THE REPUBLIC OF UGANDA
IN THE INSURANCE APPEALS TRIBUNAL OF UGANDA
APPEAL No. 6 of 2024
ARISING FROM INSURANCE REGULATORY AUTHORITY COMPLAINT No. IRAB/COMP/115/7/23

CHARLES TWAGIRA ==========APPLICANT

-VERSUS-

LIBERTY GENERAL INSURANCE (U) LTD ========== RESPONDENT
(Appeal arising from the decision of the Insurance Regulatory Authority dated 9th February 2024 and delivered on 12th April 2024)

CORAM: MRS. RITA NAMAKIIKA NANGONO - CHAIRPERSONPERSON
MR. GEORGE STEVEN OKOTHA- MEMBER
MRS. SOLOME MAYINJA LUWAGA – MEMBER
DR. JOHN BBALE MAYANJA – MEMBER
MS. HARRIETTE NABASIRYE PAMINDA KASIRYE -MEMBER

DECISION

1.0. BACKGROUND TO THE APPEAL

1. The APPLICANT took out a Domestic Package Insurance Policy with the Respondent in respect to his property comprised in and known as Block 244 Plot 1277 land at Kisugu, Kampala for the period starting 1st February 2022 to 31st January 2023.

2. The APPLICANT purported to have placed the policy cover with the Respondent through an insurance broker/agent known as 'Pentad Insurance Services Ltd' which company requested the insurance cover on behalf of the Applicant.

3. In December 2022, the Applicant/insured verbally notified the Respondent's officers of the leakage of a National Water and Sewerage Corporation (National Water And Sewerage Corporation) Pipe that had caused damage to his insured property. The Respondent appointed a loss assessor to assess the damage and loss but the loss assessor could not conclusively assess the loss. Due to the various reasons that were notified to the Applicant, the Respondent declined to compensate the Applicant for the loss.

4. This prompted the Applicant to file a complaint with the Insurance Regulatory Authority-Complaints Bureau vide; Complaint No. IRAB/COMP/115/7/23 against the Respondent seeking compensation for the loss arising from the above-mentioned insurance contract. On the 9th February 2024, the Authority delivered its decision in favor of the Respondent, where it was found among others that the claim was not payable as the Applicant did not disclose a material fact pertinent to the insurance contract owed to the Respondent by not fully disclosing the

presence of the water pipes and the presence of leakages that had previously occurred.

2.0. REPRESENTATION AND APPEARANCE

5. At the hearing, the APPLICANT was represented by Counsel George Arinaitwe of M/s PNK Advocates. The Respondent was represented by Counsel Paul Kuteesa of M/s Arcadia Advocates.

3.0. EVIDENCE AND SUBMISSION IN SUPPORT OF THE APPEAL

3.1. THE SUBMISSIONS OF THE APPLICANT

6. The Applicant submitted that his insurance contract with the Respondent, dated 9th March 2022, is under scrutiny to determine whether Pentad Insurance Services Limited acted as an insurance agent for the Respondent or as a broker for the APPLICANT. The Domestic Package Policies issued to the Applicant ***(Exhibits AX 1, AX 2, AX 6, and RX 1***) consistently identify Pentad Services Limited as *"the Agency."*

7. Counsel for the Applicant relied on the Black's Law Dictionary to define 'an agency as a fiduciary relationship where one party, the agent, is authorized to act on behalf of another, the principal, and bind them through their actions'. It was contended that this relationship was confirmed by the Respondent's witness, RW1 Paul Kaigwa, during cross-examination.

8. It was submitted that the Insurance Act defines an "insurance agent" as a person appointed by an insurer to solicit insurance Appeals or negotiate coverage on the insurer's behalf whereas an "insurance broker," on the other hand, is an independent contractor who arranges insurance contracts for either an insurer or a prospective insured. The Applicant emphasized during cross-examination that Pentad Insurance Services Limited acted for the Respondent, not for him.

9. On this issue, it was argued that Pentad Insurance Services Limited acted as the Respondent's agent, given that it had full knowledge of the insured premises and there was no direct interaction between the Applicant and the Respondent outside of the initial call and site visit.

10. For the second issue, the Applicant submitted that it is a requirement to have a proposal form. That the requirement of a formal proposal form in insurance contracts is outlined in ***Section 64 of the Insurance Act***. This section mandates that insurers must obtain approval from the Insurance Regulatory Authority (IRA) for the text or format of their policy or proposal forms. Counsel thus emphasized that a proposal form is essential for the validity of an insurance policy in Uganda and that an insurer cannot bypass this requirement without compromising regulatory oversight. Counsel relied on the text relating to the significance of a proposal form which he contended was further supported by ***MacGillivray on Insurance Law***, which explains that insurers may waive the right to additional disclosures if they ask specific questions in a proposal form.

11. Counsel also submitted that the Applicant testified that the Respondent did not provide him with a proposal form before issuing the insurance contract, a statement that is claimed to have remained uncontested. Reference was made to the evidence of RW1 Paul Kaigwa wherein Counsel pointed out that during cross-examination no proposal form was issued to the Applicant and that this omission indicates non-compliance with legal requirements by the Respondent.

12. In respect to the third issue, the Applicant relied on the case of ***National Insurance Company Limited v. Kakugu Sylvian (Civil Appeal No. 040 of 2015)***, wherein the High Court of Uganda emphasized that the principle of utmost good faith, as stated in ***Section 17 of the Marine Insurance Act 2002***, applies to all insurance business. Further, the materiality of representations must be assessed based on their influence on an insurer's decision to accept the risk or determine the premium.

