CMTI ZIMBABWE (PRIVATE) LIMITED

versus

TRISTAR INSURANCE COMPANY LIMITED

HIGH COURT OF ZIMBABWE

MTSHIYA J

HARARE, 5 March 2012, 6 March 2012, 7 March 2012, 8 March 2012,

9 March 2012, 23 March 2012 and 1 August 2012

*Advocate Morris*, for the plaintiff

*Advocate Fitches* for the respondent

MTSHIYA J: On 23 June 2008 the plaintiff and the defendant entered into an insurance agreement. The insurance policy issued to the plaintiff (the insured) was to cover damage to the “whole or part of the property described in the schedule, owned by the insured or for which they are responsible, including alterations by the insured as tenants to the buildings and structures”. Specifically the insurance was against damage from “ fire, lightning or thunderbolt, explosion and such additional perils as are stated in the schedule.” The schedule then provided details of the cover as follows;-

1. Fire Business Combined

Sum insured : US$450 000-00

1. Plant and Equipment : US$200 000-00

Total sum Insured for (a) & (b) US$650 000-00

The annual premium payable was US$1 732.50

In addition to the above risk, the schedule provided a cover of US$1000 for theft at an annual premium of US$30.00. The above details also appear in the defendant’s letter of 23 June 2008 written by its agent which letter reads as follows;-

“Dear Patrick

**BUSINESS INSURANCE FOR CMTI AND ASSOCIATED COMPANIES**

W e refer to our meeting this morning at our offices wherein we discussed the above matter and are pleased to confirm the following terms:-

**Assets All Risks Policy**

Section 1 – Fire and Allied Perils

Description Sum Insured Annual Premium

Stocks USD 450,000 USD 742.50

Plant & Equipment USD 200,000 USD 990.00

Section 2 – Theft USD 1,000 USD 30.00

**Total Premium** **USD1, 102.50**

Please note that we have included Section 2 deliberately as we realized having omitted that aspect during our discussions.

Motor Fleet Policy

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **Vehicle** | **Registration** | **Year** | **Sum Insured** | **Premium** |
| Toyota Hilux | AAB 8306 | 2001 | USD 15,000 | USD 525.00 |
| Ford Bantam | AAA 7586 | 2000 | USD 8,000 | USD 280.00 |
| Mitsubishi Pajero Jnr | AAT 2419 | 1996 | USD 20,000 | USD 525.00 |
| Nissan March | ABC 7424 | 1996 | USD 7,000 | USD 245.00 |
| **Total** |  |  |  | **USD1,750.00** |

You advised that you have since disposed of the Toyota Prado recently, and we have worked out the refund premium for the unexpired 264 days 14/03/09 as USD1, 265.75.

Taking the above premium due on your account is as follows:-

Assets All Risks USD 1, 102.50

Motor Fleet USD 1, 750.00

Less Refund on Toyota Prado (USD1,265.75)

**Premium Due**  **USD 1,586.75**

We now await your premium payment – please note that we are able to accept payment in the form of cash.

Yours sincerely

RAYMOND CHIDANYIKA

**EXECUTIVE CONSULTANT”**

On 30 June 2008 the defendant confirmed the payment of the total premium payable. The confirmation letter, again written by the defendant’s agent and under whose cover the policy document was sent, read as follows:-

“Dear Patrick

**BUSINESS INSURANCE FOR CMTI AND ASSOCIATED COMPANIES**

We are pleased to enclose herein our policy documents regarding to the above matter and also acknowledge receipt of your payment amounting to USD1,337.50 being the premium due on your account for the two policies.

We thank you very much for your continued support and please read through the policy documents and familiarize yourself with the terms and conditions of this insurance contract.

Yours sincerely

RAYMOND CHIDANYIKA

**EXECUTIVE CONSULTANT”**

On 9 March 2009 a fire, suspected by the Fire Brigade to have been caused by an electrical fault, occurred at 22 Whites Way Msasa, Harare where the insured property was housed. Quantities of property were damaged and destroyed. The value of the destroyed or damaged property was given as:-

1. Stock -US$323,131.70
2. Plant & equipment -US$ 67, 097-21

On 10 March 2009 the plaintiff notified the defendant about the fire. The plaintiff then made a claim to the defendant for the total loss, valued at US$390,228-91.

On 14 April 2009 the respondent addressed the following External memorandum to its agent:-

“Att; Mr R. CHIDANYIKA

From : Grace Ntuli Chibaya

Date: 14 April 2009

RE: CMTI ZIMBABWE OUR CLAIM NUMBER DF09HF0003

We refer to the above.

We acknowledge receipt of your claim documents and we confirm having discovered the following:-

1. Financials submitted to us indicate that our insured CMTI Zimbabwe had nil stock. In view of the above we are unable to assist on the stock claim.
2. Our offer on the equipment claim based on the assessment made is as follows:

Sum insured (after applying average and depreciation) US$38 030.94

Less excess US$ 3 803.09

Net payable US$34 227.84

We however would like the insured to clarify the following discrepancies discovered by our Forensic Scientist:

1. The ashes burnt and charred remains of cloth found at the premises are inconsistent to the amount being claimed.
2. The observed damage is synonymous with that caused by an explosion (attributed to flammable liquid) what kind of liquids does the insured keep?

We will proceed with payment of the above amount once the above issues have been cleared.

Grace Ntuli Chibaya

**Acting Claims Manager”**

On the same date the plaintiff’s Managing Director responded to the above memorandum in the following terms:

“RE: Claim CMTI Zimbabwe (Pvt) Ltd

In reference to your external memo; we would like to clarify the following:

1. We are insured under the group CMTI Zimbabwe (Pvt) Ltd which have the following locations:

Bay 1-22, Whites Way, Msasa

Bay 3-22, Whites Way, Msasa

Bulawayo – Ramjis’s Complex

At the time when we were first insured, we had goods at Bay 2, 22 Whites Way, Msasa. Your consultant visited all the locations apart from the one in Bulawayo.

Financials – The following companies – Prolude Investments, Takara Investments and Sportford Investments are under the umbrella CMTI.

The stock valuation in USD as at December 31st 2008 were given to the assessor and these are indicated in Z$ under Prolude. Note that we are not allowed to revalue our stock in $Z terms; however, quantity of stock were given to the assessor.

1. Equipment – we do not agree to your offer, we had insured our equipment up to USD250,000 – which is reflective of the value of our equipment as at to-day. Therefore there is no under-insurance to justify your application of average. All the quotes for replacement of equipment damaged have been given to the assessor.
2. Forensic scientist – we dispute the fact that the ashes burnt and charred remains of fabric were inconsistent to amount claimed. Note that your forensics came after a week during which it rained heavily.
3. Explosion – We had some alkyd resins (raw material to manufacture paint) outside the internal fence and the firemen can testify that the fire was in the fabric section as they were in the warehouse at the start of the fire and the alkyd resin were still intact.

