**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**COMMERCIAL DIVISION**

**AT DAR ES SALAAM**

**COMMERCIAL CASE NO. 79 OF 2023**

**LAKE OIL LIMITED ..... PLAINTIFF**

VERSUS

**FIRST ASSURANCE COMPANY LIMITED ..... 1ST DEFENDANT**

**VICTORIA INSURANCE BROKERS LTD ..... 2ND DEFENDANT**

# JUDGMENT

*30/10/2023 & 07/11/2023*

**SIMFUKWE, J.**

In the amended plaint, the plaintiff Lake Oil Limited claims against the defendants jointly and severally for payment of Tshs 485,125,658.74, equal to 50.82% of the total loss of value of Petroleum products stored in tanks located at Vijibweni Industrial Area, Kigamboni in Dar es Salaam Region, due to fire accident alleged to have occurred on 08th January 2020, payment of general damages, interest and costs. It was alleged by the plaintiff that sometimes in 2019, she approached the second defendant who is the insurance agent of the first defendant for the

purpose of purchasing fire and allied perils Insurance policy for stock of petroleum products stored in seven tanks at Vijibweni Industrial Area, Kigamboni, Dar es Salaam. On 22nd June 2019, the plaintiff entered into Insurance Policy Agreement with the 1st defendant on the following terms:

(a) The period of Insurance Policy was for one year commencing from 22nd June 2019 to 22nd June, 2020.

(b) Premium paid by the plaintiff to the 1st defendant was USD 35,400.00 to cover sum insured of USD 20,000,000.

(c) Properties insured were stock of Petroleum products stored in 7 tanks located at Vijibweni Industrial Area, Kigamboni, Dar es Salaam.

Sometimes in November 2019, the plaintiff again entered into another Insurance Policy with the 1st defendant, with the following terms and conditions:

(a) The period of Insurance Policy was for one year commencing from 10th November, 2019 to 10th November, 2020.

(b) Premium paid by the plaintiff to the 1st defendant was USD 35,400.00 to cover sum insured of USD 12,000,000.

(c) Description of the properties or risk were stock of fuel, gas, lubricants and/or hospitality stock and/or general goods held in trust:

(i) Stock of hospitality and other general goods in trade or held in trust at depots anywhere in Tanzania.

(ii) Fuel anywhere in Tanzania at any Petrol Station owned or operated by Lake Oil Limited.

Along side with the 1st defendant, the plaintiff entered into another insurance policy agreement with Britam Insurance Tanzania Limited to cover same stock of Petroleum at 13 storage tanks at insured premises at Vijibweni Kigamboni, Dar es Salaam, on the following conditions:

(a) The insurance period was for one year commencing from 5th December 2019 to 5th December 2020.

(b) Premium paid by the plaintiff to Britam Insurance Tanzania Limited was USD 63,720.00 to cover the value of stock of USD 30,000,000.

(c) The description of risk details was stock of Petroleum products at 13 storage tanks at the plaintiff's premises at Vijibweni, Kigamboni, Dar es Salaam

The plaintiff prayed for judgment and decree against the defendants jointly and severally as follows:

a) *Payment of an amount of Tshs 485,125,658.74 being the value of fuel lost due to fire which erupted on 8th January, 2020 at plaintiff's insured premises at Vijibweni, Kigamboni, Dar es Salaam.*
b) *Payment of general damages to be assessed by the Court.*
c) *Payment of compound interest on (a) above from 8th January, 2020 until full payment at the rate of 10% per annum.*
d) *Costs of this suit.*
e) *Any other reliefs this honourable Court may deem fit and just to grant.*

In their Written Statements of Defense, both defendants denied the claims levelled against them. However, the second defendant admitted to had acted as agent of the first defendant, in the process of the plaintiff purchasing Fire and Allied perils Insurance Policy for stock of petroleum products stored in seven tanks located at Vijibweni (supra). The second defendant noted the facts in respect of the subsequent insurance policies which the plaintiff averred to had entered with the first defendant and Britam Insurance Tanzania Limited.

