IN THE SUPREME COURT OF ZAMBIA APPEAL NO. 103 OF 2016

HOLDEN AT KABWE

(Civil Jurisdiction)

BETWEEN:

CHESNEY D. MIDDLETON (T/A C.D. Middleton Enterprises) APPELLANT

AND

NICO INSURANCE ZAMBIA LIMITED 1ST RESPONDENT

BEAM INSURANCE BROCKERS LIMITED 2ND RESPONDENT

For the Appellant : Ms M. Mwanawasa of Dove Chambers

For the First Respondent : Mr. K. Kamfwa of Wilson Cornhill Advocates

For the Second Respondent : N/A

Coram : Wood, Kabuka and Mutuna JJS

On 2nd April 2019 and 8th January 2020

J U D G M E N T

MUTUNA J, delivered the judgment of the court.

Cases referred to:

1) **Wilson Masauso Zulu v Avondale Housing Project Limited (1982) ZR 172**
2) **Rhodes Park School v Goldman Insurance Limited [2010] ZR volume 2 page 150**

Legislation referred to:

1) **The Insurance Act No. 27 OF 1997**

Other Works referred to:

1) **Chitty on Contracts - Specific Contracts volume 2, 30th edition by H.G. Beale, General Editor, Sweet and Maxwell Thomson Reuters, UK**
2) **Shawcross on The Law of Motor Insurance, 2nd edition, by C. Shawcross and M. Lee, Butterworth and Co. UK.**
3) **Commercial Law in Zambia, Cases and Material by M. Malila, UNZA Press**
4) **Black's Law Dictionary, 8th edition by Bryan A. Garner, Thomson West, USA**
5) **Halsbury's Laws of England, 4th edition, re-issue, volume 4(1) by Lord Hailsham of St. Marylebone, Butterworth, London, 1992**
6) **Hailsbury's Laws of England, 4th edition, volume 25, by Lord Hailsham of St. Marylebone, , Butterworth, London, 1978.**

Introduction

1) This is an appeal from the judgment of Mukulwamutiyo J (retired) in which he found that no contract of insurance had been concluded between the Appellant and First Respondent on the ground that the latter did not accept the Appellant's proposal for insurance. The Judge, consequently, dismissed the Appellant's claim for indemnity after the loss of his tobacco crop in a hail storm.

2) The appeal contests the finding of fact by the Learned High Court Judge on the ground that there was sufficient

evidence led by the Appellant proving the conclusion of the insurance contract. It also discusses the role of an insurance broker and agent in the conclusion of insurance contracts and effect of a negotiable instrument which is incomplete and post dated.

Background

3) The Appellant whose farming activities are conducted in Kalomo, in the Southern Province of Zambia, met a representative of the Second Respondent, one Alaster Bweupe on 20th October 2012 on the outskirts of Kalomo and discussed the possibility of insuring his crop with the First Respondent. In pursuance of this, the Appellant obtained the First Respondent's proposal forms from Alaster Bweupe with the intention of completing and submitting them.

4) Later the Appellant gave Alaster Bweupe the completed proposal forms and a blank and post dated cheque which he pre-signed with the intention that once the First Respondent indicated the premiums due, Alaster Bweupe

would complete the cheque and pay it to the First Respondent.

5) Subsequently, Alaster Bweupe called the Appellant and informed him that the initial payment for the premium was K19,792,500.00 (unrebased). He also emailed a copy of the quotation for the premiums he received from the First Respondent on 30th October 2012 to the Appellant.

6) On 1st November 2012 the Second Respondent's officer, one Gracious Simutende, emailed the First Respondent's officer requesting for the First Respondent's bank account details so that she could deposit the premiums collected from the Appellant and various farmers at Kalomo in its account. Along with this request, Gracious Simutende submitted to the First Respondent details of these various farmers and those of the Appellant, and requested it to effect immediate cover for their crop.

