IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR-ES-SALAAM

COMMERCIAL CASE NO.29 OF 2023

JOHN BARAKAEL MUSHI .....PLAINTIFF

VERSUS

ALLIANCE INSURANCE

CORPORATION LTD.....1ST DEFENDANT

NCBA BANK TANZANIA LTD .....2ND DEFENDANT

VICTORIA INSURANCE BROKERS LTD..NECESSARY PARTY

Date of last Order: 11/08/2023
Date of Judgment: 10/11/2023

JUDGEMENT

NANGELA, J.:

The Plaintiff sued the Defendants jointly and severally seeking for Judgment and Decree as follows:

(a) An order for payment of specific damages TZS. 123,450,000.00 as pleaded in paragraph 5 and 15 and 17 there in above.

(b) Interest on the decretal sum at Court's rate from judgment until payment of the amount in full.

(c) Payment of the general damages to be assessed by this Honourable Court.

(d) Costs.

(e) Any other order(s) and relief (s) may this Honourable Court consider fit and just to grant.

In brief it all started on the 20th of January 2021 when the Plaintiff approached VICTORIA INSURANCE BROKERS LTD (**the Necessary Party**) intending to insure four (4) of his Motor vehicles. Two among them with registration number T606DPS and T354DNX, Make SCANIA were assessed and valued at **TZS 120,000,000.00**. Having been assessed, the Plaintiff was asked to pay to the 1st Defendant, the Plaintiff's preferred Insurer, **TZS 11,676, 336.00** as premium. Unfortunately, the Plaintiff did not have enough money to pay the whole sum.

Still, the Plaintiff, the 1st and 2nd Defendants arranged for payment through an "**Insurance Premium Finance Agreement"** (IPFA), a facility provided from the 2nd Defendant. Under the IFP arrangement, the 2nd Defendant was to help pay the requisite Premium. However, it was a condition that, before the issuance of a **Motor Vehicle Cover Note**, the Plaintiff must have issued postdated cheques to the 2nd Defendant as security.

The Plaintiff signed the **IPF Agreemen**t, issued and deposited eleven post-dated cheques as required under the

IPF arrangement with the 2nd Defendant as security. On the 21st of January 2021 the Plaintiff was issued with two "*Risk Notes*" No. 6235 and No. 6237. He thereafter walked away confidently pursuing his daily businesses knowing that all has been set and done.

Unfortunately, and since misfortunes never send an alert when they occur, on the 25th of January 2021 two of his vehicles with registration No. T606 DPS and T 354 DNX collided in a road accident and got badly damaged. That accident claimed the life of one of the Plaintiff's drivers named Mr. Raymond Mashola and damaged curbstones belonging to the TANROADS. Allegedly, TANROADS imposed a fine on the Plaintiff amounting to TZS 450,000/=. Further, the Motor Vehicles were allegedly parked at a fee which has caused costs to the Plaintiff in the tune of TZS 3,000,000.00/=.

On 18th September 2021, the Plaintiff submitted motor accident claim forms and a demand notice to the 1st Defendant but since then noting positive was forthcoming. He resorted to court seeking for judgement and decree against the Defendants jointly and severally. The Defendants filed their written statements of defense denying the claims.

When the parties convened for a final pre-trial conference, these issues were agreed:

(i) Whether the Insurance Premium Finance Agreement dated 20/01/2021 between the plaintiff

and the 1st and 2nd defendants was properly executed by all parts and binding.

(ii) If the 1st issue is responded to negatively, who between the Defendants and the Necessary Party shall be held liable for any negligent conduct which made the Plaintiff to suffer loss due to non-payment of the premium.

(iii) Whether motor vehicles with registration No. T606 DPS and T354 DNX make Scania were insured by the 1st defendant at the time of accident on 20/01/2021

(iv) Whether the Cover Note/ Risk Note No. 6233 and 6237 with stickers No. 9657304 and 9657306 issued to the plaintiff by the party were valid at the time of accident

(v) To what reliefs are the parties entitled.

On the day of hearing the Plaintiff's case, the Plaintiff called two witnesses, himself being one of them and testifying as PW-1. The rest who testified for the Plaintiff was Mr. Aziz Zuberi, testifying as PW-2. Both tendered several exhibits in court. I will summarize their testimonies before I bring the

Defense case. In his statement received in court as his testimony in chief, Pw-1 told this court he approached Victoria Insurance Brokers Ltd, in January 2021, with a view to insure his four (4) Motor Vehicles, two being the subject of this suit.

Pw-1 told the court that, the total premium which he had to pay was TZS 11,676,336.00. Pw-1 testified that, lacking enough funds, he was advised to conclude an *Insurance Premium Finance (IF)* arrangement with the 1st and 2nd Defendants. It was Pw-1's testimony that, having submitted the required documents to the 2nd Defendant for appraisal, the same were approved for him to be granted the IPF facility.

He stated, however, that, the IFP facility was conditional, the condition being the Plaintiff should provide postdated cheques to the 2nd Defendant as security for the grant of the IPF facility. He also told this court he duly met the condition by depositing with the 2nd Defendant 11 post-dated cheques on 20/01/2021. In court, Pw-1 tendered copies of the cheques issued to the NCBA (the 2nd Defendant), and these were admitted as **Exh.P-1**.

Pw-1 told this court that, he maintains a bank account with Akiba Commercial Bank Plc at Moshi Branch, A/C. No. 10800340948. He further testified that; he signed the IPF Agreement on the 20th of January 2021. He tendered it in court and the same got admitted as **Exh.P-2**. Pw-1 testified further that, having signed **Exh.P-2** and deposited the post-dated checks (**Exh.P-1)** he was issued with two "Risk Notes",

namely*: Risk Note No. 6235* with sticker No. 9657304 for Motor Vehicle No. T354 DNX T DNX -Scania and Risk Note No. 6237 with sticker No.9657306 for Motor Vehicle No. T606 DPS, Scania. The two Motor Vehicle Cover Notes covered a period commencing from 21/01/2021 to 20/01/2022. The Cover Notes were collectively admitted as **Exh.P-3.**

Pw-1 told this court that, one of the Motor Vehicles with Reg. No. T354 DNX, was bought in January 2021 from one – Abdulwahab Abdulrazack Abdulkader. He tendered in court a Motor Vehicle Sale Agreement admitted as **Exh.P-4**. However, Pw-1 told this court he was on the process of transferring ownership of the Motor vehicle No. T354 DNX to his own name.

He also testified that, on the 25th of January 2021 two of his Motor Vehicles, i.e., the Motor vehicle No. T354 DNX-Scania and Motor Vehicle No. T606 DPS, Scania got involved in a fatal head-on collision accident which claimed the life one of his driver Mr. Raymond Mashola. Pw-1 told this court that, the accident was reported to the Police Station and an investigation took place. According to the investigation, the two vehicles were validly insured, and the two drivers had valid driving licenses. He tendered in court the TIRA-MIS motor vehicle insurance cover validation regarding the motor vehicle No. T606 DPS and this was admitted as **Exh.P-5.**

Pw-1 testified further that, due to the accident, there occurred damages to curbstones which are a property of

TANROADS and so the Plaintiff was made to pay for the damages to a tune of **TZS 450,000** and further paid **TZS 3million** as towering fees. He tendered in court TANROADS payments receipts, and these got admitted as **Exh.P-6**.

Pw-1 testified further that, on the 9th of February 2021, he filled in *Motor Accident Claim Forms* and served the 1st Defendant followed by a demand letter dated 18th of September 2021. He told this court that, to date he has never been attended despite the matter having been referred to the Insurance Ombudsman. Pw-1 tendered in court the *Motor Accident Claim Forms,* and these were collectively admitted as **Exh.P-7**.

According to Pw-1, since the 2nd Defendant and the "**Necessary Party**" were acting as agents of the 1st Defendant, the 1st Defendant is liable for actions of his agents. He testified that, when the accident occurred his account had enough funds to cater for the required 1st installment payable as premium because, the post-dated cheques deposited with the 2nd Defendant, were received on 20/01/2021. In court, he tendered his bank statement showing the status of his account at the time and the same was admitted in **Exh.P-8**.

Pw-1 stated further that, even though between the 20th of January and the date when the accident took place the Plaintiff's account had enough to pay for the requisite first installment premium, the 2nd Defendant did not process the cheques she received on the 20th of January 2021 until the 3rd

of February 2021. It was Pw-1's further testimony that, on the 3rd of February 2021, TZS 1,167,634 were deducted from his account by the 2nd Defendant, being the first premium installment which she ought to have been paid to the 1st Defendant as Premium.

