THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA

CIVIL DIVISION

CIVIL APPEAL NO. 040 OF 2015

(*Arising out of Civil Suit No. 106 of 2014*)

NATIONAL INSURANCE CORPORATION LTD :::::::::: APPELLANT

VERSUS

KAKUGU SYLVAN :: RESPONDENT

BEFORE: HON. MR. JUSTICE STEPHEN MUSOTA

JUDGMENT

This is an appeal against the judgment and orders of the Chief Magistrate Mengo dated 18th September 2015.

At the hearing of the appeal, the appellant, National Insurance Corporation was represented by Ms. Sarah Namwanje holding brief for Mr. Jude Akampurira and Mr. Kato Semengo represented the respondent Kakugu Sylvan.

The appeal proceeded by way of written submissions. The appellant did not file any written submissions. After having waited in vain, for the submissions by the appellant, the respondent filed their submissions on 14th June 2016.

The background to this appeal is that the respondent was the registered owner of three Bajaj motor cycles. Himself as the insured took out a comprehensive insurance policy for each of the motor cycles from the appellant as the insurer. The policy registration reference numbers for the said motor cycles were policy number – 10/071/1/000127/2008 for Bajaj Reg. No. UDG 166Z,

policy number 010/071/1/001960/2009 for Bajaj Reg. No. UDN 414M, policy number10/071/1/000204/2009 Reg. No. UDK 070Z.

In 2008, the respondent's motor cycles UDG 166Z, was stolen and never recovered. He reported to police but up to the time of the suit the suspects were still at large. In 2010, the other two motor cycles were also stolen. On all occasions, the respondent informed the appellant by way of letters. He also reported all the incidents to police. The respondent made several demands for payment and compensation for the loss of the three motor cycles in several demand letters to no avail. The appellant instead wrote several replies denying liability and rejecting the obligation to pay.

As a result, the respondent filed a suit in the Chief Magistrates' Court Mengo for breach of Insurance Contract, recovery of shs.7,480,000/= being value of the three motor cycles insured, an order for specific performance, general damages and costs of the suit.

The appellant filed a written statement of defence and her case was that the respondent was not entitled to compensation because he breached the conditions in the Insurance Policy; that he was guilty of non-disclosure of material facts and mis-representation relating to the motor cycles.

Judgment was entered in favour of the respondent in which it was found that there was a valid Insurance Contract between the appellant and respondent.

Further that the appellant breached the said contract and should pay the respondent a total sum of shs.7,480,000/= as compensation plus shs.3,000,000/= as general damages and costs of the suit.

The appellant was dissatisfied with the decision and decree of the Chief Magistrates' Court hence this appeal.

In the memorandum of appeal, the appellant raised six grounds of appeal as follows:

1. *The learned trial Magistrate erred in law and fact when he failed to properly evaluate the evidence on record thus occasioning a miscarriage of justice;*

2. *The learned trial Magistrate erred in law and fact when he over looked the core principles of an Insurance Contract which is "utmost good faith";*

3. *The learned trial Magistrate erred in law and fact when he disregarded the provisions of the Insurance Policy which actually bind the parties;*

4. *The learned trial Magistrate erred in law and fact when he ruled that the Insurance Company ought to have known and foreseen the risks involved in Boda Boda business as they are judicially noticed.*

5. *The learned trial Magistrate erred in law and fact when he appreciates that the plaintiff connived with his relatives to steal one of the motor cycles and obtain a police report to the same effect but in his final judgment he states that there was no clear proof that the rider connived with his relative;*

6. *The learned trial Magistrate erred in law and fact when he held that the defence of misrepresentation is both available to the Insurer and Insured.*

This being the first appellate court its role is to review the evidence of the case and reconsider the materials before the trial Magistrate. It must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. ***Kifamunte Henry Vs Uganda SC Cr. App. No. 10 of 2007.***

