

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL DIVISION

MISC. CAUSE NO. 171 OF 2014

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

LEEDS INSURANCE LTD.....APPLICANT

V

1. INSURANCE REGULATORY AUTHORITY OF UGANDA

2. KISUULE ASTACIO & SONS LTD..... RESPONDENT

BEFORE HON.LADY JUSTICE HENRIETTA WOLAYO

RULING

Introduction

1. On November 17, 2014, the Applicant moved court under Articles 28 and 42 of the Constitution and Section 36 of the Judicature Act and the Judicial Review Rules 2009 for the following orders:
 - a. A declaration that the Ruling of the 1st Respondent was illegal as it did not have the legal mandate to adjudicate the subject matter.
 - b. A declaration the 1st Respondent could not constitute itself in a quasi- judicial organ and could only arbitrate over a dispute with the consent of the parties.
 - c. An order of certiorari quashing the Respondent's ruling.
 - d. An order of prohibition prohibiting the 1st Respondent from adjudicating the matter complained of.

Background

2. On July 5, 2017, the Court of Appeal delivered its judgment in appeal against the refusal of Musota J as he then was, to review a decision that upheld a preliminary objection by the Insurance Regulatory Authority and Kisuule Astacio & Sons that Leeds Insurance Ltd had applied for judicial review yet Section 92B of the Insurance Act (Cap 213) now repealed, provided for appeals

against the decisions of the Regulatory Authority to the Insurance Appeals tribunal.

3. The Court of Appeals allowed the appeal and directed the High Court to hear the motion for judicial review on its merits. Specifically, the court directed the High court to determine the following issues:
 - a. There was lack of legal mandate by the 1st Respondent to adjudicate the subject matter;
 - b. The appellant was not afforded an opportunity to be heard in the cause;
 - c. The rules of natural justice were not observed
 - d. Any other relevant matter.

4. During the course of the various court sessions, I urged counsel to prepare trial bundles to facilitate an orderly management of the case but this was not done. Nevertheless, I shall as much as possible rely on the available affidavit and documentary evidence to determine the dispute before me based on the issues framed by the Court of Appeal and any other issue that might emerge. On November 6, 2019, both counsel were directed to file written submissions and the Ruling reserved for delivery on notice. I have carefully considered submissions of both counsel and the authorities cited.

The guiding principles in judicial review matters.

5. The precedent of **Koluo Joseph Andres & two others v Attorney General HCMC. No. 106 of 2010** cited by counsel for the Applicant aptly captures the function of a judge sitting in a judicial review cause. This approach has been captured in the Judicial Review Rules 209 as amended by 2019 Rules.

'...judicial review is not concerned with the decision in issue per se but with the decision making process. Essentially, judicial review involves the assessment of the manner in which the decision is made. ...jurisdiction is exercised in a supervisory manner, not to vindicate rights as such but to ensure public (administrative) powers are exercised in

accordance with the basic standards of legality, fairness and rationality.'

6. This means my duty is to review the decision and process complained of from the standpoint of legality, procedural propriety or fairness and rationality.

The evidence

7. Parties entered into an insurance contract on June 28, 2012 wherein the insurer (Leeds) agreed to insure Kisuule Astacio's property (coffee) against theft resulting from violent entry on agreed terms for the period ending June 27, 2013.
8. The status report by Jinja Road Police Station dated December 11, 2012 addressed to the Claims Manager, Leeds Insurance Company shows that on December 3, 2012, at 8 a.m., one Gilbert Bukenya a production manager of Kisuule Astacio and sons Ltd that is located at plot 9, 3rd Street Industrial area, reported a case of store breaking and theft of coffee by unknown people. The report indicates the incident occurred between December 1 and 2, 2012 at night at plot 9, 3rd street and the key suspect was on the run. The claim form by Kisuule & Co. Ltd attached to the affidavit of Wahab Bukenya indicates date and time of loss as December 2, 2012 at 10-11 p.m. and value of coffee lost as 415, 852,118.
- 10 Almost a year later, in December 2013 (see decision of Insurance Regulatory Authority (IRA), Kisuule & Co. complained to IRA. The nature of the complaint is not disclosed but on February 6, 2014, IRA required Kisuule to produce evidence which they apparently submitted because annexure F to Kisuule's affidavit shows IRA wrote to Leeds Insurance Co Ltd requiring them to respond to the written submission of Kisuule & Co within seven days. Sam Phiri the Executive Director of Leeds Co Ltd then wrote back to IRA that their lawyers would get back to IRA.
- 10 On November 4, 2014, IRA determined complaint No. 6 of 2014 (Astacio Kisuule v Leeds Insurance) in favour of Kusuule and

found Leeds Insurance Ltd liable to pay Kisuule 201,597,030/ It's against this determination that Leeds Insurance Ltd seeks judicial review.