Pw-1 testified that the amount deducted from his account has never been returned to the account. He told this court that, following the accident, he handed the claim for payments to the Victoria Insurance Broker Ltd (the **Necessary Party**) including several documents, the Claim Forms, Risk Notes, Police Form No.90, Sketch Map, Vehicle Inspection Report, TANROADS receipts and 10 leafs of post-dated cheques.

According to Pw-1, from the actions of the 1st and 2nd Defendants, the Plaintiff suffered both specific and general damages, owing to the loss suffered, including loss of business opportunities and the parking fees claimed. He also told this court that, the two motor vehicles involved in the accident were damages beyond repair and that, to date, the Plaintiff has never received compensation for the losses suffered.

During cross-examination, Pw-1 told the Court that, he read **Exh.P-2** before signing it. He denied being issued with a Pro-forma Invoice but admitted that his Insurer was **Alliance Insurance Corporation Limited** (the 1st Defendant). The Plaintiff insisted that he was duly insured. When asked, Pw-1 also admitted that he did not tender evidence that 2nd

Defendant paid any amount to the 1st Defendant as per the **Exh.P-2**. However, he admitted being the borrower under **Exh.P-2** and that, the duty of the borrower was to pay the two first Premium instalments after signing of **Exh.P-2.** He told the court he did pay by way of the post-dated cheques **(Exh.P.3**)

Upon further cross-examination, Pw-1 admitted that he did not show in his testimony if the 1st two installments were paid or not to the 1st Defendant. He admitted as well that the cover notes did show that their validity depends on there being made payments of the premium. He stated, however, that, the insurer was not supposed to receive all premium considering that there were also the post-dated cheques.

Pw-1 stated that, the two Motor Vehicles were valued at TZS 60,000,000/= each and that makes TZS 120,000,000. Pw-1 told the court that the post-dated cheques were for the four motor vehicles and, that, he paid about TZS 1,167,634 (for each of the 10 cheques) equal to TZS 11,676,340.00 and the 2nd Defendant (the NCBA Bank) received the cheques (**Exh.P-1**). Further still, Pw-1 told this court that, the 1st cheque was realized (paid) but the 2nd Defendant was yet to realize the rest of the cheques.

Pw-1 admitted that the Registration Card regarding his motor vehicle No. T354 DNX is still in the name of Abdulwahab Abdulrazack Abdulkader. When shown **Exh.P-4**, Pw-1 admitted that he has not paid all the amount regarding the

motor vehicle. When asked about the towing costs he claims, he admitted that he did not substantiate that claim and neither did he plead it in the Plaint.

When asked about the role of the **Necessary Party**, Pw-1 told the court that, her duty was to help him getting insurance cover. He admitted that the two (2) Cover Notes bear a name of "**Alliance Insurance Corp. Ltd**" and not "Victoria Brokers Ltd". He further admitted that the 1st cheque was received by the 2nd Defendant and if the monies were to be returned it was the 2nd Defendant who should refund the amount debited from his account and no other person. When shown **Exh.P-2**, Pw-1 told the court that it is the 1st Defendant who signed it.

When further asked if he was aware of the relationship between the 2nd Defendant and the 1st Defendant, Pw-1 stated that he had no details of their relationship.

During re-examination, Pw-1 told this court that, as per the IPF Agreement, (**Exh.P-2**) the 2nd Defendant was supposed to pay *Alliance Insurance Corporation Ltd* (1st Defendant). He affirmed that his account had the sufficient money to pay for the first premium installment. He also told this Court that the vehicle No. T354 DNX was purchased from Mr. Abdulwahab Abdulrazack Abdulkader, and that, he was still paying for it on installment basis.

When asked if that fact was disclosed to the insurer, Pw-1 affirmed to have fully disclosed it and that he was assured

there will be no problem as the Cover Notes would read both names to show he also has interest in the Cover Notes. He told the court that the Cover Notes do show that fact. He also told the court that when signing **Exh.P-2** the parties did not meet but each signed separately.

Pw-1 told this court further that, the cheques submitted to the 2nd Defendant were ten (10) in number and that, the purpose was for the 2nd Defendant to debt the amount from the Plaintiff's account and meet the Insurer's premium demands. He told the court that the 10 cheques are still with the 2nd Defendant, and one was already encashed as 1st installment payable to the 1st Defendant.

The second witness for the Plaintiff's case was PF 19303 Inspector Aziz Zuberi of Police Traffic Bagamoyo. He testified as Pw-2. In his testimony in chief, Pw-2 told this court that, he got informed of the accident involving the two motor vehicles with Registration No. T606 DPS Scania and T354 DNX Scania and visited on the scene of accident. He testified that, upon such visit, he found two drivers who were fatally injured, and vehicles damaged beyond repair. He tendered in court a Police Form No. 90 (PF 90) and accident sketch drawing. These documents were collectively admitted as **Exh.P-9**.

Pw-2 testified further that, after inspecting the two vehicles and having determined the extent of damages, he issued Police Form No. 3 (PF-3) 3 for treatment of those injured because of the accident, although one among the

drivers passed away. He also stated that, his investigation uncovered that the two motor vehicles were owned by one person John Barakaeli Mushi and, that, they were validly insured.

Besides, Pw-2 told this court that, the drivers owned valid driving licenses. He tendered in court a Police Force Vehicle Inspection Form, and this was admitted as **Exh.P-10.** Finally, Pw-2 stated that, the owner of the motor vehicles was not indicted with criminal charges because the vehicles had valid insurance policy and the drivers had valid driving licenses.

During cross examination Pw-2 admitted that he did not assess the value of the damage caused because he does not know how it is calculated. That marked a closure of the Plaintiff's case and the opening of the Defendants' case.

To support the Defense case, the 1st and 2nd Defendants called three witnesses. Two testified as Dw-1 and Dw-2 regarding the case for the 1st Defendant while one witness testified for the 2nd Defendant's case. But the **Necessary Party** had only one witness to call. As it shall been seen shortly here below, the witnesses tendered several documents as exhibits to support the defense case.

The first defense witness was Mr. John James, who testified as **Dw-1**. He told this court he is the founder of CGL Insurance Assessors Limited and for more than 14 years has worked as a private investigator. According to his testimony in

chief, Dw-1 told this court that, he was engaged by the 1st Defendant to carry out an investigation regarding an accident which involved two motor vehicles with registration No. T354 DNX-(Scania) and T606 DPS- (Scania).

Dw-1 told this Court that, on February 15th, 2021, upon carrying out the investigation, and upon assessing the environment and the extent of damages, repair costs, and appraisal for both motor vehicles, he prepared and submitted a report to the 1st Defendant. Dw-1 tendered in court two motor vehicle reports regarding motor vehicles with registration numbers T354 DNX and T606 DPS. The two reports were admitted as **Exh.D-1** and **Exh.D-2** respectively.

When shown **Exh.P-2**, Dw-1 told this court that the IPF Agreement **(Exh.P-2**) was not signed by the 2nd Defendant as required by the Bank (2nd Defendant) and the monies paid as premium were not paid to the 1st Defendant. According to Dw-1; the Cover Notes issued on the 21st of January 2021 had a clause which provides for their validity only if the required premium was paid.

Dw-1 testified further that; in his investigation, he uncovered:

(i) That, the IPF Agreement was signed on the 20th of January 2021 and the Cover Note was raised on the 21st of January 2021, even before the premium got paid to the 1st Defendant.

(ii) That, the Necessary Party issued Cover Note No.6235 on the 21st of January 2021 covering M/V with Reg. No. T354 DNX – Scania Tractor to the Plaintiff.

(iii) That, the same M/V with Reg. No. T354 DNX- Scania Tractor was also under another 3rd Party Insurance issued by BUMACO Insurance as per TIRA-MIS.

(iv) That, the *Necessary Party* (Broker) could not show that photographs of the Motor Vehicle were taken during the time of underwriting, i.e., (non-compliance of pre-cover underwriting procedures).

(v) That, the premium payment for the Premium Finance Agreement was not yet sighted in the 1st Defendant's Bank Account.

(vi) The Truck with Registration No. T354 DNX-SCANIA TRACTOR bears the name of the Abdulwahab Abdulrazak Abdulkader (thus the Plaintiff herein lacks "Insurable Interest" in the Motor Vehicle.

He further told this court that, if the Plaintiff's claims were to be honoured (of which he said they should not) still

they were outrageous and unwarrantable. His was of the view that, according to the insurance principles and practice, should there be total loss to the insured motor vehicles, and due to their depreciation, indemnification is to be done as per the vehicle's pre-accident value and not the value shown in the Cover Note. His reasoning for that was the need to avoid a person getting more or less than what he/she deserves.

