

*Judge*

IN THE HIGH COURT FOR ZAMBIA  
AT THE PRINCIPAL REGISTRY  
HOLDEN AT LUSAKA  
(Commercial Division)

2020/HPC/0161

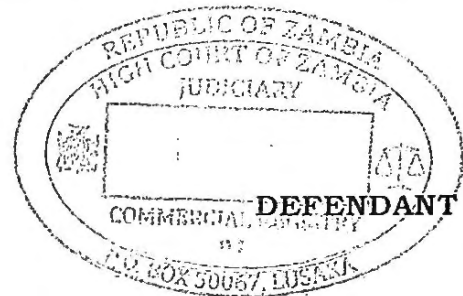
BETWEEN

MEANWOOD GENERAL INSURANCE COMPANY  
LIMITED

PLAINTIFF

AND

MULTI-INDUSTRY LIMITED



Before Judge B.G Shonga this 25<sup>th</sup> day of August, 2022

For the Plaintiff: Ms. C. Banda, Messrs. Tembo Ngulube Associates

For the Defendant: In Person

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## JUDGMENT

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### Cases Referred to:

1. *Priscilla Mwenya Kamanga V Attorney-General, Peter N'gandu Magande* (2008) Z.R. 7 Vol. 2 (S.C.).
2. *Monarch Steel Limited v. Jessons Insurance Agency Limited* Appeal No. 106/2008.
3. *Wilson Masauso Zulu v Avondale Housing Project Limited* (1982) Z.R. 172.

### Legislation and Other Materials referred to:

1. *Commercial Law in Zambia, Cases and Material, Mumba Malila* (UNZA Press for School of Law, University of Zambia, 2006).
2. *The Insurance Act, 1997: s. 2 and 76.*

*The Claim*

1. This is an action commenced by the plaintiff by way of a writ of summons, accompanied by the statement of claim, filed into Court on 6<sup>th</sup> March, 2020.
2. The plaintiff's claim, as endorsed on the writ, is for: (i) payment of the sum of K153,864.06 allegedly owed to the plaintiff by the defendant. This is in respect of unpaid insurance premiums on motor vehicle insurance policies and bonds insurance policies which were purchased on credit by the defendant; (ii) interest on the sum due; and (iii) costs.

*The Defence*

3. The defendant did not enter appearance or file a defence notwithstanding having been served. The action is, therefore, undefended.
4. With respect to service, I draw comfort from the affidavit of service filed into court on 17<sup>th</sup> August, 2020. It demonstrates that the plaintiff effected service by way of substituted service in accordance with the order of the Court obtained on 23<sup>rd</sup> April, 2020.

*The Evidence*

5. The plaintiff relied on the testimony of Gershom Ngosa (PW1), an accountant. Mr. Ngosa's witness statement dated 17<sup>th</sup> February, 2021 was admitted in court as evidence in chief. In

addition, PW1 adduced and relied on the plaintiff's bundle of documents dated 4<sup>th</sup> February, 2021.

6. PW1's testament was that the plaintiff is in the business of providing insurance covers for various risks, including motor vehicle and contractual risks.
7. He avowed that the defendant was the plaintiff's client for about five years from August, 2013, to December, 2018. It was PW1 evidence that during that period, the defendant purchased the following types of policies from the plaintiff: (i) motor vehicle insurance policies; bid bonds insurance policies; advance bonds insurance policies; and performance bond insurance policies.
8. PW1 referred me to page 7 of the plaintiffs bundles of documents, a summary of the insurance policies that the defendant had purchased from the plaintiff. The summary indicates the particular risk that was to be covered by the plaintiff.
9. According to PW1, the defendant fully paid for a number of insurance policies soon after they were purchased. He also stated that some policies were partially paid for by instalment payments. Further, that some policies were not paid.
10. Payments made by the defendant, he is avowed, were reflected on the statement of account exhibited on pages 1 to 6 of the plaintiff's bundle of documents.
11. PW1 explained the meaning of the columns on the statement of account. In his view the statement revealed that as of 30<sup>th</sup> September, 2019, the defendant had an outstanding balance of K153,864.06 in unpaid premiums.

12. Ultimately, PW1 attested that notwithstanding demand having been made, the defendant had failed to settle the outstanding balance of K153,864.06 that it owes to the defendant.

