

TANZANIA / JUDGMENT

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IN THE HIGH COURT OF TANZANIA (COMMERCIAL DIVISION) AT PAR ES SALAAM
COMMERCIAL CASE NO. 2 OF 2003 S&C GINNING COMPANY LIMITED.....PLAINTIFF VERSUS
NATIONAL INSURANCE CORPORATION OF TANZANIA LIMITED..... 1ST DEFENDANT
PRESIDENTIAL PARASTATAL SECTOR REFORM COMMISSION..... 2nd DEFENDANT

JUDGMENT

KIMARO, J, The plaintiff is suing on an insurance policy. On 21/6/1997 the plaintiff bought a policy for insurance of money with the 1st Defendant to ensure itself against theft. Policy NO.19CA00184 was issued covering the period 21/6/1997 to 21/6/1998. The plaintiff alleges sustaining loss of money by robbery at its office premises during business hours during the subsistence of the said policy. The loss suffered is alleged to be T.shs 134,908,850/ = . The plaintiff avers that the loss was promptly reported to the insurer (1st Defendant) and the Police. The 1st Defendant appointed Loss Adjuster who recommended to the 1st Defendant to settle the claim but the 1st Defendant decided not to settle on the pretext of connivance of the plaintiff's employees and that the loss suffered was not covered by the policy. The second defendant has been joined in the suit because of its statutory position of divestiture of specified 2 public corporation which by virtue of section 43 (1) (a) of the Public corporations Act, 1992 as amended by Act No.16 of 1993 and the specification, is a Receiver/Manager of the properties of the 1st Defendant. Mrs. Magdalena Rwebangira, Learned Advocate appears for the plaintiff, while Mr. Kariwa and Mr. Msechu, Learned Advocates appear together for both defendants. issues framed for the determination of the court are -

1. Whether the loss of money by theft was covered by the insurance Policy issued by the defendant.
2. Whether there was collusion and or connivance on the part of the plaintiff's employees.
3. Whether the Assessor's Report is binding upon the 1st Defendant.

4. To what relief(s) are the parties entitled to. A narration of how the theft occurred is found in the testimony of PW1. PW1 is Mr. Laxmikant N. Meshra. He is an Indian citizen and was at the material time the General Manager of the plaintiff's company. PW1 said on the material date in the morning, at around 8.00 a.m. he found three men seated at the visitors lounge as he entered his office. He approached the men and asked why they were there. The men pretended to be customers. They wanted to buy oil in bulk. They also represented to PW1 that they knew one 3 Mohamed Sidari whom PW1 knew as their agent and that they had come from Magu. With that introduction from the three men, they were invited into the office of PW1 where they embarked on negotiations. The three men said they wanted to buy about 400 jerry cans of edible oil. When they agreed on the price, PW1 said he had no mandate to receive the money and he sent someone to call the Financial Controller (F C) who joined PW1 and the three persons in his office. The F C was introduced to the three men and also the deal which had taken place was explained. The price agreed was T.shs 4.4 million. The F c said he was ready to receive the money and he would count the same in the presence of the so called customers. It was then one of them opened a brief case. PW1 and his F C thought he was going to give them the money. To their surprise and shock, he took a gun and using the same, started to threaten PW1 and the F C. He required them to open the cupboard and drawers. At the same time the other two persons took knives and joined the one with a gun in threatening PW1 and his F C. As the drawers and cupboards were opened, the culprits got some money which PW1 said was kept in his office for security purposes by the F C. The culprits were not satisfied with the amount of money they got from the office of PW1. They threatened to kill PW1 and his F C if they did not show the other money. One of the persons with a knife threatened PW1 that his private part would be chopped off if he did not show where all the money was. The F c was asked where his big chest was and he replied that it was in his office. They were then led to the office of the F C. The 4 threats continued. Although the F c opened the chest and there was about T.shs 7.0 million, the culprit were not satisfied. They demanded more. The threats continued and PW1 and the F C were beaten. The culprits searched the office until they got two boxes which had about T.shs 200 million. Then two employees of the plaintiff were called and they carried the two boxes to Lake Victoria shore where there was a boat waiting for them. PW1 and his F C were also ordered to walk the culprits to the Lake shore. The culprits made all of them walk in such a way that no one was suspicious of what was taking place. It was after the culprit had the money loaded in the boat and themselves boarded, that PW1 and his F C returned to the factory and immediately reported the incident to the police. PW1 was extensively cross examined on why he did not shout. He replied that he was too afraid after being threatened that he would loose his life. When asked why he did not verify the information received from the culprits about Mohamed Sidari, the witness had no explanation. He was also cross-examined about the security of the area. He replied that although there is a security fence the guards do stay at the gate and that there was no guard nearby his office when the robbery took place. PW2, one Mr. Rashid Juma is one of the persons who was made by the culprits to carry one of the boxes. He is an employee of the plaintiff. He corroborated the evidence of PW1 on the movement of the culprits and their General Manager and F C, as well as himself from the