Dw-1 told this court further that, as per his calculations the amount to be paid by the Insurer as compensation (if such was to be paid) was TZS 46,250,000/= and TZS 38,850,000/= for motor Vehicle No. T606 DPS, Scania and T354 DNX respectively. It was his further testimony that, his recommendations as per **Exh.D-1/D-2**, were that, even if the accident occurred, still there were serious irregularities in the underwriting process.

He noted, for example, that, the Cover Notes (**Exh.P-3**) were issued before there being payment of the requisite premium and, hence, there cannot be a valid insurance claim.

Dw-1 testified further that, since the Claimant had not tabled repair estimates before his submission of **Exh.D-1/D-2**, he had to establish the market price of costs of repair of the respective motor vehicles and such costs were TZS 54,290,000/= (for each vehicle). He told this court that such costs almost equaled the pre-accident value of each truck. He told this court, however, that, his recommendation was that

there had been a total loss of the property purported to have been insured, with a possible salvage of TZS 5000,000/-.

Dw-1 told this court further that, his further recommendation was that, if there be payments, then the same should consider the (**Market Value)** less (**Depreciation Value),** less **(the Salvage amount)** and pay the rest. According to Dw-1, there was an excess value of (+) or (-) 7% of the depreciation value, which amounts to TZS 54million as stated.

Dw-1 told this court that a round figure of TZS 55million was proposed in the **Exh.D-1/D-2**, which, minus the excess value and the salvage value equals TZS 46,250,000 as the amount payable. He testified that the above stated scenario applies to both motor vehicles involved in the accident. That means his conclusion was that if the 1st Defendant was to pay the claims, the amount payable should be TZS 51,090,000 (less) Salvage amount (TZS 8,000,000) (less) Excess Value (TZS 315,000), the balance will be TZS 38,850,000/=.

During cross-examination, Dw-1 told this court that, his investigation made a finding that the Plaintiff's motor vehicles had no valid Cover Notes. He told this court that, the Cover Notes have validity clauses which state they would be valid only if the agreed premium was paid. Dw-1 admitted that the agreed premium could have been paid by cheque or in cash but that, by the time of the accident no cheque or cash was paid to the 1st Defendant.

He told this court that when he inquired from the 1st Defendant it was confirmed that no premium was paid. He admitted, however, that, **Exh.P-3** (the Cover notes) was issued by Ms. Seline P. Anjerusi, a servant working for the **Necessary Party** (broker), the latter being a brokerage firm that also serves the 1st Defendant's clientele.

When asked whether an ordinary person seeking insurance services would have understood all the nitty-gritties and arrangements between the 1st Defendant and the broker (**Necessary Party**), Dw-1 admitted that it would not have been easy for such a person to gain understanding of all that had he engaged the broker. He admitted, however, that, the broker works for the 1st Defendant and can access the 1st Defendant's system online and issue Cover Notes.

Dw-1 admitted that the broker assessed the value of the Plaintiff's motor vehicles when issuing the Cover Notes (**Exh.P-3**). He also admitted that ordinarily, premium is paid according to the value of the insured property at the time of assessment. He further admitted that **Exh.P-3** (Cover Notes) were raised on the 21st of January 2021 and the accident took place on the 25th of January 2021. He also admitted that the motor vehicles could not have been valued at TZS 100million and after four days its value depreciate to TZS 60million.

He stated, however, that, as per his investigation, the motor vehicle with Reg. No. T354DNX was valued at TZS 55million, and the other M/V was valued at TZS 50million.

Even so, he admitted that, before accident, the vehicles had been valued at TZS 60million each. He emphasized that one of the motor vehicles did not belong to the Plaintiff but admitted, however, that, the cover note had both the name of the Plaintiff and that of Mr. Abdulwahab Abdulrazack Abdulkader.

When asked by court, Dw-1 stated that, the pre-accident value of a motor vehicle is obtained by taking up the market value less the depreciated value and that, the market value he used was obtained from the seller. And that in their report he did not state that the broker over valued in her assessment. He told the court that the values cannot be the same as the brokers always inflates them. He admitted, however, that, in his report (**Exh.D-1**) he did not state whether the broker had over valued the motor vehicles she had assessed or not.

Even so, when Mr. Runyoro cross-examined him, Dw-1 told this court that, the broker over valued the vehicle with Reg. No. T354DNX and that, as per **Exh.D-1**, its stated market value is TZS.80,000,000/=. When further pressed, he admitted that the broker valued it at TZS.60,000,000/= and so, the motor vehicle in question was valued between TZS 80,000,000 and TZS 60,000,000, the greater value being TZS.80,000,000/=. Dw-1 told the court, however, that, upon his own research on the market value, the value of such a motor vehicle was TZS 55million, which he derived from the market value of TZS 80,000,000/- and not from the TZS 60,000,0000/=.

As for the motor vehicle with Reg.T606 DPS, Dw-1 stated that, although its true market value was TZS 70,000,000, the broker had written a value of TZS 60,000,00. As such, Dw-1 defended his assessment as the correct assessment.

When shown **Exh.P-3,** Dw-1 told this court that, the document does not show whether the premium was paid or not but admitted that **Exh.P3** was approved by someone called Elisa and, that, the broker who accessed the online system of the 1st Defendant did not do so illegally. Dw-1 admitted that the 1st Defendant signed the IPF Agreement (**Exh.P-2**) and that the 1st Defendant was aware that the Plaintiff was seeking to have his motor vehicles insured. He, however, denied that the broker colluded with the 1st Defendant.

Dw-1 told the court further that the 2nd Defendant did not disclose to him whether she had realized the 1st cheque from the Plaintiff's account. However, Dw-1 stated that the amount payable as premium was not received by the 1st Defendant.

During re-examination Dw-1 stated that the broker had over valued the motor vehicles since the value should have been the market value less depreciated value. He told this court that the broker operates independently for several insurance companies and not just one. When shown **Exh.P-2** he admitted that the 1st Defendant signed it and, that, **Exh.P-**

2 ought to have been signed by three parties, namely: the insured, the insurer, and the bank. He stated, however, that the 2nd Defendant did not sign **Exh.P-2.**

When asked, Dw-1 admitted that it was the 2nd Defendant who ought to have paid the premium. He also reaffirmed that the validity of the Cover Notes was subject to insurance premium being made payable directly to the insurer's bank account.

The second witness who testified for the Defendants was Mr. Jonas Joseph Rutabingwa, testifying as Dw-2. In his testimony in chief, he told this court he worked with the 1st Defendant as Senior Executive-Legal and Claims Officer. He told this court that he knows the **Necessary Party** (Victoria Insurance Broker Ltd) as an insurance brokerage company and that the company has a business relation with the 1st Defendant. He told the court that, an Insurance Cover Note is issued and becomes valid upon issuance of invoice by the 1st Defendant and deposit of premium amount with the 1st Defendant.

He testified that the Plaintiff had to pay premium by way of consecutive monthly instalments. When shown **Exh.P-2**, Dw-2 told this court it was incumbent upon the 2nd Defendant to pay the premium on behalf of the Insured and, that, all relevant parties were supposed to have signed **Exh.P-2**. Concerning **Exh.P-3** (Cover Notes), it was Dw-2's testimony that, their validity was subject to confirmed payments of

premium directly to the insurer. According to Dw-2, having an insurance policy or Cover Note is one thing but for one to be indemnified for the loss, he must show that the required premium was paid to the insurer before the inception of the risk.

Dw-2 stated further that the 1st Defendant was not aware of any discussion between the Plaintiff and the 2nd Defendant or the Necessary Party. According to him, the 1st Defendant issued no invoice, neither to the Plaintiff nor the 2nd Defendant for proper payment of premium. He told the court that simply the agreement (**Exh.P-2**) was not executed by the 2nd Defendant, and hence no proper calculation of premium to be paid by the Plaintiff was made. Finally, he stated that, the parties' insurance contract was problematic and beset with irregularities as per the investigation conducted by Dw-1.

During cross-examination Dw-2 denied that the Cover Notes were generated automatically from the system of the 1st Defendant (the insurer). He stated that the Cover Notes were for the broker and not the 1st Defendant. Concerning **Exh.P2**, he told this court that it applies where a customer is intending to pay premium through a banker and differs from bank-assurance where the bank acts as a broker searching for business on behalf of the Insurer. He admitted, however, that the 1st Defendant has a Memorandum of Understanding with the **Necessary Party**.

Dw-2 admitted further that the 1st Defendant signed **Exh.P-2** and sent it to the 2nd Defendant for its signing as well and it was for the Plaintiff to have made follow up with the Bank (2nd Defendant). He admitted that by signing the **Exh.P-2** the 1st Defendant had consented to be bound by its contents. However, he told the court that the 1st Defendant was also waiting for the 2nd Defendant to sign her part and the rest was to follow, including the issuance of Cover Notes.

