IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: LILA, J.A., MWANDAMBO, J.A, And FIKIRINI, J.A.)

CIVIL APPEAL NO. 165 OF 2020

HERITAGE INSURANCE COMPANY TANZANIA LIMITED..... APPELLANT

VERSUS

FIRST ASSURANCE COMPANY LIMITED.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania,

(Commercial Division) at Dar es Salaam)

(Philip, J.)

dated the 31st day of January, 2020

in

Commercial Case No. 145 of 2018

JUDGMENT OF THE COURT

24th October, 2022 & 5th April, 2023

MWANDAMBO, J.A.:

The appellant Heritage Insurance Company Tanzania Limited, unsuccessfully sued the respondent First Assurance Company Limited in a suit for payment of USD 533,530.25 being balance allegedly due and payable to her from a facultative reinsurance claim. Besides, the appellant claimed interest on the principal sum, damages and costs. She has appealed against that judgment before the Court.

The appellant's suit before the trial court was premised on facts alleging that the respondent had refused to settle a claim on a facultative reinsurance despite its earlier undertaking to settle the claim. The dispute arose from the following background. For quite some time, the appellant was an insurer to a company called Samos Hotel Limited (the insured) covering buildings and contents at its hotel in Zanzibar. Given the magnitude of the insured risk, the appellant made an arrangement ceding part of the risk by way of a facultative reinsurance with several insurance companies for different proportions, the respondent assuming 25% of the insured value. Pleadings show that such an arrangement with the respondent began on 1st April 2014 evidenced by a facultative closing slip running through 31st March 2015 covering 25% of the insured risk which meant that, in the event of occurrence of the insured risk, the respondent would be liable for 25% of the claim.

It was common cause that, on 17th April 2015, the appellant sent an email to the respondent notifying her of a renewal of insurance policy with the insured Samos Hotel Limited for another year from 1st April 2015 to 31st March 2016. Through that email, the appellant asked the respondent to confirm the reinsurance coverage arrangement it had the previous year to which the respondent agreed. On 4th May 2015, the appellant's officer

sent an email to the respondent intimating a possibility of a claim by the insured, subject of the facultative reinsurance. That email indicated further that the appellant had appointed a loss surveyor to investigate the circumstances behind the loss of which the respondent would be kept abreast. Nevertheless, this information did not stop the parties from going ahead with the arrangements for renewal of the facultative reinsurance for, on 16th June 2015 the respondent signed a facultative reinsurance closing slip (exhibit P3) covering the period from 1st April 2015 to 31st March 2016 (the second period of cover). The signing of exhibit P3 was followed by the appellant's payment of the requisite premium to the respondent on 30th June, 2015.

The arrangements above went almost simultaneously with the settlement of the interim request from the insured forwarded to the appellant by the company which had been appointed to survey and investigate on the fire incident and the loss involved. Initially, the appellant paid USD 500,000.00 against the request for interim payment and claimed from the respondent the corresponding 25% of its share under the facultative reinsurance. There was no dispute that the respondent agreed to settle the claim against a cash call as evident through an email (exhibit P8) from the respondent's General Manager sent

to the appellant's officer on 9th June 2015. That was followed by a second request for interim payment for an equivalent amount which the respondent undertook to pay its share upon receipt of a cash call from the appellant. In the process of the settlement of the insured's claim, it was mutually agreed that the appellant retains a sum of USD 75,000 from the amount it owed the respondent by way of a set off considering that the respondent had not yet paid any amount demanded. Subsequently, the respondent paid the appellant a sum of USD 25,000 making a total of USD 100,000 thereby reducing the liability from USD 630,392.75 to USD 535,392.75. It was common ground that, the respondent made no other payment to the appellant on the cash calls despite demands followed by promises for payment. After a series of correspondences characterized by claims and responses between the parties, on 20th July 2017, the respondent reneged on its earlier undertaking by refusing to settle the claim contending that the loss occurred prior to the renewal of the facultative reinsurance. It purportedly rescinded the coverage notwithstanding that it had already expired long before that date.

