

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 9 OF 2019

AMC TRADE FINANCE LIMITED.....PLAINTIFF

VERSUS

SANLAM GENERAL INSURANCE

(TANZANIA) LIMITED.....DEFENDANT

JUDGMENT

B.K.PHILLIP,J

This case arises from an insurance policy issued to the plaintiff by the defendant. The plaintiff alleges the following; That he provided finance to Elements Limited for the purchase of raw cashew nuts, the consideration thereof was to be paid by Letters of Credit. By Marine Cargo Open Stock-Throughput Policy No.P/01/2017/T2001/000001, (Henceforth "the Policy") issued by the defendant, the plaintiff together with M/S Element Limited obtained an insurance cover for the shipment of 7,196 bags of raw cashew nuts with gross weight of 574,620 KG packed and loaded into 33 containers.

It is alleged in the plaint that the policy covered among other things export of the cashew nuts between 15th December 2017 and 14th December 2018, from ports and/places anywhere in the world until

delivered to final destination. All risks of physical loss or damages as direct result of peril as per the institute Cargo Clauses (A) C 1382 01/01/2009 as applicable were covered.

It is the plaintiff's case that having being stuffed into bags and loaded in shipping containers at Dar es Salaam Port, on 25th January 2018 his aforesaid cashew nuts were shipped to Ho Chi Minh City, in Vietnam and the same arrived in Vietnam on 25th February 2018. Upon arrival in Vietnam, inspection of the consignment was conducted and it was discovered that 1,660 bags were discovered that were wet. It was also found out that inside the bags part of the consignment had sprouted and heavily damaged.

Upon realizing the above mentioned damages in the cashew nuts the plaintiff communicated with the defendant seeking for a confirmation that the defendant will provide an indemnity under the terms and conditions of the policy. In response the defendant repudiated the claim on the ground that policy did not cover the plaintiff's loss. It is the plaintiff's contention that the defendant's repudiation of the policy amounts to breach of the terms of the contract.

In this case the plaintiff prays for judgment and decree against the defendant as follows;

- i. A declaration that the Insurance policy extends to the damage occasioned to the cashew nuts and the Plaintiff is entitled to be indemnified by the defendant.*

- ii. An order that the defendant pays the plaintiff a sum of United States Dollars Eight Hundred Forty Thousand, Four Hundred Thirty – Four Cents Ninety Nine (USD 840,434.99) or its equivalent in Tanzania shillings being indemnity for the loss suffered.*
- iii. Interest on the above at the Commercial rate of 1.50% from 30th April 2018 when the claim was lodged with the defendant to the date of judgment.*
- iv. Interest on the decretal amount at the rate of 7% from the date of judgment until full and final payment.*
- v. costs of the suit*
- vi. Any other reliefs which this honourable Court may deem just to grant in favour of the plaintiff.*

In his defence the defendant acknowledged to have issued the aforementioned policy in respect of the plaintiff's cashew nuts and further stated that the policy was meant to cover risks in respect of the transportation of the cashew nuts from the warehouse in Lindi to Dar Es Salaam Port. It was never meant for the export of the consignment from Dar Es Salaam to Ho Chi Minh City , Port in Vietnam. In the Alternative, the defendant stated that even if it is assumed that the policy covered the risks for shipping the consignment to Vietnam, the loss/damages or expenses if any either emanated from the inherent vice nature of the subject matter insured or caused by a delay in the processes of clearing the consignment or the packaging prior the shipment was not in compliance with the requirements for the shipment of cashew nuts via sea cargo.

In addition to the above, the defendant alleged that the condition at the port of destination aggravated the sprouting process as the cargo was cleared approximately 46 days from the date of the arrival of the consignment. Moreover, the defendant alleged that upon receiving the claim letter from the plaintiff, he did a thorough investigation on the matter using services of independent loss adjuster surveyors whose results showed the following; when the containers were opened craft papers lined inside the containers were wet and partially torn due to condensation of moisture inside the container, the consignment took 39 days to arrive in Vietnam, which is a very long time for considering the organic nature of the cargo and the weather condition in March in Vietnam which was warm, sunny and very little rain was, not conducive bearing in mind that the containers were kept in the port for 47 days. So, the defendant alleged that the cause of the damages was moisture condensation during the extended stay at the discharge port.

