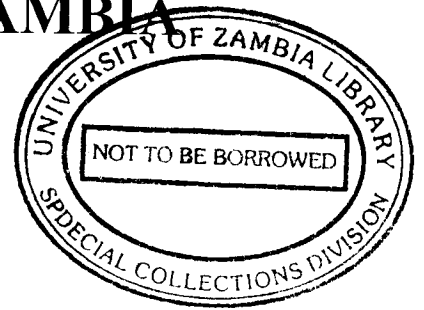


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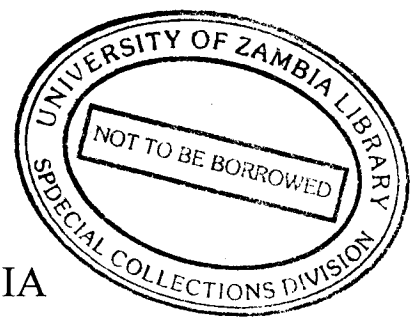
INSURANCE LAW AND PRACTICE IN ZAMBIA TODAY

BY

CHONGO MUSONDA

An obligatory essay submitted to the University of Zambia in partial fulfilment of the requirements for the award of the Degree of Bachelor of laws (LLB)

JANUARY, 2007



THE UNIVERSITY OF ZAMBIA
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I CHONGO MUSONDA Computer number 99145391 do hereby declare that the contents of this Directed Research Paper are entirely based on my own findings and that I have not used another persons work without acknowledging the same to be so.

I bear absolute responsibility for errors, defects or any omissions therein.

Date. *1st December 2016*

Signature... *Musonda*

DEDICATION

This work is dedicated to my son TATENDA, born on the 4th of May, 2006. You are the new eyes through which I see life. You have added a new meaning to life and your smile is the sweetest and most comforting. I thank the Almighty God for you. I love you.

ACKNOWLEDGEMENTS

With a grateful heart...

I thank the Almighty for giving me this life and all the support in my life.

Mum, Joy Chola Mary Mwando Musonda - for being my pillar and best friend. You are the woman I will never be. Thank you for being my gaurdain angel. I love you.

Dad, Gabriel Katwishi Mangamu Musonda - you are my dream man. Thank you for being so understanding and supportive. I love you beyond measure. Thank you for being a father and a half. May the Lord add more days to your life.

To my brothers and sisiters, Gabby, Chomba, Nsama and Chichi - you guys complete my life.

To Aunt Beatie - My friend and mother. You are the big sister I never had. Take the chance.

To my supervisor Mr K Musongo - Thank you very much for reading through my work page by page and never loosing patience. Thank you for your guidance. I count myself lucky.

To Mr M Chibiya, deputy Registrar of Insurance at PIA - Without your help, this work would not have been completed. Thank you for your time.

To my friends, Hellen and Chitimba - I can always count on you two

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ABSTRACT

Insurance is of commercial importance in any given industry either for individuals or in the corporate world as the case might be. With the liberalization of the economy, issues of insurance are a growing concern and as such the law governing insurance is one that must be taken into critical consideration not leaving out the practice and manner of carrying out and on of insurance business.

As there is no future without the past, the paper will first of all look at the historical development of insurance from the colonial state right through the present day of a liberalized economy. This having been done the subject matter of the paper will be defined and ultimately its nature and the major concepts which come to mind when one talks about a contract of insurance and those that one must be aware of in considering insurance generally as a subject of study.

Before 1970, Zambia was a liberal economy but the 1970 economic reforms changed the status quo. The then twenty six (26) existing insurance companies were obliged to transfer their assets to ZISC. Prior to the liberalization of the economy, the insurance industry not being an exception, the Zambia State Insurance Corporation (ZSIC) held a monopoly over the insurance industry.

In as much as we leave in the world of education awareness as concerns various aspects of our lives, not everyone in the communities we live in can capably contract an insurance policy without the help of experts in the field of insurance. To this effect, the growing insurance industry in case of insurance companies either as agents or brokers causes an academic eye concern as to whether or not they operate within the four corners of the law and whether the Act as it is today gives efficacy to the insurance industry. Henceforth, the Insurance Brokers Association of Zambia will be analyzed. The analysis of this body is vital to this paper as it regulates the operations of insurance brokers who play a vital role in insurance business.

The legislature alert to the problems that might be born of the growing insurance industry enacted amended the 1968 Insurance Act in 1997. The Act as amended in section 99 recognizes the Pensions and Insurance Authority, which came into existence in 1997. In this regard the paper will look at the reason that this body was formed and whether or not its operation is for the improvement of the insurance industry. In so doing the paper will also look at the standard of insurance business operation which the said body is said to put in place and consequently the advantage that the standards so set have both on the insurer and the insured or assured as the case might be.

CHAPTER ONE

This chapter seeks to discuss the origins of insurance law, as it is appreciated, respected and practiced in the global economy of today. It is the essence of insurance as it originated that ultimately determines how it is defined and its nature. Zambia as one of the countries that seek to keep abreast with the global economy has not been left out on the many countries that practice insurance in its economic realm.

1.1 Birth and Growth of Insurance

The history of insurance law is greatly linked to the practice of the medieval merchants. The records of the chamber of commerce of Florence have established as a matter of fact that the insurance contract as it is known at present has its origins in the medieval Italian merchants of the 14th century who spread their commerce over most Europe. Insurance among these merchants took a simple but basic form. Groups of merchants would get together and agree that one of them would bare the loss of a particular voyage in consideration of a fee¹. This fee we now call the premium.

It is these enterprising traders from the thriving commercial cities of Northern Italy who introduced into England their custom of insuring their marine ventures. In

¹ Hugh, C. Insurance (1976) p 29

recognition of these fallen merchants, Lombardy street on London is actually named after them. It is where they established their international trading houses.²

These merchants together with ship owners and other international traders frequented a famous coffeehouse in London known as Lloyd's Coffee House. Their frequent meeting and exchange of ideas as to the best way of getting the most out of their investments gave birth to the practice of 'indemnity' against the fear of loss which could be occasioned perils of the sea to which their business was subject. In order for a merchant to engage in this practice of being indemnified, one had to circulate a paper containing a description of the ship on which his goods were aboard, the nature of the voyage, the character of the ship's crew and subsequently the name of the ships captain. The purpose of this was to give the 'insurers' as they are known today a clear picture of the extent of the risk that was at hand. The individuals who wrote their names under the circulated piece of information also put down the amount of the risk they were willing to assume in the event that the risk manifested. Thus, attained the term 'underwriters'.

From the foregoing, it is an established fact that the practice of insurance was entirely for and by individuals who by their known practice guaranteed and encouraged commercial ventures and undertakings on a purely economic basis. It is important to note that the practice of insurance of the underwriters was mainly

² Taylor, I.R The Law of Insurance. 2nd (1968) p. 2

marine oriented. The insurance practice that was carried on at Lloyd's Coffee House is the genesis of insurance business today. But the business did not easily and intentionally spread to other aspects of human life that was likely to be under risk of unexpected but possible peril, that is, non-marine risks.