The foregoing resulted into the appellant instituting the suit before the trial court predicated upon breach of the facultative reinsurance cover by non-payment of the claim as alluded to above. The appellant claimed

that it had a valid facultative reinsurance policy which was automatically renewed upon its expiry on 31st March 2015 based on the insurance business usage, custom and practice to that effect. In support of that assertion, the appellant provided a list of 10 instances involving her and other insurance companies, the respondent included. It was her case that, the email it sent on 17th April 2015 (exhibit D2) was by no means a request for renewal but meant to put the records proper and that, under the said practice, a facultative reinsurance closing slip would not be issued promptly but at a subsequent date as it happened in the instant case; 16th June 2015 followed by payment of the requisite premium to the reinsurer. It was contended further that, the appellant had no knowledge of the occurrence of the risk on 17th April 2015 but in any event, at that time, the cover was already in existence and the respondent was not justified in cancelling the contract of insurance long after its expiry.

The respondent, for her part, denied existence of any valid facultative reinsurance before 17th April 2015 when the appellant requested for its renewal. It denied the appellant's contention that the facultative reinsurance coverage was renewed automatically upon expiry on 31st March 2015. Regarding the renewal covering the period between 17th April 2015, the respondent contended that, the appellant did not

disclose a material fact that the risk, subject of the request for the renewal had already occurred a day before the email asking the respondent to renew it. It was her further contention that, had the appellant disclosed the fact on the occurrence of the risk, it would not have agreed to renew the facultative coverage. Hence, its election to avoid the contract upon discovery of the non-disclosure at a later stage. It also counterclaimed from the appellant an amount of USD 25,000 paid to the appellant as part of the avoided facultative reinsurance.

The trial court framed five issues for determination of the suit. However, the issues boil down to two main issues namely; **one**, whether there was a facultative reinsurance cover and the terms thereof; **two**, whether there was any breach of the terms and conditions of the facultative reinsurance coverage by either of the parties. From those issues followed the reliefs.

In its judgment, the trial court rejected the appellant's claim on automatic renewal of the facultative coverage upon expiry on 31st March 2015 based on insurance business practice in the absence of any notice of renewal. Having so stated, the court found that the evidence supported existence of a coverage from 17th April 2015, a day when the appellant's officer contacted the respondent vide exhibit D2 for a renewal. From such

a finding, the trial court addressed itself on the validity of the coverage running from 17th April 2015 considering the facts showing that the risk sought to be insured in favour of the primary insured occurred on 16th April 2015; a day before the appellant contacted the respondent to confirm the arrangement for the cover vide exhibit D2. Satisfied that the appellant failed to disclose to the respondent material facts on the occurrence of the risk a day before the instruction for renewal, the trial court concluded that, the appellant was in breach of the principle of utmost good faith; a fundamental principle in contracts of insurance. It thus found the facultative coverage void as there was no longer any insurable risk.

Even though the appellant's advocate contended that the contract could be voidable for misrepresentation, the learned trial judge took a different view reasoning that, contracts of insurance are special contracts distinct from ordinary contracts which are rendered void for misrepresentation notwithstanding the dictates of section 19 (1) of the Law of Contract Act (the Act) to the contrary. Upon that finding, the trial court dismissed the appellant's suit. On the other hand, it entered judgment for the respondent on the counter-claim for an amount of USD

25,000 on account of the amount it paid in part settlement of the claim under a facultative cover which it held to be inexistent.

The appellant appeals against the whole judgment upon fifteen grounds of appeal. It is significant that rule 93 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules) requires a memorandum of appeal to be concise, without argument or being narrative specifying the points which are alleged to have been wrongly decided. The appellant's memorandum of appeal contains 15 grounds from findings of the High Court on just one main issue which was, whether there was a facultative reinsurance cover between the plaintiff and the defendant. Besides, the grounds are not free from arguments and being narrative. We shall leave the matter at that but not without a reminder to litigants and their counsel. We cannot do better than echoing the words expressed by Lord Templeman in **Ashmore v. Corp of Lloyd's** [1992] 2 All. ER 486. His Lordship sounded a warning to litigants and particularly their legal advisors of their duty to cooperate with the court by ensuring that they present their cases with focused, chronological and brief pleadings defining issues in such a way simplifying the matters and not raising a multitude of ingenious arguments hoping that the judge will fashion a

winner. We can only hope that litigants and their advocates shall strive to adhere to the requirements prescribed by the Rules.

Having examined the grounds of appeal, it is evident that, regardless of the number, they raise the following issues, **one**, whether the trial court was correct in holding that the appellant failed to discharge her burden of proof that there existed a facultative reinsurance cover running from 1st April 2015 to 31st March 2016; **two**, whether the respondent was in breach of the facultative reinsurance coverage; and, **three**, whether the High Court had jurisdiction to enter judgment in favour of the respondent on the counter-claim.

