THE REPUBLIC OF UGANDA
IN THE INSURANCE APPEALS TRIBUNAL OF UGANDA AT KAMPALA
APPLICATION No. 06 of 2024

SANLAM LIFE INSURANCE (UGANDA) LTD ======================= APPELLANT

VERSUS

MINET UGANDA INSURANCE BROKERS ===========================RESPONDENT

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

DECISION

1. **BRIEF FACTS GIVING RISE TO THE APPLICATION**
This appeal was brought by Sanlam Life Insurance Uganda Ltd against Minet Uganda insurance brokers following the decision rendered by the Insurance Regulatory Authority on the 14th day of November 2023. Having been the complainant before the IRA, the Respondent which acted in representation of Ernst & Young Certified Public Accountants sought redress in a medical insurance claim for one of the employees of its client a one Mr. Prosper Ahabwe as the principal beneficiary whose son Will Ankunda was diagnosed with a hearing impairment which called for an insurance cover payment by the Appellant.

2. The Appellant argued that the claim was not payable on the basis that the parent concealed material information relating to the child's pre-existing condition at enrollment onto the insurance scheme and that the quotation of USD 41,175 for the procedure recommended by the specialist for the insertion of cochlear implants to correct the hearing impairment and therefore declined to pay the same.

3. Upon hearing of the complaint before it, the IRA rendered its decision wherein it found that the insured had no prior knowledge of the child's hearing impairment at the time of signing the policy forms and that the insured's claim was payable. Being dissatisfied with the decision of the IRA, the insurer preferred the instant appeal before this Tribunal seeking orders that its decision be set aside.
REPRESENTATION AND APPEARANCE

4. At the hearing the Respondent was represented by Counsel Horace Nuwasasira and Counsel Gerald Batandafrom M/s Signum Advocates while the Respondent was

represented by Counsel Richard Rugambwa and Counsel Christine Atukwase M/s R Mackay & Co Advocates

THE AGREED ISSUES FOR DETERMINATION BY THE TRIBUNAL

5. The Parties agreed on three issues for determination by the Tribunal
   i. ***Whether the Respondent has locus standi to institute a claim?***

   ii. ***Whether the claim by the Respondent is payable?***

   iii. ***What remedies are available to the parties herein?***

EVIDENCE AND SUBMISSIONS

6. **Issue One: *Whether the Respondent has locus standi to institute a claim?***

a. **Appellant's Legal Arguments in Support of the Appeal**

7. On the first issue, the same came up in the submissions of counsel for the Appellant to the effect that the Respondent does not have the power to commence or continue, prosecute or defend on behalf of a beneficiary or dependent (in its capacity as a broker) based on a letter purported to vest such authority to it was not a sufficient instrument to confer such powers to the Respondent.

8. It was submitted that the letter which was exhibited as **'AEh2'** that all acts, deeds, and anything necessary and in connection with the claim were to be done 'in Ernst & Young's name and on its behalf', the Appellant contended that the proceedings were not commenced in the name of Respondent instead of 'Ernst & Young's name or on its behalf'. Further under the law proceedings can be commenced on behalf of a substantive party is only possible where there is a duly registered power of attorney authorizing another to perform an act on its behalf. To support this preposition, Counsel relied on the authority of ***Samuel Mubiru Kizito v Edward Sekabanja T/A Sekabanja & Co Advocates.***

Respondent's reply to the preliminary point of law

9. The Respondent contended that under the Insurance Complaint Bureau Guidelines, 2022 it has locus standi to institute a claim as it did file a complaint before the IRA. Counsel relied on paragraph 6(1) thereof which is to the effect that 'Any affected person including the following persons can lodge a complaint;
   (e) A broker
   (h) Members of the industry licenced/registered with the Authority

10. Secondly that having been a broker for its client Ernst and Young, and the failure by the Appellant to honour the Respondent's demands under the policy would have a

negative impact on the Respondent's business, and as such as an affected person was vested with the capacity to lodge a complaint before the IRA as it did.

