THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL SUIT NO. 109 OF 2016

SALINI CONSTRUTTORI S.P.A :::::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

JUBILEE INSURANCE COMPANY OF

UGANDA LIMITED:: DEFENDANT

BEFORE: THE HON. JUSTICE DAVID WANGUTUSI

JUDGMENT:

Salini Costruttori SPA the Plaintiff in this suit filed this claim against the Defendant Jubilee Insurance Company of Uganda Limited for breach of contract arising from a Marine Cargo Insurance Policy seeking the following reliefs;

a) Payment for actual total loss and/or constructive total loss of the value of the insured goods, the sum of USD. 2,686,556.
b) Payment of EUR 348.000,00 being legal expenses, expenses relating to inspection, expenses related to delivery to the laboratories for testing in Conakry, Guinea.
c) Interest at the rate of 15% per annum on the amounts from the date of each expenditure till payment in full;
d) General damages for breach of contract; and
e) Costs of the suit.

The background to this claim is that the Plaintiff was contracted in 2007 to construct Bujagali Hydro Power Plant in Njeru, Jinja under an Engineering, Procurement and Construction contract. In order to execute this contract the Plaintiff was obliged to procure materials for the construction. According to the Plaintiff 5,021.60 metric tons of reinforcing steel bars were required in the construction.

The Plaintiff bought them from Turkey and prior to shipment of the cargo she approached the Defendant to insure the steel cargo for the duration of the entire shipment to the Plaintiff's site at Njeru, Jinja. Upon satisfaction that the marine questionnaire forms, **Exh D1** had been completed, the Defendant issued Policy No: P/KLA/151/1501/07/1456 on the 20th of December 2007, Marine Cargo Insurance Policy, **Exh D2** which was an "All Risks Cover" against physical loss or damage to all property and interests of every kind and description intended for the construction of the Project while in transit.

In this policy the Defendant undertook to provide insurance cover from the time the property left the premises of the manufacturers in transit till delivery to Bujagali Dam site.

On the 18th of July 2009 the cargo was loaded at Nemrut Port, Izmir Turkey, on board Marine Vessel "EVR" enroute to Mombasa from where it would be transported by road to its final destination being Njeru, Jinja at Bujagali Dam. The cargo route was through the Suez Canal sailing downwards to Mombasa port.

Unknown to the Plaintiff, the vessel instead sailed through the Strait of Gibraltar and eventually ended at Conakry Port, Guinea in West Africa. It was discovered later that the vessel had developed mechanical problems and was forced to dock. The Plaintiff contends that she notified the Underwriters informing them of the vessel's failure to reach Mombasa and reminded them that time was of essence.

It is the Plaintiff's claim that the Defendant's counterparts, Swiss Re advised WK Webster & Co. Ltd to investigate the matter. Therefore between the period of 17th December 2009 and 20th February 2010, the Plaintiff communicated with GM Shipping & Chartering a General Average Adjuster and received information in respect of the quantity and quality of the steel cargo.

The Plaintiff got to learn that part of the cargo had been unloaded and that the ship was indebted to several claimants who included GM Shipping & Chartering.

The Plaintiff was concerned and through its Legal Counsel filed an application at the Conakry court seeking an order of inspection to ascertain the status of the cargo.

On learning that the iron bars had been degraded, the Plaintiff put in a claim of indemnity.

The Defendant did not respond favourably to the Plaintiff's demand for compensation. The first sign of resistance to the Plaintiff's claim is in **Exh P3** a letter from Clyde & Co. dated 30th April 2010.

Firstly the Defendant denied that the voyage was covered under the Policy, **Exh D2**.

Secondly that the ship that carried the cargo was over 30 years of age and that since the Plaintiff did not promptly inform the Defendant of that fact the underwriters were unable to determine whether to grant coverage under that policy as it was or to charge an additional premium.

The Defendant contended that the classification clause having been breached, the Plaintiff could not receive protection under the Policy. As such the loss was not covered.

Another reason given by the Defendant was that the cargo had been condemned to be destroyed for unclear reasons. That in any case the Defendant had asked a metallurgy expert to look at the laboratory reports who was of the view that the results fell short of demonstrating that the cargo had degraded to the extent of non-use.

Furthermore, that the Plaintiff took no steps to mitigate the loss, because there was no thorough investigation before the cargo was taken for recycling.

