THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)

CIVIL SUIT NO. 594 OF 2015

NIKO INSURANCE (U) LTD::PLAINTIFF

VERSUS

1. SOUTHERN UNION INSURANCE BROKERS LTD
2. ALBERT NDUMA
3. M.M BAGALAALIWO
4. S.R SHAM
5. CONSTEN MUTUKA::DEFENDANTS

BEFORE: HON. JUSTICE DAVID WANGUTUSI.

JUDGMENT:

This suit was originally filed in the name NIKO INSURANCE (U) Ltd as the Plaintiff and on the 16th May 2017 the parties informed Court that the Plaintiff had changed to Sanlam Insurance Ltd. The Defendants did not object to the change.

In this suit the Defendants are Southern Insurance Brokers Ltd, Albert Nduma, M.M Bagalaliwo, S.R Sham, Consten Matuka who are referred to in these proceedings as the 1st, 2nd, 3rd, 4th and 5th Defendants respectively. The 2nd, 3rd, 4th and 5th Defendants are the directors of the 1st Defendant.

The Plaintiff Sanlam General Insurance (U) Ltd sued the Defendants jointly and severally for a liquidated sum of UGX 156,225,632/= being unpaid insurance premiums, general damages, interest on the decretal sum at 25% and on general damages at 12% p.a from the date of judgment till payment in full and costs of the suit.

The brief background is that the Plaintiff was engaged in all types of Insurance covers to her various clientele.
The 1st Defendant is an insurance broker who would solicit and take out insurance policies from the Plaintiff on behalf of her various clientele. In return the 1st Defendant would collect and receive payments for the premiums from her various clientele and remit the same to the Plaintiff.

The Plaintiff avers that the 1st Defendant in the course of collecting money, did not remit all of it to her.

It is the Plaintiffs' claim that the 1st Defendant operated under the direction and control of the 2nd, 3rd, 4th and 5th Defendants to solicit and takeout insurance policies from the Plaintiff on behalf of their clients.
According to the Plaintiff the Defendants' clients made payments of premium to the 1st Defendant on diverse dates but demands by the Plaintiff for remission of the money were futile. It was later discovered that the Defendants had left their last known physical address without leaving forwarding addresses as to where they had shifted and completely cutting off telephone communications.

That because the 1st Defendants' place of business could not be found and money collected by her was not remitted to the Plaintiff, it amounted to fraud by the 2nd, 3rd, 4th and 5th Defendants who had deliberately with intent willfully deprived the Plaintiff of the said money. That as directors of the Defendant Company, they promoted the 1st Defendants' illegitimate transactions as persons who were actively engaged, managed and transacted the daily business of the 1st Defendant being the directing mind and will of the latter.

The Plaintiff further averred that the 2nd, 3rd, 4th and 5th Defendants were simply using the 1st Defendants' name to transact business and gain trust fraudulently. That the Defendants did on various occasions commit themselves to clear the said premium amounts and demanded for time but failed to do so.

According to the Plaintiff there are no known assets of the company and that by a resolution dated 31st January 2013, the 2nd, 3rd, 4th and 5th Defendants fraudulently sold the 1st Defendant operations and business to Kinkizi Development Company Ltd and authorized W.J Mhonde and J. Katsidzira to negotiate the purported sale in an attempt to defeat the Plaintiffs' effort to recover the monies.

It is the Plaintiffs' averment that the Defendant did acknowledge indebtedness through an email dated 13th December 2012 saying that by 13th December 2012 they had received UGX 129, 060, 952/=, **ExhP12.** This acknowledgement was enhanced by the 5th Defendant in his letter dated 7th September 2015 when he regretted that finality had not yet been reached.

Coming back to the claim against the 2nd, 3rd, 4th and 5th Defendants, the Plaintiff averred that at the time the insurance policies were taken from her, these Defendants were the directors. That at the moment the 1st Defendants' place of business cannot be found, this constituted fraud and misappropriation of the monies by the Defendants.
That for those reasons, the 2nd, 3rd, 4th and 5th Defendants should be held jointly and severally liable for the losses incurred by the Plaintiff.

The Defendant on their part denied liability stating that the Plaintiff dealt with the 1st Defendant an incorporated company capable of being sued on her own.
That in particular the 4th Defendant was only a Director of the 1st Defendant and that all insurance policies solicited and secured for the Plaintiff were solicited by the 1st Defendant as a legal person. That at the time the resolutions to sale were made on 30th January 2013, the 4th Defendant had long left the company.

