IN THE HIGH COURT FOR ZAMBIA **2023/HPC/0177**
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

INFRATEL CORPORATION LIMITED **PLAINTIFF**

AND

PHOENIX OF ZAMBIA ASSURANCE COMPANY (2009) LIMITED **FIRST DEFENDANT**

NORWICH INSURANCE BROKERS LIMITED **SECOND DEFENDANT**

Before the Honourable Mr Justice K. Chenda on 21st June 2024 in Chambers

For the Plaintiff : Mr S. Kaonga & Mr N. Sinkamba, In House Counsel
For the First Defendant : Ms W. Chirwa & Mr D. Siachenda of Kate Weston Legal Pract.
For the Second Defendant : Mr G. Hakaainsi of L.M. Chambers

JUDGMENT

Primary legislation referred to:

1. The High Court Act, Cap. 27 of the Laws of Zambia

Rules of Court:

1. The High Court Rules, created under Cap. 27 of the Laws of Zambia

Case law:

1. *Richwell Siamunene v Sialubalo Gift - Vol. 3 (2017) ZR 335 at 354*
2. *ZRA v Hitech Trading Co. Ltd.* (2000) ZR 17 at p.21
3. *Bank of Zambia v Jonas Tembo & Ors* (2002) ZR 103 at 106,
4. *Indo Zambia Bank Limited v Mushaukwa Muhanga.*() (2009) ZR 266 at p.277, lines 6-39.
5. *Murphy v Kuhn* 90 N.Y.2d 266, 660 N.Y.S.2d 371, 682 N.E.2d 972 (1997)

6. *Galaunia Farms Limited v National Milling Company Limited* (2004) ZR1 at pages 9-10
7. *Afrope Zambia Limited v Anthony Chate & Ors - Appeal No. 160/2013 at* p.J16

Authoritative texts:

1. Words *and Phrases Legally Defined* in John B. Saunders ed. 2nd Edition (1970) Vol 5 (S-Z) London: Butterworths at p.133
2. Ray Hodgin, *Insurance Law Text and Materials,* 2nd Edition (2002), London: Cavendish Publishing Ltd. at p.504-505
3. Jeffrey W. Stempel, *Principles of Insurance Law,* 4th Edition (2012), Massachusetts: Lexis Nexis at p. 181-182 and 187

1. INTRODUCTION AND BACKGROUND

1.1 The matter before Court is a dispute in the realm of insurance. The Plaintiff is the insured, the First Defendant is the insurer and the Second Defendant the broker.

1.2 Following some incidents of theft affecting the Plaintiff's property and technical infrastructure, the Plaintiff made a series of claims on the insurance policy. However, differences arose after the claims were not paid.

1.3 Thereafter, the Plaintiff took out this action by writ of summons and statement of claim filed on 7th March 2023 for:

(i) payment of K4,294,600 said to be outstanding on the claims;
(ii) damages for breach of contract;
(iii) interest;

(iv) costs; and
(v) any other relief the Court may deem fit.

1.4 The Second Defendant was first to respond with a defence filed 22nd March 2023 in which it averred that it had honoured its obligations as broker.

1.5 This was followed by the First Defendant's defence on 24th March 2023, the core of which was that the incidents of theft were not covered by the insurance policy. The pleadings closed with the Plaintiff's reply of 20th April 2023.

1.6 Thereafter I convened a scheduling conference on 15th June 2023 during which I engaged Counsel in consultation that bore fruit in the narrowing down of the case into 6 core issues for determination, namely:

(i) did the insurance policy between the Plaintiff and the First Defendant cover burglary and/or theft of the Plaintiff's property including (batteries and solar panels);

(ii) how many valid insurance policy claims were made by the Plaintiff to the First Defendant in pursuance of the policy in (i), have they been honoured, and if not why?

(iii) are the First Defendant's letters (of 16th March 2022 and 29th July 2022) and the Plaintiff's response of any legal significance to the Plaintiff's claims against the First Defendant and if so what;

(iv) did the brokerage contract of 1st October 2020 place an obligation on the Second Defendant to ensure that the First Defendant settled all insurance policy claims made by the Plaintiff;

(v) is the non-payment of any of the insurance policy claims made by the Plaintiff to the First Defendant attributable to the Second Defendant; and

(vi) ultimately, is the Plaintiff entitled to any relief against the First Defendant and/or Second Defendant?

1.7 The parties performed the preparatory steps for trial which was set to commence on 2nd October 2023 and to end on 5th October 2023. Before then, the Plaintiff took out a preliminary application on 12th September 2023.

1.8 In the resultant ruling of 12th October 2023, the first core issue was determined and the following findings (of significance to this stage) were made by this Court -

1.8.1 the policy indeed covered theft of the Plaintiff's property including (batteries and solar panels) as alleged by the Plaintiff; and

1.8.2 as part of its defence, the onus is on the First Defendant to demonstrate that the circumstances fell under the general or specific exclusions and exceptions under the policy.

1.9 Trial was eventually held on 13th and 14th February 2024, with the Plaintiff calling 3 witnesses while the First Defendant and Second Defendant called 2 witnesses and 1, respectively.

2. SUMMARY OF EVIDENCE

2.1 The Plaintiff's first witness (PW1) was Mr Yande Chanda, its senior infrastructure security officer. His testimony in chief was embodied in a witness statement filed 24th July 2023 supported by the Plaintiff's main bundle of 10th July 2023.

