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IN THE COURT OF APPEAL OF ZAMBIA APPEAL NO. 166/2020
HOLDEN AT LUSAKA
(*Civil Jurisdiction*)

BETWEEN:

METALCO INDUSTRIES LIMITED **APPELLANT**

AND

FOCUS LIFE ASSURANCE (In Liquidation) **RESPONDENT**

Coram: Makungu, Majula and Siavwapa, JJA
On the 22nd day of September, 2021 and 2nd day of December, 2021

For the Appellant : *Mr. M. Mulenga of Messrs Lungu, Simwanza & Co.*
For the Respondent : *Mrs N. Zimba and Miss M. Pilula both In- House Counsel Pension Insurance Authority (Liquidators of Appellant Company)*

JUDGMENT

MAKUNGU, JA delivered the Judgment of the court.

Cases referred to:

1. *Mukuwe Akamana v. Diamond Insurance Limited 2009/HN/316*

Legislation referred to:

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

Other works referred to:

1. *Micheal Parkington and Anthony O'Dowd, Mac Gillivray & Parkington on Insurance Law, 7th Edition (Sweet & Maxwell, 1981)*
2. *Halsbury's Laws of England, 4th Edition Vol. 9 (1)*
3. *Lawrence Koffman & Elizabeth.J. Macdonald, The Law of Contract, 7th Edition (Oxford University Press, 2010)*
4. *Turnerstips.wikidot.com/time-on-risk accessed on 2nd November, 2021 at 14:38 hours.*

1.0 INTRODUCTION

1.1 This appeal is against the judgment of Mrs. Justice Irene Z. Mbewe dated 31st March, 2020 in which she entered judgment in the sum of US$56, 239.73 in favour of the respondent.

2.0 FACTUAL BACKGROUND

2.1 Sometime between March and April 2017, the appellant requested the respondent for a Keyman insurance policy to cover the life of Hussein Saffiedine, a director in the appellant company in the sum of US$10, 000, 000.00 at a calculated premium of US$127, 500.00. It was also to note and register the interest of International Finance Corporation (IFC). Other significant terms and conditions of the cover were that it was with effect from 19th April, 2017; it was a full life cover including protection from death due to all causes except illegal practice. The duration was for an initial period of two years, renewable with a thirty (30) day grace period in which the premium could be paid.

2.2 A tax invoice was issued on 19th April, 2017 and delivered to the appellant on 27th April, 2017. A policy document based on the approved terms and conditions was prepared and signed off.

The appellant engaged the services of Performance Insurance Brokers to negotiate and enter the policy.

2.3 Despite repeated demands, the appellant and its brokers failed and/or neglected to pay the premium as agreed. Consequently, by letter dated 27th September, 2017, the respondent cancelled the policy.

2.4 According to the respondent, at that date, the sum of US$56, 239.73 was outstanding as time-on-risk premium on the appellant's account for the period the insurance cover remained valid and/or operational from 19th April, 2017 to 27th September, 2017.

2.5 The respondent made a demand for that amount but the appellant refused to settle. Consequently, the respondent commenced an action against the appellant by way of writ of summons and statement of claim, seeking payment of the sum of US$56, 239.73 as time-on-risk premium for the period 19th April, 2017 to 27th September, 2017 with interest and costs.

2.6 The appellant resisted the claim stating that the insurance policy was to take effect upon issuance of a loan to the defendant by IFC. That the fact that no loan was granted entailed that the policy was inoperative or ineffective.

2.7 The appellant insisted that it did not breach any insurance policy agreement and that the respondent was not entitled to the claim it had made.

3.0 EVIDENCE BEFORE THE COURT BELOW

3.1 At trial, the respondent called one witness, Mike Mweemba, the Consultant, Risk Management and former employee of the respondent company who stated that the appellant breached the agreement by failing to pay the premium within a month.

3.2 That the purpose of the policy was to register the interest of IFC but no loan was obtained from IFC.

3.3 PW1 explained that where a policy lapses due to lack of payment of the premium, it amounts to a debt and the insurer is exposed to cover the risk if the policy is not cancelled. In *casu,* the respondent had to reinsure with other insurance companies overseas to protect these risks.