As for the 2nd, 3rd, and 5th Defendants they contended that at no time did they deal with the Plaintiff in their personal capacities and for personal benefit but simply performed duties as directors of the 1st Defendant which was a corporate body. More so that the day to day running of the business of the 1st Defendant was at all material times in the hands of management and not the Directors. That being the case, the Defendant at no time did they in their individual capacities cause or procure the 1st Defendant in to any kind of fraud or illegality.

Furthermore, that they did not condone abuse of the Plaintiffs' funds as alleged by the Plaintiff. That the collection and non remittance of the premium was not the boards function since they were only supposed to provide guidance on corporate matters. That neither did they miss-appropriate nor misdirect the insurers funds to meet the 1st Defendants operational expenses.

As for sale of the 1st Defendant to Kinkizi Development Company Ltd, the Defendants contended that it was done openly and that they at all the times communicated to the Insurance Regulatory Authority through meetings and correspondences. Moreover the resolution authorizing the

alleged sale was a mandate of the 1st Defendants' shareholders as it was for the 2nd, 3rd, 4th and 5th Defendants.

The issues agreed for trial were;

1. Whether there is any outstanding premiums payable to the Plaintiff for the policies taken by the 1st Defendant on behalf of her various clients.
2. If the issue is answered in the affirmative then how much is payable.
3. And if there is any outstanding premiums payable in line with the issue 2 above, whether the Defendants are jointly and severally liable to pay the Plaintiff such outstanding premiums.
4. What other remedies are available to the parties.

As to whether there are any outstanding premiums payable to the Plaintiff. I would like to first state that the Plaintiff was engaged in business of all types of insurance covers and had various clientele.
It is an agreed fact that the 1st Defendant was an insurance broker and it is also not in dispute that the relationship between the two was that the 1st Defendant would solicit and take out insurance policies from the Plaintiff on behalf of her various clientele.
It is also an agreed fact that the 1st Defendant would then collect or receive payments for the premiums from her various clientele and remit the same to the Plaintiff.

The 1st Defendant was pursuant to *Section 87 of the Insurance Act* as it existed at that time obliged to remit the money collected from her clientele to the Plaintiff. The section provides that;

"An insurance broker shall pay to insurers all premiums collected on their behalf 30 days from receipt of the premiums."

This requirement was further emphasized in *Section 87(1)(a)* in these words;

"Where an insurance broker does not pay a premium collected as required under subsection 1, the insurance broker shall within 14 days after expiry of the period specified for making payment submit to the insurer the details of client from whom the premium is collected."

The Defendants contend that they remitted all the money that they collected. That they collected is clearly shown by **ExhP13**, a document that showed collection and remittance.

ExhP13 which was compiled by Robert Mujjuzi GR and was attached to the mail sent to Anthony Ngalika the Operations Manager of the Plaintiff clearly stated the indebtedness in these words;

"Thank you for the submitted statement which we do confirm that the premium collected and yet to be remitted is as per attached schedule totaling to UGX 129, 060,952/=."

According to Mr. Mujjuzi Robert this very figure was communicated by the very 1st Defendant to the Insurance Regulatory Authority indicating their indebtedness.

There is no proof that the Defendants made further remittances to the Plaintiff after the 13th December 2012. That the 1st Defendant collected

money is again clear under **ExhP159**, a report by GN & Associates who were instructed by the Plaintiff to reconcile the statements of money received by the Defendant and find how much of that had been remitted to the Plaintiff.

ExhP159 according to PW3 George Ndiko was written after examining a total of 99 policies, broker instructions, debit notes, debit figures, debit amounts vis a viz statement of amounts and other documents in which he came up with the following; firstly that the money collected by the 1st Defendant from her clientele was UGX 156,225,631.89/= and UGX 39,060,196/= as commission due to the Defendant.

The Defendants did not call any evidence to rebut the report neither did they file any document to the contrary. Moreover during scheduling, Counsel for the Defendant while adopting the draft memorandum of scheduling notes clearly stated that they had no documents to submit and would adopt those the Plaintiff had produced.

Since there was nothing to rebut the report and the evidence of PW3, I do not have any reason to dispute it and accordingly find that the money collected by the 1st Defendant was UGX 156,225,623/= and that out of this the 1st Defendant was expected to deduct UGX 39,060,196/= as her commission for the brokerage.

It is therefore my finding that the Plaintiff is entitled to UGX 117,163,717/=.

