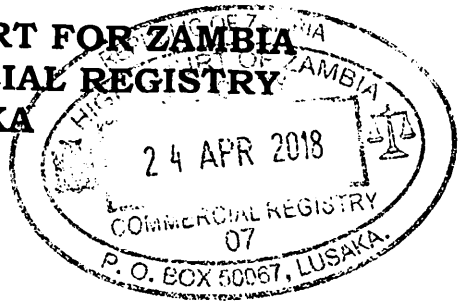
IN THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)



2016/HPC/0439

BETWEEN:

BRIDGEHOPE INVESTMENTS LIMITED **PLAINTIFF**

AND

PHOENIX OF ZAMBIA ASSURANCE COMPANY (2009) LIMITED **DEFENDANT**

Before Hon. Lady Justice Dr. W.S. Mwenda at Lusaka the 24th day of April, 2018.

For the Plaintiff: **Mr. S. Mambwe of Mambwe Siwila and Lisimba Advocates.**

For the Defendant: Mr. K. Kamfwa of Wilson and Cornhill.

JUDGMENT

Cases referred to:

1. *Mitchell & Jewell Limited v. Canadian Pacific Express Company (1974) 44 D.L.R. (3d) 603.*
2. *Monarch Steel v. Jessons Insurance Appeal No. 106 of 2008 (2013) ZMSC 6.*
3. *Kelly v. London and Staffordshire Fire Insurance Company (1888) 1 Cab & E. 47.*
4. *Rogers Chama Ponde and Others v. Zambia State Insurance Corporation Limited (2004) Z.R. 151.*

Legislation referred to:

Insurance Act No. 27 of 1997 as amended by Act No. 26 of 2005.

Publication referred to:

Beale, H G. (ed) Chitty on Contracts, 28th Edition, Volume 1 (Sweet & Maxwell, 1999).

By way of Writ of Summons dated 8th September, 2016, the Plaintiff herein commenced legal action against the Defendant claiming the following relief, namely:

1. K900,000.00 being the value of comprehensively insured bus, motor vehicle number ALH 6188 damaged beyond repair in a road traffic accident on 24th January, 2016 near Chinsali;
2. An order that the Defendant honours all Third-Party claims from passengers who died or were injured in the accident;
3. Interest at current bank lending rate;
4. Further of other relief;
5. Costs.

A Statement of Claim was filed simultaneously with the filing of the Writ of Summons (henceforth referred to as "the Writ"), wherein the Plaintiff claimed that on or about 3rd June, 2015, it

comprehensively insured its passenger carrying bus registration number ALH 6188 following which a Certificate of Motor Insurance No. 001235, Policy No. P-TAK-15-301-CODT-000795 was issued covering the period 3rd June, 2015 to 2nd June, 2016 at a total premium cost of K83, 520.00. The Plaintiff paid an initial premium instalment of K24, 360.00 leaving the balance of K59, 160.00 which the parties, by written agreement, agreed to be paid in four monthly instalments of K14, 790.00 per month. The Instalment Premium Payment Agreement ("the IPPA") was made on 5th June, 2015 and covered other buses on similar terms.

With respect to the subject bus, the agreement provided, *inter alia,* that the balance of K59, 160.00 was to be paid in four equal monthly instalments of K14, 790.00 with effect from 1st July, 2015 and that if payment was not made within seven days of becoming due, the policy would automatically lapse. It provided, further, that in case of default of payment, the cover was to automatically lapse but could be reinstated at any time during the insurance year upon payment of arrears and penalties and that the insurer reserved the right to cancel the policy for outstanding premium.

