

IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)

2015/HP/1591

BETWEEN:

AQUAMARINE INVESTMENTS LIMITED

AND

GOLDMAN INSURANCE LIMITED



PLAINTIFF

DEFENDANT

CORAM : Honorable Mr. Justice Mubanga Kondolo, SC

MARSHAL : Ethel Phiri

FOR THE PLAINTIFF: Mr. K. Chikuba of Messrs BCM Legal Practitioners

FOR THE DEFENDANT: Mr. K. Kamfwa of Messrs Wilson & Cornhill Advocates

JUDGMENT

AUTHORITIES

CASES

1. A.J. Trading Company Limited v Chilombo (1973) ZR 55 HC
2. Czarnikow Ltd v Koufos (1969) 1 A.C. 350
3. Times Newspapers Limited v Kapwepwe
4. McGregor on Damages, 18th Edition, Sweet & Maxwell, para 11-011
5. Zambia State Insurance Corporation v Serios Farms Limited (1978) Z.R. 93 (S.C.)
6. Rodgers Chama Ponde v Zambia State Insurance Corporation Limited (2004) ZR 151

7. **Tilley v Official Receiver in Bankruptcy (1960) HCA 86**
8. **National Australia Bank Limited v KDS Construction Services Pty Ltd (1987) HCA 65**
9. **Castellian v Preston (1881-85) 5 All ER 493 at 495**
10. **Zulu v Avondale Housing Project (1985) ZR**

TEXT

1. **Section 2 of the Insurance Act, Chapter**
2. **Pensions & Insurance Authority Circular No.1 of 2005 (Revised in 2009)**

The brief background to this matter is that the Plaintiff took out an insurance policy, including fire cover, with regard to some industrial equipment. The Factory caught fire and the PW1s molding machine was destroyed but when the Plaintiff submitted an insurance claim the claim was rejected because according to the Defendant, the policy had lapsed on account of failure to pay a premium installment on the due date. The Plaintiff took out a writ of summons seeking the following relief;

1. *Indemnification for the loss of the moulding machine which was destroyed by the fire that broke out on the 21st of June, 2015 in the sum of USD250,000.00 by virtue of the Insurance Policy it took up with the Defendant;*
2. *Damages for the loss of business from 2nd of July 2015 to date of Judgment and or consequential loss;*
3. *Punitive Damages on account of the Defendant's malicious conduct;*
4. *Interest on the amount that the Court find due;*
5. *Costs;*
6. *Any relief the court may deem fit.*

The Plaintiff Company called two witnesses whilst the Defendant called one.

PW1 was Hassan Faisil Ali, the General Manager of the Plaintiff Company, who testified that around 08:45 on Sunday 21st June, 2015, he received a phone call from the guard telling him that his factory was burning. The guard woke PW1's cousin, who resides within the factory premises, who in turn called the fire brigade.

PW1 rushed to the factory and found the fire under control but the injection machine was completely damaged. He reported the matter to Chinika Police and called a Goldman Agent by the name of Pedro who arrived at the scene, took some photos and asked PW1 to go to the main branch on Monday morning and explain what happened.

The following Monday PW1 went to Defendant's offices where he filled in a claim form which he submitted together with a Police report, Fire Brigade report and invoice for the damaged machine and customs papers to PW1's Main Branch within the following 10 days. After some days the Defendant sent an adjuster who inspected the premises, took photographs and asked a lot of questions about how the fire happened. The adjuster checked the machine, the serial number and asked again for the invoice for the machine to show proof that it was bought for the indicated value. PW1 gave him a bank statement showing that the money for the purchase of the machine was sent through PW1's account. PW1 told the Court that the adjuster came back two weeks later saying that he needed to check the machine again and take extra photo's. He advised PW1 that the Defendant would communicate with PW1.

PW1 stated that he went to the Defendant's offices because two weeks had elapsed with no word from them and they told him that the adjuster had not completed his work and that when they were ready they would inform him. A week later, he was told that the person responsible was away and this continued over the following 10 days. Two months later the Defendant informed PW1 in writing, that in paying his premiums, one of the cheques he had issued had bounced and that it was a criminal offence in this country therefore there was no claim¹.

¹ Letter from Goldman Insurance to Aquamarine Investments Limited, p.43, Defendants Bundle of Documents

PW1 testified that he disputed the assertion because his account was funded and therefore the cheque could not have bounced. He said that the cheque in issue was dated 15th May, 2015 and the agent had brought it to him between 30 to 35 days later and he had shown the agent his company's bank statement² showing that there were funds in the account.

Further, PW1 explained that the Plaintiff Company and the Defendant had an agreement for the payment of the premium by 3 installments in the following manner;

1. *The 1st was to be paid on 15th April, 2015 which he duly paid by a Barclays Bank cheque in the sum of K6,960.*
2. *The 2nd was to be paid on 15th May which he duly paid and was given a receipt in the sum of K3,480.*
3. *The 3rd payment was due on 17th June 2015 and the Agent picked up the cheque on the 20th June.*

PW1 told the Court that when the agent came to collect the last payment he brought the cheque paid in May and that is when he told PW1 that it had bounced. When PW1 asked him why he'd brought it back 3 days later the agent said that it was because the cheque had been sent to the Defendant's head office whilst the agent was operating from the Kafue Branch so it took him some time to pick it up. PW1 told the agent that the cheque couldn't have bounced and that there must have been some misunderstanding, the agent asked him to issue a fresh cheque in the same amount which he did on 20th June 2015 in the sum of K6,960 and the agent issued him with a receipt dated 22nd June, 2015.

PW1 told the Court that he enquired from his bank as to why the cheque had bounced and was informed, in writing that the cheque had never been presented for clearing at Barclays Bank³. PW1 pointed out that the alleged bounced cheque was not marked as bounced and it only bore

³ Letter from Barclays Bank to Aquamarine Investments Limited, p.1, Plaintiffs Further Bundle of Documents

a date stamp of Stanbic Bank⁴ which is not the Plaintiff's bank. PW1 further explained that the Agent collected two cheques on the 20th of June and the fire occurred the following day on the 21st June and that is when the Defendant mentioned the bounced cheque.

