THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

MISCELLANEOUS CAUSE NO. 329 OF 2017

MICROCARE INSURANCE LTD:: APPLICANT

VERSUS

CENTENARY RURAL DEVELOPMENT BANK :::::::::::::::::::::: RESPONDENT

BEFORE HON. JUSTICE MUSA SSEKAANA

RULING

BACKGROUND

The applicant filed this suit under section 98 of the Civil Procedure Act, Cap 71 and Order 52, Rule 6 of the Civil Procedure Rules, SI 71-1 seeking orders that;

a) all funds held in escrow or in any part thereof as the court may so determine by Sebalu & Lule Advocates in favour of the respondents, for settlement of the alleged outstanding claims by respondents against the applicant arising out of a contract of insurance, be released forthwith as the applicant does not owe the respondent the alleged sums; and

b) any funds established as due and owing to the applicant from the respondent be paid henceforth and without delay and the court makes any such other reliefs so far as possible resolved any matters in dispute and outstanding between the parties.

The parties executed insurance policy agreements from 2006 to 2009. In 2014, the Insurance Regulatory Authority filed Company Cause 17/2014 seeking to wind

up the applicant. The respondent joined the proceedings in company cause 17/2014 and supported the petition. The respondent also made a claim for sums totaling to UGX. 37,593,490/=. The claim was substantiated by the affidavit of one Peninah Kasule which was accompanied by a number of annextures. In order to reach a swift resolution of the issues in Company Cause 17/2014, the parties to the instant application executed a consent judgement. Pursuant to the terms of that consent judgement, the applicant deposited UGX. 37,593,490/= in escrow held by M/S Sebalu & Lule Advocates. It was agreed that the fund in escrow would be released upon settlement of all disputes between the applicant and the respondent which matters were to be resolved in thirty days from the date of the consent judgement. The respondent and her counsel frustrated every effort to resolve all outstanding maters within the agreed timeline despite the applicant's numerous efforts to do so.

The respondent contended that the applicant failed to make any objections to the claims the respondent submitted to it for reimbursement of expenses its employees had incurred to access the services that they were entitled to access without charge under the insurance policy. The respondent stated that it is entitled to payment of its employees' claims to the sum of UGX. 37,229,590/= currently being held in escrow by Messr. Sebalu & Lule Advocates and that the applicant is not entitled to recover any sums allegedly owed by the respondent having failed to demand for the payment of the same or filed a suit for recovery within the time permitted by law.

The applicant was represented by *Mr. Robert Kirunda* whereas the respondent was represented by *Mr. James Zeere*.

The parties filed a joint scheduling memorandum wherein they proposed the following issues for determination by this court.

1. ***Whether the applicant is entitled to release of the funds in escrow by M/s Sebalu & Lule Advocates.***
2. ***Whether the applicant is entitled to recover any sums owed by the respondents.***
3. ***What remedies are available to the parties?***

The parties were ordered to file written submissions and they accordingly filed the same.

Both parties' submissions were considered by this court.

DETERMINATION OF ISSUES

Issue 1

Whether the applicant is entitled to release of the funds in esrow by M/s Sebalu & Lule Advocates.

Submissions

Counsel for the applicant submitted that the applicant is entitled to release of funds held in escrow based on the affidavit of Dr. Gerald Noble and its accompanying annextures.

He stated that the terms of the consent judgement between the parties provided that any funds found to be lawfully owing to the interested party shall be released from the escrow upon making of such a determination. He stated that the funds should be released to the applicant. Counsel stated that Peninah

Kasule's affidavit filed with the court had a breakdown of sums claimed and a sum of UGX. 5,475,900/= which sum was categorized as "unsubmitted claims". This fact was also borne out in para. 10 of Ronald Sekitto's affidavit in reply where he affirmed that the claims were not submitted in the stipulated time.

