

IN THE HIGH COURT FOR ZAMBIA

2018/HPC/0159

AT THE COMMERCIAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

FOCUS LIFE ASSURANCE (In Liquidation)

PLAINTIFF

AND

METALCO INDUSTRIES LIMITED

DEFENDANT

Before the Hon Justice Mrs Irene Zeko Mbewe

Appearances

For the Plaintiff: Mrs N C Zimba and Mr M Bwalya of Pension Insurance Authority

For the Defendant: Mr O Ngoma and Ms Maggie Mulenga of Messrs Lungu Simwanza and Company

JUDGMENT

Cases referred to:

1. *Mukuwe Akamana and Diamond Insurance Limited*[2009/HN/316
2. *Monarch Steel Limited v Jessons Insurance Agency Limited SCZ Judgment No 6 of 2013*

Legislation referred to:

1. *Insurance Act No 26 of 2005*

2. MacGillivray & Parkington on Insurance Law, 7th Edition

The Plaintiff commenced legal proceedings by way of writ of summons claiming for the following –

- (i) The sum of USD56,239.73 being due as time-on-risk premium for the period from 19th April 2017 to 27th September 2017 in respect of a Keyman Insurance Cover availed by the Plaintiff to the Defendant at the Defendant's own request.
- (ii) Interest on the said sum;
- (iii) Costs of and incidental to this claim;
- (iv) Any other relief the court may deem fit.

According to the Plaintiff, in or around March to April 2017, the Defendant requested for a keyman insurance policy cover for the life of Hussein Safieddine a director of the Defendant Company which was effective from 19th April 2017. The cover provided for a full life cover which included protection against death due to all causes except illegal practice. The interested registered beneficiaries were the International Finance Corporation (IFC) and OPEC Fund for International Development.

The purpose of the policy was to provide a full life cover as well as note and register the interest of IFC. The insured amount was USD10,000,000.00 with a calculated premium of US\$127,500.00 for an initial period of two years renewable.

On or about 19th April 2017, the Plaintiff issued its tax invoice No 005316 to the Defendant for the calculated premium of US\$127,500.00 and the invoice was acknowledged by the Defendant on 27th April 2017. The Plaintiff prepared a policy document relating to the keyman insurance cover which it signed off on 28th April 2017 and the same was accepted by the Defendant on 3rd May 2017. The Plaintiff

alleged that the Defendant engaged a broker namely Performance Insurance Broker.

The keyman insurance cover was availed by the Plaintiff on the consideration that the Defendant would pay the calculated and agreed premium of USD127,500.00. It is averred that despite several reminders the Defendant by itself or through its brokers failed or neglected to pay the premium as agreed. As a result, the Plaintiff through the broker cancelled the keyman insurance cover effective on 27th September 2017.

It is disclosed that the sum of US\$56,239.73 remains outstanding as a time on risk premium on the Defendant's account with the Plaintiff for the period the insurance cover remained valid and operational from the 19th April 2017 to 27th September 2017.

The Defendant denied that the insurance policy was to take effect upon issuance of a loan to the Defendant as the loan was never availed to the Defendant. The Defendant averred the said insurance policy was not operational as the loan was not availed and therefore the policy could not be enforced by the Plaintiff. The Defendant denied breaching any insurance policy agreement and stated that the Plaintiff is not entitled to any of the claims.

In reply, the Plaintiff averred there was no written agreement between the Plaintiff and Defendant creating the condition that the insurance policy would only be effected upon issuance of a loan to the said Defendant.

Plaintiff's evidence

The trial commenced on 12th June 2019 and Plaintiff called one witness Mike Mweemba (PW1) a Consultant in risk management and insurance who filed a

witness statement on 1st April 2019 with similar averment as those contained in the statement of claim.

In cross examination, PW1 told the Court he did not take part in the negotiations of the policy but was aware the premium was to be paid within the grace period of one month. PW1 stated the premium was not paid resulting in a breach and maintained the purpose of the policy was to register the interest of IFC.

PW1 stated that the Defendant never obtained the loan from IFC. He explained that where a policy lapsed due to lack of payment of the premium, it amounted to a debt and the insurer was exposed to risk where a policy had not been cancelled.

PW1 told the Court that despite the premium remaining unpaid, had there been a death during that period, the claim would have been made against the Plaintiff. He further stated that the Plaintiff had to re-insure with other insurance companies.

In re-examination, PW1 clarified that in respect to the premium clause in the policy, it meant that when one took out an insurance policy it was expected premiums would be paid at the beginning of the cover and in some instances insurance companies allow individuals to pay at a later stage. He explained that when an insurance policy is issued a tax invoice is issued which is considered as a debit note.