We look forward to a meeting with you in order to find a way forward as it looks as though you are trying to find ways not to compensate us for the loss.”

It appears a meeting was then held between the parties resulting in the defendant’s formal repudiation of the claim through an External Memorandum addressed to its agent. The memorandum dated 23 April 2009 reads as follows:

“RE: CMTI ZIMBABWE OUR CLAIM NUMBER DF09HF0003

We refer to the above and our meeting of the 16th of April 2009 and acknowledge receipt of additional claim documents in the form of purchases done between 2004 and 2008 which you confirmed are the full documents relating to this claim. We however note the following for your attention:

1. Our insured was CMTI Zimbabwe (Pvt) Ltd and as at the end of December 2008, our insured did not hold any stocks. The other companies which the insured purports were also covered under CMTI Zimbabwe (Pvt) Ltd are separate legal persons as who should have been disclosed to us in terms of General Condition 1 which states that:

**“Misrepresentation, misdescription and non-disclosure**

*Misrepresentation, misdescription or non-disclosure in any material particular*

*shall render voidable the particular item, section or sub-section of the policy, as*

*the case may be, affected by such misrepresentation, misdescription or non-*

*disclosure.”*

The other companies were not disclosed to us and we believe this is material and should have been disclosed to us for rating purposes.

1. The insured alleges that stocks were transferred from CMTI Zimbabwe (Pvt) Ltd to Prolude as supported by sales invoices issued on 28/08/2008. We wish to bring your attention to the Alteration and Misdescription Clause which states that:

“*The insurance under this section shall not be prejudiced by any alteration or misdecsription of occupancy whether due to the transfer of processes or machinery or by virtue of acquisition of additional premises, structural alterations or repairs to buildings, machinery or plant, provided that notice is given to the company as soon as practicable after such event and the insured agree to pay additional premium if required.”*

We note that the insured is in breach of the above Clause. The said transfers should have been notified to us in terms of the policy clause to enable review the risk and effect any policy changes as envisaged in the policy document.

1. Total purchases in 2008 amounted to $127 259.68 less amounts not being claimed which leaves us with a figure of $89 879.61 from the 2008 purchases.
2. Transfers from CMTI Zimbabwe (Pvt) Ltd to Prolude amounts to $195 051.77 as the amount being claimed. We however note that in terms of fabric transferred from CMTI Zimbabwe (Pvt) Ltd to Prolude plus purchases done in 2008, amounts to 27 365.5kgs but however the insured is claiming 42 587.56kgs of fabric. We are concerned with this disparity in the amount being claimed against the total fabric bought including transfers to Prolude which the insured confirmed is the only subsidiary which had stocks at the end of December 2008.
3. Forensic report implies that the amount of ash versus the fabric being claimed suggests an overstatement of the claim and this also supported by our point number 4 above.
4. The cause of the fire according to the insured is an electrical fault. From the forensic report and our own investigations there is no physical evidence of an electrical fault. From the aforegoing, the cause of the loss is suspicious in view of the disparities noted above.

In view of the above facts and the inconsistencies picked from the submissions made by the insured, we wish to withdraw our initial offer and repudiate this claim in its entirety based on the above facts.

We have therefore closed our file.

Agripah Marangwanda

**Operations Executive”**

On 24 April 2009 the defendant’s agent, in response to the above memorandum, wrote as follows:-

“TO: MR A. MARANGWANDA

FROM: RAYMOND CHIDANYIKA

DATE: 24 APRIL 2009

RE: CMTI ZIMBABWE (PVT) LTD – FIRE CLAIM

We acknowledge receipt of your memo dated 23 April 2009.

I have communicated the position to the client however would like to comment as follows before you can close the claim outright. I think our mutual client deserves your audience and possibly re-consideration of your position;

1. As we discussed in meeting here on 16 April 2009, it is appreciated that the companies are separate legal personas – however if we look at the correspondences leading to the issuing of the policies, it is noted that the insurances were to cover not just CMTI Zimbabwe but also to include the other associated companies.
2. It was not intentional for CMTI Zimbabwe not to advise of the subsequent alterations in the risk since assumption was that the policy was covering all the companies and also that there was not any physical movement of assets so much to alter the nature of the risk. The transfers were only in the books of accounts being from one company to the other without any alterations in the work processes.
3. Client is disputing your computations of the stocks and purchases and has said he will present his computations for your consideration – he says there were possible omissions from your workings.
4. Again client says he will give the breakdown of the transfers.
5. Client suggests that we need second professional opinion about the quantities of the ash.
6. Client did not say the fire was caused by an electric fault but only suspects that could have been the cause because on the day the fire happened there were numerous power-cuts from ZESA. The fire brigade team also suspects the same – but client was not absolutely sure of the cause according to his submissions.

I wish to request you to re-consider the repudiation and allow further negotiations and give empathy to our mutual client in their loss.

Thank you and best regards,

RAYMOND CHIDANYIKA

**EXECUTIVE CONSULTANT”**

The defendant did not reconsider its position and on 16 October 2009 the plaintiff filed summons against the defendant claiming payment of;-

“a) The sum of US4390,228.91 being fire damage to its property and that of its associated

companies namely Prolude Investments (Pvt) Ltd, Takara Investments (Pvt) Ltd and

Sportford Investments (Pvt) Ltd on the 9th and 10th March 2009, the subject of an

insurance policy between the plaintiff and the defendant covering such risk.

1. Interest thereon a *tempore morae* from the date of Summons to the date of judgment

and further interest at the same rate on the judgment debt from the date thereof to the

date of payment.

c) Costs of suit”

On 30 September 2010 the parties filed a Joint Pre-Trial Conference Minute in which the issues for determination by this court were listed as follows;-

“1.Whether the Plaintiff and its associated companies are *incolae.*

2.Whether the insurance cover under the Defendant’s policy extended to the Plaintiff

alone or to its associated companies.

1. Whether the averment of “inadvertence” and “error” on the Defendant’s part in having the associated companies included provides any legally recognized defence.
2. Whether the associated companies had an insurable interest.
3. Whether the property and stock of the Plaintiff and its associated companies was destroyed by fire as alleged.
4. Whether the value of such loss is as claimed in the declaration.
5. Whether the loss was one of the calamities covered by the insurance policy.
6. Whether “Condition 6 (c ) was part of the contract, contained in the polic, that bound the parties.
7. Whether the Plaintiff was in breach of Condition 1 of the policy.
8. Whether even if the Plaintiff failed to advise the Defendant of the inclusion of its associated companies was the Defendant in any way prejudiced thereby so as to create a breach of Condition 1.
9. Whether the Plaintiff breached the clause in the policy styled Alteration and Misdescription.
10. Whether in any event such clause could be breached by a transfer of stock when such prohibition does not appear in the clause in question.
11. Whether the Plaintiff is entitled to claim interest a *tempore morae* in terms of the Prescribed Rates of Interest.
12. Whether the Plaintiff is entitled to claim interest a *tempore morae* in terms of the Prescribed Rats of Interest Act.
13. Whether the Defendant’s claim for a Declaratur is procedurally correct.
14. Whether reference to associated companies was made by the Defendant’s authorized broker inadvertently.
15. Whether the reference to associated companies was made by the Defendant’s broker at all, or by the Defendant’s “Executive Consultant”.
16. Whether in any event such “inadvertence” on the part of the Defendant’s duly authorized agent offers any defence to the Defendant.
17. The question of costs.”

