MUKUWE AKAMANA
v
DIAMOND INSURANCE LIMITED

HIGH COURT
SIAVWAPA, J.,
18th MARCH,2011.
2009/HN/316.

[1] Contract - Insurance - Prepayment of premium - Whether prepayment of premium is a condition precedent to the making of a complete contract of insurance.

The brief facts of this case are that the plaintiff took out a comprehensive motor insurance cover for his Mitsubishi Canter light truck with the defendant at a total premium of K2,800,000.00. The defendant subsequently issued a certificate of motor insurance cover note effective 19th June, 2008, to 18th June, 2009. The plaintiff subsequently issued a cheque dated 29th August, 2008, to the defendant in full amount of the premium.

On or about 9th November, 2008, the truck was involved in a road traffic accident with a truck belonging to a third party. On receiving a claim on the insurance cover from the third party, the defendant refused to indemnify the plaintiff stating that the cover was not effective for non-payment of the premium by the plaintiff.

Held:

1. The insurance cover fell within the scope of the general principles of the law of contract; in which there must be an offer, acceptance as well as consideration.

2. In making the proposal, the insurer undertakes to indemnify the assured against the risk proposed to be covered by the policy.

3. In turn the insured must pay or undertake to pay the premium which constitutes the consideration.

4. The certificate of insurance denotes acceptance by the insured. The certificate of insurance or cover note also form the full extent of the contract, stipulating the terms, conditions, and extent of the cover provided.

5. The premium was not paid at the date of the commencement of the cover. As a result, the defendant issued a Debit Note to acknowledge that the plaintiff owed it money in form of premium for the period covered.

6. Once the defendant had issued the Debit Note acknowledging the plaintiff's

indebtedness to it, the remedy was to sue for the unpaid premium. And not to repudiate the contract by refusing to indemnify the plaintiff once the event for which the cover was provided occurred.

7. It is not a condition precedent that the premium should be paid before the cover takes effect.

8. The plaintiff was a credit customer without losing the benefits of the cover.

9. Section 76(1) of the Insurance Act envisages a situation where the due date for the premium is set out in the contract itself. If the premium is not paid by the stipulated date, then thirty days thereafter, the insurance ceases to operate.

10. In the absence of any stipulation as to the time or period the premium is due; the insured remains a debtor to the insurer without losing the benefits of the contract.

11. If the event covered by the insurance occurs before the premium is paid as was the case in this matter, then the insurer has an obligation to indemnify the insured, and then claim the premium through the normal channels of debt recovery.

12. The defendant was held to be in breach of the contract.

Cases referred to:

1. Kelly v London and Staffordshire Fire Insurance Company [1888] 1 Cab and E. 47.
2. Equitable Fire and Accident Office v Ching Wo Hong [1907] A.C. 96.

Legislation referred to:

1. Insurance Act Number 27 of 1997, as amended by Act Number 26 of 2005, s 76(1).

Work referred to:
T.W. Morgan, Porters, Law of Insurance, Eighth Edition, (London, Sweet and Maxwell, 1983).

Chabu (Mrs) of Messrs Lumangwe Chambers for the plaintiff.
Imonda of Messrs A. Imonda and Company for the defendant.

SIAVWAPA, J.: The plaintiff's claim is for the cost of reinstating or replacing his Mitsubishi Canter light truck, damages for breach of contract, any other relief, interest and costs. The brief facts of the case are that the plaintiff took out a comprehensive motor insurance cover for his Mitsubishi Canter light truck with the defendant at a total premium of K2, 800, 000.00. The defendant subsequently issued a Certificate of Motor Insurance (Cover Note) effective 19th June, 2008, to 18th June, 2009.

The plaintiff subsequently issued a cheque dated 29th August, 2008, to the defendant in the full amount of the premium.

