THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(COR: MANYINDO, D.C.J., ODOKI, J.S.C., &TSEKOOKO, J.S.C.)

CIVIL APPEAL NO. 9 OF 1994

ALFA INSURANCE CONSULTANTS LTD……..APPELLANT

-VERSUS-

EMPIRE INSURANCE GROUP.....….....RESPONDENT

(Appeal from the decision of the H/C of Uganda by the Hon. Mr. Justice J.H. Ntabgoba Principal Judge dated 16th November, 1994).

IN CIVIL SUIT NO. 79 OF 1993

JUDGEMENT OF MANYINDO, D.C.J.

The Appellant Company has brought this appeal against the judgment of the Principal Judge of the High Court, Mr. Justice Ntabgoba, dismissing their suit against the Respondent. The Appellant Company is an Insurance Broker while the Respondent is Insurance Company. Both are based in Kampala where they carry on their businesses. The Appellant sued the Respondent for a sum of Shs. 15,049,344/= being the balance on their commission for brokerage work they did for the Respondent.

The Appe11ants case in the High Court was that sometime in 1990, its Director, Vincent Mu1indwa (PW1), approached the American Embassy in Kampala and sold to them the idea of putting in place an Insurance scheme for the Embassy staff. The Embassy showed interest in the matter and so the parties began negotiations on a suitable package for the insurance policy cover. Subsequently the Embassy agreed (in 1991) to take out a major group medical insurance scheme for its staff. Mr. Mulindwa then started looking for a suitable Insurance Company to undertake the risk. He approached three different Companies, including the Respondent. Different rates were offered by those Companies. Mr. Mulindwa decided that the Respondents terms were the best for his client, the Embassy.

According to the Respondents terms, the Insurance policy was to be in three parts, namely, for the cover of:-

(a) Department of state	Shs. 31,633,220/=
(b) U.S.A.I.D.	Shs. 20,762,500/=
(c) Security Forces	Shs. 43,000,000/=
	TOTAL Shs. 95,365,720/=

Mr. Mulindwa put those proposals to the Embassy which accepted them. The Respondents were informed of that and they agreed to undertake the risk. The policy was to be issued in two covers. The first was for Shs. 52,149,720/= in respect of the first two categories of staff mentioned above; the second one for Shs. 43,000,000/= was for the Security Forces. The first cover was issued on 14.1.92 and the second one on 26.5.92. The respondent collected the insured sums directly from the Embassy and without reference to the Appellant.

According to the Appellant, their broker commission should have been Shs. 19,079,144/= (at the rate of 20% of the full insured sum of Shs. 95,395,720/=), but they were paid only Shs. 4,029,800/=, hence the claim for Shs. 15,049,344/ as balance.

The respondent denied the claim. Paragraph 2 of their written Statement of defence stated thus: -

> "It is denied that the Plaintiff procured the insurance policy for the defendant. The deal was negotiated by the defendant direct with the American Embassy."

At the commencement of the trial of the suit Dr. Byamugisha who represented the appellant and late Mr. Kateera for the respondent agreed on two issues which they put to the court for determination. They were:

(1) Whether it was the appellant or the respondent who procured the Insurance policy with the American Embassy.

(2) If the policy was procured by the appellant what relief were they entitled to?

During the trial Mr. Kateera is said, by Counsel for the Appellant, to have refrained the first issue when he made this submission in his final address to court.

> "Now the 1st issue is misleading. In the absence of agreement as to the rate and amount of the commission is the plaintiff entitled to what is reasonable commission **on <u>Quantum merit basis".</u>**

After hearing the evidence and submissions of Counsel the Learned Principal Judge came to the conclusion that Mr. Mulindwa's role in the transaction was merely to introduce the Respondent to the Embassy which fell short of full brokerage. He reasoned that this was so because Mr. Mulindwa had not participated in the making of the final agreement between the respondent and the Embassy. He also found that the appellant had in fact introduced the respondent to the Embassy only in respect of the first policy cover.

On the second issue the learned Principal Judge was of the opinion that the appellant had been adequately remunerated in the sum of Shs. 4,029,800/= at the respondent's chosen rate of 7.7% of the insured sum on the first policy cover as he had not done full brokerage work

on it. He held that the appellant company was not entitled to a commission on the second policy as it had been negotiated or procured by the respondent directly with the Embassy. This is what he said on this point.