11. That the Respondent lodged the complaint to the bureau on behalf of their client Ernst & Young and did not depart from the mandate of the authority letter as they filed the complaint not on their own behalf but on behalf of their client who had given them authority to do so. They opposed the preposition that the Respondent ought to have obtained powers of attorney in its favour and averred that there is no specific law to that effect and that they therefore disagreed with the Appellant's contention on that point. That it was the duty of the IRA to receive and resolve insurance-related complaints whether by letter or email. In support of this, counsel relied on ***Section 12(1) (j) and (k) of the Insurance Act, 2017.***

12. Further that in accordance with the procedures set out under Order 3 Rules 1 & 2 of Civil Procedure Rules S.I 71-1 appearance can be made in person or done by a party in a Court and that the purpose and intent of the letter was to appoint the Respondent as an agent to commence proceedings against the Appellant. Further, that there is no legal requirement to have the letter registered. To fortify this position counsel relied on the case of ***Kafeero v Turyagenda (1980) HCB 122***

Appellant's rejoinder

13. In rejoinder to the Respondent's submissions, the Appellant asserted that Guideline 6 merely enlists the entities that are eligible to lodge complaints but do not extend to representation by brokers on behalf of beneficiaries or other parties in their own name. Further, that the absence of a power of attorney, the Respondent could not through a letter initiate an action on behalf of another, and that where there is a general provision of the law pertaining to the same subject matter and the other specific, the specific one prevails over the general one.

14. In response to the Respondent's submission that the general authority to sue and continue proceedings on behalf of their client, was unfounded on the basis that the actions of initiating the proceedings in its own names rather than directly in accordance with the specific provisions of the letter are legally untenable.

15. Counsel noted that in Uganda there are only three ways in which an action can be brought by a third party that is under the Constitution, the Enforcement of Human Rights Act, and the National Environmental Act, and that litigants other than those initiating proceedings under the said acts could only do so upon a power of attorney.

Issue Two: Whether the claim is payable?

16. We shall go ahead and determine the appeal on its merits.

Appellant's submission

17. The Appellant argued that RW3 knew about his son's condition 2 years preceding 28th April 2023 and failed to disclose the same to the Appellant. Reference was made to 'three treatments' that were made in respect of Will Ankunda on the 6th of November, 2022, 19th of November, 2023, and 15th of April, 2023 at the Royal Children's Medical Centre.

18. Subject to the terms of the policy pre-existing condition meant 'a condition for which medical advice, diagnosis, care or treatment was recommended or received during the period of 24 months prior to the date on which application for membership in terms of the Master policy was made. That from the testimonies of the Respondent's witnesses knew about the pre-existing Otitis media condition but chose to conceal it to take advantage of the Appellant. It was further submitted that from the medical evidence obtained from the Royal Children's Medical Centre, the subject child had been diagnosed and treated for acute otitis for the last two years with the last visit having been two weeks preceding the submission of the form which pointed to concealment of a material fact from the Appellant.

19. That the opinion of an assured on the materiality of particular information is not a rule worth considering rather that if it were so, the frequent suppression of information would lead to difficulty in showing that the party neglecting to give information thought it was material. Counsel further submitted that a fact is deemed material if it would affect the insurer's judgment in setting premiums or accepting the risk and that it would be relevant to demonstrate that the non-disclosure induced the insurer to enter into the contract under the given terms.

20. The Appellant referred to the testimony of RW1 which set out the dependant's history of bilateral otitis media. Counsel also referred to the assertion that the dependant's medical history was exclusively accessible at 'International Hospital Kampala' where he had been treated since birth. In light of AEh17 which demonstrated that the dependant had received medical attention from other facilities like the Royal Children's Medical Centre, Doctor's Medical Centre, Paragon Hospital Kampala, Family Healthcare, and St, Francis Hospital hence evidencing the Respondent's deliberate omission to disclose the child's pre-existing condition through those contact medical facilities.