It is the Plaintiff's contention that the said agreement contained contradictory terms and to that extent is not enforceable. That the Plaintiff failed to pay the instalments as agreed for reasons communicated to the Defendant, who notwithstanding the default, did not cancel the policy, but in fact, received the sum of K46,371.91 paid by the Plaintiff on 22nd October, 2015, which was several days beyond the expiration of the IPPA, in further reduction of the balance of the premium, leaving a balance of K12, 788.09. The Plaintiff asserts that the Defendant's acceptance of the sum of K46, 371.91 outside the agreement and non-cancellation of the policy, created a fresh agreement and legitimate expectation that the balance would be paid as and when funds were available but within the insurance period.

On or about 24th January, 2016, within the cover period of the insurance, the subject bus was involved in a fatal accident near Chinsali where three people died and several other passengers were injured. The bus itself was damaged beyond repair. By letter dated 3rd February, 2016, the Plaintiff forwarded a cheque for the balance of premium of K12, 518.09 and made a claim on the insurance. However, the Defendant returned the cheque uncashed and refused

to honour the claim stating that the Defendant's re-insurers had refused to admit liability due to the default. According to the Plaintiff, this was notwithstanding that the Plaintiff had earlier been assured that the claims would be processed upon payment of the said K12, 518.09 balance on the premium.

The Plaintiff laments further, that the Defendant has equally refused to honour all third-party claims notwithstanding that the said third parties were not party to the IPPA and that there was an uncancelled insurance policy at the time of the accident, which policy was recognised in the Police Report relating to the accident. That as a result of the Defendant's actions aforesaid, the Plaintiff has suffered loss and damage; the particulars of loss and damage being the value of the bus registration number ALH 6188 which was comprehensively insured for K900,000.00 and failure to honour third-party claims.

The Defendant entered appearance to the suit on 19th September, 2016, and concurrently filed its Defence wherein it admits that the Plaintiff failed to pay the instalments but avers that it communicated the reasons for the failure to the Defendant. The defendant claims that there was no need to formally cancel the policy after the default because clause 3 of the same provided for an automatic lapse of the

policy in the event of default by the Plaintiff in paying any one instalment. The Defendant asserts that it will rely on clause 3 of the IPPA which provides that any claim arising during the lapsation period is not admissible for payment. The Defendant denies that there was insurance cover in place for the Plaintiff's bus when it was involved in a fatal road accident on 24th January, 2016 and avers that on the contrary, the insurance cover had lapsed on account of non-payment of premium as provided for in the IPPA. The Defendant admits returning the cheque of K12, 518.09 uncashed and refusing to honour the claim for the reason that the re-insurers had refused to admit the claim due to the default. The Defendant, however, denies the allegation that the Plaintiff had been assured that the claims would be processed upon payment by the Plaintiff of the balance of K12, 518.00 on the premium.

The Defendant admits, in further response to the Plaintiff's claims, that it refused to honour all third-party claims, but maintains that the accident in respect of which the third-party claims were made happened during the period of lapsation of the policy and therefore, in terms of the express term in the IPPA, the same are not admissible. The Defendant denies that the Plaintiff has suffered loss

and damage and specifically denies liability for all the Plaintiff's claims itemised in the Plaintiff's particulars of loss and damage as indicated in the Statement of Claims.

At the trial both parties called one witness each. The witness for the Plaintiff was Alick Tembo, the Plaintiff's Finance Manager (henceforth referred to as "PW1"). PW1 admitted in cross-examination that the Plaintiff defaulted in paying instalments for July, August, September and October, 2015 as per paragraph 4 of his Witness Statement. He also admitted that according to the agreement, default led to an automatic lapse of the policy. He conceded that he was not expecting notification of the lapse of the policy as per terms of the agreement. PW1 was referred to clause 2 of the IPPA exhibited on pages 6 – 8 of the Plaintiff's Bundle of Documents which provides as follows:

> *"where an instalment premium is not received on the due date, the insured shall have seven (7) days from the due date in which to pay the outstanding instalment premium. If the premium is not received within seven (7) days from the date the premium became due, the policy shall automatically lapse without further notice from the insurer."*