Mr. Audax Kahendaguza, learned advocate of Auda & Company Advocates continues to represent the appellant as he did before the trial court. So does Mr. Hussein Mohamed, learned advocate from a firm of advocates operating in the name of Pegasus Legal, for the respondent. Both learned advocates lodged their written submissions for and against the appeal raising powerful arguments in support of their respective stand points to which we feel indebted for their industry.

In view of the approach we have taken, we shall be excused in our judgment for not following the pattern adopted by the appellant's learned advocate in his written submissions. It will be apparent that the first issue

we have framed for the determination of this appeal takes on board grounds 1, 2, 3, 4, 6, 8, 9, 10 and 11. Mr. Kahendaguza's bone of contention both in his written and oral submissions was against the trial court failing to make a finding that the appellant discharged her burden of proof that a facultative reinsurance coverage was automatically renewed running from 1st April 2015 based on custom, usage and practice in the insurance industry prevalent at the time. He argues that, the evidence placed before the trial court both oral and documentary, proved the existence of automatic renewal of reinsurance coverage amongst insurance companies. He cites examples from ten instances through exhibit P21 even though six of out them relate to transactions after 1st April 2015. He also relies on the evidence of PW4 said to be an expert in insurance industry to the same effect. To bolster his submission on the relevance of customs and usage in contracts, the learned advocate relies on the works of Cheshire, Fifoot and Furmston in their book; **Law of Contract**, 12th Edition, Butterworths, London.

The learned advocate criticizes the trial court for determining the first and decisive issue in the negative despite its finding that a facultative reinsurance cover existed and established through exhibit P3 and D2 as well as the testimonies of DW1 and DW2. On this, the learned advocate

argues that the trial court strayed into error in determining the first issue in the manner it did and framing a different issue on which it concluded that there was no valid facultative reinsurance cover in answer to the first issue.

Submitting further, the learned advocate contends that, contrary to the view held by the trial court, the evidence through PW4 established that no writing was required to support automatic renewals. It was his submission that, in any event, exhibit D2 was by no means a request for renewal of the cover which had been automatically renewed from 1st April 2015. According to him, exhibit D2 was meant to document existence of the renewed cover for further steps to be taken including issuance of closing slips as was always the case in the previous transactions. Mr. Kahendaguza concluded his submissions on the first issue covering grounds 1, 2, 3, 4, 6, 8, 9, 10 and 11 by urging the Court to set aside the trial court's finding and make its own inferences which will result in an affirmative answer to the first issue before the trial court determined against the appellant.

Mr. Hussein was emphatic in his written as well as oral submissions in support of the trial court's findings that resulted into the dismissal of the appellant's suit. Essentially, the learned advocate submits that in the

absence of any express term in the agreement, the argument on automatic renewal cannot be inferred. He submits that, to succeed in such a claim, the appellant must have led evidence proving that the practice in favour of a positive finding on automatic renewal was so notorious and prevalent that it could be positively implied in the agreement the parties entered on 1st April 2014. He draws support from a decision of the Privy Council in **BP Refinery (Western Port) Pty Ltd. v. President, Councillors and Rate Payers of The Shire of Hastings** [1977] 52 ALJR 20, 26 for the proposition that a term can only be implied subject to existence of five conditions that is to say; **one,** it is reasonable and practicable; **two**, it is necessary to give business efficacy to the contract; **three**, it is so obvious that it goes without saying; **four**, it is capable of clear expression and; **five,** it must not contradict any express terms of the contract. It is the learned advocate's submission that the appellant's case did not satisfy the above conditions. In his further submission, Mr. Hussein places reliance on **Waddington in Tamplin (FA) Steamship Co. Ltd. v. Anglo Mexican Petroleum Products Co. Ltd.** [1916] A.C. 397 for the proposition that a term cannot be implied in a contract where it is inconsistent with its express provisions or with the intention of the parties gathered from the provisions.

With regard to the arguments revolving around grounds three and four contending that the trial court determined the first issue negatively based on a newly framed issue, it is the learned advocate's submission that the trial court did not frame and determine a completely new issue regarding the validity of the cover. He argues that was corollary to the main issue on the existence of the cover which it had already found to be inexistent. The learned advocate contends that, submitting otherwise borders on absurdity matching with painting a lily and invites the Court to reject it.