The great fire of 1666 propelled the expansion of insurance business. Although there were fears that insurance against fires would increase the number of arson cases as con men would thrive to defraud the insurers. One way or another insurance had to increase and spread to meet the expanding business and commerce of the nineteenth century Britain and United States of America and everywhere else in the world. The growth and expansion of commerce created an urgent need for insurance. The benefits of insurance became apparent and outweighed the fears of arsonists.

1.2 The Colonial Period

Although colonial period in Zambia the then Northern Rhodesia was of a relatively short duration, its effects on the economy were and are overwhelming. As a protectorate of the British Crown, the settlers and consequently the foreign capital which they brought influenced and set the terms on how the country's resources would be put to use then and to even a greater extent after the colony gained independence.

One of the economic reforms, which came with the colonialism, was the crystallization of insurance law and business. The economy of Zambia then was greatly attributed to the growth of the industrial sector that was due to the discovery of vast mineral deposits on the present day Copperbelt.³ The rise of immense industrial activity owing to the mining industry and the increase of white population attracted insurance companies from Great Britain as a colonial master and South Africa to set up offices in Zambia. Henceforth, to cover the need for insurance, the London Lancashire Insurance Company was one of the first insurance companies to set its offices in Zambia. It was mandated to underwrite all classes of insurance as was perfect in the rising economic need for insurance. This is notwithstanding the fact that there were other insurance companies that set their offices in Zambia.⁴ Thus, it is beyond dispute that at the attainment of independence there were an appreciable number of companies in existence.

1.3 The Post Independence Period

In total, there were 26 insurance companies in existence before 1969. The priority of the new government was to 'Zambianize' the economic resources of the country.⁵ Thus, in 1967 the then ruling party, that is, United National Independence Party (UNIP) adopted the philosophy of humanism as a national philosophy. As regards the economic sector, this philosophy of humanism meant, chiefly the transfer of the

³ Roberts, A. (1976). A History of Zambia. London at Page 176

⁴ National Archives of Zambia, January 1990

⁵ W, Tordoff. (1974). Politics in Zambia. Manchester University Press at Page 20

commanding heights of the economy from the private hands to the state for and on behalf of the Zambian people. At this point it is important to note that prior to effectuation of humanism and nationalization, Zambia was a liberal economy.

The insurance industry was not spared as regards the implementation of humanism. The central aspect of this philosophy was that government rather than the private sector would mobilize and provide massive investment capital.

The Mulungushi Economic Reforms is the platform on which the government set out its aspirations of nationalization of the Zambian economy. To this effect on the 19th of April 1968, the former Republican President Dr Kenneth Kaunda stressed the necessity for transfer of the Zambian economic power in the following words:

"...time is now that we must take urgent and vigorous steps to put Zambia's business firmly in the hands of the people themselves just like political power is in their hands⁶"

The main aim was to stop the repatriation of profits by foreign-owned companies and to re-orient their operations to fit the prevailing sense of nationalization, that is, greater control over the economy. The insurance industry was no exception to these reforms hence the second part of Zambia humanism stated that:

⁶ The President's speech on economic reforms at Mulungushi. Published by Zambia Information Services printed by Government Printers at page 27

"In order to avoid the possibility of local over-mighty barons... insurance... would be under local forms of ownership, management and control."⁷

Given the foregoing policy of government on commerce in general and insurance in particular, the law, that is, the 1964 Insurance Laws (Modification and Adaptations) Regulations, regarding insurance business had to be reformed to embody the new policies of government as they were totally incompatible. This view was amply summarized by the words of the Minister of Finance of the time:

"This law which is not intended for Zambia alone, has proved to be ineffectual and does not permit me, as the ultimate supervising authority, to exercise sufficient control to ensure that the conduct of insurance business is in the best interest of the public and in accordance with sound insurance principles and practice. It is for this reason that it is proposed to repeal the Federal Act..."⁸

He stated further and with enthusiasm that:

"The ramifications of insurance extend to all sections of our population. For the common man it provides a means of saving and security of

⁷ Kaunda, K.D Humanism in Zambia and a Guide to its implementation. (1979) Government Printers. At page 63

⁸ Daily Hansard dated Thursday the 14th December, 1967

Providing in advance for the social needs of his family and protection against his property; for the industry and commerce it affords financial Protection and stability necessary for development of the country; and for medium sized business undertakings and even small organizations especially those in the embryo stages finding it difficult and restrictive if not altogether impossible to operate without protection provided by insuranceFinally, it is important that it should, to the fullest extent possible, be administered from within the country.⁹"

Therefore, in the same year, 1967, the Insurance Act was enacted and it came in force on the first of January 1968. The Act gave autonomy to Zambia as an independent country as regards the rules and practice of insurance business. As with all Acts of parliament, this Act also sort to regulate the insurance industry by providing checks on the industry.

As part of the nationalization process the Zambia State Insurance Corporation (ZSIC) was formed on the 4th of January 1968. Further economic reforms were made with the notable one being the point that ZSIC was to hold a monopoly on the insurance business. The Insurance Companies (Cessation and Transfer Business) Act 1970 effected the dissolution of the then existing insurance companies and finally the take over by government. The announcement of the take over came on the 10th

⁹ Ibid

of November, 1970 and actually took effect on the 24th of December of the same year, 1970.

1.4 Post Economic Liberalization-1992

The liberalization of the economy has seen the emergence of new market players in all sectors of the economy that were previously state owned, insurance inclusive. Thus, until 1992 ZSIC remained the only organization permitted to transact and conduct insurance business. Presently, there are a lot of insurance players operating as insurers, brokers, assessors, agents and loss adjusters. This was facilitated by the passing of the Insurance Companies (Cessation and Transfer of Business) Act number 16 of 1991.

To this effect, the insurance industry presently consists of at least 1 re-insurer, 9 insurers, 32 brokers, 37 agents, 7 assessors, 2 loss adjusters and 4 claims agent.¹⁰

Appreciated is the fact that insurance is a good thing and is a positive step in economic stability. But it must be available to the mass of the population if it is to be seen as a success in raising the living standards of the people. It has been observed that the government's view in 1968 of providing insurance services to empower the mass of the Zambian population has not been fruitful as the insurance packages provided are not fashioned to suit the life styles of most of the population.

¹⁰ List of Insurance entities licensed in 2006 as obtained from the Pensions and Insurance Authority on the 20th of November, 2006.

CHAPTER TWO

To understand insurance in its entirety, one must appreciate its nature and the general premise on which, it is established. To fully appreciate the concept of insurance, the principles and important concepts employed in the practice of insurance must be availed to the lay man.

2.1 DEFINITION AND NATURE OF INSURANCE

The early traders who started the practice that is currently known as insurance were alive to the fact that to bear alone the burden of loss occasioned by an unexpectedly but probable event was usually but not always beyond the capacity of most individuals and even most substantial business organizations depending on the type of business which they were engaged in. Succinctly, the function of insurance by its nature is to distribute the risks of the feared loss among a number of persons exposed to the similar perils, the consequence of which was that the loss became economically bearable.