PW1 admitted that the Plaintiff did not pay the insurance premium within the seven days mentioned in the agreement. When

referred to paragraph 5 (i) of the Plaintiff's Statement of Claim, PW1 agreed that the balance of the premium was to be paid in four instalments, beginning on 1st July, 2015 up to 1st October, 2015. PW1 was further referred to clause 3 of the IPPA, at page 6 of the Plaintiff's Bundle of Documents which states as follows:

> *"In case of default on the part of the client in respect of payment of the insurance premium due, cover shall automatically lapse and may be reinstated at any time during the insurance year upon payment of the arrears and penalties thereon. Any claim arising during the lapsation period shall not be admissible for payment."*

PW1 admitted in further cross-examination that the accident happened in January, 2016 while the Plaintiff was in default regarding the credit period. He agreed that the agreement provided that the policy could be reinstated during the insurance year, but if not reinstated, and a claim arose during the lapsation period, the claim was not payable. PW1 was lastly referred to clause 6 of the IPPA which provides thus:

> *"Subject to the terms and conditions of this Agreement, the insurer undertakes to honour all valid claims arising during the agreement credit period subject to the insured not having any arrears on the instalments prior to the accident."*

PW1 admitted that the accident happened in January, 2016 which was outside the credit period of four months, that is, 1st July, 2015 to 1st October, 2015.

In re-examination, PW1 stated that the Plaintiff was in Court in line with clause 3 of the agreement which provided that the policy could be reinstated on condition that the arrears outstanding were paid. He said that the Plaintiff paid the arrears of K46,000.00 within the insurance period.

This marked the close of the Plaintiff's case.

The Defendant's witness was Chimba Peter Mwansa, the Defendant's Claims Manager. He will be referred to as "DW1". DW1 testified in cross-examination that he was not privy to what happened at the time the insurance was contracted and that his involvement only related to handling of the claim for compensation. DW1 admitted that the policy in issue was a comprehensive cover which covered damage to the insured's vehicle as well as third-party injury or property damage. He further stated that the total premium for one bus was K83,520.00. In further cross-examination DW1 admitted that the Plaintiff's claim came in after the accident. He

could not confirm that at the time of handling the claim a sum of K46,371.91 was paid and only K12,788.00 was remaining. It was his testimony that according to the payment plan, an amount of K50,000.00 was paid on the policy the subject of this suit. He denied that the balance on the policy was K35,000.00 as at June, 2015.

Upon being referred to page 9 of the Plaintiff's Bundle of Documents, DW1 identified the document as a receipt voucher which attested to payment of premium by Bridgehope Investments Limited on 22nd October, 2015. He confirmed that the said receipt relates to the policy which is in contention. DW1 further confirmed that the premium of K46,371.91 reflected on the receipt was received by the Defendant after the credit period had expired and that despite that fact, the money was accepted by the Defendant.

DW1 was referred to pages 2 - 4 of the Defendant's Bundle of Documents and identified the document therein as the IPPA which was prepared by the Defendant. He was then referred to clause 9 of the agreement on page three of the Bundle of Documents which states as follows:

"In the event of a total loss of the insured item, the premium shall fall due for payment immediately in full. In this regard, the insured shall have an option to pay the outstanding balance in full or alternatively have the amount deducted from the cost of the claim."

DW1 was then asked to confirm whether the Plaintiff had paid the balance of K12,518.09 to the Defendant. He said that he could not confirm that the payment was made. In continued cross-examination DW1 was shown the document on pages 13 – 14 of the Plaintiff's Bundle of Documents, which is a letter from the Plaintiff to the Defendant dated 3rd February, 2016. DW1 agreed that according to that letter the K12,518.09 was being paid in full settlement of the premium for the bus. It was DW1's evidence that the cheque was returned to the Plaintiff by the Defendant because the Plaintiff had breached the payment plan. He admitted that it was correct that the Defendant had accepted the K46,371.91 cheque after the credit period but had refused the K12, 518.09.

