THE REPUBLIC OF UGANDA
IN THE INSURANCE APPEALS TRIBUNAL OF UGANDA AT KAMPALA
APPLICATION No. 003 of 2023
(ARISING FROM THE DECISION OF THE INSURANCE REGULATORY AUTHORITY OF UGANDA VIDE; COMPLAINT NO. IRAB/COMP.60/2020)

MUA INSURANCE UGANDA LTD :: APPLICANT

VERSUS

AGRI EXIM LIMITED :: RESPONDENT

(Appeal from the decision of the Insurance Regulatory Authority dated 20th December 2022)

CORAM: RITA NAMAKIIKA NANGONO (CHAIRPERSON), SOLOME MAYINJA LUWAGA, GEORGE STEVEN OKOTHA, JOHN BBALE MAYANJA (PhD) – (MEMBERS)

JUDGMENT

1.0. BACKGROUND TO THE APPLICATION

This application seeks to challenge the decision of the Insurance Regulatory Authority (IRA) made on the 20th day of December 2022, on the basis that the Regulator wrongly came to the conclusion that Ms Caroline Nabufu was liable for fraud and dishonesty in the absence of any trial/evidence and in total disregard of her termination letter and rather that she had obtained personal financial gain from the loss. Further that in coming to its conclusion, the IRA ignored the reports of the assessors to wit; M/s Vericlaims and properties limited and M/s Claims Care Uganda Ltd hence coming to the wrong conclusion. The Applicant further alleges that the IRA failed to distinguish the loss suffered by the Respondent at its Mpererwe and Nakawa warehouses hence the wrong assessment as to the amount of money payable to the Respondent.

The application was filed before the Tribunal on 19th January 2023.

2.0. BRIEF FACTS GIVING RISE TO THE APPLICATION

The Respondent took on a fidelity guarantee policy from the Appellant for a duration of 1(One) year. It was agreed that the Appellant would indemnify or compensate the Respondent upon the occurrence of any of the defined but none exempted events within the terms of their fidelity guarantee policy under Policy Reference No 3374/2018.

Sometime in October 2019, the Warehouse Manager, Ms Caroline Nabufu ("Ms Nabufu") upon the instructions of her superiors reported at Sekanyonyi Police Station theft of simsim from the Company premises in Mpererwe, valued at Ug Shs 415,000,000/= under SD 13/28/10/2019 and investigated vide CRB 1046/2019, CRB 11022019, and SD 02/19/10/2019. This was exhibited as '<u>R2</u>'

Upon the loss of 75.57 metric tons of its stock/produce (Sim-Sim) lodged a claim with the Appellant in the sum of UGX 365,081,430 (Uganda Shillings Three Hundred Sixty-Five Million Eight One Thousand Four Hundred Thirty Only), Following the rejection of its claim by the Appellant, the Respondent filed a complaint with the IRA on 9th April 2022 seeking for the recovery arising from the purported loss. After consideration of the parties case, the IRA directed the Appellant (MUA) to issue the Respondent (Agri Exim Ltd) with a discharge voucher for payment of USD 37,810 within a period of 7 (seven) working days and pay the said sums to the Respondent with 20(twenty) working days from the date of receipt of the decision and that the Appellant submits the policy wording for its fidelity guarantee product for review within 3(three) days from the date of the said decision.

It is against this background that the Applicant filed the instant application against the decision of the IRA on the grounds enlisted earlier on.

3.0. REPRESENTATION AND APPEARANCE

The Applicant was represented by M/s Katende, Ssempebwa & Co Advocates while the Respondent was represented by M/s Shonubi, Musoke & Co. Advocates. The parties filed their respective pleadings and the matter proceeded by witness statements.

The Tribunal hearing was held on the 31st March 2023 in the presence of Counsel for both parties Mr. Sim Katende, Mr. Edwin Mugumya Counsel for the Appellant and Ms. Bridgette Kusiima Counsel for the Respondent as well as the Respondent's CEO Mr. Varun Bhassin.

4.0. ISSUES FOR DETERMINATION BY THIS TRIBUNAL

The Applicant premises its application on the grounds summarised below;

a. That the IRA erred in law and fact when held/ came to the conclusion that the Appellant's former employee, Ms. Caroline Nabafu was liable for fraud and dishonesty, without subjecting her to trial/fair hearing and in total disregard of the letter terminating her employment.

b. That the IRA erred in law and fact in as far as it ignored, omitted and failed to consider the reports made by Assessors including M/s Vericlaims and Properties Ltd and M/s Claims Care Uganda Ltd and thereby arrived at the wrong decision.

c. IRA erred in law and fact in as far as it failed to sever/separate the loss allegedly suffered by the Respondent at its Mpererwe and Nakawa warehouses and thereby arrived at the wrong computation of money payable.

d. The regulator erred in law and fact when it came to the conclusion that the Appellant's former employee- Caroline Nambafu had obtained personal financial gain from the loss, albeit without basing on any piece of evidence to that effect.

e. IRA erred in law and fact in as far as it misconstrued the fidelity guarantee policy between the parties regarding the provisions on defined events and thereby arrived at the wrong decision.

f. The IRA erred in law and fact when it arrived at the amount of money payable for the alleged loss by the Respondent without basing its findings on any authentic records

5.0. PRELIMINARY CONSIDERATIONS

Before we delve into the merits of the application, we wish to deal with the Respondent's submissions that in addition to the six grounds on which the Applicant based their application, the Respondent included Ground No 7 which to them appeared to have been left out to wit; *'Whether the Insurance Regulatory Authority erred in law and in fact when it didn't award to the Respondent, USD 100,000 being the limit of one occurrence of an incident giving rise to payment'*. It is trite law that all grounds of appeal must be embedded in the memorandum of appeal and that in the absence of a cross-appeal one cannot raise an additional ground as a Respondent. Similarly, in the instant application, the Respondent did not raise a cross-claim against the Applicants and could therefore not have included a ground of appeal cumulative to the Applicant's grounds on which this application is founded. We are therefore disinclined to consider the ground sought to be smuggled into the application by counsel for the Respondent since it was not properly brought. ***See; Celtel Uganda Ltd T/A Zain Uganda v Karungi Suzan; Civil Appeal No.0073 of 2012***

6.0. EVIDENCE AND SUBMISSIONS BY THE PARTIES

6.1. Grounds One, Four, and Five

i. ***That the IRA erred in law and fact when held/ came to the conclusion that the Appellant's former employee, Ms. Caroline Nabafu was liable for fraud and dishonesty, without subjecting her to trial/fair hearing and in total disregard of the letter terminating her employment.***

ii. ***The Insurance Regulatory Authority erred in law and fact when it came to the conclusion that the Appellant's former employee, Ms. Caroline Nabafu had obtained personal financial gain from the loss, albeit without basing on any piece of evidence to that effect.***

iii. ***The Insurance Regulatory Authority erred in law and fact in as far as it misconstrued the fidelity guarantee policy between the parties regarding the provision on defined events, and thereby arrived at the wrong decision.***

6.2. The Appellant's arguments

The appellant argues that the IRA (Insurance Regulatory Authority) erred in interpreting the defined events provision of the fidelity guarantee policy. They state that the facts of the case do not fit within the policy's definition of defined events, which requires the insured to demonstrate they sustained direct financial loss resulting from fraud or dishonesty of an insured employee during the policy period, leading to the employee's personal financial gain.