At the Final Pre –Trial Conference the following issues were framed for determination by the court;

- i) Whether the damages occasioned to the plaintiff's consignment of cashew nuts was a risk covered under the marine cargo open stock throughput Policy No.P/01/2017/T2001/000001 issued by the defendant in favour of the plaintiff.*
- ii) If the 1st issue is answered in the affirmative, Whether the plaintiff suffered loss to a tune of USD 840,434.99*
- iii) To what reliefs are the parties entitled to.*

At the hearing of this case the learned advocates Gasper Nyika and Oscar Msechu appeared for the defendant and the plaintiff respectively. The plaintiff brought one Witness, namely Jan Louis Van Den Berg (PW1), the plaintiff's Principal officer, whereas the defendant brought three witnesses, namely Mecky Morgan (DW1), Cecilia peter Shirima (DW2) , employees of the defendant and Peter M. Kapalata (DW3), employee of Toplis & Harding, a firm of Chattered Loss Adjuster/Marine & Aviation Surveyor.

Starting with the first issue, that is, *Whether the damages occasioned to the plaintiff's consignment of cashew nuts was a risk covered under the marine cargo open stock throughput Policy No.P/01/2017/T2001/000001 issued by the defendant in favour of the plaintiff*, PW1 testified as follows; That the plaintiff provided finance to Element Limited for purchase of raw Cashew nuts for a consideration that was to be paid under a letter of credit. The raw Cashew nuts were 576,649 Kilograms worth Tshs 2,271,997,060/= and same were purchased from Lindi Mwambao Cooperative Union in Lindi Region. In order to protect the cargo against all associated risks with the export of the goods from Tanzania, the plaintiff procured from the defendant a marine Cargo Insurance Policy, whereby the defendant issued in favour of the plaintiff a Marine Cargo Insurance Policy No. P/01/2017/T2001/000001 (Exhibit P1). A sum of Tshs 5,201,055.7 was paid by Elements Limited to the defendant as premium for the Policy .That stuffing of the cashew nuts was properly done and the containers used to for shipment of the cashew nuts were inspected and confirmed to be in suitable conditions to carry the consignment of dried nuts in shell bags, (Exhibit P1-survey report by SGS). On 25th January

2018, the consignment of nuts was safely loaded into a vessel in Dar Es Salaam (Exhibit P3) and on 25th February 2018, the Plaintiff's consignment of nuts arrived in Vietnam. Upon inspection In Vietnam it was discovered that 1660 bags of cashew nuts were damaged as result of sea Voyage. The total weight of sprouted and heavily damaged cargo was 66,400Kgs (exhibit P4 and P5)

In addition to the above , PW1 testified that the policy covered all risks for loss or damages to the cashew nuts except as excluded by the provisions of clause 4,5,6 and 7 of the Institute Cargo clauses which formed party of the policy. The cashew nuts bags that were shipped to Vietnam under the policy aforesaid (exhibit P1) were 7,196 with a gross weight of 574,620 Kg. They were packed and loaded into 33 containers.

It is PW1's testimony that the only reason that was stated by the defendant 's lawyers in the reply to the plaintiff's claims (Exhibit P8) as a basis for repudiating the policy was that the loss was a result of inherent vice and /or delay in handling the consignment. The defendant never raised any concern that the policy was not intended for the export of the consignment from Dar Es Salaam to Vietnam. PW1 prayed the plaintiff's prayers to be granted.

Responding to the questions posed by Mr. Mchechu during cross examination , PW1 told this court that Exhibit P4 and P5 (The survey Report on the quantity, weight , quality and condition of the Cargo) were prepared by experts in Vietnam thus, he was not in a position to explain in

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detail about the same. He also told this court that the policy (Exhibit P1) was obtained through a Court Broker, namely Puri.

On the other hand the defendant's witnesses DW1 and DW2 both testified to the effect that the policy was intended to cover risks for the transportation of the raw cashew nuts from Lindi to Dar Es Salaam Port. It was never meant for covering risks for export of the cashew nuts from Dar Es Salaam to vietnam. In their testimonies DW1 and DW2 confirmed that the defendant issued the policy to the plaintiff through an Insurance Broker namely B.R.Puri Co. Limited. The premium for the policy was Tshs. 5,201,055.67 VAT inclusive which was for a maxim limit of liability for Tshs. 2,271,997,060/=

It was DW1's testimony that the documents submitted by the plaintiff and the documents on the transportation agreement between the plaintiff and Bravo Logistics Ltd showed that the cargo was being transported to Dar Es Salaam Port. (Exhibit D1 collectively). Moreover DW1 testified that upon receiving the claims from the plaintiff, the defendant engaged, a firm of chartered Loss Adjuster/Marine & Aviation Surveyors, known as *Toplis and Harding* (Henceforth "Toplis"), to handle and investigate all the pertinent documents relating to the claim, including the policy. The report from Toplis (Exhibit D1), that was submitted to the plaintiff indicates the following; *the Damage to the Raw Cashew Nut was attributed by moisture condensation during the extended storage at the discharge Port. ii) the said moisture from within the Raw Nuts caused the sprouting process of the Raw Cashew Nuts.iii) the insurance policy on the consignment was meant to cover the Risk between Lindi and Dar es Salaam.*

DW3, who is the employee of Toplis, supported the testimony of DW1 on the contents of the report from Toplis. DW3 testified that pursuant to the underwriting documents received from M/s B.R. Puri, (Insurance Broker) the policy was intended to cover the risks for transportation of the cashew nuts from Lindi to Dar es Salaam Port only.

