**IN THE HIGH COURT OF ZAMBIA** **2009/HPC/789**
**AT THE COMMERCIAL REGISTRY**
**HOLDEN AT LUSAKA**
*(Commercial Jurisdiction)*

BETWEEN:

**MATTANIAH INVESTMENTS LIMITED** **PLAINTIFF**

AND

**ZAMBIA STATE INSURANCE CORPORATION LTD** **DEFENDANT**

**BEFORE THE HON. MR. JUSTICE C. KAJIMANGA THIS 4TH DAY OF MAY, 2011.**

**FOR THE PLAINTIFF:** Ms N. Kantumoya, Messrs Simeza Sangwa & Associates

**FOR THE DEFENDANT:** Mr. G. G. Chilekwa, Legal Counsel

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# J U D G M E N T

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**Cases referred to:**

1. Anderson Kambela Mazoka & Others v Levy Mwanawasa & Others (2005) Z. R. 138
2. De Souza v Home and Overseas Insurance Company [1995] L R L R 453

**Works referred to:**

1. Black's Law Dictionary, Sixth Edition
2. Colinvaux's Laws of Insurance, 6th edition
3. Halsbury's Laws of England, 4th edition volume 5

4. Mumba Malila, Commercial Law in Zambia: Cases and Materials (UNZA Press, 2006)
5. Insurance Law: Doctrines and Principles 2nd edition

The Plaintiff issued a writ of summons endorsed with a claim for:

(a) the sum of K40,356,000.00 or alternatively, damages

(b) interest

The brief facts are that by a policy of insurance number BGLPPH0000110701 dated 5th February, 2008 made by the Defendant in consideration of premiums paid to it by the Plaintiff, the Defendant insured the Plaintiff against loss of 150,000 broiler chickens located at Sub-division 1 of Sub-division "U" of Farm No. 215a, Lusaka West, Lusaka for K12,000.00 per chicken due to accident, disease and illness.

On 9th April, 2008 the Plaintiff lost 3,363 broiler chickens due to failure of electricity supply to the farm. The Defendant was notified of the loss but declined to settle the claim alleging that the loss was not covered by the Plaintiff's insurance policy, hence this action.

The Plaintiff called one witness, John Sangwa, its director. His witness statement discloses that on 10th August, 2006 the Plaintiff company, through him as director took out an insurance policy with the Defendant company, to insure the Plaintiff company's chickens against loss due to accident, disease and illness. The policy was renewed on 5th February, 2008 and policy number BGLPPH0000110701 was accordingly issued, insuring the Plaintiff company against loss of 150,000 broiler chickens with the value of each chicken pegged at K12,000.00.

The witness statement of PW1 also discloses that most of the Plaintiff's chickens are kept in full enclosed, computerized and environmentally

controlled houses in which all the needs of the chickens are automatically controlled. Given the high level of automation, the Plaintiff relies heavily on regular supply of electricity from ZESCO to keep the farm operational. However, as an alternative back-up system in the event of failure of ZESCO supply, the Plaintiff has 110 KVA stand-by generator, enough to supply all the electricity needs of the farm. The generator is regularly maintained by the supplier Barloworld Equipment Zambia Limited. On 9th April, 2008 there was a sudden failure in electricity supply from ZESCO which affected the Plaintiff's farm and the surrounding farms. For some unexplained reasons the generator also failed to start and supply the electricity needed until some two hours later when it was fixed.

The witness statement further discloses that due to lack of electricity supply by both ZESCO and the generator, the ventilation system failed, leading to an increase in temperature in the chicken houses, which in turn led to the death of 3,363 chickens. The following day on 10th April, 2008 PW1 informed the Defendant through its agent, Budget Insurance Brokers Limited, of the loss suffered due to a break down in electricity supply and also requested them in writing to view the birds before their disposal. The Defendant's officers did not visit the Plaintiff's farm until on 14th April, 2008 and in its letter dated 15th April, 2008 the Defendant declared that the loss suffered by the Plaintiff was not an insured risk as provided for in the policy. On 27th May, 2008 the Plaintiff formally challenged the Defendant over its decision. The loss suffered by the Plaintiff when quantified in monetary terms at the material time amount to K40,356,000.00 which is being claimed together with interest and costs. The Defendant's failure to pay the said amount is a breach of the policy of insurance.

In cross examination PW1 told the Court that the generator was fixed two hours later. He testified that the engineers told him that the generator had

an air lock. He said that there was no physical damage to the generator or the chicken houses.

PW1 further testified that there was no ventilation in the chicken houses, hence the loss of chickens because there was no power from ZESCO and the generator. It was also his evidence that there was no damage to the electrical line supplying power to the chicken houses.