Respondent's submissions

21. It was the submission of the Respondent that whereas an insurance contract is a contract of utmost good faith, which duty is reciprocal, an insured only has a duty to disclose that information which is well within their knowledge. That however, requiring the Respondent to avail information which is not within their knowledge would be to stretch the principle so far which would therefore be contrary to the law and would be illegal. They relied on the cases of ***Nemchand Premchand Shah & Another v South British Insurance Co Ltd (1965) 1 E. A and Pan Atlantic Insurance Company Ltd v Pine Top Insurance o (1995) A.C 501.***

22. Counsel agreed with the Appellant's submission that a fact is considered material if it would influence the judgment of a prudent insurer in fixing the premiums or in determining whether to take the risk or not, that nevertheless, the Appellant failed to demonstrate that the Respondent failed to disclose a material fact and that such failure induced the insurer to accept the risk when it would have otherwise declined to a accept, or would have accepted the contract on different terms.

23. The Respondent argued that the test of materiality is a question of law and the actual determination of the issue involves a question of fact. According to ***Section 103 of the Evidence Act Cap 6,*** the evidential burden to prove non-disclosure lay on the Appellant, and whether or not the Respondent was aware of a material fact that was not disclosed to the Appellant is a factual question. Relying on the case of **Lee v British Law Insurance Co (1972)** Counsel noted that as held in the said case '*A proposer for life or sickness insurance need not disclose the existence of a medical condition of which their doctors have not informed them as long as they are genuinely unaware of it and willfully ignoring the truth*'

24. That it was the obligation of the Appellant to provide sufficient proof as to the non-disclosure. Counsel challenged the evidence by AW1 (Mr. Samson O Oyagi-the Managing Director of Protectors International Loss Adjusters Limited) who presented a report prepared by the said Loss adjusters and presented the same. That notably, in cross-examination, AW1 confirmed that the company was one of the listed service providers of the Appellant and had performed numerous assignments on their behalf including the subject report. The Respondent contended that he failed to cite any report that he had ever presented that was against the Appellant's interests hence demonstrating partiality on his part.

25. Secondly, his evidence was discredited on the premise that AW1 confirmed that he was neither a medical doctor nor a medical professional in any category and that therefore

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the conclusions in his report were merely opinion-based. But most importantly he was not aware of what the condition 'otitis media' was but rather merely obtained information to that effect on Google. Counsel challenged AW1 opinions based on the recent principle cited from the High Court of Australia case of ***Google LLC V Defteros (2022) HCA 25*** to the effect that Google is a search engine and not publishers themselves and therefore not reliable content. Counsel prayed that this Tribunal disregards the report by AW1.

26. The Respondent's counsel contended that the insured disclosed information over and above the ordinary required information. Counsel submitted that the beneficiary disclosed that the dependant was a preterm baby born at 28 weeks and got a nasal defect to CPAP and that had undergone an operation to reconstruct the nasal defect in the year 2021, had recovered well, save that cough and flue infections had persisted together with whizzing that requires nebulizing.

27. Further as testified by AW2 once the Appellant received the Membership Application Forms, the same were passed to the Appellant's underwriters who ought to have decided whether or not the information given by the Respondent's client was sufficient and advised on whether they required additional information which they did not do. In the circumstances, counsel contended that the insured was not under any obligation to disclose a matter by inference or judgment and that if an insurer is not familiar with the natural inferences it was their duty to inquire to ascertain potential risks. Counsel quoted ***MacGillivray on Insurance Law on page 497*** to support this proposition

28. The Respondent also denied the allegations by the Appellant on the findings purportedly made at Royal Children's Medical Centre. The Respondent emphasized that throughout the visits identified by the Appellant as per the clinical notes exhibited before this Tribunal, the dependant had been treated for cough and flue and was on one occasion managed for Pneumonia and SPASMS to rule out acute asthma bacteremia and acute otitis media and not diagnosed with Otitis Media as contended by the Appellant.