7) On 2nd November 2012, there was a hail storm in the Kalomo area which destroyed the Appellant's crop. On 12th November 2012, the Appellant's bank account was debited in the sum of K19,792,500.00 which was the

premium paid by the Appellant and on 13th November 2012, the First Respondent emailed its bank account details to the Second Respondent.

8) The record of appeal is not clear but at a certain point, the First Respondent refunded the K19,792,500.00 premium paid to it by the Appellant on the ground that the cover was repudiated. It also rejected the Appellant's claim for the damaged tobacco crop contending that the insurance policy had never been concluded.

9) On 26th November 2012, the Ministry of Agriculture and Livestock conducted an assessment at the Appellant's farm on the damage to his tobacco crop and rendered a report.

10) As a consequence of the First Respondent's refusal to honour the Appellant's claim, the latter's lawyers wrote a letter of demand to the First Respondent. Soon thereafter, the Appellant took out an action against the First Respondent.

The Appellant's claim in the High Court and contentions

11) The Appellant initially took out an action against the First Respondent only. He contended that he had been approached by Alaster Bweupe an employee of the Second Respondent who informed him that he was marketing tobacco insurance policies on behalf of various insurance companies which included the First Respondent.

12) The Appellant contended further that he informed Alaster Bweupe that he intended to insure forty-two hectares of his Virginia tobacco crop against wind and hail storm at the value of K2,671,200.00(un-rebased). He opted to insure his crop with the First Respondent on the recommendation of Alaster Bweupe and his (Alaster Bweupe's) assurance as agent of the First Respondent that he would receive immediate cover upon his completing the proposal forms and paying the premiums. This assurance was confirmed later on 1st November 2012 by way of an email from Alaster Bweupe to the First Respondent.

13) Following the events in the preceding paragraphs, the Appellant completed the proposal forms indicating his intention to insure forty-two hectares of his Virginia tobacco crop and gave the proposal forms and a blank cheque for the premiums (to be assessed) to Alaster Bweupe on 22nd October 2012.

14) On 2nd November 2012, the Appellant's tobacco was struck by a hail storm resulting in sixty two percent damage to his tobacco crop assessed at K50,000.00 per hectare bringing the total loss to K558,000.00. The assessment of the loss was done by the Ministry of Agriculture and Livestock. Consequently, he claimed the sum of K558,000.00 from the First Respondent plus costs and interest as indemnity for the loss.

15) After issuing process, the Appellant sought and was granted leave to join the Second Appellant to the proceedings and amend his claim. The result of the joinder and amendment to the claim was an emphasis that the Second Respondent, acting through Alaster Bweupe, was at all material times acting as agent for the

First Respondent. As such, the First Respondent was bound by the action of the Second Respondent.

The Respondents' defences and contentions in the High Court

16) The First Respondent's position was that there was no insurance contract between itself and the Appellant. It also denied that the Second Respondent, acting through Alaster Bweupe, was ever its agent or that he had its mandate to issue insurance cover on its behalf.

17) In addition, it denied any knowledge of the business transaction between the Appellant and Alaster Bweupe acting for the Second Respondent.

18) In its defence, the Second Respondent admitted being the agent of the First Respondent and confirmed that it had had dealings with the Appellant as alleged. It however denied that its officer, one Alaster Bweupe, had undertaken to ensure that the Appellant was given immediate cover for his tobacco crop.

The evidence tendered before the High Court

19) The Appellant's evidence

19.1 At the trial of the matter in the High Court, the Appellant testified on his own behalf. His testimony was similar to the contentions he made in his pleadings with an emphasis that in its dealings with him, the Second Respondent was the agent of the First Respondent and that its officer, one Alaster Bweupe, had assured him that the insurance cover would start running soon after he submitted the proposal forms and handed over the cheque. The contract of insurance was thus concluded according to him, on the happening of those events. He, however, conceded under cross examination that the First Respondent's proposal form indicated that the insurance cover would only commence after the First Respondent accepted the proposal. Further, he did not receive a cover note from the First Respondent.