Whether the 1st Respondent had the legal mandate to adjudicate the subject matter.

Submissions of counsel for the Applicant

11 The thrust of the submissions of counsel for the Applicant was that the IRA lacked jurisdiction to determine the dispute over a disputed insurance claim and cited **Code of Civil Procedure 14th edition at page 225** where Mullah states that such jurisdiction is conferred by Statute, Charter or Authority by which a court is constituted. Extending this reasoning to IRA, counsel submitted that it lacked jurisdiction to determine the dispute between Leeds Insurance Co. Ltd and Kisuule Astacio Ltd where Kisuule and Co claimed 59,759 kgs of coffee worth sh. 415, 852, 118/ was stolen but with no conclusive investigative report regarding the theft.

12 Counsel relied on clause 11 of the burglary policy between the parties that provides that:

a. It is hereby declared and agreed that any difference arising out of the policy as to the amount of any loss, such difference shall independently of all other questions be referred to the decision of the judicial courts in Uganda'.

13 It was counsel for the Applicant's submission that this clause required Kisuule & Co Ltd to take the claim dispute to courts of law.

Submissions of counsel for the 2nd Respondent

14 Counsel for Kisuule & Co submitted that Section 10b of the Insurance Amendment Act 7 of 2011(now repealed) mandated IRA to

'receive complaints from members of the public on the conduct of a person licensed under the Act and arbitrate and grant restitution to the complainant as may be possible.'

15 Counsel for Kisuule & Co. further submitted that Leeds Insurance Co Ltd had previously appeared before the Complaints bureau of IRA and therefore knows it is subject to the Authority of IRA and not only when it deems fit.

Submissions of counsel for the 1st Respondent

16 Counsel for the 1st Respondent IRA made the same argument in their submissions and further submitted that the meaning of arbitration under the Insurance Act is different from that ascribed in the Arbitration and Conciliation Act. The affidavit in sur rejoinder of Rachel Kabala reiterates the argument that IRA has authority to arbitrate disputes under the Insurance Act which complaints are handled by a Complains Bureau.

17 For an administrative body like IRA to have powers adjudicate disputes, such powers must be expressly given in the Act.

Section 15 as amended by Section 11 of Act 13 of 2011 fell under part 2 of the Insurance Act (now repealed) that was essentially concerned with the establishment of initially the Commission and later renamed the Insurance Regulatory Authority and its objectives/ mandate. Among the objectives of the Authority was to

Ensure the effective administration, supervision, regulation and control of the business of insurance in Uganda;

Receive complaints from members of the public on the conduct of a person licenced under this Act, arbitrate and grant restitution to the complainant as may be possible.

17. The Insurance Act as amended by Act 13 of 2011 has since been repealed by the Insurance Act 6 of 2017 which recast these two objectives more appropriately, as functions in Section 12 thereof.

18. Section 12 (1) provides as follows:

For the attainment of its objectives, the functions of the Authority are

(a) To regulate, supervise, monitor and control the insurance sector

(j) To receive and resolve insurance related complaints.

(k) To receive complaints from members of the public on the conduct of a person licensed under this Act and arbitrate and grant restitution to the complainant as may be possible.

19. In order to effectively regulate the insurance business, the Authority has to address complaints against the insurers and other actors in the business. The question is whether Section 15 (2) of Insurance Act Cap. 213 (now repealed) but re-enacted in section 12(k) of Act 6 of 2017 confers on the Authority adjudicative function.

20. While section 12 (j) empowers IRA to receive and resolve complaints of a general and routine nature¹, section 12 (k) empowers the Authority to address against actors in the business, arbitrate disputes and provide relief where possible.

21. The use of the term ‘**arbitrate**’ is to be understood in the context of the process of determining or adjudicating a dispute but, it is not used in the manner ascribed to it by the **Arbitration and Conciliation Act Cap.4**. Had this been the case, the said Act would have been cross referenced whereas it was not. The word ‘arbitrate’ is both a legal concept as used in the Arbitration Act and a concept to refer to adjudication without the formalities of arbitration. Of course the use of the word ‘*arbitrate*’ causes confusion with the formal arbitration² as we know it and it would have been better if Parliament had used simpler term like ‘determine’ disputes. IRA does not just

¹ I note that Section 135 of Act 6 of 2017 establishes an Ombudsman to execute this function, a body that was missing in the repealed law.

have quasi-judicial powers but it is empowered to adjudicate disputes. The reference to arbitrate clearly refers to adjudicating a dispute and there was no need to mince words. **Bernstein et al (1998:13)** defines arbitration as

*‘...a mechanism for the resolution of disputes which takes place, usually in private, pursuant to an agreement between two or more parties, under which the parties agree to be bound by the decision to be given by the arbitrator according to law or, if so agreed, other considerations, after a fair hearing, such decision being enforceable at law. sometimes the submission instead of being voluntary is imposed by statute’*³(referred to as statutory arbitration as is the case with the Cooperative societies Act).

