THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

HCT – 00 – CC – MC - 25 - 2012

CHARTIS UGANDA INSURANCE COMPANY LIMITED) ……APPLICANT

Versus

1. INSURANCE REGULATORY AUTHORITY OF UGANDA

2. NTAKE BAKERY COMPANY LIMITED } …...…RESPONDENTS

BEFORE: THE HON. JUSTICE GEOFFREY KIRYABWIRE

R u l i n g

This is an application for Judicial Review seeking Orders for certiorari, prohibition and injunction against the ruling of the first respondent in favour the second respondent of August 2012 (undated) that the applicant pay the second respondent the sum of Shs 2,386,226,000/= arising from an insurance claim.

The facts of this case are that the second respondent, M/s Ntake Bakery & Company Limited took out an Industrial All Risks Policy No.0636000078 with the Applicant Company in respect of its bakery and flour mill from 21st February, 2010 to 21st February, 2011. The second respondent then reported to the applicant a claim for Shs.2,386,226,000/ (Shillings two billion three hundred eighty six million two hundred twenty six thousand) arising out of damage/loss to one of its silos which the Applicant rejected on the basis an adjuster's report by M/s General Adjusters Uganda Ltd.

By letter dated 2nd February, 2012, the first respondent notified the applicant that they had received a letter dated 24 January, 2012 from the second respondent requesting for arbitration on the Insurance Claim and further requested the applicant to communicate their position to enable the first respondent to determine the appropriate course of action.

The Applicant then received summons from the first respondent to attend meetings on 18th and 27th May, 2012 which the applicant complied with. Following the meeting conducted by the

first respondent on 27th May, 2012 in the presence of representatives from the applicant the first respondent resolved that the main area of contention was the cause of the loss and this had not been resolved by the parties' expert advisers before the damaged silo had been demolished.

By letter dated 06th June, 2012, the first respondent accordingly advised the Applicant to review its decision bearing in mind the cardinal principle of insurance of "proximate cause"**.**

The Applicant subsequently referred the matter to another loss adjuster for further review and duly communicated its final position to the first respondent maintaining that there was no liability under the policy.

On 31st August, 2012, the applicant received a ruling from the first respondent wherein it was decided that the applicant settles the second respondent's claim on grounds that it did not sufficiently discharge the onus of disproving the possibility of external causes of the damages and due to failure to disclose facts which were very material to the risk which was being covered.

The Applicant being aggrieved by the first respondent's decision now seeks an order of certiorari setting aside and quashing the decision, an order of prohibition prohibiting the Respondents from implementing, enforcing or taking further action on the basis of the said impugned ruling and an injunction restraining the Respondents, their officers, servants and/or agents from proceeding to implement the illegal decision.

The Applicant contends that the first respondent's decision was in exercise of its functions under Section 10 (b) of the Insurance (Amendment) Act, 2011 and not an arbitration process as had been requested by the second respondent as this required liability to be admitted under the policy (Clause 16) which was not the case here.

It is the case for the first respondent that it's ruling on the claim was based on facts presented before it at the hearings and therefore is not erroneous.

It is the case for the second applicant that it made a justified claim for loss it it incurred while under insurance cover provided for by the applicant and that this application is an attempt to appeal the decision of the first respondent but not review.

Mr J. Magezi appeared for the applicant while Mr C. Wanyama appeared for the first respondent and Mr. C Mayiga and Mr. E. Busulwa appeared for the second respondent.

The case for the Applicant

It is the case for the applicant that the decision of the first applicant is tainted with illegality because the said decision has an error of law on the face of the record because

i. It failed to take into account the provisions of the insurance policy
ii. It took into account inadmissible evidence

It is also the case for the applicant that the decision of the first respondent is irrational.

Counsel for the applicant submitted that the decision of the applicant cannot be subject to judicial review because the first respondent in adjudicating the dispute between the applicant and the second respondent exercised its power in violation of the basic standards of legality, fairness and rationality. He referred court to the decision of **Lord Diplock** in **Council of Civil Service Unions v. Minister for the Civil Service (1985,) AC. 374** where he held that it is trite that judicial review can only be granted on three grounds namely: illegality; irrationality and procedural impropriety.

On the issue of illegality counsel for the applicant referred Court to the decision of Justice Remmy Kasule (as he then was) in the case of **Fr. Francis Bahikirwe Muntu & 15 others versus Kyambogo University,** High Court Miscellaneous Application No.643 of 2005 where he defined illegality as

> *"…Illegality is when the decision making authority commits an error of law in the process of taking its decision. An exercise of power that is not vested in the decision making authority is such an instance. Acting without jurisdiction or ultra vires are instances of illegality. A decision maker who incorrectly informs him/herself as to the law or who acts contrary to the principles of the law is guilty of an illegality..."*

He further referred Court to the author **Peter Kaluma** in the book **Judicial Review, Procedure and Practice** at pages 128-129 where he writes that , a decision of an administrative authority can be quashed if there is an error of law apparent on the face of the record, even if the error is non jurisdictional. Error is apparent on the face of the record if it can be ascertained merely by examining the record without having recourse to other evidence. The error must be self-evident, patent or manifest. It must not require in-depth examination or long-drawn process of reasoning or argument to establish. An error which has to be established by lengthy and complicated arguments is not an error of law apparent on the face of the records.

