IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 245 OF 1994

BETWEEN:

AMINAS HARDWARE CENTRE ..... PLAINTIFF

- and -

COMMERCIAL UNION ASSURANCE CO. PLC ..... 1st DEFENDANT

- and -

CHOONARA HIGHWAY EMPORIUM ..... 2nd DEFENDANT

CORAM: Tembo, J
Chisambiro, Counsel for the Plaintiff
Ching'ande, Counsel for the 1st Defendant
2nd Defendant Present but Unrepresented
Selemani, Official Interpreter

R U L I N G

By an originating Summons, the plaintiff has applied to the Court for a number of declarations to be made in the above cause namely-

(a) that theft of the vehicle MHG 257 having occurred during the period of insurance, the 1st defendant should pay the plaintiff as this falls under the provision of subsection 1 (b), under the heading Loss or Damage, of the motor policy Number 303922209, issued by the 1st defendant in favour of the plaintiff in respect of the motor vehicle MHG 257;

(b) that the 1st defendant should pay the plaintiff the sum insured for the vehicle of K120,000.00 or the market value at the time of theft whichever is less by the sum of K13,450.00 already paid in accordance with condition 4 of the policy under the heading Conditions;

(c) that the misstatement of the year of make of the motor vehicle which was indicated by the 2nd defendant on the plaintiff's proposal form as 1991 instead of 1986 is not fatal or does not go to the root of the insurance contract so as to nullify the said policy; and

(d) that if the misstatement is fatal, then the 2nd

defendant who misstated should pay the claim which would have otherwise been paid by the 1st defendant.

The originating summons is supported by the affidavit of Mr Mahomed Shiraz Suleman, the manager of the plaintiff and of Mr Chisambiro, Counsel for the plaintiff. However, it is opposed by an affidavit of Mr Ching'ande, Counsel for the first defendant.

The following facts in regard to the case have clearly emerged from the affidavits referred to above: On or about 14th December, 1992, the plaintiff through the 2nd defendant, entered into a contract of insurance with the 1st defendant for the insurance of the plaintiff's vehicle No. MHG 257. In the proposal form, the plaintiff had indicated that the vehicle's year of make was 1991. As a matter of fact the year of make was 1986. The purchase price and value of the vehicle, then, was indicated as K120,000.00 instead of a purchase price of K12,980.00, being the price and value of the vehicle which the plaintiff had declared to the customs authorities upon importation into Malawi of the vehicle in question on 4th May, 1992. The plaintiff paid a premium in the sum of K13,450, whereupon the 1st defendant issued policy No. 303922209 for the period 14th December, 1992, to 30th November, 1993. On or about 28th May, 1993, the vehicle MHG 257 was stolen by unknown persons and the police found it completely burnt at some place in Dedza where it was abandoned. The plaintiff notified the 1st defendant of the theft of the vehicle and claimed compensation in the terms of the policy. The first defendant rejected the claim and, then, repudiated liability on the basis that the plaintiff had made incorrect statements in his proposal form in respect to the year of make, the purchase price and value of the motor vehicle. In the circumstances, the first defendant merely refunded to the plaintiff the premium paid, thus, K13,450.00. The plaintiff still maintains that he ought to be paid the sum insured or the value of the car at the time of theft,hence the instant proceedings against the defendants.

I have heard both Counsel, each of whom has made lengthy oral submissions for my consideration in the determination of the plaintiff's summons now before me. Mr Chisambiro, for the plaintiff, has raised a number of legal points or arguments which I now set out as follows: that clause 1 (b) of the policy under consideraiton covers the case of the plaintiff in that the clause provides that the 1st defendant will indemnify the insured against loss of, or damage to, the vehicle insured caused, inter alia, by theft; that in the instant case the insured vehicle was actually stolen by unknown persons for which the 1st defendant must be held liable to indemnify the plaintiff. Mr Chisambiro has also submitted that in the terms of clause 4 of the policy under the heading **Conditions**, the first defendant should be ordered by the Court to pay to the plaintiff the sum insured or the value of the vehicle at the time of theft, whichever is the less. In his further submission, Mr Chisambiro urged the Court to hold that the mispresentations made by the plaintiff in his proposal form as to the year of make, purchase price and value of

the vehicle were not material facts; that such must more so be the case, in regard to the market value of the insured vehicle, as per clause 4 under heading **Conditions**, the 1st defendant had an option to either pay the sum insured or the value of the car at the time of the theft, whichever was less. He, in that regard, submitted that such misrepresentations were not, and should not be, regarded by the Court as having been fatal in that they rendered the contract of insurance voidable or void **ab nitio**. He further submitted that in the terms of the **Statement of General Insurance Practice** of the Association of British Insurers, in particular its paragraph 2 (b) (iii) even if the misrepresentations could be regarded as a breach of conditions or warranties, the Court should finally hold that they were unconnected to the theft that occurred, and for which reason the Court should nonetheless find the 1st defendant liable to indemnify the plaintiff as aforesaid. Finaly, Mr Chisambiro maintained the view that the 2nd defendant in acting, in matters affecting the instant case, so acted as the agent of the 1st defendant; that should the Court hold that the 1st defendant should not indemnify the plaintiff as aforesaid then the 2nd defendant ought to be ordered to do so instead.