The issues for determination by court as agreed by the parties are;

1. Whether there was a Policy of insurance and if so, which Policy and what were its terms?
2. Whether under the Policy the Plaintiff is entitled to indemnity?
3. Whether the Plaintiff suffered any loss?
4. What remedies are available to the parties?

On the first issue of whether there was a policy of insurance, counsel for Plaintiff submitted that the Defendant made an offer to insure the cargo and that on the 20th December 2007 when the policy **Exh D.2** was issued the deal was completed. That it was an "all risk" insurance policy.

That the Defendant then issued Debit notes dated 24th December 2007, **Exh P.6,** which were paid. DW.1 admitted that payment was indeed effected by the Plaintiff.

The Plaintiff further contended that DW.2 agreed that **Exh D.2** had not been approved by the Insurance Regulatory Authority.

The Plaintiff further contended that **Exh D.3** could not be the Policy they were operating on because it attempted to alter **Exh D.2** without the necessary approval by the Regulatory Authority as provided for in Section 35 of the Insurance Act.

The Plaintiff therefore asked Court to find **Exh D.2** as the operative policy.

The Defendant on its part agreed that **Exh D.2** was an "all risk" policy, but contended that it was not the operative policy. That **Exh D.2** was a draft which was revised into **Exh D.3**.

Exh D.3 differed from **D.2** in that it created and introduced the choice of law and jurisdiction as the Courts of England when it provided;

"This insurance shall be governed by and construed in accordance with the Laws of England and Wales and each party agrees to submit to the exclusive jurisdiction of the Courts of England."

Going by that clause, the suit now before Court would be in the wrong jurisdiction and ought to be struck out.

Furthermore if **Exh D.2** was revised into **Exh D.3**, then the "all risk" protection would go, and there would come into operation the Exemption clauses in **Exh D.3**.

Counsel for the Defendant also argued that the Plaintiff did not pay the premium and that in the absence of consideration **Exh D.2** was no policy at all.

I have gone through the evidence of both parties. It is not in doubt that the Defendant indeed did issue and communicate a signed **Exh D.2** to the Plaintiff. The only question, to be answered is whether it remained a draft.

Evidence is abundant that **Exh D.2** carried Policy Number P/KLA/151/1501/07/1456. That its communication was followed by Debit notes dated 24th December 2007, **Exh P.6.** In **Exh**

P.6 the Defendant gave the Plaintiff a grace period up to 24th February 2008 to effect payment or risk cancellation.

It stated;

"To avoid cancellation please remit the full amount before 24th February 2008,"

the debit notes also indicated that an account for the Plaintiff was in existence, it stated;

"*We have debited your account as follows*

Description

Premium on MARINE CARGO Policy No.P/KLA/151/1501/07/1456

Amount in USD 276,480."

There was yet another debit note but with a bigger sum of USD 602,906 under the same policy number.

According to the policy the liability was spelt out as;

"Worldwide to final destination, Bujagali-Jinja-Kampala Uganda

Another clause relevant to this case was on error and omissions which provided this;

"Salini Construttori SPA believe the information provided in the two attached questionnaires completed by Alstom, is accurate, this insurance shall not be vitiated by unintentional error, omission or oversight in the information contained in the questionnaire and quoted as well in the information section, provided the same be communicated to the insurer as soon as known to the insured and any reasonable additional premium paid if any."

A study of **Exh D.2** and **D.3** reveals interesting situation.

Exh D.2 is dated 20th December 2007 while **Exh D.3** is dated 15th February 2008.

When you look at the last four pages of the **Exh D.3** there are transactions endorsed by all dated 27th December 2007 in which the period of insurance specified in Section 1 reads Marine Cargo 44 proceed dated 00:00 hours of 21st December 2007. Section 2 provides;

"ALOP 14 months from notice to proceed date

00:00 hours of 21st December 2007-14 months indemnity period."

The proceed date being 21st December 2007 could only be attributed to **Exh D.2** because **D.3** was not yet in existence.

This explains why the Debit notes came out on 24th December 2007. It could only be because the insurance cover had been agreed upon in **Exh D.2**.

I also agree with the Plaintiff that whenever there are changes in the text or policy the insurer would seek approval of the Regulatory Authority.

Section 35 of the Insurance Act provides:

"1. *An insurer shall not issue any policy of insurance unless;*

a) The text or format of the policy

b) The proposal form, or

c) The premium rates, rating scales and commission as suitable for the purpose of the insurance business it is meant for.