29. In his testimony as a parent of the child, RW3 noted that he had never heard of the condition 'Otitis media' until he was presented with the investigation report by this Tribunal. In further confirmation of their claim, RW1 a one Dr. Emily Kakande ENT surgeon testified that the dependant child was brought to her for attention on 29th April 2023, and upon examination she recommended tests to wit; OAEs, Tympanometry, and ABR) at Kampala Audiology and Speech Centre and on the 10th May 2023 she obtained results which showed bilateral profound sensory neural hearing loss hence prescribing

the implantation of cochlear implants to correct the condition. She testified that the hearing diagnosis is an objective as opposed to a subjective one and that it can be either congenital (born with a defect) or acquired but that in this case no screening was done at birth. It was therefore the contention by the Respondent that until the tests were conducted no diagnosis could be done to the effect that the dependant has 'Otitis media'. That RW1 testified that 'Otitis media' is an infection of the middle ear and is not a hearing impairment.

30. The Respondent, therefore, argued that there was no advantage in lodging a claim to the Appellant and not its previous insurer Liberty Life Insurance Company based on the fact that the diagnosis was only made on 10th May 2023 upon obtaining the results from the tests recommended by the specialist on 29th April, 2023. The Appellant thus failed to prove that the beneficiary had any prior knowledge of the child's hearing impairment.

Appellant's Rejoinder

31. In rejoinder to the Respondent's argument that the Appellant demanded information beyond RW1's knowledge, the Appellant argued that the Respondent had made several visits to medical facilities for Otitis media treatment which fact was supported by AW2 whose testimony linked Otitis media to hearing impairment.

32. Further, the failure to present a witness to rebut the findings embedded in the clinical reports from the Royal Children's Medical Centre unequivocally confirmed the dependant's pre-existing otitis media condition.

DECISION OF THE TRIBUNAL

Resolution of Issue One: Whether the Respondent has locus standi to institute a claim?

33. We have had the benefit of perusing the submissions put across by both counsel for the parties and we find it vital to lay a background to the contentions by the parties. The Respondent filed it complaint before the IRA as a direct party to the same as can be deduced from the pleadings of the parties as well as the decision rendered by the IRA. It is also not in dispute that the Respondent did not have any power of attorney issued in its favour by Prosper Ahabwe the principal beneficiary or its client Ernst & Young Certified Public Accountants.

34. The Supreme Court has pronounced itself on the principle of the law that a company can be represented as a client based on a company resolution and duly executed powers of attorney and if one proceeds without a resolution of a company or powers of attorney all such actions are a nullity. ***See; Kabale Housing Estates Tenants Association v Kabale Municipal Local Council [2013] UGSC 19 (18 December 2013)***

35. In the instant case, the Respondent relied on exhibit '**AEh2**' as the basis of its authority to file a complaint before the IRA, this was a letter authorizing its representation in the insurance claim. In addition, the Respondent cited ***Section 12(1) (j) and (k) of the Insurance Act, 2017, and Guideline 6 of the Bureau Regulations*** that recognizes brokers as some of the potential parties to an insurance claim before the IRA and this Tribunal.

36. We wish to note that notwithstanding the above, it is important to pay attention to the nature of Respondent's client 'Ernst & Young, this by virtue of its business is a firm of Certified Public Accountants and is by default a partnership. Unlike a company, there is no requirement for a partnership to execute or register a resolution to authorize another to operate or commence a suit on its behalf as the dealing are in law deemed to be directly with the partners in their capacities. We therefore find that the locus standi vide the letter relied on by the Respondent cannot be contested on the basis that there was no duly executed power of attorney.

37. Be that as it may, we however agree in part with the submission for counsel for the Appellant as cited in the case of ***Samuel Mubiru Kizito v Edward Sekabanja*** that whereas the said case is distinguishable from the instant facts to the extent that the lawful attorney of Shandong Ltd in the said case did not attach a copy of the power of attorney on which he sought to rely. In the case before us, there is no reliance on power of attorney but rather an authorization letter.

38. We note that the wording of the said letter was precise, to effect that the Respondent would do all acts ....." *In the name of Ernst & Young name and on its behalf, all such acts, deeds, appeals, and things necessary in connection and incidental to the insurance claim of Prosper Ahabwe....*'. We refer to ***Halsbury's Laws of England, 4th Edition Volume 1 page 447*** is states that "*An agent acting under a power of attorney should, as a general rule act in the name of the principal. If he is authorized to sue on the principal's behalf, the action should be brought in the principal's name. A deed executed in pursuance of such a power is properly executed in the name of the principal or with words to show that the agent is signing for him*..."