At the commencement of the hearing, Advocate Fitches, for the defendant, gave notice of his intention to apply for security of costs. However, that issue was later resolved by consent when the plaintiff agreed to pay the said costs.

Both the Plaintiff and the Defendant submitted their bundles of documents as exhibits 1 and 2 respectively. . In addition to the bundles of documents the parties also submitted the following exhibits:

Plaintiff

Policy Document (Blue Policy) – Exhibit 1A

Raymond Chidanyika’s Business cards – Exhibits 3A & 3B

Defendant

Loss assessment Report - Exhibit 2A

Business Protection policy (Red Policy) - Exhibit 2B

Chidanyika’s application - Exhibit 3C

The plaintiff, CMTI Zimbabwe (Private) Limited (CMTI), called four witnesses and the first witness was Raymond Galufa Chidanyika (Chidanyika).

Chidanyika said he joined the defendant in October 2006 as an Executive Consultant and was housed in the defendant’s premises. He said he was essentially an agent of the defendant and his job was to source business for the defendant for a commission. He said he would gather relevant information from clients and advise them on the requisite type of insurance. The premiums payable and any other terms and conditions would be determined by the Defendant.

Chidanyika said the risk *in casu* was to be valued and transacted in foreign currency. That being the case, he said, there was need for the defendant to consult re-insurers before a final decision was taken because it was the re-insurers who would carry the risk in foreign currency.

Chidanyika said in June 2008 Patrick Tong, the then Managing Director of the Plaintiff, approached him for an insurance policy for his businesses in Msasa. He said there was more than one company and all were operating from one centre and the plaintiff was the umbrella company.

Chidanyika said he was convinced Mr Tong wanted to insure all the companies that fell under the umbrella of the plaintiff. He had sat down with the underwriting department in defendant and on the basis of the information he had given to the department the terms of a policy were agreed and confirmed. Furthermore the underwriters had confirmed that there was reinsurance support for the insured risk. He said after the fire there was a delay from the defendant in appointing an assessor to determine the extent of the damages He had been informed by the underwriting department that the delay was due to the fact that the defendant had not remitted premium(s) to the re-insurer. An assessor, Mr Rugare Chingono, was however, later appointed, a week after the plaintiff had notified the defendant of its claim.

Chidanyika said the effect of a delay in remitting premium(s) to the re-insurer was that the re-insurer would allege that there was no insurance cover when the risk occurred.

Chidanyika confirmed that the covering letter at page 8 of Exhibit 1 was written by himself and that he had not made a mistake when he wrote “Business Insurance for CMTI and Associated Companies.” He said the underwriters were fully aware of the fact that the policy covered all the companies under the umbrella of the plaintiff. He also confirmed that exhibit 1A (Blue Policy) was the only policy issued to the plaintiff by the defendant and that there was no time bar in that policy with respect to litigation.

Chidanyika said Mr Tong had paid the requisite premium a week after agreement had been reached on the terms of the policy.

Chidanyika said on 10 March 2009 Mr Tong had telephoned him about the fire and he had immediately notified the defendant. He had also sent Mr Tong a claim form. Once the claim form was completed, he had dispatched same to the defendants’ claims department.

Chidanyika said after the fire, he had entered into negotiations with the defendant and an offer to pay US$34227.84 for plant and equipment had been made by the defendant. He said that offer had, however, been withdrawn through a memorandum dated 23 April 2009 (ie the memorandum quoted herein in full at pages 5-7)

Chidanyika said he ceased working for the defendant on 31 January 2011 following disagreement relating to a repudiation of a claim by the defendant. He said, notwithstanding his dismissal, he had no ill feelings against the defendant.

The plaintiff’s second witness was Mr Patrick Tong (Tong). Tong testified that at the time of the fire he was still the Managing Director of the plaintiff. He described the plaintiff as one of the biggest companies in Mauritius whose main business was in textiles. He said he was the sole shareholder in the plaintiff at the time of the fire. He testified that shares in the subsidiary companies were owned by the following;-

1. Prolude Investments (Private) Limited (Prolude) – Tong, Mr Madzima and Mr Chung.
2. Takara Investments (Private) Limited (Takara) – Tong, Mr Madzima and Mr Chung.
3. Sportford Investments (Private) Limited (Sportford) – Tong and Ms King.

He said the fire occurred at 22 Whiteway, Msasa and that the buildings contained stocks of fabric materials, painting materials, textile accessories, plant and embroidery processes. He said the materials belonged to all the four companies.

Tong said when he met Chidanyika he wanted local insurance for all the businesses at 22 Whiteway, Msasa and as far as he was concerned, dealing with Chidanyika was just as good as dealing with the defendant because Chidanyika represented the defendant.

He said there was never any doubt that the insurance was for all businesses under the umbrella of CMTI and correspondence between the parties confirmed that position. He admitted though that upon being given the policy document he did not check the schedule because he relied on Chidanyika. In any case, he said, the premium he paid was based on inspected stock, plant and equipment (i.e all valued at US$650 000 for all the companies)

. He said the internal transfers of stock to Prolude Investments (Private) Limited were mere paper transfers dictated by a restructuring exercise they were undertaking.

Tong said they had submitted to the insurers lists of goods destroyed and goods not destroyed. He said this was less goods already sold. The stock was purchased in US dollars and hence the value was based on landed cost. He said, whereas the policy allowed the plaintiff to claim the market value of the stock, it was only claiming the landed cost.

Tong said he was unable to say what the cause of fire was. The plaintiff had, however, made sure that inflammable and explosive materials were kept outside the building.

The plaintiffs’ third witness was Mr Kim Fong Chung Sen Chong (Chong)

Chong said he was the Financial Director of the plaintiff and was in Mauritius at the time of the fire. He said Tong had requested for stock details as at 31 December 2008 because everything had been burnt. He had seen the schedule of the damaged assets. He confirmed that the figures presented by Tong were obtained from him.

The plaintiff’s fourth and last witness was Mr Charles Harry Cockram (Cockram).

