

**SCZ Judgment No. 6 of 2013**  
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IN THE SUPREME COURT FOR ZAMBIA  
**HOLDEN AT LUSAKA**  
*(CIVIL JURISDICTION)*

**APPEAL NO. 106/2008**  
**SCZ/8/109/2008**

**B E T W E E N :**

MONARCH STEEL LIMITED

APPELLANT

**AND**

JESSONS INSURANCE AGENCY LIMITED

RESPONDENT

**CORAM: Mambilima, D.C.J., Silomba and Mwanamwambwa, J.J.S.,**  
***On 22<sup>nd</sup> June 2009 and 21<sup>st</sup> June 2013***

*For the Appellant: Mr. K. Nsofu of Messrs Katongo and Company.*

*For the Respondent: Mr. W. Mweemba of Messrs Mweemba and Company.*

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**JUDGMENT**

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**Mwanamwambwa, JS, delivered the Judgment of the Court.**

***Case Referred to:***

- 1. Itowala v Variety Bureau De Change (2001)Z.R.**
- 2. Achiume v Attorney General (183) Z.R. 1**

***Legislation referred to:***

- 1. The Insurance Act 1997, Sections 75, and 76(1)**

Hon. Judge Silomba was part of the Court that heard this appeal. He has since retired. Therefore, this Judgment is by the majority.

This is an appeal against a Judgment of the High Court, dated 1<sup>st</sup> April, 2008, whereby it granted the Respondent's claim for K49,950,155.91, plus interest, against the Appellant.

The facts of the matter are 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 Respondent acted as Agents of Zambia State Insurance Corporation (ZISC). The covers were for:

1. Fire Insurance Policy
2. Money Insurance Policy
3. Public Liability Policy
4. Employments' Liability Cover
5. G.P.A. Insurance Policy
6. Private Car Comprehensive Policy

The total Insurance premium was K57,770,155.91.

The Appellant could not pay the premium sum within the stipulated period of 60 days. So it 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 on

fire. This premium was fully paid about 11 months from inception of the policy. It substantially defaulted on the other policies.

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 Insurance Act, 1997**. And therefore, it was not bound to pay the claimed sum.

After evaluating the evidence, the learned trial Judge observed that the legal issue for determination was whether a claim arising from an Insurance Policy that has not been paid for, within a period of 60 days, could succeed at law. On the evidence, he found that the conduct of the Appellant and the Respondent at the time of the Insurance contract, amounted to waiver of the legal requirement to pay the premium within 60 days. He observed that by the doctrine of waiver, a party may be barred from asserting that the original condition precedent was still operating. That a waiver was in fact an abandonment of a right. He noted that the premium credit scheme was agreed right from the beginning, to pay the premium outside the stipulated period of 60 days referred to in **Section 76(1)** of the Act. He also noted that the Appellant enjoyed the benefits of the Insurance Covers issued to it for all the six (6) Policies. He observed that the Appellant could not be heard to deny liability; because as late as 24<sup>th</sup> August 2006, it's Finance and

Administrative Manager, apologized to the Respondent, for the inconvenience caused by the delay in settling the account. He then promised to table the matter before the Management to work out the payment. The learned trial Judge then concluded and held that on the basis of the doctrine of waiver, the Appellant could not insist that the original condition precedent of the 60 days premium payment clause was still operative and binding. That the Appellant had abandoned its right and it would be unjust and inequitable to allow it to enforce it, having regard to the conduct which took place between the parties. He then entered Judgment in favour of the Respondent in the sum of K49,950,155.91, plus interest thereon.

Dissatisfied with the Judgment, the Appellant has appealed to this Court, raising three grounds of appeal. These read as follows:

**GROUND ONE:** “The learned trial Judge erred in law and in fact when he held that the evidence on record demonstrated that a premium scheme was agreed upon right from the beginning to pay premium outside the stipulated period of sixty days in section 76(1) of the Insurance Act No. 27 of 1997 without putting into consideration the law pertaining to Insurance credit Policy as submitted by the Appellant

**GROUND TWO**: Having found that the appellant only paid premium for the Fire Insurance Policy, the Learned trial Judge

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erred in Law and in fact in having held that the Appellant enjoyed insurance cover on all six policies sought by the Appellant in disregard of section 76(1) of the Insurance Act No. 27 of 1997 and the “**Sixty days premium payment clause**” and the effect of a cover-note issued by an Insurance Agent (*in this case, the Respondent*).

**GROUND THREE** The Learned trial Judge erred in law and in fact when he held that by the doctrine of waiver, the Appellant could not rely upon the “**Sixty days premium payment clause**” in gross disregard of the strict law pertaining to the law on insurance Contracts.”

We note that ground one and three are interrelated. Accordingly, we shall deal with them together.

On behalf of the Appellant, on ground one and three, Mr Nsofu refers to **Section 76(1)** of **the Insurance Act No. 27 of 1997**. It provides as follows:

***“A contract of General Insurance shall cease to operate if a premium is not paid within 60 days after the due date of the premium or within such period as the contract may stipulate”***

Next he refers to Guidelines 1 – 3, issued under **Circular No. 1 of 2005**, under **Section 99** of the same Act, by the Registrar of Pensions and Insurance. These state as follows:

- “1. Insurance premiums must be paid as and when they fall due.**
- 2. Insurance Brokers must pay to the Insurer who issued the Policy within 60 days of the policy inception date, provided that where the Insurer have agreed otherwise, it shall be stipulated in the contract.**
- 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.”**

