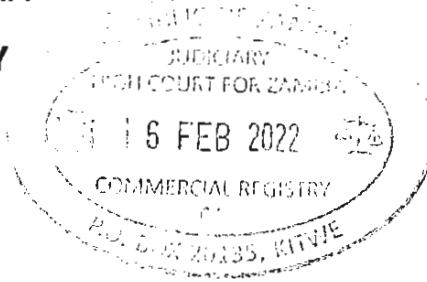


IN THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT KITWE
(CIVIL JURISDICTION)

2020/HKC/064



BETWEEN:

ESKAYARTS LIMITED

PLAINTIFF

And

MADISON GENERAL INSURANCE COMPANY LIMITED

DEFENDANT

Before Hon. Lady Justice Abha Patel, S.C. on 29th October 2021

For the Plaintiff: Mr. N. Chaleka with Mr. T. Chibeleka
Messrs ECB Legal Practitioners

For the Defendant: Mr. L. Tembo
Messrs Iven Mulenga & Co

JUDGMENT

List of Authorities

1. Patrick Matibini, *Zambian Civil Procedure, Commentary and Cases* Lexis Nexis.
2. The Insurance Act No. 27 of 1997 as amended by Act No. 26 of 2005.
3. Pension & Insurance Authority Circular No. 1 of 2005, clause 1.

4. Phipson On Evidence 17th Edition.
5. Bullen and Leake and Jacob's precedents of Pleadings 17th edition, volume 2.
6. Halsburys Laws of England paragraph 3 of volume 25, 4th edition.
7. Chitty on Contracts 25th Edition at paragraph 363.
8. The High Court Act, chapter 27 of the Laws of Zambia.

Cases Referred to:

1. Mukuwe Akamana vs Diamond Insurance Limited 2009/HN/316.
2. Monarch Steel Limited vs Jessons Insurance Agency Limited SCZ/8/109/2008.
3. Khalid Mohamed vs The Attorney General (1982) Z.R. 49.
4. Wilson Masauso Zulu v Avondale Housing Project Limited (1982) Z.R 172 SC.
5. Anderson Mazoka & Others vs The Electoral Commission of Zambia and The AG (2005) Z.R 138.
6. Rabson Sikombe vs Access Bank (Zambia) Limited Appeal No. 240 of 2013.
7. Livingstone Rawyards Company (1880) 5 A.C. 25.
8. Zambia Railways vs Pauline S Mundia and Another.
9. Mpika District Council vs. Jameson Musongo (Appeal No. 160/2014 (2016).
10. Zambia State Insurance Corporation vs. Serios Farms Limited (1987) Z.R 93.
11. Castellan vs. Preston (1883) 11 Q.B.D 380 at page 386.

1. Introduction

1. The Plaintiff commenced this action on 27th October 2020 and by its Writ and Statement of Claim, it seeks the following reliefs:
 - 1.1 Payment of the sum of United States Dollars One hundred and thirtyseventhousand (USD 137,000.00) being the value of the toners and cartridges insured ;

- 1.2 Interest on all amounts found to be payable;
- 1.3 Costs;
- 1.4 Further or other relief.
- 1.5 The Defendant entered appearance and defence on 12 November 2020.
- 1.6 The matter was referred to mediation with the consent of both Parties and reverted back to Court upon the Mediation being unsuccessful. The Court issued a Notice for a Scheduling Conference and issued the Order for Directions dated 16 June 2021. It is noted that the Defendant was not present at the Scheduling Conference. The Compliance Conference was scheduled to be held on 4th August 2021 which by Notice dated 12 July 2021 was re-scheduled to 10th August 2021.
- 1.7 At the Compliance Conference, it was noted that the Plaintiff was fully compliant and requested for a date for trial, while Counsel for the Defendant attempted to raise issues with inspection and purported to make an application from the Bar for time within which to comply. By Ruling of the Court, the defendant's application was dismissed, and the defendant barred from filing any further process and the matter was scheduled for Trial to commence on 14th September 2021.
- 1.8 The Defendant applied, unsuccessfully, for a Review of the Courts Order of 10th August 2021, details of which are on the Record. Trial proceeded as scheduled with the Plaintiff calling one Witness.

