C. of A (CIV) No.35/94

IN THE COURT OF APPEAL OF LESOTHO

In the matter between:

LESOTHO NATIONAL INSURANCE (CO) Pty LTD Appellant

and

LESETLA LESOMA Respondent

HELD AT

MASERU

CORAM:

MAHOMED P.
BROWDE J.A.
LEON J.A.

JUDGEMENT

LEON, J.A.

I shall refer to the parties herein as the Plaintiff and the Defendant respectively.

At all material times hereto the Plaintiff was the owner of a retail shop near the village of Marakabei in the district of Maseru.

It is common cause that on the 23rd October, 1980

the Plaintiff entered into a written agreement of insurance with the Defendant in terms whereof the Defendant undertook to insure the Plaintiff's shop against the risks mentioned in the contract, one of them being destruction by fire. The contract of insurance is annexure "A" to the Plaintiff's declaration.

Although it was not admitted by the defendant on the pleadings, there is no dispute on the evidence that on the 3rd October, 1989, the plaintiff's shop was completely destroyed by fire.

It was the plaintiff's case that the building of the shop was insured for M90,000-00 while the stock - in - trade was insured for M97,000 at the time of destruction by fire. The plaintiff alleged further that at that time the stock in trade was worth M97,000 while the building was valued at M90,000.

Alleging that the defendant was bound under the Policy to reinstate in a reasonably sufficient manner the items insured and that he had complied with all his obligations under the Policy, the Plaintiff claimed payment of the total sum of M187,000 together with interest and costs which the defendant had failed to pay.

Before referring to the plea it is convenient to refer to certain provisions of the Policy.

Paragraph 1 provides:-

"In consideration of the payment of the premium, the Company agrees that in the event of destruction of a damage to the property insured occurring during the period of insurance by

(1) Fire whether resulting from explosion or otherwise
(2) .....
(3) .....

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 its option reinstate or replace such property or any part thereof but not exceeding in respect of each item the sum insured thereon."

Clause 10 of the Policy reads:-

"It is agreed that in the event of the property insured under the written Policy being destroyed or damaged the basis upon which the amount payable under each of the said items of the Policy is to be calculated SHALL BE the cost of replacing or reinstating on the same site property of the same kind or type but not superior to or more extensive than the INSURED property when new, subject to the following special provisions and subject also to the terms, exceptions and conditions of the Policy except insofar as the same may be VARIED hereby"

In its plea the defendant denied that the Plaintiff's shop was insured for M90,000-00 stating that the shop was insured to the value of the shop at

the time of its destruction or the amount of such damage. The defendant denied that the value of the building at the time of its destruction was M90,000 and put plaintiff to the proof thereof.

With regard to the stock-in-trade, the defendant denied that the plaintiff had stock-in-trade worth M97,000-00 in the building at the time of the fire putting plaintiff to the proof thereof. The defendant further denied that at the time of its destruction, the shop contained stock to the value of M97,000.00 and put plaintiff to the proof thereof.

The defendant admitted that in terms of the Policy, the defendant could at its option reinstate or replace the insured destroyed property. It alleged that it had offered to reinstate the building at its option but that the plaintiff had refused to accept the reinstatement. The defendant had earlier offered an amount of M38,000-00 which the plaintiff refused to accept.

The matter went to trial before KHEOLA, C.J. Only one witness gave evidence, namely the Plaintiff, the defendant closing its case without adducing evidence.

The first question which the learned Chief

Justice decided to deal with was whether the Policy in question was an unvalued policy or a valued policy. The distinction is this. In the case of an unvalued policy the insured can only recover the real, actual or intrinsic value of the loss whereas a valued policy is one which specifies the agreed value of the subject - matter of the insurance, in which case they are bound by that value for better or for worse. In such a policy what is valued is the subject matter of the insurance and not the amount of loss.

In the case of an unvalued policy, the amount recoverable 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. He is not entitled to recover the amount specified in the policy unless it represents his actual loss (*NAFTE V ATLAS ASSURANCE CO. LTD 1924 WLD 239 AT 245 and the cases there cited).*

The learned Chief Justice held that according to the definition of a "valued policy" there was no doubt in his mind that the Policy in this case is not a "valued policy". This is made clear by paragraph 1 of the Policy (to which I have already referred) which obliges the insurer to pay to the insured "*the value of the property at the time of its destruction....".*

In the light of that finding, the learned Chief Justice held, relying only on the terms of the policy, that the plaintiff was under an obligation to prove that the value of the building at the time of its destruction was M90,000-00.