On the effective date of the renewal of the cover, subject of grounds 6, 8, 9, 10 and 11, the learned advocate, yet again, posits that the appellant's arguments that the reinsurance cover was renewed on 1st April 2015 are a fallacy. He contends that exhibit D2 sent on 17th April 2015 for the renewal of the coverage running retrospectively from 1st April 2015 was acted upon oblivious of the fact that the appellant concealed a material fact that the primary insured's hotel had been gutted down by fire on 16th April 2015. According to the learned advocate, the facultative reinsurance was not automatically renewed on 1st April 2015 as to cover the risk which occurred on 16th April 2015 neither was exhibit D2 anything other than notice of renewal. This is so, it is argued, had the reinsurance

cover been automatically renewed as contended by the appellant, there could be no basis for sending that email. He invites the Court to reject the appellant's submissions on these grounds.

Having examined the counsel's submissions, it seems to us that, the first issue we have posed cannot be determined without appreciating the nature of the contract the parties were at loggerheads as to its terms, in particular, in relation to its renewal. Apparently, neither the learned advocate for the appellant nor the respondents was forthright in the submissions on what document constituted a facultative reinsurance cover from which the trial court could ascertain the intention of the parties. The issue has exercised our minds to a considerable extent considering that we had no benefit of any authority in that regard. Our research has landed into an article titled: "*The precision of the formation of a contract of reinsurance and other fairly stories*" by John Edmond of Allens Arthur Robinson; a renowned law firm in Australia available at *<https:// date.allens.com au/pubs/pdf/insur/ins4junos.pdf>* accessed on 11th December 2022 which we find to be quite useful in this appeal. According to the author, formation of a contract of reinsurance is governed by the same principles applicable to other contracts regardless

of the fundamental consideration in insurance contracts; utmost good faith. The learned author articulates the issue thus:

> *"It is quite usuai for the parties to a contract to reduce their intentions to a short form document know as a **slip**. The idea of the slip is to have the salient terms of the contract set out in writing. Those terms are usually themselves in a short form code which is understood by both parties to refer to a particular market wording. In the simplest of cases, the broker prepares the slip and presents it to a reinsurer with a view to that reinsurer taking on the risk. The reinsurer then reviews the slip and, if he accepts the terms, he will affix his stamp and scratch for 100% of the risk" (At page 3).*

In support of the proposition, the learned author refers to a decision of the Court of Appeal of England in **General Reinsurance Corporation and Ors v. Forsakringsakrietbolaget Fennia Patria** [1983] 2 LLR 287 at p. 290 in which Kerr, LJ writing for the majority stated:

> *"The presentation of the slip by the broker constitutes the offer, and the writing of each line constitutes an acceptance of this offer and the underwriter".*

The learned author remarks that the same considerations should apply in cases where there is no broker. Downplaying the myth that a slip is not a contract of reinsurance, the learned author remarks that:

> *"This is not simply the case. The analysis above demonstrates that provided there is adequate certainty between the parties, the slip is perfectly acceptable form of the contract. Indeed, it is regrettably the case that in many of the disputes..., the policy or wording is not issued until after it becomes clear that a dispute is likely. It is quite usual for one party or both parties to sue on the slip...". (At page 5).*

We are highly persuaded by the above decisions and, in our firm view, they hold true in our jurisdiction. Under the circumstances, it is glaringly clear that the facultative reinsurance closing slip (exhibit P3) for the period from 1st April 2014 to 31st March 2015 constituted the contract of reinsurance between the parties.

In the premises, the argument advanced by Mr. Kahendaguza that a closing slip was merely a paper to document what the parties had already agreed but not necessarily the contract itself, in our view, is misconceived. One wonders, if the slip did not constitute the agreement between the parties, it is not clear to us which contract the appellant had

with the respondent between 1st April 2014 to 31st March 2015 which the appellant claims to have been automatically renewed from 1st April 2015 to 31st March 2016. It will be recalled that, apart from the custom and usage heavily relied upon by the appellant in support of the argument on automatic renewal, it is plain that the parties had been in the relationship for only a year as the reinsured and re-insurer. It is for this reason the argument by the respondent's learned advocate that for such custom, usage and practice to be relied upon, it must have been shown from the evidence that such custom, usage and practice was too prevalent at the time to bind the parties or any of the players in the industry. This takes us back to John Edmond's article in which he argues that:

> *"At the end of the policy period it is usual for renewal terms to be quoted. Generally, the reinsurer will provide cover under a new contract from the end of the existing contract. Under the common law, it has been said that the time of the formation of the new contract depends on who initiates the renewal" (At page 12).*