The appellant contends that there is no evidence presented to prove that the Respondent suffered a direct financial loss as required by the policy. They refer to the case of ***Nomchand Premchand Shah & Anor Versus South British Insurance Company Ltd (1965) EA 679***, to emphasize that the burden of proof lies with the insured. The IRA's ruling, which stated that it was not in dispute whether the Respondent suffered any loss, is criticized for lacking an explanation and not complying with the principles of judicial decisions in light of ***Order 21 of the Civil Procedure Rules.***

Furthermore, the Appellant disputes the accuracy and validity of the figures provided in the report by Intertek Agri World, which the IRA relied upon to determine the financial loss suffered by the respondent. They argue that Intertek's report was based on a re-bagging and stock-taking exercise, rather than a forensic audit, and therefore cannot accurately ascertain the loss.

Additionally, Counsel for the Appellant asserts that even if a financial loss did occur, it cannot be attributed to the employee, Ms. Caroline Nabafu. They refer to the report by Claim Care Ltd, which suggests that the entire loss is not solely due to Ms. Nabafu's alleged under-weighing, as other quantities were missing prior to her involvement. In conclusion, the appellant argued that the IRA erred in finding that the respondent had suffered a loss and failed to satisfy the requirement of direct financial loss, which is a necessary element under the fidelity guarantee policy.

Secondly, the Appellant also submitted that Ms. Caroline Nabafu was not liable for fraud and dishonesty. That the contrary findings of the Insurance Regulatory Authority (IRA) to the effect that Ms. Caroline Nabafu liable for fraud and dishonesty as enunciated under paragraph 33 of its ruling was unfounded. This finding was based on the record of proceedings from the disciplinary hearing conducted by the Respondent and the termination letter which stated that Ms. Caroline Nabafu admitted to giving instructions to re-bag goods at less than the standard weight and signing off on records that showed false weights. That the Respondent's employee Ms. Nabafu was terminated for gross negligence, but not for fraud as purported by the Respondent.

Citing the principle that fraud must be distinctly proved and cannot be inferred from facts alone, Counsel faulted the IRA for having inferred fraud and dishonesty from the termination letter and the record of proceedings without strictly proving it being strictly proved with evidence. Further that the investigations conducted by the Respondent's

disciplinary committee and independent assessors all concluded that Ms. Caroline Nabafu was not liable for fraud or dishonesty and that this included the IRA's own independent investigators also reached the same conclusion.

Thirdly that the Respondent's disciplinary committee found Ms. Caroline Nabafu liable for gross negligence but not fraud or dishonesty and that this was supported by the minutes of the disciplinary hearing and the termination letter. Counsel for the Appellant also emphasized that gross negligence is not the same as fraud or dishonesty and cannot be inferred from each other. Hence faulting the IRA for its findings and conclusions that Ms. Caroline Nabafu was liable for fraud and dishonesty and said to be violating her right to a fair hearing, as she was not given an opportunity to defend herself against the accusations.

It was submitted that IRA's inference of fraud and dishonesty is described as mere suspicion and speculation rather than factual evidence. The argument is made that the IRA should not have disregarded Ms. Caroline Nabafu's statements regarding instructions from her supervisor without seeking clarification or relying on the conclusions of the disciplinary committee and independent investigators.

It is stated that the IRA tribunal did not have the right to revisit the findings of the disciplinary committee and substitute them with its own interpretation of the proceedings. It is pointed out that two other employees were terminated for negligence but not for fraud or dishonesty.

The lack of evidence is highlighted, suggesting that Ms. Caroline Nabafu did not obtain dishonest personal financial gain from the alleged loss. In summary, the argument presented is that the IRA made an erroneous decision by holding Ms. Caroline Nabafu liable for fraud and dishonesty without sufficient evidence and by disregarding the findings of the disciplinary committee and independent investigators. The claim is also made that there is no evidence to support the allegation that Ms. Caroline Nabafu obtained dishonest personal financial gain from the alleged loss

Respondent's arguments in reply

In response to the Appellant's arguments, it was argued for the Respondent that they suffered a direct financial loss and presented evidence to support their claim. The Respondent referred to reports from loss assessors and adjusters to wit; M/s VeriClaims and M/s Claim Care which highlight shortages in the production chain and underdeclared weights. The Respondent also pointed to the respective termination letters of its former employees Ms. Nabafu, Isaac Nyeko and Noah Kiwala that make reference to the reason for their termination as having been gross negligence and financial loss occasioned to the Respondent by the said employees.

In particular response to the averment that the IRA was bound to follow Order 21 of the Civil Procedure Rules, the Respondent argued the proceedings of the IRA are

governed by the Insurance Complaints Bureau Guidelines, rather than the Civil Procedure Rules and that contrary to the Appellant's assertions, the Respondent has fully dispensed with the burden and standard of proof hence the findings of the IRA that the Respondent had indeed suffered direct financial loss as supported by evidence before it.

Regarding the extent of the loss, the Respondent's counsel submitted that stock reconciliation which was conducted by Intertek and referred to the findings of the famous audit firm Grant Thornton. The Respondent asserted that the absence of records of the loss should be attributed to the person responsible for stock reconciliation, and not the Respondent. In response to allegations of fraud and dishonesty against Ms. Nabafu, the Respondent cites admissions made by Ms. Nabafu herself and the reports of loss adjusters and assessors to wit; M/s Claim care Ltd and Vericlaims Ltd as evidence. The Respondent argued that the employee Nabafu's actions fall within the definition of fraud and highlight the employer's burden of proof in disciplinary proceedings.

The Respondent also emphasized that the disciplinary hearing is an administrative process and does not require the same level of proof as a Court of law. Further that the Complaints Bureau, while exercising quasi-judicial functions, is not a Court and that it is important to note that without full context and understanding of the specific case being discussed, it is difficult to provide a comprehensive analysis or judgment. Counsel averred that legal matters often involve multiple perspectives and interpretations, and a complete assessment would require careful examination of all relevant information.

In reply to the Appellant's argument, the Respondent argued against the submissions of the Appellant, stating that the Insurance Regulatory Authority (IRA) did not assume that all the loss was attributable to Ms. Nabafu. The reference made was specifically regarding the unprocessed sesame loss attributed to her. As the warehouse Manager, Ms. Nabafu had access to the unprocessed stock and was responsible for balancing shortages in processed and semi-processed items. It was submitted that the IRA was justified in holding her liable based on her position and responsibilities.

The Respondent also highlights that Ms. Nabafu admitted to under-declaring weights based on the instruction of her supervisor, Kiwala. The differences in their positions and testimonies demonstrate Ms. Nabafu's dishonesty, which the Respondent argued was recognised by the IRA.

Regarding the Appellant's emphasis on 75 Tonnes, the Respondent argued that it is irrelevant since the Respondent was not awarded indemnity for the entire loss. The Whatsapp messages between the warehouse Managers were only indicative of the loss mentioned at the time and were not conclusive for the entire period and that the IRA was aware of this.

The Respondent disputes the Appellant's claim that Ms. Nabafu obtained dishonest personal financial gain from the alleged loss. It was argued that the law on circumstantial evidence must be considered in each unique case to determine if a fact has been proven. The Respondent asserts that the IRA was correct in its findings based on the circumstantial evidence and guidelines.

In response to the Appellant's assertion that the loss occurred over a period of time, the Respondent disagrees with the Appellant's suggestion that Ms. Nabafu could have kept the entire 75MT of sesame for herself. The Respondent also agree with the IRA's ruling that the burden of proving direct financial gain should not fall on the Respondent, as it goes against insurance industry practices.

The Respondent argued that the Appellant failed to bring the exclusion clause to the attention of the Respondent during the contract formation. They assert that the absence of signatures or stamps on the policy indicates that it was not the executed policy. The version of the policy with signatures and stamps should be considered by the tribunal to confirm if the exclusion clause was properly communicated to the Respondent.

The Respondent cited the authorities of ***Tight Securities Limited V Chartis Uganda Insurance Company Limited & Anor, CA No 14 of 2016*** to support its argument that in standard form contracts, the party seeking the benefit of an exclusion or limitation clause must bring it to the attention of the other party. Counsel contended that since the Appellant failed to provide a signed and stamped policy, they did not fulfill this requirement, and the IRA was right in disregarding the exclusion clause.

