IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MKUYE, J.A., MWANDAMBO, J.A. And MAIGE, J.A.)

CIVIL APPEAL NO. 393 OF 2020

AMC TRADE FINANCE LIMITED .....APPELLANT

VERSUS

SANLAM GENERAL INSURANCE (TANZANIA) LIMITED..... RESPONDENT

(Appeal from the judgment and decree of the High Court of Tanzania, (Commercial Division) at Dar es Salaam)

(Philip, J.)

dated the 12th day of May, 2020
in
Commercial Case No. 09 of 2019

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JUDGMENT OF THE COURT

14th July & 12th September, 2023

MWANDAMBO, J.A.:

The appellant, AMC Trade Finance Limited, was aggrieved by the decision of the High Court (Commercial Division), which dismissed its suit for compensation in the sum of USD 840,434.99 for breach of contract of insurance with the respondent due to the alleged wrongful repudiation of the said contract. Acting through M/s IMMMA Advocates, the appellant faults the trial court's decision on five grounds of appeal.

Briefly, the appellant, a business lender based and regulated by the laws of the United Kingdom, financed the purchase of raw cashew nuts by a local company called Elements Limited sometime in the year 2017. The purchase through auction was made in Lindi and Mtwara Regions for export. The purchased cashew nuts were to be transported from warehouses in Mtwara/Lindi Regions to Dar es Salaam in readiness for export. The arrangements for transportation of the consignment of 7,196 bags weighing 574,620 Kilogrammes from Mtwara were made by Elements Limited by engaging a transporter in the name of Bravo Logistics (T) Limited. That arrangement was made pursuant to a Service Level Agreement for the Provision of Transportation and Freight Forwarding Services Required to Sustain Activities of Elements Limited, popularly known as the transportation agreement.

The aforesaid agreement was between Elements Limited and Bravo Logistics Limited providing inter alia, consignment through B.R. Puri & Co. Limited; the Insurance Broker. It was common ground that the latter approached the respondent for an appropriate insurance cover. The respondent issued to both Elements Limited and the

appellant an insurance policy titled: Marine Cargo Policy Open Stock Throughput Cover, Ref. No. P/01/2017/T2001/000001 (the policy) covering the period between 15/12/2017 to 14/12/2018 inclusive upon payment of a premium in the sum of TZS. 5,201,055.07.

Sometime in January, 2018, the consignment of raw cashew nuts loaded in 33 containers left Dar es Salaam to Ho Chi Minh City in Vietnam by sea transport. It was common ground that, upon arrival at the port of destination, part of the cargo weighing 574,620 Kilogrammes was found to have been damaged. The damage was investigated by a company called Vina Control; a loss surveyor and adjuster based in Vietnam at the instance of the appellant. The survey report (exhibit P4), revealed that part of the consignment was sprouted and heavily damaged.

Initially, armed with the report, the appellant lodged a claim (exhibit P6) with the respondent (the insurer) but to no avail. The respondent repudiated the claim on the ground that the policy did not cover risks due to inherent vice or nature of the subject matter. The appellant's demand for indemnification through its lawyers (exhibit

P7) was similarly rejected for similar reasons and hence the institution of the suit before the trial High Court.

After the institution of the suit and before the respondent had filed its defence, the appellant had unsuccessfully moved the trial court to pronounce a default judgment against the respondent allegedly for failure to file its written statement of defence in accordance with the summons to appear issued under Order V rule 1 of the Civil Procedure Code. The trial court rejected that prayer and ordered the respondent to file its defence which it did. It will be noted later in the course of this judgment that the trial court's order aggrieved the appellant and forms part of the grievances in this appeal.

In its defence, the respondent disputed liability contending that the policy (exhibit P1), was restricted to inland transit from Mtwara and Lindi regions on the basis of the transportation agreement between Elements Limited and Bravo Logistics Ltd (the transporter). In the alternative, it reiterated its earlier reason for repudiation contained in a letter through its lawyers (exhibit P8) that is; inherent vice and nature of the subject matter.

From the pleadings, the trial court framed three issues for the determination of the suit. The first and the decisive issue was whether the damage occasioned to the plaintiff's consignment of cashew nuts was a risk covered under the policy issued by the defendant (respondent) in favour of the plaintiff (appellant). The trial court (Philip, J.), answered that issue negatively sustaining the respondent's defence that the policy (exhibit P1), was limited to inland transit from Mtwara and Lindi regions which did not extend to export of the consignment outside Dar es Salaam.