He refers to a statement of Jacobs, J. in **Randall v. Western Australia Insurance Co. Limited** [1981] 1 ANZ Ins. Cas 60 - 422 where it was stated:

> *"Where the policy is renewable and both parties so desire, the renewal is effected in one of two ways. The insured, by tendering the renewal premium in the first instance, makes an offer to renew the policy which the insurer may accept or decline at their pleasure; they cannot therefore be compelled to accept the renewal premium when tendered. If, on the other hand, the insurer invite the insured to renew the policy by sending him a renewal notice... the offer to renew proceeds from them and the insured's acceptance is signified by payment of the renewal premium".*

The record shows that the first contract expired on 31st March 2015 but it was not until 17th April 2015 when the appellant notified the respondent vide exhibit D2 that it had renewed the policy with the insured asking her to confirm the reinsurance arrangement. Despite the appellant's attempt to treat that email as just seeking confirmation from a contract that had already been automatically renewed, the trial court rejected that argument and rightly so in our view. Drawing inspiration from **Randall's** case (supra), we agree with the learned trial judge that the appellant failed to discharge its burden of proof in support of an automatic renewal. Similarly, we agree that the email (exhibit D2) sent to

the respondent on 17th April 2015 constituted a renewal notice for a new contract upon expiry of the previous one.

Having so held, the next question for our consideration relates to the effective date of the renewal vide exhibit D2. Was it from 1st April 2015 or 17th April 2015?. The learned trial judge agreed with the respondent's learned advocate that it was from 17th April 2015 rejecting the appellant's argument that the contract took effect from 1st April 2015 on the ground that it was automatically renewed. Mr. Kahendaguza urged that, even assuming that the email was a notice to renew the facultative reinsurance cover, it was for renewal from 1st April 2015 and not from the date it was sent. To reinforce his argument, the learned advocate submitted that, based on exhibit D2, the respondent signed exhibit P3 on 16th June 2015 covering a period from 1st April 2015 even though at that time it was aware of the occurrence of the risk on the insured occurring on 16th April 2015. It was his further argument that, subsequently, the appellant accepted the premium for the second period of cover.

In further elaboration, the learned advocate argued that, indeed, in para 8 of its written statement of defence, the respondent did not dispute that it accepted to renew the reinsurance cover rather, it did so as a result of the appellant's concealment of a material fact in relation to the

occurrence of the insured risk, subject of the cover a day before the notice to renew. Accordingly, the learned advocate contended that, it was wrong for the trial court to have held as it did that the facultative reinsurance cover took effect from 17th April 2015 rather than 1st April 2015 and holding that on that date, there was no longer any risk to be reinsured and hence rendering the contract void. Taking the argument further, the learned advocate contended that the holding that the contract was void for non-disclosure was a misconception in the light of the express provisions of section 19 (1) of the Act regardless of the underlying principle of utmost good faith in contracts of insurance. On the contrary, the learned advocate argued, assuming there was a misrepresentation or concealment of material fact in relation to the date of the occurrence of the insured risk, the respondent had a right to rescind the contract which it did not do.

To support his stance, Mr. Kahendaguza argued that the appellant established its case that the respondent did not exercise its right to rescind the contract after it became aware of the occurrence of the insured risk on 4th May 2015 or any other subsequent date before the expiry of the cover and purported to do so on 20th July 2017 when there was no longer any cover in existence. Several instances were cited to demonstrate that

the rescission of the cover two years after its expiry was merely an afterthought considering that the respondent had already affirmed the contract by doing the acts pointed out earlier.

Reinforcing his submission on affirmation of the contract, Mr. Kahendaguza relied on commentaries from Cheshire, Fifoot and Furmston's Law of Contract (supra) and argued that, the respondent's acts constituted a binding affirmation of the contract. Concluding, it was urged that the trial court's finding that no facultative reinsurance coverage existed from 1st April 2015 to 31st March 2016 was erroneous as it was against the weight of the evidence on record.

Mr. Hussein advanced several arguments in support of the trial court's finding on the effective date of the facultative cover based on exhibit D2 but crystallising into the appellant's alleged concealment of the material fact on the occurrence of the loss a day before the notice of the renewal vide exhibit D2. It was his submission that, the appellant's email of 4th May 2015 was too vague to inform the respondent of the particulars and the date of the occurrence of the risk. That aside, the learned advocate contended that the agreement on the retrospective operation of the cover was made on the assumption that at that time, the appellant had disclosed all material facts which was not the case. Had it been so,

the learned advocate argued, the respondent could not have agreed to that arrangement. He also contended that, the appellant's case before the trial was not premised on affirmation as to bring into play section 19 (1) of the Act. Otherwise, the learned advocate, placed reliance on a book by **MacGillivray on Insurance Law** for the proposition that a party who sets up a defence of waiver, he must do so specifically citing words or actions leading him to believe that such words or actions intended to treat the policy as subsisting.