During the hearing of this matter, the plaintiff was represented by Mr. Jerome Msemwa, learned counsel, Ms Regina Herman learned counsel appeared for the first defendant and Ms Robi Simon Magaigwa learned counsel represented the second defendant. Prior to the hearing, the following issues were framed:

1. *Whether there was a breach of terms of insurance contract?*
2. *Whether the plaintiff is entitled to payment of TZS 489,000,000/= (sic) being indemnity for the loss of petroleum products stored at plaintiff's tanks located at Vijibweni Industrial area, Kigamboni DSM due to fire incident that occurred on 08/01/2020.*
3. *To what reliefs are the parties entitled to?*

Pursuant to **Rule 49 (2) of the High Court (Commercial Division) Procedure (Amendment) Rules, 2019,** parties were ordered to file witness statements. The plaintiff called one witness and tendered four documentary exhibits to prove their case, while the defendants called two witnesses and did not tender any exhibit. All witnesses identified their witness statements which were adopted to form part of their evidence in chief.

**PW1 Mr. Apolinary Massenge,** the accountant of the plaintiff testified inter alia that the plaintiff claims against the defendants a total sum of

Tshs 485,125,658.74 as assessed by Absolute Surveyors Tanzania Limited, being loss of value of Petroleum products stored in tanks at Vijibweni Industrial area, Kigamboni Dar es Salaam; due to fire incident which occurred on 08/01/2020. He said that, Absolute Surveyors Tanzania Limited was appointed by the first defendant on 09/01/2020, one day after the incident.

PW1 explained how the plaintiff entered into Insurance Policy agreement with the first defendant via the second defendant on 22/6/2019, vide Policy No. 19/10/003161706. The said policy was for the period of one year, on consideration of USD 35,400.00 premium, to cover USD 20,000,000, the value of the insured properties, seven tanks of petroleum products located at Vijibweni (supra). On 10/11/2019, the plaintiff entered into another Insurance policy agreement No. 19/10/00325/4/11 which was ending on 10/11/2020. The premium paid was USD 35,400.00 to cover stock of fuel, gas, lubricants and hospitality stock/general goods held in trust, valued at USD 12,000,000. The second policy was covering fuel located anywhere in Tanzania at any petrol station owned or operated by Lake Oil Limited.

PW1 testified further that, the plaintiff had another insurance policy agreement with Britam Insurance Tanzania Limited to cover some stock

of petroleum at thirteen storage tanks at insured premises at Vijibweni (supra). The policy with Britam was for the period of 05/12/2019 to 05/12/2020, on consideration of USD 63,720.00 to cover a stock valued USD 30,000,000.

PW1's testimony revealed further that on 08th January 2020, fire accident occurred at the plaintiff's insured premises. The plaintiff reported the matter to the second defendant Victoria Insurance Brokers Limited, the agent of the first defendant by way of email. In proof of authenticity of the said email printout, PW1 averred that, the email dated 09/01/2020 was generated, stored and communicated by himself. That, he was the only one who had access to his computer and that the said email was printed from the said computer.

It was stated further that on the same day, that is on 09/01/2020, the second defendant replied the plaintiff's email about fire incidence and the loss assessor Absolute Surveyors and Loss Assessors Tanzania Limited and the first defendant had already been informed about the said incidence. On the same day Absolute Surveyors were appointed to assess the loss. Upon being appointed by the first defendant, on 19/02/2020, they issued a preliminary report dated 10/02/2020, about fire loss which occasioned to the plaintiff on 08/01/2020. The said report came up with

estimated loss on fuel of Tshs 954,595,944, involving both the first defendant and Britam Insurance Tanzania Limited Insurance policies. The share of the loss to the two Insurance companies was 50.82% and 49.18% respectively. It was contended that, since 10/02/2020 when the preliminary report was issued, the first defendant remained quite and could not give back any information to the plaintiff. That act prompted the second defendant to write to Tanzania Insurance Regulatory Authority (TIRA) about delay by the first defendant on settlement of plaintiff's claim, by a letter dated 08/05/2020. The said letter was copied to the plaintiff and Tapex Re-Insurance Brokers Limited who was the first defendant's re-insurance broker. On 19/05/2020 the first defendant replied to the Commissioner of Tanzania Insurance Regulatory Authority through a letter, about the complaint of the second defendant. The said letter had the following explanations:

(a) That, the plaintiff's claim was covered by two different insurers, First Assurance Company Limited and Britam Insurance Co. Ltd with different sum and number of tanks insured.