DW1 also confirmed that the Defendant had told the Plaintiff through a letter dated 4th February, 2016, to go ahead and submit the necessary documents for the claim and that the Plaintiff filed its claim as per the Defendant's request. In further cross-examination, DW1 testified that slightly over one month after the Plaintiff had filed

its claim, the Defendant told the Plaintiff that the re-insurers had refused the claim. He later changed his testimony to say that it was both the Defendant and the re-insurers who refused the claim. DW1 was referred to a letter exhibited on page 17 of the Plaintiff's Bundle of Documents from the Defendant to the Plaintiff dated 3rd April, 2016, paragraph 2, which towards the end reads as follows: "Regrettably, our re-insurers are unable to admit liability on account of outstanding premiums which stand at US$ 18,049.65 and ZMW 12, 788.09".

DW1 said that according to the paragraph read out, it seems it is the re-insurers who made the decision to refuse the claim. It was DW1's evidence that the re-insurers are the Defendant's partners who share the risk. He named the re-insurers as Guardian Re-insurance Brokers. He said that the re-insurers did not deal directly with the Plaintiff. DW1 confirmed that the policy in issue only reflects the Plaintiff and the Defendant as the parties. He confirmed that the Defendant refused to honour even third-party claims. He also confirmed that the Police Report exhibited on page 11 of the Plaintiff's

Bundle of Documents, reflected the policy as valid at the time of the accident.

In re-examination DW1 stated that after the payment of K46,371.91 by the Plaintiff, there was still some premium outstanding on the policy. With respect to clause 9 of the IPPA, DW1 stated that the said clause refers to a situation where a client has been adhering to the payment agreement. In further re-examination, DW1 stated that the Defendant had asked the Plaintiff to submit a claim with a view to collect or keep a record of events that had happened relating to the accident. He further stated that the Defendant did not give the Police the certificate of insurance indicating that the policy was still valid at the time of the accident.

This marked the close of the Defendant's case.

Both parties filed submissions to fortify their respective cases. I am indebted to Counsel on both sides for the same.

In a nutshell, it has been argued on behalf of the Plaintiff that this case revolves around two questions, namely, what the legal effect of the Defendant's action is after the lapse of the IPPA and what remedies are available to the Plaintiff. It has been contended that the

action by the Defendant to accept the payment of K46,371.91 after the IPPA had expired, was an indication that the Defendant did not intend to treat the insurance contract as terminated; that this meant the contract was still subsisting between the parties and ought to be treated as such. In other words, the Defendant waived its right to treat the contract as having ended. To support its argument, the Plaintiff cited the case of *Mitchell & Jewell Limited v. Canadian Pacific Express Company*[1], where 'waiver' was defined at page 614 as follows:

> *"Waiver arises where one party to a contract, with full knowledge that his obligation under the contract has not become operative by reason of the failure of the other party to comply with the condition of the contract, intentionally relinquishes his right to treat the contract or obligation as at an end but rather treats the contract or obligation as subsisting. It involves knowledge and consent and the acts or conduct of the person alleged to so have elected, and thereby waived that right, must be viewed objectively and must be unequivocal."*

It was submitted that in making the above submission, the Plaintiff was not oblivious to the provisions of the Section 76 (1) of the Insurance Act of 1997 which provides as follows:

> *"A contract of general insurance shall cease to operate if a premium is not paid within thirty days after due date of the premium, or within such period as the contract may stipulate."*

It was the Plaintiff's contention that notwithstanding that the contract between the parties in *casu* stated seven days, Section 72 (1) of the Act allows for the payment of premiums outside of this period for as long as the parties agree. That in this case the parties agreed by conduct, a position the Supreme Court gave a nod to in the case of *Monarch Steel v. Jessons Insurance*[2]. It was the Plaintiff's further argument that after acceptance of the late premium, the principle established in the case of *Kelly v. London and Staffordshire Fire Insurance Company*[3] was applicable, namely, that prepayment of the premium is not in law a condition precedent to the making of a complete contract of insurance. Further, that the principle of estoppel may also apply in the Defendant's case as by its conduct it led the Plaintiff to believe that the contract was still subsisting. It is thus estopped from departing from the position it so presented.