13. Counsel also noted that for misrepresentation or non-disclosure to be proven, there must be evidence that a false statement or omission influenced the insurer's decision. The present case lacks evidence of such misrepresentation by the Applicant. Additionally, ***Section 17 of the Marine Insurance Act*** imposes an obligation on insurers to make inquiries. If no inquiries are made, any undisclosed information that diminishes the risk is not required to be disclosed by the insured.

14. In summary, the Applicant alleged that he was not provided with a proposal form, and there is no evidence of misrepresentation or non-disclosure on his part. Therefore the responsibility to inquire about material facts rested with the Respondent, who failed to fulfill this duty.

15. Counsel contended that the Respondent has failed to provide evidence that any inquiries were made to either the Applicant or the broker. The Applicant mentioned that the Respondent inspected before the insurance coverage was issued. However, there is no evidence that the Respondent raised any questions during this inspection.
16. ***Section 17(4) of the Marine Insurance Act (MIA) 2002*** provided that whether a non-disclosed circumstance is material or not is a question of fact. The Applicant contended that the Respondent has not presented any evidence to show that any non-disclosed information was material. Further, that materiality should be determined by whether the Respondent would have either declined to issue the policy or increased the premium had they been aware of the undisclosed information. The Respondent, represented by Managing Director Mr. Balasundar, merely stated that the policy would not have been issued or that the premium would have been adjusted, but did not provide evidence to support these claims.

17. He implored this Tribunal to be guided by the provisions of the MIA 2002 in making its decision. Counsel cited the case of ***Pan Atlantic Insurance Co. Ltd V Pine Top Insurance Co. Ltd*** **[1995] AC 501**, wherein the House of Lords held that the test for disclosure and misrepresentation is whether the undisclosed or misrepresented information would have influenced a prudent insurer's assessment of risk. Material information is that which would affect the premium charged or other policy terms. The insurer must show that it was induced by the non-disclosure to enter the

contract on its terms, with the burden of proving inducement and its effect lying with the insurer. In the instant case, the Respondent has not met this burden.

18. The Applicant invited the Tribunal to determine whether the non-disclosed fact that "there being National Water And Sewerage Corporation pipes which had at one time burst" would have influenced the Respondent to refuse coverage or offer it on different terms. The fact came to light only after a flood occurred under the insured building.
19. Counsel referred to the testimonies from Paul Kaigwa and Frederick K. Ronoh in which he noted that they indicate that the Applicant informed the Respondent of the National Water And Sewerage Corporation pipe leakage after the policy was already in place. Furthermore, Paul Kaigwa and Ronoh confirmed that the leakage occurred previously, and a team from the National Water and Sewerage Corporation visited the premises for repairs. However, the Respondent alleges that the Applicant's non-disclosure of the pipes and previous leakages would have led them to decline the policy or exclude coverage for such incidents. That the renewal of the policy after the disclosure undermines the Respondent's claim that the non-disclosed information was material.
20. Regarding the issue of whether the insurance contract was illegal, counsel submitted that the general rule is that the burden of proving illegality lies with the party alleging it. In this case, the Respondent relies on a letter from the National Water and Sewerage Corporation (National Water and Sewerage Corporation) dated 2nd March 2023, to argue that the contract is illegal because the building was constructed above National Water And Sewerage Corporation water pipes without proper consent. That, however, no witness from National Water And Sewerage Corporation was called to substantiate this claim. The Applicant testified that the property was developed in 1990, before the enactment of the ***Water Act Cap 164***, and any waterworks installed at that time are deemed to have had the necessary consent under ***Section 77(5) of the Act***. Therefore, the provisions of Section 101 of the Water Act do not apply retroactively to the instant case.

21. The Respondent's reliance on the National Water And Sewerage Corporation's letter is insufficient to prove illegality, especially since National Water and Sewerage Corporation did not order the removal of the building but instead recommended that the Applicant relocate the leaking water pipes. The Insurance Regulatory Authority (IRA) should not have declared the building illegal, as that was beyond its jurisdiction. The Applicant argued that the Respondent failed to prove that the insurance contract is illegal hence the Tribunal should not deny the claim based on alleged illegality.

22. Finally, regarding remedies, the Applicant argued that he is entitled to an order requiring the Respondent to perform the insurance contract and pay compensation. The Respondent never repudiated the contract and even renewed the policy with an increased premium after the alleged non-disclosure became known. Counsel argued that the case of ***Kenindia Assurance Company Ltd vs Kamithi & Another (2004) 2 E. A (CAK)*** illustrates that an insurer cannot repudiate a policy after accepting premiums with knowledge of non-disclosure. The Respondent's confrontational stance with the National Water and Sewerage Corporation does not justify their attempt to label the contract as illegal. The Respondent's actions suggest they acknowledged the validity of the contract, and therefore, they should fulfill their obligations under it.

3.2. SUBMISSION BY THE RESPONDENT

23. For the first issue, the Respondent argued that Pentad Insurance Services Limited operated as an insurance broker for the Applicant and not as an insurance agent for the Respondent. According to ***Section 2 of the Insurance Act, Cap. 191***, an insurance broker is distinct from an insurance agent. The former acts independently on behalf of the insured, while the latter represents the insurer.

24. The Respondent referenced Exhibit **REX 9, which** listed Pentad Insurance Services Limited as a licensed insurance broker, confirming its role as an independent contractor working for the Applicant. The Applicant acknowledged in his witness statement that Pentad Services Limited had been handling his insurance matters for a long time. Thus, the Applicant cannot now claim that Pentad was acting on behalf of the Respondent. Counsel for the Respondent submitted that the principle in ***Roko Construction (R) Limited v Enson Global Limited & Anor; H.C.C.S. No. 675 of 2016*** supports that once a fact is admitted, it need not be proven unless the court deems otherwise.