(b) That, the first defendant appointed Absolute Surveyors and Loss Assessors (T) Ltd to inspect and assess the loss and full report was submitted with total loss adjustment amount of Tshs

874,903,637.98. The plaintiff stated that previously, preliminary report by the same Absolute Surveyors and Loss Assessors (T) Ltd had indicated that the estimated loss of value on fuel was Tshs. 954,595,944 according to annexure A-7 of the plaint.

(c) That, the amount of Tshs 874,903,637.98 was required to be paid as follows:

i. Britam Insurance Co. Ltd was supposed to pay Tshs 430,277,609/=

ii. First Assurance Co. Ltd, the first defendant herein, was supposed to pay Tshs 444,626,028.82.

(d) That, before proceeding with the claim, loss adjusters appointed by Britam Insurance Co. Ltd, Toplis & Harding Loss Adjusters and Surveyors Ltd approached the first defendant for some clarification on the policy of the same risk.

(e) That, the first defendant decided to wait for Toplis and Harding Loss Adjusters and Surveyors Ltd report in order to get second opinion regarding the claim. The first defendant stated in the letter that the second defendant was informed and had several meetings.

(f) That, the first defendant stated that there were two issues which lead to delay of the claim. First was to wait for a final report from

Toplis & Harding Loss Adjusters Ltd and there were some details regarding the value at risks requested by loss adjusters from the insured, yet to be submitted.

PW1 went on to state that, pursuant to what was contained in the first defendant's letter dated 19/05/2020, at no point in time they had received any letter from loss adjusters requesting details regarding the value at risk. The first defendant promised the plaintiff of intention to repudiate the claim based on a report in which it was alleged that the fuel that is claimed to have lost was from the pipe line and not from the tanks. That was subject to re-examination of the claim to establish what were possible considerations. Thereafter, the plaintiff never received any report from Toplis & Harding Loss Adjusters and Surveyors Ltd as the basis of repudiation of plaintiff's claim. On 13/07/2021, the first defendant decided to offer to the plaintiff ex gratia payment of Tshs 170,000,000/= being 41% of the actual assessed loss instead of the claimed sum by the plaintiff.

PW1 tendered the said letter dated 13/7/2021 as exhibit. It was admitted as exhibit P1. He was of the view that, repudiation of the claim by the first defendant was unlawful on four grounds. First, that the first defendant and Toplis & Harding Loss Adjusters and Surveyors Ltd did not give loss

report to the plaintiff as the plaintiff had a right to have the said report in order to understand how the assessment was done and whether the information supplied to the Assessor was captured correctly. Second, that the plaintiff was not consulted on the report by Toplis & Harding Loss Adjusters and Surveyors Ltd that the fuel claimed to have lost was from the pipe line and not the storage tanks as alleged by the first defendant. Third, that the fire broke at plaintiff's premises at Vijibweni and caused loss to the stock of fuel (petrol and diesel) which was insured by both Britam Insurance Tanzania Ltd and the first defendant. The claim was reported to both insurers and the assessment was done of which the plaintiff was claiming Tshs 954 million being the value of 459 litres of fuel lost during the fire incidence. Fourth, that, the plaintiff had received compensation of Tshs 416 million as per email dated 22/10/2021 from Britam Insurance Tanzania Ltd being 49.18% of share of loss according to the preliminary report by Absolute Surveyors and Assessors Tanzania Limited.