The Plaintiff submitted in addition, that the Defendant's letter of 1st April, 2016, exhibited on page 17 of the Plaintiff's Bundle of Documents, shows that the motivating factor for denying liability was that the re-insurers had denied liability on account of unpaid premiums. It was the Plaintiff's argument that the insurance

contract was signed between the Plaintiff and the Defendant and no one else. That, therefore, the re-insurers should not have had any influence on the contract. The Plaintiff argued that it is trite law that a person who is not privy to a contract can neither claim benefits nor be burdened with liability therefrom. Consequently, the said re-insurers had no right whatsoever over the agreement. In sum , the Plaintiff submitted that having established that despite the default in paying the premiums on the insurance policy by the Plaintiff, the Defendant had waived its right to treat the policy as at an end by accepting the late premium and receipting the same, the contract was still in effect when the accident happened in Chinsali during the insurance year and therefore, the Plaintiff is entitled to be awarded the claims as set out in the Writ of Summons and Statement of Claim.

In response, the Defendant submitted that arising from the facts of this case, there is only one issue to be determined by the Court, namely, whether or not the insurance cover/policy was in force at the time the subject motor vehicle was involved in a road traffic accident on 24th January, 2016. It was the Defendant's argument that the Plaintiff consistently and expressly admitted its default on

the IPPA and the consequence of default as per clause 2 of the agreement was that if the premium was not received within seven (7) days from the date the premium became due, the policy automatically lapsed without further notice from the insurer. Further, that in accordance with clause 3 of the agreement, upon lapsing of the policy, the same could be reinstated at any time during the insurance year upon payment of the arrears and penalties thereon. That any claim arising during the lapsation period was not admissible for payment.

According to the Defendant, the undisputed evidence on record is that the first instalment was due on 1st July, 2015, but the Plaintiff defaulted in paying the same as well as the subsequent instalments and as such, there can be no dispute that the Plaintiff's insurance policy automatically lapsed on 7th July, 2015 and from 8th July, 2015, the Plaintiff was not under cover. That to reinstate the policy, the Defendant needed to pay all the outstanding arrears at once. The Defendant submitted that the Plaintiff admitted that it defaulted on all instalments and only made a part payment of K46, 371.91 on 22nd October, 2015 leaving a balance of K12, 518.09; that in terms of

clause 3 of the IPPA, the policy was not reinstated because the arrears were not paid in full and therefore, the policy continued to be in lapsation. The Defendant submitted further, that the Plaintiff's Higer Bus registration number ALH 6188 which is the subject of these proceedings was involved in a road traffic accident on 24th January, 2016 and at that time premium in the sum of K12, 518.09 was still outstanding, a fact admitted by the Plaintiff in its letter dated 3rd February, 2016 which is produced on pages 13 to 14 of the Plaintiff's Bundle of Documents. That in fact, it was on 3rd February, 2016 when the Plaintiff attempted to clear the premium arrears by paying the remaining balance of K12,518.09. It is the Defendant's contention that from the chronology of events, it is clear that the Plaintiff's insurance policy was never reinstated and therefore, at the time of the accident involving the Plaintiff's Higer Bus registration number ALH 6188, the insurance policy had lapsed.

