THE REPUBLIC OF UGANDA

THE HIGH COURT OF UGANDA

(COMMERCIAL DIVISION)

HCT – 00 – CC - CS - 665 - 2002

and

HCT – 00 – CC - CS - 667 - 2002

TIGHT SECURITY LTD. ..... PLAINTIFF

VERSUS

GOLDSTAR INSURANCE CO. LTD. ..... DEFENDANT

BEFORE: THE HON. JUSTICE GEOFFREY KIRYABWIRE

J U D G M E N T

This is a consolidated suit involving the same parties (vide HCCS 665 and 667 both of 2002) the subject matters for which were insurance claims made by the plaintiff against the defendant insurance company which alleged are to be outstanding.

In HCCS No. 665 of 2002 the plaintiff seeks the recovery of Ushs. 82,225,419/= from the defendant as money due and owing for indemnity under insurance policies and or refund of premium paid on a pro rata basis.

The case for the plaintiff is that the defendant insured them under various policies to wit Public Liability policy No PL/GSI/00018/98; All Risks policy No PL/GSI00027/99 and Vehicle Insurance Policy No MP/GSI/00168/2001. The plaintiff avers that during the period between 1998 and 2001, the plaintiff suffered loses the risks insured under the said policies and sought indemnity from the defendant in accordance with the specific insurance covers but the defendant did not indemnify the plaintiff. The plaintiff averred that it made the following claims

1. Burglary and theft at M/S Translink (U) Ltd at Plot 6 Jinja Road on 23/11/1999
2. Burglary and theft K2 Consult (U) Ltd at Plot 58 Bukoto Street on 26/11/99
3. Theft at CEMCO on 7/12/1999
4. Theft International Rescue Commission on 25/5/2000
5. Office breaking and theft at KAOS Bar on 6/12/1999
6. Office breaking and theft at I.P.S Jubilee on 1/9/2000.
7. Robbery at Orient Bank Jinja Road Branch on 1/9/2000
8. Robbery at Translink (U) Ltd at Plot 6 Jinja Road between 15th to 17th April 2000
9. Robbery at Wanno Engineering Co. Ltd on 13/8/2000,
10. Robbery at Gaba Multiple Store on 13/3/1999,
11. Robbery at Uganda Polymers on 7/1/2000
12. Robbery at Car and General on 26/3/2001.
13. Store breaking and theft at Betar Enterprises 5th Street Industrial Area on 12/6/2000.

The plaintiff averred that above claims amounted to a total of Ushs. 57,082,919/=.

The plaintiff also averred that they made further claims under policy No. AR/CL/00305/2000 for the loss of 20 radios resulting from theft by guards and robbers between January and October 2000 in the sum of Ushs. 9,387,599/= where the defendant issued a debit/discharge voucher for payment, but never effected the said payment. The plaintiff also avers that the plaintiff made a claim for lost radios vide claim numbers 82, 141 and 230 totaling to Ushs. 2,262,000/= which the defendant refused to process. The plaint also made a claim for broken rear glass of motor vehicle No UAD 729K in the sum of Ushs. 490,000/= under the Vehicle insurance policy No MP/GSI/00168/2001.

On the other hand the defendant's case is that the plaint disclosed no cause of action and was therefore bad in law. In the alternative, the defendant contended that the

plaintiff had defaulted in the premium payments for a period exceeding thirty days and thus, the defendant had avoided the contracts. Furthermore, in the alternative, the defendant contended that if there were any insurance contracts between the plaintiff and the defendant, the liability for the claims made by the plaintiff did not fall within the scope of the contracts.

In the further suit HCCS No.667 of 2002 the plaintiff sought the recovery of Ushs. 3,658,000/= as indemnity under a Workmen's compensation Insurance contract policy No WC/GSI/00023/98.

The plaintiff avers that the claim resulted from accident injuries, made on behalf of Victor Gershom Yukahirwa, Tabu James and Hannington Otto. The plaintiff avers that the defendant accepted this claim but despite several demands by the plaintiff, the defendant did not effect payment under the said claims.

The defendant contended that the plaintiff was not entitled to payment under the workman's compensation policy because they were in breach of the said policy.

The defendant pleaded that it would raise a defence of set off against the plaintiff for the sum of Ushs. 20,464,125/= as unpaid premium which the plaintiff agreed to pay upon renewal of the policy on the 30th December 2000.

The plaintiff was represented by Mr. Ambrose Tebyasa, while the defendant was represented by Mr. Alex Rezida.