In re-examination, PW1 told the Court that the chicken houses are fully automated and the requirement is that there has to be electricity supply at all times. He testified that the first line of supply of electricity was ZESCO and as a back-up the company also has a generator.

The Defendant also called one witness, Emmanuel Malata, its assistant manager in the fire, accident and engineering department. His witness statement discloses that on 10th August, 2006 the Defendant company underwrote a policy insuring the Plaintiff's broiler chickens against loss due to accident, disease and illness. The policy was renewed on 5th February, 2008, insuring the Plaintiff against loss of 150,000 broiler chickens.

The witness statement of DW1 further discloses that on 9th March, 2008 the Defendant received a claim notification from the Plaintiff's agent, Budget Insurance Brokers. On 14th April, 2008 the Defendant visited the Plaintiff's farm to assess the reported loss the Plaintiff had suffered. On 15th April, 2008 the Defendant communicated its findings to Budget Insurance Brokers to the effect that the cause of loss was not an insured risk. The Defendant has therefore refused to pay the Plaintiff any indemnity or compensation as the loss was not covered by the policy. The Defendant's refusal to pay the Plaintiff was not in breach of the policy of insurance.

In cross-examination, DW1 told the Court that the Plaintiff had no input in the drafting of the insurance policy. He testified that the Plaintiff was insured against loss due to accident, illness and disease but the word

*'accident'* is not defined in the policy issued to the Plaintiff. It was his evidence that under the Plaintiff's policy, an *'accident'* is when there is an external force, for example, an explosion or the collapse of chicken houses, adding that it is something unexpected and without the insured's involvement.

DW1 told the Court that power failure by ZESCO was foreseen by the Plaintiff and that was why there was a stand-by generator. The witness conceded that the Plaintiff would not have foreseen that the stand-by generator would fail to operate when switched on.

DW1 also testified that when they visited the Plaintiff's farm for assessment, they were told that the chickens had died of suffocation due to lack of ventilation as a result of non supply of fresh air and non expulsion of used up air from the chicken houses because of the non functioning of the stand-by generator.

On behalf of the Plaintiff, Ms Kantumoya submitted that the Defendant undertook to indemnify the Plaintiff for loss suffered due to accident, disease and illness. She argued that the Plaintiff suffered loss due to accidental death of chickens but it has not been indemnified by the Defendant for the loss suffered, in breach of the contract of insurance.

Counsel contended that the policy of insurance signed between the parties does not define what an accident is. She referred the Court to the case of ***Anderson Kambela Mazoka & Others v Levy Mwanawasa & Others(1)*** where the Supreme Court stated that:

> ***"It is trite law that the primary rule of interpretation is that words should be given their ordinary grammatical and natural meaning. It is only if there is ambiguity in the natural meaning of the words and the intention cannot be ascertained from the***

***words used by the legislature, that recourse can be had to the other principles of interpretation."***

It was Ms Kantumoya's submission that since the word *'accident'* is not defined in the policy of insurance, the natural and ordinary meaning of the word should be used to define what an accident is. She referred the Court to ***Black's Law Dictionary*** which defines *'accident'* as follows:

***"1. An unintended and unforeseen injurious occurrence; something that does not occur in the usual course of events or that could not be reasonably anticipated.***

***2. An unforeseen and injurious occurrence not attributable to mistake, negligence, neglect or misconduct.***

***The word 'accident', in accident policies, means an event which takes place without one's foresight or expectation. A result, though unexpected, is not an accident; the means or cause must be accidental; … but where, in the act which preceded an injury, something unforeseen or unusual which produces the injury, the injury results through accident."***

Ms Kantumoya contended that the loss of the chickens was both unintended and could not be foreseen as the failure of power supply from ZESCO and the failure of the generator could not be reasonably anticipated. Counsel argued that the act which preceded the loss of the chickens (injury) was the failure of the generator to operate after power supply from ZESCO had failed, adding that the generator's failure was unforeseen and unusual and therefore the loss of chickens resulted through accident.

Counsel also submitted that the loss suffered by the Plaintiff falls into the realm of accident as there was no mistake, negligence or misconduct which could be attributed to the Plaintiff and therefore covered under the

policy of insurance. Ms Kantumoya referred the Court to the evidence of DW1 in cross-examination to the effect that the Plaintiff could not have foreseen that the generator would fail to operate when electricity supply from ZESCO failed.

