

# Nyimba Investments Limited vs Nico Insurance Zambia Limited (Appeal No. 130/2016) [2017] ZMSC 32

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**Nyimba Investments Limited vs Nico Insurance Zambia Limited**  
**(Appeal No. 130/2016) [2017] ZMSC 32**  
*Edward Sampa*

**The Facts**

On 15 October 2010, the Appellant company, Nyimba Investments, obtained an insurance policy from Nico Insurance. The policy insured against risk on all real and personal property, and against business interruptions and the loss of profit of the Appellant and its group companies trading in Zambia. On 12 September 2011, a fire gutted the property of the Appellant. At the time of the fire, the titleholders of the property were Gulam Ahmed Adam Patel and Ayyub Adam Patel who traded under the name: “Nyimba Filling Station and Supermarket”. The two were also shareholders in the Appellant company.

The Appellant claimed on the policy for material damage, and the claim was settled by the Respondent, Nico Insurance. However, the claim for business interruption and loss of profit was later rejected by the Respondent when it was discovered that the destroyed property was not registered in the name of the Appellant Company, but instead in the names of two of its shareholders. The Respondent repudiated the policy for lack of insurable interest, refused to honour the claim for business interruption and loss of profit, and sought to recover the money it had already paid for material damage.

The Appellant took the matter to the High Court. The High Court held that the Appellant made a representation that it owned the property that was the subject of the claim, when it did not in fact do so, and further that the Appellant's misrepresentation was fraudulent. This rendered the insurance policy void, and the claim on the policy untenable. It is against this judgment that the Appellant appealed.

The legal issues to be determined could be summarized as follows:

1. What constitutes an insurable interest? Is an insurable interest co-extensive with legal or equitable ownership of the subject matter of insurance?
2. Is it misrepresentation, and therefore a breach of the duty of utmost good faith, for the insurer to insure the property as its own, when that property is in fact owned by the shareholders of the insured?
3. Is an insurer who accepts and continues to accept premiums from the insured, while knowing that it is entitled to decline to insure the risk, or to repudiate a claim on account of breach of warranty or misrepresentation, estopped from pleading breach of warranty or misrepresentation?

### **The Holding**

On Issue 1 above, the Supreme Court held that;

- (a) The insurable interest requirement does not necessarily require an insured to own the insured property outright. A less direct interest is enough. It may be enough that the insured is in possession of the property, or simply that it would suffer loss if the property were to be damaged.
- (b) The determination of insurable interest should depend on a careful reading of the contract of insurance in each case.
- (c) While authorities of apex courts in England will remain persuasive on courts in Zambia, authorities will not be applied without consideration of the circumstances in which they were decided.

On Issue 2, the Court held that;

- (a) Insurance contracts are contracts of utmost good faith. Each party to the contract should not only disclose all the relevant information truthfully, but should also refrain from misleading the other party to the contract.
- (b) Misrepresentation must be material and must lead to inducement.
- (c) A misrepresentation is material if, first, it influences the prudent insurer's decision to take up the risk, and second, if it influences the premium to be fixed for such risk. The test for materiality is an objective one made by reference to the attitude of a hypothetical prudent insurer.
- (d) A representation is influential if it weighs on the critical decision to insure or not to insure, and if to insure, on what terms. The insurer will only be entitled to avoid a policy if they can show that they were induced by the non-disclosure or misrepresentation by the insured, to enter into the contract.

On Issue 3, the Court held that the issue of estoppel did not arise, given the Court's finding that the Respondent was bound to honour the claim.

### **Significance**

#### *General*

The Court is to be commended for deviating from the narrow interpretation of insurable interest under English law as espoused in *Macaura v. Northern*

*Assurance*<sup>1</sup> and *Luceana v. Craufurd*.<sup>2</sup> Instead the Court leaned in favour of authorities that follow the reasonable expectancy theory and broad interpretation of insurable interest. The Court's holding that the insured had an insurable interest, despite the fact that it had no legal title registered in its name, is sound.<sup>3</sup>

Since insurance companies and underwriters do, in some cases, seek to evade their legal obligations on the grounds of a lack of an insurable interest, it is the duty of the Court to lean in favour of an insurable interest, where possible. After insurance companies have accepted premiums, the objection that there was no insurable interest is often a technical objection and one which has no real merit.<sup>4</sup>

The above notwithstanding, the Court in its analysis of the *Feasey v. Sun Life Assurance Company* case, should have considered adopting Waller L.J.'s<sup>5</sup> three-step test for the validity of a policy under the rules of insurable interest, which was laid down as:

- (a) What is the subject-matter of the policy?
- (b) What is the interest of the insured in the insured subject-matter?
- (c) Does the policy cover the assured's interest?

The adoption of the above test would have made future determination of matters dealing with insurable interest easier.