Under further examination in chief PW1 repeated that on 15th May, 2016, the Plaintiff Company had the sum of K217,673 in its account⁵ and the alleged bounced cheque was for the sum of K3,480 only. PW1 referred to paragraph 8 of the Defence filed by the Defendant which showed only 2 items that the Plaintiff was alleged to have breached whilst the letter denying the claim provided 3 reasons; the Defendant had not raised one of the reasons in the particulars of breach in paragraph 8 of the Defence.

PW1 said that the Plaintiff's business had suffered losses of between US\$50,000 to US\$60,000 on account of lost sales because of the absence of the burnt machine and he reiterated that the Plaintiff sought the reliefs set out in the Statement of Claim.

PW1 was cross examined and he said that the Plaintiff took out the insurance policy in March, 2015 and when referred to the policy he said it was to run from 15th April 2015 to 15th April 2016 and the premium amount was US\$2,320⁶. PW1 said that there was an agreement to pay the premiums in 3 installments but that the agreement was not in writing. He however agreed that there was such an agreement after being shown an installment payment agreement signed on behalf of the Plaintiff Company by Kouder Ezzeddine⁷ and that the installments were supposed to be paid on 17th May, 17th June and 17th July.

PW1 agreed that term 2 of the agreement stated that the policy would lapse if a payment was delayed. PW1 was asked when the 1st installment which was supposed to be paid on 17th May, was actually paid and he said it was paid on the 15th April by cheque. He was referred to the

⁴ Cheque paid to Goldman Insurance by Aquamarine Investments Limited, p.2, Plaintiffs Further Bundle of Documents

⁵ Plaintiffs Bank Statement, p.5, Plaintiffs Further Bundle of Documents

⁶ Insurance Policy, p. 1, Defendants Bundle of Documents

⁷ P. 3, Defendants Bundle of Documents

cheque dated 15th May 2015⁸ and when asked which installment it was for, he answered that it was for the 2nd installment. He was asked whether the Plaintiff paid anything when the policy commenced on the 15th April, 2015 and PW1 agreed saying that the sum of K6,960 was paid at inception.

PW1 was shown the installment schedule and he agreed that the 1st payment was supposed be paid on 17th May but said that it was actually paid on 15th April and when asked if he could prove it, PW1 referred to a receipt⁹ which he claimed was issued to that effect and he explained that it was dated 20th April, 2015 instead of 15th April because the Agent used to pick up the cheques late, sometimes, 3, 5 or even 10 days late, both when picking up the payment and when bringing the receipt.

Under further cross examination PW1 said that the alleged bounced cheque was for the 2nd installment and that he was later issued with a receipt for that cheque and he identified the copy of the receipt¹⁰. When asked if the cheque was ever paid, PW1 said that it never went through his bank and when asked if he knew what happened, PW1 said that the agent told him that he may have put a comma on the cheque or there was a problem with the handwriting. He said that he only became aware that the cheque had not gone through his account after about 30 – 35 days when the agent came with the cheque to collect the 3rd payment from PW1.

He reiterated that he did not go to the Defendant to collect the dishonored cheque but it was brought to him on 20th June and he replaced it the same day. When pressed further, PW1 said he could not prove that he paid on 20th June because the agent usually brought the receipt later. PW1 was shown Receipt No. 183325¹¹ and he confirmed that the receipt was dated 20th July, 2015 and the cheque was dated 15th May, 2015. He however insisted that he replaced the cheque on the same day it was brought to him together with the 3rd payment.

⁸ P. 8, Defendants Bundle of Documents

⁹ Receipt No. 174481, page 6, Defendant's Bundle of Documents

¹⁰ Receipt, p. 7, Defendants Bundle of Documents

¹¹ Ibid

Under further cross examination, PW1 told the Court that the 3rd payment was done on 17th June, 2015 and it was his final installment. When reminded that the last payment was supposed to be on 17th July, 2015 he replied that they agreed from the beginning that the Plaintiff would pay 3 installments of which the 1st was K6,960, the second was K3,480 and the final was in the sum of K6,960.

It was pointed out to PW1 that the replacement cheque when combined with the due installment was receipted by the Defendant on 20th July 2015 which was after the fire occurred on 21st June. He responded by saying that he gave the Defendant 2 cheques on 20th of June 2015. One was a replacement for the bounced cheque dated 15th May, 2015 which was receipted on 20th July, 2015 whilst the 2nd cheque which he gave on the same day was dated 20th June, 2015 and was receipted on 22nd June, 2015¹². PW1 said he was not aware that the Defendant was not open to receive money on Saturday and it was put to him that when the fire happened on 21st June, 2015, the Defendant had not receipted the Plaintiff's payment. He replied that the agent used to collect all the cheques and he was paid on Saturday, 20th June.

PW1 was asked when he sought a clarification from his bank and he said it was sometime in August after the Defendant told him that he had committed a criminal offence. When asked about his claim for loss of business, PW1 agreed that the policy did not cover loss of business and punitive damages.

In re-examination PW1 was asked to explain why the receipt for the 1st installment was dated 20th April when he said that the payment was made on 15th April and in his response he explained that it was because the agent used to bring back receipts later on. He also said that the last payment was due on 17th July but he finished paying on 20th July and that he replaced the bounced cheque the same day he was told about it. He further stated that the date on the cheque was correct but the Defendant gave him the receipt late. PW1 further to stated that he

¹² Receipt 183325, p. 7, Defendants Bundle of Documents

was claiming damages because he made the claim in June, 2015 and to date (the date he testified) the Defendant has not resolved his problem and the lack of it was affecting his business. He lamented that he took out the insurance policy so that he could replace his business if something happened.