Furthermore, on 25/08/2021 the plaintiff appealed to the first defendant against ex-gratia payment of Tshs 170 million on ground that the insurance bought was to cover stock of fuel at storage tanks which in any case would not be separated from the pipe line. On 21/10/2021, the first

defendant replied the plaintiff by stating that the ex-gratia payments were approved by the Board and that any changes were to be done by the Board and promised to communicate soon. PW1 tendered a letter from the first defendant dated 21/10/2021. It was admitted as exhibit P2. Thereafter, the first defendant did not inform the plaintiff anything about the decision of the Board as promised, which prompted the Commissioner for Insurance to give 14 days to the first defendant by a letter dated 19/02/2022 to provide a final decision and thereafter to update the Commissioner by providing proof of compliance on or before 15/03/2022. On 09/03/2022, the first defendant wrote to the Commissioner of Insurance regarding final decision on appeal by the plaintiff following ex gratia offer. Whereas they admitted to pay Tshs 409,666,800.00 as full payment of the claim. PW1 buttressed his averment by tendering the said letter dated 09/03/2022. It was admitted as exhibit P3. Then, the plaintiff through the second defendant accepted an offer for payment of Tshs 409,666,800/= in two instalments on ground that the first defendant delayed to settle the claim for two years by emails dated 8th, 9th and 11th April 2022 respectively.

It was testified further that, the first defendant unlawfully and without any justifiable cause by a letter dated 20/06/2022 repudiated plaintiff's

claim of Tshs 409,666,800/ on ground that the plaintiff had declined payment plans and had found elements of forgery on plaintiff's claims on quantum. The plaintiff denied claims of forgery as alleged as there was no official report which showed that the plaintiff had committed forgery and that plaintiff's refusal to be paid by instalments could not be a ground for repudiating the claim.

PW1 was of the opinion that, the plaintiff is entitled to be paid by the defendants jointly and severally for payment of Tshs 485,125,658.74 as claimed as loss of value of fuel as a result of fire which erupted at plaintiff's insured depot located at Vijibweni.

In conclusion, PW1, tendered a Board Resolution to sue the defendants. It was admitted as exhibit P4.

The only witness for the first defendant, DW1 Dotto Suleiman Madali testified that he is currently employed as the Head of Claims of the first defendant herein. He stated inter alia that, at the time of the accident, the plaintiff was insured by the first defendant via the second defendant. He said that, the said policy covered the fuel stock in tanks and that the plaintiff under the policy was duly bound to disclose the amount of the stock on daily and monthly basis. DW1 acknowledged that, after being informed about the fire outbreak at the plaintiff's insured premises, as co-

insurers, they appointed Absolute to investigate the claim. That, the report of Absolute was vague with no clarification and misguiding the first defendant in respect of fuel lost due to fire, was that cleared for transit or local consumption and whether was refunded on the importation of goods. They requested for documents from the plaintiff but to date no document was issued to the first defendant. The damaged fuel was not assessed and the plaintiff did not disclose the amount of the deteriorated fuel. As a result, the first defendant refused to pay for failure to prove by the plaintiff. DW1 alleged further that, as claims manager, he discovered that all reports issued lacked exact quantity of fuel in the tanks at the time of fire outbreak and no documentary evidence was issued by the plaintiff. Then, the first defendant decided to offer ex-gratia payment of Tshs 170,000,000/ being 41% for enhancement of their business relationship.

DW1 noted that, what he knew was that, the plaintiff and the second defendant had agreed on the daily open declaration policy which was not complied with by the second defendant and the plaintiff, to justify the stock as the policy clearly stated so, hence the plaintiff is not entitled to any claim which resulted from the said fire outbreak.

DW1 prayed the plaint in this case and its reliefs be dismissed for want of merit with costs.

DW2 Elinipa Elias for the second defendant, stated that, she was the general manager of the second defendant. Her responsibilities included to manage all activities of the second defendant and the plaintiff company. She admitted to had acted as a broker of the first defendant and the plaintiff when they entered into the above noted insurance policy agreements. Also, DW2 admitted to had received information from the plaintiff about the fire incident at Vijibweni and that she informed the first defendant about the same.

In short, DW2's testimony corroborated the testimony of PW1 in all aspects. DW2 added that, the first defendant had already appointed an investigator who came up with a report that the claim is payable and apportioned the amount to be paid by the first defendant. That, it is surprising that the first defendant without any further investigation, came up with allegations of fraud. DW2 was of the view that, if there was fraud, the first defendant was supposed to report the same to the police station who are responsible for fraud matters. To date, there is no police report which has been produced. It was averred that, the acts and omissions of the first defendant, are totally tactics to avoid indemnifying the plaintiff while she is well aware that the plaintiff has a valid claim and she is supposed to be indemnified fully.

