

**THE REPUBLIC OF UGANDA,
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
CIVIL SUIT NO 684 OF 2015**

MICROCARE INSURANCE LTD}.....PLAINTIFF

VERSUS

INSURANCE REGULATORY AUTHORITY OF UGANDA}.....DEFENDANT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

RULING

This ruling arises from a preliminary objection to the Plaintiff's suit on the ground that it is time barred under section 3 of the Limitation Act cap 80 laws of Uganda. The submission is that the Defendant is a scheduled Corporation according to number 44 of the third schedule to the Civil Procedure and Limitation (Miscellaneous Provisions) Act, Cap 72 laws of Uganda 2000. It is contended that the Plaintiff's action is founded on tort which ought to be filed within two years from the date the cause of action arose.

The Defendant is represented by Dr Byamugisha while the Plaintiff is represented by Counsel Robert Kirunda. The court was addressed in written submissions.

The Defendant's Counsel submitted that the plaint is barred by the law of limitation. According to the plaint, the Defendant is the INSURANCE REGULATORY AUTHORITY OF UGANDA. Under **Section 9 of the Insurance (Amendment) Act No. 13 of 2011** it is provided that:

"9. Amendment of section 14 of the Principal Act

Section 14 of the Principal Act is amended by substituting for "a Uganda Insurance Commission" the words "the Insurance Regulatory Authority of Uganda".'

The Uganda Insurance Commission was a scheduled corporation according to No. 44 in the Third Schedule of the Civil Procedure and Limitation (Miscellaneous Provisions) Act, Cap. 72 Laws of Uganda 2000 and though renamed remains a scheduled corporation. According to section 3 of the Act no action founded on tort shall be brought against a scheduled corporation, after the expiration of two years from the date on which the cause of action arose. With reference to paragraphs 3 and 14 of the plaint it is averred as follows;

‘3. the Plaintiff’s claim against the Defendant is for general damages for loss of business, loss of income, loss of earnings and misfeasance in public office, interest and costs of the suit.’

Paragraph 14 of the plaint summarizes the cause of action as follows;

‘14. the Plaintiff shall aver that the Defendant’s officers were malfeasant in their conduct and as a result of the Defendant’s actions to wit; refusal to grant a licence and publishing a list of licensed companies without including the applicant, petitioning for winding up of the Plaintiff on baseless considerations, declining to arbitrate between the Plaintiff and its reinsurers, the Plaintiff has suffered great injury to its reputation and image in the public, incurred great loss of business and earnings for which it holds the Defendant liable.’

According to paragraph 4 (b) of the plaint the cause of action arose in 2009 when the Defendant refused to grant a licence to the Plaintiff to carry on insurance business and refusal to grant the licence in 2009 is the crux of the Plaintiff’s cause of action. In the judgment of Kania, J. in **Gulu H.C.C.S No. 0066 of 2002 Onegi Obel and Anor vs. the Attorney General and Anor** breach of statutory duty is a tort and so is misfeasance in public office. The two years within which the Plaintiff should have instituted its suit has long passed when the suit was filed on 21st October, 2015. The Defendant’s Counsel prayed that the suit should be struck out with costs to the Defendant.

In reply the Plaintiff’s Counsel opposed the objection and in reply submitted that Section 3 of the Civil Procedure and Limitation (Miscellaneous Provisions) Act, Cap 72 of the Laws of Uganda on which the Defendant’s submissions is anchored is limited to tortuous claims only and is to that extent not sufficient to warrant the striking out of the Plaintiff’s suit. He submitted that the Defendant has misinterpreted the Plaintiff’s cause of action by giving it a narrow interpretation, thereby misdirecting himself on the time within which the plaint ought to have been filed.

The Plaintiff’s Counsel submitted that the Plaint and its annexure read together demonstrate that the suit is not time barred. He invited court to note that while the Defendant properly pointed court’s attention to paragraphs 3 and 14 of the Plaint, it is important that these paragraphs be read more critically. Paragraph 3 shows that the Defendant’s claim joins several causes of action. Counsel further submitted that in essence, the claim is founded not just on misfeasance in public office and breach of statutory duty but also on loss of business, loss of income and loss of earnings. The causes of action in this suit are distinct and separate and should not be read as one paragraph. Such a narrow reading would lead to a misinterpretation of the facts and issues in this suit and a miscarriage of justice. The events arose at different times and must be treated as such. Furthermore the Plaintiffs Counsel contended that

section 3 of the Civil Procedure and Limitation (Miscellaneous Provisions) Act Cap 72 must be read together with Section 3 of the Limitation Act Cap 80 which prescribes a 6 year window within which to bring an action to recover any sum by way of enactment. The Limitation Act supplies a wider timeframe for non- tortuous claims, such as the ones in the attendant plaint. It is apparent therefore that Section 3 of the Civil Procedure and Limitation (Miscellaneous Provisions) Act Cap 72 is insufficient to warrant the striking out of the Plaintiff's suit. In determining when the cause of action arose, court should consider the decision in **Charles Lubowa and others vs. Makerere University S.C.C.A No. 02 of 2011**, where Katureebe JSC held that one has to look at all the facts and peculiar circumstances of the case and pleadings have to be considered in their entirety to be able to conclude that there were present all the facts which were material.