In terms of the purpose of the policy, PW1 reiterated that an individual who took up a policy could decide who the beneficiary was. As to whether the interest of IFC was registered, PW1 responded in the affirmative. He further explained that a keyman insurance was a policy contingent upon human life and in the policy in dispute, the contract was between IFC and the Plaintiff and it was incumbent on the Plaintiff to settle the claim irrespective of who the beneficiary was.

PW1 reiterated that despite the non-payment of the premium, the insurer could withhold the settlement of the claim subject to the payment of premium but it was his understanding it did not invalidate the claim.

Defendant's evidence

Chrispin Tembo (DW1) an accountant in the Defendant Company filed a witness statement on 7th June 2018 where he averred that in April 2015 the Defendant applied for a loan from IFC and as security it required a keyman insurance cover.

The Plaintiff was approached for the insurance policy which was negotiated through insurance brokers namely Performance Insurance Brokers Limited. It was a term of the insurance policy that payment of premium was to be made within 30 days and if one failed it would invalidate the policy resulting in its termination.

It was the Defendant's intention to pay the premium from the loan from IFC which never materialised and therefore the keyman insurance cover could not be enforced. DW1 denied the Plaintiff was ever put at any risk or greater exposure since the premium was never paid.

He maintained that by operation of the law, the keyman insurance cover terminated within 30 days from the effective date and therefore the Plaintiff's assumption that the policy continued its life for 6 months before its purported termination was a misconception at law and illegal.

In cross examination, on being questioned about the terms of the policy, DW1 responded in the affirmative and told the Court the Defendant received the tax invoice on 27th April, 2017 for US\$10 million with a premium of US\$127,500. He admitted that the premium was payable in instalments. He failed to show the Court any clause or evidence that the policy would only be valid once the loan was

disbursed to the Defendant. He denied the policy term allowed for the insured to appoint any beneficiary of choice.

DW1 told the Court that apart from the insurance policy, there was no binding agreement between the parties. In support of his position on automatic termination of the policy if the Defendant failed to pay the premium in advance, DW1 referred to pages 5 and 6 of the policy. DW1 explained that a keyman insurance cover was a life assurance and long term.

On the tax invoice, DW1 maintained it was a demand for payment but that it was not valid since the policy terminated after the 30 day period.

In further cross examination, DW1 told the Court the Plaintiff was never notified of the cancellation of the policy. He further stated the Defendant had in previous insurance policies paid in instalments.

In re-examination, DW1 reiterated the loan was not disbursed by IFC and the policy was specific to the loan.

Analysis and determination

From the pleadings, the evidence led by the parties, arguments raised and submissions, it appears to me that the issues arising for determination are as follows:

1. Whether the failure to pay the premium invalidated the insurance policy.
2. Whether the Plaintiff is entitled to the claims sought.

The brief facts of the case are that the Plaintiff was approached by the Defendant for a keyman insurance cover over the Defendant's key employee which offered a long-term viability of business in the event of the key person dying or suffering a covered accident. The Defendant registered the interest of IFC as a beneficiary.

Both PW1 and DW1 confirmed in their testimony that the policy was valid.

The main issue for consideration is the effect of non-payment of the premium on an insurance policy. The other issue is whether the Plaintiff can claim the unpaid premiums from the Defendant from the effective date of the policy up to its date of termination.

The law on insurance defines life assurance sometimes referred to as life insurance in other jurisdictions, as a contract between the policy holder and the insurance company (insurer) where the insurer promises to pay a designated beneficiary of a sum of money in exchange for a premium upon the death of the insured person.

In the case of *Mukuwe Akamana and Diamond Insurance Limited 2009/HN/316*, cited by Counsel for the Plaintiff which I find persuasive and of sound principles, the High Court stated as follows:

“insurance cover falls within the scope of the general principles of the law of contract in which there must be an offer, acceptance as well as consideration. In making the proposal, the insurer undertakes to indemnify the assured against the risk proposed to be covered by the policy. In turn, the insured must pay or undertake to pay the premium which constitutes consideration for his part while the insurer’s consideration is the risk of providing the indemnity if the event insured against occurs.

From the definition of life assurance, it has the trappings of a contract namely offer, acceptance and consideration, and on the happening of an event, the insurer indemnifies the beneficiary.

The keyman insurance policy between the Plaintiff and Defendant reflects the intentions of the parties. According to the policy, the effective date of the cover

was 28th April 2017 (page 2 of the Plaintiff's bundle of documents). The relevant parts read as follows:

"GENERAL CONDITIONS AND PRINCIPLES

Benefits shall only be paid under the following conditions:

(a)

(b) All premiums, levies and tax duties due and payable have been received by Focus Life Assurance Limited

Appointment of beneficiary

The policy shall recognize the appointed beneficiary who are named in the insured. However, if there is a change of beneficiary during the term of policy, such change or appointment shall be notified to the Life Assurer in writing and letters of appointments attached. The beneficiary on this policy is International finance Corporation (IFC)

The policy provided for the payment of premiums as follows:

All premiums are due in advance during the term of policy.