Lastly, the respondent argued that it is common practice for judicial and quasi-judicial bodies to sever clauses of this nature from contracts while upholding the substance of the contract, as ought to be found by the Tribunal in this application. Counsel cited the case ***Petrocity Enterprises (U) Ltd. v. Security Group (U) Ltd. HCT – 00 – CC – CS – 869 – 2004***

Appellant's submissions in rejoinder

In their rejoinder to the Respondent's submissions, the Counsel for the Appellants emphasized that the Insurance Regulatory Authority (IRA) did not establish or make any finding regarding the Respondent's direct financial loss, which is a crucial requirement under the fidelity guarantee policy. The Appellants argued that the IRA's ruling did not address this important element.

They pointed out that the IRA stated in paragraph 22 of its ruling that it was not in dispute whether the Respondent suffered any loss. However, the Appellants highlighted that the policy specifically covers "direct financial loss" and not just any type of loss. They argued that the term "direct financial loss" is defined in the policy and differs from general loss.

The Appellants contended that the IRA should not have found the Respondent's claim payable under the policy since it failed to establish the element of direct financial loss. Additionally, they disputed the grounds presented by the Respondent to prove direct financial loss, addressing each of them individually.

Regarding the re-stock audit, the Appellants referred to the Veri claims report, which indicated that a forensic audit report was requested but not provided by the Respondent. They argued that Intertek, the company responsible for the re-bagging inspection and stock take, was not qualified to conduct a forensic audit and did not establish any financial loss.

The Appellants also questioned the alleged report by Grant Thornton, which was not adduced as evidence and formed the basis for Intertek's figures. They urged the Tribunal to ignore the figures derived from this disputed report.

Furthermore, the Appellants argued that the difference in weight resulting from the rebagging exercise did not translate into financial loss. They pointed out that the variances in weight were attributed to moisture loss, a natural process, which the Respondent admitted. Therefore, they claimed that the difference in weight did not demonstrate direct financial loss or establish employee misconduct.

The Appellants asserted that the re-bagging issue of packaging at 45 kgs instead of 50 kgs did not amount to loss as it was purely a packaging matter and did not affect the quantity of sesame held by the Respondent. They argued that the IRA erred by concluding that the Respondent had suffered loss, rather than direct financial loss as required by the fidelity guarantee policy.

In summary, the Appellants contended that the Respondent failed to prove direct financial loss as required under the policy. They criticized the reliance on Intertek's report, the absence of a forensic audit, and the lack of evidence regarding the alleged report by Grant Thornton. They maintained that the difference in weight and the re-bagging issue did not demonstrate direct financial loss or employee misconduct. Therefore, they concluded that the Respondent was not entitled to indemnity from the Appellants

Submissions in respect to Ground 2

In this excerpt, the appellant presented grounds of appeal related to the alleged errors made by the Insurance Regulatory Authority (IRA) in evaluating and considering the findings and recommendations of independent assessors in the case. The appellant argued that various experts and loss assessors, including M/s Claims Care Uganda Ltd and M/s Vericlaims and Properties Limited were commissioned to investigate the respondent's claim and all recommended that the claim was not payable.

The appellant pointed out that the IRA had appointed Claim Care Ltd as an independent assessor to assess the loss and provide findings. The report by Claim Care Ltd, dated April 22, 2021, was submitted to the IRA, but the appellant argued that the IRA did not consider various aspects of the report during the proceedings. The appellant believed that the IRA disregarded the recommendations of the experts and independent assessors and instead made findings in favor of the respondent.

One of the key arguments presented by the appellant was that there were other possibilities that could have accounted for the alleged loss of sesame from the respondent's warehouse. These possibilities included theft incidents involving security guards and casual workers, loss or theft reported from the warehouse guarded by KK Security, and variances in weight possibly due to moisture loss or previous losses. The appellant argued that the IRA did not consider these possibilities and wrongly attributed the entire loss to the fraud and dishonesty of the respondent's employee, Ms. Caroline Nabufu.

The appellant also pointed out that the loss at the Nakawa warehouse had already been attributed to and pursued from a private security firm, KK Security, and that the IRA did not take this into consideration. The appellant argued that the respondent's claim to the appellant for the alleged loss of 75 metric tons was an act of forum shopping after the initial claim to KK Security failed.

Furthermore, the appellant argued that the employees of the respondent, including Ms. Caroline Nabufu, were not found guilty of fraud or dishonesty in the internal disciplinary hearings, and no competent authority had found them liable for the same. Despite this information presented in the report by Claim Care Ltd, the IRA held Ms. Caroline Nabufu liable for fraud and dishonesty, which the appellant considered to be contrary to the findings of the independent assessor.

Lastly, the appellant disputed the IRA's finding that Ms. Caroline Nabufu obtained financial gain from the alleged loss. The appellant argued that the findings of Claim Care Ltd did not establish how the employees benefitted from the under-declaration of weights, and the IRA's conclusion disregarded these findings.

Overall, the appellant requested the honourable Tribunal to re-evaluate the evidence, consider the recommendations of the independent assessors, and find that the alleged loss was not entirely attributable to Ms. Caroline Nabufu or the employees of the respondent. The appellant argued that the respondent's claim may not have been proven, and if any loss did occur, it could have been caused by other factors not covered by the appellant's insurance policy.

Respondent's Reply to Ground 2

Regarding the accuracy of reports, the Respondent pointed out that the concerns raised by the Respondent were not addressed. The shortcomings in Claim Care's execution of the mandate were recorded in the Ruling, where the IRA noted that it was unfortunate that the assessor had not contacted the supervisor to verify Ms. Nabufu's allegations, leaving the IRA at a loss. The Respondent's CEO mentioned during the proceedings that Guarav Aggarwal was always in Uganda, contradicting the allegations made against him.

The role of Claim Care was to investigate and provide further information, but the IRA was not bound by their findings. This is in line with the Insurance Complaints Bureau Guidelines. Other possibilities for the lost sesame from the Respondent's warehouse were also mentioned.

Regarding the letter issued to KK Securities, the Respondent clarified that the liability mentioned in the letter was specific to the loss on October 19, 2019. The letter did not refer to the entire loss initially believed to be 60MT. The loss attributed to KK Security for the 22 bags was resolved separately.

The Respondent explained that the loss caused by the dishonest actions of its employees was conducted through systematic pilferage, which was not easily identifiable. Therefore, the Respondent had to act cautiously and notify potential suspects pending conclusive investigations.

In response to various paragraphs raised by the Appellant, the Respondent provided counterarguments and requested the tribunal to disregard certain claims, such as hearsay evidence and alleged unanswered requests for information.

The Respondent also addressed the issue of Ms. Nabufu's knowledge of the loss, stating that the extent of the loss was discovered after her termination. Therefore, she cannot be expected to be authoritative on matters discovered post her exit. Regarding the Claim Care report, the Respondent argued that the report only suggested potential leakages but did not provide concrete evidence. The IRA was justified in disregarding the report. The IRA never awarded indemnity for 75 tonnes but considered the maximum loss attributable to Ms. Nabufu to be 37,919.5 kgs based on the available evidence.

The Respondent referred to previous submissions to explain the incidents related to the theft of simsim, the involvement of KK Security, and the separation of losses at different locations. The Respondent also clarified that the insurance cover was taken out in respect of all the insured's locations, and the separation of premises was unnecessary. Regarding the liability of employees for fraud and dishonesty, the Respondent reiterated its previous submissions, stating that Ms. Nabufu returned from maternity leave when the dishonest actions occurred. The IRA's finding of her liability was valid.