The Plaintiff's Counsel submitted that the court should consider not just paragraphs 3 and 14, but the plaint in its entirety, together with the annexure thereto. In so doing, it is apparent for instance that paragraph 9 (e) of the Plaint, avers that as a result of the Defendant's conduct, the Plaintiff suffered great loss of business, income and prospective profit in that the Plaintiff lost the income it would have earned if it had utilized the funds that were illegally held by the Defendant, and the funds that the Defendant did not aid the Plaintiff in recovering from the reinsurers. Various letters annexed to the Plaint from the Plaintiff requesting the Defendant to furnish information regarding funds it held, annexed as "0" to the Plaint and further requesting the Defendant to arbitrate the dispute between the Plaintiff and her reinsurers, further annexed as "N1" and "N2", support these facts. The facts now have the notoriety of judicial precedent. (See: Micro Care Insurance Limited v. Insurance Regulatory Authority of Uganda Miscellaneous Application 442 of 2014). These facts are not outside the prohibited statutory timelines.

(ii) At Paragraphs 11, 12 and 13, the Plaintiff demonstrates that the Defendant wantonly ignored her duty to arbitrate between the Plaintiff and her reinsurers, or otherwise breached it by not acting on repeated requests as late as in 2014, which is within the time allowed by statute. It is clear from the reading of these paragraphs and the annexure attached thereto that the Defendant was being consistent in her infractions against the Plaintiff, which had commenced as far back as 2009.

(iii) Each of the annexure contained a different request for arbitration that was never acted on. Each of the annexure contained a different request for information on how much funds were being held by the Defendant and each request was ignored. This information was crucial for the Plaintiff to rearrange her affairs. Each letter that was ignored supports a cause of action for breach of statutory duty. Most of these

correspondences were in 2014. This was within the time frame in which the Plaintiff was entitled to file the suit.

(iv) It is also clear from reading these paragraphs that rather than furnish the Plaintiff with vital information to enable the Plaintiff rearrange her affairs, the Defendant elected to file a winding up petition on 21st May, 2014, even though the Defendant had indicated that the decision to wind up the Plaintiff would be made at the end of 2014 (see annexure "O" to the Plaintiff). In so doing, the Defendant was simply acting on the bad faith exhibited in her letter of May 29th 2012 where, rather than arbitrate the dispute between the Plaintiff and the Defendant, the Defendant expressed the "opinion" that the Plaintiff should be wound up.

He submitted that the Defendant is aware that the Plaintiff has filed Miscellaneous Application No. 168 of 2017 seeking to amplify the facts in the Plaintiff, particularize each cause of action pleaded by the Plaintiff and clarify the material questions in the dispute. Read together with the Plaintiff, it is apparent that the Plaintiff's multiple causes of action are sustainable and were brought within the statutory time frames permitted under the Law. The Respondent therefore submitted and prayed that court be pleased to dismiss the preliminary objection and proceed to hear the pending Applications before the court.

In rejoinder the Defendant's Counsel submitted that turning to the second page of the Plaintiff's submissions that section 3 of Cap. 72 of Laws of Uganda 2000 should be read together with section 3 of the Limitation Act Cap 80, each statute is separate and distinct and the Civil Procedure and Limitation (Miscellaneous Provisions) Act is a special statute for, as its heading states, in part

"...the Limitation of certain actions, for the protection of persons against actions of persons acting in the execution of public duties ..."

(i) Plaintiff's reliance on paragraph 9(e)

Here, Plaintiff's submissions state, inter alia, that:

"...the Plaintiff lost the income it would have earned if it had utilized the funds that were illegally held by the Defendant; and the funds that the Defendant did not aid the Plaintiff in recovering from the reinsurers".

The Defendant's Counsel submitted that letters annexure "O" and "N1" and "N2" are referred to. As to funds held by the Defendant, those were held since the revocation of the licence in 2009. Their claim is time barred since "O" is dated August 14, 2012. "N1" is dated March 3, 2014. It refers to sums accruing since the refusal to grant a licence. It adds

“3. Through this letter we are again raising a complaint against ZEP RE ... and African Reinsurance Corporation ...”