20) The First Respondent's evidence

20.1 The evidence by the First Respondent was led by its Agricultural Insurer Officer, one Mulenga Mutale. It confirmed that she had received the Appellant's proposal for insurance of his tobacco crop from the Second Respondent. That, following from this the First Respondent sent a quotation to the Second Respondent indicating the cost of the cover. That as at the date of the damage to the Appellant's tobacco, the First Respondent had not issued cover for the crop. Therefore, there was no contract of insurance concluded. In addition, the evidence revealed that a broker in the insurance industry represents the insured in the preliminary stages of effecting cover and the insurance company after the cover is issued.

20.2 In relation to the matters on hand, the witness revealed that the First Respondent did not issue the insurance cover because the Second Respondent was not comfortable with the quotation from the

First Respondent. She also stated that the payment of part of the premium was made to the First Respondent after the loss occurred which it subsequently refunded to the Second Responded. She denied that the Second Respondent was agent for the First Respondent or that the contract of insurance was concluded because no cover was issued.

21) The Second Respondent's evidence

21.1 The evidence by the Second Respondent was led by its officer one Alaster Bweupe. It revealed how he and the First Respondent's officer met and agreed that he would sell hail storm insurance policies to farmers in his area on behalf of the First Respondent. It also revealed that the Appellant had collected the First Respondent's proposal forms from the Second Respondent which he completed and handed over to the witness along with a cheque. That the proposal forms were clear that

upon their completion the First Respondent would appraise the proposal, and signify acceptance by issuance of a cover note. The evidence then reiterated the contentions made by the Second Respondent in its pleadings by, among other things, denying that the witness promised the Appellant immediate cover upon receipt of the payment and also stated that the payment by the Appellant was by way of a post dated cheque.

Consideration by the Learned High Court Judge and decision

22) After the Learned High Court Judge considered the pleadings, evidence and arguments by the parties, he found that for a contract of insurance to be concluded there had to be: an offer made by the insured; an acceptance by the insurer; and consideration by the insured to the insurer. He held that the act of completing the proposal forms by the Appellant and submitting it to the First Respondent, through the Second Respondent, amounted to an offer. As such, the first aspect of concluding a contract of insurance had been met.

23) The Learned High Court Judge then considered whether the issuance of the quotation by the First Respondent amounted to acceptance of the offer as argued by the Appellant. In doing so, he considered the law on what constitutes acceptance of an offer and concluded that, although receipt or acknowledgement of the agreed premium can amount to acceptance, the mere issuance of a quotation does not have the same effect. He accordingly, found that the First Respondent did not accept the First Appellant's offer and thus, there was no contract of insurance concluded. The Learned High Court Judge dismissed the Appellant's claim.

Ground of appeal to this court and arguments by the parties

24) The Appellant is unhappy with the decision by the Learned High Court Judge and has launched this appeal fronting three grounds of appeal as follows:

24.1 The Learned Trial Judge erred in law and in fact when he held that there was no valid insurance

contract that existed between the Appellant and the First Respondent;

24.2 The Learned Trial Judge erred in law and in fact when he held that the payment of the insurance premium made by the Appellant to the First Respondent through the Second Respondent in respect of the quotation issued to the Appellant by the Respondent did not amount to acceptance;

24.3 The Learned Trial Judge erred in law and in fact when he failed to make a finding in his judgment on the role played by the Second Respondent as agent of the First Respondent thereby rendering acts of the Second Respondent as being valid acts of the First Respondent.

25) Prior to the hearing, the Appellant and First Respondent filed heads of argument which they relied upon at the hearing along with *viva voce* submissions. The Second Respondent did not file heads of argument and was not

represented at the hearing despite having been notified of the hearing.