When asked about **Exh.P-3** it was Dw-2 admissive response that **Exh.P-3** was issued by **the Necessary Party** (Victoria Insurance Brokers Ltd). However, he told this court that **Exh.P-3** does not relate to the 1st Defendant. When shown **Exh.P-2** and noting that it showed no amount payable as premium, Dw-2 told this court that although the 1st Defendant signed it, the final say regarding the payments was to come from the 2nd Defendant. He admitted, however, that, had the bank signed **Exh.P-3**, even without there being shown any amount **Exh.P-3** would still have been binding.

Dw-2 admitted that **Exh.P-3** had schedules to it and that they showed the premium instalment amounts to be paid monthly equal to TZS 1,167,634 plus interest. He told the court that that was the amount which should have been shown in **Exh.P-3**. He admitted, however, that, **Exh.P-3** is to be read with its annexed schedules.

Concerning the ownership of the motor vehicles, Dw-2 told the court that one, with Reg. No. T354 DNX was owned

by Mr. Abdulwahab Abdulrazack Abdulkader while the other with Reg. No. T606 DPS was owned by the Plaintiff. He admitted that the 1st Defendant appoint an independent investigator/ assessor to assess the accident involving the two motor vehicles. He admitted that the Investigator's report shows that the motor vehicles are properties of one and same person.

Dw-2 told the court that although the broker operates independently, the insurer carries the risks of the insured for being financially capable. He admitted that an e-system can be accessed by both the broker and the insurer and generate Cover Notes. However, he admitted that the business of insurance is placed with the insurer.

When further cross-examined by Mr. Rutabingwa, Dw-2 told this court that communications with the 2nd Defendant started after the signing of the **Exh.P-3** (the IPF Agreement) and were through email exchanges. However, he told the court that, although the email communications between the parties were available, they were not tendered in court.

When asked why then the premiums were not paid, Dw-2 told this court the 1st Defendant asked and was told by the 2nd Defendant that there were miscommunications between the 2nd Defendant and the client (Plaintiff), and the 2nd Defendant did not go ahead with the payments of premium. When asked by the court, Dw-2 admitted that their agents do issue Cover Notes on their behalf and do have access to the

Insurer's e-system named – SMART POLICY. He admitted that if the agent so acts to the detriment of a client, the principal will shoulder liability. He denied, however, that the broker (*Necessary Party*) was their agent.

When Mr. Runyoro further cross-examined Dw-2, the latter admitted that **Exh.P-3** shows the name of the 1st Defendant. However, he told this court that even if the broker could issue Cover Notes, that does not mean the insurer accepted to cover the risks involved while the **Exh.P-3** was improperly issued. He admitted, however, the 1st Defendant knew that the Plaintiff was processing Cover Notes for his motor vehicles.

When asked by the court he responded that a user (client) issued with a Cover Note will still be in an uncertain position as he must receive the policy with a tax invoice from the Insurer.

During re-examination, Dw-2 told this court that, had **Exh.P-2** been signed by the 2nd Defendant, she would have been bound by it. He denied that **Exh.P-3** had any bearing with the 1st Defendant. He stated that the **Exh.P-3** was issued as a business proposal to the insured given that its validity was subject to payment of the requisite premium before the inception of the risk or subject to realization of the post-dated cheques whichever is applicable.

The third witness for the Defendants' case was Mr. Daniel Marealle who testified as Dw-3. He testified on behalf

of 2nd Defendant. In his examination in chief, he told this court that, the 2nd Defendant received the Insurance Premium Application Form duly filled with all requirements from the Broker (the Necessary Party. He also stated that, the 2nd Defendant shared an email communication with the 1st Defendant seeking for her confirmation of the transactions between the 1st Defendant and the Plaintiff.

According to Dw-3, despite several demands for the confirmation from 1st Defendant, nothing was forthcoming and, hence, no contract (IPF Agreement) was executed. Dw-3 stated further that, the 2nd Defendant did not process or endorse the **Exh.P-2** (IPF Agreement) due to the lack of confirmation from the 1st Defendant (insurer). He told this court that, the Plaintiff was duly advised on the same, including the 2nd Defendant's intention not to grant the IPF facility.

According to Dw-3's testimony, since the IPF-Agreement (**Exh.P-2**) was not signed by the 2nd Defendant for lack of confirmation, no premium was paid. He admitted, however, that, one installment worth TZS1,167,634/=was received from the cheque dated 20/01/2021.

During cross examination, Dw-3 admitted receiving an application form for the IPF arrangement, with all necessary annexures, from the Plaintiff. He also told the court that the bank was supposed to ask the insurer to send a confirmation regarding the transaction with the Plaintiff, and they did it by

writing an email to them and even making phone calls, but that the 1st Defendant did not respond. Unfortunately, Dw-3 provided no evidence regarding the emails, or the calls made.

When further cross-examined, Dw-3 told this court that the amount received as premium was received by the bank (2nd Defendant) and not by the Alliance Insurance (1st Defendant). He stated that such same amount was still with the bank, yet to be transferred to the 1st Defendant. Dw-3 admitted that it was improper for the Plaintiff to claim from Alliance (1st Defendant) while there was no premium paid to him.

Dw-3 also admitted in the contract of insurance payment of premium constitutes an element of consideration. Further, Dw-3 admitted that **Exh.P-2** was dated 20/01/2021 and, that, it was 5 days before accident occurred on 25/01/2021. He also admitted that the Plaintiff fulfilled all requirements which would have entitled him to be issued with the IPF loan and, that, the 2nd Defendant receive the first premium instalment amount equal to TZS 1,167,634/=.

Furthermore, Dw-3 admitted that the above stated amount was deducted from the Plaintiff's account based on the **Exh.P-2**. He told the court, however, that the 2nd Defendant held the amount paid by the Plaintiff in a suspense account until when the loan application was approved. He told this court, however, that the IPF (**Exh.P-2**) was void because

the 1st Defendant did not provide to the 2nd Defendant the confirmation she had requested.

When cross-examined by Mr. Nanyaro, Dw-3 told this court that, **Exh.P-2** was not an insurance agreement but came earlier than the insurance policy which constituted the contract of insurance. He told the court that, as per **Exh.P-2**, (see- page 3) the premium was to be paid by the 2nd Defendant. He admitted that from when the IPF (**Exh.P-2**) was signed, and up to the 26th of February 2021, the 1st Defendant had not received any amount from the 2nd Defendant.

He also told the court that up to the 20th of January 2021 the 1st Defendant had not sent to the 2nd Defendant the confirmation which the latter had requested. He also stated that the amount received as premium is yet to be received by the 1st Defendant and is still with the bank (2nd Defendant).

Dw-3 admitted that it was TZS 11,676,336/- which ought to have been paid by the 2nd Defendant to the 1st Defendant as insurance premium payable by the Plaintiff. He stated that such amount was not deposited with the 1st Defendant. He admitted, however, that paragraph 10 of **Exh.P-2** does state that, the 2nd Defendant will not be bound by **Exh.P-2** until the she signs it and, therefore, that the clause meant there should be a tri-partite signing of **Exh.P-2.**

When Dw-3 was cross-examined by Mr. Runyoro, he admitted that **Exh.P-2** was to be signed by three parties. He

told this court that the Plaintiff was not privy to whatever communication there was between the 1st Defendant and 2nd Defendant. He also could not tell the court whether **the Necessary Party** was made aware of the decision not to move forward with the issuing of the IPF facility to the Plaintiff.

Though Dw-3 stated that the 2nd Defendant had emailed to the Necessary Party asking her to collect the monies and cheques paid by the Plaintiff, Dw-3 could not tender such email in court as evidence of what he stated. Neither was he able to tell when the 2nd Defendant communicated with the 1st Defendant asking for the latter's confirmation to move forward with the IPF arrangement.

Dw-3 admitted, however, that, in paragraph 5 of his witness statement, he stated that on 26th February 2021 the Necessary Party was advised that the 2nd Defendant was not intending to move forward with granting the IPF and that, by that time it was already a month after the IPF was signed. He told the court that as a matter of common sense, it was not expected of the 1st Defendant to confirm when it was already know that an accident had occurred 5 days after the IPF was signed.

During re-examination, Dw-3 stated that, the insurance loan processing had two parts, one being for the client to fulfill the conditions required thereunder and once the bank receives the document, it would let the client know if the bank could

lend him money or not. He told the court that it is after the bank had confirmed with the guarantor who was the Insurer (1st Defendant) if he knew the Client/ Applicant that the process would go ahead or end up there. Dw-3 told this court that the 1st Defendant used to promise sending the confirmation but since she never did that. He stated that, the 2nd Defendant had to tell the Broker about the progress of the IPF for her to also make follow-ups.