It was stated that under the policy between the parties, claims should have been submitted within sixty days or a suit filed within a year from the date on which the claim first arose. The sum "unsubmitted claims" first arose in the course of the winding up proceedings. The terms were discussed between the parties and the respondent was bound by the said contractual obligation. Counsel submitted that from the contents of the letter of January 20th 2016, clause 14 of the insurance policy prohibited the submission of claims beyond the 60 day window and the respondent did not submit the claims in time, nor lodge a suit in time. It was submitted that the duty of this court is to enforce that provision while relying on the case of C& A Tours and Travel Operations v TPS (Uganda) Ltd Misc. Appliic 195 of 2012. Counsel therefore invited court to find that the sum of UGX. 5, 475, 900/= in "un-submitted claims" is not payable to the respondent and should be released to the applicants forthwith.

The applicant denied all the said "submitted claims" as stated in Annexture D to Penina Kasule's affidavit in Company Cause No. 17 of 2014 as the respondent has never submitted official claim documents. The applicant requested for these documents from the respondent in a letter dated October 21, 2015 reference 09/RK/148/2014 but the respondent did not supply them and neither did she attach them to the affidavit in reply.

Counsel stated that the respondent is aware and has never disputed the fact that she was contractually bound to submit claims together with accompanying documents from medical facilities where the services were consumed. It is the applicant's submission that in the absence of such concrete evidence of submission of claims, the respondent is not entitled to any of the sums claimed as proving insurance claims ought to be made by way of documentary evidence which was the contractual obligation the respondent bound herself to. The applicant submitted that the UGX. 32,117,590/= is also not payable to the respondent.

In the affidavit of Penina Kasule, Annexture D filed with court, Kasule set out three tables showing an outstanding debit notes balance in a total sum of UGX 22,357,322/= where the respondent admitted to owing the sum to the applicant. She averred that the respondent had never settled the sum. The applicant submitted that the respondent is bound by this evidence which she brought to court since as a general rule; a reference in a document to an annexture has the effect of incorporating the contents of the annexture in the document (see; ***GM Combined (U) Ltd v AK Detergent Ltd & Others Civil Appeal No. 7/98.*** The applicant invited court to find that the respondent in her pleadings admitted to having owing the applicant the sum UGX. 22,357,322/= in unsettled debit note balances.

Counsel stated that since sum is held in escrow was based on the total claim lodged by the respondent; this portion of the funds must not be allowed to remain under the control of the respondent's counsel.

On other claims submitted as owing to the applicant, Dr. Noble averred in paragraph 10 (d) of his affidavit in support that the respondent owed the applicant a sum UGX.955,000/= for provision of medical identity cards to members of the staff. The respondent denied the same but however submitted Annexture A to Sekitto's affidavit in reply where it invoiced amounts for medical identity cards but no payments were made against these invoices. The applicant therefore invited court to find by the respondents admission and evidence that this sum was owed to the respondent as it was never paid.

It is therefore the applicant's submission that she is entitled to recover all the sums held in escrow by the respondent as the latter is not entitled to hold any of the funds.

The respondent submitted that this case was one for enforcement of the consent judgement entered into by the parties in September 2015 and that the applicant is not entitled to the funds in escrow having failed to comply with the terms of the consent judgement. Counsel stated that by executing the said consent judgement, the applicant confirmed that certain claims had been made by the respondent to which the former had raised certain objections and once those objections were addressed by the respondent, the claims in whose regard there were no objections would become ascertained and would be paid to the respondent out of the funds released and held in escrow.

Counsel stated that the "un-submitted claims" had not been submitted to the applicant at the time they stopped operation and acknowledged claims worth UGX. 5,475,900/= as represented in annexture D of the affidavit of Penina Kasule

and Dr. Noble Gerald. It is however the respondent's submission that the respondent is not barred from recovering that sum because the performance clause 14 of the insurance policy was deterred by the applicant's closure of its operations. He stated that failure to submit "unsubmitted claims" was occasioned by the winding up proceedings that had been commenced against the applicant where any claims would have to be settled. It was therefore the respondent's prayer that court finds the respondent entitled to the "unsubmitted claims" as the same were incurred during the period of cover but could not be submitted since the applicant was not operational.