In my view that answers the 1st and 2nd issues.

Turning to whether the Defendants are jointly and severally liable to pay the Plaintiff.

PW2 averred that the 2nd, 3rd,4th and 5th Defendants who had been Directors of the 1st Defendant during the committal of illegal transactions as they engaged, managed and transacted the daily business of the 1st Defendant did direct the 1st Defendants' will and mind and were therefore jointly and severally liable for the losses that she had incurred.

PW2 further testified that the 2nd, 3rd, 4th and 5th Defendants caused the 1st Defendant to commit illegalities, abused, plundered and grossly mismanaged the 1st Defendants business in the following ways. She went on to state that the commission of the illegalities were as a result of the continued trading of the 1st Defendant while aware that she had a working capital deficit and did not take steps to address that statutory breach. More so that they were involved in tax evasion, collection and non remittance of premiums, condoning abuse of insurers fund for operational expenses of the 1st Defendant.

She further stated that the Defendants breached legal obligations when they made repayments of bank overdrafts using the brokers trust account. And lastly that the 2nd, 3rd, 4th and 5th Defendants sold the 1st Defendant as a going concern to Kinkizi Development Company Ltd less its liabilities and concealed the sale from the Authority where they were expected to seek approval. That therefore the 2nd, 3rd, 4th and 5th Defendants ought to be held individually accountable for the acts herein aforementioned.

Under ***Salmon vs Salmon 1897 A.C 22*** a company is a legal entity, the directors are there simply to do its bidding and as directors, the mind and will to give direction to the company.

In the same vein, the acts that are done by the directors and managers on behalf of the company bind the company.

The relationship between the company and her Directors was properly described by ***Lord Denning M.R at Page 172*** in the case of ***HL Bolton (Engineering) Company Ltd (1957)1 QB 159*** in these words;

> *"A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or the will. Others are directors and managers who represent the directing mind and will of the company and control what it does. The state of mind of these directors is that of the company and is the state of mind of the company and is treated by law as such."*

That notwithstanding there instances when the directors will be held responsible for the corporate faults of the company. The day to day business of the company is delegated to directors by her shareholders. These Directors may eventually appoint additional Directors in the running of the company. The decision of the Directors is a collective one. Where there are several directors, a single director cannot act on his own. His role and powers are normally defined in the company's articles.
This appointment however does not necessarily give him executive powers. That notwithstanding, the Directors may also be an employee with specific powers delegated to him. Directors owe a duty to the company and for

creditors they become more important where insolvency is threatened. They are required to keep proper books of account and records.

Where a Director breaches the provisions he might be held personally liable.

In considering personal liability of a director, one would require to pierce the veil of incorporation so as to understand what has been going on behind the corporate veil.

This doctrine of lifting the veil is a device developed to avoid the hardships of the doctrine of corporate personality. The veil is said to be lifted when Court ignores the corporate personality and concerns itself directly with the members or managers.

Circumstances under which this veil of incorporation can be lifted to find individuals responsible for bad company acts which might include holding them liable for misconduct or debts of the corporation are limited. The circumstances are twofold; statutory provisions and judicial interpretation

Section 20 of the Company Act provides circumstances under which the corporate veil could be pierced. It provides;

> *"The High Court may, where the company or its directors are involved in acts including tax evasion, fraud, or where, save for a single member company falls below the statutory minimum, lift the veil of incorporation."*

The lifting of the veil is intended and necessary to achieve justice notwithstanding the legal efficacy of the corporate structure. It is intended to prevent directors from hiding behind the veil to commit frauds. The

situation was aptly described in ***Jones vs Lipman (1962)1 WLR 832 at 833***; when he described corporate veil as;

> *"The creature of the Managing Director, a device and a sham, a mask which he held before his face in an attempt to avoid recognition by the eye of equity."*

One of the grounds raised by the Plaintiff for piercing the corporate veil and holding the directors liable is that they acted fraudulently.

Fraud should not just be alleged but must be proved to the satisfaction of Court.

In law fraud is intentional deception to secure unlawful gain or to deprive a victim of a legal right.

It is a false representation of a matter of fact whether by words or by conduct, by false or misleading allegations or concealment of that which deceives and it is intended to deceive another so that he or she shall act upon it to his or her legal injury. It is an allegation which must be looked in to, ***Fredrick Zabwe vs Orient Bank SCC 4/2006.***

In ***Kampala Bottlers Ltd vs Damanico (U) Ltd (1992)22;*** fraud must be strictly proved, the burden being heavier than one on balance of probabilities generally applied in civil matters.