14. By analogy, the **Cooperative Societies Act Cap 112** dedicates Part X of the Act to settlement of disputes. Section 73 thereof describes the nature of potential disputes, e.g. among members, between the society or its committee and any officer, or past officer, and any other registered society and a claim or demand for a debt due from a member is deemed a dispute. So a ‘dispute’ is clearly described in the law. The Act sets out how appointment of arbitrators is done and what happens when parties to a dispute cannot agree on choice of arbitrators.

15. It follows that the Insurance Act empowers to IRA to determine insurance disputes but in a nuanced form by using the term ‘arbitrate’, which means ‘adjudicate’ but without the formalities and structures of arbitration under the Arbitration and Conciliation Act. The fact that Section 136 establishes an Appeals Tribunal further strengthens this analysis. Appeals from this tribunal go to the High Court under section 137 (5).

³ Ronald Bernstein et al, Handbook of Arbitration Practice, Third edition, Sweet & Maxwell, (1998:14)

Absence of an independent body to arbitrate/judge/adjudicate/settle disputes

22. Section 10 of Act 6 of 2017 provides for the continuance of the Authority that was created under the repealed Insurance Act Cap. 213. The Authority is comprised of a Board established under Section 14; the Chief Executive Officer position is established under Section 21, while the Secretary and other officers are established under Sections 23 and 24 respectively. Under Section 18, the board is responsible for the overall direction and supervision of the Authority and provides guidance to the CEO.

23. Section 12 of Act 6 of 2017 (similar to repealed Act 11 of 2013) provides that the Authority shall receive complaints and impose sanctions on an insurer who fails to comply with its '*decisions*'.

24. The power to sanction a licenced person is provided in section 45 (1) (j) in these terms:

'The Authority may at any time vary, suspend or revoke the licence of an insurer to carry out business under the Act where the insurer has refused or failed to abide by the decision of the Authority to settle a claim or complaint in accordance with the Act.'

25. Section 33 of the repealed Act, now (Section 45) conferred on the Authority powers

- a. *To suspend or revoke a licence in the public interest or to protect policy holders' interests if the business is not being conducted in accordance with 'sound insurance principles, practices and ethics prescribed by the Uganda insurers association and filed with the commission;*
- b. *The insurer repeatedly acts in an illegal way or ignores the requirements of the commission, among other breaches.*

26. An examination of the impugned '*decision*' by the three officials of IRA shows it was signed by the CEO, Assistant Operations Officer and Manager, Legal and Compliance. The functions of the chief executive officer and other officers are described in Sections 22 to 24 and the determination of disputes is not one of the functions expressly provided.
27. From the correspondence provided by Rachel Kabala in her affidavit in sur joinder, it is the CEO who signed a letter to Leeds Ltd dated January 23, 2014 informing it of the complaint by Kisuule and Co Ltd and required Leeds Ltd to respond within two weeks. On June 19, 2014, the CEO forwarded a submission by Kisuule and Co Ltd to Leeds Ltd and required them to respond within seven days. There were also several other correspondences with the parties by the CEO.
28. The point I want to make is that the CEO received the complaint, commissioned an investigation evidenced by a report dated September 10, 2014 by Protectors International Ltd titled '**Private and confidential report on theft of processed coffee**' and then determined the resulting claim dispute with two other officials without requiring the parties to appear before the team.
29. Counsel for the Respondents as well as affidavit evidence of Rachel Kabala suggests that these disputes are referred to the Complaints Bureau which in fact is comprised of the CEO among other staff members as indicated by Complaint No. 6 of 2014 which was signed off by the CEO, Assistant Director Operations, and Manager Legal and Complaints. It is therefore evident that the Complaints bureau is one and the same as CEO and the team which determined the dispute yet the same team commissioned 'private' investigations into the initial complaint.

30. In principle, there is nothing wrong with commissioning an independent investigation but the report should not be '*private and confidential*' and must be made available to all parties.
31. The fact that the report was confidential made the CEO the investigator and judge all in one contrary to the principle of natural justice '*No man a judge in his own cause*' (*nemo judex in causa sua*).
32. Furthermore, the CEO's functions under Section 22 do not include adjudication of disputes and no instrument was adduced to show that the board had assigned such an important function to the CEO.
33. Whereas IRA is mandated to arbitrate or adjudicate disputes, such adjudication must take place in an environment where principles of natural justice are observed, namely, before an independent body, all parties are heard and the judges ought not participate in investigations as commanded by Article 28(1) of the Constitution. Therefore, the impugned decision of the CEO and team is tainted with procedural impropriety.