3.4 PW1 further stated that when an insurance policy is issued, a tax invoice is issued which is considered a debit note. He explained that a Keyman insurance policy is contingent upon human life and in the policy in dispute, the contract pertaining to any interests of IFC was between the IFC and the respondent.

3.5 In defence, and on behalf of the appellant Chrispin Tembo, Accountant and Insurance expert (DW1), told the court that in April 2015, the appellant applied for a loan from IFC, and as security, it required a Keyman insurance cover. The policy was negotiated by Performance Insurance Brokers Limited and that it was a term of the policy that the premium be paid within 30 days. If one failed, it would invalidate the policy resulting in termination.

3.6 DW1 explained that the appellant intended to pay the premium from the loan from IFC which never materialized, and so the insurance cover could not be enforced. The respondent was not put at any risk or greater exposure as the premium was not paid.

3.7 In cross-examination, DW1 could not point to any clause to the effect that the policy would only be valid once the loan was disbursed.

4.0 DECISION OF THE COURT BELOW

4.1 In her judgment, Judge Mbewe was of the view that there were two issues to be determined firstly, whether the failure to pay

the premium invalidated the insurance policy, and secondly, whether the respondent was entitled to the reliefs sought.

4.2 The court below stated that life assurance has the trappings of a contract, namely, offer, acceptance and consideration: on the death of a person whose life is being covered (the life assured) life assurance company commits to pay the beneficiary.

4.3 The lower court found that all premiums were to be paid in advance with a 30 day grace period and the beneficiary was IFC. The learned Judge was of the considered view that the clause on premiums was a promise to act in future and not an obligation to pay first. In this respect, relying on **MacGillivray & Parkinson on Insurance Law, 7th edition. Para. 861**, the lower court was of the view that there was a contract of insurance even though the premium had not been paid. Therefore, when the respondent issued the debit note to the appellant, the appellant became indebted to the respondent.

4.4 That the cover remained valid from the date of issuance until it was cancelled by the respondent on 27th September, 2017. In this regard, the appellant's argument that having failed to pay the premium, the policy automatically terminated by operation of law, and that had the key person died during the period the

policy was in existence, the respondent would not have indemnified the appellant in view of non-payment of the premium, was untenable.

4.5 With respect to the reliance placed on **section 76(1) of the Insurance Act No. 26 of 2005** by the appellant, the lower court found that the provision referred to contracts of general insurance as opposed to life assurance. That there was nothing in the policy that linked the payment of the premium to the disbursement of loan by IFC to the appellant.

4.6 Accordingly judgment was entered in favour of the respondent in the sum of US$56, 239.73 with interest and costs.

5.0 GROUNDS OF APPEAL

5.1 Five grounds of appeal have been advanced as follows:

1) The trial court erred in law and fact when it held that failure to pay premium does not invalidate the insurance contract in the face of evidence on record that the insurance company would not pay any claim in the absence of payments of premiums.

2) The trial court erred in law and fact to have found that there was consideration and henceforth there was a

contract of insurance created between the appellant and the respondent contrary to the evidence on record which reveals absence of consideration as premium was not paid by the respondent thereby rendering the purported contract invalid.

3) ***The trial court erred in law and fact when it held that the Keyman insurance policy cover did not terminate by operation of law and the terms of the said Keyman insurance policy in total disregard of the evidence on record and the law.***

4) ***The trial court erred in law to have considered that there was a waiver of insurance when the parties never agreed verbally or by conduct to have any agreed written terms of the contract waived; and;***

5) ***The trial court erred in law and in fact to have held that recognition and enforceability of the insurance policy would not amount to enforcing an illegal contract in the face of the evidence on record and vis-à-vis the provisions of the Insurance Act No. 27 of 1997 as amended by Act No. 26 of 2005.***