Cockram said he has been a loss adjuster since 1973. He said since 1985 he operates as an independent loss adjuster. He said although he had not seen the forensic report, he hoped it was accurate. He said as per the report from the Firebrigade, he also suspected that the cause of fire was electrical. He believed that there might have been some damage to the electrical trunking. He did not believe there was any explosion at all.

Cockram said it was not possible to determine the quantity of stock that was burnt through the pile of ash. He said this was so because fabric burns completely to fine ash and dust. *In casu*, he said,half of the roof was gone and as such dust could have dispated into the air through wind.

The defendant called five witnesses and its first witness was Mr Rugare Chingono (Chingono)

Chingono said he was a Managing Consultant as well as a Loss Adjuster for insurance companies operating under a company called Millenium Risk Consultant Services. A Mechanical Engineer by profession, Chingono also holds a certificate of proficiency in insurance. He said he and his assistant, a Mr Chisara, had, at the defendant’s request, prepared Exhibit 2A (Loss Assessment Report) He said in compiling the report, as from 13 March 2009 to 3 April 2009, they had visited the plaintiff’s premises and spoken to Tong,Kennedy (Storeman) and Chidanyika (Consultant). He said in carrying out their job they were not aligned to either party and what they sought to produce was a fair report based on the information they gathered.

Chingono said using his knowledge of insurance he had analysed the financials of the plaintiff and had noted that some factors were not tying up. He had therefore recommended the engagement of Messrs Kudenga & Chidawu. He wanted a justification of the amounts claimed by the plaintiff, which he said were above US$323 000 for stock and just under US$100 000 for plant and equipment.

Chingono said they discovered that there was nil stock for CMTI and they had therefore requested for the closing stock for January 2009 and not for December 2008. The nil stock position meant that there was a huge variance with respect to the figures claimed. He said CMTI had never been able to explain the variances in their stock figures. The figures they had problems with, he said, related to stock held by CMTI and the other companies they were advised belonged to the CMTI group.

Chingono said for the forensic report, a Miss Magwenzi who is a scientist based at the University of Zimbabwe, had been engaged. He said the said Miss Magwenzi had an MSC in microbiology and they were satisfied with her report. They agreed with her findings.

Chingono said not everything had been burnt. He said there were charred remains and that there was no dispute that a fire had occurred.

Chingono said in submitting their report they had also recommended a settlement proposal. He maintained that it was important for the plaintiff to explain variations in stock.

The defendant’s second witness was Miss Marceleyn Magwenzi (Magwenzi), the Forensic scientist. Magwenzi said she has a Masters degree in Medical Microbiology and is currently a Lecturer at the University of Zimbabwe. She said she has extensive experience in fire investigations at factories and households.

Magwenzi said her report was signed by her colleague, a Mrs Shamu. She attended at the scene of the fire on 22 March 2009 and had seen ash and burnt remains of cloth material. Magwenzi said if the warehouse was fully stocked, then she would have expected a lot more ash than she found. She said water would not have washed the ash away but would have reduced it to paste. She said the quantity of ash did not match the level of stocks of cloth that the plaintiff claimed were burnt.

The defendant’s third witness was Nyashadzashe Ndawona ( Ndawona). He said he worked as a Senior Accountant at BDO Zimbabwe. He was responsible for the financial report. He said the CMTI financial statements as at 31 December 2008 reflected nil stocks.

The defendant’s fouth witness was Raviroyashe Mangena (Mangena). He said he works for BDO Zimbabwe as head of Corporate Finance. He confirmed that Ndawona submitted financial statements to him (ie an analysis of stock). His own conclusion was that as at 31 December 2008 CMTI had no closing stocks. They had only noted purchases valued at US$2014-00 and sales valued at US$1900-00. To them, those figures meant that the company was not trading. Their report did not cover the period January 2009 to 9 March 2009. He said the papers did not show landed costs.

The defendant’s last and fifth witness was Agrippah Marangwanda (Marangwanda). Marangwanda, who, at the time of this trial was the Acting Managing Director of the defendant, said he was the Operations Executive at the time the fire occurred.

Marangwanda said Chidanyika was an agent of the defendant and there was an agreement between Chidanyika and the defendant signed in 2006. Following that agreement and in terms of practice in the insurance industry, the defendant facilitated Chidanyika’s registration as an insurance agent. He, however, said the contract (agreement) disappeared at the time the plaintiff lodged its claim with the defendant.

Marangwanda testified that Chidanyika’s licence as an insurance agent was later cancelled by the Commissioner of Insurance for an act of misconduct. He said at the moment Chidanyika is not allowed to conduct insurance business.

Marangwanda said an insurance policy has a schedule which indicates the risks insured and the amounts. He said generally insurance for corporate is done through agents who have the necessary level of insurance knowledge and also deal with clients in good faith. The agents, he said, supply information to the insurance company, and on the basis of the information supplied, the underwriters (i.e employees of the insurer) classify the risk and indicate the premium payable. He said the premium *in* *casu* was based on figures supplied by Chidanyika. He went on to say that generally underwriters do not undertake site visits. These, he said, were undertaken by valuers.

Marangwanda said the premium *in casu* was for CMTI, and that was the only company referred to in the schedule.

Marangwanda said there were two claims made by the plaintiff, namely a claim for plant and equipment and then a claim for stock. The first claim, he said, was not initially rejected. But an offer of settlement was made. The claim for stock was rejected due to the information revealed in the financials (ie showing nil stock for CMTI).

He said they had not insured the other companies but as a fair insurance company they were prepared to discuss settlement and to that end a meeting had taken place between the parties. The result of the meeting was that the defendant formed the impression that only Prolude had stock and accordingly as far as the defendant was concerned, the claim was exaggerated. The claim was then rejected or repudiated in its entirety.

Marangwanda said exhibit 2B was a policy document containing general conditions. The general conditions set out the time limits within which claims should be made. He said Chidanyika ought to have known that the general conditions applied to the policy that was given to the plaintiff. One of such conditions was clause 6c which sets a time bar regarding litigation.

In his submissions, Advocate Morris, for the plaintiff noted that there were nineteen (19) issues listed for determination in the Joint Pre-Trial Conference Minute. He, however, argued that in the main there were three major issues for determination, namely;-

“a) Whether the plaintiff has established that the defendant is liable for the loss caused by

the fire.

1. The quantum of any damage arising from such liability
2. The question of costs.”

In addition to the above he also acknowledged that it was important to establish whether or not the policy also covered the plaintiffs’ associated companies, namely Prolude, Takara and Sportford. He said it was common cause that together with the plaintiff the associated companies held certain amounts of textiles in stock in the same warehouse and that there was a communality of shareholders and directors in all the said associated companies which fell under the umbrella of the plaintiff.

Advocate Morris said the evidence of Chidanyika had clearly shown that the stock material was kept together in the same warehouse and that Tong wanted insurance cover for the entire stock in the warehouse. It was, he argued, improbable that Tong would have wanted to insure only the portion of stock belonging to the plaintiff as cited in the schedule.