2. Facts and Background

The Plaintiff's case

- 2.1 The Plaintiff led evidence through its Director and relied on the Witness Statement of **Jateen Ragha PW1**, and placed reliance on its bundle of pleadings and documents filed into Court on 30 June 2021.
- 2.2 The evidence in chief of Jateen Ragha was offered through his Witness Statement and the witness was subsequently tendered for cross examination. Key features of his evidence was that the Plaintiff company had been taking out insurance cover for its goods such as Toners and Cartridges from South Africa, for marine transits with the defendant company, through its Brokers, namely Tana Insurance Brokers Limited. He testified that the Plaintiff company had taken out similar cover with the defendant from as far back as 2015. It was further his evidence that the Parties enjoyed a good business relationship until December 2018 when the incident the subject of this Action occurred.
- 2.3 The witness testified that it enjoyed a Credit Terms Account Agreement with its supplier, a company in the Republic of South Africa, known as Drive Control Corporation (PTY) Limited. (*The Supplier*). The nature of the Plaintiffs business with the Supplier was such that the Supplier sent cartridges and toners from South Africa through its freight management company known as Celtic Freight, to the Plaintiff in Kitwe in the Republic of Zambia. A copy of the Agreement between the Supplier and the freight company was produced and marked at **pages 105 to 126** of the Plaintiffs Bundle of Documents.

2.4 The date material to this action was 12 December 2018, when the witness narrated that he did send an e-mail to its brokers, Tana Insurance Brokers, to issue a cover note for toners and cartridges, from Johannesburg to Kitwe, valued at USD 137,000 from the Supplier. A copy of the said e-mail and its acknowledgement is produced at **page 1** of the Plaintiffs Bundle of Documents. Copies of the covering e-mail and Non-Motorcover note No. 54124 were issued and produced at **pages 2 and 3** of the Plaintiffs Bundle of Documents. The Insurance Policy issued by the Defendant is produced at **pages 10 to 13** of the Plaintiffs Bundle of Documents.

2.5 The consignment, the subject of the Insurance cover, was stolen during a hijacking which took place on 12th December 2018, copies of the exchange of correspondence are produced at **pages 4 to 9** of the Plaintiffs Bundle of Documents. The witness narrated that the Plaintiff proceeded to file its Claim Form on 20th December 2018, copies of which are at **pages 71 to 75** of the Plaintiffs Bundle of Documents.

2.6 It was the Plaintiff's evidence that from the date of reporting the incident of hijacking, the Defendant engaged the Broker and the Plaintiff and had meetings with them and stated that it was waiting for its investigator to issue its report. A copy of the letter from the Plaintiff's Broker and the Plaintiff to the Defendant is provided at **page 76 and 77-78** of the Plaintiffs Bundle of Documents. The Plaintiff also refers to a letter by its Advocates of record to the defendant dated 17 August 2020 produced at **page 81** of the Plaintiffs Bundle of Documents.

2.7 The Plaintiff has narrated the manner in which the defendant sought to defeat the Plaintiff's claim, which led to the suspension of its Credit Terms Account with the Supplier and has referred to documents at **page 139 to 145** detailing its history of dealings with the Supplier, and the Account Suspension Letter, issued by the Supplier, on **page 150** of the Plaintiffs Bundle of Documents. The Plaintiff has also testified that due to the conduct and wilful refusal of the defendant to settle its claim, the Plaintiff has suffered loss to reputation and has lost its Gold HP Certification that it enjoyed from 2013 to 2019 and that the Plaintiff has suffered loss of business as a result. The copies of the said HP bonus payments and HP certification status are produced at **pages 128 to 138** and **pages 146 to 149** of the Plaintiffs Bundle of Documents.

2.8 The Plaintiff has therefore claimed the sum of USD 137,000 being the value of the lost toners and cartridges, the subject of the insurance cover, damages for loss of business sustained as a result of the suspension of its credit terms account and loss of HP certification, and interest on all amounts and costs of the action.

2.9 Under cross examination, the witness was taken to task on the exact time that the insurance cover was obtained, and also on the aspect of payment of the insurance premium, which proof of payment was not before the Court. He was also questioned as to the mode of their paper work and clearing formalities with the Zambia Revenue Authority and whether the Plaintiff complied with the format of Tax Invoices, Bills of Lading and the SADC 500 Form as required by the Zambia Revenue Authority. He was also

questioned on the existence of a contract between the Plaintiff and the Supplier to which he responded that there was a credit facility between the Plaintiff and the Supplier. Under further cross examination, the witness confirmed that he did not have a document of cover signed by the Defendant but maintained that there was a contract between the Plaintiff and the Defendant.