On his part, Mr Ching'ande, Counsel for the first defendant, after noting that the parties were in agreement on the facts of the case, as these have been set out hereinbefore, made the following submissions, which were well set out in his affidavit, as follows: that the plaintiff, when filling in the proposal form, made false representations regarding the year of make, the purchase price and the present value of motor vehicle; that the false statements constitute misrepresentations which entitle the 1st defendant to avoid the contract of insurance. Further and in the alternative, the misrepresentations aforesaid constitute a breach of warranties and entitle the 1st defendant to treat the contract of insurance as void **ab nitio** and that the 1st defendant in fact did treat the contract as such and merely returned the premium to the plaintiff. It was further submitted that the misrepresentations were fraudulent and were made jointly by the plaintiff and the second defendant as principal and its agent, respectively. Finally Mr Ching'ande submitted that by condition 9 of the policy of insurance, the truth of the statements and answers in the proposal are conditions precedent to any liability of the 1st defendant to make any payment under the policy. Mr Ching'ande cited numerous case authorities in support of his submissions, some of which are cited and referred to hereinafter.

Mr Chimpeni, an employee of the 2nd defendant, told the Court that he had been instructed on phone to fill in a proposal form for the plaintiff. All the information contained in the proposal form was supplied to Mr Chimpeni by the manager of the plaintiff; that thereupon, Mr Chimpeni submitted the proposal form to the manager of the plaintiff who after perusal of the same signed it. The 2nd defendant had not been given or shown the Blue Book of the vehicle insured at anytime at all, even after the theft of the vehicle in question. On that basis, the 2nd defendant denies

liability to make any payment to the plaintiff.

The instant case, concerning as it does a contract of insurance, relates to a contract of **uberrimae fidei** in regard to which the principle of utmost goodfaith applies. See **Carter -V- Boehm** (1766), 3 Burr 1905 at page 1909 where Lord Manfield stated that insurance is a contract upon speculation where the special facts upon which the contingent chance is to be computed lie generally in the knowledge of the insured only, so that good faith requires that he should not keep back anything which might influence the insurer in deciding whether to accept or reject the risk. A fact is material if it is one that would affect the judgment of a prudent insurer, even though its materiality is not appreciated by the insured, thus in fixing the premium or determining as to whether or not he will take the risk. See **London Assurance -V- Mansel** (1879), 11 Ch. D 363; and **Container Transport International Inc. - V - Oceans Mutual Underwriting Association Ltd (1984) 1 Lloyds Report 476; Lacker and WoolF Ltd. - V - Westem Australian Insurance (1936) 1 K.B. 408; and Bates -V- Hewitt (1867) L. R. 2 Q B 595 at 607.** Besides that, where the insurer asks the insured to answer specific questions, the insured and the insurer are taken to have mutually intended that the facts arising from, or involved in, the answers to those questions are material facts. Certainly in the terms of the policy under consideration, such was the position, as it is clearly evident from the last but one paragraph on page two of the proposal form and also clause 9 of the Conditions of the Insurance policy under consideration. It is expedient that I set out such provisions herein, respectively, as follows-

> "I desire to effect an insurance against risks as set forth above in terms of the policy used for this class of business and I warrant that the above statements and particulars are correct and complete. I hereby agree that this proposal and warranty shall be held to be promissory and be the basis of the contract between me and the company.".
>
> "9.The due observance and fulfilment of the terms, conditions and endorsements of this policy in so far as they relate to anything to be done or complied with by the insured and the truth of the statements and answers in the said proposal shall be conditions precedent to any liability of the Company to make any payment under this policy.".

Thus in regard to that point, in the case of **London Assurance -V- Mansel** (cited above), Jessel M.R. stated the following at page 371:-

> "... First of all that the proposal which forms the basis of the contract asks a question ... Now where it is to form the basis of the contract, the other side cannot say it is not material. So here we have a proposal as the basis of the contract. It is

> impossible for the insured to say that the question asked is not a material question to be answered and that the fact which the answer would bring out is not a material fact."