25. Further Pentad Insurance Services Limited acted as a broker for the Applicant, not as an agent for the Respondent. On this issue counsel invited, the Tribunal to find that Pentad Insurance Services Limited represented the Applicant in the negotiations.

26. On the issue as to whether the Respondent was required to offer a formal proposal to the Applicant before the insurance contract was issued, the Respondent submitted that it was neither required to nor did it offer a formal proposal to the Applicant before the insurance contract. The Respondent's standard procedure involves receiving requests for coverage, issuing a quotation, and providing the policy upon payment.

27. In this case, Pentad Insurance Services Limited requested on behalf of the Applicant, and the Respondent issued a proforma invoice. Upon payment, the insurance policy was issued. That in the absence of formal documents during contract negotiations does not invalidate an insurance contract, as established in ***Suffish International Food Processors (U) Limited & Anor v Egypt Air Corporation t/a Egypt Air Uganda, Civil Appeal No. 15 of 2001.***

28. Since both parties were in agreement on the essential terms of the policy, the Respondent was not obligated to offer a formal proposal form. The Respondent therefore invited the Tribunal to rule in favor of the Respondent on this issue.

29. On the issue of whether there was any misrepresentation or nondisclosure of a material fact by the Applicant in respect of the insurance contract, the Respondent's position was that the insurance contract was based on the ***'uberrimae fidei'*** principle, requiring utmost good faith. That the Applicant's failure to disclose the presence of large water pipes beneath the insured property and the previous leakages was a material nondisclosure that rendered the contract voidable. Further, the existence of the National Water And Sewerage Corporation water pipes and the history of leaks were facts that a prudent underwriter would consider crucial in assessing the risk.

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30. Counsel referred to ***Clause 2 of the General Conditions of the Policy (Exhibit REX1)*** which mandated the Applicant to disclose all material facts, that the nondisclosure therefore breached this obligation. The Respondent relied on ***Hajji Kavuma Haroon v First Insurance Company Limited, H.C.C.S No. 442 of 2013,*** which reaffirmed the importance of full disclosure in insurance contracts. Counsel concluded that the Applicant's failure to disclose these material facts constitutes misrepresentation, justifying the Respondent's position that the contract is void and that this Tribunal should find accordingly.

31. For the Respondent it was argued in reliance on the case of ***Hajji Kavuma Haroon v. First Insurance Company Limited, HCCS No. 442 of 2013,*** the legal principle established is that the insured must disclose all material facts to the insurer, which are known to them and relevant to the insurer's evaluation of the risk. Failure to disclose such material facts entitles the insurer to void the policy, provided it can demonstrate that the non-disclosure influenced the terms of the contract.

32. It was argued that before finalizing the insurance policy, the APPLICANT knew about the large transmission pipes running beneath his home, which were prone to breaking and potentially causing damage but chose not to disclose this crucial information to the Respondent.

33. Additionally, the Structural Condition Assessment Report from Macro Technics Limited **(included in REX 6)** indicates the presence of a National Water And Sewerage Corporation transmission pipe under the house, which had previously leaked and was repaired by National Water And Sewerage Corporation. That this information, known to the Applicant at the time of policy procurement, was not disclosed to the Respondent.

34. Further, the Applicant's witness statement showed that Mr. Solomon Rubondo of Pentad Insurance Services Limited was familiar with the risks associated with the property. Nevertheless, Pentad, acting on behalf of the Applicant, did not inform the Respondent about the transmission pipe or its previous leakage. Such an omission therefore constitutes a failure to disclose material facts. It was the position of the Respondent that knowledge of these material facts would have affected any prudent underwriter's risk assessment and premium calculation.

35. The burden was on the Applicant to demonstrate that either he or his broker Pentad informed the Respondent of these material facts. The Applicant did not provide evidence to show that either party disclosed the transmission pipe or its history of leakage. In contrast, RW1's testimony, which was not contested, confirmed that these facts were unknown to the Respondent at the time of contract formation. Counsel urged this Tribunal to uphold the finding of the Complaints Bureau.

36. Additionally, under ***General Condition 4 (iv) of the Policy***, the insured is required to protect the property from further damage and not abandon it, they submitted that this condition was breached by the Applicant. According to the letter from National Water And Sewerage Corporation dated 2nd March 2023 (part REX 6) advised the Applicant on remedial actions to prevent further damage. That the Applicant failed to undertake these measures and abandoned the property, violating policy terms and that thus the Insurance Regulatory Authority (IRA) rightly

determined that the Applicant breached the duty of utmost good faith by failing to disclose the transmission pipes and leakage.

37. The Respondent also raised an issue as to the legality of the insurance contract between them and the Applicant. It was argued that the insurance contract was made illegal by the Applicant's construction of the insured property over a National Water And Sewerage Corporation water transmission pipes, violating legal requirements embedded under ***Section 101(1) (b) of the Water Act Cap. 164*** which prohibits building or filling within 4(four) meters of any works without the authority's consent. Counsel further cited that ***Section 101(7)*** which makes it an offence to contravene this section or any conditions attached to authority approvals.

38. Counsel relied on the principle that one cannot benefit from their wrongdoing is well established. This principle was discussed in ***Candiru Asinia Binnia Centenary Rural Development Bank, H.C.C.S No. 0022 of 2016,*** wherein Justice Stephen Mubiru elaborated on the Latin maxim ***'ex turpi causa non oritur actio'.*** He stated that the principle emphasizes that courts will not enforce rights arising from actions deemed sufficiently anti-social. Since the Respondent's evidence shows that the Applicant's house, the subject of the insurance contract, was built illegally over National Water And Sewerage Corporation pipes. The Applicant did not prove that he obtained the necessary consent from National Water And Sewerage Corporation. Additionally, ***Section 19(2) of the Contracts Act, 2010*** renders agreements void if their object is unlawful, preventing any proceedings to enforce such agreements or recover money.