2.10 The witness confirmed that the incident of hijacking occurred at about 11:47 hours, on 12 December 2018, and confirmed that there were variances in the time the hijacking was alleged to have taken place, in the several documents produced in the Plaintiffs Bundle of Documents.

2.11 The witness clarified his evidence under re-examination and the Court will make specific reference to his evidence when it analyses the same.

2.12 The Plaintiff did not call its intended second witness, whose evidence albeit tendered through a Witness Statement filed on 14 July 2021, closed its case and whose evidence will not be considered by the Court.

3. The Defendants case

3.1 For reasons stated at paragraphs 1.7 and 1.8 above, the defendant having been barred from filing its Witness Statements and Bundle of Documents, closed its case.

4. The Submissions

4.1 The Court extends its gratitude to Counsels respectively for their industry, diligence and co-operation rendered to the Court and for the submissions, filed on the due dates, all of which have been painstakingly considered in the Judgment of the Court.

4.2 I will not recast the submissions as the same are on record, and I will refer to them where appropriate in the Judgment.

5. The Issues for determination

5.1 The Parties having failed to file a list of agreed issues in dispute for the determination of the Court, the Plaintiff, did on 23 July 2021, file what it believed to be the list of issues that required the Courts determination.

In my considered opinion, arrived at, at the end of the hearing, the issues that require determination are as follows:

- i. Was there a valid insurance cover between the Plaintiff and the Defendant at the time the incident of hijacking took place?
- ii. If the answer to (i) above is decided in the affirmative, is the Plaintiff entitled to its claim for business loss against the Defendant?

5.2 I note that there are several peripheral issues which have arisen in this action, and from the submissions filed by Defence counsel, such as whether the premium was paid, whether the Plaintiff was a credit customer of the

Defendant and the discrepancy in the times at which the hijacking is said to have taken place, and whether the cover, if at all it was in existence, was validly taken out before the hijacking occurred.

Whichever way one looks at this matter, in determining the issue in (i) above, I will address my mind to all the peripheral issues as stated above.

6. Findings of Facts

- 6.1 I am of the considered view that before I embark on analysing the facts, the evidence, the law as well as the supporting skeleton arguments and submissions filed by Counsels, I will proceed to make findings of facts, for clarity of Judgment and to prevent repetition.
- 6.2 The Plaintiff and the Defendant are both companies incorporated under the Companies Act No. 10 of 2017 of the Laws of the Republic of Zambia.
- 6.3 The Plaintiff is in the business of *interalia*, dealing with computer consumables and the subject of this action is the loss of a consignment of HP Toners and Cartridges on 12 December 2018. (*hereinafter referred to as the consignment*).
- 6.4 The Plaintiff instructed its broker, Tana Insurance Brokers Limited to place insurance cover for marine specific, with the Defendant on 12 December 2018. Cover Note No. 54124 was issued by the Defendant on 12 December 2018 for the sum insured of USD 137,000.

6.5 Policy Number P/03/3003/257333/2018 was issued by the Defendant at Kitwe dated 16 July 2019 for the period 12 December 2018 to 11 January 2019. This document is not signed.

6.6 The consignment left the premises of the Supplier, Drive Control Corporation (DCC) on 12 December 2018, in a container loaded on to a green Tata truck Registration Number WGG034GP belonging to Celtic Freight under Road Consignment Note #WB45452.

6.7 The truck belonging to Celtic Freight and carrying the consignment, was involved in a hijacking, on 12 December 2018, en-route from DCC's premises at 20 Milkway Avenue Linbro Business Park in Sandton, to the Office of Celtic Freight in Benoni, near Atlas Road in Johannesburg, in the Republic of South Africa.

6.8 The South African Police issued a case number CAS305/12/2018

7. The Law and Analysis to the Facts

7.1 It is the defendant's submission that for an insurance contract to be valid, it requires offer, acceptance, agreement, consideration and an intention to create legal relationships. It is further the thrust of the defendant's submission, that there having been no payment of the insurance premium within 30 days, the contract of insurance between the Parties had lapsed. The defendant has referred the Court to **section 76 (1) of The Insurance Act**

No. 27 of 1997 as amended by Act No. 26 of 2005 which provides as follows:

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

- 7.2 It is further the defendant's submission that a contract of insurance must cease to exist if a premium is not paid within 30 days after the due date of the premium. To define the due date, the defendant has called in aid the provisions of **clause 1 Pension & Insurance Authority Circular No. 1 of 2005** (PIA Circular) which provides as follows:

"a contract of insurance shall cease to operate if premium is not paid within 30 days after the due date of premium, or such period as the contract will stipulate. The due date shall be the commencement of cover or the date stipulated in the contract of insurance."