On the whole, whilst the respondent's advocate concedes that it was in order for the cover to run retrospectively from 1st April 2015, he argues that it cannot apply in this case because the appellant concealed material fact relevant to the reinsured risk having occurred a day before the email seeking renewal of the coverage. Apparently, he made no submissions on the incidents cited to prove affirmation of the contract featuring in the appellant's written submissions.

We propose to begin our discussion on this issue with the obvious; that is, parties are bound by their own pleadings; a well settled principle expressed in various decisions amongst others, **James Funke Gwagilo v. Attorney General** [2004] T.L.R 161.

Juxtaposed to this appeal, it is evident that, the respondent admitted in para 8 of its written statement of defence that it agreed to a renewal of the facultative reinsurance coverage in response to the appellant's request via exhibit D2 dated 17th April 2015 running retrospectively from 1st April 2015. With respect, the respondent cannot not depart from its pleadings. Whether that was a result of misrepresentation or concealment of a material fact relevant to the risk is a distinct issue. In our view, had the trial court properly directed its mind to the facts and the respondent's pleadings, it should have found that, even though the appellant's case on automatic renewal was not established, there was evidence supporting renewal of the cover from 1st April 2015 following exhibit D2. That evidence included; **one**, signing the facultative reinsurance closing slip (exhibit P3) on 16th June 2015 running from 1st April 2015 to 31st March 2016, **two**, accepting payment of premium on 30th June 2015; **three**, committing itself to pay its share on the insured's claim under a cash call followed by part payment as late as 21st January 2016 vide exhibits P8 and P12.

There can be no doubt that, contrary to the submission by the learned advocate for the respondent supporting the finding of the trial

court, the contention that the facultative reinsurance coverage took effect from 17th April 2015 is not supported by any evidence.

Undeniably, the respondent who had agreed to a retrospective renewal of the coverage cannot renege on that undertaking and argues as it does that, it could not have agreed to a retrospective facultative reinsurance allegedly because there was no longer any insurable risk following the occurrence of the loss on the insured on 16th April 2015. In the same token, since we have already held that exhibit D2 was an offer for the renewal of the cover running from 1st April 2015, there could not have been created any valid contract from it on the basis of an acceptance from the respondent for such cover running from 17th April 2015. Again, the trial court appears to have strayed into error in holding that the cover started to run from 17th April 2015 disregarding the tenor of the email duly responded to by the respondent. In our view, the holding in support of the cover running from 17th April 2015 had no legal or factual basis. That finding cannot stand and is hereby set aside. That takes us to a consideration whether there was any breach of the facultative reinsurance cover.

The appellant's case was premised on the respondent's refusal to pay its share on the ceded risk in the amount of USD 533,530.25 after

payment of USD 100,000. On the other hand, the respondent's contention was that there was no facultative reinsurance cover because the appellant concealed a material fact relevant to the ceded risk. Both learned advocates have advanced formidable arguments for or against their stand points. Without going into the details of their respective arguments, we have already held that there existed a facultative reinsurance cover for the second period from 1st April 2015 to 31st March 2016. Whether that cover was vitiated by the alleged non-disclosure of the material fact involving occurrence of the loss to the insured's hotel on 17th April 2015 is the next issue for our consideration before deciding whether there was any breach.

The appellant's case was that it was not aware of the loss until 4th May 2015 even though the respondent imputes knowledge considering the evasive nature of the email. All the same, the appellant argues that, notwithstanding the notification of the possibility of a claim from the insured, the events that followed negates any claim justifying repudiation of the cover. We have already accepted that the events supported the appellant's case on the existence of the cover. According to the appellant's advocate, since the respondent became aware of the occurrence of the loss preceding notice of renewal through exhibit D2, it had an option to

rescind the contract immediately thereafter for the alleged non-disclosure in pursuance of section 19 (1) of the Act. It was thus argued that, since it did not do so and went ahead doing the acts cited earlier on, it must be taken to have affirmed the contract.

