CIV\T\498\90

IN THE HIGH COURT OF LESOTHO

In the matter between:

LESETLA LESOMA Plaintiff

and

LESOTHO NATIONAL INSURANCE COMPANY Defendant

J U D G M E N T

delivered by the Honourable Chief Justice
Mr. Justice J.L. Kheola on the 27th day
of June, 1994.

The plaintiff is claiming M90,000-00 in respect of the building and M97,000-00 in respect of the stock-in-trade. On the 3rd day of October, 1989 the plaintiff's retail shop and stock-in-trade were destroyed by fire.

It is common cause that the plaintiff's retail shop and the stock-in-trade were insured by the defendant in terms of Annexure "A" to the plaintiff's declaration. Annexure "A" must be read with exhibit "D" which shows that on the 25th October, 1988 schedule to Annexure "A" was revised.

In his declaration the plaintiff states that in terms of a clause on reinstatement in Annexure "A" the defendant is bound to reinstate in a reasonably sufficient manner the items insured. He states that he has duly notified the defendant of the destruction of the premises and stock-in-trade by fire and has in all other respects complied with his obligations under the policy.

In his evidence the plaintiff testified that from 1985 to 1986 the building was improved and the defendant agreed on the value of the building to be insured. That was the replacement value of the building.

At the time of the fire there was stock-in-trade in the shop consisting of soft goods packed in boxes. The stock came from another shop. The shop in question was not operating at the relevant time because the plaintiff was still looking for a Manager. The plaintiff lived at 'Masemousu and kept the key of the shop at ha Marakabei. In his absence a person guarded the place.

The plaintiff handed in invoices relating to the

soft goods in question and they were marked Exhibit "C" (collectively). The soft goods reflected in Exhibit "C" were bought for M123,525-09.

The defendant agreed to pay M38,000-00 in respect of the building which was insured to the tune of M90,000-00. He rejected their offer of M38,000-00 because he felt that the defendant was cheating him. They did not even tell him how they arrived at the figure of M38,000-00.

Under cross-examination the plaintiff said that in order to assess the value of the building the defendant sent its agent to Marakabei in order to look at the building. This happened between 1985 and 1987. He had improved the building by fitting planks and thick mazonite and ten skylights and partition. The planks had made the building much stronger. The applicant admitted that after his shop and stock-in-trade were destroyed by fire the defendant sent an assessor to his premises in order to enable him to assess the damage. As regards the stock the assessor said there was no debris indicating that there was any stock at the time of loss. Considering the magnitude of the stock alleged to have been stored (worth

M97,000-00) it is reasonable to expect that there would be evidence of such stock having existed even after fire.

The plaintiff said that he last saw the stock in his shop on the 18th and 19th August, 1989.

After the plaintiff had closed his case the defendant closed its case without calling any witness.

In the leading South African case of **Nafte v. Atlas Assurance Co. Ltd**, 1924 W.L.D. 239 at p. 245 Krause, J. said:

> "The amount recoverable under a policy of insurance in the event of a fire, must not exceed the sum necessary to indemnify the insured fully against any loss which he may have actually sustained in consequence of the fire (per Lord Selborne at p. 710 **Westminsiter Fire Office v. Glasgow Provident Investment Society** (1888, 13 A.C.699)). He is not entitled to recover the amount specified in the policy unless it represents his actual loss (Cf. **Chapman v.**