39. The Respondent thus invited this Honourable Tribunal to dismiss the appeal as meritless uphold the decision of the Insurance Regulatory Authority's Complaints Bureau and award the Respondent with costs for the appeal.

4.0. DETERMINATION BY THE TRIBUNAL

40. To place this appeal in proper context, from the pleadings and submissions of the parties to this appeal, the points of contention as cited by counsel for both parties as embedded in the APPLICANT's grounds as stated in its statement of facts and reasons in support of the appeal are summarized in the issues below;

(i) Whether in negotiating the insurance coverage leading to the insurance contract dated 9th March 2022 between the APPLICANT and the Respondent, Pentad Insurance Services Limited acted as an insurance agent of the Respondent or as an Insurance Broker of the APPLICANT?

(ii) Whether the Respondent was required to offer a formal proposal form to the APPLICANT for the insurance contract, and if so, whether the Respondent availed the APPLICANT with a proposal form before the insurance contract?

(iii) Whether there was any misrepresentation or non-disclosure of a material fact made by the APPLICANT in respect of the insurance contract?

(iv) Whether the insurance contract was illegal?

(v) What remedies are available to the parties herein?

5.0. THE DECISION

RESOLUTION OF ISSUE ONE - *Whether in negotiating the insurance coverage leading to the insurance contract dated 9th March 2022 between the Applicant and the Respondent, Pentad Insurance Services Limited acted as an insurance agent of the Respondent or as an Insurance Broker of the Applicant?*

41. 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.

42. According to the evidence on record by both parties, what is in contention is that Pentad Insurance Services Limited acted on behalf of the Applicant or the Respondent but not both. As to whether the said Pentad Insurance Services Limited acted as an insurance agent for the Respondent or as a broker for the Applicant. The Applicant alleges that the Domestic Package Policies issued to the Applicant and ***Exhibits AX 1, AX 2, AX 6, and RX 1*** all refer to the said Pentad Insurance Services Limited as "the Agency." On the other hand, the act defines who an agent is in terms of his/her role. i.e. one who solicits insurance contracts on behalf of the Insurer and the broker is an independent contractor who arranges insurance contracts for either an insurer or a prospective insured. ***See; Oriental Insurance Brokers Ltd v. Transocean (U) Ltd S.C. Civil Appeal No. 55 of 1995;***

43. We wish to expound on the above context by adding that agents and brokers act as intermediaries between the insurance buyer and the insurers. These can be either "insurance agents" or "insurance brokers".

44. ***Section 2 of the Insurance Act Cap 191 formerly No. 6 of 2017*** defines an "insurance agent" *as a person appointed and authorised by an insurer to solicit insurance applications or negotiate insurance coverage on behalf of the insurer or to perform other functions of an insurance nature that may be assigned to him or her by the insurer, and who in consideration for his or her services receives commission or other remuneration from the insurer.*

45. "insurance broker" means a person, not being an insurance agent, who acting as an independent contractor for a commission or remuneration —
(a) negotiates or arranges insurance contracts on behalf of an insurer or prospective insured, other than himself or herself; or
(b) advises an insured or prospective insured on his or her insurance needs and requirements;
Insurance agents have contractual agreements (known as appointments) with insurers that set up the guidelines for the policies they can offer and the terms of their remuneration.

46. In other words, an insurance agency sells policies on behalf of insurers that have granted it an appointment.

47. Whilst insurance agents can complete and seal insurance sales/contracts (bind coverage), insurance brokers cannot. On the other hand insurance brokers represent the insurance buyer ***See; Arthur v. London Guar. & 25 Acc. Co., 78 Cal. App. 2d 198, 202 [177 P.2d 625] and Detroit T. Co. v. Transcontinental Ins. Co., 105 Cal. App. 395, 398 [287 P. 535)***.

48. Subject to ***Section 2 of the Insurance Act Cap 191 formerly No 6 of 2017*** an "insurance broker" as a person, not being an insurance agent, who acting as an independent contractor for a commission or remuneration;

    (a) *negotiates or arranges insurance contracts on behalf of an insurer or prospective insured, other than himself or herself; or*

    (b) *advises an insured or prospective insured on his or her insurance needs and requirements.*

    Insurance brokers therefore may help the insured to do any or all of the following:
    (a) solicitation of a policy;
    (b) engage in negotiations preliminary to execution;
    (c) execution of a contract of insurance;
    (d) transaction of matters subsequent to execution of the contract and arising out of it.

49. Insurance brokers thus are not appointed by insurers and do not have the authority to bind coverage. They solicit insurance quotes and/or policies from insurers by submitting completed Appeals on behalf of insurance buyers. They prepare applications to insurers on behalf of the insurance buyers. They guide the insurance buyer through selection of the most suited insurance company to underwrite their risk in terms of underwriting capacity, may engage in the selection of the most ideal insurance policy/package, may guide the insurance buyer through insurance claims requirements and procedures to ensure prompt payment of indemnities etc.

50. Brokers are intermediaries – they are "middlemen" between the insurer and insured who will owe contractual and common law duties to both the insured and insurer. The actual relationship is determined by what the parties do and say, not by the title that is used to refer to them. In real terms and practice, a dual agency can equally exist as such where a broker represents both the insured and the insurer, for example in instances where an insurance broker acts as an agent for the insured in procuring insurance for the insured, but the broker may also be the agent of the insurer in respect to the policy ***See; Fraser Yamor Agency, Inc. v. Del Norte County (1977) 68 Cal. App. 3d 201, 213 [137 Cal. Rptr. 118)***.