Counsel has also cast doubt on the validity of the document shown on **pages 10 to 13** of the Plaintiff's Bundle of Documents for want of execution, and for the fact that it carries two dates, 10 January 2019 and 16 June 2019, (which ought to read 16 July 2019). It is thus the defendant's submission that in the absence of a signed formal contract between the Parties, the above provision is applicable.

- 7.3 The Plaintiff has countered the argument above and has relied on a Judgment delivered by Hon Justice Siavwapa, Judge in Charge of the Commercial Division, as he then was, in the case of **Mukuwe Akamana vs Diamond Insurance Limited**. The case dealt with whether a cover note

amounted to conclusive evidence of an insurance cover and the issue of payment of a premium in as far as it related to the validity of the insurance cover. Counsel for the Plaintiff has urged the Court to find that the facts in that case are similar to the facts in *casu*, wherein the Cover Note No. 54124 produced at **page 3** of the Plaintiff's Bundle of Documents shows that it was issued on 12 December 2018 and signed on behalf of the Defendant. I also note that the defendant has countered this authority and has submitted that the case cited by the Plaintiff was overturned by a Judgment of the Supreme Court of Zambia in the case of **Monarch Steel Limited vs Jessons Insurance Agency Limited**, which Judgment was delivered on 21 June 2013. The Court is indebted for copies of the Judgments relied on by the defendant.

- 7.4 In addressing my mind to this issue, I note that the Plaintiff proceeded to arrange for the required marine specific cover through its Brokers, Messrs Tana Insurance Brokers Company Limited (Tana). **Section 2** of the Insurance Act 1997 defines a broker as

"...a person who, on behalf of an insured person, or a person who intends to take up an insurance policy, arranges insurance policies."

It is trite that a broker acts on behalf of the insured and it is common in practice for persons seeking insurance cover to engage brokers. I find as a fact that the Plaintiff did engage the services of Tana and this fact has not been disputed or challenged.

7.5 I have also noted, and the Plaintiff's witness confirmed that the Plaintiff company had arranged several such goods-in-transit covers, with the defendant from as far back as 2015. The witness referred to page 127 of the Plaintiffs bundle of documents. I have noted that this a schedule itemising 25 previous cover notes and cover note No. 54124, being the disputed cover note, was the 26th such cover, all for goods, being toners and cartridges from the Republic of South Africa, and all for a period of 30 days. I also note that the value of the goods in transit varied, and I have seen figures ranging from as low as USD 4,070.00 to USD 221,250.00.

I am satisfied and find that this record of dealings showed a pattern of regular and consistent practice of insuring goods in transit, between the Plaintiff and Defendant. I note also from the said Schedule at page 127, the premium for the disputed cover note No. 54124 is treated as paid, in the column of premiums paid by the Plaintiff from the inception of its account with the Defendant, in the sum of USD 10,169.36 for a corresponding value of goods insured in the sum of USD 2,403,471.00

7.6 In the circumstances of the facts in *casu*, I am satisfied from the evidence of Jateen Ragha that he issued instructions, by e-mail of 12 December 2018, at 9:04 am, to Tana, to place cover for the consignment valued at USD 137,000.00, in transit by road from Johannesburg to Kitwe. I also find that the instructions to issue the cover note, in an on-going relationship binds the Defendant immediately. I have also noted that the witness testified that he received an email acknowledgement from a Ms Grace, at Tana, at 9:27 am on the same day, confirming receipt of the instructions. This was

followed by the Cover Note which was e-mailed to him at 11:44 hours. Copies of the exchange of correspondence were shown to the Court at **pages 1 and 2** and a formal copy of the cover note was seen at **page 3** of the Plaintiff's bundle of Documents.