“To hold that the defendant should pay the Plaintiff commission on any subsequent policies underwritten by the defendant in favour of the American Embassy, following the introduction by Mr. Vincent Mulindwa is to suggest that the Plaintiff can even now continue to recover a commission on any other policy that may in future be underwritten by the defendant in favour of the Embassy. I reject such claim”.

It was on that basis that he dismissed the Appellant’s suit with costs to the Respondent. This appeal is founded on five grounds. They are rather narrative and argumentative, contrary to the clear provisions of Rule 84(1) of the Rules of this Court. But the complaint in those grounds can be summarised as follows:

(1) The learned Principal Judge did not consider the issues as agreed and framed by the counsel, but decided the case according to the issue unilaterally put forward by the Respondent’s counsel which was wrong.

(2) The learned Principal Judge should have found, on the evidence before him, that the appellant had procured the two policy covers and was therefore entitled to the full brokerage commission and at 20% and not 7.7%

Dr. Byamugisha who presented the appellants appeal contended that the learned Principal Judge did not when he should, answer the first agreed issue, namely, and was it the Appellant or the Respondent who procured the Insurance policy from the Embassy? Instead he had only considered the new issue raised by Mr. Kateera. It seems to me that Mr. Kateera did not in fact reframe the issue. He merely shifted from the original defence of total denial and acknowledged the fact that the appellant had indeed participated in the procurement of the policy. It was of course a partial concession as his new stand was that the appellant could only be paid commission on quantum meruit basis, that is to say, as much as the Appellant had deserved.

The principle of quantum meruit is applied as a possible measure of restoration in case of unjust enrichment or measure of payment where a contract has no fixed a price. Mr. Kateera's argument which the learned Principal Judge accepted, was that the appellant had done some little work for which he had been adequately paid, The Principal Judges answer on the first agreed issue was that Mr. Mulindwa did not procure the first policy cover but merely introduced the Respondent to the Embassy; it was the Respondent which completed the deal. I do not therefore agree that the learned Principal Judge did not answer the issue in question. Whether he answered it correctly is another matter.

It is quite clear from the evidence of Mr. Mulindwa that it was the appellant, through him, acting in its capacity as an Insurance Broker, which approached the American Embassy and solicited the Insurance deal in terms agreed by Mr. Mulindwa and the Respondent Company, through its Mr. Bwogi, who died before the trial of the suit. All the terms which Mr. Bwogi gave to Mr. Mulindwa were accepted by the Embassy. It was at that stage that the Respondent chose to side step the appellant and deal with the Embassy directly. This was essentially for the purpose of signing the standard policy documents and collection of the premium. When the appellant learnt of what had happened they claimed their commission from the respondent, but were paid only shs. 4,029,800/=.

The appellant then demanded the balance on commission, to which the respondent replied on 26.5.92 as follows in their letter (Exh. P.4):-

"Dear Mr. Mulindwa, our records show that you received a total of Shs. 4,029,800/= on the U.S. Embassy case, being the 'Servicing Commission paid to all non-contracted producers.

Considering your status with us (non-contracted producer), the percentage commission we paid you was substantially above normal.

It is a Company policy that in order to earn the full Agent/Broker Commissions, one must be under contract. Again, our records show that you and /or your brokerage have not yet been contracted.

The purpose of the contract is to: (a) give you full representative status for the Company, (b) make sure that the company prepares you, through regular training, to attain a certain degree of professionalism, unique to all Empire Insurance agents and (c) protect and safeguard the interests of the Customer, the Agent and the Company. We want you to know that you are welcome to discuss with us the possibility of acquiring an Empire Insurance Agents contract.
Best wishes. Samuel M.Bwogi, CLU".

In the above letter a different defence was raised by the Respondent that the appellant had not been contracted for the job and could not be contracted as they had not been trained for the job by the Respondent Company. It seems to me that the respondent misconceived the roles of a Broker and that an Agent. It was the evidence of Mr.Kizito (DW2), a General Manager of Hogg Robinson, an Insurance Broker in Uganda that a Broker works on behalf of an insured while an Agent acts on behalf of the insuring company. This must be correct as it agrees with the definition of "Insurance Broker" In Section 57 of the Insurance Decree (No. 19 of 1978) which states: -

" Insurance brokers" means a person who, as an independent contractor and not as the agent of an insurer, is carrying on the business on the business of soliciting or negotiating Insurance for a commission or other enumeration on behalf of the insured, other that himself."