Having analyzed the evidence adduced by the witnesses from both sides and the closing submissions filed in court by the learned advocates, I am inclined to agree with the submissions made by Mr. Msechu, that this issue has to be answered in the negative for the reasons that I am going to explain soon hereunder.

In his closing submission , Mr Mchechu submitted that the insurance procured by the plaintiff was meant to cover inland voyage, that is, the 1st part of the voyage, which is inland transportation of the cargo from Lindi to Dar es Salaam and the whole issue was initiated by signing the transportation agreement between Bravo Logistics Ltd and the plaintiff (Exhibit D1 collectively). Referring to pages 2 and 3 of the policy document Exhibit P1) , Mr. Mchechu submitted that the policy indicates that the maximum limit covered for export is NIL while for Inland Transit the maximum limit covered is indicated as Tshs 2,271,997,000/= .Mr Mchechu insisted that ,under the circumstances, it shows clearly that the policy was meant for inland transit and not beyond that.

In addition to the above, Mr. Mchechu, submitted that even if it is assumed that the policy was intended to cover the export of the cashew nuts to Vietnam, which he insisted that the same is disputed, he contended that,

the damages/loss was occasioned by the inherent vice of the cashew nuts, and condensation of moisture during the extended stay of the cashew nuts at the discharge port.

It is a common ground that the policy at issue was obtained by the plaintiff through B.R.Puri and Co Ltd, an Insurance Broker. This is the one who took the quotation for the policy which was later issued to the plaintiff by the defendant. The quotation by B.R.Puri was tendered by DW1 as part of exhibit D1 collectively. Not only that it is also not in dispute that the transporter of the plaintiff's cashew nuts was Bravo Logistics (T) limited. The contract for transportation of the cashew nuts (exhibit D1 collectively) indicates that the cashew nuts were to be transported from the place where auction was taking place to Dar Es Salaam Port, and that B.R.Puri & Co Limited was supposed to arrange the insurance cover for the cashew nuts. For easy of understanding let me reproduce the relevant part of the contract for transportation between the Element Ltd and Bravo Logistics (T) Limited.

"9. Terms and conditions

Please also refer to the general terms and conditions of the BRAVO logistics Tanzania

9.1 Insurance

- *Elements limited Goods will be insured from auction warehouse to port of loading under the insurance policy arranged by B.R. Puri & Co. On winning of the bid and before goods are uplifted*

for transport to the port of loading. Elements are to advise B.R. Puri & Co of quantity of goods (Mt) nature of goods (Cashew nuts). Place of auction warehouse, port of loading of goods and inco term. Advice to be sent for the attention of A.K. Puri at email address brpuriacc5@gmail.com Telephone number +255713320109

Pay the premium as billed by the insurers.

The quotation taken by A.K. Puri & Company indicates that the policy was for 576 tons of Raw Cashew Nuts –Tshs 2,271,887,060/= for Inland transit –Lindi to Dar es Salaam. It has to be noted that it is this quotation which was the basis of the policy issued to the plaintiff by the defendant. The details in the quotation are the same to the ones indicated in the policy. In the sections indicating Voyages and Estimated Annual Carry, has two options, Exports and Inland Transit. The policy has indicated a sum of Tshs 2,271,997,060/= under the Inland Transit. For easy of reference let me reproduce the relevant part;

"Voyages:

- ***Exports***

From ports and/or places anywhere in the world until delivered at final destination anywhere in the Republic of South Africa excluding countries under the united Nation Sanction.

Including all customary transshipments.

Cover to attach on exit at border post or port of discharge in respect of sending(s) from any of the excluded Territories.

Other voyages to be agreed by insurers prior to risk attaching.

- ***Inland Transit***

From ports and/or places anywhere in the Mtwara, Lindi, Tunduru, Pwani and Tanga regions until delivered at final destination in Dar es Salaam and Mtwara Regions.

Other voyages to be agreed by insurers prior to risk attaching.

