ZAMBIA STATE INSURANCE CORPORATION v SERIOS FARMS LIMITED
(1987) Z.R. 93 (S.C.)

SUPREME COURT
NGULUBE, D.C.J., GARDNER AND SAKALA, JJ.S.
18TH MARCH, AND 16TH APRIL, 1987.
(S.C.Z. JUDGMENT NO. 6 OF 1987)

Flynote

Damages - Contracts - Non-payment of debt - Suitability of interest as damages recoverable.
Damages - Inconvenience - Failure to pay insurance claim - Whether damages recoverable.
Damages - Insurance indemnity - Delayed payment of claim - Consequential loss - Whether damages recoverable.
Damages - Interest on award - Appropriate calculation of rate.

Headnote

The respondent took out insurance policies with the appellant in respect of its maize crop whereby the appellant undertook, *inter alia,* to meet any loss suffered by the respondent due to drought. When the respondent later claimed indemnity under the policies in the sum of K245,867.33, the appellant delayed payment of the claim. By the time payment was made the commercial rate of interest in the country had risen dramatically. The trial court also awarded the respondent an additional sum of K177, 170.28 as extra damages over and above the amount due under the policies for consequential loss suffered as a result of the appellant's refusal to pay the claim. In addition the trial court awarded K100,000 general damages for inconvenience. Interest was awarded at the rate of 13%.

The appellant appealed against the award of extra sums over and above the drought-loss. The respondent has been kept out of his money, and a fair average rate of interest should be applicable.

Held:

(i) It would be unrealistic to ignore the fluctuations in the rate of interest when the respondent has been kept out of his money, and a fair average rate of interest should be applicable.
(ii) An insurance policy only covers the losses which were the subject matter of the insurance itself and that any consequential losses cannot be claimed under the policy unless expressly stipulated in the contract.

(iii) Non-pecuniary losses may be recovered if they were within the contemplation of the parties as not unlikely to result from the breach. In the case of inconvenience, the damages have normally related to substantial physical or personal discomfort.
(iv) Payment of interest is normally regarded as equivalent to an award of damages for the detention of a debt.

Cases cited:

(1) Wadworth v Lydall [1981] l W.L.R. 598
(2) Attorney-General v Mpundu (1984) Z.R. 6 (S.C.)
(3) Miyanda v Attorney-General (1985) Z.R. 185

For the appellant: M. Mwamba, Legal Manager, Zambia State Insurance Corporation.
For the respondent: M.M. Imasiku, Messrs Lisulo & Co.

Judgment

NGULUBE, D.C.J.: delivered the judgment of the court.

The respondent took out with the appellant three insurance policies in respect of their maize crop covering the risk, *inter alia,* of reduced yields due to drought. It was in evidence that the effect of the drought depended on, among other things, the stage of the growth of the crop when the deficiency in the rainfall occurs. The respondent had a number of fields under cultivation, some of which did quite well and exceeded the insured harvests. Other fields did rather poorly. A clause in the policies required expeditious notification of any possible claim by telex, telephone, or any fastest means. On 13th January, 1983 and on 7th March, 1983, the appellant's agricultural inspector was informed orally by the respondent's farm manager - while the two were engaged in inspecting the fields - of a possible claim due to drought. The dispute on this matter, that is to say whether such conversation took place or not, was resolved on an issue of credibility. The respondent did notify the appellant's representative and followed this up with some correspondence. The grounds of appeal criticising the learned commissioner's finding that notice was duly given within the parameters of the warranty clause are without merit. Indeed the appellants, in their heads of argument and through Mr Mwamba indicated quite properly that no arguments would be advanced in support of such grounds. Once there was credible evidence to support the respondents' contention that due notice was given within the proper times, the appellant's bare denials which were in conflict with the correspondence were properly rejected on an issue of credibility and the contention that the learned trial commissioner was in error in resolving the issue in favour of the respondent, and in finding that the respondent had not acted in breach of the relevant warranty clause, was somewhat expletive.

Under the policies in issue, the appellant undertook to meet any loss suffered due to drought. The policies indicated the insured harvests in terms of bags per hectare and the loss insured against was any shortfall on such yields which was due to drought as defined in the policies. By their statement of claim and in evidence, the respondent claimed drought-related loss in the sum of K245,867.33n. This the learned trial commissioner found to have been established and accordingly judgment was entered for this sum with interest at 13%. There is no appeal against this part of the award. However, we did entertain under this head an application by way of cross appeal on

the part of the respondent whereby Mr Imasiku argued that the rate of interest awarded ought to be increased in conformity with the prevailing circumstances. We were informed that this amount had not yet been paid, the appellant having obtained an order for stay of execution pending appeal. Mr Imasiku pointed out that, at the time the case arose, the commercial rate of interest was 13% but that since then there has been an increase to 17 12% in 1984 followed by a dramatic increase after the auction system was introduced to 30% which has now dropped marginally to 26%. We are

