THE HIGH COURT OF SWAZILAND

HELD AT MBABANE Civil Trial No. 910/2004

In the matter between

PURPOSE PAPER PRODUCTS (PTY) LTD Plaintiff

vs

SWAZILAND ROYAL INSURANCE CORPORATION Defendant

Coram Banda, CJ

For the Plaintiff Mr. B.S. Dlamini

For the Defendant Mr. W. Mabuza

JUDGMENT

01/02/2008

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[1] The plaintiff is suing the defendant for a sum of E161,980 as damages arising from a fire which damaged the plaintiff's premises and goods.

[2] The plaintiff in this case is the Purpose Paper Products (Pty) Ltd a company duly incorporated in accordance

with the company laws of Swaziland and whose principal place of business is situated in Manzini in the district of Manzini. The defendants are the Swaziland Royal Insurance Corporation, a body corporate carrying on business as a registered Insurance company and whose principal place of business is at Lilunga House, Gilfillan Street, Mbabane in the district of Hhohho.

[3] On or about the month of January 2004, the parties entered into a written contract of insurance in terms of which the defendants undertook to insure the plaintiff's Toilet Paper Manufacturing business against the risk of fire. The plaintiff's business premises contained machinery, plant and raw materials and produce. It is not disputed that the value of the plaintiff's premises together with the plant, machinery and produce was, as is indicated in the contract, in the sum of E161 980 (One hundred and sixty one thousand nine hundred and eighty Emalangeni). On or during the month of January 2004 the plaintiff's business premises caught fire which completely destroyed the plaintiff's machinery and produce. The plaintiffs duly notified the defendants of the fire damage. The plaintiffs have contended that they have, in all respects, complied with their obligations under the contract. The plaintiffs have further contended that the defendants have refused to

make any payment with respect to damages caused by the fire.

The defendants have, on their part, contended that they are not liable to pay any damages because the plaintiffs failed to take reasonable precautions to prevent the damage to the machinery. They have further contended that the circumstances of the fire point to a case of gross negligence which, in their view, is equivalent to “Wanton intention.”

[4] The plaintiffs called two witnesses to support their case. The first witness was Mr. Bheki Gule who stated that he and his friends formed the plaintiff’s company in 2003 with the intention of manufacturing toilet paper. He stated that the manufacturing of toilet paper required buying bulk giant rolls for Paper Manufacturing Companies. These giant rolls would be taken into the warehouse where they would be cut into smaller toilet paper rolls. The machinery they had bought from Haier SA (Pty) Ltd comprised the Toilet Paper Machine, the roller cutter, the industrial bag sealer, and there was a compressor and a hydraulic lifter. He informed the court that the roller cutter uses electricity.

[5] Mr. Gule also informed the court that they had three

employees by the names of Sibusiso Lokotfwako, Mbuso Dlamini and Doda Ginindza. Mr. Gule said that the plaintiffs obtained a loan from the bank for the operation of the plaintiffs company. He stated that it was a condition of the loan from the Bank that their machinery and property had to be insured. He stated that he approached the defendants who advised him that the best cover was to have a Fire Policy. This witness stated that he had full discussions with defendants' underwriters to whom he described, in detail, how the operations of the business would be conducted. Mr. Musa Vana Simelane, from the defendants, conceded that these discussions took place with their underwriter.

[6] Mr. Gule agreed that Ex. 1 is the Fire Policy which they obtained from the defendants. He stated that the Fire Policy was on the machinery, plant, produce and tenants improvements. He stated that as far as he was aware they had not defaulted in any way on their obligations under the contract. On 8th January 2004 while he was at his place of employment, he received a call when he was told that the factory was on fire; he informed his co-director to pick him up and went to the factory. He found the building was already on fire with fire fighters trying to put it out. He said he was

shocked and just tried to be there as he looked on and tried to find out from one of his employees how the fire had started. He stated that he later approached some members of the defendant's staff who advised him to make a claim which he duly made. He further told the court that he was advised by the defendant that he would hear from them in due course. Six months later he received a letter in which the defendants disclaimed liability. That letter is Ex. 2 in these proceedings.