The Respondent addressed the Appellant's claims about financial gain, the misinterpretation of the Claim Care report, and the lack of clarity on how the sesame

went missing from the warehouse. The Respondent argued that if they had known how the acts transpired, there would have been no need for police involvement. The policy did not require the Respondent to prove how the sesame went missing.

In conclusion, the Respondent requested the honorable tribunal to consider their submissions and maintain the IRA's decision based on the evidence available.

Appellant's submissions in Rejoinder

In their rejoinder to the Respondent's response, the Appellant made the following key points:

The purpose of appointing M/s Claim Care Limited as an independent assessor was to reevaluate the alleged loss of sesame and provide findings to guide the conclusion of the matter. However, the IRA did not consider various aspects of Claim Care Ltd's report. Claim Care Ltd's report identified several possible leakages in the Respondent's operations that could account for the alleged loss, including theft incidents, stock discrepancies, and processing of sesame by other dealers.

The losses mentioned in Claim Care Ltd.'s report were not disputed by the Respondent in their submissions. The IRA concluded that the entire loss claimed by the Respondent was due to the fraud and dishonesty of one employee, Ms. Caroline Nabufu, without considering other possibilities mentioned in the report. The Appellant argued that the IRA erroneously relied on a presumptive figure of 37,919 kgs as the actual loss suffered, which was based on assumptions and not supported by verifiable evidence.

The report by Intertek Agri-world, which was used by the Respondent, did not accurately indicate the quantity lost and should not have formed the basis for establishing the loss. The Appellant contended that a forensic audit should have been conducted to accurately determine the quantum of loss suffered by the Respondent. Counsel criticized the IRA for solely relying on the report of Intertek, which was not a forensic audit and did not provide a legally accepted process of verifying and computing loss.

The Respondent's argument that the ability to prove how the sesame went missing should not be a precondition for indemnification was countered by the Appellant, who pointed out that the policy expressly excluded unexplained shortages or losses. The burden of proof lies with the insured to demonstrate that the loss insured against occurred, as stated in the case of ***Nomchand Premchand Shah & Anor Versus South British Insurance Company Ltd (1965) EA 679***.

Overall, the Appellant prayed the Honorable Tribunal to re-evaluate the evidence, overturn the IRA's decision, and reconsider the amount of sesame lost and the sum of money payable under the policy.

Submissions in respect to Ground Three

The Appellant argued that in the case of ***Nomchand Premchand Shah & Anor Versus South British Insurance Company Ltd (1965) EA 679***, it had been established that the burden of proof lies on the insured to demonstrate that the insured loss occurred and to provide supporting evidence. According to the fidelity guarantee policy between the parties, it specifically covered events of loss happening at the Mpererwe warehouse and not at the Nakawa warehouse.

The alleged loss and claim took place during a period when the Respondent was shifting operations from Nakawa to Mpererwe, resulting in significant movement of goods between the two warehouses, as stated in paragraph 1, page 5 of the record of proceedings.

Initially, the losses were discovered at the Nakawa warehouse, including the loss of 60 MT of simsim in October 2019, as indicated on page 6 of the record of proceedings. Mr. Peter Manyala mentioned on page 12 that it was challenging to demarcate the Nakawa stock from the Mpererwe stock due to the stock being located at Mpererwe during the re-bagging process. However, Agri Exim's letter to KK Security suggested that 60 MT were lost in Nakawa.

Therefore, it can be inferred that the 75 MT alleged to have been lost included the 60 MT lost from Nakawa, leaving only 15 MT that could potentially have been lost from Mpererwe. Furthermore, it was mentioned on page 11 that some of the stock left the Nakawa warehouse and was dispatched to third parties, including Africo Trading Company Limited.

Both the M/S Claim Care report and Mr. Kiiza Jesse, a member of the panel for IRA, acknowledged on page 11 and page 15, respectively that the insured failed to separate the losses per location. This failure to apportion the losses between Nakawa and Mpererwe made it impossible to determine the exact losses that occurred.

Consequently, the Appellant argued that due to the failure to attribute the loss to the covered location, the Respondent could not accurately ascertain and subsequently claim for the alleged loss suffered. The Appellant prayed that this ground be successful.

Respondent's Reply

The Respondent argued that in their earlier submission, they stated that due to the nature of their operations, it was not practically possible to make a distinction or separation as claimed by the Appellant. Furthermore, the Respondent contended that the IRA's award, as outlined in Paragraphs 60-65 of the Ruling, only considered unprocessed sesame at the time of its receipt at Mpererwe, without taking into account any losses at Nakawa warehouse. They asserted that this distinction was supported by substantial evidence and that they had fulfilled the burden of proof,

citing the case of ***Nomchand Premchand Shah & Anor V South British Insurance Company Limited.***

Regarding the reference to 60MT lost in Nakawa, the Respondent referred to their earlier submission and pointed to their previous explanation, where they clarified that M/s Claim Care did not request any evidence of the stock's return from Africa Trading Company Limited, which the Respondent claims is not included in their claim.

Appellant's rejoinder to ground 3

In their rejoinder to the Respondent's submissions, the Appellant emphasized that the claim under appeal was specifically related to the stock at the Respondent's warehouse in Mpererwe, not Nakawa. They argued that even if the insurance policy covered both warehouses, it was crucial to separate the loss at Mpererwe from any other losses at Nakawa to determine the exact amount of loss and applicable indemnity.

To achieve this, the Insurance Regulatory Authority (IRA) appointed M/s Claim Care Ltd. to demarcate the Nakawa stock (which was not part of the claim) from the Mpererwe stock. However, according to the Claim Care report, they were unable to clearly separate the two due to a lack of records. The Appellant pointed out that Mr. Kiiza Jesse, a member of the IRA panel, also acknowledged the failure to separate the loss location between Nakawa and Mpererwe, stating that it would provide the exact losses that occurred.

Due to the absence of clear separation, the Appellant argued that the IRA and Claim Care Limited likely considered losses at Nakawa when arriving at the figure of 37,919 kilograms. The Appellant contended that all the suspected losses suffered by the Respondent were attributed to Mpererwe, even though most of the loss occurred at the Nakawa warehouse, which was not part of the initial claim.

To support their position, the Appellant referred to a police report stating that approximately 60 tons of simsim had been stolen from Nakawa during the claimed period. They also mentioned a letter addressed to KK Security by the Respondent, where they admitted to a recurrent loss of approximately 60 metric tons at Nakawa. Based on these documents, the Appellant argued that the Respondent acknowledged the loss at Nakawa but failed to claim compensation from KK Security. Instead, they attributed the loss to the Mpererwe warehouse and made a claim from the Appellant.

The Appellant asserted that by failing to separate the Nakawa stock from the Mpererwe stock, the Respondent bundled up all its losses, including the 60 tons reported for Nakawa, in the claim made to the Appellant. They further argued that to accurately establish the actual loss at Mpererwe, the admitted 60 metric tons from Nakawa needed to be deducted. This, according to the Appellant, demonstrated

that the Respondent did not suffer a financial loss due to its employees but rather as a result of the theft events mentioned.

In conclusion, the Appellant submitted that the Respondent's failure to apportion the loss to the relevant warehouse undermined their ability to ascertain and claim for the alleged loss suffered, and they requested the Tribunal to rule in their favour on this ground.

Submissions in respect of Ground 6

Counsel for the Appellant argued that the Insurance Regulatory Authority (IRA) erred in law and fact when determining the compensation payable for the alleged loss by the Respondent, as it did not rely on authentic records. They requested the Tribunal to find that the IRA made this error and set aside their decision.

According to the Appellant's submissions, the IRA based its decision on the report of Claim Care Ltd, which, in turn, relied on the report of Intertek Agri World. However, the IRA's decision to determine the loss amount based on "fairness and equity" was considered erroneous. The Appellant emphasized that an insurance policy should be governed by the contents of the policy itself, not subjective notions of fairness and equity.

