IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 106 OF 1998

BETWEEN:

RIMO SUPPLEIERS …… PLAINTIFF

AND

PRIME INSURANCE ……DEFENDANT

CORAM: MKANDAWIRE, J

Ching'ande of Counsel for the Plaintiff

Mtawali of Counsel for the Defendant

Balakasi Official Interpreter

JUDGMENT

By his Originating summons the plaintiff is seeking the following reliefs:

a. " A declaration that on the true construction of a fire policy of Insurance No. JD 10/00/27051 issued by the Defendant to the Plaintiff on 12th September 1997 the Defendant is liable to and must indemnify the Plaintiff for loss sustained in the amount insured of K4,000,000.00.

Further the Plaintiff claims against the Defendant for consequential loss the following:

I. Shop rentals at K8,000.00 per month from October 1997 up to March, 1998 then K10,000.00 from 1st April 1998 to vacation date until full payment.

II. Revenue/earnings lost at K100,000.00 per month October 1997 until full payment.

III. Securicor security charges on the shop at K1,368.57 per month from October 1997 to vacation date until full payment.

IV. Shop staff salary payments at K3,000 per month from October 1997 until full payment.

V. City rates payments on the shop at K260.57 per month from October 1997 to vacation date until full payment.

VI. Interest at Lending rate on the sums in i, ii, iii, iv and v above until full payment.

The plaintiff is a businessman operating a shop dealing in electrical goods. It is not in dispute that he took out a policy of fire insurance with the defendant. It was on 12th September 1997 when he insured his shop against loss by fire for the sum of K4,000,000.00 at a premium of K26440.00. The plaintiff dealt with Mr Galeta who was an insurance agent. It was the plaintiff's evidence that the proposal form was filled by Mr Galeta who was reading to him the questions on the proposal from and he was

providing the answers. It was his evidence in chief that his occupation was hardware, electrical and general supplier. After the proposal form was fully completed the plaintiff signed it. The fire policy issued by the defendant was tendered as exhibit P1. On the 7th October 1997 the shop caught fire and a lot of goods were destroyed. The City of Blantyre Fire Brigade was called to extinguish the fire. The fire accident was reported to police who issued a report. The plaintiff then submitted a claim to the defendant based on the insurance policy. After the claim was processed, the plaintiff was advised that the claim could not be entertained as he was guilty of material non-disclosure in that he did not disclose in the proposal form that he was keeping in his shop commodities of a hazardous nature which could easily catch fire. The plaintiff had to close the shop and during the period of closure, he has been losing a lot of money.

In cross-examination he said that when asked about his occupation, he told Mr Galeta that he was an electrical supplier. He conceded that he did not tell Mr Galeta that he kept commodities of a hazardous nature or liable to sudden combustion or explosion. He also conceded that he told Mr Gareta that he kept records in a fire proof safe. When pressed further he conceded that the defendant would not have insured him if he had told Mr Galeta that he kept paints, twines, toilet paper and other items that could easily catch fire. He agreed that he had made misrepresentations.

The second witness for the plaintiff was Mr Chisanje. He was the Senior Fire Officer in the City of Blantyre. He led the team that went to put out the fire at the plaintiff's shop. He explained how they struggled to extinguish the fire. He then submitted a report in which he said the cause of the fire was electrical malfunction. He told the court that the fire spread when it contacted items on the ground. Toilet paper was there and it was burning.

The first witness for the defence was Mr Mwakalenga. He was working for Prime Insurance as a Superintent for Blantyre Branch. He told the court that he had received a request from Mr Satter of Rimo Suppliers that he wanted insurance cover for his shop against fire and burglary. However Mr Mwakalenga did not go to Mr Sattar's shop as he was busy. He asked Mr Gareta, an insurance agent to go and attend to Mr Satter's request.

Mr Gareta went to Mr Sattar's shop known as Rimo Suppliers on 12th September 1997. He inspected the shop and there were so many electrical appliances. The plaintiff told him that the value of the goods was K7,000,000.00. However he wanted to be insured in the sum of K4,000,000.00. Mr Galeta completed the proposal form as the plaintiff said he could not write well. He was reading out the questions on the proposal from and the plaintiff was providing the answers. Question No 2 was whether any inflammable oils, spirits, liquid, gas or explosives were kept in the shop and the plaintiff said he did not. Question No 3 was specifically about commodities of a hazardous nature or liable to

sudden combustion or explosion to which the plaintiff answered No. Question 9 was about a set of books showing a complete record of business transacted and inventories. The plaintiff said he kept these. When the form was finally completed, the plaintiff signed it. The proposal form was tendered as EX D1. Mr Gareta then calculated the premium and the plaintiff made out two cheques. He later visited the shop and he noticed that the goods were vanishing. The plaintiff's explanation was that he was keeping them in the bulk store so that he should not attract thieves. Mr Galeta explained that it was common practice for an insurance agent to complete the proposal form as he did with Mr Sattar.