51. Secondly, in instances where the broker accepts the policy from the insurer and the premium from the assured, he is deemed to have elected to act for the insurer to deliver the policy and to collect the premium. When the broker is entrusted with and accepts the policy from the insurer for delivery to the assured, and accepts the premium from the assured for delivery to the insurer, such facts create an actual dual agency. This was the case in ***Maloney v. Rhode Island Ins. Co., 115 Cal. App. 2d 238, 244 [251 P.2d 1027])***.

52. There are several other English authorities which have uniformly held that an agency relation exists between an insurer and a broker as to collection of the premium including but not limited to the cases of ***Shee v. Clarkson, (1810), 104 Eng. Rep. 199; Goldschmidt v. Lyon, (1812), 128 Eng. Rep. 438 and Houston v. Robertson (1816), 128 Eng. Rep. 1109.).***

53. Depending on the particular role undertaken by the broker in any given transaction, a broker may be found to be acting either as an agent of the insured for certain functions (completing and filing the application for insurance) or as an agent of the insurer (binding coverage).

54. Therefore it is possible that the broker is an agent for the insured, and also for the underwriter/insurer. He is an agent for the insured, first, in effecting the policy, and in everything that is to be done in consequence of it; then he is an agent for the underwriter as to the premium, but for nothing else; and he is supposed to receive the premium from the insured for the benefit of the underwriter.

55. In the case before us, the Applicant testified that he had a dispute with his former insurer Goldstar Insurance over premiums payments, he then contacted a friend in Kenya who shared his contact with the Managing Director of the Respondent a one Peter Makhanu. Following a detailed conversation between them the said, Mr. Makhanu asked the Applicant for the telephone number of the person who handled his(the Applicant) insurance business. The Applicant further testified that it was himself who 'passed on Mr. Rubondo's name and contact number to the said Mr. Makhanu'. That the said Mr. Rubondo subsequently informed him of the Respondent's offer to provide the APPLICANT with an insurance cover. Mr. Makhanu sent Mr. Rubondo a Domestic Package Policy No. P/HQ/301/22/000001 which identified Pentad Insurance Services Limited as the Agency of the Insurer *(paragraph 15 of witness statement)*. He admitted that Mr. Rubondo presented to him a fee note to pay a premium which premium was paid by the Applicant's company.

56. During cross-examination, the Applicant was asked whether Solomon Rubondo was the one behind Pentad Insurance Services and further asked to confirm that he was not only his personal friend but also the one in charge of handling his insurance needs for quite some time. Indeed, he confirmed that that was the position but most significantly, he did not provide any evidence to show the nexus between his agent Solomon Rubondo and Pentad Insurance Services Limited. Yet contrary to his response in cross-examination under paragraphs 33 and 34 of his witness statement he testified that he referred any question or issue he interfaced with to Rubondo.

57. Whereas the Applicant denies having been represented by Pentad Insurance Services Limited in his witness statement he ably pointed out the fact that Mr. Kihuguru and Mr. Rubondo formed Pentad Insurance Services Limited which they introduced to him as agents of various insurance companies. The Domestic Package document he received identified Pentad Insurance Services Ltd as the agency. We find that for all intents and purposes Pentad Insurance Services Limited through Mr. Rubondo acted on behalf of the Applicant as his agent. The Applicant did not contest Rubondo being under Pentad Insurance Services Ltd and having

negotiated the insurance contract on his behalf and therefore acted as a broker on his behalf.

58. This issue is resolved in the affirmative.

RESOLUTION OF ISSUE TWO - *Whether the Respondent was required to offer a formal proposal to the APPLICANT for the insurance contract, and if so, whether the Respondent availed the APPLICANT with a proposal form before the insurance contract?*

59. Counsel for the Applicant submitted that pursuant to ***Section 64 of the Insurance Act Cap 191,*** it is a requirement to have a proposal form. This is not the position as the provision as cited by counsel was in error as section 64 is on approval of premium and commission rates. Otherwise, the relevant section would be section 65 which merely makes mention of the fact that an insurer or HMO shall not issue the text or format of the policy or the proposal form unless such had been approved by the Authority as suitable for the purpose of the insurance business it is meant for.

60. To establish the existence of an insurance contract, it is not necessary that all its terms should have been separately agreed upon. As the contract is usually in common form, there is, as a rule, no real negotiation of terms, the agreement being, on the part of the insurers, to issue, and on the part of the insured to take a policy in the ordinary form issued by the insurers. There must, however, be a clear agreement as to the distinctive features of the particular contract of insurance. The parties, therefore, must be ascertained; the assured must have agreed to the particular insurers. They must be ad idem as regards the subject matter of the insurance. The period of insurance must be fixed and there must be agreement as to the sum insured and the premium to be paid. It must also be clear that there was, in fact, an offer to enter into the contract by one party followed by an acceptance of the offer by the other and that a complete contract resulted. ***See; Suffish International Food Processors (U) Ltd & Panworld Insurance Company V Egypt Air Corporation T/A Egypt Air Uganda; Civil Appeal No. 15 of 2001***

61. Just like any other contract, usually, a valid insurance contract must have all the necessary elements of a valid contract. For example, if there is a need to accept the offer made by the insurer, the acceptance of the offer will not take place at once, and before it does so, it is the practice for a "cover *note*" to be issued.