2.2 In summary he stated that between October 2020 and June 2021, 26 incident reports were received by his office of thefts at the Plaintiff's tower sites across the country.

2.3 It was his evidence that the incidents were investigated, confirmed as having occurred and reported to the Police.

2.4 Mr Chanda also stated that the incidents were also reported to the Defendants to process insurance claims. Examples of such communication were said to be at p.228-240 of the Plaintiff's bundle.

2.5 When cross examined by Mrs Chirwa for the First Defendant, Mr Chanda testified that he gave the loss adjuster documents relating to the Plaintiff's policy claims. He was however aware that the Second Defendant was the broker and that by the mail at p.189 of the First Defendant's bundle, the Plaintiff would send documents to the Second Defendant which would in turn send to the First Defendant.

2.6 He testified that he was not aware of the terms of the policy between the Plaintiff and the First Defendant nor the value of the batteries and solar panels as at date of purchase.

2.7 When cross-examined by Mr Hakaainsi for the Second Defendant, Mr Chanda testified that in his evidence in chief, he has not alleged any wrong doing against the Second Defendant.

2.8 When re-examined, Mr Chanda clarified that he was aware of the relationship between the First Defendant and the Plaintiff and Second Defendant. The Second Defendant was the Plaintiff's broker and all claims were passed on to the Second Defendant to share with the First Defendant.

2.9 He clarified that whenever there would be an incident covered by the insurance, he would go on the ground to verify then submit reports to the broker which would then go to the insurer.

2.10 Mr Chanda testified that he did not know the value of batteries and solar panels at date of purchase as he was not present at purchase. However, he would populate the incident reports with figures based on information from the suppliers.

2.11 The Plaintiff's second witness (PW2) was Mr Jeremiah Njobvu, the acting chief technical officer. His evidence in chief was set out in a witness statement of 24th July 2023.

2.12 Mr Njobvu echoed the evidence of PW1 and PW2 that the Plaintiff was insured by the First Defendant and that it suffered theft of equipment at its tower sites. Part of Mr Njobvu's addition was that the Plaintiff has more than 1,200 towers across the country in both urban and rural areas.

2.13 He also testified that the said sites are prone to vandalism and theft hence the taking out of insurance cover to mitigate.

2.14 Mr Njobvu gave the breakdown of the outstanding insurance policy claims as K4,273,200 for the stolen batteries and K221,400 for the stolen solar panels.

2.15 When cross examined by Mrs Chirwa for the First Defendant, Mr Njobvu testified that other than his word, there was no proof that the advice spoken of in paragraph 5 of his witness statement was actually given to the Defendants.

2.16 Mr Njobvu testified that he was not part of the negotiations for the terms and conditions of the policy.

2.17 He spoke of a list of common items found at the lower sites, in paragraph 8 of his witness statement and he has no proof that the list was given to the First Defendant. He agreed that it was imperative for the First Defendant to have the information on the list and testified that the information was none-the-less explained to the Defendants during discussions with the Plaintiff.

2.18 Mr Njobvu also testified that the contract between the Plaintiff and the Second Defendant is the one at p.62 of the Plaintiff's bundle. Further that at p.63, the assets to be insured were referenced as those listed in an annexure 1, which annexure was not however there in the bundle. For that reason he could not confirm or deny whether by the said contract a list of the Plaintiff's assets were availed to the Second Defendant.

2.19 Mr Njobvu was also cross-examined by the Second Defendant's Counsel, Mr Hakaainsi during which he admitted that in his witness statement he had not alleged any wrongdoing on the part of the Second Defendant.

2.20 Mr Njobvu was not re-examined.

2.21 The Plaintiff's third witness (PW3) was Mr Wilson Moyo, its head of human capital and administration.

2.22 His testimony in chief was embodied in a witness statement of 24th July 2023.

2.23 He stated in summary that the Plaintiff engaged the second Defendant to provide insurance broking services as per contract at p.62 to 74 of the Plaintiff's bundle. The Second Defendant in turn engaged the First Defendant as insurer resulting in the all-risk policy at p.79-122 of the Plaintiff's bundle and an addendum at p.123.

2.24 Mr Moyo testified that from 2020 the Plaintiff experienced losses including damage to vehicles, theft of laptops and theft of equipment at the tower sites. The Plaintiff claimed on the insurance policy and the First Defendant settled the claims on the vehicles and laptops but not the equipment.

2.25 He testified that in response to follow-ups by the Plaintiff, the First Defendant wrote a commitment letter dated 16th March 2022 and 29th July 2022, appearing at p.150 of the Plaintiff's bundle.

2.26 Mr Moyo stated that after a series of engagement between the Plaintiff and the First Defendant. The Plaintiff only paid K200,000 towards the claim on the equipment and K45,648.25 for the laptops.

2.27 The First Defendant then took the position that theft or burglary was not covered by the policy. According to Mr Moyo the outstanding amount on the unfulfilled policy claim is K4,294,600.

2.28 Mr Moyo was cross-examined by Mrs Chirwa for the First Defendant during which he testified that he could not state the total number of claims lodged by the Plaintiff to the First Defendant but only their specifications. The claims for vehicles and laptops were settled but not for batteries and solar panels.

2.29 He testified that at p.1 of the First Defendant's bundle is a quotation and at p.72 is a schedule of the policy. The purpose of the schedule was to highlight the different categories of insurance cover by the First Defendant. The sum insured for electronic equipment under the schedule corresponds to that in the quotation.