PW2 was Mwitumwa Pedro who told the Court that he worked for the Defendant Company from 2014 to August 2015. He testified that in the first week of April 2015 the Plaintiff Company requested insurance cover against fire to protect their machinery which cover was provided the same month and that they made their first payment on 15th April 2015.

He further testified that after the first payment was made, the parties executed an agreement for the remainder of the premium to be paid in three installments in May, June and July 2015¹³ and that the first premium which was due on the 17th May 2015¹⁴ was paid a little earlier than the due date. He said that the 2nd installment was paid on 15th June, 2015 as provided in the schedule and the last payment was to be paid in July but it was paid in June. PW2 recalled that he collected the cheque for the 2nd payment on the 15th June from the Plaintiff Company and took it to the Accountant, at the Defendant Company's Kafue Road Branch, who was in charge of receipting and a receipt was issued. In the same month of June, the Accountant Mr. Banda told him that one of the Plaintiff's cheques had been returned by the bank and he requested that he be given the cheque for purposes of forwarding the same to the Plaintiff for rectification.

He said he couldn't recall the exact day but it was either the 16th or 17th June when Mr. Banda gave him the cheque and he took it to the Plaintiff Company for verification. PW1 told him that he didn't know why the cheque could bounce when his account was sufficiently funded but he, nonetheless, instructed his accountant to issue two cheques, namely; one to replace the returned cheque and the other to pay the July installment as final settlement of the premiums.

¹³ *Installment Premium Payment Agreement, page 3, Defendant's Bundle of Documents*

¹⁴ *The premium schedule, page 5, Defendant Bundle of Documents*

PW2 further testified that he took the two cheques to Mr. Banda who used to issue receipts for payments. He then referred the Court to the receipt of K6,960 dated 20th April 2015¹⁵ which he said related to the initial payment and the cheque was issued on the 17th April, 2015 but receipted on 20th April, 2015. He said he didn't know why the receipt was issued later than the date on which the cheque was collected but the accountant would know better. PW2 further explained that the payment for the June installment was made on the 20th June, 2015 and the receipt was issued on the 22nd June 2015¹⁶ and likewise a cheque was paid on 15th May but the receipt was issued on 20th July, 2015¹⁷. There is also a receipt issued on 15th May, 2015 in respect of a cheque issued on 15th May, 2015. He however stated that that there was another cheque issued on 15th May and the receipt was dated 15th May and he thought that this was the payment for the replaced cheque. PW2 informed the Court that he always collected the payments on time and he thanked PW1 because he never used to trouble him with payments.

He testified that he knew about the accident which happened in this matter and reiterated that the June and July cheques were collected at the same time on a Saturday. The following day on Sunday PW1 phoned PW2 around 15:00 hours asking him to go to the Defendant Company's premises and when PW2 got there he found the plant on fire. PW2 instructed PW1 to report the matter to the police and then notify the insurance company who would advise him on what to do next.

PW2 informed the Court that it was his understanding that the Plaintiff Company had not been compensated by the Defendant and added that the Plaintiff Company did not breach the installment plan as all the installments were paid at the right time. He also said that he didn't know why the bank failed to honor the cheque that was returned.

¹⁵ Receipt No. 174481, page 6, Defendant's Bundle of Documents

¹⁶ Receipt No. 183223, page 6, Defendant's Bundle of Documents

¹⁷ Receipt No. 183325, page 7, Defendant's Bundle of Documents

Under cross examination PW2 confirmed that he arranged the insurance policy in question. He also confirmed that the premium of US \$2,320 inclusive of VAT was to be paid in installments, on stipulated dates; in accordance with the premium installment agreement and that he witnessed the agreement. PW2 explained that the initial deposit paid was US\$928 which was 40% of the total annual premium and the balance of US\$1,392 which was to be paid in 3 installments of US\$464 each on 17th May, 2015, 17th June 2015 and on 17th July 2015.

PW2 agreed that the receipt dated 20th April, 2015 of K6,960¹⁸ was for the initial deposit and was not subject of the agreement. Under further questioning PW2 said that he collected the cheque which was due for the first installment of 17th May on that same date and when pressed, PW2 said he actually picked it up on 15th May, 2015. PW2 was referred to receipt No. 179224 dated 15th May 2015¹⁹ and he said that it was in the sum of K3,480 and in respect of the 1st installment. PW2 was then shown a cheque dated 15th May, 2015 in the sum of K3,480 and PW2 said he was unable to confirm if the cheque was in relation to receipt No. 179224 because the details on the receipt were not clear but he agreed that the receipt was issued for the same amount.

PW2 was pressed further and asked if he knew what became of the cheque for the first installment of 17th May 2015 and he replied that the accountant had told him that it was returned by the bank and he took it to the Defendant Company the same day Mr. Banda gave it to him though he couldn't remember the specific date.

When asked about the next installment, PW2 said it was due on 17th June 2015 and it was paid on the 20th which was 3 days late and it was receipted on the 22nd June. PW2 said he was aware of the effect of defaulting in any installment and when he was asked if this particular delay meant that the policy had lapsed he replied saying he didn't know.

¹⁸ Receipt No. 174481, page 6, Defendant's Bundle of Documents

¹⁹ Receipt No. 179224, page 7, Defendant's Bundle of Documents

In further cross examination, PW2 said that when he collected the cheque on Saturday, for the 2nd installment, he only gave it to the accountant on Monday the 22nd June because the accountant was not working on Saturday. He said the receipt was issued that same day on 22nd June and PW2 agreed that in the meantime the fire had occurred at the Plaintiff's premises on the previous day, Sunday, 21st June.

Learned Counsel for the Defendant put it to PW2 that the insurance policy had lapsed due to the non-payment of the first two installments and the agreement was only revived on the 22nd June when payment was made but by then fire had occurred and there was no insurance in place. PW2 answered by saying that the installment agreement stated likewise.

Under re-examination PW2 said that it was his responsibility to collect the payment from the client and that he did not collect the installment due on 17th June on that day but on 20th because that is when the client told him to go and collect it. PW2 said he had followed up the payment earlier, on the 16th and the 17th.