Pole (1870, 22L.T. 306). The main purpose of the policy is to fix the total amount of the premium and to mark the limit beyond which the liability of the insurers is not to extend. The insured is, therefore, entitled to a full indemnity within the limits of his policy (
Cf. Westminster Fire Office v. Glasgow Provident Investment Society, supra, at page 711), for the loss which he has sustained in respect of the subject-matter of the insurance. (Cf. Bowen, L.J., at p. 401, Castellain v. Preston (1883, 11 Q.B.D.380)). The premium in this case was £6 0s 9d. and the amount insured was £1200 and embraced furniture, household goods and personal effects, the property of and in private use of the plaintiff.
The policy in this case is what is termed an "unvalued" or "open" policy i.e., the insured is only entitled to recover the value of the subject-matter, as proved by him, subject to the limitation imposed by the amount specified in the policy; or, as Lord Cockburn, C.J. at page 307 in Chapman

v. Pole (1870,22 L.T.306), puts it: "You (the Jury) must not run away with the notion that a policy of insurance entitles a man to recover according to the amount represented as insured by the premiums paid .... he can only recover the 'real and actual value' of the goods." (Cf also Dailby v. India and London Life Assurance Company (1854, 15 C.B. 365, per Pakke, B. at p. 387); Castellain v. Preston (1883,2 Q.B.D. 380, per Brett, L.J., at p.380))."

and earlier on at p. 243:

"The defence, therefore, of fraud fails, and the onus is on the plaintiff to show that the goods claimed were in fact destroyed by fire and to establish the "real and actual" value of such goods - (per Cockburn, C.J., at p. 307 in Chapman v Pole (1870, 22 L.T. 306) - because the contract of fire insurance is purely a contract of indemnity against losses actually sustained. (Cf. North British and Mercantile Insurance Co. v. London, Liverpool and Globe insurance Co. (1877, 5 Ch. D. 569); and Darrell v.

Tibbitts (5 Q.B.D. 560 C.A.).)"

The first issue is whether the insurance policy in the present case is an unvalued policy or a valued policy. In The South African Law of Insurance, 3rd edition by Gordon and Getz, at page 237 an unvalued policy is defined as 'one in which the insured can recover only the real, actual and intrinsic value of the loss in accordance with the rules set out above. The rules deal with the way in which the value of the property is calculated.

A valued policy is defined as 'one which specifies the agreed valued of the subject - matter of the insurance'.

In **Elcock v. Thomson** (1949) 2 All E.R. 381 at p.385 Morris, J said:

> "When parties have agreed on a valuation, then, in the absence of fraud or circumstances invalidating their agreement, they have made an arrangements by which, for better or for worse they are bound. As Atkin, L.J., said (126L.T. 44) in **City**

Tailors Ltd v. Evans, (1921) 91L.J.K.B. 379:

"in a valued policy, what is valued is the subject-matter of the insurance, and not the amount of the loss.

He pointed out that in marine insurance the position is made clear by the Marine Insurance Act, 1906, S.27(2) and (3) which read:

"(2) A valued policy is a policy which specifies the agreed value of the subject-matter insured. (3) Subject to the provision of this Act, and in the absence of fraud, the value fixed by the policy is, as between the insurer and assured, conclusive of the insurable value of the subject intended to be insured, whether the loss be total or partial."

According to the definition of a "valued policy" shown above there is no doubt in my mind that the policy which forms the subject-matter of the present proceedings is not a "valued policy". The parties

never agreed on the value of the subject-matter. What the parties did was to fix the total amount of the premium and to mark the limit beyond which the liability of the insurers is not to extend. The plaintiff is entitled to a full indemnity within limits of his policy, for the loss which he has sustained in respect of the subject-matter of the insurance.

Clause or paragraph on the first page of the insurance policy (Annexure "A") to the plaintiff's declaration provides that:

> "the Company will subject to the exceptions and conditions hereto pay to the insured the value of the property at the time of its destruction or the amount of such damage or at is option reinstate or replace such property or any part thereof but not exceeding in respect of each item the sum insured thereon."

Clearly the above clause puts it beyond any doubt that the policy in the present case is not a valued policy.