2.30 He testified that from p.127 to 131 of the Plaintiff's bundle is a schedule of assets that the Plaintiff submitted to the First Defendant through the Second Defendant as broker.

2.31 He testified that batteries and solar panels are not listed but the policy covered the tower site which extends to all passive equipment there such as batteries, solar panels, generators, electronic and power cables over and above the tower mast.

2.32 Mr Moyo admitted that the sum insured on the quotation at p.1 of the First Defendant's bundle has corresponding values in the schedule at p.74. He testified that the Plaintiff paid premiums for cover for theft of batteries and solar panels.

2.33 As for the letter of 16th March 2022 (at p.273 of the First Defendant's bundle) he admitted that it did not expressly state any sum of money as payable to the Plaintiff but added that the preceding letter from the Plaintiff to the First Defendant had actual figures.

2.34 He admitted that the letter of 29th July 2022 (at p.152 of the Plaintiff bundle) also did not have any figures as payable to the Plaintiff.

2.35 Mr Moyo testified that the Second Defendant was hired by the Plaintiff to manage all insurance processes as an intermediary to manage insurance contracts and claims between the Plaintiff and the First Defendant.

2.36 He testified that initially the First Defendant committed to pay for the batteries and solar panels claims and gave two commitment letters and attended the Plaintiff's office with the First Defendant's board chairman and committed to pay in two installments namely K2,200,000, then the rest after two weeks.

2.37 Mr Moyo agreed that the Plaintiff received the First Defendant's letter (at p.283-284 of the First Defendant's bundle). Further that during engagements the Second Defendant gave an explanation to the Plaintiff that the First Defendant was not paying because it said theft was not covered.

2.38 He confirmed that the Second Defendant engaged the First Defendant on the Plaintiff's behalf and that the policy wording was negotiated between the two Defendants with the Plaintiff only coming in at signing stage.

2.39 The list of assets to be insured was given by the Plaintiff to the Second Defendant and he was not aware if it was then availed to the First Defendant.

2.40 The Second Defendant would then provide quotations and invoices upon which the Plaintiff would make payment.

2.41 Mr Moyo was also cross examined by Mr. Hakaainsi for the Second Defendant, during which he admitted that he had not (in his witness statement) alleged any wrong doing by the Second Defendant.

2.42 He also stated that the Plaintiff through him submitted all claim documents to the Second Defendant for onward transmission to the First Defendant and thereafter discussions and correspondence arose over settlement of the claims.

2.43 Mr. Moyo was not re-examined and on that note the Plaintiff closed its case.

2.44 The First Defendant's first witness (DW1) was Mr Edward Njamba Kanema as insurance officer in its claims department.

2.45 His testimony in chief was embodied in a witness statement dated 26th July 2023 which echoed that of DW1:

2.45.1 on the relationship of insured and insurer between the Plaintiff and the First Defendant;

2.45.2 on the lodgment of claims by the Plaintiff with documentation initially incomplete;

2.45.3 on the absence of solar panels and batteries from cover and on the discretionary computation of the Plaintiff's claim; and

2.45.4 on payment of K200,000 and insistence by the Plaintiff that it should have been K4,294,600.

2.46 Mr Kanema was cross examined by Mr Kaonga for the Plaintiff during which he testified that the letter of 16th March 2022 from the First Defendant to the Plaintiff was signed by Amanda Kasempa who was at the time the First Defendant's representative in dealing with the Plaintiff for the claim. She is no longer an employee of the First Defendant.

2.47 He testified that after receiving the Plaintiff's claims, a loss adjuster was engaged by the First Defendant to assess the extent of loss. The loss adjuster sent the email at p.232 of the Plaintiff's bundle on 3rd August 2021 giving an update on inspection of the sites and that all that was required to complete the task was quotations/invoices for replacement and also police reports.

2.48 He testified that in line with the First Defendant's letter of 1st December 2022 at p.217 of the Plaintiff's bundle, the First Defendant only paid K200,000 towards the Plaintiff's claims for solar panels and batteries.

2.49 Mr Kanema was also cross examined by Mr Sinkamba during which he testified that the First Defendant arrived at a figure of K341,185.54 as payable to the Plaintiff based on a formula and principles of under insurance and indemnity.

2.50 He also testified that the First Defendant engaged the loss adjuster to physically inspect the sites and also for transparency considering the magnitude of claim.

2.51 When cross-examined by Mr Hakaainsi for the Second Defendant, Mr Kanema testified that the First Defendant received a number of notifications from Second Defendant of losses by the Plaintiff. He denied that the Second Defendant submitted all documents required for the policy claims, when shown paragraph 8 of his witness statement which suggested that the requisite documents were submitted and asked which was true between his testimony in Court and the said paragraph 8, Mr Kanema looked away from the Court and answered with unconvincing demeanour that not all required documents were submitted to the First Defendant.

2.52 Mr Kanema was not re-examined.

2.53 The First Defendant's second witness (DW2) was Mr Anthony Malasha its chief operations officer.

2.54 He testified in summary that the Plaintiff had made various claims on the insurance policy but only included complete supporting documents for motor and theft of laptops. The documentation for theft of solar panels and batteries was incomplete.

2.55 Mr Malasha further testified that the First Defendant later evaluated the claims and concluded that there was actually no cover for solar panels and batteries.

