ZAMBIA STATE INSURANCE CORPORATION LIMITED *v* NORTHERN BREWERIES LIMITED

Supreme Court
Sakala, Chirwa and Chibesakunda, JJS
7th September, 1999 and March, 2000
(SCZ Judgment No. 6 OF 2000)

Flynote

Insurance – Damage caused by servant – liability of insurer.

Headnote

This is an appeal and cross appeal against a decision of the High Court in which the learned trial Judge ordered the appellant to pay the full insured sum of K50,000,000.00 together with interest at the current bank deposit rate from the date of the writ of summons to the date of Judgment and thereafter at 6% per annum until full payment. The trial Judge dismissed the claim for consequential loss.

The brief facts are that the respondent took out an insurance policy generally known as the Boiler and Pressure Vessel Insurance policy. The policy was to indemnify, inter alia, the respondent for damage to the boiler or other apparatus in the schedule of the policy and to other property insured. In due course, the boiler was damaged. The respondent made a claim under the policy. However, the appellant repudiated the claim. The appellant issued summons claiming K50,000,000.00 under the policy as well as damages for the consequential loss and interest. The consequential loss calculated as special damages came to K115,966,062.00 (one hundred and fifteen million, nine hundred and sixty six thousand sixty-two Kwacha). The learned trial Judge found that the damage to the boiler did not amount to "*collapse as defined under the policy"*. The learned trial Judge found that the boiler was damaged as a result of the negligence of its servant and that the said damage fell within the confines of the policy. Judgment was given in favour of the respondent. The appellant appealed.

Held:

The learned trial Judge having found that the collapse of the boiler was not a collapse as defined in the policy misdirected himself in holding that insurance companies are there to cover negligent acts. Negligence was specifically excepted in the policy.

Cases referred to:

(1) *Curtis and Sons* v *Matthew* [1918] 2 KB 829.
(2) *Theobald* v *Railway Passengers Assurance Co*. [1854] 10 EX. CH. 45.
(3) *General Accident Fire and Life Assurance Corporation* v *Midland Bank Limited* [1940] 2

KB 388.
(4) *Attorney-General* v *Adelaide Steamship Co. Limited* [1923] AC 292.

M. K. Musongo of York Partners for the appellant.
J. L .Kabuka of Kabuka and Company for the respondent.

Judgment

CHIRWA, JS, delivered the judgment of the Court.

This is an appeal and cross-appeal against a decision of the High Court in which the learned trial judge ordered the appellant, Zambia State Insurance Corporation Limited to pay the full insured sum of K50,000,000 together with interest at the current bank deposit rate from the date of the writ of summons up to the date of judgment and thereafter at 6 percent until full payment is made. The learned trial Judge dismissed the respondent claim for consequential loss.

Briefly the facts which are not in serious dispute are that the respondent, Northern Breweries Limited took up an insurance policy generally known as the Boiler and Pressure Vessel Insurance Policy. The policy was to indemnify the respondent against:-

(a) damage to the boiler or other apparatus in the schedule of the policy and to other property of the insured;

(b) liability of the insured at law for damage to property not belonging to the insured;

(c) liability of the insured at law on account of fatal or non-fatal injuries sustained by any person except where such injuries arise out of and in the course of employment of such person by the insured caused by explosion or collapse as defined in the Policy of any boiler or other apparatus described in the schedule of the policy occurring either in the course of ordinary working or as a result of external impact or fire. *"Explosion"* is defined in the Policy as sudden and violent rending or tearing apart of the permanent structure of a boiler or other apparatus by force of internal steam or fluid pressure causing bodily displacement of the structure or any part or parts thereof and accompanied by the forcible ejectment of its contents. Except in the case of a steam test at a pressure not exceeding the maximum pressure permitted by the Inspecting Authority, the term *"Explosion"*shall not mean failure under any test. *"Collapse"* is defined as the sudden and dangerous distortion of any part of a boiler or other apparatus by bending or crushing caused by steam or fluid pressure whether attended by rupture or not, it shall not mean slowly developing deformation due to any cause.