2. No alteration of any text or format of the policy, premium rates, rating scales, commission scale, proposal form or other document approved under subsection (1) shall be made without the prior approval of the commission."

Exh D.3 intended to shift from "all risk" cover to one ridden with exemptions. It also intended to remove jurisdiction from Uganda to the Courts of England. It also made changes in the list of underwriters this in my view was a significant change in the text. Text in simple English is defined as;

"a book or other written or printed work,

regarded in terms of its content rather than its physical form."

In my view changing from "all risk" Insurance Policy to exemptions and jurisdiction of choice in event of dispute from Uganda to England was change of text because a very important piece of the content of the policy was to be changed. That being the case, it was mandatory that the Defendant obtains approval from the commission for the alteration. Having failed to do so rendered the attempted variation of the insurance policy inapplicable. That being the case **Exh D.2**, remained as the Insurance Policy governing the parties relationship.
The conclusion is that there was a policy of insurance. This policy was **Exh D.2**.

The other issue to consider is whether under the policy the Plaintiff was entitled to indemnity. The answer to that issue is found in **Exh D.2** under interest which provides for marine cargo as;

"this policy to provide coverage against All Risks of physical loss or damage to property and interests of every kind and description (including materials, equipment, machinery and spares) intended for the project while in transit by land, air and/or marine perils...."

The Defendant contended that the Plaintiff was not entitled to indemnity because she had dishonestly hidden the fact that the vessel she used was over 30 years. That this was something that the Plaintiff should have provided in the questionnaire.

It was a requirement to fill a Questionnaire before the Defendant could insure the Plaintiff.

The Questionnaire covered various things, like distance, type of roads to destination, delay penalties, security, weather along the route of transit, location of final destination, whether by sea, road or both, freight by ship or air, bridges to cross and clearance thereof.

In this case the cargo was being brought in by the bigger portion of the journey by sea. This sea journey started in Turkey and was to continue through the Suez Canal to Mombasa. Because of the risks involved there were provisions relating to permissible vessels by way of age.

In the instant case when the Plaintiff put in a claim after the iron bars had gone missing, the Defendants advocate Clyde & Co. Raised questions about the age of the vessel. He wrote to the Plaintiff;

"The first issue is whether the voyage was covered under the Policy. It is apparent that the M/V "EVR" was in fact, at the time of sailing, over the prescribed 30 years of age. In such circumstances the classification clause set out in the policy applies. In failing to give prompt notice as required, underwriters were unable to determine whether to grant coverage under policy in respect of the equipment and/or charge an additional premium and/or to apply additional/different conditions to the policy."

He concluded that because of the failure of the Plaintiff to disclose the ship's age as over 30 years, the underwriter would not consider the voyage, and therefore the loss as covered.

The Defendant's Advocate relied on the Institute Classification Clause 354 1/1/2001 which provided for qualification of vessels. Clause 2 on Age Limitation provides;

"Cargoes and/or interest carried by qualifying vessels which exceed the following age limits will be insured on the policy or open cover condition subject to an additional premium to be agreed.

Bulk or combination carries over 10 years of age or other vessels over 15 years of age unless they;

2.1 have been used for carriage of general cargo on an established and regular pattern of trading between a range of specified ports, and do not exceed 25 years.

2.2 Where constructed as containerships vehicle carries or double-skin open hatch gantry vessels (OHGCS) and have been continuously used as such on an established and regular pattern of

trading between a range of specified and do not exceed 30 years of age."

From the foregoing, it is clear that even a vessel of 15 years and above can be covered as long as the insurer is notified of the age of the vessel and the insurer pays an additional premium agreed upon by the parties.

In this case the Plaintiff was expected to notify the insurer that the age of the vessel was over 30 years.

This the Plaintiff could only do if she was aware of the age at the time she filled in the questionnaire.
Exh D.1 was the questionnaire and when asked under Transit Exposures 2(d) of the details of the vessel as to age the Plaintiff replied that it was "unknown" to her.

In a situation where the Plaintiff did not know certain particulars such as the age of the vessel, that ignorance should not be held against her.
This relief to the Plaintiff is provided for under the clause of ERROR and OMISSIONS of **Exh D2** which provides;

"Salini Construttori SPA believe the information provided in the two attached questionnaires, completed by Alstom, is accurate.