In respect of the "submitted claims", counsel submitted that by virtue of the consent judgement, the applicant acknowledged that it had received claims from the respondent which if proved would be paid out of the funds held escrow. Counsel further relied on Clause 2 of the consent judgement and stated that it is false when Dr. Noble alleges in para 11 of the affidavit in support of the application and para 7 (h), (i) and (j) of the submissions that the respondent has never submitted the official claim documents for the "submitted claims". The respondent denied allegations that it had failed to submit supporting documents which were requested by the applicant in the letter dated October 21, 2015.

Counsel therefore stated that applicant had not adduced any evidence to prove that they requested any other documents after the correspondences and in the circumstances, all claims not queried stand valid and proved. He therefore prayed that court find the "submitted claims" to the sum of UGX. 32,117,590/= were submitted to the applicant and the same are payable out of the funds being held in escrow and that if any sums be released, to the applicant should be the

sustained objections and the rest being released to the respondent in settled of its uncontested claims.

In rejoinder, counsel submitted that the respondent misunderstood the purpose of this case and the consent judgement in Company Cause 17 of 2014. He stated that the consent judgement only provided for an opportunity to resolve any outstanding issues between the parties and stipulated that the parties should work to resolve the same in a month from the date of its execution. Counsel stated that the claims made in the consent judgement were claims in Insolvency law and not claims in Insurance law as the respondent joined the proceedings in Company Cause 17 of 2014 in order to support the winding up petition of the applicant. Counsel stated that proof was by the affidavit which gave rise to the affidavit of Penina Kasule in which she set out her "claims in liquidation" which she was required to substantiate with sufficient evidence. When the applicant objected to those "claims in liquidation" as set out in the consent judgement, the parties were under the purview of Insolvency Law. The moment the parties agreed to resolve those objections, the respondent then bore the burden to prove her "claims" in Insurance law and it is under this that the parties were subject to the insurance policy agreement.

Counsel in rejoinder submitted that the respondent having admitted that she did not submit the "un-submitted claims before the applicant stopped operating; the respondent is not entitled to these sums. He stated that the respondent has not denied the import of clause 14 of the Insurance policy between the parties that requires claims to be submitted within 60 days or a suit filed within a year. Stoppage of the applicant's business would not be a basis to bypass the

consequence of breaching this clause. The respondent's submission is therefore untenable and that the claims were all time barred and therefore not payable starting with the unsubmitted claims.

In regards to submitted claims, the applicant in rejoinder submitted that it required the respondent to supply all supporting documentation relating to the claims that she alleges were submitted but she did not oblige. It was stated that spreadsheet supplied as Annexture D falls short of the respondent's contractual obligation. The applicant states that it requested for this documentation before the commencement of these pleadings but the respondent did not oblige and has not submitted any evidence of these claims.

Counsel therefore invited court to find in favour of the applicant on issue 1 and release all the funds from escrow.

Determination

I have analyzed the evidence before this court and the submissions of counsel in regard to this issue.

As stated by counsel for the applicant this being a commercial transaction with a signed agreement/ insurance policy, this court has a duty to simply give effect to the contract and not dictate to the parties what court thinks they ought to have agreed if it had read the contract and addressed its mind to the problem which in the outcome has arisen. This is to give effect to the intention of the parties. ***See; Mannai Investment Co. v Eagle Star Life Assurance [1997] A.C 749 HL.***

In respect of the "un-submitted claims", both parties were in agreement as to the effect of clause 14 of the Insurance Policy which prohibited the submission of claims beyond the 60 day window. The respondent through the affidavit evidence by Ms. Penina Kasule in Annexture D stated that indeed, there was a time limit for submission of the unsecured claims which was 60 days according to the policy agreement. She also admitted that the said claims of UGX. 5,475,900/= had indeed not been submitted to the applicant since at the time it had stopped operation. The respondent was aware of the import of this clause to which it had agreed to upon execution. As stated by counsel, stoppage of the applicant's business would not be a basis to bypass the consequence of breaching this clause for claim that was never met by the applicant. In the circumstances, am therefore inclined to believe that this "un-submitted claims" for a sum of UGX. 5,475,900/= were all time barred and therefore not payable by the applicant.