- 7.7 The defendant has not pleaded that the premium for the Cover Note remains outstanding nor that the Plaintiff should not be treated as a credit customer or that the insurance policy be deemed lapsed for non-payment in its defence. Of particular importance is **paragraph 4** of the Plaintiff's Statement of Claim which reads as follows:

"The Plaintiff further obtained transit Insurance with the Defendant. By Policy No. P/03/3003/257333/2018 dated the 10th day of January 2019 valid from the 12th day of December 2018 to the 11th day of January 2019 the Defendant insured the Plaintiff's Toners & cartridges against loss or damage while in transit from the Republic of South Africa to the Republic of Zambia. The Plaintiff paid a premium of USD 548 to insure the total value of the goods whilst in transit." (emphasis added).

- 7.8 In response, the defendant's defence at **paragraph 4** reads as follows:

"The contents of paragraph 4 are denied only to the extent that the said Policy No. P/03/003/257333/2018 came into existence after the seizure of the truck carrying the alleged Toners and Cartridges as the notification from the Plaintiff to Tana Insurance Brokers was only sent at 11:44 hours which Notification was received by the defendant at 11:44 hours on the 12th December 2018." (emphasis added).

Although I have lent a keen ear to the defendant's submissions, and proceeded to analyse the facts and law above, I am on firm ground in holding that the issues of non-payment of the premium, which has not

been traversed or the issue of the Plaintiff not being a credit customer, and or the policy itself not having been issued, not having been pleaded, do not need the further consideration of the Court. For the defendant to submit, as it has, that the contract of insurance was not consummated for lack of consideration, is such a far-fetched submission, and smacks of an attempt albeit a feeble one, to massage the evidence before the Court despite its own pleaded defence.

7.9 It has been noted that the Defendant has in fact pleaded that the Policy came into existence, although allegedly after the incident of hijacking. The witness, **Jateen Ragha** was credible and consistent on the issue of payment of the premium and maintained that the same, as with all previous premiums, for 25 cover notes placed with the defendant, had been paid. I will accept that evidence. For these reasons, I will not delve into the authority cited by counsel in the case of **Monarch Steel Limited** nor examine the provisions of **section 76 (1)** of the Insurance Act as the same is misapplied to the facts in this case. It is trite that no two cases will have the exact same set of facts, and I have sought to distinguish the facts of the case in *casu*, coupled with the defendant's admissions. Contrary to the defendant's submissions, the Court is not being dragged into formulating an agreement for the Plaintiff to be treated as a credit customer, as the same is not an issue for this Court's consideration.

7.10 I will revert to the time of 11:44 hours, as it will become material when I consider the issue of the time the hijacking is reported to have taken place. I will now move to examine the evidence and facts before this Court to

establish the time the hijacking is reported to have taken place. The Plaintiff's witness admitted to there being discrepancies in the times indicated in several documents placed before the Court. It was his evidence tendered before the Court that the hijacking occurred on Atlas Road after 11:47am on 12 December 201. He also referred to the exchange of correspondence produced at pages 6, 7 and 8 of the Plaintiffs bundle. I have scrutinized the said documents and note that the formal incident report is produced at page 4 of the Plaintiff's bundle.

7.11 From the exchange of e-mails placed before the Court, I have noted that from the chronology of events that the first e-mail is at page 8 and is from Saul Ndou of DCC, on 12 December 2018 at 03:28 pm. The e-mails should therefore be read from page 8 going to page 7. The formal notification of the incident report on page 4 was sent under cover of e-mail from one Aileen of Celtic Freight on 12 December 2018 at 04:08pm. It is apparent to the Court that all e-mails were copied to Tana and that they were kept informed throughout.

7.12 It is the defendant's submission and it has pleaded in its defence that the hijacking occurred at 10:15 hours on 12 December 2018 at which time the insurance cover did not exist.

7.13 The Court has also noted from the evidence of the Plaintiff that the defendant engaged its own loss adjuster and asked for a second series of reports and tracking information. The Court has noted the contents of the

authenticated GPS Tracking records produced at **pages 14 to 58** of the Plaintiff's bundle. The Police Report is also produced at **pages 59 to 70** of the Plaintiff's bundle. I have also noted authenticated documents produced at **pages 84 to 103** being details of the JOB card from Celtic Freight, Tax Invoices and Packing Lists of various dates material to the issue and all the documents at **page 105 to 126** from Claims SOS, tendered in support of the Plaintiff's claim.