There was not a great deal of evidence on this topic. Such evidence as there was amounted to this:-

1) The building was constructed of corrugated iron sheets with wood frame under iron.

2) In October 1980, the building was insured for M44,000-00.

3) In October 1987, the building was insured for M70,000-00.

4) In October 1988, the building was insured for M90.000-00.

5) The plaintiff gave evidence that at the time of the fire, the building had increased in value because he had fitted planks, thick marzonite, ten skylights and partitioning. As a result of the fitting of planks, the building became much stronger.

6) Agents of the defendant had inspected the building in 1985 and 1986 before the limit of the defendant's liability was increased in 1987 and 1988.

7) On the 6th November, 1989 a Director of the defendant's assessors Graham Miller Lesotho (Pty) Ltd wrote a letter to the plaintiff in which they stated that there would be no possibility that rebuilding the structure would exceed M45,000-00 or so. Obviously dependent on the quality of the material, the

cost could be somewhat less.

8) The defendant reduced the figure of M45,000-00 to M38,000-00 on the ground that it was taking into account wear and tear which the building had suffered.

The Court *a quo* approached this aspect of the case in the following way. By increasing the limits of its liability in 1987 and in 1988 after improvements had been made and its agents having inspected the building, the defendant had agreed or admitted that there were some improvements to the building. Inspections had been conducted in 1985 and 1986 after improvements had been effected. Although such inspections cannot convert an unvalued policy into a valued one the limits of the defendant's liability has some bearing on the value of the subject - matter. The figure of M45,000 given by the defendant's assessor does not take into account the fact that improvements had been effected and the value of the building thereby increased. The Court *a quo* considered that wear and tear could not be taken into much account as the building had been greatly improved. The learned Chief Justice concluded:- "*using the figure suggested in Exhibit H*" (the assessor's letter)" and the improvements I come to the conclusion that the plaintiff is entitled to a sum between M45,000 and M90,000-00. I would fix that at M60,000-00"

With regard to the question as to whether the defendant was entitled to reinstate the building the Court *a quo*, relying on *Halsbury laws of England 4th ed) volume 25 paragraph 661,* held that an election for or against reinstatement is final once it is made and cannot afterwards be withdrawn. On the evidence, the defendant had elected to offer the plaintiff a sum of money i.e. M38,000-00. The fact that the parties were unable to agree on the exact sum to be paid did not entitle the defendant to withdraw the election which it had made. That defence therefore failed.

With regard to the claim for the stock-in-trade (M97,000-00) it was held that the claim failed in two respects. Firstly, the plaintiff had failed to enumerate the damage to the property on the reverse side of the claim form when he submitted it. In any event, the plaintiff had failed to establish that there was any stock-in-trade on the premises at the time of the fire.

With regard to the last point, the learned Chief Justice pointed to the fact that the plaintiff had failed to challenge an allegation in a letter written on behalf of the defendant that there was no debris in the building after the fire. More importantly, the plaintiff had last visited the building one and a half months before the fire and the guard who guarded the

building on a daily basis and would therefore, be able to testify as to the presence of the stock-in-trade at the time of the fire was not called as a witness. It was as likely as not that thieves had stolen the property and then set fire to the building. In all those circumstances it was held that the onus had not been discharged.

The defendant has appealed against the award of M60,000-00, it being contended that the trial court had erred in failing to find that the Plaintiff had failed to prove his damages. The Plaintiff has cross-appealed against the dismissal of his claim for M97,000-00 and against the trial Court's failure to award him M90,000-00.

It is submitted on behalf of the appellant that the Court erred in holding that the defendant had made an election to pay M38,000-00.

It is further contended on behalf of the defendant that inasmuch as the insurance policy is an UNVALUED policy, the respondent can only recover the real and actual value of the stock and the building or the reinstatement thereof. The onus was on the plaintiff to prove the value of the actual loss by adducing all evidence reasonably available to him and where he does not produce such evidence, the Court is

justified in granting absolution from the instance. The Court should not be left to guess at the amount.