39. In the same spirit, an agent as a general rule acts on behalf of the principal, any work done must be done in the name of the principal unless none disclosure of the principal's identity is a term of the agency relationship between them. Upon our perusal of Exhibit '**AEh2'/'REX1'** it appears that the Respondent was authorized to do such acts in the name of Ernst & Young's names which it clearly failed to do and therefore breached the terms of the agency. Dispute the failure to meet the procedural standards to sue in the name of its client before the IRA, the substantive law is that brokers can sue.

40. The legal principles governing the relationship between the insured, the broker, and the insurer as discussed by the Supreme Court in the case of ***Oriental Insurance Brokers Ltd v Transocean (U) Ltd [1997] UGSC 1*** are that;

i. Unless otherwise agreed, where an insurance policy is effected on behalf of the insured by a broker is directly responsible to the Insurer for the premium. The insurer looks to the broker for his premium, and through the broker, as a rule, upon the happening of a loss, the insurer receives notice of any claim.

ii. As a general rule, the insured is liable to the broker for prenij3 as money paid on his behalf whether or not they have been paid over by the broker to the insurer. As regards any particular policy the premium is treated by the broker, and the insurer as having been paid upon the completion of the contract.

iii. The insured is not, as a rule, liable for the premium to the insurer, but only to the broker.

iv. The broker can sue the insured for the premium even though he has not paid the insurer, and if lie has paid it he has a lien upon the policy unless otherwise agreed.

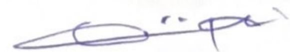
v. Generally, the principles of the law of agency apply to the relationship between the broker and the insurer on the one hand and between the broker and the insured on the other Where the insurer holds out the broker as his agent, the broker has ostensible authority to bind the insurer as his principal.

41. From the foregoing, by way of analogy an agency relationship between a broker and insured calls for ostensible authority to represent the insured once a claim arises. In the same way, the broker can sue the insured for premium even though he has not paid the insurer, and if he has paid it he has a lien upon the policy unless otherwise agreed. The broker representing an insured has a reciprocal duty to recover on behalf of the insured. Guideline 6 and Section 12 of the Insurance Act, 2017 as cited by counsel allow for the broker to bring an insurance claim. These claims can be on behalf of the insurers or insured in the capacity of agents with ostensible authority to do so. We therefore dismiss the first ground of appeal/ preliminary point of law by the Appellant.

Resolution of Issue Two: *Whether the claim by the Respondent is payable?*

42. Having had the benefit of perusing the evidence on record, the decision rendered by the Insurance Regulatory Authority, and the submissions of counsel we give our decision issue 2 and address the major point of contention as follows;

43. From the evidence presented by both parties, we note that the pertinent aspect for determination is whether or not the dependant child had had a hearing impairment or



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been diagnosed with Otitis media condition before the enrolment to the scheme and whether or not this was readily available information and within the knowledge of the insured. To put this into a proper context we shall state the chronology of events from the evidence presented to better outline our analogy and evaluation of the decision by the tribunal vis-à-vis the submissions of counsel.

44. Among the undisputed facts on record is that on 28th April 2023, the beneficiary/dependant's parent filled in and submitted a membership application form to the Appellant concerning his child for insurance coverage. On the membership application which was exhibited as AExh8, the parent Prosper Ahabwe ticked "no" in response to question 2 "Do you or your dependants suffer from or have suffered from any chronic or recurring illness or any serious ailment? He further ticked "yes" to the questions *"Do you or any of your dependants suffer from any allergies? And Have you or your dependants received any medical attention of any nature (e.g. hospitalization, operation, orthodontics, etc) during the last years?* Mr. Ahabwe further disclosed *"Ankunda Will was born pre-term at about 28 weeks and got a nasal defect due to the CPAP. He underwent an operation to reconstruct the nasal in 2021 and has since recovered well. <u>Cough and flu infections trigger whizzing that requires nebulizing</u>. (our emphasis)*