Mr. Hussein argued that the appellant's case was not premised on affirmation and so it cannot be a basis of its case on appeal. It was his further submission that, for a party to rely on affirmation which is equivalent to relinquishment of his right to rescind a contract for non-disclosure or any other reason, there must have been express pleading to that effect.

It is plain from the plaint that the case for the appellant was predicated upon breach of the facultative reinsurance cover said to have been automatically renewed by custom and usage. Some of the paragraphs went to show that, despite the existence of such contract and the respondent reinsurer signing a facultative reinsurance slip after it became aware of the loss occurring within the period of the renewed cover, it reneged on its obligation to settle the claim. It is equally plain that repudiation of the cover for non-disclosure of material facts was raised in the respondent's defence particularly, paras 8, 11, 17 and 22.

Apparently, the appellant did not seek to file any reply on those aspects and no issue was framed to determine such contention. All the same, both the appellant and the respondent led evidence for and against this aspect in their respective witness statements. The appellant did so through PW1 who feigned ignorance of the fire outbreak at the insured's hotel on 17th April 2015, the date an email to the respondent was sent.

From the respondent's side, Bosco Bugali (DW1) and Mariam Sakara (DW2) testified. The essence of their evidence was that, the facultative reinsurance was renewed on 17th April 2015 but the respondent was not aware of the occurrence of the loss a day before which resulted into rescinding the cover upon discovery that the appellant concealed a material fact relevant to the reinsurance cover in question.

In their closing submissions, both learned advocates addressed the trial court on whether the appellant misrepresented to the respondent on the existence of the loss on 16th April 2015 having a bearing on exhibit D2 on the basis of which the respondent acceded to renew the facultative reinsurance cover. Whilst the appellant was adamant that the cover was automatically renewed upon expiry of the previous one running from 1st April 2015, it maintained and continues to do so in this appeal that, the email was by no means a notice of renewal rather intended to keep record

of the renewed cover. It was also submitted that apart from the fact that the appellant was unaware of the loss on 16th April 2015, during the existence of the cover, the respondent took no step to rescind the same when it became aware of it on 4th May 2015 or any date thereafter. Instead, it was submitted, the respondent went ahead to sign a closing slip confirming the renewal running from 1st April 2015, vide exhibit P3, committed itself to pay its share of the claim in response to cash call request (exhibit P8 and P12) and accepted payment of the premium on the renewed cover thereafter. The appellant's advocate submitted further that the respondent's conduct and acts were consistent with a party affirming the contract in pursuance of section 19 (1) of the Act and not otherwise.

The respondent's advocate was resolute that there was no automatic renewal of the cover and thus loss on the insured's hotel occurring on 16th April 2015 was not protected by any reinsurance cover. It was equally argued that, the respondent acceded to the renewal of the cover from 17th April 2015 and not otherwise because the reinsurance cover so renewed could not have operated retrospectively to cover a loss that had already occurred for which there was concealment from the appellant inducing the respondent to accede to the renewal. These

arguments were all intended to support the respondent's decision to repudiate the claim but no submissions were made in response to the appellant's contentions on affirmation.

Be it as it may, as indicated earlier, the trial court took the view that the cover was void which sealed any opportunity for a discussion on the alternative argument on affirmation. We have already held that although there was no evidence of automatic renewal of the facultative reinsurance cover, there was evidence of its renewal in response to exhibit D2 resulting into the signing of the facultative reinsurance closing slip (exhibit P3) on 16th June 2015. We have equally held that it was an error for the trial court to hold as it did that the cover was void in the absence of evidence of misrepresentation according to the dictates of section 19 (1) of the Act. As to whether the appellant rescinded the contract, we endorse Mr. Kahendaguza's submission that the respondent's conduct and acts were inconsistent and incompatible with a party rescinding the contract on the alleged misrepresentation. We say so mindful of the provisions of section 19 of the Act which provides that:

> *"19.-(1) Where consent to an agreement is caused by coercion, undue influence, fraud, or misrepresentation, the agreement is a contract*

voidable at the option of the party whose consent was so caused:

Provided that, if such consent was caused by misrepresentation or by silence, or fraud within the meaning of section 17, the contract nevertheless is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.

(2) .... (n.a)

(3) A party to a contract, whose consent was caused by fraud or misrepresentation may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representations made had been true".