When asked whether the non-approval was Applicant's fault, Dw-3 admitted that it was not. He also admitted that the Applicant (Plaintiff herein) paid the first required premium instalment as per the **Exh.P-2** and together with the 1st Defendant did sign **Exh.P-2** although the 2nd Defendant did not sign it. He told the court, however, that, the 2nd Defendant received the monies paid by the Plaintiff as premium.

The last witness to testify for the Defendants was Ms. Celine Patrick Anjerusi who testified as Dw-4. She testified that, she works as an Insurance Broker and that on 20/01/2021 the Plaintiff applied for insurance services for his motor vehicles, including the motor vehicles with registration No. T606 DPS and T354 DNX Scania trucks which he applied that they be insured by the 1st Defendant.

According to her testimony, due to lack of sufficient amount to pay for premium, the Plaintiff signed an IPF Agreement with the 1st and 2nd Defendants and, that, based on that the tripartite agreement between Plaintiff, 1st, and 2nd

Defendants a sum of TZS. 2,690,400 were paid for each of his vehicles. Dw-4 stated further that upon approval by the 1st Defendant, the Broker issued a comprehensive Motor Cover Note with Risk Note No. 6235, sticker No. 9657304 and Risk Note No. 6237 Sticker No. 9657306 in the name of the Plaintiff to cover his vehicles with Reg. No. T606PDS and T354DNX.

According to Dw-4, the Cover Notes were issued through the e-system provided to the Broker (Necessary Party) by the 1st Defendant. She finally concluded that the Plaintiff's vehicles were well insured since she issued Cover Notes in the name of Plaintiff and, hence, the Plaintiff had the right to be indemnified by the 1st Defendant.

When cross examined, Dw-4 told the court that she was the one who introduced the Plaintiff to the 2nd Defendant. She admitted that the 2nd Defendant was supposed to pay the required premium. She also stated that a client would be sure of being validly insured once the Insurance Company issues her with an Insurance Cover Note. She admitted that the broker could legally access the e-system of the Insurer and provide insurance services.

Dw-4 stated further that by the word "issued" which appears on the Cover Notes, it means that, the Cover Note was processed by the Broker with a valid permission from the responsible officer of the 1st Defendant. She told this court that had there been no approval from the 1st Defendant she would not have issued the Cover Notes.

As for payment of premium, Dw-4 told this court there were two ways to have it paid, one was by cash deposit or by way of obtaining a loan (the IPF) arrangement from the bank and the latter will pay the whole amount to the Insurer. She stated that later the loan would be repaid on a monthly instalment by way of post-dated cheques. She told the court that, if all that process is done, it should be taken that the insurance company has received the amount.

She also admitted that the Bank was to pay the whole amount on behalf of the client (the Insured). She admitted, however, that, the proof of payment of premium was a receipt even if the IPF was the approach used.

When shown **Exh.P2**, Dw-4 told the court there is with it an invoice attached thereto showing an amount equal to TZS 11,676,336/= and that an amount equal to TZS 10,761,606 ought to have been paid to the 1st Defendant by the 2nd Defendant. She confirmed that the initial instalment was TZS 2,690,400/-. She admitted that the premium covers those who contributed and those are the ones to be compensated when the risk materializes. She admitted that that the Plaintiff revealed to her that the motor vehicle with Reg. No. T354 DNX was co-owned partly by Mr. Abdulwahab Abdulrazack Abdulkader and the Plaintiff.

Dw-4 admitted being aware of the principle of insurable interest and that the insurance law recognizes the "*cash-and - carry principle*" – i.e., the payments of premium are made,

and the Cover is issued. She admitted that the 2nd Defendant did not sign **Exh.P2**. She told the court, however, that, the 2nd Defendant was aware and 1st Defendant approved the issuance of the Cover Notes (**Exh.P-3**). She also admitted that later 2nd Defendant informed **the Necessary Party** that the 1st Defendant was not responding to their emails.

Dw-4 told this court that although the Plaintiff wanted to pay the first instalment in cash, the 2nd Defendant was not ready to receive cash but required the same to be deposited including the post-dated cheques. She told the court that the Cover Notes (**Exh.P-3**) were the client's proof of being insured. She told the court that the 1st Defendant never called to have the Cover Notes cancelled.

As for the Smart-Policy procedures, Dw-4 told this court that, first there must be a quotation made by the Broker into the e-system to get a Cover Note. Second, the Insurer will check on the quoted amount electronically and will let the Broker go forward and issue Cover Note to the client and the deal is done. She told the court that the process is such that one cannot issue Cover Note unless approval is granted by the 1st Defendant.

So far that was all from the witnesses called to prove the cases for each party. The learned counsel for the parties filed closing submissions which I will consider as I analyze the evidence laid and the testimonies made before me. However, before I start the analysis and evaluation of the evidence, both

oral and documentary, it is worth noting that, in law he who alleges must prove. This is a cardinal principle enshrined in section 110 to 111 of the Law of Evidence Act, Cap.6 R.E 2022 and several authorities such as the case of **Jasson Samson Rweikiza vs. Novatus Rwechungura Nkwama,** Civil Appeal No.305 of 2020 (unreported) have also alluded to it.

In this suit the parties agreed and this court recorded five issues to be proved. The **first issue** was/is:

> Whether the Insurance Premium Finance Agreement dated 20/01/2021 between the plaintiff and the 1st and 2nd defendants was properly executed by all parts and binding.

Addressing this issue in his closing submissions, Mr. Nyambo has urged this court to make a finding that **Exh.P-2** was a properly executed and was a binding agreement on the parties. While he admits that **Exh.P-2** was not signed by the 2nd Defendant as required by clause 10, he was quick to point out that, by conduct, the 2nd Defendant was bound by **Exh.P-2** even if she did not sign it. To support his submission, he relied on two incidents which make it pulpable that the 2nd Defendant was bound by **Exh.P-2**.

One is the act of encashing the initial premium instalment paid by the Plaintiff and the second, is the receipt of the 9 post-dated cheques (**Exh.P-1**) paid in by the Plaintiff and which she retains. Second, was the amount which the 2nd

Defendant deducted from the Plaintiff's account. Mr. Nyambo placed reliance on **Exh.P-8**, the bank Statement, and the testimony of Dw-3 to support that fact. He contended that an inference should be drawn from those two incidences.

On the other hand, the learned counsel for the 1st Defendant argued that in no way could **Exh.P-2** be binding because it was not executed properly by all parties to it as required by its clause (paragraph) 10. He cited that clause which provides as follows:

> "It is agreed that this agreement shall not take effect and shall not be binding on the bank unless and until it is signed by the bank and other parties…."

Based on the above clause to **Exh.P-2** and the fact that none of the parties denied that the 2nd Defendant did not sign **Exh.P-2**, Mr. Nanyaro, the learned counsel for the 1st Defendant, maintained that **Exh.P-2** was not properly executed and, hence, not binding.

For his party Mr. Rutakolezibwa, the learned counsel who filed the 2nd Defendant's closing submission submitted only on the first issue. In essence, his position is not different from that of the 1st Defendant. However, he has placed reliance on the case of **Abualy Alibhai Azizi vs. Bhatia Brothers Ltd**, Misc. Civil Appeal No.1 of 1999 and argued

that any transaction which fails to meet agreed requisite conditions should be declared invalid.

To contextualize his submission within the principle he had deduced from the case of **Abualy** (supra), Mr. Rutakolezibwa contended that, according to **Exh.P-2**, the 2nd Defendant's failure to sign **Exh.P-2** makes it non-binding since signing was the prime condition for her to be bound.

Concerning the Necessary Party, her submission has not detoured from the line of thinking taken by the 1st and 2nd Defendants. Submitting for the Necessary Party, the counsel for the Necessary Party contended that the 1st issue should receive a negative answer.

Considering the above rival submissions, the question that flows from their response to the first issue is which among the two opposing camps is right. It is worth noting that, the existence and binding nature of an agreement depends on varied factors. They range from a consideration of the context under which the same was created, circumstances leading to its creation, and the conduct of the parties which may have impact on its creation.

In the case of **Louis Dreyfuls Commodities Tanzania Ltd vs. Roko Investment Tanzania Ltd**, Civil Appeal No.4 of 2013 (unreported), the Court of Appeal succinctly discussed the general principle about contract and how such may arise, noting that a binding agreement will arise where one party makes an offer or proposal, and the other party accepts it to

get what in law is called *consensus ad idem*. It is also legally accepted that a binding agreement may be inferred from the conduct of the parties. Such a position was considered with approval by the Court of Appeal in the case of **Zanzibar Telecom Ltd vs. Petrofuel Tanzania Ltd**, Civil Appeal No.69 of 2014 (Unreported).