### *The Plaintiff's Submissions*

13. The plaintiff submitted that the plaintiff and defendant enjoyed a contractual relationship that entailed the purchase, by the defendant, of various insurance policies from the plaintiff.

14. According to the plaintiff, the defendant entered into a contract of insurance the plaintiff. The plaintiff referred me to the definition of a contract of insurance contained in the book *Commercial Law in Zambia, Cases and Material, Mumba Malila (UNZA Press for School of Law, University of Zambia, 2006)*. The erudite defines a contract of insurance as follows:

*"... an agreement in which persona called the insurer agrees for a consideration called the premium to pay a sum of money or to provide a service for the benefit of another person called the insured or assured on the occurrence of a special event whose happening is uncertain."*

15. The plaintiff advanced the argument that under the contract, the defendant had a contractual obligation to settle all premiums due.
16. With respect to the law, the plaintiff cited **section 76 of the Insurance Act, 1997** (hereinafter referred to as the Act). In doing so, the plaintiff acknowledged that section 76 (1) of the Act states that a contract of insurance ceases to operate if a premium is not paid within thirty days after the due date.

17. The plaintiff proceeded to submit that in this case the evidence revealed that the parties agreed that the plaintiff would and in fact did continue to cover the defendant despite the defendant having not paid their premiums.
18. The plaintiff further submitted that the parties had an agreement to allow the defendant to pay on credit within an agreed period outside the thirty days.
19. Finally, the plaintiff invited the court to find that the defendant has an outstanding balance and owes the plaintiff the sum of K153,864.06 in outstanding premiums.

#### *Analysis of Evidence*

20. The evidence before Court consists of the testimony of PW1, as evidence in chief, in the form of a witness statement. In addition, PW1 adduced documentary evidence in the form of a statement of account and a schedule of policies contained in the plaintiff's bundle of documents.
21. The testimony of PW1 gives me some disquiet because the statement does not specify PW1's relationship with either party or his role in the transaction.
22. In the case of *Priscilla Mwenya Kamanga V Attorney-General, Peter N'gandu Magande (2008) Z.R. 7 Vol. 2 (S.C.)* the Supreme Court held that a witness must be somebody who has some personal knowledge of what is being adjudicated upon.
23. In applying the principle enunciated by the Supreme Court, I establish that the plaintiff has not introduced sufficient evidence to support a finding that PW1 has

personal knowledge of the matters in issue in the present case.

24. I recognize that such proof can be demonstrated by the witness's own testimony. In this case, PW1 failed or neglected to speak to his personal knowledge of the issues before me in his witness statement.

25. Absent evidence that reveals that PW1 holds some personal knowledge of the facts in this case, I opine that I cannot give any, or significant, weight to his testimony or the documents that he tendered.

*Issues to be determined*

26. Having considered the evidence and submissions before Court, I am of the view that this case turns on whether the parties entered a contract of general insurance; and whether the contract was operable and therefore enforceable.

*Applicable Law*

27. The plaintiff alluded to section 76 (1) of the Act which reads as follows:

*"76. (1) A contract of general insurance shall cease to operate if a premium is not paid within thirty days after the due date of the premium, or within such period as the contract may stipulate.  
(2) For the purposes of this section, a premium paid to a broker who arranged the contract shall be deemed to have been paid to the insurer."*

28. I have analyzed section 76 (1) and understand that it specifically applies to contracts of general insurance. It is trite law that a contract of general insurance refers to an

insurance contract that does not fall under the ambit of insurance contracts that are referred to as life insurance.

29. This proposition is supported by the definition of the term "general insurance business" that is contained in section 2 of the Act. Section 2 reads, in part, as follows:

*"general insurance business means insurance business other than life insurance business."*

30. In this case, it is not disputed that the contracts of insurance that underpin the plaintiff's claim are contracts of general insurance. Thus, I accept that section 76 of the Act applies to this case.

31. In my opinion, section 76(1) of Act envisages one of two scenarios: the first being where a due date for payment of a premium is stated in the contract; and the second being where the contract stipulates a period within which the premium must be paid.

32. It is clear to me that in the first scenario, the contract of insurance ceases to operate, in accordance with section 76 (1) of the Act, if the premium is not paid within thirty days after the stipulated due date.

33. Equally clear to me is that where the second scenario applies, the contract of insurance ceases to operate where the premium is not paid within an otherwise agreed period between the parties.