It was the evidence of the plaintiffs that at no time did any member of staff from the defendants visit the plaintiff's premises to see how the factory operated and that the defendants did not impose any conditions on how the plaintiffs were to conduct their business. Mr. Gule conceded that the machinery which caused the fire was not part of the machinery they had initially bought from HAIER and that the equipment which caused the fire was the petrol driven chainsaw. He explained that the bulk giant rolls come into sizes of 1.80 and that they had to cut them to fit into a machine which can only take rolls of size 1.3. Mr. Gule agreed that they had not informed the defendants that they had brought in the petrol driven chainsaw to cut the giant rolls. He also agreed that in the claim forms he had indicated that sparks were emitted from the

chainsaw. Mr. Gule informed the court that the petrol driven chainsaw was part of the business and that all manufacturers of toilet paper used a similar cutter before the paper could be put into the machine. He stated that it was part of the industry to use the petrol driven chainsaw to cut the giant rolls and that this was the standard practice within the industry. He said they did not do anything extraordinary which other people were not doing in the same industry. He denied that they had breached any conditions of the Policy. He stated that the chainsaw did not belong to them and that it belonged to the operator who had been contracted to cut the giant rolls for them and the operator did similar work for other companies in the same industry.

[7] The second witness for the plaintiffs was Sibusiso Dlamini. He was at the premises when the fire started. He stated that he was in the production team and that they were about to receive new stock which they had to cut into proper sizes. He stated that he was with the operator when suddenly there was a fire and that they took out the chainsaw and called the fire office. He stated that he would not be specific as to the cause of the fire as “it just came”. He did not think that using an electricity driven chainsaw would have prevented

the fire. This witness was specifically asked about the contents of Ex. 2 to which he replied, that none of the things mentioned in the letter happened. He denied that the plaintiffs were negligent. He stated that the fire started when they were cutting the rolls.

[8] The first witness for the defendants was Mr. Musa Vana Simelane. He is employed as Claims Administrator and agreed that the defendants had provided a Fire Insurance Policy to the plaintiffs. He identified Ex.1 as the Policy which was given to the plaintiffs. Mr. Simelane also agreed that they had received a claim form from the plaintiffs. He further stated that they had appointed a loss adjuster and that they had received a report from him. He stated that after studying the report, the defendants decided to decline the plaintiffs' claim because he said, it could not be accepted under the Policy. He agreed writing Ex. 2 to the plaintiffs. Mr. Simelane informed the court that the main reason for denying liability was that the plaintiffs were guilty of a breach of condition 1(ii) of the Policy conditions. The Policy conditions of the defendants provide as follows:

Condition 1 *"This Policy shall be voidable:*

a) *.....*

b) ……

(i) ……..

or

(ii) *Whereby the risk of destruction or damage is increased unless such alteration be admitted by the insurers. Alterations of occupancy due to the transfer of process or machinery or structural alterations, additions, renovations or repair are however permitted provided that notice be given to the insurers as soon as practicable after such transfer or alteration has been made and an additional premium paid if required from the date of such alteration."*

[9] It was Mr. Simelane's contention that when they received the assessor's report it was clear to them that the risk had been altered. He stated that when the Policy was taken there was no mention that the plaintiffs would be using a petrol driven chainsaw. It is

significant to observe, however, that the proposal form on which that statement was allegedly mentioned was not produced by the defendants in whose possession it must have continued to be.

The duty of proof in relation to the non-observance and breach of conditions in Insurance Policy lies upon the defendants vide the Case of ***Resisto Dairy (Pty) Ltd v Auto Protection Insurance Company Limited*** 1963(1) SA (A) 632 at 645 where Hoexter JA stated as follows:

> *"There are many cases in our reports in which it has*
> *been held or assumed that, if an insurer denies liability on the ground of a breach by the insured of*
> *one of the terms of the Policy, the onus is on the insurer to plead to and prove such breach."*

See also the case ***of Norwich Union Fire Insurance Company Limited v Toilet Requisites Company Limited*** 1924 AD 212 at 225. And in the case of ***West Rand Estates Limited v New Zealand Insurance Company Limited 1925 AD 245*** it was held that the breach must relate to a material fact which was, in the

circumstances of the risk, the basis of the Insurance Policy. In their plea the defendants pleaded as follows:

> *"7.1 It was a material term of the Policy (Clause 1(b)(ii) of the conditions) that the said Policy would be avoidable in the event that there was an alteration in the risk covered whereby the risk of destruction or damage was increased, unless such alteration in risk was admitted by the plaintiff (defendants).*
>
> 7.3 *The fire that occurred at the plaintiff's premises was as a result of the malfunctioning of the petrol driven chainsaw which was brought on to the premises by the plaintiff without the defendants' knowledge and/or consent and as a result, the defendant repudiated the plaintiff's claim."*

[10] In the letter (Ex. 2) in which the defendants disclaimed liability the alleged reasons for disclaimer are stated in the following terms:-

> *"Re: Fire Damage to Machinery – 08.01.2004 Claim*
> *Number 2886*

Reference is made to the above claim.