2.56 The First Defendant then used its discretion to accommodate the claim under electronic equipment and computed it with regard to the principle of under insurance.

2.57 The resultant computation of the claim was K341,185.34 after which the First Defendant paid K200,000.

2.58 He complained that the Plaintiff rejected the computation demanding instead for K4,294,600.

2.59 When cross examined by Mr. Kaonga for the Plaintiff, Mr. Malasha testified that the First Defendant did not verify all the assets for insurance coverage but issued a quotation and later a cover note and policy.

2.60 He stated that the Plaintiff was responsible for giving details of the assets to be covered. He however, confirmed that the list at p.126-139 of the Plaintiff's bundle was given to the First Defendant albeit after the quotation was issued.

2.61 The quote is the one at p.1-7 of the First Defendant's bundle of documents and it has no signature or endorsement on it, nor does the document at p.10 of the First Defendant's bundle on the schedule at p.75 of the same bundle.

2.62 Mr. Malasha admitted that the document at p.80 of the Plaintiff's bundle details what is insured and that it has a signature at p.81.

2.63 He does not remember whether the First Defendant responded to the demand letter at p.220 of the Plaintiff's bundle.

2.64 Mr. Malasha testified that Amanda Kasempa authored the First Defendant's letters of 16th March 2022 and 29th July 2022, the latter being a commitment to pay solar, batteries and laptop claims. The outstanding premiums that she referred to as a condition for payment were eventually paid but the Plaintiff was not compensated for the stolen batteries and panels.

2.65 After the First Defendant's meetings with the Plaintiff in November and December 2022, it was verbally agreed to get a final report from the loss adjusters and to see which claims are payable before settlement.

2.66 He admitted being part of the meeting referred to in the letter of 6th December 2022 at p.218 of the Plaintiff's bundle which speaks of an agreement for the First Defendant to settle 50% of the Plaintiff's claim.

2.67 Mr. Malasha recalls the Plaintiff's premiums being static and testified that the approximated K341,000 computation was calculated under office comprehensive cover since the towers did not have theft cover and also based on involvement of a loss adjuster. Out of that figure the First Defendant has only paid K200,000.

2.68 Mr. Malasha testified that the policy and addendum at p.123 of the Plaintiff's bundle was prepared after discussions with the Plaintiff for deployment of more guards. He admitted that the handwritten alterations made to the loss adjuster's document at p.6 of the First Defendant's supplemental bundle were made by him.

2.69 When cross examined by Mr. Hakaainsi for the Second Defendant, Mr. Malasha testified that not all documents required for the Plaintiff's claims were submitted by the Second Defendant.

2.70 When shown paragraph 8 of Mr. Kanema's witness statement which suggests that all documents were submitted, Mr. Malasha looked down and answered with unconvincing demeanour that not all documents were submitted.

2.71 He however, admitted that the First Defendant's basis for rejecting the Plaintiff's policy claim was that theft was not covered.

2.72 Mr. Malasha also changed his position on the assets to be covered by stating that the First Defendant checked the list of the Plaintiff's assets to be insured.

2.73 When re-examined by Mrs Chirwa, Mr Malasha testified that the First Defendant did not verify the list of assets because the placing slip from the Second Defendant highlighted the types of policies to be quoted for. He insisted that it was the responsibility of the Plaintiff to provide a list of assets for cover and that they did not, instead all the First Defendant was given was a list of polices to provide.

2.74 Mr Malasha clarified that the Plaintiff was one of the First Defendant's biggest customers and the claims therefore required attention. However, when the full documents were submitted, it was discovered that the claims were not payable under the scope of cover.

2.75 The First Defendant's computation of approximately K341,000 was correct because it was based on office comprehensive cover not theft which was not taken out by the Plaintiff. It was the maximum that the First Defendant could payout under office comprehensive. However, if the Plaintiff had taken out a policy for theft for K1.9 billion and paid the premium, the First Defendant would have settled the Plaintiff's claim.

2.76 On the issue of security, the First Defendant's major interest was on fire and allied perils, the extra security was just to make sure that the Plaintiff's installations are not attended to by strangers.

2.77 He again changed position and said that the First Defendant had viewed a list of Plaintiff's assets to be insured but added that it did not physically inspect them.

2.78 The First Defendant trusted the Plaintiff that the list given reflected what was actually covered on the ground.

2.79 On that note, the First Defendant closed its case.

2.80 The Second Defendant's sole witness (DW3) was Mrs Lydia Maambo Sibanda, its managing director.

2.81 Her testimony in chief was embodied in a witness statement of 24th July 2023 supported by the Second Defendant's bundle of 10th July 2023.

2.82 She confirmed that the Plaintiff engaged the Second Defendant as insurance broker which in turn engaged the First Defendant as insurer.

2.83 Mrs Sibanda testified that the Second Defendant diligently managed the relationship between the Plaintiff and the First Defendant and ensured that all documentation was in order.

2.84 She testified that the First Defendant however reneged on the obligation in the policy by insisting that theft was not covered.

2.85 It was her evidence that the Second Defendant did not breach its contract with the Plaintiff.

2.86 When cross examined by Mr. Kaanga, Mrs Sibanda testified that the Plaintiff contracted the Second Defendant after a public procurement process and that the Plaintiff's requirements were for all assets to be covered for an approximate value of K1.98 billion. The Second Defendant communicated the Plaintiff's requirements to the First Defendant.