Counsel for the applicant submitted that the first respondent failed to take into account Clause 18 of the General Conditions of the Policy that provided that

> *"…the due observance and fulfillment of the terms, conditions and endorsements of this policy by the Insured in so far as they relate to anything to be done or complied with by them shall be conditions precedent to liability of the Insurers to make payment under this policy …"*

One such condition Clause *7* (a) of the General Policy Conditions [at page 43 of the Policy] was that "*….on the happening of any loss destruction or damage, the insured shall forthwith give notice thereof in writing to the Insurers and shall within fifteen days after such loss destruction or damage or such further time as the Insurers may in writing allow deliver to the Insurers a claim in writing of all such proofs and information with respect to the claim as may be reasonably required together with if demanded) a statutory declaration of the truth of the claim and of any matters connected therewith..."*

Counsel for the applicant submitted that the second respondent's insurance broker reported to the applicant on the 14th December 2010 that the damage to the silo occurred between September and October 2010 which was in breach of the above policy provisions. Therefore the decision that the applicant pays the claim was made in disregard to these provisions.

Secondly counsel for the applicant submitted that Section C of the Insurance Policy in respect of Machinery Break down, provided that the Insurer was liable to indemnify the Insured where the items entered in the schedule *suffer any unforeseen and sudden physical loss or damage* from causes including faulty design and faults at workshop or in erection.

He further submitted that under the Insurance Contract, the burden of proving that the loss or damage was covered under the Policy was on the Insured. In this case the second respondent in proving that the damage/loss was unforeseen and sudden and thus an event covered by the policy submitted a computer printout of a report published on 5th December, 2005 showing an earthquake affecting Kampala to substantiate its claim that the accidental nature of the damage to its silos was as a result of seismic movements. It was this report that the first respondent wrongly admitted because it was a computer print out which had not been authenticated within the meaning of Sections 2 and 8 (2) and (3) of the Electronic Transactions Act 2011.

Counsel for the applicant further submitted that the decision of the first respondent was irrational because they found that the cause and nature of damage to the second plaintiff's silos had not been evaluated by experts of both the applicant and second respondent and that the best action would have been for a neutral engineer or loss adjuster appointed by the parties to have done so. However the first respondent instead of ruling that the parties appoint a neutral expert found that the applicant had not discharged the onus to show that the damage was caused by external causes that were sudden and unforeseen in addition to having acted contrary to the principles of utmost good faith.

Counsel for the applicant relied on the case of **Fr. Francis Bahikirwe Muntu & 15 others versus Kyambogo University,** High Court Miscellaneous Application No.643 of 2005 where irrationality was defined as

> *"…'when the decision making authority acts so unreasonably that in the eyes of the court, no reasonable authority addressing itself to the facts and the law before it would have made such a decision. Such decision must be so outrageous in its*

defiance of logic or acceptable moral standards that no sensible person applying his/her mind to the question to be decided could have arrived at such a decision…"

He then submitted that any reasonable authority addressing itself to the facts and the law before it would not have made such a ruling.

Counsel thus prayed for an order of certiorari to restore the status quo ante and prohibition to forbid the acting on the impugned decision.

The case for the first Respondent

It is the case for the first respondent that this application is incompetent, misconceived and discloses no cause of action. It is also the case of the first respondent that they made the said decision under the powers conferred on them under section 15 (2) F of the Insurance Act as amended and so it is not ultra vires.

Counsel for the first respondent submitted that this application was in essence a disguised appeal which is contrary to the purpose of an application for judicial review. He submitted that the remedy of judicial review is concerned not with a decision in issue per Se, but with the decision making process. Counsel for the first respondent submitted that judicial review involves the assessment of the manner in which the decision is made; it is not an appeal, and the jurisdiction is exercised in a supervisory manner, not to vindicate rights as such, but to ensure that public powers are exercised in accordance with the basic standards of legality, fairness and rationality. In this regard he referred me to the case of **Pius Niwagaba vs. LDC** CA No: 18/2005.

