PHOENIX OF RWANDA ASSURANCE COMPANY Ltd v. TRANSCORP

[Rwanda URUKIKO RW'UBUJURIRE – RCOMAA 00096/2018/CA (Mukanyundo, P.J., Ngagi na Kanyange, J.) 19 Nyakanga 2019]

Amategeko agenga amasezerano – Amasezerano y'ubwishingizi – Kutubahiriza amabwiriza yo gutanga ubwishingizi bigenerwa ibihano by'ubutegetsi ku ruhande rwa sosiyete y'ubwishingizi, ariko si impamvu yo gusesa amasezerano yakozwe mu buryo bwubahirije amategeko agenga amasezerano.

Amategeko agenga amasezerano – Amasezerano y'ubwishingizi – Ikimenyetso cy'ubwishyu –"Vignettes" si ikimenyetso cy'ubwishyu, ahubwo n'ikimenyetso cy'ubwishingizi bw'ikinyabiziga, uwagitanze akaba agomba kwirengera icyishingiwe igihe habaye impanuka hatitawe ko yishyuwe cyangwa atishyuwe.

Incamake y'ikibazo: Sosiyete y'ubwishingizi PHOENIX OF RWANDA ASSURANCE COMPANY Ltd yahaye sosiyete TRANSCORP umwenda w'ubwishingizi bw'imodoka zayo mu bihe bitandukanye, impande zombi zikorana amasezerano y'inguzanyo ku bwishingizi, bumvikana no ku gihe umwenda uzaba wishyuwe. Amasezerano ntiyaje kwubahirizwa ku ruhande rw'uwahawe inguzanyo ku bwishingizi kuko itabashize kwishyura amafaranga yose, maze uwatanze inguzanyo ayirega Rukiko rw'Ubucuruzi rwa Nyarugenge isaba kwishyurwa, uru rukiko rwemeza ko ikirego nta shingiro gifite.

PHOENIX ntiyishimiye imikirize y'urubanza ijuririra Urukiko Rukuru rw'Ubucuruzi, ivuga ko TRANSCORP yemeje Urukiko ko iyo uwishingiwe atishyuye ikiguzi (prime) amasezerano ahita aseswa, kandi atari ko bimeze kuko umwishingizi afite uburenganzira bwo guhitamo icyo akora, avuga ko ubwishingizi bushobora kugurizwa. Urukiko Rukuru rw'Ubucuruzi rwemeje ko ubujurire nta shingiro bufite, ruhamishaho imikirize y'urubanza rwajuririwe.

PHOENIX yongeye ijuririra Urukiko rw'Ubujurire ivuga ko Urukiko Rukuru rw'Ubucuruzi rwitiranyije amasezerano y'ubwishingizi n'amategeko ku nguzanyo kuko nta tegeko ribaho ribuza umuntu gutanga ideni y'ubwishingizi, ivuga kandi ko impande zombi zakoze amasezerano y'ubwishingizi y'imodoka ku mwenda, zihabwa vignettes, bumvikana ko bazajya bagenda bishyura igiciro cy'ubwishingizi buhoro buhoro, ibi byose bikaba aribyo byemeza ko hari umwenda bayifitiye, bikagaragazwa kandi n'inyandiko yitwa "statement of unpaid premium" impande zombi zashyizeho umukono nk' ikimenyetso cy'umwenda ushingiye ku masezerano y'ubwishingizi.

TRANSCORP yiregura ivuga ko Urukiko Rukuru rw'Ubucuruzi rwatiranyije amasezerano y'ubwishingizi n'amategeko ku nguzanyo, ivuga ko iyi mpamvu y'ubujurire nta shingiro yahabwa kuko Amabwiriza ya Banki Nkuru y'u Rwanda abuza ibigo by'ubwishingizi gutanga ubwishingizi ku mwenda, ivuga ko mu gihe rero PHOENIX yaba yarishe aya Mabwiriza, igomba guhanwa.

TRANSCORP ivuga kandi ko Banki Nkuru y'u Rwanda ari yo ishinzwe imikorere y'amasosiyete y'ubwishingizi, ariko ko hari irengayobora ku bigo bya Leta kuko byo bishobora guhabwa ubwishingizi ku ideni gihe cy'amezi atandatu gusa.

Kubirebana n'ibimenyetso bigaragaza umwenda wishyuzwa, PHOENIX yisobanura ivuga ko hari amafaranga y'ubwishingizi TRANSCORP yagendaga isigaramo uko bahaga ubwishingizi imodoka zayo, igahabwa vignettes nubwo itishyuye, ibyo bikagaragazwa na "historique" ya banki hamwe n'inyandiko yitwa "Statement of Unpaid Premiums/ After Renewal in 2016 bigaragaza uko yagendaga yishyura buhoro buhoro, bityo ikaba isaba urukiko kuyitegeka kwishyurwa umwenda hamwe n'inyungu zawo zibariwe ku gipimo cya 21% guhera umunsi yayihanangirijeho bwa nyuma kugeza igihe izishyuririrwa

TRANSCORP ku ruhande rwayo ikomeza ihakana umwenda yishyuzwa ivuga ko nta masezerano y'umwenda bagiranye kuko itari guhabwa vignettes itishyuye, akaba ari nacyo kimenyetso kigaragaza ko yishyuye, ivuga kandi ko ikomeje gushorwa mu manza nta mpamvu, bityo ikaba ibisabira indishyi.