2.87 She testified that all relevant claims in this matter were lodged by the Plaintiff to Second Defendant and all conditions were met for compensation by First Defendant. The Plaintiff was also paid up on premiums.

2.88 She disagreed with the First Defendant's interpretation that cover was limited to fire and allied perils. She also testified that there were no exceptions applicable under the policy to disallow the First Defendant from paying.

2.89 Mrs Sibanda testified that the delay in deploying the loss adjuster by the First Defendant runs a risk of obscuring the proximate cause of loss owing to passage of time. She has not seen the loss adjuster report before it was produced in Court.

2.90 Mrs Sibanda was also crossed examined by Mr. Sinkamba and testified that after the contracting of the Second Defendant and First Defendant and placing of cover there was a tripartite meeting with the Plaintiff. Purpose included to verify what the Plaintiff's requirements were and also for clarity on what the First Defendant as risk carrier was covering. The Plaintiff was asked questions by both the First Defendant and the Second Defendant and the First Defendant requested for the infrastructure to be guarded, which led to the addendum being done.

2.91 Mrs Sibanda was cross examined by Mrs Chirwa for the First Defendant and testified that the Second Defendant availed the First Defendant with a placing slip or instruction to place cover. She instructed the First Defendant to take out an asset all risk policy as per email at p.67 of the Second Defendant's bundle and cover note at p.1.

2.92 As at 28th December 2020, date of the email, the policy documents were issued but not completed. The schedule at p.44-45 of the Second Defendant's bundle gives generality of what is in the policy document and general partitions. She explained it to the Plaintiff.

2.93 The quote at p.1 of the First Defendant's bundle was given to the Second Defendant as part of the tendering process before the assets all risks policy was issued. The rates in the quote and final sum insured were arrived at based on information given to the First Defendant by the Second Defendant.

2.94 When cover was effected, the premiums did not change but the cover changed. The change was that after receipt of further information from the Plaintiff, as per list at p.2 of the Plaintiff's bundle, the Second Defendant determined that coverage was better taken out on a wider basis of assets all risk instead of individual policies given the Plaintiff's asset base.

2.95 Mrs Sibanda confirmed that the different policies at p.1-7 of the First Defendant's bundle attracted different premiums. The cover note at p.1 of the Second Defendant's bundle summarised the sum insured as K1.98 billion and summaries what is on p.2 of the Plaintiff's bundle.

2.96 She testified that the interest as per quote and cover note as well as schedule to policy was the same. The premium payable as per cover note and the schedule to the policy is the same.

2.97 Mrs Sibanda testified that the quote did not have a premium for theft cover but as at different stage when the First Defendant was asked to collapse the insurance into an assets all risk policy, coverage was included for theft.

2.98 She testified that when First Defendant was instructed to issue assets all risk policy, the First Defendant should have adjusted the premium if it wanted to but it did not. The First Defendant was also given the list of assets at p.2 of the Plaintiff's bundle.

2.99 She disputed that the payment of premiums for theft is generally quite high on assets all risk policy.

2.100 Mrs Sibanda admitted that the Second Defendant having received extensive instructions from the Plaintiff and having inspected the assets was duty bound to ensure that the Plaintiff's assets were covered as instructed and that it was done and that is how the policy changed. The schedule does not encompass all of the Plaintiff' assets.

2.101 She testified that when the First Defendant rejected the Plaintiff's claim, the Second Defendant updated the Plaintiff and added its opinion that theft was covered under the assets all risks policy.

2.102 Mrs Sibanda testified that premiums for theft were not payable if not demanded as an additional premium.

2.103 She confirmed that the Second Defendant received the terms at p.1-7 of the Plaintiff's bundle.

2.104 When re-examined, Mrs Sibanda testified that placing slips, quotations and cover notes are 3 different documents issued at different times of placement.

2.105 She clarified that after the First Defendant's quote was issued, and after the Second Defendant got the tender, the Second Defendant analysed the quote against the appropriate coverage and changed the instruction to assets all risks to also cover equipment that could not be broken down. Assets all risks is broader than individual policies. Then a cover note was issued as temporal evidence pending the policy.

2.106 By 28th December 2020, the cover note was issued and after all clarifications were made at the tripartite meeting the First Defendant issued the policy about 7th January 2021.

2.107 The practice is that when a big client like the Plaintiff wants comprehensive cover, assets all risks is issued unlike a stand-alone policy for burglary which is burdensome with premium policy rates of 2.5% upwards.

2.108 Mrs Sibanda testified that while the Second Defendant as broker collected information relevant to connecting the Plaintiff and the First Defendant, the First Defendant as insurer had its own responsibility to verify what risk it would carry and what scope of coverage including any visits.

2.109 She verified that the email at p.67 of the Plaintiff's bundle was giving additional information requested for by First Defendant at the tripartite meeting, of additional grounds.

2.110 On that note the Second Defendant closed its case.

3. SUBMISSIONS FROM THE BAR

3.1 After conclusion of trial, the Plaintiff tendered final submissions on 29th February 2024, whilst the First Defendant and Second Defendant both tendered on 27th March 2024. The Plaintiff, as proponent, had the last say with submissions in reply filed on 5th April 2024.

3.2 I found the submissions very useful and I am grateful to Counsel for their extensive research and industry. Owing to the peculiar circumstances of the case, I propose to dispense with a copious reproduction of their content.

4. ANALYSIS AND FINDINGS

4.1 I have closely studied the material on record, evidence and submissions and after a careful consideration, my decision is as set out below.