26) The thrust of the arguments by counsel for the Appellant, Ms Mwanawasa, in ground 1 of the appeal was that a contract of insurance was concluded between the Appellant and the First Respondent because the Appellant paid the premium before the tobacco crop was destroyed and the payment was acknowledged by the Second Respondent in its email to the First Respondent requesting for the latter's bank details.

27) Reinforcing her arguments in the verbal submissions at the hearing, Ms Mwanawasa, argued that the conclusion of the contract can be inferred from the conduct of the parties. She contended that the circumstances of this case reveal that the Second Respondent as broker requested for payment of part of the premium and went further to request the First Respondent to send its bank account details. These acts, counsel argued, amount to acceptance of the offer which she said need not be in writing but can be inferred from the conduct of the

parties. Concluding arguments on this issue, counsel contended that if indeed there was no contract of insurance concluded, how could the First Respondent later claim that the contract was repudiated. Here, counsel was saying that the statement by the First Respondent that it could not indemnify the Appellant because the contract was repudiated confirmed that there was indeed a contract.

28) Ms Mwanawasa drew our attention to a passage from the works, ***Shawcross On Motor Insurance***, 2nd edition which state that acceptance of an offer to enter into an insurance contract can be intimated by: a letter of acceptance to the assured; or issuance of the policy; or receipt for or acknowledgement of the agreed premium. Consequently, the Learned High Court Judge misdirected himself when he failed to consider the said position of the law.

29) In ground 2 of the appeal, counsel reinforced the arguments made under ground 1 of the appeal in regard to conclusion of the contract by way of acceptance of the

premium. She argued that according to ***Chitty on Contracts***, 28th edition, an offer may be accepted by conduct. She argued that the First Respondent accepted the offer of the contract of insurance by providing the quotation which required the Appellant to pay twenty-five percent of the premium, which he did. Further, that if the First Respondent did not intend to immediately offer cover it should have rejected the payment.

30) In the *viva voce* arguments Ms Mwanawasa argued that the Learned High Court Judge misdirected himself when he held that the contract of insurance had not been concluded merely because no cover note was issued. She, in this regard, reiterated that it can be inferred from the facts surrounding the case that the contract of insurance was concluded.

31) In addition, counsel argued that the First Respondent waived its right to inspect the crop which was a condition precedent of the contract.

32) Turning to ground 3 of the appeal, counsel acknowledged that in the ordinary course of things an insurance broker

acts for and on behalf of the insured. In this case, however, the Second Respondent also acted as agent for and on behalf of the First Respondent (and was named as such in the quotation) because it was selling insurance policies on behalf of the First Respondent. According to counsel, this relationship of principal and agent was in place from as early as 3rd October 2012, long before the Second Respondent contacted the Appellant.

33) In the *viva voce* arguments, Ms Mwanawasa explained the acts done by the Second Respondent's officer for and on behalf of the First Respondent which she contended proved that the Second Respondent was indeed agent of the First Respondent. These acts included: marketing the policies on behalf of the First Respondent; handing out the proposal forms, advising the First Respondent to issue immediate cover by email; and collecting the cheque for the premium.

34) Counsel concluded that when an insurance broker sells insurance policies or solicits business on behalf of an insurance company, as the Second Respondent did, it

acts as an agent of the insurance company. Our attention, in this regard, was drawn to a passage from ***Chitty on Contracts***, 28th edition to that effect.

35) We were urged to allow the appeal.

36) In response to the Appellant's arguments under ground 1 of the appeal, counsel for First Respondent, Mr. K. Kamfwa, argued that there was no valid contract of insurance concluded because the First Respondent did not accept the offer by the Appellant. According to Mr. Kamfwa, an insurance contract is concluded only when the offer is accepted. Counsel drew our attention to the works, ***Commercial Law in Zambia, Cases and Material*** by ***Mumba Malila*** and ***Robert Lowe, Commercial Law*** which restate the position he took. It was counsel's argument that in this case the First Respondent did not accept the Appellant's offer. That its silence in the matter could not be construed as acceptance because the position of the law is that silence does not constitute consent.