With regard to the stock - in - trade it is emphasised, that the plaintiff failed to call the security guard or produce any tangible evidence of destroyed stock. It is contended that the Court *a quo* was guite correct in holding that the plaintiff had failed to prove that there was any stock on the premises at the time of the fire or, if there was, the value thereof.

With regard to the building, it is submitted on behalf of the defendant that the insurer has the option of either effecting payment or the option of reinstatement and that such option must be exercised either within the time stated in the policy or within a reasonable time. While it is conceded that once an election is made, it is irrevocable the insurer is not bound to exercise the option immediately. On the facts, the defendant made an offer to pay the plaintiff M38,000-00 which was rejected. Upon such rejection, it is contended that the defendant then exercised its option to reinstate the building. Putting the matter another way the argument is that the offer of M38,000-00 was not an election. Attention is drawn to the fact that there were negotiations between the parties and that the

plaintiff accepted the offer to reinstate the building provided that a sum of M90,000 was spent on the reconstruction. The defendant rejected that and, so the argument ran, finally elected to construct the building to the value of M38,000-00. This was refused by the plaintiff.

With regard to the judgment, it is submitted on behalf of the defendant that the learned Chief Justice's finding that the respondent was entitled to a sum between M45,000 and M90,000 which he found to be M60,000 was supported neither by the evidence nor by any principle of law.

For the plaintiff, it is contended that the policy was a valued policy because the parties had agreed that the agreed value of the building in the event of total destruction was M90,000-00. There was uncontradicted evidence to that effect. In the alternative it is submitted that if the policy was an unvalued one, the plaintiff would be entitled to the actual, real and intrinsic value of the property at the time of destruction. In calculating the real value of the property, the basis of calculation may be the market value of the property destroyed or the cost of reinstatement. It is claimed on behalf of the plaintiff that on the evidence the basis of calculation was the cost of re-instatement in respect

of the building.

With regard to the question of election, the argument for the plaintiff amounts to this. The policy gave the defendant the option of re-instating the property insured instead of paying cash. Once the defendant had elected to pay cash by offering a sum of money such election was irrevocable. The fact that the parties were unable to agree on the amount to be paid does not detract from the fact that an election was made.

Finally it is submitted on behalf of the plaintiff and, in this regard the cross-appellant, that the evidence showed that there was stock-in-trade in the destroyed building at the time of the fire and that the invoices produced showed that value of the stock destroyed was in excess of the sum assured.

It will be appropriate if I deal firstly with the appeal against the award by the Court *a quo* of a sum of money i.e. M60,000-00 in respect of the claim of M90,000-00 arising out of the destruction of the building. In awarding a sum of money to the plaintiff in respect of this claim, the Court *a quo* was fully alive to the fact that under the Policy the defendant could either pay a sum of money "or at its option

reinstate or replace such property." Having held that the defendant had irrecovably elected to pay a sum of money, it followed that it no longer had the option to reinstate the building. If the learned Judge was wrong in this view, it must follow that the plaintiff was not entitled to the sum of money claimed or any part thereof.

Accordingly I turn now to consider the evidence relating to the question as to whether the defendant elected to pay a sum of money or elected to reinstate the building.

On the 6th November, 1989, the assessors of the defendant wrote to the plaintiff. In that letter reference is made to previous discussions with the plaintiff. The opinion is expressed that the rebuilding of the structure would not exceed M45,000-00. The relevant parts of that letter then read as follows:-

> " Under normal circumstances, insurers settle claims on the basis of rebuilding cost. However, this requires actual rebuilding to take place and if it does not, then insurers are entitled to make a reduction in respect of the normal wear and tear which the building suffered. As you have indicated1 you do not wish to rebuild the structure such a reduction must be made. Using as a base, the highest figure of M45,000-00, we think that insurers should pay no more than M38,000-00. If, however, settlement on this basis could not be acceptable to you, we would remind you that

> the insurers have the option to insist that actual ding takes place. They are entitled to refuse to deal with the matter on a cash basis only. Indeed we could say that even if rebuilding was carried out, we think it likely that ..... the actual cost might not in fact exceed the M38,000-00, we have suggested. Perhaps you would advise us how you wish us to proceed".