The contention of how many valid insurance policy claims were made by the Plaintiff to the First Defendant in pursuance of the policy, whether they have been honoured, and if not why?

and

The contention of whether the circumstances fell under the general or specific exclusions and exceptions under the policy.

4.2 PW1 stated in para. 9 of his witness statement that between October 2020 and June 2021 there were 26 incident reports of theft of the Plaintiff's property.

4.3 However, neither PW1 nor the Plaintiff's other witnesses categorically testified about how many policy claims were actually made for the relevant period as set out in para. 7 of the statement of claim (5th January 2021 to 23rd June 2021).

4.4 Instead what the Plaintiff's witnesses seemed to focus on was the monetary value of the claims not the number of the claims.

4.5 It is not the province of this Court to speculate and fill in the blanks through assumptions where the evidence is deficient. I am fortified in this regard by the decision of the Constitutional Court in ***Richwell Siamunene v Sialubalo Gift*** [1].

4.6 Accordingly, I find the evidence to be inconclusive on the point of how many valid insurance claims were made by the Plaintiff to the First Defendant in pursuance of the policy.

4.7 I now move on to whether the policies have been settled. The evidence of the Plaintiff's witnesses and those of the First Defendant coincided on the point that the claims relating to laptops and motor vehicles were honoured whilst those for solar panels and batteries were not.

4.8 In terms of why they have not been honoured, the Plaintiff's witnesses complained that various reasons were advanced by the First Defendant ranging from incomplete documentation, pending assessment by loss adjuster, outstanding premiums and lastly that theft and burglary were outside the scope of cover.

4.9 DW1 (Mr Kanema) confirmed in para 8 of his witness statement that the documentation was eventually received. The First Defendant produced a loss adjuster's report and DW2 (Mr Malasha) admitted in cross examination (by Mr Kaonga) that the outstanding premiums were eventually paid.

4.10 Even the loss adjuster confirmed in an email to Plaintiff that it was just the Police reports and quotations for replacement required to conclude the claim process (see p.232 of the Plaintiff's bundle).

4.11 Therefore, from the Plaintiff's evidence, First Defendant's defence and the testimonies of DW1 and DW2, I find that the First Defendant did not settle the claims because of a belief that theft and burglary were not covered.

4.12 The First Defendant has argued that the Plaintiff's insurance claims were excluded by specific exception to the policy on account of non-payment of the premiums.

4.13 The said argument goes against the evidence of the First Defendants own witness who I have already alluded to as having admitted (in cross examination) that the premiums were eventually paid.

4.14 In ***ZRA v Hitech Trading Co. Ltd.***[2], the Supreme Court guided that arguments and submissions from the Bar (no matter how spirited) are no substitute for sworn evidence.

4.15 Accordingly, I have no choice but to discount the First Defendant's argument on the point in preference for the evidence which shows otherwise.

4.16 The rest of the First Defendant's arguments centered on the formation stages of the policy (including quotation, bidding processes and terms of reference) are a veiled attempt to re-litigate the issue of scope of coverage of the policy.

4.17 In ***Bank of Zambia v Jonas Tembo & Ors*** [3], the Supreme Court frowned upon an attempt to re-litigate issues which had already been adjudicated upon and proceeded to dismiss an appeal with a pronouncement that it is in public interest that there should be an end to litigation.

4.18 This Court is duty bound to prevent its machinery from being abused through a second bite at the cherry already conclusively dealt with in the preliminary ruling of 12th October 2023.

4.19 The net result is that the First Defendant has failed to show that the circumstances of the Plaintiff's insurance claims fell under the general or specific exclusions and exceptions under the policy.

The contention of whether the First Defendant's letters (of 16th March 2022 and 29th July 2022) and the Plaintiff's response are of any legal significance to the Plaintiff's claims against the First Defendant and if so what.

4.20 The First Defendant's letter of 16th March 2022 to the Plaintiff and copied to the Second Defendant reads:

> *"16th March, 2022*
>
> *The Chief Executive Officer*
> *Infratel Corporation Limited*
> *Corner of Mwaimwena road and Addis Ababa Drive*
> *Standard Chartered House*
> *Rhodespark*
> *Lusaka.*
>
> *Dear Sir,*
>
> *RE:* ***COMMITMENT LETTER FOR BATTERY CLAIMS***
>
> *Reference is made to the captioned matter.*
>
> ***We wish to state that all non-motor claims concerning the batteries will be concluded by 30th April 2022. This is subject to payment of remaining premiums by yourselves.***
>
> *Kindly feel free to contact the undersigned for any clarifications.*
>
> *We hope you find the foregoing in order.*
>
> *Yours faithfully.*

Amanda Kasempa
Claims Handler

cc: Norwich Insurance Brokers" (Emphasis added)

4.21 The First Defendant's letter of 29th July 2022 to the Plaintiff and also copied to the Second Defendant was worded as follows-

"*29th July, 2022*

The Chief Executive Officer
Infratel Corporation Limited
Corner of Mwaimwena road and Addis Ababa Drive
Standard Chartered House
Rhodespark
Lusaka.

Dear Sir,

RE: ***COMMITMENT LETTER FOR BATTERY, SOLAR PANEL AND LAPTOP CLAIMS***

Reference is made to the captioned matter.

We wish to state that all non-motor claims concerning the batteries, solar panels and laptops will be concluded by 31st August 2022.