In respect of the "submitted claims" of UGX.32 , 117, 590/=, the applicant denied all the same as stated in Annexture D to Penina Kasule's affidavit in Company Cause No. 17 of 2014 as the respondent has never submitted official claim documents. The respondent denied allegations that it had failed to submit supporting documents which were requested by the applicant in the letter dated October 21, 2015. The "submitted claims" as presented by the respondent during the winding up petition required them to furnish documentation for verification purposes to establish that the employees were indeed treated since the consent judgement did not conclude on outstanding claim.

This court ordered the respondent to produce before it such evidence required in accordance with clause 17.6 to prove the claims set out in the list of submitted

claims. However, the documentation that was submitted was irrelevant to the dispute as the claims therein were not claims in terms of the policy but claims about the quality of service and about the refund policy. They also related to persons not in issue in this dispute and did not also relate to the amounts claimed. Some of the claims were exaggerated and therefore in breach of the duty of good faith. In the case of ***Longway Suitcase Manufucturing Co. Ltd v UAP Insurance (U) Ltd HCCS No. 417 of 2010*** Justice Madrama (as he then was) held that;

"According to the legal doctrine reviewed above, fraudulent or exaggerated claims are considered on the basis of whether firstly the claimant suffered no loss. Where no loss has been suffered, the claim would be fraudulent. Secondly, the claim would be fraudulent where it is supported by false evidence. Thirdly, the claim would be fraudulent where there are deliberately exaggerated figures in the claim. This is also where it is exaggerated for purposes of deceiving the insurer. Finally, such actions would be a breach of the duty of good faith."

Having considered all the evidence on record, it is hard to believe that the "submitted claims" were payable by the applicant since the respondent failed to adduce evidence/ documentation to verify its claim. In the circumstances, I therefore find that the respondent is not entitled to the "submitted claims" of UGX. 32, 117, 590/= held under the funds in escrow. It is clear that non of the said claims were ever submitted to the applicant within the stipulated time. The assertion by respondent's counsel that the applicant had been closed down and is the reason for non submission is unbelievable.

I therefore find that the applicant is entitled to the release of the funds held in escrow by M/s Sebalu and Lule Advocates.

Issue 1 is resolved in the affirmative.

<u>Issue 2</u>

Whether the respondent is entitled to recover any funds from the respondent.

Submissions

Counsel for the applicant relied on section 33 of the Judicature Act, Cap 13 that vests the high court with the power to grant all such remedies as it thinks just in exercise of its jurisdiction in matters brought before it. The applicant submitted that given the admissions made by the respondent in her pleadings in addition to recovering the funds held in escrow, the applicant is entitled to recover all unpaid balances from the respondent since all funds so held are property of the applicant. Counsel further stated the release of these funds does not establish the respondent's financial liability to the applicant.

He stated that it is evident from issue 1 above that there is debit note balance of UGX. 22, 357,322/= and UGX. 955,800/= for provision of medical identity cards to the members of the respondent's staff. He therefore stated that the total sum owed by the respondent to the applicant is UGX. 23,313,122/=. Counsel stated that the respondent attempts to argue that this claim is barred by limitation but that position is false since section 3(1) of the Limitation Act provides for a six year limitation period from when the cause of action arose for disputes arising out of contract.

Counsel submitted that the funds arise from pleadings and evidence filed by the respondent on November 20th 2014 which has been 4years since the cause of action arose and as such is not barred by time.

It is the applicant's submission therefore that the sum above has always been in issue since the respondent raised it in Penina Kasule's affidavit and invited court to find that the claim for repayment of these funds is not time barred and should be granted.