Incamake y'icyemezo: 1. Kutubahiriza amabwiriza yo gutanga ubwishingizi bigenerwa ibihano by'ubutegetsi ku ruhande rwa sosiyete y'ubwishingizi, ariko si impamvu yo gusesa amasezerano yakozwe mu buryo bwubahirije amategeko agenga amasezerano.

2. *Vignettes* si ikimenyetso cy'ubwishyu, ahubwo n'ikimenyetso cy'ubwishingizi bw'ikinyabiziga, uwagitanze akaba agomba kwirengera icyishingiwe igihe habaye impanuka hatitawe ko yishyuwe cyangwa atishyuwe.

Ubujurire nta shingiro bufite;
Amagarama y'urubanza aherereye kuri TRANSCORP.

Amategeko yashingiweho:
Itegeko Nº 45/2011 ryo ku wa 25/11/2011 rigenga amasezerano, iteganya ko amasezerano akozwe ku buryo bukurikije amategeko aba itegeko ku bayigiranye, ingingo ya 64.
Amabwiriza N⁰05/2009 yo ku wa 29/07/2009 yerekeye iyemerwa n'ibindi bisabwa mu murimo w'ubwishingizi, ingingo ya 23.

Nta manza zifashishijwe.

Urubanza

I. IMITERERE Y'URUBANZA

[1] Uru rubanza rwatangiriye mu Rukiko rw'Ubucuruzi rwa Nyarugenge, PHOENIX OF RWANDA ASSURANCE COMPANY Ltd irega TRANSCORP umwenda ungana na 83.739.236Frw ukomoka ku bwishingizi bw'amamodoka yayo iyi sosiyete yayihaye mu bihe bitandukanye guhera mu mwaka wa 2014 kugeza mu mwaka wa 2017, ivuga ko amafaranga y'ubwishingizi atishyuwe yose hasigara 83.739.236Frw.

[2] Ku wa 18/05/2018, Urukiko rw'Ubucuruzi rwa Nyarugenge rwaciye urubanza RCOM 01140/2017/TC/NYGE rwemeza ko ikirego cya PHOENIX OF RWANDA ASSURANCE COMPANY Ltd nta shingiro gifite, ruyitegeka kwishyura TRANSCORP 100.000Frw y'ikurikiranarubanza na 500.000Frw y'igihembo cya Avoka.

[3] PHOENIX OF RWANDA ASSURANCE COMPANY Ltd ntiyishimiye imikirize y'urubanza ijuririra Urukiko Rukuru

rw'Ubucuruzi, ivuga ko TRANSCORP yemeje Urukiko ko iyo uwishingiwe atishyuye ikiguzi (prime) amasezerano ahita aseswa, nyamara atari ko bimeze kuko umwishingizi afite uburenganzira bwo guhitamo icyo akora, haba kwihanangiriza uwishingiwe, kumwishyuza ikirarane cya bwa bwishingizi yahawe cyangwa gusaba ko amasezerano aseswa; ko igihe nta mpamvu yo gusaba ko amasezerano aseswa, bitabuza umwishingizi kwishyuza nyuma y'ukwezi kumwe amaze gutanga integuza, nk'uko biteganywa mu ngingo ya 14 y'Itegeko N^0 20/75 ryo ku wa 20/06/1975, bityo rero ko ubwishingizi bushobora kugurizwa.

[4] Urukiko Rukuru rw'Ubucuruzi rwaciye urubanza RCOMA 00450/2018/HCC ku wa 20/09/2018, rwemeza ko ubujurire bwa PHOENIX OF RWANDA ASSURANCE COMPANY Ltd nta shingiro bufite, ruhamishaho imikirize y'urubanza rwajuririwe.

[5] Urwo Rukiko rwasanze PHOENIX OF RWANDA ASSURANCE COMPANY Ltd nk'umunyamwuga mu by'ubwishingizi kandi izi neza ko mu mirimo yayo isanzwe isabwa kubahiriza amabwiriza ya Banki Nkuru y'u Rwanda, kuba yarishoye mu makosa yo gutanga ubwishingizi ku ideni nyuma ntiyishyurwe itari kwirirwa iregera Urukiko rufite inshingano yo gufasha mu iyubahirizwa ry'amategeko ngo ruyifashe kugira uwahatirwa kubahiriza ibyakozwe mu buryo bugaragarira buri wese ko byishe amategeko.

[6] PHOENIX OF RWANDA ASSURANCE COMPANY Ltd yajuririye Urukiko rw'Ubujurire ivuga ko Urukiko Rukuru rw'Ubucuruzi rwitiranyije amasezerano y'ubwishingizi n'amategeko ku nguzanyo kuko nta tegeko ribaho ribuza umuntu gutanga ideni, rukaba rutaranubahirije itegeko rigenga

amasezerano cyane cyane mu ngingo yaryo ya 4, iteganya ibisabwa kugira ngo amasezerano abe yuzuye. PHOENIX OF RWANDA ASSURANCE COMPANY Ltd ijurira kandi ivuga ko, aho gusuzuma ikigaragaza aho TRANSCORP yishyuriye, Urukiko Rukuru rw'Ubucuruzi rwasuzumye amabwiriza ya Banki Nkuru y'u Rwanda rwirengagije ubusumbane bw'amategeko, kandi ko aya mabwiriza atareba abagana abishingizi, ahubwo areba imikoranire hagati ya Banki Nkuru y'u Rwanda n'amasosiyete y'ubwishingizi.