To further understand the nature of insurance, a definition of the subject should be given from which the major elements will be deduced. To this effect, the Insurance Act states that:

" Insurance business means the business of assuming the obligations of an insurer. In any class of insurance business what so ever, whether defined in this Act or not, which is not exempt from the provisions of this Act by order made in terms of paragraph c of section two, and includes re-insurance business¹¹"

It is noted that the definition as provided by our statute is vague thus a more clear definition is in order. Hence, the definition given by Lawrence, J in the celebrated case of LUCENA v CRAUFURD¹² in which he stated that;

"Insurance is a contract by which the one party in consideration of a price paid to him adequate to the risk becomes security to the other that he shall not suffer loss, damage, or prejudice by the happening of perils specified to certain things which may be exposed to them.¹³"

2.2 FORMATION OF AN INSURANCE CONTRACT

The above definition refers to a contract, thus, the general principles of contracts come into play when one talks of insurance contracts. In this regard, there must essentially be an offer made by one party which must ultimately be accepted by another party to form a contract. Ordinarily one would take it for granted that the offer is made by the party willing to take the risk (the insurer) on behalf of another

¹¹ Insurance Act No. 10 of 1968 Cap 705 now re-numbered no 397 of the laws of Zambia

¹²(1806) bos and PNR at 269

(the insured or assured as the case might be). As a matter of clarity, an insured is a person who takes out insurance policy in general insurance whereas an assured is one who takes out a long term policy.

With that said, the reality in insurance business is that, the offer is made by the insured and is contained in a proposal form, which is drafted, printed and issued by the insurance company. The learned author Lowe gives a clear formation of a contract of insurance when he states that:

"The usual procedure followed is for the person seeking insurance to complete a proposal form which is then submitted to the insurers. If they reject the proposal there is no contract. If they accept it a contract may come into existence....Thus, if acceptance provides (as it sometimes does) that no insurance can take place until the first premium is received, it is clear that there will be no cover until premium is paid or tendered and it has been suggested that even if premium is tendered the insurers are at liberty to change their minds and decide not to proceed."¹⁴

It is realized that the definition as given is talking of consideration, which is an important element to any binding and legally enforceable contract. As such with regard to insurance contracts the consideration tendered is known as the premium.

¹³ Ibid

¹⁴ R. Lowe, Commercial Law (4th ed.) 390

The case of LEWIS v NORWICH UNION FIRE INSURANCE COMPANY¹⁵ defines a premium as the consideration that it tendered by the insured so that the insurer may undertake his obligation of covering the risk described in the contract known in insurance language as the policy. The policy must be sufficient to ensure and accommodate the insurers liability.

The Zambian Insurance Act recognizes the importance of premiums in insurance contracts and as such provides that:

"A contract of general insurance shall cease to operate if a premium is not paid within sixty days after the due date of the premium or within such period as the contract may stipulate."¹⁶

As a requirement in contract law, there must be acceptance of the offer for a contract to come into effect. As such, acceptance is generally not valid until and unless it has been communicated to the offeror. But there are exceptions to this general rule which come into play when for example, there is a waiver of such communication either expressly or implied, contracts under seal and where by the conduct of the offeree acceptance will be assumed. Thus, in RUST v ABBE LIFE ASSURANCE¹⁷ where the insurer after receiving the proposal was silent for a long

¹⁵ (1916) AC 519

¹⁶ Section 76(1)

¹⁷ (1901) 17 T.L.R 233

period of time, the silence was held to amount to acceptance even though there was in effect no communication.

2.3 INURABLE INTEREST

Even with the above requirements met, a fundamental requirement for the validity of the contract of insurance is that the party seeking to be insured must have an insurable interest in the subject matter of the policy. However, one cannot with precision state what constitutes insurable interest so as to distinguish insurance policies from wager policies.

Insurable interest is sui generis and peculiar in the way in which it operates. Henceforth, insurable interest in a subject matter of an insurance policy is that which puts the insurer in a position that he is so circumstanced as to the benefits obtained by it's existence or to be prejudiced by it's destruction. Yet still in the practice of insurance business the classical definition followed is that given by Lawrence, J in LUCENA v CRAUFURD¹⁸ when he said that:

"A man is interested in a thing to whom advantage may arise or prejudice happen from the circumstances which may attend it...and whom it imputeth that it's condition as to safety or other quality should continue: interest does not necessarily imply a right to the whole or part of the thing, nor necessary

¹⁸ (1806) 2 Bos and PNR at 269

and exclusively that which may be the subject of privation, but the having some relation, or concern in the subject matter of the insurance, which relation will concern by the happening of the perils insured against may be so affected as to produce damage, detriment or prejudice to the person insuring; and where a man is so circumstanced with respect to matters exposed to certain risks or damages, or to have a moral certainty of advantage or benefit, but for those risks or dangers he may be said to be interested in the safety of the thing. To be interested in the preservation of a thing, is to be so circumstanced with respect to it as to have benefit from it's existence, prejudice from it's destruction.¹⁹"

The requirement for a beneficiary to have an insurable interest in the subject matter of insurance developed as a matter of public policy. This was in a bid to restrain insured persons who had no insurable interest in the subject matter of insurance from procuring its damage or destruction so as to gain the benefit of the insurance policy. Furthermore, as insurance is basically a contract of indemnity, if the insured had no interest in the subject matter of insurance, there can be no loss and it follows as a matter of course, that there is no thing against which the insured can be indemnified. This was enunciated in the celebrated case of MACAURA v NORTHERN ASSURANCE COMPANY LIMITED.²⁰

¹⁹ Ibid

²⁰ (1925) A.C at 619

The necessity of insurable interest can not be over emphasized. It is every persons legal right to insure. As such for an insurance contract to be valid the insured must have a legally recognized interest in the subject matter of insurance, so that he may in one way or another suffer loss or be involved in expense or become liable to a third party should the subject matter of insurance be lost or damaged. If one has no such interest then he can not suffer in any manner and thus cannot claim to be indemnified.

2.4 **THE PRINCIPLE OF INDEMNITY AND DOUBLE INSURANCE**

A contract of insurance is said to be essentially one of indemnity with an exception of insurance contracts of life, personal accidents and sickness insurance this is because these contracts are for the payment of a specified amount of money on the happening of the respective specified event.²¹ This principle entails that as the insured suffers pecuniary loss, it is only fair that he recovers to the measured extent of the loss. It means then that in the event of loss, the insured will be placed in the same position he was in immediately before the occurrence of the loss. The whole essence of this principle is that the insured should not under any circumstances recover from the insurer more than his actual loss as allowing this would breed fraudulent acts of self caused loss.

²¹ M. Malila Commercial Law in Zambia: Cases and Materials 495

To understand what the principle of indemnity is all about, regard must be had to the wording of the learned judge in the land mark case of **CASTELLAIN v PRESTON**²² in which it was stated inter alia that:

*"The very foundation, in my opinion, of every rule which has been applied to insurance law is this, namely, that the contract of insurance contained in a marine or fire policy (and that equally applies to accident policy other than personal accident) is a contract of indemnity and of indemnity only, and that this contract means that the insured, in case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified. This is the fundamental principle of insurance law and even a proposition brought forward which is at variance with it, that is to say, which either will prevent the insured from obtaining a full indemnity, or which will give the assured more than a full indemnity, that proposition must certainly be wrong."*²³

The position of the law is that in the interest of public policy, an insured should not make a profit from his misfortune. This was the view of the court in the case of **DARREL v TIBBITS**²⁴ in which a landlord let out his property under a lease agreement whereby it was agreed that the tenant would repair the property in case of damage by fire. The said property was also insured against fire damage. Later, fire

²² (1883) 11 QBD 380

²³ Ibid

guttered the premises down and the landlord successfully claimed under the policy. Some time later the tenant repaired the premises as per lease agreement. When the matter was taken to court, it was held that the insurers could recover the monies paid to the insured under the claim because by virtue of the tenant repairing the property, the landlord in effect suffered no loss.