On the effect of the misrepresentation, Jessel M.R. in that case cited with approval a statement by Lord Cranworth which Jessel M.R. considered laid down the law binding upon him, as follows:-

> "... the same principles which govern insurances, matters which are said to require the utmost degree of good faith, **"uberrima fides"**. In cases of insurance a party is required not only to state all matters within his knowledge, which he believes to be material to the question of the insurance, but all which in point of fact are so. If he conceals anything that he knows to be material, it is a fraud: but besides that, if he conceals anything that may influence the rate of premium which the underwriter may require although he does not know that it would have that effect, such concealment entirely vitiates the policy.".

In the case of **Thomson -V- Weems and Others (1883-4)** 11 AC page 671, the House of Lords had made the following decision, regarding the effect of misrepresentations in an insurance contract. In that case, the insured had applied to an insurance office to effect a policy on his life. He received a printed form of proposal containing questions. Among these was the following: "question 7(a) Are you temperate in your habits? (b) and have you always been strictly so? The insured answered (a) temperate (b) yes.". Subjoined to the printed question was a declaration which the insured signed, to the effect that the foregoing statements were true, and that the insured agreed that this declaration should be the basis of the contract and that if any untrue averment was made, the policy was to be absolutely void and all moneys received as premium forfeited. The policy recited the above declaration as the basis of the contract. After the insured's death the insurance company refused payment of the policy on the ground that the above-mentioned answers were false in fact. The House of Lords held that the declaration of the insured taken in connection with the policy, constituted an express warranty that the answer to question 7 was true in fact; and as the evidence (later) clearly proved that the insured's averment as to his temperance was untrue, the policy was absolutely null and void. In delivering his judgment in that case, Lord Blackburn, **inter alia**, stated the following legal principles:-

(a) at page 683-4, that "It is competent to the contracting parties, if both agree to it and sufficiently express their intention so to agree, to make the actual existence of anything a condition precedent to the inception of any contract and if they do so

> the non-existence of that thing is a good defence. And it is not of any importance whether the existence of that thing was or was not material; the parties would not have made it a part of the contract if they had not thought it material and they have a right to determine for themselves what they deem material.";
>
> (b) at page 684, that "But I think when we look at the terms of this contract, and see that it is expressly said in the policy, as well as in the declaration iteself, that the declaration shall be the basis of the policy, that it is hardly possible to avoid the conclusion that the truth of the particulars which I think include his statement that he was of temperate habits, is warranted.".

On his part, Lord Watson in his judgment in that case at page 689, cited with approval a statement of the Lord Chancellor (Cranworth) made in **Anderson -V- Fitzerald** that:-

> "Nothing, therefore, can be more reasonable than that the parties entering into that contract should determine for themselves what they think to be material, and if they choose to do so, and to stipulate that unless the insured shall answer a certain question accurately, the policy or contract which they are entering into shall be void, it is perfectly open to them to do so, and his false answer will then avoid the policy.".

Let me now consider the legal position of an insurance broker in relation to the insured and the insurer. It is clearly settled law that, both in marine and in non-marine insurance, an insurance broker is only the agent of the insured whether in matters relating to the placing of the policy or in matters arising when a claim is made. See **Anglo-African Merchants Ltd -V- Bayley and Others** (1970) 1 Q.B. 311; **Notcutt (Overseas) Limited -V- Nakanga** 10 MLR page 148; **Barak -V- Hogg Robinson (Malawi) Limited** 11 MLR page 280. Chief Justice Skinner in delivering his judgment in the case of **Notcutt (Overseas) Limited** said the following:-

> " the appellant is an insurance broker, and both before the Registrar and the Judge below the matter proceeded on the basis that an insurance broker is the agent of the insurer. It is conceded in this Court, by Mr Mhoni for the respondent, that in law an insurance broker is not the agent of the insurer. The position in law is, and it is well-settled law, that an insurance broker is the agent of the insured and not of the insurer: see **Anglo-African Merchants Limited -V- Bayley** the latest case on the point.".

Concerning the submission by Mr Chisambiro in regard to the Statement of General Insurance Practice of the Association of British Insurers, I have this to note and say: that it is indeed correct to note that in the light of harsh consequences which may sometimes be caused by absolute nature of the obligations to disclose, and not misrepresent facts, the Association of British Insurers have issued Statements of Insurance Practice to which their members are expected to adhere, with a view to mitigating the severity of the obligations in the case of private policies. In such statement it is provided that insurers will not repudiate liability on grounds of non-disclosure of a material fact which the policyholder could not reasonably be expected to have disclosed, or on ground of misrepresentation unless it is deliberate or negligent. It is conceded that such statements do not have a Force of Law, although they are binding on the Insurance Ombudsman or any arbitrator appointed under the (UK) Personal Insurance Arbitration Service Scheme. See **Chitty on Contracts** page 939 para. 4236-7. Thus where the misrepresentation is deliberate or negligent, the insurer is unconditionally entitled, to avoid the contract. In the context of the instant case, thus clause 2 b(iii) of the Statement in question, the insurer should be entitled to repudiate the contract on grounds of misrepresentation if the same was fraudulently made.