In **Chapman v. Pole** (1870) 22 L.T. 306 (fire insurance per Cockburn, C.J., directing the jury at 307:

> "'You must not ran away with the notion that a policy of insurance entitles a man to recover according to the amount represented as insured by the premiums paid... He can only recover the real and actual value of his goods.';**Vance v. Foster** (184) Ir Cir Rep 47 (fire insurance) per Pennefather B. at 50: 'It has been truly stated that a policy of insurance is a contract of indemnity, and that while the insured may name any sum he likes as the sum for which he will pay a premium, he does not by so proposing that sum, nor does the company by accepting the risk, conclude themselves as to the amount which the plaintiff is to recover in consequence of the loss, because although the plaintiff cannot recover beyond the sum insured upon each particular item.. he cannot recover even that sum unless he proves that he has sustained damage, and then he will recover a sum commensurate with

> the loss he has sustained.' Hence, a policy in express terms indemnifying the assured against loss to an amount not exceeding the sum insured on each item is not a valued policy: **Brodigan v. Imperial Live Stock and General Insurance Co.** (1928) WC & Ins Rep. 160."

Regarding the shop building the plaintiff is under an obligation to prove the value of that building at the time of its destruction. He must not regard the sum of M90,000-00 as the actual compensation to which he is automatically entitled. He must prove his actual loss. It is common cause that the general dealer trading store was constructed of corrugated iron sheets with wood frame under iron. In October, 1980 this building was insured for M44,000-00. The plaintiff testified that at the time the building was destroyed by fire it had actually increased in value. He fitted planks, thick mazonite, ten (10) skylights and partitioning. To effect these improvements he employed men from Mohale's Hoek. He alleges that the planks made the building much stronger.

It seems to me that in October, 1987 and in October, 1988 when the building was insured for M70,000-00 and M90,000-00 respectively, it was because the defendant agreed or admitted there were some improvements to the building. There was no other reason why they agreed that the limit of their liability should be increased.

The plaintiff testified that the agents of the defendant went to inspect the building in between 1985 and 1986.

It seems to me that the inspection or inspections which were conducted by the agents of the defendant before or after the premiums and the limit of the liability were increased cannot be regarded as a valuation as to convert the unvalued policy into a valued one. However the limit of the defendant's liability has a bearing to the value of the subject-matter. In other words the defendant cannot agree to insure a small building valued at M10,000-00 for M100,000-00 simply because it is interested in the income from the large premiums.

In Exhibit"H", which is a letter written to the

plaintiff by the defendant's assessor, it was stated that "taking all these points into consideration we are satisfied that there would be no possibility that the rebuilding of the structure would exceed M45,000-00 or so. Obviously dependant on the quality of material the cost could be somewhat less". the figure suggested in that letter does not take into account that the building had recently been improved and its value had increased. In any case that letter is not evidence, it cannot be cross-examined. The defendant decided not to call the author of that letter.

Finally the defendant reduced the figure of M45,000-00 to M38,000-00 on the ground that it was taking wear and tear which the building had suffered. It seems to me that the building had not suffered much wear and tear, or even if it had suffered so, that must not be taken into great account because the building had been greatly improved. Using the figure suggested in Exhibit :H: and the improvements I come to the conclusion that the plaintiff is entitled to a sum between M45,000-00 and M90,000-00. I would fix that some at M60,000-00.

In paragraph 661 of Halsburg's Laws of England,

Vol.25, 4th edition by Lord Hailsham of St. Marylebone the learned Lord High Chancellor states the law as follows:

> "An election for or against reinstatement is final once it is made, and cannot afterwards be withdrawn. No formal election is necessary; an election by conduct is sufficient; provided that the conduct is clear and unequivocal. The insurers will be taken to have elected against reinstatement and in favour of a payment in money, if the negotiations for a settlement have been conducted by the insurers throughout on the footing that the loss is to be made good by a payment in money, or if they have proceeded to arbitration for the purpose of ascertaining the amount to be paid under the policy. On the other hand, they are not bound to exercise the option immediately; they are entitled before exercising it to investigate the loss and to ascertain what its amount is likely to be. Therefore a merely provisional assement of the amount, even if made in conjunction with the

assured, does not debar them from electing to reinstate."