Owing to the above discussion another issue that arises in insurance business is that of double insurance. This essentially happens when:

"a person takes out more than one policy in respect of the same risk of loss and if, each of the insurers were required to pay full extent of the loss."²⁵

As the insured insures with two different insurance companies, for him or her to succeed, it is imperative that a particular policy does not forbid this practice of double insurance. In as much as this is true, going by the principle of indemnity, the insured can not recover more than the amount of his loss. To this effect, in case of occasioning loss, the insured can either claim a ratable proportion from each insurer or may yet still claim the full amount under the policy from one insurance company, leaving the various insurers to claim contribution from among themselves.²⁶

²⁴ (1880) 5 QBD 560

²⁵ Smith, K. and Denis Keenan (1965) Essentials of Merchantile Law. at page 400

²⁶ Ibid

Having established that a particular policy does in fact allow double insurance, it is required that the subsequent policies cover the same adventure, the same risk and the same interest in the subject matter. Thus, where the policies cover different interests, there is no double insurance.²⁷ And the insurers will be right to deny to contribute their alleged share of the liability.

To ensure that there is no unjust enrichment on the part of the insured, and in line with the principle of indemnity and by the whole nature of insurance, it is a silent rule and also a practice in insurance that where the insured makes a successful claim and receives more than the indemnity to which, he is entitled, the balance is held in trust and later shared by the insurers in proportion to their liability to contribute.²⁸

2.5 THE DOCTRINE OF SUBROGATION

The American case of **ARNOLD v. GREEN**²⁹ defines subrogation as,

"...the mode which equity adopts to compel the ultimate payment of a debt by one who in justice, equity and good conscious ought to pay."³⁰

The implication of the above is that:

²⁷ North British and Merchantile Insurance Company v London, Liverpool and Globe Insurance Company (1877) 5 Ch.D 569

²⁸ Op Cit 401

²⁹ 161 NY 566

³⁰ Ibid

"Where the loss under a contract is total and the insurer pays the full amount, the insurer is entitled to all the interests of the insured in what is left of the subject matter of the contract."³¹

It is thus said that the insurer is subrogated to all the relevant rights and remedies available to the insured in and in respect of the subject matter insured as from the time of the casualty causing the loss. This right of subrogation accrues to the insurer after he has fully indemnified the insured in respect of the loss.

The premise of this doctrine is that there should be no unjust enrichment in insurance. The insurer assumes the rights of subrogation as against third parties. But it is trite law that should the insurer get paid more than they paid the insured by the third party, they are to hand over the excess of the monies to the insured as the rightful owner. The insurers also should not benefit more than is necessary for them to recover. It follows that the insured person should not settle or compromise claims with third parties without the consent of the insurers as this would jeopardize the insurers right to claim against third parties. This came before the court for deliberation in the case of **PHOENIX ASSURANCE COMPANY v SPOONER** in which the court held that a contract of insurance is one of indemnity and when the plaintiffs paid the agreed amount under the policy, they became entitled to all the rights of the defendant. It was further held that the defendant had no right to

³¹ Ibid

deprive the plaintiffs of the right of subrogation by compromising with the third party.

It is important that subrogation only applies to contracts of indemnity and as such does not apply to life insurance policies.

2.6 THE PRINCIPLE OF UTMOST GOOD FAITH

Going by the strict principle of indemnity on which the whole purpose of insurance is based, it is imperative that the insured does not intentionally or unintentionally provide information that will unjustly advantage him over the insurer. As stated earlier, the insurance companies draft the proposal form. As such it contains certain questions to which the proposer must answer. As the insurer relies solely on the information given by the insured, the insurers put a declaration usually at the bottom of the form to which every person seeking to be insured must subscribe. The declaration is to the effect that the proposer warrants the truth of all the information and answers given and consequently agrees that the policy be avoided should it be found that any information so given is untrue in any respect. The declaration further provides that the insured accepts that the answers given form the basis of the contract. To this effect the answers become the warranties and conditions of the contract. In this regard, when the matter came up for consideration in the case of **PATEL v OLD MUTUAL FIRE AND GENERAL INSURANCE COMPANY**

ZAMBIA LIMITED³² the then Chief Justice ruled inter alia that the declaration formed the basis of the contract.

As such the most important feature of a contract of insurance is that it requires that the parties act with utmost good faith and this is the same reason that makes insurance contracts stand out from the other contracts. This doctrine is as old as the business of insurance itself and thus expressed in the early but landmark case of **CARTER v BOEHM**³³ in which judgement was found for the plaintiff on the basis that the circumstances of the risk seeking to be insured against were not sufficiently disclosed. Lord Mansfield in passing judgment said in his dictum that:

"Insurance is a contract upon speculation. The special facts upon which the Contingent chance is to be computed lie most commonly in the knowledge of the insured only; the underwriter trusts on his representation and proceeds upon the confidences, in his knowledge to mislead the underwriter into the belief that the circumstances do not exist and to induce him to estimate the risk as if it did not exist."³⁴

From the forgoing, the elements of the duty of utmost good faith can be summarized as being:

- i. The duty to disclose material facts to the insurer

³² (1969) Z.R at page 158

³³ (1766) 97 E.R 1162

- ii The duty not to misrepresent facts
- iii The duty not to make fraudulent claims

It has been observed that emphasis is placed on the disclosure of a material fact.

What then is a material fact? The answer to this question was given in the case of

RIVAS V GERUSSI³⁵ in which it was stated that a material fact is:

*"a fact which would affect the judgement of a prudent and rational underwriter in considering whether he would enter into a contract at all or enter into it at one rate or another."*³⁶

The duty to disclose material facts and not to misrepresent the situation falls on the insured as he or she is the person who provides information to the insurer who in turn acting on the information given issues a policy and thereby claims liability. In this regard, the insured is under a duty to disclose all material facts which he knows or is legitimately expected to know regardless of whether he is asked about them or not. The underlying factor is that the information would play a fundamental role in effectuation of the insurance contract by the insurer. Furthermore, a material fact by its nature of importance to insurance contracts is one that determines the terms and conditions of the contract. And also the material facts might also determine the amount of the premium to be paid and the duration of the contract of insurance.

³⁴ Ibid

³⁵ (1880) 6 Q.B 222

Knowledge of the material facts should ultimate and primarily is actual knowledge thus knowledge by an agent in not precluded as not being knowledge by the principle. This reasoning is what formed the basis of the decision in the case of **LONDON GENERAL INSURANCE COMPANY LIMITED V GENERAL MARINE UNDERWRITERS ASSOCIATION**³⁷ in which judgment was found for the defendants on the basis that the plaintiffs ought to have known of the casualty in time to instruct their brokers to effect the re-insurance.