aware that Mr Imasiku has relied on rates applicable in a case where a party has to borrow other money from the bank in place of the money owed to him by the opponent However, we agree with the principle that the rate of interest must move with the times and must take into account prevailing commercial practices. In the case of interest awarded by the courts, this will normally be guided by the rate of interest which a depositor s likely to earn had he the use of his money and had he placed it in an interest-bearing account of a reasonable nature. On behalf of the appellant, Mr Mwamba quite properly conceded that it would be unrealistic to ignore the fluctuations in the rate of interest when the respondent has been kept out of his money. In this regard we consider that a fair rate of interest should be a single rate which takes into account that the claim was payable around September, 1983 and that there has elapsed since then two years of a non - auction regime and about one-and-half years of the auction regime with the implications that this consideration has on the commercial rates of interest. On this basis we find that a fair average rate of interest which should be applicable in this particular case is 20% per annum and this we award in substitution for the 13% which the learned trial commissioner had awarded.

The major part of the appeal is concerned with some extra sums of money which were awarded as damages over and above the amount due as indemnity under the policies. The respondent had pleaded and claimed in the case additional sums, namely, K177,170.28n allegedly lost because they planted a smaller hectarage of maize in the next season allegedly because of the appellant's refusal to pay the claims. The claim in this respect was couched in the following terms and as paragraphs 7 and 8 of the Statement of claim:

"7. By reason of the defendant's failure and refusal to - settle the claim as aforesaid the plaintiff has and continues to suffer consequential loss and damage.
8. The plaintiff had by July, 1983 budgeted to crop 780 hectares of maize but due to the defendant's deliberate refusal to pay as aforesaid the plaintiff had to reduce planting by 249.36 hectares and the plaintiff therefore, claims from the defendant K177, 170.28 expected income on 249.36 hectares of maize not planted due to the defendant's negligence in refusing to pay the plaintiff's claim."

According to the evidence the appellant's refusal to pay resulted in the respondent's failure to plant their full hectarage of maize due to financial difficulties such as inability to fulfil their obligations to their bankers who had previously provided overdraft facilities. The respondents had also claimed general damages which the

learned trial commissioner assessed at K100,000. The appellant has appealed against the award of these extra sums over and above the drought loss.

The ground of appeal against the general damages is that the learned trial commissioner misdirected himself in law in awarding K100,000 as general damages because on a contract of insurance the loss or damage is confined to the loss of or damage to the subject matter of the insurance but does not extend to consequential loss. The ground against the award of special damages was that the learned trial commissioner misdirected himself in law in awarding to the respondent K177, 170.28 special damages because this claim was speculative and not based on what the respondent had

actually lost. The upshot of Mr Mwamba's arguments against these awards was that these general and other special damages were alien to the policies and that it was, therefore, a misdirection in law on the part of the learned trial commissioner to have made these awards. He submitted that there was no authority to support the payment of damages on account of non-payment or late payment of money under an Insurance policy. He relied, *inter alios,* on paragraph 3 of Vol. 25, 4th Edition, of Halsbury's Laws of England which discusses the principles of indemnity and reads:

> "3. The principle of indemnity. Most contracts of insurance belong to the general category of contracts of indemnity in the sense that the insurer's liability is limited to the actual loss which is in fact proved. The happening of the event does not of itself entitle the assured to payment of the sum stipulated in the policy; the event must in fact result in a pecuniary loss to the assured, who then becomes entitled to be indemnified subject to the limitations of his contract. He cannot recover more than the sum insured, for that sum is all that he has stipulated for by his premiums and it fixes the maximum liability of the insurers. Even within that limit, however, he cannot recover more than what he establishes to be the actual amount of his loss.The contract being one of indemnity, and of indemnity only, he can recover the actual amount of his loss and no more, whatever may have been his estimate of what his loss would be likely to be and whatever the premiums he may have paid, calculated on the basis of that estimate."

Mr Mwamba also relied on paragraph 3683 of Chitty on contracts, 25th Edition, in particular the following:

> "Nature of loss. Contracts of insurance providing cover for loss or damage are construed so as to extend only to loss of or damage to the subject-matter of the insurance itself. The loss of profits and other consequential losses, such as loss of rents when a house is burnt down, or loss of salary after an accident, or loss in value of uninjured goods due to damage to other goods, are not covered unless expressly stipulated."

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If we understood Mr Imasiku correctly, it is obvious that the principles applicable to a contract of insurance, and as discussed in the passages which we have quoted, are not in dispute. An insurance policy only covers the losses which were the subject matter of the insurance itself and that any consequential losses cannot be claimed under the policy unless expressly stipulated in the contract. There was no such stipulation suggested in this case and the awards complained of could not possibly be supported on the basis that the contract of insurance in question provided for them.