Counsel for the first respondent further submitted that the purpose of judicial review is to ensure that the individual receives fair treatment, but not to ensure that the authority, after according fair treatment, reaches on a matter which it is authorized or enjoined by law to decide from itself a conclusion which is correct in the eyes of the Court. In this regard he referred me to the case of **Chief Constable of North Wales Police Vs Evans** [1983] ALL ER 141. Counsel for the first respondent submitted that the applicant had been accorded a fair hearing prior to the first respondent making its decision.

Counsel for the first respondent further submitted that those things which the legislature has authorized, ought not (unless expressly prohibited) to be held, by judicial construction, to be ultra vires and in this regard he referred court to the case of **Attorney General versus Cray ford Urban District Council** [1962] I CH 246 at 252-3. Counsel for the first respondent therefore submitted that the decision in issue cannot therefore be challenged by way of judicial review as it was pursuant to the statutory authority mandated vide S. 15(2) (f) of the Insurance Act Cap. 213 and the applicant has not availed Court with any evidence of illegality, unfairness irrationality affecting the said decision.

Furthermore counsel for the first respondent submitted that judicial review will not normally be permitted if there is an alternative appellate provision. In this regard he referred court to the case of **R Vs Brighton Justice, Exparte Robinson** (1973) I WLR 69. In this case section 9 (2) (A) of the Insurance Act provides for Insurance Appeals Tribunal and Section (9) (2) (B) provides for a right of appeal to the Tribunal against decision of the authority which has not been used.

The case for the second respondent

It is the case for the second respondent that the first respondent did not in anyway act illegally when it made its decision. It also the case of the second respondent that the first respondent did not fail to take into account the provisions of the insurance policy, or take into account evidence that was inadmissible, or made a decision that was irrational.

Counsel for the second respondent submitted that judicial review is a specific remedy. He referred Court to Halisbury's Laws of England 4' Edition Vol (1) (1) para 60:

> *"…Judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made but the decision-making process itself. It is different from an ordinary appeal. The purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he is subjected. It is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power…"*

Counsel for the second respondent submitted that the cause of the damage was what had been insured and this had been established by M/s Starlites Engineers Report. Furthermore the first respondent used reports of the experts from both sides to reach the conclusion in their decision.

Counsel for the second respondent further submitted that the applicant went on to process the claim and appoint adjusters without reference to the notification clause and so were not prejudiced by what they claimed was a late notification. In any case this claim required the assessment of experts first which was done by M/s Michael Meagher on or about 9th December 2010 and then the claim lodged on the 14th December 2010. Counsel for the second respondent submitted that all this was taken into account by the first respondent.

On the issue of the earthquake report counsel for the second respondent submitted that it was not a computer print out and that section 8 (1) (c) of the Electronic Transactions Act was not applicable to this case because it provides that that rules of evidence cannot be applied so as to deny the admissibility of an electronic record merely because it is not in its original form. He submitted that section 4 of the same Act provides that these rules as to evidence are applicable to courts as provided in the section but not tribunals such as that of the first respondent which are not bound by the same rules.

Counsel for the second respondent submitted that there was no irrationality in the decision of the first respondent. He referred court to the decision of **COUNCIL OF CIVIL SERVICE UNIONS** vs. **MINISTER FOR THE CIVIL SERVICE [1984] 3 ALL ER 935,** where **Lord Diplock** held page *950*

> *"…By 'irrationality" I mean what can be now succinctly referred to as "wednesbury unreasonableness" (See ASSOCIATED PROVINICAL PICTURE LTD vs WEDNESBURY CORP [1947] 2 All ER 680. It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system…"*

He further referred Court to the **SUPREME COURT PRACTICE 1997, Volume 1 14/6,** where it is written

> *"…The court will not, however, on judicial review application act as a "Court of Appeal" from the body concerned, nor will the court interfere in any way with the exercise of any power of discretion which has been conferred on that body, unless it has been exercised in a way which is not within the body's jurisdiction, or the decision is Wednesbury unreasonable. The function of the court is to see that lawful authority is not abused by unfair treatment. If the court were to attempt itself the task entrusted to that authority by the law the court would, under the guise of preventing the abuse of power be guilty itself of usurping power…."*

Counsel for the second respondent submitted that to the applicant seeks to doubt the first respondent's evaluation of the availed evidence which is a ground of appeal not review.

Resolution

I have read the notice of motion and the affidavits for and against it. I have also considered the submissions of all counsels for which I am grateful.

The applicant seeks to review the undated decision of the first applicant Authority of August 2012 (which they received on the 31st August 2012) in which the said Authority decided that the applicant settle the claim of the second respondent of Shs 2,386,226,000/= being the damage occasioned to their silos while on cover with the applicant.