[7] Urubanza rwabunishirijwe mu ruhame ku wa 14/05/2019 no ku wa 26/06/2019, PHOENIX OF RWANDA ASSURANCE COMPANY Ltd iburanirwa na Me Buhuru Pierre Célestin afatanyije na Me Nsengiyumva Colette, naho TRANSCORP iburanirwa na Me Kayitare Serge afatanyije na Me Twiringiyemungu Joseph, ababuranira TRANSCORP babwira Urukiko ko baretse inzitizi bari batanze yerekeranye n'iburabubasha rw'Urukiko rw'Ubujurire.

II. IBIBAZO BIGIZE URUBANZA N'ISESENGURA RYABYO

A. UBUJURIRE BWA PHOENIX OF RWANDA ASSURANCE COMPANY Ltd

Kumenya niba kuba PHOENIX OF RWANDA ASSURANCE COMPANY Ltd yarahaye TRANSCORP ubwishingizi ku ideni byatuma itayishyura

[8] Ababuranira PHOENIX OF RWANDA ASSURANCE COMPANY Ltd bavuga ko Urukiko Rukuru rw'Ubucuruzi

rwitiranyije amasezerano y’ubwishingizi n’amasezerano y’inguzanyo, kuko nta tegeko ribaho ribuza umuntu gutanga ideni. Basobanura ko amasezerano PHOENIX OF RWANDA ASSURANCE COMPANY LTD yagiranye na TRANSCORP ari ay’ubwishingizi, kuko yatanze ubwishingizi bw’amamodoka yabo yose ku mwenda hagendewe ku rutonde rwazo itanga na "vignettes" zifite agaciro k’umwaka wose, bumvikana ko bazajya bagenda bishyura igiciro cy’ubwishingizi buhoro buhoro kubera imikoranire bari basanganywe, akaba ari ho bahera bavuga ko hari umwenda TRANSCORP ifitiye PHOENIX OF RWANDA ASSURANCE COMPANY Ltd. Bavuga ko TRANSCORP ivuga ko nta mwenda w’ubwishingizi ifite, igasaba ibimenyetso byawo, yumvikanisha ko itahabwa “vignettes” itishyuye, ariko ikaba idatanga ibimenyetso by’uko yishyuye.

[9] Bakomeza bavuga ko ku birebana n’amasezerano y’ubwishingizi, ubwishyu (premium) butangwa mu minsi 30, bitaba ibyo, amasezerano akaba ashobora gusubikwa ; bivuze ko iyo uwishingiwe atishyuye muri icyo gihe cy’iminsi 30, aba arimo umwenda. Bavuga ko ku birebana n’uru rubanza, "statement of unpaid premium" impande zombi zashyizeho umukono iri muri dosiye, ari ikimenyetso cy’ukoTRANSCORP ifitiye PHOENIX OF RWANDA ASSURANCE COMPANY Ltd umwenda ushingiye ku masezerano y’ubwishingizi, mu rwego rwa mbere umucamanza akaba yaritiranyije ibintu avuga ko PHOENIX OF RWANDA ASSURANCE COMPANY Ltd itagaragaza amasezerano y’inguzanyo.

[10] Ku byerekeye Amabwiriza ya Banki Nkuru y’u Rwanda abuza gutanga ubwishingizi ku ideni yashingiweho n’Urukiko Rukuru rw’Ubucuruzi, abahagarariye PHOENIX OF RWANDA ASSURANCE COMPANY Ltd bavuga ko areba imikoranire ya

Banki Nkuru y’u Rwanda n’amasosiyete y’ubwishingizi, akaba atareba amasezerano izo sosiyete zigirana n’abo zishingira. Bavuga kandi ko ayo mabwiriza yashyizweho umukono na Guverineri wa Banki Nkuru y’u Rwanda, akaba yakoreshwa ku bandi bantu ari uko ashyizweho umukono na Perezida wa Repubulika cyangwa Minisitiri, ko icyo Banki Nkuru y’u Rwanda yakora igihe hari sosiyete y’ubwishingizi itayubahirije, ari ukuyifatira ibihano gusa.

[11] Ababuranira TRANSCORP biregura bavuga ko ku birebana no kuba Urukiko Rukuru rw’Ubucuruzi rwaritiranyije amasezerano y’ubwishingizi n’amategeko ku nguzanyo, iyi mpamvu y’ubujurire nta shingiro ifite, kuko Amabwiriza ya Banki Nkuru y’u Rwanda N^{0} 05/2009 abuza ibigo by’ubwishingizi (n’uwajuriye arimo) gutanga ubwishingizi ku mwenda, mu gihe rero PHOENIX OF RWANDA ASSURANCE COMPANY Ltd yaba yarishe aya Mabwiriza, igomba guhanwa, ndetse ko mu gihe yemera ko itayubahirije idakwiye gusaba Urukiko ngo rwemeze ko ibyo yakoze ari byo, hanyuma izajye guhanwa na Banki Nkuru y’u Rwanda; Urukiko rero rukaba mbere na mbere rukwiye kureba niba amasezerano yarakozwe mu buryo bwemewe n’amategeko.

[12] Bakomeza bavuga ko Banki Nkuru y’u Rwanda ari yo ishinzwe imikorere y’amasosiyete y’ubwishingizi (regulator), ari nayo mpamvu ishyiraho amabwiriza agomba gukurikizwa, agatangazwa mu Igazeti ya Leta, bikaba bivuze ko anareba abagana aya masosiyete, ariko ko hari irengayobora ku bigo bya Leta kuko byo bishobora guhabwa ubwishingizi ku ideni, nabwo mu gihe cy’amezi atandatu (6) gusa. Bavuga kandi ko imyenda y’igihe kirekire idashobora gusimbura ibiteganywa n’amategeko, hakaba nta mpaka zakagombye kugibwa kuri iki kibazo, mu gihe

Urukiko Rukuru rw’Ubucuruzi rwemeje ko n’iyo ibimenyetso by’umwenda byaboneka, bitahabwa agaciro kuko amasezerano yakozwe mu buryo bunyuranyije n’amategeko, kuko Amabwiriza yavuzwe haruguru yubahirizwa ku bakiriya, atari kuri Banki Nkuru y’u Rwanda (vis-à-vis des clients et non de la BNR).

