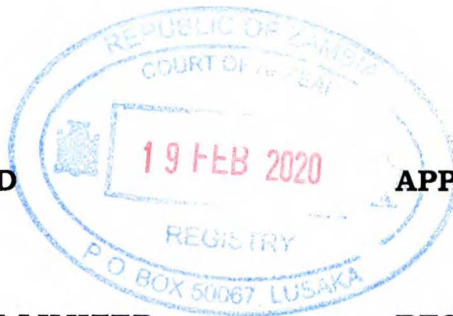
IN THE COURT OF APPEAL FOR ZAMBIA **CAZ APPEAL No.135/2018**

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:



NORTHWOLD INVESTMENTS LTD **APPELLANT**

AND

DIAMOND GENERAL INSURANCE LIMITED **RESPONDENT**

CORAM: CHISANGA JP, KONDOLO SC, MAJULA, JJA

On 26 April, 2018 and on 19th February, 2020

For the Appellants : No Appearance

For the Respondent : No Appearance

JUDGMENT

KONDOLO SC, JA delivered the Judgment of the Court

CASES REFERRED TO:

1. **Carter v Boehm (1776) 3 BURR 1905, 1909-1910**
2. **YB and F Transport Limited v Supersonic Motors Limited SCZ/3/2000**
3. **Pym v Campbell (1856) 6E&B 370**
4. **Philip Mhango v Dorothy Mhango and Others (1983) ZR 1**

OTHER WORKS REFERRED TO:

1. **The Construction of Deeds & Statutes, Sir Charles Odgers, Sweet & Maxwell, London**

The background to this appeal is that the Appellant insured his motor vehicle with the Respondent Insurance company under the following conditions;

1. A cover Note which indicated that the vehicle was insured for the sum of K148,500,000 (unrebased) was executed on the, 24th July, 2012
2. The parties agreed that the premium of K5,630,163.28 would be paid by instalments and an Instalment Premium Payment Agreement ("**IPPA**") was also executed on the 24th July, 2012 and it indicated the period of insurance as ending on 30th June 2013.

The sums of money referred to in this Judgment are pre-rebasing of the Zambian Kwacha.

What then transpired is that the Appellants car was involved in an accident on 11th August, 2012, before any instalment was paid. After the accident occurred the Respondent paid the inception premium on 21st August, 2012 and only notified the Appellant about the accident on 3rd September, 2012. The Police Report attached to the notification as proof of the accident was dated 29th

August, 2012 but did not indicate the date and time of the accident. The Respondent denied the insurance claim and the Appellant commenced the subject action.

The Respondent reacted by filing a Defence and Counter Claim seeking an order of repudiation of the Appellant's claims and damages for breach of contract and the Appellant replied by stating that the Respondent was not entitled to any of those claims.

The Appellant's main argument during the trial was that the IPPA did not indicate the date on which the inception premium was due, and that being the case, according to the **Pension & Insurance Authority Circular No. 1 of 2005, revised in 2009** ("**PIA Circular**") the due date was any date within 30 days of the Cover date. It was submitted that the Cover Note was dated 24th July, 2012 and the Appellant paid the inception premium on 21st August, 2012 which was within the stipulated 30-day period. The Appellant argued that the policy was running, even before they had paid any premium because they had an agreement as the cover note had been issued.

The Appellant told the trial Court that the car was deemed irreparable or written-off and in line with clause 8 of the IPPA, the Respondent asked the Appellant to pay off the balance of the premiums in full and the Appellant duly complied. As proof of payment, the Respondent referred to the Bank statement exhibited in its Bundle of Documents and submitted that the Respondent should have honoured the insurance Claim. However, under cross examination the Respondent admitted that the statement referred to only showed the initial deposit of K2,252,065 .03 and that the balance of the premium instalments was not reflected.

The Respondent's argument was that the inception date was the date of the IPPA which indicated that an initial deposit of K2,252,065.03 was to be paid followed by monthly instalments of which the first was due on 30th August, 2012. It was pointed out that even though the IPPA made reference to an "Initial Deposit" and an "Inception Premium" each in the sum of K2,252,065.03, the two were actually one and the same thing and the due date for payment was the date of the IPPA. The IPPA provided that where payment was not made within 7 days of the due date, the policy would automatically lapse.

It was further pointed out that the accident occurred before any premiums were paid and opined that the Appellant acted in bad faith by not disclosing that the car had already been in an accident and written-off when it made the payment on 21st August. The Respondent observed that the police report did not indicate the date and time of the accident. The Respondent told the trial Court that the payment of instalments from the Appellant was received by mistake because the vehicle had already been involved in a car accident. During the trial, DW1 on behalf of the Respondent testified that they only received payment of K2,252,065.03 from the Respondents but had paid the sum of K5,630,097.28 into Court.