He further submitted that "N2" was written in May 29, 2012 on outstanding premium with reinsurers and it annexed a letter of April 25th, 2012 which concluded as follows:

"While we appreciate that Microcare Insurance Ltd have finally approached the regulator for intervention, the reinsurers wish to emphasize that in order to be able to process the claims in accordance with the treaty terms and conditions, we still await copies of all outstanding documents which must be provided by Microcare Insurance Limited and payments due to the reinsurers made to date".

He also submitted that the Plaintiff does not claim that it complied and the year is also 2012, putting the claim against the Defendant out of time.

(ii) Paragraph 11, 12, and 13 of the plaint

"In these paragraphs Plaintiff state that, Defendant wantonly ignored her duty to arbitrate between the Plaintiff and her reinsurers or otherwise breached it by not acting on repeated requests as late as in 2014, which is within the time allowed by statute".

The Defendant's Counsel submitted that as demonstrated above, requests were first made in 2012, and repeating them does not constitute a fresh cause of action.

(iii) Whether each letter that was ignored support a different cause of action?

The Defendant's Counsel submitted that only the first letter matters for the cause of action to start running.

(iv) Bad faith exhibited in letter of May 29 2012 and winding up petition in 2014.

He submitted that if bad faith was exhibited in 2012, the cause of action arose then. Filing a suit or petition does not constitute a cause of action. If a suit or petition is dismissed on the ground that it should never have been filed, the party get costs only.

The above matters raised by the Plaintiff against the Defendant are res judicata since they were raised and decided upon in High Court Company Cause No. 17 of 2014.

Ruling

I have carefully considered the submissions of Counsel as detailed above. The fact that a cause of action arising from tort should be filed in court within two years from the date the cause of action arose is not contentious and I do not need to refer to the law which has been set out by

Counsels. The real primary question for determination by the court is when the cause of action arose and secondly what the cause of action is.

The question of whether a suit is time barred is a question of law and can be considered under Order 7 rule 11 (d) of the Civil Procedure Rules which deal with the rejection of plaint and provides as follows:

"The plaint shall be rejected in the following cases –...

(d) where the suit appears from the statement in the plaint to be barred by any law;"

What therefore needs to be considered is whether the suit appears from the statement in the plaint to be barred by any law namely the law of limitation. Paragraph 3 of the plaint provides as follows:

"The Plaintiffs claim against the Defendant is for general damages for loss of business, loss of income, loss of earnings and misfeasance in public office, interest and costs of the suit."

Paragraph 4 gives the facts giving rise to the Plaintiff's cause of action. Among other facts it is disclosed that the Plaintiff commenced operations in 2005 and obtained licenses and run a successful insurance business until 2009 when the Defendant stopped the Plaintiff from writing new insurance business. It is averred in paragraph 4 (c) that the Defendant unlawfully appointed an audit firm which produced an audit report that was fraught with irregularities and inconsistencies and at all times the Plaintiff challenged its findings. In paragraph 4 (b) the Plaintiff was illegally denied a licence in 2009 due to the findings contained in the audit report. Several facts are alleged as having arisen from the alleged erroneous or wrongful action of the Defendant flowing from the audit report. In paragraph 5 of the plaint it is alleged that the Defendant acted unlawfully in relying on the document to form an opinion on the financial status of the Plaintiff for licensing purposes as the document was not an audit report neither was it a final document for purposes of determining the Plaintiff's financial status. In paragraph 6 it is averred that the Defendant deprived the Plaintiff of the right to an independent inspection after the Plaintiff rejected the findings of the first investigation contrary to Regulation 32 of the Insurance Regulations of Uganda 2002. In paragraph 8 it is alleged that the Defendant acted in violation of the court order by publishing notices that damaged the estimation of the company's business contrary to an order of the High Court dated 25th of March 2009. It is alleged that as a result of the Defendants conduct, the Plaintiff suffered loss of business, income and prospective profit. Consequential damages are pleaded in paragraph 9. Paragraph 10 of the plaint reiterates inability to meet the obligations due to denial of licensing from 2009. This is repeated in paragraphs 11. In paragraph 14 misfeasance in a public office is alleged.