According to Pw-1's testimony, his first port of call when he needed such services was the Necessary Party's office, being an Insurance Brokerage Firm and the Plaintiff's preference was the policy coverages provided for by the 1st Defendant. It is on record according to Pw-1's testimony, that, lacking enough funds, the Plaintiff was advised (by the Broker (as per the testimony of Dw-4 who stated that he introduced the Plaintiff to the 2nd Defendant), to conclude an *Insurance Premium Finance (IFP)* (arrangement (which is the **Exh.P-2**) with the 1st and 2nd Defendants.

According to Pw-1, the Plaintiff submitted all required documents to the 2nd Defendant for appraisal and these, having been appraised by the 2nd Defendant were approved for him to be granted the IPF facility (loan). The loan was meant to pay off the requisite insurance premium. **Exh.P-2** was therefore an arrangement brought to the surface owing to the Plaintiff's inability to pay for insurance services he needed to cover his motor vehicles.

It is also on record, as per the testimony of Pw-1, that, **Exh.P-2** was signed by himself on the 20th of January 2021,

and the Dw-2 admits that the 1st Defendant also signed it, and that, the signing was not done simultaneously but at different intervals. This means that the last person required to have signed **Exh.P-2** was the 2nd Defendant but, as it has been shown, she did not sign it. Does that fact absolve her from being bound even is clause 10 stated that if the bank did not sign it then **Exh.P-2** will not bind the bank?

Before I respond to the above question, let me also point out as well that, it is an undisputed fact that the IFP facility (the loan based on **Exh.P-2**) was to be availed to the Plaintiff on condition that the Plaintiff provides post-dated cheques to the 2nd Defendant as security for the grant of IPF facility. This condition was duly met by Pw-1 and **Exh.P-1** proves that fact. Dw-3 and Dw-4 also admitted that fact. As per **Exh.P-1** the post-dated cheques were received by the 2nd Defendant on 20th January 2021. In fact, Dw-3 admitted that the Plaintiff fulfilled all conditions he was supposed to under **Exh.P-2**. So, it means he accepted the IPF facility offer by the 2nd Defendant.

Further still, having deposited the post-dated cheques, Pw-1 testified that the 2nd Defendant did not process the cheques she received on the 20th of January 2021 until the 3rd day of February 2021 when she deducted TZS 1,167,634 were from the Plaintiff's account as **Exh.P-8** shows. Although there is no explanation as what the deducted amount was meant for, the answer is obvious if one looks at **Exh.P-2** (the

attached schedule of payable instalment). The deduction was done in connection with payment of the agreed premium instalments. The same was done based on **Exh.P-2** and presumably indicating that the 2nd Defendant had paid the requisite agreed premium to the 1st Defendant.

Now, considering what has been revealed herein above, can it be said that the mere fact that the bank did not sign **Exh.P-2**, then **Exh.P-2** is not binding and enforceable? Far from me that I should support the views of the Defendants on that aspect. From the conduct of the 2nd Defendant, even if she refrained from the actual signing of the **Exh.P-2**, she was bound by it. In the case of **Mr. Erick John Mmari vs. M/s Herkin Builders Ltd,** Commercial Case No.138 of 2019 (Unreported) ruling dated 11th May 2020), this court stated as a well-accepted legal position, that:

> "subsequent actions, as well as words of the parties, may create a new contract after the expiry of the earlier one. In essence, the key to establishing such a fact is to look at the conduct of the parties, judging them objectively and with an eye to find out how consistent their conduct is…"

If one considers the above holding in line with the conduct of the 2nd Defendant, the only objective conclusion will tell out that she was fully aware that **Exh.P-2** was already

binding on her, and the actual signing was but a matter of formality not substance as the substance had been settled. The 2nd Defendant conduct taken cumulatively including her subsequent receipt of the post-dated checks and the TZS 1,167,634 deducted from the Plaintiff's account meant that she had waived the requirement of signing the **Exh.P-2**.

In the case of **Zanzibar Telcom Ltd vs. Petrofuel Tanzania Ltd**, (supra) an unsigned contract and the effect of acting on it were fully and succinctly discussed. There, the Court of Appeal considered the "issue of acceptance by conduct", and, citing the case of **Reville Independent LCC vs. Anotech International (UK) Ltd** [2015] EWHC (Comm) observed as regarding the facts of that English case:

> "the claimant, a US-based television company, had entered into a "deal memorandum" with the defendant cookware distributor, pursuant to which the former was to licence to the latter certain intellectual property rights pertaining primarily to the Master-Chef US brand, and promote the defendant's products in its television series. It was expressed in the "deal memorandum" that, that understanding was not binding until signed by both parties, also that it was intended

> to be replaced by a long form agreement which in fact, was never concluded because negotiations broke down. When the matter was in court, the defendant claimed that it was not bound by the terms of the "deal memorandum" because they did not sign that document, therefore that the terms therein were not accepted. The question for consideration by the court was whether the claimant's conduct was sufficient to amount to waiver of requirement for signature, and whether acceptance by conduct had occurred. At the end of its deliberations, that court ruled that even where a contract clearly contains completion formality requirements, the conduct of the parties amounted to a waiver of those requirements, and that it constituted acceptance. We are convinced that this is a sound principle, which we accordingly approve."

From the foregoing considerations, it is my humble view that, not signing **Exh.P-2** cannot absolve the 2nd Defendant from the obligations running from the agreement

and cannot, on the account of the subsequent conduct of the 2nd Defendant make **Exh.P-2** void and, hence, of no effect as the Defendants and the Necessary Party would want this court to believe. The contrary is true that, much as the 2nd Defendant did not sign **Exh.P-2**, her conduct makes it valid. It created a contract between all the parties even though the 2nd Defendant withheld his signature.

There being this contract, and since it was a facility agreement, what was stated in the case of **Exim Bank (T) Ltd vs. Dascar Ltd and Another** [2017] TLS LR.120 will haunt the mind and spirit of the 2nd Defendant. In that case, the Court of Appeal of Tanzania stated that, a loan facility agreement between a banker and its borrower creates a contractual relationship whose terms are binging on the parties. This means that the 2nd Defendant was bound to fulfil her obligations under **Exh.P-2** towards the Plaintiff as a borrower.

I do take note that in his submission the counsel for the 2nd Defendant relied on the case of **Abualy Alibhai Aziz** (supra) and stated that since there was non-conformity with a material condition (i.e., the requirement that for **Exh.P-2** to bind the 2nd Defendant she must first sign it) then **Exh.P2** was void. In my considered view however, the case relied on by the 2nd Defendant's counsel is distinguishable from this suit at hand,

It differs in that; it was dealing with a document for which and whose nature no subsequent conduct could have turned it to be enforceable. The document which was the subject of consideration was by itself an agreement outrightly prohibited by law because it had lacked the requisite authority or consent and so was contrary to the legal requirements of which governed the transaction under which it was being considered.

It follows, therefore, since the case relied on differs in material particular from the present suit, it cannot support the 2nd Defendant's case and cannot make **Exh.P-2** less binding on the 2nd Defendant or void. With that in mind, the first issue is responded to in the affirmative meaning that, **Exh.P-2** is binding and enforceable against the parties.

The **second issue** is:

> If the 1st issue is responded to negatively, who between the Defendants and the Necessary Party shall be held liable for any negligent conduct which made the Plaintiff to suffer loss due to non-payment of the premium.

The second issue depends on the first issue being responded to negatively. However, as I stated herein that issue is responded to positively. Still, in addressing the 2nd issue, the Plaintiff's counsel has contended in his submissions

that, the 2nd Defendant did not perform her obligations under **Exh.P-2** and hence occasioned loss to the Plaintiff. He pointed out the 2nd Defendant's respective failures which include failing to sign **Exh.P-**2 and failure to effectively communicate with the 1st Defendant and the Plaintiff while ironically proceeding to encash the post-dated cheques deposited with her by the Plaintiff. He concluded that the 2nd Defendant acted negligently in the regard.

Mr. Nanyaro, the learned counsel for the 1st Defendant, argued that the one who should bear the brunt, if any should, for any negligent conduct that made the Plaintiff to suffer loss should be the 2nd Defendant. Relying on **Exh.P-2**, he argued that, both the Plaintiff and the 1st Defendant had intended to execute an insurance contract and that, they freely executed **Exh.P-2**. He argued also that it was the 2nd Defendant who finally had to sign **Exh.P-2** and credit the 1st Defendant with the amount agreed upon as premium payable by the Plaintiff, a fact which she never did as she also never signed the **Exh.P-2**.