Counsel further made reference to the evidence of DW1 in cross-examination to the effect that the Plaintiff did not have any input in drafting the policy of insurance and relied on the learned authors of ***Colinvaux's Laws of Insurance*** at page 37 where it is stated as follows:

> ***"A policy of insurance has to be construed like any other contract; it is to be construed in the first place from the terms used in it, which terms are themselves to be understood in their primary, natural, ordinary and popular sense. The meaning of a word in a policy is that which an ordinary man of normal intelligence would place upon it, it is to be construed as it is used in the English language by ordinary persons."***

This authority further states at page 42 as follows:

> ***"In such cases the rule is that the policy, being drafted in a language chosen by the insurers, must be taken most strongly against them. It is construed contra proferentem, against those who offer it. The assured cannot put his own meaning upon a policy, but, where it is ambiguous, it is to be construed in the sense in which he might reasonably have understood it."***

The Court was also referred to the ***Halsbury's Laws of England 4th edition, volume 5*** where it is stated at page 237, paragraph 395 as follows:

> ***"When presented with a conflict between the parties as to the meaning of the policy, the Court's functions is to interpret what the parties have in fact said in their contract, not to***

***speculate as to what they may have intended when entering into the contract."***

Ms Kantumoya submitted that the authorities cited above clearly show that the words in an insurance policy are to be construed and understood in their natural and ordinary meaning and that being drafted in a language chosen by the insurers, must be taken strongly against them. She contended that in the present case, the Plaintiff did not have any input in how the policy was formulated and as such it should be construed against the Defendant as its officers were responsible for formulating the policy. Counsel argued that the Plaintiff took steps to ensure that there was continuous supply of electricity to its farm by installing a stand-by generator. It is also her contention that the loss of the chickens due to failure of electricity supply is not part of the express exclusions as defined in the exclusion clause of the policy of insurance.

Ms. Kantumoya also submitted that in determining whether an accident occurred, the Court should invoke the doctrine of proximate cause as defined by the learned author of ***Commercial Law in Zambia: Cases and Materials*** at pages 512 and 513 in the following words:

***"This is concerned with the rules which are employed in the insurance industry to determine whether or not a loss which is the subject matter of a claim was covered by an insured peril. In order to make the insurer liable to indemnify the insured, the loss must be a direct consequence of a peril insured against.***

***The proximate cause of loss insured against is not necessarily the latest in cause. The Courts will seek the direct, dominant, effective and efficient cause of loss. In determining what the proximate cause of a loss is, the courts have consistently***

***declared that the guide is common sense, and causation is to be understood as the man in the street would understand it."***

Counsel submitted that the proximate cause of the loss suffered by the Plaintiff was the failure of electricity supply, both from ZESCO and the Plaintiff's generator, which is the efficient cause that set in motion a chain of events resulting in the death of the Plaintiff's chickens, causation being understood as the man in the street would understand it. She concluded by submitting that the loss suffered by the Plaintiff is covered by the policy of insurance and that it has discharged the burden of proof, entitling it to a finding in its favour. Counsel accordingly prayed that the Defendant be ordered to indemnify the plaintiff for the loss suffered in the sum of K40,356,000.00.

On behalf of the Defendant Mr. Chilekwa submitted that the issue to be determined is whether there was an accident or not. He referred the Court to the case of ***De Souza v Home and Overseas Insurance Company(2)*** where Mustill J, defined 'accident' as involving ***"… the idea of something fortuitous and unexpected, as opposed to something proceeding from natural causes."*** He argued that in analyzing this authority, the learned authors of ***Insurance Law: Doctrines and Principles, 2nd edition*** postulate at page 360 that ***"some one who dies as a result of an undetected heart condition is not killed by an accident but by natural causes."***

Counsel submitted that there was no supply of electricity to the chicken houses because the generator failed to operate due to an airlock and that this was a mechanical problem requiring fixing but not an accident. According to Mr. Chilekwa, this event is incapable of being clothed with 'accident' as defined by Mustill, J or the three definitions from ***Black's Law Dictionary***.

It was also his submission that the loss of the chickens was certainly unintended but the loss of power from ZESCO was anticipated to the extent that the Plaintiff had a stand-by generator. He contended that the generator's failure to operate in circumstances such as these was a natural consequence and the cause of loss was therefore not an accident.

Mr. Chilekwa submitted that the Plaintiff has not discharged its burden of proof and is not entitled to a finding in its favour and that on the facts of this case, the Defendant is not liable to the Plaintiff under the policy of insurance. He accordingly urged the Court to dismiss the Plaintiff's claim with costs.

I have considered the evidence on record, skeleton arguments, authorities relied on and the written submissions filed on behalf of the parties. It is common cause that a valid contract of insurance was entered into between the Plaintiff and the Defendant by which the former was insured by the latter against loss of its 150,000 broiler chickens due to accident, diseased and illness. It is also incontrovertible that during the subsistence of the insurance contract, the Plaintiff lost 3,363 chickens due to failure in electricity supply from ZESCO and the Plaintiff's stand-by generator as the chicken houses are fully automated. In my view, the sole issue to be determined by the Court is whether or not the loss suffered by the Plaintiff was an insured risk.