7.14 The Court has noted the several letters issued to the Defendant, by Tana dated 4th November 2019, (**at page 76**) by the Plaintiff dated 17th February 2020 (**at pages 77-78**) and its Advocates dated 17th August 2020 (**at pages 81 to 83**) respectively. I have also noted that the letter of demand issued by Plaintiff's Counsel speak to all the documents having been availed to the defendant who insisted on additional documents being supplied and subjected the claim to a loss adjustment process which loss adjuster is said to have conducted a comprehensive review of all the documents stated in the said letter from counsel.

From all the facts and documents placed before the Court and from the evidence of the Plaintiff's witness, I find that the hijacking took place after the placement of the insurance cover. I am satisfied and the facts before the Court are clear that the Plaintiff sent an e-mail requesting cover at 9:04 am on 12 December 2018. A letter from its Broker produced at **page 76** of the Plaintiff's Bundle confirms that the cover was placed immediately, and only transmitted to the Plaintiff by e-mail at 11:44 am due to erratic

internet service. He also confirms that the cover note and binder were sent to the Defendants office on the same day. The letter also confirms the evidence of the Plaintiff, that the practice was to issue cover on the day of departure of the consignment, of which there have been 25 prior to the one in issue. These were seen at **page 127** of the Plaintiff's bundle of documents.

7.15 For the defendant to then insist that the hijacking must have taken place at 10:15 hours as earlier reported, can only be seen as its attempt at defeating the claim. The Police Report, the statements and all other documentation including the chain of communication confirms that the hijacking took place in any event at or around 11:47 hours. The evidence of the witness confirms this sequence of events. On this evidence, he referred the Court to the GPS report, the Claims SOS report at **pages 115 to 126**. The first e-mail on the matter was sent at 15:28 pm on 12 December 2018 as was seen at **page 8**, which ties in as close as possible to the Plaintiffs evidence that he initially received communication by whatsapp at 15:20 hours from its supplier. I also note that the incident the subject of this action took place outside of Zambia and it is only normal and expected that a report could only be made later and when facts have been established.

7.16 In the face of all this evidence provided by the Plaintiff, at great cost including costs of authentication, the defendant has submitted that the Plaintiff has not discharged the burden of proof. The defendant has placed emphasis on the often-cited cases wherein the Supreme Court of Zambia

has guided on the requisite burden of proof to be discharged by the Plaintiff before Judgment may be given in his favour. The defendant has cited the case of **Khalid Mohamed vs The Attorney General** and has quoted the words of Ngulube D.C.J. as he then was when he said:

"...An unqualified proposition that a plaintiff should succeed automatically whenever a defence has failed is unacceptable to me. A Plaintiff must prove his case and if he fails to do so the mere failure of the opponent's defence does not entitle him to judgment. I would not accept the proposition that even if a plaintiff's case has collapsed of its inertia or for some reason or other, judgement should nevertheless be given to him on the ground that the defence set up by the opponent has also collapsed. Quite clearly a defendant in such circumstances would not even need a defence.

- 7.17 The defendant also relied on the authority in the case of **Wilson Masauso Zulu v Avondale Housing Project Limited**, which echoed the principle above and which cases were cited with approval in the subsequent decision of the Supreme Court in the case of **Anderson Mazoka & Others vs The Electoral Commission of Zambia and the Attorney General**. In the **Wilson M Zulu** case, Chief Justice Sakala, as he then was said on the issue of burden of proof

"a plaintiff who has failed to prove his case cannot be entitled to Judgment whatever may be said of the opponents case."

- 7.18 Counsel quoted a passage from the **Anderson Mazoka** case and called in aid the words of former Chief Justice Sakala when he said:

"It follows that for the petitioners to succeed in the present petition, it is not enough to say that the respondents have completely failed to provide a defence or to call witnesses, but that the evidence adduced establishes the issues raised to a fairly high

degree of convincing clarity in that the proven defects and the electoral flaws were such that the majority of voters were prevented from electing the candidate whom they preferred; or that the election was so flawed that the defects seriously affected the result which could no longer reasonably be said to represent the true free choice and free will of the majority of voters''.

7.19 Counsel for the defendant seeks refuge in these celebrated authorities and has urged the Court to find that notwithstanding the shortcomings of the defendant in the lack of witness statements and or documents placed before the Court, which shortcomings were self-induced, the Court should in any event find that the Plaintiff has not proved its case. This, to me, is an unacceptable argument, as the defendant cannot seek the solace of these authorities, to be synonymous with the blanket submission that the Plaintiff has not proved its case. The authorities cited do not justify the defendant having drawn a bad and poorly drafted defence from which it seeks to resile in its submissions.