With the knowledge of what a material fact is, there are instances that give rise to a fact being of material importance to a contract of insurance and these incidences are discussed below though not exhaustively. Firstly, material facts would be taken to be those that suggest exceptional or increased risks or those that the risk is exposed to expected and definite danger. The case of **ANGLO-AFRICAN MERCHANTS LIMITED V BAYLEY**³⁸ is illustrative of this incidence. The facts of the case are that, the proposer failed to disclose that certain clothing items were over twenty years old and that they were war supplies. Upon occasioning a loss, the insured sought to claim under the policy but the insurer denied liability on the basis of non-disclosure of a material fact. The court supported and found for the insurers when it held that the insurers were right to disclaim liability as the fact that the clothes were

³⁶ Ibid

³⁷ (1921) 1 K.B at page 104

³⁸ (1970) Q.B at page 311

twenty years old and were war supplies was a material fact which, if had the insurer taken into consideration would have set the premium on different ground.

Other facts that would be considered as material are those relating to the history and character of the proposer. This can be illustrated by the case of CONDOGIANIS V GUARDIAN ASSURANCE COMPANY LIMITED³⁹ in which a policy in fire insurance states to the effect that had the proposer ever claimed on a fire policy with respect to the property now proposed, any proposed or any other property for that matter. To this the proposer answered, "yes" "1917" "ocean". In essence the answer was true to the effect that he had indeed claimed against Ocean Insurance Company in respect of a burning car. However, he omitted to state that in 1912 he had made another claim in respect of another burning car against Liverpool and Globe Company. Ultimately, the history of the proposer as regards the other claim was important as it would have affected the insurer in contemplation of risk cover.

In the case of WOOLCOTT V SUN ALLIANCE AND LIFE ASSURANCE⁴⁰ tabled before the court was the issue of the character of the plaintiff with special reference to his failure to disclose his past convictions to the defendants. In this regard the court held in favour of defendants.

³⁹(1921) 125 L.T 610
⁴⁰(1975) 1 ALL ER 1253

Other factors that can be regarded as material are those that border on the integrity of the proposer. This would include unjustified refusal to renew the policy, non-payment of premiums and convictions relating to offences of moral turpitude.

2.7 THE PRINCIPLE OF AVERAGE

In discussing this concept, the view taken by the learned authors Smith and Keenan⁴¹ will suffice. This comes into play when it occurs that the insured insures his property for instance where the risk of total loss is very slight and henceforth underinsures. An illustration of how this works is where one insures property for less than it is actually valued. He may recover the total value of the property if this is permissible under the policy in the average clause.

However, the principle of average itself entails that the insured is himself regarded as being his own insurer for the difference if any on the amount for which he has insured his property and the actual value of the property and will only be able to claim three quarters of the difference.

2.8 RE-INSURANCE

As insurance is essentially the business of risk distribution, the insurer can re-insure. *The insurer has by law insurable interest in the property insured with him and can legitimately re-insurer with another insurance company in order that he may*

⁴¹ Smith, K and Denis Keenan. Essentials of Merchantile Law. London: Pitman Limited. 1965 at page 402

relieve his commitment. One of the factors that lead to insurers re-insuring is that a particular insurer may not be willing to run a large risk on a single undertaking.⁴²

The policy of re-insurance is a separate and distinct contract from the original contract of insurance such that the original insured is not privy to the contract of re-insurance. As such the insurer can be re-insured at a lower premium than the original premium of the original contract and is entitled to the benefit of the difference between the premium paid and that received. And the original insured has no right in respect of the re-insurance. This implies that the two policies are distinct and as such the person who re-insures is solely liable to the original insured and like wise has the sole right to claim against the re-insurer.

It is important to note that in as much as the two contracts are distinct, the re-insurance policy contains a policy to the effect that the re-insurance policy is subject to same conditions as the original policy and will be paid on the same terms.

⁴² Ibid

CHAPTER THREE

The two main Acts that govern the insurance industry, that is, the Insurance Act⁴³ and the Pensions and Insurance Regulations Act⁴⁴ have been lagging as regards international insurance practice. Hence, they have been amended to meet the international standards of insurance. The implications of these amendments are vital and need to be considered in detail.

3.1 AMENDEMENTS TO THE INSURANCE ACT AND THE IMPLICATIONS

The most notable amendment to the Insurance Act is the insertion of paragraphs 3 and 4 to Section 3. The respective new paragraphs state that,

"subject to subsection (5), no insurer may transact both general and long term insurance business."⁴⁵

"Notwithstanding subsection (4), an insurer transacting both general and long term insurance business..."⁴⁶

The back ground to this amendment is that, the legislature had the intention of separating the two types of insurance on the premise that general insurance has short-term business investments characterized usually by annual policies. This is

⁴³ No. 27 of 1997 and as amended by No. 26 of 2005

⁴⁴ No. 25 of 2005

⁴⁵ Section 3 (4) of the Insurance (Amendment) Act number 26 of 2005

⁴⁶ Section 3 (5) Ibid

essentially different from long term insurance business, which was characterized by long term investment type policies.

It was further observed that the two types of insurance businesses are essentially run of different lines as the rationales behind them and the risk considerations involved are very different. Essentially, the computation of the premium to be paid in each case is essentially different and the measures of solvency and the role of actuaries in evaluations and product developments clearly set the two forms of insurance business on two very different platforms of operation.

A further reason for this distinction between general and long term accounts is to reduce cross contamination of assets and funds. This may occur because the insurers are at risk of the losses incurred from paying out claims under general insurance eroding the long-term savings of policyholders. In other words,

"holders in such sectors as life business or on the other hand, the investment losses in life business would impair the composite insurer's ability to pay general insurance claims."⁴⁷

This is all in a bid to promote specialization and professionalism, as is the trend with the countries in the SADC countries of which Zambia is a member. And to make the

⁴⁷ Report of the committee on economic affairs and labour on the Insurance (Amendment) Bill, N.A.B 20 of 2005 for the fourth session of the ninth National Assembly Appointed on 21st January 2005.

assessment of the insurance companies easier for the PIA and the monitoring process less cumbersome and transparent.

A further observation is the proviso which permits ZSIC to continue transacting in both general and long term insurance for a period not exceeding three years yet the other insurance companies have only been given a year from the date of effecting the Act. The reasoning behind ZSIC being given such leverage is that it has a lot of assets that it needs the time to sort out. In other words, it is like uprooting a hundred-year-old tree and a five-year-old one at the same time. Obviously, the older tree would require more time as it is deep rooted.

Another important amendment is Section 21 of the principle act, which in subsection 1 reduces the period within which a broker is to remit premiums to the insurer from sixty days to thirty days. This amendment is ultimately aimed at improving the solvency of the insurance companies. And to ensure compliance to this new provision, a penalty is imposed on the broker who does not remit the premium within the stipulated period whether or not a claim is made or not during the material time. The penalty being an interest on the delayed premium.⁴⁸ This is unlike the former provision, which only imposed a penalty upon a claim, being made. This was so done because the insurance companies were being run at a loss as they would pay out claims without having the premiums to beef up their accounts

⁴⁸ The Insurance (Amendment) Bill, 2005 Clause 8

from which to pay out. This can be seen as a further reason why there would be cross contamination of accounts as the case would be that the long term account would have fund as claims do not come a daily basis, which the insurer would take advantage of and pay out claims arising from general insurance claims.