(a) Grace period – One calendar month's grace is allowed for the payment of premiums.

It is common cause the payment of premiums was to be paid in advance and a grace period of 30 days was allowed. In my considered view, the clause on premiums was a promise to act in future and not an obligation to pay first. The learned authors *MacGillivray & Parkington on Insurance Law, 7th Edition paragraph 861* state as follows:

“There is no rule of law to the effect that there cannot be a complete contract of insurance concluded until the premium is paid, and it has been held in several jurisdictions that the courts will not imply a condition that the insurance is not to attach until payment. It would seem to follow that, if credit has been given for the premium, the insurer is liable to pay in the event of a loss before payment, although, as has been held in a South African decision, the insurer would be entitled to deduct the amount of the premium from the loss payable, at least where the period of credit had expired by that time, since the assured could not insist on payment when in breach of any obligation assumed on his part under the contract.

The issue to be addressed is the effect of the non-payment of premiums. It is the Plaintiff’s position that the policy remained valid until it was terminated. On the other hand, DW1 testified that though the policy was valid, having failed to pay the premiums the policy, it automatically terminated by operation of the law. The Defendant further argued that had the key person died during the period the policy was in existence, the Plaintiff would not have indemnified it as it was a term of the policy that compensation was only upon full payment of premiums.

In response, PW1 argued that having issued a debit note to the Defendant which it acknowledged, it was incumbent on the Defendant to pay the premiums as the Plaintiff was exposed to risk.

Reliance was placed on the case of *Mukuwe Akamana and Diamond Insurance Limited 2009 /HN/316*, where the Court in determining whether the insurance cover was dependent on payment of premiums stated as follows:

It is therefore, my considered view that once the Defendant had issued the Debit Note acknowledging the Plaintiff’s indebtedness to it, the remedy was

to sue for the unpaid premium and not to repudiate the contract by refusing to indemnify the Plaintiff once the event for which cover was provided occurred.

It is therefore, my considered view that once the Defendant had issued the Debit Note acknowledging the Plaintiff's indebtedness to it, the remedy was to sue for the unpaid premium and not to repudiate the contract by refusing to indemnify the Plaintiff once the event for which cover was provided occurred.

I adopt the said excerpt as my own. It is not in dispute that the Plaintiff issued a tax invoice No 005316 which showed the particulars of the policy namely the policy number, name and address of insurer and insured and the effective date (page 1 of the Plaintiff's bundle of documents). PW1 testified that once the invoice was issued this constituted a debit note acknowledging the Defendant's indebtedness, and I concur.

It is my finding that the cover remained valid from date of issue until it was cancelled by the Plaintiff on 27th September 2017. I find the Defendant's argument on invalidity of the policy untenable.

The next issue to address is whether the Defendant intended to settle the premiums in instalments.

The evidence shows that the Defendant through the brokers requested to settle the premiums in instalment payments and outside the grace period of 30 days stipulated in the policy. This can be discerned from the emails dated 28th July 2017 appearing at page 22 of the Plaintiff's bundle of documents from Nachi Musonda the insurance broker to Christian Tembo of the Defendant Company. It reads as follows:

“Subject: OUTSTANDING ON METALCO/IFC POLICIES

As discussed at our meeting with yesterday, below is a breakdown of your understanding on our account:

Metalco Keyman Policy: \$127,500 – We will remit USD37,500 by next week and the balance of USD90,000.00 to be paid in three instalments on a monthly basis.

Metalco Group Life Liability Policy: ZMW100,043.89 – We will arrange payment in three instalments starting this week, we understand that you require this payment immediately however we do not want to commit and fail to honor the obligations.

Kindly give us a breakdown on how this outstanding is going to be liquidated. Please note that the Group Life Policy needs to be paid up immediately because of the legal implications of the policy.”

From my understanding of the email, it was referring to a meeting held between the broker and the Defendant and what was discussed. This evidence was not disputed by the Defendant at trial.

On the evidence as contained in the email dated 28th July 2017, I am satisfied that the Defendant opted to pay the premiums by instalments beyond the time stipulated in the policy. In my considered view, this amounted to a waiver of the term relating to the time of payment of the premium.

My findings are supported by the case of *Monarch Steel Limited v Jessons Insurance Agency Limited SCZ Judgment No 6 of 2013* where the Supreme Court stated that:

As correctly argued by Mr Mweemba, the Insurer and the Insured agreed in writing, to a credit scheme to pay premium outside the sixty days stipulated by Section 76(1) of the Insurance Act of 1997. The endorsement to all the policies, which is set out above, and is at page 72 of the Record of Appeal, constitutes such a written agreement. Indeed, it was pursuant to such an agreement that the Appellant paid premium for the Fire Policy about 11 months from the inception of the policy. There is evidence on record that the Appellant requested to pay for premium outside sixty days. We hold that the Learned trial Judge was on firm ground when he held that the parties' agreement to a premium payment credit scheme, extending beyond the statutory sixty days, amounted to mutual waiver of the strict application of the law.