DW2 prayed judgment to be entered in favour of the plaintiff against the first defendant, together with damages and costs in order to teach a lesson to the first defendant. She prayed that, judgment should not be entered against the second defendant who has for the whole period been working hand in hand with the plaintiff to make sure that her claims are paid in time and to date the second defendant is still striving hard to make up the same.

That being the end of evidence of both parties, it may be noted that there is no dispute that the plaintiff was insured by the first defendant via the second defendant herein in two distinct insurance policy agreements: Insurance policy No. 19/10/003161/06 with effect from 22nd June 2019 to 22nd June 2020; and 19/10/00325/4/11 commencing from 10th November 2019 to 10th November 2020 respectively. The premiums paid and insured properties were as stated by PW1 and DW2 herein above. Apart from the insurance policies, the fact that the insured fuel of the plaintiff was consumed by fire is also not at issue. It is also on record that through a letter dated 9/3/2022, the first defendant admitted to pay Tshs 409,666,8000/= to the plaintiff and the plaintiff agreed to that offer. However, DW1 the principal officer of the first defendant stated inter alia that they declined from indemnifying the plaintiff on the reason that the

damaged fuel was not assessed and the plaintiff did not disclose the lost amount of fuel. Also, DW1 contended that the plaintiff and the second defendant had agreed on daily open declaration policy which was not complied with to justify the stock. At page 20 of the written statement of defence of the first defendant, there is an allegation of fraud on part of the plaintiff in respect of the value of the consumed fuel.

The refusal of the first defendant to indemnify the plaintiff based on the above noted reasons leads to the first issue, ***whether there was breach of terms of insurance contract?*** Unfortunately, neither party managed to produce the two-insurance policy agreements between the plaintiff and the first defendant. Nevertheless, since the insurance policies are not disputed, the fact that the insurance policies were not tendered as exhibits, will not detain me. Thus, I proceed to determine the first issue.

**Section 148(1) of the Insurance Act, 2009** provides that:

> *"148.- (1) The holder of a policy issued by a Tanzanian insurer shall, notwithstanding any contrary provision in the policy or in any agreement relating to the policy, be entitled to enforce his right under the policy against the insurer liable under the policy in any court of law in Tanzania."*

Under the above cited provision, the plaintiff is in the right track of enforcing her rights against the defendants, in regard to the fire accident which consumed the fuel insured by the first defendant.

**Section 131 (1) and (2) of the Insurance Act** (supra), provides that:

> *"131. -(1) Every insurer shall pay claims within forty-five days of the date of receipt of the executed discharge, and where the insurer is unable to settle claims within that time, he may apply to the Commissioner for extension of time and the Commissioner may grant an extra time of not more than forty-five days within which the claim shall be settled.*
>
> *(2) Where an insurer fails without reasonable cause to settle the claim within forty-five days or within the time extended by the Commissioner that claim shall be treated as a bad faith claim against the insurer."*

The quoted provision, prescribes the time limit for payment of claims by the insurer to be forty-five days and forty- five additional days upon extension by the Commissioner of Insurance.

In our case, the fire incidence is alleged to have happened on 08/01/2020. That fact is not contested by the defendants. From the date of incident to

date, it is beyond the prescribed 90 days (extension of the Commissioner inclusive). In the circumstances, it goes without saying that the first defendant has breached terms of contract of indemnifying the plaintiff. The first defendant has never denied the fact that she owes a duty to indemnify the plaintiff. The main excuse given by the first defendant is the allegation of fraud on the value of the consumed fuel. However, neither the duty to disclose the amount of stock on daily declaration and lost amount of fuel, nor the alleged fraud were substantiated by the first defendant.

**Section 110(1) of the Evidence Act, Cap 6 R.E 2022** provides that:

> *"110. -(1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist."*

In the instant case, the first defendant is duly bound to prove the existence of fraud on part of the plaintiff as alleged at page 20 of her written statement of defence.