Mr. Nanyaro argued that, although the Plaintiff had negotiated with the 2nd Defendant and agreed to the total amount to be paid as premium and submitted the required loan security as post-dated cheques (**Exh.P-1**) to the 2nd Defendant, the 2nd Defendant acted negligently by debiting the

Plaintiff's account but did not credit the 1st Defendant's account with the same agreed premium.

Mr. Nanyaro contended that, looking at **Exh.P-2**, there is nothing like a requirement for confirmation from the 1st Defendant. He argued that if there was to be any confirmation as Dw-3 wants this court to believe, it was incumbent upon her to prove to the court by availing the emails which Dw-3 said were communicated to the court. Reliance was placed on section 112 of the Evidence Act, Cap.6 R.E 2022.

As I stated herein earlier, Mr. Rutakolezibwa, the counsel who filed submission in favour of the 2nd Defendant did not submit on the rest of issues raised except the first issue. But Mr. Robi Magaigwa, the counsel appearing for the Necessary Party had a similar view that the 2nd Defendant should accept the liability since she was responsible for the payment of the agreed premium to the 1st Defendant under the IPF Arrangements (**Exh.P-2)** which she still did not execute unlike all other parties.

Mr. Magaigwa advanced four reasons why the 2nd Defendant should shoulder the liability. His was a view that, first, after noticing that **Exh.P-2** was signed by both parties and stamped by the Insurer, she ought to have signed as well. Second, it was his submission that, if the 1st Defendant has refused to respond to the 2nd Defendant's calls and emails, then the 2nd Defendant ought to have informed the Plaintiff before proceeding to debt the Plaintiff's account.

His third reason is that the 2nd Defendant waited for more than four days to start seeking confirmation from the 1st Defendant while knowing that the Plaintiff was seeking insurance of his commercial vehicles against the risks associated with road usage and while aware that insurance cover is valid upon deposit of premium. His fourth and final reason the 2nd Defendant should be held responsible because, although she had the Plaintiff's contacts, she continued to withhold his monies to date and indirectly acting on the **Exh.P-2.**

In my humble view, I agree with the above submissions by the learned counsel for the 1st Defendant and the Necessary Party that, if there be any who should shoulder the blames traded across the board by the Plaintiff, the Defendants, and the Necessary Party, then the culprit should be the 2nd Defendant. First, by agreeing to offer a facility to the Plaintiff under the IPF Arrangement evinced by **Exh.P-2**, the 2nd Defendant has raised the Plaintiff's reasonable expectation that by executing **Exh.P-2** and depositing the required post-dated cheques (**Exh.P-1**), the 2nd Defendant would pay the premium as agreed. Those acts of the Plaintiff constituted sufficient acceptance required by the 2nd Defendant's offer to provide the Plaintiff with a loan under the IPF arrangement.

However, the 2nd Defendant did not pay the premium as agreed and as expected by the Plaintiff in line with what

Exh.P-2 was intended to serve. Neither was the Plaintiff informed timely by the 2nd Defendant of the glitches that she was grappling with in the name of lack of confirmation from the 1st Defendant (if there was any such requirement) as stated by Dw-3.

I do also find, as correctly stated by Mr. Nanyaro, the 2nd Defendant acted negligently because, when Dw-3 testified as to the lack of communication between the 1st Defendant and the 2nd Defendant regarding the issue of "confirmation", nothing was tendered as evidence that there was this communication by emails or otherwise. When Dw-3 was asked by this court if the emails were available, he admitted that they were but not brought to the court. Non-submission of a document by a party which she knew was important and helpful to the court while determining the suit entitles the court to draw an adverse inference against that party.

The above position finds support in the case of **FABEC Investment Ltd vs. MES International Financial Services (PTY) Ltd and Another**, Commercial Case No.07 of 2022 (unreported). In that case, this court, citing several decisions including one form the Court of Appeal had this to say, and I quote:

> "Legally, even if the burden of proof does not lie on a party who is in possession of a vital document, the Court may draw an adverse

inference if he/she withholds an important document in his possession which can throw light on the facts at issue. See the decision of the Supreme Court of India in *Gopal, Krishnaji Ketkar vs Mahomed Haji Latif & Ors* (1968) AIR 1413. As this Court stated in the case of *Professional Paint Center vs. Azania Bank Ltd, Comm*. *Case No.53 of 2021 (unreported),* while it is trite legal principle that, the basis of any sound decision of the Court should not be the weakness of the defence but rather the strength of the case for the prosecution/plaintiff, (see the case of *Tanzania Cigarette Co. Ltd vs. Mafia General Establishment, Civil Appeal No.118 of 2017 (CAT) (unreported)*, on the other hand, this Court is also mindful that it is trite law premised under section 115 of the Evidence Act, Cap.6 R.E 2020, that: "In civil proceedings when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him." As this Court stated in the case of *Issac & Sons Co. Ltd vs. North Mara Gold Mine Ltd [2022]*

> *TZHCComD 163*, the business of any Court is to make sure truth is unveiled. That truth can be unveiled only when material information known to the parties to help to the Court are provided to the Court by the parties who hold such materials. Failure on a party to do so, while knowing that such were or are useful evidential materials which would have enabled this Court to decipher where the truth lies as between the two rival parties present before the Court, entitles the Court to draw a negative inference against that party, which inference is that, the party is bent to hide the true nature of things from the eyes of the Court."

Here, although Dw-3 admitted that the 2nd Defendant had various email communication and did made several calls to the 1st Defendant, the 2nd Defendant did not lead such evidence to prove her alleged inability to move forward with what was agreed under **Exh.P-2** simply because of communication failure between her and the 1st Defendant.

Ironically, the available evidence (**Exh.P-8**) shows that the 2nd Defendant indirectly implemented the terms of **Exh.P-2** by deducting on the 3rd of February 2021, an amount equal

to the amount agreed as the first premium instalment but the same ended up with the 2nd Defendant and not deposited with the 1st Defendant. This act was, as well, done long after the Plaintiff has executed **Exh.P-2** and deposited **Exh.P-1** with the 2nd Defendant.

Looking at all those incidents, there is no escape room by the 2nd Defendant from being labelled "negligent". The only finding which I can make is that the 2nd Defendant was grossly negligent in her conduct and should be responsible for whatever outcome and claims made by the Plaintiff against the 1st Defendant the Necessary Party. The second issue is dealt with in that way and rest where that pendulum of discussion has stopped.

The **third and the fourth** agreed issues need to be addressed together. These issues were/are:

> **3rd Issue:** Whether the motor vehicles with registration No. T606 DPS and T354 DNX make Scania were insured by the 1st Defendant at the time of accident on 20/01/2021.
>
> **4th Issue:** Whether the Cover Note/ Risk Note No. 6233 and 6237 with stickers No. 9657304 and 9657306 issued to the plaintiff by the party were valid at the time of accident.

In his submission, Mr. Nyambo, the Plaintiff's counsel, holds a view that the 3rd and the 4th issues hereabove should

be responded to in the affirmative. He has contended that, the motor vehicles were insured and the Cover Notes (**Exh.P-3**) were validly issued and, hence, valid at the time of the accident. He has largely relied on **Exh.P-3** (the Cover notes) and **Exh.P-5** (the TIRA-MIS) which were tendered in court by Pw-1. Mr. Nyambo has also relied on **Exh.P-8** and **Exh.P-1** and **Exh.P-2.** He has also sought support from the testimony of Dw-4 who testified that she issued him the Cover Notes.

For his party, however, Mr. Nanyaro holds an opposite view contending that, the motor vehicles were not insured by the Defendant at the time of accident. His position is that, even if the Cover Notes (**Exh.P-3**) were issued, they were not valid and enforceable. His main argument is premised on the fact that no premium was paid or received by the insurer and, hence, there was no consideration. Mr. Nanyaro relied on section 137 (1) of the Insurance Act, 2009 and Regulation 35 (a) and (b) of the Insurance Regulations, 2009 to strengthen his submissions.

A further reliance was placed on the cases of **Registered Trustees of Jhpiego (An Affiliate of John Hopkins University vs. Liaison Tanzania Ltd**, Civil Appeal No.183 of 2018 (unreported); and **Britam Insurance Tanzania Ltd vs. Mtwara Balance Investment**, Commercial Case No.02 of 2020 (unreported).