37) In his verbal arguments, Mr. Kamfwa, set out what he termed the chronology of events which proved that the contract of insurance was not concluded. These events were: the First Respondent issuing the quotation for the intended cover on 30th October 2012; the Appellant completing the proposal form which clearly stated that no insurance would commence until the proposal was accepted; after the proposal was submitted, the Second Respondent sent an email to the First Respondent on 1st November 2012 asking for cover; the following day, the Appellant's tobacco was destroyed; on 11th November 2012, well after the tobacco was destroyed the Second Respondent deposited the Appellant's cheque for part of the premium in the First Respondent's account; and on 16th November 2012 the First Respondent indicated that it could not provide insurance cover. He concluded that the foregoing chronology of events does not reveal that the First Respondent at any point accepted the Appellant's proposal.

38) In addition, Mr. Kamfwa clarified that the Appellant's cheque for the premium was paid to the Second Respondent who was his agent and not to the First Respondent's agent. Further, acceptance of a contract may be by conduct and that if the Second Respondent was agent for the Appellant perhaps then one could say that the contract of insurance was concluded in view of how far the Second Respondent had gone in concluding it with the Appellant.

39) Concluding arguments under ground 1, counsel submitted that, in any event, the finding made by the Learned High Court Judge was a finding of fact which cannot be set aside because it does not meet the threshold we set in the case of ***Wilson Masauso Zulu v Avondale Housing Project Limited (1)***. In that case we said that an appellate court will only reverse findings of fact made by a trial court if it is satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts.

40) In regard to ground 2 of the appeal, Mr. Kamfwa adopted his earlier arguments under ground 1 of the appeal. The only departure was a reference to ***Blacks Law Dictionary*** (8th edition) on the definition of the word *"quotation"*. He argued that by submitting the quotation for the premium the First Respondent was merely indicating to the Appellant the price at which it would insure its tobacco crop if it accepted the offer. That there is no communication between the First Respondent and the Appellant to show that the former accepted the latter's offer.

41) Counsel concluded arguments under ground 2 of the appeal by stating that there was evidence led by the Second Respondent's witness which revealed that he only deposited the cheque for the premium in the First Respondent's account after the occurrence of the event sought to be insured.

42) Under ground 3 of the appeal, Mr. Kamfwa agreed with the Appellant's argument that by definition ascribed to the word *'broker'* under the ***Insurance Act***, he is the

agent of the insured. Therefore, by parity of reasoning, the Second Respondent was acting as agent for the Appellant and, as such, its acts could not bind the First Respondent.

43) Counsel concluded by stating that in the insurance industry it is not uncommon for an insurance company to give a list of its products to various brokers so that once they are approached by persons seeking insurance the same can be availed to them. This, however, does not make such broker an agent of the insurance company.

44) We were urged to dismiss the appeal.

45) Replying to the First Respondent's arguments, Ms Mwanawasa referred to the text outlines of the ***Law of Agency,*** by ***Floyd R. Mechem*** at pages 8 to 9 which states that an agent normally binds the principal by the contract he makes. She, therefore, argued that the Second Respondent by its acts bound the First Respondent. She also referred to a passage from ***Chitty on Contracts - Specific Contracts***, which states that in

certain instances a broker may act for both the insured and insurer.

Consideration and decision by this court

46) Having considered the record of appeal and arguments by the parties we have arrived at the decision that the three grounds of appeal raise the following issues:

46.1 was the Second Respondent an agent of the First Respondent;

46.2 was the contract of insurance between the Appellant and First Respondent concluded.

In determining the first issue we will also distinguish the meaning and roles of brokers and agents, whilst in dealing with the second issue we will also discuss the effect of payment by way of a blank cheque.