The agreement in this matter, to pay premium outside the sixty days was not illegal. We say so because it is allowed by Section 76(1) of the Act that agreement was not intended to be performed in a manner which is legally objectionable. In the premises, we are of the view that Itowala v Variety Bureau De Change⁽¹⁾ is cited out of context. We agree with Mr. Mweemba that grounds one and three challenge findings of fact. On the evidence on record, there is nothing to warrant reversing them.

The Defendant relied to a great extent on the provision of section 76(1) *Insurance Act No27 of 2005* to absolve it from any form of liability. The said provision reads as follows:

“ A contract of general insurance shall cease to operate if a premium is not paid within 30 days after the due date of the period or within such period as the contract may stipulate. “

As correctly observed by Counsel for the Plaintiff, this section refers to general insurance as opposed to life insurance which is long term making the Defendant's argument untenable.

From the facts on record, the Defendant had not taken any steps to cancel the policy until the Plaintiff did so on 27th September 2017 for non-payment of premiums, and proceeded to sue for the period of the cover on a time on risk charge (page 26 of the Plaintiff's bundle of documents).

The letter of cancellation addressed to the brokers and copied to the Defendant stated as follows:

"re –Cancellation of Cover on keyman Policy Number FLA/KMI/00013 due to non-payment of premium

We note with regret that despite FLA having been on cover since January 2017 on this policy, you have still not paid the premium of US\$127,000. You are aware that insurance cover is contingent upon payment of premium, and this is particularly critical for reinsurance protection that we get from our reinsurers.

FLA cannot continue to stay exposed on this risk any further and have decided to terminate the policy with immediate effect. We therefore have applied a time on risk charge with effect from today as follows:

Number of days on cover (270) divided by total number of days in calendar year (365) multiplied by premium due (US\$127,000).

*i.e (270/365) *\$127,000=\$93,945.21*

Please remit payment cheques for the stated amount of \$93,945.21

The record further shows that all remainders on the payment of premiums were written to the brokers and copied to the Defendant thereby debunking Dw1's evidence that the Defendant was not aware of the cancellation of the policy.

A perusal of the policy executed by the Defendant clearly shows that the policy taken out was for a full life cover of the insured from protection against death of the key person due to all causes except illegal practice. DW1 was emphatic that the policy would only take effect once the loan from IFC was disbursed which event never happened. In cross-examination, DW1 failed to pinpoint the provision in the policy where it would only take effect upon disbursement of the loan from IFC.

I am in total agreement with Counsel for the Plaintiff that there is nothing in the policy that imposed a condition precedent for the payment of premium to relate to disbursement of the loan. In this respect, I find the Defendant's interpretation erroneous.

The Defendant submitted on the unenforceability of an illegal contract. Counsel argued that allowing the Plaintiff's claim would amount to enforcing an illegal agreement as it was not the term of the insurance cover that the premium should be paid after 30 days of the effective date being 28th April 2017. Courts of law cannot enforce what is illegal and from the evidence adduced and arising from my earlier finding, there is no illegality to impute in the policy.

Counsel for the Defendant submitted that PW1 was not privy to the negotiations between the representatives of the Plaintiff and Defendant. I find this point immaterial in light of the other evidence on record, particularly the correspondence between the brokers and Plaintiff which was admitted as evidence.

In conclusion, it is my understanding the non-payment of premiums does not invalidate an insurance contract but underpins the general contract principles that parties are bound by their obligations either recorded in the agreement or as mutually agreed. The Defendant having failed to pay the premiums, the Plaintiff is on firm ground to sue for the unpaid premium as set out in the statement (page 31 Plaintiff's bundle of documents).

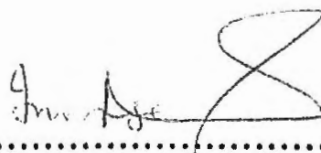
Having carefully considered the evidence of the parties, and for the foregoing reasons, the Plaintiff has proved its case on a balance of probabilities. Judgment is entered in its favour against the Defendant in the claimed sum of US\$56,239.73 on a time on risk for the period from 28th April 2017 to date of cancellation of the policy on 27th September 2017.

The claimed amount shall attract interest at the short term deposit rate from date of the writ to date of Judgment. Thereafter, interest shall accrue from date of Judgment until full payment at the average commercial lending rate taken from three (3) commercial bank.

Costs to the Plaintiff to be taxed in default of agreement.

Leave to appeal granted.

Delivered at Lusaka this 31st day of March 2020



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IRENE ZEKO MBEWE
HIGH COURT JUDGE