Mr Imasiku's argument (despite the wording of paragraphs 7 and 8 of the Statement of Claim) was that the award of K177, 170.28 represented damages for professional negligence as can be discerned from the pleading at paragraph 8 of the Statement of claim which we have already quoted. It was his argument that the appellant's agricultural inspector was negligent in failing to inspect the fields when informed of a possible claim with the result that he failed to make a proper report to his employers with the result that the appellants raised a dispute which led to non-payment of the sum assured. It was also Mr Imasiku's argument that the appellants were further negligent in that they employed independent loss adjusters to deny liability on their behalf instead of attending

to their professional function as loss adjusters. We have grave difficulties in seeing that there was in this case, pleaded or established a claim in tort for damages for professional negligence. Though Mr Imasiku had an ingenious argument - to the effect that, as a monopoly in this country the appellants owed a duty of care to settle claims quickly and that the appellants are to be regarded as professionals engaged in the business of insurance brokers as discussed in paragraphs 1001 to 1003 of Charlesworth on Negligence, 4th Edition - we entertain no doubt in our minds that this argument is untenable. For one thing, the loss adjusters who were independent parties were not engaged in any sort of negligent or other braking on behalf of the appellants. For another, it is untenable to argue that the appellants must be regarded as brokers also simply because they are a monopoly when the law makes it abundantly clear that insurers and brokers are different entities and stand in a different relationship with the person who wishes to take out insurance. The duty of care contended for in this case and the basis upon which such duty was claimed to have existed on the part of the appellants towards the respondents was far fetched and cannot be supported. We agree with the submission by Mr. Mwamba that there was no basis for attaching liability in tort for negligence. The ground of appeal against the award for unplanted maize succeeds.

We are, of course, aware that there are authorities which support the payment of damages in lieu of interest on account of non-payment of money in breach of contract: See for example *Wadsworth v Lydall* (1), which held to the effect that, a party to a contract was entailed to special damages in respect of loss suffered by him as a result of a failure by another party to the contract to pay moneys due to him under the contract, provided that the loss was not too remote and the consequences were of such a kind that they were, or ought to have been, in the contemplation of the parties at the time of making the contract as being of a very substantial degree of probability. See also paragraphs 845 to 848 of McGregor on Damages, 14th Edition, and paragraph 1711 Chitty on Contracts, 25th Edition. The claim in this case, as already discussed, was not based on the principles to which we have referred but was purported to be made in tort. We do have to mention, however, that the payment of interest is normally regarded as equivalent to an award of damages for the detention of a debt.

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But where interest is awarded for such detention in the special damages for non-payment under the principles discussed in the authorities referred to would not arise.

Mr Imasiku also defended the award of K100,000 general damages as being payable, not for consequential loss but simply as general damages for the inconvenience caused to the respondents by the appellants in delaying to settle the respondents' claim. This was said to be on the basis that the delay affected the respondents' farming operations. We have already discussed the question of damages for non-payment of money on the due date, in breach of contract. Our attention has not been drawn to any authority to support the payment of general damages in addition to either the award of interest or, alternatively, of special damages in respect of loss suffered on account of non-payment on due date. In the authorities where awards of damages for inconvenience as such were made - such as *Attorney-General v Mpundu* (2) - such damages were not considered simply because the breach of any contract is inconvenient to the plaintiff. As the learned authors of Chitty on Contracts, 25th Edition, point out at paragraph 1704, damages for breach of contract normally relate to financial loss. Non-pecuniary losses may be recovered if they were within the contemplation of

the parties as not unlikely to result from the breach. In the case of inconvenience, the damages have normally related to substantial physical or personal inconvenience or discomfort: See for example the *Mpundu* case (2) and *Miyanda v Attorney-General* (3). *In Miyanda* (3), we cautioned:

> "Of course, these damages should not be awarded unless the distress, hardship or inconvenience, as the case may be, results from some act, or omission on the part of the defendant - (either in his conduct or in the manner of effecting the wrongful breach or if such result must have been in the contemplation of the parties as likely to bring about undue suffering) - which does occasion suffering which goes beyond the normal consequences of a wrongful breach."

In our considered view, the award of general damages for inconvenience in the present case was not within the principles for the award of such damages and the award must be set aside.

As we see it, what the contract of insurance entitled the respondents to was to be paid the amount of loss due to drought, which was one of the events insured against. Because payment was not made at the proper time, namely in September, 1983 when the loss was quantified, the respondents have been adequately compensated by an award of interest for being kept out of their money. The further award of K100,000 as general damages for inconvenience was without legal support and could not be made in such a case. In sum, the appeal succeeds on the two major points taken up by Mr Mwamba. The awards of K177,170.28 and K100,000 are set aside. The costs of this appeal follow the outcome and are to be taxed in default of agreement.

Appeal allowed