[13] Basobanura ko kuva mu mwaka wa 2014, PHOENIX OF RWANDA ASSURANCE COMPANY Ltd yakoranaga na TRANSCORP, nyuma yaha hari ikamyo ya TRANSCORP yaje gukora impanuka muri Uganda, PHOENIX OF RWANDA ASSURANCE COMPANY Ltd yanga kwishyura, bituma ijya gushaka ubwishingizi ahandi, icyo gihe akaba ari bwo PHOENIX OF RWANDA ASSURANCE COMPANY Ltd yahise itangira kwishyuza ibirarane yavugaga ko TRANSCORP iyibereyemo kuva mu mwaka wa 2014, ariko ko nta birarane TRANSCORP yari iyifitiye, kuko iyo biza kuba bihari itari gukomeza kuyiha ubundi bwishingizi kugeza muri miliyoni babarega.

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[14] Ingingo ya 64 y’Itegeko Nº 45/2011 ryo ku wa 25/11/2011 rigenga amasezerano, iteganya ko amasezerano akozwe ku buryo bukurikije amategeko aba itegeko ku bayigiranye.

[15] Ingingo ya 23, igika cya 5, y’Amabwiriza N⁰05/2009 yo ku wa 29/07/2009 yerekeye iyemerwa n’ibindi bisabwa mu murimo w’ubwishingizi, iteganya ko: “Ikiguzi cy’ubwishingizi kitemewe gutangwaho umwenda”.

[16] Ingingo ya 6 y'Amabwiriza ya Banki Nkuru y'u Rwanda Nº 03/2017 yo ku wa 20/02/2017 yerekeye ibihano byo mu rwego rw'ubutegetsi n'amafaranga bifatirwa abishingizi iteganya ko: "Bitabangamiye ibiteganywa n'ingingo ya 3 hamwe n'iya 5 z'aya mabwiriza, iyo umwishingizi wigenga atubahirije ibiteganywa n'itegeko ryerekeye umurimo w'ubwishingizi cyangwa amabwiriza n'ibyemezo bya Banki Nkuru birishyira mu bikorwa, ibihano biberanye n'amakosa yakozwe bisobanuye mu mugereka bishobora gutangwa". Naho agace ka 9 k'umugereka wayo kagateganya ko gutanga ubwishingizi ku ideni bihanishwa 0.5% by'imisanzu igomba kwakirwa buri gihembwe.

[17] Inyandiko ziri muri dosiye zigaragaza ko ku wa 02/12/2014, PHOENIX OF RWANDA ASSURANCE COMPANY Ltd yagiranye na TRANSCORP amasezerano y'ubwishingizi bw'imodoka zayo 61, impande zombi zikaba zemeranya ko ayo masezerano yakomeje kujya avugururwa uko umwaka ushize kugeza mu mwaka wa 2017. Amasezerano ateganya kandi ko TRANSCORP yagombaga kwishyura ikiguzi cy'ubwishingizi mu minsi 30 uhereye igihe amasezerano atangiriye cyangwa igihe avugururiwe, ko iyo iminsi iramutse irenze TRANSCOP itarishyura, PHOENIX OF RWANDA ASSURANCE COMPANY Ltd ishobora gusesa amasezerano, kandi TRANSCORP igategekwa kwishyura ikiguzi cy'ubwishingizi kijyanye n'icyo gihe, ko hagize ikibazo kivuka mbere y'uko amasezerano aseswa, umwishingizi agomba kwishyurwa ikiguzi cyose cy'ubwishingizi[1].

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[1] *It is hereby expressly agreed cover under this Policy is granted subject to full payment of premium within 30 days from inception/renewal. It is further declared and agreed that this Policy will be voidable at the insurer discretion if the premium is not paid within 30 days and the insured shall be compelled*

[18] Urukiko rurasanga, Amabwiriza ya Banki Nkuru y'u Rwanda Nº05/2009 yo ku wa 29/07/2009, ateganya ko ikiguzi cy'ubwishingizi kidashobora gutangwaho umwenda; ibi bikaba bivuze ko PHOENIX OF RWANDA ASSURANCE COMPANY Ltd itari yemerewe gutanga ikiguzi cy'ubwishingizi ku ideni. Urukiko rurasanga kandi ingingo ya 6 y'Amabwiriza ya Banki Nkuru y'u Rwanda Nº03/2017 yo ku wa 20/02/2017 yerekeye ibihano byo mu rwego rw'ubutegetsi n'amafaranga bifatirwa abishingizi, iteganya ko utubahirije ibiteganywa n'itegeko cyangwa amabwiriza n'ibyemezo bya Banki Nkuru agenerwa ibihano biberanye n'amakosa yakoze, naho agace ka 9º k'Umugereka w'ayo Mabwiriza gateganya, ibihano by'ubutegenzi bingana na 0.5% by'imisanzu igomba kwakirwa buri gihembwe.