Kindly feel free to contact the undersigned for any clarifications.

We hope you find the foregoing in order.

Yours faithfully.

Amanda Kasempa
Claims Handler

cc: Norwich Insurance Brokers" (Emphasis added)

4.22 According to PW3, the said letters were preceded by the Plaintiff's complaint to the First Defendant over the unsettled claims and that the Plaintiff's response was an eventual complaint to the regulator, about the First Defendant after the claims remained outstanding (see paras. 21 and 26 of his witness statement).

4.23 The said evidence was not challenged in cross examination nor contradicted by other evidence on record.

4.24 Infact, PW3 testified in cross examination that even though the two letters did not have settlement figures, the preceding communication from the Plaintiff had figures.

4.25 The learned authors of **Words and Phrases Legally Defined**[1] describe the phrase '*subject to*' as introducing a condition or proviso.

4.26 It follows that the First Defendant's letter of 16th March 2022 was a conditional undertaking to conclusively deal with the Plaintiff's non-motor claims by 30th April 2022, that is on condition that the Plaintiff paid-up on premiums due.

4.27 The First Defendant's letter of 29th July 2022 was an unconditional undertaking to conclusively deal with the Plaintiff's non-motor insurance claims by 31st August 2022.

4.28 The two letters did not refer to payment of the insurance claims and cannot therefore be construed as an express admission of the liability to pay any particular figure.

4.29 However, when looked at in totality with the other evidence before Court including what preceded them, I find that the letters communicate:

4.29.1 that as at 16th March 2022, the impediment to settling the stipulated claims was the outstanding premiums due from the Plaintiff; and

4.29.2 that as at 29th July 2023, there was no impediment, just a self-given grace period to settle the claims.

4.30 It follows that the two letters evidence the fact that the First Defendant had no problem with the validity of the Plaintiff's claims. They also lend credence to the conclusion that settlement was later withheld based on the First Defendant's eventual stance that theft of the batteries and panels was not covered by the policy. The said stance ofcourse came sequentially after the Plaintiff had complained to the Pensions and Insurance Authority ("**PIA**") against the First Defendant over the unsettled claims.

4.31 Put simply, the letters show that other than the technical argument (which came later) that theft and burglary were not covered, there was no substantive problem with the Plaintiff's claims.

The contention of whether the brokerage contract of 1st October 2020 placed an obligation on the Second Defendant to ensure that the First Defendant settled all insurance policy claims made by the Plaintiff; and

The contention of whether non-payment of any of the insurance policy claims made by the Plaintiff to the First Defendant was attributable to the Second Defendant.

4.32 The Plaintiff has argued (in para. 4.23 of its submissions) that clauses 2.5 and 2.11 of the brokerage contract placed an obligation on the Second Defendant to not only transmit the Plaintiff's policy claims to the First Defendant but to also ensure that they are settled.

4.33 However, the Plaintiff has not highlighted which part in particular created the latter obligation for the Second Defendant, nor demonstrated how the clauses can otherwise be construed as such.

4.34 The relevant part of the brokerage contract appears at p.65 of the Plaintiff's bundle and clauses 2.5 and 2.11 are worded:

"*2.5* ***Manage all insurance contracts and everything incidental thereto, including*** *but not limited to: offering assistance with the performance of an insurance contract,* ***payment of insurance premiums****, amendment and termination of an insurance contract and timely execution of an insurance contract.*

2.6 ---

2.7 ---

2.8 ---

2.9 ---

2.10 ---

2.11 Act in the best interest of the client at all times and with the professionalism, independence and due diligence characteristic of insurance brokers." (Emphasis added)

4.35 At this point it is necessary to delve into the realm of principles governing interpretation of insurance policies and related contracts. The learned authors of **Insurance Law Text and Materials**[2] guide:

"***The ordinary natural meaning of words***

This is the main guiding force for the courts*. There should be an attempt to interpret words or phrases in a manner which is acceptable to the ordinary reasonable insured who has applied for that type of cover."* (Emphasis added)

4.36 Equally useful is the text of **Principles of Insurance Law**[3] wherein it was observed:

> "***Most commonly, a court will first look at the language of the*** *insurance policy or* ***other contract. If the language is clear, the court will resolve the dispute based on its view of the linguisitic meaning of the text.***" (Emphasis added)

4.37 The requirement to interpret a written contract according to the natural and ordinary meaning of the words used (unless there is ambiguity or absurdity in doing so) was also endorsed by Mambilima DCJ (as she then was) in ***Indo Zambia Bank Limited v Mushaukwa Muhanga***.[4].

4.38 Applying the aforesaid principles to clauses 2.5 and 2.11 of the brokerage contract, the import is:

4.38.1 the Second Defendant was the Plaintiff's agent (arms and legs) for performance of the insurance policy; and

4.38.2 the Second Defendant was a go-between by which the Plaintiff could do what it had to do in its engagement with the First Defendant as insurer.

4.39 There is no part of the said clauses or indeed any part of the brokerage contract from which it can be construed that the Second Defendant assumed the responsibility to guarantee or ensure that policy claims were indeed settled by the First Defendant.

4.40 I thus reject the Plaintiff's invitation to find otherwise than that the Second Defendant had no obligation under the brokerage contract to ensure that the Plaintiff's policy claims were settled by the First Defendant.