Submitting further, the Defendant pointed out that the law on the consequences of non-payment of premium is very clear and to that end, cited Section 76 (1) of the Insurance Act, already referred to above. It was the Defendant's argument that the IPPA, which the

Plaintiff was bound by, clearly provided that any claims arising during the lapsation period would not be paid. Therefore, because of the Plaintiff's breach, which resulted in the lapsation of the policy, the Defendant was discharged from its obligation to pay the Plaintiff's claims. As authority for this proposition, the Defendant quoted a passage from Chitty on Contracts, 28th Edition, Volume 1, paragraph 25 – 001 on page 1219 which provides as follows:

> *"One party to a contract may, by reason of the other's breach, be entitled to treat himself as discharged from his liability further to perform his own unperformed obligation to accept performance by the other party if made or tendered."*

It was the Defendant's contention that the Plaintiff's argument that it expected the policy to be reinstated when it made a payment in October, 2015, does not hold water because the payment did not clear the arrears outstanding at the time as required under clause 3 of the IPPA. That the Plaintiff only attempted to clear the arrears on 3rd February, 2016 after the bus had been involved in the accident. The Defendant argued that even if the Defendant had accepted the payment from the Plaintiff at that time, the claim could not have been payable because it arose during the period of lapsation. That, therefore, this Court should give full effect to the express provisions

of the IPPA as the express terms cannot be varied by parol evidence as held by the Supreme Court of Zambia in the case of *Rogers Chama Ponde and Others v. Zambia State Insurance Corporation Limited*[4]. That in that case it was held that parol evidence is inadmissible where there is a written agreement as it tends to add, vary or contradict the terms of a written agreement validly concluded by parties.

With regard to the issue raised by the Plaintiff on the effect of the Defendant's conduct after the lapse of the IPPA, the Defendant's response was that its conduct was well within the terms of the agreement. That, when the Defendant accepted the payment of K46, 371.911 in October, 2015, it was in order because the payment was made during the insurance year and the same was made as a step towards clearing the arrears so that the policy could be reinstated; unfortunately, the Defendant suffered loss before the policy was reinstated. In respect of the issue raised in cross-examination as to whether the re-insurer made the decision to reject the Plaintiff's claim, the Defendant referred the Court to the Defendant's Witness Statement made by DW1, particularly

paragraphs 9 to 11 and concluded that the Defendant tried to go out of its way to try and assist the defaulting Plaintiff by testing waters with it re-insurers to see if they could support it if it decided to settle the Plaintiff's claim. That for the foregoing reasons, it is the Defendant's prayer that the Plaintiff's claims be dismissed with costs for lack of merit.

I have carefully considered the pleadings in this case as well as the Witness Statements admitted in evidence. I have also analysed the evidence from cross-examination of the parties and finally, perused the submissions of both parties in support of their respective cases.

The undisputed facts of this case are that on 3rd June, 2015, the Plaintiff took out a comprehensive insurance policy with the Defendant for its bus registration number ALH 6188 in respect of which a Motor Insurance Policy Number TK 001235 was issued covering the period 3rd June, 2015 to 2nd June, 2016.The sum insured for the bus was K900,000.00 and the total annual premium for the bus was K83, 520.00. The Plaintiff made an initial payment of K24, 360.00 leaving a balance of K59,160.00. It was agreed

between the parties that the balance of K59, 160.00 would be paid in four equal monthly instalments over a credit period of four months starting from July, 2015 to October, 2015. The payments were to be made on the first day of each of the four months, that is, 1st July, 1st August, 1st September and 1st October, 2015. To formalise the credit arrangement, the parties signed the IPPA. The Plaintiff defaulted in making the payments, but on 22nd October, 2015, three weeks after the expiry of the IPPA the Plaintiff paid a sum of K46,371.91 leaving a balance of K12, 788.09 outstanding. Three months later, on 24th January, 2016, the subject bus, namely, Higer registration number ALH 6188 was involved in a fatal road traffic accident in Chinsali in which three people lost their lives and some were injured. The bus was damaged beyond repair. The Defendant advised the Plaintiff to lodge a formal claim, which after lodgment, the Defendant repudiated on the ground that the Plaintiff had breached the IPPA. The Defendant invoked the provisions of clauses 2 and 3 of the IPPA.