In sustaining the respondent's defence, subject of the first issue, the learned trial judge took into account clause 9.1 of exhibit D1 which provided that the goods (raw cashewnut) were to be insured from auction warehouses to port of loading under an insurance policy to be arranged by B.P. Puri & Co. Limited on winning the bid and before goods are uplifted for transport to the port of loading. Secondly, the trial court took into account the insertions in the policy showing the value of the goods and premium payable for inland transit but nil for export. Besides, according to the trial court, since there was no any indication in the policy regarding the port of

destination, suggested that the insurance policy was not meant to extend to the export of the goods. The trial court addressed itself on the appellant's argument that if there was any ambiguity in exhibit P1 (also D1) same could be construed against the respondent by reason of contra *preferentum* rule. The trial court reasoned that, the argument fell on the face of the appellant's failure to call a witness from Elements Ltd who had instructed the insurance broker to arrange and procure an insurance policy from the respondent. In the end, it dismissed the suit resulting into the instant appeal.

Mr. Gaspar Nyika, learned advocate representing the appellant lodged written submissions faulting the trial court's decision along with the trial court's order refusing to enter a default judgment for failure to file a written statement of defence and erroneously extending time within which to file the same. In the course of addressing the Court orally during the hearing of the appeal, Mr. Nyika abandoned grounds one and two which faulted the trial court's alleged error in refusing to enter a default judgment.

After abandoning the first two grounds, the remaining grounds (three, four and five) raise the following issues for the court's

determination; (1) scope of the Marine Cargo Policy Open Stock – Throughput cover; whether it was restricted to inland transit only; (2) whether the trial court rightly invoked adverse inference against the appellant for not calling a witness from Elements Limited and; (3) alleged consideration of extraneous matters not forming part of the record.

The learned advocate combined his grounds in the written submissions and addressed the Court orally at the hearing of the appeal on a few aspects followed by a reply from Mr. Oscar Msechu, learned advocate representing the respondent. We shall consider the learned advocates' submissions in the course of our discussion.

Ground three which is the main stay of the appellant's grievance faults the learned trial judge for holding that the policy was restricted to cover risks for the inland transportation of the raw cashew nuts from Mtwara and Lindi to Dar es salaam port only. It was contended that, in doing so, the learned trial judge erred for; (1) relying on Toplis and Harding Surveyor Reports which was not admitted as an exhibit; (2) relying on the transportation agreement between the appellant and the insurance broker which did not form

part of the policy nor was the respondent a party to the said policy; (3) failure to take cognisance of the respondent's reason for repudiating the contract contained in exhibit P8; (4) relying on the quotations from the insurance broker which were not admitted as exhibits; and, (5) failure to read the contract of insurance as a whole.

Mr. Nyika made his submissions on each of the above grievances faulting the trial court's findings in its decision. He urged the Court to sustain the appellant's complaints and ultimately reverse the finding of the trial court on the extent of the policy, subject of the first issue before the trial. To nobody's surprise, Mr. Msechu supported the trial court's finding as being justified.

We shall begin our discussion with the complaint faulting the trial court for relying on the transportation agreement allegedly not admitted as an exhibit. Having examined the record and the impugned judgment, we do not see any merit in the appellant's complaint. The record shows clearly [at page 328] that the impugned document was duly admitted along with the policy as exhibit D1 collectively. Apparently, Mr. Nyika could not pursue his attack further in his oral arguments when the Court drew his attention in this

regard. Nevertheless, that is not the same thing as saying that the trial court was necessarily right in its approach an aspect to which we shall revert later.

Next, we shall address the first and fourth complaints directed against the trial court's reliance on the Toplis and Harding Surveyor Reports and a quotation from the insurance broker respectively. We need not belabour on this more than necessary. The record shows that neither of them was admitted as exhibits thereby forming part of the record. In particular, the trial court rejected the admission of Toplis & Harding and so it could not have formed part of the record capable of being relied upon by the trial court. The authorities relied upon by the appellant's counsel, amongst others, **Japan International Cooperation Agency (JICA) v. Khaki Complex Limited** [2006] T.L.R. 343 and **Abdallah Abas Najim v. Amin Ahmed Ali** [2006] T.L.R. 55 say as much on the status of documents annexed to the pleadings but not admitted at the trial to form part of the record. Since the two documents complained of were not admitted during the trial and endorsed as such in terms of Order XIII rule 4 and 7 (2) of the CPC, they could not form part of the record capable of

being relied upon by the triai court in its findings on the first issue irrespective of the extent to such reliance in the impugned finding.