Advocate Morris went further to say Chidanyika’s evidence indicated that the underwriter of the defendant who worked out the premium for the policy had attended at the warehouse. That underwriter, he said, had therefore calculated the premium payable on the basis of the total stock that he saw in the warehouse. That evidence, he said, had not been challenged.

Advocate Morris said Chidanyika, who worked in an office provided by the defendant was an agent of the defendant and acted within the scope of the authority granted to him by the defendant.

Furthermore, Advocate Morris went on, the policy (Exhibit 1A) was sent under cover of a letter signed by Chidanyika, the defendant’s agent. That letter referred to the plaintiff and its associated companies. A copy of the same policy had also on been sent to Tong for purposes of further particulars, by the defendant itself and there were no alterations on exhibit 1A. Accordingly, he argued, there was no question of the removal of clause 6(c ) from that policy.

Advocate Morris accepted that in his evidence Tong said he noticed that the schedule to the policy only mentioned the CMTI (ie leaving out the associated companies). He, however, said that was due to the fact that the plaintiff was responsible for premium payments and therefore, as explained and confirmed by Chung, Tong had taken the schedule as a form of invoice. He said since the plaintiff was paying for the insurance to cover itself and the associated companies, there was nothing wrong in it being the only entity cited in the schedule. The parties, he argued, were aware that the associated companies were covered under the policy and therefore the issue of rectification did not arise. This, he said, was confirmed by the fact that the defendant did not even bother to call the underwriter who identified the stock before calculating the premium payable. That being the case, he went further, the ambiguity, created by the fact that the schedule only cited the plaintiff and yet covering letters referred to the associated companies, must be interpreted in favour of the plaintiff. For that submission he relied on *Commercial Union Fire,* *Marine and General Insurance Co. Ltd v Fawcett Security Organisation* 1985 (2) ZLR 31 (SC) and *Eagle Insurance Co Ltd v Machaka* 1989 (1) ZLR 73 (SC).

On the quantum of damage, Advocate Morris rejected the forensic evidence of Magwenzi. He said she had failed to establish the quantity of ash left after the fire. Instead, he said the court should accept Cockram’s evidence which was supported by the defendant’s own in- house loss adjusters who said the loss was “of huge magnitude”.

On the value of the stock Advocate Morris said the defendant’s forensic auditors had assessed the value of the stock in Zimbabwe dollars as at 31 December 2008. That, he said, had resulted in them recording a nil value of the stock. Advocate Morris attributed that to the massive devaluation of the Zimbabwean dollar in August 2008. That meant the stock, although physically in existence, had no Zimbabwean dollar value. The stock had, instead, a value in United States dollars, which value he said was never challenged. He said the plaintiff had in fact given the stock figures to the defendant before plea.

As to the movement of stock within the plaintiff, Advocate Morris said there were indeed transfers made but these were book entries which did not lead to prejudice on the part of the defendant.

It was Advocate Morris’ submission that the plaintiff had submitted figures of destroyed stock to the defendant and that those figures had never been successfully challenged.

With regards to the plaintiff’s claim for plant and equipment, Advocate Morris said the agreed quantum was US$34, 227-84.

On costs, Advocate Morris urged the court to order same on the higher scale because the defendant had persisted with a case it knew it would not win and had insinuated fraud on the part of the plaintiff’s witnesses. The witnesses, he said, appeared extremely honest when they gave evidence.

Advocate Morris said the repudiation of the contract was based “on flimsy grounds purely for financial considerations and not out of any genuine belief that a right to repudiation existed.”

Advocate Morris prayed that the plaintiff should succeed in its claim as laid out in the summons.

Advocate Fitches, for the defendant, submitted that, notwithstanding factual disputes, the plaintiff’s claim, had failed due to:

-failure to prove market value of the fabric claimed, and

-failure to seek rectification of the insurance contract to include plaintiff’s associated

companies as being included in the cover.”

Advocate Fitches referred to a number of authorities which deal with the value to be taken into account with respect to an insured’s loss. In particular he referred to *Canadian National Fire* *Insurance Co. v Colonsay Hotel* 1923 SCR 688 where it was said:-

“It is propounded that if the insured intended the property for sale, the basis of

assessment is the market value of the property, but if the insured did not intend to have

the property for sale prior to the loss, the basis of assessment will be the cost of reinstatement. This principle may be consonant with the subjective approach to damage which our courts are said to support.”

Advocate Fitches submitted that despite evidence that at the time of the fire the plaintiff was trading as a wholesale trade with known customers, it had given its claim on the basis of landed costs. He said that was contrary to the requirement that the plaintiff, as an entity that intended to have its stock for sale, should have proved its loss on the basis of market value. That, he said, the plaintiff had failed to do and no evidence had been led to prove same.

Advocate Fitches said there was proof that the plaintiff had traded in the period January 2009 to June 2009. He said, despite the “nil paper stock” at the time of the fire, the united states dollar had become legal tender and the plaintiff was trading at that time. It was therefore possible to determine the market value.

On the amount of fabric destroyed, Advocate Fitches said the plaintiff’s fabric claim was for 42500 kilograms. He said that was substantial amount which should have left a great deal of ash.”

On the issue of possible fraud, Advocate Fitches said the defendant had invoked the relevant clause in the policy because it felt the claim was exaggerated. He quoted from Ivamy, *General Principles of Insurance Law* 4th edition 1979 at page 436 where the following appears;-

“More usually the fraudulent claim consists of an exaggeration of the extent of the loss.

In dealing with exaggerated claims, it is necessary to bear in mind that the insured may

honestly overestimate his loss and sometimes it may have been due to a mistake. In any

case the extent and value of the loss are largely matters of opinion.”

He submitted that on the basis of expert evidence and the documents submitted, the defendant was of the view that the plaintiff’s claim was exaggerated.

On the question of the exact policy document issued, Advocate Fitches said it was a mystery as to how the plaintiff received the blue bound policy (Exhibit 1A). He said all the court could do was to speculate on how the plaintiff had come into possession of an incomplete policy. He said a comparison between exhibits 1A (Blue Policy) and exhibit 2B (the Red Policy) reflected that page numbers on the Blue Policy did not appear and yet the Red Policy was numbered consecutively.

Advocate Fitches admitted that Chidanyika was indeed the defendant’s agent but was quick to point out that Chidanyika’s authority was circumscribed by a written agreement under which he was engaged.

Advocate Fitches submitted that in view of the evidence presented before the court it was necessary for the court to grant the relief sought by the dependant in its counterclaim, namely a declaratory order by this court to the effect that the policy issued by the insurer (defendant) was only in respect of the plaintiff without the inclusion of its associated companies, and that the dependant was not liable to the associated companies. That declaratory order would also grant costs to the defendant.