On or about 9th November, 2008, the Mitsubishi Canter light truck was involved in a road traffic accident with a truck belonging to a third party. On receiving a claim on the insurance cover from the third party, the defendant refused to indemnify the plaintiff stating that the cover was not effective for non-payment of the premium by the plaintiff.

In support of his claim, the plaintiff gave evidence and called one witness. In his evidence in chief, the plaintiff stated that following the road traffic accident, he received a phone call from the third party whose truck was involved in the said accident with the Mitsubishi canter light truck asking for the details of the plaintiff's insurer. He furnished the third party with the details of the defendant which was, at the time, going under the name Diamond Insurance Cavmont. He was later informed by the third party that the defendant had refused to indemnify the plaintiff for the reasons already stated earlier in the judgment.

He then contacted his Insurance broker, PW2, who assured him that the cover was valid as all the documents were in order. He then went to the defendant's head office where an officer, told him that they had not received the premium hence the defendant's refusal to honour the claim. When he informed the officer that he had made payment by cheque to the defendant, and further that he had been issued with a debit note and a cover note, he maintained that the defendant would not entertain the claim for non-payment of the premium.

He further said that in December, 2008, the cheque he had issued was presented to the bank by the defendant and his account was debited with the amount of the cheque. In January, 2009, he received a letter from the defendant in which a refund cheque was enclosed.

It was further his evidence that he was a credit customer, and that he made a deferred payment by cheque effective 28th August, 2008, while the cover was effective 19th June, 2008. He also said that the defendant issued him with a debit note as acknowledgment that he owed the defendant money but that the same did not suspend his entitlement.

In cross-examination, he stated that the insurance cover was effective 19th June, 2008, and that he paid the premium on 28th August, 2008, but that he was not issued with a receipt of payment as it was a deferred payment. He further said that the debit note indicated that he was a credit customer, and that the insured party on the debit note was Express Insurance Brokers Limited. He acknowledged that the defendant receipted the cheque on 17th December, 2008, after the accident which happened on 9th November, 2008.

As regards a post-dated cheque, he stated that it was payment on credit and that there was effectively no payment between 19th June, 2008, and 28th August, 2008. He said that the terms of payment were mutually agreed upon. He further said that he gave the post-dated cheque to the broker in July, 2008.

In re-examination, he said that Express Insurance Brokers Limited was mandated by the

defendant to conduct insurance on their behalf, and as such, he did not doubt their credibility. He noted that the cover note was issued by the defendant, and not Express Insurance Brokers.

PW1 was the Insurance broker who handled the plaintiff's insurance cover under Express Insurance Brokers Limited as agent for the defendant. He stated that he renewed the insurance of the plaintiff's vehicle with the defendant after the earlier one with Zambia State Insurance Corporation expired. He confirmed that payment was not made immediately as the plaintiff promised to pay by a post-dated cheque. He said that when the plaintiff sent the cheque to him, he subsequently sent it to the defendant so that he could get the commission. It was his evidence that he received the cheque before the end of July, and the debit note was issued on 3rd July, 2008.

He said that he was later informed of the claim upon which he wrote to the defendant who responded to the effect that no-payment had been made. The defendant later sent a document showing that the cover had been cancelled. He further said that he was surprised at the turn of events as he had sent the cheque, and claimed for his commission. He added that he could not have kept the cheque since it was not in the name of Express Insurance Brokers Limited, but in the defendant's name. He also said that even if the cheque had been sent late, the defendant had a duty to honour the claim, and later pursue the Broker.

In cross-examination, he said that he did not remember the date he received the post-dated cheque from the plaintiff but maintained that it was before the end of July, 2008. He however, said he had no evidence that the defendant received the cheque on an earlier date than 17th December, 2008, as evidenced by the receipt marked 2 in the defendant's bundle of documents.

In re-examination, he said that the usual way of delivering documents to the defendant was by post, and that he could not ask for commission on a post -dated cheque.