4.41 This is consistent with useful jurisprudence such as ***Murphy v Kuhn***[5], where the Court of Appeals of New York presided by Bellacosa, J held:

> *"Insurance agents or* ***brokers are not personal financial counselors and risk managers, approaching guarantor status****. Insureds are in a better position to know their personal assets and abilities to protect themselves more so than general insurance agents or brokers, unless the latter are informed and asked to advise and act. Furthermore,* ***permitting insureds to add such parties to the liability chain might well open flood gates to even more complicated and undesirable litigation****."* (Emphasis added)

4.42 Moving on to the contention of blame for non-settlement, PW1, PW2, PW3 and DW1 admitted in cross examination that they did not allege any wrongdoing of the Second Defendant in their evidence in chief.

4.43 The authority of ***ZRA v Hitech Trading Co. Ltd.***[2] is again applicable that arguments and submissions from the Bar (no matter how spirited) are no substitute for sworn evidence.

4.44 Therefore, given the evidential deficiency in the relevant part of the Plaintiff's case as exposed by the admissions of PW1, PW2, PW3 (and DW1), this Court cannot be swayed (by the Plaintiff's final submissions) into holding the Second Defendant blameworthy for non-settlement of the Plaintiff's policy claims.

The contention of whether ultimately, the Plaintiff is entitled to any relief against the First Defendant and/or Second Defendant.

4.45 It has already been established that the First Defendant, (as insurer) is liable to indemnify the Plaintiff (as insured) for the loss of its batteries and solar panels occasioned by theft. The exact contractual basis for that obligation was pronounced by this Court at p.R10-R13 of the ruling of 12th October 2023.

4.46 That the First Defendant did not honour its obligation is a clear-cut breach of the policy.

4.47 However, it is not clear from the evidence how the Plaintiff arrived at the global figure of K4,294,600 for the policy claims.

4.48 The Plaintiff did not produce records of the actual claims submitted and source documents for the values that comprised the K4,294,600.

4.49 Instead, the few claim forms produced in Court (at p.153,159,165,171,177 and 184 of the Plaintiff's bundle) were all blank on the amount of claim and only referred to an 'attached report', which was not produced before Court.

4.50 In ***Galaunia Farms Limited v National Milling Company Limited***[6] the Supreme Court reaffirmed that the burden of proof in a civil case lies with the alleger of a fact.

4.51 Accordingly, I find that the Plaintiff has failed to satisfy this Court that its claim value of K4,294,600 is accurate and thus it would be an injustice to rubber stamp the claim. In the premises, a secondary process is inevitable.

4.52 I now move on to the Second Defendant. According to the originating process, the Plaintiff's cause of action against the Second Defendant was wholly founded in contract.

4.53 Consequently, the failure by the Plaintiff to prove any infraction of the brokerage contract by the Second Defendant, disentitles the Plaintiff to any relief against the Second Defendant.

5. CONCLUSION AND ORDERS

Plaintiff's claims (i) and (iii) in writ and statement of claim

5.1 The primary remedy for payment of K4,294,600 as prayed for in the statement of claim is unsubstantiated in terms of accuracy and thus unsuccessful.

5.2 The claim for it and interest thereon accordingly fails.

Plaintiff's claim (iii)

5.3 This is a claim for damages for breach of contract against the Defendants.

5.4 The First Defendant's failure to honour its obligations to the Plaintiff under the policy is a breach of contract, entitling the Plaintiff to damages which I hereby award, to be assessed by the Registrar.

Plaintiff's claim (v)

5.5 This claim is for any other relief. The circumstances and findings herein require this Court to invoke the provisions of s.13 of the **High Court Act**[1] to order as I hereby do that –

(i) the Plaintiff and First Defendant (with aid of Second Defendant if need be) should engage in objective dialogue to agree on the quantum to be paid by the First Defendant to the Plaintiff as indemnity for the claims upheld herein under the policy;

(ii) the initiative in (i) can also extend to agreeing on a figure for damages instead of recourse to assessment;

(iii) failing any agreement in (i), within 60 days from date hereof, the Plaintiff (or First Defendant) shall be at liberty to request the PIA to appoint an independent industry expert to compute the indemnity sum due from the First Defendant to the Plaintiff under the policy;

(iv) the cost of engaging the independent industry expert shall ultimately be borne by the First Defendant and recoverable as an actionable debt due to the Plaintiff.

Plaintiff's claim (iv)

5.6 This claim relates to costs of this litigation, which are a matter of discretion for the Court in terms of Order 40 Rule 6 of the **High Court Rules**[1].

5.7 As for the guidance in the exercise of that discretion, I heed the Supreme Court's judgment in ***Afrope Zambia Limited v Anthony Chate & Ors***[7], where Wood, JS aptly stated:

> *"It is a settled principle of law that a successful party will not normally be deprived of his costs unless there is something in the nature of the claim or in the conduct of the party which makes it improper for him to be granted costs."* (Emphasis added)

5.8 In the case at hand, the Plaintiff has succeeded against the First Defendant but failed against the Second Defendant which successfully repelled the Plaintiff's claims. However, had the First Defendant honoured its contractual obligations to the Plaintiff, this action in which the Second Defendant was hauled could have been avoided

5.9 Therefore, I find it fair and just to order that the Plaintiff shall have its costs against the First Defendant whilst the Second Defendant's costs shall be borne by the Plaintiff and First Defendant in equal proportion.

Dated at Lusaka this---------- day of ---------- 2024

K. CHENDA
Judge of the High Court