47) In respect of the first issue, the importance of distinguishing the meaning and roles of brokers and agents arises from the fact that, although, the Second Respondent described itself as a broker, the Appellant has contended that it also acted as agent for the First

Respondent. Further, acting as such agent, the Second Respondent concluded the contract of insurance with the Appellant and bound the First Respondent.

48) The parties are agreed that a broker generally acts as agent for and on behalf of the insured. This arises from section 2 of the ***Insurance Act***, 1997 which defines the word *"broker"* to mean *"...a person who, on behalf of an insured person or a person who intends to take up an insurance policy, arranges insurance policies"*. The key words in this definition are the ones we have underlined which attest to the fact that a broker acts on behalf of the insured or insurance buyer. Indeed, the High Court, presided over by Hamaundu J, (as he then was) in the case of ***Rhodes Park School v Goldman Insurance Limited***[2] took a similar view when discussing the role of a broker. The Judge held that *"persons seeking insurance frequently engage brokers whose services are usually remunerated on a commission basis by the assured"*. We could not agree more with the position taken by the learned Judge.

49) As regards the role of a broker, ***Blacks Law Dictionary***, 8th edition, in defining the word at page 205 refers to broker as *"... an agent who acts as an intermediary or negotiator, esp. between prospective buyers and sellers".* It goes further to define the word as being *"... a person employed to make bargains and contracts between persons".* The dictionary extends this definition to an insurance broker referring to such a person as *"... one who for compensation, brings about or negotiates contracts of insurance ...".*

50) Put simply, a broker as stated is a negotiator who conceives and consummates contracts on behalf of persons or entities intending to insure.

51) An insurance agent on the other hand is slightly different and it is defined in the ***Insurance Act*** as follows:

> **"... a person who, not being a salaried employee of an insurer**
>
> **(a) initiates insurance business; or**

(b) does any act in relation to the receiving of proposals for insurance, the issuance of temporary insurance cover notes, or the collection of premiums;
on behalf of an insurer."

On the other hand ***Blacks Law Dictionary*** refers to an agent as being *"a person authorized to act for or in place of another."* ***Chitty on Contracts***, 30th edition at paragraph 31-006 goes further and explains the context in which the relationship of principal and agent is created as follows:

> **"On the orthodox and accepted analysis, the full paradigm relationship of principal and agent arises where one party, the principal, consents that another party the agent, shall act on his behalf, and the agent consents to act."**

52) From the definitions ascribed to agent in the preceding paragraph our understanding is that the agent stands in the shoes of the principal and performs acts for and on behalf of the principal. Further, for such a relationship to exist, both the agent and principal must consent to the relationship. However, in relation to third parties, they may, where it appears as if there is consent, be entitled to assume that such consent exists. Thus, ***Chitty on***

Contracts at the same paragraph has the following to say:

> **"But under the doctrine of apparent authority, a further extension, a third party may be entitled to rely on the appearance of authority and hold the principal liable as if there had been such consent** ...[at paragraph 31.057]. **Where a person by words or conduct represents to a third party that another has authority to act on his behalf, he may be bound by the acts of that other as if he had in fact authorized them. This doctrine ... applies to cases where a person allows another who is not his agent at all to appear as his agent ..."**

53) Having distinguished the two words, broker and agent, we now turn to consider the first issue. The contention by the Appellant is that the Second Defendant was agent for the First Respondent. He stated as much in the statement of claim and contended further that the Second Respondent's officer, one Alaster Bweupe was marketing insurance policies on behalf of, among others, the First Respondent. In addition, the Appellant stated that Alaster Bweupe recommended that he insure with the First Respondent and assured him of immediate cover. Lastly, that he handed him a cheque for the

premium in the sum of K19,792,500 along with the proposal forms.

54) In his evidence, the Appellant restated these contentions and added that Alaster Bweupe was providing similar service to other farmers in Kalomo who appeared on the list of prospective insured persons which he, Alaster Bweupe, submitted to the First Respondent.