Having identified the undisputed facts of the case, I am of the considered view that the issues for determination in this case are the following:

1. Whether or not the insurance policy lapsed in the aftermath of the Plaintiff's default in the payment of premium under the IPPA;

2. In the event that the policy lapsed, whether or not the acceptance of the payment of K46,371. 91 by the Defendant reinstated the said policy; and

3. Whether or not a valid insurance policy was in force at the time the Plaintiff's bus was involved in the fatal accident on 2th January, 2016.

In order to determine the first issue, namely, whether or not the insurance policy lapsed following the Plaintiff' default in payment of premium, resort must be had to the provisions of the IPPA. Clause 1 of the said agreement provided that instalment premiums were to be paid on the due dates. Clause 2 stated as follows:

> *"2. Where an instalment premium is not received on the due date, the insured shall have seven (7) days from the due date in which to pay the outstanding instalment premium. If the premium is not received within seven (7) days from date the premium became due, the policy shall automatically lapse without further notice from the insurer."*

Clause 3 of the agreement went on to state that:

> *"3. In case of default on the part of the client in respect of payment of the insurance premium due, cover shall automatically lapse and may be*

reinstated at any time during the insurance year upon payment of the arrears and penalties thereon. Any claim arising during the lapsation period shall not be admissible for payment."

The provisions of clause 2 of the IPPA are unambiguous and clearly provided that in the event of default by the client (the Plaintiff) to pay premium within seven days from the date the premium became due, the policy would automatically lapse without further notice from the insurer (the Defendant). The fact that the Plaintiff defaulted in payment of all the premiums due is not in dispute. Under the provisions of Section 76 (1) of the Insurance Act No. 27 of 1997 as amended by Act No. 26 of 2005, a contract of general insurance, which the contract in *casu* is, shall cease to operate if a premium is not paid within thirty days after the due date of premium or within such period as the contract may stipulate.

The contract in this case required the premium to be paid within a period of seven days from the date it became due in default of which the policy would automatically lapse without further notice from the insurer. Therefore, going by the provisions of the IPPA, the insurance policy in this case automatically lapsed seven days after the date the first instalment became due. With that said, the Plaintiff's argument

that notwithstanding the Plaintiff's default, the contract was still subsisting between the parties due to the fact that no cancellation certificate was issued and the sum of K46,371.91 paid by the Plaintiff after the IPPA had expired was accepted by the Defendant, has no basis since a cancellation certificate need not have been issued by the Defendant to signify the lapsing of the policy. Further, the payment of K46, 371.91 was in respect of premium that was in arrears. Given the circumstances of this case, it cannot be argued that the Defendant conducted itself in such way that it can be taken as having opted to treat the contract as not having come to an end. In other words, the Defendant cannot be taken to have waived its right to treat the contract as having come to an end, following the Plaintiff's default in payment of premium. I am therefore, of the view that the holding in the case of *Mitchell & Jewell Limited v. Canadian Pacific Express Company*[1], is not applicable in the circumstances of this case.

Having found that the insurance policy lapsed following the Plaintiff's default in payment of premium, the second issue to be determined is whether or not the payment of K46, 371.91 by the

Plaintiff reinstated the policy. I am of the view that the payment did not reinstate the policy for the reason that, as the Defendant correctly submitted, the payment did not clear the outstanding arrears as required by clause 3 of the IPPA. After the payment of K46, 371.91, there was an outstanding amount of K12, 788.09. In order to have the insurance reinstated, the Plaintiff should have cleared the whole outstanding amount and not part of the outstanding amount as it did. The Defendant explained the acceptance of the payment of K46, 371.91 outside the IPPA as having been done because the payment was made as a step towards clearing of the arrears so that the policy could be reinstated. That, unfortunately, the Defendant suffered loss before the policy was reinstated. The Plaintiff has argued that DW1 acknowledged during cross-examination that the Defendant on one hand accepted the K46,371.91 which was payment made outside the IPPA but on the other, rejected the K12,788.09 which was also made outside the IPPA. That the Defendant cannot on the one hand enjoy the fruits of the initial payment and yet reject the K12, 788.09 on account of it being late and that to allow the Defendant to do so, would be unjust. I have already alluded to the reason advanced by the Defendant for accepting the payment of