office of F C to the Lake shore, as well as loading the money into the boat and the culprits boarding the boat and sailing away with the money. 5 He said he fell a victim of becoming a porter while he was waiting at the General Manager's office for his signature on a requisition for spare parts. PW2 was employed as a mechanic. He said another employee who was waiting for the General Manager's signature on his sick sheet also fell a victim of becoming a porter for the other box which contained the money. Mr. Raju Dave was PW6. He is the Agent of the 1st Defendant and the one who sold to the plaintiff the insurance policy. It was tendered and admitted in court as exhibit P1. PW6 said the policy covered loss of money in premises during office hours and in the safe after business hours. Mr. Topiwala, one of the Loss Adjusters who assessed the loss said money policy insurance is sometimes called "all risks" policy. It covers money in premises or safe, loss on damage and dishonesty of employees if loss is discovered within 72 hours. He also said that the loss sustained by the plaintiff was covered by the policy and they were satisfied so before making a recommendation to the 1st Defendant to settle the claim. The defendant's contention in the written statement of defence is that the loss was not covered because the policy did not extend to "hold-up" risks. An expert witness was brought by the plaintiff to testify on this issue. He is Mr. Nick Itunga. He has been called an expert because he holds a University Decree in Bachelor of Commerce (- Insurance Option) from the University of Nairobi. He is also a Fellow of Chartered institute in UK and Australia. He is an Associate of Chartered Insurance institute. At the moment he is a Claims Manager with Heritage insurance Company. His testimony was that money policy is "all risk" policy which cover loss or damage to money on premises, fraud of 6 employees and related matters. As for the hold up risk the witness said it does not arise on cash policy because cash policy covers separate risk. "Hold-up-extension policy is normally used under burglary policy, a risk which is subjected to forcible/violent entry. Donald cachuma PW3, the Operations Manager of the plaintiff is the one who reported the loss to the police. Mr. Subu PW4 - a Financial Controller of Nyanza Bottlers Limited, a Sister company of the plaintiff testified of having sent cash to the plaintiff for buying cotton prior to the incident. Constable Oliver Mwambungu PW5 a Police Detective carried out investigation of the loss but he said the culprits were not caught and prosecuted. What has been given above is the testimony which was adduced in this case, unfortunately the defendants did not bring witness when the case came for defence. An adjournment to enable the witness be summoned for another date was refused because no sufficient reason was given for the absence of the defence witnesses on the date which was fixed for the defence. Moreover, it was an event fixed two months prior to the date for the defence and the court was not even requested prior to the date of the defence to have the defence put off. The importance of complying with the Civil Procedure Code, 1966 Order VIII A rule 4 as amended by GN 422 of 1984, had to be observed. Let me go to the issues now. Mrs. Rwebangira submitted that PW1 and PW2 proved that loss of money occurred by theft at the plaintiffs premises. Although on the face of it it appears difficult to accept that theft could have been committed under the circumstance described by PW1, as there are a lot of question to be 7 asked about the security of the area, I am forced to accept that this is what actually happened because of the evidence of PW5 - the investigation Officer. His testimony