He was referred to Receipt No. 183223²⁰ and he said that it was for the June installment and the amount due was US\$464 which was the equivalent of K3,480. When asked why the receipt showed the sum of K6,960 he replied saying that he didn't know. He then said that he received the installment for May on 15th May and that he collected the installment for June on 20th June and that he also collected the installment for July on the 20th June. When asked if this could explain why receipt No. 183223 seemed to have a double payment, PW2 said that the Accountant would know better.

PW2 reiterated that he couldn't recall the exact date when he took the returned cheque to the Plaintiff but it was around the 17th or 18th June. He said that the Plaintiff was not told earlier

²⁰ Receipt No. 183223, page 6, Defendant Bundle of Documents

that the cheque had bounced and he was surprised when PW2 gave it to him. He also said that the Plaintiff had paid the full premium of US\$2,320.

Re-examination concluded with PW2 being referred to paragraph 2 of the Installment Premium Payment Agreement²¹ and asked if the policy had lapsed to which he replied that he wasn't sure.

The Plaintiff closed its case and the defence commenced.

DW1 was Yona Shimishi the Defendants Claims Manager confirmed that a claim and supporting documents were received from the Defendant Company on 2nd July, 2015 but the claim was not paid because at the time the claim was received, he was informed by their Finance department that the Plaintiff was in breach of the installment payment agreement because the payments were not made as and when they fell due. He said that the effect of the late payment was that the policy lapsed immediately.

He explained that the specific installments not made on the due date were the 1st installment which was supposed to be made on the 17th May, 2015 as well as the 2nd installment which was due on 17th June, 2015. DW1 confirmed that the Defendant appointed a loss adjuster whose role was to help determine the quantum of the claim in the event that liability was confirmed and that his appointment did not in any way confirm liability. He said that the loss adjuster determined the possible quantum payable as US\$134,505²² and that the Defendant informed the Plaintiff in writing as to why the claim could not be considered.

DW1 was cross examined and he reiterated that the claim was not paid because the client was in breach of the premium installment agreement. He was referred to a letter²³ written by him to the Defendant Company and asked whether that was the only reason for not paying the

²¹ *Installment Premium Payment Agreement, page 3, Defendant Bundle of Documents*

²² *Loss Adjusters Final Report, page 12 – 42, Defendant Bundle of Documents p42*

²³ *Letter from the Defendant to the Plaintiff, page 43, Defendant Bundle of Documents*

claim. DW1 responded by saying that the other reason was that they were in breach of the notification requirements but agreed that the notification by the Plaintiff Company did in fact qualify as notification in writing.

DW1 agreed that the letter to the Plaintiff referred to a bounced cheque including informing them that bouncing a cheque was a criminal offence. DW1 was shown a copy of the alleged bounced cheque²⁴ which he said he had seen earlier but that he was not very familiar with bounced cheques and that he wouldn't know that bounced cheques are usually marked refer to drawer or RD. When asked why his letter referred to a bounced cheque if he didn't know what one looked like, he said it was because his Finance department told him that the cheque could not be honored by the Defendant's bankers when it was presented to them. It was put to DW1 that the cheque did not bounce and the reason he gave in his letter was wrong and he replied that he wouldn't know.

When referred to the Defence filed by the Defendant, DW1 said that the Defence did not indicate that there was no notification in writing and neither did it state that the cheque bounced. DW1 said that the 1st installment was supposed to be paid on 17th May but he was not aware that it was a Sunday but in any event the installment was paid on the 15th May, 2015 and that was the payment that could not be honored by the bank.

DW1 was referred to the letter from Barclays Bank to the Plaintiff²⁵ and he said he was not aware of it as it was not addressed to the Defendants. He was then referred to a letter from the Plaintiff to the Defendant²⁶ which referred to the letter from Barclays and DW1 initially accepted that the letter was brought to the Defendant's attention but recanted and said that only the statement of account was brought to the Defendant's attention. DW1 was asked if and when the Plaintiff was notified about the cheque and he replied that their Finance department told him that the Plaintiff was informed and the cheque was presented back to them but they

²⁴ *Alleged bounced cheque, page 8, Defendant Bundle of Documents*

²⁵ *Letter from Barclays Bank to the Plaintiff, page 1, Plaintiffs Further Bundle of Documents*

²⁶ *Letter from the Plaintiff to the Defendant, page 3, Plaintiffs Further Bundle of Documents*

still didn't make good of the payment. He however said that he couldn't remember exactly when they were given back the cheque.

DW1 was pressed further and asked whether he was aware that the cheque was replaced immediately the Plaintiff was notified and he replied that he was only aware that it was replaced after the loss. DW1 said that the 2nd installment was due on 17th June, 2015 and according to receipts communicated to him the payments were received on 22nd June, 2015. DW1 was asked if he was aware that on 20th June, 2015 their agent received the cheque dated 20th June, 2015 and he acknowledged that receipt No. 183223²⁷ indicated that the cheque was dated 20th June 2015.

The cross examination continued and DW1 said that the July installment was paid on 20th July, 2015 and he referred to receipt No. 183325²⁸ which shows that the cheque was dated 15th May, 2015. He was asked if that was the replacement cheque and he said it wasn't. He was then asked how much was to be paid in June and he said it was K3,480 and DW1 also agreed that that Receipt No. 183223 was for 2 installments but stated that it did not include the installment for July.

DW1 agreed that a receipt was issued for the replacement cheque and pointed to Receipt No. 183223 and he explained that the cheque dated 15th May 2015 on receipt No. 183325 was presented on 20th July, 2015. He was reminded that their own agent, PW2, had testified that Receipt No. 183325 related to the payment in May and was accused of trying to mislead the Court that the receipt related to a payment in July and DW1 said he was not trying to mislead the Court because the date on which the cheque was presented was clear.