On 7th October 1997 Mr Gareta received information that the shop was on fire. He went to the shop and found Mr Sattar there. Then Mr Sattar asked whether his claim would be entertained. To which Mr Gareta replied that a claim must be submitted first. He explained that it would depend on what the assessor said. The plaintiff then offered to pay Mr Gareta K40,000.00 if the claim succeeded. The offer however was not accepted but it did raise suspicions. It was Mr Neil Banda who was appointed as an assessor. It was Mr Gareta's evidence, that he entered the shop with Mr Banda. What they saw was very peculiar. Instead of electrical goods there were toilet tissues, tarpaulins, tins of paints, twines, tyres. Then they entered the bulks store where the plaintiff said he was storing goods. There were only toilet tissues. There were no electrical goods. The plaintiff was not able to produce any books of records.

In cross-examination Mr Gareta emphasized that in filling the proposal form he only recorded the plaintiff's answers. He was emphatic that he inspected the shop and there were many electrical apparatus, such as switches, motors, maize mills. He did not see any hardware items. It was only after the fire that he saw toilet paper. The plaintiff did not tell him that he was a hardware and general supplier. All he said was that he was an electrical supplier. He said he had told his principals about the K40,000.00 offer.

The third witness for the defence was Mr Banda the assessor. His duties involve assessing the loss in insurance matters and investigating the circumstances leading to the incident. In the instant case, when he went to the shop he found that most of the merchandise were burned. He took photographs. He also saw the proposal form. But then the goods in the shop were not all electrical as declared. There were paints, toilet paper etc just like a general merchandise shop. Upon concluding his investigations Mr Banda submitted his report, which was tendered as exhibit D3. In his report, Mr Banda found that the plaintiff was guilty of non-disclosure. Mr Satter had offered to pay Mr Banda K400,000.00 if the claim succeeded.

The last witness for the defence was Mr Sharma, an electrician with Sharma Electrical Company. It is the company that did the electrical installation and wiring in the building. When he went to the shop he found that electricity was still on. He noticed that only wires to the circuit where the ceiling board was fixed were affected by the fire.

Otherwise no other wire was burnt. In his opinion the fire was deliberately ignited.

A contract of insurance is of the utmost good faith – **uberima fides.** A contract of insurance is mostly based on facts, which are in the exclusive knowledge of the insured. Therefore there must be full disclosure by the insured. If there is non-disclosure, the actual risk insured against may be different from that originally intended to be covered by the insurer. Further disclosure of all material facts is essential since it influences the insurer in fixing the premium or in determining whether or not to take the risk **Berger v Pollock** (1973)2 Lloyds Rep. 442. In the case of **Carter v Boehm** (1766)3 Burr 1905 Lord Monsfield described an insurance contract as:

> "…… a contract of speculation. The special facts
>
> upon which the contingent chance it to be computed

lie most commonly in the knowledge of the assured only: the underwriter trusts to his representation and proceeds upon confidence that he does not keep back any circumstances, in his knowledge, to mislead the underwriter into a belief that the circumstance does not exist. The keeping back of such circumstance is a fraud and therefore the policy is void. Although the suppression should happen through mistake without any fraudulent intention, yet still the underwriter is deceived and the policy is void, because the resque run is really different from the resque understood and intended to be run at the time of the agreement."

This was echoed by Scrutton L J in the case of **Greenhill v Federal Insurance** (1927)1 KB 65 at page 76:

> "… … … … insurance is a contract of the utmost

good faith and it is of the greatest importance that the position should be observed. The underwriter knew nothing of particular circumstances of the voyage to be insured. The insured knew a great deal and it is the duty of the assured to inform the underwriter of everything that he is not taken as knowing so that the contract may be entered into on an equal footing."

The duty to disclose is very important and it continues even after the policy is issued.

Reverting to the present case, it may be asked as to what were the material facts. Where the insurer asks the insured specific questions, the parties are taken to have agreed that the facts involved in answering the questions are material: **Dawson v Bonnin** (1922) 2 AC 413. In the proposal form the plaintiff was specifically asked if he kept commodities of hazardous nature liable to sudden combustion or explosion. He said he did not keep such items when in fact his shop was full of toilet papers, paints, tarpaulins, twines and

several other stationery and hardware items. The plaintiff did not disclose that he was also a hardware and stationery merchant. The items listed above can easily catch fire and are therefore very material to a fire policy. It is significant that in his evidence in cross-examination, he agreed that he had made misrepresentations. It is very clear that the plaintiff is guilty of material non-disclosure. He had materially misled the defendant. The plaintiff had also told the defendant that he kept records in a fire proof safe when in fact there were no records.

It would appear to me that the plaintiff was aware of the consequences of non-disclosure and that is why he was offering bribes to Mr Gareta and Mr Banda. As for the evidence of Mr Sharma, there is nothing to substantiate the view that the fire was deliberately ignited. By reason of material non-disclosure the insurance policy was rendered void. The action cannot therefore be sustained. It is dismissed with costs.

Pronounced in open Court this 14th day of February, 2003 at Blantyre.

M P MKANDAWIRE

JUDGE