The only witness for the defendant was Winfred Luchembe, the defendant's underwriter, who acknowledged dealing with the plaintiff's case. He stated in his evidence that he received a binder, which he said was a confirmation of cover, from Express Insurance Brokers Limited, but with no payment attached thereto. The defendant subsequently sent e-mails to Express Insurance Brokers Limited asking for the premium in respect of the plaintiff's cover, but that they did not get a response.

He said that the defendant therefore, refused to honour the claim when notification was received on 9th November, 2008, as no premium had been paid since the inception of cover on 19th June, 2008. He stated that a post-dated cheque was not payment, and that cover fell off thirty days after non-payment of the premium. He said that they received the cheque after the accident under unclear circumstances, and that since they had already notified the Broker of the cessation of the cover; they decided to refund the premium.

As regards the debit note, it was his evidence that the same was confirmation of someone's indebtedness, and that the plaintiff was not eligible for credit status because he was a first time client.

In cross-examination, he said that the Broker should have advised the plaintiff of his ineligibility for credit status. He further said that the cheque was deposited by mistake. He admitted that the e-mails sent to the Broker did not make specific reference to the plaintiff's case. He further admitted that the debit note was issued by the defendant, and not by the Broker.

I received submissions from Mr. Imonda on behalf of the defendant while no submissions were received on behalf of the plaintiff. The thrust of Mr. Imonda's submissions is that since the cover note did not indicate the due date for the payment of the premium, and there being no agreement for deferred payment therein, the premium was due on the effective date of the cover, the 19th June, 2008. He therefore, concluded that in terms of section 76 (1) of the Insurance Act No. 27 of 1997, as amended by Act No. 26 of 2005, the cover ceased to operate thirty days from the commencement date for non-payment of the premium.

The issue I need to resolve is whether or not Insurance cover is dependent upon payment of the premium. There is no doubt that insurance cover falls within the scope of the general principles of the law of contract in which there must be an offer, acceptance, as well as consideration. In making the proposal, the insurer undertakes to indemnify the assured against the risk proposed to be covered by the policy. In turn, the insured must pay or undertake to pay the premium which constitutes consideration for his part, while the insurer's consideration is the risk of providing the indemnity if the event insured against occurs.

As a simple contract not under seal, it is usual for a contract of insurance to be governed by set out terms usually stipulated in a standard form by the insurer. Almost invariably, the certificate of insurance, which also denotes acceptance by the insured, contains the said terms to govern the contract. This was certainly the case in the case under consideration. It is clear that the Certificate of Insurance or Cover Note also formed the full extent of the contract stipulating the terms, conditions and extent of the cover provided. It is common cause on the evidence that no other document exists that provides additional terms to the ones in the Cover Note.

I will therefore, by and large, rely on the Cover Note to give the most probable intentions of the parties at the time of making the contract. According to PW2, his organization, Express Insurance Brokers Limited,
208
were requested by the defendant to provide them with business, and the transaction involving the plaintiff's vehicle was one of the new customers that Express Insurance Brokers gave to the defendant. Consequent to that, PW 2 prepared the Certificate of Motor Insurance No. 5906. In undertaking the exercise, it is obvious that PW2, as an employee of Express Insurance Brokers Limited, was acting as agent for the defendant. In terms of the Cover Note, the insured is the plaintiff herein, and the effective period of insurance cover is 19th June, 2008, to 18th June, 2009.

It is not in dispute that no premium was paid as at the date of the commencement of the cover.

Subsequently, the defendant issued a Debit Note on 3rd July, 2008, to acknowledge that the plaintiff owed it money in form of premium for the period of cover, as per the exhibit marked 15 in the plaintiff's supplemental bundle of documents. This, in my opinion was further acknowledgement, by the defendant, that the plaintiff was entitled to indemnity under the contract except that consideration had not yet passed to it. Consequently, the plaintiff became a customer accorded a facility on credit basis otherwise; the only way to avoid that situation was to immediately reject the Cover Note for being not supported by consideration rather than issue a Debit Note.