DW1 further said that he was not aware that receipts were sometimes issued late because according to his knowledge, the receipts were issued as and when payments were made as no

²⁷ Receipt No. 183223, page 6, Defendant Bundle of Documents

²⁸ Receipt No. 183223, page 7, Defendant Bundle of Documents

client would want to pay without receipts being issued. DW1 was pushed further and he accepted that the receipt issued for the cheque paid on 15th May²⁹ was issued on the 20th April and it related to the deposit premium but pointed out that the receipt for the payment for the installment due on 15th May was issued the same day when the payment was made.

When asked about the Pension and Insurance Authority Regulations regarding pension and insurance policy payments, DW1 said he was aware that the regulations require the insured or the client to make the full payment within 30 days from the inception of the policy in the absence of a premium installment plan between the insurer and insured. DW1 agreed that Clause 2 of the Installment Premium Payment Agreement states that the policy shall be revived upon full payment of the annual premium but he was not aware that full payment was made in June. DW1 said that a policy of insurance would not be reinstated even if payment of a defaulted installment was made within 30 days of the default. DW1 further stated that a loss adjuster is engaged on a without prejudice basis to help ascertain how much would be paid if the claim was accepted and in this particular instance the loss adjuster advised that the machine was a total loss.

Cross examination concluded with DW1 saying that the Defendant did not notify the Plaintiff Company that the insurance policy had lapsed or terminated because the installment plan was self explanatory. He said that he was aware that the Pension and Insurance Authority Regulations require that an insured to be notified in writing that an insurance policy has terminated or lapsed in the absence of an installment plan.

In re-examination DW1 said that the claim form becomes notification when it is formally received and paragraph 8 of the Defence referred to the breach of the installment agreement. He was then given an opportunity to clarify his assertion that Receipt No. 183223 was not for the June and July installments. DW1 responded by saying that the receipt relates to the

²⁹ Receipt No. 174481, page 6, Defendant Bundle of Documents

installments for the month of May and June 2015, when the dishonored cheque was presented to the Plaintiff it was not replaced there and then but combined 2 payments for the months of May and June for which the Plaintiff issued a cheque dated 20th June 2015 but which was received by the Defendant on 22nd June, 2015.

The Defence closed its case and both parties indicated that they would file written submissions which have been duly received.

Learned Counsel for the Plaintiff referred to the **Pensions & Insurance Authority Circular No.1 of 2005 (Revised in 2009)** which basically states that the breach of an installment due under an installment plan the policy lapses and can only be remedied by the insured paying the full premium within 30 days of the breach upon which the policy shall be revived and any claim arising during the period of lapsation shall not be admissible. He further cited **section 2 of the Insurance Act**³⁰ which defines an insurance agent as a person who, not being a salaried employee of an insurer, initiates insurance business and amongst other things collects premiums on behalf of the insurer and **section 76 (2) of the said Act** states that a premium paid to a broker who arranged the contract shall be deemed to have been paid to the insurer.

Mr. Chikuba, on behalf of the Plaintiff submitted that, in casu, the policy lapsed on 17th June, 2015 but in was revived on 20th June when the full payment of the premium was made. With regard to the alleged bounced cheque, he submitted that the evidence showed that the Plaintiff had done no wrong and he replaced it the same day it was returned to him by the agent.

Mr. Chikuba further argued that paragraph 4 of the defence admitted that the Plaintiff was up to date with paying his premium installment payment and he cited that case of **A. J. Trading**

³⁰ section 2 of the Insurance Act

Company Limited v Chilombo³¹ in which it was held that an admission by the defendant of an allegation in the plaintiffs statement of claim means that there is no issue between the parties on that point and no further evidence is admissible in reference to that point.

Learned Counsel for the Plaintiff submitted that his client was entitled to claim for loss of business because the loss he suffered as a consequence of the Defendants delay in honoring the insurance claim. In support of this he cited the case of **Czarnikow Ltd v Koufos**³² in which the following was said;

“The modern rule of tort is quite different and it imposes a much wider liability. The defendant will be liable for any type of damage which is reasonably foreseeable as liable to happen even in the most unusual case, unless the risk is so small that a reasonable man would in the whole circumstances feel justified in neglecting it In contract, if one party wishes to protect himself against a risk which to the other party would appear unusual, he can direct the other party’s attention to it before the contract is made in tort there is no opportunity for the injured party to protect himself in that way ...”

Mr. Chikuba added that this was an appropriate case in which to award punitive damages on account of the Defendant’s malicious misconduct for failure to indemnify the Plaintiff and in support of this he cited the case of **Times Newspapers Limited v Kapwepwe**³³ in which it was held as follows;

“ ... exemplary damages may be awarded in any case where the defendant has acted in contumelious disregard of the plaintiffs rights”

³¹ *A.J. Trading Company Limited v Chilombo (1973) ZR 55 HC*

³² *Czarnikow Ltd v Koufos (1969) 1 A.C. 350*

³³ *Times Newspapers Limited v Kapwepwe*

He further cited the Learned Authors of **McGregor on Damages**³⁴ wherein it says that, *“it can confidently be said that today exemplary awards are possible across the whole range of tort....”* he further pointed out that even though awards of punitive damages were rare in cases of contract they have sometimes been awarded and as an example of this he cited the case; **The Ontario Court (General Division) (1996), 1996 Can LII 8109 (ON SC), 132 D.L.R** in which the following was said;

“Punitive damages can be awarded in certain circumstances to serve as a punishment. In this case, depending on your finding of fact, punitive damages can be awarded to deter Pilot and other insurers from engaging in improper conduct in dealing with the claims of their insureds.”