The Appellant further contended that the IRA misconstrued the statement of Claim Care Ltd regarding the figures mentioned in their report. The figure of 37,919.5 kilograms, which the IRA relied upon, was described as an overestimation and not based on verifiable evidence. Claim Care Ltd had stated that the entire loss was not attributable to the under-declaration of weights by the Appellant. The Appellant also highlighted that only 5,827 kilograms of simsim loss were established from the WhatsApp correspondences between the warehouse Managers.

The Appellant argued that the IRA should not have relied on the assumed figure of 37,822 kilograms to hold them liable to pay the Respondent a specific sum. They further criticized the IRA's order to review the defined events provision of the fidelity guarantee policy, stating that it was highhanded and should not be enforced retrospectively. The Appellant emphasized that the terms of the contractual policy should be upheld and enforced, as parties are bound by the terms of their contract unless coercion, fraud, or undue influence can be proven.

In conclusion, the Appellant requested the Tribunal to allow the appeal in its entirety and set aside all orders and directions made by the IRA. They also sought a declaration that the Respondent's claim is not payable according to the terms of the fidelity guarantee policy.

Respondent's Reply to Ground 6

The Respondent argued that in determining the amounts payable, the IRA relied on the records available as stated on Page 10 of the Claim Care report. They referred to Paragraphs 60-65 of the Ruling.

The Respondent acknowledged the principle cited by the Appellant in ***Printing Numerical Registering Co*** but also highlighted other principles that authorize a court or similar body to interfere with contract provisions, such as exclusion clauses. They referred to Paragraphs 5.1.26 - 5.1.31.

Contrary to the Appellant's submissions in Paragraphs 7.1.4 and 7.1.5, the Respondent stated that insurance contracts, like all contracts, are governed by the principles mentioned earlier. The IRA, as mandated by the Insurance Act, has the authority to act in the manner it did, including regulating and controlling the insurance sector.

The Respondent disagreed with the Appellant's suggestion in Paragraph 7.1.6 that the enforcement could not be retrospective. They argued that when an illegality is brought to the attention of a judicial or quasi-judicial institution, it must be addressed. They referred to the case of ***Makula International Ltd Versus His Eminence Emmanuel Cardinal Nsubuga and Rev. Fr. Dr Kyeyune***, where the Court of Appeal held that a court cannot sanction illegality. Based on these arguments, the Respondent concluded that the findings of the IRA were accurate.

Submissions in Rejoinder

In their rejoinder to the respondent's submissions, the appellant argued that the Insurance Regulatory Authority (IRA) erred in law and fact when determining the amount of money payable for the alleged loss without relying on authentic records. The IRA's award of USD 37,810 was based on a report by Claim Care Ltd, which, according to the appellant, did not assess that specific amount as the money payable to the respondent.

The appellant further contended that the figure of 37,919.5 kgs mentioned in Claim Care Ltd's report was an assumption and not based on accurate or verifiable evidence. They asserted that the IRA should not have relied on this assumed figure to hold them liable for paying USD 37,810.

Regarding the review of the defined events provision of the fidelity guarantee policy, the appellant argued that the provisions cited by the respondent from the Insurance Act did not grant the Complaints Bureau the power to rewrite insurance contracts between consenting parties. They referred to previous court cases emphasizing that courts cannot rewrite contracts unless coercion, fraud, or undue influence are proven.

The appellant also highlighted that before issuing the Fidelity Guarantee Policy, they had submitted all standard policy documents to the IRA for approval. Therefore, they

argued that the IRA's request to review the documents post-dispute was beyond their authority and made ultra vires.

Regarding ground 7 of the appeal, which concerned the claim amount of USD 100,000, the appellant reiterated their earlier submissions that the respondent was not entitled to any indemnity as they failed to satisfy the conditions under paragraph 3 of the fidelity guarantee policy. They emphasized that the respondent's claim did not fit within the defined events specified in the policy
The appellant maintained that the respondent did not prove that they sustained direct financial loss, that their employees were liable for fraud or dishonesty during the policy period, or that the employees obtained dishonest personal financial gain from any fraudulent or dishonest acts.

In conclusion, the appellant argued that the IRA's decisions were erroneous and not based on valid legal grounds, and therefore, the appellant should not be held liable for the alleged loss or required to pay the claimed amounts.

7.0. THE DECISION OF THE TRIBUNAL

7.1. GROUND ONE, FOUR AND FIVE

That the IRA erred in law and fact when it came to the conclusion that the Appellant's former employee, Ms. Caroline Nabafu was liable for fraud and dishonesty, without subjecting her to trial/fair hearing and in total disregard of the letter terminating her employment.

The Insurance Regulatory Authority erred in law and fact when it concluded that the Appellant's former employee, Ms. Caroline Nabafu had obtained personal financial gain from the loss, albeit without basing on any piece of evidence to that effect.

The Insurance Regulatory Authority erred in law and fact as far as it misconstrued the fidelity guarantee policy between the parties regarding the provision of defined events, and thereby arrived at the wrong decision.

7.2. RESOLUTION OF GROUNDS ONE AND FIVE

The Applicant faults the regulator for having concluded that Ms. Nabafu had committed acts of fraud and dishonesty within the terms of the fidelity guarantee agreement. The IRA in its ruling made a finding that was not in dispute as to whether the Complainant suffered any loss and that the precise issue to be determined was whether the loss was payable under the policy. Relying on the cases of ***Fredrick***

Zaabwe v Orient Bank & Oers SCCA No. 04 of 2006 and Uganda Baati Ltd v Duncan Mugabi Civil Suit No.457 of 2019 further concluded that acts of fraud extended to falsification of documents, forgery, making false account, and inter alia using deception to dishonestly make personal gain for oneself.

In concluding that the Respondent's employee Caroline Nabafu had committed acts that constructed fraud and dishonesty, the IRA relied on the minutes of the disciplinary hearing conducted by the Respondent which was exhibited as 'R5' at scheduling.

On the other hand, the letters terminating the Respondent's employees Ms Nabafu Caroline, and two of the Respondent's other employees Mr, Isaac Nyeko and Mr Noah Kiwala indicated that they were all terminated for gross negligence by allegedly allowing poor-quality maize to be offloaded in the amount of over 200MT between the period of August 2019 and September 2019. In light of the Disciplinary proceedings conducted by the Respondent itself and the termination letters incidental thereto, none of the Respondent's employees was expressly found to have committed fraud or dishonesty within the terms of the Fidelity Guarantee Policy.

From the argument of Counsel for the Respondent in support of the findings by the IRA, it is the Respondent's position that whereas the burden of proof of fraud and dishonesty as supported by the authority of ***Nomchand Premchand Shah & Anor Versus South British Insurance Company Ltd (1965)*** EA 679, is on the insured to prove that the loss insured against happened and to provide evidence, counsel argued that it was not the duty of the Respondent and if indeed the Respondent had known for a fact how the dishonest and fraudulent acts had transpired, there would not have been any need for the involvement of the police because the mystery would have been solved.

Counsel argued that to lay the onus on the Respondent to prove how this transpired is to turn the insured into the police or at the very least investigating officers and yet the Policy further did not provide that as a pre-condition to being indemnified thereunder. Further that the disciplinary hearing was a mere administrative process that was never meant to be the conclusion of the matter and that this lends credence to why the termination letters exhibited as 'A8', 'R6' and 'R7' expressly put the former employees on notice of instituting of legal proceedings for the financial loss caused and were brought to the attention of the Police for investigations.