Our determination on the two complaints takes us to the third complaint faulting the trial court allegedly for failing to take cognisance of the respondent's reason for repudiating the contract. The learned advocate for the appellant spent some force in trying to persuade us that the respondent was estopped from changing goalposts on the reason for the repudiation of the appellant's claim. It was argued that, the reason for the repudiation expressed in exhibit D2 was different from the respondent's written statement of defence alleging that the claim was not covered by the policy. The learned advocate cited a book titled: **Ewan McKendrick in Contract Law,** 5th edition to reinforce his argument. Mr. Msechu implored us to disregard that proposition arguing that, the doctrine of estoppel could not be invoked in the circumstances of the case as the respondent was not prohibited from raising the defence as it did regardless of the fact that it had not raised it as a reason for repudiating the appellant's claim for indemnity in response to the demand for indemnification.

With respect, we do not share Mr. Nyika's argument in support of the application of the principle of estoppel. The burden in his argument lies in the question which we think is very critical to the application of the doctrine of estoppel to the facts in this appeal which depends on answers to two interrelated questions. The first is whether the respondent's reason for repudiating the claim based on exclusion of the loss to the damage of the cashew nut contained in exhibit D2 amounts to a representation capable of being acted upon by the appellant. The second is, in what way did the appellant act on such representation to her detriment acting on the said reason?. From our examination of the record, none of the questions posed attract an answer in the appellant's favour because, in the first place, we do not agree that in repudiating the claim in the manner expressed in exhibit D2 to which she was entitled in response to the claim was a representation. It would have been a different issue altogether had the respondent reneged from settling the claim after accepting liability. In any case, there is no evidence proving the manner the appellant acted on such a representation to his detriment. The principle of estoppel provided under section 123 of the Evidence Act is

too clear to permit its application to the facts in the instant appeal such that it may not be necessary to search for further authority in that regard. Needless to say, we have found it apposite to excerpt a passage from the works of the renown authors of Sarkar explaining the scope and essence of the principle thus:

> *"...The rule of estoppel is based on equity and good conscience, viz that it would be most inequitable and unjust to a person that if another by a representation made, or conduct amounting to representation, has induced him to act as he would not otherwise have done, the person who made the representation should be allowed to deny or repudiate the effect of his former statement, to the loss and injury of the person who acted on it. [Prabhu V. Official Liquidator, AIR 2008 KLT 894 (907): AIR 2008 (NOC) 2173 (Ker- DB). As a doctrine based on equity, the principle of estoppel is only applicable in cases where the other party has changed his position relying upon the representation thereby made [H.R Basavaraj V. Canava Bank, (2010) 12 SCC 458].*
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> *...Estoppel is a complex legal notion involving a combination of several essential elements namely,*

*statement to be acted upon, acting on the faith of it, resulting to detriment to the actor. [***Sarkar Law of Evidence,*** S.C Sarkar, 18th Edition Vol. 2 LexisNexis at page 2283]

It is plain from the foregoing explication of the law that the appellant has not met any of the conditions for the application of the doctrine of estoppel. The appellant's attack against the trial court in this regard is, but a misconception and we reject it.

We shall now revert to the issue relating to reliance on the transportation agreement independent of our determination earlier on that it was duly admitted in evidence as part of exhibit D1. This discussion will, as of necessity, overlap to the criticism in the fifth complaint; failure by the trial judge to read the contract as a whole. It was argued by the appellant's advocate that the transportation agreement was a separate document from the policy neither was the respondent privy to it to entitle her to rely on in support its defence. It was further contended that the finding that the policy was meant for inland transportation was not supported by any express provision suggesting that the policy was to be read together with it to justify reliance upon it in determining its scope. It is common cause that in

discovering the scope of the policy, the learned trial judge took the view that understanding the intention of the parties to the policy, it was imperative that the quotation from B.R Puri & Co. Limited and the transportation agreement had to be looked at. It is from the examination of the two documents along with the policy, the trial court found and held that the scope of the policy (exhibit P1), was limited to inland transit only.

We have already held that the quotation from the insurance broker was not part of the record and so it was wrong for the trial court looking at it as she did in discovering the intention of the parties to the policy. The question for our consideration and determination is whether there was justification in looking at the transportation agreement, nevertheless. Before answering that question, we need to put one thing clear at this juncture to make the record straight. From our examination, despite the trial court's reference, the contract was more than a transportation agreement. It was a service level agreement for the provision of transportation and freight forwarding services required to sustain activities of Elements Limited. That agreement provided parameters of all freight forwarding services

covered as are mutually understood by the primary parties. This means that, inland transport of cashew nuts from Lindi and Mtwara regions to Dar es Salaam was just one, amongst many services covered by the agreement. The scope of services by Bravo Logistics (T) Limited and responsibilities by Elements Limited are detailed in clause 3 whereas the terms and conditions of Bravo Logistics Tanzania are contained in clause 9. It is plain under clause 9.1 that insurance of the goods from auction to port of loading will be the responsibility of Elements Limited under an insurance policy to be arranged by the insurance broker. Logically, that was quite in order considering that transportation of the goods by Bravo was limited to inland transit from the auction warehouse to the port of loading.