Except in case of a steam test at a pressure not exceeding the maximum pressure permitted by the Inspecting Authority the term *"Collapse"* shall not mean failure under any test. The boiler in question is described in the scheduled as *"one babcock wilcox steam boiler"* – chain grale stocker No. 50630.

The incidents leading to the calamity are also not in dispute. They are that on 2nd August 1994, the main boiler at the respondent's plant was shut and the light fuel oil boiler (LFO) in issue was switched on. On being switched on it was discovered that it was cutting off and the low water audible alarm could come on. A check was conducted and it was found that there was sufficient water and the feed water pump was running. As there appeared to have been an electrical fault, an electrician by the name of Mkhalipi was called who temporarily

repaired the fault by bridging it on the connecting block in the panel and the boiler continued operating without giving false low water level alarms. Hours later after the boiler was running under the temporary repair the whole boiler became exceedingly hot indicating that there was no water. Another electrician attended to it and he unbridged the temporary connection done by Mkhalipi and immediately the low water alarms came on. The boiler was switched off. Because of the bridging done by Mkhalipi the low water level controls could not operate and as such operators could not detect the low water level condition in the boiler and the boiler kept running even when there was no water inside. As a result of the absence of water in the boiler, the fire furnace and tubes overheated and subsequently collapsed. The respondent made a claim under the policy; but the respondent repudiated the claim. The appellant issued summons claiming K50,000,000-00 (fifty million Kwacha) under the Policy; also damages for consequential loss and interest. The consequential loss calculated as special damages came to K115,966,062 (one hundred and fifteen million, nine hundred and sixty-six thousand, and sixty-two Kwacha). The learned trial judge found that the damage to the boiler did not amount to "Collapse" as defined under the policy. He found that the boiler was damaged as a result of Mkhalipi's negligence in bridging the connection and forgetting to unbridge it when knocking off. Despite the finding of negligence on the part of Mkhalipi the learned trial judge held that the respondent insured their machinery in order to protect itself against the conduct of the likes of Mkhalipi and that was why insurance companies are there for and therefore the damage fell within the confines of the policy and gave judgment in favour of the respondent.

In arguing the appeal, three grounds were presented. In the first ground, it was submitted that the learned trial judge erred and misdirected himself in entering judgment in favour of the respondent after finding that the boiler did not collapse within the meaning of collapse as defined in the policy. It was further argued that having found that there was negligence on the part of Mkhalipi, he erred when he said that the policy covered such negligence. Having accepted that the boiler did not collapse as defined in the Policy there was no other reason to award damages as the only claim was for the collapsed boiler.

The second ground argued was that the learned trial judge erred in law and fact in awarding damages on the basis that negligence is always covered by such a policy as this was not the basis for repudiating the claim. It was submitted that repudiation was based on the fact that the boiler broke down because of the wilful act of Mr Mkhalipi who wilfully bridged the circuit and wilfully run the boiler during that time instead of switching it off.

In the alternative, it was argued that the learned trial judge erred in law and in fact by awarding the whole sum insured as damages when it was clear that the policy was indemnity policy which is often subject to several deductions. The insured is paid only the loss suffered regard being had to the value of the salvage that remains after damage to the insured chattel. That the indemnity policy merely indicates the maximum sum that the insured may get, *Curtis And Sons* v *Matthew*(1) On the cross appeal, Mr Musongo submitted that the learned trial judge did not err when he refused to award consequential loss as the Policy did not cover that. Risks are covered by the premium paid and he referred to the case of *Theobald* v *Railyway Passengers Assurance Co.* (2) arguing that unless specifically covered in the Policy, consequential loss is not paid and under clause 7*(a)* as read with clause 5, the learned trial judge was on firm ground in rejecting consequential loss.

In reply, Mr Kabuka supported the learned trial judge's findings that the Policy covered negligence as well. He invited the court to consider his submissions in the court below at pages 31-39. He argued that MTM & Associates, the loss adjusters did find that the boiler had collapsed within the meaning of the Policy.