Since this is a suit dealing with Insurance, it is important to state that a contract of Insurance is one whereby one party (Insurer) promises in return for a money consideration (the premium) to pay the other (the Insured) a sum of money or provide him with a corresponding benefit upon the occurrence of one or more specific events. See ***Prudential Insurance Co. Vs Inland Revenue Commissioner [1904] 2 KB 658 per Channel J.***

From the facts of this case, the Insurer is the appellant. The appellant agreed to indemnify the respondent the value of the three motor cycles in the event that any risk in section 1 of the Insurance Policies occurs, including theft which was the subject of this suit at trial. The clause states thus:

> ***"The Company (the appellant) will indemnify the Insured (respondent) against loss or damage to the motor vehicle and its accessories and spare parts whilst thereon:***
>
> ***(a) By accidental collision or overturning or overturning consequent upon wear and tear;***
> ***(b) By fire external explosion self ignition or lightening or burglary housebreaking or theft;***
> ***(c) By malicious Act;***
> ***(d) Whilst in transit (including the process of loading and unloading incidental to such transit) by road, inland waterway lift or elevator."***

All the risks insured are indeed fortuitous and therefore proper. There is no doubt that the respondent had insurable interest in the motor cycles. There is also no doubt that the respondent diligently paid premium as per the evidence on record. I am therefore inclined to agree with the trial Magistrate that there was a valid insurance Contract between the appellant and respondent.

The only issue appears to be whether or not the respondent is entitled to indemnity as agreed.

After a careful re-evaluation of the evidence on record of appeal and the submissions by respective learned counsel, in the lower court and this court by the respondent as well as the law and case authorities cited; I will consider the grounds of appeal generally.

The argument of the appellant in the trial court was that the respondent was not entitled to indemnity for the following reasons:

i. **For the policy covering motor cycle Reg. No. UDN 414M:**

   a. *First, the claim was rejected because the respondent had a hire purchase agreement which he never revealed.*

   b. *Secondly, that the respondent did not disclose to the appellant the true identity of the rider of the motor cycle at the time when it was stolen.*

   c. *Thirdly, the motor cycle was at the time of theft being ridden by an unauthorized rider.*

   d. *In considering the indemnity of the rider, the appellant submitted that there was inconsistency in the identity of the rider as submitted in the police report made by the respondent.*

ii. **For the policy covering motor cycle Reg. No. UDG 166Z:**

The claim was rejected because as stated in paragraph 10 of DW1's witness statement, the plaintiff's employee Samuel Kalyango connived with the alleged thief Julius Mutesasira to steal the motor cycle. That it was also in doubt whether Kalyango was an employee of the respondent. As proof of this, learned counsel for the appellant submitted that the inference of connivance is drawn from Exhibit D2 which according to him clearly showed that the suspect being related to the said Kalyango and having taken away the motor cycles from the house in the presence of neighbours shows they connived. That being so it was contrary to the Schedule of the Policy.

iii. **For the policy covering motor cycle Reg. No. UDK 070Z:**

The claim was rejected because the plaintiff entered into a hire purchase agreement with Muhammed Muwonge on 21st May 2009 where he handed over the motor cycle and he was to be paid a sum of UGX.5,040,000/= after a period, which was in breach of the Policy Schedule specifically under the limitation to use clause.

In rejecting these reasons as ground for denying liability, the court stated that they were made in bad faith and intended to just avoid liability. The learned trial Magistrate also observed that there is a strict requirement for utmost good faith in Insurance Contracts and stated that this

principle applies to and has consequences to both parties (see page 12 last paragraph of the judgment). The trial Magistrate in making these findings relied on the fact the contract of insurance was made to ensure that the respondent is compensated in case of theft, so therefore it did not make sense to him that the appellant could turn around and rely on exclusion clause to avoid liability.