In the Respondent's wisdom, the rationale for the use of the language that was adopted in the termination letters was that the Respondent did not want to be exposed legally by using specific language but expected for the same to be proved by the competent authorities such as police, thus expected that after the investigations, the Court would arrive at the finding of fraud and this was not the Respondent's call to make. ***See; page 8 of the Report by M/s Claims Care Ltd***

From the above arguments, we are persuaded to disregard the Respondent's argument insofar as it seeks to dispense with the burden to prove the alleged acts of fraud to the required standard under the law. Without prejudice to the fact that the

proceedings were only administrative in nature, the precise outcome and summation of the reasons for the Respondent's employee's termination was by reason of gross negligence as opposed to fraud and dishonesty. It appears the allegations of fraud and dishonesty against the subject employees contrary to the contents of ***Exhibits 'A8', 'R6' and 'R7'*** was a mere afterthought for purposes of pursuing the Respondent's claim for indemnity.

Even if we were to agree with the arguments by Counsel for the Respondent which we do not, the allegation that the proof of fraud and dishonesty was a matter beyond the capacity of the Respondent or would amount to turning the Respondent into investigating officers or that this is a matter to be concluded by Court, is flawed. Fraud need not be proved through a declaration of Court unless a dispute arises as in the circumstances at hand. In the absence of concrete evidence of fraud through a police investigation report, Court order or even if the least circumstance of the reports by the independent assessors confirming the existence of the same. It would be erroneous for the IRA to conclude that there was fraud and dishonesty without testimonies from the subject employees to establish the alleged facts.

Secondly, be that as it may, on the contrary view there are facts as admitted by the Respondent itself that the reasons embedded in the termination letters of the suspected perpetrators of fraud and dishonesty were gross negligence as opposed to fraud or dishonesty. Third, the expert opinions of two independent assessors namely M/s Claims Care and M/s VeriClaims and Properties Ltd both concluded that the employees were not liable for fraud and dishonesty.

To be more precise and particular, the independent assessors M/s Vericlaims & Properties Limited on page 3 of the Final Quantum Report following their evaluation of evidence, including interviewing the said employees all found that none of them had been involved in any fraud was not liable for fraud. We wish to reproduce their findings in that respect ***'verbatim' 'She had reportedly not been involved in any previous fraud', 'Mr. Nyeeko had reportedly not been involved in any previous fraudulent activity, 'Mr. Kiwala had reportedly not been involved in any previous fraudulent conduct', 'However following the discovery of this loss, their respective services were terminated on grounds of weighing fewer weights thus negligence, on admission of poor quality goods and acceptance of bad quality goods respectively.***

On page 4 of the Report by M/s Claim Care Ltd the IRA's appointed independent assessor, among other contents, the report sought to answer the questions summarised thereunder inter alia whether the loss, if any was caused by fraud or dishonesty of an employee of the insured and the circumstances under which it was occasioned. Indeed, from the assessor's analysis, Ms. Caroline Nabafu was found guilty of gross negligence on the job causing financial loss by giving instructions to re-bag the raw material at less than standard weight and failing to inform the management, signing off records that showed false weights, letting a 12MT truck be offloaded with poor quality, Mr Isaac Nyeko and Mr Noah Kiwala also found guilty of causing financial loss

due to gross negligence. ***These findings are summarised as they appear on page 4 of the Report and appendices 4 of the Report***

Most importantly, in both reports of the loss assessors and adjustors M/s VeriClaims and M/s Claim Care on pages 13 and 11 respectively, the independent assessors reached a similar verdict and thus recommended that the insurance claim was not payable by the Applicant.

The preliminary police reports vide; CRB 1102/2019 and CRB 1046/2019 reflected outstanding inquiries such as carrying out an external audit, and tracing of culprits for questioning. The Police investigation report also referred to and largely relied on the stock audit that was conducted by Intertek Agri World as submitted by the complainant company/Respondent which reported the loss of Sim-Sim to be in the quantum of 75,742.05kgs. The report also found that the alleged theft was committed when the employees were still in office and that Caroline Nabufu was involved in the scam.

Whilst the said reports from all the assessors confirm the existence of financial loss that was occasioned by the Respondent company, they do not qualify the loss to have directly arisen from confirmed acts of fraud and dishonesty and are not quoted in such terms.

The principles governing enforcement of insurance policy contract is precisely that for an insurance claim to be payable it must be within the scope of indemnity agreement and conditions enlisted thereunder. The terms, conditions, exceptions and any memoranda endorsed in the fidelity guarantee agreement reflect an undertaking that the insurers will indemnify the insured against all sums which the insured shall become liable to pay as damages and/or costs and/or legal expenses because of any dishonesty or fraudulent act on the part of an employee or former employee of the company provided always that in the event of the insurer having to meet any claim under this extension, the insurance company shall be liable to reimburse the insurer the amount of any monies so paid to them. ***See; Kabege v Niko Insurance (Uganda) Ltd (HCT-00-CC-CS 319 of 2012)***

The general rule is that an insurance contract has to be understood just like any other contract it is to be construed in the first place from the terms used in it which terms are themselves to be understood in their primary, natural, ordinary and popular sense. ***See; Curtis & Harvey V North British [1921] AC 303, Young V Sun Alliance & London Insurance [1977] 1 WLR 104***

When presented with a conflict between the parties as to the meaning of the policy, the court's function is to interpret what the parties have in fact said in their contract, not to speculate as to what they may have intended when entering into the contract. ***See; Re: George and Goldsmith and General Burglary Insurance Association Ltd [1899] 1 QB 595 at 609 per Collins LJ; Halsbury's Laws of England Vol 25 Para 395.***

What the parties have said is comprised in the words they have used; the problem is to ascertain what the words mean. In any document, the words used must prima facie be used in their plain, ordinary, popular meaning rather than their strictly precise, etymological, philosophic or scientific meaning: ***See; Stanley V Western Insurance Co. (1886) LR3 Exch 71.***

For this purpose, the document must be looked at as a whole. Where two constructions are possible, the one which tends to defeat the intention or to make it practically illusory will be rejected. ***See; Re Etherington & Lancashire & Yorkshire Accident [1909] 1 KB 591, 596.***

The intention of the parties is paramount. However, in insurance, it is only the intention of the parties as declared by the words of the policy which may be taken into account. The task of the court is to reach the meaning of the parties through the words used. ***See; Thames & Mersey Marine V Hamilton (1887) 12 AC 484, 490***

We have had the benefit of perusing the evidence and submission by counsel for both parties on record and the ruling of the IRA and we refer to the wording of the fidelity guarantee policy. For the policy to be enforced the perils insured against may be described as fraud and dishonesty. In general, the technical terms of the criminal law are used and the policy refers specifically to losses and the insured cannot recover unless he proves that the particular offence described in the policy has been committed. The policy may extend to acts which are not criminal but do not cover losses due to a crime in which the employee has not been guilty of any fault. ***See; Walker v British Guarantee Association (1852) 21 LJQB 257***

It is also vital to note that prosecution for the offence is not a condition precedent to recovery unless the policy expressly provides so. ***See; London Guarantee Co v Fearnley (1880) 5 App Cas 911, HL.*** From its wording the instant policy did not require the Respondent to prosecute its employees to prove fraud or dishonesty nor does it require a Court order, this in itself would defeat the very essence of insurance and its principle of subrogation. However, the requirement to prove fraud specifically to the standard recognised under the law is not dispensed with.
The standard of proof in civil fraud claims is the same as in all other civil claims: the balance of probabilities. This means the claimant has to show that it is more likely than not that the defendant committed a fraud. In some cases, the standard is easy to understand. For example, it may be obvious in a contract claim whether someone has performed or breached a contract. However, fraud litigation has certain characteristics that make it less straightforward. In the vast majority of cases, the victim will not know the full facts: the nature of fraud means that fraudsters hide facts from their victims and/or deceive them. Therefore, when first preparing their case, claimants often have to rely on some facts but ask the court to infer certain other facts from available evidence.