was that Indian are Cowards. With a little threat, they give in. under the circumstance where a gun and knives were used to threaten PW2 and his F C over loss of their lives if they did not yield to the culprits' wishes, it is possible to behave in the manner they behaved. PW1 was even threatened to have his private parts chopped off, if he shouted or did not comply with the culprits wishes. If PW2 and his F C were threatened of a maim, there would be a justification to blame them for other administrative matters related to the factory but not for easily succumbing to the wishes of the culprits. Mrs Rwebangira made reference to the testimonies of PW6, PW7 and PW8 arguing that the loss suffered by the plaintiff was covered by the policy. According to exhibit P1, the Corporation will indemnify the insured against - "Loss of money-i.e cash, Bank and current notes, cheques (other than crossed) postal orders or money orders arising in the circumstances or situation described in the schedule hereto from any cause not herein excepted." However, no exception come in the ambit of the plaintiff's loss. According to Mrs. Rwebangira, the plaintiff had in good faith complied with the conditions and the warranties under the policy so it is entitled to indemnity. She also looked at the evidence of PW7 and what the insurance money policy covered. She further looked at the Assessor's Report on LIABILITY: 8 " An armed Hold up accompanied by extraction of cash under threat from the premises during business hours is an insured peril." Compliance with warranties - The insured have complied with the standard applicable of warranties. The case of British and Foreign Marine insurance Co V Cambi

- (1921) AC p 47 was cited to show that cash policy being of the nature of "all risks" the plaintiff is not bound to go further to prove the exact nature of the accident or causality. The House of Lords held: "I/l/e are of course to give effect to the rule that the plaintiff must establish his case, that he must show that the loss comes within the terms of his policies, but where "all risks" are covered by the policy and not merely risks of a specified class or classes, the plaintiff discharged his special onus when he has proved that the loss was caused by some events covered by the general expression and he is not bound to go further and prove the exact nature of the accident or casualty which, in fact occasioned his loss." Mrs. Rwebangira concluded that since the policy does not specify the nature of the loss but simply say "loss of cash" the plaintiff need not go beyond what has been said to prove the incident. 9 As stated before, the plaintiff is suing on an insurance policy. The policy gives the nature of the risk which is covered. Considering the evidence of PW6, PW7 and PW8 that cash policy is in the nature of "all risks" and that the policy does not extend to hold-up risks and what PW7 recommended, I will answer the first issue affirmatively. on the second issue Mrs. Rwebangira submitted that it should be answered negatively. She relied on the evidence given by PW1, PW4, PW5, PW7 and PW8. I would agree with Mrs. Rwebangira only to the extent of the type of risk which was covered by the policy. That it was all risk policy, which did not extend to hold-up risks and does not specify the nature of the loss. I would however, not agree with her that there was no collusion and or connivance on the part of the plaintiff's employee. I can rule out that possibility for PW1 and the Financial Manager. But the circumstances under which the theft was committed, suggests that an employee of the plaintiff must have been a mastermind of the whole plan and this