Be it as it may, what a court is required to do in interpreting the terms of the contract has been a subject of judicial consideration and determination time immemorial. Our research on this landed us on a book by Gerald Dworkin titled: **Odger's Construction of Deeds and Statutes**, 5th edition, Universal Law Publishing Co. PVT Ltd making reference to decided cases on the subject. Directly relevant to this

appeal are speeches from an old case in **Shore v. Wilson** (1842) 9 CL. & F 355. Coleridge, J is quoted to have stated:

> *"Where language is used in a deed which in its primary meaning is ambiguous and in which that meaning is not excluded by the context, and is sensible with regard to the extrinsic circumstances in which the writer was placed at the time of writing, such primary meaning must be taken conclusively to be that in which the writer used it;* ***such meaning in that case conclusively states the writer's intention and no evidence is receivable to show that the writer used it in any other sense or had any other intention****..... This rule thus explained implies that it is* ***not allowable in the case supposed to adduce any evidence, however strong, to prove an unexpressed intention varying from that which the words used impart****. This may be open no doubt to the remark that, though we profess to be exploring the intention of the writer, we may be led in many cases to decide contrary to what can scarcely* ***to double*** *to have been the intention, rejecting evidence which may be most*

satisfactory in the particular instance to prove it. The answer is, ***that Interpreters have to deal with the written expression of the writer's intention and courts of law to carry into effect what he has written, not what it may be surmised, on however probable grounds, that the intended only to have written"*** *[emphasis added, at page ....]*

Parke, B. in the same case stated:

"No extrinsic evidence of intention of the party to the deed, from his declarations, whether at the time of his executing the instrument or before or after at the time, is admissible, the duty of the court being to declare the meaning of what is written in the instrument, not of what was intended to have been written."

That aside, there is a similar discussion in an article by Professor Jeffrey W. Stempel of Florida State College of Law in Tallahasee titled: **Interpreting Insurance Policies**. The learned author cites several decided cases to reinforce the proposition that the intention of the parties to a contract cannot be discovered by extrinsic evidence except by reading the contract as a whole and giving effect to all

provisions if possible [at page 1]. That is consistent with what once Morris, LJ said in **Bridges v. Hewitt** [1957] 1 W.L.R. 674,691: evidence is not admissible to contradict the plain and unambiguous meaning of a document by attempting to show that the intention of the parties were to give a meaning to the provisions contrary to the words in which the document plainly contains.

What emerges from the foregoing is that, as a general rule no extrinsic evidence is permitted to ascertain the intention of the parties to a contract. We subscribe to the above as the correct position of the law on the interpretation of contracts. It is instructive that, the above is, but a general rule subject to some exceptions as can be seen from **Shore v. Wilson** (supra) through Tindal, CJ who stated:

> *"Where any doubt arises upon the true meaning or sense of the words themselves, or any difficulty as to their application under the surrounding circumstances, the sense and meaning of the language may be investigated and ascertained by evidence* ***dehors*** *the instrument itself; for both reason and common sense agree that by no other means can be language of the instrument be made to speak*

the real mind of the party". [At page 565] see also the statement of Jenkins, LJ [1959] 1 W.L.R. 536 at P. 544; [1959] 2 All.ER 152]

There is a similar discussion in an article by Scott G. Johnson titled: *Resolving Ambiguities in Insurance Policy Language: The Contra Proferentem Doctrine and use of Extrinsic Evidence*, published in The Brief, Vol. 33, No. 2, winter 2004 by the American Bar Association. Cognisant with the general rule against the use of parol evidence in interpreting contracts, insurance policies included, the author makes it explicit that the rule is subject to exceptions. One of such exceptions is where the extrinsic evidence is introduced to clarify or aid in the interpretation of an ambiguous contract. In relation to insurance policies, such extrinsic evidence is permissible where the language used therein is reasonably susceptible to two or more interpretations. Nonetheless, it is argued that, parol evidence is only permissible if it does not have the effect of substantiating a party's unexpressed, subjective intent or the party's opinion about the meaning of an insurance policy or whether the coverage exists. [At page 2 and 3]

Applying the above to the instant appeal, the trial court's resort to the transportation agreement annexed to exhibit D1 to discover the intention of the parties was, with respect, uncalled for. We say so because there was no ambiguity in the coverage of the policy. To the contrary, the intention of the parties to the contract of insurance (exhibit P1) could have been ascertained by reading the contract as a whole.