**Section 111** of the same Act provides that:

> *"111. The burden of proof in a suit proceeding lies on that person who would fail if no evidence at all were given on either side."*

In this matter, I am of considered opinion that, since it is not contested that the property of the plaintiff which was consumed by fire was insured by the first defendant via the second defendant, if no evidence at all is given on either side, it is the insurer, the first defendant who would fail.

In support of that, **section 112 of the Evidence Act** (supra) provides that:

> "*112.* ***The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence,*** *unless it is provided by law that the proof of that fact shall lie on any other person."* Emphasis added

According to the evidence tendered, the first defendant, wishes this court to believe that the plaintiff forged the value of the consumed fuel. However, there is no concrete evidence to that effect. As rightly stated by PW1, there is no official report or evidence of the alleged fraud adduced by the first defendant. DW2 for the second defendant had the same opinion that, if there was fraud, the first defendant should have reported the same to the police station or tendered evidence to prove the said fraud. In addition, DW2 averred that, the first defendant is using tactics to avoid indemnifying the plaintiff as she is aware that the plaintiff has a valid insurance policy claim and deserves to be indemnified fully.

In the case of **Eupharacie Mathew Rimisho t/a Emari Provision Store & Another vs Tema Enterprises Limited & Another (Civil Appeal No. 270 of 2018) [2023] TZCA 102** at page 20 it was held that:

> *"Without prejudice to the aforesaid, even if the signatures were forged as alleged, it was incumbent on the appellants to act promptly, invoke other remedies by reporting the matter to the Police because all along, and before filing the joint written statement of defence the appellants had knowledge on the existence of exhibit P2 which was annexed to the plaint. In the circumstances, the appellants' inaction to invoke remedies under criminal justice leaves a lot to be desired as correctly found by the learned trial Judge."*

With respect, I subscribe to the above decision of the Court of Appeal to condemn the first defendant's inaction against the purported fraud if any. In the circumstances, I find the first defendant to have breached her contractual insurance obligation to indemnify the plaintiff after the fire accident.

The second issue is ***whether the plaintiff is entitled to payment of Tzs 489,000,000 being indemnity for loss of petroleum products stored at plaintiff's tanks located at Vijibweni Industrial area at Kigamboni, Dar es Salaam, due to fire incident that occurred on 08/01/2020.*** Based on the fact that, the first issue has been answered against the first defendant, this court is of settled mind that the plaintiff deserves to be indemnified by the first defendant except that the claimed amount is subject to the amendment effected in the amended plaint. Thus, the plaintiff is entitled to payment of Tshs 485,125,658.74.

In response to the last issue, in respect of reliefs which the parties are entitled to, in addition to amount granted above as actual loss of the consumed fuel, the plaintiff is also entitled to be awarded general damages as prayed as compensation of what she had been through from 2020 to date, caused by the delay on payment by the first defendant contrary to **section 131 (1) of the Insurance Act** (supra). I therefore grant general damages to the plaintiff at the tune of Tshs 50,000,000/= (Fifty million only). Pursuant to **Order XX rule 21 of the Civil Procedure Code, Cap 33 R.E 2022**, I also grant compound interest on the granted principal sum at the rate of 7% per annum from the date

of delivery of this judgment, until full satisfaction of the decretal sum. Costs of this suit are to borne by the first defendant.

In consideration of her effort in making follow up of the claims of the plaintiff, the claims against the second defendant are hereby dismissed.

That said and done, the suit is decided in favour of the plaintiff and it is ordered as follows:

*(a) The first defendant should pay the plaintiff Tshs 485,125,658.74. being the value of fuel lost due to fire which erupted on 08/01/2019 at the plaintiff's insured premises at Vijibweni.*

*(b) The first defendant should pay the plaintiff general damages at the tune of Tshs 50,000,000/= (Fifty million only).*

*(c) The first defendant should pay compound interest on (a) above at the rate of 7% per annum from the date of delivery of judgment until full satisfaction of the decretal sum.*

*(d) Costs of this suit to be borne by the first defendant.*

*(e) The claims against the second defendant are dismissed accordingly.*

It is so ordered.

Dated and delivered at Dar es Salaam this 07th day of November 2023.


X

S. H. SIMFUKWE
JUDGE
Signed by: S. H. SIMFUKWE

**07/11/2023**