55) In so far as the acts of the Second Respondent were limited to being an intermediary or a go between for the Appellant and the First Respondent, he was a broker acting for and on behalf of the Appellant. However, the facts reveal that the Second Respondent's officer was introducing and marketing the First Respondent's agricultural policies to the Appellant and others as well. The said officer was also the conduit through which the proposal forms and payment for the premium moved from the Appellant to the First Respondent and the quotation from the First Respondent. He also collected premiums on behalf of the First Respondent. The definition we have ascribed to the words *'agent'* and

'broker' attest to the fact that it is a question of fact as to what the true identity of a person is.

56) The pleadings and facts as we have summarized in the two preceding paragraphs leave us in no doubt that the Second Respondent was not only a broker representing the Appellant but also agent for the First Respondent. This is not peculiar to this case because as Ms M. Mwanawasa has quite rightly argued, in certain instances a broker can act in the dual role as representative of both the insured and insurer as revealed by ***Chitty on Contracts***.

57) Further, given the facts we have referred to, which the First Respondent, allowed to go on unabated along with describing the Second Respondent in the proposal form as agent (written agency) we can not fault the Appellant as a third party for assuming that the Second Respondent was such agent. In answer, therefore, to the issue of whether or not the Second Respondent was agent of the First Respondent we hold that the answer is in the affirmative. In regard to whether or not as such

agent, the Second Respondent concluded the insurance contract on behalf of the First Respondent, as contended by the Appellant, the answer is in our determination of the second issue.

58) Turning now to consider the second issue of whether or not the contract of insurance was concluded between the Appellant and the First Respondent. We must start by determining the effect of the payment made by the Appellant to the First Respondent through the Second Respondent by way of a blank cheque. The question is, was it a valid payment in view of the fact that the cheque, which is a negotiable instrument, was incomplete? For purposes of recapping, this issue is relevant because the evidence by the Appellant was that at the time he handed over the proposal forms to the Second Respondent's officer, he also gave him a blank or incomplete cheque. Further, by receiving the said payment for and on behalf of the First Respondent, the Second Respondent accepted the proposal for insurance and thus concluded the contract of insurance.

The answer to the question posed in the preceding paragraph is to be found in ***Halsbury's Laws of England***, 4th edition, re-issue, volume 4(1) at page 177 which states as follows:

> **"Incomplete instrument. Where a person is in possession of an instrument wanting in any material particular, he has prima facie authority to fill up the omission in any way he thinks fit. But in order that any such instrument when completed may be enforceable against any person who becomes a party thereto prior to its completion, it must be filled up within reasonable time, and strictly in accordance with the authority given."**

60) The Learned author goes further under the heading *"Blank signature"* as follows:

> **"The delivery by the signer of a simple signature upon a blank paper in order that the paper may be converted into a bill or note operates as a prima facie authority to fill the paper up as a complete instrument for any amount using the signature for that of the drawer, acceptor, maker, or endorser."**

Our understanding of the foregoing is that the fact, in and of itself, that a negotiable instrument or bill of exchange is incomplete does not mean that it is invalid if

passed onto a payee. Blank cheques are a means of effecting payment and consequently, payment was effected by the Appellant when he handed over the blank cheque to the Second Respondent's officer. Further, in receiving the cheque the Second Respondent, as agent for the First Respondent, accepted it for and on behalf of the latter.

61) Turning now to whether or not the contract was concluded. ***Chitty on Contracts - Specific Contracts***, 30th edition in speaking to when an insurance contract is concluded states as follows at page 1298:

> **"Apart from the doctrine of uberrima fides, normal principles of contract law apply to the formation of the contracts of insurance, though an offer by an insurer to insure may (in the absence of stipulations to the contrary) be subject to an implied condition that the risk does not materially change prior to acceptance. There must, of course, be an unconditional acceptance by one party of the offer made by the other. Thus where an insurer "accepts" a proposal subject to payment of premiums, his acceptance is in truth either a counter offer to be accepted by tendering that premium, or perhaps only an invitation to the assured to offer that**

premium to the insurer for his acceptance of it and the terms proposed. If an offer is made and accepted on the basis that the insurer will not be liable unless the premium is paid within a specified time, it appears that a binding contract is made at once, though the insurer will escape liability if the premium is not paid. As in contract generally, one party may be taken to have contracted on terms of which he was only constructively aware and generally the insurer's proposal form, which the assured uses to give the insurer particulars of the risk, contains express reference to the insurer's terms and conditions."