7.20 I will start with the burden of proof cited in the **Anderson Mazoka** case. It is without a doubt that reference to that authority is misplaced in the facts of the case at hand. It is also trite and the law is settled, that the burden of proof in election petitions, is to a fairly high degree of convincing clarity, and is higher than that in civil cases which is on a preponderance of probability.

7.21 The Court is familiar with the principles of the burden of proof espoused by the cases of **Wilson Zulu** and **Mohamed vs AG**. What is glaring in the case

at hand, is that the defendant has sought to defeat the Plaintiff's claim right from the word go. Firstly, the defendant challenged the placement of a valid cover note, then the defendant questioned the lack of execution of the Policy of Insurance, the defendant then suggested that the premium not having been paid, the Plaintiff was not entitled to be treated as a credit customer. The defendant places reliance on the authority of **Rabson Sikombe vs Access Bank (Zambia) Limited** in support of the principle that oral evidence is capable of providing proof in the absence of documents pursuant to the evidentiary rule that a party must always endeavour to provide the best evidence that is at his disposal to further its submissions that the Plaintiff's witness did not place proof of payment of the premium before the Court.

7.22 I am of the considered view that the defendant has once again quoted the authority out of context and has invited the Court to slide down a slippery slope. It has already been found by this Court that the defendant did not traverse the payment of the insurance premium in the sum of USD 548 by its defence, and that the issue of non-payment is a red-herring and after-thought, in the circumstances of the facts and evidence before the Court. It is an inconceivable argument for the defendant to engage in so many meetings with the Plaintiff, its Brokers, the Supplier and Celtic Freight and engage its own loss adjusters and demand a series of documents, if the premium had remained unpaid. The Plaintiff had also submitted its claim form on 20th December 2018 to comply with the requirements of processing its claim. This was seen at **pages 71 to 75** of its bundle. The

Court has already found that the Parties had established a pattern of similar conduct and transactions and that such cover notes were deemed normal in their business relationship. It is obvious that no loss was incurred on any of the previous goods in transit policy until the one the subject of this Action.

7.23 The Court is also guided on the burden of proof by **Phipson on Evidence**, which states as follows:

"So far as the persuasive burden is concerned, the burden of proof lies upon the party who substantially asserts the affirmative of the issues. If, when all the evidence is adduced by all parties, the party who has not discharged it, the decision must be against him. It is an ancient rule founded on considerations of good sense and should not be departed from without strong reasons."

7.24 In **Zambia Railways vs Pauline S Mundia and Another** it was held that:

"...the old adage is true that he who asserts a claim in a civil trial must prove on a balance of probability that the other party is liable...."

For the reasons above, and on the balance of probability, and on the evidence placed before this Court, I find and hold that the Plaintiff has proved its case on the first issue. I therefore find that there is a valid insurance cover between the Plaintiff and the Defendant at the time the incident of hijacking took place in the Republic of South Africa on 12 December 2018.

8. The Court having found on the first issue in the affirmative, I now escalate my enquiry into the second issue. **Is the Plaintiff entitled to its claim for business loss against the Defendant?**

8.1 The Plaintiff has submitted and has testified of the business losses it has suffered because of the defendant's actions. I have taken note of the evidence of Jateen Ragha, wherein he testified that due to the refusal by the defendant to settle its claims, the Plaintiff struggled financially to settle the value of the lost consignment and has suffered loss of credit terms with its supplier DCC, lost its bonus payment incentives and has lost out on its HPGold Certification status, a business relationship that took them several years to build. I have seen the documents produced at **pages 128 to 138, 146 to 149 and 150** respectively in its bundle of documents in support of its claim.

8.2 The Plaintiff has conceded in its submissions that business loss is available not as matter of the policy but because of the conduct of the defendant and arising as an independent claim. It is further the Plaintiff's submission that to claim this type of business loss, the Plaintiff needs to show that the defendant was aware of the peril it had exposed the Plaintiff to by not honouring its claim in time. The Plaintiff has submitted that this evidence was presented to the Court through the Plaintiff's witness and by the documents mentioned above. The Plaintiff has relied on a decision in the case of **Livingstone Rawyards Company** and the case of **Mpika District Council v Jameson Musongo** to support its submission on the claim for business loss.