34. What I perceive from section 76 (1) is, therefore, that the statute renders a contract of general insurance inoperable where a premium is not paid within either 30 days of the due date or within a period agreed by the parties.

35. I have also reflected on the meaning of the term “*due date*”. Section 2 of the Act defines it as follows:

*“means the date of commencement of the period of insurance cover referable to that premium under the contract of insurance”.*

36. Additionally, I am aware that Guidelines 3 issued under Circular No. 1 of 2005, under Section 99 of the Act, by the Registrar of Pensions and Insurance states as follows:

*“3. A Contract of General Insurance shall incorporate a cancellation condition which shall stipulate that the Policy shall be cancelled if the premium is not paid by the due date.”*

37. From section 76 of the Act, as read with the Guidelines, I perceive that it is a requirement for a contract of general insurance to not only specify a due date, but to also include a mandatory condition that states that the policy shall be cancelled if the premium is not paid by the stated due date.

38. Also germane to this dispute is the case of case of *Monarch Steel Limited v. Jessons Insurance Agency Limited Appeal No. 106/2008*. The facts of that case were that on different dates between 1<sup>st</sup> July 2005 and 1<sup>st</sup> July 2006, the appellant obtained six (6) Insurance Covers, from the Respondent. The total Insurance premium was K57,770,155.91. The appellant could not pay the premium sum within the stipulated period of 60 days. It subsequently



verbally undertook to pay the sum of K57,770,155.91, in installment, over a period of three months. The appellant fully paid premium for only one policy, which was fully paid about 11 months from inception of the policy. It substantially defaulted on the other policies.

39. In defence to the respondent's claim for the balance of K49,950,155.91, the appellant pleaded that the policies not paid for had lapsed after 60 days, under Section 76(1) of the Act, 1997 and therefore, it was not bound to pay the claimed sum.

40. In dismissing the appeal, the Court held that section 76 of the Act permits parties to pay premiums outside the then prescribed period of 60 days from the due date. Thus, I am bound by the doctrine of stare decisis to accept that section 76 of the Act law permits parties to agree a period within which an insurance premium can be paid.

#### *Determination*

41. Turning back to the case under my consideration, I believe it relevant for me to point out that if I were to elect to attach weight to PW1's unchallenged testimony, then I must accept that the parties entered into a contract of insurance which incorporated an agreed period within which the defendant was required to pay the premiums. The net result would be a finding of fact that the plaintiff's claim arose from the defendant's failure to pay premiums within a period for payment that was agreed by the parties in compliance with section 76 (1) of the Act.

42. As I have indicated above, my opinion is that the failure to pay premiums within an agreed period under a contract of general insurance renders the contract inoperable under section 76 (1) of the Act. Consequently, if I accept that the contract existed, the plaintiff's case would fail on the ground that the contract ceased to operate when the defendant failed or neglected to pay the premiums within the agreed period. As I see it liability cannot ensue from an inoperable contract because it is unenforceable.

43. Nonetheless, upon careful reflection of the position taken by the Supreme Court in the *Priscilla Mwenya Kamanga case*, I have elected not to attach any weight to the evidence tendered by PW1.

44. Because the plaintiff failed to call a witness that could demonstrate personal knowledge of the matter before Court, I find that there is insufficient evidence to justify a conclusion that there was a valid and enforceable relationship of insurance between the parties. This is buttressed by the plaintiff's failure to present an insurance contract or an insurance policy or any other form of an insurance cover to persuade me to come to any other conclusion. Consequently, I reject the submission that the parties enjoyed a contract relationship in the form of a contract of insurance.

45. In light of the foregoing I take the view that the plaintiff has failed to prove its case on a balance of probabilities.

46. Where a plaintiff fails to prove its case, it is not entitled to judgment. For this I rest on the decision of the Supreme Court in the case of *Wilson Masauso Zulu v Avondale Housing*

*Project Limited (1982) Z.R. 172* where the Court succinctly stated that:

*"A plaintiff who has failed to prove his case cannot be entitled to judgment, whatever may be said of the opponent's case."*

47. I take leaf therefrom and hold that the plaintiff in this case is not entitled to judgment. As a result, the plaintiff's claims fail and the action is dismissed.

Dated this 25<sup>th</sup> day of August, 2022



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**B. G SHONGA**  
**HIGH COURT JUDGE**