This insurance shall not be vitiated by unintentional error, omission or oversight in the information contained in the questionnaires and quoted as well in the information section, provided the same be communicated to the insurer as soon as known to the insured and any reasonable additional premium paid, if any."

The Plaintiff truthfully answered the question on age stating it was not known to them. The insurer found this sufficient answer and went ahead to insure the Plaintiff's cargo. In any case, the provision is that if they later found out about the age and communicated, the Insurer would have simply required an adjustment in the amount of premium as provided for in the

Institute Classification Clause. Moreover the intentional error, omission or oversight in the information if at all given by the Plaintiff would not vitiate the insurance as contained in the ERROR and OMMISSIONS Clause of **Exh D.2**. The sum total is that since the Plaintiff did not hide any information from the insurers, the Insurance Policy No. P/KLA/151/150L/07/1456, **Exh D.2** was a policy properly issued and gave cover to the cargo. Which entitles the Plaintiff to indemnity.

On whether the Plaintiff suffered loss, the Defendant submitted that there was no loss suffered. That there was no proof that the Plaintiff did not retrieve the cargo and put it to the intended use.

In the alternative that the cargo was condemned to be destroyed for no clear or apparent reason and lastly that the Plaintiff had not even bothered to mitigate loss.

The vessel set off from Nemrut Port, Izmir of Turkey on 20th July 2009 and was supposed to arrive in Mombasa on 15th August 2009 through the Suez Canal. By September it had not arrived and the parties did not seem to know where it was. Unknown to the parties, the vessel had developed engine problem and been diverted to Port of Conakry, Guinea in West Africa.

On 17th September 2009 the Plaintiff notified the underwriters that the vessel had not reached Mombasa.

On the 2nd December 2009 after receiving more information the Plaintiff wrote again stating that the vessel was rumoured to have developed engine problems on the West African Coast. That after 130 days since it left Turkey she did not expect the cargo. Plaintiff put them on notice of her intention to claim indemnity.

According to PW.1 the Plaintiff also received information that the vessel had been partly unloaded with the steel bars exposed to moisture which would degrade them. To mitigate loss the Plaintiff who was now concerned filed an application through legal counsel in the Conakry Court seeking an order of inspection of the cargo. The purpose was to ascertain the status of the cargo.

On the 23rd February 2010 the Court granted the application. It ruled as follows;

> *"To that effect we appoint Council Mohmed Aliou Cherif KEITA, a Bailiff at Conakry to handle the matter.*
>
> *We also appoint Mr. Kerfalla CAMARA from the Central Inspection Laboratory from the National University of Gamal Abdul Nasser in Conakry to determine the extent of degradation or deterioration of the cargo due to the risks it was exposed to."*

On the 5th March 2010 after considering the report of the bailiff, court found the cargo unfit for its intended purpose and directed the Plaintiff;

> "*to remove the cargo of reinforcing steel cargo, transported on the Ship "E.V.R/IMO no 7721598 and send it to the recycling centers through the authorised companies* and clean depot sites to restore them *to their ongoing environmental damage."*

On the 27th March 2010 the Plaintiff and the Defendant through their representatives conducted a joint survey where membership consisted of Mr Soure and Mr. Diallo both surveyors from Omega Marine said to have been nominated by cargo insurers/re insurers covering the interests of the defendant. In the team was also one Anastasi Pacquale representing the Plaintiff together with Mr Arecco Ignazio a consultant in insurance matters.

They came up with a report on 29th March 2010 to the effect that they had been shown an analysis report issued by GES Consulting. That the analysis of the cargo had been ordered by the Court which analysis results showed that the steel bars could not be used anymore for the intended initial purpose. It ordered that the whole cargo be sent to an authorised recycling company.

The team further accepted the results in these words;

> *"The Surveyors from Omega Marine have noted the results report and have received copy of the same. Having no contradictory analysis, the Surveyors have noted the results as well as the Court order No. 037 of 02 March confirming the analysis results.*

Together all the parties agreed to comply with the Court order and to consider the cargo not suitable for intended purpose anymore therefore as a total loss."

So it is not only the Plaintiff who declared the iron bars as a total loss. The Defendant's representatives did the same. It was a Court order that the iron bars be re-smelted. It did not matter whether the Defendant agreed with it. None could disobey the finding of the Court. It was in fact not challenged. The result was that the Plaintiff made a total loss and must be indemnified.