[19] Urukiko rurasanga, isesengura ry'ingingo z'Amabwirizwa yibukijwe haruguru rigaragaza ko ayo mabwiriza yashyiriweho amasosiyete y'ubwishingizi, akaba atareba amasezerano ayo masosiyete agirana n'abakiliya bayo, ko ahubwo iyo hari ibitubahirijwe na sosiyete y'ubwishingizi harimo nko gutanga ubwishingizi ku ideni, bitagira inkurikizi ku masezerano y'ubwishingizi yakozwe mu buryo bwubahirije ibiteganywa n'ingingo ya 4 y'Itegeko Nº45/2011 ryo ku wa 25/11/2011 rigenga amasezerano[2], ahubwo iyo sosiyete ifatirwa ibihano byo mu rwego rw'ubutegetsi, ariko amasezerano akagumana agaciro kayo, bitabaye ibyo uwafashe ubwishingizi

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to pay premium for the period he has been on cover provided that if a claim has arisen before termination is enforced, full premium shall be due to insurer.

[2] Ibisabwa by'ibanze mu ikorwa ry'amasezerano n'ibi bikurikira: 1º kwemerana kw'impande zigirana amasezerano; 2º ubushobozi bwo gukora amasezerano; 3º ishingiro ry'amasezerano; 4º impamvu yemewe n'amategeko.

ku ideni abayikungahaje nta mpamvu (enrichissement sans cause).

[20] Ku byerekeranye n'uru rubanza, Urukiko rurasanga kuba PHOENIX OF RWANDA ASSURANCE COMPANY Ltd yaba yaratanze ubwishingizi ku ideni, ari amakosa agenerwa ibihano byo rwego rw'ubutegetsi, bigamije kurwanya imikorere yateza amasosiyete y'ubushingizi kugwa mu gihombo, ariko ntabwo bitesha agaciro amasezerano impande zombi zagiranye mu gihe yakozwe hubahirijwe ibiteganywa n'ingingo ya 4 y'Itegeko Nº 45/2011 ryo ku wa 25/11/2011 rigenga amasezerano ryibukijwe haruguru, ngo TRANSCORP ibe yabyuririraho yanga kubahiriza ibitenganyijwe mu masezerano, hakaba rero hagomba gusuzumwa niba koko hari ibimenyetso bigaragaza ko hari umwenda w'ubwishingizi bw'ibinyabiziga TRANSCORP yaba ibereyemo PHOENIX OF RWANDA ASSURANCE COMPANY Ltd.

[21] Urukiko rurasanga na none, imvugo ya TRANSCORP yuko PHOENIX OF RWANDA ASSURANCE COMPANY Ltd yagombaga gusesa amasezerano nyuma yuko itishyuwe mu minsi 30 nta shingiro yahabwa, kuko mu masezerano byari biteganyijwe ko yaseswa ku bushake bwa PHOENIX OF RWANDA ASSURANCE COMPANY Ltd (at the insurer discretion) kandi n'ingingo ya 14 y'Itegego Teka Nº 20/75 ryo ku wa 20 Kamena 1975 ryerekeye ubwishingizi muri rusange, ikaba idategeka byanze bikunze uwishingira gusesa amasezerano[3].

[3] Iyo ukwezi gushize, uwishingira ashobora gukurikirana ubwishyu bwe cyangwa gusaba iseswa ry'amasezerano.

2. Kumenya niba hari ibimenyetso bigaragaza ko TRANSCORP ibereyemo umwenda PHOENIX OF RWANDA ASSURANCE COMPANY Ltd

[22] Abahagarariye PHOENIX OF RWANDA ASSURANCE COMPANY Ltd bavuga ko hari amafaranga y'ubwishingizi TRANSCORP yagendaga isigaramo uko bahaga ubwishingizi imodoka zayo kubera imikoranire myiza bari bafitanye, yose hamwe angana na 83.739.236 Frw. Bavuga ko kuba TRANSCORP yarahawe "vignettes" z'amamodoka yayo itarishyura amafaranga y'ubwishingizi byagiye biterwa n'imikoranire myiza bari basanganwe, ko kandi hari "historique" ya banki igaragaza uko TRANSCORP yagendaga yishyura buhoro buhoro, n'inyandiko yitwa "Statement of Unpaid Premiums/ After Renewal in 2016.

[23] Ababuranira TRANSCORP bavuga ko nta masezerano y'umwenda bagiranye na PHOENIX OF RWANDA ASSURANCE COMPANY Ltd ndetse ko nta n'uwo iyibereyemo, kuko itari guhabwa "vignettes" itishyuye, ko kuba TRANSCORP yarazibonye bigaragaza ko yishyuye, kuko iyo bitaba ibyo zitari gutangwa. Ku kibazo cyo kumenya niba hari ikigaragaza ko yishyuye, bavuga ko "vignettes" zigaragaza ko hari "présomption" ko yishyuye. Naho ku byerekeranye na " Statement of Unpaid Premiums/ After Renewal in 2016" ya 53.913.427 Frw yemejwe na TRANSCORP ku wa 02/12/2016, bavuga ko batemera ko uwayisinye yari ahagarariye TRANSCORP, ko abantu bari muri "statuts" ari bo bemerewe gusinya mu mwanya wa sosiyete aho TRANSCORP yafungura amashami hose.

[24] Ku birebana n'inyandiko igaragaza ibirarane (unpaid premium) PHOENIX OF RWANDA ASSURANCE

COMPANY Ltd iburanisha ivuga ko TRANSCORP yayishyizeho umukono, abayihagarariye bavuga ko ibyo atari ukuri, ko batigeze bayisinyaho.