The Plaintiff's submissions closed by stating that interest was payable on any sums awarded against the Defendant because as held in several authorities³⁵, the Plaintiff had been kept out of money. Mr. Kamfwa, Learned Counsel for the Defendant submitted that there were two key facts which were in dispute, namely;

1. *Whether or not the cheque dated 15th May, 2015 in the sum of K3,480 was for the first installment or second installment; and*
2. *Whether the plaintiffs cheque No. 000432 dated 15th April, 2015 bounced.*

As regards the first question, he pointed out that despite PW1 claiming that the payment was for the second installment, both PW2 and DW1 told the Court that this cheque was for the first installment which was due on 17th May, 2015. He argued that the testimony of PW2 and DW1 was consistent with the signed installment premium schedule which only related to the balance payable after the initial premium paid at inception of the policy. He argued that PW1's parol evidence was an attempt to vary a written agreement and he cited the case of **Rodgers Chama**

³⁴ *McGregor on Damages, 18th Edition, Sweet & Maxwell, para 11-011*

³⁵ *Zambia State Insurance Corporation v Serios Farms Limited (1978) Z.R. 93 (S.C.)*

Ponde v Zambia State Insurance Corporation Limited³⁶ in which it was held that parol evidence is inadmissible because it tends to add, vary or contradict the terms of a written agreement validly concluded by parties.

His position on the allegedly bounced cheque was that it was a fact that the Defendant was not credited with the value of the cheque until after the Plaintiff had suffered loss, having replaced it on Saturday 20th June 2015 and the Defendant receipting it on Monday 22nd June, 2015.

Learned Counsel for the Defendant submitted that there were issues for determination by the Court;

1. *Whether there was insurance cover in place at the time the Plaintiff suffered loss; and if yes*
2. *What indemnity is the Plaintiff entitled to from the Defendant?*

As regards the first issue, he submitted that paragraph 8 of the Defence showed that the Plaintiffs cheque No. 000432 in the sum of K3,480 dated 15th May 2015 which was intended to cover the first installment due on 17th May 2015 was returned unpaid and the Plaintiff collected it from the Defendant but failed or neglected to replace it or make good value; and that the next installment was due on 17th June, 2015 but the Plaintiff failed or neglected to make this payment until 22nd June, 2015.

Mr. Kamfwa pointed out that the Plaintiff does not dispute that he breached the payment plan and the evidence shows that the bounced cheque was in fact taken back to the Defendant by PW2 on Saturday 20th June, 2015 when the Plaintiff called him to go and collect payment for the June installment. He argued that the payment could only be receipted and paid on Monday the 22nd June, 2015 and that is the day that the payment was done and not on the 20th when the cheque was received. Mr. Kamfwa emphasized that the policy lapsed on the 17th May when the cheque was returned unpaid and lapsed again on the 17th June, 2015 when the installment

³⁶ *Rodgers Chama Ponde v Zambia State Insurance Corporation Limited (2004) ZR 151*

due on that date was not met. This meant that when the fire occurred on the 21st June the policy had lapsed as it was only revived on the 22nd meaning that the client had no insurance cover and the claim could not be paid. He cited the case of **Tilley v Official Receiver in Bankruptcy**³⁷ and **National Australia Bank Limited v KDS Construction Services Pty Ltd**³⁸ in which it was held that payment by cheque is conditional and only becomes complete when it is met on presentation.

Mr. Kamfwa submitted in the alternative, that, should this Court find the Defendant liable, the liability should be limited to and not exceed the sum of US\$134,505 which was the value of the loss assessed by the loss adjuster. He said that payment under a policy could not exceed the maximum indemnity under the policy and he buttressed this argument with the case of **Castellian v Preston**³⁹ where Brett L. J. said as follows;

“Every contract of marine or fire insurance is a contract of indemnity, and indemnity only, the meaning of which is that the assured in the case of a loss is to receive a full indemnity but is never to receive more. Every rule of insurance law is adopted in order to carry out this fundamental rule, and if ever any proposition is brought forward the effect of which is opposed to this fundamental rule, it will be found to be wrong.”

Learned Counsel for the Defendant further cited the case of **Zambia State Insurance Corporation Limited v Serios Farms Limited**⁴⁰ in which the Supreme Court held, *inter alia*, that an insurance policy only covers losses which were the subject matter of the insurance itself and that any consequential losses cannot be claimed under the policy unless expressly stipulated in the contract. He argued that on the basis of the cited cases the Defendant was not liable to pay damages and that the entire claim be dismissed.

³⁷ *Tilley v Official Receiver in Bankruptcy* (1960) HCA 86

³⁸ *National Australia Bank Limited v KDS Construction Services Pty Ltd* (1987) HCA 65

³⁹ *Castellian v Preston* (1881-85) 5 All ER 493 at 495

⁴⁰ *Corporation Limited v Serios Farms Limited* (1978) ZR 93

I have considered the evidence and the arguments adduced by Counsel on behalf of their clients. It is agreed by both parties and it is in fact the legal position that a contract of insurance is a contract of indemnity which is basically a contract transferring risk between two contractual parties generally to prevent loss or compensate for a loss which may occur as the result of a specified event.

In this particular case the evidence shows that the Plaintiff Company insured its machinery and the Defendant provided it with insurance cover in the sum of US\$1,000,000 in respect of Fire and Allied Perils. The period covered was from 15th April, 2015 to 15th April, 2016 and the Plaintiff was to pay a premium of US\$2,320. The Plaintiff paid an initial deposit of K6,960 and the parties entered into and executed an Installment Premium Payment Agreement accompanied by an Installment Premium Schedule by which it was agreed that the Plaintiff would pay the balance of the premium by installments. The installments were to be paid as follows;

1. The 1st was to be paid on 15th May, 2015.
2. The 2nd was to be paid on 15th June, 2015.
3. The 3rd payment was due on 17th July, 2015.

Of particular relevance and importance is clause 2 of the Installment Premium Payment Agreement⁴¹ which reads as follows;

"2. Where an installment premium is not received on the due date, the policy will automatically lapse from the date of stated period. When the policy so lapses, any claim arising during the period of lapsation shall not be admissible even upon revival of the policy. The policy may be revived at any time within 30 days from the date of Lapsation upon payment of the full annual premium. The policy shall be reinstated with effect from the date of payment (Insurance Act 2005 revised in 2009).