62. Before acceptance, neither party is bound, and may either withdraw at its pleasure. After acceptance, there is a contract from which neither party can withdraw, binding the insured to pay the premium, and the insurer to accept the premium when tendered, to issue a policy, and to pay any sum that may become payable under the terms of the contract. The various steps in the negotiations leading to a contract of insurance are usually recorded in certain formal documents, i.e. the proposal forms, the cover note, and, finally, the policy. However, the Supreme Court of Uganda has pronounced itself on this position that the absence of any such document, during the preliminary steps does not necessarily lead to the inference, that there is no contract of insurance between the parties. See; ***Suffish International Food Processors (U) Ltd & Panworld Insurance Company V Egypt Air Corporation T/A Egypt Air Uganda; Civil Appeal No. 15 of 2001.***

63. We have no reason to depart from the above decision of the Supreme Court as cited by the Respondent and we maintain that the absence of a proposal form does not necessarily invalidate the existence of an operative insurance contract between the parties. Contrary to the Applicant's argument, we add that where a statute lays down a process or procedure for the exercise by a person of some right conferred by the statute, and the statute does not expressly state what the consequence of the failure to comply with that process or procedure, the consequence used to be said to depend on whether the requirement was mandatory or directory.

64. If the requirement was mandatory the failure to comply was said to invalidate everything which followed; if it was directory the failure to comply would not necessarily have that effect. That approach is now regarded as unsatisfactory and has been replaced. The modern approach is to determine the consequence of non-compliance as an ordinary **issue** of statutory interpretation, applying all the usual principles of statutory interpretation.

65. It invariably involves, therefore, among other things according to the context, an assessment of the purpose and importance of the requirement in the context of the statutory scheme as a whole. Among the best-known examples of this interpretative approach is the decision of the Court of Appeal in *R v. Secretary of State for the Home Department ex p. Jeyeanthan [2000] 1 WLR 354*, in which Lord Woolf MR commented that "*Because of what can be the very undesirable consequences of a procedural requirement which is made so fundamental that any departure from the requirement makes everything that happens thereafter irreversibly a nullity it is to be hoped that provisions intended to have this effect will be few and far between*. "

66. Lord Woolf in the same case identified the sort of questions which it is necessary to ask in cases such as this:

"I suggest that the right approach is to regard the question of whether a requirement is directory or mandatory as only at most a first step. In the majority of cases, there are other questions which have to be asked which are more likely to be of greater assistance than the Appeal of the mandatory/directory test: The questions which are likely to arise are as follows:
(a) Is the statutory requirement fulfilled if there has been substantial compliance with the requirement and, if so, has there been substantial compliance in the case in issue even though there has not been strict compliance? (The substantial compliance question.)
(b) Is the non-compliance capable of being waived, and if so, has it, or can it and should it be waived in this particular case? (The discretionary question.) I treat the grant of an extension of time for compliance as a waiver.
(c) If it is not capable of being waived or is not waived then what is the consequence of the non-compliance? (The consequences question.)"

67. In the event the Act prohibited the conclusion of an insurance contract in the absence of a proposal form as the Applicant wishes this Honourable Tribunal to believe, the relevant question to ask would be whether there had been a substantial compliance and the effect of the default.

68. Being that the majority of the terms of an insurance contract are embedded in the policy and material information can often be deduced by several means i.e. even via phone call as the Applicant tends to have admitted in cross-examination failure to produce a proposal form would be a procedural error not capable of invalidating the contract as a whole.

69. We therefore find this issue in the negative.

RESOLUTION OF ISSUE THREE - *Whether there was any misrepresentation or non-disclosure of a material fact made by the Applicant in respect of the insurance contract?*

70. On this particular issue Counsel for the Applicant noted that for misrepresentation or non-disclosure to be proved, there must be evidence that a false statement or omission influenced the insurer's decision. It is argued that the case before us lacks evidence of such misrepresentation by the Applicant. Further, since the Applicant was not provided with a proposal form, there is no evidence of misrepresentation or non-disclosure on his part. He implored us to rely on the provisions of the Marine Insurance Act, 2002 which create no mandate for the insured to disclose facts not inquired into.

71. The Respondent on the other hand submitted that the Applicant's non-disclosure of the pipes and previous leakages would have led them to decline the policy or exclude coverage for such incidents. That the renewal of the policy after the disclosure undermines the Respondent's claim that the non-disclosed information was material.

72. Having heard submissions from both Counsels, to determine the key issue for determination is whether the respondent was right in repudiating the claim of the appellant on the ground of suppression of material information regarding the existence of a water pipe on the land.

73. MacGillivray on Insurance Law, (12th Edn., Sweet & Maxwell, London, 2012 at p. 477) has summarised the duty of an insured to disclose as under:

"... the assured must disclose to the insurer all facts material to an insurer's appraisal of the risk which is known or deemed to be known by the assured but neither known nor deemed to be known by the insurer. Breach of this duty by the assured entitles the insurer to avoid the contract of insurance so long as he can show that the non-disclosure induced the making of the contract on the relevant terms."

74. In the present case, the onus was on the insurer to show that the insured had fraudulently given false information and the said information was related to a material fact.

75. To answer the aforesaid question, in the absence of a proposal form, it would be useful to recapitulate the relevant provisions of the insurance policy.

76. It is a provision under the Domestic Package Insurance Policy (REX 1) under the general conditions of the policy that;

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"Material Disclosure"
If there shall be any misrepresentation or non-disclosure of a material fact supplied by the insured on the proposal or declaration or otherwise this policy shall be null and void....."

77. An insured is under a solemn obligation to make a true and full disclosure of the information on.' the subject which is within the best of his/her knowledge.