Counsel for the Respondent's Counsel submitted that the policy covered not only fraud but dishonest actions of the employees. It was counsel's submission that Ms

Nabufu admitted to bagging underweighted bags and recording different weights and that this was sufficient for the tribunal to find that she acted fraudulently. It is our observation that just like fraud there is a need for detailed evidence of facts or circumstances which, looked at together, that dishonesty occurred. This evidence will be weighed for the claimant and the defendant/respondent on the balance of probabilities.

Therefore, claimants who allege fraud and dishonesty need to provide clearer and more cogent evidence than they need to do for most other torts (such as negligence). The reasoning for this was that, in simple terms, fraud and dishonesty are serious allegations this requires that in deciding whether or not fraud has occurred, the evidence must be carefully assessed (both witness and documentary evidence). It will be influenced by a presumption that fraud is unlikely or that an innocent explanation is more likely.

Having perused the various reports by the independent assessors and the record of proceedings of the Respondent's Disciplinary Committee, we fail to see that the issue of fraud was specifically handled and proved at that level. On page 1 of the record of the proceedings of the disciplinary committee held on 30th October 2019, Caroline Nabufu was asked to explain the rebagging and she said;

> *.... This re-bagging of underweight came because of lot 19. What happened is, my supervisor at the time came to warehouses No.7 and 8. When he came, there was some wire down, he took a photo and asked me "This wire belongs to who? Does it belong to the contractor or the company?" I said I think it belongs to the contractors. My supervisor took a picture and sent it to Shesh that we want that thing to...we take that thing to Resty's warehouse. After that, he went to the other side of the Jut bags where they are stacked. He told me "These jut bags need to go outside for some sunshine so that they can dry", then after he asked me "These PPE bags which are here, what are they for?" I said we have there for 50 Kilos and 25. He asked me "For 50 Kilos, you are using them for what?" I told him, we are using them in re-bagging Sesame and re-bagging soya". He told me, "No, I want them to only be used in re-bagging soya. In re-bagging sesame, we can use this other one".*
> *Gaurav:55Kg*
>
> *Carol: Yes, 55 * 100. When he told me, every day before we start work, I hold a meeting with all my team members that is if they are all there.*

This line of questioning continues throughout Ms. Nabufu's hearing and she demonstrates that she was instructed by her supervisor on rebagging and recording the kilograms. Astonishingly, the disciplinary committee did not call the supervisor to understand whether and why he ordered the actions claimed by Ms NAbufu. The Disciplinary Committee took Ms Nabufu's testimony as a whole and found her liable for gross negligence and not fraud.

The Tribunal cannot disregard the fact that Caroline alleged to have received instructions to rebag from his supervisor, one Rameysh. We note with concern that the said Rameysh was not examined either to ascertain the facts of his involvement in the fraud as he was never examined by either the employer or the assessors. While submitting on this issue, Counsel for the respondent contended that Mr Rameysh was available at all the times for the assessors to interview him, but we do not buy into this line of argument. The primary duty to expose the fraud committed and even report it rests on the insured and in this case, the reluctance by the insured to ensure that Mr. Rameysh is appropriated to the process of investigations shows a failure in this duty. It was erroneous for the IRA to safely conclude that fraud was proved in the absence of such important primary evidence while disregarding the details entailed in the employees' respective termination letters.

We note that the re-bagging exercise by Intertek Agriworld although determined that indeed there was a loss of 75 MT, this loss was not all attributed to the alleged fraudulent acts of Caroline Nabafu. It was submitted that another plausible explanation would account for the loss such as loss of weight due to moisture, connivance by transporters between Nakawa and Mpelerwe warehouses etc. Indeed as testified by Mr Robert Gumisiriza of Claim Care, Intertek Agriworld did not conduct a forensic audit which would have been needed to establish the amount of sesame before and after the alleged loss.

At the hearing, the Respondent could not with confidence state how the fraud occurred and what was given remained speculative like the sim sim being sold on the way between the two warehouses.

Whereas the loss could have occurred, the facts remain vague and we cannot conclude on the balance of probabilities that the said employee committed fraud or dishonesty.

We are persuaded that it was for this reason that the Respondent terminated the employment for negligence and agree with the appellant that to allow the Respondent to go against the renowned common law rule that prohibits approbation and reprobation. The Respondent could not have benefitted from terminating the implicated employees on grounds of gross negligence and then chose to deny the consequences that arise, including the failure to terminate on grounds of fraud and dishonesty having not found so in its disciplinary proceedings. ***See; Asuman Mugenyi v Buwule (Civil Appeal No. 14 of 2016) [2019] UGSC 220***

We have found no evidence implicating Caroline Nabafu as having participated knowingly in defrauding the employee and ***we therefore resolve grounds one and five in favour of the Appellant.***

7.3. ***RESOLUTION OF GROUND FOUR***

The Insurance Regulatory Authority erred in law and fact when it concluded that the Appellant's former employee, Ms. Caroline Nabafu had obtained personal financial gain from the loss, albeit without basing on any piece of evidence to that effect.

We perused the policy and we find that it was a policy condition under the "Defined Events" clause that for a claim to be honoured by the insured, two events had to be proved namely;

a. ***Loss of money and/or other property belonging to the insured or for which they (the insured) are responsible stolen by an insured employee during the currency of this policy.***
b. ***Direct financial loss sustained by the insured as a result of fraud***

Obtaining financial advantage or obtaining personal gain is largely undefined for these purposes; however, it implies elevation to a more favourable economic or monetary position than they were before committing the offence. *It could be evidence that money was gained out of the deception/fraud to the advantage of the perpetrator (our emphasis)*

On this ground, the IRA in its ruling found that 'there is evidence that the complainant (Respondent herein) suffered loss through dishonest and fraudulent actions and it was obvious that the person who benefitted is that one who orchestrated the fraud.

From the foregoing, it is our view that it was wrong for the IRA in the absence of vivid evidence to conclude that the Respondent's employee had obtained personal gain without establishing so. It is trite law that before coming to a decision, one ought to act on credible evidence adduced before them and not to indulge in conjecture, speculation, attractive reasoning or fanciful theories. ***See; Karamira v Kiggundu (Civil Appeal No. 93 of 2018) [2021] UGHCLD 5 (22 January 2021)***

In the case before the Tribunal, there is no single document tendered or circumstantial evidence to show that the employee obtained financial gain/advantage from the fraud. There is no evidence to show that she directly or indirectly benefitted from the loss occasioned by the Respondent.

We, therefore, resolve ground four in favour of the Appellant.

7.4. ***RESOLUTION OF GROUND TWO***

That the IRA erred in law and fact in as far as it ignored, omitted and failed to consider the reports made by assessors including M/s Vericlaims and Properties Ltd and M/s Claims Care Uganda Ltd and thereby arrived at the wrong decision.

The Loss Adjusters and assessors' reports are detailed assessments of everything they find during their investigation. It includes all of the evidence they gather to support the insurer's liability and insured loss, based on the policy terms and conditions. M/s Vericlaims Ltd is a duly recognised Loss Adjuster and M/s Claims Care Ltd which was instructed by the IRA as its independent assessor is also a licensed Risk Advisor, Loss Adjuster & Loss Assessor.

What is precise is that loss adjustors work for the insurance company/insurer and their interests, while loss assessors work for the policyholder/insured and solely for your benefit. The findings of all the loss adjusters and assessors as hired out by the insurer, insured and the IRA came to a similar conclusion that there was no fraud or dishonesty and recommended that Respondent's claim was not payable. From the perusal of the record of proceedings and the evidence before this Tribunal as enunciated above, it is clear that the Respondent fell short of the standard to prove the allegations of fraud upon which the claim was payable.