UKO URUKIKO RUBIBONA

[25] Ingingo ya 3 y'Itegeko Nº 15/2004 ryo ku wa 12/06/2004 ryerekeye ibimenyetso mu manza n'itangwa ryabyo iteganya ko: "Buri muburanyi agomba kugaragaza ukuri kw'ibyo aburana". Ingingo ya 12, igika cya mbere, y'Itegeko Nº 22/2018 ryo ku wa 29/04/2018 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, nayo iteganya ko: "Urega agomba kugaragaza ibimenyetso by'ibyo aregera. Iyo abibuze uwarezwe aratsinda". Igika cya kabiri cyo giteganya ibikurikira: "Naho uvuga ko atagitegetswe gukora icyo yategekwaga cyagaragajwe n'ibimenyetso agomba kugaragaza impamvu zakimukuyeho.Iyo abiburiye ibimenyetso, uwo baburana aramutsinda".

[26] Mu bimenyetso PHOENIX OF RWANDA ASSURANCE COMPANY Ltd itanga ishaka kugaragaza ko hari ubwishingizi yahaye TRANSCORP ku deni, ariko hakaba hari amafaranga itayishyuye, harimo amasezerano y'ubwishingizi yo ku wa 08/04/2015 yo kwishingira imodoka 61 kuri 96.469.772Frw, hari "vignettes" TRANSCORP ibwayo yiyemerera ko yahawe na PHOENIX OF RWANDA ASSURANCE COMPANY Ltd, hari inyandiko yiswe "Statement of Unpaid Premiums/ After Renewal in 2016" yashyizweho umukono n'impande zombi, ku ruhande rwa PHOENIX OF RWANDA ASSURANCE COMPANY Ltd ku wa 28/11/2016, naho ku ruhande rwa TRANSCORP akaba ari ku wa 02/12/2016, aho impande zombi zemeranya ko umwenda

w'ubwishingizi TRANSCORP igomba PHOENIX OF RWANDA ASSURANCE COMPANY Ltd ungana na 53.915.427 Frw, ndetse na "historique" ya konti ya PHOENIX OF RWANDA ASSURANCE COMPANY Ltd igaragaza uko TRANSCORP yagiye yishyura buhoro buhoro.

[27] Ku ruhande rwa TRANSCORP, nta kimenyetso na kimwe yerekana kigaragaza ko nyuma y'aho impande zombi zishyiriye umukono kuri iriya nyandiko yiswe "Statement of Unpaid Premiums/ After Renewal in 2016" yibukijwe haruguru, yigeze yishyura amafaranga yemera.

[28] Urukiko rurasanga ibyo TRANSCORP yireguza ko nta masezerano y'umwenda yabaye hagati yayo na PHOENIX OF RWANDA ASSURANCE COMPANY Ltd ko ahubwo icyabayeho ari amasezerano y'ubwishingizi bwatanzwe ku ideni, ntacyo byayimarira kuko nayo ubwayo yemera ko ifite "vignettes" zatanzwe na PHOENIX OF RWANDA ASSURANCE COMPANY Ltd, kandi hakaba hari ibimenyetso bigaragaza ko hari umwenda itishyuye, ibyo rero bikaba bihagije kugira ngo yishyure amafaranga itarishyura.

[29] Urukiko rurasanga na none, ibyo TRANSCORP ivuga ko kuba yarahawe "vignettes" ari ikimenyetso gicukumbuye (présomption) ko yishyuye, nabyo bitahabwa ishingiro, kuko "statement of unpaid premiums After Renewal in 2016" ari ikimenyetso cy'uko izo vignettes zatangwaga primes zose zitishyuwe kubera imikoranire y'impande zombi,"vignettes" rero zikaba atari ikimenyetso cy'ubwishyu, ahubwo ari icyemezo gihabwa uwahawe ubwishingizi bw'ikinyabiziga, uwagitanze akaba agomba kwirengera icyishingiwe igihe habaye impanuka, hatitawe ko yishyuwe cyangwa atishyuwe.

[30] Urukiko rurasanga na none ibyo TRANSCORP yireguza ko uwasinye kuri iriya nyandiko yiswe ”Statement of Unpaid Premiums/ After Renewal in 2016” atari ahagarariye TRANSCORP, kuko ingingo ya 12 ya “statuts” zayo iteganya abasinya mu izina no mwanya wayo, nabyo bitahabwa ishingiro, kuko mu gihe TRANSCORP idahakana amasezerano y’ubwishingizi yakoranye na PHOENIX OF RWANDA ASSURANCE COMPANY Ltd ariho umukono usa n’uri kuri “Statement of Unpaid Premiums/ After Renewal in 2016”, itagera aho ngo ihakane ko uwasinye kuri iyo nyandiko atari abifitiye ububasha kuko byaba ari ukwivuguruza kuyitsindisha.

[31] Hashingiwe ku biteganywa n’amategeko yibukijwe haruguru no ku bisobanuro bimaze gutangwa, Urukiko rurasanga hari ibimenyetso bigaragaza ko TRANSCORP ibereyemo PHOENIX OF RWANDA ASSURANCE COMPANY Ltd umwenda ushingiye ku bwishingizi bw’imodoka zayo, bityo ikaba igomba kuwishyura.