6.0 ARGUMENTS BY THE APPELLANT

6.1 In support of the appeal, the appellant filed heads of argument dated 7th September, 2020.

6.2 Grounds one, three and five were argued together, that in terms of **section 76(1) of the Insurance Act No. 27 of 1997 as amended by Act No. 26 of 2005**, the purported Keyman insurance was terminated 30 days from 28th April, 2017 (effective date). **Section 76(1) of the Insurance Act** as amended provides 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."***

6.3 The appellant contended that in terms of the policy document, all premiums were payable in advance during the term of the policy with a grace period of one calendar month. In this case, the premium remained unpaid for over five months before termination by the respondent. However, the appellant contends that the insurance policy between the parties was

actually terminated by operation of law in terms of **section 76(1) of the Insurance Act**.

6.4 Further, the appellant submits that failure to pay the premium invalidated the insurance contract. Subsequently, the recognition and enforcement of the insurance contract or policy between the parties amounts to enforcing an illegal contract.

6.5 In ground two, the appellants contend that an insurance contract is subject to all the ingredients of a valid contract at law, being offer, acceptance and consideration as per the High Court decision in **Mukuwe Akamana v. Diamond Insurance Limited.**[1] The case at hand falls short of consideration to recognize the relationship between the appellant and respondent as that of insurer and insuree. The parties to the insurance contract in issue agreed that benefits could only be paid when premium is paid. To fortify this, paragraph (b) of the policy document under the subheading **'GENERAL CONDITIONS AND PRIVILEGES'** which provided that:

> ***"Benefits shall only be paid under the following conditions:-***
>
> ***(b) All premiums, levies and tax dues and payable have been received by Focus Assurance Limited.***

6.6 In other words, the insurance contract could only be validated or enforced when premium is paid.

6.7 Lastly, with respect to ground four, the appellant submits that the court below seemingly held that there was a waiver of the application of the provisions of the Insurance Act in the absence of express agreement by the parties to the Keyman insurance. This position by the lower court was a misdirection as there was no express agreement to oust the applicability of the Insurance Act.

6.8 Finally, we were urged to uphold the appeal and set aside the judgment of the lower court with costs.

7.0 ARGUMENTS BY THE RESPONDENT

7.1 The respondent opposed the appeal and filed heads of argument dated 4th December, 2020.

7.2 The respondent contended that **section 76(1) of the Act** is not applicable to the Keyman insurance policy, which is a life policy, for the reason that **section 2 of the Insurance Act** provides that:

> ***"General insurance business" means insurance business other than life insurance business;***

7.3 As regards paragraph 1(b) under subheading 'Premiums' in the Insurance Cover which reads "(b) Grace period one calender month's grace is allowed for the payment of premiums." It was submitted that the court below rightly interpreted this clause as ***"a promise to act in future (on the part of the insurer) and not an obligation to pay first (on the part of the insured)."***

7.4 Further, with respect to the 'date of insurance' defined in the policy document as ***"the period between the date when the debtor becomes obligated to the creditor, and the date when the debtor applies for the insurance,"*** it was submitted that it simply means that once the contract came into effect and the invoice was issued for the premium, the appellant became a debtor who owed the insurer the premium. This implied that even when the premium was not paid, the insurer had an obligation to pay out the sum assured in the event that the risk materialized.

7.5 It was argued that email correspondence between the appellant's brokers and the respondent and the parties themselves between July and August 2017 shows that the

appellant acknowledged that it owed premium and put forward a schedule for payment in instalments.

7.6 Therefore, the appellant waived the term relating to the time of payment by admitting and committing to the premium payment in August 2017. That the respondent cannot under the circumstances claim that the contract was void on account of its failure to pay the premium within the grace period.

7.7 In ground two, the respondent joined issue with the appellant to the extent that an insurance contract is subject to all the ingredients of a valid contract at law.

7.8 The respondent submitted that in the **Mukuwe Akamana** case, the High Court was of the considered view that the issuance of a debit note by the insurer was an acknowledgement of the indebtedness of the insured to the insurer. The court further stated that as opposed to repudiating a contract by refusing to indemnify the insured once the event for which the cover was provided had occurred, the remedy was for the insurer to sue for the unpaid premiums.

7.9 It was submitted that in *casu* the lower court adopted this position as parties to a contract are free to agree when consideration should be paid and what form it should take. In

this case, consideration on the part of the insurer came at the time the contract came into effect in form of the risk the respondent acquired in servicing the policy. In the event of the death of the Keyman before 27th September, 2017, the respondent would have been obligated to pay out the insured sum to the appellant less the owed premium. This, it was contended, proves that consideration was in fact present.

7.10 In any case, the appellant had made a commitment to settle the premium in instalments months after the 30 day grace period.

7.11 With respect to ground four, the respondent submitted that the trial court found that the email correspondence in which the appellant requested to settle the premiums by instalments outside the 30 day grace period amounted to a waiver of the term relating to the time of payment of the premium. The court was not alluding to a waiver of the Insurance Act, but waiver, of a term in the policy. Consequently, the lower court found that it was not correct to assert that the Keyman insurance policy was general insurance and thus, subject to section 76(1) of the Insurance Act.

7.12 That clearly, the waiver was not in respect of the Insurance Act as argued by the appellant.

7.13 In conclusion, the respondent restated its position that a Keyman insurance is a type of life insurance cover which does not fall under the ambit of section 76(1) of the Act; that the policy acknowledged circumstances in which premium was not paid while risk was still acquired by the insurer; that the conduct of the appellant amounted to a waiver of the term in the contract relating to the time frame for payment of the premium; and that the contract remained valid until it was expressly termination by the respondent.

7.14 We were urged to dismiss all the grounds of appeal, uphold the judgment of the lower court with costs to the respondent.

8.0 DECISION OF THE COURT

8.1 We have read the record of appeal and considered the arguments advanced by the opposing parties. We shall deal with grounds one, three, four and five together as they are inter-related.

8.2 In grounds one, three and five, the appellant is arguing that having not paid the insurance premium, the insurance contract came to an end in accordance with **section 76(1) of the Insurance Act**.

8.3 It is trite that an insurance contract is a contract subject to the general principles of contract, that is, offer, acceptance and consideration. Thus, we endorse the holding of Siavwapa J, as he then was, in the **Mukuwe Akamana v. Diamond Insurance Limited**[1] that:

> ***"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 the consideration. The certificate of insurance denotes acceptance by the insured and .... also forms the full extent of the contract, stipulating the terms, conditions and extent of the cover provided."***

8.4 The policy document, which constitutes the certificate of insurance and/or cover note, stipulates the type of cover as; "Full Life Cover." Being a type of "full life cover" it did not even tangentially fall under general insurance because **section 2 of the Insurance Act** distinguishes general insurance from life assurance/insurance as follows:

"General insurance business" means insurance business other than life insurance business;"

And that:

"Life insurance business" means the business of issuing life policies;

The Act goes on to define a life policy in the following terms:

"Life policy" means a policy under which the insurer assumes a contingent obligation dependent on human life, and includes any contract of insurance customarily regarded as a life insurance contract, but does not include-

(a) a funeral policy;

(b) a policy under which the contingent obligation dependent on human life forms a subordinate part of the insurance effected by the policy;

(c) a policy for a period of less than two years; or

(d) a policy of a kind or description prescribed by regulations made under this Act;

8.5 We therefore hold that since life insurance is distinct from general insurance, the provisions of section **76 (1) of the Insurance Act, 1997** do not apply to this matter.

8.6 We shall proceed to take the question whether the non-payment of the premium by the appellant resulted in the termination of the contract of insurance between the parties. The Keyman Insurance Cover stipulated that:

> ***(a)All premiums are due in advance during the term of the policy.***
>
> ***(b) Grace period***
>
> ***One calendar month's grace is allowed for the payment of premiums.***

8.7 Under the Subheading 'B General conditions and privileges benefits shall be paid under the following conditions:

> ***"(b) All premiums, levies and tax duties due and payable have been received by focus Life assurance Limited."***

8.8 The appellant contends that the contract of insurance expired within 30 days as the premium was not paid and it could not commit to the policy as the loan it had intended to get from IFC

for which it sought the cover had fallen through. For its part, the respondent argues that the clause on premiums is a promise to act in future and not an obligation to pay first as held by the lower court. We accept this view.

8.9 We hold that once the contract came into effect and the invoice for the premium was issued, the appellant became a debtor who owed the respondent as creditor. The implication being that even when the premium was not paid, the insurer had an obligation to pay out the sum assured in the event that the risk materialized. Provided that it could demand for all premiums, levies and tax duties due and payable by the appellant.

8.10 The policy document was executed by the respondent on 28th April, 2017 while the appellant executed it on 3rd May, 2017. The appellant, as debtor applied for the insurance on 3rd May, 2017. The tax invoice for the premium was issued on 21st April, 2017, thus the appellant became indebted to the respondent on that date but was free to pay the premium within the grace period of 30 days. It is from the evidence on record that long after the grace period the appellant expressed its intention to pay by instalments. This entails by email in August, 2017 that there was a waiver of the term relating to time for payment by

the appellant and that the contract was subsisting at the time. Due to the negotiations regarding payment by instalments, it is our considered view that there was an implied agreement to settle the premium by instalments as the contract was not forthwith rescinded. Therefore, there is no merit in the fourth ground of appeal and it is dismissed accordingly.

8.11 The appellant was at liberty to terminate the contract at any time but chose to negotiate to settle the premium instalments and kept the policy alive. Thus the appellant is liable to settle the premium for the period it had cover until the date the policy was terminated by the respondent. For these reasons, we find no merit in grounds one, three and five and dismiss them as well.

8.12 In the second ground of appeal, the appellant contends that there having been no payment of premium, there was no consideration and consequently, the contract of insurance was invalid. This view finds support when we consider **Halsbury's Laws of England, Vol. 9 (1) paragraph 733** states as follows:

> ***"Executory and executed consideration; Consideration is said to be 'executory' when it consists of a promise to do or to forebear from doing some act in future; and it***

is said to be 'executed' when it consists in some act or forbearance completed at earliest when the promise becomes binding. Thus valuable consideration may be provided by either the following (1) mutual promises, which will give rise to a bilateral contract, or (2) a promise in return for an act, in which case there will be unilateral contract."

8.13 Further, the learned authors, **Lawrence Koffman & Elizabeth Macdonald in The Law of Contract, paragraph 4.11** state at page 59 that:

"An exchange of promises by parties known as 'executory' consideration, will also amount to an enforceable agreement. For example, X promises to deliver a new car to Y in three week's time and Y promises to pay for the vehicle on delivery. Despite the fact that no performance of the undertakings has yet taken place, the obligations are still in the future, there is good consideration. Both parties are getting what they requested in return for their promises. For commercial reasons it is important that the

law recognized the validity of such agreements, as this facilitates forward planning by the parties."

8.14 Therefore, we hold that there was consideration in view of the mutual agreement that the premium be paid later than the date of commencement of Keyman Insurance and the negotiations to settle the premium in instalments. For these reasons, ground two also fails.

8.15 According to paragraph 12 of the statement of claim, the respondent claimed US$ 56 239.73 as time-on-risk premium for the period that the insurance cover remained valid from 19th April, 2017 to 27th September, 2017. It is important to define time on risk in order to clarify our decision. According to turnerstips.wikidot.com ***"Time on risk (TOR) is a term used by the insurance industry to define the starting point and ending point of a period of coverage. This is when your policy starts and when your policy finishes... time on risk is not relevant, you will be charged at least the minimum amount."***

8.16 In casu, the amount claimed was justified and it is still due and payable.

9.0 CONCLUSION

9.1 On the whole, all the five grounds of appeal having failed, the entire appeal is dismissed. We uphold the judgment of the court below with costs to the respondents, which may be taxed in default of agreement.

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C. K. MAKUNGU
COURT OF APPEAL JUDGE

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B.M. MAJULA
COURT OF APPEAL JUDGE

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M.J. SIAVWAPA
COURT OF APPEAL JUDGE