As I stated earlier hereabove, the 3rd and the 4th issues are related and should be disposed of together. They are

centred on when a contract of insurance ensues in transactions regarding motor insurance. The case of **Britam Insurance Ltd vs. Mtwara Balance Investment** (supra) dealt with a similar issue and this court had this to say regarding the contract of insurance:

> "Under the law governing insurance practices, the autonomy of the parties to that contract is somehow limited as to when payment of premium may be made for the contract to take effect. In fact, the general rule in insurance laws is that unless the premium is paid, the insurance policy is not valid and binding."

The holding of this court in the above cited case was premised on what section 137 of the Insurance Act No.10 of 2009, read with Regulation 35 of Insurance Regulations, 2009 provides. According to section 137 (1) of the Insurance Act, 2009 the law states that:

> "The Commissioner may, by notice published in the Gazette and by written notice to each insurer, **require insurance premiums** due **to Tanzanian insurers from Tanzanian residents**, other than another Tanzanian insurer, **to be paid within a specified period of**

time from the **date on which the insurance was effected or renewed**." (Emphasis added).

According to Regulation 35 (a) of the Insurance Regulations, 2009, to which reference was made hereabove, the same states that:

> "Pursuant to section 137 of the Act,
> (a) an insurance policy will become invalid retroactive to the date of inception if the full premium payment is not made within seven days of the policy inception, **except in case of Motor Insurance shall be paid at policy inception**." (Emphasis added).

The above cited provisions were cited as well in the earlier cited case of **Registered Trustees of Jhpiego (An Affiliate of John Hopkins University vs. Liaison Tanzania Ltd**, (supra). There, the Court of Appeal supported the Appellant's view that, there can be no valid insurance policy where no premium is paid. In a precise form, having assessed the rival arguments by the Respondent's counsel, the Court stated:

> "In contrast, the learned advocate for the appellant relies on Regulation 35 (a) of the Regulations in support of his submissions contending that no valid insurance cover existed by

> reason of non-payment. With respect, we are inclined to agree with him. Acting under the authority of section 137 of the Act, the Commissioner of Insurance made Regulation 35 to give effect to the time limitation on the payment of premiums."

As it may clearly be seen from the facts in the present suit, although the Plaintiff was issued with **Exh.P-3,** the fact remains that, the premium for his motor vehicles which were to be paid by the 2nd Defendant under the IPF Arrangement (**Exh.P-2**) were not paid to the 1st Defendant at the date of inception and in fact has never been paid to date. That fact of non-payment at the date of inception of the Cover Notes makes **Exh.P-3** (the Cover Notes) invalid because the whole transaction failed to meet the requirements of Section 137 of the Insurance Act,2009 read together with the Regulation 35 (a) of the Insurance Regulations, 2009. This finding means that, the third and fourth issues are responded to in the negative.

The argument advance by Dw-3 to the effect that the 2nd Defendant who was supposed to have paid the premium on the 20th of January 2021 (the date of inception) when Dw-4 issued the Cover Notes (**Exh.P-3**) to the Plaintiff did not do so because the 1st Defendant did not send a confirmation to the 2nd Defendant cannot be a defense. Likewise, the argument

that Dw-4 issued, and the Plaintiff received, the Cover Notes cannot make them valid if all such acts ignored compliance with the requirement of the law.

The **final issue** is in relation to the reliefs which the parties are entitled to. Here, it has been settled that, the Plaintiff, the 1st Defendant, and the 2nd Defendant executed **Exh.P-2.** The intentions and understanding were that the 2nd Defendant should effect payment of premiums to the 1st Defendant and the Plaintiff was to fulfil agreed conditions before the 2nd Defendant proceed to offer him the IPF facility and pay the required premium on his behalf.

It has also been clarified, according to Pw-1's testimony, **Exh.P-1**, and **Exh.P-8**, that, although the Plaintiff fulfilled the requirements or conditions set out in **Exh.P-2**, the 2nd Defendant, acting negligently, did not issue the expected insurance loan facility and, due to that failure, the agreed premium was not paid. Such non-payment was confirmed by Dw-1, Dw-2 and even Dw-3.

It has as well been factually portrayed that, when the Plaintiff suffered loss due to motor accident involving two of his motor vehicles, he had firmly believed that he had insured them with the 1st Defendant based on the arrangement with the 2nd Defendant and 1st Defendant evinced by **Exh.P-2**. However, the fact has turned out that the same were not and the person to blame is the 2nd Defendant.

It is also worth noting that, while hearing this matter, the Plaintiff showed, through **Exh.P-4**, that he had an insurable interest in the motor vehicle with Registration No. T354 DNX and motor vehicle No. T606 DPS. Further, through **Exh.P-9** and **Exh.P-**10, the two motor vehicles got involved in an accident and, according to the testimony of Dw-1 and as per **Exh.D-1**, the damage was almost a total loss as only TZS 5000,000/= could be salvaged.

In his valuation of the motor vehicles, however, Dw-1 valued the same at TZS 46,250,000 and 48,645,000 as per **Exh.D-1**. However, according to **Exh.P-3**, Dw-4 who worked for the Insurance Broker (the Necessary Party) had valued the motor vehicles at TZS 60,000,000 each. As the facts in this case stand, the accident took place only four days after the assessment by Dw-4. However, it defies logic to argue that within the four days the motor vehicles could have depreciated to the levels exhibited by Dw-1 in his testimony and as per **Exh.D-1**.

Considering the facts of this case and the evidence summarized herein, I find that, the evidence to be relied on as proof of the value of the motor vehicles is **Exh.P-3**. The reasons for that finding are that, had all things gone well, that would be the amount payable by the Insurer following what Dw-4 stated in her assessment and her later issuing of the Cover Notes (**Exh.P-3**), even though such Cover Notes turned out to be invalid as explained earlier hereabove. Pw-1 also

established, though **Exh.P-6**, that, he paid fines to TANROAD amounting to TZS 460,000.00. However, the claims for TZS 3,000,000 as towing and parking fees could not be supported, hence, not proved.

Considering the above and, in the circumstance of this case which consider that the Plaintiff has not only sued the Insurer (1st Defendant) and its Insurance Broker (the Necessary Party) but also the 2nd Defendant, while the case against the 1st Defendant and the Necessary Party cannot succeed, the case against the 2nd Defendant succeeds. The success of the Plaintiff's case over the 2nd Defendant is because the Plaintiff has proved that the 2nd Defendant acted negligently when she did not pay the requisite premium to the 1st Defendant thus leaving the Plaintiff exposed to risks which he had believed were covered under **Exh.P-3.**

Put differently, had the 2nd Defendant paid the requisite premium to the 1st Defendant, the Plaintiff would not have suffered the losses because he would have been covered and so benefit from his endeavors to insure his property. Ironically, while the 2nd Defendant failed to pay the premium, she, nonetheless deducted the required first instalment from the Plaintiff's account and received post-dated cheques (**Exh.P-1**) from the Plaintiff. Moreso, she did all that while knowing that the required premium was never paid to the 1st Defendant to date.

In that context, it is the 2nd Defendant who should shoulder all the liabilities which the 1st Defendant could have shouldered had the premium been paid on the date of inception. The Plaintiff is entitled to recover from the 2nd Defendant. I do also note that the Plaintiff has asked for payment of general damages. In law general damages are made payable at the discretion of the court. Considering the facts and the evidence adduced by the Plaintiff, it is clear that the Plaintiff suffered general damages which are assessable to an amount equal to TZS 3,000,000/-.

In the upshot of what has been stated herein, this court gives judgement in favour of the Plaintiff as against the 2nd Defendant and settles for these orders:

(a) That, the 2nd Defendant is ordered to pay TZS. 120,000,000.00 being the value of the two motor vehicles with Registration No. T354 DNX and T606 DPS which got involved in accident and which accident could have been covered by way of insurance cover but for the 2nd Defendant's negligence in failing to fulfil her duty under the Insurance Premium Financing Arrangement she had entered with both the Plaintiff and the 1st Defendant on the 20th of January 2021.

(b) That, the 2nd Defendant is to pay the Plaintiff TZS 450,000.00 paid to TANROADS, and which could have been paid by the Insurer had the 2nd Defendant fulfilled her obligations under the Insurance Premium Financing Arrangement.

(c) That the 2nd Defendant is to pay Interest on the decretal sum at Court's rate of 7% from judgment until payment of the amount in full.

(d) That, the 2nd Defendant is to pay general damages in the sum of TZS 3,000,000/= to the Plaintiff.

(e) That, the 2nd Defendant is to pay all costs incurred by the Plaintiff.

It is so ordered.

DATED AT DAR-ES-SALAAM ON THIS 10TH DAY OF NOVEMBER 2023

.....

DEO JOHN NANGELA

JUDGE

Right of Appeal Explained