It follows from the above definition that the appellant or its Mr. Mulindwa could never have become an Agent of the respondent since it was a registered Insurance Broker. This much was admitted by Margaret Rutare (DW1), the Respondent's office Manager, Interestingly she had this to say in cross- examination: -

"We do not have contracts with Brokers. When we start dealing with them we do not train them…….. Bwogi never alleged that Mulindwa had not performed what a Broker should perform to get full commission …… In this case we were considering Alfa an Agent/Broker. Alfa could not have been our agents since they were Brokers."

In my view and with due respect to the learned Principal Judge, he was wrong, both in law and fact, to come to the following conclusion: -

"I do clearly understand what Mr. Bwogi was saying: - that the Empire Insurance Group, Ltd. has additional standards in its insurance business, above the mere registration as a broker and belonging to the Association of Insurance Brokers. Empire Insurance Group, Ltd, in those additional standards, requires that its brokers always concluded a brokerage agreement in order to be regarded by the group as "contracted producers…….. " The law may require only registration as a broker and membership of the Association of Brokers as a standard agreement, so as to be permitted to practice as brokers in Uganda. But that is not the same thing as saying that every broker is 100% professional. Any competitive Insurance Company therefore would be in order to institute its own additional training to improve its standards of professionalism."

The above statement contradicts the evidence of Rutare (D W l) that the respondent does not take out contracts with the brokers they deal with and does not train such Brokers. It also contradicts the legal position of an Insurance Broker who is an independent contractor, working for the insured and not the insuring company. Clearly there is no way the insuring company can train such an independent contractor who must be qualified in his or its own right before he or it can be registered as a broker. And so there was no merit in that new line of defence. The trial court should have rejected it.

The evidence of Mr. Mulindwa shows very clearly that the two policy covers were negotiated by him as a single package. It was split into two covers at the request of the Embassy for ease of payment which was to be effected in two phases. The appellant should, in accordance with practice, have gone on to collect the premium from the Embassy but was not allowed to do so by the respondent. The reason for that is obvious. The respondent dealt with the Embassy directly so that they could obtain a rebate on the policy. According to Rutare (DW1) this practice of side-stepping the broker exists in the insurance business but, as she pointed out, it is unfair to the brokers.

The learned Principal Judge thought that because the Appellant had no written agreement with the respondent regarding the appe1iants renumeration for the transaction and as the appellant had not participated in the negotiations of the final terms of the policy covers, they could not claim to have done full brokerage. They were therefore not entitled to the full commission. However, it would appear from the definition of "Insurance Broker in Section

57 of the Insurance Decree quoted above that once the broker has solicited or negotiated the policy, he is entitled to full commission. He does not have to do both soliciting and negotiating. But of course as Mr. Justice Branson pointed out in **Mc. NEIL V. LAW UNION & ROCK INSURANCE COMPANY LTD.(1925) 23 LLOYD'S List LR. 341 at page 316,** the principle is that where an agent or, in this case, a broker, is claiming a commission upon a certain transaction, he must show that he was an efficient cause of the transaction coming about.

To be an efficient or effective cause, the agent or broker need not necessarily complete or take part in all the negotiations; see:- **Ha1sburys Laws of England vol. 4th Ed. page 478 paragraph 800 and "Insurance Law in Australia and New Zealand" by Sutton (Original Edition) 1980.** It is not enough for him to prove that he introduced the parties to each other. In the instant case the appellant company actually successfully negotiated the package with the American Embassy and then sold it to the respondent. What remained was the formality of signing the standard policy documents and collection of the monies from the Embassy. The Respondent collected the money in an attempt to reduce the appellant's commission.

It is remarkable that at first the respondents point was not that the appellant had not done full brokerage but that they were "non-contracted producers." In my judgment the appellant's representative, Mr. Mulindwa did fully broker the Insurance policy contained in the two policy covers. This was not a case where the broker had brought the parties together to a certain point in negotiations and then left them to set out for themselves a new track altogether. The learned principal Judge should, on the evidence before him, have found that the appellant was entitled to full commission on the two policy covers which formed one and some transaction.