I have carefully considered the complaint and I agree with the Defendant's Counsel that the crux of the dispute is the denial of a licence to the Plaintiff in the year 2009 which led to a series of other actions and proceedings. I must add that the denial of a licence ought to have been made a ground of an application for judicial review if it was unlawful. As a licensing authority, the appropriate remedy for the exercise of administrative power or statutory power lies in the realm of public law and judicial review of administrative action. The Plaintiff does not clearly specify what the cause of action of unlawful refusal of a licence is. An application for judicial review is to be made within three months or at most six months. That is not the crux of the Plaintiff's case as in the realm of public law and I do not need to elaborate on the Judicature (Judicial Review) Rules 2009 and rule 5 (1) thereof which provides that:

“5. Time for applying for judicial review.

(1) An application for judicial review shall be made promptly and in any event within three months from the date when the grounds of the application first arose, unless the Court considers that there is good reason for extending the period within which the application shall be made.”

Secondly, a person who has been unfairly treated in an administrative decision has a right to apply to a court of law under article 42 of the Constitution in respect of the administrative law decision taken against him or her. That is the crux of the complaint against the authority. The action could not have been founded on contract.

As far as the breach of statutory provisions is concerned, it would still be an administrative law suit. As an ordinary suit, it is not founded on contract but on tort. Breach of Statutory duties is a tort at common law and entitles a Plaintiff upon proof to damages or an injunction or to both. In the case of **Dawson vs. Bingley Urban Council [1911] 2 KB 149**, it was held by Farwell L.J. at page 156 that:

“..breach of a statutory duty created for the benefit of an individual or a class is a tortious act, entitling anyone who suffers special advantages there from to recover such damages against the tortfeasor”.

According to Vaughan Williams L.J. at page 153:

“Although well established authorities make it clear that public bodies representing the public are not liable to be sued by an individual member of the public who has sustained injuries in consequence of the omission of such a body to perform a statutory duty created for the benefit of a class of which such a person is one, yet the Public body may be liable if by its acts, it alters the normal condition of something which it has a statutory duty to maintain and in consequence some person of a class for whose benefit the statutory duty is imposed is injured. The reason why the Public Body is liable in such a

case is that it is not mere non-feasance but a misfeasance of the public body, which has caused the injury.”

Kennedy L.J. at page 159 held that the proper remedy for a breach of statute is an action for damages especially where the statute lays no rule for non-compliance or breach and in appropriate cases an injunction.

In the case of **Vermeulen v. Attorney General and Others [1986] L.R.C (Const) 786**, it was held by Mahon J of the Supreme Court of Samoa at page 823 in a suit for damages of 200,000 tala that:

“The basis for these claims is the tort of misfeasance in public office. There can be no doubt that this tort does exist as a separate basis for legal liability and there are many academic writings supporting this view. ... this species of wrong is described as “the well established wrong of misfeasance by public officer in the discharge of his public duties”. The act complained of must be either an abuse of power actually possessed or an act, which is a usurpation of authority, which is not possessed, but the essential ingredient of the tort is the presence of malice in the exercise or the purported exercise of statutory power. Malice obviously includes a state of mind representing malice in the popular sense, namely an attitude of ill-will or spite against the Plaintiff, and then there is the different situation where an official acts beyond his jurisdiction with knowledge of that fact. But there can be no difference between those two motivations insofar as this particular tort is concerned. It is to be emphasised that malice in this context will include a situation where there is no element of personal spite or ill will. It includes the case where a person is actuated by reasons, which are collateral to and not authorised by the rules of conduct by which he is bound. In a case of this sort, a public officer may exercise his official powers against another person for reasons devoid of ill-will but motivated by the desire to reach a result not comprehended by the power of decision or the power of discretion with which he has been invested.”

From the above authorities, the Plaintiff does not have any other cause of action other than in tort. With regard to the failure to comply with a court order or acting contrary to a court order issued in 2009, it can only be enforced by the court which made the order and not by a separate action (see section 34 CPA).

With regard to acting contrary to regulation 32 of the Insurance Regulations, it is either an administrative law suit or an action in tort.

My overall conclusion after perusal of all paragraphs of the plaint and attachments is that the Plaintiff’s action as disclosed in the plaint could only be founded on tort and the cause of action arose in 2009. The claim for loss of income is a consequence of failure to operate a business and

is not itself the cause of action but the consequence of the cause of action. It follows that the Defendants submissions detailed above is supported by the law.

The Plaintiff's action having been filed in 2015 is time barred and accordingly rejected with costs under the provisions of law Order 7 rule 11 (d) of the Civil Procedure Rules.

Ruling delivered in open court on the 12th of May, 2007

Christopher Madrama Izama

Judge

Ruling delivered in the presence of:

Dr. Byamugisha Counsel for the Defendant,

Lillian Drabo Counsel for the Defendant

Charles Okuni: Court Clerk

Julian T. Nabaasa: Research Officer Legal

Christopher Madrama Izama

Judge

12th May, 2017