K46,371.91, which is that it was taken as a payment towards clearance of the arrears with the expectation that the policy would be reinstated once all the arrears had been cleared. However, the arrears were not cleared by the Plaintiff who only attempted to do so on 3rd February, 2016, which was after the bus in issue had already been involved in an accident on 24th January, 2016. As the Defendant rightly submitted, clause 3 of the IPPA clearly states that any claim arising during the lapsation period shall not be admissible for payment.

For the avoidance of doubt, the accident involving the subject bus happened on 24th January, 2016 at which time the policy had lapsed and was still in lapsation despite the payment of K46, 371.91. Therefore, the claim arising from the accident of 24th January, 2016 came at a time when the policy had lapsed. Thus, as correctly submitted by the Defendant, even if the payment of K12, 788.09 had been accepted by the Defendant, according to clause 3 of the IPPA, the claim could not have been payable because it arose during the period of lapsation. The Defendant was correct too when it submitted that because it was the Plaintiff's breach which resulted

in the lapsation of the policy, the Defendant was discharged from its obligations to pay the Plaintiff's claims. Indeed, as authoritatively and aptly put by the learned authors of Chitty on Contracts, at page 1219, paragraph 25-001:

> *"One party to a contract may, by reason of the other's breach, be entitled to treat himself as discharged from his liability further to perform his own unperformed obligation to accept performance by the other party if made or tendered."*

Indeed, due to the fact that the Plaintiff's breach of contract led to its lapsation, the Defendant was discharged from its obligation of paying the Plaintiff's claims.

With regard to the third and final issue for determination, namely, whether or not a valid insurance policy was in force at the time the Plaintiff's bus was involved in the fatal accident on 2th January, 2016, it goes without saying that from the finding above that the policy had already lapsed at the time of the accident and had not been reinstated, the Police Report notwithstanding, no valid insurance policy was in force at the time the Plaintiff's bus, Higer registration number ALH 6188 was involved in a road traffic accident

on 24th January, 2016 and therefore, the said bus was not under cover of the said policy.

The Plaintiff submitted that from the Defendant's letter of 1st April, 2016 exhibited on page 17 of the Plaintiff's Bundle of Documents, it is evident that the motivating factor for denying liability was that the re-insurers had denied liability on account of unpaid premium. The Plaintiff submitted that the insurance contract was signed between the Plaintiff and the Defendant and no one else. Therefore, the re-insurers should not have had any influence on the contract. In response, the Defendant submitted that the Defendant's Witness Statement is very clear on this matter and it shows that DW1 wrote to the Plaintiff stating that the Plaintiff's claims would not be paid because of default by the Plaintiff on premium payments. The Defendant referred to paragraphs 9, 10 and 11 of the Witness Statement as being very instructive and that it is clear from these paragraphs that the Defendant tried to go out of its way to try and assist the Plaintiff by testing the waters with its re-insurers to see if they could support the Defendant if it decided to settle the Plaintiff's claim. In my opinion, whether the re-insurers influenced the

decision by the Defendant not to honour the Plaintiff's claim is inconsequential. What matters is that the decision not to honour the claim was made by the Defendant based on the fact that the insurance policy had lapsed at the time of the accident giving rise to the claim and had not been reinstated. The Plaintiff has lamented that the Defendant refused to honour even the third-party claims. With this Court's finding that there was no valid insurance policy at the time of the accident, the third-party claims too had no leg to stand on and therefore, could not be honoured.

The end result is that the Plaintiff's claims have failed and are accordingly dismissed for lack of merit. Costs are awarded to the Defendant, to be agreed or taxed in default of agreement.

Delivered at Lusaka the 24th day of April, 2018

Winnie S. Mwenda (Dr.)
JUDGE