There is an insertion of section 21(4), which states that;

"All monies received by a broker either from, or for, a client shall be deposited in a separate client account and shall not in any circumstances be mixed with moneys belonging to the broker provided that the money earned by way of interests on sums deposited in such client counts shall accrue to the benefits of the brokers."

And subsection (5) further states that,

"The Registrar may require a broker to disclose where the client accounts referred to in subsection (4) are maintained and in what form they are maintained."

These new inserted subsections are essentially aimed at a closer monitoring of premium handling and thus enhance the regulatory surveillance of the PIA. This is a very positive development as some brokers used to defraud their clients and the

insurance companies by enriching themselves using the premiums and not at all in certain instances remitting them. The effect of this has led to certain brokers being de-registered to maintain the integrity of the insurance business.

To ensure that the said clients account is not tempered with, subsection 6 states that,

"No client account shall be maintained in a bank in which the broker or director of such broker has a financial interest."

This is so because a broker who held the above stated positions would easily manipulate the accounts to his or her personal benefit and the all system will collapse and the law will not be seen to rid of the mischief which it aims at curing.

In line with keeping separate the asserts obtained from long term insurance and those from short term insurance and in promotion of the brokers keeping a separate client account from their administrative account, section 63 of the principle Act has been amended. The said amendment is to the effect that insurer and like wise the broker must obtain prior approval from PIA as to the appointment of an auditor and in the same spirit advice of PIA as to the removal and the reasons thereof of an auditor. This is cardinal to PIA as an auditor is the great tool of regulation and as such must be one with particular and relevant knowledge in insurance accounting.

THE AMENDEMENTS TO THE PENSIONS SCHEME REGULATIONS ACT AND THE IMPLICATIONS

The salient amendments to the above mentioned Act, are captioned in section 2 of the Amendment Act number 27 of 2005 which, states that:

"An Act to establish the Pensions and Insurance Authority and define its functions and powers; to provide for the prudential regulation and supervision of pension schemes; and to provide for the matters connected with or incidental to the foregoing. "

Of particular importance to this paper is Part II of the amendment Act which, establishes the Pensions and Insurance Authority (PIA). The PIA is the regulatory and supervisory body of insurance business. To this effect, section 4 states that:

"There is hereby established the Pensions and Insurance Authority which shall be a body corporate with perpetual succession and a common seal, capable of suing and of being sued in it's corporate name, and with power, subject to the provisions of this Act, to do all such acts and things as a body corporate may by law do or perform.⁴⁹"

The pre-current scenario was such that the Insurance Act⁵⁰ provided for the office of the registrar who performed the functions that are now officially the functions of the PIA as it is now established. The PIA then operated more on the basis a department in the Ministry of Finance and National Planning.

Thus, the effect of establishing the PIA, is that it now has a legal personality capable of doing such things as to employ its own members of staff unlike were the registrar had to appoint the personnel of the PIA.⁵¹ With the said legal personality, the PIA is capable of suing and like wise of being sued in its own capacity.

As earlier alluded to, the PIA was operating under the auspice of the Ministry of Finance and National Planning and like wise was funded by the Ministry through the departmental grants. As a legal entity, the PIA is now empowered with its own source of funds. This is a positive step as the activities of the PIA will not be restricted on the basis of luck of or shortage of administrative funds. To make this a reality, the law as it stands today states to the effect that the funds of the PIA shall consist of such monies as may...

"...be paid to the authority from a levy which may be imposed on the net asserts of the pension funds or insurance premiums paid to the insurers and re-insurers..."⁵²

⁵⁰ No. 27 of 1997 Section 99

⁵¹ Interview with Mr Chibiya Registrar of Insurance at PIA

The whole essence of the imposition of a levy on the assets of the pensions funds and insurance premiums is aimed at enhancing the operational capacity of the Authority. This idea was captured from other jurisdictions such as Kenya, South Africa and the United Kingdom as Zambia was lagging in this direction of development.⁵³

3.3 THE INSURANCE TRADE ASSOCIATIONS

Section 134 of the Insurance Act⁵⁴ provides that every licensed insurer and every licensed broker has to be a member of a professional association which has a code of conduct to which the ascribed members have to subscribe and conform with. The associations are the Insurance Association of Zambia for insurers and the Insurance Brokers Association of Zambia for brokers respectively. Important to note is that by the wording of the Act, membership to the above mentioned associations is mandatory for every licensed insurance business. To put more weight on the insistence of being a member of the said associations, section 134 (3) of the Act provides that refusal to be a member will inevitably lead to suspension of ones license for a period of not less one year which leads to a revocation of the license if default continues.

² Section 10 (1) (c) of the Pensions Scheme Regulation (Amendment) Act No. 27 of 2005

³ Presentation of salient issues in the Pension Scheme Regulation (Amendment) 2005 and other issues raised, agreed and included in the amendment by the stakeholders to the committee on economic and labour Affairs. November 2005.

⁴ Number 27 of 1997

Emphasis on membership to the above mentioned trade associations are in the view of being abreast with the worldwide industry trends. This compulsory membership will inevitably lead to a degree of self-regulation of the respective business, as the members thereof will abide to a certain code of conduct. This further makes the regulatory, monitory and supervisory mandate of the PIA easier and more manageable as it would only come in as a final arbitor in the insurance industry and further make collaboration with the said associations easy.⁵⁵

The amendments are to ensure efficacy in the insurance industry. However, the law would be more practical and appreciated if it was implemented soon after enactment so that it would start to serve its purpose. The trade associations of brokers and insurers may play a more positive role if their codes of conduct were approved by the PIA to ensure that breach of conduct will be fatal. This would also assist the PIA in its monitory and supervisory duties.

⁵⁵ Concerns from stake holders as presented to the fourth session of the ninth national assembly by the committee on economic affairs and labour on the Insurance (Amendment) N.A.B No. 20 of 2005

CHAPTER FOUR

The market forces have since 1992 been allowed to control themselves but this is only as regards the ratios of demand and supply. To ensure that the economy does not collapse, regulation is vital. As such, the Pensions and Insurance Authority is the body empowered to regulate insurance business in Zambia. To this effect, the paper will look at the history, formation and functions of the Pensions and Insurance Authority (PIA) as a regulatory body of the insurance business. In the same spirit of regulation of insurance business the paper will look at the Insurance Act as it regulated the insurance business with particular reference to insurers, agents and brokers. In so doing, the paper will outline the role of agents and brokers in insurance business and the regulation thereof.

4.1 THE PENSIONS AND INSURANCE AUTHORITY

In as much as the economy was left to regulate itself through the market forces, the government was alive to the fact that this would still lead to a state of chaos, in that the insurance industry may fail to produce efficient and effective packages to its clients due to the anti-competitive behavior that may obtain in the insurance business if it is not properly supervised and regulated.

Regulatory measures were put in force, these among others being the Pensions and Insurance Authority. To this effect, the PIA operates under the Insurance Act

number 27 of 1997 and the Pensions Scheme Regulation of 1996 and their respective amendments of 2005 that is numbers 26 and 27.