There was no evidence that the second policy cover was obtained independently by the respondent. That cover flowed from the appellant's initial efforts. And so this would not be a case of permitting a broker to continue to take commission on any other policies taken out by the claimant, although a broker may be entitled to a commission on renewal on insurance policies procured by him provided he played an effective role in the renewal on insurance

policies procured by him provided he played an effective role in the renewal of the policies, see Sullton on Insurance Law in Australia and New Zealand (supra). But this point does not arise here.

There now remains the question of quantum of the commission. Mr. Mulindwa claimed in his evidence, but without further proof, that the late Bwogi and himself had agreed, orally, that the commission would be at the rate of 20%. On the other hand Margaret Rutare (D W l) stated that no agreement had even been reached on the point. In absence of cogent evidence on the point, I think it would be safe to assume that the rate at which the commission was to be paid was not agreed. The principle has been established that where no Agents or Brokers fee was agreed, then the usual commission in agency or brokerage business should apply, see: Baring V .Stanton (1876) 3 Chancery Division 502 at 505.

The commission which was paid to the appellant and which the learned principal 3udge upheld was based on the rate of 7.7% which is payable under “any other renumeration” under S. 57 of the Insurance Decree. The 7.7% applied only to cases where a commission was not payable. Counsel for the appellant argued, quite rightly I think, that the respondent was wrong to apply that rate because the appellant was entitled to a commission. The rate of 20% fixed by the Commissioner of Insurance did not apply as they were not in existence at the time the policy was secured. I agree with the submission by Counsel for the appellant that a different rate had to apply.

There was no clear evidence as to the usual commission payable at the material time. Both Mr. Mulindwa and Geoffrey Musisi (P W 2). (Secretary General of Uganda Association of Insurance Brokers) state that the rate of commission was 20%. However Mr. Musisi did also point out in the case of the National Insurance Corporation the rate was 22%. Those were said to be maximum rates. Then there was Mr. Frank Kizito (D 1 W), the General Manager of Hogg Robinson Insurance who stated that the average commission for full brokerage for this type of policy was at 10% of the insured sum. It is clear therefore that at the time the appellant brokered the Insurance policy there was no ruling or usual commission rate.

In the circumstances, I am of the view that the appellant could only be entitled to what was a reasonable rate of the commission in the circumstances of the case. It was not shown that the transaction was difficult or expensive on the part of the appellant. Therefore the rate of the commission claimed by them was excessive. I would allow a commission at the rate of 12% on the full insured sum of shs. 95,395,720/= which comes to shs. 11,447,486.4 Less shs. 4,029,800/= already received by the Appellant which comes to shs. 7,447,868.4. in the result I would allow this appeal set aside the judgment and decree of the High Court and enter judgment for the appellant company for shs. 7,447,868.4 Plus interest at 45% which was the rate in 1992—93, which has now been certified by the Bank of Uganda. I would award the appellant costs of this appeal and of the suit in the High Court, and as Odoki JSC and Tsekooko JSC agree, it is so ordered. Dated at Mengo this……..2nd ……..day of…..February, 1996.

S.T.MANYINDO

DEPUTY CHIEF JUSTICE

I CERTIFY THAT THIS IS A TRUE COPY OF THE ORIGINAL.

E.K.E. TURYAMUBONA,

DEPUTY REGISTRAR, THE SUPREME COURT

JUDGEMENT OF ODOKI, J.S.C.

(I have had the advantage of reading in draft the judgment of Manyindo, DCJ and I agree with it and the orders proposed by him.)

Dated at Mengo this....2nd ...day....of February...., 1996.

B.J.ODOKI,
JUSTICE OF THE SUPREME COURT

I CERTIFY THAT THIS IS A TRUE COPY OF THE ORIGINAL.

E.K.E. TURYAMUBONA,

DEPUTY REGISTRAR, THE SUPREME COURT

JUDGMENT OF TSEKOOKO, J.S.C.

I have read in draft the judgment prepared by Manyindo, D.C.J. with which I concur.

Delivered at Mengo this…….. 2nd day …….of. February, 1996.

J.W.N.TSEKOOKO,

JUSTICE OF THE SUPREME COURT

I CERTIFY THAT THIS IS A TRUE COPY OF THE ORIGINAL

E.K.E TURYAMUBONA,

DEPUTY REGISTRAR, THE SUPREME COURT