Advocate Fitches insisted that clause 6 ( c) was not complied with and as such the insurer was not given adequate time to investigate the claim. Furthermore, he said, no action or suit was commenced within three months after repudiation. He said whereas clause 6 ( c) of the policy provides that: “ No claim shall be payable unless the insured claims payment by serving legal process on the company within three months of the rejection of the claim in writing and pursues such proceedings to finality.”, summons *in casu* was only served on the defendant on 19 October 2009. Repudiation had taken place on 21 April 2009.

Advocate Fitches prayed for the dismissal of the plaintiff’s claim with costs.

In dealing with this matter I shall begin by quoting from Wille’s Principles of South African Law (7th edition) at page 337 where the following appears;-

“……….A contract of insurance, whether life, marine, or fire, is a contract *uberrimae fidei*, or of the utmost good faith; the party wishing to be insured must disclose to the other party any material fact, that is, any fact which could influence the risk, whether he is asked about such fact or not, and failure to make such disclosure renders the contract voidable.”

The claim *in* *casu* is based on a contract of insurance to cover fire risk. The exact cause of the fire that occurred on 9 March 2009 has not been clearly identified. However, the general belief is that the fire was caused by an electrical fault. That was the conclusion of the Harare fire brigade and the plaintiff’s expert. There was no suggestion that the plaintiff was to blame for the fire. Although the defendant had suspicions about the fire, it did not, however, offer any other reason for the fire.

In the main the defendant’s reasons for refusing to honour the claim are clearly laid out in its External Memorandum of 23 April 2009 which appears in full on pages 5, 6 and 7 of this judgment.

The nineteen issues identified for determination by the parties at the pre-trial conference have, in my view, been correctly reduced to four main issues, namely;-

1. Whether or not the plaintiff, without seeking rectification in order to include its associated companies in the schedule forming part of the contract, has established that the defendant is liable for the loss caused by the fire.
2. The quantum of any damages arising from any such liability.
3. Whether or not such damages should be based on the market value of the stock or landed cost of the stock, and
4. The question of costs.

I believe that a determination of the above issues will adequately dispose of the dispute(s) between the parties.

In the first place I think it is important to identify the document to rely on as forming the contractual relationship between the parties. This is so because the defendant says it does not know how exhibit 1A( Blue Policy) got to the plaintiff.

It is important to note that in his submissions, without alleging that Chidanyika exceeded or tempered with the authority given to him by the defendant, Advocate Fitches, for the defendant, states;-

“From the aforegoing exposition of the law, it is submitted that the questions of

ostensible authority and estoppels do not arise, and have no bearing on the matter. Chidanyika was indeed the defendant’s agent. Tong transacted the business with him and a policy was issued. The defendant never denied that Chidanyika was its agent. His authority was circumscribed by the written agreement under which Chidanyika was engaged by the defendant. Even if Tong was not aware of those restrictions, it makes no difference.”

The above submission removes the need to determine the role of Chidanyika in the whole transaction. He was indeed an agent of the defendant and had authority to source business for the defendant. He did not set the premium payable for the insurance cover. The defendant set the premium and all the other terms and conditions. Chidanyika then relayed the information to the plaintiff.

It is Chidanyika, the defendant’s accepted agent who placed the policy document/contract (Exhibit 1A) in the hands of the plaintiff. It was also Tong’s unchallenged evidence that, upon request after the fire, the defendant sent him a copy of the document produced as exhibit 1A (Blue Policy). The defendant did not send exhibit 2B (Red Policy) – which Marangwanda referred to as policy document containing general conditions (guidelines) for various risks to be covered. It is an unsigned document and Marangwanda agreed that underwriters take out relevant sections therefrom. *In casu* the underwriters uplifted the relevant sections of the risks that the plaintiff wanted covered, namely fire and theft. This was consciously done by the defendant as can be seen from the amendment to the proviso under clause 3 of the fire policy (Blue Policy). The guidelines were clearly amended to suit the circumstances of the plaintiff.

Pages 53-57 of the guidelines (the Red Policy) contain “General Exceptions Conditions and Provisions”. Applicable provisions from those guidelines are then uplifted and included in specific policies. *In casu,* the Blue policy is the specific policy which forms the subject matter of this judgment.

Special provisions relating to claims appear on pages 54-55 of the Red Policy and it is at page 55 of that document where we find clause 6 ( c) (ie time bar), which the defendant claims to have formed part of the agreed contract. It is clear to me that the clause did not appear in the policy sent to the plaintiff. The defendant’s failure to produce the actual or an alternative copy of a signed contract, including failure to challenge the plaintiff’s evidence to the fact that it was the defendant who supplied Tong with a copy of the Blue Policy (exhibit 1A) leaves me with one policy to rely on. That policy is exhibit 1A. I have no reason to reject Exhibit 1A (Blue Policy) as the contract governing the relationship between the parties. That is the document which the defendant’s agent placed in the hands of the plaintiff under cover of his letter of 30 June 2008.

It is true that the schedule identifies the plaintiff (ie CMTI Zimbabwe (Private) Limited of 22 Whiteway, Msasa, Harare) as the insured. However, Chidanyika’s covering letter refers to “Business Insurance for CMTI and Associated Companies.”

In paragraphs 2 and 3 of its plea the defendant pleads as follows;-

“2. Save that the defendant admits that the policy pertained only to plaintiff; the

defendant denies that the policy indemnified Plaintiff’s associated companies, puts the plaintiff to the proof thereof and refers to its claim in reconvention bound herewith. More particularly, the policy indemnifies the Plaintiff only, in respect of ‘Fire Business Combined’ and ‘Fire Business Combined on Theft’ but, owing to inadvertence, by letter dated 30 June 2009, the defendant in error, in its advisory letter from its appointed broker, referred to CMTI ‘AND ASSOCIATED COMPANIES’, as a result of which, the defendant refers to its claim in reconvention bound herewith.

1. The defendant denies that the plaintiff’s associated companies were indemnified

under the policy transacted by the plaintiff. The defendant has no knowledge of the said association, and puts the plaintiff to the proof that the said companies are not peregrine liable for security for the defendant’s costs; and that, the said associated companies were ‘associated for the purpose of the policy of insurance,’ as alleged; namely, that they had an insurable interest and that the plaintiff disclosed to the defendant at the inception of the contract, that the said associated companies were included in the transaction and were peregrine; and refers to its claim in reconvention bound herewith.”

Furthermore the defendant’s claim in reconvention for a declaratory order is based on the above paragraphs of its plea. In paragraphs 4-7 of its claim in reconvention the defendant avers as follows;-

“4. On or about 24th June 2008, at Harare, the defendant, though its authorized

Insurance broker, entered into a written policy with the plaintiff, namely ‘Fire Business

Combined’ and Fire Business Combined on Theft’ of short term indemnity insurance

with the plaintiff, under policy number HFDFBC0000780800, upon the terms in the

Defendant’s Standard Business Protection Policy.