The position of the Defendant is that they refused to compensate the Plaintiff because the loss was not covered by the policy. According to Mr. Chilekwa, the failure of the generator was a natural consequence and the cause of death of the chickens was therefore not an accident. DW1 conceded that the word *'accident'* was not defined in the policy of insurance. As such, other sources have to be resorted to in seeking the meaning of the word.

Both counsel have cited authorities on the definition of 'accident'. In addition to the definitions given by counsel, ***Black's Law Dictionary, Sixth Edition*** also gives the following definitions at page 15:

> ***"In its most commonly accepted meaning, or in its ordinary or popular sense, the word may be defined as meaning; a fortuitous circumstance, event, or happening; an event happening without any human agency, or if happening wholly or partly through human agency, an event which under the circumstances is unusual and unexpected by the person to whom it happens; an unusual, fortuitous, unexpected, unforeseen or unlooked for event, happening or occurrence; an unusual or unexpected result attending the operation or performance of a usual or necessary act or event; chance or contingency; unfortunate; mishap; some sudden and unexpected event taking place without expectation, upon the instant, rather than something which continues, progresses or develops; something happening by chance; something unforeseen, unexpected, unusual, extraordinary or phenomenal, taking place not according to the usual course of things or events, out of the range of ordinary calculations; that which exists or occurs abnormally, or an uncommon occurrence. The word may be employed as denoting a calamity, casualty, catastrophe, disaster, an undesirable or unfortunate happening; any unexpected personal injury resulting from any unlooked for mishap or occurrence; any unpleasant or unfortunate occurrence, that causes injury, loss, suffering or death; some untoward occurrence aside from the usual course of events. An event that takes place without one's foresight or expectation; an undesigned, sudden, and unexpected event.***

***Insurance Contract. An accident within accident insurance policies is an event happening without any human agency, or, if happening through such agency, an event which, under circumstances, is unusual and not expected by the person to whom it happens. A more comprehensive term than 'negligence" and in its common signification the word means an unexpected happening without intention or design."*** (emphasis added).

The sum and substance of all these definitions is that an 'accident' is simply something unusual, unforeseen or an unexpected occurrence that causes injury, loss or death. In my considered opinion, what happened to the Plaintiff in the instant case fits squarely in the definitions of 'accident'. On the material day, according to the evidence on record, there was ZESCO power failure. Worse still the stand-by generator also failed to function. As properly and honestly conceded by DW1 during cross-examination, the Plaintiff could not have foreseen that the generator would fail to operate when electricity supply from ZESCO failed. The very purpose of having a 110 KVA standby generator was to ensure that there was continued supply of electricity to the fully automated chicken houses even in case of ZESCO power failure. What happened was an unexpected event which was not designed or intended by the Plaintiff. Stated otherwise, the incident was an accident which resulted in the loss of the Plaintiff's 3,363 chickens. I am, therefore, of the firm view that the loss of the Plaintiff's chickens was a direct consequence of an insured peril, namely, loss due to an accident. Quite plainly, the generator's failure to operate could not have reasonably been anticipated by the Plaintiff. Under these circumstances, I am amazed by the contention of counsel for the Defendant that the generator's failure to operate was a natural consequence and the cause of death was therefore not an accident.

Furthermore, the view I take on the facts of this case is that the Plaintiff could be assumed to have intended that this kind of loss should be covered in its policy of insurance. And since the word *'accident'* is not defined in the policy which was drafted by the Defendant without the participation of the Plaintiff, it can only be construed in the sense in which the Plaintiff might reasonably have understood it. As correctly submitted by Ms Kantumoya, the word must be construed *contra proferentem*, against the Defendant which prepared the insurance policy.

I also agree with counsel for the Plaintiff that the loss of chickens due to failure of electricity supply is not expressly excluded in the exclusion clause of the insurance policy. Since it is not expressly excluded, it means that it is included by implication.

In the final analysis, I conclude that the Plaintiff has proved its claim against the Defendant on a preponderance of probabilities. Judgment is accordingly entered in favour of the Plaintiff for the claimed sum of K40,356,000.00 with simple interest at the short term bank deposit rate from 3rd December, 2009 being the date of writ to the date of judgment. Thereafter, interest shall accrue at the bank lending rate as determined by the Bank of Zambia from time to time until full payment.

Costs follow the event and will be taxed if not agreed.

Leave to appeal is granted.

**DELIVERED THIS 4TH DAY OF MAY 2011**

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**C. KAJIMANGA**
**JUDGE**