminded myself of same, that in civil actions the standard of proof is on a balance of probabilities. Further, I am mindful of the settled principle of law that he who alleges must prove what he is alleging. Moreover, I have taken note of the fact that the Defendants did not make an appearance at the trial of this action. Thus it is a rule of practice that if at trial the Plaintiff appears, but the Defendant does not appear, the Plaintiff may prove his claim and the proof will be limited to the allegations in the statement of claim - Barker -vs- Furlong [1891]2 Ch 172. These principles of law and practice will therefore be borne in mind when I am deciding on the facts in issue in this matter.

The Plaintiff, through learned Counsel, has submitted that even though the policy of insurance was not shown to him, and he was therefore not aware of its contents, there is evidence that the 1st Defendant told him that he was covered to the extent of K35,700.00 being the estimated value of the tobacco crop. It has further been contended by learned Counsel for the Plaintiff that the perils averred by the policy included damage to the tobacco and therefore the Defendants are liable to the Plaintiff in the sum of K37,500.00. Further, learned Counsel for the Plaintiff has argued that although the insurance cover is admitted by the 2nd Defendant the policy document itself is not listed in 2nd Defendant's List of Documents thus the court should go by the evidence of the Plaintiff.

I totally disagree with learned Counsel arguments as a matter of law. It is the view of this court that, from a reading of the pleadings and Counsels arguments, the terms of the policy of insurance are in question in this matter. The question that comes to mind is if the policy document was not shown to the Plaintiff, and it has not been produced in evidence by the Plaintiff, how does this court know that the policy covered the peril being mentioned by the Plaintiff. It is a settled rule of evidence that extrinsic evidence to prove the terms in a document will be excluded if the document itself is not produced. If a party relied upon a document he/she must produce and prove it - Magnay -vs- Knight [1840]1

Man and G 944. It is immaterial that the document was kept by the Defendants or any one of them or that it was not listed by the Defendants or any since the Plaintiff could have applied for discoverly and production of the policy document for his use in this action. This court finds that the testimony of the Plaintiff, in so far as it purports to establish that there was an insurance cover for the peril mentioned by him, is excluded in view of the fact that the Plaintiff has not produced the insurance document. Put simply, this court finds that there is no evidence to prove that there was a contract of insurance between the Plaintiff and the 2nd Defendant, effected by the 1st Defendant on behalf of the Plaintiff, to cover the risk of destruction of the said tobacco by hailstorm.

It was alleged by the Plaintiff, in paragraph 6 of his statement of claim, that it was a condition of the alleged policy of insurance, that in the event of the Plaintiff's tobacco being destroyed, the 2nd Defendant would indemnify the Plaintiff to the value of K35,000.00. There was no evidence adduced to prove this allegation of fact in the Plaintiff's statement of claim. Indeed, the policy document was not produced to prove the said condition in the policy. Further, it was alleged by the Plaintiff, in paragraph 8 of his statement of claim, that the 1st Defendant effected an insurance policy on his behalf and that the premiums paid by the 1st Defendant were added to his loan. I wish to observe that if there is any evidence on record regarding the payment of premiums it was to the effect that the Plaintiff paid the sum of K4,000.00 being the premium for the insurance policy that was purportedly effected on his behalf. There is no evidence on record to support the allegation that the premiums purportedly made by the 1st Defendant were added to the Plaintiff's loan account.

The other issue that must be decided in this action, by reason of the Plaintiff's allegation of fact in paragraph 9 of this statement of claim, is whether or not Mandala Insurance Brokers were acting or acted as agents for the 2nd Defendant. At the outset it must be noted that there was no evidence to demonstrate the alleged agency relationship between the 2nd Defendant and the said Mandala Insurance Brokers. Further, it is settled law that an insurance broker is an agent of the insured and not an agent of the insured - Notcut (overseas) Ltd -vs- Nakanga 10 MLR 148; Barak -vs- Hogg Robinson (Malawi)Ltd 11 MLR 280.

It is the further finding of this court that there is no evidence on record to prove the allegation of fact that the tobacco that was damaged was valued at K35,700.00. In this court view the damage, allegedly suffered by the Plaintiff as a result of the hailstorm, was a special damage. It was incumbent upon the Plaintiff to plead and prove this damage specifically. There is no evidence, and it was not pleaded, to indicate the weight of the tobacco that was destroyed and/or how this figure has been arrived at.

The short of it is that all the issues for determination in this action have been answered adversely to the Plaintiff. There is no evidence of any real claim for an indemnify from the Defendants in the said slum of K35,700.00 without the production of the insurance policy or the insurance cover. For the reasons given above, I am not satisfied, upon the

available evidence, that the Plaintiff has failed to prove his case against the Defendants. The Plaintiff's claim is therefore dismissed.

Costs

The Plaintiff's action has been dismissed and in the normal ..... of litigation in private law cases costs follow the event. But in this matter the court has noted that the Defendants failed to attend the hearing of this action. I will therefore exercise my discretion and order that the Plaintiff's action be dismissed with costs but the Plaintiff shall not pay any part of the costs of hearing. This is the case because the Defendants did not try. The costs to be paid by the Plaintiff shall be taxed by the Registrar if not agreed.

Pronounced in open Court this 6th day of April 2001 at the Principal Registry, Blantyre.

F.E. Kapanda

JUDGE