A similar issue involving rescission and affirmation of a voidable contract whose consent was caused by fraudulent misrepresentation was discussed by the Court of Appeal of England in **Car and Universal Finance Co. Ltd. v. Caldwell** [1964] 1 All. ER 290. As to what may be taken as constituting affirmation of a voidable contract, Lord Sellers stated:

"...An affirmation of a voidable contract may be established by any conduct which unequivocally manifests an intention to affirm it by the party who has the right to affirm or disaffirm.

Communication of an acceptance of a contract after knowledge of a fundamental breach of it by the other party or of fraud affecting it is, of course, evidence establishing affirmation but it is not essential evidence…." [at page 292].

Concurring, Lord Upjohn stated:

"Where one party to a contract has an option unilaterally to rescind or disaffirm it by reason of the fraud or misrepresentation of the other party, he must elect to do so within a reasonable time and cannot do so after he has done anything to affirm the contract with knowledge of the facts giving rise to the option to rescind. In principle and on authority he must in my judgment in the ordinary course communicate his intention to rescind to the other party. This must be so because the other party is entitled to treat the contractual nexus as continuing until he is made aware of the intention of the other to exercise his option to rescind. So, the intention must be communicated and an uncommunicated intention, for example by speaking to a third party or making a private note, will be ineffective. The text-books to which we were referred are unanimous on the subject." [at page 295].

Drawing inspiration from the above, we cannot but agree that the respondent's act purporting to rescind the contract two years after the expiry of the cover was not only strange but also not made within reasonable time contemplated by section 19 (1) of the Act. If anything, the respondent might have meant repudiating the claim which is not the same as rescinding a contract.

On the other hand, despite Mr. Hussein's argument on affirmation, it is our view that, such argument is not being taken for the first time in this appeal. It was raised before the High Court but in view of its finding, considering it could have been superfluous. Otherwise, we find no merit in the argument against affirmation considering the acts and conduct of the respondent as discussed above which leaned more in favour of affirmation than rescission of the contract. Having examined the evidence on record, we reject the respondent's argument on rescission of the facultative reinsurance cover for the alleged non-disclosure. On the contrary, since the respondent did not rescind the contract and instead conducted itself in a manner that established its affirmation, its refusal to settle the claim upon demand through undisputed cash calls was in breach of the facultative reinsurance cover constituted by exhibit P3. The net effect is that, the trial court ought to have answered the second issue

affirmatively in favour of the appellant. Consequently, the finding on the refund of USD 25,000 in favour of the respondent in its counter-claim cannot stand. It is hereby set aside. So is the judgment on the counter-claim.

In view of the above, we find it superfluous discussing the third issue we formulated above on the pecuniary jurisdiction of the trial court on the counter-claim. The above said, we allow the appeal and quash the decision of the High Court dismissing the appellant's suit and entering judgment on the respondent's counter-claim.

As to the reliefs, we order the respondent to pay the appellant USD 533,530.25 as prayed. As regards interest, the appellant claimed 20% of the principal sum per annum from 4th November 2015 to the date of judgment. However, the claim was shorn of justification of the rate in the pleadings and the evidence. As we held in **National Insurance Corporation (T) Limited & Another v. China Civil Engineering Construction Corporation,** Civil Appeal No. 119 of 2004 (unreported), the award of interest must be based on express agreement or any usage of trade having the force of law. There was no such evidence before the trial court and thus, in the absence of such evidence, the claim cannot succeed. It is accordingly rejected.

Regarding the claim for general damages, we think, given all the circumstances of the case and considering the principle behind the award of general damages engraved under section 73 (1) of the Act, we award the appellant a sum of TZS 50,000,000.00 as general damages.

The sums awarded shall attract payment of interest at the court's rate of 7% per annum from the date of judgment of the trial court till full and final satisfaction of the decree. The appellant is awarded its costs in this Court and the trial court.

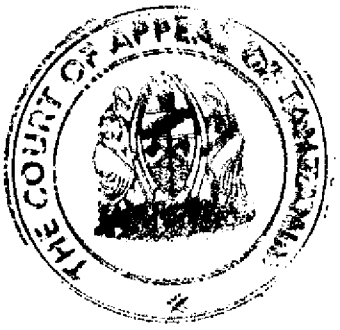
DATED at **DAR ES SALAAM** this 5th day of April, 2023.

S. A. LILA
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

The Judgment delivered this 5th day of April, 2023 in the presence of Mr. Alfred Rweyemamu, learned counsel for the Respondent and also holding brief for Mr. Audax Kahendaguza, learned counsel for the Appellant, is hereby certified as a true copy of the original.



C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL