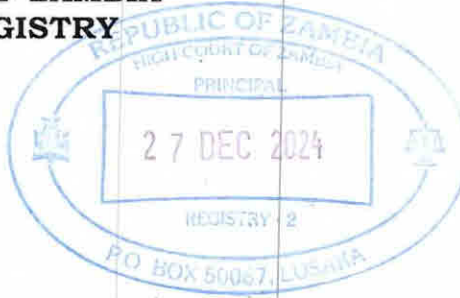


IN THE HIGH COURT OF ZAMBIA  
AT THE PRINCIPAL REGISTRY  
HOLDEN AT LUSAKA  
(Civil Jurisdiction)

2019/HP/1371



BETWEEN:

**MERCY MWANSA****PLAINTIFF**

AND

**GOLDMAN INSURANCE LIMITED****DEFENDANT**

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 27<sup>th</sup> DAY OF  
DECEMBER, 2024**

*For the Plaintiff* : Mr. E. Phiri, Messrs. Makebi Zulu Advocates

*For the Defendant* : Mr. K. Kamfwa – Messrs. Wilson and Cornhill Advocates

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## **J U D G M E N T**

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CASES REFERRED TO:

1. *Castellain v Preston (1883) 11 QBD 38*
2. *Pan Atlantic Co. Ltd v Pine Top Insurance Co.Ltd (1993) 1 Lloyd's REP 496*
3. *Chamaponde and others v Zambia State Insurance Corporation Limited 2005 ZR 151*
4. *Simwanza Namposhya v Zambia State Insurance SCJ No. 21 of 2010*
5. *Nyimba Investments Limited v NICO Insurance Zambia Limited 2017 Vol 1 ZR 196*
6. *Madison General Insurance Company Limited v Avril Cornhill and another Appeal No. 19 of 2017*

OTHER WORKS REFERRED TO:

1. *Black's Law Dictionary, 10<sup>th</sup> Edition by Bryan A. Garner*
2. *Chitty on Contracts -Specific Contracts, 30<sup>th</sup> Edition*
3. *Halsbury's Laws of England, Volume 25, 4<sup>th</sup> Edition*
4. *Halsbury's Laws of England, 4<sup>th</sup> Edition Re-Issue Vol 25*
5. *Law of Contract by Edwin Peel, 13<sup>th</sup> Edition, 2011*

## **1. INTRODUCTION**

1.1 Mercy Mwansa, the Plaintiff herein, commenced this matter by way of Writ of Summons, which was accompanied by a statement of claim on 28<sup>th</sup> August 2019, seeking the following reliefs:

- i. An Order for the immediate payment of the sum of K130,000.00 being money due to Mercy Mwansa arising out of the comprehensive insurance contract which was taken out by Mercy Mwansa;*
- ii. An Order for breach of the comprehensive insurance contract by Goldman Insurance Limited;*
- iii. An Order for specific performance of the comprehensive insurance contract against Goldman Insurance Limited in favour of Mercy Mwansa;*
- iv. An Order for Damages for failure to pay the sum of K130,000.00 arising out of the breach of the comprehensive insurance contract;*
- v. Any other relief that the Court may deem fit; and*
- vi. Costs of and incidental to this action.*

## **2. STATEMENT OF CLAIM**

2.1 In the statement of claim, Mercy Mwansa, alleged that she was a client of Goldman Insurance Limited, and the owner of the motor vehicle, Mitsubishi Pajero 1999, silver in colour Registration No. BAH 2677 ZM, and whose Chasis number was V65W-0000398. It was also stated that Goldman Insurance Limited provides insurance services.

- 2.2 The averment was that Mercy Mwansa approached Goldman Insurance Limited with a hope of entering into an insurance contract for comprehensive cover of the motor vehicle.
- 2.3 Thus, on 22<sup>nd</sup> April 2017, Mercy Mwansa bought a third-party insurance policy from Goldman Insurance Limited, which was later migrated into a comprehensive insurance cover. It was also stated that Mercy Mwansa was required to pay a sum of ZMW9,803.34 in order for Goldman Insurance Limited to provide insurance cover in her favour, in the sum of ZMW150,000.00.
- 2.4 Further assertion was made, that the insurance cover for Mercy Mwansa was accepted and entered into, on 9<sup>th</sup> June 2017, when Mercy Mwansa made a deposit with Goldman Insurance Limited in the sum of ZMW3,200.00, being payment under insurance policy no. 11040110630412017 for the motor vehicle.
- 2.5 It was contended that on 9<sup>th</sup> June 2017, after the payment was made, Goldman Insurance Limited went on and issued an insurance disk no. 160828 in favour of Mercy Mwansa for the motor vehicle, which was valid for Twelve (12) months, and which was to expire on 30<sup>th</sup> June 2018.
- 2.6 The assertion was further that, on 8<sup>th</sup> December 2017, Mercy Mwansa went and made a payment in the sum ZMW6,603.34, which was the balance of the motor vehicle insurance cover, subject of this suit, after initial payment.
- 2.7 Still in averring, it was stated that on 2<sup>nd</sup> June 2018, Mercy Mwansa's motor vehicle was involved in a road accident

along Kafue Road, Lusaka, and the matter was reported to Makeni Police Station. It was stated that Goldman Insurance Limited was informed of the accident, and the allegation was that the arising from the accident, the motor vehicle was damaged beyond repair.

- 2.8 Further averment was made, that on 4<sup>th</sup> July 2018, Goldman Insurance Limited issued a discharge letter in favour of Mercy Mwansa, in the sum of ZMW135,000.00 which was 10% less the amount covered under the comprehensive insurance contract, and less a further sum of ZMW 5000.00 for the salvage value of the motor vehicle, bringing the total amount due to Mercy Mwansa to ZMW130,000.00.
- 2.9 Mercy Mwansa stated that whilst waiting for the payment of ZMW130,000.00 from Goldman Insurance Limited, on 24<sup>th</sup> July 2018, the said Goldman Insurance Limited suspended the processing of payment of that money, stating that they were investigating the claim. Then on 17<sup>th</sup> September 2018, Goldman Insurance Limited wrote a letter to Mercy Mwansa informing her that they would not pay the sum of ZMW130,000.00, as Mercy Mwansa's motor vehicle was not road-worthy.
- 2.10 Averment was further made, that Mercy Mwansa made several attempts to recover the money from Goldman Insurance Limited, which attempts had not yielded any positive results. It was also stated that Mercy Mwansa wrote and made personal follow-ups at the known addresses for Goldman Insurance Limited.

2.11 However, Goldman Insurance Limited had failed and neglected to liquidate the sum of ZMW130,000.00, and had breached the Comprehensive Insurance Cover which was entered into with Mercy Mwansa.

### **3. DEFENCE**

3.1 In the Defence, which was filed on 9<sup>th</sup> September 2019, Goldman Insurance Limited averred that at the material time when Mercy Mwansa proposed to take out the motor vehicle insurance, the motor vehicle she proposed to insure had no registration number. Therefore, Mercy Mwansa promised to advise Goldman Insurance Limited of the registration number in due course, which she did not do.

3.2 The defence was further that Mercy Mwansa initially approached Goldman Insurance Limited with a view to taking out third-party insurance for the unregistered car. It was averred that Mercy Mwansa did not disclose that the motor vehicle had no engine at the time of making the proposal.

3.3 Admission was made, that on 22<sup>nd</sup> April 2017, Mercy Mwansa bought a third-party insurance policy, which was later migrated into a comprehensive insurance cover. However, Goldman Insurance Limited denied that the comprehensive insurance cover was for the motor vehicle, as the said motor vehicle did not have a registration number at the material time.

3.4 The contention that Mercy Mwansa was required to pay a sum of ZMW9,803.34, in order for Goldman Insurance

Limited to provide insurance cover in her favour for the sum of ZMW150,000.00 was admitted.

- 3.5 Goldman Insurance Company Limited however contended that it issued the comprehensive insurance cover to Mercy Mwansa, in the belief that the motor vehicle had an engine, when in fact not. Assertion was made, that Mercy Mwansa's agent made Goldman Insurance Limited believe that he had merely forgotten the engine number, and that he would provide it later.
- 3.6 It was agreed that Mercy Mwansa paid a deposit of ZMW3,200.00 towards the insurance policy, but it was denied that the payment was for the motor vehicle, as there was no motor vehicle that was registered at that time.
- 3.7 Admission was made, that on 8<sup>th</sup> December 2017, Mercy Mwansa made a payment of ZMW6,603.34, which was the balance of the motor vehicle cover.
- 3.8 The defence was also that the motor vehicle, Mitsubishi Pajero 1999 model, silver in colour, registration number BAH 2677 and bearing chasis number V65W-0000398 was alleged to have been in another accident, on 7<sup>th</sup> June 2019.
- 3.9 Goldman Insurance Limited agreed that on 4<sup>th</sup> July 2018, it issued a discharge letter in favour of Mercy Mwansa in the amount of ZMW135,000.00, which was 10% less the amount covered under comprehensive insurance, and less ZMW5,000.00, the salvage value, bringing the total to ZMW130,000.00.

- 3.10 It was admitted that Goldman Insurance Limited suspended the processing of the money, which was due to be paid to Mercy Mwansa, whilst it was investigating the claim. Thereafter, on 17<sup>th</sup> September 2018, it wrote to Mercy Mwansa, informing her that it would not pay the sum of ZMW130,000.00, because the motor vehicle was not road-worthy.
- 3.11 Agreement was made, that Mercy Mwansa made several attempts to recover the money, with no positive results, and that she wrote and made personal follows at Goldman Insurance Limited's address.
- 3.12 The defence was that Goldman Insurance Limited repudiated Mercy Mwansa's claim, because of her non-disclosure of material facts at the time of proposing cover namely; that the motor vehicle had no engine at the material time, and that it was bought in a damaged state from the Vendor. It was contended that Mercy Mwansa breached the duty of utmost faith.
- 3.13 Goldman Insurance Limited denied that it was liable to Mercy Mwansa for all the claims that she had made, and that should it be found liable, the true value of the motor vehicle should be ascertained, having regard to the fact that the motor vehicle in respect of which the insurance cover was issued had no engine, and it was in a damaged state from an earlier accident.

#### **4. REPLY**

4.1 In a Reply, which was filed on 12<sup>th</sup> September 2019, Mercy Mwansa joined issue with Goldman Insurance Limited on its' Defence.

#### **5. EVIDENCE AT TRIAL**

5.1 At trial, Mercy Mwansa testified and called one (1) witness, while Goldman Insurance Limited called Two (2) witnesses.

##### **PW1 – MERCY MWANSA**

5.2 Mercy Mwansa in her evidence, testified that her husband, Gustav Kabunda purchased a motor vehicle sometime between 20<sup>th</sup> and 28<sup>th</sup> February 2017, but it did not have an engine at the time. She stated that he purchased an engine and the motor vehicle was up and running, and she was using it for school runs. Thus, she had to insure it.

5.3 It was also her testimony, that her husband engaged Goldman Insurance Company Limited to purchase third-party insurance cover, stating that it was at page 2 of her bundle of documents.

5.4 Further in her evidence, Mercy Mwansa testified that Goldman Insurance Limited did its' due diligence by inspecting the motor vehicle. Thereafter, the motor vehicle was insured, and she was issued with a receipt.

5.5 She told the Court that at on 9<sup>th</sup> June 2017, the insurance cover was upgraded from third-party to comprehensive cover. Thus, they engaged Goldman Insurance Limited, who inspected the vehicle, and it was insured for ZMW150,000.00. It was her evidence, that at the time, they

did not have the ZMW9,803.00 which was required to be paid, as the initial comprehensive cover.

- 5.6 Therefore, they made part payment of ZMW3,200.00 which was agreed to, with page 5 of her bundle of documents being identified as the said receipt. Her evidence was further that they later paid the balance of ZMW6,603.00, as per the receipt, which was at page 8 of her bundle of documents.
- 5.7 It was also Mercy Mwansa's evidence, that on 2<sup>nd</sup> June 2018, whilst the insurance was still running, her husband was involved in a road traffic accident along Kafue road. She stated that he sustained a broken ankle, and they were in hospital for a week.
- 5.8 Her testimony was that she waited for his recovery before she dealt with the insurance claims. Thus, on 4<sup>th</sup> July 2018, she informed Goldman Insurance Limited, about the accident, and they wrote a letter back to her, stating that they would settle the claim. Page 12 of Mercy Mwansa's bundle of documents was stated as being the said letter.
- 5.9 Mercy Mwansa added that the said letter had her husband's signature, and that Goldman Insurance Limited indicated that they would pay ZMW135,000.00. Her evidence was that her husband and herself asked for the salvage amount, which was ZMW5,000.00, and Goldman Insurance Limited agreed and they signed for the salvage.
- 5.10 Still in her testimony, Mercy Mwansa testified that on 24<sup>th</sup> July 2018, Goldman Insurance Limited informed them through the letter which was at page 13 of her bundle of

documents, that they had suspended the payment. It was her testimony, that the payment was suspended as Goldman Insurance Limited did investigations. Mercy Mwansa explained that they kept following up, but Goldman Insurance Limited did not inform them of the nature of the investigations that they were undertaking.

- 5.11 She testified that it was only on 27<sup>th</sup> September 2018, when Goldman Insurance Limited got back to them, and told them that they would not pay the claim, because the motor vehicle was not road-worthy. It was Mercy Mwansa's evidence that they were surprised, as Goldman Insurance Limited did due diligence and inspection before insuring the motor vehicle. She identified page 14 of her bundle of documents as the said letter.
- 5.12 Mercy Mwansa further stated that they had ensured that the motor vehicle was in tip top condition, and that they followed up with Goldman Insurance Limited, to no avail. Therefore, they sued.

#### **CROSS-EXAMINATION OF MERCY MWANSA**

- 5.13 In cross-examination, Mercy Mwansa's evidence was that they bought the body of a motor vehicle on 27<sup>th</sup> February 2017. She agreed that it had no engine at the time, and her evidence was that one was purchased on a date that was known by her husband.
- 5.14 When referred to page 6 of Goldman Insurance Limited's bundle of documents, Mercy Mwansa testified that it was a

police report for change of an engine, which was dated 7<sup>th</sup> February 2018.

5.15 Her evidence was further that her husband would know when the engine was fitted into the motor vehicle. Mercy Mwansa also testified that her husband drove the motor vehicle to Goldman Insurance Limited for inspection.

**PW2 -GUSTAV KABUNDA**

5.16 Gustav Kabunda testified that he bought the motor vehicle from Jan Japan on 23<sup>rd</sup> February 2017. He stated that the vehicle had all the parts, except an engine. It was also his testimony, that around March 2017, he engaged Nicholas Chatembwa to buy an engine, on the agreement that Nicholas Chatembwa would fit the engine, on a further condition that Gustav Kabunda paid the balance on completing the transaction.

5.17 Gustav Kabunda's evidence was that as per the Road Transport and Safety Agency (RTSA) requirements, he insured the motor vehicle with Goldman Insurance Limited. To that effect, he stated that they first bought third-party insurance cover at ZMW163.00. His evidence was also that they were issued a cover note through a mobile agent at the post office for a period of Three (3) months from 30<sup>th</sup> April 2017 to 30<sup>th</sup> June 2017.

5.18 He identified the insurance cover as that which was at page 2 of Mercy Mwansa's bundle of documents, and the receipt that he was issued with, as being at page 4 of the said bundle of documents.

- 5.19 It was Gustav Kabunda's evidence that when he got the cover, the motor vehicle had not yet been registered. He stated that when the third-party insurance cover was about to expire, they decided to upgrade it to comprehensive insurance cover.
- 5.20 His evidence was that he went to Goldman Insurance Limited's branch, opposite Longacres Mall, and he engaged its' employee to insure the motor vehicle for ZMW150,000.00. Further in his testimony, Gustav Kabunda stated that the motor vehicle was inspected, and cover was drawn for a premium amount of ZMW9,803.34. He added that the motor vehicle was still not registered as at 9<sup>th</sup> June 2018. Therefore, the cover only had the chasis number of the motor vehicle.
- 5.21 Gustav Kabunda also testified that they only paid ZMW3,200.00, and they were issued with a cover and a receipt dated 9<sup>th</sup> June 2017. He identified the receipt and cover as being at pages 5 and 6 respectively, of Mercy Mwansa's bundle of documents.
- 5.22 He stated that the particulars of the motor vehicle were Mitsubishi Pajero 1999 V65W-0000398, silver in colour, with a sitting capacity of Five (5) people. Gustav Kabunda added that the insurance cover was ZMW150,000.00, with a duration from 9<sup>th</sup> June 2017 to 30<sup>th</sup> June 2018.
- 5.23 The testimony that he further gave, was that the balance on the premium was paid on 8<sup>th</sup> December 2017, at head office along Cairo road. It was also stated that they were issued a

receipt in the sum of ZMW6,603.34, which was at page 8 of Mercy Mwansa's bundle of documents.

- 5.24 In his continued testimony, Gustav Kabunda testified that in January, they began the process of registering the motor vehicle, and it was registered on 29<sup>th</sup> April. He stated that they were also issued a certificate of fitness certificate, and a road tax certificate.
- 5.25 The evidence that was further given was that Gustav Kabunda was involved in a road traffic accident on 2<sup>nd</sup> June along Kafue Road. He explained that he was rushed to the University Teaching Hospital where he was admitted for a week, and that he sustained a broken ankle, which he was still battling with.
- 5.26 Gustav Kabunda told the Court that he notified Goldman Insurance Limited about the accident after he was discharged from the hospital. He stated that Goldman Insurance Limited required him to submit a cover note, a police report and Three (3) quotations. Further, he was given a form to fill in, which he submitted on 4<sup>th</sup> July, and a settlement letter for ZMW135,000.00 was written.
- 5.27 Gustav Kabunda testified that they agreed and signed the letter on 14<sup>th</sup> July 2018, which was at page 12 of Mercy Mwansa's bundle of documents. He added that he witnessed the signing.
- 5.28 Further in his testimony, Gustav Kabunda testified that Goldman Insurance Limited issued a letter on 24<sup>th</sup> July 2018, suspending the payment pending investigations,

which was at page 13 of Mercy Mwansa's bundle of documents. His evidence was that on 17<sup>th</sup> September 2018, they received a letter stating that the claim would not be paid as the motor vehicle was not road-worthy. He identified page 14 of Mercy Mwansa's bundle of documents as the said letter.

5.29 It was his testimony, that the letter came as a shock to them, because Goldman Insurance Limited had inspected the motor vehicle when it first issued the insurance cover. Further, RTSA also inspected the motor vehicle at the time of the accident, and issued a test certificate for it.

**CROSS-EXAMINATION OF GUSTAV KABUNDA**

5.30 In cross-examination, Gustav Kabunda's evidence was that he bought a vehicle, and not a body of a vehicle.

5.31 His testimony on being referred to page 25 of Goldman Insurance Limited's bundle of documents, was that it as a letter from Mercy Mwansa, which was dated 19<sup>th</sup> September 2018. He maintained that he bought a vehicle, and not a body of a vehicle.

5.32 Gustav Kabunda further testified that the engine was purchased and fitted in March 2017. His testimony on being referred to pages 4 to 6 Goldman Insurance Limited's bundle of documents, was that page 4 was a letter of sale for the engine, which was dated 28<sup>th</sup> January 2018. He added that Nicholas Chatembwa and Mercy Mwansa were the parties to the sale.

- 5.33 Gustav Kabunda also stated that page 5 was a general affidavit for change of engine number, which was sworn by Mercy Mwansa on 7<sup>th</sup> February 2018.
- 5.34 He further stated that page 6 was a police document to change the engine number which was also dated 7<sup>th</sup> February 2018.
- 5.35 His evidence was that the motor vehicle was taken for inspection at Goldman Insurance Limited on 9<sup>th</sup> June 2017. Gustav Kabunda testified that the motor vehicle had an engine which was supplied in 2017, but whose documents were only issued on 7<sup>th</sup> February 2018.
- 5.36 It was also his testimony, that the engine was fitted into the motor vehicle after it was purchased, but that completion was only done after being satisfied with the performance.
- 5.37 Gustav Kabunda testified, when he was referred to pages 7 to 9 of Goldman Insurance Limited's bundle of documents, that it was a Goldman Insurance Limited motor accident claim form. His evidence was that the registration number for the motor vehicle was BAH 2677, and that the registration number and engine number were correct.
- 5.38 The continued testimony in cross examination, was that the motor vehicle was registered on 29<sup>th</sup> March 2018, and that Goldman Insurance Limited was not advised of the engine number and the registration number.
- 5.39 When referred to page 9 of Mercy Mwansa's bundle of documents, Gustav Kabunda testified that the first registration date was 29<sup>th</sup> March 2018, and that page 10 of

the same bundle of documents, was the road tax first registration on 6<sup>th</sup> April 2018.

5.40 Further reference was made to page 16 of Mercy Mwansa's bundle of documents, and he, Gustav Kabunda, testified that it was a road tax certificate for up to the second quarter of 2018.

5.41 That marked the close of the case for Mercy Mwansa.

**DW1- CHEWE MUTALE**

5.42 The first witness who was called by Goldman Insurance Limited was Chewe Mutale, an insurance agent. He testified that his duties included selling insurance and inspecting vehicles to be insured.

5.43 It was also his evidence, that he was involved in insuring the motor vehicle, which was subject of these proceedings, as Gustav Kabunda called him, and he went to the Chinese Centre along Alick Nkata Road with the motor vehicle.

5.44 Chewe Mutale stated that he saw the motor vehicle from the outside, and he prepared and signed an inspection report which was at page 3 of Goldman Insurance Limited's bundle of documents.

5.45 Chewe Mutale further testified was that the registration number was not on the motor vehicle, and therefore he wrote TBA (To Be Advised). He also told the Court that he did not indicate the engine number and chasis number, as Gustav Kabunda did not go with any documents for the motor vehicle.

5.46 It was further his evidence, that the registration number, engine number and chasis number were not subsequently given to him. Chewe Mutale stated that he later handled the subject matter of the claim, as after the claim was presented, he was called to write a report, which he wrote for Goldman Insurance Limited. He identified page 27 of Goldman Insurance Limited's bundle of documents, as being the said report.

**CROSS-EXAMINATION OF CHEWE MUTALE**

5.47 In cross-examination, the testimony that Chewe Mutale gave, was that he had worked for Goldman Insurance Limited for Twelve (12) years. He stated that this matter involved a motor vehicle.

5.48 When referred to the Motor Vehicle Physical Inspection Form, which was at page 3 of Goldman Insurance Limited's bundle of documents, he stated that it showed that the proposer was Mercy Mwansa, and that the motor vehicle was a Mitsubishi Pajero.

5.49 It was his evidence, when he was further referred to pages 2 and 3 of Mercy Mwansa's bundle of documents, that page 2 was a cover note, which was issued by Goldman Insurance Limited, and that the insured was Mercy Mwansa, who paid ZMW163.00 for the cover note.

5.50 On being referred to paragraph 10 of the defence, which was at page 10 of Mercy Mwansa's bundle of pleadings, Chewe Mutale testified that Gustav Kabunda went driving the motor vehicle to their old premises. It was his evidence that it was

not possible to drive a motor vehicle without an engine, but that an engine was a spare part which could be changed.

- 5.51 On again being referred to the Inspection Report which was at page 3 of Goldman Insurance Limited's bundle of documents, Chewe Mutale's testimony was that he inspected the motor vehicle, and he stated that they used that form when inspecting motor vehicles. It was also his testimony in cross examination, that the general condition of the motor vehicle was good, according to the inspection, and the motor vehicle was in good condition.
- 5.52 Further in cross examination, Chewe Mutale testified that a receipt was issued on 9<sup>th</sup> June 2017, which was at page 5 of Mercy Mwansa's bundle of documents, adding that it was a cover note for comprehensive insurance. He further testified that page 3 showed that the inspection was carried out on the same date.
- 5.53 It was also his evidence, that after he carried out the inspection, Mercy Mwansa obtained comprehensive insurance for the motor vehicle. He identified the cover note for the comprehensive insurance which was issued on 9<sup>th</sup> June 2017.
- 5.54 Chewe Mutale testified that he did not include the chasis number, as Gustav Kabunda did not have the documents for the motor vehicle. When referred to the Cover Note, which was at page 6 again, Chewe Mutale stated that it showed that the motor vehicle was a Mitsubishi Pajero 1999 with

chassis number V65w-0000398. He stated that according to the document, there was a chassis number.

- 5.55 Still in cross examination, Chewe Mutale's evidence was that the total premium was ZMW9,803.34 with a cover of up to ZMW150,000.00. He stated that Mercy Mwansa paid ZMW3,200.00 out of the total premium. He identified a receipt for ZMW6,603.34, which was dated 18<sup>th</sup> December 2017, and was at page 8 of Mercy Mwansa's bundle of documents.
- 5.56 When referred to the Statement over a Claim for Mitsubishi Pajero, which was at page 27 of Goldman Insurance Limited's bundle of documents, Chewe Mutale testified that he made the report after a request for a claim was made to Goldman Insurance Limited, and he sent it on 20<sup>th</sup> September 2018. He added that the document had no stamp from Goldman Insurance Limited, unlike all the other documents from Goldman Insurance Limited.
- 5.57 His evidence was that page 7 of Goldman Insurance Limited's bundle of documents was a motor vehicle accident claim form, and that Goldman Insurance Limited received it, and it had a stamp, with the date, 2<sup>nd</sup> June 2018. Chewe Mutale also testified that he made the report after Mercy Mwansa made a claim for comprehensive cover.
- 5.58 It was his evidence that Goldman Insurance Limited makes phone calls to its' clients for outstanding payments.
- 5.59 Further in cross examination, Chewe Mutale stated that the first payment which was made by Mercy Mwansa was

ZMW3,200.00 on 9<sup>th</sup> June 2017, and that the last payment was made on the same date. His evidence was further that he had not brought any call records to show that Goldman Insurance Limited called Gustav Kabunda over the outstanding payment, but stated that they called him for the second inspection, and not for payment of the balance.

- 5.60 He added that Gustav Kabunda was possibly called for both inspection and the outstanding balance.
- 5.61 Chewe Mutale's testimony when he was referred to the tax invoice which was at page 6 of Mercy Mwansa's bundle of documents, was that the period of cover was 9<sup>th</sup> June 2017 to 30<sup>th</sup> June 2018.
- 5.62 He stated that the Accident Claim Form which was at page 7 of Goldman insurance Limited's bundle of documents showed that the accident happened on 2<sup>nd</sup> June 2018, which was during the period of cover of the insurance.
- 5.63 Further testimony was given, that the letter that Chewe Mutale wrote, which was at page 27 of Goldman Insurance Limited's bundle of documents was dated 20<sup>th</sup> September 2018, after the accident.

**DW2 – YONA SHIMISHI**

- 5.64 The last witness who was called by Goldman Insurance Limited, was Yona Shimishi, the Chief Operating Officer at Goldman Insurance Limited. He stated that he was in charge of the day to day activities, which included underwriting and the claim function of the Company.

- 5.65 His testimony was that he dealt with Mercy Mwansa's claims. It was stated in that regard, that her claim came to his attention in 2018. Yona Shimishi's evidence was that when the claim was received, it was registered, and was subjected to processing. He testified that later on, while processing the claim, it was suspended, and was subjected to validation, after it was felt that there was a need to do so.
- 5.66 Yona Shimishi added that they needed to verify whether the claim was payable or not, taking into consideration certain findings.
- 5.67 Page 23 of Goldman Insurance Limited's bundle of documents was identified as the communication that was made to Mercy Mwansa on 18<sup>th</sup> July 2018, on the suspension, as per Goldman Insurance Limited's policy, by the Claims Manager, Mr. Chishimba Chipili.
- 5.68 He told the Court that the authentication was carried out, and the result was that the claim was found not to be payable. Yona Shimishi's testimony was that this position was communicated to Mercy Mwansa, as per the requirement, as shown at page 24 of Goldman Insurance Limited's bundle of documents. He added that Mercy Mwansa confirmed receipt of the communication.
- 5.69 Yona Shimishi further testified that he had evidence that the motor vehicle was not road-worthy. It was his evidence that he had letters of sale from Jan Japan Zambia Limited, where the shell was bought from, stating that it was at page 2 of Goldman Insurance Limited's bundle of documents.

- 5.70 The testimony that Yona Shimishi further gave, was that there was also a letter of sale from Nicholas Chatembwa, from whom the engine was bought, which was at page 4 of Goldman Insurance Limited's bundle of documents, and was dated 28<sup>th</sup> January 2018.
- 5.71 He also identified a letter which was authored by Mercy Mwansa and was dated 19<sup>th</sup> September 2018, which was at page 25 of Goldman Insurance Limited's bundle of documents. Yona Shimishi testified that Mercy Mwansa was informed of the findings, and she agreed with the findings.

**CROSS-EXAMINATION OF YONA SHIMISHI**

- 5.72 In cross-examination, Yona Shimishi stated that in his previous position at Goldman Insurance Limited, as General Manager, from January, 2018 to 30<sup>th</sup> September, 2023, he would indirectly oversee the agents' activities, and one of those agents was Chewe Mutale.
- 5.73 He reiterated that he had evidence that the motor vehicle was not road-worthy. When referred to the letter, which was at page 2 of Goldman Insurance Limited's bundle of documents, and was dated 27<sup>th</sup> February, 2017, and authored by Bright Chipepo of Jan Africa Investments Limited to whom it may concern, his testimony was that Jan Japan Investments Limited sold Mercy Mwansa a vehicle, but it did not state that it was not road-worthy.
- 5.74 He stated that his testimony was that Mercy Mwansa was sold a shell of a motor vehicle, but the document did not state so.

- 5.75 Yona Shimishi agreed that Chewe Mutale prepared the motor vehicle inspection form, which was at page 3 of the Goldman Insurance Limited's bundle of documents. It was his evidence that Chewe Mutale was their agent, and that Mercy Mwansa was the proposer of the documents.
- 5.76 Further testimony was given, that Yona Shimishi was aware that Chewe Mutale testified that the motor vehicle was inspected. His position was that Chewe Mutale gave his opinion that the general condition of the motor vehicle was good, and that he inspected the vehicle on 9<sup>th</sup> June 2017.
- 5.77 Yona Shimishi testified that page 5 of Mercy Mwansa's bundle of documents was the tax invoice, which was issued by Goldman Insurance Limited on 9<sup>th</sup> June 2017 to Mercy Mwansa, on the same date that the inspection was carried out. He added that the invoice which was issued, was for ZMW3,200.00.
- 5.78 Further in cross examination, Yona Shimishi testified that that page 6 was a tax invoice, which was also issued to Mercy Mwansa, and she paid ZMW9,803.34 for a premium of ZMW150,000.00.
- 5.79 He stated that on the particulars of risk, Mercy Mwansa insured against comprehensive risk for the Mitsubishi Pajero 1999, with Chasis number V65W-0000398.
- 5.80 Yona Shimishi went on to testify that at page 8 of Goldman Insurance Limited's bundle of documents, was a receipt which it issued to Mercy Mwansa for the payment of ZMW6,603.34. He also stated that Mercy Mwansa paid the

insurance in full, and that the duration of the cover was from 9<sup>th</sup> June 2017 to 30<sup>th</sup> June 2018.

- 5.81 It was his testimony, that he had no evidence to show that the agreement was terminated.
- 5.82 Yona Shimishi when referred to page 25 of Goldman Insurance Limited's bundle of documents, testified that from the letter which was dated 17<sup>th</sup> September 2018, the engine was fixed, and that the documentation was done afterwards. He stated that this was one of the documents that showed that the motor vehicle was not road-worthy.
- 5.83 Still in cross examination, Yona Shimishi stated that Chewe Mutale testified that on 9<sup>th</sup> June 2017, the motor vehicle was driven to their premises, and thereafter Goldman Insurance Limited entered into an agreement with Mercy Mwansa to insure the motor vehicle.
- 5.84 Yona Shimishi's evidence was that the letter of sale which was dated 28<sup>th</sup> January 2018, was between Nicholas Chatembwa and Mercy Mwansa, and was at page 4 of Goldman Insurance Limited's bundle of documents, showed that the motor vehicle was not road-worthy.
- 5.85 When cross examined further, he stated that the document did not speak to roadworthiness, and that in Zambia, RTSA ascertains the roadworthiness of a vehicle.
- 5.86 Yona Shimishi agreed that page 9 of Mercy Mwansa's bundle of documents was the registration certificate, which was issued by RTSA, when the motor vehicle was registered with there. He testified that it was a vehicle test certificate for the

motor vehicle, but he could not confirm if it was for the vehicle which was subject of the agreement with Goldman Insurance Limited.

- 5.87 Notwithstanding, Yona Shimishi agreed that the details of the vehicle, which were at page 6 of Goldman Insurance Limited's bundle of documents, were the same as those which were at page 9 of the same bundle of documents, which he had just been referred to.
- 5.88 His evidence was that the invoice was issued on 9<sup>th</sup> June 2017, and the registration book was issued on 29<sup>th</sup> March 2018. Yona Shimishi could not confirm that the registration was done when the insurance cover was valid, and that he could only confirm the documents which were issued by Goldman Insurance Limited.
- 5.89 He concluded the cross examination, by testifying that one could obtain road tax without insurance cover, and that road tax was not related to safety, but to licensing of a vehicle to be on the road.
- 5.90 That marked the close of the case for Goldman Insurance Limited.

## **6. DECISION OF THIS COURT**

- 6.1 I have considered the evidence and the submissions.

### **FACTS NOT IN DISPUTE**

- 6.2 It is not in contention, that according to the letter of sale which was authored by Jan Africa Investments Limited, Mercy Mwansa on 27<sup>th</sup> February 2017, bought a motor vehicle, namely Mitsubishi Pajero, Chasis No. V65W-

0000398, 1999 Model, Silver in colour from Jan Africa Investments Limited.

- 6.3 It is common cause that on 22<sup>nd</sup> April 2017, Mercy Mwansa took out a third-party motor vehicle insurance policy with Goldman Insurance Limited for the period 22<sup>nd</sup> April 2017 to 30<sup>th</sup> June 2017 for the said vehicle. The facts which are further not in dispute, are that Mercy Mwansa upgraded the third-party insurance policy to a comprehensive insurance policy on 9<sup>th</sup> June 2017, which was up to 30<sup>th</sup> June 2018.
- 6.4 Also, not in contention, is that Mercy Mwansa paid the required sum of ZMW 9,803.34 for the comprehensive insurance policy, with the last instalment having been paid on 8<sup>th</sup> December 2017. It is agreed that the motor vehicle was inspected by Goldman Insurance Limited before issuing the comprehensive insurance policy.
- 6.5 It is common cause that on 2<sup>nd</sup> June 2018, the motor vehicle was involved in a road traffic accident, and that Goldman Insurance Limited issued a discharge letter in favour of Mercy Mwansa, in the amount of ZMW 135,000.00 less ZMW 5,000.00 for salvage, bringing the total amount to ZMW 130,000.00 after Mercy Mwansa submitted an Accident Claim Form.
- 6.6 It is further not in dispute, that on 24<sup>th</sup> July 2018, Goldman Insurance Limited suspended the processing of paying the money, stating that they were investigating the claim. The facts which are not in contention, are that on 17<sup>th</sup> September 2018, Goldman Insurance Limited informed Mercy Mwansa

by letter, that they would not pay the ZMW 130,000.00 because her motor vehicle was not road-worthy.

**FACTS IN ISSUE**

- 6.7 The facts which are in contention, are whether Goldman Insurance Limited breached the comprehensive insurance cover with Mercy Mwansa. Also, in dispute, is whether Mercy Mwansa is entitled to the payment of ZMW 130,000.00 arising out of the comprehensive insurance policy.

**ANALYSIS**

- 6.8 Mercy Mwansa testified that she engaged Goldman Insurance Limited for the purchase of third-party insurance cover, and that Goldman insurance Limited did its' due diligence and inspected her motor vehicle. She further testified that Goldman Insurance Limited insured the motor vehicle, and on 9<sup>th</sup> June 2017, she upgraded the third-party insurance cover to comprehensive insurance cover.
- 6.9 Mercy Mwansa averred that Goldman Insurance Limited inspected the motor vehicle, and it was insured for ZMW 150,000.00, and she paid the required premium amount of ZMW 9,803.00.
- 6.10 Gustav Kabunda testified that he went to Goldman Insurance Limited's branch which is opposite Longacres Mall, and he engaged Goldman Insurance Limited's employee to insure the motor vehicle for ZMW 150,000.00. He stated that the motor vehicle was inspected and the premium of ZMW 9,803.00 was drawn. He added that the motor vehicle was not registered at the time, and the process

of registration was only commenced in January, and the motor vehicle was registered on 29<sup>th</sup> April.

- 6.11 Gustav Kabunda's further testimony, was that the motor vehicle was issued with a road tax certificate and a fitness certificate.
- 6.12 It was both Mercy Mwansa and Gustav Kabunda's testimony that the motor vehicle was involved in an accident on 2<sup>nd</sup> June 2018. Goldman Insurance Limited subsequently refused to pay out the ZMW 130,000.00, which it had initially calculated as owing to Mercy Mwansa under the comprehensive insurance cover, for the reason that the motor vehicle was not road-worthy.
- 6.13 Chewe Mutale, an agent for Goldman Insurance Limited, testified that he was called by Gustav Kabunda who later went to meet him at the Chinese Centre along Alick Nkhata road with the motor vehicle. He stated that he saw the motor vehicle from the outside, and he prepared an inspection and signed an inspection report.
- 6.14 Yona Shimishi, the Chief Operating Officer at Goldman Insurance Limited on the other hand, testified that when authentication was carried out, it was found that the claim was not payable, and this was communicated to Mercy Mwansa. He stated that he had evidence that the motor vehicle was not road-worthy, and in that regard, he referred to the letter of sale for the motor vehicle, and the letter of sale for the engine.

- 6.15 In her submissions, Mercy Mwansa, citing a passage from **page 1298 of Chitty on Contracts -Specific Contracts, 30<sup>th</sup> Edition** stated that a contract of insurance like any other contract is concluded when there is an offer, acceptance and consideration between the parties.
- 6.16 She submitted that the receipts which were issued by Goldman Insurance Limited indicated unequivocal acceptance of the insurance contract between Mercy Mwansa and itself. It was also stated that Yona Shimishi testified that Mercy Mwansa and Goldman Insurance Limited entered into an insurance agreement, which was not terminated at any point.
- 6.17 Submitting on non-performance of a contract, Mercy Mwansa relied on the passage in the book, **Law of Contract by Edwin Peel at pages 828 paragraph 17-049**, stating that once breach of a contract occurs, a party is entitled to damages. Her submission was further that there was breach of contract between the parties, when Goldman Insurance Limited failed to honour the comprehensive insurance agreement, and subsequently suspended the payment.
- 6.18 It was added, that it is trite, that most contracts of insurance are contracts of indemnity, and the insured must be placed in the same position that they were in, immediately before the happening of the event, insured against.
- 6.19 Further submission was made, that the insured is not to recover more than the actual financial loss. In support of this position, reliance was placed on the case of **Madison**

***General Insurance Company Limited v Avril Cornhill and another*** <sup>(6)</sup>.

6.20 Further reliance was also placed on the English case of ***Castellain v Preston*** <sup>(1)</sup> in defining the principle of indemnity.

6.21 In its' submissions, on the other hand, Goldman Insurance Limited discussed the duty of utmost good faith. In doing so, the case of ***Simwanza Namposhya v Zambia State Insurance*** <sup>(4)</sup> was cited, where it was held that:

***“It is trite law that an insurance contract is a contract uberrimae fidei, that is, a contract based on utmost good faith. There is a duty on both the insurer and the assured to observe utmost good faith in their dealings with each other.”***

6.22 The submission was that the weight of the documentary evidence on record, clearly showed that at the time the motor vehicle was purportedly driven to Goldman Insurance Limited's premises, it had no engine. In light of that, it could only be that a different motor vehicle was driven to Goldman Insurance Limited's premises or that a different engine was fitted into the shell of Mercy Mwansa's motor vehicle.

6.23 It was also submitted, that the fact that the motor vehicle had no engine was a material fact or circumstance which should have been disclosed by Mercy Mwansa.

6.24 In support of that position, the case of ***Pan Atlantic Co. Ltd v Pine Top Insurance Co. Ltd*** <sup>(2)</sup> which was stated was quoted with approval in the case of ***Nyimba Investments***

*Limited v NICO Insurance Zambia Limited* <sup>(5)</sup>, was relied on. The Supreme Court in so approving the case, held that:

***“The law pertaining to insurance as it applies in this country on the issue of misrepresentation must take into account at least two tests: first, the materiality test and, second, the inducement test. As regards the first of these, a misrepresentation must be material, that is to say it should influence a prudent insurer in deciding first whether or not to take up the risk and second, the premium to be fixed for such risk. A representation must weigh on the critical decision to insure or not to insure, and if to insure, on what terms.”***

- 6.25 The contention was that no prudent insurer could have agreed to issue a comprehensive insurance cover for a motor vehicle that did not have its’ own engine. The submission in the alternative, was that it would have been a factor in the determination of the premium, because the roadworthiness of the motor vehicle was not known.
- 6.26 It was further stated that Mercy Mwansa did not submit the registration book until the time of making the claim, and that Chewe Mutale’s evidence in that regard was not rebutted.
- 6.27 Goldman Insurance Limited submitted that reliance should be placed on the documentary evidence that was before Court.
- 6.28 The contention was that Mercy Mwansa’s allegation was not legally admissible, that the engine was fitted into the motor

vehicle long before the letter of sale between Nicholas Chatembwa and Mercy Mwansa. In support of that submission, the case of ***Chamaponde and others v Zambia State Insurance Corporation Limited*** <sup>(3)</sup> was cited as having held that this went against the parole evidence rule.

6.29 *Insurance* is defined in ***Black's Law Dictionary, 10<sup>th</sup> Edition by Bryan A. Garner*** as;

***“a contract by which one party (the insurer) undertakes to indemnify another party (the insured) against risk of loss, damage or liability arising from the occurrence of some specified contingency.”***

6.30 In this matter, Mercy Mwansa comprehensively insured her motor vehicle with Goldman Insurance Limited on 9<sup>th</sup> June 2017. Both Mercy Mwansa and Gustav Kabunda testified that K3,200.00 was initially paid as part of the premium, and the balance of K6,603.00 was paid on 18<sup>th</sup> December 2017.

6.31 Chewe Mutale confirmed having been engaged by Gustav Kabunda for an insurance policy for a motor vehicle. He referred to the inspection report, which was at page 3 of Goldman Insurance Limited's bundle of documents.

6.32 Mercy Mwansa's bundle of documents at page 6, shows a tax invoice dated 9<sup>th</sup> June 2017, which was issued to Mercy Mwansa in the amount of K9,803.34 for her motor vehicle, Mitsubishi Pajero, 1999 model, Chasis No. V65W-0000398,

silver in colour, with a seating capacity of five (5) at ZMW 150,000.00.

- 6.33 Pages 5 and 8 of the same bundle of documents, show that receipts dated 9<sup>th</sup> June 2017 and 18<sup>th</sup> December 2017 were issued by Goldman Insurance Limited to Mercy Mwansa in the amount of ZMW 3,200.00 and ZMW 6,603.34 respectively.
- 6.34 The inspection report which is at page 3 of Goldman Insurance Limited's bundle of documents, is dated 9<sup>th</sup> June 2017, and shows that the motor vehicle which was comprehensively insured by Goldman Insurance Limited, belonged to Mercy Mwansa. That document contains the same description for the motor vehicle, as those which are on the tax invoice which is at page 6 of Mercy Mwansa's bundle of documents, save that on the inspection report, the Registration number, Engine number and Chasis number of the motor vehicle were not stated, as they were indicated as 'T.B.A'.
- 6.35 Page 7 of Mercy Mwansa's bundle of documents, also shows that an insurance disc for the period, 9<sup>th</sup> June 2017 to 30<sup>th</sup> June 2018 for the motor vehicle, was also issued by Goldman Insurance Limited, which described the motor vehicle, save for the engine number.
- 6.36 The documents on record show that Mercy Mwansa and Goldman Insurance Limited, entered into a comprehensive insurance contract for her motor vehicle. Goldman Insurance Limited has however denied liability stating that

Mercy Mwansa's motor vehicle was not road-worthy because it had no engine at the time, and that this material fact, was not disclosed at the time of insuring the motor vehicle.

6.37 Chewe Mutale's testimony was that when Gustav Kabunda went to buy the insurance, the motor vehicle was not registered, and Chewe Mutale stated that he did not indicate the engine number or the chasis number for the motor vehicle, because Gustav Kabunda did not go with the documentation for the motor vehicle.

6.38 In cross-examination, Chewe Mutale's evidence was that Gustav Kabunda drove the motor vehicle to the premises when he went to buy the insurance, and that it would not have been possible, had the vehicle not had an engine. He nevertheless testified that an engine is a spare part which could be changed. Chewe Mutale admitted having inspected the motor vehicle which he stated was in good condition.

6.39 In cross-examination, Yona Shimishi testified that Mercy Mwansa's letter to Goldman Insurance Limited stated that the engine was first fixed, and that the documentation was done afterwards, which was proof that the motor vehicle was not road-worthy. He also stated that the letter of sale for the engine which was dated 28<sup>th</sup> January 2018, was further proof that the motor vehicle was not road-worthy, although he noted that the said document did not speak to the road-worthiness of the vehicle.

6.40 In its' submissions, Goldman Insurance Limited stated that reliance should be placed on the documents which are on

record. It pointed out, that the inspection form showed that the engine number and chasis number of the motor vehicle were not stated. Further, that the letter of sale for the engine is dated 28<sup>th</sup> January 2018, and that the general affidavit form and police report do not state the engine number.

- 6.41 Goldman Insurance Limited also submitted that Mercy Mwansa admitted in her letter, that the motor vehicle was bought without an engine.
- 6.42 A perusal of the documents that Goldman Insurance Limited produced, confirms that the letter of sale which is at page 4 of Goldman Insurance Limited's bundle of documents, was for an engine with the number 6G74-KS4906 by Chatembwa Nicholas to Mercy Mwansa on 28<sup>th</sup> January 2018. A general affidavit form for the change of engine dated 7<sup>th</sup> February 2018, which was deposed to by Mercy Mwansa is at page 5 of the same bundle of documents.
- 6.43 The document from the Zambia Police Service for the Change of engine which is also dated 7<sup>th</sup> February 2018, is at page 6 of the same bundle of documents. It is worth noting that the old engine number on the general affidavit form and Zambia Police Service document are described as 'T.B.A'.
- 6.44 Mercy Mwansa's letter to Goldman Insurance Limited which is at page 25 of Goldman Insurance Limited's bundle of documents shows that she admitted having bought the motor vehicle without an engine. She stated that it was later fixed, and put in a road-worthy condition then the documentation followed.

- 6.45 As guided by the Supreme Court in the case of ***Simwanza Namposhya v Zambia State Insurance*** <sup>(4)</sup>, an insurance contract is a contract of utmost good faith, and the insurer and the insured have a duty to disclose all material facts to each other.
- 6.46 In this matter, Goldman Insurance Limited has alleged that Mercy Mwansa did not disclose the fact that the motor vehicle had no engine at the time, and that as a result, the motor vehicle was not road-worthy.
- 6.47 The case of ***Nyimba Investments Limited v NICO Insurance Zambia Limited*** <sup>(5)</sup> discussed the aspect of a misrepresentation being material. The Supreme Court in that matter, stated that the materiality of the misrepresentation, meant that it should influence the insurer in deciding whether to take up the risk and the premium to be fixed for such risk.
- 6.48 The Supreme Court held as follows:
- “A representation must weigh on the critical decision to insure or not to insure, and if to insure, on what terms. In the landmark case of Pan Atlantic Insurance Co. Ltd. v. Pine Top Insurance Co. Ltd.<sup>32</sup>, the House of Lords held that:***
- "a material circumstance is one that would have an effect on the mind of a prudent insurer in assessing the risk and it is not necessary that it would have a decisive effect on the insurer's acceptance of the risk or on***

*the amount of premium charged. Before an insurer may avoid a contract for misrepresentation of a material circumstance it has to show that it was induced by the misrepresentation to enter into the policy on the relevant terms."*

*What this comes to, in our view, is this: the insurer must show that either the proposer appreciated that the fact in question would have significance, or assuming that the proposer did not have that appreciation, a reasonable person making the proposal and possessed with factual knowledge by the actual proposer would think that fact to be material to the insurer. The test for materiality is thus an objective one made by reference to the attitude of a hypothetical prudent insurer."*

6.49 The Supreme Court in deciding, also placed reliance on the following cases, as stated at pages J52 and J54 of the Judgment:

*"In Synergy Heath (UK) Ltd. v. CGU Insurance Plc (t/a Norwich Union) and others, the insured informed its insurance company some four months before renewal of its policy, that it was installing an intruder alarm. Due to administrative errors the alarm was not installed and a major fire occurred. The Court held that, by failing to correct its material representation, the insured had*

*impliedly repeated the misrepresentation on renewal. However, on the facts, the insurance company had not been induced by the misrepresentation to renew the policy and so could not avoid it.*

...

*In Drake Insurance Plc. v. Provident Insurance Plc. the insured failed to disclose a speeding conviction which, if it had been disclosed when the contract was negotiated, would not have affected the insurer. The insurer, nonetheless, purported to avoid the policy. The English Court of Appeal held that the insurer had not shown that he had been induced by the non disclosure and so was not entitled to avoid the policy. A similar view was carried in Norwich Union Insurance Ltd. v. Meisels. There, the Court was convinced that the insurer had not been induced by failure by the insured to disclose his circumstances.”*

6.50 In his testimony, Chewe Mutale stated that when Gustav Kabunda went to insure the motor vehicle, he did not write the chasis and engine number of the motor vehicle on the inspection report, because Gustav Kabunda did not provide the documentation for the motor vehicle. Chewe Mutale also stated that he inspected the motor vehicle, and that it was in good condition.