That notwithstanding, an expert is not a witness of fact and his or her evidence is only advisory, any document being offered in evidence must be authenticated. It is now accepted that an opinion of an expert witness will not be admitted as evidence unless that evidence relates to a field of expertise. Moreover, an expert is not a witness of fact and his or her evidence is only advisory. An expert therefore deposes and does not decide. It is incumbent upon an expert witness to furnish the court with the necessary scientific criteria for testing the accuracy of his or her conclusion to enable the court to form its independent judgment by application of the criteria to the facts proved by the evidence. The court will not take the opinion of a loss adjuster, assessor or risk advisor expert as conclusive proof but must examine his or her evidence in the light of surrounding circumstances to satisfy itself about the findings made. For that reason, an expert opinion can be rejected if it is inconsistent with the rest of the evidence available to court, where the inconsistency between the two is so great as to falsify the opinion. Expert evidence is opinion evidence and it cannot take the place of substantive evidence.

The weight to be attached to an expert opinion depends on whether there is a demonstrably objective procedure that guided the expert to reach the opinion proffered. The decision maker will not act on the opinion of the expert unless the facts upon which the opinion is based are proven in evidence. The report of an expert is not admissible unless the expert gives reasons for forming the opinion and his evidence is tested by cross-examination by the adverse party. Certain procedures and formalities must be followed when dispatching packed exhibits or physical evidence to experts. It ensures identity and continuity and above all questions of the integrity of such exhibits. See; ***Iwa Richard Okeny V Obol George Okot; Miscellaneous Application No. 063 Of 2012***

There is no evidence on record as to whether the standard protocols were followed in admitting or failing to admit or consider the opinions of any of the loss assessors or

adjuster/risk advisors. What was important was for the IRA to compare all the expert reports and form its own opinion, which it did. However, we find that from a recollection of the findings of the reports, all three experts came to the conclusion that the Respondent's claim was not payable and that the Respondent's employees were not necessarily liable for fraud and dishonesty. We have examined the trial record and found that the IRA failed to compare and analyze the expert reports at length and thus failed to vividly consider the opinions therein while forming their opinion on whether the claim was payable or not vis a viz the circumstantial evidence on its record.

We therefore find ground two of this appeal meritorious and resolve it in favour of the Appellant.

7.5. **Ground Three and Six**

IRA erred in law and fact in as far as it failed to sever/separate the loss allegedly suffered by the Respondent at its Mpererwe and Nakawa warehouses and thereby arrived at the wrong amount of money payable

And

The IRA erred in law and fact when it arrived at the amount of money payable for the alleged loss by the Respondent without basing its findings on any authentic records

The Applicant further alleges that the IRA failed to distinguish the loss suffered by the Respondent at its Mpererwe and Nakawa warehouses hence the wrong assessment as to the amount of money payable to the Respondent. The appellant also pointed out that the loss at the Nakawa warehouse had already been attributed to and pursued from a private security firm, KK Security, and that the IRA did not take this into consideration. The appellant argued that the respondent's claim to the appellant for the alleged loss of 75 metric tons was an act of forum shopping after the initial claim to KK Security failed.

The fidelity guarantee policy between the parties, specifically covered events of loss happening at the Mpererwe warehouse and not at the Nakawa warehouse. The alleged loss and claim took place during a period when the Respondent was shifting operations from Nakawa to Mpererwe, resulting in significant movement of goods between the two warehouses, as stated in paragraph 1, page 5 of the record of proceedings.

Initially, the losses were discovered at the Nakawa warehouse, including the loss of 60 MT of Sim-Sim in October 2019, as indicated on page 6 of the record of proceedings. Mr Peter Manyala mentioned on page 12 that it was challenging to demarcate the Nakawa stock from the Mpererwe stock due to the stock being located at Mpererwe during the re-bagging process. However, Agri Exim's letter to KK Security suggested that 60 MT were lost in Nakawa.

Therefore, it can be inferred that the 75 MT alleged to have been lost included the 60 MT lost from Nakawa, leaving only 15 MT that could potentially have been lost from Mpererwe. Furthermore, it was mentioned on page 11 that some of the stock left the Nakawa warehouse and was dispatched to third parties, including Africa Trading Company Limited.

Both the M/S Claim Care report and Mr. Kiiza Jesse, a member of the panel for IRA, acknowledged on page 11 and page 15, respectively that the insured failed to separate the losses per location. This failure to apportion the losses between Nakawa and Mpererwe made it impossible to determine the exact losses that occurred.

On the other hand, the Respondent contended that the IRA's award, as outlined in Paragraphs 60-65 of the Ruling, only considered unprocessed sesame at the time of its receipt at Mpererwe, without taking into account any losses at the Nakawa warehouse. They asserted that this distinction was supported by substantial evidence and that they had fulfilled the burden of proof, citing the case of ***Nemchand Premchand Shah & Anor V South British Insurance Company Limited.***

The use of Intertek Agri-world, which was retained by the Respondent to ascertain the quantity of stock lost, was in itself a violation of the policy and it is little wonder that their report was not able to map out the loss at either of the sites. Clause 7 of the policy required the use of professional accountants and the cost of such services would be met by the insured. In their submissions, the respondent's lawyers admit that Interteck Agriworld is not a qualified accounting firm although in conducting the verification exercise, it relied on the audit report authored by Grant Thornton, a reputable audit firm. We find that this did not meet the standard set in the policy and IRA was wrong to rely on the findings of its report in clear contravention of clause 7 of the policy which required referral of matters contained in the insured's books of accounts to a professional accountant whose report would be prima facie evidence of the particulars and to which such a report relates. Retaining Interteck Agriworld which is not a qualified audit firm to ascertain loss violated the policy.

It suffices to mention here that the Insurer should have guided the Insured on the use of a professional accountant in accordance with Clause 7 of the policy as part of its claims handling guidance.

The insurance contract is a contract of utmost good faith and this duty is reciprocal. This duty of utmost good faith is an implied term of the insurance contract and should be maintained throughout every step of the claim process.

An insurer must treat its insured's interests with the same consideration it gives its own interests. This means that a claims adjuster must give the policyholder the benefit of the doubt. The claims adjuster/investigator should be looking for reasons to find coverage, not for reasons to deny coverage. The claims adjuster should be looking for reasons to pay the claim, not reasons to deny it. Unfortunately, sometimes insurance companies lose sight of this fundamental rule. We note that in the witness statement

of Robert Gumisiriza, the loss adjuster attached to M/s VeriClaims Ltd in paragraph 9, that a recommendation for a forensic audit was made to the insured but we have failed to see efforts being made to have the insured comply.

It is also a key concern to the Tribunal that the Insurer tried to arm-twist the insurer to accept a conditional settlement of Ugx.170,000,000 in exchange for them renewing the policy. Such behavior by insurers should be condemned as it is in breach of the principle of utmost good faith. A claim ought to be investigated and settled or declined in accordance with the policy and the settlement should never be used as a ploy to solicit business.

Grounds three and six are resolved in favour of the appellant.

Having found that the Respondents failed to prove acts of fraud and dishonesty occasioned by the subject employees, we are inclined to conclude that the Respondent's claim is not payable. The application is therefore allowed and the decision of the IRA is accordingly set aside.

8.0. CONCLUSION AND FINAL ORDERS

1) This appeal succeeds.
2) The Decision of the Insurance Regulatory Authority is revoked.
3) Each party is to bear its costs.

Any party dissatisfied with this decision may appeal to the High Court within 30(Thirty) days from the date of this Decision.

DATED and **DELIVERED** at **KAMPALA** on the 14th day of **JULY** **2023.**

Rita Namakiika Nangono
Chairperson

Solome Mayinja Luwaga
Member

George Steven Okotha
Member

John Bbale Mayanja (PhD)
Member