5.On 30th June 2008, the defendant’s insurance broker aforesaid wrote to the plaintiff

enclosing the said policy documents. Owing to inadvertence, in that letter, the

defendant’s broker, in error, referred to ‘CMTI AND ASSOCIATED COMPANIES’,

when in fact, the contract had been transacted in respect of the plaintiff only.”

6.A dispute has arisen between the plaintiff and the defendant. A loss, as pleaded in the

plaintiff’s declaration, has occurred and the plaintiff has made a claim under the policy,

[which in any event, the defendant has rejected], save the plaintiff alleges that its

nominated companies [stipulated in paragraph 4 of the declaration] are included in the

indemnity under the insurance policy.

7.The defendant disputes that it ever insured the said associated companies and contents

that the said associated companies are not included in the indemnity under the

insurance policy, and that the inadvertent reference to them arose as a result of an error

in the defendant’s broker’s said letter to the plaintiff dated 30 June 2008.”

It is therefore important to establish whether or not the plaintiff’s associated companies were indeed covered under the policy/contract. Inevitably this called for parol or extrinsic evidence*.*

*In* *casu* the plaintiff’s claim is based on a written contract.

In the South African Law of Evidence (2nd edition 2009) at page 346 the authors DT. *Zeffertt and AP Paizes (authors)* state as follows;-

“The general rule is that a document is conclusive as to the terms of the transaction which

it was intended or required by law to embody.”

The authors go further at pages 346-347 to quote from *National Board ( Pretoria ) (Pvt) Ltd v Estate* *Swanepoel* 1975 (3) SA 16 (A) at 36 where *Botha JA* quoted Wigmore as saying;-

“This process of embodying the terms of a jural act in a single memorial may be termed

the integration of the act to its formation from scattered parts into an integral

documentary unity. The practical consequence of this is that its scattered parts, in their

former and inchoate shape, do not have any jural effect; they are replaced by a single

embodiment of the act. In other words; When a jural act is embodied in a single

memorial, all other utterances of the parties on that topic are legally immaterial for the

purpose of determining what are the terms of their act.”

The authors further quote from Union Government v. Vianini Ferro – Concrete Pipes (Pvt) Ltd 1941 AD 43 at 47 where Watermeyer JA said:-

“…this court has accepted the rule that when a contract has been reduced to writing, the

writing is, in general, regarded as the exclusive memorial of the transaction and in a suit

between the parties no evidence to prove its terms may be given save the document or

secondary evidence of its contents, or may the contents of such document be

contradicted, altered, added to or varied by paral evidence.”

The above principles are in line with Advocate Fitches’ submissions already alluded to in this judgment. However, the authors do recognize the need for the relaxation of the above rigid principles where circumstances dictate. They state at page 349;-

“………In Johnson v Leal (1980) (3) SA 927 (A) at 945D the point was made that the courts may look to the surrounding circumstances (including the negotiation) in order to determine whether there has been a total or partial integration. At first glance this seems to remove the difficulty of having to rely on circuitous reasoning. It certainly allows the court to pay regard to a greater range of data than what is mentioned in the four corners of the document. Indeed, if one were to take it literally, and to its logical conclusion, nothing would be left of the integration rule except a presumption and a metaphysical squabble about what is meant by “surrounding circumstances” in the context of integration and the particular circumstances of the case.”

On the basis of the above, I believe, without undermining the generally accepted rigid legal principles, that there is merit in allowing the court to admit and examine evidence to establish what the parties actually agreed to under the circumstances prevailing at the time of negotiations.

We are *in casu* dealing with an insurance contract, which, as I have already quoted from Wille’s Principles of South Africa Law, is “a contract of the utmost good faith”. Both parties gave parol evidence to either prove or disprove that the associated companies, namely Prolude, Takara and Sportsford, were covered in the risk. The contract, I believe, was negotiated in good faith. I have already stated that it is common cause that the schedule to the contract only cites CMTI Zimbabwe (Private) Limited (plaintiff) as the insured.

The defendant’s key witness on this issue was Marangwanda. He, although alleging that the document (Exhibit 1A) was ‘doctored,’ said the plaintiff was the only party mentioned in the schedule. He said on an exgratia basis the defendant had attempted to make certain payments to the plaintiff.

The plaintiff’s main witness on the issue was Chidanyika. He is the defendant’s agent who negotiated the contract. He is also the person who, in his correspondence, made reference to the associated companies. At the time of giving evidence he had left the employ of the defendant, This was due to alleged acts of misconducts. However, the acts of misconduct did not relate to the contract under discussion. He left the employ of the defendant on 31 January 2011. Notwithstanding the stand off with his former employer, I formed the impression that Chidanyika gave his evidence confidently and without any bias. Under cross-examination he maintained that the underwriters of the defendant he negotiated with were fully aware that CMTI Zimbabwe (Private) Limited (plaintiff) was the umbrella company for the associated companies. He said he and an underwriter had seen the assets that were insured. These were under one roof (warehouse). The premium was based on the assets that he and the underwriter saw. He said if cover was only for CMTI Zimbabwe (Private) Limited the premium would have been much lower. He said Tong wanted to ensure his entire business in Harare but specifically left out the Bulawayo Business. Chidanyika’s evidence on the issue was supported by Tong’s evidence. Tong said although he had not checked the schedule he believed the premium he paid covered the four companies.

I accept that Chidanyika’s covering letter of 30 June 2008 did not form part of the insurance contract. However, it is important to note that the defendant accepts that Chidanyika was its agent and as such had authority to source business for the defendant. He did not conclude business without the authority of the defendant and indeed the policy that he sent to the plaintiff does not appear to have been signed or witnessed by himself. It remains a mystery as to why the signatories to the contract were not called to refute Chidanyika’s evidence. Its not unreasonable to suggest that the signatories to the contract together with the underwriter who saw the assets that were insured could have led light to the issue at hand. Such witnesses could have shed light on what actually transpired in the negotiations with Chidanyika/Tong. I also believe that when Chidanyika referred to the plaintiff and associated companies, in his correspondence, he did so out of actual knowledge that the contract covered the plaintiff’s entire business at Msasa.

In fact in his memorandum of 24 April 2009 he states, in part, “however, if we look at the correspondence leading to the issuing of the policies, it is noted that the insurances were to cover not just CMTI Zimbabwe but also to include the other associated companies”.(my own underlining) “Clearly this means that other than the covering letter of 30 June 2008, there was correspondence which preceded the conclusion of the contract. Such correspondence covered the associated companies. That was never contradicted.