Conveyances: *Land and Air conveyances. Excluding vehicles owned or operated by the insured or their employees or representatives other than goods vehicles and subject to the Road Vehicle Conditions herein.*

Estimated Annual: Export

Carry: *(Inclusive of War & Strickes risks rate at 0.05%)*

Inland Transit

Tshs. 2,271,997,060"

I have taken into consideration the closing submissions made by Mr. Nyika, in which he argued that according to exhibit P1 the policy was a Marine Cargo Open ThroughPut Policy and the purpose of the policy was to cover all risks of loss and damages except as excluded by the provisions of clause 4,5,6,and 7 of the institute Cargo clauses from ports and places

anywhere in the world. In addition to the above Mr. Nyika submitted that during cross examination DW2 admitted that the policy has to be read as a whole and contended that reading the policy as a whole, it indicates that it covers transport by sea and export. Moreover, Mr. Nyika argued that since during cross examination DW2 insisted that the policy indicated the maximum limit of liability under the Inland Transit only, then it appears that there is ambiguity in the contract which has to be interpreted against the maker, that is the defendant. He invited this court to apply the *Contra Proferentem Rule*, which is to the effect that in case ambiguity in a contract the same has to be interpreted or resolved against the maker. Mr. Nyika also challenged Mr. Msechu's arguments which involved reference to the transportation agreement between Bravo Logistics Limited on the ground that the policy does not have a reference to the said transportation agreement.

Let me say on the onset that, I have read the Policy, I do not see any ambiguity in the same. The Policy is in a standard form contract, where by the terms of the policy are inserted according to the needs of the parties. So, the fact that the amount for the limit of the liability is inserted under inland transit does not create any ambiguity, but shows the type of risks intended to be insured/covered in the policy. The fact that the policy has not indicated the limit for liability in both export and inland transit, to me it proves my above view, that the policy is a standard form contract which caters for both export and inland transit despite the fact that it is titled "*Marine Cargo Policy*". It is by reading the contents of the policy that is

when one can know the type of risks/damages covered by the policy ,not the title of the policy.

To my understanding, the title of the policy cannot prevail over what is indicated in the terms of the policy. What is important here is the intention of the parties as per the details filled in the policy. Thus , with due respect to Mr. Nyika, I do not need to apply the *Contra Proferentem Rule* interpreting this policy. According to the background of this matter and the way the policy was obtained, in understanding the intention of the parties, it is imperative that the quotation by B.R Puri & Co Ltd and the transportation contract between Bravo Logistics Limited and Element Limited has to be looked at. This is due to the fact that, PW1 himself admitted during cross examination that the plaintiff obtained the policy through B.R. Puri & Co Limited, Insurance Broker and B.R Puri's authority to process the quotation for the policy was derived from the transportation contract aforesaid. (see item 9.1 of the transportation agreement quoted herein above). Thus, Mr. Nyika's argument that since the transportation agreement is not referred in the policy, then it should not be referred to in establishing the risks intended to be covered in the policy is misconceived. I think it is also worth pointing out here that the policy was processed by Element Limited on behalf of the plaintiff. So, it is Element Limited who approached B.R. Puri and made the quotation for the policy. Under normal circumstances one would expect that at least an officer from Element Limited would have been one of the plaintiff's witness to give a clarification on the quotation he made to the insurance broker which finally ended up to bring into existence the policy at issue. On the strength of the

decision of this court in the case of **Hemedi Saidi Vrs Mohamed Mbilu, (1984) TLR 113** in which it was held that "*where, for undisclosed reasons, a party fails to call a material witness on his side, the court is entitled to draw an inference that if the witnesses were called they would have given evidence contrary to the party's interests*" this court finds that a witness from Element Limited was a material witness and failure to bring him/her in court, moves this court to make adverse findings against the plaintiff that a witness from Element Limited would have given evidence contrary to the interests of the plaintiff.

It is true that the letter from the defendant's advocate for repudiation of the contract, did not mention that the policy was not intended for export of the cashew nuts to Vietnam. However, that fact cannot change the glaring facts and truth that the policy and all documents concerning this matter indicate clearly that the policy was intended to cover risks for the transportation of the cashew nuts from Lindi to Dar es Salaam Port.

In addition to the above, the policy does not indicate anywhere that the port of destination for the cashew nuts was Vietnam, instead at the section on export, it indicates that final destination is anywhere in the Republic of South Africa excluding countries under the United Nations sanctions, whereas the section on Inland Transit indicates the final destination was Dar es Salaam and Mtwara Region. What I am trying to demonstrate here is that, had it been correct that the policy was intended to cover the risks for the export of the cashew nuts to Vietnam, then the policy would have indicated so, or at least mentioned the name Vietnam, to the contrary the policy indicates that the final destination is Dar Es Salaam and Mtwara.

This makes sense because the contract of transportation shows that the cashew nuts were being transported from Mtwara and Lindi to Dar Es Salaam.

From the foregoing, since the first issue has been answered in the negative, the remaining two issues are redundant. In the upshot, this case is hereby dismissed with costs.

Dated at Dar es Salaam this 12th day of May 2020.



B.K. PHILLIP

JUDGE