Contracting out of section 12 (k) of the Insurance Act

34. That said, once the Insurance Act enacted that disputes have to be arbitrated or adjudicated, parties cannot defeat the intention of Parliament by contracting out of the jurisdiction of IRA. **Section 14 of the Judicature Act Cap 13** as amended prescribes that an Act of Parliament supersedes the common law, custom or usage and a contractual term is therefore secondary to the written law and must give way to the Insurance Act.
35. In principle, IRA is mandated to handle complaints but when these complaints progress to a claims disputes, an independent body should adjudicate the dispute.

36. The sum total of the foregoing analysis is that whereas IRA is mandated to adjudicate disputes, the structures to support an independent adjudication are not in place and therefore the impugned decision by the CEO is without legal support and is tainted with procedural impropriety.

Whether the Applicant was given a fair hearing.

37. The CEO and team received the complaint, commissioned an investigation, and then determined the dispute. This means an important aspect of the right to a fair hearing under Article 28 of the Constitution which envisages an independent tribunal was breached, in addition to the principle of natural justice, (*judex nemo in causa sua*) no person is a judge in his or her own cause.

38. The CEO and team determined a dispute that involves large sum of money without evidence on oath and with no clear written procedures to ensure a fair hearing.

Remedies

39. Having found that the CEO and team acted without clear legal authority to adjudicate a dispute and with procedural impropriety, an order of certiorari shall issue quashing the impugned decision.

40. Having found that IRA lacks an independent body to adjudicate claims dispute, an order of mandamus shall issue directing the board to establish one along with procedural rules that reflect principles of natural justice.

Summary of findings

- a) While section 12 (j) empowers IRA to receive and resolve complaints of a general and routine nature, Section 12 (k) empowers the Authority to arbitrate or adjudicate disputes and provide relief where possible.
- b) The use of the term '**arbitrate**' is to be understood in the context of the process of determining or adjudicating a dispute but it is not used in the manner ascribed to it by the Arbitration and Conciliation Act Cap.4. Had this been the case, the said Act would have been cross referenced whereas it was not.
- c) IRA is empowered to adjudicate disputes and not just to exercise quasi-judicial powers.
- d) The Insurance Act empowers IRA to determine insurance disputes but in a nuanced form by using the term 'arbitrate', which means 'adjudicate' but without the formalities and structures of arbitration under the Arbitration and Conciliation Act.
- e) The CEO and team cannot carry out investigations of complaints and then sit as an adjudicator at the same time. The principle of natural justice no person shall be a judge in his or her own cause is universal and there can be no derogation from it. (*Nemo Judex in causa sua*).
- f) In principle, there is nothing wrong with commissioning an independent investigation but the report should not be '*private and confidential*' and must be made available to all parties.
- g) Whereas IRA is mandated to arbitrate or adjudicate disputes, such adjudication must take place in an environment where principles of natural justice are observed, namely, before an independent body, all parties are heard and the judges ought not participate in investigations as commanded by article 28 of the Constitution. Therefore, the impugned decision of the CEO and team was without legal basis and tainted with procedural impropriety.

- h) Although the Act is silent on which organ handles claims disputes as between the Board and the CEO, it follows that since the CEO's functions under Section 22 do not include handling disputes, the responsibility falls on the Board by default as the organ with oversight and supervisory role over the CEO to operationalize the adjudication function.
- i) The CEO and his team acted with procedural impropriety when they determined a dispute between Leeds Insurance co. ltd and Kisuule Astacio ltd after they had authorised investigations into the alleged theft.
- j) The Insurance Act prescribe that disputes shall be arbitrated but this is a form of adjudication and parties cannot contract to defeat legislative intent. Therefore, the provision in the contract that parties refer disputes to courts if law is redundant for the reason written law overrides contractual terms.

Orders

- a. This application for judicial review succeeds.
- b. An order of certiorari shall issue quashing the decision by the CEO and his team in complaint No. 6 of 2014.
- c. An order of mandamus shall issue directing the Board to put in place an independent body to adjudicate disputes within six months from the date of this Ruling.
- d. The parties in this dispute shall await the setting up of this independent body which shall then determine their dispute.
- e. The Respondents shall pay the Applicant costs of this application jointly and severally.

Consequential orders

I am mindful that this decision might lead insurance companies that had been affected by decisions of the CEO and team to want to overturn those decisions by citing this Ruling. This Ruling will operate prospectively and not retrospectively therefore decisions made by IRA prior to this Ruling shall not be challenged on the basis of this decision.

DATED AT KAMPALA THIS 14TH DAY OF AUGUST 2020

HON. LADY JUSTICE HENRIETTA WOLAYO

LEGAL REPRESENTATION

Mugenyi & Co. Advocates for the Applicant

Attorney General's Chambers for the 1st Respondent

E. Wamimbi Advocates for the 2nd Respondent

NB. This Ruling is delivered by email