It is necessary to point out at the onset before I address this dispute that this is an old case. The consolidated suit passed through several Judges before the parties agreed to the use of joint experts before the Hon. Justice James Ogoola (as he then was) in 2004. The experts were appointed but the suit did not proceed further until it was reallocated to me in 2011. By then much time had passed. Clearly there had been inordinate delay in disposing of this suit. On review of the case with the parties and cognizant of both the time passed and presence of the expert reports on file I decided to proceed under Order 17 rule 4 of the Civil Procedure Rules. The said Rule provides

> *"4. Court may proceed notwithstanding either party fails to produce evidence. Where any party to a suit to whom time has been granted fails*

to produce his or her evidence, or to cause the attendance of his or her witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the court may, notwithstanding that default, proceed to decide the suit immediately."

To my mind the parties had failed to progress the suit despite of the presence of the expert's reports on file which I will refer to in detail later on in this judgment.

The Court record clearly shows that the parties agreed to have the dispute referred to an expert agreed to by the parties and appointed by the court. In furtherance of this agreement two experts were appointed, an accounting expert and an insurance expert. At the hearing before the former Presiding Judge Justice Ogoola on the 24th November 2003 it was agreed between the parties that the reports of the experts would be binding upon them. It was further agreed that the parties would have the right to look at the draft findings and make comments before a final report was issued by the expert.

The parties then appointed Mr. Mwandha of Mwandha & Co. Certified Public Accountants on the 6th of May 2004, as an accounting expert to render a report on the respective accounts statements of the parties for the court to use in the determination of the dispute. The said expert was appointed on the following terms of reference;

1. To reconcile the statements of accounts prepared by each party relating to the insurance policies issued by Goldstar Insurance Co. Ltd in favor of Tight Security Limited.
2. To ascertain the total payments of premiums by Tight Security Limited to Goldstar Insurance Co. Ltd.
3. To ascertain the value of the credit notes issued by Goldstar Insurance Co. Ltd to Tight Security Limited.
4. To establish the amount paid to Tight Security Ltd in respect of Insurance claims and the amount of unsettled claims.

The parties also appointed Mr. Micheal Kaggwa, an insurance expert on the 20th December 2004. The terms of reference were as follows;

1. To verify the parties claims prior to December 2000.

2. To consider the statement of accounts for the year ended December 31st 2001.

3. To ascertain the payment of the plaintiff's premium over the entire period of the parties relationship.

4. To determine the scope of the coverage of public liability policies.

With regard to the accounting report, Mr. Mwandha made the following findings as reproduced from the said report;

TOR 1; to reconcile the statements of accounts prepared by each party relating to the insurance policies issued by Goldstar insurance Co. in favor of Tight Security Ltd.

Mr. Mwandha found that the statements of accounts of both parties agree on the policies issued as determined by the debit notes to amount to Ushs. 134,358,402/= and US $ 2,414 for the period of 1998 to 2001.

TOR 2; to ascertain the total payments of premium by Tight Security to Goldstar.

Mr. Mwandha found that all the payments made by Tight Security to Goldstar for the period of 1998 to 2001 are Ushs. 40,004,000/= and USD 2,000. These payments correspond with the receipts issued by Goldstar.

TOR 3**;** to ascertain the value of the credit notes issued by Goldstar to Tight Security.

Mr. Mwandha found that the credit notes issued by Goldstar to Tight security either offsetting against the premium due or in settlement of insurance claims for 1998-2001 was Ushs. 96,496,917 and USD 1849. These were derived from the statement of accounts of both parties and they both agreed to them.

TOR4; to establish the amount paid to Tight Security in respect of Insurance claims and the amount of unsettled claims.

Mr. Mwandha found that the total sum of insurance claims paid to Tight Security by Goldstar for 1998-2001 was Ushs. 44,814,000/=. He further found that the total unsettled claims were Ushs. 71,322,919. Claims of Ushs. 6,040,000/= were in the process of being settled as discharge vouchers had been passed to Tight Security for

signature, however, claims worth Ushs. 65,282,919/= were still unacceptable to Goldstar and were not yet resolved between the parties.

With regard to the insurance report Mr. Kaggwa in his final report submitted to the court found as follows as reproduced from the said report;

Claim 1: 7th December 1998, Translink Robbery, Ushs. 5,000,000/=.