78. It may also be observed that insurance contracts are special contracts based on the general principles of full disclosure since a person seeking insurance is bound to disclose all material facts relating to the risk "

79. The law demands a higher standard of good faith in matters of insurance contracts which is expressed in the legal maxim *uberrimae fidei* (of utmost good faith). The principle connotes the duty of a promisee' to communicate to the promisor every fact and circumstance which may influence him in deciding to enter into the contract or not. Contracts of insurance of every kind are of this class.

80. Whereas the duty relates to the principles for the formation of a contract, a breach of which may vitiate the contract, the duty of utmost good faith survives the making of the contract. Therefore where the insured fails to disclose an otherwise material fact it is in breach of the principle of utmost good faith. ***See; Paragraph 492 Halsbury's laws of England.***

81. A fact is considered material to an insurance contract if it would influence the judgment of a prudent insurer in fixing premiums or determining whether he/she will take the risk.

82. There has been much debate about what "prudent" means, and whether "influencing judgement" applies generally or to the particular underwriter in question.

83. In the English case ***Container Transport International Inc. v. Oceanus Mutual Underwriting Association (Bermuda) Ltd (1984)***, the Court of Appeal held that "influencing judgment" means that the facts must be one that which a typical, reasonable underwriter would have wanted to know when forming his/her opinion. The court held that the insurance company need not prove that the underwriter would have acted differently should he/she have known the fact, only that they would have wanted to know about it.

84. However, in a later case ***Pan Atlantic Insurance Co. v. Pine top Insurance Co. (1994)***, the House of Lords noted that besides showing that a material fact was not disclosed, it was also necessary to show that the actual underwriter in question was induced by the non-disclosure into entering into the contract on the said terms.

85. In the case of ***Carter V Boehm (1966) 97 ER 1162*** Lord Mansfield stated that:

"If the facts are concealed in any way, whether fraudulent or not, then the risk taken by the insurers may be different from the risk they intended to take in which case the policy would be void. This was seen as a natural consequence of an imbalance of

knowledge under which the Insured (usually) has sole knowledge of most of the key information which should form the basis for a risk assessment by the Insurer."

86. The general duty of good faith manifests itself in at least two important respects; a positive duty to disclose material information; and a duty not to make any material misrepresentation.

87. The Applicant invited this Honourable Tribunal to determine whether the non-disclosed fact that "there being National Water And Sewerage Corporation pipes which had at one time burst" would have influenced the Respondent to refuse coverage or offer it on different terms. The fact came to light only after a flood occurred under the insured building. The evidence in support of the Respondent's case is that from the testimonies of Paul Kaigwa and Fredrick Ronoh, it was a fact undisputed by the Applicant that leakage had previously been occasioned but that the same had never been disclosed to the Respondent as at the time of commencement of the policy.

88. Indeed the review of part of REX6 which is a Structural Condition Assessment Report from Macro Technics Limited it is indicates the presence of a National Water And Sewerage Corporation transmission pipe under the insured house, which had previously leaked and was repaired by National Water And Sewerage Corporation.

89. The duty to disclose does not in any way require the insured to show that the none disclosure or misrepresentation had any causal link to the claim to avoid the contract, for example, if the claim was submitted relating to flood damage the Insurer could avoid the whole contract if the insured had failed to disclose that their alarm system was not functioning. A representation is material if it would influence the judgment of a prudent insurer in fixing the premium, or determining whether he or she will take the risk.

90. In the case of ***Pan Atlantic Insurance Co. Ltd V Pine Top Insurance Co. Ltd [1995] AC 501*** it was held regarding disclosure and misrepresentation that the relevant test was whether the information not disclosed or misrepresented would have influenced the mind of a prudent insurer in assessing the risk. Information is therefore material if it would affect the premium charged or any other policy terms. It is sufficient for materiality if the information would have been relevant in making the decisions.

91. From the above extensively outlined legal principles, it is abundantly clear that the principle of utmost good faith is more strongly applicable to insurance contracts than to any other contracts. It is also clear that this principle is most relevant at the time of making the contract.

92. Underwriting is the process by which an insurer determines whether, and on what basis, an insurance application will be accepted. It is the method used to calculate the level of risk that is involved and to determine under what rates the contract can be issued. The alteration of a risk occurs whenever something is done which affects the stipulated risk, whether as regards its subject matter. The alteration must be real making the risk a different risk, there is no alteration of the risk if the alteration made is one which was within the contemplation of the parties when they entered

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into the contract of insurance. ***See; Lord Warrington in Law, Guarantee, Trust and Accident Society v Munich Re-insurance Co [1912]1 Ch 138***

93. In the circumstances at hand, it is not shown whether the insurer/Appellant properly assessed the risk to be insured as there was no proposal form on record. What was disclosed by the insurance broker who was acting on behalf of the insured i.e. the state of the house and what lay beneath thereof at the time of the assessment is not known.

94. The authors Raoul and Colinvaux in their book **The Law of Insurance** 4th Ed (P 297 to 300) discuss the role and liability of insurance brokers.

95. They write (at Page 297)

"...***Duty of assureds agent***

.....***As the assured's agent, he should make inquiries as to material facts and will be liable to the assured for breach of duty if he (the broker) fails, through his lack of care in this matter, to disclose such facts as are material (e.g. claims history) with the result that the policy is avoided by the insurers...***"

96. The insurance broker acting on behalf of the insured is under a duty to act carefully and also to exercise proper care and skill when carrying out the assured's instructions. The Broker is required to disclose all material facts as given to it by its client the insured. The role of a broker is to "act as an intermediary between the client and the insurer and, in particular, to ensure that correct information and all material information is given to the insurer". However, a broker will not be negligent if he fails to ask questions about the risk which he had no reason to ask or if he does ask appropriate questions and the insured does not disclose important information.