It is trite law that Insurance Contracts are governed by a higher standard of utmost good faith (uberrimae fidei) which does not apply to other contracts. In the leading case of ***Carter V Boehm (1966) 97 ER 1162*** Lord Mansfield stated that:

> "***If the true 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."***

The general principle of good faith is affirmed in our S. 17 of the Marine Insurance Act 2002 which is also applicable to ordinary Insurance business as per the case of ***Orient Insurance Brokers Ltd V Transocean (U) Ltd SCCA 55/1995.***

The Act spells out that the requirement of utmost good faith must be observed by both parties. It states:

> ***"A contract of Marine Insurance is a contract based upon the utmost good faith, and if the utmost good faith is not observed by either party, the contract may be avoided by the other party."***

The general duty of good faith Manifest itself in at least two important respects:

1. A positive duty to disclose material information; and

2. A duty not to make any material misrepresentation.

In practice, good faith duties are significantly more onerous for the Insured that the Insurer which may require a review of our Insurance Law to do away with the many unfair aspects of the current law for the following reasons:

- *The Insured can be unaware of their duty to volunteer information not specifically asked for by the Insurer on the proposal form.*

- *The law requires the Insured to assess whether information would be relevant to the assessment of risk by a "prudent underwriter".*

  This test of materiality, which underlies the rules on disclosure and misrepresentation, assesses the Insured by reference to the professional knowledge of the Insurer which is unfair.

- *The Insured can still be in breach even if their error was reasonable in the circumstances; for example if a question was unclear or required specific technical knowledge which they did not have.*

- *The only remedy for breach of good faith duties is retrospective avoidance of the entire contract which is unfair too.*

- *The Insurer is not required to show that the none disclosure or misrepresentation had any causal link to the claim in order to avoid the contract, for example, if the claim was submitted relating to flood damage the Insurer could avoid the whole contract if Insured had failed to disclose that their alarm system was not functioning.*

- *Intermediaries, including brokers, are generally treated as being agents of the Insured. As such the Insured is held responsible for any failings on their part. That is so even where in practice, the intermediary is most closely connected to the Insurer*.

These unfair legal requirements put an onerous duty of disclosure on the part of the policy holder.

Materiality of misrepresentations must therefore be determined as set out in S. 20 (2) of the Marine Insurance Act 2002 which states:

> ***"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."***

In ***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.

In a recent case of ***Synergy Health (UK) Ltd Vs CGU Insurance PLC (t/a Norwich Union) and others [2010] EWHC 2583*** the Insured informed its Insurance Company, four months before renewal of its Policy that it was installing an intruder alarm. Due to administrative errors the alarm was not installed and a major fire occurred. The court held, that by failing to correct its material misrepresentation, the Insured had impliedly repeated the misrepresentation on renewal. However, on the facts, the Insurance Company had not been induced by the misrepresentation to renew the policy and so could not avoid it.

From the above extensively outlined legal principles, it is abundantly clear that the principle of utmost good faith is 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.

In the instant appeal, it is not clear what misrepresentation or non disclosure the appellant is complaining about as she did not make submissions. However, in my considered view the trial

court properly considered these issues and the principle of utmost good faith. The learned trial Magistrate did not agree with the submissions of the defendant in the lower court (now appellant) and I think he rightly did so. as I have observed, misrepresentation and non disclosure must be such as would have changed the decision of the Insurer to give out the policy. In the instant case, I highly doubt the appellant would have made a different decision.

In the Insurance Policy Schedule which learned counsel for the appellant at the trial level submitted are part of the police states that authorized drivers include the Insured or anyone under the Insured's order or with his permission. In the same policy schedules, it is stated that the limitation of use includes use for social and pleasure purposes and for the Insured's business. However, in the same Schedule it states that the policy does not cover use for the carriage of passengers for hire.