Tight Security in one of the meetings held by the parties stated that they were not going to pursue this claim as Mr. Azim (from the insurance company) had agreed to settle the claim by payment of the sum of Ushs. 1.8 million.

Claim 2: 11th March 1999, Gaba Multiple Stores, Ushs. 5,000,000/=.

It is a principle of insurance that public policy insurance does not cover losses arising out of criminal acts of the insured or his or her agents. Now, it is in insurance practice for an insurer to pay what is known as ex-gratia payment where a claim is not covered by the insurance policy. Such payments are obviously at the discretion of the insurer. So if Goldstar Insurance company paid some claims which would normally not be payable, that does not mean that they could not decline to make payment in future for a loss not covered by the insurance policy especially when they see that the situation is going out of control.

Mr. Kaggwa found that some losses were as a result of robbers by the guards who were employed by the plaintiff security company and therefore were not recoverable under the said policies. In his report Mr. Kaggwa made specific reference to the following claims

Claim 3: 7th November 1999 Uganda Polymers Ltd Robbery, Ushs. 5,000,000/=.

Mr. Kaggwa found that he was unable to trace the necessary documents. He noted that this was a case of robbery by Tight Security guards and as thus this claim was not covered under the Public Liability Insurance Policy. This finding was the same in respect of ***Claim 4****: 23rd November 1999, K2 Konsult Ltd Robbery, Ushs. 5,000,000/=,* ***Claim 5****: 6th December 1999, KAOS Robbery, Ushs. 5,000,000/=,* ***Claim 7:*** *7th January 2000, Uganda Polymers Ltd Office breaking, Ushs.5,000,000/=,* ***Claim 8:*** *7th January 2000, Translink Robbery, Ushs. 5,000,000/=,* ***Claim 9:*** *26th May 2000, International Rescue Committee theft, Ushs. 4,685,000/=,* ***Claim 10:*** *13th June 2000, Betar Enterprises theft,*

Ushs. 5,000,000/= and ***Claim 14:*** *14th March 2001, Car and General Store, Ushs. 5,000,000/=.*

Claim 6: CEMCO Industrial Area, Ushs. 5,000,000/=

Mr. Kaggwa found that in the interim report, he had requested Tight Security to explain why it took them seven months to report the claim to the insurers, and whether there is still any claim outstanding after the compensation by Jubilee Insurance Co. Ltd to their insured CEMCO but there was no response and thus, the defendant had no liability for the said claim.

With regard to Claims 11,12 and 13(of the 13th August 2000, Bukoto Jaynank Sakario Wanno Engineers, Ushs. 2,315,319/=; 1st September 2000, Orient Bank-Jinja Robbery, Ushs. 1,062,000/= and 1st September 200 IPS/2 Computers, Ushs. 5,000,000/= respectively) Mr. Kaggwa found that the documents referred to by M/S Ambrose Tebyasa and company Advocates for the plaintiffs in response to the experts interim report had no relevance to the issues before him because the claim had been not included in the earlier submissions made to expert. Accordingly, the claim can not be recovered under those circumstances.

The issue now is whether the reports of the experts resolve the dispute of the parties? The use of the experts is not disputed though plaintiffs contest some of the findings made in the final report of Mr. Kaggwa, the insurance expert. Counsel for the plaintiff told Court that the report did not state whether the some claims in contention were payable or not, nor give reasons as to why they were or were not payable. He further argued that certain categories of claims such as Claim 11, 12 and 13 were not considered in the final report. To my mind this is the only contest to the effectiveness of the reports.

There are authorities to guide Court on how to treat such expert evidence in cases such as this one.

In the case of **ANDREAS WIPFLER T/A WIPFLER DESIGNERS & CO V MEERA INVESTMENTS LTD (HCCS 028 OF 2005)** Justice Egonda-Ntende (as he then was) held that,

"The parties agreed to be bound by the report of the expert. In substance the parties appointed an arbitrator between them. In Alternative Dispute Resolution arbitration is the process where a third party agreed between the parties' issues a binding award... Applying the inherent jurisdiction of this court, I uphold the agreement the parties made before this court to be bound by the report of the expert that they jointly appointed."

In this case the parties agreed to the experts but actually let the Court make the appointment.

That agreement was subsequently reduced in writing in a letter dated 20th December by the Registrar of the court as follows;

"SUB; APPOINTMENT AS AN EXPERT IN TIGHT SECURITY (U) LTD V. GOLDSTAR INSURANCE CO. LTD HCCS NO. 665 AND 667 OF 2002.