Turning to the remedies the Plaintiff sought payment of cost of cargo worth USD 2,686,556, Euro 348,000 being legal expenses relating to inspection and other expenses, General damages for breach of contract, interest at 15% on the amounts and costs.

During the hearing the Plaintiff abandoned the claim of 348,000 EUR because they had failed to prove it.

That left the claim of the value of the cargo.

The Plaintiff claims to have bought 5,021,60 metric tons of deformed iron bars at a price of 2,309.936. They also claimed to have paid 376,620 USD for freight. Both of these totalled 2,686,556 as money spent. These sums of money are clearly spelt out in the commercial invoice dated 18th July 2009. That the cargo of 5,021.60 metric tons was indeed loaded on the vessel is seen through the Marine Bill of Lading of 18th July 2009.

Counsel for the Defendant submitted that the Plaintiff only had a commercial invoice but no evidence of payment. While there is no receipt of payment, there is a commercial invoice clearly showing the money to be paid and which if not paid yet, is still owed by the Plaintiff and for him to make good the debt he would pay that same amount. It does not matter whether he paid or is just indebted. What matters is that he bought and shipped the cargo as the commercial invoice and Bill of Lading clearly show. It is my finding that the sum of money worth 2,686,556UD should be compensated by way of indemnity from the Defendant to the Plaintiff.

The Plaintiff also sought general damages for breach of contract. General damages are the direct and probable consequence of the act complained of. This can be inconvenience, mental

distress, loss of use of money retained or loss of profit, **Kampala District Land Board & Another v. Venansio Babweyana, Civil Appeal No.2 of 2007**.

The settled position is that the award of general damages is in the discretion of court, and is always as the law will presume to be the natural and probable consequence of the Defendant's act or omission; **James Fredrick Nsubuga vs Attorney General HCCS No, 13 of 1993.**

A Plaintiff who suffers damage due to the wrongful act of the Defendant must be put in a position he or she would have been in had she or he not suffered the wrong and when assessing the quantum of damages, courts are namely guided by the value of the subject matter, the economic inconveniences that a party may have been put through and the nature and extent of the breach; **Kibimba Rice Ltd vs Umar Salim SCCA No. 17 of 1992; Uganda Commercial Bank vs Kigozi [2002] 1EA305.**

In the instant case the Plaintiff indeed suffered loss when her cargo did not reach its final destination being Njeru, Jinja. The Plaintiff had to incur costs namely; legal expenses, expenses relating to delivery of samples. Furthermore, she also had to source alternative steel bars to carry out the project from Roofings Limited. Lastly time was of essence with penalties for late delivery.

Taking into account the fact that the Plaintiff had paid a premium and ought to have been indemnified as soon as she notified the Defendant's Underwriters of the loss I find general damages of US$. 200,000 appropriate. It is so awarded.

As for interest the guiding principle is that interest is awarded at the discretion of court; **Uganda Revenue Authority vs Stephen Mabosi SCCA No. 16/1995** but like all other discretion court must exercise it judiciously taking into account all circumstances of the case; **Superior Construction & Engineering Ltd vs Notay Engineering Ltd HCCS No. 24 of 1992.**

The Plaintiff sought Interest at the rate of 15% per annum on the amounts from the date of each expenditure till payment in full. The Plaintiff did not give reasons to justify such a high rate of interest however this being a business entity losses must be considered with a commercial lense.

Taking all the circumstances into consideration and the fact that the dollar currency is not so vulnerable to inflation I find an award of interest at 8 % per annum on the US $2,686,556 from 15th August 2009 the date the cargo was expected at its destination M/V "EVR" appropriate. Turning to general damages this court finds an award of interest at 6% per annum from date of judgment till payment in full appropriate. It is so awarded.

The Plaintiff is also entitled to costs of the suits.

In conclusion judgment is entered in favour of the Plaintiff against the Defendant in the following terms;

a) Defendant pays US $2,686,556
b) Defendant pays US$ 200,000 as general damages
c) Interest on a) at a rate of 8% per annum from 15th August 2009 till payment in full.
d) Interest on (b) at 6% per annum from date of judgment till payment in full.
e) Costs.

Dated at Kampala this 14th day of February 2019

HON. JUSTICE DAVID WANGUTUSI
JUDGE