45. From the record of the proceedings before the Insurance Appeal Tribunal, the Respondent's client/scheme beneficiary (RW1) noted that when the school term had come to an end, he was informed by the teachers that according to their observation, the dependant child could only respond to loud noises. It was his testimony that he was therefore constrained to take the child to a medical facility for medical attention in respect to that. It is also on record as captured by the IRA that RW1 testified that we took the child to International Hospital Kampala the evidence of which was exhibited as **AExh7** bearing a stamp of the said hospital and dated 29th April 2023 which appears to be signed by a one Dr. Kakande who equally testified to have examined the child and accordingly recommended tests including Tympanometry, OAEs and ABR to ascertain the proper diagnosis in respect to the suspicion raised as to the hearing impairment of the child.

46. However, that shortly preceding the above diagnosis, the insured had entered into an insurance contract with the Appellant commencing 1st May 2023. The policy between Ernst & Young Certified Public Accountants and the Appellant was equally exhibited as ***'AExh9'***

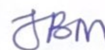
47. It was also not disputed that following this the child was taken to Kampala Audiology and Speech Centre to undergo the said tests whereof results were released and a report dated 10th May 2023 generated by the said medical facility in respect of the subject child.

48. From our reading of the Pediatric Assessment in respect of the child dated 10th May 2023 (exhibited '***AExh5***') as obtained from Kampala Audiology and Speech Centre, it was reported on page 1 thereof that according to the history, the child did not respond to sound and had no speech and under the segment of 'Past Medical History' the child had been diagnoses with hydrocephalus at 8 months and that the same was corrected with surgery. When asked why RW1 had not disclosed to the Appellant the surgery, he noted that the same had taken place in 2020 and was therefore not within the procedures sought to be reported to have occurred within the last 12 months preceding the policy enrolment. However, the conclusion upon analysis of the child it was reported that the results were suggestive of profound hearing loss in both ears, and a recommendation was thus made that trial hearing aids would be fit in preparation for cochlear implantation procedures. The procedures were rated for USD 41,174 (United States Dollars Forty One Thousand One Hundred Seventy-Four Only) which then formed the Respondent's claim on behalf of the dependant child under the policy. ***A copy of the invoice was exhibited as AExh5 (E)***

49. In a bid to further diagnose the child and rule out any condition, it was also presented in evidence that the child was taken to the MRI Centre Kampala where the results were found to have been negative as per a medical report from the said facility dated 9th June, 2023.

50. It was also our observation that before the filing of the complaint before the IRA, on 24th June 2023, a letter was written to the insurer by the Kampala Audiology and Speech Centre. The said letter recommended fixing cochlear implants followed by extensive rehabilitation to enable the child to hear and acquire speech. However, we note that the introductory contents of the said letter were somewhat admissive of the fact that the child had presented with hearing loss in both ears since birth. Further, the report pointed out that the child was born premature and had been admitted in neonatal ICU for several weeks both of which were risk factors for developing congenital hearing loss. From these two statements, it is not clear whether the child indeed had hearing loss at birth or whether the same was likely to have been caused by the fact that it was premature having been admitted in the neonatal ICU for several weeks.

51. That notwithstanding, when compared and contrasted, the testimonies of both RW1 Dr. Emily Kakande and AW1 Mr. Samson Oyagi (<u>who nevertheless is not a medical doctor</u>)



through his report both emphasize the nature of the 'Otitis Media' is an infection of the middle ear and occurs as a result of a cold, sore throat, or respiratory infection. Among the effects identified by both parties is the fact that it may result in permanent hearing loss.

52. The above corroborated with the report from the Royal Children's Medical Centre indicating that the subject child had been treated at the said clinic following the order by this Tribunal authorizing the acquiring of the necessary information in respect of the subject child (even if this fact was concealed by the Respondent), having found that the child was treated at the said facility on three occasions including 31st October 2022 on which day no diagnosis pointing to 'Otitis media' was cited in the facility's clinical report.