The concealment of the payment of some of the staff from the payroll by the Defendants so as to hide from the tax body was an intentional deception to secure unfair or unlawful gain.

The first ground for fraud was that the failures of the 2nd to the 5th Defendants to remit the premiums to the Plaintiffs amounted to fraud.

I do not think that mere failure to remit funds where you have been the collecting agent amounts to fraud. It is certainly failure in ones duty and at most misconduct but for it to amount to fraud, it must be shown that it was diverted for the personal benefit. It must be shown that the taker of the money had the guilty mind of stealing it and of depriving the lawful recipient. Such proof was not given.

The second ground of fraud as given by the Plaintiff was misappropriation of insurer's funds towards operational expenses of the company. Operational expenses were not supposed to come from insurers' funds. In other words the insurers' funds did not belong to the Defendants to divert at will and permanently deprive the insurers of the money received on her behalf. This was done for the benefit of the Defendants and to detriment of the Plaintiff. This diversion of the money amounted to fraud.

The other ground was prior sale of the 1st Defendant by the 2nd, 3rd, 4th and 5th Defendants to Kinkizi Development Company Limited and concealing the sale from the Insurance Regulatory Authority.

In my view there was no sale and even in the attempts to sale, the Insurance Regulatory Authority participated and advised the Defendant of what to do before they could sell the company to Kinkizi Development Limited.

ExhP44 shows that at the time they wrote to the Insurance Regulatory Authority, they had merely passed a resolution to sale, the letter also shows that they knew that before sale they needed the approval of the Insurance Regulatory Authority. Indeed **ExhP46** also written by Kinkizi Development Company Limited shows that by 19th February 2013 no sale had taken place, they wrote seeking guidance. In part it reads;

"We therefore would like you to give us guidance on how to handle this matter in line with Insurance Regulatory Authority regulators especially on the matter of creditors and other debts to insurers. As we will not take over any of those obligations and existing shareholders are the ones to settle this."

In the letter written by the General Manager of the Insurance Regulatory Authority dated 28th February 2013, **ExhP47** the wording of paragraph 2(1) also indicates that a sale had not taken place. In part it guides;

"However, we have noted that the new investor will not take on the liabilities but rather leave them to the previous shareholders. Please note that this kind of arrangement is not agreeable to us.
The new investors should take over both assets and liabilities of the company."

These pieces of communication clearly indicate that a sale had not taken place and that guidance of Insurance Regulatory Authority was sought.

The other ground referred to as fraudulent by the Plaintiff was the closing of their offices without notifying the Plaintiffs'. Evidence is on record that the Defendants subsequently disappeared from the map of Uganda, closed their offices, their telephone lines went on the blink and left Uganda without leaving a forwarding address or discussing on how the insurers money that they had not paid would be paid.

These Defendants are the same people who had suggested that the shareholders would be responsible for the insurers' money. Their behavior

of leaving stealthily knowing that they had left behind a shell which Kinkizi Development Co. Ltd had clearly stated that she would not buy unless they were leaving out liabilities points at nothing else but an act of fraud.

Lastly the Defendants knew that they were operating under a working capital deficit which was a statutory breach but did not bring it to the attention of the stakeholders thus receiving business which they should not have received. Because of trading under a working capital deficit, they certainly failed to pay.

The Plaintiff also alleged that the 1st Defendant through the support of the 2nd, 3rd, 4th and 5th Defendants committed tax evasion.
Page 7 of **ExhP34** under 2.5.10 lists the circumstances under which the Defendants evaded tax; the 1st Defendant had employees who were paid but whose particulars were not included in the payroll, these were under headings like; staff welfare and incentives paid to staff, personnel, fuel payment involving personnel, housing, general benefits to the General Manager which were not taxed.

Also falling under this category were leave payments, payments to Directors and management fees to Mr. Claude Munkaganwa where a lower.

In my view mistakes can be made but the financial implication of so many personnel would be so obviously noticed by Defendants because firstly; not all of them were included in the payroll but secondly the sums saved would be so big that there was no way the management of the 1st Defendant would not have noticed.

The Defendants knew that the required taxes were not paid. The failure to pay these taxes well knowing it was unlawful amounted to fraud because it was to the benefit of the Defendants.