⁴¹ *Installment Premium Payment Agreement, Defendants Bundle of Documents, p.3*

Other than the documentary evidence, most of the viva voce evidence of PW1 and DW1 regarding the dates on which payments were made is quite contradictory and unclear. However, PW1 claimed that the returned cheque was for the 2nd installment and this was corroborated by PW2 whilst DW1 insisted that it was actually for the 1st installment because that's what his accounts department told him. The returned cheque is dated 15th May, 2015 and the receipt bears the same date. According to PW2 two cheques were issued on 15th May, 2015 but the receipt for the other cheque was only issued on 20th July, 2015.

PW2 testified that the Defendant was in the habit of issuing receipts late and that was what had happened with regards to the receipt issued on 20th July, 2015. An example was provided of the payment made on 15th May of which the receipt was issued on the 20th April⁴². This allegation is cardinal because the Defendant's denial of this claim is based on late payment. It is quite surprising that the Defendant did not call any witness from its accounts department to come and address this issue and did not provide any reason for its failure to do so. In the circumstances, I believe the evidence of PW2 and find as a fact that he collected two cheques from the Plaintiff on 15th May, 2015 with respect to the 1st and 2nd installments.

Cheque No. 437 in the sum of K6,960 was therefore clearly meant to cover two installments. On account of my earlier finding of fact the only logical conclusion is that it was paid to cover the returned cheque and was also payment in advance to clear the third and final installment that was due on 17th July, 2015. I believe the evidence of PW2 and find as a fact that he collected the Plaintiffs cheque No. 437 on Saturday 20th June, 2015 and that it was receipted on Monday, 22nd June 2015 because that is when PW2 presented the cheque to the Defendant's accounts department.

In view of the numerous dates cited by the parties, it is important that these be aligned with my findings of fact which are represented in the following timeline;

⁴² Receipt No. 174481, page 6, Defendant Bundle of Documents

1. *The payment for the 1st and 2nd installment was made on 15th May, 2015 by way of two cheques.*
2. *One of the cheques issued on 15th May, 2015 was returned whilst the other was honored.*
3. *The payment for the returned cheque, as well as payment for the final installment, due on 17th July, 2015 were both paid by way of cheque No. 437 dated 20th June, 2015. The cheque was picked up by PW2, the Defendant's agent on the 20th June, 2015 which he only presented to the Defendants accounts department on the 22nd June, 2015.*
4. *The fire that damaged the insured property occurred on 21st June, 2015.*

It is clear to me that the honored cheque paid in May adequately covered the installment due on 17th May meaning that the other cheque issued on 15th May, 2015 and which was returned was actually a payment made in advance for the installment due on 17th June, 2015. This cheque was replaced on the 20th June meaning that the 2nd Installment was three days late and in terms of **clause 2 of the Installment Premium Payment Agreement**⁴³ between the parties, the insurance policy lapsed on the 18th June, 2015. The said clause does however provide that when the policy lapses in that manner it revives if, within 30 days of the lapse, the insured pays all the premiums due under the policy. The policy was therefore revived by the cheque collected by PW2 on 20th June with respect to clearing the 2nd and 3rd installments.

In my view, as regards liability, the issue for determination is as to whether the policy was revived when PW2, the Defendant's agent, collected the cheque on 20th June, 2015 or whether it was only revived when the cheque was received and receipted by the Defendant's cashier on 22nd June, 2015.

⁴³ *Installment Premium Payment Agreement, Defendants Bundle of Documents, p.3*

Learned Counsel for the Defendant submitted that the fact of the matter is that the cheque was only presented to the Defendant Company on 22nd June and that is the date when the policy revived meaning that the Defendant was not liable to pay the insurance claim because the Plaintiff had no insurance cover as the fire and consequent damage occurred during the period of lapsation. Mr. Kamfwa cited cases in which he said it was held that payment by cheque is conditional and only becomes complete when it is met on presentation⁴⁴.

Mr. Kamfwa did not provide copies of the authorities cited but I perused one of the cases he cited, namely, **National Australia Bank Limited v KDS Construction Services Pty Ltd**⁴⁵ and I would hasten to add that he somewhat misled the Court by suggesting that it was held in that case that a payment by cheque only qualifies as payment when it has been paid. This is what was said in that case, in *obiter*;

“13. Generally speaking, when a cheque is given in payment of a debt, it operates as a conditional payment. The payment is subject to a condition that the cheque be paid on presentation. If it is dishonored the debt revives. Although it is sometimes said that the remedy for the primary debt is suspended, the suspension is no more than a consequence of the conditional nature of the payment: Tilley v Official Receiver in Bankruptcy (1960) 103 CLR at pp 532-533, 535-536, 537. The condition is a condition subsequent so that, if the cheque is met, it ranks as an actual payment from the time it was given. Subject to non-fulfilment of the condition subsequent, the payment is complete at the time when the cheque is accepted by the creditor: Thomson v Moyse (1961) AC967, at p1004

Applying the cited case in means that the Plaintiff effected payment when PW2, the Defendants agent, collected the cheque on 20th June, 2015. This in turn means that having paid the policy in full, the policy revived on the 20th June, 2015 and not on the 22nd June, 2015, as argued by

⁴⁴ *Tilley v Official Receiver in Bankruptcy (1960) HCA 86*

National Australia Bank Limited v KDS Construction Services Pty Ltd (1987) HCA 65

⁴⁵ *National Australia Bank Limited v KDS Construction Services Pty Ltd (1987) HCA 65*

learned counsel for the Defendant. The Plaintiff therefore had insurance cover when the insured property was destroyed by fire and the Defendant is liable to indemnify the Plaintiff from loss in accordance with insurance note.

With regard to the issue of quantum, Learned Counsel for the Defendant submitted that the quantum be limited to the amount assessed by the loss adjuster, Steven Chizinga of Independent Adjusters Limited, whose report was referred to by DW1⁴⁶. The Loss adjuster was not called as witness to interpret his report for the benefit of the Court and explain why the Plaintiff should be compensated with payment of US\$134,505 and not the full value of the machinery of US\$250,000.