The first respondent submits that it is carrying out its functions under Section 15 (2) (f) of the Insurance Act which provides one of the objects and functions of the Authority as to

> *"…provide a bureau to which complaints may be submitted by members of the Public…"*

It is the case for the first respondent that on the 24th January 2012 they received a letter from the Managing Director of the Second Respondent entitled "Arbitration of Our Insurance Claim" in which the Managing Director of the second respondent requested the first respondent to compel the applicant to pay their claim. The first respondent clearly treated this request for arbitration as a complaint under Section 15 (2) (f) of the Insurance Act. Counsel for the applicant appears to agree with this position and submitting that the said request for arbitration would fit within the parameters of arbitration clause in the policy (clause 16).

To that extent it is agreed that the in making the decision that they did the first respondent was exercising its mandate under the Insurance Act as amended.

That being the case the role of this Court under judicial review is well stated in the law and that is to deal with the decision making process and not the decision and see that the process meets the basic standards of legality, fairness and rationality (See case of **Pius Niwagaba Supra**). The sole purpose of this review is to prevent the abuse of power by such an authority as is accorded to it as by law established. There is plenty of legal authority on this point which I need not emphasize any further.

What the role of the Court is not on the authorities is for it to substitute its own decision for that of the authority and as pointed out by **Halsbury's Laws of England** Vol 1 (1) para 40 (Supra) unless that restriction on the power of the court is observed the court will, under the guise of preventing the abuse of power, be itself, guilty of usurpation of that very power.

Paragraph 3 of the grounds in the Notice of Motion states

> *"…that the Applicant brings this application against the Respondents in this Honourable (sic) owing to the non-existence of a duly constituted Insurance Appeals Tribunal in accordance with Section 92A of the Insurance (Amendment) Act 13 of 2011…"*

Paragraph 7 of the same grounds further states

"… That the decision is unreasonable because highly significant factors were not given proper weight and/or because the decision could not have been reached on the information available…"

Section 92A of the said Act sets up the Insurance Appeals Tribunal as rightly pointed out. More importantly however Section 92B and C provides that

"… 92B. Tribunal to review decisions of the Authority.

(1) A person who is aggrieved by a decision of the Authority, may within one month from the date the decision is communicated by the Authority, appeal to the Tribunal against the decision.

(2) The Authority shall not decide any matter brought before it without giving the appellant an opportunity to be heard.

92C. Decisions of the Tribunal

(1) The Tribunal may uphold, reverse, revoke or vary a decision of the Authority…"

This section provides an appeals procedure to decisions of the Authority a most welcome improvement to the Act much in line with other similar Authorities like the Uganda Revenue Authority which has the Tax Appeals Tribunal as well.

Section 92D then provides

"…92D.Appeals to High Court from decisions of Tribunal
A party to the proceedings before the Tribunal who is aggrieved by the decisions of the Tribunal, may within one month from the date of communication of the decision of the Tribunal, or within such further time as the High Court may allow, lodge a notice of appeal with the High Court…"

This basically allows an appeal an appeal from the tribunal to lie to this Court.

Looking at the grounds in the Motion it appears this application was made in lieu of an appeal under Section 92A because since 2011 this Tribunal has not been put in place.

The **Supreme Court Practice Commentary** (Supra) cited by Counsel for the second respondent on this point is instructive and I accept it. That is a court on a judicial review application will not act as a "Court of Appeal" from the body concerned. In other words this Court cannot by way of judicial review address itself to highly significant factors that were not given proper weight and/or look at a decision that could not have been reached on the information available; as prayed for in the grounds to this motion.
It is most unfortunate that Section 92 of the Insurance Act as amended has not been made operational and this is unfair to parties which may wish to appeal decisions of the Authority. This the Authority must remedy as soon as possible.

As for judicial review I am unable to find illegality in the decision making process because the

authority is legally mandated to handle complaints and in so making the decision it made did not act ultra vires its powers.

Equally the decision of the Authority does not meet the legal test of irrationality because it cannot really be said to be so outrageous that it defies logic or acceptable moral standards that no reasonable person applying their mind to the question could have arrived at that decision.

If the Authority made the wrong decision on the evidence available to it at the time then that is a judgment call that should be the subject of an appeal but not judicial review. There is from a procedural point of view sufficient evidence through the correspondence that due process was observed and that the applicant was given an opportunity to present its case.

Since the appeal window is not yet open the applicant should seek other legal avenues rather than judicial review which is of limited application.

All in all this application is misconceived and is dismissed. Since the second respondent has not put in place an appeal mechanism as required by law which is the real reason for this application I order that each party bears their own costs

…….
Geoffrey Kiryabwire
JUDGE

Date: 18/04/13

18/04/13
9:30

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

- Magezi for Applicant

In court

- Mugwanya for Applicant
- Rose Emeru – Court Clerk

Magezi: I have instructions to appeal. I seek leave accordingly.

Court: Leave to appeal granted.

……..…

Geoffrey Kiryabwire

JUDGE

Date: 18/04/2013