He then submits that there is no documentary evidence to show that Zambia State Insurance Corporation (**hereinafter referred to as ZISC**), the Insurer, and the Appellant, entered into a credit scheme arrangement, to pay the premium outside the sixty days period alleged by P.W.1. He argues that having regard to Section 75 of the Act, an Insurance Contract cannot be verbal. This Section reads as follows:-

***“No person shall issue a Policy containing printed provisions which are not in clear type face with letters not less than eight point.”***

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He adds that any verbal agreement between the Insurer and the Insured is outside the confines of the law. He further submits that a party cannot sue on a Contract if both know that the purpose, and the manner of performance and participation in the performance of the Contract, necessarily involved the commission of an act which to their knowledge, is legally objectionable. In support of this submission, he refers to **Itowala v Variety Bureau De Change**.<sup>(1)</sup>

In response on behalf of the Respondent, Mr Mweemba submits that Grounds one and three are mostly against the trial Court’s findings of fact, which cannot be easily reversed by this appellate Court. In support of this argument, he cites **Achium v Attorney General**.<sup>(2)</sup> He argues that the Learned trial Judge correctly evaluated the evidence and made correct findings of fact.

On the alleged error on the law, Mr Mweemba points out that the learned trial Judge concluded that the parties’ agreement to a premium payment credit scheme extending beyond the statutory sixty days, as highlighted in the evidence, amounted to a waiver

of the strict application of the law by mutual agreement. He submits that this was a sound interpretation of law and is supported by **Section 76(1) of the Insurance Act, (1997)**, which provides as follows:-

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***“A Contract of General Insurance shall cease to operate if a premium is not paid within sixty days after due date of the premium, or within such period as the Contract may stipulate.”***

He points out that there was in this case an endorsement to all the policies, as per page 72 of the appeal record which reads as follows:

***“However, notwithstanding the provisions of Section 76(1) of the Insurance Act 1997. It is agreed and understood that if the premium is paid after the expiry of sixty (60) days, the policy shall automatically be reinstated but the Corporation shall not be liable for any loss or damage incurred before the payment of the premium, except where a premium settlement plan was pre- arranged and a deposit premium received by the Corporation at inception of cover”***

He submits that it was as a result of this agreement to waive the strict application of the sixty days period, that the Appellant was able to pay premiums for the Fire Insurance Policy, some eleven (11) months from the inception of the policy.



We have examined the evidence and Judgment in the Court below. We have also considered submissions of both Counsel. The gist of Mr Nsofu's submission on these grounds is that the Insurer and the Insured never agreed, in writing, for the payment premium on credit outside sixty days. We do not accept this submission because it

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disregards the evidence on record. As correctly argued by Mr Mwemba, 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**<sup>(1)</sup> 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.

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For the foregoing reasons, we find no merit in grounds one and three. We hereby dismiss them.

On ground two, on behalf of the Appellant, Mr Nsofu submits that having found that the Appellant only paid for the Fire Policy, the Learned trial Judge erred in law and in fact in having held that the Appellant enjoyed Insurance cover on all six policies, sought by the Appellant, in disregard of **Section 76(1) of the Insurance Act, 1997** and the sixty days premium clause and the effect of a cover note issued by an Insurance Agent (***the Respondent***). He submits that the Respondent only issued “*temporal*” cover notes, which were to be superseded by the grant or refusal of the Policy. In support of the submission he cites **Julien Praet ET Cie, S.A. vs H.G Poland Limited (1960) 1 Lloyds Rep 420.** That case states that the cover note which is issued at once on receipt of a proposal and covers the assured and puts the underwriter on risk for the period while the proposal is being considered and until the policy is either granted or refused. We note that this case is one of the five (5) authorities listed. Out of the 5, 4 have copies

attached. A copy of the particular case is not attached to the list of authorities. In effect, we have not been afforded the benefit of reading the whole case.

In response on ground two, Mr Mweemba repeats his submissions on ground one as to the alleged breach of **Section 76(1)** of the Act. He then refers to paragraphs 3 and 4 of the

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affidavit sworn on behalf of the Appellant by John Freddie Mutale, its witness and Finance and Administration Manager. In that affidavit, the witness admits that on dates between 1<sup>st</sup> July 2005 and 1<sup>st</sup> July 2006, the Appellant obtained Insurance covers for the 6 Policies on credit, from the Respondent. He points out that the Appellant attempted to pay premiums on all the Policies, except that some of the cheques were dishonoured. This is as evidenced by pages 44 -46 and 49 of the record of appeal.

We have examined the case record and have considered the submissions by Counsel. We accept the submissions by Mr Mweemba that the Appellant attempted to pay premium for all the other policies, by cheques. In the process some cheques were dishonoured. This is evidenced by pages 44, 45, and 46 of the record of appeal. The premium for the Fire Policy was K23,380,000. But the total paid towards premium is K31,200,000. The extra K7,820,000 was premium for the other policies. As we see it, the Appellant experienced financial problems in paying

premium for the Insurance policies. On the evidence on record, we do not accept the argument by Mr Nsofu that the Appellant paid for only the Fire Policy out of the six Policies. Even premium on the Fire Policy was paid for about 11 months from the date of inception. As late as 24<sup>th</sup> August 2006, the Appellant promised to settle the premium account. We are of the view that the learned trial Judge was entitled to find that the Appellant enjoyed the benefits of all the 6

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Policies. Accordingly, we dismiss ground two for lack of merit. The net result is that the appeal fails. We award costs to the Respondent, to be taxed in default of agreement.

I.C. MAMBILIMA

**DEPUTY CHIEF JUSTICE**

M.S. MWANAMWAMBWA

**SUPREME COURT JUDGE**