The report refers to 15% depreciation⁴⁷ but does not reference the percentage to any provision in the insurance policy nor to any other basis for applying it. Likewise, the testimony of DW1 did little to shed any light on this and how depreciation impacts on the insurance premium, if at all. According to the report⁴⁸ the cover for Fire and Allied Perils on Plant and Equipment is US\$700,000 and 10% for excess. No provision for depreciation has been presented. I therefore find that the quantum due to the Plaintiff is the value of the damaged equipment less the allowable excess of 10% meaning that Defendant is liable in the sum of US\$225,000.

The Plaintiff has asked for damages for loss of business from 2nd July, 2015 to the date of judgment or consequential loss and has also asked for punitive damages on account of the Defendants malicious conduct.

Mr. Kamfwa on behalf of the Defendant submitted that as was held in the case of **Castellian v Preston**⁴⁹ an insurance claim is a claim of indemnity which means that the insured can only be paid the sums due under the policy and nothing more. He also cited **Zambia State Insurance**

⁴⁶ Independent Loss Adjusters Final Report, Defendants Bundle of Documents p.12 - 42

⁴⁷ Independent Loss Adjusters Final Report, Defendants Bundle of Documents p.42

⁴⁸ Independent Loss Adjusters Final Report, Defendants Bundle of Documents p.12

⁴⁹ *Castellian v Preston (1881-85) 5 All ER 493 at 495*

Corporation Limited v Serios Farms Limited in which it was held that consequential losses cannot be claimed under an insurance policy.

Mr. Chikuba submitted that whilst that was the general position, in this particular instance the Plaintiff could claim damages for loss of business on account of the unwarranted delay by the Defendant in honoring the insurance claim. He cited the case of **Czarnikow Ltd v Koufos**⁵⁰ and the Learned Authors of **McGregor on Damages**⁵¹ to support his argument. In my view, he has misapplied the authorities because they both relate to tortious liability whereas, in casu, the cause of action is founded in contract.

The pleadings show that the claim for damages is neither based in tort nor on the amounts payable under the insurance policy. The claim for damages is based on unreasonable delay and losses arising thereof.

It is quite surprising that whilst alleging that the Defendant has delayed paying the claim, the Plaintiff has not indicated the period within which the claim was to be paid. I recognise that the mere fact that the Defendant denied the claim means that there was some delay in the time within which the Defendant could have paid the claim, but it still begs the question as to whether the delay was within or outside the period agreed by the parties for the settling of claims. In the case of **Zulu v Avondale Housing Project**⁵² it was held that, *"It is for the party claiming the damages to prove the damage, never mind the opponent's case."* The onus is on the Plaintiff to prove that there was a delay by either providing a definite date or time frame within which the Defendant was to honour the claim. This has not been done and the claim fails.

The Plaintiff Company asked for punitive damages on account of what it perceived as this being a case of the Defendant maliciously trying to avoid paying the insurance claim. Having

⁵⁰ *Czarnikow Ltd v Koufos* (1969) 1 A.C. 350

⁵¹ *McGregor on Damages*, 18th Edition, Sweet & Maxwell, para 11-011

⁵² *Zulu v Avondale Housing Project* (1985) ZR

considered the facts, it is quite obvious that the cheques for insurance premiums were collected by PW2, the Defendants agent on the 20th June before the fire which occurred the following day on 21st. The only reason for the Defendant declining to pay was that in their view the payment was only made on the 22nd June because that is when the Plaintiff's cheque was presented to them by their agent meaning that when the fire occurred there was no cover as the cover was only revived on the 22nd. The argument is, to say the least, ludicrous, because the Defendants representative collected the cheque from the Plaintiff on the 21st June a day before the fire. The Defendant was clearly deliberately trying to avoid paying the claim.

The standard of trust expected in a contract of insurance is very high because on the one hand the insured pays money in advance to cover potential loss and there is a legitimate expectation that claims arising under the insurance policy will be dealt with expeditiously to enable the insured to quickly revert to his original position thus avoiding further loss or inconvenience. Having received premiums, insurance companies must handle claims honestly and diligently.

On the other hand the insured are expected to make honest claims free from trickery. It must be said that in this particular case, the fire occurred the day after a late installment was paid. This was a coincidence that would legitimately raise eyebrows and perhaps even warrant an investigation into whether the insured might have had a hand in the fire. This however was not the position as the Defendant cast no aspersion or suspicion towards the Plaintiff or anybody else as to the cause of fire. This was a plain case of the Defendant trying to avoid paying the claim and I find that conduct malicious and in contumelious disregard of the Plaintiff's rights under the contract of insurance. I agree with the authority cited by counsel for the Plaintiff **In The Ontario Court (General Division) (1996), 1996 Can LII 8109 (ON SC), 132 D.L.R** in which the following was said;

"Punitive damages can be awarded in certain circumstances to serve as a punishment. In this case, depending on your finding of fact, punitive damages

can be awarded to deter Pilot and other insurers from engaging in improper conduct in dealing with the claims of their insured's."

The Defendant deserves to be punished for its conduct, especially bearing in mind that it should have known that its unwarranted denial of the claim would adversely affect the Plaintiffs business. I thus award the Defendant the sum of ZK70,000 as punitive damages.

The Plaintiff is therefore awarded the following sums;

1. The sum of US\$225,000 or its Kwacha equivalent as the sums due under the insurance policy.
2. The sum of ZK70,000 in punitive damages.
3. All the sums above to attract interest at the average short-term bank deposit rate from date of writ to date of Judgment and thereafter until date of payment, at the current bank lending rate as determined by Bank of Zambia.
4. The costs of and incidental to this action.

Dated at Lusaka this

20th

day of July, 2016


M.M. KONDOLO, SC
JUDGE