The respondent submitted that the applicant is not entitled to recover any sums from the respondent because the applicant has not proved being entitled to recover those sums, the recovery is barred by Limitation Act and is thus not possible in such legal proceedings. Counsel stated that the alleged admission or acknowledgement cannot give rise to a cause of action and were it to be true , it would only serve the purpose of confirming that a cause of action exists but would not in any way create a fresh cause of action.

Counsel therefore prayed that court finds that all of the claims made by the applicant arising out of the insurance policy of 2009 are barred by Limitation Act and strike the same from this matter.

Counsel for the applicant submitted in rejoinder that the applicant is entitled to recover sums acknowledged on the respondent's pleadings in addition to the sums held in escrow as it is trite law that parties are bound by their pleadings.

Counsel further stated that the time bar under section 3 of the Limitation Act should be computed starting 2009 as the sum arise from a 2009 policy. He further

invited court to apply section 23(4) and (5) of the Limitation Act where the right to recover any debt as acknowledged by the person liable shall be deemed to have accrued on and not before the date of the acknowledgement of the debt and shall bind the acknowledger.

He therefore prayed that court finds that the applicant is entitled to the sum of UGX. 23,306, 231/= in addition to the release of all funds held by the respondent in escrow.

Determination.

Counsel for the applicant stated that it is evident from issue 1 above that there is debit note balance of UGX. 22, 357,322/= and UGX. 955,800/= for provision of medical identity cards to the members of the respondent's staff. This was seen in the affidavit evidence Penina Kasule and Mr. Sekito respectively.

Order13 r.6 CPR provides that;

"Any party may at any stage of a suit, where an admission of facts has been made, either on the pleadings or otherwise, apply to the court for such judgment or order as upon the admission he or she may be entitled to, without waiting for the determination of any other questions between the parties; and the court may upon the application make such orders, or give such judgment, as the court may think just."

It is trite law that admission may be express or may arise by implication from non-traverse of a material fact in the statement of claim. The admission has to be clear and unambiguous and must state precisely what is being admitted. It was

also held in ***John Peter Nazareth v. Barclays Bank International Ltd., E.A.C.A. 39 of 1976 (UR)*** that for judgment to be entered on admission, such an admission must be explicit and not open to doubt. Apart from the foregone, once an admission of facts is made, court may upon application make such order or file such judgment. See: ***African Insurance Co. v. Uganda Airlines [1985] HCB 53; Mohamed B.M. Dhanji v. Lulu & Co. [1960] E.A. 541.***

There was uncontroverted evidence as seen in the affidavit evidence of Ms. Penina Kasule that showed debit notes balance invoiced to the applicant that were never cleared. The applicant sought this court's order on the outstanding debit notes balances which were explicitly admitted in the affidavit evidence on behalf of the respondent. I therefore find that the total sum of UGX. 23,313, 122/= that is was admitted to by the respondent through its affidavit evidence is owed by the respondents to the applicant.

I concur with the applicant's counsel as to his submission on the claim being time barred as this evidence was only brought to the applicant's knowledge arising from pleadings and evidence filed by the respondent on November 20th 2014 which has been 4years since the cause of action arose and as such is not barred by time under the policy**.**

This issue is therefore answered in the affirmative.

Issue 3

What remedies are available to the parties?

The applicant in its pleadings prayed for orders that:

i) The applicant is entitled to the release of all her funds held in the escrow by the respondent.

ii) That the respondent admitted sums contained in the attached annextures and affidavits as sums owed to the applicant as her liability and is liable to settle any such outstanding amounts.

iii) That court orders that the applicant is entitled to recover the sum of UGX. 23,313,122/= being the net amount owed to the applicant after deduction of sums owed to the respondent from those sums that the respondent admits in her pleadings and evidence as being owed to the applicant.

iv) Costs to the applicant.

This application is hereby allowed and the respondent is hereby ordered to release the funds held in escrow on its behalf by M/s Sebalu & Lule Advocates.

I so order.

Dated, signed and delivered be email at Kampala this 8th day of May 2020

SSEKAANA MUSA
JUDGE