In the present case the negotiations were conducted on the footing and understanding that the plaintiff did not want that the building should be rebuilt, the defendant elected to indemnify the plaintiff by payment of money. The plaintiff refused to accept the offer of M38,000-00 and demanded M90,000-00 which appear in the insurance policy. He was under the wrong impression that his insurance policy was valued policy. I have already indicated above that the policy was an unvalued one. In any case the defendant elected to pay money and once that election was made it cannot be withdrawn.The fact that the parties cannot agree on the exact sum of money does not entitle the defendant to withdraw the election it made. What the plaintiff must do is to prove his actual loss, i.e. the value of the building at the time it was destroyed. It seems to me that he has partly done so and the defendant actually support him by suggesting that the value of the building at the time of its destruction was about M45,000-00. In arriving at that amount the defendant did not take into account the improvements which were recently made to the building before it was destroyed by fire. As

I have said above the letter of the defendant's assessor is not evidence.

Regarding the stock-in-trade, Mr. Matsau, defendant's attorney, submitted that the plaintiff has conceded under cross-examination that he did not submit the documents (Exhibit "C") nor invoices together with his claim to the defendant. Plaintiff admitted under cross-examination that a certain Mr Beattie, an assessor appointed by the defendant, told him that there was no evidence that there was any stock-in-trade in the building just before it was destroyed by fire. There was no debris indicating that there was any stock before the building was destroyed by fire. Considering the magnitude of the stock alleged to have been in the building (worth M97,000) it is reasonable to expect that there would be evidence of such stock having existed even before a fire.

I agree with Mr. Matsau because the plaintiff did not challenge the allegation that there was no debris. He did not challenge that allegation at the time it was made. He did not challenge it in his evidence before this Court.

Page 4 of the claim form, (Exhibit "E") provides that if the claim is in respect of stock-in-trade, a full list of the articles must be given together with the cost price for the replacement of these stock items and not the selling price of the articles concerned. The plaintiff did not prepare such a list.

Page 3 of Exhibit "E" contains a declaration in which the plaintiff stated that:

> "I solemnly declare that I have suffered loss of or damage to property <u>enumerated on the reverse hereof</u> and that the said property was in my possession immediately prior to the said loss which occurred solely as a result of the operation of a peril insured by the above police." (My underlining)

It is common cause that the plaintiff did not enumerate any property on the reverse side of Exhibit "E".

It is again common cause that the defendant first saw Exhibit "C" here in Court. That document ought to

have accompanied the claim form.

There is another aspect of the plaintiff's claim for stock which leaves much to be desired. According to the plaintiff's evidence there was a person who guarded the building while the plaintiff lived at 'Masemousu which is hundreds of kilometres away. One would have expected the guard to have been called to give evidence as to what happened. More especially because when Mr. Beattie put it to the plaintiff that because of the absence of the debris it would seem that thieves broke into the shop and took the stock before they set the building on fire, he (plaintiff) did not challenge this suggestion by pointing out the debris.

Furthermore the plaintiff said that he last saw the stock on the 18th and 19th August, 1989. The shop was destroyed by fire about one and half months later. Nobody can tell us that the stock was still in the shop on the 3rd October, 1989 when the shop was destroyed by fire except the person who guarded it on that night of the great fire.

I have come to the conclusion that the plaintiff

has failed to prove on a balance of probabilities that there was stock in the building at the time it was destroyed by fire.

In the result judgment is entered in favour of the plaintiff in respect of his store which was destroyed by fire in the sum of M60,000-00 with costs. In regard to the claim for stock-in-trade absolution from the instance is granted with costs to the defendant.

J.L. KHEOLA)
CHIEF JUSTICE

27th June, 1994.

For Plaintiff - Mr. Pheko
For Defendant - Mr. Matsau.