- 6.51 The tax invoice dated 9<sup>th</sup> June 2017, which is at page 6 of Mercy Mwansa's bundle of documents, as well as the insurance disc at page 7, show that the chassis number for the motor vehicle, was indicated but not the engine number.
- 6.52 The inspection report dated 9<sup>th</sup> June 2017, which is at page 3 of Goldman Insurance Limited's bundle of documents shows that Chewe Mutale did not indicate the registration number, chassis number and engine number. He stated that these details were subsequently not given to him.
- 6.53 It is however worth noting that the chassis number is indicated on the tax invoice and insurance disc which bear the same date as the inspection report.
- 6.54 Chewe Mutale indicated in the inspection report, that the general condition of the motor vehicle was good, including the body condition, front windscreen, rear windscreen, foot break, front wipers, light and condition of tyres.
- 6.55 As rightly pointed out by Goldman Insurance Limited, the letter of sale for the engine is dated 28<sup>th</sup> January 2018, and the general affidavit form and the Zambia Police Service change of engine document, do not have the old engine number, and are dated 7<sup>th</sup> February 2018.
- 6.56 The documents on record show that irrespective of the missing engine number on the documents, Goldman Insurance Limited entered into a comprehensive insurance contract with Mercy Mwansa.
- 6.57 ***Halsbury's Laws of England, Volume 25, 4<sup>th</sup> Edition at page 9 and 10*** discusses the principles which are common

to all insurance contracts, and the principle of indemnity respectively, as follows:

***“Every insurance, whatever its nature, postulates that a sum of money will be paid by the insurers on the happening of a specified event. There must be uncertainty as to the happening of the event,...There must also be an insurable interest in the assured, which is normally that the event is one which is prima facie adverse to his interest.***

...

***The principle of indemnity. Most contracts of insurance belong to the general category of indemnity in the sense that the insurer’s liability is limited to the actual loss which is in fact proved. The happening of the event does not of itself entitle the assured to payment of the sum stipulated in the policy; the event must in fact result in a pecuniary loss to be assured, who then becomes entitled to be indemnified subject to the limitations of his contract...The contract being one of indemnity, and of indemnity only, he can recover the actual amount of his loss and no more, whatever the premiums may have been his estimate of what his loss would be likely to be and whatever the premiums he may have paid, calculated on the basis of what estimate.”***

6.58 In this matter, Goldman Insurance Limited entered into a comprehensive insurance contract with Mercy Mwansa for her motor vehicle. The motor vehicle was involved in an accident on 2<sup>nd</sup> June 2018, which is within the period covered by the contract. Mercy Mwansa filed in her Motor Accident Claim Form with Goldman Insurance Limited Company, and it was received on 11<sup>th</sup> June 2018, as shown at page 7 of her bundle of documents.

6.59 Goldman Insurance Limited produced a Motor Vehicle Accident Survey Report dated 18<sup>th</sup> June 2018, at page 18-19 of its' bundle of documents, which was directed to its' General Manager from the Motor Assessor. Under the heading '**SETTLEMENT**' it stated as follows:

***“In view of severe structural and mechanical damages, I recommend you settle the claim as a total loss and offer as follows:***

<b><i>Sum insured</i></b>	<b><i>150,000 00</i></b>
<b><i>Less 10% excess</i></b>	<b><i>15,000 00</i></b>
<b><i>Net</i></b>	<b><i>K135,000 00</i></b>

***SALVAGE***

***The salvage value is considered at k4,000 00.”***

6.60 Mercy Mwansa wrote a letter to Goldman Insurance Limited, accepting the sum of ZMW135,000.00 only, as shown at page 20 of Goldman Insurance Limited's bundle of documents. On 24<sup>th</sup> July 2018, Goldman Insurance Limited wrote to Mercy Mwansa suspending the claim, and subjecting it to authentication.

- 6.61 Thereafter, on 17<sup>th</sup> September 2018, Goldman Insurance Limited informed her, through a letter, that it would not proceed with settlement of the claim, because she bought the motor vehicle in a damaged state, and it was not road-worthy at the time that she obtained the insurance cover from Goldman Insurance Limited.
- 6.62 A perusal of the evidence on record, shows that at the time Gustav Kabunda obtained insurance from Goldman Insurance Limited, he drove the motor vehicle to Goldman Insurance Limited's premises, and it was inspected. Chewe Mutale stated that Gustav Kabunda did not go with the documentation for the motor vehicle.
- 6.63 His evidence was that the missing details were not subsequently given to him. While that was his testimony, it has been seen that the certificate and policy of motor insurance and the insurance disc which are at pages 2 and 3 of Mercy Mwansa's bundle of documents, which were issued on 30<sup>th</sup> June, 2017, both indicate the chassis number of the vehicle.
- 6.64 There is no evidence on record to show that Chewe Mutale other than inspecting the motor vehicle and writing the inspection report, was the person who issued the tax invoice and the insurance disc for the vehicle. Mercy Mwansa as the person alleging, bears the burden of proving on a balance of probabilities, that in fact, when Chewe Mutale inspected the vehicle he was given the documents for the vehicle.

- 6.65 Chewe Mutale in cross examination, testified that Gustav Kabunda was called for a second inspection of the motor vehicle, but this was not supported by any evidence such as call records. Nonetheless, it has not been established that Chewe Mutale in fact was given the documents for the vehicle by Gustav Kabunda, when he took the vehicle for inspection when proposing the comprehensive insurance.
- 6.66 The evidence reveals that Mercy Mwansa upgraded the third-party insurance to comprehensive insurance, as seen at pages 5-7 of her bundle of documents. She paid the premiums in full to Goldman Insurance Limited for the insurance cover.
- 6.67 It is common cause that the vehicle was involved in an accident.
- 6.68 In line with ***Halsbury's Laws of England, Volume 25, 4<sup>th</sup> Edition***, the motor vehicle accident resulted in loss to Mercy Mwansa, and ordinarily she is entitled to be indemnified in accordance with her contract, with Goldman Insurance Limited, as initially calculated.
- 6.69 I have earlier pointed out that contracts of insurance are contracts of utmost good faith. ***Paragraph 365 of Halsbury's Laws of England, 4<sup>th</sup> Edition Re-Issue Vol 25*** states that:

***“The utmost good faith requires not so much, a strict interpretation of the obligations undertaken and strict preservation of the circumstances in which they are undertaken as the performance of***

***positive duties. In its' practical application, the principle involves that either party has the right to avoid the contract altogether if he establishes against the other party, either (1) that there has been a failure by the other party to disclose a material fact; or (2) that there has been on the part of the other party a misrepresentation, however innocently and honestly made, of a material fact."***

6.70 ***Paragraph 370 of the said Halsbury's Laws of England*** states that the materiality of a particular fact, subject to proper direction, as to the test to be applied, is a question of fact. It further provides that materiality is not a question of belief or opinion tested subjectively, and the proposer does not discharge his duty by a full and frank disclosure of what he believes to be material, however honest his belief. He must go further and disclose any fact which any reasonable man ought to have thought material.

6.71 The paragraph goes on to state that:

***"If the fact, although material is one which the proposer did not and could not in the particular circumstances have been expected to know or it its' materiality would not have been apparent to a reasonable man, his failure to disclose it, is not a breach of his duty. In any case, he need not disclose matters of common notoriety, which the underwriter may be presumed to know, matters of***

*which the underwriter is, in fact, well aware or matter as to which he has waived information.”*

6.72 On the continuing nature of the duty to give full and frank disclosure, **paragraph 372 of the said Halsbury's Laws of England** states that:

*“The duty to make full and frank disclosure continues to apply throughout the negotiations for the contract but it comes to an end when the contract is concluded. Therefore, material facts which come to the proposer's knowledge subsequently, need not be disclosed...*

*If, however, any new material arises before acceptance of the proposal or if an existing fact which was previously immaterial, becomes material owing to a change of circumstances, it must be properly disclosed.”*

6.73 Then on representation of material facts, **paragraph 374 of the said Halsbury Laws of England**, is as follows in provision:

*“The second aspect of the duty of good faith arises in relation to representations which may be made during the course of negotiations for the contract, and for this purpose, all statements made by the proposer in relation to material facts constitute representations. Just as all material facts within his knowledge must be fully disclosed, so also any statements made about such facts must be*