Finally, Mr Chisambiro has submitted that if the Court does not hold the 1st defendant liable to pay, then, the Court should order that the second defendant should do so. On this point I should first note that in view of the law referred to above, the 2nd defendant was the agent of the plaintiff. The only way in which the plaintiff may succeed to obtain payment from the 2nd defendant is if the plaintiff can prove that the 2nd defendant, as an insurance broker, had breached its duty to the plaintiff or that the 2nd defendant had failed to carry out his instructions in procuring the insurance. See **Barak -V- Hogg Robinson Limited** cited above. In that connection, in delivering his judgment, Unyolo, J. had this to say at page 287:-

> "In my judgment, the position of the defendant in relation to the plaintiff was merely that of an agent, in which case, the proper party for the plaintiff to sue under the contract qua insurers are the underwriters. In a word, the defendants contention in this case appears to be made out. **Notcutt (Overseas) Ltd -V- Nakanga** appears to be a case in point here ... The matter does not end there, however. Insurance brokers can be sued by their client. Normally, the gist of the insured's action against the broker in such cases is that the broker breached its duty to him or that the broker failed to carry out his instructions in procuring the insurance: see **Ackbar -V- C.F. Green & Co. Ltd.**".

Turning to questions put for my determination in the instant case, I have this to say. Although clause 1 (b) of the policy

between the parties provided that the 1st defendant should indemnify the plaintiff in case of loss or damage of the vehicle, **inter alia**, by theft, I cannot order or declare that the 1st defendant should in fact pay the plaintiff, for the following reasons. In view of the statements of the law outlined above, it is evident that the plaintiff and the defendant had agreed that the truth of statements and answers made in the proposal form by the plaintiff ought to be conditions precedent to the effectiveness of the contract and, therefore, to the liability of the 1st defendant to make any payment under the contract. See clause 9 of the policy under **Conditions**, as setout above. Similarly, the plaintiff by his proposal form had warranted that the statements and particulars thereof were correct and complete and further that the proposal was to form the basis of the contract between the plaintiff and the 1st defendant. See the warranty set out above.

It is not denied that the plaintiff had made misrepresentations as to the year of make, purchase price and value of the vehicle. In my judgment, and in view of the law clearly set out above, these were material facts which were made fraudulently by the plaintiff in that he well knew that what he was stating was false. As such, the effect of such misrepresentations, was to entitle the 1st defendant to avoid the contract. Accordingly, the 1st defendant rightly in law elected to repudiate the contract as he did. Even if I were to admit that the statement of Insurance practice were applicable to the instant case, a matter which I do not in fact hereby determine, clause 2 b (iii), thereof relied upon by the plaintiff goes on to say that an insurer will not repudiate liability to indemnify a policyholder on grounds of a breach of warranty or condition where the circumstances of the loss are unconnected with the breach unless fraud is involved. In the instant case I have already held that the misrepresentations were fraudulent. Such being the case the plaintiff cannot succeed in having any benefit from the appliction of clause 2 b (iii) of the Statement of Insurance Practice in question.

As to whether the plaintiff should succeed to claim payment from the second defendant, the position must be as follows. From the facts of the case, it is clear that the plaintiff's manager had provided the information to the 2nd defendant for completing the proposal form. In doing so, the plaintiff's manager had withheld the provision of the Blue Book for the vehicle in question. That the 2nd defendant after filling the form with the information provided by the plaintiff's manager, submitted the form to the plaintiff's manager who upon perusal of the same duly signed it. As indeed the law provides, the plaintiff can only succeed against the 2nd defendant, an insurance broker, the plaintiff's agent, if the plaintiff can prove that the 2nd defendant had breached a duty towards the plaintiff or that the 2nd defendant had failed to carry out instructions in procuring the insurance. There is no evidence whatsoever of the breach of any duty or indeed that the 2nd defendant had failed to carry out

instructions in procuring the policy in question.

In the circumstances, and for all the reasons set out hereinbefore, the plaintiff's action must fail both in regard to the first and second defendants. Costs are for the defendants.

MADE in Chambers this 5th day of October, 1995, at Blantyre.

A. K. Tembo
JUDGE