4.2 **ESTABLISHMENT OF THE PENSIONS AND INSURANCE AUTHORITY**

Before the 2005 amendments to the afore mentioned Acts, the PIA had no express statute creating it. Initially only the office of the registrar of Pensions and Insurance was created by the Pensions Scheme Regulation Act and like wise the functions of the said office were set out in section 99 of the Insurance Act number 27 of the 1997 Act, which has since been amended. Due to the amendments alluded to earlier, the PIA is now established under part II of the Pension Scheme Regulation (Amendment) Act number 27 of 2005. To this effect, section 4 (1) states that:

"There is hereby established the Pensions and Insurance Authority which shall be a body corporate with perpetual succession and a common seal, capable of suing and of being sued in it's corporate name, and with power, subject to the provisions of this Act, to do all such acts and things as a body corporate may by law do or perform."⁵⁶

4.3 **HISTORY OF THE PIA**

The background to the establishment of the PIA was as a result of pressure from the international financial community. This was in response to the requirement by the

⁵⁶ The Pensions Scheme Regulation (Amendment) Act No. 27 of 2005

World Bank that in order for it to grant the Zambian government the sum of \$70,000,000.00, it had to establish and staff the authority by the 28th of February 1997. In this regard, the World Bank states that it was important to have a regulatory body in the insurance industry so as,

"to develop public confidence in these types of institutions, it is essential that they be carefully and prudently manage and that risk and fraud, theft or other abuses are minimized through vigorous application of a sound and strict regulatory regime."

Hence, the enactment of the Pension Scheme Regulation of 1996 and the Insurance Act of 1997 respectively. This fueled the establishment of the PIA.

4.4 FUNCTIONS OF THE AUTHORITY

The amendment having the effect that the functions are now set up out section 5 (1) of the Pension Scheme Regulation (Amendment) Act number 27 of 2005. Consequently, the functions of the authority are set out as being to:

- a) *register and deregister pension scheme in accordance with this Act and in consultation with the minister responsible for labour and social security;*
- b) *register and deregister manager, administrators and custodians and pensions scheme;*

- c) *regulate and supervise the establishment and management of occupational pension scheme and insurance business;*
- d) *protect the interests of members and sponsors of occupational scheme, and of shareholders and policyholders;*
- e) *license re-insurers, insures, insurance brokers, insurance agents, loss adjusters, claims agents and insurance risk surveyors;*
- f) *administer and manage the Fidelity Fund established pursuant to section one hundred and nine of the Insurance Act and settle claims against the Fund;*
- g) *formulate and enforce standards in the conduct of the business of insurance with which a member of the insurance industry must comply;*
- h) *monitor the solvency of insurer and ensure the observance of sound insurance principles and practices by the insurers in the conduct of insurance business;*
- i) *monitor and periodically review premium rates and scope of cover of policies that provide insurance cover in satisfaction of a legal requirement;*
- j) *in consultation with the competition Commission, formulate and implement measures calculated to encourage healthy competition and eliminate unfair practices in the insurance and pensions industry;*

- k) *advise the Minister and the Minister responsible for Labour and Social Security in policies relating to the pensions and insurance industries;*
- l) *advise the Government on adequate insurance protection of national assets and properties;*
- m) *implement policies relating to the insurance pensions industries;*
- n) *promote the development of the insurance and pensions industry;*
- o) *set and enforce standards for the conduct of the business of insurance and occupational pension schemes; and*
- p) *undertake such other activities as are conducive or incidental to the performance of it's functions under the Act*

It is very important to note that in the execution of its functions, the PIA have the interests of the policyholders at heart. This is all due to the fact that the PIA does realize and appreciate the fact that insurance business is one of sensitive financial transactions which carry fiduciary connotations. To this effect, Section 99(c) is aimed at ensuring that insurance contracts do not contain obscure or ambiguous statements or terms that are oppressive and alien to the policy holder.

Another function important to note is that the PIA makes recommendations to the Minister on matters affecting the insurance industry. This is vital in that it will ensure that viable policies and laws will be formulated. Furthermore, the PIA is well

verse with knowledge on the importance of insurance and thus is the perfect body to advise government as regards protection of national assets.

4.5 **MANDATE AND SIGNIFICANCE OF THE PIA**

The significance of the PIA is embodied in its mission statement, which reads;

"To regulate the conduct of the pensions and insurance industry through prudential supervision in order to protect the interests of the pensions scheme members and insurance policy holders and foster the industry's growth development and stability."

To this effect, the PIA is mandated as the sole regulatory body to protect the interests of the policyholders through the inspection of policy claims. In much the same spirit, the authority also addresses and entertains complaints that are advances to it against insurance companies. This is to ensure that insurance business keeps and maintains its dignity and lives up to the reasons why it was developed. This is basically because insurance contracts are based on promises which need a force of enforceability should the time come.

Another mandate is to nurture the development and operations of the insurance business in light of the existing market forces by checking on the conduct of the insurance business players. To further fulfill the mandate of the PIA, the

inspectorate division in performing its monitoring role gathers information directly from the insurance companies, agents and brokers included by the direct observance of their business operations at their business premises.

4.6 THE ADMINISTRATIVE STRUCTURE THE PIA

The organizational chart of the PIA is that more fundamentally it is run by a board through the registrar whose office runs the day to day operations of the authority.⁵⁷

The board also appoints the registrar⁵⁸ who is by law subject to the direction of the board in execution of his duties. The registrar has two deputies, one in charge of pensions and the other in charge of insurance. Third in line is the Financial and Administration Manager. The personnel does not end at this point but rather the line goes on but the above are the more important and influential in the regulation of insurance business.

4.7 FINANCING OF PIA

Although there is an amendment that will see the PIA sourcing its own funds for operation, at present, the PIA does not have its own independent manner of generating funds. As such it submits its budget to the ministry of Finance, which then approves them accordingly, and funds the PIA.

⁵⁷ Established under section 6(1) of the Pension Scheme Regulation (Amendment) Act number 27 of 2005

⁵⁸ Section 7(1) Ibid

The supervisory fees are paid directly to the central government making the allocation to PIA unpredictable and thus it varies without notice depending on how much is in the government coffers. This insufficient and erratic funding limits the PIAs ability to operate.⁵⁹

4.8 AGENTS AND BROKERS AND THEIR ROLES IN INSURANCE BUSINESS

In today's business transactions, and in consideration of the time factor and with the emergence of the specialization and expert knowledgeability being prevalent it is not a wonder that people in the business world and other fraternities engage other people to transact on their behalf. These other people are generally referred to as agents and in the insurance business, there are others known as brokers by virtue of the business they are engaged in. In this discussion, insurance agents will be looked at in light of them either representing the insured or the insurer as the case may be.

The general rules of agency law apply to the agents in insurance business. In this regard, the agent either has express authority or implied authority to act on behalf of the principal and as such enter into binding contracts with third parties and legally bind the principal to the contract so entered into. The express authority is that which the agent gets from the principal either orally or in writing while implied authority is that which the agent is expected to have and which the exercise of it is incidental

⁵⁹ Southern Africa Economies Summit paper presented by Mbikusita Lewanika, former director general of the Zambia Investment Centre.

to the authority given. Furthermore, it is said to be that which the third party may reasonably imply as being the agent's authority.