*accurate in the sense that they do not mislead. A representation may be inaccurate either because it is wholly false, or where the proposer states, contrary to the fact, that he is already insured elsewhere or because, although the facts actually stated are literally true, the statement is not complete and creates a misleading impression owing to the omission of other facts which ought to have been included...*

*A mis-statement does not matter if the true position is in fact known to the insurers, as then the mis-statement can have no effect in causing the contract to be concluded.”*

- 6.74 **Paragraph 377 of the said Halsbury's Laws of England** states that the effect of non-disclosure or misrepresentation is that the insurer has the right to repudiate, that is to avoid the contract. That this right does not depend on any implied term of the contract itself, but is an inherent right derived from a matter of law from the nature of the contract.
- 6.75 The paragraph further states that it must be distinguishable from the equitable remedy of rescission, which is available in all contracts entered into as a result of misrepresentation, and that the remedy is not available where there has been a mere non-disclosure, there must be misrepresentation, although innocent representation will suffice.
- 6.76 It is also stated in the paragraph, that the remedy involves in all cases, the principle of restitution in integrum, which

means that the parties must be put back so far as may be, into the position that they occupied before the contract was made, in particular, restoring any consideration which has been paid. However, where the insurer's answer to a claim is by repudiating any policy on the ground of fraud, misrepresentation or non-disclosure, they are not bound to offer a return of the premium, and the Court will not normally allow a proposer to set up his own fraud, misrepresentation or non-disclosure in order to found a claim to such payment.

- 6.77 In this matter, it has been seen that Gustav Kabunda who is Mercy Mwansa's husband, is the one that approached Chewe Mutale with a view to initially taking out third party insurance for the vehicle. Later that third-party insurance was upgraded to comprehensive insurance which enhanced the cover for the vehicle.
- 6.78 Gustav Kabunda was therefore Mercy Mwansa's agent in the contract of insurance. The evidence shows that Chewe Mutale's testimony was that Gustav Kabunda did not give him the documents which contained the details of the motor vehicle as seen from the inspection report, which is at page 3 of Goldman Insurance Limited's bundle of documents. That document indicates that the registration number and the engine number of the vehicle were to be advised, and this was not discredited by cross examination.
- 6.79 Therefore, it was credible evidence, and I find that in fact Gustav Kabunda did not give those details to Chewe Mutale.

I have already highlighted that there is no evidence to show that Chewe Mutale is also the person that issued the tax receipt and the insurance disc on Gustav Kabunda paying for the third-party insurance for the vehicle, and when it was upgraded to comprehensive cover.

6.80 In the absence of such evidence, it cannot be concluded that Chewe Mutale as an agent of Goldman Insurance Limited had the knowledge that there was no engine in the vehicle, when the insurance policies were taken out.

6.81 He confirmed that the vehicle was driven to him when he inspected it, but he could not verify the details on that vehicle, as no documents for the vehicle were availed to him.

6.82 **Paragraph 396 of Halsbury's Laws of England, 4<sup>th</sup> Edition Re-Issue Vol 25** which I have referred to above provides that:

***“The principles relating to the imputation of the agent’s knowledge derive from the agent’s authority to act as the insurer’s agent. Therefore, they have no place where the agent is not purporting to act as their agent or acts outside the scope of his authority.***

***Except in the case of industrial insurance, in filling in the answers in a proposal form, an insurance agent is normally regarded as the agent for the proposer at the proposer’s request, express or implied. Even if the agent knows the truth, his knowledge is not in that case, imputed to the***

***insurer's. Even if he is careless in filling up the form, it is the proposer not the insurer's who may maintain an action in negligence against him. Further, where the proposer himself signs the proposal form, as is usually insisted upon by the insurers, by signing, he adopts whatever answers the agent has inserted and makes them his own. This is clearly the case where he reads and approves the answers before signing, but the position is the same if he chooses to sign the proposal without reading them or if he signs the form when it is blank, leaving it to the agent to insert the answers later."***

- 6.83 The Motor Car Proposal Form is at pages 1-2 of Goldman Insurance Limited's bundle of documents. In that document, which was completed on 9<sup>th</sup> June, 2017, Mercy Mwansa indicated that the registration of the vehicle was to be advised, as well as the engine number for the said vehicle. She did however state that the vehicle was second hand. It was also indicated, that the vehicle had never previously been involved in accident.
- 6.84 The evidence on record shows that indeed the vehicle had not been registered at that time. While Mercy Mwansa in her bundle of documents produced at pages 9 and 10, the vehicle test certificate and the road tax respectively which show that the vehicle BAH 2677 was first registered on 6<sup>th</sup>

April, 2018, she also at pages 15 and 16 of the said bundle of document produced a reprint of those documents.

- 6.85 The re-printed documents show that the vehicle was registered on 24<sup>th</sup> July, 2019. No explanation was given for why this was so, and it could be evidence of fraud, as the vehicle may not have been registered in 2018 as alleged.
- 6.86 The letter of sale of the vehicle which is at page 2 of Goldman Insurance Limited's bundle of documents gave the particulars of the vehicle which was sold to Mercy Mwansa which included the chassis number of the vehicle, but not the engine number.
- 6.87 The general affidavit form and the Zambia Police change of engine documents which are at pages 5 and 6 of Goldman Insurance Limited's bundle of documents, show that at page 5 it was indicated that the old engine was to be advised. This was also the position at page 6.
- 6.88 Mercy Mwansa and Gustav Kabunda both testified that the vehicle had no engine when it was bought from Jan Africa Investments Limited. Mercy Mwansa confirmed so that in the letter which is at page 25 of Goldman Insurance Limited's bundle of documents, in which on 19<sup>th</sup> September, 2018, she advised Goldman Insurance Limited that the vehicle was bought from Jan Africa Investments Limited without an engine.
- 6.89 She also stated therein, that it was just a body and thereafter, the engine was purchased from Nicholas

Chatembwa which was fixed to make a complete vehicle, and that documentation would later follow.

- 6.90 Gustav Kabunda testified that he bought a vehicle and not a body of a car. He maintained that position in cross examination.
- 6.91 The fact that Nicholas Chatembwa sold an engine to Mercy Mwansa further confirms the position that when bought, the vehicle had no engine. This is further confirmed by the affidavit and the document from the police which indicate that the engine number was to be advised.
- 6.92 It is on record that Chewe Mutale, testified that Gustav Kabunda drove the motor vehicle to their premises, which goes to show that at the time, the motor vehicle had an engine. However, the particulars of that engine are unknown, considering that Chewe Mutale did not write down the particulars of the engine in his inspection report.
- 6.93 ***Halsbury's Laws of England*** states that an insurance agent is considered as an agent of the proposer, and any information that they give, will be imputed to the proposer. Accordingly, as Chewe Mutale stated that he was not given any documents to show the engine number for the vehicle, and he so recorded, that is imputed to Mercy Mwansa.
- 6.94 There having been an engine in the vehicle was a material fact on whether Goldman Insurance Limited would agree to insure the vehicle comprehensively, and at what premium. Further, there being an engine in the vehicle was a factor that induced Goldman Insurance Limited in insuring the

vehicle, as that also went to what premium would be paid for the risk.

6.95 Mercy Mwansa did not disclose that material fact, as Gustav Kabunda did not tell Chewe Mutale that the vehicle had no engine at the time, as the document for sale of the engine is dated 28<sup>th</sup> January, 2018 and therefore speaks for itself. Chewe Mutale testified that Gustav Mutale informed him that he would give him the documents with the details for the vehicle later.

6.96 The fact that the document for sale of the engine coincides with the date on the affidavit and the document from the police to change an engine speaks to the fact that when the comprehensive insurance was taken out on 7<sup>th</sup> June, 2017, the vehicle did not have its' own engine.

6.97 I have said that this material fact was not disclosed and Goldman Insurance Limited was entitled to repudiate the contract as there was misrepresentation of a material fact.

## **7. CONCLUSION**

7.1 Having found that there was misrepresentation of a material fact with regard to whether the vehicle had an engine, and that Goldman Insurance Limited had the right to repudiate the agreement, which it did, by notifying Mercy Mwansa that it would not pay the claim, the claims by Mercy Mwansa for the payment of the sum of ZMW130, 000.00 under the comprehensive insurance cover, damages for breach of contract, and for specific performance of the agreement fail

and they are dismissed with costs to Goldman Insurance Limited.

7.2 The said costs if not agreed shall be taxed. Leave to appeal is granted.

**DATED AT LUSAKA THE 27<sup>th</sup> DAY OF DECEMBER, 2024**

*S. Kaunda*

**S. KAUNDA NEWA  
HIGH COURT JUDGE**