3. Kumenya ingano y’umwenda TRANSCORP igomba kwishyura PHOENIX OF RWANDA ASSURANCE COMPANY LTD n’izindi ndishyi isabwa

[32] Me Buhuru Pierre Celestin, mu mwanzuro we usobanura umwenda PHOENIX OF RWANDA ASSURANCE COMPANY Ltd iregera, asaba Urukiko gutegeka TRANSCORP kuyishyura 83.739.236Frw iyibereyemo, hamwe n’inyungu zawo zibariwe ku gipimo cya 21% guhera ku wa 03/03/2017, umunsi PHOENIX OF RWANDA ASSURANCE COMPANY Ltd yihanangirijeho bwa nyuma TRANSCORP kugeza igihe izishyurirwa, ubu zikaba zigeze kuri 17.585.239 Frw x imyaka 2 = 35.170.497 Frw hamwe n’amafaranga y’ikurikiranarubanza n’igihembo cya Avoka angana na 5.000.000.

[33] Ababuranira TRANSCORP ntacyo bavuga ku ngano y’umwenda iyi sosiyete yishyuzwa, bavuga gusa ko nta mwenda ibereyemo PHOENIX OF RWANDA ASSURANCE COMPANY Ltd, kuko itari kuyiha “vignettes” itishyuye ubwishingizi.

UKO URUKIKO RUBIBONA

[34] Urukiko rurasanga, hakurikijwe ” Statement of Unpaid Premiums/ After Renewal in 2016” ya 53.913.427Frw atarishyuwe mu mwaka wa 2016 yakozwe na PHOENIX OF RWANDA ASSURANCE COMPANY Ltd, TRANSCORP ikayishyiraho umukono ku wa 02/12/2016, ndetse muri iyo nyandiko,impande zombi zikumvikana uko aya mafaranga azishyurwa (payment agreement), TRANSCORP igomba kuyishyura kuko nayo iyemera, Urukiko rukaba rusanga iyi nyandiko ya Statement of Unpaid Premiums/ After Renewal in 2016” ifite agaciro k’inyandiko bwite, kuko PHOENIX OF RWANDA ASSURANCE COMPANY Ltd yagaragarije TRANSCORP amafaranga y’ubwishingizi yari isigayemo nayo irayemera ndetse iyishyiraho umukono[4].

[35] Ku birebana na 29.823.809,03Frw agaragara ku nyandiko ya "statement of unpaid premiums" yakozwe na Revenue Accountant wa PHOENIX OF RWANDA ASSURANCE COMPANY Ltd ku wa 07/03/2016, Urukiko rurasanga rutahera

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[4] Ingingo ya 14 y’Itegeko Nº15/2004 ryo ku wa 12/06/2004 ryerekeye ibimenyetso mu manza n’itangwa ryabyo, iteganya ko " Inyandiko bwite ari urwandiko rufite umukono w’umwe cyangwa wa benshi mu barwanditse cyangwa se,hakabaho ibikumwe byabo.Amasezerano arukubiyemo,abera inshingano abayagiranye gusa.

kuri iyo nyandiko ngo rwemeze ko aya mafaranga TRANSCORP igomba nayo kuyishyura, kuko ari PHOENIX OF RWANDA ASSURANCE COMPANY Ltd yayikoreye, kuba rero yarakozwe n'uruhande rumwe rukaba rutayiregesha mu gihe nta bindi bimenyetso bihari byemeza ko ayo mafaranga y'ubwishingizi ari yo TRANSCORP yasigayemo koko mu mwaka wa 2014-2015, ndetse ikaba itarayamenyeshejwe ngo igire icyo iyavugaho nk'uko byagenze ku mafaranga y'ubwishingizi yo mu mwaka wa 2016, nk'uko byagaragajwe haruguru, bityo TRANSCORP ikaba igomba kwishyura PHOENIX OF RWANDA ASSURANCE COMPANY Ltd amafaranga y'ubwishingizi angana na 53.913.427Frw gusa kuko ari yo afitiwe ibimenyetso.

[36] Ku birebana n'inyungu zibariwe ku gipimo cya 21% y'amafaranga TRANSCORP ifitiye PHOENIX OF RWANDA ASSURANCE COMPANY Ltd abayiburanira basaba Urukiko ko rwategeka ko yiyongera ku mafaranga agomba kwishyurwa, Urukiko rurasanga hakurikijwe ibiteganywa n'ingingo ya 144 y'Itegeko N⁰ 45/2011 ryo ku wa 25/11/2011 rigenga amasezerano[5], bikwiye ko TRANSCORP yishyura PHOENIX OF RWANDA ASSURANCE COMPANY Ltd inyungu z'amafaranga 53.913.427 Frw kubera ko itayishyuye mu gihe no mu buryo yari yemeye, kuko bitabaye ibyo, byaba ari ukuyitera igihombo, kuko PHOENIX ASSURANCE COMPANY Ltd ari sosiyete y'ubwishingizi ikaba yari kuyakoresha mu mirimo yabo

[5] Iyo kwica amasezerano birebana no kutishyura amafaranga cyangwa kudakora igisabwa gishobora kubarwa mu mafaranga azwi cyangwa ashobora kumenyekana, inyungu zibarwa uhereye igihe igisabwa cyagombaga gukorwa hakuwemo ibyo uruhande rwishe amasezerano rufiteho uburenganzira.

y'ubucuruzi bw'ubwishingizi cyangwa akaba yarabyaye inyungu iyo aza kuba yarabitswe muri Banki.