Considering all the foregoing instances, it is my finding that fraud was perpetrated all to the benefit of the Defendants who received money for their personal benefit while evading tax. In my view this is a fit and proper case wherein the corporate veil should be perforated and the activities of the Directors examined.

In examining what had been sheltered by the veil, Court will look at the conduct of the directors. In a situation where money has been spent correctly but none the less a company has entered in to a financial crisis, the directors would be interested in showing what actually happened.

In instances where the directors take cover such as in this case, the only explanation is that they do not want others to know where the money went.

In the instant case the Directors secretly closed their place of business, left the country without leaving an address for communication and attempted to sale the 1st Defendant without providing for the insurers. Their suggestion that the insurers would be paid by shareholders boils back to them since they were also shareholders.

Allegations have been made that they used the company as a mask behind which they hid to siphon the insurers' money. They were given chance to come and say something about it; they were given chances to file documents in that regard but they did none of that and their advocates said;

"Our clients have no documents to submit"

They did not come to Court and therefore they did not in any way rebut the evidence that was collected by the Plaintiff and submitted to Court.

The Plaintiffs' evidence remained unrebutted and there is no reason for disbelieving it.

For those reasons, it is my finding that the money that entered the 1st Defendant was used by the Defendants who hid behind the corporate veil. They should be held jointly and severally responsible for recovery of the insurer's unpaid premium.

Remedies;

The Plaintiff sought for general damages. The fundamental rationale of general damages was well illustrated in ***Dharamshi vs Karsam (1974) E.A 41***; that such damages are awarded to fulfill the common law remedy of *restitution in integrum* which means that the Plaintiff had to be restored as nearly as possible to a position he or she would have been had the breach complained of not occurred.

In ***Okello James vs Attorney General HCCS NO. 574 of 2003***; It was stated that general damages are compensatory in nature and are to make good to the aggrieved party as far as money can do for the losses he or she has suffered as the natural result of the wrong done to him or her.

In the instant case the 1st Defendant was under a statutory duty to remit the premiums received to the Plaintiff. The Defendants attempt to sell the 1st Defendant to Kinkizi Development Company Limited while absolving it of liability to the insurers and secondly closing their office and disappearing into thin air must have caused a lot of stress and anguish to the management of the Plaintiff not knowing where to find the Defendants.

It set the plaintiff on a trail to search for them, an exercise which must have cost the Plaintiff money.

Considering the circumstances surrounding this case, I find an award of general damages to the tune of UGX 50,000,000/= appropriate. The damages will attract interest of 6% p.a from the date of judgment till payment in full.

The Plaintiff also sought for interest on the decretal sum at 25% p.a.
An award of interest is at discretion of Court; ***Uganda Revenue Authority vs Stephen Mabosi SCCA No. 16/1995.***

But like any other discretion it must be exercised judiciously taking into account all the circumstances of the case, ***Superior Construction Ltd vs Notary Engineering Ltd HCCS No.24/1992.***

The rationale for interest is that the Defendant has kept the Plaintiff out of his money and the Defendant has had use of it himself so he ought to compensate the Plaintiff accordingly, ***Harbutt's Placticine Ltd vs Wayne Tank and Pulp Co Ltd (1970)Q.B 447.***

The relationship between the Defendant and the Plaintiff was commercial in nature and therefore must be looked at through a commercial lens.

The Plaintiff in this case trusted the 1st defendant and gave her business, business which would carry a commission but the 1st Defendant abused that relationship. Because of that, the Defendants deprived the Plaintiff of her earnings which she would have re-invested but could not and therefore suffered damage.

Taking all the circumstances of the case into consideration, I find the award of interest on the decretal sum at the rate of 20% p.a appropriate. The interest shall run from 13th Dec 2012 the day the Defendant acknowledged indebtedness till payment in full.

The Defendants having put the plaintiff to costs, shall bear the costs of the suit.

The sum total is that judgment is entered in favor of the Plaintiff in the following terms;

a) The Defendants shall jointly and severally pay to the Plaintiff UGX 117, 163,717/=.
b) The Defendants will pay jointly and severally to the Plaintiff general damages of UGX 50,000,000/=
c) The Defendants to jointly and severally pay interest on (a) above at the rate of 20% from 13th December 2012 and on (b) at the rate of 6% per annum from date of judgment till payment in full.
d) The Defendants shall pay the costs of the suit to the Plaintiff.

Dated this.....01st.....day of.....October.....2021.

HON. JUSTICE DAVID WANGUTUSI.
JUDGE