It is therefore, my considered view that once the defendant had issued the Debit Note acknowledging the plaintiff's indebtedness to it, the remedy was to sue for the unpaid premium, and not to repudiate the contract by refusing to indemnify the plaintiff once the event for which cover was provided occurred.

I further note that on the Cover Note which I have already stated as containing all the terms of the contract, it is not a condition precedent that the premium should be paid before the cover takes effect. It further does not follow that the absence of such stipulation makes the payment of the premium an implied condition precedent to the effectuation of the cover. I take the view that had it been the defendant's intention to make payment of the premium a condition precedent to the effectuation of the cover, it would have expressly so stated in its Cover Notes which are on standard form. In the circumstances, the plaintiff is on firm ground to argue that he was treated as a credit customer without losing the benefits of the cover.

On the second limb, the defendant has strongly canvassed the position that the cover fell off thirty days after the effective date of the cover by operation of the law, particularly section 76 (1) of the Insurance Act No. 27 of 1997, as amended by Act No. 26 of 2005. This particular section provides as follows;

“A contract of general Insurance shall cease to operate if a premium is not paid within thirty days after the due date of the premium, or within such period as the contract may stipulate”

That provision is as clear as it was intended to be and no stretch of imagination or ingenuity can manage to do violence to its meaning. Firstly, it is clear that it envisages a situation where the due date of the premium is set out in the contract itself. If the premium is not paid by the stipulated due date, then, thirty days thereafter, the insurance ceases to operate. Secondly, the provision concerns itself with contracts of insurance that stipulate not a date but a period of time within which the premium should be paid. For instance, if it is a term of the contract that the premium should be paid within ninety days of the commencement of the cover, then, if no premium is paid thirty day after the elapsing of the ninety days from the date of the commencement of the cover, the insurance automatically ceases to operate.

None of the above circumstances is provided for in the Cover Note and as such, I can confidently state that the provision does not apply to the case under consideration. In the ancient case of Kelly v London and Staffordshire Fire Insurance Company (1), it was held that; “Prepayment of the premium is

not in law a condition precedent to the making of a complete contract of insurance." That is why, in the later case of Equitable Fire and Accident Office v Ching Wo Hong (2), it was held that; "but it is almost universal practice of insurers other than marine to stipulate that the contract shall not begin to take effect until the premium has been paid." (As quoted from the learned authors of Porter's Law of Insurance, 8th Edition, by T.W. Morgan, (London, Sweet & Maxwell, 1983) page 75.

In the absence of any stipulation as to the time or period the premium is due; the insured remains a debtor to the insurer without losing the benefits of the contract. It would therefore, appear to me that if the event covered by the insurance occurs before the premium is paid, as appears to have been the case in the matter under consideration, the insurer has an obligation to indemnify the insured, and then claim the premium through the normal channels of debt recovery. The same would be the case if at the end of the cover period the premium, has not been paid notwithstanding that the event covered never occurred.

The defendant, in this case, accepted payment of the full premium before refunding it through a cheque to the plaintiff, which the plaintiff says he rejected. It appears to me that the refund was an afterthought in order to avoid the claim on account of late payment of the premium. I have however; already rejected that position as it is not supported by law and neither was it a term of the contract of insurance. I would accordingly hold the defendant to be in breach of contract. The plaintiff fulfilled his part of the bargain by making payment in full to the Defendant. In refusing to indemnify the plaintiff for the accident involving his insured Mitsubishi Canter light truck, some quantifiable damage was caused to the plaintiff.

I therefore, award damages to the plaintiff for breach of contract to be assessed by the learned Deputy Registrar. The assessed damages shall attract interest at the short-term commercial lending rate as approved by the Bank of Zambia from the date of the writ, until judgment, and thereafter at 10%, until final payment. Costs will be for the plaintiff to be taxed by the Taxing Master in default of agreement by the parties.

Plaintiff's claim allowed.