We are now in receipt of the Loss Adjuster's report from which we note the following:

1. *That your employees were cutting roles of tissue paper with a petrol driven chainsaw;*
2. *That at some point in time the chainsaw started to emit sparks and later ran out of petrol;*
3. *That the chainsaw was taken outside for a petrol refill;*
4. *That when it was started it emitted sparks and burst into flames;*
5. *That its operator returned inside with the chainsaw still in flames which eventually ignited the paper hence the spread of the fire which damaged the machinery".*

And in the last paragraph the defendants state:

"In view of the above and in particular points 4 and 5, you failed to take reasonable precautions to prevent the happening of the damage to the machinery. In fact the circumstances of the fire point to a case of gross negligence which may not

be distinguishable from wanton intention."

As I have already observed earlier in this judgment the onus to prove the non observance and breach of any terms of the Policy of Insurance rests upon the defendants. What they pleaded in their defence as the cause of the fire was the malfunctioning of the petrol driven chainsaw. They must, therefore, prove that the petrol driven chainsaw malfunctioned and that it was that condition which caused the fire. There was no evidence adduced by the defendants to prove that allegation. Equally it was their duty to prove that there was an alteration in the risk which was covered by the Policy. The Policy which was issued to the plaintiffs, was a fire policy and the damage and the destruction which happened at the plaintiffs' premises was caused by a fire. Nor was evidence called to prove that the plaintiffs' trade or business or that the nature of the plaintiffs' business had changed or that circumstances affecting the plaintiffs' business had in any way changed so as to increase the risk of loss or damage. There was no change, in my view, in the risk which had been insured against. It continued to be the risk against fire.

[11] The evidence which was adduced by the plaintiffs was

never contradicted by the defendants when the plaintiffs stated that the use of a petrol driven chainsaw was the accepted practice in the trade. Indeed even if the defendant's suggestion is accepted that the plaintiffs should have used a chainsaw which is electrically driven there is no guarantee and no evidence was called to prove that such equipment would not have caused a fire. In fact the defendants conceded that an electrically driven chainsaw was equally capable of emitting sparks which could cause a fire.

[12] The defendants also alleged that the plaintiffs were guilty of gross negligence or were guilty of "wanton intention" or destruction. No evidence was called to prove this very serious allegation which, if proved, would have amounted to the criminal offence of arson, and would have shown that the plaintiffs had deliberately and fraudulently set the premises on fire.

[13] It is clear to me that the allegation of "gross negligence and wanton intention" is based on the findings of the Loss Adjuster which were hearsay and inadmissible as the Adjuster himself admitted, in court, that he was not there when the fire started and he relied, for his report, on what people had told him. In my view the

statement by the defendants,

> *"That when it (chainsaw) was re-started it emitted sparks and burst in flames"*

and that while in that condition the operator took it inside while still in flames defies credulity, in my judgment. It would have carried weight if an eye witness had come to give such evidence. None was called. There was no evidence to prove the further allegation made by the defendants that, contrary to what they had said on the proposal form, the plaintiffs kept petrol on the premises. As earlier observed the proposal form was never produced in court. In fact what the defendants state in their own letter to the plaintiff disclaiming liability tends to disprove this allegation when they stated that the chainsaw was taken outside for refill. And the fact that the chainsaw did not belong to the plaintiffs also tends to disprove the suggestion that the plaintiff kept petrol on the premises. The important point to observe is that no evidence was called to prove the allegation.

[14] I am satisfied and find that the defendants grossly misrepresented and exaggerated what actually happened on that fateful day when the plaintiffs'

premises were destroyed by fire. They exaggerated the position in order to enhance their reasons for disclaiming liability. I am further satisfied and find that there was no material change in the circumstances which was the basis of the contract of Fire Policy which was concluded between the plaintiffs and the defendants. See the case of ***Nel v Santam Insurance Company Limited*** 1981 2 TPD 231. The onus was on the defendants to prove the allegations which they claimed were the bases on which they grounded their disdaimer of liability.

[15] I find that the plaintiffs have proved that the risk against which they had insured had happened and have shown that their claim is within the four corners of the promise which the defendants had made to them. They neither failed to observe or breach any conditions of the Policy. They have proved, on a balance of probabilities, such facts as bring them prima facie within the terms of the promise made to them under the contract of insurance. I find, therefore, that this claim must succeed with costs to the plaintiffs.

R.A. BANDA
CHIEF JUSTICE