The effect of this is that a contract of insurance like any other contract, is concluded when; there is an offer; an acceptance; and consideration passing between the parties. This is in line with the holding by the Learned High Court Judge. Further, the proposal form may also contain the insurer's terms and conditions which may include the commencement date of the contract of insurance or a condition precedent to the commencement of the contract. In the case before us, the First Respondent's proposal forms which were completed by the Appellant at page 100 of the record of appeal is very clear as to when the insurance cover would commence. It

is clearly stated in bold at page 106 that the insurance contract would not commence until the proposal was accepted. The acceptance by the First Respondent was to be signified by the issuance of the cover note as the uncontested testimony of Alaster Bweupe revealed. There was no cover note issued, which fact the Appellant conceded to. There was, as a result, no contract of insurance concluded.

62) In arriving at the decision in the preceding paragraph, we have considered the contention by the Appellant that Alaster Bweupe assured him of immediate cover upon his accepting the cheque from the Appellant and that the assurance was confirmed by an email sent to the First Respondent's officer by Alaster Bweupe on 1st November 2012. By this contention it is the Appellant's position that by 1st November 2012, the contract of insurance was concluded and thus insurance cover was in place. This date is crucial because, the event which is the subject of this appeal occurred a day later on 2nd November 2012.

63) The contention by the First Respondent was an outright denial of the knowledge of the transaction between itself and the Appellant. In his arguments, Mr. Kamfwa in setting out the order of events argued that the First Respondent did not accept the Appellant's proposal which was a condition precedent to consummation of the contract of insurance. The Second Respondent, on the other hand, denied that it assured the Appellant that there would be immediate cover or that indeed there was one. In essence, the two parties denied that the contract was concluded.

64) The position we have taken on the email of 1st November, 2012, is that it was merely a request made by Alaster Bweupe to the First Respondent to effect immediate cover. There was no evidence led in the Court below, apart from that email, which shows that as agent of the First Respondent, the Second Respondent, acting through Alaster Bweupe accepted the Appellant's request for immediate cover. The condition for conclusion of the contract was clearly defined in the proposal forms, as we

have stated earlier, to be acceptance of the proposal by the First Respondent. No response or assurance was made by the First Respondent that it accepted the request or proposal and neither did the Second Respondent as agent of the First Respondent confirm this immediate cover or signify acceptance of the proposal. Crucially, no cover note was issued which would have attested to the effective date of the insurance cover. As at 2nd November 2012, the date of the event sought to be covered, all that had been done in pursuance of conclusion of the contract was completion of the proposal forms by the Appellant and handing them, along with the cheque to the Second Respondent. In effect he submitted his offer and awaited acceptance which was subject to appraisal of the proposal by the First Respondent in line with Alaster Bweupe's testimony. The findings of fact by the Learned High Court Judge were, therefore, consistent with the evidence. All three grounds of the appeal must therefore, fail.

Conclusion

65) As a result of what we have stated in the preceding paragraph, there is no merit in all three grounds of appeal and we uphold the decision of the Learned High Court Judge. The appeal collapses and we dismiss it with costs to the First Respondent, in both this and the Court below. The costs will be taxed in default of agreement.

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A.M. WOOD
SUPREME COURT JUDGE

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J.K. KABUKA
SUPREME COURT JUDGE

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N.K. MUTUNA
SUPREME COURT JUDGE