After considering the evidence, the trial Court identified the following, as issues that arose for her determination;

1. ***On what date was the inception premium payable?***
2. ***Was the Respondent justified in declining to honour the insurance claim?***
3. ***Was the Respondent entitled to damages for the Respondent's refusal to settle its claim with interest and costs?***

4. ***Whether the Defendant was entitled to repudiate the contract and be paid damages for breach of contract with interest and costs?***
5. ***How should the payment into Court be dealt with?***

The trial Judge agreed that the inception date was the date of the IPPA which was in fact the beginning of the contract. Reference was made to the PIA circular No.1 of 2005 (revised in 2009) which stipulates that where an IPPA has been entered into by the Parties, the provisions of the IPPA shall take precedence. On that basis the trial Court found that the claim could not be honoured as the policy had lapsed because the Appellant had not paid the inception premium within 7 days of the due date as provided by clause 2 of the IPPA.

The Court further found that the Appellant had acted in bad faith by proceeding to pay an instalment without informing the Respondent that the insured vehicle had already been in an accident. The Appellant had concealed material facts in order to draw the Respondent into accepting payment of the inception premium and it followed that the Respondent received the

premium by mistake. The trial Court further ordered that from the sum of K5,630,097.28 paid into Court, the Respondent should be refunded the sum of K2,252,065.03 which it paid to Appellant.

On the counterclaim, the Court ordered that the Respondent was entitled to repudiate the contract because the inception premium was paid 10 days after the loss and the Appellant acted in bad faith. The claim for damages for breach of contract was denied because the Respondent had not proved that it suffered any damages.

Dissatisfied with the Judgment, the Appellant appealed on three grounds as follows;

1. **The Court erred by making a finding of fact that the inception premium was payable on 24th July 2012 in the absence of an express provision to that effect.**
2. **The trial Judge misdirected herself when she ordered a refund of only K2,252.30 [rebased] out of the K5,630.16 [rebased] paid to the Respondent.**
3. **Costs should not have been awarded to the respondent because its counter-claim failed.**

When the matter came up for hearing, none of the Parties were present and neither were their Lawyers. Counsel for the Respondent had filed a Notice of non-attendance but Counsel for the Appellant was absent without notice or apology. We decided to consider the Appeal on the basis of the Grounds of Appeal filed by the Appellant and the Heads of Argument filed by both Parties.

The gravamen of the Appellant's argument on the first ground of Appeal was a carbon copy of the arguments they advanced in the lower Court, namely that the IPPA did not specify the date when the Inception premium was due and that under the circumstances the provisions of **Clause 1 of the PIA Circular** should apply. The provision reads as follows;

> ***"A contract of Insurance shall cease to operate if premium is not paid within 30 days after the due date of premium, or such period as the contract will stipulate. The due date shall be the commencement of cover or the date stipulated in the contract of Insurance."***

It was argued that because the due date for payment of the inception premium was not specified the due date was therefore 30 days after the date of the Cover Note which was dated 24th July

2012. The Respondent admitted that the said IPPA circular specified that the terms of an **IPPA** took precedence over the Circular and that the **IPPA** executed by the Parties stated that the policy would lapse if the initial payment was not paid within 7 days of the due date. It was however submitted, that the **PIA Circular** did not aid the Respondent because it did not specify the due date of the inception premium hence the argument that the due date was 30 days after the commencement date of the Cover Note.

It was further submitted that the terms of the PIA were clear and could not be altered and in support cited the case of **Pym v Campbell** and the book entitled, **The Construction of Deeds & Statutes**. It was on that basis opined that the Respondent should have honoured the insurance claim because the accident occurred on 11th August, 2012 which was 18 days after the date of the commencement of the cover but within the 30-day grace period specified by the PIA Circular. This Court was urged to interfere with the trial Court's finding of fact that the due date for the initial deposit was 24th July, 2012. The case of **Philip Mhango v Dorothy Mhango and Others** was cited.

The final argument under ground 1 was that, clause 8 of the IPPA provided that in the event of total loss of the insured item,

the premium shall fall due for payment immediately, in full. It was pointed out that the Appellant was allowed to pay the premium in full and that proof of this was provided by the bank deposit slip at page 43 of the Record of Appeal in the amounts of K2,252,065.03 and K3,378,097.97 respectively making a total of K5,630,097.28.

Under ground 2, the Appellant's argument was essentially that the Court should have found that after the accident, the Appellant had paid the Respondent the full sum of K5,630,097.28 as illustrated by the bank deposit slip. It was argued in the alternative that on that basis the Court should have ordered that the Appellant be paid the full amount of K5,630,097.28 paid to the Respondent and not just the sum of K2,252,065.03 as ordered by the Court.

In response to grounds 1 and 2 the Respondent argued that the trial Court was on firm ground because even though the IPPA, referred to the "initial deposit" and "inception premium", they were actually one and the same thing and the IPPA stated that the period of insurance commenced on 24th July, 2012 which was the same date appearing on the cover note as to when the cover commenced, meaning that the inception premium/initial deposit of the IPPA was due on the 24th July, 2012.

It was pointed out that the Appellant did not dispute that the due date for payment of inception Premium is the date on which the cover note took effect which is the 24th of July, 2012. It was submitted that even though the date of payment of the inception premium is not inserted, the said date could be discerned from the IPPA itself, the Cover Note and even from the PIA Circular No. 1 of 2005.