97. In this case, the Applicant was aware of the existence of the transmission pipes before taking out the insurance policy and the fact that these had broken and flooded the house previously. We are in agreement with counsel for the Respondent that this was a material fact that ought to have been disclosed by the Applicant.

98. It is clear that by corroboration by the letter written by the National Water and Sewerage Corporation, there were transmission pipes under the insured property. These had previously been repaired due to leakage which fact if at all the Respondent had been aware most likely have determined a change in the assessed premiums or avoidance of the contract. In our view the argument that the Applicant did not get an opportunity to fill out a proposal form on which he would have disclosed such facts is flawed having admitted that he offered many other details via phone calls to Mr. Rubondo and Makhanu who he cited to have been his personal friends and therefore known to him.

99. The Applicant further testified that Mr. Rubondo/Pentad were knowledgeable about his property and insurance risk. Having found that Pentad represented the Applicant as it was them who negotiated the subject contract on his behalf and they did not disclose the existence of the transmission pipes on the

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property to the insurer, we cannot fault the Complaints Bureau for having found as it did.

100. In the event an insured fails to disclose relevant information, then their insurer is entitled to void the policy, provided they can show that had they received a fair presentation they would not have entered into the insurance contract. Accordingly, this Tribunal can neither agree more nor depart from the findings of the IRA.

101. We agree with the Respondent and find this issue in the affirmative.

RESOLUTION OF ISSUE FOUR – Whether the contract was illegal?

102. Regarding this issue, counsel for the Applicant submitted that the general rule is that the burden of proving illegality lies with the party alleging it. In this case, the Respondent relies on a letter from the National Water and Sewerage Corporation (National Water And Sewerage Corporation) dated 2nd March 2023, to argue that the contract is illegal because the building was constructed above National Water And Sewerage Corporation water pipes without proper consent. That, however, no witness from National Water And Sewerage Corporation was called to substantiate this claim.

103. The Applicant testified that the property was developed in 1990, before the enactment of the ***Water Act Cap 164***, and any waterworks installed at that time are deemed to have had the necessary consent under ***Section 77(5) of the Act***. Therefore, the provisions of ***Section 101 of the Water Act*** do not apply retroactively to the instant case. Furthermore, since the National Water and Sewerage Corporation did not order the removal of the building but instead recommended that the Applicant relocate the leaking water pipes there was no illegality.

104. In opposition to the above assertions, the Respondent relied on the principle that one cannot benefit from their wrongdoing is well established. Since the Respondent's evidence shows that the Applicant's house, the subject of the insurance contract, was built illegally over National Water And Sewerage Corporation transmission pipes. The Applicant did not prove that he obtained the necessary consent from National Water And Sewerage Corporation. Additionally, ***Section 19(2) of the Contracts Act, 2010*** renders agreements void if their object is unlawful, preventing any proceedings to enforce such agreements or recover money.

105. Notwithstanding the submission of both Counsel, building over **pipelines is not a recommended practice and will only be considered justiciable in exceptional** circumstances, where no suitable alternative exists. Placing this in context Contracts that are contrary to public policy are illegal simply because these harm society or interfere with the public's safety and welfare.

106. An agreement which is opposed to "public policy" cannot be enforced by either party to it. Public policy is the "Policy of the Law". Therefore, the question as to whether an agreement is opposed to public policy or not is to be decided on

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general principles only and by considering the terms of any particular contract since the public policy is not articulated in statutes or laws.

107. An agreement is unlawful if the court regards it as opposed to public policy. Public policy in its broadest sense means that sometimes the courts will in consideration of public policy, refuse to enforce a contract. The normal function of the courts is to enforce contracts, but consideration of public interest may require the courts to depart from the primary function and refuse to enforce a contract. The laws, must in this regard, continue to keep pace with the inevitable changes in societal values as well as public policy. Therefore, an act which is injurious to the interest of society is against public policy.

108. The doctrine of public policy is based on the maxim ex turpi causa non oritur actio which means, an agreement which opposes public policy would be void and of no effect. The central issue does not lie with the legality of the contract between the Applicant and Respondent but rather on whether the APPLICANT would safely insure the property which was constructed over National Water And Sewerage Corporation transmissions pipes in the presence or absence of the Water Act Cap 152 (as it was then) being that such an act was illegal for being a threat to public safety and cannot be condoned by law enforcement authorities including but not limited to this Tribunal. ***See; Kainamura Patrick v Lt Ben Kachope and Others (Civil Suit No 59 of 2017)***

109. We therefore agree with the Respondent and find this issue in the affirmative.

110. Having found that the Applicant failed to disclose a material fact and acted illegally, we are inclined to conclude that his claim is not payable. The appeal therefore fails and the decision of the IRA is accordingly upheld.

6.0. CONCLUSION AND FINAL ORDERS

111. In conclusion, the Tribunal makes the following orders:

1) This Appeal therefore fails in whole.
2) Each party should bear its own costs

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

DATED and **DELIVERED** at **KAMPALA** on the 4TH day of SEPTEMBER **2024.**

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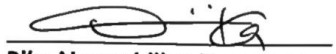
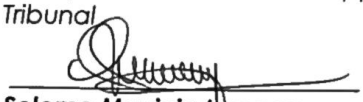


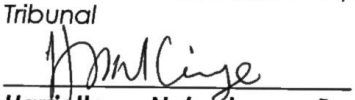
Rita Namakiika Nangono
Chairperson- Insurance Appeals Tribunal



Solome Mayinja Luwaga
Member - Insurance Appeals Tribunal

George Steven Okotha
Member - Insurance Appeals Tribunal

John Bbale Mayanja (PhD)
Member - Insurance Appeals Tribunal



Harriette Nabasirye Paminda Kasirye *Member- Insurance Appeal Tribunal*