In no sense can the above letter be read as an election by the defendant to pay a sum of money. Quite the contrary. The parties were negotiating and the plaintiff was being warned that the defendant had the option to pay a sum of money or reinstate the building. It was implied that if the plaintiff wanted more than M38,000-00, the defendant might well then exercise its option to reinstate.

On the 14th November a meeting took place at the defendant's offices between the plaintiff and two representative of the defendant one of whom was Mrs. Mc Cloy the assistant manager of claims. What transpired at that meeting is reflected in a letter written to the plaintiff on the following day. The relevant parts of that letter read:

> " We confirm that we are offering a sum of money as indemnity for your loss. We must stress that the abovementioned figure is based upon expert advice .... It was apparent during our meeting that you did not accept the above offer, we therefore, confirm that we offer to reinstate the destroyed building i.e. the company will build a building of the same type as far as is practicably possible as an alternative to pay cash. Refer to policy condition (4).

> Please note that the company has a right to either pay cash or reinstate. The option does not rest on the insured.
> .....
> .....Kindly notify us of your final decision with regard to the damaged building at your earliest convenience to enable us to finalise that aspect of your claim".

The contents of the letter make it clear to me that the defendant had not then elected to pay cash. The attitude was that it would make that election once the plaintiff had communicated his final decision. The parties were negotiating and the defendant had made it clear that unless the plaintiff accepted M38,000, it would then exercise its option to reinstate the property. The plaintiff did not accept M38,000 but issued summons claiming M90,000-00.

What transpired at that meeting was not called into question by the plaintiff when he was cross-examined on this point. " Mrs Mc Cloy's letter of the 15th November" was put to him in this way:-

> " In the same letter, that letter of the 18th November, 1989 Mrs Mc Cloy then informed you that since you were not accepting the offer of M38,000-00, the Insurance Company was opting to offer to reinstate your destroyed building.
>
> The plaintiff replied:-
>
> " I went to her and said it was okay if they reinstate me but (it) should be a building worth M90,000-00 and she refused saying that they would use M38,000-00". He went on to say "I said that I agreed that they should build the building but of the cost of M90,000-00 and she refused saying

> she would erect a M38,000-00 building and then I said they meet me in the court of laws."

The plaintiff's attitude was quite clear. He wanted M90,000-00 or a building worth M90,000-00. The defendant's attitude was equally clear. Unless the plaintiff accepted M38,000-00 it would then exercise its option under the policy to reinstate. The plaintiff having refused M38,000-00, it followed that the defendant was entitled under the policy to erect a building and not obliged to pay a sum of money.

On a proper interpretation of the evidence, I am of the opinion that the trial court erred in holding that the defendant had elected to pay the plaintiff the sum of M38,000-00 and that election having been made, it could not be withdrawn. In the light of what I have said above, the defendant made no such election.

In those circumstances, the defendant was entitled to reinstate the building and it becomes unnecessary to decide whether the trial Court's method of arriving at the sum of M60,000-00 was right or wrong.

In my judgment the appeal must be allowed with costs.

I turn now to the cross-appeal. The second ground is that the trial court should have awarded M90,000-00 instead of M60,000-00 for the building. As the court *a quo* should have awarded nothing under this claim the cross-appeal on this ground must fail.

The first and other ground of the cross-appeal is that the trial court had erred in dismissing the plaintiff's claim for M97,000-00 in respect of the stock-in-trade. I entirely agree with the judgment of the learned Chief Justice on this claim. The Onus was on the plaintiff to prove the stock-in-trade was in the store at the time of the fire. There was no such proof. The plaintiff himself had last visited the store six weeks before the fire and the guard who guarded the store on a daily basis was not called as a witness. There was thus no proof that at the time of the fire there was any stock in the store. The learned Chief Justice held that it was as likely as not that thieves had stolen the stock and then set fire to the building. I agree. He correctly absolved the defendant from the instance.

In my judgment the appeal must be allowed with costs and the judgement of the Court *a quo* altered to read "Judgment for the defendant with costs".

The Cross-appeal must be dismissed with costs.

R. N. LEON
JUDGE OF APPEAL

I agree

I MAHOMED
PRESIDENT OF THE COURT OF APPEAL

I agree

J. BROWDE.
JUDGE OF APPEAL

Delivered at Maseru this 28th day of July, 1995.