BLESSMORE Z. MABVURAMITI
versus
ALTFIN INSURANCE COMPANY

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 26 FEBRUARY 2013

MAFUSIRE J: (1) This is an application for a default judgment. My brother judge, BHUNU J, and I raised a query. We felt the claim did not disclose a cause of action. The Plaintiff is in effect claiming specific performance yet, by his own admission, he was in breach of his side of the contract.

(2) In his summons and declaration the plaintiff claims from the defendant payment of the sum of USD 4 500, less USD50.

(3) The defendant is an insurance company. At the relevant time it was the plaintiff's insurer in respect of his motor vehicle. The plaintiff's claim is for an indemnity, his vehicle having been involved in an accident and having been declared a write off.

(4) In his declaration the plaintiff avers that when he submitted his claim, the defendant declined to pay on the ground that the last premium had not been paid. The plaintiff concedes that indeed the last premium had not been paid. He however suggests in his prayer that the defendant should deduct the last premium from the amount allegedly due to him. This is surprising.

(5) When the above query was brought to their attention the plaintiff's legal practitioners persisted with the claim. By letter dated the 15 August 2012 they argued that in accordance with condition 8 of the policy document none of the parties had cancelled the contract and that therefore the contract was still valid. Although they seem to have wanted to attach the policy document nothing was attached.

(6) The plaintiff' legal practitioners also argued that the plaintiff's breach was not material; that he had not refused to honour his obligations; that his case called for the relaxation of the rules and the exercise of justice between the parties; that it would be improper for plaintiff to go "*empty handed*" but that it should be found that there was *quasi mutual* assent by the defendant in that after the accident the defendant had sent an assessor to assess the damage to the vehicle and that it had continued to send him statements.

(7) The plaintiff's arguments are untenable. Even though the plaintiff did not attach the policy document nothing turns on that. I have considered the plaintiff's claim as set out in his pleadings. He is trying to enforce a contract of insurance. An insured is entitled to an indemnity if the risk he or she insured against has occurred. But the indemnity is predicated on the premium having been paid. The plaintiff states as much in his declaration. In paragraph 2 of his declaration the averment is that the parties entered into a contract whereby defendant would provide him with insurance cover "*upon payment of premiums*."

(8) An insurance company is entitled to repudiate liability if the premium is not paid. The plaintiff concedes that he had not paid the last premium. He also concedes that indeed the defendant had refused to indemnify him citing the non-payment of the last instalment. The plaintiff's solution that the defendant should deduct the amount of the outstanding instalment from the indemnity is to require the court to order the innocent party in a breach situation to purge the default of the party in breach. That is wrong.

(9) It is trite law that where a plaintiff claims specific performance of a contract he himself must have performed his side of the bargain, or is able to do so. In *Savanhu v Marere NO & Ors*, 2009 [1] ZLR 320, the Supreme Court, MALABA DCJ, stated, at page 325A – C:

> "The right to claim specific performance of a contract by the other party is premised on the principle that the appellant must first show that he has performed all his obligations under the contract or that he is ready, able and willing to perform his own side of the bargain. Wessles *The Law of Contract in South Africa* vol 11 para 3135 states that:
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> > 'The court will not decree specific performance where the plaintiff has himself broken the contract unless he can show that he has performed his part or is ready to do so, and therefore he cannot ask for specific performance unless he has either performed his part of the contract or unless he has been prevented from doing so by the defendant.'
> > See also *Wolpert v Steenkamp* 1917 AD 493 at p 499."

(10) The plaintiff's argument in the letter from his legal practitioners seems to be confusing the issues of *interpellatio* and *mora ex persona*. Even though he accepts that he did not pay the last premium, the plaintiff insists on the contract being treated as having remained alive because, according to paragraph 7 of the declaration, he "*did not receive any correspondence from the defendant to inform him of the cancellation of the contract*".

(11) In *Asharia v Patel & Ors, 1991 [2] ZLR 276 [SC]*, the Supreme Court held that where the performance of a contract ***has not been agreed upon*** between the parties, performance is due on conclusion or so soon thereafter as is reasonably possible. But in that

situation the debtor does not fall into *mora ipso facto*. He must know he has to perform. This is known as *mora ex persona*. It only arises after *interpellatio* or demand.

(12) In this case *interpellatio* or demand on the plaintiff to pay his instalments was not necessary to place him *in mora ex persona*. By his own admission, the payment of the premium by him was the key to unlock the indemnity due by the defendant. The time for payment or performance had expressly been agreed upon.

(13) That the defendant may not have sent him correspondence about the cancellation of the contract does not change the legal position. If a party to a contract has committed a major breach of the contract the aggrieved party does not always have to go to the law; see KERR "*The Principles of the Law of Contract*", 3rd edition, at page 377. The aggrieved party is entitled to disregard the contract, wait for the defaulting party to sue and set up the default as a defence.

(14) The above position is aptly summarised in a passage on pages 377 to 378 of KERR's book aforesaid. It reads:

> "If a party to a contract finds that the other party has committed a major breach of the contract he does not necessarily have to go to the law. If he is clearly in the right and does not desire to take any action at all he is entitled to disregard the contract. In such a case if he is sued on the contract by the other party that party's default is a complete defence. Thus in *Goldestein and Wolff v Maison Blanc [Pty], 1948 [4] 446 [C],* defendant company in Cape Town placed an order for certain ladies' frocks to be dispatched to them from Johannesburg during the months of January or February 1945. They were in fact railed on 16 April 1945 and when the parcel was tendered to defendant in Cape Town it refused to accept it. The plaintiff then instituted action for the purchase price and tendered delivery. HERBSTEIN J found that time was of the essence of the contract [the goods being fashion goods which both parties knew were purchased for resale during a season limited in time] and that dispatch six or seven weeks late was not in compliance with the contract. He found too that;
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> > *'*There was no obligation on the defendant, as alleged in the replication, to intimate at the end of February that it no longer required the goods. It was entitled to wait until delivery and then to repudiate (*Federal Tobacco Works v Barron & Co, 1904 TS 483; Strachan & Co Ltd v Natal Milling Co [Pty] Ltd, 1936 NPD 376]'*
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> This is in accordance with the rule enunciated many years ago by Lord Blackburn in *The Mersey Steel and Iron Co Ltd v Naylor Benzon & Co, [1894] 9 AC 434 [HL] and* adopted in our law:
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> > *"*The rule of law …. is that where there is a contract in which there are two parties, each side having to do something … if you see that the failure to perform one part of it goes to the root of the contract, goes to the foundation of

> the whole, it is a good defence to say, "I am not going to perform my part of it when that which is the root of the whole and the substantial consideration for my performance is defeated by your misconduct"

(15) In an insurance contract, the failure to pay a premium goes to the root and is the very foundation of the contract. Contrary to the assertion by the plaintiff's legal practitioners, the breach was quite material. There was no question of *quasi mutual* assent. The defendant had repudiated liability.

(16) The plaintiff's argument seems to suggest that it would be iniquitous if he is left "*empty handed*". That implies a claim for damages. However, plaintiff's current claim is one based in contract. If his position is probably that he had paid his instalments faithfully except for the last premium, then he ought to set out such a claim properly. A damages claim is an illiquid claim. His current action is premised on a liquid claim. But as I have indicated in this judgment, the cause of action has not been properly disclosed.

(17) In the circumstances, the default judgement is hereby refused.

Mabuye Zvarevashe, plaintiff's legal practitioners