53. On the second occasion that is to say 6th November, 2022 the report indicates that the child presented with a history of cough for 1 day and was treated for acute otitis media and upper respiratory tract infection. Subsequently, the child presented with cough and flu and was treated for 'Otitis media' ruling out inter alia acute asthma exacerbation, bacteremia, and acute 'Otitis media'. The said report dated 25th March 2024 was signed and therefore presumably authored by a one Dr. Katumba Peter who did not appear before this Tribunal to not only tender in the report but also confirm the contents thereof.

54. Like pre-trial disclosure, cross-examination minimizes the risk that a judgment will be predicated on incomplete, misleading, or even deliberately fabricated testimony.

55. Under the general duty to ensure fairness of a trial, it is evident that judicial officers have the discretion to exclude witnesses but the suggestion that courts have absolute power to preclude the testimony of a witness or disregard a document that is not properly tendered on the record of the Court. Preclusion of such evidence may be justified where the witness is found to be incompetent or where their evidence is found to be irrelevant. In the case before us, the report remained redundant on the basis that no testimony was presented to back up its contents.

56. Under the Evidence Act Cap 6, documents are exhibited in court through the author or person with knowledge of the documents or who has participated in their formation and also in situations where the evidence is not contested. It is an established principle of the law on evidence that documentary evidence must be properly authenticated and a foundation laid before it can be admitted at trial. ***See; Kaggwa Michael v Olal***

Mark, and Ors CA No. 10 of 2017. Therefore before any private document presented as authentic is received in evidence, its due execution and authenticity must the provided either; By anyone who saw the document executed or written, or By evidence of the genuineness of the signature or handwriting of the maker.

57. As a general rule, documents must be proved by primary evidence (that being the original authentic document itself) except in cases in which the Evidence Act permits secondary evidence. These instances are covered in Section 64 of the Evidence Act. In this case, it appears that the report by the loss adjusters and the report from Royal Children's Medical Centre form part of the disputed documents that were produced before the court, this is evidenced by the record of proceedings. This is therefore, from our understanding at least, not a case where the primary evidence being the original copies of the disputed documents, isn't available.

58. The issue, therefore, concerns a technicality rather than authentication of the documents themselves; specifically, the issue here is whether documents were produced in Court. As a starting point we note that the Evidence Act is not explicit in outlining the process for tendering in documentary evidence through witness testimony, the main requirement is that all evidence to be admitted should be authenticated before it is accepted or heavily relied upon by Courts. This process of authentication can happen in several different ways, one way is by producing an original version of a document for inspection, this is where the best evidence rule is derived from. Another way is by providing a witness to attest to a document's authenticity either by being the document's author or being a witness to the document's execution (particularly in the case of attested documents). The takeaway here is that not all documentary evidence has to be admitted through witness testimony.

59. Be that as it may, by and large, the nature of the claim before us requires necessary scientific explanations and conclusions. If the Appellant wished to dispense off its evidentiary burden as it had undertaken to prove that the child had previously been diagnosed with 'Acute Otitis Media' and that this was within the knowledge of the Respondent's client/beneficiary, it would have been relevant to bring a witness from the said hospital to confirm the contents of the said report.

60. Having compared the report by Dr. Emily Kakande and corroborated the same with RW3's testimony that he was informed by the teachers that his child would only respond to loud sound, a hearing impairment could only be diagnosed following the tests done specifically tailored to hearing loss. Secondly, the testimonies by both Dr. Emily Kakande

i.e. RW3 and AW1 that Otitis media was a potential threat to hearing loss but was not a confirmation of hearing impairment in itself.

61. The Doctor stressed the test on whether the child had a hearing impairment was objective and not subjective and that is why she sent the child for the tests at Kampala Audiology and Speech Center. The Doctor also explained that hearing impairment can either be congenital mean born with the defect or acquired during the child's life. She stated that no newborn screening was done at birth and in the first year of the child's life. It was not ascertained whether the hearing impairment was congenital or acquired. It was the doctor's further testimony that not all pre-term child get a hearing impairment and that confirmation was only through objective testing. She further stated that there were only two specialists in the country who could do these tests and that she had checked with them to confirm if they had examined Will Ankunda before and she had found that both had not.