I am pleased to inform you that you have been appointed to mediate the above dispute. You will meet the parties and their advocates and secure the necessary documents and interview.

Therefore you will write an interim report, which will be reviewed by the parties before its submission to court. The final report shall be binding on all parties. Your professional fees will be paid by the parties in equal proportions.

Please complete the assignment by 26th January 2005."

Indeed the final reports by the experts are then addressed to the Registrar of the Court as the appointing authority.

Such an appointment is also provided for under section 26 of the Judicature Act (Cap 13) which provides for the court to refer matters before it in a dispute to a special referee. It provides that,

"References to referees.

(1) The High Court may, in accordance with rules of court, refer to an official or special referee for inquiry and report any question arising in any cause or matter, other than in a criminal proceeding.

(2) The report of an official or special referee may be adopted wholly or partly by the High Court and if so adopted may be enforced as a judgment or order of the High Court."

The appointment of the experts can also be seen as the appointment of a referee under section 26 of the Judicature Act. It follows that the findings of the experts can be adopted as a judgment of this Court and enforced as such.

Having found that the parties agreed on how to resolve the dispute by way of a court appointed expert, the court can not interfere with the agreement of the parties and consequently the final report made by the expert, except where it is clear that there was no observance of the rules of natural justice.

As to the challenge on the insurance report by counsel for the plaintiff I have already noted that the insurance expert addressed his mind to them and found them not to be relevant to his terms of reference. I accordingly find that the plaintiff had an opportunity to be heard on the interim report and his comments on it considered so there was no breach of the rules of natural justice.

On the accounting side court shall rely on the report of the accounting expert Mr. Mwandha dated 19th August 2004. The report show that both sides agree that between 1998 and 200 1insurance policies with premiums amounting to Ushs. 134,368,402/= and USD $2,414 were issued by the defendant in the names of the plaintiff. The plaintiff paid a total premium of Ushs. 40,004,000/= and USD 2,000 for the same period. The defendant issued the plaintiff credit notes worth Ushs. 96,496,917/= and USD $ 1,849. The defendant company also settled claims worth Ushs. 44,814,000/= between the periods 1998 and November 2002 these are not in contention. The report also showed claims unsettled (but this has been addressed by the insurance expert) of Ushs. 71,322,919/=.

Applying these reports to the consolidated suit the following determination can and is made. HCCS 665 of 2002 was for Ushs. 69,225,419/= and the refund of premium worth Ushs. 13,000,000/=.

The insurance expert found in his report that the claims in civil suit 665 of 2002 were not payable and the report was binding on the parties. In the premises I enter judgement in the terms of the final report of the insurance experts. That being the case I dismiss the claim as filed.

HCCS 665 of 2002 was a claim for Ushs. 3,658,000/= being an unpaid workman's compensation claims in the years 1998, 2001 and 13th December 2000. The defendant pleaded the defence set off against unpaid premium for renewal of the said workman's compensation policy. The renewal according to the debit note was supposed to run from the 22nd December 2000 to 21st December 2001. It is important to note that the workman compensation claims were not part of the investigation of the insurance expert and the only issue I can discern is whether the defendant could offset the unpaid premium against these claims. I find from the accountant's report that the reconciliation shows that the plaintiff through actual payments and credit notes was in credit for the period 1998 to 2001by at least Ushs. 2,132,515/= and USD $ 1,435. I accordingly determine and find that there was no outstanding premium to set off during the period under review against the claim of Ushs. 3,658,000/= as claimed in HCCS 667 of 2002. The last claim was for 13th December 2000 and the renewal was for 22nd December 2000; so the last claim was within the policy period and should be paid.

All in all the plaintiff only succeeds on the claim for Ushs. 3,658,000/= which I award with interest of 21%p.a. from the date of filing until payment in full. I also award nominal damages of Ushs. 1,000,000/= with interest at 8% p.a. from the date of judgment until payment in full. Due to the age of this case (and the costs of the experts used) I find it is equitable that each party bears the costs of the consolidated suit.

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Justice Geoffrey Kiryabwire

JUDGE

Date: 26/04/2012

26/04/12

Judgment read and signed in open court in the presence of;

- Ochieng h/b for Tebyasa for Plaintiff
  In Court
- G. Mbigiti for Plaintiff
- Rose Emeru – Court Clerk

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Geoffrey Kiryabwire

JUDGE

Date:26/04/12