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<sup>1</sup> (1925) A.C. 619

<sup>2</sup> (1802) 3 Bos & Pul. 75

<sup>3</sup> An insurable interest can be said to exist if: the assured has legal or equitable title to the subject matter; or if the assured is in possession of the subject matter; or if the assured is not in possession of the subject matter but may be either responsible for, or suffer loss in the event of, any damage to the subject matter. *Glengate-KG Properties Limited v Norwich Union Fire Insurance Society Limited* (1999) 2 All E.R. 487 *Feasey v Sun Life Assurance Corporation of Canada* (2003) Lloyds Rep. I.R 637. Though in *Sharp v Sphere Drake Insurance* (1992) 2 Lloyd's Rep. 501, the court rejected the view that insurable interest had to be based upon the assured being the equitable or legal owner of the property in question, and held that an insurable interest in property might arise merely because the assured owed a duty to exercise reasonable care in respect of the property.

<sup>4</sup> Brett M.R in *Stock v Inglis* (1884) 12 Q.B.D. 564, affirmed (1885) L.R. 10 App. Cas 263; *Feasey v Sun Life Assurance Co of Canada* (2003) Lloyd's Rep. I.R. 637

<sup>5</sup> Lloyd's Rep. I.R. 637

*The Time When an Insurable Interest Must Exist*

The Court at pages J44 to J46, reviewed the policy document and arrived at the conclusion that the Appellant was within the contemplation of insurable interest under the definition of “property insured” in the policy document. The Court did not address in detail nor provide guidance on the time when an insurable interest must exist. However, inference from the decision shows that it must exist at the time of contract.

Different jurisdictions have taken different views on the timing question. The opinions from the majority of the American courts hold that insurance on property is valid when an insurable interest in the property exists at the time of the loss.<sup>6</sup> The basis of this position is that if the loss only occurs to the insured with an insurable interest in the damaged property, then no loss can exist when the property lacks the prerequisite insurable interest at the time of the loss.<sup>7</sup> Common law courts however, appear to have never reached consensus on whether the insurable interest must exist at the time of contract formation. In *Sadlers Co. v. Badcockk*<sup>8</sup> the court held that the insured must have an insurable interest in the property both at the time of contract formation and at the time of loss.<sup>9</sup>

In addition, the premium is recognized as an insurer’s consideration for assuming the insured’s risk in exchange for the insurer’s obligation to pay proceeds.<sup>10</sup> The consideration may fail, however, if the insurer assumes no risk at the time the premiums are paid because, even though the insurer promises to insure against the risk of loss, the insured risk does not exist until the insured actually obtains insurable interest.<sup>11</sup> Given that the insurable interest is an essential element for the valuable consideration of an insured’s payment of premium, requiring its existence only at the time of

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<sup>6</sup> *Washington University Global Studies Law Review* Vol. 10 Issue 4 - 749

<sup>7</sup> E.g., *Dairyland Ins. Co v. Hawkwin*, 292 F. Supp. 947, 951 (S.D. Iowa 1968) as cited in the *Washington University Global Studies Law Review* Vol. 10 749 (finding insurers could not deny coverage on grounds that insured, who was listed as owner, had no insurable interest because, even though the insured’s son-in-law possessed the car and the insured intended to transfer ownership to the son-in-law when insured received payment, a bona fide sale had not occurred at the time of loss).

<sup>8</sup> 2 Atk. 544, 26 ER 733 (1743).

<sup>9</sup> Robert Jerry II, *Understanding Insurance Law*; 43 (2<sup>nd</sup> ed. 1996)

<sup>10</sup> *The Washington University Global Studies Law Review* Vol. 10 749

<sup>11</sup> *Ibid.*

loss materially therefore conflicts with the general principle of contract law.<sup>12</sup> In Germany for instance, the legislators there have endorsed the principle that the insurable interest must exist through the entire duration of the insurance contract. Article 80 of the German Insurance Contract Act for example provides that “the policyholder shall not be obligated to pay insurance premium if no insured interest exists when the insurance cover [age] commences.” The Zambian Insurance Act is silent on this issue, and the Court did not clearly address this in its judgment.

An insurable interest can be said to exist if: the assured has legal or equitable title to the subject matter; or if the insured is in possession of the subject matter; or if the insured is not in possession of the subject matter but may be either responsible for, or suffer loss in the event of, any damage to the subject matter. *Glengate-KG Properties Limited v Norwich Union Fire Insurance Society Limited* (1999) 2 All E.R. 487 *Feasey v Sun Life Assurance Corporation of Canada* (2003) Lloyds Rep. I.R 637. Though in *Sharp v Sphere Drake Insurance* (1992) 2 Lloyd’s Rep. 501, the Court rejected the view that insurable interest had to be based upon the insured being the equitable or legal owner of the property in question, and held that an insurable interest in property might arise merely because the assured owed a duty to exercise reasonable care in respect of the property.

Overall, the Court’s disposal of the issues was sound, and in accordance with long established principals of law. In developing their analysis, the Court provided a useful historical analysis of the concept of insurable interest, and undertook a cross jurisdictional comparison of how apex courts in other jurisdictions have, in recent times, dealt with the subject of insurable interest. The ambiguity on timing notwithstanding, the broader construction of the concept of insurable interest is a welcome development.

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<sup>12</sup> Malcom Clarke, *Policies and Perceptions of Insurance Law in the Twenty-First Century* 36 (2007).