A broker is defined as,

"a person who on behalf of an insured person or a person who intends to take up an insurance policy, arranges insurance policies."⁶⁰

To this effect, a broker is for all intents and purposes, an agent of the insured. This makes the brokers position in insurance business somewhat peculiar. This means that the person seeking insurance and who ultimately approaches a broker relies on the knowledge and judgement of the broker in concluding a contract of insurance on their behalf. As such, with the protection of the innocent insured on the minds of the lawmakers, they have put in place regulatory safeguards and guidelines of insurance brokerage business. In so doing, section 20 of the Act forbids a broker from carrying out any business other than brokerage business. But if they so wish, they must apply to the registrar for grant of permission to do so with the catch that such other business must be ancillary to the insurance brokerage business.

The primary method of regulation is essentially licensing. The Act thus provides that a person who holds out as being licensed as a broker when in actual fact is not,

⁶⁰ Section 2 of the Insurance Act number 27 of 1997

will on conviction be liable to a penalty, a prison term or both.⁶¹ To ensure that the vice of holding out as a licensed broker or agent is taken seriously and avoided at all costs, the Act also puts the insurer on it's guard by providing that an insurer who accepts and does business with an unlicensed agent shall on conviction be guilty of a punishable offence.⁶²

For the PIA to carry out its mandate effectively it must be empowered and left to operate without undue interference from external forces such as central government. Furthermore, the PIA and its work should be published so that members of the public have a forum to present their complaints.

CHAPTER FIVE

The end of an arduous task such as this one is almost always a moment of exhilaration for the writer. I stand unexceptional to that moment. In this paper, I undertook to investigate the law that governs the insurance business in Zambia today and like wise the practice employed in the insurance business.

5.1 GENERAL CONCLUSIONS

Chapter one discussed the historical development of insurance generally and how it was received and localized in Zambia. To this effect, the foregoing study showed that insurance business started in Italy by the merchants and with time spread to the United Kingdom from where the skeleton of our legal framework and practice of insurance business is imported. To be specific, in Zambia, the advent of the English form of insurance can be traced as far back as 1956. At the said material time, the business of insurance was controlled by foreign countries registered either in South Africa or indeed the United Kingdom. The effect of having these foreign based insurance service providers was that they did not have the interests of the locals at heart hence served no particular purpose to advance the lives of the locals. Henceforth, after the attainment of independent, the legislature in 1968 abolished all the other existing insurance companies and formed one Zambian based insurance company that was to deliver its services for the benefit of the indigenous Zambians.

⁶¹ Section 22 of the Act

⁶² Section 23 of the Act

Having done that, chapter two came in to beef up the study with the vital principles and concepts used in the day-to-day practice of the insurance business. These concepts and principles are fundamental requirements for the development of the fiduciary relationship that needs to be observed by the parties to an insurance contract.

In fostering the efficient and effective running of insurance business, and to keep abreast with the global economy, this chapter three looked at the effects and implications of the 2005 amendments made to the Insurance Act and the Pensions and Insurance Regulation Acts respectively as regard the practice of insurance business.

For the purpose of protecting the public and in an effort to maintain the integrity of insurance industry, government has taken a firm hand in monitoring and supervising the insurance industry. In this regard, chapter four came in to look at the stringent control, which has been deemed necessary as regards insurance business. In particular, the chapter dwelled on the Pensions and Insurance Authority, which is the body, empowered to regulate, monitor and supervise the insurance industry. In this light, the chapter looked at the establishment of the body, its functions and mandate and like wise its significance.

5.2 **RECOMMENDATIONS**

- It is important to once again admit that the principles and doctrines of the contract of insurance upon which the Zambian insurance industry operates are based on the British legal Jurisprudence which even at present and despite the fact that we are independent still stands as a primary source of our laws. Because the tide of national identity ought to run strong and the bond of legal subservience formally severed it is difficult to understand and appreciate whether or not the importation of these concepts should be automatic without regard to the different levels of social, economic and political advancement. It is indeed shortsightedness and dangerous to ignore the practical legal constraints that afflict every legal system especially one fashioned on a foreign legal jurisprudence. The proposer is thus in total support of localizing the insurance syllabus because currently the underwriters are trained by foreign institutions.

- The insurance packages on offer discriminate against the under privileged as they are far-fetched from what the average Zambian needs. In as much as we live under the slogan of power to the people this is not so because the larger portion of the population do not get the benefits of the insurance industry. The insurance industry as it stands can be said to be a failure, as its services are not delivered to the larger part of the population. It is thus, proposed that insurance companies should try to

carry out a survey with the lower class and find out what kind of packages they would like and can afford.

- Noted is that there is no Zambian re-insurance company on the market which can be a great hindrance to foreign investment as they would view insurance companies as not having a capital base big enough to cover some of the risk liabilities that the large investors can bring. This is a large loss as regards foreign exchange. The hands off approach that the government has toward business is fully appreciated but certain incidences and instances crave for government intervention. The fact that there is no indigenous Zambian re-insurance company leaves much to be desired in the insurance industry. It is therefore proposed that government should create a company that can be exclusively empowered with a large capital base such that it can be a re-insurance company like they did with the creation of ZSIC in 1968. Then in keeping with the government policy, can privatize the entity and let it be run by private hands. This can make the insurance industry more self reliant and effective.

- It has been observed that section 24 of the Pensions and Insurance (Amendment) Regulations Act number 27 of 2005 states to the effect that the Board may impose such necessary levies as are necessary for the operation of the PIA. At the time of this paper, the Board has not yet been constituted and as such the said levies needed as a source of funding for the PIA are not being collected and as such the PIA is still

under the ambit of the Ministry of Finance and National Planning and thus it's autonomy is not yet in force. The law as it stands is as good as not being amended because it has been over a year since the amendments but still the Act has not been effected. It is surely hoped that the Act will be effected soon so that it does not become one that is a mere paper with black ink on it.

- The activities of PIA must be publicized more to enhance and put more meaningfulness to its power. Publication can be through educational campaigns through the press and electronic media as in radio, television and indeed the Internet because more and more Zambians go on the net to find information. In this spirit, the mandate of the PIA should be expanded to allow it to legally address complaints from the public. For if such is publicized, insurers and brokers alike will be alert as regards their activities and will carry on business with professionalism and those in the habit of defrauding members of the public will desist from doing so for fear of being shamed. This will also act as a form of deterrence to law defaulters.

- The trade associations that are, the Insurance Association of Zambia and the Insurance Brokers Association of Zambia should be more pro-active. They should exchange information on dealings of their members and black list those who display a pattern of non-compliance with the provisions of the law and should in turn report such erring members to the PIA to review the matter and act accordingly.

- In the same spirit it is further proposed that the codes of conduct of the trade associations should be approved by the PIA to add more weight as to the result and effect of the none adherence to the said codes. If none adherence is feared as regards sanctions from the PIA, this will in turn make the supervisory and monitoring function of the PIA easier.

These proposals are undeniably intended to bring the insured in as much a favourable contracting position as the insurer as the scales of fair dealings are currently heavily weighted in favour of the insurer. Taking up these suggestions will greatly improve the efficiency of the insurance industry as a whole.

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