The Appellant advanced the argument that another reason the Respondent could not be compensated is because the accident occurred before any premium was paid, meaning that there was no consideration and therefore no enforceable contract between the parties. It was emphasised that by the time the inception premium was being paid, the risk insured against had already occurred and it was opined that there can be no valid insurance where the risk insured against has already occurred.

With regard to the claim that full payment of the premiums was effected, the Respondent states that the Appellant only produced one receipt as proof of payment and the other amount shown on the bank statement does not show what the payment was for.

We have considered the arguments of both Parties under grounds 1 and 2. The trial Judge held that the inception date of

the contract in issue was the 24th July, 2012 which was the beginning of the insurance period. Even though the Appellant is quite right that the IPPA does not specifically state the date of payment of the inception premium, the trial Judge was on firm ground when she found that the inception date of the IPPA is clearly indicated as 24th July, 2012. It therefore follows that the due date of the inception premium would be that same date which in fact coincides with the date of the cover note.

The Appellant's argument that the applicable regulation is paragraph 1 of the PIA circular which provides for a grace period of 30 days from the date of the cover note is not tenable because the PIA circular states that the IPPA takes precedence over the PIA and the IPPA provides in clause 2 that where an instalment premium is not received in 7 days the policy of insurance will automatically lapse. *In casu*, the inception instalment was paid 18 days later and therefore outside the 7 days' grace period meaning that the insurance policy had automatically lapsed. We therefore agree with the trial Judge that by the time the Respondent paid the inception premium the policy was void.

We also agree with the trial Judge's finding that the Appellant exercised bad faith by paying the inception premium without

disclosing to the Respondent that the insured car had already been involved in an accident. This aspect is cardinal because if the argument be that, even though the cover had lapsed, it was renewed by acceptance of the premium, the principle of *uberrima fides* (utmost good faith) enunciated in the cited case of **Carter v Boehm** would apply because the Respondent accepted the inception premium after the Appellant had withheld material information from him, namely that the subject matter (the vehicle) had been written off in an accident. In the cited case, Lord Mansfield stated that:

> ***'Good faith forbids either party by concealing what he privately knows, to draw the other into a bargain, from his ignorance of that fact, and his believing the contrary'.***

An insurance claim can be rejected for non-disclosure of material facts where that disclosure misleads the insurer into providing insurance cover where he otherwise would not.

Under ground 2, the Appellant has urged this Court to upset the trial Court's finding of fact that only K2,252,065.03 was paid by the Appellant to the Respondent in respect of this claim. It is claimed that as shown on the Bank statement appearing on page

43 of the Record of Appeal, on the 22nd August, 2012 the Appellant made two payments to the Respondent in the sums of K2,252,065.30 and K3,378,097.97 making a total of K5,630,097.28. The Respondent's short answer to this was that the Appellant had not proved that the Respondent had received the sum of K3,378,097.97 as the only receipt produced as proof of payment was in the sum of K2,252,065.30.

It has been stated time and again that Appellate Courts will only interfere with a trial Court's findings of fact where the findings are in such contrast to the evidence that no reasonable tribunal could have arrived at the same conclusion. During the trial, PW1 a director in the Appellant company told the Court that they had more than seven vehicles insured by the Respondent. When referred to the subject bank statement, PW1 stated as follows; *"On the plaintiff bank statement on page 4 of the plaintiffs bundle of documents it shows a deposit on 22nd August, 2012 of K2,252,065.03.* ***The balance of the premium instalment payments are not shown here in this statement.****"* (emphasis ours)

The Bank statement alluded to provides no details of the payee nor the purpose of the payments. The only tangible proof of

payment is the receipt referred to earlier. We find no reason to interfere with the trial Court's finding of fact and ground 2 is consequently dismissed.

The gravamen of ground 3 was that costs should not have been awarded to the Respondent in the lower Court because the Respondent's counterclaim had failed. The Respondent submitted that it had long been established that costs follow the event and these proceedings were initiated by the Appellant whose entire action had failed.

Order XII Rule 1 of the **Court of Appeal Rules** gives this Court wide discretion in awarding Costs both in this Court and the Court below. As correctly pointed out by the Appellant, costs follow the event and the case of **YB and F Transport Limited v Supersonic Motors Limited**, refers.

Counter-claims are proceedings in their own right and the rules relating to costs apply in equal measure. However, quite contrary to the Appellant's assertion, the counter claim did not fail as only the claim for damages was refused on account that the Respondent had not proved any loss. The claim for repudiation of contract was granted. The Respondent was substantially successful in the Court below and we would on that basis dismiss ground 3.

The net result is that this Appeal is dismissed in its entirety and costs are awarded to the Respondent in this Court.

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F.M. CHISANGA
JUDGE-PRESIDENT

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M.M. KONDOLO SC
COURT OF APPEAL JUDGE

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B.M. MAJULA
COURT OF APPEAL JUDGE