[37] Urukiko rurasanga ariko mu kubara izi nyungu, hatagomba kugenderwa ku gipimo cya 21% ku mwaka gisabwa na PHOENIX ASSURANCE COMPANY Ltd, kubera ko kiri hejuru cyane ndetse kinarenze igipimo cy'inyungu gikoreshwa n'amwe mu mabanki akorera mu gihugu kandi yo idakora imirimo y'ubucuruzi bw'amafaranga nk'amabanki, ahubwo hakwiye kwifashishwa igipimo cy'ibitsa (deposit rate) cya 8.478% kigaragazwa na Banki Nkuru y'u Rwanda kugeza ku munsi w'isoma ry'urubanza, icyo gipimo akaba ari cyo cyanakoreshejwe mu rubanza RCOMAA 0032/15/CS rwaciwe n'Urukiko rw'Ikirenga ku wa 22/09/2017, haburana RAHA TRADING Ltd na BAKHRESA GRAIN MILLING RWANDA Ltd (BGM).

[38] Urukiko rurasanga inyungu zigomba kubarwa uhereye ku wa 03/03/2017, umunsi PHOENIX OF RWANDA ASSURANCE COMPANY Ltd yandikiye TRANSCORP iyihanangiriza bwa nyuma (final notice) nk'uko abahanga mu mategeko babivuga, ko kwihanangirizwa bituma uberewemo umwenda utarishyuriwe igihe ahabwa indishyi cyangwa inyungu z'ubukererwe, kandi ko ubereyemo undi umwenda adategetswe kwishyura indishyi z'ubukererwe, uretse igihe yihanangirijwe[6], kugeza ku wa 19/07/2019, umunsi w'isomwa ry'urubanza,

[6] *La mise en demeure permet au créancier d'obtenir des dommages-intérêts ou des intérêts de retard (.....).En principe, le débiteur n'est tenu de dommages - intérêts moratoires, c'est-à-dire ceux qui réparent le retard, que s'il a été mis en demeure,le seul fait que le débiteur n'ait pas payé à l'échéance ne cause pas au créancier un préjudice tenant au retard, (Ph. Malaurie, L. Aynes et Ph. Stoffel-Munck, Droit des obligations,7e Edition, Paris, CUJAS, pp.529-530.*

bihwanye n'iminsi 855, bityo TRANSCORP ikaba igomba guha PHOENIX RWANDA ASSURANCE COMPANY Ltd inyungu z'ubukererwe zingana na 53.913.427 x 8.474 x iminsi 855/360x100=10.850.482Frw, bivuze ko umwenda n'inyungu zawo bingana na 53.913.427 Frw + 10.850.482 Frw, yose hamwe akaba angana na 64.763.908Frw**.**

B. UBUJURIRE BWURIRIYE KU BUNDI

Kumenya niba TRANSCORP ikwiye guhabwa indishyi isaba

[39] TRANSCORP ivuga ko ikomeje gushorwa mu manza nta mpamvu, bityo ikaba ibisabira indishyi zingana na 2.000.000Frw y'ikurikirana rubanza n'igihembo cya Avoka.

[40] PHOENIX OF RWANDA ASSURANCE COMPANY Ltd yireguye kuri izi ndishyi ivuga ko nta shingiro zifite kuko TRANSCORP itagaragaza aho yishyuriye umwenda.

UKO URUKIKO RUBIBONA

[41] Ingingo ya 111 y'Itegeko N^{o}22/2018 ryo ku wa 29/04/2018 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi iteganya ko: "Ikirego cy'amafaranga y'ikurikiranarubanza ari ikirego gishamikira ku kirego cy'iremezo kigamije kwishyuza ibyakoreshejwe mu rubanza. Ikirego cy'amafaranga y'ikurikiranarubanza kiburanishirizwa rimwe n'ikirego cy'iremezo.Gishobora kandi kwakirwa kikanaburanishwa n'iyo ikirego cy'iremezo cyaba kitakiriwe".

[42] Urukiko rurasanga TRANSCORP nta mafaranga y'ikurikiranarubanza n'igihembo cya Avoka ikwiye, kubera ko itubahirije amasezerano yagiranye na PHOENIX OF RWANDA ASSURANCE COMPANY Ltd, bivuze ko itagenerwa amafaranga isaba kandi ari yo yakoze amakosa.

[43] Urukiko rurasanga ahubwo TRANSCORP ikwiye guha PHOENIX OF RWANDA ASSURANCE COMPANY Ltd amafaranga y'ikurikiranarubanza n'igihembo cya Avoka kubera ko uru rubanza rwatumye igira ibyo itakaza irukurikirana ndetse ishaka Avoka wo kuyiburanira, ariko kubera ko amafaranga yaka ari menshi hakurikijwe imirimo yakozwe kuri uru rubanza, TRANSCORP ikaba igomba kuyiha 700.000Frw y'igihembo cya Avoka, 300.000Frw y'ikurikiranarubanza, kuri uru rwego, no kuyisubiza 50.000Frw yatanzeho ingwate y'igarama ijurira.

III. ICYEMEZO CY'URUKIKO

[44] Rwemeje ko ubujurire bwa PHOENIX OF RWANDA ASSURANCE COMPANY Ltd bufite ishingiro;

[45] Rwemeje ko imikirize y'urubanza RCOMA 00450/2018/HCC rwaciwe n'Urukiko Rukuru rw'Ubucuruzi ku wa 20/09/2018, ihindutse mu ngingo zarwo zose;

[46] Rutegetse TRANSCORP kwishyura PHOENIX OF RWANDA ASSURANCE COMPANY Ltd 64.763.908Frw y'umwenda w'ubwishingizi n'inyungu zawo;

[47] Rutegetse TRANSCORP guha PHOENIX OF RWANDA ASSURANCE COMPANY Ltd 700.000Frw y'igihembo cya Avoka na 300.000Frw y'ikurikiranarubanza, kuri

uru rwego, kandi ikayisubiza 50.000 Frw yatanzeho ingwate y’igarama ijurira.