Apart from noting that its insured was CMTI Zimbabwe, the defendant, in its first response of 14 April 2009, did not raise issue with Chidanyika’s reference to the associated companies. The issue was only raised on 23 April 2009, Chingono testified that part of his mandate was to look at the associated companies included in the risk.

It is also strange that even in its letter of 23 April 2009, the defendant is silent on the ownership structure of plant and equipment. Given its stance on who the insured was, one would have expected questions to be asked on the ownership structure of plant and equipment as between CMTI and the associated companies. Why dwell on stock only?

I am compelled to believe that, because of failure to forward premiums to the re-insurer, the defendant found itself in a difficult situation and hence the need for excuses.

It is also worth noting that the said associated companies were already in existence when Tong approached Chidanyika for insurance cover. The associated companies were incorporated as follows;-

1. Sportsford 19 November 2003
2. Prolude 14 November 2007
3. Takara 14 November 2007

It was not disputed that Tong had an insurable interest in all the above companies which operated under the same roof with the plaintiff. In any case the contract states that;

“This policy covers damage to the whole of the part of the property described in the schedule, owned by the insured or for which they are responsible, including alterations by the insured as tenants to the buildings and structures…….”(my own underlining)

I have at page 12 of this judgment listed the shareholders/directors of each company. The commonality of directorships lends credence to the averment that the associated companies operated under the umbrella of the plaintiff. Both Tong and Chidanyika testified to that fact. In the circumstances I would find it improbable that Tong would have chosen to insure a single entity of his businesses. He deliberately and consciously excluded the Bulawayo business.

Added to the above, there is no averment to the fact that the contract was secretly negotiated between Tong and the defendant’s agent. The defendant’s underwriting department was involved. I have also already indicated that I have no reason to believe that, in the process of negotiations Chidanyika only first made mention of the ‘associated companies’ on 23 June 2008. Had Chidanyika started making reference to the associated companies only soon after the claim was made I would have thought otherwise. Indeed if the plaintiff and the defendant’s agents were experts in doctoring documents, I then do not see why they could not have attended to doctoring the schedule soon after the delivery of the contract under cover of the agent’s letter of 30 June 2008. In any case the plaintiff was already in insurance business with the defendant. The defendants were already providing insurance cover for his fleet of vehicles. Thus upon receiving the contract on 30 June 2008, there would have been no compelling reason to make the plaintiff believe that ‘utmost good faith’ had suddenly disappeared between the parties. Utmost good faith relates to both parties in the contract.

In view of the foregoing, my finding is that the associated companies are covered under the policy and hence the issue of rectification does not arise. There was a valid contract between the parties and indeed, in the absence of fraud or misrepresentation he party of the plaintiff, the defendant ought to meet its obligations under the contract. In short, the defendant is, under the contract entered into on 23 June 2008, liable to the plaintiff and its associated companies for the loss caused by the fire.

The third issue that falls for determination is the quantum of damages that should be payable under the contract. Both parties led evidence from loss adjusters. The defendant contended that the plaintiff had exaggerated its loss because the quantity of ash did not match with the quantity of the destroyed stock. Furthermore the financials indicated nil stock for the plaintiff. The defendants, however, acknowledged that a huge fire had occurred and the plaintiff had cooperated in providing relevant figures in relation to the loss.

I fully agree with Advocate Morris that there was nothing to benefit from the evidence of Magwenzi (the defendant’s forensic scientist.). She could not, from measuring the quantity of ash with her boots, assist the court in providing a scientific answer to the issue in dispute. She said she had no equipment to measure the quantity of ash that remained after the fire due to lack of resources. However, Cockram (the plaintiff’s expert witness) appeared much more convincing. He dismissed the ash test and indicated that it could not be denied that both rain and wind played a part in reducing the amount of ash. In the absence of any convincing scientific evidence, I am left with no option but to accept the plaintiff’s quantification.

It was common cause that due to devaluation the stock, at the time of fire, had lost its Zimbabwean dollar value. That being the case it became reasonable, in my view, to rely on the landed cost as at time of importation. The value placed on the US dollar value placed on the stock by the plaintiff was not successfully challenged. Given the relationship between the plaintiff and the associated companies, I also did not find it strange that internal transfers of the insured stock could occur. I accept, as submitted by the plaintiff, that these were book entries and as such the question of misrepresentation did not arise. There was no prejudice on the part of the defendant. The insured stock remained the same.

I find the argument on the issue of market value untenable. I come to this conclusion because the landed cost is even less than the insured value. In any case the issue of market value is, in my view, intended to protect the interests of the insured. I therefore see no prejudice on the part of the defendant if the plaintiff elects to waive its claim to the market value of the stock.

In *Homeplus Investments (Pvt) Ltd v Kantharia Insurance Brokers (Pvt) Ltd and Global Insurance Company* (HH 15/08) CHITAKUNYE J, noted;-

“The law in this aspect is quite clear. Property insurance is a contract of

indemnity. The insurer’s liability is therefore limited to the ‘real and actual’ value of the loss suffered by the insured through the happening of the event insured against. It cannot exceed either the amount insured or the amount of the insurable interest; and if it exceeds either both of these items, it must be reduced to correspond with the smaller of them.’ See GORDON and GETZ of The South African Law of Insurance 4th edition (SUPRA) AT PAGE 247. In cases of limited valued policy which specified the agreed value of the subject matter of the insured therefore the parties are bound by the value agreed to. In the case of *Elcock v* *Thomson* [1949] 2 ALL ER 381 at 385 MORRIS J said “ When the parties have agreed a valuation, then, in the absence of fraud or of circumstances invalidating their agreement, they have made an arrangement by which for better or for worse, they are bound.”

There was no question of the plaintiff failing to place a market value on the stock but it elected to claim the landed cost of the stock. I would have had problems with that if the claim exceeded the insured value. The plaintiff testified that its mark up would have been between 35% and 50%. That would have meant a higher claim.

Although the entire claim was repudiated, I did not hear the defendant changing its position on the value placed on plant and equipment.

Finally on the issue of costs, I am unable to agree with the plaintiff that costs in a higher scale are called for. Most of the issue raised by the defendant required thorough investigation. The issues, in the main, were finally resolved through both parties leading evidence in this court.

I also believe that it is from the date of completion of such investigation that interest should start to run.

In view of the foregoing I order as follows;-

**IT IS ORDERED THAT;-**

1. The defendant’s claim in reconvention be and is hereby dismissed.
2. The defendant shall pay the plaintiff a sum of US$390 228-91, made up as follows;-
3. US$34 227-84 for plant and equipment, and
4. US$356001-07 for stock
5. The defendant shall pay interest on the sum of US$390 228-91, at the prescribed rate from the date of summons to the date of full payment; and
6. The defendant shall pay costs of suit.

*Messrs Coghlan Welsh & Guest*, Plaintiff’s legal practitioners

*Messrs Atherstone and Cook*, Defendant’s legal practitioners