62. Further still, RW3 Mr. Ahambwe's testimony that he was not aware of hearing impairment at the time of filling the declaration form and he only got the confirmation after the tests had been carried out on 10th May 2023. He testified that Will Ankunda was an active and social boy who could respond and say mama and that as parents they thought his inability to talk was due to slow growth. When asked why he did not disclose the treatment received at Royal Children's Medical Center, he stated that he thought that this was normal flu and cough. He explained that he considered the delayed speech as a delayed milestone since the child had experienced a lot of delays since he was born.

63. It is our finding therefore that from the evidence on record, Mr. Ahabwe had no prior knowledge of the child's hearing impairment at the time of signing the declaration form and he duly disclosed that flu and cough infection would trigger whizzing that required nebulizing. Besides the fact that the child was treated for 'otitis media' on three occasions at Royal Children's Medical Center is not conclusive evidence that a hearing impairment was diagnosed and hence had to be disclosed at the point of disclosure in the form. The insured must disclose to the insurer all material facts that are within knowledge (**see Pan Atlantic Company Limited Vs. Pine Top Ins. Co. [1995] A.C.501.**

64. We have assessed the expert evidence by Dr. Emily Kakande for its adequacy and persuasiveness and are indeed persuaded that the confirmation of a hearing impairment could only be made after an objective test and not subjectively that the parent should have known by the delayed speech. It is a fact that the confirmatory

tests were only done on 10th May 2023 after the commencement of the policy in contention.

65. Further still, RW3 Mr. Ahabwe testified that the Child had been insured from birth with Liberty Life Assurance and there was no motive for concealment. He testified that he was not part of the management team that chose the medical insurance service provider. It was his testimony that he had no reason for having not brought the claim to the previous insurers (Liberty Life Assurance) and he should not be punished for the transition from one insurer to another. A prudent parent would not allow their child to have continued sustenance of a disease that was likely to cause a permanent impairment. Had the child been diagnosed with profound hearing impairment as early as 6th November 2022 when he indicated to have been treated for acute 'Otitis media' there would more likely than not have been subsequent medical records showing a thread of attention to the said impairment.

66. It is our finding that Mr. Ahabwe did not disclose the hearing impairment because he was not informed and was genuinely unaware of its existence until the objective tests were done. See Lee **versus British Law Insurance Co. [1972].**

67. In conclusion, we therefore find that the Respondent's claim is payable and accordingly upholds the findings and directions of the Insurance Regulatory Authority.

Resolution of Issue Three: What remedies are available to the parties herein?

68. Having found that the Claim is payable, we direct the insurer to assess and pay the claim within 30 days

CONCLUSION AND FINAL ORDERS

In conclusion, the Tribunal makes the following orders:

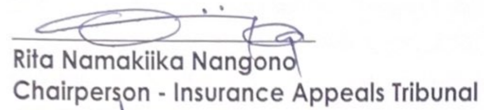
1) This appeal fails in whole.

2) Insurer to assess and pay the claim within 30 days from the date of this decision

3) Each party shall bear its costs.

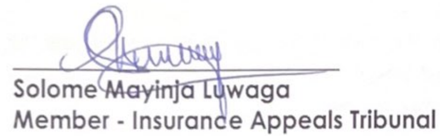
69. Any party dissatisfied with this decision may appeal to the High Court within 30(Thirty) days from the date of this Decision.

DATED and DELIVERED at KAMPALA on the 31st day of MAY______ 2024.

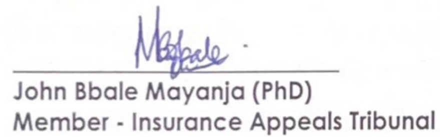


Rita Namakiika Nangono
Chairperson - Insurance Appeals Tribunal

George Steven Okotha
Member - Insurance Appeals Tribunal



Solome Mayinja Luwaga
Member - Insurance Appeals Tribunal



John Bbale Mayanja (PhD)
Member - Insurance Appeals Tribunal