8.3 The defendant has countered this claim on the ground that such a claim is untenable under Insurance Law. Counsel has referred the Court to a decision of the Supreme Court in the case of **Zambia State Insurance Corporation v Serios Farms Limited** where the Court held as follows:

"an insurance policy only covers losses which were the subject matter of the insurance itself and that any consequential losses cannot be claimed under the policy unless expressly stipulated in the contract."

8.4 The Supreme Court in the case above, also discussed the principles of indemnity as stated in **Halsburys Laws of England** which provides as follows:

"Most contracts of insurance belong to the general category of contracts 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 itself entitle the assured to payment of the sum stipulated in the policy; the event must in fact result in a pecuniary loss to the assured, who then becomes entitled to be indemnified subject to the limitations of his contract. He cannot recover more than the sum insured, for that sum is all that he has stipulated for by his premiums and it fixes the maximum liability of the insurers. Even within that limit, however, he cannot recover more than what he establishes to be the actual amount of his loss. The contract being one of indemnity, and indemnity only, he can recover the actual amount of his loss and no more, whatever 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 the estimate." (emphasis added by the Court).

8.5 **Chitty on Contracts** 25th Edition at paragraph 363, provides as follows on the issue of nature of loss:

"Contracts of insurance providing cover for loss or damage are construed so as to extend only to loss or damage to the subject matter of the insurance itself. The loss of

profits and other consequential losses, such as loss of rents when a house is burnt down, or loss of salary after an accident, or loss in value of uninjured goods due to damage to other goods, are not covered unless expressly stipulated." (emphasis added by the Court).

8.6 I am therefore on firm ground in holding that the Plaintiff is not able to successfully pursue its claim for business loss against the defendant. It is trite that for such loss to be available, it ought to be an express provision of the insurance policy. The Plaintiff has not been able to place reliance on any such express provision, other than refer to letters written to the Defendant, after the event, indicating that the Plaintiff was likely to lose, and did in fact lose its credit status with the Supplier and other industry loss such as loss of the coveted gold certification .

8.7 In the context of a marine specific policy, as was in this case, it is trite that it is a valued policy entitling the Plaintiff to recover the agreed value of the lost property. The cover note clearly reflects that the insurance sum was USD 137,000.00 and the Plaintiff has been able to show to the Courts satisfaction, authenticated corresponding consignment notes and Tax Invoices in support of that sum. (Pages 84 to 103 of the Plaintiff's Bundle of Documents.)

9. Orders of the Court

9.1 Having found on the two issues as I have above, and in making my determinations on the sums payable, I am inclined to agree with the submissions of the Plaintiff based on the indemnity principle as guided by

the learned authors of **Bullen and Leake and Jacob's precedents of Pleadings** 17th edition, volume 2. It is noted that the indemnity principle underlies the whole of this area of the law of insurance. Brett L.J. in **Castellan vs Preston** said:

*"The very foundation, in my opinion, of every rule which has been applied to insurance law is this, namely the contract of insurance contained in a marine or fire policy is a contract of indemnity, and of indemnity only, and that this contract means that the assured in case of a loss against which policy has been made, **shall be fully Indemnified, but shall never be more than fully Indemnified.**"* (emphasis is by the Court)

9.2 I therefore enter Judgment for the Plaintiff in the sum of United states Dollars One Hundred and Thirty-Seven Thousand (USD137,000). I also award the Plaintiff interest in accordance with **Order 36 rule 8** of the High Court Rules, from the date of the Writ to the date of Judgment. Thereafter, the Plaintiff is entitled to interest in accordance with **section 2** of the Judgment Act Chapter 81, being the current lending rate as determined by the Bank of Zambia from the date of this Judgment till the same is satisfied.

9.3 As to costs, I have noted the submissions and authorities relied on by the Plaintiff. It is common practice that has emerged, supported by case law, that although costs are awarded in the discretion of the court, it emerges that the award of costs should normally be guided by the principle that costs follow the event. Essentially this means that the Party who initiates the suit will bear the costs if the suit fails; conversely if the Party is successful in the suit, then the defendant will bear the costs. It is also common cause that awarding costs is a matter of the exercise of judicial

discretion, such discretion to be exercised judiciously. Having regard to the circumstances of the case in the matter before me, I find that the Plaintiff having been successful in its claim against the defendant shall have the costs awarded to it, same to be taxed in default of agreement.

Delivered in Open Court, the 16th day of February 2022.

Abha Patel

Lady Justice Abha Patel, S.C.