On the wilful act of the electrician Mkhalipi, he argued that the wilful act must be authorised

by the insured himself and in case of a company, it must be a principal officer quoting the case of_ *General Accident Fire & Fire Assurance Corporation* v *Midland Bank Limited* (3) On damages, Mr Kabuka submitted that the K50 million was specifically pleaded as a specific sum under indemnity policy and as the boiler was a total loss, the insured sum be paid. He also argued that the learned trial judge erred in not awarding damages for consequential loss as the appellant knew that the boiler was used for commercial purposes and non-use of the boiler brought with it loss of business. He prayed that these be awarded.

We have considered the evidence on record, the judgment and submissions by counsel both in the court below and before us. The result of the appeal will depend on the interpretation of the insurance policy. The term *"collapse"* is said to "mean the sudden dangerous distortion of any part of the boiler or other apparatus by bending or crushing caused by steam or fluid pressure whether attended by rupture or not, it shall not mean slowly developing deformation due to any cause. Except in cases of a steam test at a pressure not exceeding the maximum pressure permitted by the Inspecting Authority the term *"collapse"* shall not mean failure under any *"test"*. The learned trial judge found that what happened to the boiler was not *"collapse"* within the definition given in the policy. The crushing was not caused by steam or fluid pressure. All the reports show that there was a breakdown in the boiler because of low water level caused by non-switching on of the warning alarm controls caused by the bridging to the circuit done by one Mkhalipi. The judge was on firm ground in finding that the boiler did not collapse. Having so found, can the appellant be ordered to pay under the policy?

The learned trial judge found that the cause of the collapse was the bridging of the circuit by Mkhalipi and forgetting to unbridge. According to the learned trial judge, the bridging was, though wilful, innocent and it was meant to have the boiler operational temporarily. The second aspect of forgetting to unbridge the circuit was more of negligence than wilful and therefore on the authority of *Attorney-General* v *Adelaide Steamship Co. Limited (4)*, the appellant was ordered to pay the insured sum stating that having insured the boiler, the respondent took into account negligence of its employees and that insurance companies exist to take care of such situations. He therefore held that the damage fell within the policy. The facts in the *Adelaide Steamship* are very simple. The ship was requisitioned by the Admiralty and the Admiralty was not responsible for marine risks but undertook such war risks including "*all consequences of hostilities and warlike operations"*. The Adelaide collided with another ship whilst carrying wounded soldiers. It was navigating under instructions to sail at full speed within safety conditions without lights. The collision occurred because of the negligence of the master in not giving way to the other ship. The House of Lords was unanimous that the operation at the time of the collision was warlike operation and it does not matter how it was operated. Whether negligently or not, the operation was warlike operation. Insurance policies covering mobile chattels such as ships and motor vehicles do anticipate a negligent operation of the chattels. It is doubtful with static chattels such as boilers. In our present case, there was a wilful act by Mkhalipi in bridging the circuit. He never unbridged it. There is no evidence that he told anybody when knocking off that he had bridged the circuit. The policy specifically states that it does not cover *"(4*) damage and/or liability caused by the wilful act or wilful neglect of the insured". It is common cause that the insured is a company and acts through its servants and it becomes vicariously liable for its servants actions. The ratio decidendi in the case of *General Accident Fire & Life Assurance Corporation* v *Midland Bank Limited (5)* is not as canvassed by Mr Kabuka that indemnity will be refused if the wilful act is of the principal officer of the company. In the present case, the learned trial judge, having found that the collapse of the boiler was not a collapse as defined in the policy misdirected himself in holding that the collapse was caused by the negligent act of Mkhalipi, that insurance companies are there to cover such acts of Mkhalipi; that insurance companies are there to cover such acts and that the respondents having taken up the Policy, negligence was covered. These situations were specifically excepted in the Policy. We therefore allow this appeal, the policy was properly repudiated by

the appellant as the damage was not covered by the Policy. The cross-appeal automatically falls away. The appellant will have his costs here and in the court below, in default of agreement to be taxed.

Appeal allowed.
Cross-appeal dismissed.