employee must have taken an advantage of the plaintiff's poor security system. It would appear that the plaintiff's company is lacking security consciousness. This impression is drawn from the manner in which PW1 and his Financial Manager were being pushed to show more money after the culprits had obtained some money from the office of the General Manager and that other portion from the office of the Financial Controller which was in the chest. They went on pressing for more until they got the boxes. That is when they were satisfied that their mission was accomplished. Why did the culprits go on pressing for more money if they did not have the insight of what was in the custody of plaintiff. This attitude suggests that they had a detailed 10 information of the cash at hand in possession of the plaintiff. Who else could have given the culprit such a detailed information if not an employee of the plaintiff? I am also surprised by the silence maintained even by the watchmen at the gate as the money left the factory for the lake shore for being loaded in a boat which was waiting. If the watchmen had tasked their brain, they should have been suspicious that what was taking place was not ordinary. All the same, the anomalies pointed out notwithstanding, the policy covered even loss due to fraud or dishonesty of any employee of the insured, unless such loss is discovered within seventy two hours (excluding Sundays and Public holidays of its occurrence. The plaintiff's loss was reported immediately after it had been occasioned. As regards the defendant's defence of "hold-up" risks, evidence was led by the plaintiff that it is not applicable in money policy. The defendant by its own negligence did not lead evidence to support its contention in its defence, it had ample opportunity to prepare witnesses but they relaxed hence forfeiting their right. All in all, collusion/ connivance notwithstanding, such loss is covered by the policy which the plaintiff had. The answer to issue number two is yes, there was collusion and or connivance on the part of the plaintiff's employee but even that was covered under the policy so long as the loss had been reported within 72 hours of its occurrence. 11 The answer to the third issue is negative. However, both PW7 and PW8 made it clear that much as the Loss Adjusters Report does not necessarily bind the insurer, the insurer is duty bound to react on the report by either accepting it or selecting another Loss Adjuster or inform the insured reasons for not accepting the Loss Adjuster's Recommendation. The insurer is not expected to remain indifferent for a long period and then come up with a unilateral decision refusing to honour the recommendations of the Loss Adjuster on grounds which had never been raised before. PW8 said insurance contracts are based on the principal of utmost good faith (*ubirrimae fidei*). The insurer cannot keep on appointing assessors without giving reasons why the previous assessors report is doubted. Reference was made to Rileg Denis on his Consequential Loss Insurance and Clause Sweet Maxwell Ltd, London, 2nd Ed. 1959 at clause 297 where he says: "Immediately when damage has taken place which is likely to result in an interruption of the business, the insurer should be informed, and they will then instruct a qualified, independence loss adjuster to handle the matter on their behalf. The interest of the insured and insurer are identical, each desires a restoration of normal turnover as quickly as possible. Although the insured will often be in a better position to formulate steps towards the objectives, collaboration with the loss adjuster is desirable throughout the

period of interruption. While insured probably as only limited experience or none, a loss adjuster has a very extensive knowledge of such matter..." E. Killick, on insurance Handbook No.1; Ballantyre & Co. Ltd, London, 1963 also says at page 73 - " There is the one class of accident business where the service of independent loss adjuster are frequently used, but even so there are great many claims which are handled by insurer's officials. The main reason of sending claims to adjusters is because of their wide and specialized knowledge of the valuable market, if the claim goes to a loss adjuster, there is little to be done by the office staff beyond the payment of the agreed amount and the necessary accounting and statistical entries." What I get from the two authors above is that Loss Adjusters are professional experts, they are independent experts who carry out inquiry of loss without influence of either of the parties. They are usually appointed by the insurers and they are reputed to report on the loss fairly, without favour, fear or bias. Under the above circumstances, I agree with Mrs. Rwebangira that much as the 1st Defendant is not bound by the Report made by the Loss Adjuster (although he was chosen by the 1st Defendant) they are professional experts. Any doubts should have been accounted for expressly. It was wrong for the 1st Defendant to remain silent for a long period and then make a unilateral decision not to honour the report on a ground which had never been expressed before. Lastly is the relief to which the plaintiff is entitled. Having made a finding that the loss suffered by the plaintiff is covered by the insurance policy, I declare that the plaintiff is entitled to be indemnified by the 1st Defendant for the loss covered under the policy, it is entitled to the payment of T.shs 134,908,850/= as prayed for. Since the plaintiff said nothing at all on the percentage of interest it is claiming, I exercise my discretion and grant it interest at 20% from the date of the loss to the date of judgment. Thereafter, interest to be at 7% until full settlement. The plaintiff is also entitled to costs. N.P.KIMARO, JUDGE 05/05/2004 Certify the above as a true and correct copy. the origin of the order of judgment is the Registrar Commercial Court Dsm." Date

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