It is my considered view that these are exclusion clauses in an Insurance Contract which are subject to interpretation. When I read the policies, the terms in the Schedule seemed deliberately confusing. They allow the Insured to give anyone permission to ride the motor cycles who thereby becomes an authorized rider, but against limit use by excluding use for pleasure purposes and for the Insured business and also adds that the policy does not cover use for carriage of passengers for hire. These terms create a lot of ambiguity and leaves one wondering whether the policy is of any use at all if say an owner of more than one motor cycles takes out Insurance Policies covering all of them and dutifully pays premium.

In interpreting Insurance Policies, there are rules which have to be followed as follows:-

1. *The words must be given their ordinary meaning and proper sense known as the literal rule of misrepresentation;*

2. *When general words are linked with more particular words, those words must be construed as limited to the meaning similar to the one particular words known as the ejus dem generis rule;*

3. *The policy must also be interpreted as a whole;*

4. *Terms of art or technical meaning must be understood in their proper sense unless the context controls or alters their meaning;*

5. *Where the wording of the policy is ambiguous, it must be construed strictly against the person seeking to rely on it.*

I am inclined to invoke the 5th rule above against the appellant. Since the wording of the policy schedule under consideration is ambiguous and confusing, I will construe it against the appellant.

Consequently, I will agree with the conclusion by the learned trial Magistrate that the appellant was liable to indemnify the respondent for the loss of motor cycle Reg. No. UDN 414M.

Regarding indemnity for motor cycle Reg. No. UDG 166Z, the appellant alleged connivance. Connivance if proved goes to the root of the principle of utmost good faith. However, it has to be a matter of evidence. The evidence presented by the appellant was the written witness statement of DW1 at the trial and Exhibit D2 which is a police report showing that the suspect was a relative of Kalyango Samuel who was the employee of the respondent.

Further that the said Kalyango had a hire purchase agreement with the respondent and that this was in breach of the policy. I have not seen any evidence of a hire purchase agreement in this case. I also do not see enough proof of connivance alleged as there is no evidence to prove the same on a balance of probabilities. Proof of a relationship between Kalyango and the suspect is not proof of connivance. There is no justifiable reasons to deny the respondent indemnity in respect of this motor cycle as well. I will therefore find that the appellant is liable to indemnify the respondent for the loss of motor cycle Reg. No. UDG 166Z.

Regarding the claim for motor cycle Reg. No. UDK 070Z, it was rejected by the appellant because they entered into Hire Purchase with Mohammed Muwonge on 21st May 2009 where he

handed over the motor cycle and he was to be paid a sum of UGX.5,040,000/= after a period of time which was in breach of the Policy Schedule especially under the Limitation to use Clause.

The Limitation to use Clause states as follows:-

> ***"Use only for the carriage of passengers or goods in connection with the Insured's business."***
>
> ***The policy does not cover;***
>
> ***"(1) Use for racing pace making reliability trail or speed testing;***
>
> ***(2) Use while drawing a trailer except the towing (other than for forward) of any one disabled mechanically propelled vehicle."***

In the instant case, I do not see how the hire purchase agreement contravenes this provision. As I have stated I have not seen any evidence of a hire purchase agreement. In fact considering the rules of interpretation, the words in the limitation of use clause being linked to each other should mean that all users are permitted except thos specifically mentioned and any of those similar to the ones mentioned. This having been a comprehensive insurance cover, it should be deemed to cover all the risks except those specifically excepted. I therefore find that the appellant was indeed to indemnify the respondent for the loss of this motor cycle as well.

The complaint on the finding that boda boda business is a risky business should not have been raised by the appellant because they are the ones that invited the Magistrate to find so. Regarding the issue of misrepresentation affecting both the appellant as Insurer and the respondent as insured, I agree with the learned trial Magistrate that indeed it is applicable to both though the burden is higher on the respondent or the Insured. However, having found that there was no misrepresentation, it is not applicable in this case.

For the reasons I have outlined in this judgment this court finds no merit in this appeal. Accordingly, the appeal stands dismissed with costs to the respondent.

I so order.

Stephen Musota

J U D G E

08.11.2016.