Mindful of the above, an examination of the policy (be it exhibit P1 or D1) reveals that it was meant to attach for all sailings and /or sendings on or after 15th December 2017 to 14th December 2018 both dates inclusive involving the cargo; raw cashew nuts. It is significant that, the word sailing is used here to connote the action of using boats or ships. The word sailing is too clear and unambiguous to attract any other meaning than its literal meaning used in the policy. Consequently, contrary to the findings of the trial court, the policy was not limited to inland transit only. Besides, reading the policy as a whole, the finding by the trial court on the insertion of TZS 2,271,997,060.00 below the section showing inland transit cannot be correct. This is because, the evidence on record proving payment of

premium in the sum of TZS 5,201,055.00 inclusive of VAT is consistent with the section in the policy titled Gross premium rates showing 0.195% for marine which was payable per the options provided below it, that is to say;

A. Marine	*4,407,674.3*
VAT 18%	*793,381.4*
Total Deposit Premium:	*5,201,055.7*

The amount reflects the premium which appears to have been calculated from the estimated annual carry of TZS 2,271,997,060.00. The respondent received the premium as consideration for the marine cargo insurance in question and no more.

From the foregoing, it seems to us to be inconceivable that the respondent could have received premium for marine cargo which was the only consideration for the contract of insurance and renege from it contending as it did that the policy was meant to cover inland transit only. Put it in its proper place, this was a fitting occasion for the application the principle of estoppel. A reading of the insurance contract; exhibit P1 as a whole without reference to the transportation agreement and a quotation from an insurance broker which was

nonetheless not admitted as part of the evidence, could not have resulted into the finding the trial court arrived at. On the contrary, the appropriate finding should have been that the policy was not meant for inland transport only but covered marine risks and thus the damage to part of the cargo was covered. As we have alluded to shortly, much as we do not agree with the appellant's advocate on the application of estoppel on the raising of the defence, there is merit in the argument that the same was an afterthought. This is so because, had the respondent been firm that the cover was meant for inland transport only, it should not have bothered itself so much in engaging Toplis and Harding to conduct a loss survey of the cargo in Vietnam if the policy was limited to inland transit only. Logic dictated raising the defence it at the time the appellant lodged its claim.

On the whole, save for the complaints we have expressly rejected in our discussion, we sustain the substance of the appellant's complaint in ground three and five as meritorious which will be sufficient to dispose of the appeal rendering the appellant's complaint in ground four superfluous. Consequently, the trial court's finding on the first issue upon which it dismissed the appellant's suit is hereby

set aside and substituted with a finding that the damage occasioned to the appellant's consignment of cashew nuts was a risk covered under the policy issued by the respondent.

The upshot of the foregoing is that the appeal must be and is hereby allowed. Unlike the trial court, we hold that the respondent's repudiation of the appellant's claim through exhibits P6 and P7 was a breach of contract of insurance between the appellant and the respondent. Consequently, we set aside the trial court's judgment and decree and substitute it with a judgment and decree in favour of the appellant. The appellant is granted judgment and decree in the amount claimed as indemnity for the loss to the extent of the damaged consignment on the basis of exhibit P4 in the sum of USD 840,434.99. Nevertheless, we do not see any justification for the claimed pre-judgment at the rate of 1.5 % per annum on the principal sum per annum. On the strength of the Court's decision in **National Insurance Corporation T. Limited & Another v. China Civil Engineering Construction Corporation** (Civil Appeal 119 of 2004) [2010] TZCA 4 (25 March 2010) reaffirmed in **Heritage Insurance Company Tanzania Limited v. First Assurance Company**

Limited (Civil Appeal 165 of 2020) [2023] TZCA 175 (5 April 2023) the award of interest must be based on express agreement or any usage of trade having the force of law. There was no such evidence before the trial court and thus, in the absence of such evidence, that claim is rejected. Otherwise, the appellant is awarded interest at the court's rate of 7% per annum from the date of judgment to full satisfaction. Finally, the appellant is awarded the costs in this Court and the court below.

DATED at **DAR ES SALAAM** this 11th day of September, 2023.

R. K. MKUYE
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The Judgment delivered this 12th day of September, 2023 in the presence of Mr. Gaspar Nyika, learned counsel for the Appellant also holding brief for Mr. Oscar Msechu, learned counsel for the Respondent, is hereby certified as a true copy of the original.

F. A. Mtarania
DEPUTY REGISTRAR
COURT OF APPEAL